

SUBMISSION

BY:

THE ASSOCIATION OF MEAT IMPORTERS AND EXPORTERS
("AMIE")

TO:

THE PORTFOLIO COMMITTEE
ON TRADE AND INDUSTRY
("the Committee")

TO: **THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY**

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TERMS OF REFERENCE

In this submission the following terms are, *inter alia*, used:

- **"ITAC"** which refers to the International Trade Administration Commission;
- **"ITA Act"** which refers to the International Trade Administration Act (Act 71 of 2002);
- **"SAPA"** which refers to the South African Poultry Association;
- **"the Constitution"** which refers to the Constitution of the Republic of South Africa (Act 108 of 1996);
- **"the Minister"** which refers to Dr Rob Davies, the Minister of Trade and Industry;
- **"the GATT Agreement"** which refers to the World Trade Organization's General Agreement on Tariffs and Trade 1994;
- **"the poultry case"** which refers broadly speaking the initiation of an investigation and recommendations made by ITAC concerning the alleged dumping of frozen meat of fowls of the species *Gallus Domesticus*, whole bird and boneless cuts, originating in or imported from Brazil; and
- **"the WTO"** which refers to the World Trade Organization, of which South Africa is a founding Member.

1. INTRODUCTION

1.1. The AMIE is an unincorporated, voluntary association of organisations that was founded in 1996 due to a need by meat and poultry importers and exporters to have a mouthpiece to talk on behalf of the industry and to look after the interests of the members. AMIE is nationally and internationally recognized as being representative of the meat importers and exporters of South Africa.

1.2. AMIE has requested a hearing before the Committee in light of AMIE's recent interactions with ITAC on the poultry case in order to highlight certain issues of broader concern and request the Committee's assistance in dealing with the issues.

1.3. In broad outline these issues are:

1.3.1. The manner in which ITAC initiates anti-dumping investigations;

1.3.2. The manner in which ITAC thereafter conducts anti-dumping investigations and particularly the manner in which ITAC interacts with interested parties during the course of such processes;

1.3.3. The manner in which ITAC reports on its investigations during the various phases (this includes preliminary determinations, essential facts letters and final reports);

1.3.4. The Minister has written a letter to ITAC (the contents of which ITAC refuses to disclose to AMIE) wherein the Minister has

requested ITAC to take into account various issues within the realm of South Africa's international trade obligations. A subsequent essential facts letter issued by ITAC fails to make any mention of the issues raised by the Minister and makes it clear that ITAC has simply ignored these valid concerns.

1.4. It is AMIE's submission that these issues impact directly on trade, affects South Africa's international trade reputation and should be of concern to the Committee.

1.5. AMIE intends requesting the Committee to direct ITAC to report to the Committee on:

1.5.1. What procedures and practices ITAC has put in place to ensure that its internal procedures on a case-by-case basis complies with the Constitution and ITAC's obligations in terms of domestic legislation and South Africa's international trade obligations;

1.5.2. The criticisms raised by AMIE in this submission;

1.5.3. How ITAC is complying with the issues raised by the Minister during August 2012 in respect of poultry case.

1.6. AMIE is conscious of the Committee's time constraints and expresses its gratitude for the prompt audience granted to AMIE by the Committee. In consideration of the Committee's pressing schedule these submissions have been restricted as far as the subject matter allows to only focus on certain broadly identified issues without becoming bogged down in detail. Should the

Committee so require, these submissions can be expanded upon and to that end AMIE has included two schedules to this submission.¹ AMIE does not expect the Committee to read through these schedules, which have been included merely for purposes of reference (in the event that it is necessary).

- 1.7. In the past AMIE has both sought and opposed the imposition of trade measures. AMIE's purpose with this submission is therefore not to oppose all trade measures, but rather to see that problems within ITAC are addressed so that fair trade is ensured.

2. AMIE'S RECENT EXPERIENCE WITH ITAC

- 2.1. During late June 2011, ITAC started an investigation regarding the alleged dumping of frozen meat of fowls of the species *Gallus Domesticus* produced in Brazil and/or exported from Brazil to the South African Market.²

- 2.2. On 30 January 2012, ITAC issued report number 389 (*"Investigation into the alleged dumping of frozen meat of fowls of the species Gallus Domesticus, whole bird and boneless cuts, originating in or imported from Brazil: Preliminary determination"*).

¹ **Schedule A:** Chronology of the poultry case thus far; and **Schedule B:** How an anti-dumping duty is supposed to be set.

² On 24 June 2011, notice of the initiation of an investigation was published in Notice 404 of 2011 of Government Gazette Number 34377. On 12 August 2011, a further notice was published in Notice 533 of 2011 of Government Gazette Number 34510. The correction notice corrected the tariff headings to 0207.12.90 and 0207.14.10.

- 2.3. On 12 June 2012, ITAC made a final determination to recommend that anti-dumping duties be imposed ("the final determination").
- 2.4. The final determination was forwarded to the Minister thereafter.
- 2.5. Due to ITAC's refusal to properly communicate with AMIE and consider AMIE's submissions, AMIE was forced, at great cost, to launch a semi-urgent review application in the North Gauteng High Court after it assumed a final determination had been made.³ This should not have been necessary.
- 2.6. Subsequently the duties levied in terms of ITAC's preliminary determination had to be repaid as that levy period expired and AMIE learned that the Minister had rejected ITAC's final determination recommendations.
- 2.7. Subsequent the Minister addressed a letter to SAPA, which records, *inter alia*, the following:

"On 21 June 2012, the Brazilian government requested consultations with the Republic of South Africa pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes Article XXIII of the General Agreement on Tariffs and Trade 1994* and Article 17 of the *Agreement on Implementation of Article VI of GATT 1994*.

Brazil contends that the preliminary determination, the imposition of provisional anti-dumping duties as well as the initiation and conduct of the investigation, is inconsistent with South Africa's obligations under the provisions of GATT 1994 and the Anti-Dumping Agreement. Specifically, Brazil raises concerns and/or objections regarding:

³ North Gauteng High Court Case Number 46075/2012.

- a. The determination of dumping;
- b. The determination of residual margins;
- c. The determination of injury and causal link;
- d. The definition of the domestic industry; and
- e. The initiation and procedure of the investigation.

On 25 July 2012 delegates from both the South African and Brazilian governments met in Geneva to discuss concerns that were raised by Brazil.

In light of Brazil's allegations and the subsequent consultations held between the two governments, I believe the issues raised by Brazil above (a – e) are serious enough to merit my consideration. This matter raises various issues within the realm of South Africa's international trade obligations and I am compelled as a matter of policy to consider the implications of the final determination report in light of the considerations indicated above."

2.8. AMIE was unaware of the letter until recently. It is unfortunate that the Minister did not request AMIE's views, but only SAPA's views. Apparently SAPA thereafter responded to the Minister. AMIE has not seen that response.

2.9. The Minister thereafter forwarded his letter to SAPA and SAPA's response to ITAC under cover of a further letter. In the Minister's aforementioned covering letter to ITAC the Minister *inter alia* stated:

"I have not applied my mind to the positions of both SAPA and Brazil as they have been expressed. By virtue of the powers afforded to me under section 4(2) of the Board of Tariffs and Trade Act, 107 of 1986, read together with the International Trade Administration Act, 71 of 2002. I hereby refer the Final Determination back to ITAC for reconsideration, for your work to ensure that the Final Determination Report is consistent with South Africa's multilateral obligations and that it takes into account, as appropriate, the views expressed by SAPA and Brazil."

(From the Minister's letters it is not even clear whether ITAC has made the Minister aware of AMIE's comments and complaints.)

- 2.10. On 22 October 2012, ITAC issued a second essential facts letter wherein it makes it clear that ITAC intends persisting with the imposition of anti-dumping duties on whole birds and boneless cuts of the species *Gallus Domesticus* exported from Brazil. Significantly, this second essential facts letter does not take into account any of the issues raised in the Minister's abovementioned letter and is again so defective that litigation seems almost inevitable irrespective of the outcome.
- 2.11. Brazil has taken up the matter with the WTO and, should matters continue in the same vein and definitive duties imposed, Brazil will no doubt again take the matter up with the WTO. Brazil has identified 29 violations of the Anti-Dumping Agreement and its annexes. AMIE has also learned that the United States of America and the European Union intend joining the dispute if the matter continues in the same vein.
- 2.12. AMIE is of the view that the poultry investigation has, unfortunately, become indicative of problems that are endemic to the manner in which ITAC conducts its affairs, and provides a valid case study for consideration by the Committee and is illustrative of what is becoming a general failure by ITAC to properly appreciate, implement and adhere to these international trade obligations.

3. THE EXPECTATIONS OF AMIE IN RESPECT OF ITAC'S ROLE

3.1. In terms of section 7(2) of the ITA Act:

"(2) The Commission-

- (a) is independent and subject only to-
 - (i) the Constitution and the law;
 - (ii) any Trade Policy Statement or Directive issued by the Minister in terms of section 5; and
 - (iii) any notice issued by the Minister in terms of section 6; and
- (b) must be impartial and must perform its functions without fear, favour or prejudice."

3.2. In addition, ITAC, as an organ of state, is bound by the provisions of section 195(1) of the Constitution, which, *inter alia*, provides as follows:

"195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.

- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”

3.3. When ITAC makes decisions about trade measures, such as the imposition of anti-dumping duties, it also acts as an administrator and is bound by the provisions of sections 32⁴ and 33⁵ of the Constitution and the provisions of the Promotion of Administrative Justice Act (Act 3 of 2002)(“PAJA”).

3.4. AMIE submits that ITAC is systemically failing in these constitutional and other legislative obligations.

3.5. If anti-dumping duties are to be imposed, the aforementioned constitutional imperatives must be adhered to. Furthermore, ITAC

⁴ Section 32 of the Constitution provides as follows:

“32 Access to information

(1) Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

⁵ Section 33 of the Constitution provides as follows:

“33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.”

must also comply with South Africa's international trade obligations as set out in the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the Anti-Dumping Agreement"). These obligations are set out domestically, in the main, in the ITA Act, the Anti-Dumping Regulations made under the ITA Act which must be read together with the Customs and Excise Act, 1964. (There is an issue regarding the status of the SACU Act, but that is not addressed in these submissions.)

- 3.6. When ITAC fails to conduct itself properly, it does an injustice to both applicants for trade measures (such as SAPA in the poultry case) and other interested and affected parties.

4. ITAC'S FAILURE TO ADHERE TO PROPER PROCEDURES

- 4.1. AMIE is appreciative of the fact that the Committee is aware of the procedures to be followed when an anti-dumping duty to be set. For ease of reference these have nonetheless been summarized in Schedule B hereto.

- 4.2. Even a cursory comparison of ITAC's conduct in the poultry case against these norms and standards (as set out in Schedule B) show that:

- 4.2.1. ITAC should only initiate an investigation if it is satisfied that the requirements set out in article 5.2 of the Anti-Dumping Agreement and regulations 21 to 28 of the Anti-Dumping Regulations have been met. Such an examination regarding the sufficiency of the

data set out in SAPA's application evidently did not occur or was done in wholly insufficient manner.

- 4.2.2. If ITAC had conducted even a cursory overview of SAPA's application, it would have clearly seen that the application did not meet the requirements of Art 5.2 of the Anti-Dumping Agreement and regulations 21 to 28.
- 4.2.3. ITAC was warned of the defects in the data presented by SAPA on several occasions and, despite serious questions existing regarding the data used by SAPA in its application, ITAC failed to implement the necessary and required steps to verify the data.
- 4.2.4. When a question arose whether, in regard to whole birds, the data used by ITAC included chicken carcasses, which fall under the same tariff heading (namely 0207.12.90), but is very different in their prices and do not form part of the investigation, ITAC failed to deal with the matter.
- 4.2.5. ITAC, for no valid reason and in violation of Art 6.8 and paragraphs 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement, excluded responses submitted by a number of AMIE's members.
- 4.2.6. AMIE was allowed to make an oral presentation to ITAC regarding SAPA's application, however, as was evident from the subsequent preliminary determination and both essential facts letters, the presentation by AMIE went completely unheeded.

- 4.2.7. Despite further representations by AMIE, as well as several of its members, ITAC's essential facts letters makes it abundantly clear that AMIE's comments, as well as those of several of AMIE's members, had simply been disallowed on highly technical or frivolous grounds, ignored or rejected out of hand.
- 4.2.8. AMIE's interactions with ITAC evidence a general reluctance on the part of ITAC when challenged to properly, efficiently and meaningfully interact with AMIE over the entire course of the process.
- 4.2.9. Both the essential facts letters issued by ITAC fall short in material respects of what is expected of such essential facts letters. Not only did ITAC in several instances⁶ refuse to take into consideration relevant information AMIE provided, but ITAC then consistently refused or failed to include such information in its reports. This is best illustrated by ITAC stating (in its second essential facts letter) that "*all information by interested parties were considered*" and that, where the second essential facts letter does not specifically address an issue, ITAC "*is considering confirming its preliminary determination as set out in its preliminary report*". Yet, none of the information AMIE submitted in respect of the legally flawed initiation procedures and information, ITAC's failure to use exporters' own export price information, material injury, causality or several other issues raised is reflected in

⁶ See, for example, AMIE's submissions of 1 August 2011, 2 August 2011, 15 August 2011, 27 February 2012, 3 March 2012, 8 May 2012, 28 August 2012, 30 August 2012, and 27 October 2012.

ITAC's second essential facts.⁷ Instead, AMIE and other interested parties are expected within seven days to trawl through the public files and the preliminary determination as though determining the essential facts is some sort of game of hide and seek. This is in direct violation of the WTO's interpretation of the requirements as to what constitutes the essential facts in an investigation, which information was placed before ITAC in great detail in AMIE's comments on the second essential facts letter.

4.2.10. As is echoed in the Brazilian government's complaints to the WTO and the Minister, the entire process followed by ITAC in the poultry case thus far is seriously flawed and, if proceeded with in the same vein, threatens to become a debacle. In short, ITAC's reports and essential facts letters in the poultry case are in material respects logically and forensically incomprehensible, incomplete and indefensible. AMIE is of the view that this is also evidence of more generic problems within ITAC that needs to be addressed by this Committee.

4.3. AMIE's experience in the poultry case shows that:

4.3.1. ITAC of late generally fails to issuably deal with criticism and has instead adopted a *modus operandi* of ignoring valid criticisms and then refusing or failing to meaningfully interact with interested parties on these issues. A prime example of this is the verification reports. It seems to AMIE that ITAC has purposefully adopted the

⁷ Note, in addition, that none of the information submitted by AMIE is reflected in the preliminary report or ITAC's first essential facts letter.

approach to provide less than the minimum information required to avoid proper scrutiny of its decisions.

4.3.2. Despite the requirements of the Constitution, PAIA, PAJA, the ITA Act, the Anti-Dumping Regulations and the Anti-Dumping Agreement, ITAC, in crucial respects, fails to properly and effectively communicate with industry and other role players and this has become a disconcerting general tendency.

4.4. As far as AMIE is aware, similar complaints have cropped up with increased frequency and, *inter alia*, in the following matters:

4.4.1. Tyres from China;

4.4.2. Hexagonal fully threaded screws from China;

4.4.3. Threaded rods from China;

4.4.4. Frit from Brazil; and

4.4.5. Bolts and nuts from China.

4.5. Furthermore, in terms of the Anti-Dumping Agreement there are strict time periods within which investigations have to be initiated and concluded. In this regard the following:

4.5.1. Whereas ITAC is rather strict on enforcing deadlines on interested parties, it often takes weeks to respond to any request for clarification, if it does at all.

- 4.5.2. Access to the public files is restricted and often delays the investigation by a week each time access is sought, which runs into several weeks during the course of an investigation.
- 4.5.3. ITAC often takes four weeks or more to respond to an application and to identify shortcomings therein. This results in parties having to update the information in the application, as an application can only be lodged two months after the end of the investigation period as SARS statistics are only available around 6 weeks after the end of each month and then still have to be analysed and processed for the purposes of an investigation.
- 4.5.4. It often takes several months from lodging an application that properly sets out a *prima facie* case until an investigation is initiated.
- 4.5.5. Accordingly, industry suffers additional injury before an investigation is initiated and uncertainty is caused in the market for significantly longer periods than necessary.
- 4.5.6. It needs to be pointed out that investigations in Australia, New Zealand, Canada and the US are all concluded within well under 12 months and often in 6 months or less, and no investigation in the EU takes more than 15 months, whereas the average time taken for all investigations undertaken by ITAC since 2003 is slightly more than 16 months, making it one of the slowest authorities in the world.

- 4.6. It is imperative that the basic principles of fairness and equity be adhered to throughout the process, but especially in the beginning. It is unnecessary and costly for entities like AMIE and its members to have to correct basic procedures through litigation, which can often take years to resolve and is, in many respects, an ill-suited process to deal with highly technical matters. The chilling effect of defective proceedings on the trade is immense and can for the most part not be recouped, if at all.

5. THE DECLINING STANDARD OF REPORTING

- 5.1. As the saying goes, the proof of the pudding is in the eating. In ITAC's case the systemic failures complained of above are evidenced in the reporting done by ITAC.
- 5.2. The quality of reports issued by ITAC has shown a steady decline over the years and are for the most part non-compliant with ITAC's domestic legislative and South Africa's international trade obligations. This is well illustrated by the content of preliminary report and the essential facts letters issued by ITAC in the poultry case. However, this is not limited to the poultry case, but also applies to all other recent cases. When ITAC's reports are compared to those of other jurisdictions, the non-compliance becomes patently obvious to even a causal observer.
- 5.3. Whereas ITAC's earlier reports dealt, at least to some extent, with the various parties' arguments, current reports are devoid of reference to submissions made by any parties. As a general tendency ITAC

simply dismisses all submissions with a single sentence, indicating that "all submissions by all parties have been taken into consideration".

5.4. This level of reporting is one of the strongest indicators of the systemic failure complained of above. If the processes and procedures were in place then surely this would be reflected in the reports issuing from ITAC. It is not.

5.5. This has an obvious and direct impact on trade and has reached a level where it has in major instances become an international embarrassment.⁸

6. CONCLUSION

6.1. AMIE submits that the issues in the poultry case are indicative of more general trends within ITAC as an organization. These trends should be of serious concern to the Committee, as it is to the Minister, and should be addressed by ITAC.

6.2. In respect of the poultry case, AMIE submits that ITAC must also explain to this committee why it is ignoring the issues raised by the Minister.

⁸ This is most notable in the WTO dispute Brazil declared against South Africa in the poultry investigation. However, poor investigation procedures and reporting have also led to WTO challenges in the acrylic blankets from Turkey and certain paper products from Indonesia. In both the latter instances, ITAC was forced to withdraw the anti-dumping duties.

6.3. Accordingly, AMIE requests that the Committee direct ITAC to report to the Committee on:

6.3.1. What procedures and practices ITAC has put in place to ensure that its internal procedures on a case-by-case basis complies with the Constitution and ITAC's obligations in terms of domestic legislation and South Africa's international trade obligations;

6.3.2. The criticisms raised by AMIE in this submission;

6.3.3. How ITAC is complying with the issues raised by the Minister during August 2012 in respect of poultry case.

DATED AT JOHANNESBURG ON 26TH OF NOVEMBER 2012.

MR DAVE WOLPERT

Chairperson of the Association of Meat Importers and Exporters

7. SCHEDULE A: CHRONOLOGY OF THE POULTRY CASE THUS FAR

Synopsis of Relevant Events

7.1. On 2 June 2011 SAPA lodged an application on behalf of three of its members, namely, Rainbow Farms (Pty) Limited ("Rainbow"), Earlybird Farm, a division of Astral Operations (Pty) Limited ("Earlybird"), and County Fair, a division of Astral Operations (Pty) Ltd ("County Fair"), for the imposition of an anti-dumping duty on certain frozen meat of fowls of the species *Gallus Domesticus* produced in Brazil and/or exported from Brazil ("the SAPA application").

7.2. On 24 June 2011, notice of the initiation of an investigation was published in Notice 404 of 2011 of Government Gazette Number 34377 ("the notice initiating the investigation"). The notice initiating the investigation, *inter alia*:

7.2.1. recorded that "the product" was classifiable under tariff headings 0207.12 and 0207.14.10. (The relevance of these tariff headings is dealt with in paragraphs 7.41 to 7.48 hereunder.);

7.2.2. recorded in regard to dumping that:

"The allegation of dumping is based on the normal value and the export price from Brazil. For purposes of the normal value determination, the Applicant provided a retail price for the whole bird and a price list for boneless cuts in Brazil.

The export prices were based upon the official import statistics obtained from the South African Revenue Service (SARS).

On this basis the Commission found there was *prima facie* proof of dumping.”

7.2.3. recorded in regard to material injury that:

“The Applicant alleged and submitted *prima facie* evidence to indicate that there is price undercutting and that the imports in question are suppressing its selling prices. The Applicant’s information indicates a decline in market share and no growth in a growing market. While the Applicant lost market share, the alleged dumped imports’ market share increased.”

7.2.4. recorded that the period of investigation for purposes of determining the dumping margin in Brazil would be from 1 January 2010 to 31 December 2010 and the period for investigation for purposes of determining the injury would be from 1 January 2008 to 31 December 2010;

7.2.5. recorded that the investigation was initiated in terms of section 16 of the ITA Act and that ITAC would conduct its investigation in accordance with the relevant sections of the ITA Act and the Anti-Dumping Regulations;

7.2.6. called for responses within 30 days from date of the notice initiating the investigation or from date upon the date upon which the letter accompanying the questionnaires was received. Parties not directly notified had 40 days to respond.

- 7.3. On 12 August 2011, a further notice was published in Notice 533 of 2011 of Government Gazette Number 34510 ("the correction notice"). The correction notice corrected the tariff headings to 0207.12.90 and 0207.14.10.
- 7.4. On 15 August 2011, Ms Zoleka Xabendlini ("Xabendlini"), Senior Manager: Trade Remedies II, after several requests by AMIE, produced three verification reports for the three members on whose behalf SAPA made the application to ITAC, namely, County Fair (for a verification site visit that allegedly took place on 20 April 2011, i.e. more than a month before the SAPA application was made), Rainbow (for a verification site visit that allegedly took place on 4 May 2011, i.e. almost a month before the SAPA application was made) and Early Bird (for a verification site visit that allegedly took place on 18 April 2011, i.e. more than a month before the SAPA application was made);
- 7.5. AMIE, Federated Meats (Pty) Ltd ("Federated Meats"), Chester Wholesale Meat (Pty) Ltd ("Chester"), Eitlin International Trading (Pty) Ltd ("Eitlin"), Merlog Foods (Pty) Ltd ("Merlog"), Britos Foods International (Pty) Ltd ("Britos"), Millennium Meat Import and Export (Pty) Ltd ("Millennium Meat"), Fercon (Pty) Ltd and Foodcorp Consumer Brands (pie division) all submitted responses to ITAC's importers questionnaire on the non-confidential version of the SAPA application. The responses of Chester, Eitlin, Merlog, Britos, Millennium and Fercon were all *"found to be deficient and was therefore not considered"*. AMIE later established that the highly technical "deficiency" was that the sworn statements of the

aforementioned parties were not also submitted in electronic format (as opposed to having been submitted in printed format). None of the parties was given an opportunity to rectify this shortcoming, despite the provisions of Article 6.8 and paragraphs 3, 5, 6 and 7 of Annex II to the Anti-Dumping Agreement in this regard. Chester, Eitlin, Merlog, Britos, Millenium and Fercon are all members of AMIE;

7.6. On 30 January 2012, ITAC issued report number 389 (*"Investigation into the alleged dumping of frozen meat of fowls of the species Gallus Domesticus, whole bird and boneless cuts, originating in or imported from Brazil: Preliminary determination"*) ("the preliminary determination"). In the preliminary determination ITAC, *inter alia*:

7.6.1. stated that the investigation was initiated after it considered that there was *"prima facie evidence that indicated that the subject product was being dumped at prices, causing material injury to the SACU industry"*; and

7.6.2. determined that:

"...dumping of the subject products imported from Brazil is taking place, the SACU industry is suffering material harm and that the material harm suffered by the SACU industry is causally linked to the dumped imports from Brazil. The Commission therefore decided to request the Commissioner for South African Revenue Service (SARS) to impose provisional payments."

7.7. On 10 February 2012, the imposition of a provisional payment was published in Government Gazette Number 35030 in terms of section 57A of the Customs and Excise Act. In terms of the aforementioned notice, a provisional payment in relation to anti-dumping duty was

imposed up to and including 10 August 2012 to the extent and on the goods set out in the Schedule in the notice.

- 7.8. On 27 February 2012 and 2 March 2012, AMIE submitted responses to the preliminary determination.
- 7.9. On 25 April 2012, ITAC issued the first essential facts letter. The essential facts letter ignored or rejected all of AMIE's responses and recommended anti-dumping duties exactly as advised in the preliminary determination. None of AMIE's submissions was reflected in the first essential facts letter.
- 7.10. On 8 May 2012, AMIE submitted a response to the first essential facts letter. ITAC did not respond to this and presumably it too was ignored or rejected, as ITAC clearly recommended to the Minister to impose definitive anti-dumping duties and as none of the submissions were reflected in the second essential facts letter.
- 7.11. On 12 June 2012, ITAC made a final determination to recommend that anti-dumping duties be imposed ("the final determination"). The duties to be imposed under the final determination are presumed to be the same as those imposed under the preliminary determination. AMIE has not seen this determination and, indeed, ITAC has refused to provide any details of this final determination to AMIE, but, it seems has supplied the information to SAPA as is evident from the July 2012 edition of the Poultry Bulletin, a copy of which can be made available to the Committee. This is but the latest in a series of conduct by ITAC shown its bias in favour of SAPA and against AMIE

and its members which is unacceptable in terms of the legislative framework within which ITAC is supposed to operate.

7.12. On 13 June 2012, AMIE, through its attorneys Messrs Wertheim Becker Attorneys ("Wertheim Becker"), requested ITAC to confirm that *"ITAC has made a final determination regarding the products. In the event that no final determination was made, we request that you inform us precisely what decision was taken in this regard. In the event that no response is received from your offices by 13h00 on 15 June 2012, we will assume that a final determination has been made in line with your letter of 25 April 2012 and our client intends giving 30 days' notice in order to review such decision."*

7.13. On 14 June 2012, ITAC responded to Wertheim Becker's letter of 13 June 2012 and informed that:

"As you are aware that the investigation is in its final stage, please be advised that the Commission's final determination and recommendation will be communicated to all interested parties through the Commission's final report once a decision is made by the Minister of Trade and Industry."

7.14. ITAC's response is wholly unacceptable for the following reasons:

7.14.1. AMIE, and other affected parties, are entitled to know of the decision;

7.14.2. Section 26(3)(b)(ii) requires ITAC to publish its recommendation for general consumption;

7.14.3. ITAC's response directly undermines AMIE's, and other interested parties', right to take the final determination under review in terms of regulation 64 of the Anti-Dumping Regulations.

7.15. On 19 June 2012, Wertheim Becker again addressed a letter to ITAC wherein the following was *inter alia* stated:

- "3. In terms of our aforesaid correspondence, we requested you to advise whether at your meeting of 12 June 2012, a final determination has been made to recommend to the Minister that anti-dumping duties be imposed on the aforementioned products.
4. We had further advised you that if you failed and/or refused to inform us whether the aforementioned decision was taken, we will assume that such a decision was taken and will then furnish you with the prescribed notice in terms of Regulation 64(2) of the Anti-Dumping Regulations (made under [the] International Trade and Administration [Act], 71 of 2002.
5. As you failed to respond to our aforementioned correspondence we will now assume that such a decision was taken on 12 June 2012. In terms of Regulation 64(2) of the Anti dumping (sic) Regulations, our client hereby gives the Commission 30 (thirty) days notice that it intends to launch review proceedings to review and set aside the aforesaid final determination."

SAPA's Application

7.16. SAPA complained in its application that:

"Brazilian exporters are selling the subject product (being whole birds and boneless cuts of fowls of the species *Gallus Domesticus*) at prices lower than the selling prices of the subject prices of the subject products in Brazil to South African importers. As a result SAPA members are suffering material injury and a threat of material injury exists through the following indicators amongst other:

- (a) Price suppression;
- (b) Price undercutting;
- (c) Price depression;
- (d) Profit margins are under pressure;
- (e) Actual decline in sales value;
- (f) Actual decline in market share;
- (g) Unacceptable return on investments;
- (h) Actual under utilisation of capacity; and
- (i) Negative impact on growth."

7.17. In regards to the alleged dumping, SAPA *inter alia* stated the following in its application regarding **normal wholesale and retail values**:

7.17.1. normal wholesale and retail values (January 2010 – December 2010) were allegedly obtained for whole birds slaughtered in Brazil as published on the AviSite website;

7.17.2. photos and prices were obtained "of the subject products as obtained in the Brazilian shops, as well as from the website "What things cost in Brazil". Annexure D1.1 to SAPA's application contains a redacted email from an unknown source that attaches a document which *inter alia* contains the following statements from the website:

"In a country the size of Brazil (slightly larger than the continental United States), it is almost impossible to definitively note the price of everything, especially items you would normally find in a modern supermarket."

And:

"**All prices noted here** are those one could expect to find in a **large chain supermarket in a major city** and can vary greatly (up or down) from one store to another and, from one location in Brazil to another. For example, price differences from a small rural town -vs- large metropolitan city. We have excluded any "sale" prices."

7.17.3. Annexure D1.1(a) to SAPA's application, however, makes it clear that prices were only obtained from a single shop (not shops) and contains images of four products, namely, (i) a Sadia Brand frozen whole chicken, with feet, head, neck, liver, gizzard and a packaging weight of "0,012 kg" at an alleged price of "3,65 R\$ *per kilogram*"; (ii) a Korin Brand frozen whole organic chicken (which is a product wholly irrelevant to the application), at a packaging weight of "0,000" and at an alleged price of "7,69 R\$ *per kilogram*"; (iii) a Sadia Brand "galeto" (which is also a product wholly irrelevant to the application), at a packaging weight of "0,004" kg at an alleged price of "6,19 R\$ *per kilogram*"; and (iv) a Sadia Brand, frozen whole chicken, without internals, head or feet, with a packaging weight of 0,004 kg at an alleged price of "5,09 R\$ *per kilogram*";

7.17.4. normal values were then calculated by SAPA on both whole frozen birds and boneless chicken cuts and the following conclusions presented:

Product	Retail	Ex-factory
	R\$	R\$
Whole frozen bird	5.09	2.52
Boneless	8.12	4.03

7.17.5. The “worksheet” presented by SAPA as part of Annexure D1.1(a) to its application is simply nonsensical, with no apparent correlation between the “data” and SAPA’s calculations, which are in any event based on a single shop in Brazil. SAPA clearly also only adjusted the domestic selling price in Brazil to a “wholesale” rather than to the ex-factory price.

7.18. AMIE has conducted further investigations into the source of Annexure D1.1 to SAPA’s application and found the following:

7.18.1. the document attached as part of Annexure D1.1 to SAPA’s application comes from a website called Brazil-Help.com (with website address: www.brazil-help.com);

7.18.2. Brazil-help.com’s home page makes it clear that it is a general information portal, does not purport to be an authoritative source of information and *inter alia* records:

“Brazil-Help.com was created to provide English-speaking people around the world with information, knowledge, understanding, assistance, help, and practical tips about Brazil and its vast expanses, peoples, culture, language, customs,

mores, history, as well as the dichotomies that one may encounter. We make every effort to keep all pages as up-to-date as humanly possible. Additionally, new topics and information are added as required or available."

7.18.3. Brazil-help.com's disclaimer also *inter alia* records that:

"The information and materials contained in this site are provided "as is" without any express or implied warranty of any kind, including warranties of merchantability, non-infringement of intellectual property or fitness for any particular purpose. In no event will www.brazil-help.com be liable for any damages whatsoever (including, without limitation, damages due to loss of profits or business interruption) or due to the use of or inability to use the materials."

7.18.4. Copies of Brazil-help.com's homepage and disclaimer page can be made available should the Committee so request.

7.19. In regards to the **export values** that it used in its application, SAPA stated that it used data obtained from SARS. However, as far as AMIE has been able to ascertain, the data published by SARS does not accord with the "data" supplied by SAPA. SARS has also denied that it provided the information and indicated that the information did not tally with the actual import statistics.

7.20. In regard to the material injury suffered by SAPA's three members, the financial documents for Rainbow, Early Bird and County Fair were allegedly supplied, but were claimed to be confidential and were not been supplied to AMIE.

7.21. In regard to the effect on SACU prices, SAPA stated that:

7.21.1. there was price depression in that:

- (i) based on Annexure E3.1.1 to the SAPA application (all of which save for two pages was claimed to be confidential), *"it was evident that although the producers were able to increase their selling prices in 2009, price depression with regard to whole birds and boneless cuts was evident in 2010 compared with 2009 as a result of the imports of the subject Brazilian products casing (sic) the SACU industry to suffer material injury in 2010 and the threat exists that the injury will continue in 2011"*. AMIE denies that this is the case, as is confirmed by ITAC's finding that no price depression occurred;
- (ii) based on Annexure E3.1.2 to the SAPA application (all of which save for one page was claimed to be confidential), *"...the selling prices of the SACU producers of whole birds and boneless cuts over the 12 months of 2010 remains fairly stable but sometimes dropped below the 2009 average selling prices causing the producers to suffer material injury. As a result of the alleged dumped imports the prices were adjusted to counter these imports from Brazil."*. AMIE denied (an still denies) that this is the case, as

ITAC also found that prices had increased over the investigation period;

7.21.2. there was price suppression based on information contained in Annexures E3.2.1 and E3.2.2. AMIE denied that this was the case and is supported in its arguments since ITAC found no proof of price suppression during the investigation period.

7.22. In regard to the **effect on SACU sales**, SAPA stated that its members had suffered a decline in sales based on information contained in Annexures E4.1, E4.2, E4.3 and E4.4. AMIE denied that this was the case and ITAC also found that SAPA's members' sales increased during the investigation period.

7.23. In regard to a **decline in profit**, SAPA stated that its members have not been able to "*realise the expected profit levels that would enable the producers to reinvest and make it a continually viable industry*". This statement was based on Annexure E5.1 to SAPA's application, which was claimed to be confidential and not provided publicly. ITAC itself, however, found that the industry's profit had increased significantly during the investigation period.

7.24. In regard to **output**, SAPA stated that its members had suffered a decline in production from 2009 to 2010 based on information contained in Annexure E6.1 to SAPA's application. AMIE denied that this was the case and ITAC also found that SAPA's members' output increased during the investigation period.

- 7.25. In regard to **market share**, SAPA stated that its members had suffered a decline in market share whereas *"the subject products from Brazil gained market share in the same period causing the SACU industry to suffer material injury."* This statement was made based on information contained in Annexures E7.1 and E7.2 to SAPA's application. AMIE denied that this was the case and pointed out that SAPA, and ITAC, had relied on incorrect import statistics and that the data relied upon as regards whole birds were tainted by the inclusion of carcasses, which do not form part of the investigation.
- 7.26. In regard to **productivity**, SAPA stated that its members had experienced an increase in productivity over the period 2008 to 2010 based on information contained in Annexure E8.1 to SAPA's application.
- 7.27. In regard to **return on investment**, SAPA stated that its members had experienced an increase in their return on investment over the period 2008 to 2009, but that it remained the same in 2010 based on information contained in Annexure E9.1 to application. SAPA contended that *"the low level of return on investment is as a result of the continued import of the alleged dumped products from Brazil and is indicative of material injury"*. AMIE denied that this was the case and ITAC also found that SAPA's members' return on investment increased nine-fold during the investigation period.
- 7.28. In regard to **capacity utilisation**, SAPA *inter alia* stated that *"capacity utilisation increased from 2008 to 2009 but decreased again in 2010 to the same level as in 2008 causing the SACU industry to*

suffer material injury as a result of the import of the Brazilian products at alleged dumped prices." SAPA also stated that *"as a result of the continuation of the alleged dumped imports volumes (sic) from Brazil the SACU producers prices were constantly under pressure and this forced the SACU producers to sell at depressed and suppressed selling prices"*. The aforementioned statement was based on trends allegedly identified in Annexures E10.1 and E10.3 to the SAPA application. Annexures E10.1 and E10.3 were claimed to contain confidential information and were not made publically available. AMIE denied that this was the case and ITAC also found no decreased capacity utilisation during the investigation period.

7.29. In regard to **cash flow**, SAPA *inter alia* stated that *"[a]lthough a positive cash flow was realised in 2009 and 2010 as indicated in paragraph E 9.1 the return of investment is still insufficient to allow reinvestment."* The aforementioned statement was based on Annexure E11.1 to the SAPA application. Annexure E11.1 was claimed to contain confidential information and was not made publically available. AMIE denied that this was the case and ITAC found that SAPA's members' net cash flow had improved significantly during the investigation period.

7.30. In regard to **inventory levels**, SAPA *inter alia* indicated that inventory levels were not a clear indicator of material injury because stock could not be kept, yet also claimed that Annexure E12.1 (which was again claimed to contain confidential information) showed *"that inventory levels were substantial over the period 2008 to 2010 causing the SACU industry to suffer material injury"*. AMIE denied

that this was the case and ITAC did not find this relevant to its analysis.

- 7.31. In regard to **employment**, SAPA acknowledged that employment had increased, but warned that "if the import trend from Brazil continues the SACU producers would have to reduce employment to remain competitive". The latter statement is, however unsubstantiated and gives no indication of when such a point would be reached or what the impact would be.
- 7.32. In regard to **growth**, SAPA *inter alia* stated that "*the SACU market with regard to whole birds showed growth of 83 index points over the period 2008 to 2010. This while the SACU producers only showed growth of 5 index points over the same period. The imports from Brazil however showed growth of 295% over the same period.*" The aforementioned statement was based on Annexure E15.1 to SAPA's application. The statistics, however, were false and misleading, very significantly overstated imports both from Brazil and elsewhere, and still included carcasses, which do not form part of the investigation.
- 7.33. In regard to **capital and investment**, SAPA significantly recorded that investment by poultry producers continued over the period of 2009 to 2010, i.e. this did not support a finding of injury.
- 7.34. In regard to **causality**, SAPA stated that:
 - 7.34.1. SAPA compiled Annexure G2.1, which it stated contained "import data" that allegedly "*clearly indicates the substantial increase in the Brazilian product in the SACU*

market as a result of the low prices causing material injury to the SACU industry". Annexure G2.1 was not included in the documents given to AMIE. Annexure G2.1 is clearly not of a confidential nature and should have been provided to AMIE, but was nonetheless not provided to AMIE despite repeated requests;

7.34.2. SAPA conceded that it had been unable *"to obtain accurate data relating to normal values in Brazil"* and also conceded that *"volume increases" with regard to subject products were not so "dramatic". However, (Annexure G2.1) still indicates that the Brazilian products (sic) volume over the period 2008 to 2010 continued to increase causing the SACU industry to suffer material injury".*

7.35. In regard to **market share**, SAPA *inter alia* stated that, based on Annexure E7.1, it was allegedly *"clear that the SACU producers' market share with regard to sales volume of whole birds and boneless cuts declined over the period 2008 to 2010. While the subject products from Brazil gained market share in the same period causing the SACU industry to suffer material injury."*

The Initiation of the Investigation

7.36. ITAC should only initiate an investigation if it is satisfied the requirements set out in Articles 5.2 and 5.3 of the Anti-Dumping Agreement and regulations 21 to 28 of the Anti-Dumping Regulations have been met. In particular:

- 7.36.1. Article 5.2 of the Anti-Dumping Agreement, read with regulation 23.1 of the Anti-Dumping Regulations, requires and applicant to submit such information as is reasonably available to it. In the present case SAPA was in possession of additional information, including accurate import statistics, the volume and prices of imports from Argentina, and the fact that carcasses were included under the same tariff heading as whole birds, yet it failed to submit this information. This alone is sufficient to invoke section 26(6) of the ITA Act and force ITAC to revoke the initiation of the investigation;
- 7.36.2. Article 5.3 of the Anti-Dumping Agreement obligates authorities to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation. This ITAC clearly did not do, which, AMIE submits, rendered and still renders the whole process fatally flawed.
- 7.36.3. Regulation 25 of the Anti-Dumping Regulations also requires ITAC to satisfy itself of the accuracy and adequacy of the information provided in the application.

7.37. This examination regarding the sufficiency the data set out in SAPA's application did not occur or was done in a wholly insufficient manner. In particular AMIE draws the above Committee's attention to the following:

7.37.1. all three the verification reports were issued subsequent to the initiation of the investigation and only after specific requests for such reports from AMIE. The investigation was initiated on 24 June 2011 but the verification reports, pertaining to verifications that had allegedly taken place in April and May 2011, were only issued on 15 August 2011 (and comments were called for by 17 August 2011);

7.37.2. all three verification reports are, for all practical purposes and extents, *verbatim* the same, indicating that these are merely *pro forma* documents and not, in fact, verification reports and a weak attempt to purport to go through the motions.

7.38. All three verification reports refer to site visits that were conducted on three separate days. At each site visit the "production process", the "accounting systems", the "cost and price build-up" and "all material injury indicators" were allegedly verified. In this regard AMIE draws the Committee's attention to the following:

7.38.1. it is not clear what relevance the "production process" has to SAPA's application. This is evidently a rote statement that has little if any bearing on the case and indicates the

lack of a proper appreciation of the application and process and a failure to properly assess and verify the facts;

7.38.2. there is no indication that ITAC, in accordance with its international obligations, made any effort to substantiate the data in respect of the normal value and export prices relied upon by SAPA, particularly where the "data" relied upon is data from third party websites;

7.38.3. the verification reports indicate that the accounting systems of each of SAPA's three members was explained to Xabendlini, but does not record that ITAC verified the actual financial data provided.

7.39. Moreover:

7.39.1. In verifying the accuracy and adequacy of the information for purposes of initiation ITAC investigators have wide powers and ability to access and request information. In this regard they have access to the statistical data of imports from SARS on a transaction-by-transaction basis or what is commonly known as access to the Bills of Entry filed by importers at the time of importing products into the Republic and as such to all information regarding the volume, values, origin and so forth in respect of all relevant imports.

- 7.39.2. It is clear that ITAC did not follow such a process and, simply put, ITAC could not rationally have been satisfied that the information available was sufficiently adequate and accurate to initiate an investigation, particularly if it had applied itself in accordance with the Anti-Dumping Agreement and the Anti-Dumping Regulations.
- 7.39.3. One of the important pre-initiation steps is to establish the normal value of the product in question. Regulation 23 of the Anti-Dumping Regulations sets out the requirements that need to be satisfied to establish the normal value for initiation purposes. In this regard the complaining industry is required to submit information that is reasonably available on the price of the like products sold in the country of origin or for export, preferably on an ex-factory basis. In the current application the information in respect of the normal value consisted of information of the retail selling prices of certain products in a single shop in Sao Paulo, Brazil on a single day, not all of which relate to the exported product, presenting a limited number of photos of the products and prices as evidence. To these prices SAPA then made unsubstantiated adjustments of 50.4% to derive the "wholesale" price. For initiation purposes ITAC simply accepted this information without further consideration as to whether it was adequate and accurate. ITAC also thereafter persisted in relying on this

unsubstantiated and speculative information, despite several submissions by AMIE in this regard.

7.39.4. To compound matters, ITAC's approach and acceptance of SAPA's "data" without properly verifying SAPA's allegations is in direct conflict with its obligations in terms of the Anti-Dumping Regulations and the Anti-Dumping Agreement. ITAC was also aware or should have been aware of a directly relevant WTO report relating to an investigation in Argentina, also pertaining to poultry from Brazil, which indicated that the Anti-Dumping Agreement requires that a comparison between the normal value and the export price should be made in respect of sales "*made at as nearly as possible the same time*" and that this implied that "*if a product such as eviscerated poultry, in respect of which there are many transactions taking place on a daily basis, we are not persuaded that domestic sales data for one day provides sufficient overlap with the export price data for several months for the purpose of article 5(3)*".⁹ A copy of the aforementioned report can be made available to the Committee should it so request.

7.39.5. In addition regulation 23.3 of the Anti-Dumping Regulations specifically requires that reasonable adjustments must be made to the normal value where this price is not at the same level as the export price. Article 5

⁹ WTO Argentina – Poultry panel report paragraph 7.85.

of the Anti-Dumping Agreement provides that "*Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.*" As regards the adjustment of 50.4% (which already indicates that the prices submitted bear absolutely no resemblance to the normal value), no proper substantiation was submitted; yet ITAC accepted this adjustment without confirming the correctness and adequacy of the information. In addition, as already indicated, the adjustment was only made to bring the product to a wholesale level, which was then compared to the ex-factory export price, clearly an incorrect comparison.

7.39.6. ITAC was clearly derelict in its duties and failed to fulfill its obligations in terms of the international agreements and the Anti-Dumping Regulations as no proper basis for a normal value has been established.

7.40. As is pointed out serious questions existed and continue to exist regarding the data used by SAPA in its application. ITAC, despite being forewarned about this, failed to implement the necessary and required steps to verify the data and insisted on relying on this incorrect information.

7.41. The use of questionable data was, however, not the only problem that plagued the initiation of the investigation. The tariff headings in the initial notice initiating the investigation (dated 24 June 2011)

identified the applicable tariff headings as 0207.12 and 0207.14.10, which appeared to cover 0207.12.10 (whole birds – mechanically deboned meat), 0207.12.90 (whole birds – other) and 0207.14.10 (boneless cuts). SAPA should clearly have excluded mechanically deboned meat as not being produced in SACU (and should also have alerted ITAC to the fact that carcasses did not form part of the investigation, yet were included in the import statistics).

7.42. AMIE, through its appointed international trade consultants, XA International Trade Advisors ("XA"), contacted ITAC and pointed out that the SAPA application appears to limit the scope to tariff headings 0207.12.90 and 0270.14.90, whereas Annexure D5.1 to the SAPA application refers to tariff heading 0207.12.90 and Annexure E3.1.1 refers to tariff heading 0207.12. ITAC was asked to confirm the scope of the investigation. XA also pointed out that it was unclear whether, in regard to whole birds, this also included chicken carcasses, which falls under the same tariff heading (namely 0207.12.90) but is very different in their prices.

7.43. Prior to 1 January 2012 whole birds and carcasses were classified under tariff heading 0207.12.90 for importation purposes. On application to SARS this was changed with effect from 1 January 2012 to distinguish between whole birds and carcasses. The provisional determination was therefore made on whole birds only, but the data that were used to determine the export price, injury and causality included data for both whole birds and carcasses. This is highly relevant to the determinations made in respect of whole birds.

7.44. The concerns raised by XA led to the publication of a correction notice on 12 August 2012, which limited the scope of the investigation to whole birds and boneless cuts, classifiable under tariff headings 0207.12.90 and 0207.14.10. The purpose the correction notice was to exclude mechanically deboned meat from the scope of the application and, unfortunately, left unaddressed the issue of whether carcasses were included in the scope of the investigation.

7.45. However, as pointed out by XA in a letter to ITAC dated 15 August 2012, this did not resolve whether chicken carcasses were included or excluded from the investigation.

7.46. On 17 August 2011, ITAC responded to XA and stated that:

"The scope of the investigation is whole birds and boneless cuts classified under tariff headings 0207.12.90 and 0207.14.10 respectively. ITAC is not in a position to rule on the issue of the classification of whole bird and carcasses, as this is a SARS issue. The Applicant has indicated that the whole bird refers to a whole bird that consists of an intact carcass with all parts intact with the head, feet, tail[,], oil gland and giblets present or not."

7.47. Unfortunately ITAC's response still left the issue unanswered. ITAC also failed to appreciate that what AMIE was requesting was not a re-classification, but clarity on what actual products were included in the investigation or not. Clearly ITAC has authority regarding such a determination of the scope.

7.48. Despite the significance of this issue and the remaining uncertainty, ITAC also surprisingly refused any extension for AMIE to respond to

SAPA's application. This is one of several instances where ITAC's unreasonable conduct directly impinged on AMIE's right to a fair administrative process.

The Exclusion of Comments from Importers

7.49. As pointed out above, the responses of Chester, Eitlin, Merlog, Britos, Millennium and Fercon were all "*found to be deficient and was therefore not considered*".

7.50. There was no valid reason for this exclusion.

7.51. The effect was that valid and relevant information was not considered and was excluded from the determination process by ITAC.

7.52. Chester, Eitlin, Merlog, Britos, Millennium and Fercon are all members of AMIE.

7.53. AMIE was allowed to make an oral presentation to ITAC regarding SAPA's application. However, as is evident from the preliminary determination, the presentation by AMIE went unheeded.

The Preliminary Determination

7.54. On 30 January 2012, the preliminary determination was made. This preliminary determination was issued on 10 February 2012.

7.55. In regard to **whole birds**:

7.55.1. ITAC determined in summary that "the Applicant" (should be SAPA's members) was suffering material injury in the form of price undercutting, market share and growth;

7.55.2. significantly, ITAC only found material injury in respect of three injury indicators and also found that:

- (i) "the Applicant" did not experience price depression during the period of investigation;
- (ii) price suppression decreased;
- (iii) sales volume increased over the injury period of the investigation;
- (iv) sales value increase during the period of investigation;
- (v) profit increased over the period of investigation;
- (vi) productivity increased over the period of investigation;

- (vii) return on net assets increased over the period of investigation;
- (viii) capacity utilisation remained constant during the period of investigation;
- (ix) cash flow increased over the period of investigation;
- (x) inventory volume and value increased over the period of investigation;
- (xi) employment increased over the period of investigation;
- (xii) wages increased over the period of investigation;
and
- (xiii) capital investment and expenditure increased over the period of investigation.

7.56. In regard to **boneless cuts**:

7.56.1. ITAC again relied upon the information provided by SAPA;
and

7.56.2. ITAC determined that SAPA was suffering material injury
in regard to boneless cuts in the form of:

- (i) price undercutting;

- (ii) price suppression;
- (iii) sales volume;
- (iv) market share;
- (v) capacity utilisation; and
- (vi) growth.

7.56.3. Notably, ITAC did not find material injury in respect of

- (i) Price depression;
- (ii) Profit;
- (iii) Productivity;
- (iv) Return on net assets;
- (v) Cash flow;
- (vi) Inventories;
- (vii) Employment;
- (viii) Wages; or
- (ix) The industry's ability to attract further capital or investments.

Events after the Preliminary Determination

- 7.57. On 27 February 2012 and 2 March 2012, XA, on behalf of AMIE, submitted responses to the preliminary determination. The grounds why the preliminary determination was wrong in respect of whole birds and boneless cuts is dealt with therein. I deal with these grounds in detail hereunder.
- 7.58. On 25 April 2012, ITAC issued its first essential facts letter. In this essential facts letter the Chief Commissioner of ITAC stated that ITAC had decided to confirm its preliminary determination regarding the residual margin of dumping (namely 62.93% in respect of whole birds and 45.59% in respect of boneless cuts).
- 7.59. The Chief Commissioner also stated that:
- 7.59.1. ITAC was considering confirming its preliminary determination regarding injury and causality; and
- 7.59.2. ITAC was therefore considering making a final determination to recommend to the Minister of Trade and Industry that the following definitive anti-dumping duties against imports of the subject products be imposed: 62.93% in respect of whole birds and 46.59% in respect of boneless cuts.
- 7.60. From ITAC's first essential facts letter it was evident that AMIE's comments, as well as those of several of AMIE's members, had

simply been disallowed on highly technical or frivolous grounds, ignored or rejected out of hand.

- 7.61. On 8 May 2012, XA, on behalf of AMIE, submitted extensive comments on the first essential facts letter.
- 7.62. On 12 June 2012, ITAC made a final determination to recommend that anti-dumping duties be imposed ("the final determination").
- 7.63. The final determination was forwarded to the Minister thereafter.
- 7.64. Due to ITAC's refusal to properly communicate with AMIE and consider AMIE's submissions, AMIE was forced, at great cost, to launch a semi-urgent review application in the North Gauteng High Court after it assumed a final determination had been made.¹⁰ This should not have been necessary.
- 7.65. Subsequently the duties levied in terms of ITAC's preliminary determination had to be repaid as that levy period expired and AMIE learned that the Minister had rejected ITAC's final determination recommendations.
- 7.66. Subsequent the Minister addressed a letter to SAPA, which records, *inter alia*, the following:

"On 21 June 2012, the Brazilian government requested consultations with the Republic of South Africa pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes Article XXIII of the General Agreement on Tariffs and Trade*

¹⁰ North Gauteng High Court Case Number 46075/2012.

1994 and Article 17 of the *Agreement on Implementation of Article VI of GATT 1994*.

Brazil contends that the preliminary determination, the imposition of provisional anti-dumping duties as well as the initiation and conduct of the investigation, is inconsistent with South Africa's obligations under the provisions of GATT 1994 and the Anti-Dumping Agreement. Specifically, Brazil raises concerns and/or objections regarding:

- f. The determination of dumping;
- g. The determination of residual margins;
- h. The determination of injury and causal link;
- i. The definition of the domestic industry; and
- j. The initiation and procedure of the investigation.

On 25 July 2012 delegates from both the South African and Brazilian governments met in Geneva to discuss concerns that were raised by Brazil.

In light of Brazil's allegations and the subsequent consultations held between the two governments, I believe the issues raised by Brazil above (a – e) are serious enough to merit my consideration. This matter raises various issues within the realm of South Africa's international trade obligations and I am compelled as a matter of policy to consider the implications of the final determination report in light of the considerations indicated above."

7.67. AMIE was unaware of the letter until recently. It is unfortunate that the Minister did not request AMIE's views, but only SAPA's views. Apparently SAPA thereafter responded to the Minister. AMIE has not seen that response.

7.68. The Minister thereafter forwarded his letter to SAPA and SAPA's response to ITAC under cover of a further letter. In the Minister's aforementioned covering letter to ITAC the Minister *inter alia* stated:

"I have not applied my mind to the positions of both SAPA and Brazil as they have been expressed. By virtue of the powers afforded to me under section 4(2) of the Board of Tariffs and Trade Act, 107 of 1986,

read together with the International Trade Administration Act, 71 of 2002. I hereby refer the Final Determination back to ITAC for reconsideration, for your work to ensure that the Final Determination Report is consistent with South Africa's multilateral obligations and that it takes into account, as appropriate, the views expressed by SAPA and Brazil."

(From the Minister's letters it is not even clear whether ITAC has made the Minister aware of AMIE's comments and complaints.)

7.69. On 22 October 2012, ITAC issued a second essential facts letter wherein it makes it clear that ITAC intends persisting with the imposition of anti-dumping duties on whole birds and boneless cuts of the species *Gallus Domesticus* exported from Brazil. Significantly, this second essential facts letter does not take into account any of the issues raised in the Minister's abovementioned letter and is again so defective that litigation seems almost inevitable irrespective of the outcome.

7.70. On 29 October 2012, AMIE, through XA, responded to the second essential facts letter.

8. SCHEDULE B: HOW AN ANTI-DUMPING DUTY IS SUPPOSED TO BE SET

8.1. The process to be followed by ITAC in initiating an investigation, making determinations and making recommendations for the levying of anti-dumping duties may be summarised as follows:

8.1.1. the domestic industry producing a like product to the product under investigation may bring an application in terms of section 26 of the ITA Act. In the poultry case SAPA brought the application on behalf of only three of its members;

8.1.2. the applicant must lodge an application using the prescribed application form. The application must clearly set out:

- (i) the details of the applicant;
- (ii) the product under investigation and the like product produced by the domestic industry;
- (iii) the production volumes of all the SACU producers in order to determine industry standing;
- (iv) the identity of all known interested parties;
- (v) information that establishes a *prima facie* case of dumping, based on a correctly established and

substantiated normal value and export price, all adjustments to ensure a fair comparison between these values and a correctly calculated margin of dumping;

(vi) material injury, which is to be based on all such information as is reasonably available to the applicant and which has to refer specifically to a number of pertinent injury factors; and

(vii) a causal link between the alleged dumping and the material injury;

8.1.3. once ITAC is satisfied that it has received a properly documented application, i.e. an application where all questions have been duly answered, it must determine the accuracy and adequacy of the information, including by verifying the injury information submitted by the domestic industry. ITAC not only has to verify the injury information, but has to check the normal value and export price information against whatever information is available, in other words ITAC cannot simply accept the information as is;

8.1.4. after verification and after identified deficiencies have been addressed, ITAC issues verification letters to the relevant companies and considers the merits of the application. If it finds that the application shows *prima facie* evidence of

injurious dumping, it will inform the trade representatives of the country under consideration that it has received an application and it will then proceed to initiate an investigation through publication of a notice in the Government Gazette;

- 8.1.5. following initiation ITAC sends a covering letter, a copy of the initiation notice, a copy of the non-confidential version of the application and the relevant questionnaire to each known interested party, i.e. to all known importers, exporters and the representatives of the exporting country;
- 8.1.6. the questionnaire has to be completed and all comments on the application made within a period of 30 days after receipt of the documentation, unless an extension is granted after good cause has been shown. Such extension, if granted, is usually granted for a period of 14 days;
- 8.1.7. after receipt of the responses, ITAC must consider these responses and identify any deficiencies, which have to be addressed within 7 days of the Commission's letter;
- 8.1.8. parties may also request an oral hearing with ITAC if they can show reasons for not relying exclusively on written submissions;
- 8.1.9. ITAC will normally verify all cooperating importers' and exporters' submissions during the preliminary investigation

process and will issue verification reports to each such party;

8.1.10. The domestic industry may comment on the verification reports prior to ITAC's preliminary determination is made;

8.1.11. ITAC may thereafter make a preliminary determination and issue a preliminary report to all interested parties. If ITAC has made a preliminary determination of injurious dumping, it will then request the Commissioner for SARS to impose provisional payments for a period of 4 months from the date of imposition thereof, although this period may be 6 months if ITAC considers the lesser duty rule, which, in terms of the Anti-Dumping Regulations and the Anti-Dumping Agreement, can only happen where both the exporter and the corresponding importer have cooperated. These periods may be 6 and 9 months, respectively, on request of exporters¹¹;

8.1.12. interested parties are then normally granted 14 days to comment on the preliminary report;

8.1.13. ITAC then produces an essential facts finding. All comments on the preliminary report should be taken into consideration in the ITAC essential facts finding. ITAC issues an essential facts letter to all interested parties, and

¹¹ Regulations 33.2 and 33.3 of the Anti-Dumping Regulations; section 57A of the Customs and Excise Act; and articles 7.1 and 7.4 of the Anti-Dumping Agreement.

is supposed to set out in detail all essential facts that will be taken into consideration by ITAC in its final determination. All parties receive 7 days to comment on the essential facts letter;

8.1.14. once comments on the essential facts letter have been received, these are taken into consideration in ITAC's final determination. In terms of section 30(3) of the ITA Act, ITAC should make its final determination in the form of a recommendation to the SACU Tariff Board. In practice I am advised that the recommendation is made to the Minister of Trade and Industry;

8.1.15. if the Minister accepts the Commission's recommendation to impose definitive anti-dumping duties he requests the Minister of Finance to impose the duties. The Minister of Finance will then instruct the Commissioner for SARS to impose the duties in the amount and for the period indicated in the request from the Minister of Trade and Industry. If the Minister of Trade and Industry accepts a recommendation that the investigation be terminated without the imposition of anti-dumping duties, ITAC itself will publish a notice in the Gazette indicating the termination of the investigation.

"C"



MINISTER
OF TRADE AND INDUSTRY
REPUBLIC OF SOUTH AFRICA

International Trade Administration Commission

DTI Campus (Building E)
77 Meintjies Street
Sunnyside
Pretoria 0002

Dear Commissioner

INVESTIGATION AND DETERMINATION INTO THE ALLEGED DUMPING OF FROZEN MEAT OF FOWLS OF THE SPECIES *GALLUS DOMESTICUS*, WHOLE BIRD AND BONELESS CUTS, ORIGINATING IN OR IMPORTED FROM BRAZIL

I refer to the Final Determination Report I received from the International Trade Administration Commission ("ITAC") regarding the investigation in to the alleged dumping of frozen meat of fowls of the species *gallus domesticus*, whole bird and boneless cuts, originating in or imported from Brazil.

As you are aware, staff members from ITAC accompanied the South African delegation to formal consultations with Brazil, that were convened on 25 July 2012 in Geneva, pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article XXIII of the *General Agreement on Tariffs and Trade* ("GATT") 1994 and Article 17 of the *Agreement on Implementation of Article VI of GATT 1994*. During those consultations Brazil raised various concerns with, and objections to, the investigation by ITAC as contained in the Preliminary Determination by ITAC which had resulted in the

imposition by South Africa of preliminary duties against the investigated products imported from Brazil. We are now fully aware of Brazil's concerns.

On 13 August 2012, I wrote a letter to the South African Poultry Association (SAPA) wherein I invited SAPA's views on issues raised by Brazil, including those raised during the aforementioned consultations (**Attachment A**). SAPA responded to this request on 17 August 2012, wherein they outlined their views in respect of the issues (**Attachment B**).

I have now considered and applied my mind to the positions of both SAPA and Brazil as they have been expressed. By virtue of the powers afforded to me under section 4(2)(a) of the *Board of Tariffs and Trade Act*, 107 of 1986, read together with the *International Trade Administration Act*, 71 of 2002, I hereby refer the Final Determination back to ITAC for reconsideration, for you work to ensure that the Final Determination Report is consistent with South Africa's multilateral obligations and that it takes into account, as appropriate, the views expressed by both SAPA and Brazil.

Yours Sincerely

Dr Rob Davies, MP

Minister of Trade and Industry

11 August 2012



MINISTER
TRADE AND INDUSTRY
REPUBLIC OF SOUTH AFRICA

Private Bag 9441, CAPETOWN 8001 • Tel: 021 461 7001 • Fax: 021 461 7001
Private Bag 9441, CAPE TOWN 8001 • Tel: 021 461 7001 • Fax: 021 461 7001

Mr Kevin Lovell
CEO: South African Poultry Association
PO Box 1202
Honeydew
2040

Dear Mr Lovell

INVESTIGATION AND DETERMINATION INTO THE ALLEGED DUMPING OF FROZEN MEAT OF FOWLS OF THE SPECIES *GALLUS DOMESTICUS*, WHOLE BIRD AND BONELESS CUTS, ORIGINATING IN OR IMPORTED FROM BRAZIL

We refer to the above matter.

As you are aware, the International Trade Administration Commission of South Africa ("ITAC") published its preliminary determination regarding the alleged dumping of frozen meat of fowls of the species *gallus domesticus*, whole bird and boneless cuts, originating in or imported from Brazil, in Notice No R105 of Government Gazette No 35030, dated 10 February 2012.

Subsequent to the publication of the aforementioned, ITAC issued Report 389, being the preliminary determination report, setting out its facts, finding and law. On 25 April 2012, ITAC conveyed its essential facts, in accordance with Section 37 of the International Trade Administration Anti-Dumping Regulations, to the interested parties.

At present, the final determination report, as prepared by ITAC, has been received and I am considering it in terms of the International Trade Administration Act (ITA Act). In terms thereof I may accept, reject or refer the final determination report back to ITAC for reconsideration.

On 21 June 2012, the Brazilian government requested consultations with the Republic of South Africa pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*

Article XXIII of the *General Agreement on Tariffs and Trade 1994* and Article 17 of the *Agreement on Implementation of Article VI of GATT 1994*.

Brazil contends that the preliminary determination, the imposition of provisional anti-dumping duties as well as the initiation and conduct of the investigation, is inconsistent with South Africa's obligations under the provisions of GATT 1994 and the Anti-Dumping Agreement. Specifically, Brazil raises concerns and/or objections regarding:

- a. The determination of dumping;
- b. The determination of residual margins;
- c. The determination of injury and causal link;
- d. The definition of the domestic industry; and
- e. The initiation and procedure of the investigation.

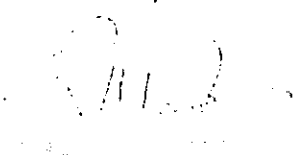
On 25 July 2012 delegates from both the South African and Brazilian governments met in Geneva to discuss concerns that were raised by Brazil.

In light of Brazil's allegations and the subsequent consultations held between the two Governments, I believe the issues raised by Brazil above (a – e) are serious enough to merit my consideration. This matter raises various issues within the realm of South Africa's international trade obligations and I am compelled as a matter of policy to consider the implications of the final determination report in light of the considerations indicated above.

I would therefore also invite the South African industry's views on the aforementioned concerns before making a decision in terms of the ITA Act. I would appreciate your feedback by 17 August 2012.

Should you have any further queries, please do not hesitate to contact my office.

Yours sincerely


Dr Rob Davies, MP
Minister of Trade and Industry

____ August 2012