

# **REPORT NO. 716**

**SUNSET REVIEW OF THE ANTI-DUMPING DUTIES ON IMPORTS OF FROZEN BONE-IN PORTIONS OF FOWLS OF THE SPECIES *GALLUS DOMESTICUS* ORIGINATING IN OR IMPORTED FROM THE UNITED STATES OF AMERICA: FINAL DETERMINATION**

The International Trade Administration Commission of South Africa herewith presents its  
**Report No. 716: SUNSET REVIEW OF THE ANTI-DUMPING DUTIES ON IMPORTS OF  
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**AYABONGA CAWE  
CHIEF COMMISSIONER**

**PRETORIA**

**17/07/2023**

# INTERNATIONAL TRADE ADMINISTRATION COMMISSION OF SOUTH AFRICA

## REPORT NO. 716

### SUNSET REVIEW OF THE ANTI-DUMPING DUTIES ON IMPORTS OF FROZEN BONE-IN PORTIONS OF FOWLS OF THE SPECIES *GALLUS DOMESTICUS* ORIGINATING IN OR IMPORTED FROM THE UNITED STATES OF AMERICA: FINAL DETERMINATION

#### SYNOPSIS

On 25 June 2021, the International Trade Administration Commission of South Africa (“the Commission” or “ITAC”) notified interested parties through Notice No. 387 of 2021 in *Government Gazette* No. 44761, that unless a substantiated request was made indicating that the expiry of the anti-dumping duties against imports of frozen bone-in portions of fowls of the species *gallus domesticus* (“the subject product”) originating in or imported from the United States of America (“USA”) would likely lead to the continuation or recurrence of dumping and material injury, the anti-dumping duties would expire on 23 November 2022.

A detailed response to the Commission’s sunset review questionnaire was received from the South Africa Poultry Association (“SAPA” or “the Applicant”), on 04 July 2022. After all deficiencies were identified and addressed, an updated application was received on 21 September 2022.

The information submitted by the 8 participating producers (“Applicant”) was verified as follows: Supreme Poultry Proprietary Limited (“Supreme”) was verified on 11 October 2022, Grain Field Chickens Proprietary Limited (“Grain Field”) on 12 October 2022, Afgri Poultry (Proprietary) Limited, t/a Daybreak Farms (“Daybreak”) on 13 October 2022, Crown Chickens Proprietary Limited t/a Sovereign Foods, which is a subsidiary of Sovereign Food Investments Proprietary Limited (“Sovereign”) on 17 October 2022, RCL Foods Consumer Proprietary Limited (“RCL Foods”) on 18 October 2022, County Fair, a division of Astral Operations Limited (“Astral County Fair”) on 21 October 2022, Festive, a division of Astral

Operations Limited (“Astral Festive”) on 20 October 2022 and Goldi, a division of Astral Operations Limited (“Astral Goldi”) on 21 October 2022.

The verification reports were sent to Supreme on 12 October 2022, to Grain Field Chickens, Daybreak, and Sovereign on 19 October 2022, to RCL foods on 20 October 2022, to Astral Goldi on 24 October 2022, to Astral Festive on 24 October 2022 and to Astral County Fair on 27 October 2022. The Commission sent the Applicant a letter accepting the application as properly documented on 07 November 2022.

On 09 November 2022, the Commission initiated a sunset review of the anti-dumping duties on the subject product, originating in or imported from USA through Notice No.1392 of 2022 published in *Government Gazette* No.47480.

The investigation was initiated after the Commission considered that the Applicant submitted sufficient evidence that there was a *prima facie* case to indicate that expiry of the duties would likely lead to the continuation or recurrence of dumping and material injury to the Southern African Customs Union (“SACU”) industry should the current anti-dumping duties expire.

Upon initiation of the investigation, known manufacturers/exporters of the subject product in the USA were sent foreign manufacturers/exporters questionnaires to complete. Importers of the subject product were also sent questionnaires to complete.

No responses to the Commission’s exporter questionnaire were received from any exporter/manufacturer in the USA. A response to the Commission’s importer questionnaire was received from Merlog Foods (Pty) Ltd (“Merlog”) on 09 January 2023.

The Commission considered making a final determination before essential facts that the expiry of the anti-dumping duty on the subject product originating in or imported from the USA would likely lead to the continuation and/or recurrence of dumping and material injury.

Essential facts letters were sent to all interested parties on 13 April 2023, informing them

of the “essential facts” which were being considered by the Commission for purposes of its final determination and inviting interested parties to comment. The Commission provided all interested parties with 14 days to submit comments.

After considering all comments to the essential facts letter, the Commission made a final determination that the expiry of the anti-dumping duty on the subject product originating in or imported from the USA would likely lead to the continuation and/or recurrence of dumping and material injury.

The Commission noted that no properly documented responses from the manufacturers of the subject product were received, and therefore the determination of the likelihood of the continuation and/or recurrence of dumping was made on the best information available, being that provided by the Applicant. In these circumstances, it is the Commission’s practice to recommend that the anti-dumping duty be maintained at the current levels unless there are compelling reasons to deviate from its practice. The Commission did not find any compelling reasons to deviate from its practice.

The Commission therefore made a final determination to recommend to the Minister of Trade, Industry and Competition that the current anti-dumping duty on frozen bone-in portions of the species *gallus domesticus* originating in or imported from the United States of America, be maintained as follows:

Tariff heading	Sub-	Description	Imported from or Originating in	Rate of duty Anti –dumping duty
0207		Meat and edible offal, of the poultry heading 01.05, fresh, chilled or frozen		
0207.1		Of fowls of the species GALLUS DOMESTICUS		
0207.14		Cuts and offal, frozen:		
0207.14.9		Other		
0207.14.91		Whole bird cut in half	USA	940c/kg
0207.14.93		Leg quarters	USA	940c/kg
0207.14.95		Wings	USA	940c/kg
0207.14.96		Breasts	USA	940c/kg
0207.14.97		Thighs	USA	940c/kg
0207.14.98		Drumsticks	USA	940c/kg
0207.14.99		Other	USA	940c/kg

## **1. APPLICATION AND PROCEDURE**

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### **1.1 LEGAL FRAMEWORK**

This investigation was conducted in accordance with the International Trade Administration Act, 2002 (“ITA Act”), the International Trade Administration Commission Anti-Dumping Regulations (“ADR”), read with the World Trade Organisation (“WTO”) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (“ADA”).

### **1.2 APPLICANT**

The application was lodged by South African Poultry Association (“SAPA” or “the Applicant”) on behalf of Astral County Fair, Astral Festive, Astral Goldi, Daybreak, Grain Field, RCL Foods, Sovereign; and Supreme.

### **1.3 ACCEPTANCE OF APPLICATION**

The application was accepted by the Commission as being properly documented in accordance with ADR 21 on 07 November 2022.

### **1.4 ALLEGATIONS BY THE APPLICANT**

The Applicant further alleged that as a result of the continuation and or recurrence of dumping of the subject product from the USA, it will experience material injury in the form of:

- (a) Increase of imports
- (b) Decline Capital expenditure
- (c) Decline in Capacity utilisation
- (d) Decline in output
- (e) Decline in growth
- (f) Decline in productivity
- (g) Decline in investment
- (h) Decline in cash flow
- (i) Increase in price depression

(j) Increase in price suppression

## **1.5 INVESTIGATION PROCESS**

The Applicant submitted an application to the Commission on 04 July 2022. The information submitted by the eight participating producers was verified from the 11 October 2023 to 21 October 2022. The verification reports were sent to all participating producers from 12 October 2023 to 24 October 2022. The response to the verification reports issued to all participating producers were received from 19 October 2023 to 03 November 2023.

The Commission initiated a sunset review of the anti-dumping duties on the subject product, originating in or imported from the USA through Notice No.1392 of 2022 published in *Government Gazette* No.47480 on 09 November 2022.

Prior to the initiation of the investigation, the trade representative of the USA was notified of the Commission's intention to investigate, in terms of ADR 27.1. All known interested parties were informed and requested to respond to the questionnaires and the non-confidential version of the application.

## **1.6 INVESTIGATION PERIODS**

The investigation period for dumping is from 1 January 2021 to 31 December 2021, and the injury investigation involves evaluation of data for the period 1 January 2019 to 31 December 2021, and an estimate for 2022 in the event that the anti-dumping duties expire.

The Applicant submitted its application on the basis of continuation and/or recurrence of dumping and the recurrence of material injury, if the anti-dumping duties expire.

## **1.7 COMMENTS**

The Commission considered comments received from interested parties with regard to the application and procedure. All submissions made by interested parties are contained in the Commission's non-confidential public file for this investigation and

are available for perusal. It should be noted that this report does not purport to present all comments received and considered by the Commission. However, some salient and pivotal comments received from interested parties and the Commission's consideration of these comments are specifically included in this report.

### **Comments by Merlog Foods (Merlog)**

Merlog stated that it has a concern relating to the initiation of this investigation, submitting the following comments:

It would seem that the Commission has initiated this investigation based on a number of questionable assumptions and/or processes. According to Merlog, the Applicant submitted its original application in early July 2022. The investigation was initiated on 09 November 2022. At this point the injury information was already 11 months old. Merlog stated that in its opinion, this information was out-dated and there are a number of injury indicators, which have/had substantially changed. Merlog also stated that without going into a full detailed synopsis at this point they will identify a few of the pertinent points. Astral the largest SACU producer has just released a glowing set of financial results, reporting in excess of R1 billion rand net profit. Imports from USA are declining and the annual import quota free of the dumping duty (which is now being reviewed) has not been filled over the past two years, and local production has been growing steadily over the past 5 years. At a high level, these indicators would not give rise to an indication of an industry constrained, or likely to be constrained, by dumping from the USA.

The Applicant has claimed confidentiality on aggregated information and has claimed confidentiality on information that is susceptible to summary or indexing. This is intended to deceive or make it impossible for interested parties to properly and fully comment. Merlog requested the Commission to instruct the Applicant to properly disclose and present information and assumptions allowing interested parties to understand the basis of their assumptions and allegations, and to then comment thereon.



The timelines from application, verification, to submission of fully documented application seem to be very tight. If we have our facts correct the properly documented submission was received by the Commission on or about 03 November stated Merlog. Subsequent to receiving this properly documented application, within 3 working days the Investigators prepared a merit assessment, presented this assessment to the Commission which considered it and made a decision to initiate an investigation, and ITAC then instructed the Government printers to publish the initiation notice which appeared on 09 November 2022. The timelines would seem to be exceptionally tight to have properly done and considered what was required.

It is also curious and interesting that in the recently completed investigation into dumping of Bone-In chicken portions from Brazil and the European Union (EU) 4 that ALL injury was apportioned to the alleged “dumping” from these 5 countries. There was no apportionment of injury to the dumping/exports from the USA. That investigation has only just concluded and the Minister determined to suspend the implementation of those dumping duties, but we now have this investigation initiated and there is no apportionment to the injury which is attributable to the yet unprotected imports from Brazil and the EU 4 (Denmark, Ireland, Spain and Poland). Merlog stated that it would seem that the Applicant is double and triple dipping and the Commission is complicit in this illegal protection of big South African Poultry.

### **Commission's consideration**

With regard to Merlog’s comment that the sunset review was based on outdated data, the Commission noted that in the case of a sunset review unlike an anti-dumping investigation the consideration is on whether (a) injury is occurring and (b) likely to continue or recur should the duties be allowed to expire. In this case, the period of injury includes the three-year period 01 January 2019 to 31 December 2021 as well as estimates should the anti-dumping duties expire.

The Commission also noted that no particular methodology is prescribed for the determination of the likelihood determination in a sunset review.

The Panel in *US — Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 of the ADA does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review:

*“Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member’s investigating authority in making such a ‘likelihood’ determination.”*

The Panel in *US – Oil Country Tubular Goods Sunset Reviews* noted that Article 11.3 of the ADA does not prescribe any time-frame for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the time-frame on which their likelihood determination is based. Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination.

The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews* adopted a similar approach to the need to base a prospective likelihood determination on “positive evidence”:

*“The requirements of ‘positive evidence’ must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a ‘forward-looking analysis’. Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on ‘positive evidence’.”*

With respect to the determination of a likelihood of recurrence or continuation of dumping and injury, the Appellate Body in US — Corrosion-Resistant Steel Sunset Review noted that, as this likelihood determination is a prospective determination: *“the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated”*. In this respect, the Appellate Body pointed to the important difference between original investigations and sunset reviews:

*“In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.”*

#### **Comments by the Association of Meat Importers and Exporters (“AMIE”)**

AMIE stated that in summary, the following key steps in assessing the merit of the application and determining the basis of initiation had not been fully complied with in initiating this investigation:

1. Assessing completeness
2. Determining normal value
3. Assessing the allegation of dumping
4. Assessing material injury
5. Verification of critical information supplied and allegations made by the applicants
6. Performing a complete merit assessment on verified facts. An administrative decision has been taken at this point to initiate the investigation.
7. Notify the embassy before initiation

#### **Due process and an ability to respond**

AMIE stated that whenever information is treated as confidential, transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation. Due process requires that interested parties have a right to see the evidence submitted or gathered in an

investigation and have an adequate opportunity for the defence of their interests. That opportunity must be meaningful in terms of a party's ability to defend itself.

AMIE also stated that the respondents in an anti-dumping case have only the applicants' non-confidential submission to work with when assessing the merits of the investigation, particularly of injury and causality. For the Commission to arrive at the best rational decision, it is essential that interested parties are given the most complete access to information possible, within the constraints of the ITA Act, the ADR and the ADA so that proper arguments can be formulated on the application.

Section 7(2)(b) directs that the Commission: "must be impartial and must perform its functions without fear, favour or prejudice".

AMIE stated that this independence requires the Commission to weigh up the arguments of both the applicants and the respondents, equally. AMIE stated that when the Applicant withholds information which could be summarised and indexed, it leaves the respondents in the position where they cannot properly engage with this information.

AMIE also stated that when it is not possible to furnish a non-confidential summary, Article 6.5.1 requires a party to identify the exceptional circumstances and provide a statement explaining the reasons why summarisation is not possible. For its part, the Commission must scrutinise such statements to determine whether they establish exceptional circumstances and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible.

AMIE also stated that it is unable to defend its interests as fully as it is entitled to, as provided by the Agreement. AMIE stated that we can all agree that the legislated role of the Commission is not to rubberstamp the application to extend the anti-dumping duties, but if the Commission is not presented with proper arguments from respondents because those respondents are deprived of critical information, then this

is exactly what will happen. Section 33 of the ITA Act creates a hierarchy for the treatment of information submitted to the Commission, with the default being that information submitted is treated as non-confidential, unless the information owner makes a specific claim of confidentiality.

AMIE further stated that the Appellate Body held that information can only be regarded as confidential by nature where “disclosure of such information 'would be of significant competitive advantage to a competitor' or 'would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information'.” AMIE stated that the Appellate Body concluded that “a party seeking confidential treatment for information must make its 'good cause' showing to the investigating authority upon submission of the information”. The authority must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular 'good cause' alleged.

AMIE stated that the obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a 'good cause' showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only 'upon good cause shown'.

AMIE stated that it notes that the panel in Guatemala – Cement II found that the requisite 'good cause' must be shown by the interested party submitting the

confidential information, not for the investigating authority to provide such 'good cause'.

In EC – Fasteners (China) (Article 21.5 – China)

The Appellate Body found that it is for the party requesting confidential treatment for information that it considers to be confidential by nature, or that it submits on a confidential basis, to furnish reasons justifying such treatment. The role of the authority is to assess such reasons and determine, objectively, whether the submitting party has shown good cause for the confidential treatment of its information" and that where the investigating authority "never conducted an objective assessment of whether the information at issue was confidential by nature" or whether the submitting party "had shown good cause on this basis for the confidential treatment of such information", this would constitute a violation of Article 6.5 of the Anti-Dumping Agreement.

In Korea – Pneumatic Valves (Japan)

Where the Panel could not find evidence on record to show that the investigating authority had objectively assessed whether there was "good cause" for granting confidential treatment, it found the authority in violation of Article 6.5 of the Anti-Dumping Agreement.

In Korea – Certain paper

The panel found that some showing of good cause is necessary for the confidential treatment of information that is by nature confidential.

AMIE stated that the Commission needs to actively engage with the confidentiality claims, not defaulting to passively accepting the claims made by the applicant. In this case, no good cause has been shown, as release of the aggregate or indexed information cannot be detrimental to the interests of any individual party. The application has been brought for seven individual companies. It is not clear how disclosing the aggregate information for this many companies will compromise the identity or information of any individual producer. Further, as stated above, it is

required that interested parties submitting confidential information must furnish non-confidential summaries thereof.

#### In Mexico – Steel Pipes and Tubes

The panel held that Article 6.5.1 establishes that the investigating authority must require that interested parties submitting confidential information also furnish a sufficiently detailed non-confidential summary.

AMIE further stated that these summaries have to permit a reasonable understanding of the substance of the confidential information. The Appellate Body continued to indicate that it is an Anti-Dumping Agreement requirement that [s]uch summary contains 'sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'.

The Appellate Body noted that Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement [a]ccommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon 'good cause' shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests.

AMIE's conclusion on the ability to respond is that the Commission's treatment of confidential information requires not only its protection, but also displaying the rationality of the Commission's decision by disclosing enough information that is relied upon for that decision to allow interested parties enough information about the confidential information to defend their interests. It is a dual rather than a monistic role.

#### **Applicant's comments**

The Applicant stated that in all other instances in the Application, where confidential information has been omitted and summaries have not been provided, the Applicant

has provided reasons why it is not *possible to* summarise the information without revealing the confidential information and provided sworn statements complying with the ITA Act and Anti-Dumping Regulations.

The Applicant also stated that as set out in its sworn statements and the Participating Producers, in most instances providing indexed information would allow other interested parties to calculate the confidential information of the Participating Producers using information that is non-confidential and other confidential information that has been indexed. This could in turn be used to calculate other confidential information. For these reasons, such indexed information was not provided.

The Applicant stated that for the cost build-up, it submits that even indexed information for the individual line items would reveal confidential information and submits further that the indexed information that the Applicant has provided for subtotals and totals contain sufficient information to permit a reasonable understanding of the substance of the confidential information.

In other instances, including information regarding own imports, the confidential information cannot be summarised in a non-confidential form as, inter alia, it contains detailed information regarding the relationships between the Participating Producers and their customers, detailed reasons for and/or details of strategic business decisions or names and contact information for suppliers, and any summary would necessarily reveal confidential information.

### **Commission's consideration**

The Commission noted AMIE's comments and concern with regard to the Applicant's treatment of its confidential information and the Commission's acceptance of such. The Commission considered that the Applicant provided the Commission with a non-confidential application which was thoroughly scrutinised by the investigators and found to be meeting the requirements of a non-confidential application as per the Regulations. For information that the Applicant deemed to be confidential, a non-



confidential version thereof was provided. In cases where the Applicant could not provide a summary or an index version of the confidential version the Applicant provided a sworn statement outlining reasons why they could not provide such information.

The Commission is of the opinion that AMIE's issue with the non-confidential that the Applicant provided is with the consolidated information that the Applicant claims confidentiality on. According to AMIE, the Applicant should not claim confidentiality on consolidated information.

The Commission is of the view that the Applicant has complied fully with the confidentiality requirements and the application that led to the initiation of this investigation was properly documented.

### **Specific pre-initiation concerns raised by interested parties**

#### Completeness

AMIE stated that ADR 22.1 requires,

In determining whether a complaint submitted in terms of section 21 constitutes a properly documented application the Commission shall determine whether the application includes such information as is reasonably available to the applicant relating to the prescribed information.

AMIE stated that very little to no supporting information is given for projections of potential future injury. Given the weighting which necessarily needs to be given to these projections in a sunset review, a lack of supporting information, or facts, leaves the application necessarily incomplete.

AMIE stated that the projections were made and were presumably based on something, which has not been provided in the application. It clearly is "reasonably available" to the applicants, or it is instead faced with information which was simply made up.

AMIE stated that part of assessing the completeness of the application is to confirm the completeness of the non-confidential version of the application. As noted above, there are large gaps in the non-confidential record, making it difficult for interested parties to respond properly to the investigation, thus compromising the Commission's ability to arrive at an impartial, reasonable, and rational decision.

### **Commission's consideration**

#### The Applicant not providing basis for its projections/ completeness

The Commission is of the view that the Applicant provided sufficient basis for the projections. In all instance where the Applicant made an estimate of what the situation would be should the anti-dumping duties expire the Applicant provided a base for such an estimate as well as an explanation on how the estimate was calculated.

It is therefore, the Commission's view that the Application contains sufficient information to permit a reasonable understanding of the substance of the confidential information and that all interested parties have all information necessary to respond to the Application and to defend their interests.

#### Initiation of a sunset review in the absence of proven dumping and material injury

For purposes of the initiation of an anti-dumping investigation, Applicants are required to provide *prima facie* information that dumping of the subject product is taking place, that the industry is experiencing material injury and that there is a causal link between the alleged dumping and the injury experienced. The interested parties however are ignoring the fact that in the case of a sunset review, the requirement for the Applicant is to provide *prima facie* information of the likelihood of continuation and/or recurrence of dumping and material injury.

The Commission noted the Appellate Body in US – Corrosion-Resistant Steel Sunset Review noted that, as this likelihood determination is a prospective determination: "the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated". In this respect, the Appellate Body pointed to the important difference between original investigations

and sunset reviews: "In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.

The Panel in Ukraine – Ammonium Nitrate made a distinction between making an injury determination in the context of a sunset review and considering the state of the domestic industry following the imposition of original duties, and held that "just because an investigating authority considers the existing state of the domestic industry, based, inter alia, on various factors and indices showing the performance of that industry, does not mean that it was seeking to establish that the domestic industry was suffering material injury during the period of review".

The Panel in EU – Cost Adjustment Methodologies II (Russia) addressed claims by Russia that the European Commission's analysis and determination concerning the likelihood of recurrence of injury were inconsistent with Articles 3 and 11.3 of the Anti-Dumping Agreement. The European Union countered that, for these claims, only Article 11.3 applied. In determining which legal standard was relevant for its examination of Russia's claims relating to a determination of the likelihood of recurrence of injury, the Panel recalled the Appellate Body's statements in US – Corrosion-Resistant Steel Sunset Review (reproduced in part above).

The Panel noted that the Appellate Body had distinguished the analysis to be undertaken in an expiry review (pursuant to Article 11.3) from that in an original investigation (pursuant to Article 3): "The likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated. In considering the nature of a likelihood determination in a sunset review under Article 11.3., in US – Carbon Steel, in the context of the SCM Agreement, that: ... original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review

differs in certain essential respects from the nature of the determination to be made in an original investigation. This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.

With reference to the above case law, the Commission is of the opinion that it is clear that the nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation. The requirement in a sunset review is that the Applicant should provide *prima facie* information to indicate the likelihood of continuation or recurrence of dumping and/or injury and not dumping, material injury and causality as stated by Merlog, AMIE and the USAPEEC. The Commission considered that the Applicant has submitted *prima facie* information for purposes of initiation that there is a likelihood of continuation or recurrence of dumping and/or injury should the duties on the subject product originating in or imported from the USA expire.

#### Non-confidential summaries

The Commission considered that the Applicant provided adequate summaries to enable interested parties to come to a reasonable conclusion on the information provided. Where confidentiality has been claimed, the Applicant provided reasons and a sworn statement.

## **1.8 PARTIES CONCERNED**

### **1.8.1 SACU industry**

The SACU industry is represented by the following manufacturers of the subject product: County Fair, Festive, Goldi, Daybreak, Grain Field, RCL Foods, Sovereign and Supreme.

## **1.8.2 Responses by Foreign Manufacturers/Exporters/Importers**

No responses to the Commission's exporter questionnaire were received from any exporter/manufacturer in the USA. A response to the Commission's importer questionnaire was received from Merlog, an importer of the product subject to this investigation, on 09 January 2023. After scrutinizing Merlog's response, a deficiency letter was sent to Merlog on 19 January 2023. Merlog submitted an updated response, which was scrutinized and found to be properly submitted, making it eligible for verification. This response was verified by means of desktop verification and a verification report was sent on 06 March 2023.

Comments to the Commission's initiation notice were received from AMIE, Merlog, and USAPEEC

Essential facts letters were sent to all interested parties, informing them of "essential facts" which were being considered by the Commission and inviting interested parties to comment. Comments on the essential facts letter were received from the below interested parties.

### **Comments by the Merlog to the essential facts letter**

Merlog stated that it had addressed a letter dated 14 February 2023 through its attorneys to the Commission relating to the flawed initiation of this investigation.

These flaws had 6 main themes:

1. Rushed Timelines to Initiate
2. Administrative fairness
3. Outdated injury information
4. The calculation of normal value
5. The lack of causal link between "alleged dumping" and injury the reducing imports of subject product from the USA, resulting in South Africa not fully utilising the available quota free of dumping duty over the past two years. Lack of sufficient and or indexed information and unwarranted claims of confidentiality.

Merlog stated that the rushed timelines in which the investigation was initiated from the time that a properly documented application was received (based on the voluminous content of both the Confidential and Non-Confidential submissions were delivered to the Commissions offices) would bring into question what was done at what point and with what level of interrogation and detail. Based on the information available to the Commission, it would seem that either the interrogation was sub-par or there is a partiality in favour of the Applicant. Requests for the merit assessment which is the culmination of its process have been unreasonably declined by the Commission. All parties, applicants and potential affected parties are to expect administrative fairness. Again, there would seem to be a partiality in favour of the Applicant. Examples being the request for the merit assessment being denied, lack of enough indexed information for affected parties to comment meaningfully on the application, use of a normal value which is not in terms of the ADR and WTO Anti-Dumping Agreement requirements, absolute lack of causal link to injury based on declining imports and non-fulfilment of available quota free of the current dumping duty, the effects of Covid19 and Energy supply and other macro-economic factors.

Merlog further stated that the out-dated injury information means that there is a major disconnect between the information used to assess dumping and injury and the likelihood of future dumping, especially in a forward-looking investigation such as a sunset review. The currency of the information and merits of the forward assumptions are critical. It is incumbent on the Commission to consciously and with knowledge, expertise and due care to interrogate the information submitted by the applicant and the assumptions and predictions made. The reason for this is that the initiation of an investigation triggers a substantial amount of work by interested parties and the Commission. This includes time of various levels of staff in an organisation, cost of expert advisers and potential political strain on relationships with trade partners. The Commission is the only party outside of the Applicant which has all the information in a non-confidential form. Parties affected or wishing to participate are hamstrung in being able to comment and properly participate in an investigation, by having to deal with partial information. This is all the more reason that as the expert body responsible for making a recommendation that it conducts itself as an impartial and non-biased

regulator, especially as they are obliged to weigh up the merits and balance the interests of all parties (including the consumer) and to a higher extent the participants which may be negatively affected due to having access to incomplete information.

Merlog stated that the information is out-dated and the global political and social matrix has changed substantially between 2021 and when the investigation was initiated. The Essential Facts do not enlighten a reader any better, and in the face of declining imports from the USA and unutilised quota, and the recently conducted dumping investigation into Brazil and EU and the recently concluded EU Sunset review (UK, NL, DE), where the ITAC reports attribute all injury to the respective countries investigated in the individual reports. This investigation is further flawed by the Commission accepting the application as properly documented where the Applicant has included Chicken Mixed Portions in the injury information, but has specifically mentioned and extracted the volumes of production for “mixed portions” and sworn under oath that there is no tariff heading for this item. Yet injury information has been included by the Applicant and accepted by the Commission.

Merlog stated that the Commission has accepted and verified this information. If this product has no tariff heading, then it cannot be included in the scope of this investigation. The scope of an investigation cannot be amended after initiation without gazetting such changes. The initiation is fatally flawed on this matter alone!

On top of this lack of apportioning injury to the “other factors” raised in all of these investigations leads to a determination (by outsiders) that the Commission is partial to the Applicant and will offer unfair protection irrelevant of the facts. Merlog stated that in its opinion all of these decisions are reviewable. The lack of detailed properly indexed information does not allow for affected parties to properly protect their interests and rights. Merlog stated that in its opinion the initiation is fatally flawed.

Merlog further stated that if its view is correct the rest of the investigation is flawed as the investigation fails at the first hurdle and should not have started. These flaws cannot be rectified. According to Merlog the investigation should be terminated and

the dumping duties should expire retrospective to 23 November 2022, the expiry of the 5 years' validity of the dumping duties. Merlog denies that the application (from the non-confidential version was properly documented or that the Commission properly mediated between the parties relating to the claims of confidentiality, or properly interrogated the application to ascertain the veracity and truthfulness of the applications claims and assumptions. This failure resulted in the flawed initiation of this investigation.

### **Comments by AMIE to the essential facts letter**

- (i) AMIE stated that the essential facts letter is not merely a letter summarizing the Commission's proposed decision. It is meant to provide the essential facts which will be considered when the final decision is made. If important facts are left out of the letter, then it reasonably can be assumed those facts were not considered essential and so will not be considered when the final decision is made. AMIE provided a number of Case laws to substantiate its dissatisfaction and to provide further information on what an essential facts letter should contain.

AMIE stated that from the number of case laws it provided it is again clear that the Commission cannot only make available the facts "on which it has relied, or will rely, in reaching factual conclusions", but that it has to inform interested parties of all information under consideration and which will form the basis of the final determination.

AMIE further stated that the essential facts letter does not provide it with all the facts being considered by the Commission before its final decision will be taken. It is not clear at all why certain important information was omitted, but that is the case.

- (ii) AMIE stated that the Commission in the essential facts letter stated that it is satisfied that the Applicant provided it with a non-confidential application that meets the requirements of the ITAA and the Anti-Dumping Regulations



("ADR"). A refusal to provide indexed or aggregated information, which is already a protective measure built into the process to protect the confidentiality of the Applicant's information, does not meet the requirements of the ITAA and the ADR, as well as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the World Trade Organization requirements.

### **Comments by the Applicant on the essential facts letter**

The Applicant stated that the ADR define investigation period for injury as: "the period for which it is assessed whether the SACU industry experienced material injury. This period shall normally cover a period of three years plus information available on the current financial year at the date that the application was submitted, but may be determined by the Commission as a different period provided that the period is sufficient to allow for a fair investigation. The investigation period for injury shall be clearly indicated in the initiation notice published in the Government Gazette." The definition of 'investigation period for injury' in the ADR provides for a period of three years and explicitly provides that the Commission may determine a different period, provided that the period is sufficient to allow for a fair investigation. The Applicant also stated that given that the focus of a sunset review is what is expected to happen in the future if the duties are removed and the investigation period for injury covers a period of three years in the past and one year in the future, the Applicant stated that it agrees with the Commission's determination of the investigation period for injury.

The Applicant further stated that it agrees with the Commission's view that it provided the Commission with a non-confidential application that meets the requirements of the International Trade Administration Act 71 of 2002 (the "ITA Act") and the ADR. It notes that where it was not possible to provide the information in an indexed format (since this would allow other interested parties to calculate the confidential information using information that is non-confidential and other confidential information that has been indexed), it has provided a summary that indicates (i) whether the figure is positive or negative; (ii) whether the figure has increased or decreased from the previous year; and (iii) whether the figure has increased or

decreased from the base year. It submits that this summarised information is sufficient to give interested parties a reasonable understanding of the confidential information submitted by it. The Applicant stated that it has also provided sworn statements setting out the reasons why it would not be possible to provide further non-confidential summaries without revealing confidential information. The Applicant stated that for each estimate in the event that the anti-dumping duties expire has been set out in detail in the Application and supporting documents are provided.

### **Commission's consideration**

#### Non-confidential summaries

The Commission is of the view that although interested parties should be granted an opportunity to defend their interests it does not agree that a party who is not the owner of the information submitted decide what part of the information should be regarded as confidential or non-confidential. In Guatemala – Cement II, the Panel discussed the scope of Article 6.5: the text of Article 6.5 distinguishes between two types of confidential information: (1) 'information which is by nature confidential', and (2) information 'which is provided on a confidential basis'. Article 6.5 then provides that *“the provision of confidential treatment is conditional on 'good cause' being shown. Logically, one might expect that 'good cause' for confidential treatment of information which is 'by nature confidential' could be presumed, and that 'good cause' need only be shown for information which is not 'by nature confidential' (but for which confidential treatment is nonetheless sought)”*. *“...the requirement to show 'good cause' appears to apply for both types of confidential information, such that even information 'which is by nature confidential' cannot be afforded confidential treatment unless 'good cause' has been shown.”*

In the Appellate Body in EC – Fasteners (China) commented generally on "good cause" in Article 6.5: "The 'good cause' alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation, who would otherwise have a right to view this information under Article 6 of the Anti-Dumping Agreement. Put another way, 'good cause' must demonstrate the risk of a potential consequence, the avoidance of which

is important enough to warrant the non-disclosure of the information. 'Good cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party.

With reference to the above it is clear that good cause must be demonstrated when submitting confidential information as well as when a party claims confidentiality on information that is not by nature confidential. The Commission requires the Applicant when making its application, to submit a sworn statement for information that is by nature not confidential. The sworn statement required in the application details why certain data is regarded as confidential and cannot be summarized. During the deficiency phase investigators interrogate the eligibility of information being regarded as confidential, whether by law or common practice. In this case the Applicant has shown good cause on its confidentiality claims.

#### Essential facts

The Commission noted AMIE's comments above and agree that the essential facts to be disclosed are those facts which form the basis of the decision whether to apply definitive measures or not and are the body of facts essential to the determinations that must be made by the investigating authority before it can decide whether to apply definitive measures. The Panel in China – Broiler Products found that: "the facts that are 'essential' may vary from interested party to interested party... the relevance of those facts to the determination to be made by the investigating authority determine whether the facts are essential or not (own emphasis).

Further to that the Panel in Argentina – Poultry Anti-dumping duties further considered that the term "essential facts" refers to "factual information" rather than "reasoning". In the Panel's view, the failure to inform an interested party of the reasons why the authority failed to use certain data does not equate to a failure to inform an interested party of an essential fact.

In the view of the Panel in Korea – Certain Paper (Article 21.5 – Indonesia), Article 6.9 provided a one-time disclosure requirement that contained the "essential facts" under consideration regarding the authorities' decision on whether to apply definitive measures. The scope of the obligation excluded the reasoning of the authorities or their intention as to how certain determinations were made.

AMIE although correct in its definition of what essential facts are, does not take into consideration that essential facts may differ from one party to another. For this reason the decision on which facts are to be considered essential is made by the investigating authority. The onus thus lies with the investigating authority to make a decision on essential facts based on the facts it is considering for purposes of its final determination.

Further to that, the Commission, under the provisions of Article 6.9 of the ADA, as the Investigating Authority is under no obligation to provide reasons or its intentions to interested parties of how certain determinations were made as part of its essential fact letter. The Commission's duty is to disclose the essential facts it is considering in making its final determination.

## **1.9 FINAL DETERMINATION AND RECOMMENDATION**

After considering all interested parties' comments on the application and "essential facts letter", the Commission made a final determination that the expiry of the anti-dumping duty on the subject product originating in or imported from the United States of America would likely lead to the continuation and/or recurrence of dumping and material injury.

The Commission made a final determination to recommend to the Minister of Trade, Industry and Competition that the current anti-dumping duty on frozen bone-in portions of the species *gallus domesticus* originating in or imported from the United States of America, be maintained as follows:

<b>Tariff heading</b>	<b>Sub- heading</b>	<b>Description</b>	<b>Imported from or Originating in</b>	<b>Rate of duty Anti –dumping duty</b>
0207		Meat and edible offal, of the poultry heading 01.05, fresh, chilled or frozen		
0207.1		Of fowls of the species GALLUS DOMESTICUS		
0207.14		Cuts and offal, frozen:		
0207.14.9		Other		
0207.14.91		Whole bird cut in half	USA	940c/kg
0207.14.93		Leg quarters	USA	940c/kg
0207.14.95		Wings	USA	940c/kg
0207.14.96		Breasts	USA	940c/kg
0207.14.97		Thighs	USA	940c/kg
0207.14.98		Drumsticks	USA	940c/kg
0207.14.99		Other	USA	940c/kg

## 2. PRODUCTS, TARIFF CLASSIFICATION AND DUTIES

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### 2.1 SUBJECT PRODUCT

#### 2.1.1 Description

The imported product is frozen portions of meat that contain bones, of fowls of the species *gallus domesticus* that is classifiable under tariff subheading 0207.14.9.

#### 2.1.2 Like product

In the original investigation the Commission found that the SACU product and the imported product are “like products” for purposes of comparison in terms of Section 1 of the ADR.

#### 2.1.3 Tariff classification

When the duties were imposed, the subject product was classifiable under tariff subheading 0207.14.90 as follows:

##### Current tariff classification

TARIFF SUBHEADING	DESCRIPTION	CUSTOMS DUTY					
		General	EU	EFTA	SADC	MERCOSUR	AFCFTA
0207	Meat and edible offal, of the poultry heading 01.05, fresh, chilled or frozen						
0207.1	Of fowls of the species GALLUS DOMESTICUS						
0207.14	Cuts and offal, frozen:						
0207.14.9	Other						
0207.14.91	Whole bird cut in half	62%	free	62%	free	62%	62%
0207.14.93	Leg quarters	62%	free	62%	free	62%	62%
0207.14.95	Wings	62%	free	62%	free	62%	62%
0207.14.96	Breasts	62%	free	62%	free	62%	62%
0207.14.97	-Thighs	62%	free	62%	free	62%	62%
0207.14.98	Drumsticks	62%	free	62%	free	62%	62%
0207.14.99	Other	62%	free	62%	free	62%	62%

## 2.1.4 Other applicable duties and rebates

The following anti-dumping duties are currently applicable:

Tariff heading	Sub-	Description	Imported from or Originating in	Rate of duty Anti –dumping duty
0207		Meat and edible offal, of the poultry heading 01.05, fresh, chilled or frozen		
0207.1		Of fowls of the species GALLUS DOMESTICUS		
0207.14		Cuts and offal, frozen:		
0207.14.9		Other		
0207.14.91		Whole bird cut in half	USA	940c/kg
0207.14.93		Leg quarters	USA	940c/kg
0207.14.95		Wings	USA	940c/kg
0207.14.96		Breasts	USA	940c/kg
0207.14.97		Thighs	USA	940c/kg
0207.14.98		Drumsticks	USA	940c/kg
0207.14.99		Other	USA	940c/kg

### Comments by AMIE

#### Scope of the investigation

AMIE stated that it is clear from the initiation gazette that individual tariff codes need to be considered for purposes of initiation, which is consistent with the 2021 anti-dumping investigation into frozen bone-in chicken from Brazil, Denmark, Ireland, Poland, and Spain ("the Brazil / EU investigation"). On page 6 of Report 695, the Commission states because of the tariff structure of the portions, at initiation the Commission made a decision to conduct the negligibility test separately for each of the tariff subheadings at the 8-digit level and found that imports of the subject product imported under some tariff subheadings were below the 3% threshold.

AMIE stated that following that logic, no dumping has been found for tariff code 0207.14.99, so this tariff code should be removed from the investigation. It stated that Article 5.8 of the Agreement stipulates that "an application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case".

AMIE further stated that of the same article requires “there shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. It stated that the correct margin of dumping for initiation purposes should be Leg quarters 7.69%, Thighs 72.41%, Drumsticks 10.00% and the weighted average margin of dumping is 13.97%.

### **Comments by Merlog**

Merlog stated that the investigation should be done at an 8-digit level, as not all items have the same demand and price (value) or are readily available from SACU producers in the required quantities. The investigation should not be a “one size fits all”. If the investigation is done at an 8-digit level rather than a 7-digit level the result would be very different, as producers which sell single cut packs realise a higher selling price than the mixed portion (lowest value return) packs.

### **Comments by Merlog**

Merlog stated that the Applicant has throughout the current application indicated that there is NO HS code for “mixed portions”. According to Merlog the Applicant has gone to great lengths to explain that mixed portions do not have a tariff heading. Merlog also stated that the Commission has not, in the initiation notice, indicated how they have dealt with this at point of initiation, or how they intend to deal with mixed portions during the process of this investigation.

Merlog stated that it agrees with the Applicant that mixed portions are a “different” product:

1. Mixed portions are brined
2. Mixed portions are consumer ready
3. Mixed portions are not imported
4. Mixed portions make up approximately 65% of SACU frozen production.

Merlog also stated that based on the Applicant’s insistence that mixed portions are a different product (without HS code) it would assume that mixed portions fall outside the scope of this investigation. Therefore, in summary, products that were not



imported, or imported in negligible volumes, should not be included in the scope of this investigation.

Merlog also stated that breast bone in (TH0207.14.96), half birds (TH0207.14.91), Wings (TH0207.14.95) and other (TH0207.14.99) should ALL be excluded from the scope of this investigation. Following this logic, if mixed portions have no HS code, there is no directly comparable item imported with which to compare the injury information for the aforementioned “negligible” items and mixed portions should be removed from the investigation. According to Merlog the Applicant should restate the injury information excluding the items not imported and mixed portions, and interested parties should be afforded adequate opportunity to comment on the revised scope.

### **Comments by the Applicant**

The Applicant stated that in terms of the initiation notice, "the product allegedly dumped is frozen portions of meat that contain bones, of fowls of the species Gallus Domesticus classifiable under tariff subheading 0207.14.9 originating in or imported from the USA" ("**Frozen Bone-In Portions (0207.14.9)**" or the "**Subject Product**").

The Applicant went on to state that although there are 7 separate tariff subheadings under 0207.14.9, each providing for a different cut of the subject product, these cuts do not constitute separate products as inter alia these cuts can be easily substituted by other cuts of the subject product. There is only a single product, namely, Frozen Bone-In Portions (0207.14.9).

The Applicant also stated that the majority of SACU sales are Frozen Mixed Portions (No HS) which contain a variable combination of cuts falling under several 8-digit tariff subheadings and not a single 8-digit tariff subheading.

The Applicant provided injury information for the subject product (at the 7-digit level 0207.14.9). Although it is submitted it was not necessary to do so, it also provided information at the 8-digit level and separately for Frozen Mixed Portions (No HS), its largest sub-category of the subject product.

The Applicant further stated that it provided injury information for Frozen Mixed Portions (No HS) separately from the information for Other Frozen Bone-In Portions (0207.14.99) and other 8-digit tariff subheadings for the following reasons:

- providing injury information for this sub-category separately provides the Commission and other interested parties with a better understanding of the information on the majority of its sales than if this information was included under Other Frozen Bone-In Portions (0207.14.99) (which includes cuts of the subject product that are not mixed portions) or any other 8-digit tariff subheading; and
- Frozen Mixed Portions (No HS) do not only compete against and are substitutable by imports of Other Frozen Bone-In Portions (0207.14.99) but also compete against and are substitutable by imports under the other separate 8-digit tariff subheadings. As such, including information for Frozen Mixed Portions (No HS) under Other Frozen Bone-In Portions (0207.14.99) or any other 8-digit tariff subheading would not reflect the market situation for Frozen Mixed Portions (No HS), Other Frozen Bone-In Portions (0207.14.99) or cuts classified under the other 8-digit tariff subheadings. The only way to reflect the market situation for Frozen Mixed Portions (No HS) at a level other than a 7-digit level (which it is submitted is the correct and most accurate level) is to provide information for Frozen Mixed Portions (No HS) separately from the information for Other Frozen Bone-In Portions (0207.14.99) and other 8-digit tariff subheadings.

### **Commission's consideration**

The Commission is of the view that this is a sunset review of the existing anti-dumping duties. The fact that certain products were not imported during the POI does not disqualify them from being included in this investigation, as an assessment is made of the likelihood of continuation and/or recurrence of dumping. The Applicant provided a methodology on how the dumping margin for the frozen cuts that were not imported during the POI should be calculated. The Applicant also provided estimates in terms

of the likelihood of continuation or recurrence of material injury should the duties be allowed to expire.

### **Comments by Merlog**

Merlog stated that brining is the practice of adulterating the chicken by the addition of a brine-based mixture (salts, binders (glues) and water) to add succulence and flavour to the chicken portions. This is an industrial process requiring highly specialised equipment and technology. These are steps introduced by SACU producers after slaughter and are not necessary in the making of chicken consumer ready. The cost of the “process” of brining to produce a value added consumer product is in addition to the cost of normal production. Either a reduction in cost of production should be made to SACU production costs for the industrial process employed by SACU producers or a value upward adjustment to the landed cost of imported product should be made to bring the imported product to the equivalent level of industrial processing.

### **Commission's consideration**

The Commission is of the view that, as defined above, brining is the process of injecting a water and salt solution to the subject product. Although Merlog contends that this process adds flavour and succulence to the subject product, this process is also undertaken to preserve the meat.

The Commission is of the view that as per the verified information of the participating producers, brine is injected at percentages less than 15 per cent. The cost of brining meat is very low, as demonstrated in the Applicants verified cost build-up, and cannot constitute a different production process. One frozen bone-in chicken portion is substitutable with another regardless of whether it is brined or not and therefore are like products for purposes of this investigation. The Commission therefore does not agree with the analysis made by Merlog.

### **Comments by the USAPEEC on the essential facts letter**

The USAPEEC stated that the Commission cites a 2012 study by the National Chicken Council for the proposition that there is a strong preference in the United States for “white breast meat over dark meat poultry.” That study was published more than a decade ago and things have changed dramatically since 2012 and certainly since the original Anti-dumping case was instigated in 2000. The USAPEEC contends that much better, and clearly more credible, information on this topic is publicly available to ITAC. USAPEEC stated that in October 2019, CoBank, the largest U.S. agricultural lending institution, published an article entitled “Evolving U.S. Demographics Give Chicken a New Leg to Stand On,” authored by CoBank’s lead economist Will Sawyer.

The USAPEEC stated that in the article, Mr. Sawyer describes how “evolving USA demographics are shifting consumer preferences from white meat chicken to dark meat.” He explains that this shift is driven by two principal factors: the changing preferences of younger generations of Americans who are now the top consumers of restaurant meals, and the preferences for dark meat chicken among the increasing Latin American and Asian populations in the USA. Mr Sawyer points out that this increased preference for dark meat chicken has resulted in significant changes to the relative share of whole bird value since 2000, with breast meat value dropping from 66% to 45%, and leg value increasing from 12% to 30%. The USAPEEC stated that “in all markets, the prices for portions of chicken are totally dependent on conditions of supply and demand for those particular portions.” And the CoBank article shows, on the basis of real data, that this is true.

### **Commission's consideration**

The Commission notes that in terms of the research in 2019, around 62% of USA poultry sales were chicken breasts. The Commission is of the view that preference for white meat leaves significant export potential in dark meat cuts. This supports that strong preference in the USA for “white breast meat over dark meat poultry, even though it demonstrates a downward trend, white meat is still popular.

The Commission made a final determination that the SACU product and the imported product are “like products”, for purpose of comparison, in terms of section 1 of the ADR.

### 3. SACU INDUSTRY

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#### 3.1 INDUSTRY STANDING

SAPA lodged the application and the following producers provide the data in the application:

- County Fair, a division of Astral Operations Limited (“Astral County Fair”);
- Festive, a division of Astral Operations Limited (“Astral Festive”);
- Goldi, a division of Astral Operations Limited (“Astral Goldi”);
- Afgri Poultry (Proprietary) Limited, t/a Daybreak Farms (“Daybreak”);
- Grain Field Chickens Proprietary Limited (“Grain Field”);
- RCL Foods Consumer Proprietary Limited (“RCL Foods”);
- Crown Chickens Proprietary Limited t/a Sovereign Foods, which is a subsidiary of Sovereign Food Investments Proprietary Limited (“Sovereign”); and
- Supreme Poultry Proprietary Limited (“Supreme”).

The Commission made a final determination that the application can be regarded as being made “by or on behalf of the domestic industry” in terms of Section 7 of the ADR.

## 4. RECURRENCE OF DUMPING

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### 4.1 METHODOLOGY IN THIS INVESTIGATION FOR THE USA

As no responses were received from any manufacturer/exporter in the USA, the Commission made a final determination to use the best information available, as contemplated in ADR 58.2, being the information provided by the Applicant.

#### 4.1.1 Normal Value

The available information indicates that sales in the USA with regard to bone-in portions are not in the ordinary course of trade, as bone-in portions are sold below cost. According to the available information, this is as a result of a particular situation which exists in the USA domestic market, as USA consumers prefer “white meat” over “brown meat”.

The Applicant stated that:

- the subject product exported to SACU is bone-in portions consisting wholly of brown meat;
- verifications undertaken by the Commission on previous occasions and information that was supplied by the Applicant confirmed the preference for white over brown meat in the USA domestic market; and
- there is a clear distinction between the South African and USA markets in the frozen market where in the USA exists a clear preference for white meat over brown meat. This was already confirmed by the Commission in the previous investigations.

In addition to the above, the Commission noted recent supplementary information provided by the Applicant to demonstrate that there is a particular market situation in the USA. The Commission noted an online article titled: “*Local preferences persist*

*as global poultry demand rises*” published on 08 December 2020. The article states, “*In the E.U. and U.S. breast meat is the chicken meat of choice. In 2019, around 62% of U.S. poultry sales were breasts. While dark meat, particularly boneless skinless chicken thighs, is gaining in popularity, the preference for white meat leaves significant export potential in dark meat cuts*”. The article went on to state that “*Boneless cuts are favoured in many developed countries as consumers are willing to pay a premium.....When companies achieve premium prices for breast meat, they can sell the dark meat for less than it costs to produce it..... Selling parts at discounted rates to less developed countries provides needed protein sources; however, it can make it difficult for local farmers to compete and grow a local market*”.

The Commission also noted another article titled: “Factors affecting poultry meat colour and consumer preferences - A review”. The Article states that “*Much of the dark meat from U.S. broilers continues to be exported to other countries because of local consumers’ long-standing and strong preference for white breast meat*”. The article continued to state that “*In the U.S. breast meat is strongly preferred over dark meat. In 2012, a survey was conducted by the National Chicken Council to determine the frequency and preference of chicken consumption among U.S. consumers. The survey found that the average consumer eats chicken 10 times a month, and when chicken is prepared in the home 91% of those surveyed preferred white breast meat over dark poultry meat (National Chicken Council, 2012)*”.

The Commission is therefore of the view that the available information indicates that as a result of the particular market situation in the USA, bone-in portions are sold below cost and not in the ordinary course of trade. The Commission is therefore considering constructing the normal value in terms of section 32(2)(b)(ii) (aa) of the ITA Act.

In calculating the normal value for the USA, the Applicant provided constructed normal value based on the price for a whole broiler provided in the '*USDA Weekly National Whole Broiler/Fryer Report*' produced by the US Department of Agriculture. The constructed normal value was determined by taking into consideration the



weighted average cost allocation method that allocates costs equally between cuts of the chicken, the per unit costs of the whole bird are the same as the per unit costs for the subject product.

#### 4.1.2 Export Price

In determining the export prices for the USA, the official South African Revenue Service (“SARS”) statistics for the period 01 January 2021 to 31 December 2021 were used as the best information available, since no properly documented responses were received from any producer/exporter in the USA.

The Commission made final determination to accept the methodology used by the Applicant in calculating the export prices for other cuts of the subject product that were not imported during the investigating period as the best information available.

#### 4.1.3 Dumping margin

The following dumping margins were calculated:

Cuts	Sub-tariff heading	Dumping Margins calculated
Frozen bone-in portions	0207.14.90	2590c/kg
Whole bird cut in half	0207.14.91	2626c/kg
Frozen Leg quarters	020714.93	2590c/kg
Frozen Wings	020714.95	2590c/kg
Frozen Breasts	020714.96	2997c/kg
Frozen Thighs	020714.97	2590c/kg
Frozen Drumsticks	020714.98	2590c/kg
Other	020714.99	2590c/kg

#### 4.2 SUMMARY – DUMPING

Based on the best information available, the Commission made final determination that there is sufficient information available to indicate that the expiry of the anti-dumping duties would likely lead to the continuation and/or recurrence of dumping of the subject product originating in or imported from the USA.

### **Comments by USAPEEC**

The USAPEEC stated that it objects the method for determining dumping urged by the Applicant and accepted by the Commission in this case. In addition, the USAPEEC stated that South Africa's own Anti-Dumping Regulations, ADR.23.1, provide that the normal value of an imported product should be determined ordinarily by reference to the price for the like product sold in the country of origin or export. This, of course, is the methodology prescribed by the World Trade Organization Anti-Dumping Agreement which provides that dumping shall be determined principally by comparing the export price of a product with "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 1. The USAPEEC further stated that both South African regulations and WTO rules provide that a constructed value is appropriate only where there are no, or very low volumes of, sales of the like product in the domestic market of exporting country. That is clearly not the case with respect to the poultry products under investigation in this review. There are ample home market sales in the United States of all of the individuals' poultry products and cuts at issue in this case and there are publicly available and highly reliable prices reported by both USA governmental agencies and private services.

The USAPEEC further stated that the ADR is clear that domestic selling prices must be used unless they are "not reasonably available to the applicant", which they clearly are in this case. According to the USAPEEC, the Applicant has indeed included data regarding the home market prices for USA chicken parts in its application. The USAPEEC stated that there is no suggestion by the Applicant that the price information it has provided in its application is inaccurate. Nonetheless, the Applicant urges the Commission to ignore these available price data and perform its analysis on the basis of a methodology that the Commission itself no longer uses.

The USAPEEC stated that there is no legal basis for the Commission to proceed in its review other than on a price-to-price comparison. If the correct methodology is applied, it will show that no dumping has occurred. According to the USAPEEC the method advanced by the Applicant for determining dumping in this case – a constructed normal value based on allocating the cost of a whole chicken to its parts based on the relative weight of each part -- does not reflect how any company in the United States of America, in South Africa, or anywhere else in the global marketplace sets its prices. While USAPEEC contends that constructed normal value is not legally applicable in this case because home market price data is readily available, it (the USAPEEC) understand that the Commission itself has adopted the “net realizable value” approach in other cases where constructed value might be a valid approach.

The USAPEEC also stated that the Commission has conducted investigations on chicken products previously with regards to exports from Europe and Brazil and has done constructed value using the net realizable value approach in those cases. In its application, the Applicant requests the Commission not only to use the wrong anti-dumping methodology, but also requests the Commission to disregard its own precedent. Not surprisingly for the USAPEEC, the Applicant does so because its proposed approach would result in ridiculously high theoretical dumping margins.

According to the USAPEEC the Applicant suggested approach does not reflect any reality and the Commission knows this. The Applicants methodology assumes that all parts of a meat animal have the same market value per unit of weight. How ridiculous is the Applicant’s approach? Applying the logic – or perhaps, better said, the “illogic” – of the Applicant’s approach, filet mignon would have the same value per pound as hamburger, pork loin would have the same value per pound as pig’s feet. Anyone who walks into a food store or restaurant in South Africa or anywhere else in the world knows that this is nonsense. The USAPEEC stated that as SAPA’s application is clearly erroneous both on legal and economic bases, it should be summarily rejected by the Commission.

The USAPEEC stated that the reality is that both the USA domestic market for poultry and the world market for poultry is a market that involves many distinct products – whole birds, breast meat, wing meat, drumsticks, thigh portions, mechanically deboned meat, and even chicken feet. Each has a value based on consumer demand for the individual products. That is the most basic principle of market economics, and is unquestionably how poultry products are priced everywhere. Moreover, the reality is that if a fair and rational comparison were made – a comparison between prices paid for the USA leg quarters, drumsticks and thigh meat in the United States and the import prices for those same products in South Africa – it would clearly demonstrate that no dumping has occurred.

**South African Import Prices vs U.S. domestic prices in 2021**

<b>Subject Product</b>	<b>HS code</b>	<b>South African import price (US\$/MT)</b>	<b>U.S. domestic price (US\$/MT)</b>
Leg Quarters	02071493	844	768
Drumsticks	02071498	870	829
Thighs	02071497	639	936

The USAPEEC stated that the table above compares South African import prices of the subject products from the United States with the USA domestic prices in 2021. According to the USAPEEC USA domestic prices for chicken leg quarters and drumsticks were significantly lower than South African import prices. This clearly indicates that if a normal price-to-price comparison were made for the same products, the USA chicken leg quarters and drumsticks are not dumped in the South African market. While USA domestic price for thighs was higher than South Africa import price, import quantity of thighs was small, accounting for 8.7% of total imports of subject products. What these figures show is that prices in South African prices for USA leg quarters and drumsticks are higher – not lower – than prices for those same products in the United States. This is not dumping by any reasonable analysis. It is just the market at work.

## **Comments by AMIE**

AMIE stated that the Commission accepted a constructed normal value when prices were provided by the Applicant. Using the prices provided, the margin of dumping should be; 7.69 per cent for leg quarters, 72.41 per cent for thighs, 10.00 per cent for drumsticks and zero per cent for everything else. Using the correct prices removes four tariff codes from the scope of the investigation.

AMIE stated that first is the normal value according to provision 23 of the ADR, which needs to be determined based on price and only if this is not possible, to then consider either a constructed normal value or sales to a third country.

*ADR 23.1 The applicant shall submit such information as is reasonably available on the price for the like product sold in the country of origin or of export. ADR 23.2 For the purpose of subsection 1 an invoice indicating the price, quotes for domestic sales of the like product, price lists, international publications or any other reasonable proof of such domestic price shall be considered. ADR 23.3 If a price as indicated in subsection 1 is not available at the same level of trade as for export purposes, the application shall indicate reasonable adjustments to allow the Commission to compare the submitted normal value and the submitted export price. ADR 23.4 If the domestic selling price as contemplated in subsection 1 is not reasonably available to the applicant, the applicant shall state its efforts to obtain such price.*

AMIE stated that if the applicant is unsuccessful after having undertaken reasonable efforts to obtain a domestic price as contemplated in subsection 1, the applicant may submit information in respect of normal value - (a) by constructing such value; or (b) with reference to the export price from the exporting country or country of origin to any third country. The ADR is clear that domestic selling prices must be used unless they are "not reasonably available to the applicant", which they clearly are in this case as they are included in the application. AMIE stated that there seems to be no dispute that the pricing information provided by the Applicant is accurate. It is just that the Applicant would prefer not to use these

prices. According to AMIE this contention has no legal basis and AMIE stated that it needs to consider what the margin of dumping would have been if the correct methodology had been followed.

AMIE stated that the Applicant submits that the sales in the USA with regard to bone-in portions are not in the ordinary course of trade, where bone-in portions are sold below cost. This is as a result of a peculiar situation which exists in the USA domestic market as USA consumers prefer "white meat" over "brown meat". The Applicant submits further that as a result of the particular market situation in the USA, bone-in portions are sold below cost and not in the ordinary course of trade. Therefore, the Commission should construct the normal value in terms of section 32(2) (b) (ii) (aa) of the International Trade Administration Act (the "ITA Act"). AMIE stated that there is no reason to believe the Applicants' assertion that "sales in the USA... are not in the ordinary course of trade, where bone-in portions are sold below cost", or that a "particular market situation" exists in the USA. AMIE stated that should the Commission accept this assertion, which is a deviation from the regulations, then a specific reason needs to be given for why the methodology was accepted.

AMIE further stated that without conceding that the applicants' use of constructed normal value is acceptable, when valid prices are available, the way the applicant constructed the normal value is also incorrect as they use a methodology which is inconsistent with the jurisprudence established in China – Broiler products (2013). The Commission accepted costs being allocated based on net-realizable value in the following chicken anti-dumping investigations: • Frozen bone-in chicken – Germany, Netherlands, and the UK (2013) • Frozen bone-in chicken sunset review - Germany, Netherlands, and the UK (2020) • Frozen bone-in chicken – Brazil, Denmark, Ireland, Poland, and Spain (2021). On page 109 of Report 695 (Frozen bone-in chicken – Brazil, Denmark, Ireland, Poland, and Spain – 2021), the Commission notes the cost of production was based on the total production cost per cut, this would be the sum of the total production costs as well as the SG and A costs per cut. It is important for the Commission to note

that it is the practice of the subject product costs to be allocated based on the net realisable value. Portions that are sold at higher prices attract a higher cost allocation percentage. A weighted average cost allocation method could potentially skew the reality of the actual costs of production resulting in a greater percentage of sales made below cost.

AMIE also stated that there is a clear understanding by the Commission, which is fully aware of both the general cost allocation practice in the chicken sector and how using the method requested and accepted in this investigation would result in an inappropriate outcome. If the Commission were to accept a constructed normal value from the applicants, which we deny should occur, and then it should be constructed using the correct methodology, which the Commission is quite familiar with.

#### **Commission's consideration**

The Commission is of the view that in any investigation, after verification of the Applicant's information, it places reliance on the Applicants information as this is the best information available at the time of initiation. After initiation, the USA Government as well as known importers and exporters of the subject product are invited to respond to the claims made by the Applicant and provide information with regard to domestic and export prices. The onus thus lies with exporters in the USA to prove that sales were indeed made in the ordinary course of trade by submitting a fully substantiated response to the Commission's exporter questionnaire.

The Commission is of the view that comments by USAPEEC stating that "both South African regulations and WTO rules provide that a constructed value is appropriate only where there are no, or very low volumes of, sales of the like product in the domestic market of exporting country" is incorrect. Paragraph 2.2 of the Anti-Dumping Agreement provides as follows:

"When there are no sales of the like product in the **ordinary course of trade** in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. The ADR allows using sales from an appropriate country or constructed normal value".

The Commission notes that the Applicant stated in its application the reasons why they didn't use the sales in the USA with regard to bone-in portions because the sales in the USA are not in the ordinary course of trade, where bone-in portions are sold below cost. The Applicant did state that as a result of a peculiar situation which exists in the USA domestic market as USA consumers prefer "white meat" over "brown meat".

The Commission is of the view that since there were no responses received from exporters in the USA, the Commission may use the best information available to it. AMIE states that "there is no reason to believe the applicants' assertion that "sales in the USA... are not in the ordinary course of trade, where bone-in portions are sold below cost", or that a "particular market situation" exists in the USA", however it did not provide any proof to demonstrate to the Commission that sales in the USA were made in the ordinary course of trade. There is no reason for the Commission not to believe the Applicant's claim that customer in the USA has a preference for "white meat" over "dark meat". The Applicant provided recent information with regards to its allegation. The Commission accepted this information for purposes of initiation of the investigation.



### **Comments by the USAPEEC to the essential facts letter**

USAPEEC stated that it disagrees strongly with the Commission's contention, in proposing to conclude the sunset review, that imports from the USA "would likely lead to the continuation or recurrence of dumping and material injury." USAPEEC stated that it has, from the beginning of the original anti-dumping investigation, consistently objected to the flawed methodology that the Commission has used to determine dumping which had been advanced SAPA and mistakenly accepted by the Commission in this case.

USAPEEC contends that there never has been either dumping or injury to the South African industry as a result of the USA imports. According to the USAPEEC there is no credible evidence in the current sunset review of any continuation or recurrence of dumping and injury in this case because there was never any credible evidence of dumping in the first place. The Commission has simply not applied the appropriate legal standards for determining dumping that are required under international law.

The USAPEEC stated that the methodology for determining dumping accepted by the Commission in this case and applied again during this investigation – a constructed normal value based on allocating the cost of a whole chicken to its parts based on the relative weight of each part – is economically unsound and lacking in marketplace reality. No company in the United States, in South Africa, or anywhere else in the global marketplace sets its prices by allocating the cost of a whole bird to its various parts based on weight. In all markets, the prices for portions of chicken are totally dependent on conditions of supply and demand for those particular portions.

The USAPEEC stated that the Commission seeks to justify its resort to a constructed value methodology by alleging that the best information available to it "indicates that as a result of the particular market situation in the USA, bone-in portions are sold below cost and not in the ordinary course of trade." However, the alleged best information cited by the Commission for those conclusions is an

“on-line article” provided by SAPA. The Commission does not identify the author of this article, nor does it explain why this on-line article should be credited with any authority on the topics of poultry costs or poultry trade. The Commission cites to no data or methodology in that article that supports the conclusions reached.

The USAPEEC concluded that the Commission’s assertion that it is basing its proposed final decision in this investigation on “best information” submitted by the Applicant completely ignores the fact that USAPEEC and others have pointed out that USA home market prices for the period of investigation – i.e., the period ending December 31, 2021 – were publicly available and regularly published by an agency of the USA Government. The USAPEEC notes that, because of the limitations faced by trade associations under the USA antitrust and competition laws, it does not itself collect any data from its members on individual prices or contracts. However, the best information regarding the USA market prices during the period of investigation is publicly available from neutral and highly reliable USA Government sources.

#### **Comments by Merlog on the essential facts letter**

Merlog stated that the Commission has erred in their use of a constructed value in determining the “cost” of the subject product for purposes of calculating dumping margins. ADR section 23.1 provides for basis of calculating normal value. There is a series of processes to follow in arriving at normal value:

1. Sales in the country of production;
2. Export pricing;
3. Sales to a comparative 3rd country.

Merlog stated that the constructed value is only to be used in circumstances where all the previous options do not apply. Constructed value is the default position, where none of the hierarchy of preferences in S 23.1 is available. According to Merlog constructed normal value should be the last option. It stated that there is credible sales price information available publicly in the USA. This information can easily be accessed online. The Applicant included information from these sources

in the application document, but it chose to motivate for a constructed value, which the Commission endorsed even though such information had been accessed and supplied by the Applicant.

Merlog also stated that the calculated dumping margin has been applied across all cuts, including those which were not imported during the period or were imported in de-minimis volumes. This methodology is inconsistent with ADR requirements and WTO agreements. It would be incorrect of the Commission to accept the Applicant's methodology when there is detailed credible information available in the public domain. Firstly, Applicant is aware of this information and submitted such information as part of the application, but chose to direct the Commission toward an alternative constructed value, the Commission could have, and should have used the "normal value" as is readily available in the USA (as submitted by applicant) or the use of export information to comparable 3rd countries, before using the last alternative of a constructed value when other alternatives are not available. If the Commission had used the normal values based on domestic USA sales as supplied by the applicant, the investigation would not have been initiated. This means that either the Commission is partial to applicant or was negligent when choosing to use constructed value instead of domestic sales value when deciding to initiate.

Particular Market Situation:

Merlog stated that the Commission referred to a "particular market situation" on pg 5 and again on pg 7. According to Merlog there is no "particular market situation" in the USA which should exclude the use of the criteria of ADR section 23.1. and ITA Act section 32.

Merlog stated that the Commission reference an article that indicates that 62% of US poultry sales are breasts. This means that 38% are not breasts. Further in putting this into perspective, nearly 40% of a chicken when cut up is breast meat! This maths alone indicates a "massive" market for meat that is not breast (i.e. legs, thighs, drumsticks).

According to Merlog this trend of increasing brown meat consumption has consistently developed since the original investing into dumping circa 1999.

Merlog referred the Commission to a research article by CoBank (an agricultural focused financial and research institution) at the following link: <https://www.cobank.com/knowledge-exchange/animal-protein/evolving-us-demographics-give-chicken-a-new-leg-to-stand-on>.

Merlog stated that this article highlights the following key points:

- Evolving U.S. demographics are shifting consumer preferences from white chicken meat to dark meat.
- Advances in mechanical deboning technology have allowed U.S. chicken producers to capture the emerging U.S. demand for dark meat while addressing the ever-present labour shortage.
- The U.S. chicken leg crush spread shows greater profit potential from funnelling more chicken legs to the domestic market instead of to the traditional export channel.
- As the popularity of dark chicken meat grows in the U.S., dark meat prices will garner a higher price, affecting U.S. chicken's competitiveness on the global stage"

Merlog further stated that the reference to articles from 2012 is well outdated, and the trend of increasing dark meat (leg meat) consumption is continuing. It stated that further to the calculation of normal value and "dumping margins" the Commission has not highlighted that there is an already astronomical and high MFN duty of 62% which applies to the subject product imported from the USA. So in other words, irrelevant of the dumping margin calculated there is already a 62% protection in place (on a basic foodstuff) which is the most consumed and affordable animal protein in South Africa. This 62% domestic producer protection increased by a punitive (incorrectly calculated) dumping margin is protecting a poor business model of domestic SACU producers at the expense of the unemployed, poor and social security dependent South Africans.

Merlog stated that it is also important that there should be a consistency with WTO precedent and also from investigation to investigation in South Africa. Over the past 5 years there have been a number of sunset review and dumping investigations on the subject product of this investigation conducted by the Commission. In every recent case the Commission has worked on and used a normal value based on domestic sales or comparable 3rd countries, and not relied on a constructed value. This is common cause in all animal protein businesses globally including South Africa. It is called "balancing the carcass". It stated that spare rib and a pork roast do not carry the same value, a beef steak and beef stew do not carry the same value and a chicken wing and a chicken leg do not carry the same value.

Merlog concluded that when calculating dumping margin based on a constructed value to arrive at level of dumping the Commission has failed on a number of points. It stated that the Commission should never have initiated based on a constructed value, it should have considered initiation on publicly available reliable information of domestic sales, alternatively comparable 3rd country sales. This information is publicly available to any interested party including the applicant and the Commission and that the methodology is inconsistent with ADR and WTO requirements.

#### **Comments by the Applicant on the essential facts letter**

The Applicant stated that other interested parties have argued that (i) Regulation 23.1 provides that the normal value of an imported product should be determined ordinarily by reference to the price of the like product sold in the country of origin or export and (ii) the Regulations and the WTO Agreement on Implementation of Article of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") provide that a constructed value is appropriate only where there are no, or very low volumes of sales of the like product in the domestic market of the exporting country. This is incorrect as Regulation 23 applies to original *anti-dumping investigations and does not apply to sunset reviews*. As its heading indicates, regulation 23 provides for "Normal value standard for initiation

purposes". For the purposes of initiating an original investigation it is necessary to prove present dumping and Regulation 23 describes the normal value standard which is required for initiation purposes. On the other hand, in a sunset review, it is not necessary to show present dumping. The Regulations require an applicant for a sunset review to provide "detailed information in the prescribed format indicating the likelihood of a continuation or recurrence of dumping and injury in the event that the anti-dumping duty is removed." The Regulations do not impose any specific methodology that the Commission must follow in a sunset review and do not require the SACU industry to show that there is current dumping, only that there is a likelihood of a continuation or recurrence of dumping.

The Applicant stated that this reflects the position in the ADA, which states in Article 11.3 that: "*... any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition ... unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. ... The duty may remain in force pending the outcome of such a review.*"

In US – Corrosion Resistant Steel Sunset Review, the Appellate Body held: "*In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion.*" See also Regulation 54.4 which states: "*In the event that the SACU industry requests that the anti-dumping duty be maintained, it shall provide the Commission with a proper application containing the necessary information to establish a prima facie case that the removal of the anti-dumping duty will be likely to lead to the continuation or a recurrence of injurious dumping.*"

The Applicant emphasized that it is clear therefore that in a sunset review, it is not necessary to show present dumping. It often happens in a sunset review that there are no exports of the subject product during the period under investigation and therefore there is no present dumping. As a sunset review is prospective, it is not a jurisdictional requirement that present dumping must be proved. Regulation 23, therefore, has no bearing in this investigation. The interpretation by other interested parties that of Regulation 23 as requiring the Commission to use domestic selling prices if they are available is incorrect. What is required by Regulation 23.1 is that an applicant "submit such information as is reasonably available on the price for the like product sold in the country of origin or of export." Despite this not being a requirement for a sunset review (since there is no requirement to show present dumping) the Applicant stated that it submitted reasonably available information on the price for the like product sold in the country of origin or of export. Thus, even if Regulation 23 applied, which it does not, it would have complied with its requirements. Regulation 23 does not, however, require the Commission to determine normal value (for initiation or any other purpose) on the basis of domestic selling prices if they are available.

The Applicant stated that as pointed out in the essential facts letter, the ADA explicitly provides for the use of third country export sales or a constructed normal value where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, domestic sales do not permit a proper comparison. The reasons for supplying normal value based on constructed normal value are set out in detail in section D6.1 of the Application. The Applicant stated that it submits that the sales in the USA with regard to bone-in portions are not in the ordinary course of trade, as bone-in portions are sold below cost. This is as a result of a peculiar situation which exists in the USA domestic market as USA consumers prefer "white meat" over "brown meat". The Applicant stated that no information has been provided by other interested parties to contradict the information it provided, despite other interested parties being afforded the opportunity to do so. As the Commission

correctly noted, no properly documented responses were received from any producer/exporter in the USA, this was also the case in the previous sunset reviews. The Applicant stated that the best information available, as contemplated in ADR 8.2, being the information provided by the Applicant is the best available information as no properly documented responses were received from any producer/exporter in the USA.

### **Commission's consideration**

It is not the Commission's practice to rely on, in part or fully, on unsubstantiated and unverified domestic sales values from parties other than manufacturers of the subject product in the country under investigation. The Commission notes that the USAPEEC is an organisational body representing the interests of the USA in this investigation. The USAPEEC has not been appointed to act on behalf of any exporter and the information on domestic sales presented by it does not belong to a specific manufacturer nor does it constitute a response to the Commission's exporter questionnaire by or on behalf of any manufacturer of the subject product in the USA.

### Constructed normal value vs. domestic sales vs. third country sales

It is the Commission's practice, in the absence of reliable verified domestic sales information, to elect to construct the normal value rather than rely on third country sales. This is based on the belief that if a country, in this case the USA, can dump the subject product in the SACU, it can dump it anywhere. The Commission is of the view that the constructed method is thus the next best alternative after the normal value method based on domestic sales. Manufacturers and/or exporters of the subject product in the USA were given an ample opportunity to respond to the initiation of this investigation, however they opted not to. The Commission made a decision to continue to use the best information available to it, being that provided by the Applicant.



The Commission is of the view that interested parties are also ignoring the fact that the Applicant and the Commission are not saying there are no publicly available USA prices. The crux of the matter is that due to a peculiar situation that exist in the USA there is a preference of white meat over dark meat hence the constructed normal value.

The Commission made a final determination that the expiry of the duties would likely lead to the continuation and/or recurrence of dumping of the subject product originating in or imported from the USA.

## 5. RECURRENCE OF MATERIAL INJURY

The information below is for the period between 01 January 2019 and 31 December 2021 as well as the estimates should the anti-dumping duties expire. The Applicant submitted the following information to substantiate the claim that should the anti-dumping duties expire the SACU industry will experience a continuation and/or recurrence of material injury:

### 5.1 IMPORT VOLUMES AND EFFECT ON PRICES

#### 5.1.1 Import volumes

The table below shows the volume of the allegedly dumped imports of the subject product as sourced from the South African Revenues Service from 01 January 2019 to 31 June 2021 and an estimate, should the anti-dumping duties expire.

**Table 5.1.1: Import volumes**

Kg	Product Description	2019	2020	2021	Estimate if the anti-dumping duties expire
<b>USA imports</b>					
0207.14.90	All products	<b>73,710,085</b>	<b>72,939,791</b>	<b>60,261,346</b>	<b>153,547,692</b>
0207.14.91	Whole bird cut in half	0	167,666	0	19,988
0207.14.93	Leg quarters	49,824,403	62,693,051	38,346,136	99,807,336
0207.14.95	Wings	148,137	26,535	0	8,894,964
0207.14.96	Breasts	0	0	0	0
0207.14.97	Thighs	2,484,844	1,702,313	5,251,606	9,241,753
0207.14.98	Drumsticks	21,243,494	8,350,226	16,663,604	33,649,557
0207.14.99	Other	9,208	0	0	1,934,095
<b>Other countries</b>					
0207.14.90	All products	<b>150,384,431</b>	<b>90,188,897</b>	<b>73,313,113</b>	<b>73,313,113</b>
0207.14.91	Whole bird cut in half	54,000	0	28,620	28,620

0207.14.93	Leg quarters	103,257,770	64,706,299	49,658,667	49,658,667
0207.14.95	Wings	24,407,138	10,077,157	12,736,483	12,736,483
0207.14.96	Breasts	0	0	0	0
0207.14.97	Thighs	3,807,341	2,960,832	461,788	461,788
0207.14.98	Drumsticks	10,722,249	7,018,140	7,658,171	7,658,171
0207.14.99	Other	8,135,933	5,426,470	2,769,384	2,769,384
<b>Total imports</b>		<b>224,094,516</b>	<b>163,128,688</b>	<b>133,574,458</b>	<b>226,860,805</b>
<b>USA imports as % of total imports</b>		<b>32.89%</b>	<b>44.71%</b>	<b>45.11%</b>	<b>67.68%</b>
<b>Other imports as % of total imports</b>		<b>67.11%</b>	<b>55.29%</b>	<b>54.89%</b>	<b>32.32%</b>

The table above indicates that alleged dumped imports from the USA decreased from 73,710,085 to 72,939,791 kilograms between 2019 and 2020, it further decreased from 72,939,791 to 60,261,346 between 2020 and 2021. However, it is estimated to increase should the anti-dumping duties expire.

The table above also indicates that other imports decreased from 150,384,431 to 90,188,897 kilograms between 2019 and 2020, and further decreased from 90,188,897 to 73,313,113 between 2020 and 2021. However, it is estimated to remain unchanged should the anti-dumping duties expire.

The Applicant stated that the volumes of dumped imports decreased during the period under investigation as a result of the anti-dumping duties in force. However, if the anti-dumping duties are allowed to expire, volumes of the dumped imports are likely to increase significantly, which would result in the continuation of material injury to the SACU industry. The table above shows that imports for the forecast year would be more than double that of the previous years.

The Applicant further stated that prior to the introduction of the AGOA rebate quota of anti-dumping duties; imports of the subject product from the USA were insignificant. Following the introduction of the quota, imports of the subject product increased by approximately 60 000 tons, the amount of the quota. This indicates

that if the anti-dumping duties, which were not subject to the quota, are removed the dumped imports from the USA will increase accordingly.

The Applicant stated that the forecast for import volumes is calculated by adding forecast increase in Imports to the figures for 2021. Forecast increase in imports (19 988 kg) is calculated by dividing forecast increase in imports (frozen bone-in portions (0207.14.9) by import volume (total imports) (frozen bone-in portions (0207.14.9) for 2021 and then multiplying by import volume (total imports) for 2021. The ratio of total imports is used instead of dumped imports on the assumption that the removal of the restriction imposed by the quota would lead to exporters and importers also exporting/importing other cuts of the subject product.

## 5.2 Effect on Domestic Prices

### 5.2.1 Price undercutting

Price undercutting is the extent to which the price of the imported product is lower than the price of the like product produced by the SACU industry.

Product	2019	2020	2021	Price undercutting % estimates if the anti-dumping duties expire*
Frozen Bone-in	100	94.57	97.72	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Whole bird cut in half	100	161.63	100	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2021]
Leg quarters	100	93.13	90.58	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2021]
Wings	100	97.92	57.50	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]

Breasts	100	100	100	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Thighs	100	112.89	88.29	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [INCREASED FROM 2021]
Drumsticks	100	93.72	92.60	CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other	100	79.17	79.17	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [INCREASED FROM 2021]

The table above shows that the Applicant experienced price undercutting on all cuts, with the exception of whole bird cut in half, of the subject product during the period of investigation from 01 January 2019 to 31 December 2021.

The table above shows that the Participating Producers decreased from 2019 to 2020 and in 2021 a decrease from 2020 and 2019.

The Applicant explained that if the anti-dumping duties expire, price undercutting is likely to decrease from 2019 to 2021.

### 5.2.2 Price depression

Price depression takes place where the SACU industry's ex-factory selling price decreases during the period of investigation.

**Table 5.2.2: Price depression**

<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimates if the anti-dumping duty expires</b>	
All Frozen bone-in	100	104	112	Increased
Whole bird cut in half	100	118	114	Increased
Leg quarters	100	99	108	Decreased
Wings	100	104	114	Increased
Breasts	100	82	104	Increased
Thighs	100	130	103	Increased
Drumsticks	100	109	118	Increased
Other	100	106	111	Increased
Mixed Portions	100	103	113	Increased

The table above indicates that the Applicant did not experience price depression on all products during the period of investigation. The Applicant estimated that its selling prices would either decrease or remain the same as those of the 2021 period of investigation should the anti-dumping duties expire.

### **5.2.3 Price suppression**

Price suppression is the extent to which increases in the cost of production of the product concerned, cannot be recovered in selling prices.

	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimates if the anti-dumping duties expire</b>
All Frozen bone-in portions	100	100	102	111
Whole bird cut in half	100	89	101	108
Leg quarters	100	78	99	0
Wings	100	101	102	108
Breasts	100	130	111	118
Thighs	100	82	112	119
Drumsticks	100	97	98	104
Other	100	99	104	111
Mixed Portions	100	103	102	109

The table shows that cost of production as a percentage of selling price has increased during the period of investigation and it is estimated to further increase should the anti-dumping duties be expire.

The Applicant further stated that the SACU sales net ex-factory price increased during the period under review. However, if the anti-dumping duties are allowed to expire the SACU sales net ex-factory price is forecast to reduce despite current high inflation, which would necessitate price increase. The expiry of the anti-dumping duties will lead to a continuation or recurrence of injury in the form of price suppression, as the Applicant will not be able to increase their prices in line with increases in costs due competition from the significantly cheaper dumped imports.

### **Commission’s consideration**

The Commission noted that the Applicant suffered price suppression on all cuts of the subject product during the period of investigation. The Commission considered that should the anti-dumping duties expire, the Applicant will continue to experience material injury in the form of price suppression.

## **5.3.1 CONSEQUENT IMPACT OF THE DUMPED IMPORTS ON THE SACU INDUSTRY**

### **5.3.1.1(a) Actual and potential decline in sales volumes**

The following table shows the Applicant’s sales volumes:

**Table 5.3.1.1 (a) Sales volume**

<b>Sales volumes Kg</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimates if the anti-dumping duties expire</b>
All Frozen bone-in portions	100	105	112	Increase
Whole bird cut in half	100	60	68	Decrease
Leg quarters	100	104	94	Decrease
Wings	100	99	115	Increase
Breasts	100	116	99	Decrease
Thighs	100	107	122	Increase
Drumsticks	100	96	106	Decrease
Other	100	82	101	Increase
Mixed	100	114	117	Increase

The table above shows that total SACU sales volumes increased by 5 index points from 2019 to 2020; increased by 7 index points from 2020 to 2021, increased by 12 index points during the period of investigation. Total sales estimated to decrease should the anti-dumping duties expire.

### 5.3.1.1 (b) Actual and potential decline in sales values

The following table shows the Applicant's sales values:

**Table 5.3.1.1 (b) Sales volume**

<b>Rands</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimates if the anti-dumping duties expire</b>
<b>Sales values</b>	100	110	126	115
Whole bird cut in half	100	71	78	58
Leg quarters	100	102	101	0
Wings	100	103	131	114
Breasts	100	95	103	103
Thighs	100	138	126	105
Drumsticks	100	104	126	58
Other	100	86	112	111
Mixed	100	118	132	131

The table above shows that the total SACU sales values increased by 10 index points from 2019 to 2020; increased by 16 index points from 2020 to 2021, increased by 26 index points for the period of investigation and is estimated to decrease should the anti-dumping duties expire.

### 5.3.1.2 Profit

The following table shows Applicant's profit situation on frozen bone-in portions:

**Table 5.3.1.2: Profit**

<b>Gross profit /kg</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Frozen Bone in Portions	100	107	81	-60
Whole bird cut in half	100	85	77	51
Leg quarters	100	196	103	0
Wings	100	102	127	98
Breasts	100	-331	-71	-172
Thighs	-100	223	-338	-391
Drumsticks	100	113	133	51
Other	-100	-72	-189	-314
Mixed portions	100	49	65	-112
<b>Net Profit/ kg</b>				
Frozen Bone in Portions	-100	-135	-237	-555
Whole bird cut in half	100	87	76	48



Leg quarters	100	290	104	0
Wings	100	97	125	90
Breasts	-100	-965	-457	-687
Thighs	-100	22	-223	-238
Drumsticks	100	117	137	45
Other	-100	-87	-145	-198
Mixed portions	-100	-191	-199	-380

The table above indicates that SACU gross profit per kilogram increased by 7 index points from 2019 to 2020, decreased by 26 index points from 2020 to 2021, decreased by 19 index points during the period of investigation and it is estimated to decrease should the anti-dumping duties expire.

Net profit decreased by 35 index points from 2019 to 2020, decreased by 102 index points from 2020 to 2021, decreased by 137 index points during the period of investigation and is estimated to decrease further should the anti-dumping duties expire.

The Applicant stated that its total gross profit increased in 2020 from 2019 but changed into a total gross loss in 2021. If the anti-dumping duties are allowed to expire, its total gross loss is likely to increase substantially. Furthermore, the unit gross profit increased in 2020 from 2019 but changed into a per unit gross loss in 2021. If the anti-dumping duties are allowed to expire, its unit gross loss is likely to increase substantially.

The Applicant also stated that it made a total net loss in 2019, which increased in 2020 and 2021. If the anti-dumping duties expire, its total net loss is likely to increase substantially as result of the flood of dumped imports at low prices. The losses incurred by the Applicant caused by the dumped imports are likely to worsen if the anti-dumping duties expire with consequent increase in dumped imports.

### **Commission's consideration**

The Commission is of the view that the Applicant experienced material injury in the form of decreased gross profits and increased gross losses on all cuts of the

subject product with the exception of whole birds cut in half during the period of investigation. Should the anti-dumping duties expire the Applicant will continue to incur gross losses.

### 5.3.1.3 Output

The following table outlines SACU industry's output of frozen bone-in chicken portions:

**Table 5.3.1.3: Output**

<b>Output (kg)</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimates if the anti-dumping duties expire</b>
Frozen bone-in	100	106	107	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Whole bird cut in half	100	30	37	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Leg quarters	100	106	95	[CONFIDENTIAL] [DECREASED FROM 2019] [DECREASED FROM 2021]
Wings	100	99	107	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Breasts	100	127	83	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [UNCHANGED FROM 2021]
Thighs	100	111	110	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Drumsticks	100	97	100	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]

Other	100	88	95	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Mixed	100	112	113	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]

The table above indicates that total SACU output increased by 6 index points from 2019 to 2020, increased by 1 index point from 2020 to 2021, increased by 7 index points during the period of investigation and is estimated to decrease should the anti-dumping duties expire.

The Applicant stated that its volumes increased during the period of investigation. If the anti-dumping duties expire, its volumes are likely to decrease significantly below 2019 levels as it will be forced to reduce production volumes as a result of the flood of dumped imports at low dumped prices.

#### 5.3.1.4 Market share

The following table shows SACU industry's market share of frozen bone-in chicken portions based on volumes:

**Table 5.3.1.4: Market share (Volume)**

Total SACU market %	2019	2020	2021	Estimate if the anti-dumping duty expire
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]

USA Imports	5.55%	5.37%	4.41%	11.23%
Other imports	11.32%	6.64%	5.36%	5.36%
Producers				
Total SACU	100%	100%	100%	100%
<b>Whole bird cut in half %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	CONFIDENTIAL [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
USA imports	0.00%	71.92%	0.00%	18.71%
Other Imports	27.04%	0.00%	26.79%	26.79%
Total SACU	100%	100%	100%	100%
<b>Leg quarters %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
USA imports	23.72%	33.33%	26.99%	66.78%
Other Imports	49.17%	34.40%	34.95%	33.22%
Total SACU	100%	100%	100%	100%
<b>Wings %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED]	[CONFIDENTIAL] [UNCHANGED]	CONFIDENTIAL [UNCHANGED]

		FROM 2019]	FROM 2019] [UNCHANGED FROM 2020]	FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
USA import	0.17%	0.04%	0.00%	10.63%
Other Imports	28.02%	13.73%	15.23%	15.23%
Total SACU	100%	100%	100%	100%
<b>Breasts %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [UNCHANGED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [UNCHANGED FROM 2021]
USA imports%	0.00%	0.00%	0.00%	0.00%
Other Imports	0.00%	0.00%	0.00%	0.00%
Total SACU	100%	100%	100%	100%
<b>Thighs %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
USA imports	9.32%	6.26%	17.52%	30.82%
Other Imports	14.28%	10.88%	1.54%	1.54%
Total SACU market	100%	100%	100%	100%

<b>Drumsticks %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[ONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2020]	[[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[ONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2020]	[[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
USA imports	34.23%	18.54%	29.73%	60.03%
Other Imports	17.28%	15.58%	13.66%	13.66%
Total SACU	100%	100%	100%	100%
<b>Other %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU producers	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
USA imports	0.00%	0.00%	0.00%	0.83%
Other Imports	3.41%	2.68%	1.19%	1.19%
Total SACU	100%	100%	100%	100%
<b>Mixed Portions %</b>				
Applicant	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
Other SACU Producers	[CONFIDENTIAL]	[CONFIDENTIAL] [UNCHANGED FROM 2019]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2020]	CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Total SACU	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]

producers	[POSITIVE]	[POSITIVE] [DECREASED FROM 2019]	[POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2020]	[POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
USA imports	0.00%	0.00%	0.00%	0.00%
Other Imports	0.00%	0.00%	0.00%	0.00%
Total SACU	100%	100%	100%	100%

The table above indicates that the Applicant’s market share based on sales volumes increased by 5 index points from 2019 to 2020, increased by 7 index points from 2020 to 2021, increased by 2 index points during the period of investigation and is estimated to decrease should the anti-dumping duties expire.

The Applicant stated that its market share by production volume and production value shows an increase during the period of investigation. If the anti-dumping duties expire, production volumes and production values are likely to decrease significantly from 2021 caused by the flood of dumped imports. This clearly shows that the expiry of the anti-dumping duty will lead to a continuation or recurrence of injury in the form of decline in market share by volume and value.

### 5.3.1.5 Productivity

The following table provides SACU industry’s productivity. It is calculated based on total production by each company and employment as follows:

**Table 5.3.1.5: Productivity**

No of employees/kg	2019	2020	2021	Estimate if the anti-dumping duties expire
Total production all products	100	106	107	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Whole bird cut in half	100	30	37	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Leg quarters	100	106	95	[CONFIDENTIAL] [DECREASED FROM 2019] [DECREASED FROM 2021]

Wings	100	99	107	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Breasts	100	127	83	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [UNCHANGED FROM 2021]
Thighs	100	111	110	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Drumsticks	100	97	100	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other	100	88	95	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Mixed	100	112	113	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
Total SACU employees	100	100	101	101
Production per employee	100	106	107	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]

The table above indicates that employee productivity increased by 6 index points from 2019 to 2020, increased by 7 Index points from 2020 to 2021, increased by 7 index points during the period of investigation and is estimated to decrease should the anti-dumping duties expire.

The above table indicates that the production per employee increased during the period under investigation. If the anti-dumping duties are to expire, production per employee is likely to decrease in the forecast year as a result of a decrease in production of the participating producers caused by the increase in dumped



products at low dumped prices

### 5.3.1.6 Return on investment

The following table shows SACU industry's return on investment for the whole business based on information provided by the respective companies:

**Table 5.3.1.6: Return on investment**

Rands	2019	2020	2021	Estimate if the anti-dumping duties expire
Net profit for all products				
Applicant's total	100	126	122	122
Net Assets				
Applicant's total	-100	-214	-276	-522
Return on Assets%	[CONFIDENTIAL] [NEGATIVE]	[CONFIDENTIAL] [NEGATIVE] [DECREASED FROM 2019]	[CONFIDENTIAL] [NEGATIVE] [DECREASED FROM 2019] [DECREASED FROM 2020]	[CONFIDENTIAL] [NEGATIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]

The table above indicates that return on net assets increased by 26 index points from 2019 to 2020, decreased by 4 index points from 2020 to 2021, decreased by 22 index points during the period of investigation and is estimated to decrease should the anti-dumping duties expire.

The Applicant stated its return on net assets was negative in 2019 and further substantially reduced in 2020 and 2021 as a result of the dumped imports. If the anti-dumping duties expire, its return on net assets is likely to further decrease significantly. This clearly shows that the expiry of the anti-dumping duties will lead to a continuation or recurrence of injury in the form of increasing negative returns on investment as caused by increased dumped imports.

### Commission's consideration

The Commission is of the opinion that the Applicant experienced material injury in the form of decreased return on investment during the period of investigation.

Should the anti-dumping duties expire the Applicant will continue to experience material injury.

### 5.3.1.7 Utilization of production capacity

The following table shows SACU industry's production capacity utilisation:

**Table 5.3.1.7: Utilization of production capacity**

<b>Kg</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Applicant's total capacity	100	107	110	110
Applicant's actual production	100	106	107	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Applicant's capacity utilisation %	100	99	98	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]

The above table shows that SACU industry's capacity utilisation has been fairly constant during the period of investigation. However, it is estimated to decrease should the anti-dumping duties expire.

The Applicant stated that its production capacity increased during the period of investigation. Its capacity is likely to remain unchanged from 2021. The Applicant stated that its capacity utilisation decreased in 2020 and 2021. If the anti-dumping duties expire, its capacity utilisation is likely to significantly decrease as a result of the flood of further dumped imports at low dumped prices.

### 5.3.1.8 Actual and potential negative effects on cash flow

The table below outlines SACU industry's cash flow for the whole business based on information provided by the respective companies:

**Table 5.3.1.8: Cash flow**

<b>Rands</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Incoming Cash Flow (the Participating Producers) (Whole Company) (R) (indexed)	100	93	87	79
Outgoing Cash Flow (the Participating Producers) (Whole Company) (R) (indexed)	-100	-93	-103	-107
Net Cash Flow (the Participating Producers) (Whole Company) (R) (redacted)	[CONFIDENTIAL] [POSITIVE]	[CONFIDENTIAL] [POSITIVE] [DECREASED FROM 2019]	[CONFIDENTIAL] [NEGATIVE] [DECREASED FROM 2019] [DECREASED FROM 2020]	[CONFIDENTIAL] [NEGATIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]

In the table above net cash flow decreased by 7 index points from 2019 to 2020, further decreased by 6 index points from 2020 to 2021, 13 index points decreased during the period of investigation and is estimated to decrease should the anti-dumping duties expire.

### 5.3.1.9 Inventories

The following table provides the SACU industry's inventories for frozen bone-in chicken portions:

**Table 5.3.1.9: Inventories**

<b>Volume (kg)</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Inventory Volume (the Participating Producers) (Frozen Bone-In Portions (0207.14.9)) (R) (indexed)	100	134	90	90
Inventory Value (the Participating Producers) (Frozen Bone-In Portions (0207.14.9)) (R) (partially indexed, partially redacted)	100	142	100	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [INCREASED FROM 2021]

The table above indicates that inventory volumes increased by 34 index points

from 2019 to 2020, decreased by 44 index points from 2020 to 2021, decreased by 10 index points during the period of investigation and is estimated to increase should the duties be removed. Inventory values increased by 42 index points from 2019 to 2020, decreased by 42 index points from 2020 to 2021, no change during the period of investigation and is estimated to increase should the anti-dumping duties expire.

### 5.3.1.10 Employment

The following table provides the SACU industry's employment figures:

**Table 5.3.3.10: Employment figures**

<b>No. of production employees</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Number of Direct Production Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	100	100	100
Number of Indirect Production Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	101	103	103
Total Number of Production Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	100	101	101
Number of Selling and Administrative Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	112	57	57
Total Number of Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	101	99	99
Total Number of Production Employees (Other Participating Producers) (Whole Company) (employees) (indexed)	0	0	0	0
Total Number of Production Employees (All Participating Producers) (Whole Company) (employees) (indexed)	100	100	101	101
Total Number of Production Employees (Non-Participating SACU)	0	0	0	0

Producers) (Whole Company) (employees) (indexed)				
Number of Direct Production Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	100	100	100

The table above shows that the applicant's employment remains unchanged from 2019 to 2020, increased by 1 index point from 2020 to 2021, increased by 1 index point during the period of investigation and is estimated to remain unchanged should the anti-dumping duties expire.

The Applicant stated its number of direct and indirect production employees increased over the period of investigation. The number of direct and indirect employees is likely to remain unchanged in the short term if the anti-dumping duties expire. If no action is taken to remedy the material injury caused by dumped imports, it may be forced to consider reductions in employees.

### 5.3.1.11 Wages

The following table provides SACU industry's annual wages:

**Table 5.3.1.11: Wages**

	2019	2020	2021	Estimate if the anti- dumping duties expire
Total Remuneration to Production Employees (the Participating Producers) (Whole Company) (R) (indexed)	100	111	120	127
Total Number of Production Employees (the Participating Producers) (Whole Company) (employees) (indexed)	100	100	101	101
Remuneration per Production Employee (the Participating Producers) (Whole Company) (R) (indexed)	100	111	119	126
Total Remuneration to	100	111	120	127

Production Employees (the Participating Producers) (Whole Company) (R) (indexed)				
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The table above shows that the wages per employee increased by 11 index points from 2019 to 2020, increased by 9 index points from 2020 to 2021, increased by 19 index points during the period of investigation and is estimated to increase should the anti-dumping duties expire.

The Applicant stated that despite continuing to suffer injury caused by dumped imports, it has managed to increase average wages per production employee over the period of investigation for injury, which demonstrates its commitment to sustainable employment. However, if the anti-dumping duties expire, it is likely to continue to increase average wages per production employee but may have to reduce them in the medium to long term.

### 5.3.1.12 Growth

The following table shows size of the SACU market:

**Table 5.3.1.12: Growth**

<b>Kg</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Size of SACU market	[CONFIDENTIAL]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019]	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2020]	[CONFIDENTIAL] [UNCHANGED FROM 2019] [DECREASED FROM 2021]
Applicant	0	100	118	[CONFIDENTIAL] [NEGATIVE] [DECREASED FROM 2019] [DECREASED FROM 2021]
Other SACU producers	0	0	0	[CONFIDENTIAL] [UNCHANGED FROM 2019] [UNCHANGED FROM 2021]
Imports: USA	0.00%	-1.05%	-17.38%	154.80%
Other imports	0.00%	-40.03%	-18.71%	0.00%

The table above shows that the size of the SACU market increased and is estimated to decrease should the anti-dumping duties be removed. Imports from the USA increased are estimated to increase further should the anti-dumping duties expire.

### 5.3.1.13 Ability to raise capital or investments

The following table provides SACU industry’s ability to raise capital and investments:

**Table 5.3.1.13: Ability to raise capital or investment**

<b>Rands</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Estimate if the anti-dumping duties expire</b>
Total Capital / Investment (the Participating Producers) (Frozen Bone-In Portions (0207.14.9)) (R) (partially indexed, partially redacted)	100	117	115	[CONFIDENTIAL] [POSITIVE] [INCREASED FROM 2019] [DECREASED FROM 2021]
Capital Expenditure per Period (the Participating Producers) (Frozen Bone-In Portions (0207.14.9)) (R) (partially indexed, partially redacted)	100	69	66	[CONFIDENTIAL] [DECREASED FROM 2019] [DECREASED FROM 2021]

The table above shows that the Applicant’s investment increased by 17 index points from 2019 to 2020, decreased by 2 index points from 2020 to 2021, increased by 15 index points during the period of investigation and is estimated to remain constant should the anti-dumping duties be removed. Capital expenditure decreased by 31 index points from 2019 to 2020, decreased by 3 index points from 2020 to 2021, decreased by 34 index points during the period of investigation and is estimated to further decrease should the anti-dumping duties expire.

### Comments by the USAPEEC

The USAPEEC stated that the assertions by the Applicant that imports from the United States would cause material injury to South African domestic production are untrue. In fact, chicken production in South Africa has increased significantly over the years, according to USDA statistics. In the past decade ending in 2021,

chicken production in South Africa jumped from 1,360,000 metric tons in 2012 to 1,570,000 tons in 2021, an average annual increase of 1.7 per cent. Moreover, for the current sunset review injury analysis period, chicken production increased from 1,395,000 tons in 2019 to 1,570,000 tons in 2021, an average annual growth of 6.2 per cent.

The USAPEEC further stated that the problem is that domestic demand for chicken products in South Africa has also increased over the years, jumping from 1,667,000 metric tons in 2012 to 1,888,000 tons in 2021, an average annual increase of 1.5 percent. Moreover, for the current sunset review injury analysis period, chicken consumption in South Africa increased from 1,828,000 tons in 2019 to 1,888,000 tons in 2021, an average annual growth of 1.7 percent. Chicken production in South Africa has increased over the years, and while South African domestic producers have been protected from competition by the imposition of dumping duties, the gap between chicken consumption and chicken production also increased for a number of years.

The USAPEEC stated that the simple fact is that South African domestic production, even when protected from competition, was initially unable to keep up with increased domestic demand during the period 2010-2018. As a result, demand for imported chicken products in the country trended up over time. Chicken production in South Africa increased much more rapidly than domestic consumption during the current sunset review injury investigation period from 2019 to 2021, as a result, import demand for chicken products has decreased significantly in 2019-2021. According to South African Revenue Service (SARS) trade statistics, total chicken imports in South Africa decreased from 511,317 metric tons in 2019 to 406,826 metric tons in 2021. In addition, as the table below shows, share of chicken imports from the United States was 15.4% in 2019, 16.3% in 2020, and 15.2% in 2021.



### South African Chicken Imports by Source

	2019	2020	2021	2019	2020	2021
	MT	MT	MT	share	share	Share
Brazil	262,991	262,872	280,131	51.4%	57.1%	68.9%
United States	78,794	75,239	61,837	15.4%	16.3%	15.2%
EU-27	120,097	85,161	33,128	23.5%	18.5%	8.1%
Argentina	37,939	29,530	23,690	7.4%	6.4%	5.8%
Other Countries	11,496	7,906	8,040	2.2%	1.7%	2.0%
<b>World Total</b>	<b>511,317</b>	<b>460,708</b>	<b>406,826</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

The USAPEEC stated that the imports of frozen bone-in chicken cuts or the subject products under investigation (HS code 0207.14.9) decreased from 224,999 metric tons in 2019 to 134,420 metric tons in 2021. The share of subject products in total chicken imports decreased from 44.0% to 33.0% during the same period. This recent increase in domestic production and decrease in imports has resulted in record profits for South African poultry producers.

The USAPEEC stated that Astral Foods, one of the domestic petitioners in this case, has reported publicly that its profits for its most recent fiscal year were R1.07 billion, 126% higher than its profits for the prior year. Astral has attributed this “in the main to growth in broiler sales volumes, as well as a recovery in the selling price of poultry.” (Source: SA Money Daily). Ironically, “Astral sounded a cautious note about future prospects, saying issues such as high employment and rampant living costs were bringing pressure on consumers....” In other words, Astral has publicly acknowledged that South African consumers are facing very hard times in terms of both unemployment and inflationary cost of living. Yet, despite its record profits, it seeks to block imports of affordable chicken that might help to ease those burdens and to narrow the still-existing gap between South African demand for poultry and South African domestic production.

The USAPEEC stated that at a time when South African consumers are facing high rates of unemployment and rampant increases in cost of living, blocking needed imports on the basis of a theoretical “constructed value” that has bears no reality in world poultry trade not only undermines the trade relationship between the South

Africa and the United States, but it also serves to unconscionably deprive middle income and lower income South African citizens an affordable source of protein in their diets. If there is any injury in this case, it is injury to the average citizen of South Africa, and not to the domestic poultry industry.

The USAPEEC further stated that as the Astral profit figures show; the South African industry is doing just fine. According to USAPEEC the USA imports pose no ominous threat to South African producers for the simple reason that today, and for the foreseeable future, the world market for poultry products is, and will continue to be, highly competitive. Increased world population – now above 8 billion people – along with weather-related and conflict-related reductions in food and feed production, mean that demand for affordable poultry products will continue to increase in the upcoming years. South Africa is a valued market for USA exporters, but it is only one part of a much larger world picture. In 2021, the United States shipped a total of 1,621,872 metric tons of chicken leg quarters to nearly 100 markets in 2021, according to USA official export statistics. South African imports of 38,763 metric tons of CLQs from the USA in 2021 (per SARS trade statistics) accounted for only 2.4% of total USA exports worldwide. In other words, the world market for USA chicken leg quarters is very large and very competitive. The USA exporters have no reason to dump product in South Africa and they do not do so. During the period from 2019 to 2021, the amount of imports of USA subject products was only a small percentage of the amount of South African total chicken production. Specifically, share of imported USA subject products was, relative to South African chicken production, only 5.3% in 2019, 4.8% in 2020, and 3.9% in 2021.

The USAPEEC concluded that the above data on broiler production, consumption, and import demand in South Africa demonstrate that the South African chicken industry would not be injured by imports of USA subject products if the anti-dumping duties expired. There would still be a substantial normal tariff in place. South African poultry companies are making solid profits and will continue to do so if poultry remains affordable to the average citizen in South Africa.

### **Commission's consideration**

The Commission noted the statistics provided by the USAPEEC that production in the SACU increased by an average of 1.7% annually in the last decade and that during the period of investigation domestic production increased by 6.2% whilst demand also increased by an average of 1.5% annually and by 1.7% during the period of investigation. The Commission also noted that imports from the USA amounted to 15.4% of total imports in 2019, 16.3% in 2020, and 15.2% in 2021.

The Commission also noted the conclusion by the USAPEEC that the reason they provided the above data on broiler production, consumption and import demand in the SACU is to demonstrate that the SACU Industry would not be injured by imports of the subject product from the USA. The Commission is of the view that had the above been the case producers/exporters from the USA would have provided the Commission with completed exporters' questionnaire in order for the Commission to make a determination based on that.

### **Comments by AMIE**

AMIE stated that if the Commission finds a *prima facie* case of dumping, and it (AMIE) deny this has been achieved on all tariff codes, then the allegations of injury need to be considered. AMIE stated that this is a sunset review, so the consideration is a little different. The Commission needs to consider the likelihood of injury occurring in the future, rather than assessing only historical injury. Given that this is forward looking, it makes sense for the injury information provided to be as recent as possible, yet quite the opposite has occurred in this case, with the Commission deliberately deciding to use older information because this is a sunset review.

AMIE stated that in the letter to Merlog, dated 15 December 2022, the Commission states "The investigation period for dumping shall... normally be a period ending not more than 6 months before the initiation of the investigation". Since this is a sunset review investigation, which considers whether there is a likelihood of continuation or recurrence of material injury, the Commission decided that the

injury evaluation will involve evaluation of information for the period 1 January 2019 to 31 December 2021 as well an estimate of the anti-dumping duties should the duties expire, as indicated in the initiation notice.

AMIE stated that in *Pakistan – BOPP Film (UAE)*, the question was raised whether Article 5.3 of the Anti-Dumping Agreement imposed requirements on the temporal scope of the evidence on which initiation is based. After examining the text, context, and object and purpose of Article 5.3, the Panel found that evidence justifying the initiation of an investigation must pertain to current dumping, injury, and causation in para 7.29: *[F]or evidence to be 'sufficient evidence to justify the initiation of an investigation' under Article 5.3, it must pertain to current dumping, injury, and causation. The more recent the data are at the time of initiation, the more likely they will be to provide evidence of current dumping, injury, and causal link, and vice versa. Whether a temporal gap between the date of initiation and the evidence on which initiation is based means that the evidence does not relate to current dumping, injury, and causation, must be assessed case by case in light of the relevant circumstances.*

AMIE stated that in the *Panel in Mexico-Anti-Dumping Rice*, the issue was whether the use of a period of investigation that ended more than fifteen months prior to the initiation of the anti-dumping investigation and nearly three years prior to the final determination was consistent with Mexico's obligations under Article VI:2 of GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. The Mexican investigating authority examined data for a period of investigation covering March to August 1999 for purposes of its dumping determination, and March to August 1997, 1998, and 1999 for purposes of its injury analysis. The investigation was initiated on 11 December 2000, 15 months after the end of the period of investigation. Final anti-dumping measures were imposed on 5 June 2002, a little less than three years after the end of the period of investigation. The Panel held at paras 7.56-7.58:

7.56 *The choice of the period of investigation is obviously crucial in this investigative process as it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.*

7.57 *It is clear that the AD Agreement does not contain any specific and express rules concerning the period to be used for data collection in an anti-dumping investigation. As acknowledged by Mexico, this does not mean that the authorities' discretion in using a certain period of investigation is boundless. Mexico considers that it would be preposterous to suggest that measures may be imposed after an investigation which was based on data relating to a period of investigation which ended ten years ago, and accepts that it would be desirable that the period of investigation end as closely as practicable to the date of initiation of the investigation. While we do not need to decide in the abstract whether the period of investigation always has to end as close as practicable to the date of initiation of the investigation, we are of the view that there is necessarily an inherent real-time link between the investigation leading to the imposition of measures and the data on which the investigation is based.*

7.58 *We are of the view that these provisions are clear textual evidence that measures may be imposed to offset dumping presently causing injury. The terms "offset" and "counteract" connote the concept of a current reaction against a prevailing (i.e. existing and present) force. Thus, if an anti-dumping duty may be imposed only to "offset" dumping, and only for "as long as necessary" to "counteract" dumping, it is clear that this is an entitlement to act that is itself strictly conditioned on the active presence of its reciprocal -- in this case, injurious dumping that is taking place at that time. There is therefore an inherent real-time link between the imposition of the measure and the conditions for application of the measure, dumping causing injury.*

AMIE further stated that the use of the present tense in Article 3.5 of the AD Agreement is clear evidence of this temporal connection between what is investigated and what needs to be demonstrated in order to allow the imposition of measures, i.e. that dumped imports are causing injury. Of course, it is well established that the data on the basis of which this determination is made may be based on a past period, known as the period of investigation. Nevertheless, because this "historical" data is being used to draw conclusions about the current situation, it follows that the more recent data is likely to be inherently more relevant and thus especially important to the investigation. This, as a consequence, implies that the data considered concerning dumping, injury and the causal link should include, to the extent possible, the most recent information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case. [own emphasis] In particular, in para 7.63, the Panel held: *In sum, data of ten years old may well be reliable and creditworthy as to past dumping then causing injury but such data obviously are of much less relevance to the question whether that dumping is presently causing injury. Certainly, more recent data are more relevant to this question. As we discussed earlier, the AD Agreement requires that the conditions for imposing anti-dumping measures, that dumped imports are causing injury, have to be present at the time of imposition of the measure, to the extent practically possible. AMIE stated that the requirement of a time-consuming and sometimes complicated investigation to demonstrate the existence of dumping and the ensuing injury poses a practical impediment to a complete identity in time between the imposition of the measure and the conditions for such imposition, i.e. dumping causing injury. Although this practical problem may lead to the situation in which any determination of dumping causing injury has by the time of the imposition of the measure become more of a proxy than a real time assessment of the current situation, it would, in our view, not be correct to be led by the practical necessity to examine the past to assess the present to accept that an investigating authority could justifiably base itself on old data to the exclusion of more recent data which was available and usable. To the contrary, the fact that an investigation of up to 12 months may have to be conducted to Non-confidential 20 determine dumping,*

*injury and the causal link magnifies the importance of having a period of data collection which ends as closely as possible to the date of initiation, as by the time of the possible imposition of the measure another 12 months may have passed. We established above the textual and contextual support in the GATT 1994 and the AD Agreement for this basic proposition.*

The Committee on Anti-Dumping Practices adopted the Recommendation concerning the periods of data collection for anti-dumping investigation of 5 May 2000, which states that as a general rule:

*(a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable.*

AMIE stated that in the recent Arbitration Panel decision in Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union of 3 August 2022 between the EU and SACU concerning the legal basis for the imposition of safeguard duties on chicken products from the EU, the EU made the argument that the data employed by ITAC during the investigation was "outdated" and ITAC had refused to take "more recent data" into account. The Arbitration Panel observed that while ITAC was concluding its investigation, SACU decided to enact a provisional safeguard measure. When that measure lapsed, in July 2017 (200 days), it took 11 months for SACU to adopt a definitive safeguard measure (in June 2018), and then another three months for the measure to enter into force (in September 2018). The panel held in para 346:

*Yet, it is also undisputable, in view of the extraordinary nature of safeguard measures, that "the right to apply a safeguard measure, once established, cannot be saved for future use." The Arbitration Panel considers that the excessive character of a delay requires a case-by-case analysis. In the case at hand, given: (i) the length of the period separating the investigation from the adoption of the measure; (ii) the fact that a provisional measure had been allowed to lapse without*

*being replaced by the definitive measure; and (iii) prima facie evidence of a sharp drop in the imports at stake, the Arbitration Panel concludes that the delay was excessive.*

AMIE stated that while this is in respect of safeguard duties, it is common cause that the covered agreements of the WTO covering the trade remedies such as dumping, and safeguard measures are an inseparable package of rights that must be interpreted coherently and consistently. Thus, the same considerations should apply in respect of anti-dumping duties. A value judgement has been made by the Commission that an older period is preferable to a more recent period in an investigation which is forward looking. This is circular reasoning, not a reason. Given the deviation from the norm prescribed in the ADR, AMIE requested that proper reasons for allowing the older period to be the basis of this investigation be given.

#### **Commission's consideration**

The Commission notes that, with regard to AMIE's comment that the sunset review was based on out dated data, in the case of a sunset review unlike, an anti-dumping investigation, the consideration is on whether (a) injury is occurring and (b) likely to continue or recur should the duties be allowed to expire. In this case, the period of injury includes the three-year period 01 January 2019 to 31 December 2021 as well as estimates should the anti-dumping duties expire. No particular methodology is prescribed for the determination of the likelihood determination in a sunset review.

The Panel in US — Corrosion-Resistant Steel Sunset Review considered that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review:



“Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member’s investigating authority in making such a ‘likelihood’ determination.”

The Panel in US – Oil Country Tubular Goods Sunset Reviews noted that Article 11.3 of the Anti-Dumping Agreement does not prescribe any time-frame for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the time-frame on which their likelihood determination is based. Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination.

The Appellate Body in US — Oil Country Tubular Goods Sunset Reviews adopted a similar approach to the need to base a prospective likelihood determination on “positive evidence”:

“The requirements of ‘positive evidence’ must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a ‘forward-looking analysis’. Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on ‘positive evidence’.”

With respect to the determination of a likelihood of recurrence or continuation of dumping and injury, the Appellate Body in US — Corrosion-Resistant Steel Sunset Review noted that, as this likelihood determination is a prospective determination: “the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated”. In this respect,

the Appellate Body pointed to the important difference between original investigations and sunset reviews:

“In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.”

### **Comments by Merlog on the essential facts letter**

Merlog stated that the out-dated injury information means that there is a major disconnect between the information used to assess dumping and injury and the likelihood of future dumping, especially in a forward-looking investigation such as a sunset review. The currency of the information and merits of the forward assumptions are critical.

Merlog stated that it is incumbent on the Commission to consciously and with knowledge, expertise and due care to interrogate the information submitted by the applicant and the assumptions and predictions made.

Merlog further stated that the reason for this is that the initiation of an investigation triggers a substantial amount of work by interested parties and the Commission. This includes time of various levels of staff in an organisation, cost of expert advisers and potential political strain on relationships with trade partners.

### Apportionment of Injury

Merlog stated that the Commission at the instance of the applicant (SAPA) has initiated and investigated a number of dumping and sunset review investigations over the past number of years. In each of these investigations ALL “injury” experienced by the domestic industry has been apportioned to the countries alleged to be dumping in that specific investigation.

Merlog stated that many of these investigations have overlapping time periods. No injury is allocated in any of these investigations to any other factor or investigation. No allocation to injury is apportioned to “other factors” of which there are many, droughts, labour disputes, animal disease (such as Avian influenza or Newcastle disease), Level of Trade adjustment, Covid, energy costs, and of course reliable electricity supply. The WTO agreements and obligations require that injury related to “other factors” must be deducted from injury margins before allocating injury to dumping. This has not been done in this investigation or in any previous investigations.

Merlog also stated that they request the Commission to allocate injury to “alleged” dumping by other countries (not included in this investigation), other factors raised in this and previous investigations (such as the investigation into alleged dumping of Bone in chicken from Brazil and EU and the Sunset Review of dumping from Netherlands, Germany and UK). Merlog further stated that if the request is not done the Commission will be in contravention of its obligations in terms of the ADR as well as WTO Dumping Agreement. Merlog further stated that the Commission recommended that a dumping duty be implemented against Brazil, Denmark, Spain, Ireland and Poland in 2022. The Minister (DTI) has deferred the implementation of this DD (in favour of the consumer), yet the Essential Facts make no reference to this and any injury or other causal factors.

### **Comments by AMIE on the essential facts letter**

AMIE stated that the Commission noted its concerns with the period of investigation yet has ignored the arguments around the period. AMIE stated that it is not rational to prefer an older period to a more recent period when considering prospective behaviour. On page 3 of the report, the Commission states “...critical in a sunset review are estimates because this data is key to assessing the (future) impact of removing an Anti-dumping duty on a domestic industry.” AMIE also stated that it is denied access to even a non-confidential version of these ‘critical’ projections. It further stated that it is expected to comment meaningfully on the

application, when the most important information is denied to us. The essential facts letter states that

*“(t)he Commission noted that information submitted by the Applicant demonstrates that it would continue to experience injury in the form of price suppression, profitability, cash flow and return on investment should the duties be allowed to expire.”*

*Furthermore the essential facts letter states that “should the duties expire, the alleged dumped imports would enter the SACU market at a higher rate, thereby resulting in the continuation of injury in the form of reduced sales value and sales volumes, output and market share and having a negative impact on the performance of the domestic industry.*

AMIE stated that none of these claims are properly substantiated. It is not clear which data the Applicant or Commission relied on to come to this conclusion as even the information in the essential facts letter is largely labelled as confidential with no summary or indexed versions provided. Again, a lot of the information provided in the essential facts letter is marked as confidential, in particular the estimates if the anti-dumping duty expires. As explained above, it is inconceivable that forward-looking information can be confidential in nature and incapable of being indexed as it is not actual figures, but an estimate provided by the Applicant without explanation of the methodology relied upon to decide this with.

By not providing this information, AMIE is not allowed a fair opportunity to comment on the claims submitted by the Applicant. Furthermore, these claims are not properly substantiated, nor does the Commission explain its reasoning for agreeing with the Applicant on these claims. These rights are contained in section 35(2) of the ITA Act which requires the Commission to act as a mediator between a person requesting confidential information and the holder of such information, and Regulation 2.1(c) of the ADR, stating that interested parties are entitled to summaries of confidential information in sufficient detail to permit a reasonable understanding of the information relied upon. In addition, rights of the respondent

are protected by Articles 6.2, 6.4 and 6.5.1 of the ADA dealing with confidentiality claims. Failure to provide the respondents with adequate information would be a breach of the rights contained in all of these provisions.

AMIE stated that it makes no sense for the price undercutting figures to be confidential and incapable of being indexed but the price depression and sales value numbers to be provided. This indicates inconsistencies in the reasoning of the Applicant regarding confidentiality and aggregation. No reasons are provided why information on some of the injury indicators can be summarised and why the same cannot be done for the others. As previously highlighted, this is a sunset review. Therefore, the consideration is a little different. The Commission needs to consider the likelihood of injury occurring in the future, rather than assessing only historical injury. Given that this is forward looking, it makes sense for the injury information provided to be as recent as possible, yet quite the opposite has occurred in this case, with the Commission deliberately deciding to use older information because this is a sunset review. In its letter to Merlog, dated 15 December 2022, ITAC states:

*"The investigation period for dumping shall... normally be a period ending not more than 6 months before the initiation of the investigation". Since this is a sunset review investigation, which considers whether there is a likelihood of continuation or recurrence of material injury, the Commission decided that the injury evaluation will involve evaluation of information for the period 1 January 2019 to 31 December 2021 as well an estimate of the anti-dumping duties expires (sic), as indicated in the initiation notice."*

AMIE also stated that various WTO Appellate Body decisions have confirmed this, as previously noted in our submission. The decisions repeatedly confirm that the more recent the data at the time of initiation, the more likely they will be to provide evidence of current dumping, injury, and causal link, and vice versa. Where a gap in time exists between the date of initiation and the evidence, it could mean that the evidence does not relate to the current dumping, injury and causation. Furthermore, the excessive character of a delay requires a case-by-case

analysis. A value judgement has been made by the Commission that an older period is preferable to a more recent period in an investigation which is forward looking. This is circular reasoning, not a reason. Given the deviation from the norm prescribed in the ADR, AMIE request proper reasons for allowing the older period to be the basis of this investigation. AMIE stated that it simply cannot accept the outdated and inadequate injury information which is provided and accepted in the current case.

AMIE stated that it reminds the Commission of its arguments previously submitted as the interests of all parties concerned need to be considered before a final determination can be made that is fair, transparent and based on sound legal reasoning.

#### **Comments by the Applicant on the essential facts letter**

The Applicant stated that the Commission refers to increases in production and demand as well as the proportion of imports from the USA as a percentage of imports from all countries provided by other interested parties. The information referred to, which was provided by USAPEEC, is for all chicken products in South Africa and not for the subject product specifically. Information for the subject product specifically was provided by it in the Application and this has been verified. This information does not support the view of other interested parties that the SACU industry would not be injured by imports of the subject product from the USA should the dumping duty be allowed to expire. On the contrary, the verified information provided by the Applicant clearly shows that the expiry of the anti-dumping duties would lead to the continuation or recurrence of dumping and injury. The Applicant stated that the comments by other interested parties regarding Astral Foods' FY2022 financial results are for the Astral Foods group (and not for the subject product) and is for a period where the extent of injurious dumping was limited by the anti-dumping duties. If the anti-dumping duties are allowed to expire, the volume of dumped imports will increase significantly and this will lead to the continuation or recurrence of injury. With regards to AGOA, trade statistics provided by the South African Revenue Service show that utilisation of the AGOA

Import Quota exceeded 100% in AGOA Year 2018 (April 2017 to March 2018) (106.50%), AGOA Year 2019 (April 2018 to March 2019) (111.81%) and AGOA Year 2020 (April 2019 to March 2020) (119.73%). The global economy suffered a major disruption towards the end of AGOA Year 2020 (April 2019 to March 2020) with the outbreak of the COVID-19 pandemic and the effects of this disruption and the disruptions to global supply chains are on-going.

The Applicant concluded that imports of the subject product originating in South Carolina, which is a major chicken producing state, were subject to an import ban due to an outbreak of avian influenza from 14 April 2020 and lifted on 4 September 2020 (during AGOA Year 2021) (April 2020 to March 2021). Imports of the subject product originating in 21 states were banned for a portion of AGOA Year 2022 (April 2021 to March 2022) and for the entirety of AGOA Year 2023 (April 2022 to March 2023).

#### **Commission's consideration**

The Commission is of the view that the "issue" on the Applicants "old" information has been addressed sufficiently both in letters to interested parties (in the public file) and in its essential fact letter.

#### **5.4 Summary of continuation and/or recurrence of material injury**

The available information shows that if the anti-dumping duties expire, the SACU industry would experience a continuation of material injury in the form of:

- price suppression;
- decline in profitability;
- decline in cash flow;
- decline in (or negative) return on investment;
- price undercutting;
- a decline in capacity utilization;
- a decline in capital investment in the subject product; and
- a decline in capital expenditure on the subject product.

There is sufficient information to indicate that if the anti-dumping duties expire, the SACU industry would experience a recurrence of material injury in the form of:

- reduced sales value;
- reduced sales volumes;
- decline in output;
- decline in market share;
- price depression; and
- a decline in productivity per employee.

The Commission made a final determination that the expiry of anti-dumping duties on the subject product originating in or imported from the USA would likely lead to the continuation and/or recurrence of material injury to the SACU industry.



## **6. SUMMARY OF FINDINGS**

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### **6.1 Continuation and/or recurrence of dumping**

From the information available, it is evident that the expiry of the anti-dumping duties imposed on the subject product would likely lead to the continuation and/or recurrence of dumping of the subject product originating in or imported from the USA.

### **6.2 Continuation and recurrence of material injury**

The available information shows that if the anti-dumping duties expire, the SACU industry would experience a continuation of material injury in the form of:

- price suppression;
- decline in profitability;
- decline in cash flow;
- decline in (or negative) return on investment;
- price undercutting;
- a decline in capacity utilization;
- a decline in capital investment in the subject product; and
- a decline in capital expenditure on the subject product.

There is sufficient information to indicate that if the anti-dumping duties expire, the SACU industry would experience a recurrence of material injury in the form of:

- reduced sales value;
- reduced sales volumes;
- decline in output;
- decline in market share;
- price depression; and
- a decline in productivity per employee.

## 7. FINAL DUTIES

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### 7.1 Amount of duties

The table below is provided for the purposes of comparison between the applicable anti-dumping duties and the calculated anti-dumping margins in the investigation:

Tariff Sub-heading	Description	Imported from or Originating in	Rate of duty Anti – dumping duty	Calculated dumping margin
0207	Meat and edible offal, of the poultry heading 01.05, fresh, chilled or frozen			
0207.1	Of fowls of the species GALLUS DOMESTICUS			
0207.14	Cuts and offal, frozen:			
0207.14.9	Other			
0207.14.91	Whole bird cut in half	USA	940c/kg	2590c/kg
0207.14.93	Leg quarters	USA	940c/kg	2626c/kg
0207.14.95	Wings	USA	940c/kg	2590c/kg
0207.14.96	Breasts	USA	940c/kg	2590c/kg
0207.14.97	Thighs	USA	940c/kg	2997c/kg
0207.14.98	Drumsticks	USA	940c/kg	2590c/kg
0207.14.99	Other	USA	940c/kg	2590c/kg

The above table compares the current anti-dumping duties with the calculated dumping margin as per the dumping calculation that is based on the constructed normal value and the export price from SARS statistics as well as estimates based on the SARS statistics for those cuts that have not been imported during the POI.

As no properly documented responses from the manufacturers of the subject products, the determination of the likelihood of the continuation and/or recurrence of dumping is made on the best information available, being that provided by the Applicant. In these circumstances, it is the Commission's practice to recommend that the anti-dumping duties be maintained at the current levels unless there are compelling reasons to deviate from its practice.

The Commission made a final determination to recommend to the Minister of Trade, Industry and Competition that the current anti-dumping duty on frozen bone-in portions of the species *gallus domesticus* originating in or imported from the United States of America, be maintained.

## 8. RECOMMENDATION

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The Commission made a final determination that the expiry of the anti-dumping duty on the subject product originating in or imported from the USA would likely lead to the continuation and/or recurrence of dumping and material injury.

The Commission therefore made a final determination to recommend to the Minister of Trade, Industry and Competition that the current anti-dumping duty on frozen bone-in portions of the species *gallus domesticus* originating in or imported from the USA, be maintained as follows:

Tariff heading	Sub-	Description	Imported from or Originating in	Rate of duty Anti – dumping duty
0207		Meat and edible offal, of the poultry heading 01.05, fresh, chilled or frozen		
0207.1		Of fowls of the species GALLUS DOMESTICUS		
0207.14		Cuts and offal, frozen:		
0207.14.9		Other		
0207.14.91		Whole bird cut in half	USA	940c/kg
0207.14.93		Leg quarters	USA	940c/kg
0207.14.95		Wings	USA	940c/kg
0207.14.96		Breasts	USA	940c/kg
0207.14.97		Thighs	USA	940c/kg
0207.14.98		Drumsticks	USA	940c/kg
0207.14.99		Other	USA	940c/kg