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**Whose chicken? A discussion of the Anti-Dumping Agreement with particular
focus on the Southern African Development Community-European Union
Economic Partnership Agreement (SADC-EU EPA)**

By

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ACKNOWLEDGMENTS

In loving memory of my Grandfather, Willem Graham, whose love, support, sense of humour and unwavering determination I will forever remember and be inspired by.

I will always be grateful for being able to have called you my Grandfather.

Thank you for everything.

'So do not fear, for I am with you, do not be dismayed, for I am your God'

Isaiah 41:10

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ABBREVIATIONS AND ACRONYMS

AB	Appellate Body
ACP	African Caribbean and Pacific
ADA	Anti-Dumping Agreement
AEC	African Economic Community
AGOA	African Growth and Opportunity Act
BTT	Board on Tariffs and Trade
CAP	Common Agricultural Policy
COMESA	Common Market for Eastern and Southern Africa
COSATU	Congress of South African Trade Unions
CRTA	Committee on Regional Trade Agreements
CU	Customs Union
DAFF	Department of Agriculture, Forestry and Fishing
DTI	Department of Trade and Industry
EBA	Everything But Arms
EC	European Community
EEC	European Economic Community
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FPC	Further Processed Chicken product
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade

GDP	Gross domestic product
IQF	Individually quick frozen
ITAC	International Trade Administration Commission
ITO	International Trading Organization
LDC	Least Developed Country
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OAU	Organisation of African Unity
PRC	People's Republic of China
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development and Co-ordination Conference
SAIIA	South African Institute of International Affairs
SAPA	South African Poultry Association
TDCA	Trade, Development and Cooperation Agreement
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
USA	United States of America
WTO	World Trade Organization

Chapter 1:

INTRODUCTION

1.1 Key words

Dumping; South Africa; WTO; SADC; EU; Anti-Dumping Agreement; SADC Trade Protocol; Poultry.

1.2 Background and outline of the research problem

In current news, there are many articles being published about a crisis in the local poultry industry with it being unable to compete with cheaper imports, particularly from the European Union (EU) countries.¹ In an article in the Mercury newspaper for 27 February 2017, it was reported that a number of larger companies have started reducing production while other small-scale firms have exited the industry due to the imports.² This has resulted in job cuts in large poultry producers, such as Rainbow Chicken³, which is one of the biggest producers in South Africa.⁴ Of concern is that job losses for the industry is currently at a figure of over 3 500 with reports indicating that there will be more in the future.⁵ This will only increase the unemployment rate, which was at 26.5% for the last quarter of 2016.⁶ Further effects felt by Rainbow Chicken include a decline in profits of 21.9 percent for 2016 from 2015 and a 50 percent reduction in the production of the 'individually quick frozen (IQF) mixed portion' range.⁷ In addition, Rainbow has implemented a decrease in shift numbers at the Hammarsdale plant to achieve profitability again.⁸

¹ The information in this dissertation covers the period up to October 2017. K Crowley and T Seal 'Unfair game? SA chicken industry in crisis, blames EU for selling 'cheap' meat' *BizNews Online* 26 January 2017, available at <http://www.biznews.com/global-investing/2017/01/26/sa-chicken-industry-eu/>, accessed on 23 February 2017.

² S Mchunu 'Local poultry industry buckling from an oversupply of imports' *The Mercury, Business Report* 27 February 2017 at 13.

³ L Phillips 'Rainbow to Retrench 1350 poultry workers in KZN' *Farmer's Weekly* 20 January 2017 at 15.

⁴ 'Rainbow' available at <http://www.rclfoods.com/rainbowchicken>, accessed on 27 February 2017.

⁵ Mchunu (note 2 above; 13).

⁶ The employment rate is 26.5% as per the Quarterly Labour Force Survey done in the fourth quarter of 2016. 'Media release: Quarterly Labour Force Survey – QLFS Q4: 2016' *Statistics South Africa* 14 February 2017, available at <http://www.statssa.gov.za/?p=9561>, accessed on 16 March 2017.

⁷ Mchunu (note 2 above; 13).

⁸ G Kriel 'RCL Foods' financial results reflect impact of poultry imports' *Farmer's Weekly* 17 February 2017 at 16.

The poultry industry is an important one in South Africa for numerous reasons. Importantly, it is a major contributor to the country's food security as it is the most economical and the main source of animal protein for many South Africans.⁹ For such reason, it is the biggest contributor to the country's agricultural sector.¹⁰ Of interest, is the fact that the industry is part of a value chain and so its problems affect other sectors and producers.¹¹ This is evident in the poultry industry consuming 40 percent of the country's animal feed, with soya beans seeing almost all its local production being used in the manufacture of poultry feed.¹² Furthermore, a reduction or disappearance of the country's poultry industry will not only affect soya beans but also the maize industry.¹³ The underlying reasons for such problems facing poultry and its dependents thus need to be addressed to ensure the continued operation of these industries in the economy.

The major reason cited for the problems experienced in poultry is the increased imports over the last few years, mostly from the EU.¹⁴ It has been reported that during

⁹ T Davids and F Meyer 'Competitiveness of South African broiler production' (2016) 2(5) *Oilseeds focus* 22 and 'Evaluating the competitiveness of the South African broiler value chain' *Bureau for Food and Agricultural Policy and the National Agricultural Marketing Council* available at <http://www.economic.gov.za/entities-external-links/entities-reports-a-research/621-idc--poultry-project-report--dec-2016/download>, accessed on 24 May 2017 at 8 and 22 and L Dunn 'Importance of the poultry industry' (2014) 26(1) *AFMA Matrix* 56.

¹⁰ Dunn (note 9 above; 56).

¹¹ DW Boshoff 'SA Poultry sector and value chain partners negatively affected by government policies' (2017) 26(1) *AFMA Matrix* 3.

¹² Davids and Meyer (note 9 above; 22), Dunn (note 9 above; 56) and B Roosendaal 'The use of soybean meal in the South African poultry industry: Formulation and quality considerations' August 2011, available at <https://www.proteinresearch.net/poems/images/projects/0164/article/1-8c-1-9-1b-pp-roosendaal-b-aug2011.pdf>, accessed on 16 September 2017.

¹³ Dunn (note 9 above; 56).

¹⁴ In December 2014, a ban was imposed by South Africa on poultry imports from countries where there was an outbreak of 'avian influenza' which started in November 2014. The affected states included Canada, United Kingdom (UK), Germany and Netherlands. This resulted in a reduction of imports into South Africa from these states. In December 2016, an outbreak of 'highly pathogenic avian influenza' was reported to have broken out in numerous European states. This resulted in South Africa imposing temporary trade bans on poultry imports from Germany, France, Denmark, Netherlands, Poland and Hungary. Furthermore, an outbreak of avian influenza also occurred in South Africa in June 2017, resulting in bans being imposed by Zimbabwe, Botswana and Namibia on imports from South Africa. These factors will not be discussed in further detail due to a word limitation. I Hofmeyr 'Africa's chicken import challenge: production' (2015) 1(1) *FarmBiz* 40-41, 'SA bans chicken imports over bird flu' 10 December 2014, available at <https://www.iol.co.za/business-report/international/sa-bans-chicken-imports-over-bird-flu-1793732>, accessed on 21 August 2017, L Ensor 'Neighbours suspend imports of poultry from SA amid avian flu crisis' 27 June 2017, *Business Day* available at <https://www.businesslive.co.za/bd/world/africa/2017-06-27-namibia-suspends-imports-of-sa-poultry-amid-bird-flu-outbreak/>, accessed on 21 August 2017, Boshoff (note 11 above; 3), 'South African Poultry Meat Imports: Country Report June 2017' *South African Poultry Association* available at <https://www.sapoultry.co.za/pdf-statistics/country-report.pdf>, accessed on 8 September 2017 and T Kapuya 'What next for South Africa's poultry sector?' (2017) 3(3) *FarmBiz* 19.

the period of 2010 to 2015 imports increased by 90 percent from 240 000 to 457 000 tons per year.¹⁵ It is estimated that this will rise to a high of 530 000 tons.¹⁶ Furthermore, 90 percent of South Africa's poultry imports are comprised of 'mechanically deboned meat' and 'bone-in portions', with the latter accounting for the majority.¹⁷ The EU is the largest exporter of bone-in portions to South Africa, being responsible for 87 percent of the total imported amount.¹⁸ These imports, which enter South Africa duty free¹⁹, have been noted by Kapuya as being the 'most contentious product from a trade policy perspective'.²⁰ They do however continue to enter the South African market.²¹

These imports are satisfying the local demand for bone-in portions whereas in Europe there is a greater demand for breast meat.²² European producers can thus sell breast meat for a high price, allowing for other poultry pieces to be sold at 'competitive prices' in South Africa to meet the local demand.²³ In response to the calls by the industry and other stakeholders, the Department of Trade and Industry (DTI) put together an 'Action-focused Government Task Team' to formulate an approach to address the difficulties facing the industry.²⁴ Prior to this, a provisional safeguard duty of 13.9 percent was imposed on poultry imports from Europe by the International Trade Administration Commission (ITAC) of South Africa, responsible for such investigations

¹⁵ Davids and Meyer (note 9 above; 22).

¹⁶ Boshoff (note 11 above; 3).

¹⁷ Imports of bone-in portions account for 42 percent of all the poultry imports into South Africa. Kapuya (note 14 above; 18).

¹⁸ Brazil is responsible for the majority of the mechanically deboned meat imports, namely 87 percent thereof. Such figures were averages calculated over the period of 2013 to 2015. Kapuya (note 14 above; 18).

¹⁹ These products previously entered the country duty free under the Trade, Development and Cooperation Agreement (TDCA) between the EU and South Africa. They now enter duty free under the EPA between the same parties. These two agreements will be discussed further in chapter 4 of this dissertation. Kapuya (note 14 above; 18).

²⁰ Kapuya (note 14 above; 18).

²¹ Davids and Meyer (note 9 above; 25).

²² *Ibid.*

²³ *Ibid.*

²⁴ The team is comprised of representatives from various government departments and interested parties. This includes the Departments of Trade and Industry, Agriculture, Forestry and Fishing and Economic Development. Other parties involved are the Industrial Development Corporation, Poultry South Africa, leaders of the Food and Allied Workers Union and Poultry South Africa. 'Poultry task team making headway' *South African Government News Agency* 30 January 2017, available at <http://www.sanews.gov.za/business/poultry-task-team-making-headway>, accessed on 11 September 2017 and 'Government Committed to Resolve the Poultry Crises' *Department of Trade and Industry* 2 February 2017, available at <http://www.thedti.gov.za/editmedia.jsp?id=3946>, accessed on 28 February 2017.

and determinations.²⁵ In addition thereto, anti-dumping duties were also imposed on imports of bone-in portions originating from Germany, United Kingdom (UK) and Netherlands.²⁶ Another factor contributing to the problems in poultry is the drought which began in 2015, resulting in increased maize and soya prices thus reflecting in higher feed prices.²⁷ This further increases difficulties.²⁸

This situation requires clarity, particularly on South Africa's international trade obligations in relation to international anti-dumping laws and the EU.²⁹ The aim of the research undertaken is to analyse the current Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the Anti-Dumping Agreement or ADA)³⁰ to determine its shortcomings and possible improvements. This is to be undertaken in consideration of the recently concluded SADC-EU Economic Partnership Agreement (EPA)³¹. Such improvements must not only promote free trade but also protect and assist vulnerable domestic industries, such as poultry, in developing and least developed states (LDCs) of the Southern African Development Community (SADC)³², particularly South Africa. Recommendations formulated should be ones that the SADC members can take to the World Trade Organization (WTO) with the objective of encouraging positive change in the ADA.

²⁵ The nature and role of the ITAC will be discussed further in chapter 3 of this dissertation. Kapuya (note 14 above; 18), W Viljoen 'The ongoing chicken wars put into perspective' 1 February 2017, available at <https://www.tralac.org/discussions/article/11213-the-ongoing-chicken-wars-put-in-perspective.html>, accessed on 9 February 2017 and 'Trade Remedies' available at <http://www.itac.org.za/pages/services/trade-remedies>, accessed on 11 July 2017.

²⁶ These duties will apply from January to June of 2017. The investigation will be discussed in greater detail in chapter 4 of this dissertation. Kapuya (note 14 above; 19).

²⁷ E Fox 'Extreme drought persists across South Africa' *Aljazeera Online*, 17 January 2016 available at <http://www.aljazeera.com/news/2016/01/south-africa-drought-160117111204356.html>, accessed on 27 February 2017, Viljoen (note 25 above) and Boshoff (note 11 above; 3).

²⁸ Boshoff (note 11 above; 3).

²⁹ Mchunu (note 2 above; 13) and Kapuya (note 14 above; 18-19).

³⁰ 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994' available at https://www.wto.org/english/docs_e/legal_e/19-adp.pdf, accessed on 23 April 2017.

³¹ 'Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part' available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf, accessed on 15 February 2017.

³² The SADC members are South Africa, Botswana, Zimbabwe, Mozambique, Zambia, Namibia, Tanzania, Angola, Lesotho, Democratic Republic of Congo, Malawi, Swaziland, Mauritius, Madagascar, Seychelles and the Comoros, which is the newest SADC member. 'Member States' available at <http://www.sadc.int/member-states/>, accessed on 13 August 2017 and 'The Union of Comoros becomes the 16th SADC Member State' available at <http://www.sadc.int/news-events/news/union-comoros-becomes-16th-sadc-member-state/>, accessed on 29 August 2017.

1.3 Preliminary literature review and rationale for the study

1.3.1 Literature review

The ADA has come under much scrutiny over the years with various authors criticising it from numerous points of view. It has been described by Gupta and Choudhury as 'one of the most controversial issues in international trade'.³³ Dumping is defined in Article VI of the 1947 General Agreement on Tariffs and Trade (GATT) as being the state where the;

'products of one country are introduced into the commerce of another country at less than the normal value of the products'.³⁴

The ADA expands on Article VI by providing greater detail on items such as calculation of dumping.³⁵ This agreement is found in Annex 1A of the Agreement Establishing the WTO, 1994 (Marrakesh Agreement)³⁶.

The WTO's history has its origins in the GATT, which controlled world trade between 1948 and 1994.³⁷ During these years, regional organisations began to form, such as the Southern African Development and Co-ordination Conference (SADCC)³⁸ in 1980 which was replaced by the SADC in 1992.³⁹ Ukpe has stated that newly independent African states looked towards regional organisations as a means to achieve development on the continent post-independence.⁴⁰ Thereafter authors such as Thomas speak of the occurrences in Europe and North America in the 1990s as being the influence behind new attempts at regional integration amongst the Southern

³³ K Gupta and V Choudhury 'Anti Dumping and Developing Countries' (2011) 10 *Korea University Law Review* 117.

³⁴ 'The General Agreement on Tariffs and Trade' available at https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf, accessed on 13 February 2017.

³⁵ L Ostoni 'Anti-Dumping Circumvention in the EU and the US: Is there a future for Multilateral Provision Under the WTO?' (2005) 10(2) *Fordham Journal of Corporate and Financial Law* 407-438.

³⁶ The Agreement Establishing the World Trade Organization, 1994 is also known as the 'Marrakesh Agreement'. 'Agreement Establishing the World Trade Organization, 1994' available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed on 24 October 2017 and 'Marrakesh Agreement Establishing the World Trade Organization' available at https://www.wto.org/English/docs_e/legal_e/04-wto_e.htm, accessed on 24 October 2017.

³⁷ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' *World Trade Organization* available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed on 5 March 2017.

³⁸ M Holland 'South Africa, SADC, and the European Union: Matching Bilateral with Regional Policies' (1995) 33(2) *The Journal of Modern African Studies* 264.

³⁹ J Mapuva and L Muyengwa-Mapuva 'The SADC regional bloc: What challenges and prospects for regional integration?' (2014) 18 *Law, Democracy & Development* 24.

⁴⁰ AI Ukpe 'Will EPAs Foster the Integration of Africa into World Trade?' (2010) 54(2) *Journal of African Law* 214.

African states.⁴¹ Such events included the signing of the Treaty of Maastricht or Treaty on European Union, which established the European Union⁴², and the founding of the North American Free Trade Agreement (NAFTA).⁴³ Thomas also cited the political changes in South Africa, Angola and Mozambique as contributors to regional efforts in the 1990s.⁴⁴ Carim has stated that the movement towards regional integration stemmed from South Africa's realisation that its future and development is closely associated with its neighbours.⁴⁵ Most of these authors have observed the recent developments in Southern Africa, particularly surrounding the establishment of the SADC in 1992.⁴⁶ It is evident that the development of the regional organisation prior thereto, including its predecessor, has not been thoroughly investigated. Research of such developments in relation to the establishment of the multilateral trading system to determine whether a connection exists between the two is lacking. Such gaps will be addressed in chapter two of the dissertation.

The ADA has faced many criticisms especially since its increased use in recent times, which Prusa has associated with the rise in WTO membership.⁴⁷ In another article by Prusa it was stated that the ADA is misused as it is an 'extremely flexible and timely instrument', thus capable of wide interpretations.⁴⁸ Furthermore, such author also finds that dumping complainants often succeed having produced sparse amounts of evidence for investigation.⁴⁹ The ADA provisions have also been described as 'vague and ambiguous' by authors such as Lekfuangfu.⁵⁰ Writers, Gupta and Choudhury⁵¹, state that such characteristics are often taken advantage of by developing countries, with Tharakan regarding the measurement of the injury margin as being the frailest

⁴¹ RH Thomas 'The World Trade Organisation and Southern African trade relations' (1999) 3(1) *Law, Democracy and Development* 105.

⁴² 'Treaty of Maastricht on European Union' available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Axy0026>, accessed on 6 March 2017.

⁴³ Thomas (note 41 above; 105).

⁴⁴ Thomas (note 41 above; 105).

⁴⁵ X Carim 'Multilateral Trading, Regional Integration and the Southern African Development Community' (1997) 65(3) *South African Journal of Economics* 347.

⁴⁶ Ukpe (note 40 above; 214), Carim (note 45 above; 347), Holland (note 38 above; 264), Thomas (note 41 above; 105) and Mapuva and Muyengwa-Mapuva (note 39 above; 23-24).

⁴⁷ TJ Prusa, 'Anti-Dumping: A Growing Problem in International Trade' (2005) 28(5) *The World Economy* 697.

⁴⁸ TJ Prusa 'On the Spread and Impact of Anti-Dumping' (2001) 34 (3) *Canadian Journal of Economics* 593.

⁴⁹ *Ibid.*

⁵⁰ N Lekfuangfu 'Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective' (2009) 4(2) *Cambridge Student Law Review* 305.

⁵¹ Gupta and Choudhury (note 33 above; 117).

point in the anti-dumping structure.⁵² Writers have also criticised the basis of the determination of dumping, arguing that a below normal cost price does not always result in distortions in importing markets.⁵³ Barfield claimed that price variances could also be the result of various prevailing marketplace conditions.⁵⁴ This research resonates with the sentiments of other writers as noted by Barfield.⁵⁵ It has been argued that investigators need to consider that plausible explanations other than a dumping motive can exist for goods being imported at lower costs than in their domestic markets.⁵⁶

Proposed solutions to such issues raised include 'more balanced procedures' for the calculation of key aspects such as dumping and the margins.⁵⁷ Barfield maintains that a connection between the alleged market distortion and damaging dumping caused by the lower prices should be established by the applicants before duties are imposed.⁵⁸ While the authors have looked at the ADA specifically and noted various solutions to the associated problems, there is a lack of focus on the Agreement in relation to the SADC industries. This new perspective will be investigated further in the dissertation to provide constructive criticism and solutions for proposal by the SADC to the WTO.

Moreover, the EU's approach to trade is based on 'maximising internal development'.⁵⁹ According to Franicevic, such is accomplished through adoption of a 'multilateral liberalisation approach' to non-EU member policies and a 'regional integration approach' towards its interior trading plans.⁶⁰ Franicevic states that such internal policy has resulted in an influential amount of global trading authority being gained by it.⁶¹ The EU uses trade with other countries as a means to develop its own markets.⁶² This is made possible through regional organisations, which Holland states it encouraged

⁵² PKM Tharakan 'Is Anti-Dumping Here to Stay? (1999) 22(2) *The World Economy* 192.

⁵³ C Barfield 'Anti-dumping Reform: Time to Go Back to Basics' (2005) 28(5) *The World Economy* 727.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Due to word constraints, this issue will not be discussed further in this dissertation.

⁵⁷ WE James 'The Rise of Anti-dumping: Does Regionalism Promote Administered Protection? (2000) 14(2) *Asian-Pacific Economic Literature* 20.

⁵⁸ Barfield (note 53 above; 728).

⁵⁹ SV Franicevic 'Trade Relations between the European Union and South Africa' (2011) 7 *Croatian Yearbook of European Law and Policy* 203.

⁶⁰ *Ibid.*

⁶¹ *Ibid* 204.

⁶² *Ibid* 203.

and focused on after its own formation.⁶³ Against this backdrop, in a study by Issabekov and Suchecki it was found that 70 percent of the EU's anti-dumping proceedings initiated by it related to products where it no longer had an element of market leverage or 'comparative advantage' in or were failing to hold onto.⁶⁴ The literature reveals that the trading policies of the EU do inform its actions but the extent to which such views have been tested in relation to the SADC-EU EPA is yet to be explored.

In connection with the SADC, Hurt has argued that concluding an EPA with the EU will 'lock in the neoliberal development model' thus assisting the EU to ascertain and assert dominance in the region.⁶⁵ This argument was made for two reasons, first that such model will decrease the freedom of states to conclude policies of their choice and that it interferes with the attainment of regional integration as economies cannot be diversified.⁶⁶ It appears as though the relationship between the EU and SADC has been observed from the perspective of the trade policies that each organisation possesses but not from the perspective of the ADA. The arguments proffered by such authors will inform the analysis of the effect of the ADA on this relationship.

Further, the literature examined indicates that there are gaps in the knowledge, most notably in relation to the SADC and the SADC-EU EPA. This dissertation will look at such gaps and attempt to draw associations not previously considered, such as between the formation of the multilateral trading arrangement and regional communities. It will thus form an integral part of the present available knowledge.

1.3.2 Rationale for the study

An interest in the topic was sparked upon observation of the events unfolding in the newspapers and after hearing talk about poultry that was to be imported from the United States of America (USA) under the African Growth and Opportunity Act (AGOA). Upon further research, it was discovered that poultry imports from the EU were of a greater level and thus concern when compared with those from the USA. A great interest in the matter has thus developed and I intend to pursue it further in order

⁶³ Holland (note 38 above; 264).

⁶⁴ N Issabekov and NI Suchecki 'Analysis of the EU Anti-dumping Policy in Terms of the Revealed Comparative Advantages' (2016) 19(5) *Comparative Economic Research* 59.

⁶⁵ SR Hurt 'The EU-SADC Economic Partnership Agreement Negotiations: 'locking in' the neoliberal development model in southern Africa' (2012) 33(3) *Third World Quarterly* 496.

⁶⁶ *Ibid.*

to determine a way forward for all states concerned. Such research is important given that workers in the sector are currently being retrenched, thereby increasing South Africa's unemployment rate.⁶⁷ Retrenchments prevent people from actively participating in the economy and promoting its growth.⁶⁸ This is true not only for South Africa but other SADC members too as such occurrences negatively affect growth and development in the region.⁶⁹ This dissertation will shed light on the anti-dumping laws, relations with the EU and make recommendations as to how the ADA as a whole can be improved while allowing SADC states to protect their vulnerable industries.

1.4 Statement of purpose

The purpose of this study is to analyse the ADA with particular focus on its implications on the SADC-EU relationship and to formulate recommendations for its improvement with emphasis on the SADC countries' poultry sectors, particularly that of South Africa.

1.5 Research questions

- i. How has the development of the multilateral trading system (since the GATT) affected the proliferation of regional trade organisations with particular focus on the SADC members?
- ii. To what extent has the implementation of the ADA affected the particular poultry industries within the SADC, with specific focus on South Africa?
- iii. To what extent has anti-dumping practices affected the SADC-EU relationship, in lieu of the current talks on the formation of EPAs?

⁶⁷ 'Media release: Quarterly Labour Force Survey – QLFS Q4: 2016' (note 6 above) and Mchunu (note 2 above; 13).

⁶⁸ 'Articles: Unemployment crisis and the increase in retrenchments' 5 August 2016, available at <https://www.bdo.co.za/en-za/insights/2016/business/unemployment-crisis-and-the-increase-in-retrenchment>, accessed on 29 March 2017 and CM Marumoagae 'The Effect of the Global Economic Recession on the South African Labour Market' (2014) 5(23) *Mediterranean Journal of Social Sciences* 386.

⁶⁹ S Tsiko 'Southern Africa: Unemployment: One of SADC's Biggest Challenges' 21 October 2005, available at <http://allafrica.com/stories/200510210342.html>, accessed on 29 March 2017.

1.6 Principal theories underlying the study

There are numerous theories influencing the research but the main one underlying it is legal positivism in respect of international trade and economic law.⁷⁰ This theory is centred on the organ responsible for making the law, such as a Parliament.⁷¹ The law is observed and scrutinised from both a 'descriptive' and 'morally neutral' manner.⁷² If a law is produced by following the correct steps, then it can be regarded as genuine even if it is unjust.⁷³ A person's rights are thus determined with reference to the laws that govern them.⁷⁴

Positivism advocates for the criticism of law to be done by scrutinising those institutions responsible for producing and imposing it.⁷⁵ In terms of this theory, there are distinct markers to determine whether a law is indeed a law.⁷⁶ The legal validity of all laws produced is found in the 'Rule of Recognition' which is regarded as being the criterion for validity.⁷⁷

This research will be centred on scrutinising and critiquing the ADA from various perspectives. The validity and morality of the law will not be questioned. The propositions for the improvement of the ADA will primarily be directed towards the WTO, which is responsible for the formulation of law on a multilateral level.⁷⁸ This approach is in line with the Positivist Theory.

There are a number of economic theories that will be considered throughout the dissertation. Mercantilism is a theory that was developed in the 16 and 17th centuries and was centred on the idea that the influence of a state could only be enlarged upon accrual of national wealth, of which there was a certain amount.⁷⁹ Such was attainable through the gathering of 'precious metals' and a rise in exportation of goods

⁷⁰ All these theories mentioned will only be considered to a limited extent in this dissertation.

⁷¹ 'Legal Positivism vs. Natural Law Theory' available at <http://web.nmsu.edu/~dscoccia/376web/376lpaust.pdf>, accessed on 27 February 2017.

⁷² A Tutt 'The Improbability of Positivism (2014) 34(2) *Pace Law Review* 567.

⁷³ 'Legal Positivism vs. Natural Law Theory' (note 71 above).

⁷⁴ *Ibid.*

⁷⁵ Tutt (note 72 above; 567).

⁷⁶ *Ibid.*

⁷⁷ *Ibid* 568.

⁷⁸ 'The WTO' available at https://www.wto.org/english/thewto_e/thewto_e.htm, accessed on 19 November 2017.

⁷⁹ GR Steele 'The Money Economy: Mercantilism, Classical Economics and Keynes' General Theory' (1998) 57(4) *American Journal of Economics and Sociology* 486 and 'Classical Theories of International Trade, International Economics, Course 2' available at http://cis01.central.ucv.ro/iba/files/int_ec2.pdf, accessed on 28 February 2017.

produced.⁸⁰ This resulted in the overproduction of certain products beyond the demands of the consumers, leading to depressions in economies.⁸¹

Another notable theory, the Absolute Advantage Theory, was proposed by Adam Smith in his publication entitled 'Wealth of Nations' in 1776.⁸² It was argued that a nation can only profit from its exports if the needs of its people are satisfied by imports as a nation does not have to manufacture all the required goods by itself.⁸³ He went on further to say that they should rather produce those goods for export in which they have an 'absolute advantage'⁸⁴, namely that they are the best at producing.⁸⁵ Conversely, in terms of the Comparative Advantage Theory, developed by David Ricardo, a country ought to produce those goods that it can do so cheaper although they do not have to be the best at it.⁸⁶

The dissertation will also consider, to a limited extent, the free trade and protectionist theories which have developed from the above basic theories underlying international trade law. The free trade theory encourages specialisation in the production of goods that the country can best produce while it trades with others for the remaining goods required.⁸⁷ Such trade between countries must not be impeded by quotas, trade barriers or other methods that prevent the free flow of trade.⁸⁸ It is believed that the implementation of this theory will not only increase the standard of living for many but also provide the opportunity to purchase goods and services that would otherwise not have been possible.⁸⁹ On the contrary, Protectionism involves the use of policies by

⁸⁰ 'Classical Theories of International Trade, International Economics, Course 2' (note 79 above).

⁸¹ Steele (note 79 above; 487).

⁸² 'Classical Theories of International Trade, International Economics, Course 2' (note 79 above).

⁸³ *Ibid.*

⁸⁴ 'Comparative Advantage' *Economics Online* available at http://www.economicsonline.co.uk/Global_economics/Comparative_advantage.html, accessed on 28 February 2017.

⁸⁵ 'Comparative Advantage' *Library of Economics and Liberty* available at <http://www.econlib.org/library/Topics/Details/comparativeadvantage.html>, accessed on 28 February 2017.

⁸⁶ 'Comparative Advantage' *Economics Online* (note 84 above) and 'Comparative Advantage' *Library of Economics and Liberty* (note 85 above).

⁸⁷ S Tiefenbrun 'Free Trade and Protectionism: The Semiotics of Seattle' (2000) 17(2) *Journal of International and Comparative Law* 272.

⁸⁸ B Farmer 'Free Trade in Theory and Practice' 8 September 2011, available at <https://www.thenewamerican.com/economy/commentary/item/4069-free-trade-in-theory-and-practice>, accessed on 28 February 2017.

⁸⁹ Tiefenbrun (note 87 above; 272).

governments aimed at limiting its international trade to protect their local businesses from outside opposition in order to maintain 'national security'.⁹⁰

1.7 Research methodology

In this thesis, desktop research will principally be undertaken. A legal analysis focused on the WTO's ADA will be completed. Other primary sources to be considered include the SADC-EU EPA, the Protocol on Trade in the Southern African Development Community Region 1996 (SADC Trade Protocol)⁹¹ and Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union L 179/21 (EU Anti-Dumping Regulations).⁹² Furthermore, the founding treaties of the SADC, namely the Treaty of the Southern African Development Community, 1992 (SADC Treaty)⁹³ and the Treaty on the Functioning of the European Union 2012/C 326/01⁹⁴ will also be considered in the dissertation. The secondary sources to be consulted include a wide range of journal articles, textbooks, working papers, website documents, trade briefs, newspaper and magazine articles. Due to the research being desktop based, there will be no ethical concerns related thereto.

1.8 Structure of dissertation

Chapter one will comprise of the research proposal outlining the problem as well as the questions to be answered in order to address the main problem highlighted.

Chapter two will be centred on the question of how the development of the multilateral trading system has affected the SADC members.

⁹⁰ 'Protectionism' available at <http://www.investopedia.com/terms/p/protectionism.asp>, accessed on 28 February 2017 and Tiefenbrun (note 87 above; 272).

⁹¹ 'Protocol on Trade in the Southern African Development Community (SADC) Region, 1996' available at <http://webapps.daff.gov.za/AmisAdmin/upload/The%20SADC%20PROTOCOL%20annex%20i%20to%20v.pdf>, accessed on 10 June 2017.

⁹² 'Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification)' available at http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154702.en.L176-2016.pdf, accessed on 29 June 2017, T Voon *Cultural Products and the World Trade Organization* (2010) 441 and PFJ Macrory, AE Appleton and MG Plummer (eds) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Vol 1: 441.

⁹³ 'Treaty of the Southern African Development Community, 1992 (SADC Treaty)' available at http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf, accessed on 26 April 2017.

⁹⁴ 'The Treaty on the Functioning of the European Union' available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>, accessed on 11 June 2017.

Chapter three will explore the extent to which the ADA has affected the poultry industries within the SADC EPA group.⁹⁵

Chapter four will determine the extent to which the anti-dumping practices have affected the SADC relationship with the EU in light of the current talks on the formation of EPAs.

The final chapter, chapter 5, will contain the findings of the research and draw conclusions and recommendations from it in order to answer each sub question and finally the main research question.

1.9 Concluding remarks

The aim and objective of this dissertation is to analyse the ADA, its implementation by the SADC and EU and the impact thereof on their relationship and SADC states' poultry sectors, primarily South Africa. The conclusion of the EPA will also be considered in the assessment of the status of such relationship and the suitable recommendations formulated thereafter.

⁹⁵ Members of this group include South Africa, Botswana, Namibia, Lesotho, Swaziland and Mozambique. Angola has the option to join. 'Southern African Development Community (SADC)' available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>, accessed on 15 July 2017. See Annexure A for further details on all the SADC members.

Chapter 2:

THE EFFECT OF THE MULTILATERAL TRADING SYSTEM ON THE DEVELOPMENT OF THE SADC

2.1 Introduction

In this chapter, the history of the world's multilateral trading system will be traced back to the GATT, the Bretton Woods Institutions especially the International Trading Organization (ITO), the WTO and the rounds of negotiations engaged in over this period. This will be undertaken to determine how the development of the multilateral trading system has affected the emergence of regional organisations in Africa, with particular focus directed towards the SADC. In relation thereto, advances in the area of anti-dumping within the multilateral stage over the years will also be addressed.

2.2 Historical background of the ITO, GATT and WTO

2.2.1 The development and demise of the ITO

On 21 November 1947, the United Nations (UN) Conference on Trade and Employment (Havana Conference) commenced in Havana, Cuba.⁹⁶ It saw the participation of over 50 countries, where the aim was to create the ITO.⁹⁷ From this conference, the Havana Charter for an International Trade Organization emerged and was subsequently approved by the parties.⁹⁸ They hereby promised to abide by a collection of rules governing international trade.⁹⁹ This was the result of a belief that the existence of such rules would help instil 'stability and well-being' into the trading system, being a necessity for the existence and persistence of nonviolent relations amongst states.¹⁰⁰

⁹⁶ TN Srinivasan 'Global Trading System: Decline of Nondiscrimination and Rise of Preferential Trade Arrangement and Agreements' (2010) 46(2) *Stanford Journal of International Law* 200 and 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

⁹⁷ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

⁹⁸ 'United Nations Conference on Trade and Employment, The Havana Charter for An International Trade Organization' available at https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf, accessed on 21 April 2017, PW Bidwell and W Diebold 'The United States and the International Trade Organization' (1949) 27 *International Conciliation* 190 and Srinivasan (note 96 above; 200).

⁹⁹ Bidwell and Diebold (note 98 above; 189).

¹⁰⁰ W Diebold 'Reflections on the International Trade Organization' (1994) 14(2) *Northern Illinois University Law Review* 189.

The ITO was meant to be the third component of the 'Bretton Woods Institutions' and a 'specialized agency of the United Nations'.¹⁰¹ The other Bretton Woods Institutions established at a conference held in Bretton Woods, USA, in 1944, were the International Monetary Fund (IMF) and World Bank (WB).¹⁰² The ITO was formulated with the aim of regulating international trade, with the GATT functioning within it as the rules controlling the trading policy in the ITO's Charter.¹⁰³

The functions of the ITO included promoting and enabling talks between contracting parties, undertaking research and advancing trade and investment agreements while gathering data relating to global trade, tariffs and business' operations.¹⁰⁴ Four bodies were developed to carry out such functions, namely the Conference, Executive Board, Commissions and administrative staff.¹⁰⁵ However, despite the progress made in formulating this organisation, it did not materialise due to opposition by the USA.¹⁰⁶

The Congress of the USA did not ratify the Charter in the years following its creation, thereby effectively ending its life.¹⁰⁷ Its concerns related to the large amounts of 'regulation and planning' that would accompany the complete implementation of its provisions and the inadequate protection of 'private foreign investment'.¹⁰⁸ Its main objection was that it would no longer have control over nor be able to determine its foreign trade and resource advancement as such power would be held by the ITO.¹⁰⁹ Additionally, its apprehensions were also premised on the fact that it would not have possessed a degree of voting influence allowing it to guard its 'interests'.¹¹⁰ This is because each member state would only have been allocated one vote and no veto rights in the Conference, which was to be the policy formulating body of the ITO.¹¹¹

¹⁰¹ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

¹⁰² 'What are the Bretton Woods Institutions?' available at <http://www.brettonwoodsproject.org/2005/08/art-320747/>, accessed on 27 April 2017 and 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

¹⁰³ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above) and Srinivasan (note 96 above; 200 and 202).

¹⁰⁴ Article 72 of the Havana Charter for an International Trade Organization, 1948 and Bidwell and Diebold (note 98 above; 230).

¹⁰⁵ Bidwell and Diebold (note 98 above; 229).

¹⁰⁶ EL Symons 'The Kennedy Round GATT Anti-Dumping Code' (1968) 29(3) *University of Pittsburgh Law Review* 487.

¹⁰⁷ *Ibid.*

¹⁰⁸ Bidwell and Diebold (note 98 above; 208).

¹⁰⁹ *Ibid* 227.

¹¹⁰ *Ibid* 231.

¹¹¹ *Ibid* 229 and 231.

Despite this setback, states persisted with the aim of founding such an institution.¹¹² There was an additional attempt at establishing one similar to the ITO a few years later when the Agreement on the Organization for Trade Cooperation was put forth in 1955.¹¹³ Despite it being 'less ambitious than the ITO', it was again not accepted by the Congress of the USA.¹¹⁴ Due to this, the GATT had to continue to exist by itself thereafter.¹¹⁵

2.2.2 The GATT

As alluded to above, the GATT was an international agreement which came into effect on 1 January 1948 with 23 contracting parties.¹¹⁶ It contained the rules by which international trade would be conducted, with the most important ones being the National Treatment and Most Favoured Nation (MFN) principles.¹¹⁷ These were aimed at avoiding events that occurred between the World Wars, such as the Great Depression, through the creation of a trade system grounded in rules and non-discrimination between states.¹¹⁸ Its development was also facilitated by the realisation that liberalisation of trade would assist in post-World War II 'recovery and reconstruction'.¹¹⁹ Of interest is that the GATT was originally intended to be provisional, pending approval of the Havana Charter and establishment of the ITO.¹²⁰ In anticipation of the ITO's development, the GATT did not encompass extensive means by which it could be executed.¹²¹ This however did not seem to deter states from relying upon it in the following years.¹²²

¹¹² Srinivasan (note 96 above; 202) and Symons (note 106 above; 487).

¹¹³ Srinivasan (note 96 above; 202) and Symons (note 106 above; 487).

¹¹⁴ Srinivasan (note 96 above; 202) and Symons (note 106 above; 487).

¹¹⁵ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

¹¹⁶ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above), Srinivasan (note 96 above; 202) and Symons (note 106 above; 486).

¹¹⁷ These principles are found in Articles I and III respectively of the GATT. 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above) and 'The WTO and GATT, a Principled History' available at https://www.brookings.edu/wp-content/uploads/2016/07/selfenforcingtrade_chapter.pdf, accessed on 21 April 2017.

¹¹⁸ 'The Great Depression' available at <http://www.history.com/topics/great-depression>, accessed on 21 April 2017 and Srinivasan (note 96 above; 200).

¹¹⁹ Srinivasan (note 96 above; 201).

¹²⁰ Symons (note 106 above; 486).

¹²¹ G Bronz 'An International Trade Organization: The Second Attempt' (1956) 69(3) *Harvard Law Review* 476.

¹²² 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

2.2.3 The GATT years and rounds of negotiations

This temporary agreement, the GATT, went on to regulate global trade from 1948 through the provision of rules for 47 years.¹²³ It was ratified indefinitely by consent following the failure of the US to adopt its Charter.¹²⁴ Just like the ITO, the GATT itself also promoted the principles of identical treatment, 'reciprocity' and 'multilateralism'.¹²⁵ These would be incorporated and promoted during the eight rounds of negotiations that took place over the years up till 1994.¹²⁶

The first five rounds of the GATT negotiations, from 1947 to 1961, focused solely on tariff decreases.¹²⁷ The initial round saw 45 000 concessions in tariffs being agreed upon, affecting trade to the approximate value of US\$10 billion.¹²⁸ In the rounds subsequent to 1961, other topics were incorporated into the agendas.¹²⁹ Issues such as development and anti-dumping were discussed in the Kennedy Round lasting from 1964 till 1967.¹³⁰ The Tokyo Round, which ran from 1973 to 1979, featured discussions on non-tariff barriers with agreements in this respect being passed by the parties.¹³¹ These agreements were only accepted by a minor number of developing countries though.¹³² The final round, known as the Uruguay Round that ran from 1986 to 1994, brought great changes most notably the establishment of the WTO through Article I of the Marrakesh Agreement.¹³³ This Agreement included the GATT of 1947, thus making the WTO the latter's administrator.¹³⁴

The WTO is premised on the principles of members not discriminating against one another in relation to products, the opening up of trade and ensuring certainty,

¹²³ *Ibid.*

¹²⁴ Symons (note 106 above; 487).

¹²⁵ Diebold (note 100 above; 335-336).

¹²⁶ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

¹²⁷ *Ibid.*

¹²⁸ Such concessions took effect from 30 June 1948 in terms of the 'Protocol of Provisional Application'. *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Non-tariff barriers are hinderances to international trade in forms other than trade tariffs and includes but is not limited to 'import quotas, subsidies, customs delays'. 'Non-tariff Barriers' available at <http://www.sadc.int/themes/economic-development/trade/non-tariff-barriers/>, accessed on 23 October 2017 and 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

¹³² 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

¹³³ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above) and Ukpe (note 40 above; 212).

¹³⁴ Annex 1A of the Marrakesh Agreement, J Dugard *International Law: A South African Perspective* 4 ed (2011) 444 and MJ Trebilcock and R Howse *The Regulation of International Trade* 2 ed (1999) 36.

foreseeability and prioritisation of the safeguarding of the environment¹³⁵. Furthermore, the WTO aims to assist developing countries in their efforts to integrate into the global system.¹³⁶ Its main functions include determining disputes relating to trade, facilitating negotiations on trade matters and supervising the implementation of WTO Agreements.¹³⁷

2.2.4 Successes of the GATT

The GATT enjoyed many achievements over its years of implementation. Most notably was its contribution to the reduction of trade barriers.¹³⁸ Such success in the 1970s and 1980s was however noted to have culminated into the use of various forms of protection by states for their industries, such as subsidies for agriculture.¹³⁹ Despite this, tariff reductions helped increase growth rates of countries as seen in the 1950s and 1960s where their average growth was eight percent.¹⁴⁰ As trade became more liberalised over the years and WTO membership increased, so authors have associated this with increased use of anti-dumping measures by states.¹⁴¹

2.3 Development of anti-dumping laws over the years

2.3.1 Reasons for anti-dumping laws in multilateral trading system

Currently, dumping is defined in article 2.1 of the ADA¹⁴², which regulates dumping alongside Article VI of the GATT.¹⁴³ The main reasons for its presence in our global trading system today is the recognition that dumping has the potential to alter 'market fundamentals', create unfair trade and competition and confer damaging results on the

¹³⁵ 'Understanding the WTO, What we stand for' available at https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm, accessed on 23 April 2017.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Srinivasan (note 96 above; 202).

¹³⁹ 'Understanding the WTO, What we stand for' (note 135 above).

¹⁴⁰ *Ibid.*

¹⁴¹ S Sudsawasd 'Tariff Liberalization and the Rise of Anti-dumping Use: Empirical Evidence from Across World Regions' (2012) 26(1) *International Trade Journal* 6 and Prusa (note 47 above; 698).

¹⁴² Article 2.1 of the ADA defines dumping as the situation where a product is 'introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'.

¹⁴³ 'Anti-dumping, subsidies, safeguards: contingencies, etc' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm, accessed on 23 April 2017 and Ostoni (note 35 above; 408).

public, local producers and governments.¹⁴⁴ One can argue that this is contrary to the main objectives of the WTO.¹⁴⁵

As such, Article VI of the 1947 GATT saw the inclusion of the anti-dumping trade remedy for the first time in an international agreement although initially its insertion was not planned.¹⁴⁶ Leading up to such time, eight countries around the world had already incorporated anti-dumping rules into their legal frameworks.¹⁴⁷ The intention behind its eventual inclusion in the GATT was to provide guidance on the response that states should take to dumping.¹⁴⁸ This article gave states the right to levy anti-dumping duties against another.¹⁴⁹ They were only required to apply this article to the greatest degree where it did not conflict with their own anti-dumping laws.¹⁵⁰ Pangratis and Vermulst thus argued that contracting parties who had such laws in place were favoured as they could avoid applying Article VI, which was viewed as being stricter.¹⁵¹ However, over the following GATT negotiation rounds attempts were made to further modify it in response to concerns raised.¹⁵²

2.3.2 Anti-dumping Code of the Kennedy Round

Interestingly, in the Kennedy Round of the GATT negotiations, the 1967 Agreement on the Implementation of Article VI (1967 Code) was formulated and became effective

¹⁴⁴ L Ndlovu 'South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy' (2013) 28(2) *Southern African Public Law* 283 and L Ndlovu 'An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's dumping and anti-dumping Law' (2010) 5(1) *Journal of International Commercial Law and Technology* 31.

¹⁴⁵ Its importance was recognised and introduced into legislation by countries as early as 1904 as in Canada and on the international scale in 1947. AV Deardorff and RM Stern 'A Centennial of Antidumping Legislation and Implementation: Introduction and Overview' available at <http://fordschool.umich.edu/rsie/workingpapers/Papers526-550/r538.pdf>, accessed on 23 April 2017 and N Joubert 'The Reform of South Africa's Anti-Dumping Regime' available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm, accessed on 22 February 2017.

¹⁴⁶ Joubert (note 145 above) and Lekfuangfu (note 50 above; 304).

¹⁴⁷ These countries were Canada, Australia, USA, South Africa, Japan, New Zealand, France and United Kingdom. Prusa (note 47 above; 685).

¹⁴⁸ Lekfuangfu (note 50 above; 304).

¹⁴⁹ Symons (note 106 above; 489).

¹⁵⁰ A Pangratis and E Vermulst 'Injury in Anti-Dumping Proceedings, The Need to Look Beyond the Uruguay Round Results' (1994) 28(5) *Journal of World Trade* 64.

¹⁵¹ *Ibid.*

¹⁵² Lekfuangfu (note 50 above; 305).

on 1 July 1968.¹⁵³ States viewed it as an expansion to the Article.¹⁵⁴ This development was necessary to address concerns that the Article was being used by states as a means to protect their industries and trade.¹⁵⁵ Additionally, its provisions were being subjected to varied interpretations and applications.¹⁵⁶ This resulted in contracting parties complaining that industries were unable to gain access to markets, such as that of the USA, on a fair and economical basis.¹⁵⁷ Member states were thus calling for an extension to Article VI, which would include definitions of key terms such as 'industry'.¹⁵⁸ More so, parties wanted procedures with considerations that had to be utilised by states in anti-dumping matters in the hope that it would bring predictability and fairness to the area.¹⁵⁹

As such, the Code addressed many issues relating to Article VI.¹⁶⁰ In its preamble, the commitment to providing an interpretation for the Article and rules necessary for its implementation to achieve 'certainty' and 'greater uniformity' were highlighted.¹⁶¹ Key terms, such as 'industry' and 'like product', were defined in articles 4(a) and 2(b) respectively.¹⁶² Furthermore, concerns relating to procedures for its implementation were addressed as evident in article 10(a) which required an initial finding of both dumping and injury before provisional duties could be imposed.¹⁶³ Article 11 levied limitations on the use of retrospective duties while article 6 introduced rules relating to evidence and confidentiality.¹⁶⁴ Importantly, article 3(c) incorporated the requirement of a causal link between dumping and injury having to be established before a duty

¹⁵³ 'Agreement on Article VI of GATT' available at <http://www.antidumpinglaws.com/content.php?id=Agreement%20on%20Article>, accessed on 24 April 2017, Joubert (note 145 above), Trebilcock and Howse (note 134 above; 167), M Trebilcock, R Howse and A Eliason *The Regulation of International Trade* 4 ed (2013) 334, P Gay 'Unveiling Protectionism: Anti-Dumping, the GATT, and Suggestions for Reform' (1997) 6 *Dalhousie Journal of Legal Studies* 54 and 'Article VI Anti-Dumping and Countervailing Duties' available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art6_e.pdf, accessed on 23 April 2017 at 222.

¹⁵⁴ Pangratis and Vermulst (note 150 above; 66-67).

¹⁵⁵ Lekfuangfu (note 50 above; 305).

¹⁵⁶ Symons (note 106 above; 489).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid* 490.

¹⁶⁰ Trebilcock, Howse and Eliason (note 153 above; 334).

¹⁶¹ 'Article VI Anti-Dumping and Countervailing Duties' (note 153 above; 252), Pangratis and Vermulst (note 150 above; 67) and Preamble to the 1967 Code.

¹⁶² Trebilcock, Howse and Eliason (note 153 above; 334-335) and Articles 2(b) and 4(a) of the 1967 Code.

¹⁶³ Trebilcock, Howse and Eliason (note 153 above; 334).

¹⁶⁴ *Ibid.*

could be imposed.¹⁶⁵ The Code required dumping to have been ‘demonstrably the principal cause of material injury or threat of material injury to a domestic industry’.¹⁶⁶ This result also had to be considered in light of the other factors which contributed to the injury being felt.¹⁶⁷ Considering these inclusions, positive responses were yielded from states.¹⁶⁸

This Code was regarded as a success in numerous respects.¹⁶⁹ First, it was seen as encouraging fair competition and thus increases in trade.¹⁷⁰ This was due to the coordination between the states’ anti-dumping legislation and the procedures developed at international level, which would ensure consistency in application of such law.¹⁷¹ Secondly, it was viewed as an indication that non-tariff barriers in trade were going to be removed in the future.¹⁷² Anti-dumping was regarded as a non-tariff barrier during such time.¹⁷³ Despite these achievements, concerns arose over the following years.¹⁷⁴

2.3.3 Anti-dumping Code of the Tokyo Round

Prior to the next round of the GATT negotiations, the Tokyo Round, issues developed around the implementation of the 1967 Code.¹⁷⁵ These arose from the commitment made by signatories to ensure that their national laws reflected the Code’s requirements.¹⁷⁶ The Congress of the USA opposed this, in particular to altering its laws and reducing the authority and discretion enjoyed by its local administering authorities.¹⁷⁷ The European Community (EC) stated that the United States Tariff Commission was not considering the 1967 Code in the application of their Antidumping

¹⁶⁵ Trebilcock and Howse (note 134 above; 168), Trebilcock, Howse and Eliason (note 153 above; 335) and Pangratis and Vermulst (note 150 above; 68).

¹⁶⁶ Article 3(a) of the 1967 Code. ‘Antidumping act of 1921 and the International Dumping Code, Consistent or Not? A Critique by the Staff’ available at <https://www.finance.senate.gov/imo/media/doc/PrtAnti.pdf>, accessed on 24 April 2017, Trebilcock, Howse and Eliason (note 153 above; 335) and Pangratis and Vermulst (note 150 above; 68).

¹⁶⁷ Pangratis and Vermulst (note 150 above; 70).

¹⁶⁸ Symons (note 106 above; 514).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Pangratis and Vermulst (note 150 above; 66).

¹⁷⁴ Trebilcock, Howse and Eliason (note 153 above; 335).

¹⁷⁵ ‘Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh’ (note 37 above) and Trebilcock, Howse and Eliason (note 153 above; 335).

¹⁷⁶ Trebilcock, Howse and Eliason (note 153 above; 335).

¹⁷⁷ *Ibid.*

Act of 1921.¹⁷⁸ As the EC sought compliance by the USA, they insisted on the 1967 Code being readdressed during the next round.¹⁷⁹ Furthermore, it also wanted its concerns relating to the causation requirement of that Code to be addressed, namely that it was too strict, thereby reducing 'administrative discretion'.¹⁸⁰

Thus, in the Tokyo Round of the GATT negotiations two agreements relating to Article VI were formulated and came into existence on 1 January 1980.¹⁸¹ These were the 1979 Agreement on Implementation of Article VI (1979 Code) and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII (the Subsidies Code).¹⁸² The latter dealt primarily with the application of countervailing duties and subsidies in an attempt to decrease non-tariff trade barriers.¹⁸³ Due to the Subsidies Code, and the fact that similarities existed between countervailing duties and dumping in relation to procedure and injury determination, changes were to be made to the 1967 Code to make it compliant with the former.¹⁸⁴

Many variations to the Agreement resulted from this Round, most notably in areas of injury calculations and the causal link required between dumping and injury.¹⁸⁵ For injury, the necessities for determination were altered to require instead that 'dumped products are, through the effects of dumping, causing injury'.¹⁸⁶ At the same time, it was required that additional factors, also causing injury, were not to be accounted for in determining injury produced by dumping.¹⁸⁷ This was criticised for being in line with

¹⁷⁸ Pangratis and Vermulst (note 150 above; 69), Trebilcock and Howse (note 134 above; 168) and 'The Antidumping act of 1921 and the International Dumping Code, Consistent or Not? A Critique by the Staff' (note 166 above).

¹⁷⁹ Trebilcock, Howse and Eliason (note 153 above; 335).

¹⁸⁰ Pangratis and Vermulst (note 150 above; 69).

¹⁸¹ 'Article VI Anti-Dumping and Countervailing Duties' (note 153 above; 222).

¹⁸² 'Agreement on Implementation of Article VI of the General Agreement On Tariffs And Trade' available at https://www.wto.org/english/docs_e/legal_e/tokyo_adp_e.pdf, accessed on 24 October 2017, 'Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade' available at https://www.wto.org/english/docs_e/legal_e/tokyo_scm_e.pdf, accessed on 24 October 2017, 'Article VI Anti-Dumping and Countervailing Duties' (note 153 above; 222) and Pangratis and Vermulst (note 150 above; 69).

¹⁸³ Preamble to the Subsidies Code and 'Difference between Antidumping and Countervailing Duties' 23 March 2015, available at <http://www.customsinfo.com/industry-blog/difference-between-antidumping-and-countervailing-duties>, accessed on 24 April 2017.

¹⁸⁴ 'Article VI Anti-Dumping and Countervailing Duties' (note 153 above; 252) and Pangratis and Vermulst (note 150 above; 69).

¹⁸⁵ Trebilcock, Howse and Eliason (note 153 above; 335).

¹⁸⁶ Article 3 of the 1979 Code, Pangratis and Vermulst (note 150 above; 70) and Trebilcock and Howse (note 134 above; 168).

¹⁸⁷ Article 3 of the 1979 Code, Pangratis and Vermulst (note 150 above; 70) and Trebilcock, Howse and Eliason (note 153 above; 335).

the USA's existent position and rendering the calculation of injury not as demanding.¹⁸⁸ Pangratis and Vermulst argued that this, along with the change in the definition of 'regional industry', resulted in a 'more protectionist approach to anti-dumping measures' being adopted.¹⁸⁹

Another significant change in the 1979 Code was the introduction of provisions which took cognisance of developing countries' needs.¹⁹⁰ Article 13 required members to consider using alternative solutions contemplated by the Code before implementing and enforcing anti-dumping duties against developing ones.¹⁹¹ This had to be adhered to especially when implementation of duties would affect the 'essential interests of developing countries'.¹⁹² In their research, Trebilcock and Howse highlighted that this provision had at that time not found its way into the national anti-dumping laws of the developed nations, which would have been concerning for developing states.¹⁹³

2.3.4 The ADA of the Uruguay Round

Noting the tense situation in this area, proposals for changes to the 1979 Code were raised at the initiation of the Uruguay Round of negotiations.¹⁹⁴ This was due to various issues, such as its 'incompleteness' and 'ambiguities', which according to Trebilcock and Howse resulted in states having varied 'antidumping practices'.¹⁹⁵ When negotiations began, it was characterised by opposing demands of developed and developing states.¹⁹⁶ While developed ones called for flexibility in the anti-dumping laws, developing ones wanted 'more discipline'.¹⁹⁷ This culminated in a delay of approximately two years in concluding the Round.¹⁹⁸ At the end, the ADA was produced and entered into force on 1 January 1995.¹⁹⁹

¹⁸⁸ Trebilcock and Howse (note 134 above; 168), Trebilcock, Howse and Eliason (note 153 above; 335) and Pangratis and Vermulst (note 150 above; 69).

¹⁸⁹ Pangratis and Vermulst (note 150 above; 69).

¹⁹⁰ Trebilcock and Howse (note 134 above; 372).

¹⁹¹ Article 13 of the 1979 Code and Trebilcock and Howse (note 134 above; 372).

¹⁹² Article 13 of the 1979 Code and Trebilcock and Howse (note 134 above; 372).

¹⁹³ Trebilcock and Howse (note 134 above; 372).

¹⁹⁴ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above) and Pangratis and Vermulst (note 150 above; 71).

¹⁹⁵ Trebilcock, Howse and Eliason (note 153 above; 335).

¹⁹⁶ Lekfuangfu (note 50 above; 305).

¹⁹⁷ *Ibid.*

¹⁹⁸ VC Jones 'WTO: Antidumping Issues in the Doha Development Agenda' available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32810.pdf>, accessed on 24 April 2017.

¹⁹⁹ 'Article VI Anti-Dumping and Countervailing Duties' (note 153 above; 222).

The notable changes introduced in this Agreement, although described as a compromise, concerned anti-dumping procedures.²⁰⁰ Article 5.8 of the ADA introduced the *de minimis* standards, whereby investigations have to be ended immediately once determined that the actual or potential dumped imports in question are below the 'negligible' level'.²⁰¹ In addition, article 3.3 allows for the practice of cumulation in certain instances, such as in the determination of dumping wherein an investigating authority is permitted to include imports of all states against whom complaints have been made.²⁰² The parties to this Agreement now include all the WTO members who accepted the Marrakesh Agreement as Annex 1A thereof contains the ADA.²⁰³ Extensive use of this instrument by members of free trade agreements, established under Article XXIV of the GATT, has been noted by James.²⁰⁴

2.4 Proliferation of regional trade organisations

2.4.1 Article XXIV of the GATT

Associated with the dumping concerns, is the establishment of Regional Trade Agreements (RTAs), regulated by Article XXIV which entails the formation of either a customs union (CU) or free trade area (FTA).²⁰⁵ Requirements for establishment thereof are that 'substantially all trade' between the members concerned is free and that tariffs in relation to non-members should not be higher than those which existed prior to formation.²⁰⁶ Such agreements are expressly allowed under this provision as they would otherwise violate articles I and III of the GATT.²⁰⁷ These agreements have developed over the years from dealing mainly with goods and services trade to now encompassing areas of labour, global investment and 'environmental standards'.²⁰⁸

²⁰⁰ Pangratis and Vermulst (note 150 above; 71-72).

²⁰¹ *Ibid.*

²⁰² *Ibid* 71.

²⁰³ Annex 1A of the Marrakesh Agreement.

²⁰⁴ James (note 57 above; 16).

²⁰⁵ Article XXIV of the GATT, Srinivasan (note 96 above; 203), I Virág-Neumann 'Regional Trade Agreements and the WTO' available at <https://core.ac.uk/download/pdf/6504616.pdf>, accessed on 18 April 2017 at 386.

²⁰⁶ Article XXIV of the GATT, Srinivasan (note 96 above; 203) and Virág-Neumann (note 205 above; 386).

²⁰⁷ Virág-Neumann (note 205 above; 386) and Srinivasan (note 96 above; 200).

²⁰⁸ Srinivasan (note 96 above; 205).

2.4.2 Waves of regionalism

The growth in RTA numbers has been noted as having occurred predominantly in two 'waves of regionalism'.²⁰⁹ Mansfield and Reinhardt state that the first was in the 1950s to 1970s period and the second in the 1990s.²¹⁰ These coincide with the periods of 'post colonialism' and 'post communism' respectively.²¹¹ To date, every WTO member is party to at least one RTA.²¹²

Africa has not been spared from such RTA growth over the years.²¹³ On this continent, they have been viewed as a means to encourage growth economically and influence the formation of trade terms internationally.²¹⁴ Trade, as promoted by RTAs, has thus been identified as key to achieving 'political stability', improved governance and 'competitiveness in the international market'.²¹⁵ However according to Bhagwati, such RTAs simply contributed to the global 'spaghetti bowl proliferation' of these arrangements.²¹⁶

2.4.3 Reasons for growth

Numerous motives have been offered for this great growth, with some being associated with the GATT and WTO.²¹⁷ It has been argued that increases in the WTO membership has resulted in a consequential reduction in the influence that states possess within the multilateral system.²¹⁸ Thus, RTAs have been viewed as a way for states to avoid being exploited in this system due to such minimal influence.²¹⁹ They

²⁰⁹ E Mansfield and E Reinhardt 'Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements' (2003) 57(4) *International Organization* 831.

²¹⁰ *Ibid.*

²¹¹ Mansfield and Reinhardt (note 209 above; 848), 'Fall of Communism in Eastern Europe, 1989' available at <https://history.state.gov/milestones/1989-1992/fall-of-communism>, accessed on 24 April 2017 and AB Darku and AB Appau 'Analysing Sub-Saharan Africa Trade Patterns in the Presence of Regional Trade Agreements- The Case Of COMESA, SADC, ECCAS and ECOWAS' (2015) 17(1) *African Finance Journal* 47.

²¹² 'Regional trade agreements' available at

https://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed on 24 April 2017.

²¹³ HK Mutai 'Regional trade integration strategies under SADC and the EAC: A comparative analysis' (2011) 1 *SADC Law Journal* 81.

²¹⁴ PN Ndlovu 'The State of Trade Liberalisation in Goods in SADC' (2012) 2(2) *SADC Law Journal* 187-188.

²¹⁵ Darku and Appau (note 211 above; 47).

²¹⁶ J Bhagwati 'Preferential Trade Agreements: The Wrong Road' (1996) 27(4) *Law and Policy in International Business* 866.

²¹⁷ Mansfield and Reinhardt (note 209 above; 834).

²¹⁸ *Ibid* 838.

²¹⁹ CB Picker 'Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat' (2005) 26(2) *University of Pennsylvania Journal of International Economic Law* 275.

can also be used as ‘insurance’ in the event of various ‘failures’ occurring at the WTO, including negotiations not being completed on time or states not attaining the results desired in key sectors of trade.²²⁰ Additionally, RTAs can help ensure that barriers to trade are not later ‘unilaterally’ raised by a state’s trading partners.²²¹

Authors have also noted that the WTO itself encouraged the conclusion of RTAs as it viewed them as being equally important alongside the multilateral trading administration.²²² Its failure on the other hand to ensure compliance with Article XXIV has been viewed as possibly contributing to their recent growth.²²³ Attempts to rectify this situation were made by the WTO, especially after the Uruguay Round where the Understanding on Article XXIV was produced.²²⁴ In terms of this Understanding, the Committee on Regional Trade Agreements (CRTA) was created to supervise such agreements while the Dispute Settlement Understanding was rendered applicable to RTAs too.²²⁵ According to Picker, such developments have not been successful as compliance with this Article has not improved, partly due to the ‘technical’ nature of the Understanding.²²⁶ This compliance issue extends back to the GATT years as only one judgment was reached on a RTA’s conformity with Article XXIV.²²⁷ The reason for this is the varied views of members on ‘what constitutes compliance’ therewith.²²⁸ Over and above such reasons for the RTA growth, there is also the pursuit of security goals and political influences that influence the formation of such agreements.²²⁹

With the increases in RTAs, numerous issues have arisen as well as advantages highlighted.²³⁰ Most notable are concerns relating to the WTO, whereby such agreements are regarded as hindering the development of the multilateral system.²³¹ According to Picker, RTAs are attracting the investment of states’ resources away from

²²⁰ Mansfield and Reinhardt (note 209 above; 834 and 837) and Virág-Neumann (note 205 above; 387).

²²¹ Mansfield and Reinhardt (note 209 above; 834 and 837), Picker (note 219 above; 302) and Virág-Neumann (note 205 above; 275).

²²² Virág-Neumann (note 205 above; 382).

²²³ Srinivasan (note 96 above; 205).

²²⁴ Picker (note 219 above; 283).

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Mansfield and Reinhardt (note 209 above; 832).

²²⁸ *Ibid.* 832-833.

²²⁹ Picker (note 219 above; 274) and Carim (note 45 above; 351-352).

²³⁰ Picker (note 219 above; 270).

²³¹ *Ibid.*

the WTO, such as their government officials.²³² This creates difficulties especially during negotiations.²³³ Furthermore, Bhagwati has argued that trade is being made chaotic with RTAs as they concentrate states' attention on the 'nationality of goods'.²³⁴ Coupled with this are anxieties over distortions of universal resource allocations by RTAs as cheaper producers in non-RTA members are not traded with due to such commitments.²³⁵ This practice reduces the competitiveness of non-members' products as argued by Mansfield and Reinhardt.²³⁶ These would be concerning for the WTO.²³⁷ Conversely, for developing countries RTAs present the opportunity to collectively utilise their available resources and voice their views to other WTO members in order to benefit from participation in the multilateral system.²³⁸ Such benefits could include them influencing the content of trade terms formulated at this level, thus improving their position in the global market.²³⁹ This can greatly assist in ensuring a faster integration pace for such states.²⁴⁰ The reduction of tariffs that comes with the conclusion of RTAs, especially in the form of a FTA, can also assist to increase a state's trade.²⁴¹ The fact that intra-regional trade, measured as a portion of the total global trade, has increased from 28 percent in 1990 to 50.8 percent in 2008, is not only evidence thereof but also influences states to view RTAs as a means to attain such goal.²⁴² The conclusion of such agreements has also been found to be easier than those on the multilateral level, given that the parties will often have mutual interests at regional level.²⁴³ The issues around such growth are still pressing though.²⁴⁴

²³² Virág-Neumann (note 205 above; 382) and Picker (note 219 above; 271, 294 and 296).

²³³ Picker (note 219 above; 270-271).

²³⁴ Bhagwati (note 216 above; 866).

²³⁵ Trebilcock and Howse (note 134 above; 130).

²³⁶ Mansfield and Reinhardt (note 209 above; 833).

²³⁷ Picker (note 219 above; 270).

²³⁸ Mansfield and Reinhardt (note 209 above; 835).

²³⁹ *Ibid* 836.

²⁴⁰ *Ibid* 836-837.

²⁴¹ Darku and Appau (note 211 above; 42).

²⁴² X Liu 'Trade Agreements and Economic Growth' (2016) 82(4) *Southern Economic Journal* 1375.

²⁴³ Virág-Neumann (note 205 above; 384) and Mansfield and Reinhardt (note 209 above; 839).

²⁴⁴ Picker (note 219 above; 270).

2.4.4 Proposed solutions

In order to address the concerns relating to the rapid RTA growth, certain writers have put solutions forward, such as Bhagwati.²⁴⁵ He has proposed that the conclusion of a free trade agreement involving 'hegemonic' powers, such as the USA, should only be allowed in two circumstances.²⁴⁶ First, where it will be used to form a 'common market' with a 'common external tariff' and secondly where it is the only means to attain 'multilateral free trade' between the states concerned when WTO negotiations have halted.²⁴⁷ This will ensure that such agreements are only used when they can contribute towards the development of the multilateral trading system.²⁴⁸ Trebilcock and Howse have echoed calls for stricter rules governing the formation of RTAs and for Article XXIV to be subjected to sterner interpretation and application.²⁴⁹

2.5 Factors influencing the development of the SADC

2.5.1 Developing countries in the GATT and the UNCTAD

From the 1960s, the numbers of developing countries becoming signatories to the GATT was increasing primarily due to many being granted independence from colonial rule during this period.²⁵⁰ While their contributions to global trade grew during the 1960s and 1970s, they were not satisfied that they had any power over the content and application of the GATT rules.²⁵¹ Calls for greater 'preferential treatment' in relation to such rules were also made by them.²⁵² Against this backdrop, the UN Conference on Trade and Development (UNCTAD) was established in 1964, taking the form of a conference where UN members would meet intermittently.²⁵³ A forum was also established where developing countries could play a more active role in the making of GATT related decisions.²⁵⁴ The UNCTAD was thus utilised as a means to pressurise developed countries to 'liberalise trade unilaterally with developing

²⁴⁵ Bhagwati (note 216 above; 869).

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ Trebilcock and Howse (note 134 above; 519).

²⁵⁰ Trebilcock and Howse (note 134 above; 367) and 'Decolonization of Asia and Africa, 1945-1960' available at <https://history.state.gov/milestones/1945-1952/asia-and-africa>, accessed on 25 April 2017.

²⁵¹ Trebilcock and Howse (note 134 above; 367).

²⁵² *Ibid.*

²⁵³ Trebilcock, Howse and Eliason (note 153 above; 608) and Trebilcock and Howse (note 134 above; 377).

²⁵⁴ Trebilcock and Howse (note 134 above; 377).

countries'.²⁵⁵ Success in this regard was seen with the inclusion of part IV to the GATT in 1965, focused on ensuring GATT requirements were laxed thus allowing developing states to 'pursue inward-looking growth policies'.²⁵⁶ This forum permitted developing members to use their numbers to put their views and opinions across and to exert some influence over developed ones.²⁵⁷ This is somewhat indicative of the position of developing members in the multilateral system at this time.

2.5.2 Development and influence of the OAU

The 1960s also saw the development of the Organisation of African Unity (OAU) in 1963.²⁵⁸ Its goals included encouraging 'African solidarity', ending colonialism in African countries and attaining cooperation between states economically.²⁵⁹ While Darku and Appau have found that the SADCC did not make a substantial contribution to economic cooperation amongst members, they argued that it had a great influence on the formation of the SADCC and other RTAs.²⁶⁰ This was due to its aims of solidarity and ending colonialism.²⁶¹ The association between these two organisations is especially evident when viewed in light of the fact that the SADCC worked towards ending Apartheid in South Africa.²⁶²

2.5.3 The SADCC

The SADCC was the predecessor of the SADC known today.²⁶³ Its formation has been linked to both external and internal influencing factors, including the founding of the UNCTAD and OAU.²⁶⁴ The SADCC was officially established on 1 April 1980 through the 'Lusaka Declaration "Towards Economic Liberation"' formulated at a summit in

²⁵⁵ *Ibid* 378.

²⁵⁶ Trebilcock and Howse (note 134 above; 371) and Trebilcock, Howse and Eliason (note 153 above; 608).

²⁵⁷ Trebilcock and Howse (note 134 above; 377-378).

²⁵⁸ Darku and Appau (note 211 above; 47) and Dugard (note 134 above; 439).

²⁵⁹ Darku and Appau (note 211 above; 47).

²⁶⁰ Darku and Appau (note 211 above; 47) and 'Organisation of African Unity (OAU)' available at <http://www.sahistory.org.za/topic/organisation-african-unity-oau>, accessed on 25 April 2017 and DA Mungazi *The Struggle for Social Change in Southern Africa: Visions of Liberty* (1989) -91.

²⁶¹ 'Organisation of African Unity (OAU)' (note 260 above) and Darku and Appau (note 211 above; 47).

²⁶² Holland (note 38 above; 268).

²⁶³ Dugard (note 134 above; 439).

²⁶⁴ JA Moma 'Reconsidering the Origins of the Southern African Regionalism Thirty Years Later: Towards a Constructivist Approach to the Origins Of SADC' (2012) 3(2) *Janus.Net: e-Journal of International Relations* available at <http://www.redalyc.org/pdf/4135/413536170006.pdf>, accessed on 18 April 2017 at 107, Darku and Appau (note 211 above; 47-48) and Trebilcock and Howse (note 134 above; 371).

Lusaka, Zambia.²⁶⁵ It was attended by various neighbouring southern African countries who became members thereof.²⁶⁶ The SADCC was guided by the Memorandum of Understanding on the Institutions of the Southern African Development Co-ordination Conference, signed on 20 July 1981.²⁶⁷

The SADCC's efforts were primarily focused on ensuring South Africa gained freedom and addressing poverty levels in Southern Africa.²⁶⁸ To achieve this, it encouraged cooperation in its 'regional networks of multilateral projects', undertaken in key focus areas.²⁶⁹ This cooperation was acquired through the states' common interest in opposing South Africa's government.²⁷⁰ Coordinated action was thus used for projects in the key areas of:

'[A]griculture and natural resources, mining, energy, industry and trade, manpower, transport, communications and tourism.'²⁷¹

In relation to trade and industrial expansion, this included developing infrastructure.²⁷² Its projects on transport and communication were undertaken with the explicit intention of decreasing members' dependence on South Africa.²⁷³ In the area of agriculture, of concern was food security and agricultural research.²⁷⁴ These sectors were highlighted as being necessary to develop in order to achieve regional integration.²⁷⁵

Alongside the goal of reduction of dependence on South Africa, the SADCC also aimed to create links between member states to attain regional integration.²⁷⁶

²⁶⁵ 'History and Treaty' available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/>, accessed on 25 April 2017, B Weimer 'The Southern African Development Co-ordination Conference (SADCC): Past and future' (1991) 21(2) *Africa Insight* 79 and C Ng'ong'ola 'Regional Integration and Trade Liberalization in the Southern African Development Community' (2000) 3(3) *Journal of International Economic Law* 488.

²⁶⁶ The countries in attendance included the 'frontline states' (Zambia, Angola, Botswana and Mozambique), the 'Prime Minister designate of Zimbabwe', Lesotho, Malawi and Swaziland. Ng'ong'ola (note 265 above; 487-488) and 'History and Treaty' (note 265 above).

²⁶⁷ 'History and Treaty' (note 265 above) and Ng'ong'ola (note 265 above; 489).

²⁶⁸ Darku and Appau (note 211 above; 48).

²⁶⁹ 'Appendix A, An Outline and History of Regional Trading Arrangements' available at https://piie.com/publications/chapters_preview/72/appaie2024.pdf, accessed on 19 April 2017 at 271, Weimer (note 265 above; 78) and Holland (note 38 above; 265).

²⁷⁰ Holland (note 38 above; 268).

²⁷¹ Ng'ong'ola (note 265 above; 488) and Weimer (note 265 above; 78).

²⁷² Holland (note 38 above; 265) and 'Appendix A, An Outline and History of Regional Trading Arrangements' (note 269 above; 271).

²⁷³ Ng'ong'ola (note 265 above; 488) and Holland (note 38 above; 266).

²⁷⁴ Ng'ong'ola (note 265 above; 488).

²⁷⁵ Weimer (note 265 above; 79).

²⁷⁶ Ng'ong'ola (note 265 above; 488), D Hansohm and W Breytenbach et al (eds) 'Monitoring Regional Integration in Southern Africa Yearbook' available at <http://paulroos.co.za/wp->

Furthermore, it worked to gather resources for the implementation of its policies at 'national, interstate and regional' levels and for financing its development.²⁷⁷ Finally, it wanted to achieve the 'cooperation' and 'support' from international sources for its projects.²⁷⁸ Its success in achieving such aims was very limited though.²⁷⁹

2.5.3.1 Failures of the SADCC

A number of criticisms were raised against the SADCC, which can be traced to the organisation and its structures.²⁸⁰ Holland states that its work was hindered by a lack of 'inter-regional institutions' to carry it out while arguing that a treaty as its basis would have given it more force.²⁸¹ Furthermore, its abilities to attain its aims was reduced by the respect afforded to the sovereignty of states, which it avoided violating.²⁸² Additionally, the Secretariat did not have powers to coerce members to ensure compliance.²⁸³ Furthermore, while the SADCC allocated the responsibility of the various sectors to the members, this was criticised as certain states were given sectors which they were not suited to oversee implementation in.²⁸⁴ Holland also highlighted 'inclusiveness', lack of enthusiasm and dedication by member states to work as a region and misunderstanding of the distinction between plans for improving cooperation economically and those aimed at 'integration' as other factors that reduced the SADCC's effectiveness.²⁸⁵

In relation to its aim of reducing reliance on South Africa, there was limited advancement in transport and communication.²⁸⁶ By 1987 though, approximately 75 percent of the 'dry cargo imports and exports' of the land locked members passed through harbours of SADCC countries.²⁸⁷ Despite this, there was no evidence of any reduction in reliance on South Africa for 'both imports and exports'.²⁸⁸ Thus

content/blogs.dir/12/files/2011/uploads/MRI_Book_2005.pdf#page=198, accessed on 21 February 2017 and E Leistner 'SADCC into SADC: *Plus ça change*' (1992) 22(3) *Africa Insight* 158.

²⁷⁷ Ng'ong'ola (note 265 above; 488), Weimer (note 265 above; 79), Moma (note 264 above; 108-109) and Hansohm and Breytenbach et al (note 276 above; 166).

²⁷⁸ Weimer (note 265 above; 79), Hansohm and Breytenbach et al (note 276 above; 166) and Ng'ong'ola (note 265 above; 488).

²⁷⁹ Holland (note 38 above; 265).

²⁸⁰ *Ibid.*

²⁸¹ Holland (note 38 above; 265) and Ng'ong'ola (note 265 above; 489).

²⁸² Holland (note 38 above; 265) and Ng'ong'ola (note 265 above; 490).

²⁸³ Ng'ong'ola (note 265 above; 490).

²⁸⁴ *Ibid* 489-490.

²⁸⁵ Holland (note 38 above; 265).

²⁸⁶ Weimer (note 265 above; 80) and Holland (note 38 above; 266).

²⁸⁷ Weimer (note 265 above; 80).

²⁸⁸ Holland (note 38 above; 266).

economically, the SADCC was not successful in attaining such independence.²⁸⁹ Authors, such as Ng'ong'ola and Holland were pessimistic about this aim, describing it as 'not attainable' and 'misplaced' respectively.²⁹⁰

All these obstacles culminated in outcomes of a fall of trade amongst members with inter-member trade only constituting five percent of the total trade of the members.²⁹¹ Of this figure, 80 percent was linked to Zimbabwe.²⁹² Weimer links this to an insufficient amount of tradeable goods being produced and such goods being similar in nature.²⁹³ Furthermore, manufacturing declined between 1980 and 1988 from 13.1 percent to 12 percent when measured as a portion of the members' gross domestic product (GDP).²⁹⁴ Income calculated per capita also decreased by 13 percent during this time, exacerbated by the fact that population growth exceeded members' economic growth.²⁹⁵ This clearly highlights the SADCC's failure to achieve its goals.²⁹⁶

In other economic matters, the SADCC was not financially able to provide the required financing for its projects.²⁹⁷ Thus, there was a great dependence upon international donations, which comprised over 90 percent of its funding with only the remainder being sourced locally.²⁹⁸ This was problematic as it transgressed two of the SADCC's aims, namely to utilise its own resources and to become more independent.²⁹⁹ However, the SADCC succeeded in drawing international focus to the region.³⁰⁰

²⁸⁹ Holland (note 38 above; 267) and Leistner (note 276 above; 158).

²⁹⁰ Ng'ong'ola (note 265 above; 491) and Holland (note 38 above; 270).

²⁹¹ Holland (note 38 above; 266), Leistner (note 276 above; 158) and Weimer (note 265 above; 81).

²⁹² Weimer (note 265 above; 81).

²⁹³ *Ibid.*

²⁹⁴ GDP is the money spent on manufactured goods and services less imports. 'Gross domestic product (GDP)' available at <https://data.oecd.org/gdp/gross-domestic-product-gdp.htm>, accessed on 26 April 2017, Holland (note 38 above; 266) and AM Hawkins, 'Economic Development in the SADCC Countries' in G Maasdorp and A Whiteside (eds) *Towards a Post-Apartheid Future* (1992) 107.

²⁹⁵ Holland (note 38 above; 266) and Hawkins (note 294 above; 107).

²⁹⁶ Holland (note 38 above; 265).

²⁹⁷ Moma (note 264 above; 108) and Ng'ong'ola (note 265 above; 490).

²⁹⁸ Ng'ong'ola (note 265 above; 490), Leistner (note 276 above; 158) and Weimer (note 265 above; 81).

²⁹⁹ Weimer (note 265 above; 81).

³⁰⁰ Leistner (note 276 above; 158).

2.5.4 The AEC

On a regional level, the OAU continued its work towards unifying and integrating Africa.³⁰¹ This is seen in the Lagos Plan of Action for the Economic Development of Africa³⁰² and adoption of the Treaty Establishing the African Economic Community (Abuja Treaty) in 1991.³⁰³ The former would be the starting point for the formation of the African Economic Community (AEC), a body that will oversee economic integration of Africa as a whole.³⁰⁴ This is an overarching goal of the OAU.³⁰⁵ In order to attain this by 2028, the aim was to initially grow existing RTAs while encouraging the formation of new ones.³⁰⁶ This was to be done within the first five years following the implementation of the above agreements.³⁰⁷ During this period, the SADCC changed to the SADC.³⁰⁸

An important factor that came into play in the 1990s was the realisation that South Africa was close to attaining democracy and consideration of the integration of its economy with the economies of other members was undertaken.³⁰⁹ It began to focus on the liberalisation of the member's economies and political steadiness during such time.³¹⁰ When South Africa did join the regional body as a democracy, it became the organisation's largest economy and was responsible for two thirds of the region's accumulated GDP.³¹¹

³⁰¹ Darku and Appau (note 211 above; 47).

³⁰² 'Lagos plan of action for the economic development of Africa' available at <https://www.merit.unu.edu/wp-content/uploads/2015/01/Lagos-Plan-of-Action.pdf>, accessed on 26 April 2017.

³⁰³ Preamble of the Abuja Treaty, 'Treaty Establishing the African Economic Community (AEC)' available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173333, accessed on 26 April 2017, Darku and Appau (note 211 above; 47) and 'Organisation of African Unity (OAU)' (note 260 above).

³⁰⁴ Preamble of the Abuja Treaty, Darku and Appau (note 211 above; 47) and 'Organisation of African Unity (OAU)' (note 260 above).

³⁰⁵ Preamble of the Abuja Treaty.

³⁰⁶ Darku and Appau (note 211 above; 47).

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ Thomas (note 41 above; 105).

³¹⁰ Hansohm and Breytenbach et al (note 276 above; 166).

³¹¹ M Rusare 'SADC and ESA Experiences in Negotiating EPAS with the EU Conference Report' available at <https://www.saiia.org.za/images/upload/SADC%20AND%20ESA%20EXPERIENCES%20EPAS.pdf>, accessed on 29 March 2017.

2.6 The SADC

2.6.1 Birth and aims

The SADC succeeded the SADCC on 17 August 1992 with the signing of the SADC Treaty by ten states.³¹² Its aims include the enablement of cooperation on a broader spectrum of matters of a social, political and economic nature, to be undertaken in areas regarded as key to attaining 'regional development and integration'.³¹³ This focus on integrating trade in the region represented a change from the cooperation required for projects under the SADCC.³¹⁴ This regional goal of economic integration is to be met using 'regimental, interventionist and centrally directed policy'.³¹⁵

Further, the SADC also aims to address pressing social and economic issues in the region whilst working towards ensuring improved opportunities for generating income.³¹⁶ It also intends ensuring sustainable financial development through greater collaboration and integration, peace and proper governance as well as attaining regional political integration.³¹⁷ Its long-term objectives include formation of a customs union by 2010, a common market by 2015 and a monetary union by 2016 followed by the adoption of a single currency in 2018 as inspired by the EC.³¹⁸ The attainment thereof has thus far been hindered.³¹⁹

2.6.2 Failures of the SADC

The SADC, like the SADCC, has experienced numerous failures.³²⁰ It has not met its targets of establishing a customs union, common market or monetary union.³²¹ In this respect, Leistner has noted that it is simply attempting to 'run before it can crawl' while Mapuva and Muyengwa-Mapuva argue that its goals are 'overambitious' coupled with

³¹² The signatories to the Treaty were Angola, Lesotho, Mozambique, Swaziland, Zambia, Botswana, Malawi, Namibia, Tanzania and Zimbabwe. Article 2 and 44 of the SADC Treaty, Leistner (note 276 above; 158), Dugard (note 134 above; 439) and Darku and Appau (note 211 above; 48).

³¹³ Dugard (note 134 above; 439).

³¹⁴ Holland (note 38 above; 267) and Hansohm and Breytenbach et al (note 276 above; 186).

³¹⁵ Holland (note 38 above; 268).

³¹⁶ Darku and Appau (note 211 above; 48) and S Zondi 'Governance and social policy in the SADC region: An issues analysis' *Development Bank of Southern Africa* available at <http://www.dbsa.org/EN/About-Us/Publications/Documents/DPD%20No%202.%20Governance%20and%20social%20policy%20in%20the%20SADC%20region-%20An%20issues%20analysis.pdf>, accessed on 16 April 2017 at 12.

³¹⁷ Darku and Appau (note 211 above; 48) and Leistner (note 276 above; 158).

³¹⁸ Leistner (note 276 above; 158).

³¹⁹ Mapuva and Muyengwa-Mapuva (note 39 above; 26).

³²⁰ *Ibid.*

³²¹ *Ibid.*

a 'dismally poor implementation record'.³²² This can also be attributed to its issues with political leaders and the relationship between the Secretariat and governing elements of the SADC.³²³ The Secretariat has no 'formal political power', preventing the assurance of compliance with rules.³²⁴ Further obstacles include trade limiting rules of origin, overlapping regional organisation memberships and restraints to supply.³²⁵

2.7 Association between the GATT and SADC development

The international trading system was initially influenced by developed nations and the protection of their interests.³²⁶ This is evident in the opposition by the USA to the ITO's development due to its belief that the ITO will intrude into its powers to make trade decisions.³²⁷ The USA's blocking of the second attempt to form such an organisation is further evidence of its influence.³²⁸ It can be said that this influence was challenged in the following years by developing countries in their attempts to gain access to the multilateral system.³²⁹

During such time, the GATT members were setting a pace for tariff reduction, evident by the focus on this topic during the first few negotiation rounds.³³⁰ Developing countries were thus faced with this and the influence of developed members when they joined GATT from the 1950s onwards.³³¹ Coupled with such tariff reductions, the 1970s and 1980s saw an increase in subsidy use, most notably in the agricultural sector.³³² This was concerning for developing countries given its importance to their economies.³³³ Furthermore, while the WTO later focused expressly on assisting developing countries in joining the international trading system, this was not the case initially.³³⁴ Greater recognition of their needs and assistance was only seen in 1965

³²² Leistner (note 276 above; 158) and Mapuva and Muyengwa-Mapuva (note 39 above; 26).

³²³ Hansohm and Breytenbach et al (note 276 above; 170).

³²⁴ *Ibid.*

³²⁵ *Ibid* 187.

³²⁶ Symons (note 106 above; 487).

³²⁷ Symons (note 106 above; 487) and Bidwell and Diebold (note 98 above; 208).

³²⁸ Srinivasan (note 96 above; 202) and Symons (note 106 above; 487).

³²⁹ Ndlovu (note 214 above; 187-188).

³³⁰ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above).

³³¹ Mansfield and Reinhardt (note 209 above; 831).

³³² 'Understanding the WTO, What we stand for' (note 135 above).

³³³ Holland (note 38 above; 268).

³³⁴ 'Understanding the WTO, What we stand for' (note 135 above) and Trebilcock and Howse (note 134 above; 371).

with the incorporation of part IV of the GATT.³³⁵ This must have been taken as an indication by such countries that they needed to take steps themselves to protect and promote their interests on the international scale.³³⁶

The SADCC was formed during the first wave of regionalism, when many newly independent developing countries were becoming GATT signatories.³³⁷ With such states believing that they had minimal influence in the GATT, came the formation of the UNCTAD in 1964 to help address this.³³⁸ However, it did not seem to be enough for certain African states to alleviate their GATT related concerns evident by the subsequent formation of the SADCC in 1980.³³⁹ The conclusion of an RTA presented many opportunities for African countries during such time, especially as a means to ensure effective participation in the GATT.³⁴⁰ They were used to encourage political stability and economic advancement, both issues hindering participation, in order to help increase their influence in the multilateral system.³⁴¹ RTAs also allowed for the pooling of resources in order to attain such benefits, which would be of great assistance to countries who had just obtained independence.³⁴²

These events surrounding the GATT, and the OAU's influence in the facilitation of solidarity among African states, can be said to have impacted on the SADCC's formation.³⁴³ The GATT's influence was especially evident in the SADCC's focus on improving its transportation and communication abilities, which is necessary for attaining development, through the gathering of its own resources.³⁴⁴ The failures of the SADCC, seen in relation to manufacturing amongst else, indicated its inability to keep pace with the global system without some changes.³⁴⁵

³³⁵ Trebilcock and Howse (note 134 above; 371) and Trebilcock, Howse and Eliason (note 153 above; 608).

³³⁶ Picker (note 219 above; 275-276) and Mansfield and Reinhardt (note 209 above; 834-835).

³³⁷ Mansfield and Reinhardt (note 209 above; 831), Trebilcock and Howse (note 134 above; 367) and 'Decolonization of Asia and Africa, 1945-1960' (note 250 above).

³³⁸ Trebilcock and Howse (note 134 above; 367 and 377).

³³⁹ 'History and Treaty' (note 265 above), Weimer (note 265 above; 79) and Ng'ong'ola (note 265 above; 488).

³⁴⁰ Picker (note 219 above; 275).

³⁴¹ Darku and Appau (note 211 above; 47), Ndlovu (note 214 above; 187-188) and Mansfield and Reinhardt (note 209 above; 838).

³⁴² Mansfield and Reinhardt (note 209 above; 835) and 'Decolonization of Asia and Africa, 1945-1960' (note 250 above).

³⁴³ 'Organisation of African Unity (OAU)' (note 260 above), Darku and Appau (note 211 above; 47) and Holland (note 38 above; 265).

³⁴⁴ Ng'ong'ola (note 265 above; 488) and Weimer (note 265 above; 78-79).

³⁴⁵ Holland (note 38 above; 166), Hawkins (note 294 above; 107) and Weimer (note 265 above; 81).

The changes that the Uruguay Round brought, especially in establishing the WTO, also influenced shifts in the focus of the Lomé Convention.³⁴⁶ It included a greater emphasis on 'economic integration and functional co-operation'.³⁴⁷ This appears to have brought it in line with the GATT's aim of liberalising trade.³⁴⁸ As such, the Cotonou Agreement aimed to continue Lomé, attend to its defects and ensure further development.³⁴⁹ Moreover, the establishment of the AEC, which also influenced the change from the SADCC to SADC, can be regarded as being made in an attempt to integrate Africa into the global economy as moulded by the GATT.³⁵⁰ Thus, it is evident that the GATT and its advancements over the years influenced not only the SADC's formation but other organisations and events too, that in turn also played a role in the SADC's development.³⁵¹

2.8 Concluding remarks

The advancement of the multilateral trading system did have an effect on the development of regional organisations, such as the SADC.³⁵² This was primarily in the form of the many challenges that it presented to developing states upon their entry therein.³⁵³ To this end, regional trade organisations presented a means to deal with such issues.³⁵⁴ As the number of regional groupings increased over the years, so too has implementation of anti-dumping measures.³⁵⁵ This is despite the changes to anti-dumping rules with a view to making their requirements stricter over the various

³⁴⁶ The Lomé Conventions regulated trade between the European states forming the European Economic Community (EEC) and African, Caribbean and Pacific (ACP) states between 1975 and 1995. This Convention is discussed further in chapter 4 of this dissertation. Article I of the Marrakesh Agreement and Holland (note 38 above; 268-269).

³⁴⁷ Holland (note 38 above; 268).

³⁴⁸ Srinivasan (note 96 above; 201).

³⁴⁹ R Grynberg 'The WTO Incompatibility of the Lomé Convention trade provisions' available at <https://crawford.anu.edu.au/pdf/wp98/sp98-3.pdf>, accessed on 5 August 2017 at 17 and W Braude 'SADC-EU progress and EU market access for South Africa' (2010) 94(3) *South African Sugar Journal* 74.

³⁵⁰ Darku and Appau (note 211 above; 47), 'Organisation of African Unity (OAU)' (note 260 above) and Preamble to the Treaty Establishing the AEC, 1992.

³⁵¹ Leistner (note 276 above; 158).

³⁵² Picker (note 219 above; 275).

³⁵³ 'Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh' (note 37 above) and 'Understanding the WTO, What we stand for' (note 135 above).

³⁵⁴ Darku and Appau (note 211 above; 47), Ndlovu (note 214 above; 187-188) and Mansfield and Reinhardt (note 209 above; 835 and 838).

³⁵⁵ Sudsawasd (note 141 above; 6), Prusa (note 47 above; 698) and James (note 57 above; 16).

negotiation rounds.³⁵⁶ Regional groupings could thus also be regarded as a means to counter any anti-dumping use against states, especially developing ones.³⁵⁷

³⁵⁶ Pangratis and Vermulst (note 150 above; 69).

³⁵⁷ Picker (note 219 above; 275) and Mansfield and Reinhardt (note 209 above; 834).

Chapter 3:

THE ANTI-DUMPING AGREEMENT AND PARTICULAR SADC INDUSTRIES

3.1 Introduction

This chapter seeks to determine the extent to which the implementation of the ADA has affected particular poultry industries within the SADC, with specific focus on South Africa. To attain this, there will be an analysis of important provisions of the ADA and relevant cases involving SADC member states. In addition, there will be a discussion of how anti-dumping is the exception to the MFN and National Treatment principles.³⁵⁸ Moreover, the chapter will engage in a brief discussion of the poultry industries within SADC EPA group to determine how such industries have been affected by dumping and the ADA. This will be undertaken with particular focus on the South African poultry sector.

3.2 Exceptions to certain WTO rules for the ADA

In the WTO, there are two key non-discrimination principles that underlie its agreements.³⁵⁹ This is the MFN principle, found in Article I, and the National Treatment principle, contained in Article III of the GATT.³⁶⁰ The main aim of both is to ensure that all members share in the benefits derived from the multilateral trading system.³⁶¹ To protect this goal from being compromised through unfair competition, anti-dumping duties, being the exception to these principles, can be applied by members in such circumstances.³⁶²

The MFN principle requires that any benefit accorded to the 'most favoured nation' also be given to all other members.³⁶³ Benefit in this context refers to any 'advantage, favour, privilege or immunity', covering both imports and exports.³⁶⁴ Additionally, any benefit accorded to a particular product originating from a certain country, including

³⁵⁸ Dugard (note 134 above; 447).

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ B Lal Das, World Trade Organisation and United Nations Conference on Trade and Development *An Introduction to the WTO Agreements* (1998) 13.

³⁶² James (note 57 above; 14-15) and Issabekov and Suchecki (note 64 above; 45).

³⁶³ Lal Das et al (note 361 above; 11).

³⁶⁴ *Ibid.*

both WTO members and non-members, must be extended unconditionally and immediately to other members' like products.³⁶⁵ This principle is not applicable to benefits given between states who are party to a RTA established in terms of Article XXIV.³⁶⁶ For the SADC, the MFN principle is contained in article 28 of its Trade Protocol.

Conversely, the National Treatment principle is aimed at preventing member states from treating imported products differently to its domestic ones in a negative manner.³⁶⁷ This applies once the relevant border duties have been paid, with treatment extended to such products thereafter having to be 'no less favourable than that accorded to the domestic product'.³⁶⁸ There are three elements to this principle.³⁶⁹ First, no additional taxes can be applied internally after border duties are paid.³⁷⁰ Secondly, imported products must experience no less favourable treatment in relation to rules and requirements than that imposed on domestic products.³⁷¹ Thirdly, no rules can require that the products of local producers be favoured over imported ones.³⁷² This principle attempts to secure identical opportunities for competing products of both importing and exporting members.³⁷³ The SADC gives emphasis to this principle by including it in article 11 of its Trade Protocol.

In application of the ADA, such principles do not have to be followed, thus making it an instrument whose use should be carefully controlled to avoid harming international trade instead of promoting it.³⁷⁴ Such non-adherence is permitted as the purpose of anti-dumping action is to ensure that unfair trade is eliminated.³⁷⁵ The promotion of fair competition is a fundamental WTO principle and one which can be given effect to and maintained through anti-dumping action.³⁷⁶

³⁶⁵ *Ibid.*

³⁶⁶ Lal Das et al (note 361 above; 11), Trebilcock, Howse and Eliason (note 153 above; 82) and Trebilcock and Howse (note 134 above; 27).

³⁶⁷ Dugard (note 134 above; 448).

³⁶⁸ Trebilcock and Howse (note 134 above; 29), Trebilcock, Howse and Eliason (note 153 above; 136) and Lal Das et al (note 361 above; 15).

³⁶⁹ Lal Das et al (note 361 above; 15).

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid* 7.

³⁷⁴ James (note 57 above; 14-15) and Issabekov and Suchecki (note 64 above; 45).

³⁷⁵ 'Principles of the trading system' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 1 August 2017.

³⁷⁶ *Ibid.*

3.3 The ADA, particular provisions and relevant cases

Article VI of the GATT is key, as it extends to all WTO members the right to levy anti-dumping duties against the exports of another.³⁷⁷ The ADA expanded on this right by providing a set of rules to guide members in formulating their own anti-dumping 'policies and practices'.³⁷⁸ Moreover, it has been noted that the ADA assists in ensuring that 'members will not apply anti-dumping measures arbitrarily', thus curbing use thereof.³⁷⁹ In this respect, James has commended it on bringing about a greater degree of 'transparency and regulation of anti-dumping use', while also declaring that more needs to be done.³⁸⁰

Various authors have cited issues with the current ADA.³⁸¹ This includes vagueness of its provisions allowing for favourable interpretations by authorities, arbitrary procedures being used for application of the rules and incorrect calculations for determinations of dumping.³⁸² This has permitted the instrument to be used by an increasing number of members to counter competition from foreign exporters, resulting in it becoming the most commonly used 'protection' in international trade.³⁸³

Its widespread use for protection purposes must be considered alongside the rapidly increasing implementation of anti-dumping measures over the years.³⁸⁴ In 1958, only 37 anti-dumping measures were in place while in the 1980s approximately 1 600 investigations were launched.³⁸⁵ The number of initiations rose to approximately 2 500 between the years 1995 and 2003 with over 1 500 measures being applied.³⁸⁶ In December 2013, there were 2 894 anti-dumping measures in place globally.³⁸⁷ A rise

³⁷⁷ RW Staiger 'Some Remarks on Reforming WTO AD/CVD Rules' (2005) 28(5) *World Economy* 739.

³⁷⁸ Lal Das et al (note 361 above; 7), 'Anti-dumping, subsidies, safeguards: contingencies, etc' (note 143 above) and Ostoni (note 35 above; 408).

³⁷⁹ TA Cook, R Alston and K Raia *Mastering Import and Export Management* (2004) Vol 1: 430 and K Adamantopoulos and D De Notaris 'The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective' (2000) 24(1 & 2) *Fordham International Law Journal* 34.

³⁸⁰ James (note 57 above; 15).

³⁸¹ Adamantopoulos and De Notaris (note 379 above; 34).

³⁸² Adamantopoulos and De Notaris (note 379 above; 34), Lekfuangfu (note 50 above; 305) and PFJ Macrory, AE Appleton and MG Plummer (eds) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Vol 2: 70, Barfield (note 53 above; 720) and United Nations Development Programme (UNDP) *Making Global Trade Work for People* (2003) 187.

³⁸³ Voon (note 92 above; 441), Macrory, Appleton and Plummer (note 92 above; 487) and Sudsawasd (note 141 above; 4-5).

³⁸⁴ Macrory, Appleton and Plummer (note 92 above; 487).

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ MJ Trebilcock *Advanced Introduction to International Trade Law* (2013) 61.

in use occurred after the ADA's implementation, along with growth in global trade and GATT and WTO membership numbers coupled with tariff reductions.³⁸⁸ Linked to the membership growth has been the significant intensifications in imposition of anti-dumping measures by developing members, whose use has surpassed that of developed ones.³⁸⁹

Notably, developing countries were often the target of anti-dumping duties imposed by developed members in the 1980s.³⁹⁰ This stemmed from their deficiencies in financial and legal resources and knowledge, leading to difficulty in successfully defending disputes.³⁹¹ Developed states dominated use during this period, evidenced by the fact that between 1980 and 1989, 95 percent of the anti-dumping measures in place were imposed by them.³⁹² Thereafter, the main users became the developing members, who were responsible for imposing over half the measures in place between 1995 and 2003.³⁹³ This change has also been associated with tariff decreases, leading to industries turning to other means, such as anti-dumping, to shield themselves against such imports.³⁹⁴ In Africa particularly, complaints of large amounts of dumped imports entering such states have been noted along with a lack of expertise and resources to deal with this problem.³⁹⁵ To understand the nature of this issue and other concerns associated with the ADA, a limited examination and discussion of its important provisions will be undertaken.³⁹⁶

3.3.1 Article 1

Article 1 of the ADA contains its key principles, such as members being required to ensure that anti-dumping investigations are compliant with the Agreement and Article VI of the GATT.³⁹⁷ In the case of *United States- 1916 Act*, the Appellate Body (AB) of

³⁸⁸ Staiger (note 377 above; 741), Prusa (note 47 above; 690 and 698), Jones (note 198 above; 6) and Sudsawasd (note 141 above; 2, 3 and 6).

³⁸⁹ UNDP (note 382 above; 185) and Macrory, Appleton and Plummer (note 92 above; 487).

³⁹⁰ Gupta and Choudhury (note 33 above; 117 and 122).

³⁹¹ *Ibid.*

³⁹² Macrory, Appleton and Plummer (note 92 above; 487).

³⁹³ Macrory, Appleton and Plummer (note 92 above; 487) and Gupta and Choudhury (note 33 above; 117).

³⁹⁴ UNDP (note 382 above; 185) and Macrory, Appleton and Plummer (note 92 above; 488).

³⁹⁵ UNDP (note 382 above; 192).

³⁹⁶ This thesis cannot undertake an examination and discussion of all the articles of the ADA. Thus, it will be limited to articles 1, 2, 3, 5, 7, 8, 9 and 15 with reference being made to article 4. These articles cover the necessary requirements for an anti-dumping investigation and the treatment to be afforded to developing nations.

³⁹⁷ Macrory, Appleton and Plummer (note 92 above; 500).

the WTO held that the USA's 1916 Anti-Dumping Act did not conform to such principles because the Act provided for criminal sanctions in certain circumstances, amongst other reasons.³⁹⁸

3.3.2 Article 2

The second article focuses on the determination of dumping.³⁹⁹ It sets out the important principles for such calculations while implementation thereof is left to the member's discretion.⁴⁰⁰ The definition of a dumped product is contained in article 2.1, with the key terms being 'normal value' and 'export price'.⁴⁰¹

For the calculation of normal value⁴⁰², should the amount not be determinable following article 2.1, then recourse to alternatives contained in article 2.2 is required.⁴⁰³ This includes either looking to the price a like product was sold for to a third country or the cost of production plus certain additional costs for 'selling costs and profit'.⁴⁰⁴ For the export price, it is usually ascertained by reference to the exporter's books.⁴⁰⁵ If it cannot be located or is regarded as unreliable, then construction thereof using the price charged for sale of the goods to the first independent buyer is permitted.⁴⁰⁶ In the normal value calculations, usually only sale prices that are greater than its costs will be averaged while all export sales, irrespective of its relation to cost price, will be averaged to determine a final figure.⁴⁰⁷ Various issues with such elements and calculations have arisen.⁴⁰⁸

The recourse to construction of normal value in terms of article 2.2 has been of concern to some exporters due to the discretion it leaves to administering

³⁹⁸ Macrory, Appleton and Plummer (note 92 above; 500-501) and *United States- Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R of 28 August 2000 (*United States- 1916 Act*).

³⁹⁹ United Nations Conference on Trade and Development (UNCTAD) 'Training Module on the WTO Agreement on Anti-Dumping' available at http://unctad.org/en/Docs/ditctncd20046_en.pdf, accessed on 24 February 2017 at 6.

⁴⁰⁰ UNCTAD (note 399 above; 6).

⁴⁰¹ Trebilcock (note 387 above; 62).

⁴⁰² Normal value has been defined as 'normally the price of the like product in the exporting country, as long as the product is destined for consumption there and the price is in the ordinary course of trade'. EA Vermulst *The WTO Anti-Dumping Agreement: A Commentary* (2008) 19.

⁴⁰³ Trebilcock (note 387 above; 62).

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Article 2.2.1.1 of the ADA and Lal Das et al (note 361 above; 64).

⁴⁰⁶ Lal Das et al (note 361 above; 64).

⁴⁰⁷ Trebilcock (note 387 above; 63).

⁴⁰⁸ Adamantopoulos and De Notaris (note 379 above; 48).

authorities.⁴⁰⁹ Authors such as Pangratis and Vermulst state that such discretion is excessive.⁴¹⁰ The calculation of 'reasonable profit' has however been subject to criticism specifically.⁴¹¹ Suggestions for improvement thereof have been noted despite article 2.2.2 requiring that this calculation be based on production data and sales made in the ordinary course of the exporter's business.⁴¹² One such proposal is that the profit amount should be determined by reference to all the exporter's sales of the product concerned and not merely those sales made in the ordinary course of trade.⁴¹³ Thus, to obtain the profit margin, the percentage of such profits in relation to either the 'total domestic turnover' or production costs should be calculated instead.⁴¹⁴ Providing such guidelines would not only reduce the extent of dumping margins determined, but also the discretion allotted to authorities herein.⁴¹⁵

The construction of the export price, allowed in some instances by article 2.3, has also been criticised for being used too often by authorities.⁴¹⁶ It has been recommended that the article be amended to only allow only for its use when an export price cannot be determined based on sales to a third country.⁴¹⁷ This would also reduce the discretion granted to authorities, which is a general concern with the ADA.⁴¹⁸

Once the export and normal values have been determined, article 2.4 requires that a 'fair comparison' between the two be conducted to determine how much greater the normal value is than the export price.⁴¹⁹ The result is the dumping margin.⁴²⁰ Before this, and to facilitate a proper comparison, article 2.4 sets out further requirements to be met including that the prices used be of the same trading level, either ex-factory,

⁴⁰⁹ There are three components to this construction, namely the production cost, a 'reasonable amount for administrative, selling and general cost' and an amount for profit. Article 2.2 of the ADA, UNCTAD (note 399 above; 10) and Adamantopoulos and De Notaris (note 379 above; 48).

⁴¹⁰ Pangratis and Vermulst (note 150 above; 70).

⁴¹¹ *Ibid.*

⁴¹² Adamantopoulos and De Notaris (note 379 above; 51), Trebilcock (note 387 above; 63) and article 2.2.2 of the ADA.

⁴¹³ Adamantopoulos and De Notaris (note 379 above; 51).

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ C Satapathy 'WTO Agreement on Anti-Dumping: Misuse and Case for Review' (1999) 34(32) *Economic and Political Weekly* 2212.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ Trebilcock (note 387 above; 63) and UNCTAD (note 399 above; 13).

⁴²⁰ Trebilcock (note 387 above; 63).

retail or wholesale, with ex-factory being recommended.⁴²¹ Thus, authorities are required to deduct from the price those costs incurred past the chosen trade level point.⁴²² Furthermore, sales considered in this calculation should have been made around the same time.⁴²³

The contentious aspect of article 2.4 is the allowances permitted for certain aspects which affect price comparability, particularly when additional costs are incurred between importation and resale of the products for profit.⁴²⁴ The article has been regarded as 'open-ended' despite the list of such differences contained therein.⁴²⁵ This is due to any difference possibly being considered provided its effect on the comparability of prices can be shown.⁴²⁶ Although it is not mandatory to give effect to such allowances, as held in *United States- Steel plate*, implementation thereof could decrease the export price thus raising the possibility of a positive dumping finding.⁴²⁷ Accordingly, it would seem unlikely that investigating authorities would shy away from exercising this discretion.⁴²⁸

After the above-mentioned adjustments are considered, the comparison between the export and normal prices must be done.⁴²⁹ It can be undertaken in three ways.⁴³⁰ The first is the weighted average to weighted average method, where the weighted averages for the normal and export prices are calculated and then compared.⁴³¹ Secondly, in the transaction to transaction method, the normal and export prices applicable on the transaction date concerned are compared.⁴³² The third method entails a comparison between the weighted average calculated for the normal value and individual export price for each transaction concerned.⁴³³ Where a calculation

⁴²¹ The ex-factory price refers to the price of the goods at the moment they depart from the factory concerned. Article 2.4 of the ADA, UNCTAD (note 399 above; 7 and 13) and Lal Das et al (note 361 above; 64).

⁴²² UNCTAD (note 399 above; 13).

⁴²³ Lal Das et al (note 361 above; 64).

⁴²⁴ UNCTAD (note 399 above; 7).

⁴²⁵ *Ibid* 13.

⁴²⁶ *Ibid* 13.

⁴²⁷ The panel found that the word 'should' in article 2.4 is non-mandatory. *United States- Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R of 28 June 2002 (*United States- Steel plate*) at paras 6.93-6.94 and UNCTAD (note 399 above; 7).

⁴²⁸ UNCTAD (note 399 above; 7).

⁴²⁹ Article 2.4 of the ADA and Vermulst (note 402 above; 51).

⁴³⁰ Article 2.4.2 of the ADA and Vermulst (note 402 above; 51-53).

⁴³¹ Article 2.4.2 of the ADA, Vermulst (note 402 above; 51-53) and Trebilcock (note 387 above; 63).

⁴³² Article 2.4.2 of the ADA, Vermulst (note 402 above; 52) and Trebilcock (note 387 above; 63).

⁴³³ Article 2.4.2 of the ADA, Vermulst (note 402 above; 52), Satapathy (note 416 above; 2211) and Macrory, Appleton and Plummer (note 92 above; 507).

renders a negative margin, a zero is attributed to it by some states' investigating authorities, thus increasing the chances of a positive dumping finding and a higher one too.⁴³⁴ This practice is known as zeroing and has been the subject of much debate despite a defence being raised that it assists in combatting 'targeted dumping'.⁴³⁵ According to Voon, it has been the most prevalent topic amongst the cases before the WTO.⁴³⁶

Further, use of zeroing was challenged by various states without success before the Uruguay Round.⁴³⁷ However, after this Round it was agreed that use thereof be allowed in circumstances contained in article 2.4.2 of the ADA, namely where

'the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods'.⁴³⁸

Interestingly, in order to bypass this requirement, some states began to engage in inter-model zeroing, where the dumping margin was determined for each model within the category of products investigated.⁴³⁹ For those models which had a negative dumping margin, a zero was denoted thereto, thus increasing to a greater extent the likelihood of a positive dumping margin being determined.⁴⁴⁰ This practice was ruled by the AB in *EC- Bed Linen* as being improper and thus not allowed under article 2.4.2.⁴⁴¹ Another variation of this margin calculation did arise.⁴⁴²

The use of zeroing through 'multiple averaging periods' was held to be inconsistent with article 2.4.2 in *United States- Stainless steel plate in coils and stainless steel*

⁴³⁴ Vermulst (note 402 above; 53-54).

⁴³⁵ Vermulst (note 402 above; 53-54) and Macrory, Appleton and Plummer (note 92 above; 507).

⁴³⁶ Voon (note 92 above; 442).

⁴³⁷ In the case of *United States- Fresh and chilled Atlantic salmon from Norway*, ADP/87 of 30 November 1992 (*United States- Salmon*) at para 482 it was held that this method was not 'inherently biased'. In the case of *European Communities- Audio tapes in cassettes from Japan*, ADP/136 of 28 April 1995 (*EC- Audio tapes*) at paras 125-126 and 354, the panel held that this method would not always cause an increase in the dumping margins determined when compared to the transaction to transaction method where each one could result in a less favourable result than the other depending on the circumstances. Vermulst (note 402 above; 54-56).

⁴³⁸ Article 2.4.2 of the ADA and Vermulst (note 402 above; 56).

⁴³⁹ Vermulst (note 402 above; 57) and Macrory, Appleton and Plummer (note 92 above; 507).

⁴⁴⁰ Vermulst (note 402 above; 57) and Macrory, Appleton and Plummer (note 92 above; 507).

⁴⁴¹ This finding was confirmed in the case of *United States- Softwood lumber II. European Communities- Anti-dumping duties on imports of cotton-type bed linen from India*, WT/DS141/AB/R of 1 March 2001 (*EC- Bed Linen* (AB)) at para 55, *United States- Final dumping determination on softwood lumber from Canada*, WT/DS264/R of 13 April 2004 (*United States- Softwood lumber*) at para 98, Vermulst (note 402 above; 58 and 60) and Macrory, Appleton and Plummer (note 92 above; 507).

⁴⁴² Macrory, Appleton and Plummer (note 92 above; 507-508).

sheet and strip.⁴⁴³ This method was used as it was alleged that the normal value had undergone drastic variations during the investigation period, thus necessitating use of an altered method.⁴⁴⁴ The USA's investigating authority had divided the investigation period into two with one being before the economic crisis in Korea and the other one thereafter.⁴⁴⁵ Dumping margins were then calculated for each period and zeroes attached to periods which had negative margins.⁴⁴⁶ The panel found that:

- i. article 2.4.2 did not permit the division of the investigation period as such for the purposes of calculating dumping margins⁴⁴⁷; and
- ii. that the export and normal values calculated and compared must relate to identical time periods.⁴⁴⁸

Owing to such difficulties experienced, an amendment to the article to curb such use has been suggested by Satapathy.⁴⁴⁹ While these cases assist in ensuring that the ADA is applied correctly, such rulings only require the states concerned to 'address the specific duties at hand'.⁴⁵⁰ There is no obligation for states to alter their rules and methods of practice, thereby not completely preventing other states from also embracing such practices.⁴⁵¹

3.3.3 Article 3

The next step required by the ADA is establishment of whether the dumped products are causing the domestic industry, responsible for production of the like product, to suffer injury.⁴⁵² Where data is not available to determine this for the like product

⁴⁴³ *United States- Anti-dumping measures on stainless steel plate in coils and stainless steel sheet and strip from Korea*, WT/DS179/R of 22 December 2000 (*United States- Stainless steel plate in coils and stainless steel sheet and strip*) at para 7.3, Vermulst (note 402 above; 61) and Macrory, Appleton and Plummer (note 92 above; 507-508).

⁴⁴⁴ *United States- Stainless steel plate in coils and stainless steel sheet and strip* (note 443 above; para 7.3), Vermulst (note 402 above; 61) and Macrory, Appleton and Plummer (note 92 above; 507-508).

⁴⁴⁵ Vermulst (note 402 above; 61).

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *United States- Stainless steel plate in coils and stainless steel sheet and strip* (note 443 above; para 7.3) and Vermulst (note 402 above; 61).

⁴⁴⁸ *United States- Stainless steel plate in coils and stainless steel sheet and strip* (note 443 above; para 6.121) and Vermulst (note 402 above; 61).

⁴⁴⁹ Satapathy (note 416 above; 2211).

⁴⁵⁰ UNCTAD (note 399 above; 57).

⁴⁵¹ *Ibid.*

⁴⁵² Articles 3.1 and 3.7 of the ADA. Footnote 9 of the ADA states that 'injury' means 'material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the

concerned, then article 3.6 is applicable.⁴⁵³ This is known as the ‘product line exception’ as it permits investigating authorities to use available data relating to the ‘narrowest group or range of products which includes the like product’ in such calculation.⁴⁵⁴

The next important factor in an injury determination is that of the ‘domestic industry’.⁴⁵⁵ The meaning thereof is found in article 4.1 of the ADA⁴⁵⁶, which has to be followed and given effect to as held in *Argentina- Poultry*.⁴⁵⁷ Furthermore, it was held that more than one manufacturer can be responsible for producing a large part of the like product.⁴⁵⁸ Once such requirements have been established, it can be determined whether the industry has suffered injury.⁴⁵⁹

More so, investigating authorities need to determine the existence of injury, utilising an ‘objective examination’ of the ‘positive evidence’.⁴⁶⁰ This is usually investigated over a three-year period, wherein injury must be suffered.⁴⁶¹ The requirement of an ‘objective examination’ has been used as a standard to measure the fairness of findings.⁴⁶² This element must be present in an authority’s findings as noted in

establishment of such an industry’. The meaning of ‘like product’ is contained in article 2.6. It states that ‘like product’ is to ‘mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration’. It must be the domestic industry which produces the like product that is suffering injury. Trebilcock (note 387 above; 63), Vermulst (note 402 above; 63-64), and UNCTAD (note 399 above; 19).

⁴⁵³ Vermulst (note 402 above; 64) and UNCTAD (note 399 above; 19).

⁴⁵⁴ Article 3.6 of the ADA. In the case of *Mexico- HFCS* it was held that article 3.6 does not permit the examination of a category within the like product which would be narrower than the parameters of the like product. UNCTAD (note 399 above; 19), Vermulst (note 402 above; 64-65) and *Mexico- Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States*, WT/DS132/R of 28 January 2000 (*Mexico- HFCS*) at para 7.157.

⁴⁵⁵ Vermulst (note 402 above; 63).

⁴⁵⁶ Article 4.1 states that ‘domestic industry’ refers to ‘the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products’. Vermulst (note 402 above; 67).

⁴⁵⁷ *Argentina- Definitive anti-dumping duties on poultry from Brazil*, WT/DS241/R of 22 April 2003 (*Argentina- Poultry*) at paras 7.331 and 7.338 and Vermulst (note 402 above; 67).

⁴⁵⁸ *Argentina- Poultry* (note 457 above; para 7.341) and Vermulst (note 402 above; 67).

⁴⁵⁹ Vermulst (note 402 above; 63 and 73).

⁴⁶⁰ Article 3.1 of the ADA and Trebilcock (note 387 above; 63).

⁴⁶¹ The ‘three-year period’ noted here was the recommendation of the WTO Committee on Anti-Dumping Practices (WTO Committee on Anti-Dumping Practices - Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations - Adopted by the Committee on 5 May 2000, G/ADP/6 (16 May 2000)). It was ruled in *Guatemala- Cement II* that this recommendation was not binding on members as it was not a rule of the ADA. *Guatemala- Definitive anti-dumping measures on grey Portland cement from Mexico*, WT/DS156/R of 24 October 2000 (*Guatemala- Cement II*) at para 8.266, Vermulst (note 402 above 82-83) and UNCTAD (note 399 above; 21).

⁴⁶² *Thailand- Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland*, WT/DS122/AB/R of 12 March 2001 (*Thailand- H-Beams (AB)*) at para 106 and Vermulst (note 402 above; 74).

Thailand- H-Beams.⁴⁶³ In this case the requirement that authorities examine ‘positive evidence’ was determined to mean that it has to be ‘affirmative, objective and of a verifiable character and that it must be credible’.⁴⁶⁴ Such requirements have to be met when gathering information and making decisions in respect of articles 3.1(a) and 3.1(b).⁴⁶⁵

Further, Article 3.2 requires authorities to consider various factors in relation to the ‘volume of dumped imports’.⁴⁶⁶ The word ‘consider’ was held in both *Thailand- H-Beams* (AB) and *China- X-Rays* as not requiring a precise finding that the increase was significant.⁴⁶⁷ In *Thailand- H-Beams* (AB) it was stated that evidence showing that authorities have investigated whether such a significant increase exists, must be noted in the documents.⁴⁶⁸ In *China- X-Rays*, the panel made reference to *China- GOES* by agreeing with its finding that the authority’s activities relating to this article are to be in accordance with the principles of article 3.1.⁴⁶⁹ This includes ‘positive evidence’ being used in an ‘objective examination’.⁴⁷⁰

The relationship between the next important consideration in article 3.1(b) and its corresponding provision in article 3.4 is explained by the panel in *Argentina- Poultry*.⁴⁷¹ It held that the close connection between these provisions is such that a violation of article 3.4 also implies a transgression of the other.⁴⁷² Article 3.4 requires the

⁴⁶³ *Thailand- H-Beams* (AB) (note 462 above; para 106) and Vermulst (note 402 above; 74).

⁴⁶⁴ *Thailand- H-Beams* (AB) (note 462 above; para 111) and Vermulst (note 402 above; 75).

⁴⁶⁵ An ‘objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products as well as the consequent impact of these imports on domestic producers of such products’ must be undertaken as required by article 3.1 of the ADA. Article 3.1(a) is further defined in article 3.2 while article 3.1(b) is expanded upon on in article 3.4 of the ADA. Vermulst (note 402 above; 75) and Trebilcock (note 387 above; 63-64).

⁴⁶⁶ Article 3.2 of the ADA and Vermulst (note 402 above; 75).

⁴⁶⁷ In *China- X-Rays* the panel also quoted *China- GOES* with approval in that ‘consider’ requires one to take notice of such factor. *China- Countervailing and anti-dumping duties on grain oriented flat rolled electrical steel from the United States* WT/DS414/R of 15 June 2012 (*China- GOES*) at paras 130-131, *Thailand- H-Beams* (AB) (note 462 above; para 7.167), *China- Definitive anti-dumping duties on X-Ray security inspection equipment from the European Union* WT/DS425/R of 26 February 2013 (*China- X-Rays*) at para 7.45, Vermulst (note 402 above; 75) and G Brink ‘Price comparisons in anti-dumping investigations following *China- X-rays* WT/DS425/R (2012) 37(1) *South African Yearbook of International Law* at 319-320.

⁴⁶⁸ *Thailand- H-Beams* (AB) (note 462 above; para 7.161) and Vermulst (note 402 above; 75).

⁴⁶⁹ *China- X-Rays* (note 467 above; para 7.45), *China- GOES* (note 467 above; paras 130-131) and Brink (note 467 above; 320).

⁴⁷⁰ The meaning of ‘positive evidence’ and ‘objective examination’ contained in article 3.1 is explained on pages 48 to 49. *China- X-Rays* (note 467 above; para 7.45), *China- GOES* (note 467 above; paras 130-131) and Brink (note 467 above; 320).

⁴⁷¹ *Argentina- Poultry* (note 457 above; para 7.325) and Vermulst (note 402 above; 75).

⁴⁷² *Argentina- Poultry* (note 457 above; para 7.325) and Vermulst (note 402 above; 75).

authorities consider the factors contained therein when determining whether dumped imports are affecting the domestic industry concerned.⁴⁷³ The need to examine and consider such factors has been the subject of some panel hearings with the obligation on investigating authorities being settled in *Thailand- H-Beams* (AB).⁴⁷⁴ Herein the AB determined that it is mandatory for every factor listed in article 3.4 to be evaluated and evidence of such assessment to be apparent from the documentation of the investigation.⁴⁷⁵ Before such evaluation, the authorities have to collect information and data for each factor.⁴⁷⁶

Once authorities have gathered the material required by article 3, article 3.5 requires an investigation be conducted into whether a causal link exists between the dumping and injury.⁴⁷⁷ In doing so, this provision refers to 'other known factors' affecting the industry which have to be examined in certain circumstances as stated in *EC- Malleable cast iron tube or pipe fittings*.⁴⁷⁸ Such factors must be considered if they are known, are not the dumped imports and are causing injury at the same time as the dumped imports.⁴⁷⁹ These additional issues must be raised by the parties while the investigation is on-going, at which point authorities are required to examine them.⁴⁸⁰ Authorities are not obligated to search for such factors.⁴⁸¹ Furthermore, the entire list of factors in article 3.5 does not have to be scrutinised by authorities unlike with article 3.4 as held in *Thailand- H-Beams*.⁴⁸² The individual effect of each one need only be

⁴⁷³ Article 3.4 of the ADA and Trebilcock (note 387 above; 64).

⁴⁷⁴ The panels that have considered the obligation on authorities to consider such factors were *Mexico – HFCS* (note 107 above), *Thailand- Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R of 28 September 2000 (altered by the report of AB WT/DS122/AB/R), *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R of 30 October 2000 (*EC- Bed Linen*) (altered by the AB report WT/DS141/AB/R) and *Guatemala- Cement II* (note 461 above). UNCTAD (note 399 above; 22).

⁴⁷⁵ *Thailand- H-Beams* (AB) (note 462 above; para 125) and UNCTAD (note 399 above; 22).

⁴⁷⁶ *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R of 30 October 2000 (*EC- Bed Linen*) at para 6.167, Vermulst (note 402 above; 88) and UNCTAD (note 399 above; 22-23).

⁴⁷⁷ Article 3.5 of the ADA and Vermulst (note 402 above; 90).

⁴⁷⁸ *European Communities- Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil*, WT/DS219/AB/R of 22 July 2003 at para 175 (*EC- Malleable cast iron tube or pipe fittings*) and Vermulst (note 402 above; 91).

⁴⁷⁹ *EC- Malleable cast iron tube or pipe fittings* (note 478 above; para 175) and Vermulst (note 402 above; 91).

⁴⁸⁰ *Thailand- Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland*, WT/DS122/R of 28 September 2000 (*Thailand- H-Beams*) at para 7.273, Vermulst (note 402 above; 92) and UNCTAD (note 399 above; 24).

⁴⁸¹ *Thailand- H-Beams* (note 480 above; para 7.273), Vermulst (note 402 above; 92) and UNCTAD (note 399 above; 24).

⁴⁸² *Thailand- H-Beams* (note 480 above; para 7.274) and Vermulst (note 402 above; 92).

looked at and not the collective effect thereof if found that such factors have not contributed to injury suffered by the industry concerned as a result of the dumped imports.⁴⁸³

In relation to such other known factors, article 3.5 also contains an important principle, known as the 'non-attribution principle'.⁴⁸⁴ This requires injury caused by such other factors to not be linked to the dumped imports when determining the causal relationship between dumping and injury.⁴⁸⁵ The application and importance of this principle was explained by the AB in *United States- Hot-rolled steel*.⁴⁸⁶ It stated that it applies when injury is not only being caused by the dumped imports but also by other known factors.⁴⁸⁷ In such circumstances, injury caused by each such factor must be determined separately in order to conclude whether the dumped imports are causing the reported injury.⁴⁸⁸

The AB also ruled that findings relating to the non-attribution principle contained in article 4.2(b) of the WTO's Safeguards Agreement can assist in interpreting this principle in the ADA.⁴⁸⁹ In this respect, the AB laid down two guidelines which also apply to article 3.5 of the ADA.⁴⁹⁰ First, imports only need to be at least a 'contributory cause' to the injury suffered and, secondly, there must be a separation between injury caused by the dumped imports and by the other factors.⁴⁹¹ While injury determinations

⁴⁸³ *EC- Malleable cast iron tube or pipe fittings* (note 478 above; para 190-192) and *Vermulst* (note 402 above; 91).

⁴⁸⁴ *Vermulst* (note 402 above; 93) and *Trebilcock* (note 387 above; 8).

⁴⁸⁵ *Vermulst* (note 402 above; 91).

⁴⁸⁶ *United States- Anti-dumping measures on certain hot-rolled steel products from Japan*, WT/DS184/AB/R of 24 July 2001 (*United States- Hot-rolled steel (AB)*) at para 223, *Vermulst* (note 402 above; 93) and *Trebilcock* (note 387 above; 8).

⁴⁸⁷ *United States- Hot-rolled steel (AB)* (note 486 above; para 223) and *Vermulst* (note 402 above; 93).

⁴⁸⁸ *United States- Hot-rolled steel (AB)* (note 486 above; para 223) and *Vermulst* (note 402 above; 93).

⁴⁸⁹ Article 4.2(b) of the Agreement on Safeguards. 'Agreement on Safeguards' available at https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf, accessed on 21 November 2017, *United States- Hot-rolled steel (AB)* (note 486 above; para 229) and *Vermulst* (note 402 above; 94).

⁴⁹⁰ *United States- Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* of 19 January 2001, WT/DS166/12 of 12 April 2001 (*United States- Wheat Gluten from the EC*) at paras 67-68, *United States- Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, WT/DS177/12 and WT/DS178/13 of 2 October 2001 (*United States- Lamb meat from New Zealand and Australia*) at paras 167 and 170, *United States- Hot-rolled steel (AB)* (note 486 above; paras 231-232) and *Vermulst* (note 402 above; 93).

⁴⁹¹ *United States- Wheat Gluten from the EC* (note 490 above; paras 67-67), *United States- Lamb meat from New Zealand and Australia* (note 490 above; paras 167 and 170) and *Vermulst* (note 402 above; 93).

are key to anti-dumping investigations, authorities need to foremost ensure that initiation requirements of article 5 are satisfied.⁴⁹²

3.3.4 Article 5

Further, an initiation requirement of article 5.3 of the ADA requires investigating authorities to determine the ‘accuracy and adequacy of the evidence’ contained in the application to decide whether an investigation is warranted.⁴⁹³ An issue highlighted with this article is that it does not specify how authorities must ascertain the ‘accuracy and adequacy’ of the evidence’.⁴⁹⁴ This makes it problematic for other states to prove non-compliance therewith and for the WTO to determine whether initiation was warranted.⁴⁹⁵

Some guidance on the nature of evidence required for article 5.3 has been provided.⁴⁹⁶ In *Mexico- HFCS* it was stated that the amount and quality thereof needed to start an investigation is not as great as that required to make a final or preliminary decision on injury, dumping or the causal link.⁴⁹⁷ Furthermore, the application need not contain evidence for each factor listed in articles 3.2 and 3.4.⁴⁹⁸ Evidence can also be submitted in the form of ‘raw numerical data without analysis’ as held in *Thailand- H-Beams*.⁴⁹⁹ Over and above the information provided, authorities are permitted to locate relevant evidence and data themselves.⁵⁰⁰

Moreover, article 5.8 states an investigation must be terminated where there is either *de minimis* dumping or negligible injury.⁵⁰¹ *De minimis* dumping refers to the situation where the dumping margin calculated is below two percent, with such calculation being

⁴⁹² UNCTAD (note 399 above; 28).

⁴⁹³ *Ibid.*

⁴⁹⁴ *EC- Bed Linen* (note 476 above; para 6.198), article 5.3 of the ADA, UNCTAD (note 399 above; 28) and Macrory, Appleton and Plummer (note 92 above; 511).

⁴⁹⁵ UNCTAD (note 399 above; 28).

⁴⁹⁶ UNCTAD (note 399 above; 28) and Macrory, Appleton and Plummer (note 92 above; 511).

⁴⁹⁷ *Mexico- HFCS* (note 454 above; para 7.94) and UNCTAD (note 399 above; 28).

⁴⁹⁸ *Mexico- HFCS* (note 454 above; para 7.73) and Macrory, Appleton and Plummer (note 92 above; 511).

⁴⁹⁹ *Thailand- H-Beams* (note 480 above; para 7.77) and Macrory, Appleton and Plummer (note 92 above; 511).

⁵⁰⁰ *Guatemala- Cement II* (note 461 above; para 8.62) and Macrory, Appleton and Plummer (note 92 above; 511).

⁵⁰¹ This is in addition to the requirement that an investigation must be terminated where the evidence provided showing the alleged dumping and injury is inadequate as stated in article 5.8 of the ADA. Vermulst (note 402 above; 512) and Trebilcock (note 387 above; 64).

required for each producer involved in the investigation.⁵⁰² In *Mexico- Rice* it was noted that while the negligibility calculation is to be done on a ‘country-wide basis’, no such guidance was expressed for the dumping margin determination.⁵⁰³ Herein, the Panel ruled that Mexico had violated article 5.8 when it failed to terminate the investigation after finding that two of the producers involved had dumping margins below the *de minimis* level.⁵⁰⁴

The other circumstance wherein termination must occur is where ‘negligible injury’ is found.⁵⁰⁵ An ‘import share test’ is used to determine this.⁵⁰⁶ Thus, for injury to be regarded as ‘negligible’, an investigated country’s volume of dumped imports must be below three percent of the importing country’s total imports, when expressed as a percentage thereof.⁵⁰⁷ Should individual states investigated not meet this three percent requirement, an investigation can still be initiated where together such states are responsible for seven percent of the total imports.⁵⁰⁸ There have been calls for this option to be abolished as it could potentially increase chances of an affirmative dumping finding.⁵⁰⁹ Authors, such as Vermulst, have also noted that there is no provision in this requirement for developing countries, as with *de minimis* too.⁵¹⁰ To this end, Satapathy suggests that a five percent limit for negligibility should be applicable.⁵¹¹ Other apprehensions in relation to article 5.8 have also arisen.⁵¹²

There were concerns over the lack of provision of a time period in which the two calculations required by article 5.8 have to be made in.⁵¹³ As such, the Committee on Anti-Dumping Practices attempted to deal with this by making a recommendation in

⁵⁰² This is margin calculated by expressing the normal value as a percentage of the product’s export price. Article 5.8 of the ADA, Vermulst (note 402 above; 119) and UNCTAD (note 399 above; 30).

⁵⁰³ *Mexico- Definitive anti-dumping measures on beef and rice from the United States, Complaint with respect to rice*, WT/DS/295/R of 6 June 2005 (*Mexico- Rice*) at para 7.145 and Vermulst (note 402 above; 120).

⁵⁰⁴ *Mexico- Rice* (note 503 above; para 7.144-7.145) and Vermulst (note 402 above; 120).

⁵⁰⁵ Article 5.8 and Vermulst (note 402 above; 121).

⁵⁰⁶ Vermulst (note 402 above; 121).

⁵⁰⁷ Article 5.8 of the ADA, Vermulst (note 402 above; 121) and UNCTAD (note 399 above; 30).

⁵⁰⁸ Article 5.8 of the ADA and Vermulst (note 402 above; 121).

⁵⁰⁹ Satapathy (note 416 above; 2211) and ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#injury, accessed on 28 October 2017.

⁵¹⁰ UNCTAD (note 399 above; 30) and Vermulst (note 402 above; 121-122).

⁵¹¹ Satapathy (note 416 above; 2211).

⁵¹² Satapathy (note 416 above; 2211) and Vermulst (note 402 above; 123).

⁵¹³ Satapathy (note 416 above; 2211) and Vermulst (note 402 above; 123).

this respect.⁵¹⁴ It stated that the time limit should pertain to the period used to conduct the investigation or to the ‘most recent 12 consecutive months’ preceding either one of two dates.⁵¹⁵ This is either the initiation date that data is on hand for or the date when the party or parties filed the application for which data is available, as long as there is not a gap of longer than 90 days between the application and initiation of the investigation.⁵¹⁶ This recommendation, as with others, will not be binding as noted in *Guatemala- Cement II*, thus making concerns relating to the provision still viable.⁵¹⁷ Such concerns include members being able to make ‘arbitrary and unilateral decisions’ when choosing a time period, thereby allowing for a finding that meets the minimum requirements of article 5.8 and for the investigation to continue when it should not have.⁵¹⁸ Satapathy has suggested that the article be altered to include a specific time period to standardise such calculations, thereby limiting the authorities’ discretion.⁵¹⁹ Once all the above requirements are met, then the authority can utilise either definitive antidumping duties pursuant to article 9, provisional duties under article 7 or price undertakings in terms of article 8 of the ADA.⁵²⁰

3.3.5 Article 7

Article 7 lays down the circumstances where provisional measures may be utilised.⁵²¹ They may only be applied once the conditions in article 7.1 are met.⁵²² Measures must consist of either a ‘provisional duty’ or security, such as a ‘cash deposit’ or ‘bond’ that is the same value as the provisional determination of anti-dumping duties.⁵²³ Once chosen, they can only be applied for the shortest possible period of time or four months at the maximum unless the requirements of article 7.4 are satisfied, whereupon an

⁵¹⁴ Committee on Anti-Dumping Practices - Recommendation Concerning the Time- Period to be Considered in Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement - Adopted by the Committee on 27 November 2002, G/ADP/10 (29 November 2002).

⁵¹⁵ Committee on Anti-Dumping Practices - Recommendation Concerning the Time- Period to be Considered in Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement (note 514 above) and Vermulst (note 402 above; 123).

⁵¹⁶ Committee on Anti-Dumping Practices - Recommendation Concerning the Time- Period to be Considered in Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement (note 514 above) and Vermulst (note 402 above; 123).

⁵¹⁷ *Guatemala- Cement II* (note 461 above; para 8.266).

⁵¹⁸ Satapathy (note 416 above; 2211).

⁵¹⁹ *Ibid.*

⁵²⁰ Trebilcock (note 387 above; 66).

⁵²¹ Trebilcock (note 387 above; 64) and Vermulst (note 402 above; 166).

⁵²² Lal Das et al (note 361 above; 66) and Vermulst (note 402 above; 166-167).

⁵²³ Article 7.2 of the ADA, Trebilcock (note 387 above; 64), Lal Das et al (note 361 above; 66) and Vermulst (note 402 above; 168).

additional two months may be granted.⁵²⁴ Such deadlines must be strictly observed and cannot be extended beyond such limits as held in *Mexico- HFCS*.⁵²⁵

3.3.6 Article 8

Further, price undertakings are also available under the ADA.⁵²⁶ They can be described as an undertaking or a promise to either 'revise prices' or stop exports 'at dumped prices' to the extent that this removes any injury being caused.⁵²⁷ It is only available once positive preliminary injury and dumping findings have been made.⁵²⁸ If chosen, then no anti-dumping duties can be levied and the investigation will only continue at the request of the exporter.⁵²⁹

The importing state, however, has the discretion as to whether or not to accept such undertakings as indicated by the word 'may' in article 8.1.⁵³⁰ They will probably not be accepted where there is a large number of exporters involved, thus making 'their acceptance impractical'.⁵³¹ In instances of non-acceptance, explanations for this should be produced by the authorities.⁵³² Furthermore, should the exporter decide not to offer or accept an offer to give undertakings, this must not negatively impact upon the authorities' final decision whether to impose duties or not.⁵³³ Exporters are not obligated to make such undertakings.⁵³⁴ Thus, the provision of undertakings is essentially based on consensus of the parties concerned.⁵³⁵ Some disadvantages noted with their use however include possible decreases in sale amounts of the product concerned and having to adhere to the reporting and verification requirements of article 8.6.⁵³⁶ This remedy has been favoured by exporters as anti-dumping duties are not required if undertakings are implemented and additional profits earned accrue

⁵²⁴ Article 7.4 of the ADA, Macrory, Appleton and Plummer (note 92 above; 518) and Vermulst (note 402 above; 167-168).

⁵²⁵ *Mexico- HFCS* (note 454 above; para 7.182) and Vermulst (note 402 above; 168).

⁵²⁶ Trebilcock (note 387 above; 66).

⁵²⁷ Article 8.1 of the ADA, UNCTAD (note 399 above; 34) and Vermulst (note 402 above; 168).

⁵²⁸ Article 8.2 of the ADA and Trebilcock (note 387 above; 64).

⁵²⁹ Articles 8.1, 8.4 and footnote 19 of the ADA, Trebilcock (note 387 above; 64) and Macrory, Appleton and Plummer (note 92 above; 518).

⁵³⁰ UNCTAD (note 399 above; 34).

⁵³¹ Article 8.3 of the ADA, Macrory, Appleton and Plummer (note 92 above; 518) and Vermulst (note 402 above; 170).

⁵³² Article 8.3 of the ADA and Macrory, Appleton and Plummer (note 92 above; 518).

⁵³³ Macrory, Appleton and Plummer (note 92 above; 518).

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

⁵³⁶ Article 8.6 of the ADA and Vermulst (note 402 above; 170).

to them.⁵³⁷ Its use could be expanded by the ruling in *EC- Bed Linen* which classified it as a possible 'constructive remedy' for developing countries under article 15 instead of anti-dumping measures.⁵³⁸

3.3.7 Article 9

The imposition and gathering of definitive anti-dumping duties is regulated by article 9.⁵³⁹ There is no specific guidance in the ADA as to what type such duties must take as noted in *Argentina- Poultry*.⁵⁴⁰ Possible forms include 'ad valorem (percentage)', 'specific' or 'variable duties'.⁵⁴¹ States do however have discretion as to whether or not to charge such duties when the requirements are met.⁵⁴² They are encouraged to charge at a rate which is lower than the dumping margin determined if it will eliminate the injury suffered.⁵⁴³ In order to decide whether to impose duties, some states have introduced a 'public interest test' where the interest of the public is the criterion for this decision.⁵⁴⁴ Should duties be imposed, article 9.2 requires that there be non-discrimination in the collection thereof.⁵⁴⁵ Before such decisions in relation to developing countries are made, article 15 contains certain obligations for developed members.⁵⁴⁶

⁵³⁷ UNCTAD (note 399 above; 34), Macrory, Appleton and Plummer (note 92 above; 518) and Vermulst (note 402 above; 170).

⁵³⁸ *EC- Bed Linen* (note 476 above; para 6.238), UNCTAD (note 399 above; 34) and Macrory, Appleton and Plummer (note 92 above; 525).

⁵³⁹ Vermulst (note 402 above; 170).

⁵⁴⁰ *Argentina- Poultry* (note 457 above; para 7.355) and Vermulst (note 402 above; 170-171).

⁵⁴¹ 'Specific duties' could include a 'fixed amount per unit or per weight' while 'variable duties' refers to the 'difference between a fixed minimum price... and the actual import price'. Vermulst (note 402 above; 170).

⁵⁴² Article 9.1 of the ADA and Vermulst (note 402 above; 171).

⁵⁴³ This is referred to as the 'lesser duty rule'. Article 9.1 of the ADA, Vermulst (note 402 above; 171) and UNCTAD (note 399 above; 34).

⁵⁴⁴ Vermulst (note 402 above; 171) and UNCTAD (note 399 above; 34).

⁵⁴⁵ Article 9.2 of the ADA, Vermulst (note 402 above; 173) and UNCTAD (note 399 above; 34).

⁵⁴⁶ Article 15 of the ADA and Vermulst (note 402 above; 215).

3.3.8 Article 15

Article 15 is of importance to developing members and was given force by the panel in *EC- Bed Linen* which found that in relation to constructive remedies it imposes

‘an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country’.⁵⁴⁷

Furthermore, it is required of developed states that the ‘exploration’ of possibilities must be actively undertaken’ by their authorities ‘with a willingness to reach a positive outcome’.⁵⁴⁸ The failure to do so in *EC- Bed Linen* constituted a violation of the article.⁵⁴⁹ In *United States- Steel Plate* the USA was found not to have violated article 15 when it did not apply a constructive remedy as it had considered its application prior to such decision.⁵⁵⁰ Constructive remedies may take the form of a price undertaking or a duty below the dumping margin which is capable of removing the relevant harm.⁵⁵¹

The application of article 15 has been criticised on the basis that developed nations are not often considering constructive remedy options.⁵⁵² Satapathy believes that this is due to the unclear nature of the article and that it has become ‘practically inoperable’.⁵⁵³ This has led to suggestions that greater detail be incorporated into it while altering its nature to render it mandatory.⁵⁵⁴ Other remarks and suggestions have also been put forward in relation to developing states.⁵⁵⁵

⁵⁴⁷ The ‘essential interests of a developing country’ can refer to an industry that is strategic for the state and which is reliant on export trading. *European Communities imposition of anti-dumping duties on imports of cotton yarn from Brazil*, BISD 42 S/17 (adopted October 30, 1995) at para 589, *EC- Bed Linen* (note 476 above; para 233), Vermulst (note 402 above; 216) and Macrory, Appleton and Plummer (note 92 above; 498 and 525).

⁵⁴⁸ *EC- Bed Linen* (note 476 above; para 6.233) and Vermulst (note 402 above; 216).

⁵⁴⁹ *EC- Bed Linen* (note 476 above; para 6.238) and Vermulst (note 402 above; 216-217).

⁵⁵⁰ *United States- Steel Plate* (note 427 above; paras 7.114-7.115) and Macrory, Appleton and Plummer (note 92 above; 525).

⁵⁵¹ *EC- Bed Linen* (note 476 above; para 6.229), Macrory, Appleton and Plummer (note 92 above; 525) and G Brink ‘Guidelines for the Negotiations of the SADC EPA: Appropriate Legal Provisions dealing with Anti-dumping and Countervailing Measures in the proposed Economic Partnership Agreements’ available at paulroos.co.za/wp-content/.../Report-SADC_Anti-Dumping-and-Countervailing.doc, accessed on 15 February 2017 at 9.

⁵⁵² Satapathy (note 416 above; 2211).

⁵⁵³ *Ibid* 2212.

⁵⁵⁴ Adamantopoulos and De Notaris (note 379 above; 59) and Satapathy (note 416 above; 2212).

⁵⁵⁵ UNDP (note 382 above; 189) and Adamantopoulos and De Notaris (note 379 above; 59).

There have been observations that the initiation of an anti-dumping investigation against a developing state can have great consequences for its affected industry.⁵⁵⁶ This decision alone has been found to impact trading patterns as importers in such circumstances often attempt locating other suppliers of such products.⁵⁵⁷ Subsequent to this, investigations can also be onerous on these states especially when investigating authorities demand a wide range of information.⁵⁵⁸ Adamantopoulos and De Notaris have called for separate requirements for instigation of investigations involving developing states.⁵⁵⁹ This includes an increase in the *de minimis* dumping margins of article 5.8 from two to four percent while cumulation of imports could either only apply between developed or developing states.⁵⁶⁰ Additionally, calls for the provision of 'technical support' in the form of additional time and the necessary resources, which could allow such states to work effectively with authorities concerned, have been made.⁵⁶¹ Should anti-dumping duties be applied to these countries, it has been urged that an obligation be introduced requiring developed nations to review dumping margin and injury calculations a year after imposition to determine if the duties are still needed.⁵⁶²

While the ADA has seen development, there is evidently still room for improvement, especially in the discretion afforded to authorities.⁵⁶³ Such discretion is believed to allow anti-dumping measures to be used as a means to protect a state's industries.⁵⁶⁴ Therefore, it has been suggested that initiation of investigations be rendered more difficult in order to reduce such numbers.⁵⁶⁵ This could be bolstered by permitting compensation in certain instances to help ensure only genuine matters are pursued.⁵⁶⁶ Before such extensive recommendations be effected, the suggestion of Macrory and others that states be required to account for dumping margins calculated, price undertakings accepted and *ad valorem* or percentage duties collected, seems to be a

⁵⁵⁶ UNDP (note 382 above; 189).

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Adamantopoulos and De Notaris (note 379 above; 58).

⁵⁶⁰ *Ibid* 58-59.

⁵⁶¹ UNDP (note 382 above; 193).

⁵⁶² Adamantopoulos and De Notaris (note 379 above; 59-60).

⁵⁶³ Satapathy (note 416 above; 2212), Adamantopoulos and De Notaris (note 379 above; 48 and 51), Pangratis and Vermulst (note 150 above; 70) and Prusa (note 47 above; 696).

⁵⁶⁴ Satapathy (note 416 above; 2212) and UNDP (note 382 above; 191).

⁵⁶⁵ Satapathy (note 416 above; 2212).

⁵⁶⁶ Staiger (note 377 above; 741).

reasonable one.⁵⁶⁷ While many proposals have been made, an obstacle to their adoption and implementation lies in the eagerness of developed members to review and modify the ADA for the benefit of developing ones.⁵⁶⁸

3.4 Approach to dumping by the SADC

It is important to determine how regional groupings have agreed to approach dumping as it could affect their trade relations with others.⁵⁶⁹ The SADC's stance is contained in article 18 of its Trade Protocol, requiring member states to adhere to the ADA in this respect.⁵⁷⁰ The definition ascribed to the term 'dumping' therein is also aligned with Article VI of the GATT.⁵⁷¹ These provisions are applicable to all SADC member states who have signed and ratified this Protocol.⁵⁷²

In relation to the SADC EPA group members, Brink in his research in 2005 noted that only South Africa had anti-dumping legislation and the resources to implement it.⁵⁷³ Brink suggested that until the SADC decides to implement such legislation for all, each member should have its own.⁵⁷⁴ Legislation of members would need to be harmonised with identical principles being incorporated therein that are ADA compliant, as required by the Trade Protocol.⁵⁷⁵ This could be used as the basis for the development of legislation applicable to the entire SADC later.⁵⁷⁶

South Africa is responsible for the administration of trade remedies relating to international trade for itself and the Southern African Customs Union (SACU) members.⁵⁷⁷ South Africa signed the Marrakesh Agreement, which was ratified by

⁵⁶⁷ Macrory, Appleton and Plummer (note 382 above; 78).

⁵⁶⁸ Satapathy (note 416 above; 2212).

⁵⁶⁹ Voon (note 92 above; 441).

⁵⁷⁰ Mutai (note 213 above; 91).

⁵⁷¹ Brink (note 551 above; 8).

⁵⁷² Preamble to the SADC Trade Protocol, article 22.3 of the SADC Treaty and 'Trade Policy Review: Angola' available at <https://www.tralac.org/news/article/8122-trade-policy-review-angola.html>, accessed on 11 July 2017.

⁵⁷³ Brink (note 551 above; 19), 'Trade Policy Review, Trade Policies and Practices by Measure' available at https://www.wto.org/english/tratop_e/tpr_e/s158-3_e.doc, accessed on 11 July 2017 at 32 and 'Trade Policy Review: Mozambique' available at <https://www.tralac.org/news/article/11567-trade-policy-review-mozambique.html>, accessed on 11 July 2017.

⁵⁷⁴ Brink (note 551 above; 19).

⁵⁷⁵ Article 18 of the SADC Trade Protocol and Brink (note 551 above; 19).

⁵⁷⁶ Brink (note 551 above; 19).

⁵⁷⁷ The SACU members are South Africa, Botswana, Lesotho, Namibia and Swaziland. 'SACU, Southern African Customs Union' available at <http://www.sacu.int/>, accessed on 14 July 2017, 'Trade Remedies' (note 25 above), G Brink 'Anti-dumping in South Africa' available at <https://www.tralac.org/images/docs/4208/d12wp072012-brink-anti-dumping-in-sa-20120725final.pdf>, accessed on 15 February 2017 at 42, section 2 of the ITA Act and S Khanderia 'The determination of

Parliament in accordance with section 231(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).⁵⁷⁸ Thus, both the GATT and ADA, contained in Annex 1A of the Marrakesh Agreement, are only binding on South Africa internationally as they were not introduced into domestic law through procedures of section 231(4) of the Constitution.⁵⁷⁹ These agreements can be used when interpreting the national anti-dumping laws, including the International Trade Administration Act 71 of 2002 (ITA Act), as required by section 233 of the Constitution.⁵⁸⁰ The ITAC is responsible for ensuring compliance with such laws and regulations, when carrying out its investigations and in its other responsibilities.⁵⁸¹ The ITAC was established in terms of the ITA Act.⁵⁸² This Act operates first with the Anti-Dumping Regulations of 2003, created in accordance with article 59 thereof providing further details on items specified in this article and secondly with chapter 6 of the Customs and Excise Act 91 of 1964.⁵⁸³

3.4.1 ADA cases involving SADC member states

South Africa is the only member of the SADC EPA group to have come into contact with the WTO's Dispute Settlement Mechanism.⁵⁸⁴ It has been involved in five anti-dumping disputes, all brought before the WTO by other developing countries, with none advancing beyond the consultation request stage.⁵⁸⁵

In its first dispute with India, India requested consultations in 1999 following the imposition of anti-dumping duties by the Board on Tariffs and Trade (BTT) on certain

injury in South African anti-dumping investigations: recent approaches' (2016) 49(2) *Comparative and International Law Journal of Southern Africa* 257.

⁵⁷⁸ 'Trade Remedies' (note 25 above).

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ The ITAC is also responsible for executing trade policy in the areas of 'trade remedies' and 'import and export control'. M Kwaramba and F Tregenna 'International Trade Administration Commission Tariff Investigations: An Analysis of the Poultry and Paper Cases' (2014) Special issue 1 *Journal of Economic and Financial Sciences* 620 and 'Trade Remedies' (note 25 above).

⁵⁸² The ITAC was established in terms of section 7(1) of the ITA Act.

⁵⁸³ The Anti-Dumping Regulations form part of the ADA by virtue of the definition of 'this Act' contained in section 1 of the ITA Act. The Anti-Dumping Regulations, 2003, Khanderia (note 577 above; 256) and GN 3197 of GG 25684, 14/11/2003.

⁵⁸⁴ 'Disputes by Agreement' available at

https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6#selected_agreement, accessed on 12 July 2017.

⁵⁸⁵ JB Cronjé 'Brazil files WTO dispute against South Africa' available at

<https://www.tralac.org/discussions/article/5271-brazil-files-wto-dispute-against-south-africa.html>, accessed on 8 June 2017.

medication it exported.⁵⁸⁶ India's concerns included non-compliance of South Africa's definition of 'normal value' and their determination thereof with the WTO's rules and requirements and an incorrect calculation of the dumping margin.⁵⁸⁷ It also stated apprehensions over the lack of evaluation of relevant factors indicating the condition of the industry concerned by South Africa.⁵⁸⁸ This case did not advance further.⁵⁸⁹

In 2003, Turkey demanded consultations with South Africa relating to anti-dumping measures imposed on its exports of 'blanketing in roll form' following an investigation by the BTT.⁵⁹⁰ Turkey claimed that notifications given by South Africa were not up to standard and that it had not properly considered the facts in deciding to initiate the investigation, during the investigation as well as thereafter when the duty was applied.⁵⁹¹ In that same year, South Africa imposed anti-dumping measures on Indonesian imports of 'uncoated woodfree white A4 paper'.⁵⁹² While Indonesia initially raised apprehensions over this by requesting consultations, they were withdrawn in 2008 in response to South Africa's decision to cease application of such measures.⁵⁹³

Further, South Africa's investigation into alleged dumping of frozen whole bird and boneless chicken cuts from Brazil, and the subsequent imposition of provisional anti-dumping measures, led to a request for consultations in 2012.⁵⁹⁴ Concerns were raised over the ITAC's calculations of normal and export values.⁵⁹⁵ For the normal value, it was argued that products that were not 'like' had been included while for the

⁵⁸⁶ *South Africa- anti-dumping duties on certain pharmaceutical products from India*, WT/DS168/1 of 13 April 1999. The BTT was created in terms of the Board on Tariffs and Trade Act 107 of 1986 and was the predecessor of ITAC, which replaced it on 1 June 2003 in terms of section 7 of the ITA Act. 'An Overview of ITAC' available at <http://www.itac.org.za/pages/about-itac/an-overview-of>, accessed on 12 July 2017.

⁵⁸⁷ *South Africa- anti-dumping duties on certain pharmaceutical products from India* (note 586 above).

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Cronjé (note 585 above).

⁵⁹⁰ *South Africa- definitive anti-dumping measures on blanketing from Turkey*, WT/DS288/1 of 15 April 2003.

⁵⁹¹ *South Africa- anti-dumping measures on uncoated woodfree paper*, WT/DS374/1 of 9 May 2008 and *South Africa- anti-dumping measures on uncoated woodfree paper*, WT/DS374/2 of 25 November 2008.

⁵⁹² *South Africa- anti-dumping measures on uncoated woodfree paper* (note 591 above).

⁵⁹³ *South Africa- anti-dumping measures on uncoated woodfree paper* (note 591 above) and Cronjé (note 585 above).

⁵⁹⁴ 'Report No. 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' *International Trade Administration Commission* available at http://www.itac.org.za/upload/document_files/20140928111626_Report-389.pdf, accessed on 8 June 2017 and *South Africa- anti-dumping duties on frozen meat of fowls from Brazil*, WT/DS439/1 of 25 June 2012.

⁵⁹⁵ *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above).

export value, sales of products not part of the investigation had been incorporated into the value determined.⁵⁹⁶ Furthermore, it was claimed that the comparison between the weighted averages of each was not fair as the calculation thereof only encompassed one type of both boneless cuts and whole birds.⁵⁹⁷ Brazil noted that in undertaking the comparison required by article 2.4 to determine the margin of dumping, the ITAC did not make any deductions to the normal value or allowances for price comparability purposes.⁵⁹⁸ Concerns over the determination of injury to the domestic industry have also been by raised by authors, Khanderia and Brink.⁵⁹⁹

In determining injury, the ITAC initially divided all the poultry products into either whole birds or boneless cuts.⁶⁰⁰ For the whole birds, Khanderia stated that in calculating price undercutting by dumped imports, the ITAC did not consider the possibility of more than one type of whole bird being sold and for varied prices.⁶⁰¹ A similar point was raised for the boneless cuts.⁶⁰² Such issues were noted in the consultations request and that deductions to normal values and allowances for items, which influenced the ability to compare prices, were not made.⁶⁰³ This was not consistent with the principle found in the panel decision of *China- X-Rays* which, according to both Brink and Khanderia, is concerning.⁶⁰⁴ This principle requires that for a suitable comparison between the product under investigation and the like domestic one, they must be 'actually comparable' and note must be taken of any 'differences between individual products and levels of trade'.⁶⁰⁵

In addition to the above-mentioned injury issues, Brazil also raised concerns over an apparent lack of consideration of 'other known factors' in the ITAC's determination.⁶⁰⁶ Khanderia noted here that the ITAC only took cognisance of increases in import volumes for both groupings between 2008 and 2010.⁶⁰⁷ It did not determine whether

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ Khanderia (note 577 above; 264).

⁶⁰⁰ *Ibid.*

⁶⁰¹ Article 3.2 of the ADA and Khanderia (note 577 above; 264).

⁶⁰² Such cuts include 'drumstick, thighs, breasts and leg quarters'. Khanderia (note 577 above; 264).

⁶⁰³ *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above).

⁶⁰⁴ Brink (note 467 above; 323), *China- X-Rays* (note 467 above; paras 7.51 and 7.57) and Khanderia (note 577 above; 264).

⁶⁰⁵ Brink (note 467 above; 320 and 323) and *China- X-Rays* (note 467 above; paras 7.51 and 7.57).

⁶⁰⁶ Article 3.5 of the ADA and *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above).

⁶⁰⁷ Khanderia (note 577 above; 274-275).

such increases could have added to injury suffered by the industry.⁶⁰⁸ Furthermore, it was stated that the relationship between injury suffered and the factor of increased imports was not considered individually for each type of product.⁶⁰⁹ For the other injury indicators in article 3.4, the request included a concern over the large number of positive trends found by the ITAC.⁶¹⁰ Khanderia has also criticised it in ignoring such findings when determining the industry's condition, choosing instead to only consider the negative results even 'if the positive outweighed them'.⁶¹¹ This was done for both products under investigation.⁶¹² In such a situation, the WTO had determined that 'compelling reasons' must be provided for any injury determinations made.⁶¹³ In March 2013, the ITAC's recommendation to impose duties on such imports was rejected by the Minister of Trade and Industry along with the provisional ones imposed being overturned.⁶¹⁴

In particular, Pakistan, in 2015 raised similar issues in its consultations request, revealing a number of inconsistencies with the ITAC's investigation, particularly in its determination of the 'like product'.⁶¹⁵ In the request, Pakistan stated that the product in question was 'Portland Cement' but noted that the ITAC only considered 'bagged cement' in the investigation.⁶¹⁶ Bulk cement should have also been included within the scope of the like product.⁶¹⁷ Thereafter, in calculating injury to the domestic industry, the ITAC only considered sales figures from KwaZulu-Natal and not for the cement industry in the SACU as a whole, which was required.⁶¹⁸ Pakistan also noted that the

⁶⁰⁸ *Ibid* 279.

⁶⁰⁹ *Ibid* 279.

⁶¹⁰ *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above).

⁶¹¹ Khanderia (note 577 above; 279).

⁶¹² *Ibid* 271.

⁶¹³ Khanderia (note 577 above; 271) and *Thailand- H-Beams* (note 480 above; para 7.249).

⁶¹⁴ JB Cronjé 'Anti-dumping investigation on chicken imports from the EU' available at <https://www.tralac.org/discussions/article/5343-anti-dumping-investigation-on-chicken-imports-from-the-eu.html>, accessed on 12 August 2017 and Kwaramba and Tregenna (note 581 above; 630).

⁶¹⁵ 'Report No. 495: Investigation into the alleged dumping of Portland cement originating in or imported from Pakistan: Preliminary determination' *International Trade Administration Commission* available at http://www.itac.org.za/upload/document_files/20150518102229_Report-495---Portland-Cement-Preliminary.pdf, accessed on 8 June 2017, *South Africa- provisional anti-dumping duties on Portland cement from Pakistan*, WT/DS500/1 of 12 November 2015.

⁶¹⁶ *South Africa- provisional anti-dumping duties on Portland Cement from Pakistan* (note 615 above) and Khanderia (note 577 above; 268).

⁶¹⁷ Article 2.6 of the ADA, 'Anti-dumping duties: ITAC at loggerheads with Pakistani cement producers' available at <https://www.tralac.org/discussions/article/8532-anti-dumping-duties-itac-at-loggerheads-with-pakistani-cement-producers.html>, accessed on 8 June 2017, *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above) and Khanderia (note 577 above; 268).

⁶¹⁸ Khanderia (note 577 above; 268).

investigation into whether dumping was causing the injury complained of, was not carried out objectively.⁶¹⁹ It stated that the evaluation of factors contained in article 3.4 was done by simply indicating whether the facts showed an increase or decrease for each.⁶²⁰ In this regard, Khanderia stated that no 'clear and persuasive explanation' was given for concluding that the dumped products had caused the injury.⁶²¹ Pakistan also noted that in the comparison between normal and export values no adjustments for various items such as selling, general and administrative costs were made.⁶²²

In consideration of those investigations conducted by the ITAC, it appears that its approach thereto is flawed.⁶²³ This is apparent in its incorrect determination of the 'like product' by either not including all the relevant products or including those which are not comparable.⁶²⁴ Concerns in both investigations were raised over the fairness of the comparisons to determine the margin of dumping and in injury determinations, where factors affecting price comparability were not considered.⁶²⁵ Of particular concern is the lack of thorough examination and explanation of the causal relationship between the injury experienced and the factors of article 3.4 as well as other known factors.⁶²⁶ This is problematic as it could lead to distrust of the ITAC's future investigations, thus putting strain on South Africa's trade relations.⁶²⁷ Additionally, exporters might choose to shy away from supplying the South African market with products, thus reducing the opportunity for its people to experience the benefits of

⁶¹⁹ *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above).

⁶²⁰ Khanderia (note 577 above; 272 and 276) and *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above; para 7.4).

⁶²¹ Khanderia (note 577 above; 276).

⁶²² *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above).

⁶²³ Only the investigations conducted by the ITAC will be considered in observation of the SADC's approach to dumping. This is because the ITAC is currently responsible for conducting such investigations and this will probably persist in the years to come, during which the SADC EU EPA will be in force. Khanderia (note 577 above; 264 and 268).

⁶²⁴ *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above), *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above), Khanderia (note 577 above; 268) and 'Anti-dumping duties: ITAC at loggerheads with Pakistani cement producers' (note 617 above).

⁶²⁵ *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above) and Khanderia (note 577 above; 268).

⁶²⁶ Article 3.5 of the ADA, Khanderia (note 577 above; 272, 276 and 279), *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above) and *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above; para 7.4).

⁶²⁷ Voon (note 92 above; 441).

cheaper goods and improved living standards.⁶²⁸ Other states could also view South Africa as embracing protectionism through such anti-dumping activities.⁶²⁹

3.5 Approach of the EU to dumping

In the EU, anti-dumping action is regulated by article 207 of the Treaty on the Functioning of the European Union along with the EU Anti-Dumping Regulations.⁶³⁰ The Trade Directorate of the European Commission is responsible for investigating dumping claims.⁶³¹

Some notable features of the EU's legislation include fulfilment of a third requirement, in addition to that of dumping and injury, for the imposition of anti-dumping measures.⁶³² It must be proven that imposition of the measures, in exercise of the members' discretion under Article 9.1 of the EU Anti-Dumping Regulations, would be in the Union's interest.⁶³³ Article 21.1 furthermore requires the 'interests of the domestic industry and users and consumers' be considered as well as the necessity to remove the negative effects on trade and reinstate competition, both altered by the dumping.⁶³⁴ Moreover, for the Commission to entertain a claim, the imports of the country concerned must represent not less than one percent of the EU's 'market share'.⁶³⁵ However, should a number of countries under investigation together be responsible for imports representing a minimum of three percent of the Union's consumption, an investigation can then be initiated.⁶³⁶ In both circumstances, the volume of imports will not be regarded as negligible.⁶³⁷ This has raised concerns and could indicate the use of anti-dumping as a form of protection.⁶³⁸

⁶²⁸ UNDP (note 382 above; 189) and '1 The WTO can ... cut living costs and raise living standards' available at https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi01_e.htm, accessed on 17 July 2017.

⁶²⁹ James (note 57 above; 14).

⁶³⁰ Voon (note 92 above; 441), article 207 of the Treaty on the Functioning of the European Union and the EU Anti-Dumping Regulations.

⁶³¹ Voon (note 92 above; 441) and JU Nielsen and A Rutkowski 'The EU Anti-dumping Policy Towards Russia and China: Product Quality and the Choice of an Analogue Country' (2005) 28(1) *World Economy* 104.

⁶³² Voon (note 92 above; 443) and articles 21, 7.1(d) and 9.4 of the EU Anti-Dumping Regulations.

⁶³³ Voon (note 92 above; 443) and articles 21, 7.1(d) and 9.4 of the EU Anti-Dumping Regulations.

⁶³⁴ Article 21.1 of the EU Anti-Dumping Regulations.

⁶³⁵ Article 5.7 of the EU Anti-Dumping Regulations and Brink (note 551 above; 12-13).

⁶³⁶ Article 5.7 of the EU Anti-Dumping Regulations and Macrory, Appleton and Plummer (note 382 above; 71).

⁶³⁷ Article 3.4, 5.7 and 9.3 of the EU Anti-Dumping Regulations and Macrory, Appleton and Plummer (note 382 above; 71).

⁶³⁸ Macrory, Appleton and Plummer (note 382 above; 71).

The EU threshold for cumulation of three percent is less than the seven percent contained in article 5.8 of the ADA.⁶³⁹ Macrory states that in doing so the EU has permitted injury to be proven with less difficulty, thereby allowing for consideration of a greater number of dumping complaints.⁶⁴⁰ Additionally, Eggert has noted that the EU has thus given producers a greater chance in seeking and attaining the imposition of duties by making it easier to approach the Commission.⁶⁴¹ Furthermore, it was found that a majority of anti-dumping proceedings between 1995 and 2012 had been initiated for products where the EU lacks a 'comparative advantage or is losing it'.⁶⁴² While James has submitted that this is all relative to the amount of EU products being investigated for anti-dumping, it could be deduced that measures are being used to protect local industries against imports.⁶⁴³

3.6 Effect of the ADA on the SADC members' poultry sectors

Agriculture is an important industry for many African countries, including those in the SADC region.⁶⁴⁴ For countries such as South Africa, poultry is a major contributor thereto with other sectors, such as soya bean, in turn being dependent on poultry.⁶⁴⁵ Of interest, poultry imports from Brazil, the USA and European states have been noted as an issue for African countries.⁶⁴⁶ The effect of ADA on this sector will be briefly evaluated in relation to each of the SADC EPA group members, with particular focus on imports of frozen bone-in portions.⁶⁴⁷

⁶³⁹ Article 5.8 of the ADA and Vermulst (note 402 above; 121).

⁶⁴⁰ Macrory, Appleton and Plummer (note 382 above; 71).

⁶⁴¹ J Eggert 'Observations on the EU Anti-Dumping Regulation, FTA Position for the Expert Meeting' available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_129812.pdf, accessed on 31 May 2017.

⁶⁴² Between 1995 and 2013, EU imports to the value of €10 billion were subject to anti-dumping investigations. Issabekov and Suchecki (note 64 above; 43, 46 and 59).

⁶⁴³ James (note 57 above; 14 and 17).

⁶⁴⁴ Imara Africa Securities Team 'Agriculture- 'the most important sector of the African economy'' 25 August 2012, available at <https://www.howwemadeitinafrica.com/agriculture-%E2%80%93-the-most-important-sector-of-the-african-economy/>, accessed on 14 July 2017.

⁶⁴⁵ Boshoff (note 11 above; 3) and Dunn (note 9 above; 56).

⁶⁴⁶ 'Why does Africa import so many chickens?' 12 October 2016, available at <http://www.bbc.com/news/world-africa-37617379>, accessed on 15 July 2017.

⁶⁴⁷ South Africa will be discussed separately from other members of the SADC EPA grouping in relation to its poultry industry. Frozen bone-in portions include 'whole chicken- cut in half, leg quarters, wings, breasts, thighs, drumsticks and other portions'. While such chicken products will be the main focus, reference will also be made to imports of other poultry products which are of particular concern to specific countries in order to indicate the problems that they are facing and the effect of the ADA on them. 'South African Poultry Meat Imports: Tariff Code Report for March 2017' available at <http://www.sapoultry.co.za/pdf-statistics/poultry-imports-report.pdf>, accessed on 24 May 2017 and K Crowley 'Imports put SA's chicken sector in distress, but Europe disagrees' 25 January 2017, available

In Botswana, only imports of poultry products which cannot be produced in the country, including 'Further Processed Chicken products (FPCs)' from South Africa and Zimbabwe, are allowed while the importation of broiler chicks has been 'blocked'.⁶⁴⁸ Otherwise, the total annual demand of approximately 60 000 tonnes is met by the local industry.⁶⁴⁹ The ability to meet their own needs stems primarily from various import restrictions which have been in place for approximately 40 years.⁶⁵⁰ Consequently, imports are not a pressing concern for Botswana and so its interactions with and the effect of the ADA on the sector could be described as minimal.⁶⁵¹

In Namibia, concerns arose over large imports of poultry products of the same nature as those produced locally and at lower prices.⁶⁵² This was apparently resulting in losses for the local industry which could not compete with such prices.⁶⁵³ It has also been reported that 'low cost and allegedly low-quality poultry' was being imported from Brazil but only in small quantities for certain users, such as hospitals.⁶⁵⁴

Such occurrences led to the Namibian Trade and Industry Ministry introducing the requirement of importation permits in 2013.⁶⁵⁵ Only those products not produced locally up the quantity of 600 tonnes could be imported with no other products originating from 'slaughtered chickens' being allowed.⁶⁵⁶ Currently there is a monthly

at <https://www.businesslive.co.za/bd/business-and-economy/2017-01-25-imports-put-sas-chicken-sector-in-distress-but-europe-disagrees/>, accessed on 14 July 2017.

⁶⁴⁸ Broiler chicks are a fast-growing breed of chicken, bred specifically for their meat. 'Southern African Poultry Association, Botswana' 2015, available at <http://www.sapoultry.co.za/pdf-statistics/botswana-country-report.pdf>, accessed on 24 May 2017, 'Broiler chicken' available at <http://www.encyclopedia.com/education/dictionaries-thesauruses-pictures-and-press-releases/broiler-chicken>, accessed on 14 July 2017, L Arcuri 'How to Raise Chickens for Meat, The Important Difference Between Meat Birds and Laying Hens' 28 May 2017, available at <https://www.thespruce.com/raise-chickens-for-meat-3016587>, accessed on 14 July 2017 and C Masole, GK Mphothwe and JC Moreki 'Value Chain Analysis of Botswana Poultry Industry: The Case of Gaborone, Kgatleng, Kweneng and South East Districts' (2015) 5(3) *Journal of World's Poultry Research* 64.

⁶⁴⁹ R Grynberg and M Motswapong 'Development of the poultry sector in Botswana: From good intentions to legal oligopoly' (2016) 8(2) *Journal of Development and Agricultural Economics* 14 and JC Moreki 'Poultry meat production in Botswana' 1 July 2011, available at <http://www.lrrd.org/lrrd23/7/more23163.htm>, accessed on 14 July 2017.

⁶⁵⁰ Grynberg and Motswapong (note 649 above; 17-18).

⁶⁵¹ *Ibid* 18.

⁶⁵² 'Namibia Introduces Poultry Meat Import Quota' 9 May 2013, available at <http://www.thepoultrysite.com/poultrynews/28903/nambia-introduces-poultry-meat-import-quota/>, accessed on 24 May 2017 and S Shipanga 'Cabinet Moves to Protect Poultry Industry' 12 March 2013, available at <https://www.namibian.com.na/index.php?id=106100&page=archive-read>, accessed on 24 May 2017.

⁶⁵³ Shipanga (note 652 above).

⁶⁵⁴ *Ibid*.

⁶⁵⁵ 'Namibia Introduces Poultry Meat Import Quota' (note 652 above).

⁶⁵⁶ *Ibid*.

restriction of 1 500 tonnes on poultry imports.⁶⁵⁷ The majority of the local poultry demand of approximately 3 000 tonnes per month is being satisfied by imported products.⁶⁵⁸ It is apparent that the opening of the borders to imports from abroad has somewhat injured the local industry, although there seems to be no evidence of anti-dumping action being taken by Namibian authorities in this respect.⁶⁵⁹ The impact of the ADA on this industry therefore cannot be conclusively deduced.

Lesotho's poultry production is not of a significant amount, in relation to both its own numbers and that of other SADC states.⁶⁶⁰ Such production accounts for 5.4 percent of the total production of the country's 'livestock industry'.⁶⁶¹ Furthermore, it is unable to meet its own poultry demands due to its 'under-developed' industry, which is mainly of a subsistence nature.⁶⁶² Thus the remainder of its need is satisfied by South African imports.⁶⁶³ As Lesotho cannot meet its poultry demands without importations, its concerns over dumping could be said to be minimal and thus the ADA impact is probably immaterial.⁶⁶⁴

In contrast, Swaziland's poultry sector has been classified as one of the 'top producers' in Africa.⁶⁶⁵ Its focus has been on broiler chicken production in order to reduce dependence on South African imports.⁶⁶⁶ Whilst a levy is charged on poultry imports except those of the EU, of between 12 and 82 percent depending on the type of poultry, it has been reported that Swaziland does not permit such imports.⁶⁶⁷ However,

⁶⁵⁷ F Ngulu 'Trade Forum reports on chicken import tariff' 14 February 2017, available at <https://economist.com.na/22520/headlines/trade-forum-reports-on-chicken-import-tariff/>, accessed on 28 May 2017.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ 'Namibia Introduces Poultry Meat Import Quota' (note 652 above).

⁶⁶⁰ 'The Lesotho Review, Agriculture' available at <http://www.lesothoreview.com/agriculture-2015.php>, accessed on 14 July 2017.

⁶⁶¹ *Ibid.*

⁶⁶² 'Lesotho - Agricultural Sectors' 11 January 2016, available at <https://www.export.gov/article?id=Lesotho-Agricultural-Sectors>, accessed on 14 July 2017.

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

⁶⁶⁵ T Karombo 'African Poultry Wrap: Swaziland Boosts Poultry Industry' 23 October 2015, available at <http://www.thepoultrysite.com/poultrynews/36028/african-poultry-wrap-swaziland-boosts-poultry-industry/>, accessed on 15 July 2017.

⁶⁶⁶ 'Livestock Services' available at http://www.gov.sz/index.php?option=com_content&view=article&catid=80%253Aagriculture&id=722%253Apoultry-production-section&Itemid=593, accessed on 15 July 2017.

⁶⁶⁷ 'Tariffs and rates of duty for poultry trade' 2 April 2014, available at <https://www.sapoultry.co.za/pdf-statistics/poultry-trade-tariffs-rates.pdf>, accessed on 15 July 2017, 'Why does Africa import so many chickens?' (note 646 above) and 'Poultry imports slaughter industry' 31 May 2013, available at <https://mg.co.za/article/2013-05-31-00-poultry-imports-slaughter-industry>, accessed on 15 July 2017.

anxieties over cheap imports have increased since South Africa concluded an agreement with the USA under the AGOA, allowing imports of US poultry products up to 65 000 tonnes per year into its market.⁶⁶⁸ Concerns are not that such product will be exported to Swaziland as the USA agreed with South Africa not do so, but rather that the product will be brought into Swaziland through the South African food retailers, which have stores in Swaziland.⁶⁶⁹ It is believed that this will impact negatively on local producers, especially smaller ones, and the industry as a whole.⁶⁷⁰ While Swaziland does not seem to have been affected by the ADA, it is evident that it could be required to make use of it in the future should such cheaper imports materialise.⁶⁷¹

The Mozambican poultry industry is also facing similar challenges.⁶⁷² This includes a growing demand that cannot be met by local production, high production costs and alleged dumping by various states.⁶⁷³ There have also been allegations of dumping of frozen chicken by South Africa, Malawi and Brazil, which would compete with its local broiler production that supplies the majority of poultry meat sold.⁶⁷⁴

In 2011, after allegations made by the local industry that dumping was occurring, poultry imports were put on hold to give it an opportunity to supply the local demand itself.⁶⁷⁵ Following their inability to do so, imports were again allowed.⁶⁷⁶ Since then,

⁶⁶⁸ 'Government Explores Ways to Protect Poultry' available at <http://www.times.co.sz/business/106613-govt-explores-ways-to-protect-poultry.html>, accessed on 15 July 2017.

⁶⁶⁹ 'Government Explores Ways to Protect Poultry' (note 668 above) and F Sikhondze 'US imports into SA not good for Swaziland chicken industry' available at <http://www.observer.org.sz/news/73685-us-imports-into-sa-not-good-for-swaziland-chicken-industry.html>, accessed on 15 July 2017.

⁶⁷⁰ Sikhondze (note 669 above).

⁶⁷¹ Sikhondze (note 669 above) and 'Government Explores Ways to Protect Poultry' (note 668 above).

⁶⁷² 'Country report, Mozambique' 2014, available at <http://www.sapoultry.co.za/pdf-statistics/mozambique-country-report.pdf>, accessed on 15 July 2017.

⁶⁷³ It has been stated that the production costs for Mozambican producers is approximately 30 percent higher than the cost to import chicken into the country. 'Why does Africa import so many chickens?' (note 646 above), 'Country report, Mozambique' (note 672 above) and A Frey 'Mozambique to ban chicken imports from 2019' 3 October 2016, available at <http://clubofmozambique.com/news/mozambique-ban-chicken-imports-2019/>, accessed on 15 July 2017.

⁶⁷⁴ This production was the work of the 'co-operative and private sectors' according to a report by the United Nations Food and Agriculture Organization. J Linden 'Mozambique Targets National Chicken Consumption' 14 November 2013, available at <http://www.thepoultrysite.com/poultrynews/30579/mozambique-targets-national-chicken-consumption/>, accessed on 24 May 2017, 'FAO Animal Production and Health, livestock country reviews, poultry sector Mozambique' 2013, available at <http://www.fao.org/docrep/018/i3487e/i3487e.pdf>, accessed on 15 July 2017 and 'Country report, Mozambique' (note 672 above).

⁶⁷⁵ Frey (note 673 above).

⁶⁷⁶ *Ibid.*

calls made to reduce dependence have been met with a promise to ban poultry imports from 2019, coupled with support being extended to producers thereafter.⁶⁷⁷ While Mozambique has experienced dumping in recent years, it appears as though the ADA has had limited effect on it.⁶⁷⁸ It is also evident in the apparent lack of investigation preceding the imposition of anti-dumping duties.⁶⁷⁹ It seems that the ADA has had limited influence on the poultry industries of not only Mozambique but also the other states discussed.

3.7 Effect of the ADA on the South African poultry sector

The poultry sector is important for the South African economy.⁶⁸⁰ In 2016 it made the greatest contribution to the agricultural sector's total gross production, namely 18 percent thereof.⁶⁸¹ The industry is however not able to satisfy the local demand and consumption is increasing to the point that an additional 700 000 tonnes will be required by 2024.⁶⁸² Amongst South African consumers there is a demand for 'bone-in portions' whereas in Europe breast meat is in high demand.⁶⁸³ Such demand in Europe allows for producers to charge higher prices for breast meat while other portions can be sold cheaper elsewhere, such as in South Africa.⁶⁸⁴ Thus, the EU's products can be imported at a rate which is less than the cost of production in South Africa despite South Africa's production costs being an estimated 25 percent less than the EU's costs.⁶⁸⁵

Since 2010 it has been reported that poultry imports into South Africa from various countries are close to doubling.⁶⁸⁶ In March 2017, the USA became the primary exporting country for poultry to South Africa with its imports constituting 38.2 percent

⁶⁷⁷ 'Mozambican leader calls for increased poultry production' 2 April 2017, available at <http://apanews.net/en/news/mozambican-leader-calls-for-increased-poultry-production>, accessed on 15 July 2017 and Frey (note 673 above).

⁶⁷⁸ Frey (note 673 above).

⁶⁷⁹ Articles 1 and 9 of the ADA and Frey (note 673 above).

⁶⁸⁰ Davids and Meyer (note 9 above; 22) and A Coleman 'Chicken dumping will cripple the economy and kill off jobs' *Farmer's Weekly* 23 June 2017 at 37.

⁶⁸¹ Davids and Meyer (note 9 above; 22) and Coleman (note 680 above; 37).

⁶⁸² It is estimated that consumption will increase by 38 percent over the period from 2015 to 2025. T Karombo 'African Poultry Wrap: Africa's Poultry Industry Poised for Growth' 23 December 2015, available at <http://www.thepoultrysite.com/poultrynews/36345/africa-poultry-wrap-africas-poultry-industry-poised-for-growth/>, accessed on 24 May 2017 and Davids and Meyer (note 9 above; 25).

⁶⁸³ Davids and Meyer (note 9 above; 25).

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Coleman (note 680 above; 36).

⁶⁸⁶ G Kriel 'Total feeds sales growing slowly, while poultry struggles' *Farmer's Weekly* 7 February 2017 at 24.

while those of the EU were 14.3 percent although this was largely due to avian influenza bans affecting some European states.⁶⁸⁷ According to a report by the South African Poultry Association (SAPA) for March 2017, frozen bone-in portion imports increased by 131 percent or 21 304 tonnes in comparison with February 2017.⁶⁸⁸ The total imports of such products for 2016 amounted to 239 589 tonnes, equating to a 24.5 percent increase from the 192 390 tonnes imported in 2015.⁶⁸⁹ In 2015, imports satisfied approximately 20 percent of the local demand.⁶⁹⁰

Currently, South Africa applies varied duties to the range of poultry imported, barring a few exceptions.⁶⁹¹ Exceptions include the USA, which is allowed to export up to 65 000 tonnes of poultry products without duties being imposed, and the EU, which enjoys duty free imports due to the Trade, Development and Cooperation Agreement (TDCA) with South Africa.⁶⁹² A further exception is the UK, Netherlands and Germany where measures varying between 3.86 and 73.33 percent apply to frozen bone-in chicken portions following an ITAC investigation in 2013.⁶⁹³

As such, the poultry industry has recently been making calls for the imposition of increased tariffs on imported poultry.⁶⁹⁴ The ADA and its various requirements have placed South Africa in a position where the application of tariffs following an investigation, either done correctly or shy of the ADA standards, could result in its trading partners imposing countervailing duties or other remedies.⁶⁹⁵ Furthermore, duties can only be implemented for a limited period of five years and so action is

⁶⁸⁷ 'Summary report of poultry imports report for March 2017' available at <http://www.sapoultry.co.za/pdf-statistics/summary-imports-report.pdf>, accessed on 24 May 2017 at 4.

⁶⁸⁸ See definition of frozen bone-in portions in footnote 647 on page 66 'South African Poultry Meat Imports: Tariff Code Report for March 2017' (note 647 above).

⁶⁸⁹ *Ibid.*

⁶⁹⁰ 'Evaluating the competitiveness of the South African broiler value chain' (note 9 above; 8).

⁶⁹¹ The current import duties are 82 percent for whole bird, 31 percent for carcasses, 12 percent for boneless cuts, 30 percent for offal and 37 percent for bone-in portions. 'DTI deals with poultry imports concerns' 11 December 2016, available at <http://www.sanews.gov.za/business/dti-deals-poultry-imports-concerns>, accessed on 16 July 2017.

⁶⁹² 'DTI deals with poultry imports concerns' (note 691 above), 'Government Explores Ways to Protect Poultry' (note 668 above) and 'Evaluating the competitiveness of the South African broiler value chain' (note 9 above; 8).

⁶⁹³ 'DTI deals with poultry imports concerns' (note 691 above) and 'Report No. 492: Investigation into the alleged dumping of frozen bone-in portions of fowls of the species *Gallus Domesticus*, originating in or imported from Germany, the Netherlands and the United Kingdom: Final Determination' *International Trade Administration Authority* available at http://www.itac.org.za/upload/document_files/20150306125607_Report-No-492.pdf, accessed on 1 August 2017 at 3 and 5.

⁶⁹⁴ Coleman (note 680 above; 36-37).

⁶⁹⁵ G Uys 'Higher tariffs and trade bans will not save local poultry industry' *Farmer's Weekly* 7 July 2017 at 20.

required to ensure that the industry can cope when imports resume thereafter.⁶⁹⁶ This is problematic considering the industry's position in the economy.⁶⁹⁷

Aside from its contribution to the country's coffers, poultry also assists in providing jobs for skilled and unskilled workers and can do so in 'semi-rural and peri-urban areas'.⁶⁹⁸ This makes protection of the industry important given South Africa's high unemployment rate.⁶⁹⁹ The extent of such problem is that 48 000 people are employed directly by the poultry industry, while it indirectly supports or is responsible for another 63 000 jobs.⁷⁰⁰ Conversely, chicken serves as one of the primary animal protein sources for many families with the cheaper imports allowing a greater number of people to have access thereto.⁷⁰¹ While this is an important consideration for South African authorities, any dependence upon such food imports could jeopardise the country's food security as price changes and supply will be at the discretion of exporters.⁷⁰² Thus, the ADA has placed South Africa in a situation where many factors have to be considered when deciding what action to take while the industry could suffer further damage as the situation progresses.⁷⁰³

3.8 Concluding remarks

The ADA appears to have had limited effect on the SADC EPA members in relation to their poultry industries as they choose to impose measures to protect such industries with seemingly little regard for the ADA's requirements.⁷⁰⁴ For South Africa however, the ADA has affected it through the binding rules of the ITA Act.⁷⁰⁵ Its efforts to give effect to such laws, through ITAC's investigations, have raised many concerns though.⁷⁰⁶ This could lead to states imposing counteracting measures should the ITAC

⁶⁹⁶ Article 11.3 of the ADA and Uys (note 695 above; 20).

⁶⁹⁷ Uys (note 695 above; 20).

⁶⁹⁸ 'Peri-urban' refers to the areas found on the close outskirts of a city. Uys (note 695 above; 20) and 'peri-urban' available at <https://www.merriam-webster.com/dictionary/peri%E2%80%93urban>, accessed on 16 July 2017.

⁶⁹⁹ The employment rate is 26.5% as per the Quarterly Labour Force Survey done in the fourth quarter of 2016. 'Media release: Quarterly Labour Force Survey – QLFS Q4: 2016' (note 6 above).

⁷⁰⁰ 'SA government committed to resolve the poultry crises' 3 February 2017, available at <https://www.tralac.org/news/article/11226-sa-government-committed-to-resolve-the-poultry-crisis.html>, accessed on 9 February 2017.

⁷⁰¹ Uys (note 695 above; 20), Dunn (note 9 above; 56) and 'Evaluating the competitiveness of the South African broiler value chain' (note 9 above; 8).

⁷⁰² Coleman (note 680 above; 37).

⁷⁰³ Uys (note 695 above; 20).

⁷⁰⁴ Frey (note 673 above) and 'Namibia Introduces Poultry Meat Import Quota' (note 652 above).

⁷⁰⁵ 'Trade Remedies' (note 25 above).

⁷⁰⁶ Khanderia (note 577 above; 268).

apply anti-dumping measures on poultry imports after conducting questionable investigations now and in the future.⁷⁰⁷ Furthermore, due to the ADA, authorities have to consider a wide range of factors when making such decisions, which have the potential to affect numerous individuals and the economy, whilst ensuring that South Africa adheres to its WTO commitments.⁷⁰⁸ The ADA has thus affected the industry in that authorities cannot simply provide it with the protection demanded.⁷⁰⁹ The next chapter will provide more insight into anti-dumping practices and how it is affecting the SADC-EU relationship.

⁷⁰⁷ Uys (note 695 above; 20).

⁷⁰⁸ 'Trade Remedies' (note 25 above), Uys (note 695 above; 20), 'SA government committed to resolve the poultry crises' (note 700 above), Dunn (note 9 above; 56) and 'Evaluating the competitiveness of the South African broiler value chain' (note 9 above; 8).

⁷⁰⁹ UNDP (note 382 above; 191).

Chapter 4:

ANTI-DUMPING PRACTICES WITHIN THE SADC-EU RELATIONSHIP

4.1 Introduction

The focus of this chapter is on determining the extent to which anti-dumping practices have affected the SADC-EU relationship, with particular focus on current EPA negotiations. This question will be answered by first establishing and analysing the main principles and elements of both the SADC and EU. This will be followed by a brief report of the SADC-EU EPA negotiations and the particular issues faced by the SADC during such period. The principles of each organisation discussed prior will then be linked to the EPA in terms of whether they can be attained through it. Further, recent anti-dumping investigations undertaken by each organisation against the other will be included in the discussion to determine how such actions have affected this relationship.

4.2 Main principles, values and aims of each Organisation

4.2.1 The SADC

The SADC is a mixture of countries at different levels of development, grouped together merely by their geographical location and historical linkages.⁷¹⁰ This in itself presents a complexity within its unique structure.⁷¹¹ Considering this, the principles that the SADC members must abide by are contained in article 4 of the SADC Treaty. Members' actions are to be guided by 'sovereign equality of all' member states; unity, 'peace and security'; democracy, human rights and rule of law; benefit for all and equilibrium and the peaceful settlement of disputes.⁷¹² Such principles find application in members' efforts to attain the objectives contained in article 5.1 of the SADC Treaty.⁷¹³ Important aims include the reduction of poverty; improvement of the standard of living; sustainable economic development achieved through reliance on fellow members and the productive use of available human and natural resources.⁷¹⁴

⁷¹⁰ Hansohm and Breytenbach et al (note 276 above; 182) and 'History and Treaty' (note 265 above).

⁷¹¹ Mapuva and Muyengwa-Mapuva (note 39 above; 25).

⁷¹² Article 4 of the SADC Treaty.

⁷¹³ Article 5.1 of the SADC Treaty.

⁷¹⁴ The Regional Indicative Strategic Development Plan (RISDP) is a key SADC plan that was accepted by the SADC Summit in August 2003. It primarily aims to increase integration and reduce

The methods used to attain such aims are found in article 5.2 with areas of key importance in which to focus such efforts being agriculture, food security and the advancement of human resources.⁷¹⁵

The approach of the SADC to trade in the region is encapsulated in its Trade Protocol with primary focus being on liberalising trade.⁷¹⁶ Furthermore, it also refers to economic and industrial growth along with 'good governance' as being key goals.⁷¹⁷ The structures tasked with ensuring such objectives are achieved are found in article 31 of the Protocol.⁷¹⁸ This includes the Committee of Ministers responsible for overseeing execution of the Protocol, the Committee of Senior Officials which monitors its implementation and the Sector Coordinating Unit responsible for the daily execution thereof.⁷¹⁹

4.2.2 The EU

The EU's historical development is well known and the link between its members is based on history, geography as well as the attainment of political and economic power.⁷²⁰ The EU is also guided in its actions by certain values, namely respect for human rights and the dignity of humans, democracy, the rule of law, freedom and equality for all.⁷²¹ The advancement of human rights is not limited to those living in EU member states but the EU also attempts to attain this ideal in other states too.⁷²² These

poverty levels faster with key areas being identified and targets set for each. The Plan comprises a five and fifteen-year plan implemented between 2005 and 2020. Key areas include reducing the spread of HIV and AIDS and 'human and social development'. An example of a programme for a targeted area is the SADC Health Programme, established in 1997. This Programme seeks to give effect specifically to the SADC's Health Policy Framework, the SADC Protocol on Health and the RISDP. Its main aim is to 'attain an acceptable standard of health for all citizens'. 'Health' available at <http://www.sadc.int/themes/health/> accessed on 29 August 2017, 'Regional Indicative Strategic Development Plan' available at <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/>, accessed on 29 August 2017, Article 5.1 of the SADC Treaty and Ng'ong'ola (note 265 above; 491).

⁷¹⁵ Article 5.2 of the SADC Treaty and Ng'ong'ola (note 265 above; 493).

⁷¹⁶ Mutai (note 213 above; 84).

⁷¹⁷ Ndlovu (note 214 above; 187-188) and Hansohm and Breytenbach et al (note 276 above; 172).

⁷¹⁸ Article 31 of the SADC Trade Protocol and Ndlovu (note 214 above; 188).

⁷¹⁹ Articles 31(2)(a), 31(3)(e) and 31(5)(a) respectively of the SADC Trade Protocol.

⁷²⁰ 'The Economy' available at https://europa.eu/european-union/about-eu/figures/economy_en, accessed on 29 August 2017 and 'The EU in brief' available at https://europa.eu/european-union/about-eu/eu-in-brief_en, accessed on 1 August 2017.

⁷²¹ 'Values' available at <http://europarlamenti.info/en/values-and-objectives/values/>, accessed on 1 August 2017 and 'The EU in brief' (note 720 above).

⁷²² In the 2012 Strategic Framework on Human Rights and Democracy, aimed at standardising rights and ensuring greater effectiveness, the Action Plan on Human Rights and Democracy was annexed thereto. This Plan, applicable from 2015 to 2020, states that the EU will object to discrimination and protect political, economic, civil, cultural and social rights in countries outside the EU. Furthermore, it incorporates and will continue to include human rights clauses in its trading and cooperation

values are all contained in the Charter of Fundamental Rights, which must be upheld by all EU establishments and member governments.⁷²³

In relation to the objectives it strives towards, a key one is to give effect to its values and ensure peace and improved prosperity for all in the region.⁷²⁴ Furthermore, it aims for trade within its borders to be free-flowing whilst development is 'stable and sustainable'.⁷²⁵ It believes the latter is attainable when there is both growth in the economy and steady prices.⁷²⁶ Conversely, its international aims include maintenance of peace, eradication of poverty and the promotion of human rights and trade that is 'fair' in nature.⁷²⁷ Such global aims seem to be affected by the position it adopts in relation to its internal market.⁷²⁸

The EU has been classified as the biggest trade group, being responsible for approximately 20 percent of international trade.⁷²⁹ While this represents the largest market for developing countries' exports, access thereto can be hampered in certain circumstances by the protection the EU affords to its market.⁷³⁰ Of course, this is done in an attempt to grow its internal market to the greatest extent.⁷³¹ Such growth is only attained through its trade with other states, especially ones whose markets have not been penetrated as noted by Hurt and Franicevic.⁷³² For such markets, liberalisation is encouraged by the EU, thereby ensuring favourable access for its products.⁷³³

agreements wherein sanctions can be levelled against states that do not promote such rights. In terms of this Plan, a EU Special Representative for Human Rights has been appointed and tasked with promoting human rights internationally and ensuring that such rights are given effect to. Annex III of The 2012 Strategic Framework on Human Rights and Democracy, 11855/12 of 25 June 2012, 'The EU in brief' (note 720 above), 'Human Rights' available at https://europa.eu/european-union/topics/human-rights_en, accessed on 29 August 2017 and 'Human Rights and Democracy: EU Strategic Framework and EU Action Plan' available at <http://data.consilium.europa.eu/doc/document/ST-11855-2012-INIT/en/pdf>, accessed on 29 October 2017.

⁷²³ 'Charter of Fundamental Rights of the European Union' available at

http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed on 1 August 2017 and 'The EU in brief' (note 720 above).

⁷²⁴ 'Objectives' available at <http://europarlamentti.info/en/values-and-objectives/objectives/>, accessed on 1 August 2017.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ Franicevic (note 59 above; 202).

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid.* More detail on this will be provided later.

⁷³¹ Franicevic (note 59 above; 202-203) and 'The EU in brief' (note 720 above).

⁷³² Hurt (note 65 above; 500) and Franicevic (note 59 above; 202-204).

⁷³³ Franicevic (note 59 above; 203).

4.3 SADC-EU EPA negotiations

4.3.1 Background to the EPAs: Lomé Conventions and the Cotonou Partnership Agreement

Historically, the relationship between Europe and the African, Caribbean and Pacific countries (known as the ACP group) dates back to colonial ties.⁷³⁴ The creation of the then European Economic Community (EEC) presented a conundrum to those countries who wanted to maintain their links with their colonies.⁷³⁵ As such, a number of agreements were implemented to give effect to this 'special relationship'.⁷³⁶ The trading relationship, in the form of economic cooperation, between the European states and certain states in ACP areas, was regulated initially by the Yaoundé Convention and thereafter by the Lomé Conventions.⁷³⁷ The latter Conventions administered such trade from 1975 to 1999, with five being negotiated and signed therein.⁷³⁸ The main feature of these agreements was the extension of non-reciprocal

⁷³⁴ 'Historical overview of EU cooperation and aid' available at https://ec.europa.eu/europeaid/historical-overview-eu-cooperation-and-aid_en, accessed on 29 August 2017.

⁷³⁵ 'Partnership in Africa: the Yaoundé Association' available at <http://aei.pitt.edu/34505/1/A674.pdf>, accessed on 29 August 2017 at 5-6.

⁷³⁶ MM Sissoko, LO Osuji and WI Cheng 'Impacts of the Yaounde and Lome Conventions on EC-ACP Trade' (1998) 1(1) *The African Economic & Business Review* 6 and M Meyn 'Economic Partnership Agreements: A 'Historic Step' Towards a 'Partnership of Equals'?' (2008) 26(5) *Development Policy Review* 516.

⁷³⁷ The Yaoundé Convention was signed on 20 July 1963 by six European states (France, Belgium, Italy, Germany, the Netherlands and Luxembourg) and 18, later 19, African countries ('Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Tchad, Congo (Brazzaville), Congo (Kinshasa), Côte d'Ivoire, Gabon, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somalia and Togo') as well as Madagascar and Mauritius. The five-year Convention came into effect on 1 June 1964 and its application ceased on 31 May 1969. The European states undertook to eliminate custom duties over time on certain imports from the African countries while maintaining a common external tariff against equivalent imports from other states. Aid for development to the value of \$800 million was also granted to the countries concerned from 1964 to 1969. The African states were required to steadily reduce custom duties on certain imports from the European states concerned while increasingly purchasing a greater portion of goods required from such states too. Yaoundé Convention II was signed in 1969 and applied from then until 1975 with the most significant change being the decision by the European states to no longer apply the common external tariff against imports from states not party to the Convention. 'Partnership in Africa: the Yaoundé Association' (note 735 above; 5-6), A Keck and R Piermartini 'The Economic Impact of EPAs in SADC Countries' available at https://www.wto.org/english/res_e/reser_e/ersd200504_e.doc, accessed on 5 March 2017 at 3, Sissoko, Osuji and Cheng (note 736 above; 8), 'European Parliament Fact Sheets, 6.4.5. Relations with the African, Caribbean and Pacific countries: from the Yaoundé, Lomé Conventions to the Cotonou Agreement' available at http://www.europarl.europa.eu/facts_2004/6_4_5_en.htm, accessed on 29 August 2017 and 'Evolution of cooperation' available at http://ec.europa.eu/development/body/cotonou/maps_en.htm, accessed on 30 August 2017.

⁷³⁸ Lomé I was signed in on 28 February 1975. Its main feature was the granting of non-reciprocal trading advantages by nine states of the EEC to 46 ACP countries. Furthermore, the Stabilization of Exports (STABEX) was introduced under Lomé I and the System of Minerals (SYSMIN) was given effect to under Lomé II. Both were insurance arrangements aimed at reducing losses suffered in

trading preferences by the European countries for certain products imported from the ACP states.⁷³⁹ Interestingly, customs duties and quantity limitations were not applied for particular 'manufactured and agricultural products' that, according to Fontagné and others, posed no competition to those products supported by the Common Agricultural Policy (CAP) in Europe.⁷⁴⁰ In exchange, the ACP states were only required to ensure application of the MFN principle, especially in relation to imports from the various European states.⁷⁴¹

The ACP states made various requests over the years for improvement of the agreements.⁷⁴² This included duty-free preferences being granted for ACP products where production of the corresponding product in Europe was assisted under the CAP, streamlining of the rules of origin and for a greater amount of aid.⁷⁴³ The Lomé Conventions ended after 1999 for various other reasons though.⁷⁴⁴ In particular,

relation to income earned from exporting commodities. Lomé II was signed on 31 October 1979 by 57 ACP states. Lomé III was signed on 8 December 1984 by 66 ACP states and saw the focus shifting towards encouraging the ACP states to attain sustainable development themselves, such as through food security. The first three Lomé Conventions each applied for five years. Lomé IV, signed on 15 December 1989, applied for 10 years. The focus of this Convention was on the attainment and protection of goals such as human rights, democracy, environmental protection, good governance, greater regional cooperation and women empowerment. When this Convention was revised, to be applicable from 1995 to 2000, human rights was made a fundamental obligation and a requirement for the continuation of the Convention. The penalty for not promoting and ensuring human rights was suspension, either entirely or in part, of the Convention. Throughout the existence of such Conventions, funds from the European Development Funds (EDF) were provided, subject to renewal every five years. K Laaksonen, P Mäke-Fränti and M Virolainen 'Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975-2000' available at <http://ageconsearch.umn.edu/bitstream/18853/1/wp060020.pdf>, accessed on 31 August 2017, 'European Union, Press Release Database' available at http://europa.eu/rapid/press-release_ECA-95-2_en.htm?locale=en, accessed on 31 August 2017, 'The Cotonou Agreement, From Lomé I to IV bis' available at http://ec.europa.eu/development/body/cotonou/lome_history_en.htm, accessed on 5 August 2017, G Faber 'The Lomé Conventions and the causes of economic growth' available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.535.1712&rep=rep1&type=pdf>, accessed on 30 August 2017, P Kenneth Kiplagat 'Fortress Europe and African under the Lomé Convention: From Policies of Paralysis to a Dynamic Response' (1993) 8(3) *North Carolina Journal of International Law and Commercial Regulation* 599 and L Fontagné, D Laborde and C Mitaritonna 'An Impact Study of the Economic Partnership Agreements in the Six ACP Regions' (2010) 20(2) *Journal of African Economies* 186.

⁷³⁹ 'The Cotonou Agreement, From Lomé I to IV bis' (note 738 above) and A Borrmann, M Busse and M De La Rocha 'Consequences of Economic Partnership Agreements between East and Southern African Countries and the EU for Inter- and Intra-regional Integration' (2007) 21(2) *International Economic Journal* 233-234.

⁷⁴⁰ The CAP is a programme that assists farmers in many respects, mostly financially, to ensure that agricultural development is achieved. 'CAP at a glance' available at https://ec.europa.eu/agriculture/cap-overview_en, accessed on 5 August 2017 and Fontagné, Laborde and Mitaritonna (note 738 above; 186).

⁷⁴¹ Fontagné, Laborde and Mitaritonna (note 738 above; 186).

⁷⁴² Keck and Piermartini (note 737 above; 3).

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

towards the end of the 1990s the EU was not content with the results of the Conventions, namely the unsatisfactory attainment levels of 'good governance, human rights and democratisation' amongst the ACP states.⁷⁴⁵ Moreover, there was dissatisfaction with the states' use of the funds allocated for development purposes from the European Development Funds.⁷⁴⁶ It was also noted that exports of the ACP states had neither grown, become more competitive nor varied in nature despite the preferences granted over the years.⁷⁴⁷ Borrmann and others have argued that such states were prevented from taking full advantage of such preferences by impairments in capacity, transportation and marketing means as well as an inability to comply with sanitary rules.⁷⁴⁸

The most notable motive however for ending the Lomé was the refusal by other developing WTO members to grant a waiver from the WTO rules for such Conventions beyond 2007.⁷⁴⁹ The EU had to seek a waiver of the requirements of Article XXIV of the GATT as the Conventions established neither a free trade area nor customs union which was both reciprocal and applicable to a considerable amount of trade between the parties.⁷⁵⁰ This led to the EU discriminating between the ACP states and other developing WTO members, in violation of the non-discrimination rules particularly the

⁷⁴⁵ It has been noted that the regions did not attain acceptable standards for healthcare, education, nutrition and availability of drinking water for its people. Keck and Piermartini (note 737 above; 3) and H Sheppard 'The Lomé Convention in the Next Millenium: Modification of the Trade/Aid Package and Support for Regional Integration' (1997-1998) 7(3) *Kansas Journal of Law & Public Policy* 89.

⁷⁴⁶ The European Commission stated that its investment in development had not yielded results immediately as seen in the fact that income per capita in Sub-Saharan Africa in 2000 was actually less than in 1980. Furthermore, Bertelsmann-Scott states that 'the recipients of aid had overwhelmingly become corrupt and unable to govern effectively, let alone be able to use donor funds optimally'. 'Green paper on relations between the European Union and the ACP countries on the eve of the 21st century' available at http://aei.pitt.edu/1206/1/ACP_21st_gp_COM_96_570.pdf, accessed on 30 August 2017, T Bertelsmann-Scott 'The Impact of Economic Partnership Agreement Negotiations on Southern Africa, SAIIA Trade Policy Working Paper No. 2, 2004' available at <http://www.saiia.org.za/images/upload/EPA%20Working%20Paper%20final.pdf>, accessed on 29 March 2017 at 9, Faber (note 738 above), Keck and Piermartini (note 737 above; 3) and Meyn (note 736 above; 516).

⁷⁴⁷ Keck and Piermartini (note 737 above; 3) and 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* available at <https://www.tralac.org/news/article/10641-the-economic-impact-of-the-sadc-epa-group-eu-economic-partnership-agreement.html>, accessed on 12 February 2017.

⁷⁴⁸ Borrmann, Busse and De La Rocha (note 739 above; 234).

⁷⁴⁹ Keck and Piermartini (note 737 above; 3) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* available at http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154663.pdf, accessed on 29 May 2017 at 10.

⁷⁵⁰ Article XXIV(5) of the GATT, Grynberg (note 349 above; 17), Fontagné, Laborde and Mitaritonna (note 738 above; 180) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 10).

MFN.⁷⁵¹ The EU rectified this in the subsequent Cotonou Agreement of 2000 which replaced Lomé.⁷⁵²

The Cotonou Partnership Agreement was entered into by the EU and 79 ACP developing group members on 23 June 2000, applicable over 20 years.⁷⁵³ The states therein agreed to work towards the formation of free trade areas that would be attained through EPAs.⁷⁵⁴ Reciprocity between the EU and ACP states would be foundational to these EPAs to render them compliant with Article XXIV of the GATT, thereby also

⁷⁵¹ The MFN principle is contained in Article I of the GATT. The decision to move away from the Lomé Convention was also influenced by the decision of three panels and the Appellate Body of the WTO relating to the EU's banana import arrangements. The world's largest banana producers were the Caribbean, Philippines and Central American states with Europe being the biggest market for such product. In July of 1993, European states introduced a 'system of tariff quotas' to ensure that it complied with protocol 5 of Lomé IV and the Banana Protocol in terms of this Convention. In respect of this system, free access was granted to bananas imported from those 12 ACP states that typically supplied this product while a quota was applied to bananas imported from Central American states and the non-traditional ACP countries. Moreover, those suppliers subject to the quota were further required to apply for an import licence. In the second panel report of February 1994, where the complainants were Ecuador, the USA, Honduras, Mexico and Guatemala, it was determined that the European states were discriminating between the various developing states. Additionally, such actions did not comply with articles I and III of the GATT. In the third panel report, it was decided that there was non-compliance with Article XIII of the GATT but that the quota could still be applied by virtue of the waiver granted for the Lomé Convention. Article XIII concerned 'non-discriminatory administration of quantitative restrictions'. The AB held however that the 'allocation of tariff quota shares' contravened Article XIII and that the waiver did not alter this position'. It also found that the allocation of licences and rules relating to such licences contravened articles I and III of the GATT. The EU was ordered to alter such rules, which formed part of the Lomé Convention, to render it compliant with the GATT. On the 8th of November 2012, the EU notified the WTO that it had reached a 'mutually agreed solution' with the complainants. Grynberg (note 349 above; 6-8 and 23), 'EC-Bananas III' available at

https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds27sum_e.pdf, accessed on 30 August 2017, European Communities - Regime for the Importation, Sale and Distribution of Bananas - Request for consultations by Ecuador, Guatemala, Honduras, Mexico and the United States - Addendum of 8 November 2012, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, 'The Banana Wars Explained' available at <https://www.theguardian.com/world/1999/mar/05/eu.wto3>, accessed on 30 August 2017, A Landau 'The Cotonou Agreement: An EU Replicate' available at <https://ecpr.eu/Filestore/PaperProposal/ee66a31d-5397-4bc9-a7d0-852cfab7d5cd.pdf>, accessed on 5 August 2017 at 8, Fontagné, Laborde and Mitaritonna (note 738 above; 180), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Borrmann, Busse and De La Rocha (note 739 above; 233-234).

⁷⁵² Bertelsmann-Scott (note 746 above; 10) and Braude (note 349 above; 74).

⁷⁵³ Ukpe (note 40 above; 213), Bertelsmann-Scott (note 746 above; 7), 'Africa's external relations' available at <https://www.tralac.org/resources/by-region/africa-s-external-relations.html#>, accessed on 13 August 2017, 'Economic Partnerships' available at <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/>, accessed on 13 August 2017 and Fontagné, Laborde and Mitaritonna (note 738 above; 186).

⁷⁵⁴ Ukpe (note 40 above; 213) and Bertelsmann-Scott (note 746 above; 13).

addressing the concerns of the WTO members.⁷⁵⁵ This was to be completed before expiration of the waiver in 2007.⁷⁵⁶ In terms of the Agreement, the EU granted non-reciprocal duty-free access or a reduced duty rate for various products exported by the ACP states to the EU.⁷⁵⁷ The aims of the EU in doing so was to assist in poverty reduction amongst the ACP populations, encourage maintainable growth therein and integrate these states into the global economy.⁷⁵⁸ It can be said that comparable objectives guided the EPA negotiations that followed.⁷⁵⁹

Similar to Lomé and as contained in the Cotonou Agreement, the fundamentals of 'human rights, democratic principles, the rule of law and good governance' are what the EU based its objectives on, especially in relation to the attainment of development.⁷⁶⁰ The EU undertook to ground the EPAs in four 'pillars'.⁷⁶¹ This included both parties being subject to rights and duties, the EPAs being compatible with the work of applicable regional organisations, encouragement of development while being cognisant of the states' limitations and compliance with the WTO rules so to attain incorporation of these states into the world economy.⁷⁶²

Upon such bases, the EPAs are to be formulated to encourage increases in regional integration and sustainable growth while assisting in the attainment of other goals.⁷⁶³ Such goals include growth in trade, in relation to volume and levels thereof, thereupon a reduction in poverty levels amongst group members along with the raising of the countries' income and employment.⁷⁶⁴ Such an association has also been supported

⁷⁵⁵ Article XXIV(8)(b) of the GATT, Braude (note 349 above; 74), 'Is the Region Ready for a Modern Free Trade Agreement? – a Small Country Perspective' available at http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20051018_EPAs_in_SADC_countries.pdf, accessed on 29 May 2017 and Keck and Piermartini (note 737 above; 3).

⁷⁵⁶ Bertelsmann-Scott (note 746 above; 11) and 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above).

⁷⁵⁷ Braude (note 349 above; 74).

⁷⁵⁸ *Ibid.*

⁷⁵⁹ Bertelsmann-Scott (note 746 above; 13) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 12-13).

⁷⁶⁰ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁷⁶¹ S Woolfrey 'State of play in the SADC-EU EPA negotiations, Tralac working paper No. 03/2010 May 2010' available at <https://www.tralac.org/publications/article/4266-state-of-play-in-the-sadc-eu-epa-negotiations.html>, accessed on 8 August 2017 at 4.

⁷⁶² *Ibid.*

⁷⁶³ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 7 and 13) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 12-13).

⁷⁶⁴ M McQueen 'The EU's Free-trade Agreements with Developing Countries: A Case of Wishful Thinking?' (2002) 25(9) *World Economy* 1371.

by authors such as Mapuva and Muyengwa-Mapuva.⁷⁶⁵ Furthermore, this is all to be attained with respect being extended towards the key development goals of each country.⁷⁶⁶ The ultimate goal for the EU is to assist in enabling the ACP states to integrate into and participate in the global economy.⁷⁶⁷ This has been incorporated into the EU's work to assist the WTO and itself in attaining this ideal found in the preamble to the Marrakesh Agreement.⁷⁶⁸

4.3.2 The start of the EPA negotiations

The EPA negotiations were met with a mixture of optimism and critique.⁷⁶⁹ Much of this was due to the ACP states generally not having decreased their dependence on the EU nor having advanced themselves over the years despite the longstanding relationship and development opportunities granted.⁷⁷⁰ The negotiation and formation of the EPAs was to be undertaken by initially separating the ACP states into negotiation groups.⁷⁷¹ Seven were formed.⁷⁷² Such divisions were undertaken by the ACP states themselves, who were encouraged to do so in accordance with their regional organisation memberships.⁷⁷³ Thereafter, the negotiations were divided into two main phases.⁷⁷⁴ The first phase, from February 2002 to October 2003, involved

⁷⁶⁵ The authors write that for Africa, regional integration has been viewed 'as a means of encouraging trade' and that 'regional integration has become increasingly accepted as essential in facilitating economic and political development'. Furthermore, the authors also stated that it 'has been credited with providing an important step towards a wide global involvement' alongside its 'potential to promote economic growth and reduce poverty through increased exports of domestic goods'. Mapuva and Muyengwa-Mapuva (note 39 above; 23).

⁷⁶⁶ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 12-13) and McQueen (note 764 above; 1371).

⁷⁶⁷ Bertelsmann-Scott (note 746 above; 13) and Ukpe (note 40 above; 213).

⁷⁶⁸ Ukpe (note 40 above; 212).

⁷⁶⁹ See Annexure C for further details on key dates for EPA negotiations, particularly the SADC-EU EPA. Borrmann, Busse and De La Rocha (note 739 above; 234), Rusare (note 311 above; 12) and 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁷⁷⁰ Borrmann, Busse and De La Rocha (note 739 above; 234) and Landau (note 751 above; 2).

⁷⁷¹ This was undertaken in accordance with article 37(5) of the Cotonou Agreement. C Grant 'Southern Africa and the European Union: the TDCA and SADC EPA' available at <https://www.tralac.org/images/docs/4578/20060518tdcasadcepagrant.pdf>, accessed on 12 February 2017 at 4 and LE Hinkle and M Schiff 'Economic Partnership Agreements Between Sub-Saharan Africa and the EU: A Development Perspective' (2004) 27(9) *World Economy* 1322.

⁷⁷² The groups are the West Africa, Central Africa, Eastern and Southern Africa (ESA), East African Community (EAC), SADC, Caribbean and Pacific. 'Overview of Economic Partnership Agreements' available at http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf, accessed on 7 August 2017.

⁷⁷³ Fontagné, Laborde and Mitaritonna (note 738 above; 186).

⁷⁷⁴ Bertelsmann-Scott (note 746 above; 26).

all ACP states and was centred on those negotiation issues that would affect all.⁷⁷⁵ This included the objectives and principles that would guide the EPAs, topics to be covered therein and how disputes would be settled.⁷⁷⁶ The parties engaged with such issues, thereby laying the groundwork for individual negotiations that followed thereafter.⁷⁷⁷ The second phase, consisting of negotiations between the EU and the groups for the formulation of individual EPAs, began in October 2003.⁷⁷⁸

The SADC-EU EPA negotiations officially began on 8 July 2004 in Windhoek with only eight of the fifteen SADC members initially constituting this group.⁷⁷⁹ South Africa was only an observer at this point and did not participate in negotiations as it had concluded the TDCA with the EU, which came into full force in 2004.⁷⁸⁰ Herein both parties agreed to implement free trade between them by reducing tariffs on goods over 12 years.⁷⁸¹ The other SACU members have to adhere to it in relation to EU products brought into their countries, thus making them 'de facto members of the Agreement'.⁷⁸² Despite having this Agreement, South Africa was invited to join the negotiations in 2007 as a 'full member'.⁷⁸³ This was prompted by concerns over the SACU being subjected to

⁷⁷⁵ Bertelsmann-Scott (note 746 above; 22 and 26) and Borrmann, Busse and De La Rocha (note 739 above; 234).

⁷⁷⁶ Bertelsmann-Scott (note 746 above; 27) and Borrmann, Busse and De La Rocha (note 739 above; 234).

⁷⁷⁷ Borrmann, Busse and De La Rocha (note 739 above; 234) and Bertelsmann-Scott (note 746 above; 27).

⁷⁷⁸ Borrmann, Busse and De La Rocha (note 739 above; 234) and Bertelsmann-Scott (note 746 above; 26).

⁷⁷⁹ Tanzania initially participated in the SADC EPA group but later joined the East African Community (EAC) EPA group. South Africa was first an observer and later became a full member of the SADC EPA group. Woolfrey (note 761 above; 6), Rusare (note 311 above; 20) and A Kwa, P Lunenburg and W Musonge 'African, Caribbean and Pacific (ACP) countries' position on Economic Partnership Agreements (EPAs) available at

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433843/EXPO-DEVE_ET\(2014\)433843_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433843/EXPO-DEVE_ET(2014)433843_EN.pdf), accessed on 22 February 2017 at 59.

⁷⁸⁰ This Agreement came into force on 1 January 2000 and into full force on 1 May 2004. The SADC-EU EPA will replace the TDCA in respect of South Africa when the EPA is ratified and thereupon fully in force. 'South Africa's transition from TDCA to EPA: Agricultural market access' available at <https://www.tralac.org/news/article/10734-south-africa-s-transition-from-tdca-to-epa.html>, accessed on 20 August 2017, 'Countries and regions, South Africa' available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>, accessed on 8 August 2017, 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above), Kwa, Lunenburg and Musonge (note 779 above; 59) and 'Trade, Development and Cooperation Agreement (TDCA)' available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:r12201>, accessed on 8 September 2017.

⁷⁸¹ The Agreement has been fully implemented since the end of 2012. 'Trade, Development & Cooperation Agreement (TDCA) Additional Protocol on Croatia Accession to European Union' available at <https://pmg.org.za/committee-meeting/21531/>, accessed on 8 September 2017 and 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above).

⁷⁸² 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above).

⁷⁸³ 'Kwa, Lunenburg and Musonge (note 779 above; 59).

two varied tariff arrangements, namely the EPA and TDCA, should South Africa not be party to the EPA and to avoid fragmentation of the SADC, as alleged by Hurt.⁷⁸⁴ In lieu of the existing problems with overlapping regional body memberships and varied development statuses of the states, this concern was valid.⁷⁸⁵

4.3.3 Issues that arose during the SADC EPA negotiations

4.3.3.1 Existing memberships

A major problem that came about through the EPA negotiation is the non-alignment of such groupings with the various states' existing regional memberships, particularly in Africa.⁷⁸⁶ It further compounds prevailing issues within such bodies, namely overlapping memberships with different regional bodies having varied aims and methods of attainment.⁷⁸⁷ This is prevalent in the SADC where ten of its sixteen members simultaneously hold Common Market for Eastern and Southern Africa (COMESA) memberships, comprising the majority of the latter.⁷⁸⁸ While the SADC promotes development as a means to attain regional integration, the COMESA aims to achieve such integration through an eradication of various barriers to trade.⁷⁸⁹ Such overlapping results in states having to implement numerous methods to attain integration for such bodies.⁷⁹⁰

Given this knowledge, African states should have ensured that the EPA groupings were more in line with existing regional groups and their memberships to avoid compounding such existent issues to a greater degree.⁷⁹¹ Instead, the situation in the SADC is that the majority of its members are part of the SADC and Eastern and

⁷⁸⁴ Hurt (note 65 above; 502-503), T Creamer 'EU, six SADC countries sign Africa's first EPA following more than a decade of 'tough' talks' 10 June 2016, available at http://www.miningweekly.com/article/eu-six-sadc-countries-sign-africas-first-epa-following-more-than-a-decade-of-tough-talks-2016-06-10/rep_id:3650, accessed on 22 February 2017, Braude (note 349 above; 74) and 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' 10 October 2016, available at <https://www.tralac.org/news/article/10636-entry-into-force-of-the-sadc-eu-economic-partnership-agreement-epa.html>, accessed on 8 August 2017.

⁷⁸⁵ Bertelsmann-Scott (note 746 above; 7) and Hansohm and Breytenbach et al (note 276 above; 82).

⁷⁸⁶ 'Kwa, Lunenburg and Musonge (note 779 above; 12) and Borrmann, Busse and De La Rocha (note 739 above; 235).

⁷⁸⁷ Bertelsmann-Scott (note 746 above; 7).

⁷⁸⁸ In addition to this overlap, five of the SADC members also make up the SACU. Mapuva and Muyengwa-Mapuva (note 39 above; 27-28) and Bertelsmann-Scott (note 746 above; 16).

⁷⁸⁹ Mapuva and Muyengwa-Mapuva (note 39 above; 28).

⁷⁹⁰ *Ibid.*

⁷⁹¹ Fontagné, Laborde and Mitaritonna (note 738 above; 186).

Southern Africa (ESA) EPA groups with the latter holding seven SADC members.⁷⁹² Meyn has argued that such fragmentation of the SADC through the EPAs has left the responsibility of working towards ensuring economic incorporation within the SADC to the SACU states and Mozambique.⁷⁹³ Thus, varied EPA group memberships will probably detract further from the attainment of regional integration by existing regional groups and now for the EPAs too.⁷⁹⁴

Such overlapping membership has also been regarded as an indication of weak integration within the SADC.⁷⁹⁵ This is supported by its failure to form a customs union by 2010, to liberalise 85 percent of trade within the region by 2008 and all by 2012.⁷⁹⁶ Furthermore, Bertelsmann-Scott has argued that such deficiency has resulted in those states being unable to negotiate the EPAs from a 'unified base', thus rendering them not properly organised for the negotiations.⁷⁹⁷ Therefore, its position therein will probably be weakened.⁷⁹⁸ In relation to the SADC Trade Protocol, Hansohm and Breytenbach have noted that its implementation has been hampered through the division of the SADC by the EPAs.⁷⁹⁹ Again, it could be contended that overlapping regional memberships will probably lead to states struggling to determine where to focus their efforts and resources, thus applying individual resources and efforts either too thinly or in isolated areas only.⁸⁰⁰ This in turn could jeopardise the achievement of various groups' aims with the issue only being increased further by the EPA groups and negotiations.⁸⁰¹

⁷⁹² SADC members participating in the ESA group EPA negotiations include Mauritius, Madagascar, Zimbabwe, Zambia, Seychelles, the Comoros and Malawi. Tanzania is negotiating with the EAC EPA group while the Democratic Republic of Congo is negotiating in the Central Africa group. Borrmann, Busse and De La Rocha (note 739 above; 235), Mutai (note 213 above; 94), Mapuva and Muyengwa-Mapuva (note 39 above; 28), Bertelsmann-Scott (note 746 above; 7), 'Economic Partnership Agreement between the EU and the ESA EPA Group' available at http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149213.pdf, accessed on 8 August 2017, 'The Union of Comoros becomes the 16th SADC Member State' (note 32 above) and 'Central Africa' available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/>, accessed on 13 August 2017.

⁷⁹³ Meyn (note 736 above; 524).

⁷⁹⁴ Bertelsmann-Scott (note 746 above; 7) and Braude (note 349 above; 75).

⁷⁹⁵ Mapuva and Muyengwa-Mapuva (note 39 above; 28).

⁷⁹⁶ *Ibid.*

⁷⁹⁷ Bertelsmann-Scott (note 746 above; 22 and 29).

⁷⁹⁸ *Ibid.*

⁷⁹⁹ Hansohm and Breytenbach et al (note 276 above; 182).

⁸⁰⁰ Mapuva and Muyengwa-Mapuva (note 39 above; 28) and Ukpe (note 40 above; 218).

⁸⁰¹ Mapuva and Muyengwa-Mapuva (note 39 above; 28) and Ukpe (note 40 above; 218).

4.3.3.2 Differences between states

An additional problem that faced the SADC EPA group in the negotiations is the economic and developmental differences amongst members.⁸⁰² This is evident in the categorisation of South Africa, Botswana and Namibia as 'upper middle income' states, Swaziland as 'lower middle income' and Angola, Mozambique and Lesotho as 'Least Developed Countries (LDCs)'.⁸⁰³ The differences between such states is further encapsulated by the fact that the GDP of Botswana, of about 15 700 Euros, is approximately 14 times higher than that of Mozambique, the poorest member of the group.⁸⁰⁴ Such disparity will probably not only affect regional integration efforts but also the energies put into EPA negotiations and implementation given that states will undoubtedly satisfy individual priorities first before attending to other commitments.⁸⁰⁵

4.3.3.3 Dominant role of the EU

Additionally, during the negotiations, certain authors and organisations expressed opinions on the EU's position therein.⁸⁰⁶ One such author, Hurt, stated that the EPA relationship cannot be viewed as a partnership given that the EU holds the greater amount of power.⁸⁰⁷ Similarly, in South Africa, the Congress of South African Trade Unions (COSATU) has expressed its opposition to the EPAs, particularly over the unequal bargaining positions of the parties.⁸⁰⁸ Support for this view can be found in the fact that the average GDP for the capitals in the SADC region is about a quarter of the EU's.⁸⁰⁹ Coupled with the EU's wealth of resources are its skilful negotiators, which Bertelsmann-Scott has cited as an extra strain on ACP states.⁸¹⁰

The concerns connected herewith are evident in the inclusion of topics in the EPA negotiations known as the 'Singapore Issues'.⁸¹¹ These include issues of 'investment, competition, government procurement and trade facilitation', originally raised in the

⁸⁰² Hansohm and Breytenbach et al (note 276 above; 82).

⁸⁰³ Kwa, Lunenburg and Musonge (note 779 above; 9 and 59).

⁸⁰⁴ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸⁰⁵ Hansohm and Breytenbach et al (note 276 above; 182) and Bertelsmann-Scott (note 746 above; 7).

⁸⁰⁶ Hurt (note 65 above; 504).

⁸⁰⁷ *Ibid.*

⁸⁰⁸ Kwa, Lunenburg and Musonge (note 779 above; 65).

⁸⁰⁹ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸¹⁰ Bertelsmann-Scott (note 746 above; 15).

⁸¹¹ Hurt (note 65 above; 504).

Ministerial Conference in Singapore in 1996 but strongly opposed by developing states then and now.⁸¹² Hurt states that such an inclusion was a manipulation of the negotiation plan, with Woolfrey noting that this prevented a prompt conclusion of the negotiations.⁸¹³ The ACP states have expressed the view that negotiation and agreement on such topics in the EPAs is not necessary to render them compliant with the WTO's rules.⁸¹⁴ Conversely, the EU has skilfully supported such inclusions on the basis that agreement thereon is essential as such issues are key to achieving development.⁸¹⁵

Dissatisfaction was also expressed in relation to interim EPAs, wherein it was believed that the EU placed pressure on the states to agree thereto.⁸¹⁶ This was stated by the ACP Council of Ministers in December 2007 in a 'unanimous declaration' to this effect.⁸¹⁷ Such experiences and concerns over effects of the EPAs on trade and the EU's aims apparently culminated in it not having finalised any EPAs with the African groups by the beginning of 2008 as originally intended.⁸¹⁸ Thereafter, when drafts of the final EPAs were determined, Hurt expressed concern over the short time period given to ACP states to deliberate over them.⁸¹⁹

4.3.4 Outcomes of the EPA Negotiations

After the initial slow pace of the EPA negotiations, the EU decided to first ensure that interim EPAs, relating only to goods, were agreed upon and signed by 2008 with negotiations for final ones continuing thereafter.⁸²⁰ This was done in light of the expiration of the WTO waiver.⁸²¹ By the end of 2007, only 18 of the 46 African nations had initialled such agreements, with such states securing further duty and quota free access to the EU market from this point.⁸²²

⁸¹² R Sandrey 'WTO and the Singapore Issues' available at http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20061114_Sandrey_SingaporeIssues.pdf, accessed on 8 August 2017 at 1-2 and Woolfrey (note 761 above; 4).

⁸¹³ Hurt (note 65 above; 504) and Woolfrey (note 761 above; 4).

⁸¹⁴ Meyn (note 736 above; 519).

⁸¹⁵ *Ibid.*

⁸¹⁶ Hurt (note 65 above; 504).

⁸¹⁷ *Ibid.*

⁸¹⁸ Ukpe (note 40 above; 213) and Meyn (note 736 above; 516).

⁸¹⁹ Hurt (note 65 above; 504).

⁸²⁰ Woolfrey (note 761 above; 4) and Ukpe (note 40 above; 226).

⁸²¹ Woolfrey (note 761 above; 4).

⁸²² Woolfrey (note 761 above; 5 and 7) and Fontagné, Laborde and Mitaritonna (note 738 above; 186).

Despite the problems encountered during negotiations, an interim SADC EPA was initialled by Lesotho, Botswana, Mozambique and Swaziland on 23 November 2007.⁸²³ Namibia initialled on 5 December 2007 but with reservations.⁸²⁴ It was signed by Botswana, Lesotho and Swaziland on 4 June 2009 with Mozambique signing on 15 June 2009.⁸²⁵ South Africa did not sign as it wanted to remain bound by the TDCA instead.⁸²⁶ As Angola had not brought a 'market access offer' to the EU, it was not entitled to initial but was able to continue receiving preferences under the 'Everything But Arms (EBA) initiative'.⁸²⁷ In terms of the interim EPA, all signatories had to liberalise 86 percent of trade while Mozambique only had to liberalise 81 percent thereof.⁸²⁸ The signatories also agreed to discuss the topics of services and investment and to negotiate 'competition and government procurement' issues upon them first acquiring sufficient capacity to do so.⁸²⁹ This Agreement was never ratified though as this process was postponed in 2010 due to the concerns previously raised having to first be dealt with in the final EPA negotiations.⁸³⁰

After approximately ten years of negotiations in total, they closed on 15 July 2014.⁸³¹ Angola remained an observer throughout but has been given the opportunity to participate in the EPA later.⁸³² As such, the Agreement was signed by all, except

⁸²³ 'The Interim SADC EPA Agreement, Legal and Technical Issues and Challenges' available at http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20080129_Erasmus_Discussion_InterimSADC_EPA.pdf, accessed on 8 August 2017.

⁸²⁴ One such reservation was centred around the ending of infant industry protection once the Agreement had been applied for 12 years. C McCarthy and P Kruger 'A SADC-EU Economic Partnership Agreement- current status and benchmarking of negotiations' August 2008, available at <https://www.tralac.org/documents/publications/working-papers/wp-archive/778-mccarthy-and-kruger-benchmarking-sadc-epa-report-20080822/file.html>, accessed on 30 August 2017 at 38 and 'Fact sheet on the Interim Economic Partnership Agreements SADC EPA Group' available at http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142189.pdf, accessed on 8 August 2017.

⁸²⁵ Kwa, Lunenburg and Musonge (note 779 above; 59) and Woolfrey (note 761 above; 10).

⁸²⁶ Ukpe (note 40 above; 218).

⁸²⁷ The EBA initiative is a 'preference level' forming part of the EU's General System of Preferences that is granted to all LDCs. Such preferences have been granted since 2001. Woolfrey (note 761 above; 7) and Meyn (note 736 above; 522).

⁸²⁸ 'Fact sheet on the Interim Economic Partnership Agreements SADC EPA Group' (note 824 above).

⁸²⁹ 'The Interim SADC EPA Agreement, Legal and Technical Issues and Challenges' (note 823 above; 3 and 6).

⁸³⁰ This included concerns over varied rules of origin that existed between the TDCA and interim EPA. 'Fact sheet on the Interim Economic Partnership Agreements SADC EPA Group' (note 824 above), Woolfrey (note 761 above; 11 and 15) and M Julian 'EPA Update' (2010) 2(9) *Trade Negotiations Insights* 14.

⁸³¹ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 8).

⁸³² 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 8) and 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above).

Angola, on 10 June 2016 and has been provisionally implemented since 10 October 2016, bar in respect of Mozambique.⁸³³ It is being applied as such until all the EU members have ratified it.⁸³⁴ The EPA cements the parties' relationship on an enduring basis, which is important given that the EU is a key trading partner for many African nations.⁸³⁵ Its enduring nature is strengthened by its compliance with the WTO's rules.⁸³⁶ While the EU is expected to attain some financial gains through the EPA's implementation, its global trade will probably not be affected, but for the SADC members there is however potential for increases in both global and inter-member trade.⁸³⁷

Such potential for the SADC members is evident in the EU's promise to open its markets to a greater extent than required by the former, thus favouring the SADC states.⁸³⁸ This was reportedly undertaken in light of the varied developmental statuses between the EU and SADC members.⁸³⁹ Connected herewith is the achievement of a standardising of the tariffs charged by the SACU members due to the EPA, which was

⁸³³ Mozambique ratified the EPA on 28 April 2017 and is currently sending such ratification to the Council of the EU, whereupon the Agreement will also provisionally apply to it. 'Overview of Economic Partnership Agreements' (note 772 above), T Fundira 'Implementing the SADC EPA – challenges and impact' 1 March 2017, available at <https://www.tralac.org/discussions/article/11348-implementing-the-sadc-epa-challenges-and-impact.html>, accessed on 8 August 2017, 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above) and 'Africa's external relations' (note 753 above).

⁸³⁴ Ratification of the EPA by the EU states could be 'complicated' upon the UK giving its formal notification of withdrawal from the EU in the future. A full discussion of the implications of such notification and withdrawal will not be undertaken in this dissertation due to the word limitations. Fundira (note 833 above) and 'Overview of Economic Partnership Agreements' (note 772 above).

⁸³⁵ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 56) and Meyn (note 736 above; 516).

⁸³⁶ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸³⁷ Fundira states that the trade benefits accruing to the EU through the final EPA will be 21 times higher than the effects expected for SADC members with trade to the value of 3.6 billion US dollars expected to accrue to it. Fundira (note 833 above), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Fontagné, Laborde and Mitaritonna (note 738 above; 181).

⁸³⁸ The EU has removed 100 percent of customs duties on all products, except arms and ammunition, imported from all SADC EPA members except South Africa. For South Africa, 98.7 percent of customs will be removed with full removal for 96.2 percent and partial removal for 2.5 percent thereof. SACU only has to eliminate custom duties on 86.2 percent of EU imports, with 74.1 percent being full removal and 12.1 percent being partial. Mozambique is only required to remove such duties on 74 percent of EU products. 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' available at http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152818.pdf, accessed on 8 August 2017 and 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸³⁹ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

not being attained prior thereto.⁸⁴⁰ In relation to South Africa specifically, it has secured a greater level of market access through the EPA than the TDCA.⁸⁴¹ Under the TDCA the EU liberalised 95 percent of trade with South Africa, whereas it has now agreed to 98.7 percent liberalisation under the EPA.⁸⁴² South Africa is however only required to eliminate 86.2 percent of custom duties on EU goods as opposed to the 86 percent requirement of the TDCA.⁸⁴³

Further benefits for all SADC EPA members include access to exclusive safeguards in terms of the EPA.⁸⁴⁴ Safeguards with 'flexible activation clauses' are available, including a 'general bilateral safeguard'⁸⁴⁵, agricultural⁸⁴⁶, 'infant industry'⁸⁴⁷ and food security safeguards⁸⁴⁸ as well as a temporary one available specifically for Lesotho, Botswana, Swaziland and Namibia for their 'sensitive products'.⁸⁴⁹ Of great importance is the EU's promise not to subsidise its exported agricultural products bound for the SADC EPA states, as normally undertaken in terms of the CAP.⁸⁵⁰ This can all help ensure that the SADC members are able to take full advantage of the Agreement, which is further assisted by the flexibility allowed in the rules of origin.⁸⁵¹ In terms of these rules in the EPA, producers are permitted to source a greater degree of parts or ingredients from beyond their borders while still qualifying for EU preferential market

⁸⁴⁰ 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' (note 838 above).

⁸⁴¹ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 56) and 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸⁴² 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' (note 838 above; 4) and N Kruger 'Portfolio Committee on Trade and Industry, Additional Protocol to SA/EU Trade Development and Cooperation Agreement (TDCA)' available at <https://www.thedti.gov.za/parliament/2015/TDCA.pdf>, accessed on 8 August 2017 at 3.

⁸⁴³ 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' (note 838 above; 4) and Kruger (note 842 above; 3).

⁸⁴⁴ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 9).

⁸⁴⁵ Article 34 of the SADC EPA.

⁸⁴⁶ Article 35 of the SADC EPA.

⁸⁴⁷ This safeguard is only available to Botswana, Namibia, Lesotho, Swaziland and Mozambique. Article 38 of the SADC EPA.

⁸⁴⁸ Article 36 of the SADC EPA.

⁸⁴⁹ Article 37 of the SADC EPA. See Annexure B for a summary of all the available safeguards. 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 20) and Fundira (note 833 above).

⁸⁵⁰ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸⁵¹ *Ibid.*

access.⁸⁵² Further, an exporter in a SADC EPA state is now permitted to utilise materials acquired from within any other state that has a trading agreement with the EU.⁸⁵³ This can encourage the growth of 'new value chains in the region'.⁸⁵⁴

The projections made by various authors indicate that positive trade results are expected to materialise in the following years owing to the EPA.⁸⁵⁵ In comparison to a situation with no EPA in place, imports to the SADC are forecast to be 0.73 percent higher with an EPA while exports from the SADC EPA members to the EU is estimated to be 0.91 percent more.⁸⁵⁶ Furthermore, the SADC EPA global exports are projected to increase on average by 0.13 percent while imports to the SADC from the globe could see an average increase of 0.14 percent.⁸⁵⁷ Of interest is the expectation of an increase in exports from the white meat industry.⁸⁵⁸ The effect of this and other EPA benefits for the states concerned will probably be seen through positive trends in their GDPs.⁸⁵⁹

Generally, it has been forecast that the GDP of the member states will increase on average by approximately 0.03 percent when compared to a projected situation in 2035 with no EPA.⁸⁶⁰ A great contributor to this projected figure will be South Africa.⁸⁶¹ It is estimated that the GDP of the states will increase by between 0.01 and 1.18 percent.⁸⁶² Connected herewith are concerns of some states over decreases in import duty collections, which contribute to their revenue and upon which they are greatly

⁸⁵² *Ibid.*

⁸⁵³ 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above).

⁸⁵⁴ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸⁵⁵ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 55).

⁸⁵⁶ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 52 and 55).

⁸⁵⁷ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 55).

⁸⁵⁸ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸⁵⁹ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 56).

⁸⁶⁰ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁸⁶¹ *Ibid.*

⁸⁶² *Ibid.*

dependent.⁸⁶³ To this end, it has been noted that only Lesotho and Swaziland will not be affected while for others the extent thereof is expected to be limited.⁸⁶⁴ This will be due to an anticipated rise in 'economic activity' including imports into such countries.⁸⁶⁵ Another positive result stemming from the EPAs includes states not being able to alter economic policies upon changes in government or political views.⁸⁶⁶ This, along with member states being required to frequently work together and possibly alter their rules of trade after considering them collectively, could further strengthen regional integration.⁸⁶⁷ On the other hand, the EPAs have the potential to reduce states' policy space, thus limiting their discretion in determining how to deal with various issues.⁸⁶⁸ In reality, the realisation of regional integration through EPAs seems unlikely due to the complexity of memberships held by such states.⁸⁶⁹

4.4 The attainment of each Organisation's principles through the EPA

A key aim of the EPAs is to ensure that sustainable economic growth in ACP countries is achieved through increases in trade and regional integration.⁸⁷⁰ This is somewhat in line with the SADCs objective contained in article 5.1(a) wherein the aim is for economic development and growth.⁸⁷¹ However, it could be argued that it is not 'self-sustaining development' attained through reliance on each other as required by article 5.1(d) of the SADC Treaty due to the relationship with and market access being granted by the EU.⁸⁷² The extent of this dependence is somewhat reduced by the EU's

⁸⁶³ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Fontagné, Laborde and Mitaritonna (note 738 above; 179 and 205).

⁸⁶⁴ It has been estimated that countries such as Swaziland, where about 47 percent of its national income is derived from customs duty collection, will lose approximately 5.7 percent of such income under the EPA. It is forecast that Congo will lose approximately 33 percent of its tariff income but that this will only account for approximately 7.1 percent of its national income. 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 54), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Fontagné, Laborde and Mitaritonna (note 738 above; 179 and 205).

⁸⁶⁵ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 54).

⁸⁶⁶ It must be noted that WTO members are required to report changes in their internal trade policies in terms of article D of Annex 3 of the Marrakesh Agreement. Bertelsmann-Scott (note 746 above; 19).

⁸⁶⁷ *Ibid* 29.

⁸⁶⁸ McCarthy and Kruger (note 824 above; 3 and 8) and Woolfrey (note 761 above; 14).

⁸⁶⁹ Bertelsmann-Scott (note 746 above; 7) and Mapuva and Muyengwa-Mapuva (note 39 above; 28).

⁸⁷⁰ McQueen (note 764 above; 1371), 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 12-13), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Ukpe (note 40 above; 212).

⁸⁷¹ Article 5.1(a) of the SADC Treaty.

⁸⁷² Articles 5.1(d) of the SADC Treaty.

desire to attain such growth with respect for the developmental goals of the states concerned.⁸⁷³ Thus, SADC states can still ensure that their aims are attained using their own methods, such as supporting itself and other members as required by article 5.1(d).⁸⁷⁴

The EU also intends to ensure that through the EPAs and regional integration, poverty is reduced while income and employment is increased.⁸⁷⁵ This satisfies the SADC's objective in article 5.1(a) of the Treaty to use regional integration as a means to attain such benefits.⁸⁷⁶ Furthermore, the values of human rights, democratic principles, rule of law and good governance, upon which the EPA's objectives are grounded as confirmed in article 2 thereof, are mostly in accordance with those of the SADC found in article 4(c) of its Treaty, except that of good governance.⁸⁷⁷ Such values are upheld through the threat of imposition of trading sanctions if not respected.⁸⁷⁸ Overall it is evident that the SADC's aims and values are promoted and attainable through the EPA.⁸⁷⁹ Despite this, SADC states should have attempted to ensure they played a greater role in the formulation of its provisions.⁸⁸⁰ The EU, by guiding the formation of EPAs through the provision of market access opportunities to SADC members, could thereby easily have ensured that such provisions promote its aims and objectives.⁸⁸¹ Thus greater participation by the SADC was necessary to ensure that there is not a repeat of former trade relations where European states reportedly viewed the former

⁸⁷³ Article 5.1(d) of the SADC Treaty and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 12-13).

⁸⁷⁴ Article 5.1(d) of the SADC Treaty.

⁸⁷⁵ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 7 and 13), 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 12-13) and McQueen (note 764 above; 1371).

⁸⁷⁶ Mapuva and Muyengwa-Mapuva (note 39 above; 22-23), Bertelsmann-Scott (note 746 above; 7 and 13), Braude (note 349 above; 75), McQueen (note 764 above; 1371), 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 13), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Ukpe (note 40 above; 212).

⁸⁷⁷ Articles 4(a), (c) and (d) of the SADC Treaty. The SADC places emphasis upon respecting the 'sovereign equality' of the members and ensuring fairness amongst members. 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' (note 838 above).

⁸⁷⁸ *Ibid.*

⁸⁷⁹ Braude (note 349 above; 74).

⁸⁸⁰ Bertelsmann-Scott (note 746 above; 15) and Hurt (note 65 above; 504).

⁸⁸¹ 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' (note 838 above).

as merely 'sources of raw materials and markets for finished products'.⁸⁸² This is evident under Lomé where the exportation of manufactured goods from ACP states was not met with great tariff cuts by the EU.⁸⁸³

Presently, the market access and other opportunities granted under the EPA could nevertheless help increase trade in the SADC states, thus assisting in eradicating poverty, reducing unemployment and increasing the countries' wealth.⁸⁸⁴ Through this, it can be ensured that various human rights are also honoured by the SADC states.⁸⁸⁵ This in turn assists in the attainment of the EU and SADC's objectives, especially the promotion of human rights.⁸⁸⁶

4.5 Recent anti-dumping investigations undertaken by each Organisation against the other

4.5.1 Investigations by the SADC

The SAPA made an allegation that frozen bone-in chicken portions imported from the UK, Netherlands and Germany were being dumped onto the SACU market.⁸⁸⁷ An investigation was started on 25 October 2013 with an initial positive outcome being determined.⁸⁸⁸ The ITAC's request for imposition of provisional duties was granted and applied for six months from 4 July 2014 till 2 January 2015.⁸⁸⁹ The then applicable customs duty for this product was 37 percent, except where it originated from the EU where no duty was levied in accordance with the TDCA.⁸⁹⁰ The investigation covered the year 2012 with injury being investigated over the period of 1 January 2010 to 31

⁸⁸² See footnote 837 on page 89 for details on benefits accruing to the EU from the EPA. Landau (note 751 above; 2), Rusare (note 311 above; 42), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 15) and Hurt (note 65 above; 504).

⁸⁸³ Landau (note 751 above; 2), Rusare (note 311 above; 42), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 15) and Hurt (note 65 above; 504).

⁸⁸⁴ McQueen (note 764 above; 1371) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 13).

⁸⁸⁵ 'The EU in brief' (note 720 above).

⁸⁸⁶ 'Objectives' (note 724 above), 'The EU in brief' (note 720 above), McQueen (note 764 above; 1371) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 13).

⁸⁸⁷ The SAPA, as the association for the poultry industry, represents producers that are responsible for about 72 percent of the volume of chicken produced in the SACU region. Report No. 492 (note 693 above; 3 and 5) and Cronjé (note 614 above).

⁸⁸⁸ Report No. 492 (note 693 above; 3).

⁸⁸⁹ Report No. 492 (note 693 above; 4) and Cronjé (note 614 above).

⁸⁹⁰ Report No. 492 (note 693 above; 20) and Cronjé (note 614 above).

December 2012.⁸⁹¹ Information was also collected for an additional year thereafter from 1 January 2013 to 31 December 2013 to determine the 'performance of the SACU industry'.⁸⁹²

The ITAC calculated positive dumping margins for all investigated parties, barring certain Dutch producers.⁸⁹³ Thereafter, for the material injury calculation, an increase in the total amount of imports of this product coupled with decreasing imports of 'non-dumped' products and rises in volumes of the alleged dumped products was found.⁸⁹⁴ An issue noted herewith in the report was that in 2010, the first year of the injury assessment period, Germany did not export any of the product concerned to South Africa.⁸⁹⁵

It was pointed out that due to this, the calculation of increases in imports for the remaining years of the investigation, in comparison to that year, produced high results.⁸⁹⁶ The ITAC argued that there were no rules to guide this decision and that no validation for its choice was required either.⁸⁹⁷ While the WTO Committee on Anti-Dumping Practices has recommended that the investigation period span over three years, such a recommendation was characterized in *Guatemala- Cement II* as being non-binding on parties as it was not a rule in the ADA.⁸⁹⁸ However, it could be argued that the ITAC's decision does not comply with article 3.1 of the ADA, which requires that fairness be exercised when undertaking the 'objective examination' with the evidence provided being objective in nature.⁸⁹⁹ One could view the decision to not extend the investigation period beyond three years to reflect Germany's lack of exports

⁸⁹¹ Report No. 492 (note 693 above; 10-11).

⁸⁹² The product under investigation was 'without limitation, breasts and cuts there-off, with or without backbone and cuts there-off, full wings, prime wings, two-joint wings, 2nd joint/flat wings, thighs with or without backbone, drumsticks, halves and quarters'. *Ibid* 7 and 11.

⁸⁹³ *Ibid* 53-54.

⁸⁹⁴ For the period of 1 January 2010 to 31 December 2013, applying a cumulative assessment, total imports increased from 107 983 903kg to 189 009 081kg with non-dumped product imports decreasing from 104 196 612kg to 101 171 265kg and alleged dumped product imports increasing from 3 787 291 to 87 837 816kg. *Ibid* 57.

⁸⁹⁵ *Ibid* 58.

⁸⁹⁶ *Ibid* 58.

⁸⁹⁷ *Ibid* 58-59.

⁸⁹⁸ WTO Committee on Anti-Dumping Practices - Recommendation Concerning the Periods of Data Collection for Anti-Dumping (note 494 above), *Guatemala- Cement II* (note 461 above; para 8.266), *Vermulst* (note 402 above; 82-83) and UNCTAD (note 399 above; 21).

⁸⁹⁹ This was the ruling in the case of *Thailand- H-Beams (AB)*. *Thailand- H-Beams (AB)* (note 462 above; paras 106 and 111) and *Vermulst* (note 402 above; 74-75).

in 2010 as being unfair to the investigated parties, as this decision probably contributed to the ITAC's positive material injury finding.⁹⁰⁰

In relation to the determination of material injury, the ITAC found that it was occurring in various forms.⁹⁰¹ This included price suppression⁹⁰²; undercutting of SACU prices⁹⁰³; a reduction in profit earned⁹⁰⁴ and return made on investments⁹⁰⁵; a decrease in use of 'production capacity'⁹⁰⁶ and a negative impact on 'net cash flow'.⁹⁰⁷ Examination of the information relating to the additional period thereafter revealed that the same factors, as noted above, prevailed along with a reduction in production, employment and difficulty being experienced in attaining additional capital.⁹⁰⁸ Furthermore, it was determined that the rise in 'import volumes' exceeded the SACU's local market growth.⁹⁰⁹ A positive determination of material injury was thus made.⁹¹⁰

The ITAC, in establishing the causal link as required by article 3.5 of the ADA, compiled a table referring to the relevant factors found in article 3.4 that have to be evaluated.⁹¹¹ Therein, an increase or decrease in relation to each factor was noted, accompanied by some form of explanation, unlike in other investigations undertaken in following years.⁹¹² An example of such association was the linking of price suppression with the decreases in profit, which affected the industry's ability to recuperate such costs through an increase in prices due to competition from imported products.⁹¹³ Other factors alleged to have added to the injury experienced included

⁹⁰⁰ Report No. 492 (note 693 above; 58 and 76), *Thailand- H-Beams (AB)* (note 462 above; para 106) and Vermulst (note 402 above; 74).

⁹⁰¹ Report No. 492 (note 693 above; 75).

⁹⁰² 'Price suppression' refers to the degree to which production costs of the product concerned cannot be recouped through the selling price. Report No. 492 (note 693 above; 61-62).

⁹⁰³ Price undercutting refers to the degree to which the imported good's price is less than the domestic industry's selling price of the like product. Report No. 492 (note 693 above; 59).

⁹⁰⁴ Report No. 492 (note 693 above; 64).

⁹⁰⁵ *Ibid* 67.

⁹⁰⁶ This indicator looks at the ability of the producers to store their product produced in freezers. It was found that the domestic industry producers did not produce to their full capacity during the period even though their production did rise. *Ibid* 68.

⁹⁰⁷ *Ibid* 69.

⁹⁰⁸ *Ibid* 75.

⁹⁰⁹ *Ibid* 75.

⁹¹⁰ *Ibid* 76.

⁹¹¹ *Ibid* 78.

⁹¹² In an ITAC investigation involving Portland cement, only a table was used to determine the effects of dumped imports on the local industry required by article 3.5. See pages 63 to 64 of chapter 3 for further details. Report No. 492 (note 693 above; 78 and 81-83), *South Africa- provisional anti-dumping duties on Portland cement from Pakistan* (note 615 above; para 7.4), Report No. 495 (note 615 above) and Khanderia (note 577 above; 272 and 276).

⁹¹³ Report No. 492 (note 693 above; 82).

'labour unrest', an inappropriate business model being followed and extensive use of brine injecting.⁹¹⁴ Based on this reasoning, the Commission found a causal link between the dumped imports and material injury to the local industry.⁹¹⁵ With all the requirements satisfied, a recommendation for the imposition of 'definitive anti-dumping duties' on imports of bone-in portions from the three states and certain producers therein was made to the Minister of Trade and Industry.⁹¹⁶ These duties were to be applied from January to June of 2017.⁹¹⁷ As yet there is no clear response from the EU in dealing with such matter according to normal WTO processes.⁹¹⁸

4.5.2 Investigations by the EU

The EU undertook an investigation into allegations of dumping of electrolytic manganese dioxides originating from South Africa, where provisional duties were initially imposed.⁹¹⁹ This product is used in the production of cell batteries.⁹²⁰ The

⁹¹⁴ Brine is salt water injected into chicken in order to provide flavour to it, make it tender or preserve it. The brine added cannot increase the mass of the prices by more than 15 percent of the original mass as ruled in 2016 by the Minister of Agriculture. This was done through an amendment of regulation 5 (GN R471 of GG 39944, 22/4/2016; 8 and 11) of the Regulations published in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972. Such regulations were upheld by the High Court in *South African Poultry Association v Minister of Agriculture* (39597/2016) [2016] ZAGPPHC 862 (21 September 2016). 'Government Finally Sets Levels Of Brine In Frozen Chicken' 1 May 2016, available at <https://www.foodstuffsa.co.za/government-finally-sets-levels-of-brine-in-frozen-chicken/>, accessed on 14 August 2017, W Knowler 'Department sets percentage of brine on frozen chicken' 26 April 2016, available at <https://www.timeslive.co.za/sunday-times/lifestyle/2016-04-26-department-sets-percentage-of-brine-on-frozen-chicken/>, accessed on 14 August 2017, Report No. 492 (note 693 above; 79) and 'Anti-dumping duties imposed on frozen chicken portions imports' 2 March 2016, available at <http://www.itac.org.za/news-headlines/media-releases/anti-dumping-duties-imposed-on-frozen-chicken-portions-imported-from-germany,-the-netherlands,-and-the-united-kingdom>, accessed on 31 July 2017.

⁹¹⁵ Report No. 492 (note 693 above; 83).

⁹¹⁶ The Commission recommended that a 31.3 percent duty be imposed on the product imported from the listed German producers while a 73.33 percent duty be imposed on such products produced by other German poultry producers exported to the SACU. For Netherlands, a 3.86 percent customs duty was recommended for the listed producers while a 22.81 percent duty rate was to be imposed on other Dutch producers whose product was imported into the SACU. For the imported product of the producers of the UK involved in the investigation, a 12.07 percent duty was proposed and a 30.99 percent customs duty on all other producers. Report No. 492 (note 693 above; 19) and 'Anti-dumping duties imposed on frozen chicken portions imports' (note 914 above).

⁹¹⁷ Kapuya (note 14 above; 19).

⁹¹⁸ 'Disputes by Member' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm, accessed on 23 October 2017.

⁹¹⁹ This decision was made in terms of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community. 'Council Regulation (EC) No 221/2008 of 10 March 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain manganese dioxides originating in South Africa' available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:069:0001:0007:EN:PDF>, accessed on 23 February 2017 (Council Regulation (EC) No 221/2008 of 10 March 2008) at para 1.

⁹²⁰ *Ibid* para 6.

investigation was conducted from 1 October 2005 till 30 September 2006, wherein it was determined whether injury was suffered between 1 January 2002 and 30 September 2006.⁹²¹ During such period, using the weighted average method, a dumping margin of 17.1 percent was calculated.⁹²² A positive injury finding was thereafter made.⁹²³

For determination of the causal link between these two requirements, the Council considered a wide range of factors.⁹²⁴ It reasoned that imports of the same product from the People's Republic of China (PRC) did not contribute to the alleged injury as they were of low volumes owing to a user's difficulty and the costs associated with changing providers.⁹²⁵ The relocation of a major user of the product from the EU to the PRC was also excluded as a contributing factor to the injury as decreases in sales amounts as a result therefrom reportedly only accounted for a small extent of total decreases experienced.⁹²⁶

The South African producer, Delta, alleged that the low prices of its products was attributable to the comparative advantage it enjoyed and so increases in raw materials did not affect its price greatly.⁹²⁷ This would be possible due to its reportedly close proximity to the mines, the source of the product, and its 'advantageous contractual conditions with the supplier'.⁹²⁸ The Council rejected this factor as being 'irrelevant to the causality examination' as dumping had been proven.⁹²⁹ It does not appear to clearly refute the argument being made that such an advantage exists, which is a plausible reason for the lower prices.⁹³⁰ Such action could be indicative of the Council attempting to protect its industry through anti-dumping measures.⁹³¹ This would be in accordance with the concerns raised by Issabekov and Suchecki that such measures are used in respect of products for which a comparative advantage is being lost.⁹³² This is evident here given that the EU's main electrolytic manganese dioxide producer,

⁹²¹ *Ibid* para 2.

⁹²² *Ibid* para 15.

⁹²³ *Ibid* para 21.

⁹²⁴ *Ibid* paras 23-46.

⁹²⁵ *Ibid* paras 24-25.

⁹²⁶ *Ibid* para 32.

⁹²⁷ *Ibid* paras 34-35).

⁹²⁸ *Ibid* para 34.

⁹²⁹ *Ibid* para 35.

⁹³⁰ *Ibid* paras 34-35.

⁹³¹ *Ibid* para 35.

⁹³² Issabekov and Suchecki (note 64 above; 59).

Tosoh, is struggling to compete with the lower prices of the South African producers.⁹³³ This is bolstered by the fact that such producers are of a limited number and that the product can only be used for certain purposes.⁹³⁴

In terms of the Community's interest, the additional factor considered by the Council, it was determined that key local producer, Tosoh, should be prevented from closing down.⁹³⁵ The reasons provided for this were that Delta's below cost prices were unsustainable and so Tosoh would be able to compete again should such prices be increased.⁹³⁶ Furthermore, the difficulty and costs associated with changing product suppliers and the requirement of having to test the suitability of it, reportedly placed the supplier in a strong bargaining spot.⁹³⁷ It was argued that Delta's position would have been strengthened even further should Tosoh not have operated anymore, thus placing users at Delta's mercy.⁹³⁸ The Council determined that the requirements for dumping had been satisfied.⁹³⁹

An offer to make undertakings was rejected on the grounds that it would not alleviate the harm caused.⁹⁴⁰ This was reportedly due to changes in prices of other raw materials used in batteries that could increase the price of the goods produced.⁹⁴¹ Additionally, it was noted that the formulation of a price through such undertakings could lead to it becoming a 'reference price on the market', thus decreasing competition amongst producers.⁹⁴² The Council therefore decided to impose a 'definitive anti-dumping duty' of 17.1 percent on South African imports and to 'definitively collect' those amounts charged and collected as provisional measures.⁹⁴³ In February 2014, a decision was taken to keep such duties in place for a further five

⁹³³ Issabekov and Suhecki (note 64 above; 59) and Council Regulation (EC) No 221/2008 of 10 March 2008 (note 919 above; para 35, 39 and 43).

⁹³⁴ Issabekov and Suhecki (note 64 above; 59) and Council Regulation (EC) No 221/2008 of 10 March 2008 (note 919 above; para 35, 39 and 43).

⁹³⁵ Council Regulation (EC) No 221/2008 of 10 March 2008 (note 919 above; para 49).

⁹³⁶ *Ibid* para 50.

⁹³⁷ *Ibid* para 50.

⁹³⁸ *Ibid* para 50.

⁹³⁹ *Ibid* para 61.

⁹⁴⁰ *Ibid* para 70.

⁹⁴¹ *Ibid* para 70.

⁹⁴² *Ibid* para 70.

⁹⁴³ *Ibid* articles 1 and 2.

years.⁹⁴⁴ According to normal WTO processes, there appears to be no clear response as yet from South Africa on this matter.⁹⁴⁵

4.6 Concluding remarks

In relation to anti-dumping, it appears that both the SADC and EU use it somewhat as a protective means for their industries.⁹⁴⁶ In respect of the EU, such is seen in the implementation of duties on imported products where a comparative advantage is being lost or is lacking in respect of the locally produced equivalent.⁹⁴⁷ It is also evident in the greater ease at which a complaint can be considered.⁹⁴⁸ For the SADC, such approach is evident in multiple investigations into allegations of dumping in the poultry sector having been initiated over the years.⁹⁴⁹ However, with research undertaken by Brink in 2005 indicating that only the SACU has anti-dumping legislation in place, it could be said that the effect of the SADC's actions in this respect has a limited effect on its relationship with the EU.⁹⁵⁰

Despite such approaches, both parties have been able to ensure that their goals and values are recognised and will be given effect to through the EPA, especially for the SADC.⁹⁵¹ Furthermore, the WTO's aims and rules are also being upheld.⁹⁵² For the SADC however, certain internal issues such as overlapping regional organisation membership and varied economic and developmental differences could hamper the implementation of the EPA.⁹⁵³ Notwithstanding this, its EPA members have successfully concluded an enduring formal agreement with a key trading partner, thus

⁹⁴⁴ A Lawson 'EU Extends Duties On S. African Battery Raw Material' 28 February 2014, available at <https://www.law360.com/internationaltrade/articles/514351/eu-extends-duties-on-s-african-battery-raw-material>, accessed on 30 August 2017.

⁹⁴⁵ 'Disputes by Member' (note 918 above).

⁹⁴⁶ Report No. 492 (note 693 above; 3) and Council Regulation (EC) No 221/2008 of 10 March 2008 (note 919 above; para 35).

⁹⁴⁷ Macrory, Appleton and Plummer (note 382 above; 71), Eggert (note 641 above) and Issabekov and Suchecki (note 64 above; 43, 46 and 59).

⁹⁴⁸ Macrory, Appleton and Plummer (note 382 above; 71), Eggert (note 641 above) and Issabekov and Suchecki (note 64 above; 43, 46 and 59).

⁹⁴⁹ 'Report No. 389' (note 594 above), *South Africa- anti-dumping duties on frozen meat of fowls from Brazil* (note 594 above) and Kwaramba and Tregenna (note 581 above; 628-629).

⁹⁵⁰ Brink (note 551 above; 19).

⁹⁵¹ Braude (note 349 above; 74), 'Objectives' (note 724 above), 'The EU in brief' (note 720 above), McQueen (note 764 above; 1371) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 13).

⁹⁵² Ukpe (note 40 above; 212).

⁹⁵³ Hansohm and Breytenbach et al (note 276 above; 182), Bertelsmann-Scott (note 746 above; 7 and 13) and Braude (note 349 above; 75).

cementing such relationship.⁹⁵⁴ Additionally, the EU has granted greater benefits than that required of the SADC members, seen in its superior market opening promises and the various safeguard options for the SADC members.⁹⁵⁵ Such benefits, along with an expected rise in the SADC states' GDP, indicate that the relationship is a positive and rewarding one for SADC EPA members.⁹⁵⁶

It can be argued that anti-dumping practices of both parties have not negatively impacted on their relationship, despite it being noted as more of a concern for the SADC.⁹⁵⁷ Such lack of effect could be attributed to the fact that the EU enjoys superiority in the EPA, due to it not being dependent on it to the extent of the SADC states and that its global trading levels will not be affected thereby.⁹⁵⁸

⁹⁵⁴ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 56), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Meyn (note 736 above; 516).

⁹⁵⁵ See footnote 838 on page 89 and page 90 for the applicable custom rates under the EPA.

'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group. Key Advantages June 2016' (note 133 above), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 21 and 55).

⁹⁵⁶ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above).

⁹⁵⁷ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 15) and Brink (note 551 above; 12).

⁹⁵⁸ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Bertelsmann-Scott (note 746 above; 15).

Chapter 5:

FINDINGS, RECOMMENDATIONS AND OVERALL CONCLUSION

5.1 Research findings

This dissertation centred around a discussion of the ADA with special focus on the SADC-EU EPA, concluded in June 2016.⁹⁵⁹ The analysis was undertaken with the broad aim of determining the effect of the ADA on relations between the SADC and EU and formulating recommendations for the development of the SADC members' poultry sectors, specifically that of South Africa.

In order to satisfy these main objectives, numerous underlying questions had to first be answered. In chapter two it was determined whether development of the multilateral trading system, since the GATT, had any effect on the increased numbers of regional organisations, particularly the SADC. Generally, the research indicated the existence of such effect.⁹⁶⁰ For the SADC's predecessor, the SADCC, it was the persisting difficulties in such states and those encountered when attempting to participate in this system that hindered their involvement, leading to the organisation's formation.⁹⁶¹ Its creation was viewed as a means to resolve such issues as noted on pages 36 and 37 of chapter two.⁹⁶² The success of the SADCC and then the SADC in this regard was limited.⁹⁶³ Significantly, it was also found that the growth in these regional organisations could be associated with the increased use of anti-dumping measures during such time.⁹⁶⁴ This was due to the advances in anti-dumping laws largely taking place around the same time as the waves of regionalism.⁹⁶⁵

Such increased use of anti-dumping measures necessitated a uniformed approach to the application of Article VI, an issue not solved by prior Codes.⁹⁶⁶ The ADA was thus

⁹⁵⁹ 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above).

⁹⁶⁰ This was determined on pages 37 to 38 of chapter 2. Picker (note 219 above; 275).

⁹⁶¹ This was discussed on pages 35 and 36 of chapter 2.

⁹⁶² Darku and Appau (note 211 above; 47), Ndlovu (note 214 above; 187-188) and Mansfield and Reinhardt (note 209 above; 835 and 838).

⁹⁶³ A discussion of this is contained in pages 31 to 32 and 34 to 35 of chapter 2.

⁹⁶⁴ This can be found on page 38 of chapter 2 with a discussion of the development of international anti-dumping law found on page 18.

⁹⁶⁵ See the discussion on the various GATT rounds of negotiations, Codes developed therein and the waves of regionalism on pages 17 to 25.

⁹⁶⁶ Trebilcock and Howse (note 134 above; 169), Trebilcock, Howse and Eliason (note 153 above; 335) and Pangratis and Vermulst (note 150 above; 71).

formulated as stated on page 23 of chapter two although numerous issues therewith were highlighted in chapter three.⁹⁶⁷ In consideration of the ADA's effect on the SADC states' poultry industries, most notably South Africa's, varied approaches by such states to the ADA were also discovered in chapter three.⁹⁶⁸ It was found that South Africa had been affected by the ADA to a larger extent than other SADC states.⁹⁶⁹ This was mainly due to its attempts to comply with the ADA by implementing the ITA Act.⁹⁷⁰ However, in seeking to uphold compliance, with efforts being questionable at times⁹⁷¹, South Africa has not been able to provide the assistance demanded by the poultry industry.⁹⁷² In contrast, other SADC states appear to have provided protection seemingly without regard for most notably the ADA's requirements.⁹⁷³

Further to this, the next question investigated in chapter four was the extent to which anti-dumping practices have affected the relationship between the SADC and EU. It was determined that despite the apparent use of anti-dumping measures to protect their industries and the investigations undertaken against each other, their relationship has thus far not been negatively affected.⁹⁷⁴ This was determined in light of their current EPA negotiations, with the EU dominating the relationship and only the SACU members reportedly having anti-dumping legislation to facilitate such action against the EU, thus limiting effect thereof on the EU.⁹⁷⁵ The EPA formulated was noted as being potentially beneficial to the SADC although certain persisting internal issues could hamper this.⁹⁷⁶ However, importantly, through it the parties take cognisance of

⁹⁶⁷ See the discussion and analysis of important provisions of the ADA on pages 41 to 59 of chapter 3. 'Anti-dumping, subsidies, safeguards: contingencies, etc' (note 143 above).

⁹⁶⁸ See page 66 of chapter 3 for the full discussion and examination hereof.

⁹⁶⁹ Frey (note 673 above) and 'Namibia Introduces Poultry Meat Import Quota' (note 652 above).

⁹⁷⁰ 'Trade Remedies' (note 25 above).

⁹⁷¹ For a further discussion on this see pages 60 to 65 of chapter 3.

⁹⁷² UNDP (note 382 above; 191).

⁹⁷³ Botswana and Swaziland appear to be the only states of those observed to be prospering as a result of not strictly complying with the requirements of the ADA. This is discussed further on pages 67 to 69 of chapter 3 of the dissertation. Frey (note 673 above), Sikhondze (note 669 above) and 'Government Explores Ways to Protect Poultry' (note 668 above).

⁹⁷⁴ Report No. 492 (note 693 above; 3), 'Council Regulation (EC) No 221/2008 of 10 March 2008 (note 919 above; para 35), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Bertelsmann-Scott (note 746 above; 15).

⁹⁷⁵ See pages 77 to 87 of chapter 4 for a full discussion of such SADC-EU EPA negotiations and pages 59 of chapter 3 and 86 and 100 of chapter 4 for the discussion on the two issues highlighted here. 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 15) and Brink (note 551 above; 19).

⁹⁷⁶ Hansohm and Breytenbach et al (note 276 above; 182), Bertelsmann-Scott (note 746 above; 7 and 13), Braude (note 349 above; 75), 'Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group, Key Advantages June 2016' (note 838 above), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership

and endeavour to realise their values and objectives.⁹⁷⁷ This also indicates consideration of the needs and constraints of the SADC members, which is imperative given the issues facing the South African poultry sector.⁹⁷⁸

The main reason underlying this research is the problems currently facing such industry. Due to the allegedly cheaper imports coming into the country, the local poultry industry is struggling to compete, with concerns arising especially over the resulting job losses.⁹⁷⁹ Other factors have also compounded such problems, including the drought which has increased prices of animal feed constituents such as maize.⁹⁸⁰ Additionally, the recent outbreak of avian influenza, reportedly affecting five of the country's provinces, is resulting in decreases to viable output.⁹⁸¹

Problems in poultry need to be addressed given the dependence of other industries on it and its contribution to South Africa's food security.⁹⁸² To attain any development and positive results, it is recognised that along with recommendations for reform at the WTO level, changes are also required on regional, state and industry level. The main goals of the South African industry, thus also influencing its actions, should first be to produce poultry products of sufficient quantities and at competitive prices so to contend with imports and secondly to thereafter produce sufficient quantities to export abroad.⁹⁸³

Agreement' *Tralac* (note 747 above) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 21 and 55).

⁹⁷⁷ Braude (note 349 above; 74), 'Objectives' (note 724 above), 'The EU in brief' (note 720 above), McQueen (note 764 above; 1371) and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 13).

⁹⁷⁸ 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 13).

⁹⁷⁹ The unemployment rate for the first quarter of 2017 was 27.7 percent, 1.2 percent higher than in the last quarter of 2016. N Shaikh 'Tough times in poultry industry' *Sunday Tribune* 3 September 2017 at 4, Mchunu (note 2 above; 13) and S Menon 'SA's unemployment rate hits a 13-year record high' 1 June 2017, *Times Live* available at <https://www.timeslive.co.za/news/south-africa/2017-06-01-sas-unemployment-rate-hits-a-13-year-high/>, accessed on 8 September 2017.

⁹⁸⁰ Shaikh (note 979 above), Fox (note 27 above), Viljoen (note 25 above), Boshoff (note 11 above; 3), Dunn (note 9 above; 56), Davids and Meyer (note 9 above; 22) and 'Evaluating the competitiveness of the South African broiler value chain' (note 9 above; 22).

⁹⁸¹ Shaikh (note 979 above).

⁹⁸² For further details on this see chapter 1 of the dissertation. Dunn (note 9 above; 56) and Davids and Meyer (note 9 above; 8).

⁹⁸³ This recommendation and others pertaining to the poultry industries of the SADC states are made in relation to frozen bone-in portions as defined in footnote 647 on page 66.

5.2 Recommendations for improvement of the ADA

As mentioned above, numerous issues with the ADA have arisen, which South Africa can highlight and suggest improvements for.⁹⁸⁴ These recommendations are formulated to ensure that members of regional groups, such as the SADC, and their industries are shielded from unnecessary investigations and imposition of dumping duties in the future. This is due to the adverse consequences of such actions for developing and least developed states as noted in chapter three.⁹⁸⁵ Furthermore, with this basis, developed states could also be influenced to support such suggestions in order to reduce investigations initiated against them too.

In relation to article 2 of the ADA, numerous improvements can be suggested, including the formulation of a more precise definition for the term 'reasonable profit' in article 2.2.⁹⁸⁶ This could be achieved by creating guidelines containing factors to be used in determining reasonable profits. Such factors could take cognisance of the various industries, economic positions and value of applicable currencies. By doing so, it can help ensure that the reasonable profit determined is more accurate and related to the circumstances that it is normally determined within. This would reduce the discretion afforded to investigating authorities.⁹⁸⁷ Meanwhile, the proposal that all the sales of the exporters concerned be used could also remedy this issue.⁹⁸⁸

Additionally, an adaptation to article 2.4 in relation to allowances could be proposed.⁹⁸⁹ It can be suggested that allowances only be permitted upon production of documentation to the investigating authorities showing the incurring of those extra costs by such parties.⁹⁹⁰ This could be achieved by amendment to the ADA or a recommendation by the Committee on Anti-Dumping Practices, although the latter will not be binding on members.⁹⁹¹ These improvements could ensure that the chances of

⁹⁸⁴ See pages 41 to 59 of chapter 2 for a full discussion of the important provisions of the ADA including the concerns raised and recommendations made in relation to each one discussed. Satapathy (note 416 above; 2212), Adamantopoulos and De Notaris (note 379 above; 48 and 51), Pangratis and Vermulst (note 150 above; 70) and Prusa (note 47 above; 696).

⁹⁸⁵ UNDP (note 382 above; 189).

⁹⁸⁶ See page 44 of chapter 2 for further details. Adamantopoulos and De Notaris (note 379 above; 51).

⁹⁸⁷ *Ibid.*

⁹⁸⁸ *Ibid.*

⁹⁸⁹ See page 45 of chapter 2 of the dissertation. UNCTAD (note 399 above; 7).

⁹⁹⁰ *Ibid.*

⁹⁹¹ This concern was noted on pages 54 of chapter 3. *Guatemala- Cement II* (note 461 above; para 8.266).

a positive dumping finding and the margins calculated are not manipulated to be artificially higher through the use of excess discretion afforded to authorities.⁹⁹²

Another key issue associated with article 2 is the practice of zeroing, which ought to be addressed by the WTO members.⁹⁹³ This is due to the case law only being applicable to the parties involved and such states not being obliged to alter their legislation or practices despite case findings as noted by Satapathy.⁹⁹⁴ Additionally, this practice is concerning given that it increases chances of a positive dumping determination and amplified dumping margins.⁹⁹⁵ This allows states to protect their industries at the expense of those of another.⁹⁹⁶ The suggestion of Trebilcock and Jones to ban this practice, in line with determinations in the applicable cases, through an amendment to the ADA can be proposed by developing countries including South Africa.⁹⁹⁷ This could instil greater certainty into the ADA through a reduction in the discretion granted to authorities.⁹⁹⁸

For article 3 of the ADA, requests for greater clarity and explanation of methods used and key terms therein have also been made.⁹⁹⁹ Due to the extensive case law covering this article, thus providing a sufficient set of guidelines for states, an amendment thereto does not appear to be of immediate concern as with article 2.¹⁰⁰⁰

There are two key concerns relating to article 5 that could possibly be brought to the WTO's attention. Concerning article 5.3, it can be recommended that further guidelines on what qualifies as 'accurate and adequate evidence for initiating an investigation' be provided.¹⁰⁰¹ This would be warranted by the lack of clear guidance in the applicable case law.¹⁰⁰² Furthermore, the proposal of Adamantopoulos and De Notaris that an

⁹⁹² UNCTAD (note 399 above; 7).

⁹⁹³ This was found in relation to article 2.4 of the ADA and a discussion thereof is found on pages 45 to 47 of chapter 3. Vermulst (note 402 above; 53) and Macrory, Appleton and Plummer (note 92 above; 507).

⁹⁹⁴ Satapathy (note 416 above; 2211).

⁹⁹⁵ UNCTAD (note 399 above; 57).

⁹⁹⁶ *Ibid.*

⁹⁹⁷ Jones (note 198 above; 14) and Trebilcock (note 387 above; 74).

⁹⁹⁸ Satapathy (note 416 above; 2212).

⁹⁹⁹ This is evident from the case law on pages 48 to 52 of chapter 3 wherein numerous terms and phrases were defined. Jones (note 198 above; 17).

¹⁰⁰⁰ See the discussion of article 3 on pages 47 to 52 of chapter 3.

¹⁰⁰¹ *EC- Bed Linen* (note 476 above; para 6.198), UNCTAD (note 399 above; 28) and Macrory, Appleton and Plummer (note 92 above; 511).

¹⁰⁰² See page 52 of chapter 3. *Mexico- HFCS* (note 454 above; para 7.94), UNCTAD (note 399 above; 28), *Thailand- H-Beams* (note 480 above; para 7.77) and Macrory, Appleton and Plummer (note 92 above; 511).

investigation request not be considered if both the product and country were investigated in the preceding year on that same party's request, can be taken further by South Africa.¹⁰⁰³ This would help ensure that states, especially developing ones, avoid being subjected to numerous investigations in quick succession, thereby depleting their limited resources and increasing the chances of another gaining protection for their industry.¹⁰⁰⁴

Thereafter, in relation to the *de minimis* dumping and injury standards, article 5.8 should be amended to reflect the Committee's recommendation concerning time periods used in such calculations.¹⁰⁰⁵ This is necessary given that such periods can be altered to ensure *de minimis* standards are met, thereby warranting initiation of an investigation.¹⁰⁰⁶ While numerous suggestions have been proposed to otherwise reduce investigations, those of Adamantopoulos and De Notaris in this respect could be brought before the WTO by South Africa.¹⁰⁰⁷ They proposed that consultations between parties be held before an investigation is undertaken to gauge whether the evidence presented is of sufficient quantity and quality.¹⁰⁰⁸

This proposal has merit as it could influence states to consider an application carefully before acting upon it, thereby reducing the number of investigations.¹⁰⁰⁹ It would be especially beneficial to developing states and LDCs who sometimes have difficulty participating therein and the negative consequences of duties on their industries and economies.¹⁰¹⁰ Additionally, it can provide such states with the opportunity to make any applicable negative consequences known to the investigating state for consideration before a decision is made.¹⁰¹¹ Another mechanism to protect developing states and LDCs is to request that developed WTO members only investigate dumping allegations concerning the former if the alleged dumping is affecting 'an essential interest' of theirs.¹⁰¹² This will ensure that investigations against such states are only

¹⁰⁰³ Adamantopoulos and De Notaris (note 379 above; 44).

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ See pages 53 to 54 of chapter 3 for further details. Committee on Anti-Dumping Practices - Recommendation Concerning the Time- Period to be Considered in Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement (note 514 above) and Satapathy (note 416 above; 2211).

¹⁰⁰⁶ Satapathy (note 416 above; 2211).

¹⁰⁰⁷ Adamantopoulos and De Notaris (note 379 above; 45).

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ See page 58 of chapter 3 for further details. *Ibid.*

¹⁰¹¹ *Ibid.*

¹⁰¹² *Ibid* 46.

pursued as a last resort and when serious concerns warrant it. Furthermore, it would probably be acceptable to developed states as it does not require much of them in giving effect thereto.

The improvement of article 15 is essential to ensure that developed states implement it and in the appropriate manner. It is also critical for developing countries and LDCs, such as those comprising the SADC, as it can assist in protecting their important industries.¹⁰¹³ The satisfaction of the obligations in article 15 could be made mandatory so that developed members can be held accountable.¹⁰¹⁴ While this would be the most appropriate manner to achieve this outcome, developed states may oppose it. Developing and LDC states could otherwise benefit from a precedent or standard form created by the Committee stating what information is required for an investigation and questions that could be posed to the parties.¹⁰¹⁵ This would assist such states as it requires fewer resources to conduct an investigation and will also be appealing to developed states as it does not require great effort.¹⁰¹⁶ It must be recognised though that changes to the ADA alone will not yield great results for the poultry sector in particular.

5.3 Recommendations for regional level

In order to assist the poultry industry, changes should be initiated within the SADC. This ought preferably to be attended to first, before recommendations for the ADA's improvement as it could help the SADC to take full advantage of any consequential changes adopted by the WTO. In this regard, it must be recognised that the SADCC's work was hindered by a lack of dedication from members, amongst other factors, leading to an inability to attain its goals.¹⁰¹⁷ This is also evident today in the issue of overlapping memberships held by African states plaguing its successor and other African regional groups as discussed in chapter four.¹⁰¹⁸ The SADC, owing partly to this factor, has also been characterised by its failures to attain goals, such as

¹⁰¹³ Vermulst (note 402 above; 216) and Macrory, Appleton and Plummer (note 92 above; 525).

¹⁰¹⁴ Satapathy (note 416 above; 2212) and Adamantopoulos and De Notaris (note 379 above; 59).

¹⁰¹⁵ Jones (note 198 above; 18-19).

¹⁰¹⁶ *Ibid.*

¹⁰¹⁷ Holland (note 38 above; 265) and Ng'ong'ola (note 265 above; 489-490).

¹⁰¹⁸ See pages 84 to 85 of chapter 4. Bertelsmann-Scott (note 746 above; 7).

becoming a customs union by 2010.¹⁰¹⁹ Issues associated herewith are now further exacerbated by the varied nature of the EPA affiliations in recent years.¹⁰²⁰

The optimum solution for the issue of EPA memberships would have been for African states to have followed the EU's advice to match such groupings with existing regional memberships.¹⁰²¹ This could have been attained through greater preparation by states before the EPA negotiations.¹⁰²² The suggestion of attempting to achieve this now through EPA members changing groups would not be realistic as it would take too long to implement, cause great confusion and result in states being bound to EPAs that they did not help formulate. On a more practical level, the SADC regional group could rather encourage members not part of its EPA group to work towards the attainment of goals and values shared by both former groups in their own EPA groups. This would only be applicable to those EPA groups still negotiating their agreements, namely the ESA and Central Africa.¹⁰²³ In this, the SADC regional group can at least ensure that its members are working towards common goals and means of attaining them, such as development and regional integration.¹⁰²⁴

In conjunction with overlapping memberships, the SADC could address its issue of overambitious goals.¹⁰²⁵ To this end it is recommended that greater caution be exercised when setting future goals.¹⁰²⁶ Its failure in this respect could indicate its inability to recognise the extent of resources held by and those issues facing its members, thereby hampering their abilities. By improving this, states could be driven to work towards attaining such goals as they could be within their reach and not too demanding on their resources. The issue of scarce resources could be addressed by the SADC focusing on increasing regional integration, key for its developmental aims, through the encouragement of its members to reduce regional organisation

¹⁰¹⁹ Mapuva and Muyengwa-Mapuva (note 39 above; 26) and Leistner (note 276 above; 158).

¹⁰²⁰ Kwa, Lunenburg and Musonge (note 779 above; 12) and Borrmann, Busse and De La Rocha (note 739 above; 235).

¹⁰²¹ Fontagné, Laborde and Mitaritonna (note 738 above; 186).

¹⁰²² Bertelsmann-Scott (note 746 above; 22 and 29).

¹⁰²³ See Annexure A for further details. 'Africa's external relations' (note 753 above) and 'Economic Partnerships' (note 753 above).

¹⁰²⁴ Bertelsmann-Scott (note 746 above; 7) and Mapuva and Muyengwa-Mapuva (note 39 above; 28).

¹⁰²⁵ This issue was discussed on pages 34 to 35 of chapter 2. Mapuva and Muyengwa-Mapuva (note 39 above; 26).

¹⁰²⁶ *Ibid.*

memberships.¹⁰²⁷ This could free resources and focus attention on a reduced number of goals and means to attain them.¹⁰²⁸

Implementation of such proposals could assist in allowing other issues, such as anti-dumping, to be properly addressed by the SADC members. In relation to the reported lack of anti-dumping legislation in place amongst them, bar the SACU members, this should be rectified in order to bring about greater certainty and uniformity herein.¹⁰²⁹ If followed it will introduce increased credibility to actions taken by member states in response to allegations of dumping and ensure conformity with the ADA as required by the SADC's Trade Protocol.¹⁰³⁰ This is proposed in light of the direct measures taken by many SADC EPA members in response to issues facing their poultry industries, such as with Namibia apparently restricting import quantities without first conducting an investigation.¹⁰³¹

Recognising the scarcity of most SADC members' resources, the SADC itself could formulate a guide as to what the anti-dumping legislation in each state should encompass.¹⁰³² The existing ITA Act could be a guide in this respect.¹⁰³³ It accords with Brink's suggestion that each state introduce its own anti-dumping legislation, possibly following a guideline to achieve some uniformity.¹⁰³⁴ It is encouraged that such action be taken in the next five years given the current practices of some EPA members noted above and the general advanced stages of the EPA negotiations. Thereafter, it is recommended that SADC members undertake implementation of this

¹⁰²⁷ *Ibid* 28.

¹⁰²⁸ Bertelsmann-Scott (note 746 above; 7).

¹⁰²⁹ This was noted on page 59 of chapter 3. Brink (note 551 above; 19), 'Trade Policy Review, Trade Policies and Practices by Measure' (note 573 above; 32), 'Trade Policy Review: Mozambique' (note 573 above) and Voon (note 92 above; 441).

¹⁰³⁰ Mutai (note 213 above; 91).

¹⁰³¹ See pages 67 to 68 of chapter 4 for further information. 'Namibia Introduces Poultry Meat Import Quota' (note 652 above).

¹⁰³² This collective action is important as it can help ensure that some of the objectives and obligations voluntarily undertaken by the SADC members in terms of the SADC agreements are honoured and implemented. This includes article 4(b) of the SADC Treaty whereby states agreed to strive towards the objective of attaining 'solidarity' through such act and 'complementarity between national and regional strategies and programmes', which can both be attained through the formulation of this guide. Additionally, member states can 'contribute towards the improvement of the climate for domestic, cross-border and foreign investment' as undertaken in terms of article 2(3) of the SADC Trade Protocol. Importantly, such a guide can also ensure that all member states honour the promise in article 18 of this Protocol to ensure that if anti-dumping legislation is formulated and implemented by them that it is 'in conformity with WTO provisions'. Kwa, Lunenburg and Musonge (note 779 above; 9 and 59).

¹⁰³³ Brink (note 551 above; 19).

¹⁰³⁴ *Ibid*.

legislation in the following five to ten years. Furthermore, the SADC could formulate its own investigation body to assist members in conducting investigations.¹⁰³⁵ This is warranted by the technical nature of the ADA requirements, which would be concerning to such developing states and LDCs.¹⁰³⁶ These suggestions should be implemented alongside measures created to address specific issues facing the SADC members' poultry industries to ensure maximum growth therein.

5.4 Recommendations for state level and the South African poultry industry

5.4.1 EPA safeguards

In order to address pressing concerns, particularly in the South African poultry industry, a short term, fairly quick and accessible solution can be found in the EPA.¹⁰³⁷ The SADC EPA members can look towards utilising the safeguards found therein in the current or following year.¹⁰³⁸ Given that such allowances were granted by the EU and the beneficial nature of the EPA towards the SADC members, use thereof will probably not affect their relationship negatively.¹⁰³⁹ Furthermore, it could be argued that activating such safeguards is vital to ensuring that SADC members are not used by the EU as a source of materials and a market for its goods but rather that the former attains meaningful benefits from the EPA.¹⁰⁴⁰

There are a number of safeguards that can be employed to protect the poultry and associated industries from failing, whilst ensuring that the EPA works in favour of the SADC members.¹⁰⁴¹ First, the general bilateral safeguard would be available to all the SADC EPA states should increases in EU poultry imports be causing some form of injury listed in article 34(2) to the industry.¹⁰⁴² Secondly, the food security safeguard would also be applicable to members if they can prove that their food security is being

¹⁰³⁵ UNDP (note 382 above; 193).

¹⁰³⁶ *Ibid.*

¹⁰³⁷ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above; 9).

¹⁰³⁸ *Ibid.*

¹⁰³⁹ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above) and Bertelsmann-Scott (note 746 above; 15).

¹⁰⁴⁰ See pages 93 to 94 of chapter 4 and footnote 647 on page 66 in this respect. Landau (note 751 above; 2), Rusare (note 311 above; 42), 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above), Bertelsmann-Scott (note 746 above; 15) and Hurt (note 65 above; 504).

¹⁰⁴¹ 'The Economic Impact of the SADC EPA Group- EU Economic Partnership Agreement' *Tralac* (note 747 above; 9).

¹⁰⁴² Article 34 of the SADC EPA and 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' *European Commission* (note 749 above; 20).

negatively affected by increased import quantities.¹⁰⁴³ Thirdly, the transitional and infant industry safeguards could provide much needed relief to those states not as developed as its unique partner, South Africa.¹⁰⁴⁴

5.4.2 South Africa and its trading agreements with the EU

As noted from both chapters two and four, South Africa has a distinctive role in the SADC given its comparatively advanced developmental status and its trading agreements with the EU.¹⁰⁴⁵ While the TDCA will be replaced by the EPA when the latter is fully implemented, they are currently both being implemented.¹⁰⁴⁶

The application of these two somewhat contradictory agreements needs to be addressed.¹⁰⁴⁷ As such, it is proposed that South Africa consult with the EU in the coming months with a view to suspend the TDCA until the EPA is fully implemented, pending a more formal solution being determined. This should be undertaken while allowing the EPA to continue being provisionally applied.¹⁰⁴⁸ Such proposal is viable given that the TDCA has been fully implemented since 2012.¹⁰⁴⁹ It could also help ensure that the SADC EPA members are prepared for the full implementation of the EPA by using this time to alert various stakeholders to it and its consequences. Furthermore, it will ensure that the reason for South Africa entering the EPA negotiations, namely to avoid a duplication of agreements applicable to SACU, is

¹⁰⁴³ Article 36 of the SADC-EU EPA.

¹⁰⁴⁴ In relation to the transitional safeguard contained in article 37 of the SADC-EU EPA, Annex V includes frozen bone-in portions as a sensitive product. Articles 37 and 38 of the SADC EPA. See Annexure B for more information on the safeguards contained in the SADC-EU EPA.

¹⁰⁴⁵ This was discussed on page 33 of chapter 2 and 83 and 90 of chapter 4. Kwa, Lunenburg and Musonge (note 779 above; 9 and 59), 'Current status of key economic indicators: Regional economic trends' available at <https://www.saiia.org.za/special-publications-series/615-sadc-business-barriers-current-status-of-key-economic-indicators-regional-economic-trends/file>, accessed on 10 September 2017 at 16, 'South Africa's transition from TDCA to EPA: Agricultural market access' (note 780 above) and 'Countries and regions, South Africa' (note 780 above), 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above), Kwa, Lunenburg and Musonge (note 779 above; 59) and 'Trade, Development and Cooperation Agreement (TDCA)' (note 780 above).

¹⁰⁴⁶ The EPA is provisionally being implemented since 10 October 2016. Braude (note 349 above; 74), 'South Africa's transition from TDCA to EPA: Agricultural market access' (note 780 above), 'Countries and regions, South Africa' (note 780 above), 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above), Kwa, Lunenburg and Musonge (note 779 above; 59), 'Trade, Development and Cooperation Agreement (TDCA)' (note 780 above), 'Overview of Economic Partnership Agreements' (note 772 above), Hurt (note 65 above; 502-503), Creamer (note 784 above) and 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above).

¹⁰⁴⁷ Braude (note 349 above; 74), Hurt (note 65 above; 502-503), Creamer (note 784 above) and 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above).

¹⁰⁴⁸ 'Overview of Economic Partnership Agreements' (note 772 above).

¹⁰⁴⁹ 'Trade, Development & Cooperation Agreement (TDCA) Additional Protocol on Croatia Accession to European Union' (note 781 above) and 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above).

attained.¹⁰⁵⁰ Such a streamlining of the states' focus and regional efforts can only be beneficial towards development and regional integration.¹⁰⁵¹

5.3.3 Proposals for the poultry industry specifically

On an industry level, there are numerous schemes that can help address the issues facing the poultry industry. While the main focus will be on South Africa, such recommendations could also be implemented in other SADC states. In South Africa, continued assistance and support from the government, particularly the Department of Agriculture, Forestry and Fishing (DAFF) and the DTI, is required.¹⁰⁵² Some assistance has already been given with the development of the task team to investigate the industry's problems.¹⁰⁵³ It has been reported that while progress is being made in formulating short term measures, these have not yet been finalised.¹⁰⁵⁴ Once finalised, they have to be sent to the relevant Ministers for approval.¹⁰⁵⁵ Ideally this should be completed before the end of 2017 so that implementation could possibly begin in 2018, given the seriousness of the concerns. In the meantime, other proposals in this regard should be put forward.

The first concern and aim for the poultry sector that should be addressed is its ability to compete with cheaper imported products.¹⁰⁵⁶ According to Mujahid, in order to do so and thereby attain stability in the economy, 'world class goods and services at most competitive rates' are required.¹⁰⁵⁷ South African producers are however currently faced with 'high input costs' in respect of electricity, feed and labour.¹⁰⁵⁸ Additionally, poultry producers do not receive any governmental aid.¹⁰⁵⁹ This should to be altered to help develop and assist the industry.

¹⁰⁵⁰ Hurt (note 65 above; 502-503), Creamer (note 784 above), Braude (note 349 above; 74) and 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (note 784 above).

¹⁰⁵¹ Mapuva and Muyengwa-Mapuva (note 39 above; 28).

¹⁰⁵² Other relevant government departments at national, provincial and local levels can also assist in the provision of the necessary support and assistance.

¹⁰⁵³ 'Government Committed to Resolve the Poultry Crises' (note 24 above).

¹⁰⁵⁴ 'Poultry task team making headway' (note 24 above).

¹⁰⁵⁵ *Ibid.*

¹⁰⁵⁶ YH Mujahid 'E-commerce & WTO, Digitalizing Trade Liberalization' available at <http://kavehh.com/my%20Document/Essex/wto/E-commerce%20and%20WTO.pdf>, accessed on 30 April 2017 at 7.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ Cronjé (note 614 above).

¹⁰⁵⁹ T Bolton 'The state of the South African poultry industry' available at www.supermarket.co.za/SR_Downloads/S&R%202015-3%20Poultry.pdf, accessed on 15 February 2017 at 21.

To obtain any immediate relief, it is recommended that measures be implemented in industries which supply poultry with essentials to reduce the ultimate cost of poultry products.¹⁰⁶⁰ Most importantly would be those who produce the constituents of animal feed.¹⁰⁶¹ The extent of the involvement in the feed industry was highlighted in chapter one and is illustrated by the ingredients in feed for chickens bred for egg-laying.¹⁰⁶² Thus, it is of primary importance that support structures be implemented for such key industries, especially maize production since it also forms part of the population's staple diet.¹⁰⁶³

The DAFF and DTI additionally need to ensure that farmers in the maize industry specifically can access technical and financial assistance where necessary. It is proposed that this be established and implemented within the next two years with a view to optimize maize production, thereby reducing costs. Such reductions can be passed along to other industries, thus ensuring food security and probably stability in the economy too.¹⁰⁶⁴ Additionally, it can assist in creating jobs which is vital for the South African economy.¹⁰⁶⁵ Once attained, other proposals for both the short and thereafter the long term can be implemented in the poultry sector.

To address the lack of competitive poultry produced in the short term, financial and technical support could be extended to certain small-medium and medium sized established poultry farmers.¹⁰⁶⁶ The goal should be to develop such producers from this size to large scale commercial ones through the improvement of their skills and facilities. Due to such producers already being participants in the industry and somewhat established therein, results from such assistance could be seen quicker. Ideally, this should be undertaken over an implementation period of four to five years.

¹⁰⁶⁰ Davids and Meyer (note 9 above; 22) and Boshoff (note 11 above; 3).

¹⁰⁶¹ Davids and Meyer (note 9 above; 22) and Boshoff (note 11 above; 3).

¹⁰⁶² This is comprised of, amongst other things, fish, sunflower oilcake and groundnut oilcake meals thus affecting the fishing, sunflower and nut industries respectively. JMB Smith *Handbook for Agricultural Advisors in KwaZulu-Natal* (September 1998) 120, 'Use of sunflower oilcake in dairy cattle rations' May 2012, available at <http://www.grainsa.co.za/use-of-sunflower-oilcake-in-dairy-cattle-rations>, accessed on 12 September 2017, 'Groundnut Oil Cake' available at <http://www.khedutsolvexp.com/groundnut-oil-cake-1096967.html>, accessed on 12 September 2017 and Dunn (note 9 above; 56).

¹⁰⁶³ J Visser 'The ripple effect of SA's maize crop shock' 17 April 2015, available at <https://www.farmersweekly.co.za/agri-business/agribusinesses/the-ripple-effect-of-sas-maize-crop-shock/>, accessed on 12 September 2017.

¹⁰⁶⁴ Mujahid (note 1056 above; 7).

¹⁰⁶⁵ Menon (note 979 above).

¹⁰⁶⁶ Bolton (note 1059 above; 21).

Increased and cheaper production could thus be achieved quicker as when compared to the development of poultry producers from the beginning. However, the DAFF and DTI will need to assist by developing criteria for the attainment of such assistance as well as locate or train advisors for this industry.¹⁰⁶⁷ These advisors must be able to confer advice and provide training to such farmers that will promote the development of their enterprises.¹⁰⁶⁸ Such short-term measures proposed will be in compliance with the rules of the WTO.¹⁰⁶⁹

In the long-term, similar assistance can be given for the establishment of poultry farmers in rural areas across the country. It is recommended that this be implemented immediately with a view of continuing support over approximately ten years, reviewed thereafter. The first step would be to determine the size of a profitable poultry farm able to provide sustainable living to an average sized family. With this in mind, the overall goal must be for such farmers to initially supply poultry products to meet the demand of the local area. Thereafter these farmers should be advanced to the stage where they can supply shops in nearby areas and abattoirs should they choose to produce processed products.

In order to determine where to establish such farms, the DAFF and DTI need to locate areas with a high demand for poultry products that is not being met. There must also be an interest amongst the community to establish such businesses. This can be seen in the presence of informal producers or new entrants to the market of a rudimentary size. Such is necessary to ensure that the assistance and advisory services provided will be well received and result in incremental development of the farms over time.¹⁰⁷⁰ This is essential to ensure sustainable development, with participants being able to

¹⁰⁶⁷ Smith (note 1062 above; 120).

¹⁰⁶⁸ SH Worth 'Agriflection: A Learning Model for Agricultural Extension in South Africa' (2006) 12(3) *Journal of Agricultural Education and Extension* 186.

¹⁰⁶⁹ Article 3 of the Agreement on Subsidies and Countervailing Measures, 1994. Viljoen (note 25 above) and 'Agreement on Subsidies and Countervailing Measures' available at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf, accessed on 21 November 2017.

¹⁰⁷⁰ Worth (note 1068 above; 186) and 'Sustainable Livelihoods Guidance Sheets' available at <http://www.eldis.org/vfile/upload/1/document/0901/section2.pdf>, accessed on 12 September 2017 at 2.3.1.

learn valuable skills to further such sustainability.¹⁰⁷¹ This plan would also be WTO compliant.¹⁰⁷²

In conclusion, it has been found that while the ADA is in need of various alterations and improvements, its implementation by the SADC and EU has not affected their relationship negatively. This is seen by their recently concluded EPA which appears to be favourable to the SADC members. However, in order to protect South Africa's poultry industry specifically and other dependent sectors from failure due to cheaper imports, changes also need to be implemented on a regional, state and industry level. This is necessary despite the purpose of the ADA being to enable states to protect their industries from alleged dumping by others.

¹⁰⁷¹ Worth (note 1068 above; 186) and 'Sustainable Livelihoods Guidance Sheets' (note 1070 above; 2.3.1).

¹⁰⁷² Viljoen (note 25 above) and article 3 of the Agreement on Subsidies and Countervailing Measures.

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Annexure A

SADC member states

	SADC member states ¹⁰⁷³	Date of WTO accession ¹⁰⁷⁴	Date of SADC accession ¹⁰⁷⁵	Other regional trade organisation memberships ¹⁰⁷⁶	EPA group membership ¹⁰⁷⁷	EPA status ¹⁰⁷⁸
1	South Africa	1 January 1995	29 August 1994	SACU	SADC	Provisional application of EPA since 10 October 2016 pending ratification by all members of the EU.
2	Botswana	31 May 1995	17 August 1992	SACU	SADC	Same as South Africa above.

¹⁰⁷³ 'Member States' (note 32 above).

¹⁰⁷⁴ 'Members and Observers' available from https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed on 13 August 2017.

¹⁰⁷⁵ 'Southern African Development Community' *International Democracy Watch* available at <http://www.internationaldemocracywatch.org/index.php/southern-africa-development-community>, accessed on 13 August 2017 and 'Declaration and Treaty' available at http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf, accessed on 13 August 2017.

¹⁰⁷⁶ Mapuva and Muyengwa-Mapuva (note 39 above; 27), 'Overview of EAC' available at <http://www.eac.int/about/overview>, accessed on 13 August 2017 and 'Economic Community of Central African States' available at <http://www.internationaldemocracywatch.org/index.php/economic-community-of-central-african-states->, accessed on 13 August 2017.

¹⁰⁷⁷ 'Africa's external relations' (note 753 above) and 'Economic Partnerships' (note 753 above).

¹⁰⁷⁸ 'Overview of Economic Partnership Agreements' (note 772 above).

3	Zimbabwe	5 March 1995	17 August 1992	SACU and COMESA	ESA	An interim EPA was signed on August 2009 ¹⁰⁷⁹ by Mauritius, Seychelles, Madagascar and Zimbabwe only and has been applied provisionally between such states and the EU since 14 May 2012.
4	Mozambique	26 August 1995	17 August 1992		SADC	Ratified the EPA on 28 April 2017 and is in the process of sending ratification to Council. Thereafter the EPA will provisionally apply to it.
5	Zambia	1 January 1995	17 August 1992	COMESA	ESA	Same as Zimbabwe above.
6	Namibia	1 January 1995	17 August 1992	SACU and COMESA	SADC	Same as South Africa above.
7	Tanzania	1 January 1995	17 August 1992	EAC	EAC	Negotiations were concluded in October 2014 and all parties have signed the EPA.

¹⁰⁷⁹ 'Eastern and Southern Africa' available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/esa/>, accessed on 13 August 2017.

8	Angola	23 November 1996	17 August 1992	ECCAS	SADC	Have the option to participate in the SADC EPA in the future. ¹⁰⁸⁰
9	Lesotho	31 May 1995	17 August 1992	SACU	SADC	Same as South Africa above.
10	Democratic Republic of the Congo	1 January 1997	28 February 1998	ECCAS	Central Africa ¹⁰⁸¹	The EPA between the EU and Cameroon was signed on 15 January 2009 and has been provisionally applied since 4 August 2014. Negotiations between the EU and other EPA members continue in order to attain their accession.
11	Malawi	31 May 1995	17 August 1992	COMESA	ESA	Same as Zimbabwe above.
12	Swaziland	1 January 1995	17 August 1992	SACU and COMESA	SADC	Same as South Africa above.
13	Mauritius	1 January 1995	28 August 1995	COMESA	ESA	Same as Zimbabwe above.
14	Madagascar	17 November 1995	2005	COMESA	ESA	Same as Zimbabwe above.

¹⁰⁸⁰ 'Southern African Development Community' *European Commission* available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>, accessed on 13 August 2017.

¹⁰⁸¹ 'Central Africa' (note 792 above).

15	Seychelles	26 April 2015	24 June 1998	COMESA	ESA	Same as Zimbabwe above.
16	Comoros	In the process of negotiating membership. ¹⁰⁸²	20 August 2017 ¹⁰⁸³	COMESA and IOC ¹⁰⁸⁴	ESA	Same as Zimbabwe above.

Key:¹⁰⁸⁵

COMESA: Common Market for Eastern and Southern Africa

EAC: East African Community

ECCAS: Economic Community of Central African States

ESA: Eastern and Southern Africa

SADC: Southern African Development Community¹⁰⁸⁶

IOC: Indian Ocean Commission¹⁰⁸⁷

¹⁰⁸² 'The Comoros determined to complete WTO accession negotiations by MC11' available at https://www.wto.org/english/news_e/news17_e/acc_com_01jun17_e.htm, accessed on 29 August 2017.

¹⁰⁸³ 'The Union of Comoros becomes the 16th SADC Member State' (note 32 above).

¹⁰⁸⁴ 'List of countries within Regions/Groups' available at <http://gtad.wto.org/publish/Regions.pdf>, accessed on 29 August 2017 and S Sanya 'Tunisia set to join COMESA in October' 6 March 2017, available at http://www.newvision.co.ug/new_vision/news/1447844/tunisia-set-join-comesa-october, accessed on 29 August 2017.

¹⁰⁸⁵ 'Africa's external relations' (note 753 above).

¹⁰⁸⁶ 'Economic Community of Central African States' (note 1076 above).

¹⁰⁸⁷ 'List of countries within Regions/Groups' (note 1084 above).

Annexure B

Summary of important information regarding the safeguards available under the SADC-EU EPA (articles 34 to 38).

Safeguard and article number	Conditions for its implementation	Form that the safeguard make take when applied	Duration of safeguard
<p>General bilateral safeguard</p> <p>Article 34</p>	<p>Article 34(2)</p> <p>There must be increased import quantities of a product entering a party's territory wherein rising quantities in those conditions is causing or threatening to result in a form of harm contained in article 34(2)(a) to (c).</p>	<p>Article 34(3)</p> <ol style="list-style-type: none"> 1. Not reduce the import duty rate as required by the EPA 2. Increase the customs duty on the product but not to an extent greater than the applicable MFN rate at the time of implementation 3. Tariff quotas on the product 	<p>Article 34(6)</p> <p>It can only be applied to the extent necessary to avoid or address the injury complained of or for a maximum of two years</p>
<p>Agricultural safeguard</p> <p>Article 35</p>	<p>Article 35(1)</p> <p>There are increased import quantities of products listed in Annex IV of the EPA beyond the quantities stated therein. This has to occur within a period of 12 months.</p> <p>Article 35(7)</p> <p>The safeguard cannot be applied in conjunction with or at the same time as a safeguard being applied in terms of either section 34 of the EPA, article XIX of the GATT, the</p>	<p>Articles 35(1) and 35(2)</p> <p>An import duty must be applied. It must not be greater than the applicable MFN and not be higher than one of the following two:</p> <ol style="list-style-type: none"> 1. '25 percent of the current WTO bound tariff' or 2. '25 percentage points' 	<p>Article 35(3)</p> <p>It can remain in place for the longer of the two periods below:</p> <ol style="list-style-type: none"> 1. The remaining months of the calendar year 2. Five months

	Safeguards Agreement or one under article 5 of the WTO's Agreement on Agriculture.		Article 35(7) This safeguard can only be used within the first 12 years of implementation calculated from the date the EPA comes into force
Food security safeguards Article 36	Article 36(2) It can be applied where it is necessary to avoid or relieve certain shortages of food products necessary for food security and where great difficulties will result if the situation persists.	Article 36(2) Articles 34(7)(a) to (d), (8) and (9) of the EPA need to be followed in this respect.	Article 36(2) It can only remain in place for as long as it is needed to eliminate the circumstances giving rise to its application.
BLNS transitional safeguards Article 37	This safeguard is only applicable to Botswana, Lesotho, Namibia and Swaziland. Article 37(2) For the safeguard to be applied there must be increased quantities of an imported product from the EU, listed in Annex V, in such quantities that it is causing or threatening to result in injury to one of the states concerned. Annex V includes frozen bone-in chicken portions as a sensitive product.	Article 37(3) A duty, not greater than the applicable MFN rate, is to be applied to the product.	Article 37(6) The measure can only be applicable for a maximum of four years. It can be extended for another four years thereafter if warranted. Article 37(7) This safeguard can only be used within the first 12 years calculated from the

			date that the Agreement comes into force.
Infant industry protection safeguards Article 38	Article 38(1) Only available to Lesotho, Mozambique, Swaziland and Botswana. There must be increased quantities of a product imported from the EU which can threaten the development of an infant industry or 'cause or threaten to cause disturbances to an infant industry producing like or directly competitive products'.	Article 38(1) Extended reductions of custom duties may be halted temporarily or the custom duty can be increased. This cannot exceed the applicable MFN duty. Article 38(2) If the state concerned is also a SACU member then the applicable form is to levy extra duties.	Article 38(3) The safeguard can be applied for up to a maximum of eight years but an extension can be granted by the Joint Council.

Annexure C

EPA dates and delays with specific focus on the SADC

Year	2000	2001	2002	2003	2004	2007
Event	Cotonou Partnership Agreement enters force 23 June 2000. ¹⁰⁸⁸		First phase of EPA negotiations begins February 2002. ¹⁰⁸⁹	First phase of negotiations end October 2003. ¹⁰⁹⁰	Negotiations between the EU and the SADC group began on 8 July 2004. ¹⁰⁹¹		Final EPAs scheduled to be completed by 31 December 2007. ¹⁰⁹² Not completed by due date. ¹⁰⁹³ Only Interim EPAs were concluded by this date. ¹⁰⁹⁴ Only 18 of 46 African states had signed their applicable interim EPAs by this date. ¹⁰⁹⁵ Interim EPA initialled by Lesotho, Botswana, Mozambique and Swaziland on 23 November 2007. ¹⁰⁹⁶ Namibia initialled on 5 December 2007 with reservations. ¹⁰⁹⁷

¹⁰⁸⁸ Ukpe (note 40 above; 213), Bertelsmann-Scott (note 746 above; 7), 'Africa's external relations' (note 753 above), 'Economic Partnerships' (note 753 above) and Fontagné, Laborde and Mitaritonna (note 738 above; 186).

¹⁰⁸⁹ Bertelsmann-Scott (note 746 above; 22 and 26) and Borrmann, Busse and De La Rocha (note 739 above; 234).

¹⁰⁹⁰ Bertelsmann-Scott (note 746 above; 22 and 26), Borrmann, Busse and De La Rocha (note 739 above; 234).

¹⁰⁹¹ Woolfrey (note 761 above; 6), Rusare (note 311 above; 20) and Kwa, Lunenburg and Musonge (note 779 above; 59).

¹⁰⁹² Bertelsmann-Scott (note 746 above; 11) and 'Is the Region Ready for a Modern Free Trade Agreement?' (note 755 above).

¹⁰⁹³ Woolfrey (note 761 above; 4) and Ukpe (note 40 above; 226).

¹⁰⁹⁴ Woolfrey (note 761 above; 4) and Ukpe (note 40 above; 226).

¹⁰⁹⁵ Fontagné, Laborde and Mitaritonna (note 738 above; 186) and Woolfrey (note 761 above; 5).

¹⁰⁹⁶ 'The Interim SADC EPA Agreement, Legal and Technical Issues and Challenges' (note 823 above).

¹⁰⁹⁷ McCarthy and Kruger (note 824 above; 38) and 'Fact sheet on the Interim Economic Partnership Agreements SADC EPA Group' (note 824 above).



30 June 2017

Ms Claire Gillespie (213504330)
School of Law
Howard College Campus

Dear Ms Gillespie,

Protocol reference number: HSS/0953/017M

Project title: Whose chicken? A discussion of the Anti-Dumping Agreement with particular focus on the Southern African Development Community-European Union Economic Partnership Agreement (SADC-EU EPA)

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Ms Clydenia Stevens
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

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