

Before the Arbitration Panel

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

**FIRST WRITTEN SUBMISSION OF THE SOUTHERN AFRICAN CUSTOMS
UNION**

*Confidential information deleted, as indicated [***]*

24 January 2022

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<i>Bananas II</i>	Panel Report, <i>EEC – Import Regime for Bananas</i> , DS38/R, 11 February 1994, unadopted
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<i>EC - Poultry</i>	Panel Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/R, adopted 23 July 1998, as modified by Appellate Body Report WT/DS69/AB/R, DSR 1998:V, p. 2089

<i>Hatters' Fur</i>	Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT, GATT/CP/106, adopted 22 October 1951
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<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

LIST OF ABBREVIATIONS

ABBREVIATION	DESCRIPTION
ACP States	African, Caribbean and Pacific Group of States
AGOA	African Growth and Opportunity Act
AMIE	Association of Meat Importers & Exporters
AVEC	Association of Poultry Processors and Poultry Trade in the EU
BLNS States	Botswana, Lesotho, Namibia and Swaziland
CARIFORUM	Caribbean Forum
CJEU	Court of Justice of the EU
DG Trade	Directorate General for Trade of the European Commission
EPA	Economic Partnership Agreement
EU	European Union
EU-SADC EPA	EU-SADC Economic Partnership Agreement
FOASTAT	Food and Agriculture Organization Corporate Statistical Database
FOB	Free on Board
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade, 1994
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organisation
ITAC	International Trade Administration Commission
ITC	International Trade Centre
MFN	Most Favoured Nation
OCT	Overseas Countries and Territories
OECD	Organisation for Economic Cooperation and Development
POI	Period of Investigation
SACU	Southern African Customs Union
SADC	Southern African Development Community

SAPA	South African Poultry Association
SARS	South African Revenue Service
SPS	Sanitary and Phytosanitary
TDC	Trade and Development Committee under the EU-SADC EPA
TDCA	Agreement on Trade, Development and Cooperation
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
WTO ADA	WTO Anti-Dumping Agreement
WTO ASCM	WTO Agreement on Subsidies and Countervailing Measures
WTO SGA	WTO Agreement on Safeguards

LIST OF EXHIBITS

Exhibit No.	No. of Pages	Title and Date
Exhibit SACU-1 (Confidential)	1	Joint Report of the 2 nd TDC, 21 October 2017 (relevant extracts) <i>Report is confidential</i>
Exhibit SACU-2 (Confidential)	4	Joint Report of the Joint SADC-EU EPA Technical Consultative Meeting on Poultry Safeguards, 24 November 2017 (relevant extracts) <i>Report is confidential</i>
Exhibit SACU-3 (Confidential)	3	Joint Report of the 3 rd TDC, 22 and 23 February 2018 (relevant extracts) <i>Report is confidential</i>
Exhibit SACU-4 (Confidential)	2	Report of the 4 th Meeting of the TDC, 6 November 2018 (relevant extracts) <i>Report is confidential</i>
Exhibit SACU-5 (Confidential)	4	EU submission to the TDC on SACU safeguard measure against imports of frozen bone-in chicken cuts from the European Union, 26 November 2018 <i>Submission is confidential</i>
Exhibit SACU-6	8	SACU Preliminary Objection to Certain Claims in the EU First Written Submission, 31 December 2021
Exhibit SACU-7	4	SAPA letter to ITAC: Request for clarification re letter from the Minister, 17 August 2017 and ITAC response, 17 August 2017
Exhibit SACU-8	80	Bilateral Safeguard Clauses in International Agreements Referred to in SACU's First Written Submission
Exhibit SACU-9	3	European Commission Fact Sheet: Economic Partnership Agreement (EPA) between the European Union and the

		Southern African Development Community (SADC) EPA Group, 10 October 2016
Exhibit SACU-10	7	Agreement between the European Economic Community and the Republic of Austria, 22 July 1972
Exhibit SACU-11	4	European Commission website, 'Economic partnerships' https://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/
Exhibit SACU-12	2	ITAC verification report for the information provided by the participating producer Astral-Gold, following the inspection on 18 May 2017, 19 May 2017
Exhibit SACU-13	3	DG Trade submission on the application, 8 March 2016
Exhibit SACU-14	2	DG Trade submission requesting an oral hearing, 27 May 2016
Exhibit SACU-15	3	DG Trade submission on SAPA's updated application, 20 June 2016
Exhibit SACU-16	4	DG Trade presentation at the oral hearing with ITAC, 12 July 2016
Exhibit SACU-17	3	DG Trade submission on ITAC's 1 st Essential Facts Letter, 31 August 2016
Exhibit SACU-18	3	DG Trade submission on ITAC's 2 nd Essential Facts Letter, 22 September 2016
Exhibit SACU-19	32	SAPA presentation for oral hearing with ITAC, 7 February 2017
Exhibit SACU-20	25	Mpact Results Presentation for the year ended 31 December 2016

Exhibit SACU-21	23	2015 Mpact Group Annual Results, 31 December 2015
Exhibit SACU-22	1	ITC Trade Map data for SACU Member State import volumes at tariff sub-heading 0207.14
Exhibit SACU-23	8	European Commission, Proposal for a Council Decision on the signing and provisional application of the EU-SADC EPA, Explanatory Memorandum, 22 January 2016
Exhibit SACU-24	1	FAOSTAT data on SACU Member State chicken meat production
Exhibit SACU-25	2	ITAC letter, 20 September 2016

I. INTRODUCTION

1. This case concerns the consistency with Article 34 of the EU-SADC Economic Partnership Agreement ("EU-SADC EPA")¹ of a bilateral safeguard measure adopted by the Southern African Customs Union ("SACU") on imports of frozen bone-in chicken cuts from the European Union ("EU"). SACU will refer to this as the "Measure at Issue". The export of frozen bone-in chicken cuts is of considerable interest to the EU poultry industry since it comprises the parts of slaughtered chickens for which there is little or no demand from the EU consumer, who prefers the "white meat" of chicken breast, and which would otherwise have to be disposed of at a cost. That circumstance explains why it is a product that is also being dumped, as the EU itself observes in its introduction,² in a manner that has been described as opportunistic.³ The product is, however, of great importance to the sustainability of poultry farmers throughout the SACU territory, as evidenced by the fact that the generally applicable or "MFN" tariff for the product (which is not of course applicable to exports from the EU) was 37% at the time of the adoption of the Measure at Issue and has since been increased to 62% because of the precarious state of the domestic industry.
2. As SACU will show, the EU's complaints all essentially rest on an entirely mistaken legal premise, namely that the requirements and standards of the World Trade Organisation ("WTO") safeguard rules, and in particular, the WTO Agreement on Safeguards ("WTO SGA"), can simply be transplanted to Article 34 of the EU-SADC EPA even though it concerns a very different subject-matter and it makes no reference to such requirements and standards. This fundamental legal error is typified by the EU's assertion in Section I of its first written submission, that safeguard measures can only be imposed in "exceptional circumstances" where "surging imports" threaten a domestic industry.⁴ While this may be the case under the WTO SGA, there is nothing to suggest that this should also be the case under Article 34 of the EU-SADC EPA. Rather, the Measure at Issue must be assessed in light of the actual requirements and standards of Article 34 of the EU-SADC EPA itself, and not requirements and standards based on other provisions that are inapplicable to the Measure at Issue.
3. The Measure at Issue is wholly consistent with Article 34 of the EU-SADC EPA, as properly interpreted. In fact, as will be shown below, it also complies with many of the transplanted requirements that the EU invokes, even though they are not requirements of Article 34 of the EU-SADC EPA. The Measure at Issue even exceeds in a number of respects those requirements. In fact, one of the EU's complaints is, in effect, that SACU took too long to impose the measure while investigations and consultations continued. The thoroughness with which the Measure at Issue was prepared and consulted upon with the EU is now effectively being turned against it.

¹ This is Exhibit EU-2 to the EU's first written submission ("EU FWS"). For the convenience of the Panel, SACU adopts wherever possible the same defined terms as the EU and refers to EU exhibits for documents that the EU has provided.

² EU FWS, para 6.

³ Exhibit EU-23, SAPA Updated Information, 12 June 2017, paras 3.1-3.12.

⁴ EU FWS, para 5.

4. SACU will be responding in detail below to all the arguments contained in the EU first written submission that are within the terms of reference of the Panel ("Terms of Reference"). Before addressing the legal issues, SACU will first comment briefly on the EU's account of the procedural and factual background (Sections II and III). SACU will then address jurisdictional issues and identify the EU's claims that it considers are misdirected and without object and / or outside the scope of the Panel's Terms of Reference (Section IV). SACU will then set out its observations in relation to the proper legal framework applicable to this dispute, building on the preliminary remarks above as well as addressing the applicable standard of review (Section V), before rebutting each of the EU's claims in turn (Section VI). SACU will then comment on the EU's request for a recommendation and finally conclude (Sections VII and VIII).

II. COMMENTS ON PROCEDURAL BACKGROUND

5. While the EU addresses the pre-Panel establishment procedure at length in Section II of its first written submission,⁵ SACU will refrain from commenting on this in detail, as it is not relevant to the Panel's adjudication of the dispute.
6. But SACU does object to certain misrepresentations of the exchanges between the Parties and the suggestion by the EU that it has sought to obstruct the dispute resolution process. SACU has always wanted a rapid and satisfactory resolution of this dispute, but there have been delays in particular, due to the COVID-19 pandemic, the insistence by the EU on unsuitable contractual arrangements and the EU's failure to respect procedural agreements:
 - a. The Parties had jointly agreed to suspend the dispute settlement proceedings in light of the COVID-19 pandemic and to only resume once the situation in relation to COVID-19 had stabilised. Contrary to the EU's first written submission,⁶ it was the EU, not SACU, who made this proposal in April 2020, which SACU accepted. At the end of 2020, the EU, however, unilaterally decided to proceed with the establishment of the panel, even though there was no agreement between the Parties that the situation in relation to COVID-19 had stabilised and without any consideration for the difficulties in the SACU Member States, which were then facing a "second wave" of infections.
 - b. **[[***]]**
 - c. **[[***]]**
 - d. **[[***]]**

III. COMMENTS ON FACTUAL BACKGROUND

7. In Section III of its first written submission, the EU describes in detail the procedure before the International Trade Administration Commission ("ITAC") and related matters such as the imposition of provisional duties.⁷ SACU considers this to be largely irrelevant since the Measure at Issue is the definitive safeguard measure alone, as SACU will explain in Section IV.A below. Article 34 of the EU-SADC EPA contains no requirement as to the conduct of a safeguard investigation. It

⁵ EU FWS, paras 9-28.

⁶ EU FWS, para 14.

⁷ EU FWS, paras 29-69.

merely sets out certain substantive conditions, and the procedural requirements are limited to referring the matter to the Trade and Development Committee ("TDC") set up under the EU-SADC EPA in order to seek an alternative solution to the imposition of a safeguard measure and providing the TDC with all relevant information so that it may discharge this function. While the EU seeks to import many procedural obligations from the WTO safeguard rules and in particular from the WTO SGA, this is inappropriate, as SACU will explain in further detail in Section V.A below.

8. In connection with this, a number of further comments are called for. First, the EU repeatedly refers to submissions being made by the EU to ITAC during the investigation, when this is inaccurate. This is because these submissions were made by the Directorate General for Trade of the European Commission ("DG Trade") that was intervening in an investigation under domestic law in support of EU chicken exporters who were making similar comments through their trade association, the Association of Poultry Processors and Poultry Trade in the EU ("AVEC"). Submissions to the TDC are transmitted through different channels and dealt with differently.
9. Second, the description of the procedural background provided in Section III of the EU's first written submission in fact omits key details in relation to the discussions between SACU and the EU properly so-called, in the context of the TDC. SACU therefore provides a full account below:
 - a. At the TDC meeting of 21 October 2017, SACU presented the need for safeguard action. *[[***]]*⁸ which were not provided by the EU in its first written submission.
 - b. It was agreed that the EU would provide a written submission that would form the basis for further discussion of the matter. The EU provided this submission on 31 October 2017,⁹ and it was made to SACU, and not ITAC as the EU claims in its first written submission.¹⁰
 - c. Detailed discussion of the matter was delegated to a Joint SADC-EU EPA Technical Consultative Meeting, held on 24 November 2017, which was not mentioned by the EU in its first written submission. The minutes of that meeting,¹¹ show that there was a substantive discussion, including of proposals made by the EU to reduce the duty, and that SACU agreed to consider further some of the points made by the EU.
 - d. The matter was discussed again at the TDC meeting of 22 and 23 February 2018, which again, is not mentioned by the EU in its first written submission. The minutes record that there had been "*an extensive engagement through the TDC*" but that no agreement on an alternative solution had been reached.¹² The SACU Member States then undertook significant internal consultations in order to agree upon an appropriate mechanism for the phase-down of the safeguard, including discussing the matter at the *[[***]]* SACU Council of Ministers meeting *[[***]]*

⁸ *[[***]]*

⁹ Exhibit EU-27.

¹⁰ EU FWS, para 64.

¹¹ *[[***]]*

¹² *[[***]]*

April 2018, before finally adopting the Measure at Issue at the **[[***]]** SACU Council of Ministers meeting on 27 June 2018.

- e. Discussions with the EU at the TDC continued after the Measure at Issue had been adopted, which again, are not referred to by the EU in its first written submission. In particular, at the TDC meeting of 6 November 2018, the EU proposed that the subject product be included within the scope of the special agricultural safeguards regime under Article 35 of the EU-SADC EPA that is applicable to certain products.¹³ The EU made a written submission with its proposals on 26 November 2018.¹⁴
10. For the purposes of the discussions at the TDC, SACU provided the EU with: the ITAC summary report of its investigation,¹⁵ the complete copy of the non-confidential file in ITAC's investigation, and the methodology for calculating the price disadvantage on which ITAC's recommendation for the level of the Measure at Issue was based. Crucially, and this is another fact that is omitted in the EU's first written submission, the EU did not at any point in the context of the discussions at the TDC, ask for any more documents or information beyond that which had been provided at the TDC. SACU will return to this key fact in the discussion of the EU's Claim 5 in Section VI.G below.

IV. COMMENTS ON JURISDICTION

11. On 31 December 2021, SACU submitted a preliminary objection¹⁶ to certain of the EU's claims raised in its first written submission on the basis that they had not been announced in the EU's request to establish an arbitration panel ("EU Arbitration Panel Request")¹⁷ and consequently, were not within the Panel's Terms of Reference and therefore outside of its jurisdiction.
12. In response to an invitation from the Panel to comment, the EU communicated on 10 January 2022 that it did not accept that there was any legal basis for this request and that, in any event, there is no legal possibility for the Panel to provide a ruling prior to the issuance of the final report in the arbitration. The EU also submitted brief comments on the substance of the preliminary objection.
13. SACU is disappointed by the EU's response. SACU's preliminary objection was intended, as stated in its first paragraph, to clarify the scope of the case and therefore contribute to an efficient resolution of the dispute. SACU further notes that when a jurisdictional objection was raised otherwise than as a "preliminary issue" in another of the EU's recent disputes, the EU-Ukraine arbitration in relation to restrictions on exports of certain wood products under the EU-Ukraine Association Agreement, the EU objected that it was raised *too late* and should be rejected for that reason. The panel's report in that arbitration records as follows:

"Procedurally, the EU submits that Ukraine's objection to jurisdiction is "manifestly untimely", because Ukraine has failed to raise it

¹³ **[[***]]**

¹⁴ **[[***]]**

¹⁵ Exhibit EU-7.

¹⁶ **Exhibit SACU-6**, SACU Preliminary Objection to Certain Claims in the EU First Written Submission, 31 December 2021.

¹⁷ Exhibit EU-5.

“seasonably and promptly” in the proceedings. In the EU’s view, previous DSB rulings clearly indicate that claims over “procedural deficiencies” shall be brought in accordance with the principle of good faith and due process. As Ukraine did not file this objection in a timely manner the consequence is that Ukraine “may be deemed to have waived its right to have a panel consider such objections.” (footnotes omitted)¹⁸

14. The panel in that case went on to agree with the EU concluding that:
"The Arbitration Panel therefore concludes that Ukraine is thereby precluded from raising, at the Hearing, the alleged lack of jurisdiction of the Arbitration Panel."¹⁹
15. It is therefore regrettable that in this case the EU claims to see no legal basis for a preliminary ruling and opposes the early resolution of the issues raised in the Preliminary Objection. The legal basis for a preliminary ruling that the EU claims not to see in the present case is the inherent jurisdiction of the Panel to rule on the scope of its own competence, that is, to interpret its Terms of Reference. The requirement for the Panel to do so is implicit in Article 79(2) of the EU-SADC EPA, as will be explained in more detail in sub-section A below. The need for jurisdictional matters to be dealt with at an early stage derives from the requirements of efficiency of procedure and due process. A party cannot be asked to respond to claims that are not within the jurisdiction of an arbitration panel simply because the complaining party considers that it is in its interest to expand the scope of the proceedings from that originally agreed.
16. On 10 January 2022, the Panel requested SACU to address all its preliminary objections in its first written submission due on 24 January 2022 and for the EU to respond to the Preliminary Objection at the same time. The Panel further stated that it will thereafter determine and decide whether it would need to receive further representations from either or both Parties and also deal with the question of whether the preliminary objections are to be adjudicated and determined separately prior to the scheduled hearing or dealt with during the scheduled hearing and in the final report of the Panel.
17. In the remainder of this Section, SACU will therefore reiterate and further develop the jurisdictional objections to certain of the EU's claims raised in its first written submission. SACU will first discuss the importance of the Terms of Reference, before setting out the claims raised by the EU that SACU asks to be declared as being misdirected and without object and / or to fall outside the Terms of Reference.

A. The Terms of Reference of the Panel

18. The Terms of Reference of the Panel are, as the EU itself states:²⁰

¹⁸ Final Report of the Arbitration Panel established pursuant to Article 307 of the Association Agreement between Ukraine, of the one part, and the European Union and its Member States, of the other part, *Restrictions applied by Ukraine on exports of certain wood products to the European Union*, 11 December 2020 ("EU – Ukraine Arbitration"), para 100.

¹⁹ *Ibid.*, para 117.

²⁰ EU FWS, paragraph 28.

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

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

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

19. The matter referred to in the request for the establishment of the arbitration panel,²¹ i.e. the EU Arbitration Panel Request, lists the EU's claims at length. These are the only claims that the Panel has jurisdiction to adjudicate according to the Terms of Reference.
20. The second sentence of Article 79(2) of the EU-SADC EPA provides that:

"The complaining Party shall identify in its request the specific measures at issue, and it shall explain how such measures constitute a breach of the provisions of this Agreement."
21. The EU therefore had a duty to specify its claims precisely in its Arbitration Panel Request and cannot now introduce new claims. The Terms of Reference must be strictly construed and any broadening of the EU's complaint beyond the specific claims announced in the Arbitration Panel Request cannot be permitted as it would be contrary to Article 79(2) of the EU-SADC EPA. The duty to explain how the specific measures at issue constitute a breach of the agreement excludes the possibility of adding new complaints. The use of terms like "*such as*" or "*inter alia*" cannot be relied upon to add new complaints in the dispute as this would effectively lead to the dispute being open-ended contrary to the clear intent of Article 79(2) of the EU-SADC EPA.
22. SACU also underlines that Article 79(2) of the EU-SADC EPA requires a specific *measure at issue* to be identified. This the EU did in its Arbitration Panel Request in the following terms

"The measure at issue is the safeguard measure that was adopted on 27 June 2018 by the SACU Council of Ministers, notified to the European Union on 18 July 2018 and that entered into force on 28 September 2018. The measure at issue concerns the imports of frozen bone-in chicken cuts from the European Union and is based on an alleged increase in the volume of imports into the territory of SACU causing or threatening to cause a disturbance and/or serious injury."
23. The Measure at Issue is therefore the definitive safeguard measure adopted by SACU. It is not the provisional safeguard measure, or even the investigation conducted by ITAC.
24. The EU in its first written submission, however, refers in a number of instances to the investigation and even to action taken by ITAC. Complaints that actions or omissions by ITAC are contrary to the EU-SADC EPA are not as such within the Terms of Reference. The EU can only complain in these proceedings that SACU

²¹ Exhibit EU-5.

should not have taken the action it did in light of the findings of the investigation. It is only SACU's action in this regard that is within the Terms of Reference.

25. In its brief comments communicated on 10 January 2022, the EU essentially argued that ITAC's investigation is "closely connected" to SACU's decision to adopt the Measure at Issue and consequently, it may also raise arguments against ITAC's investigation.
26. This misses the point. SACU's position is not that the EU cannot raise arguments in relation to ITAC's investigation, but that the actions or omissions by ITAC cannot be sufficient to establish any inconsistency of the Measure at Issue with Article 34 of the EU-SADC EPA. Rather, it is SACU's action in light of the findings of ITAC's investigation that is determinative.
27. SACU will now set out in the subsections below, the various claims in the EU's first written submission that it considers are misdirected and without object and / or fall outside the Terms of Reference of the Panel.

B. Claims that do not relate to Article 34(5) of the EU-SADC EPA are misdirected and without object

28. The substantive legal standards that the Measure at Issue must comply with are those set out in Articles 34(5) of the EU-SADC EPA. This was emphasised by SACU at the consultations with the EU that were held on 13 September 2019.
29. However, the EU's Arbitration Panel Request does not allege any inconsistency with Article 34(5) of the EU-SADC EPA and in fact, hardly mentions it at all. The EU's Arbitration Panel Request only alleges inconsistencies with Article 34(2) and Articles 34(7)(a), (b) and (c) of the EU-SADC EPA. While the EU does acknowledge that the Measure at Issue may be justified by Article 34(5) at one point in its first written submission,²² it explains nowhere why the Measure at Issue may be considered as inconsistent with that provision.
30. SACU notes that the EU states, in a footnote in its first written submission,²³ that ITAC's 3rd Essential Facts Letter indicated that ITAC considered Article 34(2) of the EU-SADC EPA was the legal successor of Article 16 of the Agreement on Trade, Development and Cooperation ("TDCA"), and "*that therefore Article 34(2) constituted the legal basis for the imposition of the final safeguard measure*". But as explained above, the Measure at Issue is only the definitive safeguard measure adopted by SACU and not the actions or omissions of ITAC. What ITAC itself may have considered as the legal basis for the Measure at Issue is, accordingly, irrelevant.
31. SACU also notes in any event, that in further correspondence in the investigation, ITAC corrected its earlier reference to Article 34(2), replacing it with Article 34, which includes Article 34(5).²⁴ Similarly, the ITAC summary report does not refer specifically to Article 34(2) of the EU-SADC EPA, but rather to Article 34.
32. The EU's failure to address Article 34(5) of the EU-SADC EPA in its Arbitration Panel Request, even though SACU had explained that the Measure at Issue was

²² EU FWS, para 102.

²³ EU FWS, footnote 68.

²⁴ **Exhibit SACU-7**, SAPA letter of 17 August 2017 and ITAC response of 17 August 2017, available on ITAC's non-confidential file.

justified under this legal basis, renders the claims in the Arbitration Panel Request that allege an inconsistency with Article 34(2) of the EU-SADC EPA as misdirected and without object. This affects paragraphs 1, 2 and 3 of the Arbitration Panel Request and the EU's Claims 1, 2, 3 and 4 in its first written submission.

33. SACU anticipates that the EU may argue that the claims in its Arbitration Panel Request and first written submission which allege an inconsistency with Article 34(2) of the EU-SADC EPA, should be understood as alleging a violation of certain requirements of Article 34(2) insofar as those requirements are *also contained* in Article 34(5) of the EU-SADC EPA.
34. This would represent a fundamental transformation of the plain meaning of the claims made by the EU in its Arbitration Panel Request (as well as its first written submission) and consequently, the Terms of Reference, and therefore should not be entertained. But even if this were to be explored by the Panel, it would only take the EU so far. This is because there are important differences between the requirements under Article 34(2) of the EU-SADC EPA, which the EU has erroneously presented as being the provision against which the Measure at Issue must be judged and Article 34(5) of the EU-SADC EPA, which is the applicable legal provision that SACU has stated justifies the Measure at Issue.
35. To explain further, Article 34(5) sets out the specific requirements for SADC EPA States and SACU to impose a safeguard measure and is the counterpart of Article 34(4) which sets out a specific substantive standard for measures adopted by the EU for its developing regions, that is, its "outermost regions". These provisions provide as follows:

"4. Without prejudice to paragraphs 1 to 3, where any product originating in any SADC EPA State is being imported in such increased quantities and under such conditions as to cause or threaten to cause one of the situations referred to in paragraphs 2(a) to (c) to a like or directly competitive production sector of one or several of the EU's outermost regions, the EU may take surveillance or safeguard measures limited to the region or regions concerned in accordance with the procedures laid down in paragraphs 6 to 8.

5. Without prejudice to paragraphs 1 to 3, where any product originating in the EU is being imported in such increased quantities and under such conditions as to cause or threaten to cause one of the situations referred to in paragraph 2(a) to (c) to a SADC EPA State or SACU, as the case may be, the SADC EPA State concerned or SACU, as the case may be, may take surveillance or safeguard measures limited to its territory in accordance with the procedures laid down in paragraphs 6 to 8."

36. Articles 34(4) and (5) do incorporate by reference some of the requirements in Article 34(2), namely the definition of the serious injury or disturbance that must exist and the conditions of Articles 34(6) to (8). They both omit, however, the following two requirements:
 - a. the requirement that the increased imports and serious injury or disturbance must be *"a result of the obligations incurred by a Party under this Agreement,*

including tariff concessions" – SACU will refer to this as the "obligations incurred requirement"; and

- b. the requirement that any safeguard measure "*shall not exceed what is necessary to remedy or prevent the serious injury or disturbances*" – SACU will refer to this as the "safeguard level requirement".²⁵
37. Articles 34(4) and (5) of the EU-SADC EPA therefore set out a lower substantive threshold for the imposition of a bilateral safeguard for the benefit of developing countries and regions. This is one of the ways in which the EU-SADC EPA pursues its important development objective, which SACU will expand upon in Section V.B below. As a result, the additional requirements of Article 34(2) do not apply in the case of bilateral safeguards imposed by SACU (or by the EU in favour of its outermost regions). They apply only to bilateral safeguards imposed by the EU for its developed regions.
 38. Both Articles 34(4) and (5) of the EU-SADC EPA are expressed to be "*without prejudice*" to Articles 34(1)-(3). That can only mean that they are independent of Articles 34(1)-(3) save for the requirements specifically referred to that an increase in imports must result in either serious injury to the domestic industry, disturbances in a sector of the economy, or disturbances in the markets of agricultural products, and the requirements in Articles 34(6) to (8). Any other interpretation would render these provisions superfluous and therefore could not have been the intention of the Parties.
 39. Requiring that SACU should comply with all the requirements of Article 34(2) in the same way as the EU for its developed regions would not only deprive Article 34(5) of any meaning but would also undermine the development objective of the EU-SADC EPA.
 40. In light of the above, the EU's claims that are based on the obligations incurred requirement and the safeguard level requirement are misdirected and without object and must be dismissed for that reason. This affects the following EU claims:
 - a. The EU's Claim 2, first argument at paragraphs 108 to 135, that the increase in quantity of imports allegedly did not result from obligations incurred under the EU-SADC EPA; and
 - b. The EU's Claim 4, second argument at paragraphs 217 to 240, that the Measure at Issue allegedly exceeds what is necessary to remedy or prevent the serious injury or disturbance.
- C. The claim of incorrect selection of the period of investigation is not within the Terms of Reference**
41. The EU's Claim 2, second argument, point 1 at paragraphs 140 to 144, complains that the 2011 to 2016 period on which ITAC based its assessment, which the EU refers

²⁵ SACU notes that Article 34(6)(a) of the EU-SADC EPA states that safeguard measures "*shall only be maintained for such a time as may be necessary to prevent or remedy serious injury or disturbances as defined in paragraphs 2, 4 and 5*", but this relates to the duration of the safeguard measure and is separate to the safeguard level requirement in Article 34(2). If it were otherwise, Article 34(6)(a) would not specifically refer to Article 34(2) as it does, but would only refer to Articles 34(4) and (5).

to as the "period of investigation" or "POI", was too old. In particular, the EU argues that the POI should have been January 2016 to March 2018.²⁶

42. As explained above, actions or omissions of ITAC are not, as such, part of the Measure at Issue. In addition, no such claim was announced in the EU's Arbitration Panel Request. Point 1(e) of the Arbitration Panel Request only stated as follows:

"(e) The measure does not take into consideration that the imports during the period December 2016 – September 2018 greatly decreased compared to the period covered by the investigation."

43. This does not include a claim that the "POI" was wrongly selected by ITAC and was too old. Rather, point 1(e) of the Arbitration Panel Request is separately developed in the EU's Claim 2, second argument, point 2, which argues that more recent data should also have been taken into account.
44. The EU's claim of incorrect selection of the "POI" goes beyond the scope of the Arbitration Panel Request and therefore it is not within the Terms of Reference.

D. The claim of non-correlation between the increased EU imports and a worsening of the serious injury or disturbance factors is not within the Terms of Reference

45. The EU's Claim 3 complains that other factors contributing to the serious injury or disturbance were not appropriately taken into account, which the EU refers to as the "non-attribution requirement" of a causation analysis. However, as part of this Claim 3, the EU also argues at paragraphs 161 to 163 that there was no correlation between the increase in EU imports and a worsening of the serious injury or disturbance factors examined by ITAC, which the EU refers to as the "correlation requirement" of a causation analysis.
46. The EU had raised a claim in relation to causation analysis at point 1(d) of the Arbitration Panel Request as follows:

"d) Other factors such as the volatility of feed raw material prices, the increase in labour costs, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries were not appropriately taken into account in the analysis of the existence and level of a threat of disturbance and/or serious injury because of an increase in volume of imports;"

47. The claim announced in the Arbitration Panel Request therefore relates only to what the EU refers to as the "non-attribution requirement". It does not relate to what the EU refers to as the "correlation requirement". No claim in relation to this "correlation requirement" is to be found in the Arbitration Panel Request and therefore it is not within the Terms of Reference.

²⁶ EU FWS, para 141.

E. The claim of violation of the so-called principle of "reverse parallelism" and the claim regarding the geographic scope of the serious injury or disturbance data is not within the Terms of Reference

48. The EU's Claim 4, first argument at paragraphs 205 to 216, contests the right of SACU to impose measures for the whole of the territory of SACU in this case. Indeed, the conclusion of this section reads:

*"The ITAC only analyzed alleged increased imports and alleged injury with respect to South Africa. Thus, there is no basis under the EU-SADC EPA for the ITAC to impose safeguard measures for the entire territory of SACU."*²⁷

49. SACU assumes that the reference to ITAC imposing a safeguard measure is a clerical error and what is meant is that SACU was not entitled to impose a safeguard measure for the entire territory of SACU.

50. The EU had announced a claim in relation to the geographic scope of import data used in the investigation at point 1(c) of the Arbitration Panel Request as follows:

"c) The measure at issue concerns a different geographic scope than the investigation, which did not take into account the import data relating to SACU but was based on data relating exclusively to the Republic of South Africa;"

51. The claim announced in the Arbitration Panel Request relates only to the geographic scope of the import data used. It does not contest the right of SACU to impose a measure on the whole of the SACU customs union when imports and serious injury or disturbance are occurring allegedly only in one part of the customs union.

52. Indeed, the EU alleges in this regard a violation of Article 34(1) of the EU-SADC EPA in paragraphs 205 to 207 of its first written submission although that provision is not at all referenced in the Arbitration Panel Request.

53. In order to justify its new claim the EU goes on in paragraphs 208 to 216 to develop a new principle of "reverse parallelism" whereby a measure can only apply to the territory for which increased imports have been found and injury to result therefrom (a principle that the EU certainly does not apply in its own trade defence measures).

54. The pertinent point, however, is that such a claim is nowhere to be found in the EU's Arbitration Panel Request and therefore it is not within the Terms of Reference.

55. Similarly, paragraphs 212 to 215 of the EU's first written submission, which specifically concern the geographic scope of the data used to assess serious injury or disturbance, go beyond the claim announced at point 1(c) of the Arbitration Panel Request, which concerns only the geographic scope of the import data used. The EU's claim in these paragraphs is therefore also not within the Terms of Reference additionally for this reason.

F. The claims regarding provision of information on the price comparison and unsuppressed selling price calculation are not within the Terms of Reference

56. The EU's Claim 5 concerns the information provided to the TDC under the EU-SADC EPA. In particular, the EU complains that SACU: (i) did not provide adequate

²⁷ EU FWS, para 216.

information on the comparison of the prices of domestic and imported products; (ii) did not provide adequate information on the unsuppressed selling price calculation; and (iii) did not provide actual data but only indexed data, in relation to certain of the serious injury or disturbance factors.

57. The EU had announced a claim in relation to the information provided to the TDC at point 4(a) of the Arbitration Panel Request as follows:

"a) The Trade and Development Committee (and therefore the European Union Party) was not provided with the necessary data or was provided only with indexed data, which made it impossible to thoroughly and fully examine the situation and propose a recommendation or satisfactory solution."

58. The claim announced in the Arbitration Panel Request, that the TDC *"was not provided with the necessary data or was provided only with indexed data"* relates to point (iii) above, namely the non-provision of actual figures, but only indexed data (hence the use of the word *"or"*). It does not relate to the provision of information regarding the comparison of the prices of domestic and imported products and the unsuppressed selling price calculation. These parts of the EU's Claim 5 are therefore not within the Terms of Reference.

G. Conclusion

59. In light of the above, SACU invites the Panel to find that paragraphs 1, 2 and 3 of the Arbitration Panel Request and the EU's Claims 1, 2, 3 and 4 in its first written submission that allege a violation of Article 34(2) of the EU-SADC EPA, are misdirected and without object since they allege a violation of a provision that is not applicable to the Measure at Issue.

60. In the alternative, if the Panel accepts that the Arbitration Panel Request and the EU's first written submission can be read as alleging a violation of certain requirements of Article 34(2) of the EU-SADC EPA that are also contained in Article 34(5) of the EU-SADC EPA, SACU invites the Panel to find that the following claims in the EU's first written submission are misdirected and without object:

- a. The claim in relation to the obligations incurred requirement, set out at paragraphs 108 to 135; and
- b. The claim in relation to the safeguard level requirement, set out at paragraphs 217 to 240.

61. Further, and in any event, SACU requests the Panel to declare the following claims to be outside the Panel's Terms of Reference:

- a. The claim of incorrect selection of the POI set out at paragraphs 140 to 144;
- b. The claim of non-correlation between the increased EU imports and a worsening of the serious injury or disturbance factors set out at paragraphs 161 to 163;
- c. The claim of violation of the so-called principle of "reverse parallelism" set out at paragraphs 205 to 216 and the claim in relation to the geographic scope of the serious injury or disturbance data set out at paragraphs 212 to 215; and
- d. The claim regarding provision of information on ITAC's price comparison and unsuppressed selling price calculation set out at paragraphs 242 to 245.

62. Consequently, SACU will only address the claims set out at paragraphs 60 and 61 on a subsidiary basis, for the eventuality that the Panel does not agree that these claims are misdirected and without object and / or not within the Terms of Reference. SACU further reserves the right to supplement its responses to these claims, should this be the case.

V. **PRELIMINARY LEGAL OBSERVATIONS**

63. Before addressing the EU's five specific claims, SACU considers it necessary to discuss a number of important and overarching legal issues that are pertinent to the proper legal framework applicable to this dispute.

A. **The lack of relevance of WTO law and case-law**

64. The first of these overarching legal observations responds to the arguments made by the EU in Section V.A of its first written submission.²⁸ The EU goes to great lengths in that Section to seek to justify its reliance on the WTO safeguard rules and WTO case-law in support of its claims. The EU's arguments are entirely unjustified and the EU's reliance on the WTO safeguard rules and WTO case-law undermines most of its arguments.

65. SACU readily agrees that the rules of interpretation of the Vienna Convention on the Law of Treaties ("VCLT") must be applied by the Panel in the task of interpreting Article 34 of the EU-SADC EPA. Indeed Article 92 of the EU-SADC EPA expressly says so. The EU cites this provision²⁹ but significantly omits its final sentence that states, "*The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided for in this Agreement.*"

66. The principal argument of the EU is that the VCLT applies to both the WTO agreements and the EU-SADC EPA and that, therefore, they must be interpreted in the same way. The EU states that:

*"Accordingly, to the extent that the text of the EU–SADC EPA and the WTO agreements (in casu ASG and the GATT 1994) is the same or materially similar, the EU has cited WTO case law in support of the EU's interpretation. When the text of the EU–SADC EPA and the WTO agreements (ASG and the GATT 1994) are not entirely identical, the jurisprudence of WTO panels and the AB nonetheless represent a reasonable and sensible way to interpret the relevant EU–SADC EPA provision(s), and thus relevant case law has been accordingly cited by the EU."*³⁰

67. The EU's position is however, entirely untenable, as will be shown below and in reality, the EU is asking the Panel to add new obligations that are not contained in the EU-SADC EPA, in violation of its Article 92.

68. The fact that the rules of interpretation of the VCLT apply to these proceedings and that they are also applied in WTO dispute settlement does not allow WTO provisions and case-law to be imported into the EU-SADC EPA. The provisions of the EU-SADC EPA must be interpreted as required by the VCLT. While the EU states that

²⁸ EU FWS, paras 76-81.

²⁹ EU FWS, para 77.

³⁰ EU FWS, para 80.

it bases its position on Article 31 of the VCLT, the EU in fact only relies on the similarity of certain words and expressions in Article 34 of the EU-SADC EPA and the WTO provisions. The EU, however, ignores the very significant differences in the texts of the two sets of provisions. The EU also ignores entirely their very different contexts, objects and purposes, even though Article 31 of the VCLT attaches equal importance to the context, object and purpose of the provision to be interpreted, as set out below:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

69. SACU will now provide its views on the applicable legal framework, based on a proper approach to the rule of interpretation under Article 31 of the VCLT.
70. Starting with the terms of the relevant provisions, although certain words in Article 34 of the EU-SADC EPA are also found in the WTO safeguard rules consisting of Article XIX of the General Agreement on Tariffs and Trade, 1994 ("GATT") and the WTO SGA, many other words and concepts from these provisions, and the WTO SGA in particular, are *not* to be found in Article 34 of the EU-SADC EPA. The features and requirements of Article 34 EU-SADC EPA and the WTO safeguard rules are very different. In terms of notable examples:
- a. Article 34 of the EU-SADC EPA is entitled "General bilateral safeguards" and does not refer to "emergency action", while the WTO rules do.³¹
 - b. Article 34 of the EU-SADC EPA does not refer to the existence of "unforeseen developments", while the WTO rules do.³²
 - c. Article 34 of the EU-SADC EPA additionally covers "disturbances" and not only "serious injury" unlike the WTO rules,³³ and the EU-SADC EPA does not require that such disturbances are "serious".
 - d. Article 34 of the EU-SADC EPA does not list mandatory serious injury or disturbance factors that need to be analysed, while the WTO rules do.³⁴
 - e. Article 34 of the EU-SADC EPA does not contain any detailed provisions in relation to establishing causation unlike the WTO rules and does not require any "non-attribution" analysis, which is required under the WTO rules.³⁵
 - f. Article 34 of the EU-SADC EPA does not contain any requirement for there to be a domestic investigation with procedural rights for interested parties,

³¹ C.f. WTO SGA, preamble and Article 11.1; GATT, Article XIX (title).

³² C.f. GATT, Article XIX:1(a).

³³ C.f. WTO SGA, Article 2.1 and GATT, Article XIX:1(a).

³⁴ C.f. WTO SGA, Article 4.2(a).

³⁵ C.f. WTO SGA, Article 4.2(b).

including disclosure of relevant information, which is required under the WTO rules.³⁶

- g. Article 34 of the EU-SADC EPA does not require there to be a published report setting out the "*findings and reasoned conclusions on all pertinent issues of fact and law*", which is required under the WTO rules.³⁷
71. These differences are therefore both significant, as well as substantive, and must be taken into account in any serious interpretative exercise, as they have an important impact on how the respective provisions must be applied.
72. This is evident from the earlier case-law in relation to Article XIX of the GATT, which was interpreted very differently by panels before it was supplemented by the additional and more detailed requirements of the WTO SGA in 1994. Considerable deference was accorded to GATT Contracting Parties over the need and justification of safeguard measures under Article XIX of the GATT.³⁸
73. The advent of the WTO SGA however, and in particular, the addition of a specific obligation to conduct a domestic investigation conforming to certain standards and to publish a report setting out the "*findings and reasoned conclusions on all pertinent issues of fact and law*" adequately justifying the measure,³⁹ completely transformed the WTO safeguards regime from a quasi-discretionary "escape clause" into a trade defence regime based on even more exacting standards than those required of anti-dumping and countervailing duty measures.⁴⁰ It also effectively reversed the burden of proof, since a complaining party no longer had affirmatively to show that the substantive conditions for the imposition of a measures were not met but only that the report of the investigation did not adequately justify the measure. As a result, after the conclusion of the WTO SGA, many safeguard measures were contested and nearly all were found to be unjustified, whereas before the conclusion of the WTO SGA no safeguard measure was ever found by a panel to be contrary to Article XIX of the GATT.⁴¹
74. This is also evident from the way in which other safeguard clauses in international agreements, which also contain significant differences from the WTO SGA, have been applied. Looking at the WTO agreements themselves, a good example is the

³⁶ C.f. WTO SGA, Article 3.

³⁷ C.f. WTO SGA, Articles 3.1 and 4.2(c).

³⁸ See Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT, GATT/CP/106, adopted 22 October 1951 ("*Hatters' Fur*"), paras 30 and 48.

³⁹ WTO SGA, Article 3.1.

⁴⁰ See, C Ledet, 'Causation of Injury in Safeguard Cases: Why the US Can't Win' (2003) *Law and Policy in International Business* 713, which explains at 745 that: "*the escape clause concept was always intended to be a flexible one to allow for a case-by-case analysis of serious injury and to provide for the fashioning of an appropriate response*" but the WTO SGA, as interpreted by the Appellate Body "*does not provide a workable means for defending a safeguard measure.*" See also AO Sykes, 'The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute' (2004) *Journal of International Economic Law* 523, which concludes at 562-563 that under the WTO SGA as interpreted by the Appellate Body, WTO Members face "*near-certain defeat when a complaint is brought against them*", underlining the requirement to produce a sufficiently "*reasoned and adequate explanation*" as causing particular difficulty.

⁴¹ See, KJ Pelc, 'Seeking Escape: The Use of Escape Clauses in International Trade' (2009) *International Studies Quarterly* 349, at 358-361.

"special safeguard" regime under the WTO Agreement on Agriculture,⁴² which recognises the particularly sensitive nature of agricultural markets and is consequently based on very different conditions, namely, the breaching of specific "trigger levels" in terms of either import volumes or prices. There is no requirement for an investigation or any finding of injury.⁴³

75. Similarly, Article XVIII of the GATT, which is entitled "Governmental Assistance to Economic Development", recognises the special needs of developing countries and sets out a safeguard mechanism that is more adapted to those needs. That mechanism is not subject to the procedural requirements that were added by the WTO SGA. The same is true of the balance of payments safeguard mechanism in Article XII of the GATT. Indeed, many other provisions of the WTO agreements have the same effect as safeguard measures but are generally called "exceptions". One particularly broad exception is the national security exception in Article XXI of the GATT but there are many others throughout the WTO Agreements and they generally do not require an investigation to be conducted but only for more or less substantive conditions to be satisfied.
76. More generally, safeguard clauses in international agreements come in many different varieties. While some are trade related, others are not.⁴⁴ Some require an investigation to be conducted,⁴⁵ but many others do not. Most require consultations with a view to avoiding the imposition of a safeguard,⁴⁶ but others simply require notification to the other party to the agreement.⁴⁷ Some limit safeguard measures to a transitional period only⁴⁸ whereas others allow such measures indefinitely.⁴⁹ Some

⁴² WTO Agreement on Agriculture, Article 5.

⁴³ As illustrated in the Panel Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, adopted 23 July 1998, as modified by Appellate Body Report WT/DS69/AB/R, DSR 1998:V, p. 2089 ("*EC – Poultry*"), in particular, at para 284.

⁴⁴ For example, Article 16 of the Protocol on Northern Ireland/Ireland annexed to the Agreement on the Withdrawal of the United Kingdom from the EU is a safeguard clause that allows action to depart from other provisions of the agreement in the case of grave economic or societal problems as well as "diversion of trade". See **Exhibit SACU-8**, section 1.1.

⁴⁵ For example, the Australia-China Free Trade Agreement ("*FTA*"), the Australia-Japan FTA, the Malaysia-Australia FTA and the EFTA-Canada, EFTA-Central America and EFTA-Hong Kong agreements all specifically incorporate by reference the investigation obligations in the WTO SGA. See **Exhibit SACU-8**, sections 1.2-1.6.

⁴⁶ This is the case in particular with the equivalent provisions to Article 34 of the EU-SADC EPA in other EU EPAs with ACP countries. See **Exhibit SACU-8**, section 2.

⁴⁷ For example, the Canada-Korea FTA merely requires notice of a provisional measure to be given through publication in an official journal. See **Exhibit SACU-8**, section 1.8.

⁴⁸ For example, the Australia-China FTA, the Australia-Japan FTA, the Malaysia-Australia FTA, the EFTA-Canada and EFTA-Central America FTAs (but not the EFTA – Hong Kong FTA) and the EU FTAs with Mexico, Singapore, Japan and MERCOSUR. See **Exhibit SACU-8**, section 1. The agricultural safeguard in Article 35 of the EU-SADC EPA is also limited to a period of 12 years.

⁴⁹ This is the case in particular with the equivalent provisions to Article 34 of EU-SADC EPA in other EU EPAs with ACP countries. See **Exhibit SACU-8**, section 2.

allow rebalancing of rights and obligations (or compensation as it is more normally termed),⁵⁰ others do not.⁵¹ Some are subject to dispute settlement, others are not.⁵²

77. Indeed, the EU-SADC EPA itself contains five different bilateral safeguard clauses,⁵³ each with their own specific conditions and features. When explaining the importance of these safety valves to the world, the European Commission, in its "Fact Sheet" in relation to the EU-SADC EPA, insisted on the ability of SADC EPA States to protect themselves and nowhere mentioned the obligation that it now claims to exist to conduct an investigation. It stated as follows:

"The EPA contains a large number of "safeguards" or safety valves. EPA countries can activate these and increase the import duty in case imports from the EU increase so much or so quickly that they threaten to disrupt domestic production."⁵⁴

78. The various safeguard clauses negotiated and concluded by the EU itself in its trade agreements, in particular, are instructive. EU agreements with African, Caribbean and Pacific ("ACP") countries, that is EPAs like the EU-SADC EPA, do not include any obligation to conduct an investigation or to produce a report. SACU attaches the general bilateral safeguard clauses in the following EU EPAs, which illustrate this point: the EU EPA with the West African States, the Economic Community of West African States and the West African Economic and Monetary Union; the EU EPA with the Eastern and Southern Africa States; the EU EPA with the East African Community Partner States; the EU EPA with Cameroon; the EU EPA with the Caribbean Forum ("CARIFORUM") States; and the EU EPA with the Pacific States.⁵⁵
79. In contrast, recent EU FTAs with more developed countries that provide for bilateral safeguard measures, specifically include an obligation for an investigation to be conducted and a report justifying the measures to be published. They also explicitly incorporate the standards of the WTO SGA. This is the case for the safeguard clauses in the following EU FTAs, which are attached: the EU FTA with Singapore; the EU FTA with Japan; the EU FTA with Vietnam; the EU FTA with MERCOSUR; the EU FTA with Mexico; the EU's proposed FTA with Chile; the EU's proposed FTA with Australia and the EU's proposed FTA with New Zealand.⁵⁶
80. The pattern is clear. Obligations to conduct an investigation and to produce a report justifying the proposed measure in line with the WTO safeguard rules are agreed with more advanced nations but are not included in agreements with developing nations where a greater degree of flexibility is required. These follow the "notify and

⁵⁰ Examples of FTAs that require rebalancing (or compensation) are the EFTA Agreements with Canada, Central America and Hong Kong and the China-Singapore FTA. See **Exhibit SACU-8**, section 1.5-1.7 and 1.9.

⁵¹ This is the case in particular with the equivalent provisions to Article 34 of EU-SADC EPA in other EU EPAs with ACP countries. See **Exhibit SACU-8** section 2.

⁵² For example, the Canada-Korea FTA excludes dispute settlement with respect to the implementation of a safeguard measure. See **Exhibit SACU-8**, section 1.8.

⁵³ These are: Article 34 on general bilateral safeguards; Article 35 on certain agricultural safeguards by SACU; Article 36 on food security safeguards by SADC EPA States; Article 37 on transitional safeguards by the BLNS States; and Article 38 on infant industry protection safeguards by certain SADC EPA States.

⁵⁴ **Exhibit SACU-9**, European Commission Fact Sheet: EU-SADC EPA, 10 October 2016.

⁵⁵ **Exhibit SACU-8**, section 2.

⁵⁶ **Exhibit SACU-8**, section 1.

- negotiate" model that is also found in the EU-SADC EPA, as opposed to the "investigate and justify in a report" model that applies in the WTO and in some FTAs.
81. Moving to the context, object and purpose of the relevant provisions, it is clear that these are very different in the case of Article 34 of the EU-SADC EPA on the one hand, and Article XIX of the GATT and the WTO SGA on the other. As will be explained in detail in Section V.B below, the EU-SADC EPA is as much a development agreement as a trade agreement and its provisions must be interpreted and applied in this light.
82. This necessarily involves recognising that lower and more flexible requirements apply to safeguards for the benefit of the SADC-EPA States as developing countries. This is reflected in:
- a. The lower substantive thresholds for applying safeguards under Article 34(5) of the EU-SADC EPA, which allows SACU to derogate from the rules under Articles 34(1)-(3) in determining whether safeguard measures are appropriate (and the equivalent provision for the EU's outermost regions in Article 34(4)).
 - b. SACU's ability to apply safeguard measures for four years under Article 34(6)(b) of the EU-SADC EPA, as opposed to the normally applicable period of two years.
 - c. SACU's ability to apply provisional measures for two hundred days under Article 34(8)(a) of the EU-SADC EPA, as opposed to the normally applicable period of one hundred and eighty days.
83. In addition, Article 34 of the EU-SADC EPA is a bilateral safeguard regime as opposed to a multilateral safeguard regime like the WTO safeguard rules. Bilateral safeguard clauses are drafted, interpreted and applied rather differently from the general multilateral safeguard regime of the WTO rules because they are the result of a *bilateral* negotiation and provide that the parties seek a *bilateral* negotiated solution to the matter, which is much more difficult to achieve in a multilateral context. This is precisely what SACU and the EU attempted prior to the adoption of the Measure at Issue. SACU provided the TDC with all relevant information and the issue was discussed at length in the TDC with a view to seeking an alternative solution to the proposed safeguard measure. As explained in Section III above, the EU proposed that the level of the duty be reduced and it later proposed that the subject product be included within the scope of the special agricultural safeguards regime under Article 35 of the EU-SADC EPA.
84. Looking at the practice in relation to bilateral safeguards in EU's agreements, there are few examples, but two are noteworthy:
- a. In 1993, the EU imposed a bilateral safeguard measure on imports of gearboxes from Austria⁵⁷ under the then applicable FTA between the EU and Austria (prior to Austria becoming a Member State of the EU).⁵⁸ Neither the relevant safeguard clauses in the FTA,⁵⁹ nor the EU's domestic legislation providing for

⁵⁷ Council Regulation (EC) No 3697/93 of 20 December 1993, available [here](#).

⁵⁸ **Exhibit SACU-10**, Agreement between the European Economic Community and the Republic of Austria.

⁵⁹ *Ibid*, Articles 23 and 27.

action to be taken pursuant to these clauses,⁶⁰ provided for an investigation to be conducted or a report thereof to be adopted or published. Indeed, the EU regulation imposing the safeguard measure, which is just three pages long, states only that the European Commission made a "detailed assessment"⁶¹ but provides no information as to its content and it does not appear that it was ever published. Instead, the EU regulation refers to the significant discussions between the EU and Austria in the context of the joint committee under the FTA with a view to seeking a mutually acceptable solution, as required under the safeguard clauses.⁶²

- b. In 2021, the EU envisaged invoking a bilateral safeguard in the Protocol on Ireland / Northern Ireland to the UK-EU Withdrawal Agreement.⁶³ The relevant safeguard clause did not require any investigation or a published report prior to the adoption of the safeguard measures, and the draft regulations invoking the safeguard clause did not record that any such investigation had been carried out or that any report would be published. Instead, the safeguard clause provided for consultations in the context of the joint committee under the Withdrawal Agreement with a view to finding a commonly acceptable solution, as well as the provision of "all relevant information" so that the joint committee may discharge this function.
85. Article 34 of the EU-SADC EPA follows the same "notify and negotiate" model as these safeguard clauses, and in SACU's view, the EU's practice thereunder is readily transferable to the present case.
86. SACU further points out that Article 33 of the EU-SADC EPA expressly draws a distinction between safeguard measures under the WTO safeguard rules and the safeguard provisions under the EU-SADC EPA, including Article 34, strongly suggesting that the WTO requirements cannot be applicable to the latter. Indeed, Article 33 of the EU-SADC EPA explains that safeguard action under the EU-SADC EPA is of a fundamentally different nature to safeguard action under the WTO safeguard rules, as safeguard action under the EU-SADC EPA can only remove the preference granted to the other party and restore it to the position that that other party would be in under the WTO agreements.
87. Consequently, it is not only entirely inappropriate to import into one agreement provisions relating to a certain kind of safeguard measure from another agreement, it is particularly unjustified to argue that provisions and principles developed under the WTO safeguard rules can be applied to Article 34 of the EU-SADC EPA.
88. Finally, the EU seeks to support its position that the WTO safeguard rules and WTO case-law should be transplanted into Article 34 of the EU-SADC EPA by referring to Article 31(3)(c) of the VCLT which requires that "*any relevant rules of international law applicable in the relations between the parties*" are taken into consideration. Drawing on Article 1(f) of the EU-SADC EPA, which states that the

⁶⁰ Regulation (EEC) No 2837/72 of the Council of 19 December 1972 on the safeguard measures provided for in the Agreement between the European Economic Community and the Republic of Austria, available [here](#).

⁶¹ Council Regulation (EC) No 3697/93 of 20 December 1993, page 1.

⁶² *Ibid.*, pages 1-2.

⁶³ Protocol on Ireland / Northern Ireland annexed to the Agreement on the Withdrawal of the United Kingdom from the EU, Article 16 and Annex 7. See **Exhibit SACU-8**, section 1.1.

operation of the EU-SADC EPA is to be "*consistent with WTO obligations*" and the preamble of the EU-SADC EPA which states that the parties have taken account of their WTO obligations, the EU argues that this means that the WTO safeguard rules must be respected.⁶⁴

89. The conclusion that the EU seeks to draw does not follow at all. Article XIX of the GATT and the WTO SGA do not apply at all to the Measure at Issue. The Measure at Issue is not derogating from any WTO obligation – it is merely partially withdrawing a preference and to that extent partially re-imposing a duty that the WTO agreements allow the SACU States to impose. Since these WTO agreements do not apply, there is no reason for them to be taken into consideration. Indeed, if the EU logic were followed, it would be more appropriate to take into consideration the particular safeguard mechanism for developing countries under Article XVIII of GATT referred to above⁶⁵ as "*relevant rules of international law applicable in the relations between the parties*".
90. SACU also points out that the references in Article 1(f) and the preamble to the EU-SADC EPA, to consistency with and regard being paid to WTO obligations, are in reality references to the objective of the EU-SADC EPA to replace the previous Lomé Convention framework with a more WTO-consistent one, as explained in sub-section B below.
91. Quite to the contrary of what the EU claims, the EU-SADC EPA in fact makes clear the intention of the Parties that WTO safeguard rules are *not relevant* in Article 34(10) of the EU-SADC EPA which states:

"Safeguard measures adopted under the provisions of this Article shall not be subject to WTO Dispute Settlement provisions."

92. Accordingly, the EU's attempt to base its case on WTO provisions is entirely unjustified and the great majority of its specific claims must fail for this reason.

B. The EU-SADC EPA is a development agreement as well as a trade agreement

93. A striking feature of the EU's first written submission, and indeed the attitude displayed by DG Trade during the ITAC investigation, is that the EU approaches the issues in this case from a purely trade perspective. It considers that the sole purpose of the EU-SADC EPA is to increase trade, and in particular, the export opportunities of its companies, in its "partner" countries. This has led it to treat this dispute in the same way as it treats its WTO disputes and it seems, even to assume that Article 34 of the EU-SADC EPA is to be interpreted and applied as if it was the WTO SGA.
94. This is a fundamentally flawed approach. The wording, context and objectives of the EU-SADC EPA are very different from the WTO agreements. Most importantly, the EU fails to mention at all in its first written submission the specific development context and objectives of the EU-SADC EPA. In view of their importance, SACU will recall them now.

⁶⁴ EU FWS, para 81.

⁶⁵ See para 75.

95. The EU's EPAs were designed ultimately to replace the previous Lomé Convention framework,⁶⁶ which came under challenge in the WTO Bananas litigation.⁶⁷ The Lomé Convention was essentially a development agreement between the EU and the ACP States, which provided for, *inter alia*, non-reciprocal trade preferences in favour of the ACP States. This non-reciprocity prevented the EU from defending the preferences as being covered by the exemption for FTAs and thus led to them being held inconsistent with WTO law and in particular, the most-favoured nation or "MFN" principle. By providing for reciprocal reductions in tariffs, the EPAs, addressed this issue. The EPAs remained development agreements however and the tariff reductions were expressly asymmetric⁶⁸ and contained many other provisions designed to promote development. The EPAs therefore constituted a continuation of the development framework under the Lomé Convention.
96. The nature of the EPAs in this regard is clear from the 2000 Cotonou Agreement between the EU and the ACP countries, which provided for the parties to conclude "*new World Trade Organisation compatible agreements*" in view of the "objectives and principles" set out thereunder.⁶⁹ Those "objectives and principles" were largely development-orientated, and included:
- a. "*fostering integration initiatives of ACP States, bearing in mind that the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries*";
 - b. "*enabling the ACP States to manage the challenges of globalisation and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalised global economy*";
 - c. "*enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment*";
 - d. "*a comprehensive approach which builds on the strengths and achievements of the previous [Lomé Conventions]*" and that "*particular regard shall be had to trade development measures as a means of enhancing ACP States' competitiveness. Appropriate weight shall therefore be given to trade development within the ACP States' development strategies, which the [EU] shall support*"; and that
 - e. "*Economic and trade cooperation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and*

⁶⁶ The text of the Lomé Convention can be found [here](#).

⁶⁷ A finding that measures taken under the Lomé Convention could not be justified under the GATT was contained in the Panel Report, *EEC – Import Regime for Bananas*, DS38/R, 11 February 1994, unadopted ("*Bananas II*"), at para 170. The banana litigation was long-running and continued with *Bananas III* that was only resolved in 2012.

⁶⁸ In the case of the EU-SADC EPA, this principle is clearly expressed in Article 20.

⁶⁹ Cotonou Agreement, Article 36(1).

to taking due account of the vulnerability of small, landlocked and island countries."⁷⁰

97. These development-orientated objectives and principles were faithfully reflected in the EU-SADC EPA itself. In particular:
- a. The preamble to the EU-SADC EPA refers to, *inter alia*: "*the efforts by the SADC EPA States to ensure economic and social development for their peoples*"; "*the special needs and interests of the SADC EPA States and the need to address their diverse levels of economic development, geographic and socio-economic concerns*"; "*the Parties' commitment to and support for economic development in the SADC EPA States to attain the Millennium Development Goals ('MDGs')*"; and "*the importance of agriculture and sustainable development in poverty alleviation in the SADC EPA States.*"
 - b. The title of Part 1 of the EU-SADC EPA notably does not refer to trade, but is entitled "*Sustainable Development and Other Areas of Cooperation*".
 - c. In Article 1 of the EU-SADC EPA, which sets out the "objectives" of the agreement, the very first objective expressed in Article 1(a) is to "*contribute to the reduction and eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the MDGs and the Cotonou Agreement.*" In a similar vein, Article 1(c) indicates that an important objective of the EU-SADC EPA is "*to promote the gradual integration of the SADC EPA States into the world economy in conformity with their political choices and development priorities*".
 - d. Article 2 of the EU-SADC EPA, which sets out the "principles" of the agreement, explains at Article 2(1) that the EPA: "*is based on the Fundamental Principles, as well as the Essential and Fundamental Elements, as set out in Articles 2 and 9, respectively of the Cotonou Agreement.*"⁷¹ These include that "*cooperation arrangements and priorities shall vary according to a partner's level of development, its needs, its performance and its long-term development strategy*"⁷² and that "*Cooperation shall be directed towards sustainable development centred on the human person*". Article 2(3) further states that the Parties "*agree to cooperate to implement this Agreement in a manner that is consistent with the development policies and regional integration programmes in which the SADC EPA States are or may be involved*".
 - e. The EU-SADC EPA makes clear that development objectives are to be embedded in every aspect of the Parties' trade relationship. Notably, Article 6(2) states that the Parties: "*reaffirm their commitments to promote the development of international trade in such a way as to contribute to the objective of sustainable development, in its three pillars (economic development, social development, and environmental protection) for the welfare of present and future generations, and will strive to ensure that this objective is integrated and reflected at every level of their trade relationship.*" Similarly, Article 7(1) states that the Parties: "*reaffirm that the objective of sustainable development is to be*

⁷⁰ Cotonou Agreement, Articles 34-35.

⁷¹ EU-SADC EPA, Article 2(1).

⁷² Cotonou Agreement, Article 2, fourth indent.

applied and integrated at every level of their economic partnership, in fulfilment of the overriding commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development." Finally, Article 10(1) records that the Parties: "*reconfirm their commitment to enhance the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions*".

- f. In this regard, Article 6(1) of the EU-SADC EPA further sets out a list of important international instruments on development which inform the context of the agreement, namely:
- Agenda 21 on Environment and Development of 1992, the major UN action plan on sustainable development, which sets out, among other things, proposals for international cooperation to accelerate sustainable development in developing countries and for combating poverty;
 - the ILO Declaration on Fundamental Principles and Rights at Work of 1998;
 - the Johannesburg Plan of Implementation on Sustainable Development of 2002, which sets out further concrete actions and measures towards implementation of Agenda 21, including chapters on poverty eradication and sustainable development for Africa;
 - the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, which sets out various actions to create an environment that is conducive to the attainment of full and productive employment and decent work for all as a foundation for sustainable development;
 - the ILO Declaration on Social Justice for a Fair Globalisation of 2008, which aims, among other things, to promote employment by creating a sustainable institutional and economic environment in which all enterprises are sustainable to enable growth and the generation of greater employment and income opportunities and prospects; and
 - the UN Conference on Sustainable Development of 2012 entitled "The Future We Want", which re-affirmed, among other things, commitments to sustainable development, poverty reduction and achieving internally agreed development goals, including the Millennium Development Goals.
98. Finally, it should be noted that notwithstanding the absence of any acknowledgment in the EU's first written submission, it would appear that the European Commission itself shares this characterisation of the EU-SADC EPA. Indeed, the European Commission's website describes the Cotonou Agreement as offering the EU and the ACP States "*the opportunity to negotiate development-oriented free trade agreements called Economic Partnership Agreements*" which are "*firmly anchored in the objectives of sustainable development, human rights and development cooperation*".⁷³ The European Commission further explains that the EPAs, "*go beyond conventional free-trade agreements to focus on ACP countries' development, taking account of their socio-economic circumstances*" and that their overall

⁷³ Exhibit SACU-11, European Commission website, 'Economic partnerships'.

objective is "to contribute through trade to sustainable economic growth and poverty reduction in ACP countries".⁷⁴

99. With respect to the EU-SADC EPA specifically, the European Commission refers to it as being "[a]n agreement orientated towards development" which provides for "[a]symmetric trade opening", noting that "[o]utside EPAs, the EU has never agreed before to such a degree of asymmetry in any free trade agreement". The European Commission further emphasises the safeguard provisions in favour of the SADC EPA States, explaining that: "*The EPA contains a large number of "safeguards" or safety valves. EPA countries can activate these and increase the import duty in case imports from the EU increase so much or so quickly that they threaten to disrupt domestic production. There are no less than five bilateral safeguards in the agreement, a number not replicated in any other EU trade agreement*" (emphasis added).⁷⁵
100. The European Commission also explains that: "*should the EU apply a safeguard under WTO rules, the EU offers its EPA partners a renewable 5-year exemption from its application, so the SADC EPA countries will still be able to export.*"⁷⁶ This exemption is reflected in Article 33 of the EU-SADC EPA, which states that: "*the EU shall, in the light of the overall development objectives of this Agreement and the small size of the economies of the SADC EPA States, exclude imports from any SADC EPA State from any measures taken pursuant to [WTO rules]*" (emphasis added).
101. In light of the above, the notion that the EU-SADC EPA should be considered as a typical trade agreement is unsupportable. Rather, the EU-SADC EPA is as much a development agreement as it is a trade agreement, and its provisions, including its Article 34, must be interpreted and applied in this light.

C. Standard of review and burden of proof

102. The EU's first written submission does not discuss the standard of review and the burden of proof to be applied by the Panel, despite having announced in the Introduction that it would do so.⁷⁷ SACU considers that it is essential to the balance of rights and obligations under the EU-SADC EPA that the Panel adopt the correct approach on the standard of review and the burden of proof. Article 92 of the EU-SADC EPA expressly requires the Panel not to add to or diminish rights and obligations under the EU-SADC EPA in adjudicating on this dispute.
103. SACU insists that the EU as the complaining party has the burden of proving that the allegations of inconsistency with the EU-SADC EPA that it makes in its Arbitration Panel Request are well founded. If it fails to do so, the Panel must find that it has failed to establish the alleged inconsistency.
104. The principle that he or she who asserts the affirmative of a fact, not he or she who denies it, has the burden of proving it, is a general principle of law so well established that it hardly needs recalling. It is recognised as being applicable in arbitrations, for example in Article 27(1) of the UNCITRAL Arbitration Rules, which states, succinctly that:

⁷⁴ *Ibid.*

⁷⁵ **Exhibit SACU-9**, European Commission Fact Sheet: EU-SADC EPA, 10 October 2016.

⁷⁶ *Ibid.*

⁷⁷ EU FWS, paragraph 8.

*"Each party shall have the burden of proving the facts relied on to support its claim or defence."*⁷⁸

105. This means, in particular, that the EU must show that the Measure at Issue is not justified in terms of the Article 34(5) of the EU-SADC EPA and, as noted above, it has not even alleged this or meaningfully addressed Article 34(5) of the EU-SADC EPA in its first written submission.
106. Even if it were to be found for whatever reason that the Measure at Issue falls to be assessed on the basis of Article 34(2) of the EU-SADC EPA, the EU must then show that it is inconsistent with that provision, and in particular that there was no increase of imports resulting from obligations incurred under the EU-SADC EPA and that there was no disturbance or risk of disturbance as a result of that increase of imports.
107. The EU cannot transpose principles from WTO case-law in relation to the WTO SGA in order to attempt to escape this obligation, as SACU has explained in sub-section A above. Whereas the WTO SGA expressly provides that a safeguard measure must be justified by a reasoned report based on an investigation meeting certain standards,⁷⁹ the EU-SADC EPA contains no such obligation. It is therefore not possible for a Party complaining against a safeguard measure under Article 34 of the EU-SADC EPA to simply criticise an investigation or a report of an investigation and therefore avoid having the burden of proving a substantive inconsistency, as is possible under the WTO SGA.
108. The standard of review to be applied by the Panel in this case is a distinct but related issue which is not expressly regulated in the EU-SADC EPA. It is to be derived from general principles of law and the practice of international courts and tribunals.
109. The issue is particularly delicate in the case of judgments arrived at by sovereign entities after due consideration. The usual approach adopted is one of deference to those judgments.
110. To take a recent example, in a dispute between an investor and a State over changes in electricity tariffs that affected the viability of its investment, an arbitration tribunal held that:

*"... the Tribunal is of the opinion that the Respondent enjoys a margin of appreciation in conducting its economic policy; therefore, it will not substitute its own views either on the appropriateness of the measures at stake or on the characterization of the situation which prompted them; in particular, the Tribunal will abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation."*⁸⁰
111. Thus, it is not the role of an international adjudicator to second-guess the judgment of the sovereign entity. It does not have the resources or the knowledge or indeed the authority to do so. Its role is rather to ensure that any applicable procedures

⁷⁸ UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), available [here](#).

⁷⁹ WTO SGA, Articles 3 and 4.

⁸⁰ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018 ("*Spain - RREEF Infrastructure*"), at para 468. The decision is subject to annulment proceedings by Spain.

required by the governing agreement have been complied with and that no manifest error has been committed in the assessment of the substantive requirements.

112. In the present case the Panel is asked to adjudicate a dispute about the exercise by SACU and its Member States of a right accorded to them in the EU-SADC EPA to temporarily derogate from tariff concessions accorded under that agreement in order to avoid an actual or threatened disturbance to an agricultural market – that is, to apply a safeguard measure in accordance with Article 34 of the EU-SADC EPA. SACU clearly had a "margin of appreciation" in deciding on the need for the Measure at Issue. To establish its inconsistency with the EU-SADC EPA, the EU would need to show that SACU exceeded its margin of appreciation or infringed a procedural requirement contained in the EU-SADC EPA. It has not. On the contrary, it is clear that the Measure at Issue was not adopted hastily or arbitrarily but after considerable engagement and reflection.
113. In the United States, a deferential approach referred to as the *Chevron*⁸¹ is applied to the interpretation of trade defence statutes. According to this doctrine:
- "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."*
114. In the EU, the Court of Justice of the European Union ("CJEU") applies a similar approach in the review of trade defence cases. For example, in a case contesting a safeguard measure imposed by the EU on imports from some of its overseas countries and territories ("OCT"), the CJEU held that:
- "The Court observes that the Community institutions have a wide discretion in the application of Article 109 of the OCT Decision, which entitles them to take or authorise safeguard measures where certain conditions are met. In cases involving such a discretion the Community Court must restrict itself to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether the Community institutions clearly exceeded the bounds of their discretion."⁸²*
115. In the present case therefore, it is not the role of the Panel to place itself in the position of SACU to decide whether a safeguard measure is warranted. Rather, it is for the Panel to assess whether the procedural requirements in the EU-SADC EPA were

⁸¹ Derived from the case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 ("*Chevron*").

⁸² Judgment of the Court of First Instance of the European Communities of 14 November 2002, *Rica Foods and others / Commission* (T-94/00, T-110/00 and T-159/00, ECR 2002 p. II-4677) ECLI:EU:T:2002:273 ("*Rica Foods and Others*").

followed and / or whether there has been a manifest error of assessment in the establishment of the substantive conditions for the adoption of the Measure at Issue.

VI. RESPONSE TO EU LEGAL ARGUMENTS

116. SACU has already responded to the EU's preliminary legal argument in support of its reliance on WTO standards and case-law in Section V.A above. It will now examine the specific claims made by the EU.

A. Comments on EU Claim 1 (different authority and different legal basis)

117. The first claim of the EU in its first written submission is that there is somehow a breach of Article 34 EU-SADC EPA because "*the Measure at Issue was adopted by a different authority from the one which opened the investigation, and on a different legal basis*".⁸³

118. It is difficult to understand this claim because there is no requirement in the EU-SADC EPA for any investigation to be conducted, let alone that it be conducted by a particular authority under a particular legal basis. Indeed, the EU does not in fact cite any requirement in Article 34 that would not have been respected.

119. It may be that this claim is the echo of a dispute that was brought before the courts of South Africa that sought to have the investigation stopped on the grounds of a change of legal basis under domestic law.⁸⁴ That legal proceeding appears to have been abandoned but in any event, the question of whether ITAC was entitled to continue under the EU-SADC EPA an investigation that it had commenced under the TDCA is not a matter for this Panel. The jurisdiction of this Panel can only relate to violations of the EU-SADC EPA and the only question for this Panel can be whether SACU infringed any of the cited provisions of the EU-SADC EPA by adopting the Measure at Issue for the reasons contained in the Arbitration Panel Request.

120. Instead of explaining why the continuation, at a time when the EU-SADC EPA is in force, of an investigation initiated at the time that the TDCA was in force could be inconsistent with the EU-SADC EPA, the EU devotes the first part of its reasoning under this claim to contesting that Article 16 TDCA could be relied on to impose the Measure at Issue⁸⁵ and to denying that the EU-SADC EPA is a "successor agreement" to the TDCA.⁸⁶

121. However, SACU adopted the Measure at Issue under Article 34 of the EU-SADC EPA (specifically Article 34(5)) and so the question of whether the TDCA was "repealed" or "suspended" or "extinguished" is irrelevant.

122. It is however, remarkable that the EU should seek to deny that the EU-SADC EPA is a "successor agreement" to the TDCA. While this is irrelevant for the reasons explained above, SACU will explain below why the EU-SADC EPA must be considered as a continuation of the TDCA.

⁸³ EU FWS, Section V.B.

⁸⁴ Case No. 56397/2017, *Association of Meat Importers and Exporters (AMIE) v Minister of Trade and Industry, ITAC and Others*.

⁸⁵ This appears to be the argument in paras 88 and 92 of the EU FWS.

⁸⁶ EU FWS, paras 89 to 91.

123. First, however, since the EU does not make this clear and even speaks of the EU-SADC becoming "fully operational" in 2018,⁸⁷ SACU wishes to clarify that the EU-SADC EPA is at present only provisionally applied since a number of EU Member States have not ratified it and this is necessary for its definitive entry into force. Furthermore, certain provisions of the EU-SADC EPA are inapplicable during provisional application unless specified conditions have been met.⁸⁸ Accordingly, it is still legally possible that the EU-SADC EPA will not enter into force (although all SADC States have definitively ratified it and hope that all EU Member States will do so as well). Theoretically, if the EU-SADC EPA were not to definitively enter into force the TDCA would apply again. That is already a reason to conclude that the EU-SADC EPA is intended to be a continuation of the TDCA, indeed the successor to the TDCA.
124. The fact that the EU-SADC EPA is a continuation of various arrangements applicable under the TDCA is also evident from the reference to the TDCA in the preamble to the EU-SADC EPA and especially from Article 2 (Principles) of the EU-SADC EPA which states that:
- "1. ... This Agreement shall build on the achievements of the Cotonou Agreement, the TDCA and the previous ACP-EC agreements in regional cooperation and integration, as well as economic and trade cooperation.*
- 2. This Agreement shall be implemented in a complementary and mutually reinforcing manner with respect to the Cotonou Agreement and the TDCA, subject to Articles 110 and 111."*
125. The EU refers to Protocol 4 on the relationship between the two agreements to support its view that the relevant provisions of the TDCA are "extinguished". However, it fails to appreciate that according to Article 2 of Protocol 4, these provisions are only *suspended* in the event of provisional application, which is the current regime.
126. In any event, suspension or extinguishing of an agreement logically does not prevent another agreement from being a continuation of that first agreement. In fact, the very existence of Article 111 and Protocol 4 of the EU-SADC EPA and its provisions on termination or suspension of the TDCA on definitive and provisional application of the EU-SADC EPA respectively demonstrates that the second is a successor to the first. Why otherwise, would an agreement between one set of parties provide for its transition to an agreement between a different set of parties?
127. In sum, the first part of the EU's argumentation on the first claim is untenable and cannot be seriously entertained.
128. The EU goes on to argue in the second part of its reasoning under this claim that even if the EU-SADC EPA is considered a successor agreement to the TDCA (which it denies), Article 34(2) of the EU-SADC EPA cannot be considered a legal successor to Article 16 of the TDCA.⁸⁹ It points to various differences between the provisions and also argues that only Article 35 of the EU-SADC EPA can be considered the

⁸⁷ EU FWS, para 1.

⁸⁸ See Articles 113(5)-(6) of the EU-SADC EPA.

⁸⁹ EU FWS, para 93.

legal successor to Article 16 of the TDCA.⁹⁰ The point of this reasoning seems to be to support the statement in paragraph 106 of the EU's first written submission that:

*"The conditions as set out in Article 34 (2) of the EU-SADC EPA – and not those set out under Article 16 of the TDCA – shall be met."*⁹¹

129. SACU agrees that the Measure at Issue must comply with the requirements of the EU-SADC EPA (specifically Article 34(5)) and not those of the TDCA and so considers the second part of the EU's arguments under this claim to also be irrelevant.
130. However, should the Panel wish to explore these arguments, SACU makes the following comments.
131. First, SACU does not deny that Article 16 of the TDCA and Article 34 of the EU-SADC EPA are different. In addition to the differences noted by the EU, SACU would add that Article 16 of the TDCA requires there to be an actual or threatened "serious disturbance" whereas Article 34 of the EU-SADC EPA only requires there to be an actual or threatened "disturbance".
132. That does not prevent however Article 34 of the EU-SADC EPA being a continuation of Article 16 of the TDCA. Both, in fact, allow for safeguard measures to be applied.
133. It is true that Article 35 of the EU-SADC EPA is also a safeguard provision and that it specifically applies to certain agricultural products. It does not, however, apply to frozen bone-in chicken cuts. Furthermore, it operates on the basis of imports reaching certain "trigger" levels, which is very different to the mechanism in Article 16 of the TDCA and Article 34 of the EU-SADC EPA which both require actual or threatened injury or disturbance, a requirement that is entirely absent from Article 35 of the EU-SADC EPA. Accordingly, the argument that because Article 35 of the EU-SADC EPA is merely entitled "agricultural safeguards" it is the more appropriate legal successor to Article 16 of the TDCA⁹² does not withstand scrutiny.
134. The EU also discusses in this part of its reasoning whether Article 34(5) of the EU-SADC EPA (rather than Article 34(2) of the EU-SADC EPA) could be a legal successor to Article 16 of the TDCA.⁹³ It dismisses this on the basis that Article 34(5) contains the language "*in such increased quantities and under such conditions*" whereas Article 16 of the TDCA does not. This reasoning is hardly consistent with the EU's contention that Article 35 of the EU-SADC EPA must be considered the legal successor to Article 16 of the TDCA since Article 16 of the TDCA and Article 35 of the EU-SADC EPA exhibit even greater differences.
135. SACU sees no reason why several provisions of the EU-SADC EPA cannot be considered to be the continuation of Article 16 of the TDCA. The EU-SADC EPA was intended to "build on" the achievements of the TDCA and that therefore it can be expected to further elaborate on the safeguard mechanisms of the TDCA.
136. In conclusion, SACU considers the EU's first claim to be misconceived, irrelevant and in any event unfounded.

⁹⁰ EU FWS, paras 94-95.

⁹¹ EU FWS, para 116.

⁹² *C.f.* EU FWS, para 94.

⁹³ EU FWS, para 102.

B. Comments on EU Claim 2, First Argument (obligations incurred)

137. Section V.C of the EU first written submission sets out a claim based on the chapeau of Article 34(2) of the EU-SADC EPA, which provides that safeguard measures can be taken against imports that have increased *as a result of the obligations incurred* under the EU-SADC EPA (the obligations incurred requirement). The EU's contention is that the increase in imports did not result from obligations incurred under the EU-SADC EPA but rather under the TDCA, and that any increase in imports occurred prior to the application of EU-SADC EPA cannot be a result of the obligations incurred under the same agreement.
138. The EU deduces two consequences from the wording in Article 34(2) referred to above. These are that:
- a. A logical link needs to be shown between the increase in imports and an obligation incurred by the importing Party under the EU-SADC EPA; and logically,
 - b. To establish such a link, only imports after the entry into force of the EU-SADC EPA can be taken into consideration.⁹⁴
139. The EU examines these two consequences successively and SACU will respond below.
140. First however, SACU notes that the obligations incurred requirement that is the subject of this claim does not apply to the Measure at Issue because it is Article 34(5) of the EU-SADC EPA that is applicable and that provision does not contain the words on which the EU relies. As SACU has observed in Section IV.B above, Article 34(5) of the EU-SADC EPA is the legal basis available to SADC States and SACU as developing countries and is the counterpart of Article 34(4) of the EU-SADC EPA which is available for the EU's developing outermost regions. Just like Article 34(4), Article 34(5) does not contain the words on which the EU is relying in this claim.
141. SACU will now proceed to examine the two branches of the EU's argument in the event that the Panel should nonetheless decide to examine them.

1. The requirement of a "logical link"

142. The EU derives its requirement for a "logical link" from WTO case law interpreting the requirement in Article XIX GATT that the words "as a result of unforeseen developments" requires there to be a logical connection between an unforeseen development and an increase in imports.⁹⁵ As noted in Section V.A above, SACU rejects the pertinence of WTO case-law because of the different wording, context and object and purpose of Article 34 of the EU-SADC EPA. The EU's reasoning is, however, also erroneous because the WTO case-law relied on by the EU relates to the link between unforeseen developments (which is not a notion present in Article 34 of the EU-SADC EPA) and increased imports, while the EU is attempting to apply it to the obligations incurred requirement. The WTO Appellate Body has held in relation to the obligations incurred requirement that it must merely be shown as a

⁹⁴ EU FWS, para 110.

⁹⁵ EU FWS, paras 113-115.

- matter of fact that a tariff concession has been made.⁹⁶ This is because it can be presumed that tariff concessions lead to increased imports. That is why they are negotiated.
143. SACU is not relying on WTO case-law to support its view of the meaning of Article 34 of the EU-SADC EPA, but is only underlining the weakness of the EU's argument. The fact that the words "as a result of" may have been interpreted as requiring a certain causal link in one treaty when referring to the relationship between two factors, does not support the words being interpreted as requiring the same causal link in relation to different factors in a different treaty. Each treaty must be interpreted on the basis of all the words used in their context and taking account of the object and purpose. For SACU, the plain meaning of the obligations incurred requirement is that there must be an obligation which, if not present, would have led to no, or to a lesser, increase in imports.
144. The EU does not attempt to show that the increase of imports would not have occurred if the tariff concession for frozen bone-in chicken cuts were not included in the EU-SADC EPA. It seeks to impose the burden of proof on SACU.⁹⁷
145. However, it is the EU that must prove that the increase of imports would not have occurred or has no logical link with the tariff concession. For SACU, it is evident that the removal of the MFN duty of 37% on imports of frozen bone-in chicken cuts from the EU does have a logical connection with the increase of imports that occurred.
146. There is no requirement in Article 34(2) that the increase in imports must have a logical connection with a new obligation that did not exist before. That is not even required at the WTO.⁹⁸ Moreover, as explained in Section VI.A above, the EU-SADC EPA is expressly stated to be a continuation of the TDCA.
147. The fact that the tariff concession was originally made by South Africa in the TDCA and was carried over into the EU-SADC EPA is irrelevant. It is still an obligation under the EU-SADC EPA. Indeed, for the SADC EPA States other than South Africa it was also a "new" concession.
148. Accepting the EU's argument would also create unwarranted costs to the upgrading of agreements and would effectively render inoperative the safeguard provisions

⁹⁶ See Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515 ("*Argentina - Footwear (EC)*") at para 91, where it is stated that: "*With respect to the phrase "of the effect of the obligations incurred by a Member under the Agreement, including tariff concessions ...", we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions.*" (emphasis added). See also Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3 ("*Korea – Dairy*"), para 84; Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273 ("*US – Steel Safeguards*"), para 10.140.

⁹⁷ EU FWS, para 117.

⁹⁸ See for example, Appellate Body Report, *Argentina – Footwear (EC)*, referred to above.

under an agreement such as the EU-SADC EPA for a substantial period of time in these circumstances. That surely could not have been the intention of the Parties.

149. The EU goes on to rely on WTO case-law to argue that the particular obligation incurred and its precise effect on imports needed to be identified in a report published prior to the safeguard measure being adopted and that the ITAC summary report does not do so.⁹⁹
150. However, unlike in the WTO, there are no obligations in Article 34 of the EU-SADC EPA relating to the investigation or to the publication of a report. The context of the obligations incurred requirement of Article 34(2) of the EU-SADC EPA, even if it is applicable to the Measure at Issue, is therefore very different from the similar words in the WTO rules.
151. The obligation of SACU was different, namely, to supply the TDC with all relevant information so as to allow it to make recommendations to remedy the situation that has arisen. This is dealt with more fully in response to the EU's Claim 5 in Section VI.G below. For present purposes however, it is sufficient to note that the obligation is not the same as under the WTO safeguard rules. Under the WTO safeguard rules, the report must justify the measure and contain full reasoning to this end¹⁰⁰ and that is why a WTO safeguard measure can be judged on the basis of what is in the report. Under Article 34(7)(c) of the EU-SADC EPA, the purpose of the provision of all relevant information to the TDC is to facilitate seeking an alternative solution. The EU had all the information that it needed and made a number of proposals for alternative solutions. It never requested any more information than that which had been provided. Since there was no TDC recommendation to remedy the situation, i.e. there was no alternative solution, SACU was entitled under Article 34(7)(b) of the EU-SADC EPA to adopt the Measure at Issue.

2. Imports both before and after entry into force of the EU-SADC EPA are relevant

152. The EU proceeds to argue¹⁰¹ that the obligations incurred must be "under this Agreement" (meaning the EU-SADC EPA) and claims that the removal of the 37% duty was a concession made in the TDCA and therefore not under the EU-SADC EPA. This is a strange argument to make since the TDCA no longer applies and therefore the preference accorded to the EU under the TDCA also no longer applies. It was in fact continued under the EU-SADC EPA and is therefore an obligation "under this Agreement".
153. The EU seeks to derive, from the need for a logical link between obligations incurred and increased imports, that only imports occurring after the entry into force of the EU-SADC EPA may be taken into account.¹⁰² The EU does not seek to rely on WTO case-law in support of this contention and indeed WTO case-law has allowed the increase of imports to be assessed by comparing it to a period before the WTO entered into force.¹⁰³ The EU is very selective in its reliance on WTO case-law. As

⁹⁹ EU FWS, paras 119-123.

¹⁰⁰ WTO SGA, Article 3 and 4.

¹⁰¹ EU FWS, para 129.

¹⁰² Paras 128 *et seq* of the EU FWS.

¹⁰³ For example, in the case *Argentina –Footwear (EC)*, on which the EU in fact relies for different purposes (at para 140 of its FWS), the period of investigation was from 1991 to 1996 overlapping the entry into

noted however, the WTO provisions are part of different agreements and are irrelevant for the purposes of this proceeding.

154. SACU would respond to the EU argument by pointing out that the temporal limitation that the EU seeks to impose does not at all follow from the need for a logical link and certainly not from the wording of Article 34(2) of the EU-SADC EPA.
155. The requirement in Article 34(2) is that a product "*is being imported into the territory of ... SACU ... in such increased quantities and under such conditions....*". That requires imports are higher than they would be if not for the obligations under the EU-SADC EPA.
156. SACU came to just this conclusion on the basis of the evidence produced by ITAC. The investigation by ITAC covered a period including the end of 2016 when the EU-SADC EPA was provisionally in force. The level of imports occurring at this time needed to be compared with an earlier moment and there is no reason why this cannot be before the provisional application of the EU-SADC EPA.
157. It is true that the Measure at Issue was imposed in 2018, but this was due to the time taken to consider all the evidence, including allowing representations to be made and taken into account, and to undertake the required consultations at the TDC, as SACU will explain in detail in Section VI.C.1 below.
158. Furthermore, it would not have made sense to reopen the investigation in order to include 2017 or even 2018 import data as argued by the EU,¹⁰⁴ since this would not have been representative due to the presence of the provisional duties and temporary Sanitary and Phytosanitary ("SPS") restrictions imposed during 2017-18 as a result of avian flu outbreaks in certain major poultry producing EU Member States, as SACU will explain in further detail in Section VI.C.2 below.

3. Conclusion

159. For the above reasons, it must be concluded that EU has failed to establish its Claim 2, first argument.

C. Comments on EU Claim 2, Second Argument (outdated data and recent decrease)

160. Section V.D of the EU's first written submission sets out a claim that: (a) ITAC incorrectly selected the POI; and (b) the most recent import trends were not taken into account.

1. The period of investigation (POI)

161. Since there are no requirements in Article 34 of the EU-SADC EPA as to the investigation to be conducted, there is consequently no requirement as to the POI to be used. The POI that was in fact used, was the most recent period feasible. It was even updated after the imposition of provisional measures to include data for 2016,

force of the WTO on 1 January 1995. Although the Panel and the Appellate Body both found that the data did not demonstrate an increase of exports to the WTO standard, no objection was raised to the fact that the period of investigation started before the obligation was incurred. (Para 8.276 of the Panel Report). The Appellate Body even insisted at para 129 of its report that trends from 1994 be taken into account, that is before the entry into force of the WTO Agreement.

¹⁰⁴ EU FWS, para 134.

something that the EU does not do in its trade defence investigations.¹⁰⁵ It is however not possible to constantly update a POI since otherwise an investigation would never end.

162. Indeed, the EU insisted in its submission of 31 October 2017 during the TDC discussions that the POI should end in 2015, claiming that "*it is established practice in trade defence investigation not to change the so-called period of investigation during the time of the investigation itself.*"¹⁰⁶ It repeated this argument at the Joint SADC-EU EPA Technical Consultative Meeting held on 24 November 2017, referring to this as "*established international legal practice*".¹⁰⁷ The EU made this argument simply because it considered that this might lead to a lower duty. The EU is being inconsistent in claiming that SACU has violated the EU-SADC EPA by relying on an investigation where the POI had not been updated when it had argued in the context of the TDC that updating the POI was contrary to "established practice".
163. Indeed, if the EU's self-interested advice about acceptable practice in trade defence investigations had been followed, the gap between the end of the POI and the investigation's findings and recommendation would have been over twice as long. And the delay between the end of the POI and the imposition of the Measure at Issue would have been correspondingly longer.
164. As the EU notes,¹⁰⁸ the final findings of the investigation and the recommendation to impose a safeguard measure were made in September 2017. The POI therefore covered the most recent full calendar year data preceding the investigation's final findings and recommendation, which is an entirely reasonable approach. It is not possible to constantly update a POI since otherwise an investigation would never end.
165. The lapse in time between the end of 2016 and the final findings and recommendation is attributable to ITAC's investigative diligence in undertaking rigorous verification of the information submitted by the applicant, the South African Poultry Association ("SAPA"), which included a series of inspection visits at the premises of the participating producers,¹⁰⁹ and ensuring that interested parties, including DG Trade itself, were afforded sufficient opportunity to make submissions and that those submissions were taken into account. Indeed, ITAC issued three "essential facts" letters to interested parties during the investigation, setting out its findings at various

¹⁰⁵ By way of recent example, see the European Commission's final decision in in *MEG anti-dumping investigation*, European Commission Implementing Regulation (EU) 2021/1976 of 12 November 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of mono ethylene glycol originating in the United States of America and the Kingdom of Saudi Arabia, available [here](#). The investigation period considered by the European Commission ended on 30 June 2020 and was not updated, even though the remaining year's data would have been available at the time the Commission took its decision, and the data from H1 2020 would have been materially affected by the disruption caused by the outbreak of the COVID-19 pandemic (see in particular, paras 183-189 and 226-227 of the decision).

¹⁰⁶ Exhibit EU-27, at section 1.

¹⁰⁷ **[***]**

¹⁰⁸ EU FWS, para 61.

¹⁰⁹ By way of example, see **Exhibit SACU-12**, ITAC's verification report for the information provided by the participating producer Astral-Gold, following the inspection on 18 May 2017, available on ITAC's non-confidential file.

stages and accepted submissions from interested parties not only on these essential facts letters, but also on the opening of the investigation, the updated information provided by the applicant, the continuation of the investigation in relation to Article 34 of the EU-SADC EPA and on the provisional measures. DG Trade itself took full advantage of these opportunities and made ten written submissions / representations to ITAC and also participated in two oral hearings with ITAC.¹¹⁰ Other interested parties, including the EU's producers and exporters trade association, AVEC and the trade association of meat importers and exporters in South Africa, AMIE, similarly took full advantage of these opportunities and made voluminous submissions and representations during the investigation, which were all considered and taken into account.

166. As explained in Section III above, following the final findings of the investigation and recommendation in September 2017, extensive consultations were undertaken between SACU and the EU in the TDC, comprising meetings on 21 October 2017, 24 November 2017, and 22 and 23 February 2018, as well as consideration and discussion of a written submission by the EU suggesting alternatives to the proposed safeguard measure. Finally, the SACU Member States then undertook significant internal consultations in order to agree upon an appropriate mechanism for the phase-down of the safeguard. The lapse in time between the conclusion of the investigation and the adoption of the Measure at Issue was therefore attributable to SACU undertaking the required consultations with the EU at the TDC, which exceeded the minimum requirements under Article 34(7) of the EU-SADC EPA and the necessary internal consultations between SACU Member States in order to ensure an appropriate phase-down mechanism. It would be paradoxical and counterproductive to criticise SACU for any delay in these circumstances.
167. In summary, in the real world there is always a delay in the availability of data and this is all the more so when an investigation takes place and interested parties are given the right to comment on the evidence and make submissions and indeed where international consultations are subsequently required. Obliging a Party to the EU-SADC EPA to rely on only very recent data would lead to insufficient verification and reduced opportunities for interested parties and the other Party to the agreement.

2. Account was taken of most recent import trends

168. The assessment of the existence of a threat of disturbance was undertaken using data for the period 2011-16. The data on the disturbance factors showed a negative trend not only from 2011-16, but also as from 2015-16.

¹¹⁰ In addition to the DG Trade submissions included as Exhibit EU-21 (DG Trade submission of 13 January 2017 on the provisional measure), Exhibit EU-22 (DG Trade submission of 4 April 2017 on the ongoing investigation), Exhibit EU-24 (DG Trade submission of 10 July 2017 on the updated SAPA information), Exhibit EU-25 (DG Trade speaking notes for the 8 August 2017 oral hearing with ITAC), Exhibit EU-26 (DG Trade comments of 25 August 2017 on ITAC's 3rd Essential Facts Letter) and Exhibit EU-30 (DG Trade submission of 21 March 2016 on the opening of the investigation); DG Trade also made the following submissions: DG Trade submission on the application, 8 March 2016 (**Exhibit SACU-13**); DG Trade submission requesting an oral hearing, 27 May 2016 (**Exhibit SACU-14**); DG Trade submission on SAPA's updated application, 20 June 2016 (**Exhibit SACU-15**); DG Trade presentation at the oral hearing with ITAC, 12 July 2016 (**Exhibit SACU-16**); DG Trade submission of 31 August 2016 on ITAC's 1st Essential Facts Letter (**Exhibit SACU-17**); and DG Trade submission of 22 September 2016 on ITAC's 2nd Essential Facts Letter (**Exhibit SACU-18**).

169. While the Measure at Issue was finally adopted in 2018, this was due to the time taken to consider all the evidence, including allowing representations to be made and taken into account, and to undertake the required consultations at the TDC and internally, as SACU explains in detail in Section VI.C.1 above.
170. The EU is being inconsistent in its arguments complaining both that the investigation was not thorough enough and that there should only be a short period of time between the end of the POI and the adoption of measures. The investigation was conducted by and in developing countries and the measure was only adopted after lengthy discussion with the EU. It would seem that the EU would like investigations to be less thorough and assessments and consultations cut short.
171. In this context, the lapse of time between the end of the investigation period and the definitive measures coming into force is not out of proportion with the possible 4-8 year duration for SACU / SADC EPA States safeguards under Article 34(6)(b) of the EU-SADC EPA.
172. In any event, unlike the practice under the WTO SGA there is no requirement under Article 34 of the EU-SADC EPA for there to be an increase in imports in the most recent period. On the contrary, as explained in Section IV.B above, the safeguard regime under Article 34 of the EU-SADC EPA is intended to give SACU / the SADC EPA States much greater flexibility in applying safeguard measures.
173. Finally, the argument made by DG Trade and others that more recent data showed a lower level of imports, was taken into consideration even if fully verified data was not available. It was considered that even if imports had declined during 2017 and the beginning of 2018, this period could not be considered as representative for two reasons.
174. First, the level of EU imports during this period was significantly impacted by the temporary SPS import restrictions that were imposed by South Africa as a result of avian flu outbreaks in certain major poultry producing EU Member States. In particular, temporary SPS import restrictions were imposed on imports from the following EU Member States either very shortly before or during this period:
- a. Netherlands, starting in November 2016;
 - b. Hungary, starting in November 2016;
 - c. United Kingdom, starting in December 2016;
 - d. Poland, starting in February 2017;
 - e. Spain, starting in February 2017;
 - f. Belgium, starting in June 2017; and
 - g. Germany, starting in November 2017.
175. When such import restrictions have been lifted in the past, the volume of EU imports from the relevant countries has rebounded significantly¹¹¹ and the same would have been expected with respect to the 2017-18 import restrictions given the nature of the subject product as an unwanted product in the EU, which allows for opportunistic import practices. Indeed, subsequent events show this to remain the case as

¹¹¹ This was the case for the earlier avian flu import bans on the Netherlands and the UK which were lifted in 2015.

demonstrated by the enormous increase in imports from Spain following the lifting of health restrictions for that country in August 2018.¹¹²

176. Second, the level of imports into SACU from the EU was undoubtedly affected by the provisional safeguard measures that were imposed in December 2016 and were in place until July 2017. In accordance with established practice in trade defence investigations, including the EU's own practice in safeguard investigations, the period during which provisional measures are imposed is never taken into account, for this reason. For the EU now to suggest otherwise, is evidently disingenuous.

3. Conclusion

177. For the above reasons, it must be concluded that EU has failed to establish its Claim 2, second argument.

D. Comments on EU Claim 3 (non-attribution analysis)

178. The EU argues that the Measure at Issue is inconsistent with Article 34(2) of the EPA on the basis that other factors allegedly contributing to the injury or disturbance were not appropriately taken into account.¹¹³ In particular, the EU argues that ITAC did not conduct a "non-attribution analysis" in accordance with the WTO safeguard rules and did not adequately address the possible impact of the following alleged factors: an increase in feed costs; increases in costs of labour, diesel, electricity, plastic and cardboard boxes, and imports from non-EU countries, in particular, the US and Brazil (together, the "other factors").
179. SACU will address each of these points in turn and demonstrate that the EU's arguments must be dismissed.
180. The EU repeatedly impugns decisions taken by ITAC whereas, as explained in Section IV.A above, the Measure at Issue is the imposition by SACU of a definitive safeguard measure. In fact, the EU is (or should) be basing its claims on the actions of by SACU acting in reliance on the findings of ITAC, and SACU will assume that this is what is meant.

1. The non-attribution analysis requirements under the WTO safeguard rules do not apply to Article 34 of the EU-SADC EPA

181. The EU's Claim 3 is predicated on the assumption that the causation analysis and in particular, the non-attribution analysis requirements under the WTO SGA, are applicable to Article 34 EPA. This is misconceived. As explained at Section V.A above, the WTO case-law on the WTO SGA cannot be simply transplanted across to the present case. Rather, the Measure at Issue must be assessed in light of the specific requirements under Article 34 of the EU-SADC EPA, and not requirements based on provisions in other agreements that are inapplicable to the Measure at Issue.
182. In the present context, whereas Article 4.2(b) of the WTO SGA specifically requires that a non-attribution analysis be undertaken, Article 34 of the EU-SADC EPA does not contain any provision setting out such a requirement. Rather, the only

¹¹² Imports recovered from zero in August 2018, to 2,826 tonnes for the remaining four months of that year, and to 5,093 tonnes for the first half of 2019.

¹¹³ EU FWS, paras 158-204.

requirement that applies under Article 34 of the EU-SADC EPA is that the *increased imports cause or threaten to cause serious injury or disturbance*.¹¹⁴

183. There are various possible standards of causation that could be applied in safeguard investigations. One factor may be considered to be the sole cause of a situation, a substantial cause or a contributing cause. WTO law effectively employs a "substantial cause" test, but this is because of the specific non-attribution analysis requirements under the WTO SGA.¹¹⁵ In the absence of such requirements, the standard under Article 34 EPA must be less than "substantial cause". Rather, under Article 34 EPA, it must only be necessary to show that the increased imports are a contributing cause to the serious injury or disturbance.
184. This was clearly established by the investigation, which considered the extent of the increase in the volume of EU imports against the incidence of serious injury or disturbance suffered by the SACU domestic industry, along with the extent to which the market share of the SACU domestic industry had decreased, with a corresponding increase in the market share of EU imports.¹¹⁶
185. As explained at Section V.C above, the EU as the complaining party bears the burden of proof. If the EU is to challenge the Measure at Issue on the ground of inadequate causation, it must therefore demonstrate that the EU imports were not a contributing cause to the serious injury or disturbance or threat thereof.
186. The EU however only addresses this issue in very brief and unsubstantiated terms, claiming that there was no correlation between the increase in EU imports in 2016 and a worsening in the serious injury or disturbance factors, on the basis that "*SACU producers' production and capacity utilization remained stable; and sales increased*".¹¹⁷
187. This claim is clearly erroneous. Out of the 11 serious injury or disturbance factors examined during the investigation (excluding EU import volumes and prices), 8 of these factors further worsened in 2016, namely: price undercutting; price suppression; price disadvantage; decline in SACU domestic industry market share; decline in SACU participating producers production; capacity utilisation; SACU participating producers gross profit per unit; and SACU participating producers net profit per unit.¹¹⁸ While there was a very slight increase in sales (2 index points),¹¹⁹ this coincided with an increase in the total size of the SACU market, as indicated by the fact that the SACU domestic industry market share continued to decrease, while the market share of EU imports continued to increase. Furthermore, all sales by the SACU participating producers were made at a very severe loss due to the competitive pressure exerted by the rapidly increasing, low-priced EU imports.

¹¹⁴ EU-SADC EPA, Article 34(5).

¹¹⁵ See Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717 ("*US – Wheat Gluten*"), para 69.

¹¹⁶ Exhibit EU-7, ITAC summary report, sections 4.1 and 4.2.

¹¹⁷ EU FWS, paras 162-163.

¹¹⁸ Exhibit EU-7, ITAC summary report, section 3.

¹¹⁹ Although, as noted in the ITAC summary report, some of the participating producers experienced decreases in sales.

188. The EU also neglects the broader and even more pronounced deterioration in the serious injury or disturbance factors since 2011, when the EU imports began to increase. Taking 2011 as the starting point, 9 out of the 11 serious injury or disturbance factors worsened, including inventories, which increased by a very substantial 48 index points.
189. The evidence is therefore more than sufficient to show a correlation between the increase in imports and a worsening in the serious injury or disturbance factors. The picture that clearly emerges is that of an industry in a sensitive sector that is suffering declining market share and profitability and that increased imports from the EU are at prices that substantially undercut the unsuppressed selling price of the domestic industry. The conclusion by SACU that the tariff preference of 37% granted to EU imports caused the serious injury or disturbance or threat thereof was therefore entirely warranted. The EU, which has the burden of proof, has not attempted to show that these increased imports were not a substantial cause of serious injury or disturbance or threat thereof, let alone that they were not a contributory cause.
190. It may also be noted that the degree of correlation between the increase in imports and a worsening of the serious injury or disturbance factors in this case is stronger than the standard that has been required by the European Commission itself in its safeguard investigations. By way of example, in its *Farmed Salmon safeguard investigation*,¹²⁰ the European Commission considered that the position of the EU domestic industry had "*worsened considerably*" during the last year considered¹²¹ due to increased imports, notwithstanding increased capacity, increased capacity utilisation,¹²² increased production,¹²³ increased productivity,¹²⁴ increased sales¹²⁵ and improvement in cash flow.¹²⁶ Instead the European Commission focused on the effect of the increased imports on prices and the domestic industry's profitability.¹²⁷
191. In the present case of course, during 2015-16, price suppression increased by 18 index points and the price disadvantage increased by 151 index points, while the net profit per unit decreased by 249 index points. This deterioration was even more pronounced, taking 2011 as the starting point.¹²⁸
192. Finally, SACU underlines that under Article 34 of the EU-SADC EPA, the threshold of harm that needs to be met in order to justify a safeguard measure is a threat of "serious injury" or "disturbance". These are alternatives and it should be clear that "disturbance" represents a significantly lower threshold than "serious injury", which is the only standard that applies under the WTO SGA. Indeed, the EU itself has made the following comments in relation to the difference between the two terms:

¹²⁰ Commission Regulation (EC) No 206/2005 of 4 February 2005 imposing definitive safeguard measures against imports of farmed salmon, available [here](#).

¹²¹ *Ibid.*, para 70.

¹²² *Ibid.*, para 48 table.

¹²³ *Ibid.*, para 51 table.

¹²⁴ *Ibid.*, para 54 table.

¹²⁵ *Ibid.*, para 55 table.

¹²⁶ *Ibid.*, para 57 table.

¹²⁷ *Ibid.*, paras 71 and 80-86.

¹²⁸ Taking 2011 as the starting point, price suppression increased by 21 index points and the price disadvantage increased by 191 index points, while the net profit per unit decreased by 262 index points.

"While it is true that this last criterion does not appear nor is defined in the WTO Agreement on Safeguards, it does appear in many of the regional/bilateral trade agreements of the EC, especially as far as agricultural products are concerned. In that contractual context where concessions must be made to attain a substantial share of trade, "serious disturbances" is intended to be a criterion that is somehow less stringent than "serious injury", to cater for emergency situation linked to more sensitive products and thus help Parties to make these trade concessions by providing a safety-net. However, the EC being an extremely moderate user of safeguards, both global and bilateral, there is no case law regarding interpretation of "serious disturbances".¹²⁹ (emphasis added)

193. It may be noted that the above comments of the EU relate to the notion of "serious disturbance". The concept of merely "disturbance", which applies under Article 34 of the EU-SADC EPA, reflects an even lower threshold.
194. In light of the above, it should be clear that there was a sufficient correlation between the increase in EU imports and the incidence of harm at the level that is required to justify safeguard measures under Article 34 of the EU-SADC EPA. For completeness however, SACU will proceed to address the specific arguments that the EU raises in relation to the non-attribution analysis.

2. The alleged other factors that may have contributed to the injury or disturbance were properly examined

195. While there is no requirement for a non-attribution analysis to be undertaken under Article 34 of the EU-SADC EPA, the alleged other factors that may have contributed to the serious injury or disturbance were nonetheless examined, as acknowledged by the EU.¹³⁰
196. The EU however argues that ITAC did not sufficiently explain why it considered that these factors did not detract from the causal link established between the increased imports and the injury or disturbance, claiming that ITAC *"simply disregarded them without any explanations"*.¹³¹
197. The EU's argument must be dismissed for two main reasons. First, the EU's argument essentially relates to compliance with the standards in relation to explanations provided by the competent authority under the WTO SGA. The WTO SGA of course contains specific requirements in this regard, in particular the requirement in Article 4.2(c) that *"[t]he competent authorities shall publish promptly [...] a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."* As explained in Section V.A above however, the Measure at Issue is based on Article 34 of the EU-SADC EPA, which does not contain any such requirements.

¹²⁹ EU Statement at the WTO in relation to the interim agreement on trade and trade-related matters between the European Communities and Albania, WT/REG226/2 (28 March 2008), available [here](#).

¹³⁰ EU FWS, para 169.

¹³¹ EU FWS, para 170.

198. Second, and contrary to the EU's allegations and its attempt to misrepresent the ITAC summary report by selective quoting, the alleged other factors that may have contributed to the serious injury or disturbance were not "simply disregarded".
199. Rather, the investigation found that although increasing costs affected the SACU domestic industry's *ability to compete with EU imports*, it was the EU imports that had *caused the injury or disturbance*.¹³² In particular, it was established that:
- a. Imports from the EU increased continuously during 2011-16 notwithstanding the anti-dumping duties that were implemented against three EU Member States.¹³³ Indeed, it was observed that EU imports had increased by 147 per cent. from 2011 to 2015 and increased by a further 26 per cent. in 2016,¹³⁴ representing an increase of 210 per cent. in total;
 - b. The market share of EU imports increased by 144 index points from 2011 to 2015 and increased by a further 48 index points in 2016,¹³⁵ representing an increase of 192 index points in total; and at the same time; and
 - c. The total market share of the SACU domestic industry decreased by 6 index points from 2011 to 2015 and decreased by a further 3 index points in 2016,¹³⁶ representing a decrease of 9 index points in total.
200. The investigation also examined the potential impact of imports from other countries and found that the market share of other countries' imports decreased by 41 index points and increased by 8 index points in 2016,¹³⁷ representing a decrease of 33 index points in total.
201. In light of the above, the investigation thereby concluded that, "*although there are factors other than the increase in the volume of imports from the EU that are causing a threat of serious disturbance in the SACU market, these factors do not sufficiently detract from the causal link between the increased imports and the threat of serious disturbance in the SACU market.*"¹³⁸
202. The EU's arguments in relation to the examination of the alleged other factors and its explanation thereof must consequently be rejected.
- 3. The further arguments and information put forward by the EU in relation to the alleged other factors do not sufficiently detract from the causal link established between the increased EU imports and the injury or disturbance**
203. The EU also sets out further argument and information in relation to the alleged other factors, i.e. the claiming that had a "*proper non-attribution analysis*" of these factors been conducted, it would have been concluded that they "*were relevant to any alleged serious injury/disturbance or threat thereof*".¹³⁹

¹³² Exhibit EU-7, ITAC summary report, section 4.3.

¹³³ *Ibid.*

¹³⁴ Exhibit EU-7, ITAC summary report, section 4.1.

¹³⁵ *Ibid.*

¹³⁶ Exhibit EU-7, ITAC summary report, section 4.2.

¹³⁷ Exhibit EU-7, ITAC summary report, section 4.2.

¹³⁸ Exhibit EU-7, ITAC summary report, section 4.3.

¹³⁹ EU FWS, paras 183, 192 and 201.

204. The EU's claims are however based on an incorrect factual premise. The investigation did not conclude that these other factors were "irrelevant" to the injury or disturbance, or threat thereof, which had been established. On the contrary, as set out in Section VI.D.3 above, it was concluded that these other factors may have contributed to the serious injury or disturbance, or threat thereof. However, it was also concluded that these other factors did not sufficiently detract from the causal link between the EU imports and the serious injury or disturbance, or threat thereof, which had been established. The EU's arguments are therefore misdirected.
205. Furthermore, with respect to the increases in the SACU domestic industry's costs which represent the main factor averred by the EU, SACU does not dispute that there was volatility in raw material and input costs during 2011-16. But such volatility, in particular in relation to feed costs, is integral to the business environment for the agricultural sector, and their consequent sensitivity. The particular situation of agricultural markets in this regard is indeed recognised by having a specific provision in Article 34 of the EU-SADC EPA, namely Article 34(2)(c), that is applicable to agricultural products and on which, in conjunction with Article 34(5) of the EU-SADC EPA,¹⁴⁰ the Measure at Issue is based, sets out a lower threshold of harm for safeguard measures.
206. The EU argues that the deterioration in the SACU participating producers' net profit in 2016 cannot be related to imports but rather an increase in costs, as EU import prices only decreased by a limited amount while SACU sales slightly increased in 2016.¹⁴¹ The EU however neglects to mention that the volume of EU imports increased substantially in 2016, by 26 per cent., meaning that the SACU participating producers were facing a significant effective increase in the competitive constraint posed by the low-priced EU imports. In this context, as SAPA pointed out during the investigation, the subject product is a high-volume, low margin product, with the result that even a small undercutting percentage, which in fact increased by 25 index points in 2016, has a significant impact on profit margins.¹⁴²
207. Moreover, and more fundamentally, it is quite normal for agricultural producers to respond to temporary cost increases, in particular due to weather conditions, by increasing their prices in turn. But as SAPA pointed out during the investigation, the SACU domestic industry could not do this here due to the significant increase in low-priced imports from the EU and the competitive pressure exerted by those imports.¹⁴³ This is demonstrated by the data which indicates that the SACU participating producers' prices increased only marginally from 2015 to 2016, while at the same time, the price of EU imports decreased and the SACU participating producers faced an increase in undercutting by EU imports of 36 index points.¹⁴⁴

¹⁴⁰ Which refers to Article 34(2)(c).

¹⁴¹ EU FWS, para 180.

¹⁴² Exhibit EU-12, SAPA Revised Application, 28 December 2015, paras 24.4 and 30; **Exhibit SACU-19**, SAPA presentation for oral hearing with ITAC, 7 February 2017, slides 33; and Exhibit EU-23, SAPA Updated Information, 12 June 2017, para 6.3.

¹⁴³ Exhibit EU-12, SAPA Revised Application, 28 December 2015, paras 14.1-14.5; **Exhibit SACU-19**, SAPA presentation for oral hearing with ITAC on 7 February 2017, slide 11; and Exhibit EU-23, SAPA Updated Information, 12 June 2017, paras 7.1-7.8.

¹⁴⁴ Exhibit EU-7, ITAC summary report, section 3.

208. The EU should not dispute this as the European Commission has repeatedly relied on similar reasoning in its trade defence investigations to reject claims that increases in production costs are insufficient to break the causal link. By way of example, in its *Bed Linen anti-dumping investigation*, the European Commission concluded that increases in raw material prices had caused injury, but nonetheless considered that they could not detract from the causal link with dumped imports.¹⁴⁵ This was because the extent of such injury depended on producers' ability to pass on the increased cost to the downstream product and in that case, "*it was reasonable to assess that the dumped imports were the main reason why such pass-through did not occur.*"¹⁴⁶ In a similar vein, in its *Citric Acid anti-dumping investigation*, the European Commission explained that any increases in raw materials cannot be considered, "*as in a normal market situation, the Community industry could have passed on these increased costs at least to a certain extent to its customers.*"¹⁴⁷ However, in that case, "*the investigation showed the increasing presence of dumped imports which undercut the prices of the Community industry significantly.*"¹⁴⁸
209. It should also be clear that the further information put forward by the EU in relation to the other factors cannot call into question the conclusions of the investigation, as SACU will explain below.
- (A) **Increases in the costs of feed, labour diesel, electricity, plastic and cardboard boxes**
210. There were increases in the cost-base of the SACU domestic industry during 2011-16, which were well-documented, including in the SACU domestic industry producers' own annual reports and this was noted in the investigation.
211. But crucially, there was nothing to indicate that any of these cost increases were structural and permanent, rather than temporary cost increases attributable to certain events, which the agricultural sector commonly faces from time to time. In contrast, the situation of increasing, low-priced imports from the EU would have been permanent, in light of the structural factors influencing EU exporters' behaviour, namely the nature of the subject product as an unwanted product in the EU, which allows for opportunistic export practices.¹⁴⁹ Consequently it was the increase in EU imports which threatened to cause further serious injury or disturbance, not the increases in the SACU domestic industry's costs.
212. This is supported by the further information put forward by the EU:
- a. Feed costs – The graphs put forward by the EU show that there was an increase in feed costs, with the costs peaking in early 2014 and the end of 2015 /

¹⁴⁵ Commission Regulation (EC) No 1069/97 of 12 June 1997 imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, available [here](#), para 103.

¹⁴⁶ *Ibid.* The EU antidumping duty was also reviewed in WTO dispute settlement and although the measure was found to be inconsistent with the WTO Anti-Dumping Agreement ("*WTO ADA*") for other reasons, no violation of the causation requirement in Article 3.5 of that Agreement was established. A summary of the proceedings is available [here](#).

¹⁴⁷ Council Regulation (EC) No 1193/2008 of 1 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duties imposed on imports of citric acid originating in the People's Republic of China, available [here](#), para 61.

¹⁴⁸ *Ibid.*

¹⁴⁹ See para 1 and footnote 2 above.

beginning of 2016.¹⁵⁰ However, the same graphs show that costs subsided again in 2016 and 2017, indicating that any effect would have been temporary.¹⁵¹ This is because, as admitted by the EU, the increase was caused by an exceptional event, namely a severe drought that has been described as the "*worst drought since 1992*".¹⁵²

The EU also asserts that most of the soya oilcake used in production of feed had to be imported and was subject to a 6.6% duty.¹⁵³ While this may be factually correct, it is not clear why the EU considers that this advances its submission. Numerous raw materials are subject to customs duties and such duties simply represent part of the ordinary costs that industries bear as part of their business

- b. Labour costs – The EU puts forward information in relation to increased labour costs deriving from alleged labour market unrest in 2014-15,¹⁵⁴ but does not submit any information indicating that these problems were still being felt in 2016, or would have been expected to continue going forward.

SACU must also point out that the EU has misrepresented certain of the evidence it has put forward in relation to labour costs. First, the OECD report to which the EU refers as evidencing labour market unrest,¹⁵⁵ explains that this unrest "*was largely the result of an almost six-month-long strike in the platinum mining sector, and a broader one-month strike by metal workers involving 220,000 employers and 12,000 companies*".¹⁵⁶ Suffice to say, this labour market unrest is not relevant to the poultry sector. Second, a statement in RCL Foods' 2014 annual report that the EU refers to as evidencing increased labour costs,¹⁵⁷ in fact concerns RCL Foods' Vector Logistics, its supply chain business,¹⁵⁸ not its poultry business.

- c. Diesel costs – The EU puts forward information on diesel prices from a South African technology website "My Broadband",¹⁵⁹ which the EU states, "*shows a dramatic increase in inland diesel prices in South Africa from 2010 to 2014*".¹⁶⁰ The use of a technology website to source diesel prices is peculiar. But more fundamentally, the EU only reproduces data from 2010 to 2014. It does not reproduce the data from the same website for 2015 and 2016, which shows that diesel prices again subsided to lower levels. SACU reproduces the full data from 2010 to 2016 below:

¹⁵⁰ EU FWS, para 182.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ EU FWS, para 181.

¹⁵⁴ EU FWS, paras 186-187.

¹⁵⁵ Exhibit EU-34.

¹⁵⁶ *Ibid.*, page 12.

¹⁵⁷ Exhibit EU-35, page 34.

¹⁵⁸ The relevant section in the annual report is headed "*Vector Market Conditions and Review of Operations*".

¹⁵⁹ Available [here](#).

¹⁶⁰ EU FWS, para 189.

	Petrol – 93 Unleaded	Petrol – 95 Unleaded	Diesel – 500PPM	Diesel – 50PPM
Jan 2010	R7.67	R7.86	R6.90	R6.92
Jan 2011	R8.58	R8.73	R7.84	R7.90
Jan 2012	R10.43	R10.61	R10.28	R10.33
Jan 2013	R11.65	R11.86	R11.11	R11.16
Jan 2014	R13.36	R13.57	R12.87	R12.91
Jan 2015	R11.02	R11.24	R10.28	R10.33
Jan 2016	R12.09	R12.37	R10.05	R10.11

Again, this shows that while the SACU domestic industry faced increased costs, there was nothing to indicate that these were not the product of temporary volatility. It also, regrettably, serves as another example of the EU's approach in providing misleading information

- d. Electricity costs – The EU states that, "*In 2014, South Africa's economy faced uncertainty around electricity supply and government policy (particularly relating to the resources and agricultural sectors). Electricity generation was hit by a large-scale plant failure in the latter part of the year, leading to power outages continuing well into 2015*".¹⁶¹ The EU does not however refer to any sources for these assertions, save for RCL Foods' 2014 annual report. The particular statement to which the EU refers however, as explained above, relates to RCL Foods' Vector Logistics supply chain business, not its poultry business.¹⁶²

But in any event, the circumstances that the EU asserts, uncertainty around government policy and a plant failure both in 2014, represent exceptional events that would have led to temporary price increases. They do not suggest structural or permanent cost increases

- e. Plastic and cardboard boxes – The EU reproduces a chart from the 2015 annual results presentation of Mpact, a paper and plastics packaging and recycling business in Southern Africa, indicating the changes in the company's variable costs.¹⁶³ The EU then claims that this chart shows an increase in both plastic and paper costs, "*which inevitably would have raised costs of input for bone-in chicken producers that use these materials in poultry production and packaging*".¹⁶⁴

Looking at the chart in isolation, it shows an increase in 3.8% from 2014 to 2015 in plastic raw materials and an increase of 16.5% in paper raw materials. The 3.8% increase is insignificant and much lower than inflation¹⁶⁵ and can consequently be disregarded. The 16.5% increase in paper raw materials is of

¹⁶¹ EU FWS, para 186.

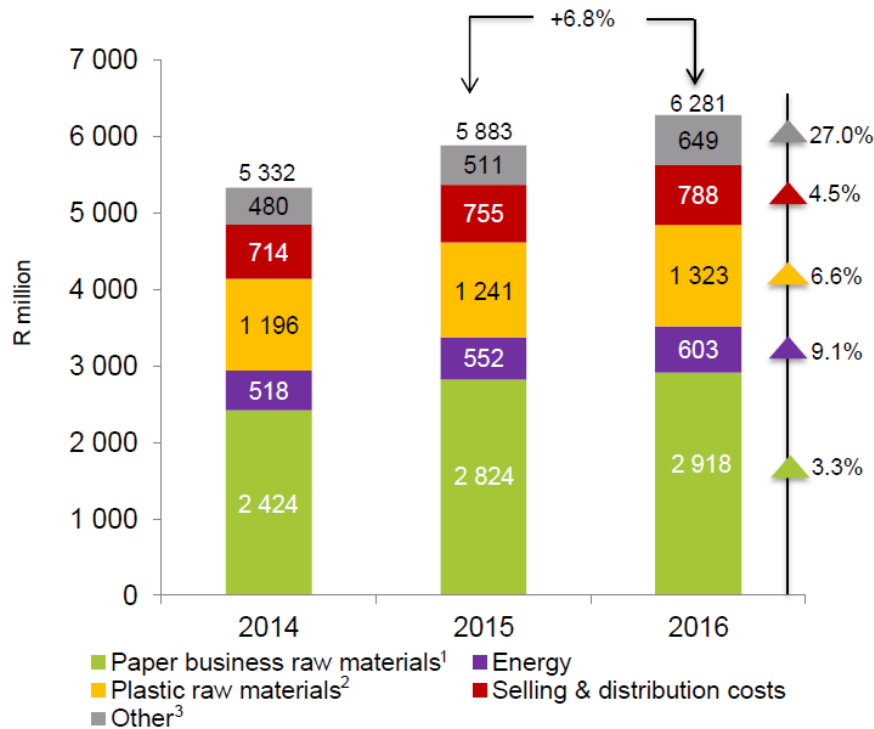
¹⁶² Exhibit EU-33, page 34.

¹⁶³ EU FWS, para 188.

¹⁶⁴ *Ibid.*

¹⁶⁵ Statistics South Africa's records indicate that South Africa's headline consumer price index was above 5% between January 2014 and January 2015 (see [here](#)).

course more significant. But the equivalent chart from Mpact's 2016 annual results presentation (reproduced below),¹⁶⁶ indicates that the position had since stabilised, with the increase in paper raw materials only being 3.3%, which is insignificant and below inflation.¹⁶⁷



In any event, it is important to recall that these charts represent the changes in variable costs experienced by a paper and plastics packaging *producer*. It does not automatically follow that this will be reflected in an increase in costs to the final customer, here the poultry producers, as this will be determined by various factors, including competitive conditions. Indeed, the same 2015 annual results presentation drawn on by the EU indicates that Mpact's selling prices and product mix for its plastics business in fact decreased by 4%.¹⁶⁸

213. In light of the above, the further information put forward by the EU in relation to the cost increases experienced by the SACU domestic industry does nothing to support its case.

(B) Non-EU imports

214. The further information put forward by the EU in relation to non-EU imports can be summarised as follows:

¹⁶⁶ **Exhibit SACU-20**, Mpact Results Presentation for the year ended 31 December 2016, page 12.

¹⁶⁷ Statistics South Africa's records indicate that South Africa's headline consumer price index was above 4% between January 2015 and January 2016 (see [here](#)).

¹⁶⁸ **Exhibit SACU-21**, 2015 Mpact Group Annual Results, 31 December 2015, page 7.

- a. Information in relation to the renewed African Growth and Opportunity Act ("AGOA"), explaining that South Africa in June 2015 agreed to allow a quota of 65,000 tonnes of US chicken, which was increased to 68,950 tonnes quarterly for the April 2019 – March 2020 quota year.¹⁶⁹
 - b. Quotations from various SAPA documents expressing concern over the impact of increased US and Brazil imports.¹⁷⁰
 - c. Data in relation to non-EU imports from December 2014 to December 2018, indicating that since the end of 2016 there has been an increase in non-EU imports.¹⁷¹
215. None of this further information advances the EU's position. SACU does not dispute that non-EU imports have increased since the end of 2016, and have become a source of competitive pressure on the SACU domestic industry. But this does not signify that non-EU imports are the cause of the injury or disturbance to the SACU domestic industry that occurred during the 2011-16 period.
216. On the contrary, non-EU imports only rose after the end of 2016 due to the restrictive measures on EU imports, namely: the provisional safeguard duties applied in December 2016; the SPS import restrictions imposed by South Africa during 2017-18 as a result of avian flu outbreaks in certain major poultry producing EU Member States; and the Measure at Issue itself, applied in September 2018. In other words, non-EU imports were effectively constrained by the potency of EU imports, and were only able to increase once the EU imports were themselves constrained by the restrictive measures that were applied.
217. This is evident from the import data in 2016. As noted by the EU, the new AGOA quota for US imports had been agreed in 2015, meaning that the conditions for non-EU imports to grow significantly were now in place. Yet, as pointed out in Section VI.D.2 above, the market share of non-EU imports only grew by a relatively minor 8 index points in 2016 while the market share of EU imports grew by a further 48 index points during that year. Indeed, EU imports were able to respond to the additional competition from US imports by decreasing in price in 2016, limiting any gains by non-EU imports, which they were able to do given the nature of the subject product as an unwanted product in the EU, which allows for opportunistic export practices.
218. The 2016 data clearly indicates that, if not for the restrictive measures, EU imports would have remained the dominant market force, to which non-EU imports would have continued to play a minor role. The 2016 data also exposes another important point – the effect of the increased non-EU imports would have been to draw lower prices from EU imports, thereby further exacerbating the damaging effects of the EU imports on the SACU industry. But crucially, the cause of this injury or disturbance has been and would have always remained, the EU imports. SACU reiterates that the Measure at Issue is justified not only by the serious injury or disturbance caused by the EU imports but also by the **threat** of further serious injury or disturbance caused by the maintenance of EU imports.

¹⁶⁹ EU FWS, paras 193 and 195.

¹⁷⁰ EU FWS, paras 194 and 197-198.

¹⁷¹ EU FWS, para 196.

219. In light of the above, the further information put forward by the EU in relation to non-EU imports does nothing to advance its submission and the EU's Claim 3 should be dismissed.

4. Conclusion

220. For the above reasons, it must be concluded that EU has failed to establish its Claim 3.

E. Comments on EU Claim 4, First Argument (geographic scope)

221. The EU's first argument concerns the respective geographic scopes of the Measure at Issue and the investigation.¹⁷² In particular, the EU argues that there is a disconnect between the scope of the Measure at Issue on the one hand, which covers the whole of SACU, and the scope of the investigation, which the EU claims was based on only import data relating to South Africa and serious injury or disturbance to the domestic industry in South Africa. According to the EU, this amounts to a violation of so-called "reverse parallelism",¹⁷³ a new term of art invented by the EU for the present arbitration.
222. The EU's arguments are unfounded as they are based on incorrect factual and legal premises, as SACU will explain below.

1. The Measure at Issue was based on import data that effectively covered the whole of SACU

223. The import data on which the Measure at Issue was based, emanated from the South African Revenue Service ("SARS") and concerned imports into South Africa. This import data effectively covered the whole of SACU, as the overwhelming majority of poultry imports in SACU as a whole would have come through South Africa, which has all of the major ports in Southern Africa.¹⁷⁴
224. This is confirmed by examining the relevant available import data at the 6 digit level that applies to the subject product, at tariff subheading 0207.14. The data set covers a broader range of frozen poultry products than the subject product concerned by the Measure at Issue (which concerned certain specific 8 digit tariff subheading lines for bone-in products),¹⁷⁵ but it provides a reasonable approximation of the balance of imports between South Africa and the other SACU Member States with respect to the subject product. The data shows that on average, imports into South Africa represented over 98% of all imports in SACU as a whole during the years 2011 to 2016 that were the subject of the investigation.¹⁷⁶
225. As explained at Section V.C above, the EU as the complaining party bears the burden of proof and must substantiate its assertions. The EU has not, however, adduced any evidence to show that SARS import data would not cover practically all imports of frozen bone-in chicken cuts into the SACU region.

¹⁷² EU FWS, paras 205-216.

¹⁷³ EU FWS, para 208.

¹⁷⁴ This fact appears to be appreciated by the EU – see para 211.

¹⁷⁵ For instance, whereas the import volume of the subject product in South Africa was 126,116 tonnes in 2011, the import volume of the frozen poultry products constituting tariff subheading 0207.14 was 177,236 tonnes during that year.

¹⁷⁶ See **Exhibit SACU-22**. Source: ITC Trade Map data, available at <https://www.trademap.org/>.

226. Moreover, SACU is a customs union of developing countries and four of the five SACU Member States, Botswana, Eswatini, Lesotho and Namibia, do not have ready access to import data into their territories at the 8 digit level. This is something that the EU is well aware of from the discussions in the EU-SADC EPA Joint Council *[[***]]*.
227. In light of these difficulties and given that the overwhelming majority of poultry imports in SACU as a whole would have come through South Africa, it was entirely justified for SACU to base the Measure at Issue on data from SARS. Any other approach would have the effect of nullifying SACU's ability to avail itself of the bilateral safeguards regime under Article 34, which is expressly provided for. It would also discriminate against developing countries and undermine the development objectives of the EU-SADC EPA.
228. In any event, SACU is a customs union with a common external tariff. The EU-SADC EPA therefore recognises the right of SACU to apply safeguard measures uniformly to the whole of its territory by providing in Article 34 that measures can be imposed by a SADC Member State (for example Mozambique which is not part of SACU) or by SACU "as the case may be". The special circumstances of SACU requiring this approach is recognised in a recital to the EU-SADC EPA stating:
- "RECOGNISING the particular case of the Southern African Customs Union ('SACU') established under the Southern African Customs Union Agreement, 2002, between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland, signed on 21 October 2002 ('SACU Agreement')"*
229. This was explained to the EU Member States when the European Commission proposed the signature and provisional application of the EU-SADC EPA in the following terms:
- "The EPA is designed to be compatible with the operation of SACU, in particular by fully harmonising SACU's import trade regime. SACU presents a single external schedule of tariffs and quota arrangements applied to imports from the EU."¹⁷⁷*
230. The attempt by the EU to impose a new obligation of "reverse parallelism" on SACU and its Member States is not only outside the Terms of Reference of the Panel (as explained in Section IV.E above), it is also incompatible with the EU-SADC EPA. In any event, SACU reserves the right, as with the other claims that it considers are outside the Terms of Reference of the Panel, to bring further arguments once the matter is clarified.
- 2. The data used to assess serious injury or disturbance to the domestic industry related to SACU as a whole and / or a sufficiently representative part of the domestic industry**
231. The EU claims that only data in relation to serious injury or disturbance to the domestic industry in South Africa was examined because the participating producers

¹⁷⁷ **Exhibit SACU-23**, European Commission, Proposal for a Council Decision on the signing and provisional application of the EU-SADC EPA, Explanatory Memorandum, 22 January 2016, page 4.

that provided the data in relation to certain of the serious injury or disturbance factors were all based in South Africa. Consequently, it asserts, serious injury or disturbance to SACU as a whole has not been demonstrated and the Measure at Issue is unlawful.

232. The EU's arguments are both factually and legally incorrect. First, it is not true that only data in relation to serious injury or disturbance to the domestic industry in South Africa was examined. When the investigation was transitioned from the TDCA to the EU-SADC EPA, the scope of the investigation was expended to encompass all SACU Member States and SAPA provided updated information in relation to SACU as a whole.
233. Estimates for non-South African production were made by SAPA based on information provided by the Participating Producers and Leading-Edge Poultry Software CC, the main poultry market intelligence operator in Southern Africa. SAPA estimated that South African production of the product in question represented approximately 95% of total SACU production and used this estimate to update the production, sales and market share information.
234. This represented a conservative estimate. Indeed, according to data from FAOSTAT, the database of the UN Food and Agriculture Organisation, the other SACU Member States accounted for only 1.33% of the total volume of chicken meat produced in SACU in 2016.¹⁷⁸ Consequently, South African production of the subject product in fact represented 98.67% of total SACU production.
235. Second, and the above notwithstanding, it was not necessary to take into account information on injury or disturbance in the domestic industry in other SACU Member States. As demonstrated by established practice in trade defence investigations, injury or disturbance can be established with respect to a proportion of the domestic industry that is sufficiently representative. In this regard, the EU in its own domestic legislation on safeguard procedures only requires that negative effects are established in relation to "*a major proportion of the total Union production*".¹⁷⁹ That EU legislation does not require the conditions to be satisfied in respect of each of its Member States.
236. In this regard, as explained above, South African production represented at least 95% of total SACU production, while the participating producers represented approximately 70% of total SACU production. The data assessed in the investigation is therefore evidently sufficiently representative and in any event, would clearly represent a "major proportion" of total SACU production.
237. The EU surely cannot be arguing that this notwithstanding, it was still necessary to assess the domestic industry in the other SACU Member States. Such a proposition would in effect require that customs unions assess the domestic industry in every single Member State, even if they represented an insignificant proportion of the overall domestic industry (as Botswana, Eswatini, Lesotho and Namibia do here).

¹⁷⁸ FAOSTAT's database indicates that a total of 1,700,463 tonnes of chicken meat were produced by the SACU Member States. South African production accounted for 1,677,838 tonnes (approximately 98.67%), while the remaining SACU Member States combined accounted for 22,625 tonnes (approximately 1.33%). See **Exhibit SACU-24**.

¹⁷⁹ Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, available [here](#), Article 4(3)(c).

Suffice to say, this does not represent the European Commission's own practice in EU safeguard or other trade-defence investigations.¹⁸⁰

238. Finally, the EU neglects to mention that following the broadening of the investigation to include other SACU Member States, letters of support were received from the domestic industries in the other SACU Member States. In particular, letters of support were received from the Botswana Poultry Association, the Basotho Poultry Farmers Association, Namib Poultry (PTY) Limited, the Poultry Producers' Association of Namibia and the Swaziland Poultry Association. The members of these associations comprise substantially all the commercial producers in the other SACU Member States.
239. For the above reasons, if the EU's Claim 4 should be found to be within the Panel's Terms of Reference, it should be dismissed as unfounded.

F. Comments on EU Claim 4, Second Argument (level of the Measure at Issue)

240. The EU's second argument concerns the level of the Measure at Issue.¹⁸¹ Specifically, the EU argues that the Measure at Issue exceeds what is necessary to remedy or prevent the serious injury or disturbance, the "safeguard level requirement", on three bases: (i) other factors allegedly contributing to the serious injury or disturbance were not appropriately taken into account; (ii) the fact that imports had decreased in 2017 was not taken into consideration; and (iii) the anti-dumping duties that had been adopted previously for the same products were not taken into consideration.
241. The EU's arguments are based on incorrect factual premises and should therefore be dismissed, as SACU will explain below.
242. First however, SACU notes that the safeguard level requirement that is subject of this claim does not apply to the Measure at Issue because it is Article 34(5) of the EU-SADC EPA that is applicable and that provision does not contain the words on which the EU relies. As SACU has observed in Section IV.B above, Article 34(5) of the EU-SADC EPA is the legal basis available to SADC States and SACU as developing countries and is the counterpart of Article 34(4) of the EU-SADC EPA which is available for the EU's developing outermost regions. Just like Article 34(4), Article 34(5) does not contain the words on which the EU is relying in this claim.
243. SACU will now proceed subsidiarily to address the EU's arguments, for the eventuality that the Panel should nonetheless decide to examine them.

¹⁸⁰ Indeed, the European Commission simply relies on the data provided by the specific cooperating domestic producers, irrespective of whether they cover every Member State within the EU. The European Commission also often relies on data provided only by a sample of domestic producers (selected by the European Commission), which represents even narrower coverage. By way of example, in its recent *MEG anti-dumping investigation*, the European Commission relied on a sample of three domestic producers in Belgium and Germany only, notwithstanding that the domestic industry also included significant producers in France, Spain, the Netherlands, Poland and Sweden. See Commission Implementing Regulation (EU) 2021/939 of 10 June 2021 imposing a provisional anti-dumping duty on imports of mono ethylene glycol originating in the United States of America and the Kingdom of Saudi Arabia, available [here](#), paras 65-67.

¹⁸¹ EU FWS, paras 217-240.

1. The level of the Measure at Issue is calibrated precisely to the impact of the EU imports

244. Referring to its Claim 3 regarding the non-attribution analysis, the EU argues that SACU failed appropriately to take into account other factors allegedly contributing to the serious injury or disturbance, namely the volatility of feed raw material prices, the increase in costs of labour, diesel, electricity, plastic and cardboard boxes, duties imposed on the soya oilcake used in production of feed and imports from other countries. As a consequence, the EU claims that the Measure at Issue was therefore not limited to the extent necessary because the level of the safeguard duty could not have taken into account the impact of these other factors.¹⁸²
245. SACU has explained in Section VI.D above why the EU's Claim 3 regarding the non-attribution analysis is unfounded and consequently the EU's related argument in the context of the level of the Measure at Issue must also fail. But even putting this to one side, the EU's argument, in any event, rests on a fundamental misunderstanding of the methodology that was used to set the Measure at Issue.
246. This methodology was fully disclosed during the investigation¹⁸³ and was provided to the TDC and again to the EU during the consultations. As explained, the level of the Measure at Issue was set based on a price-disadvantage calculation, which compared the average FOB price of EU imports with an unsuppressed selling price, with the safeguard measure being set at the level of the price disadvantage. The unsuppressed selling price was constructed on the basis of production costs, selling, general and administrative expenses, plus a reasonable profit margin, which was assessed as 8%.
247. The level of the Measure at Issue was therefore determined based on the relative prices of EU imports and a constructed non-injurious or non-disturbing price and therefore entirely on the price pressure exerted by the EU imports. As explained in SACU's response the EU's Claim 3 in Section VI.D.3 above, many factors influence the cost of producing poultry and they vary constantly to a greater or lesser extent. As a result of the above methodology however, the level of the Measure at Issue was designed to directly remove the price pressure exerted by the increased imports so as to prevent the threatened continuation of disturbance.
248. It should be noted that this kind of methodology is commonly deployed in trade defence investigations, including by the EU itself. The European Commission's decisions in relation to its *Steel Safeguard* measures serve as a good example.¹⁸⁴ In these decisions, the European Commission had identified four factors that contributed to the injury being experienced by the EU domestic industry apart from the increase in imports, namely, a decline a domestic consumption, a decline in exports, excess capacity and ongoing rationalisation efforts by the EU domestic

¹⁸² EU FWS, paras 224-227.

¹⁸³ Exhibit EU-8, 3rd Essential Facts Letter, 14 August 2017, paragraph 4 and **Exhibit SACU-25**, ITAC letter of 20 September 2016, version available on ITAC's non-confidential file.

¹⁸⁴ Commission Regulation (EC) No 560/2002 of 27 March 2002 imposing provisional safeguard measures against imports of certain steel products ("EU Provisional Safeguards Decision") available [here](#); and Commission Regulation (EC) No 1694/2002 of 27 September 2002 imposing definitive safeguard measures against imports of certain steel products ("EU Definitive Safeguards Decision"), available [here](#).

industry.¹⁸⁵ Like the present case however, the EU considered that these factors did not displace the causal link between the injury and the increased imports, and went on to set a safeguard measure using an out-of-quota rate based on similar price disadvantage calculation which compared the average price of imports with an unsuppressed selling price ("underselling margin").¹⁸⁶ Furthermore, and like the present case, the unsuppressed selling price was based on the cost of production, plus a profit margin of 8%.¹⁸⁷ In other words, the EU itself has deployed the same methodology as SACU to set the level of safeguard measures in comparable circumstances to the present case.

249. It may be further noted that the European Commission has in many cases set a higher profit margin than 8%. By way of example, in the European Commission's recent decision in its *Pneumatic Tyres anti-dumping investigation*,¹⁸⁸ the European Commission used a profit margin of 17.9% for most of the product segments under investigation.¹⁸⁹ Indeed, in certain cases, the European Commission has even gone further to assess a profit margin at a higher level than what was considered normal for the domestic industry in order to recover from the past injury caused by imports.¹⁹⁰
250. Finally, the EU neglects to mention in the context of its Claim 4, the mechanism for the phase-down of the Measure at Issue. Indeed, the duty was set at 35.3% for less than six months, before being reduced to 30% in March 2019, to 25% in March 2020 and finally to 15% in March 2021, prior to its expiry on 11 March 2022. This further serves to ensure that the Measure at Issue does not exceed what is necessary to remedy or prevent the serious injury or disturbance.
251. The EU's arguments in relation to the methodology used to set the Measure at Issue are therefore not only illogical but also disingenuous. They should be dismissed.

2. The period from January 2017 to March 2018 was unrepresentative and therefore correctly was not taken into account

252. The EU argues that the level of the Measure at Issue exceeds what is necessary because the period from January 2017 to March 2018, in which EU imports decreased compared to the POI, was not taken into account.¹⁹¹

¹⁸⁵ See EU Definitive Safeguards Decision, para 667, for an example in relation to one of the product categories.

¹⁸⁶ EU Definitive Safeguards Decision, para 696. Further details of the methodology are set out in the EU Provisional Safeguards Decision, para 68.

¹⁸⁷ EU Provisional Safeguards Decision, para 68.

¹⁸⁸ European Commission Implementing Regulation (EU) 2018/1579 of 18 October 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163, available [here](#).

¹⁸⁹ *Ibid*, paras 301-325. The European Commission used a profit margin of 9.2% for the remaining product segment under investigation.

¹⁹⁰ See for example, European Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, available [here](#), at paras 48-49.

¹⁹¹ EU FWS, paras 228-232.

253. As explained in SACU's response to the EU's Claim 2, the level of imports during the period from January 2017 to March 2018 cannot be considered as representative for two reasons.
254. First, the level of EU imports was significantly impacted by the temporary SPS import restrictions that were imposed by South Africa as a result of avian flu outbreaks in certain major poultry producing EU Member States, as explained in Section VI.C.2 above. When such SPS import restrictions have been lifted in the past, the volume of EU imports has rebounded significantly and the same would have been expected with respect to the 2017-18 import restrictions given the nature of the subject product as an unwanted product in the EU, which allows for opportunistic export practices.
255. Second, the level of imports into SACU from the EU was undoubtedly affected by the provisional safeguard measures that were imposed in December 2016 and were in place until July 2017. In accordance with established practice in trade defence investigations, including the European Commission's own practice, the period during which provisional measures are imposed is never taken into account.

3. The existing anti-dumping duties were appropriately taken into account in setting the level of the Measure at Issue

256. Finally, the EU argues that the Measure at Issue exceeds what is necessary on the ground that SACU failed to reflect the existing anti-dumping duties on imports from certain EU Member States in setting the level of the Measure at Issue.¹⁹² The EU acknowledges that the existing anti-dumping duties were taken into account by adjusting the average EU FOB import price used in the price-disadvantage calculation by 3.3%. According to the EU however, this adjustment is insufficient as it would still result in an excessive duty for the individual exporters subject to anti-dumping duties.¹⁹³ The EU also argues that there was a lack of disclosure as to how taking into account the existing anti-dumping duties resulted in the initial level of the Measure at Issue at 35.3%.¹⁹⁴
257. The EU's arguments are again disingenuous as well as unfounded and should be dismissed. First, it is worthwhile clarifying at the outset that contrary to what may be suggested by the EU, there is no principled reason, even under the jurisprudence in relation to the WTO SGA, which is inapplicable here, that prevents the imposition of both anti-dumping and safeguard duties. This is because they are different remedies addressing different trading situations, dumping on the one hand and substantial increases in imports on the other.¹⁹⁵ Safeguard measures are applied to a product irrespective of the behaviour of any particular exporter whereas anti-dumping measures do in principle take account of individual behaviours and circumstances.
258. Indeed, the EU itself has frequently applied safeguard measures in conjunction with other trade-defence measures, most recently in the context of its *Steel Safeguard* measures, where the European Commission explained that:

¹⁹² EU FWS, paras 233-240.

¹⁹³ EU FWS, para 237.

¹⁹⁴ EU FWS, para 238.

¹⁹⁵ See in this regard, Appellate Body Report, *Argentina – Footwear (EC)*, para 94.

"anti-dumping and countervailing duty measures do not seek to close the Union market but merely remedy injurious trading practices. As such, these measures target country-specific situations of dumping and subsidisation, have a different scope of application and purpose than the safeguard measure imposed by way of this Regulation, and are not mutually exclusive." ¹⁹⁶

259. Second, whereas in its decision imposing definitive *Steel Safeguard* measures the European Commission took no action to address the existing trade defence measures, simply stating that *"the Commission will explore the need to address the issue at a later stage and in due course"*,¹⁹⁷ this issue was addressed upfront in the design of the Measure at Issue. As acknowledged by the EU, an adjustment of 3.3% was added to the average EU FOB import price used in the price-disadvantage calculation in order to take into account existing anti-dumping duties. As explained during the investigation, the adjustment was calculated based on information on the actual anti-dumping duties paid as a percentage of all imports from the EU.¹⁹⁸
260. This approach cannot be criticised in the circumstances. The safeguard investigation related to imports from the EU as a whole, not individual Member States or individual exporters. The FOB price used to calculate the price disadvantage was therefore the average FOB price for EU imports as a whole – for the price disadvantage calculation to be coherent, the anti-dumping duties also therefore had to be allocated across all imports. Furthermore, as noted by the EU, the majority of EU imports during Q1 2016 were already subject to anti-dumping duties, which again, logically militates towards taking the approach of averaging the existing anti-dumping duties across all imports.
261. The alternative would have been to assess individual price disadvantages and therefore individual safeguard measures for each EU exporter. There is no basis for such an approach and indeed it is not applied in the context of safeguard investigations, which relate to the totality of imports. It would, in any case, have been overly complex and burdensome to apply given the sheer number of poultry exporters across the EU's then 28 Member States.¹⁹⁹ This would have been entirely disproportionate, especially given that the majority of EU imports were subject to anti-dumping duties, as noted above. Article 34 of the EU-SADC EPA provides for a single safeguard tariff to be applied to all imports. Individual treatment of importers is not envisaged in safeguard measures, neither in the EU-SADC EPA, nor even at the WTO.
262. While the EU argues that the 3.3% adjustment to the average FOB price is insufficient as it would still result in an excessive duty for the individual exporters subject to anti-dumping duties, the EU neglects to mention that this is balanced out by the benefit of the adjustment to those exporters that were not subject to anti-

¹⁹⁶ Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, available [here](#), para 186.

¹⁹⁷ *Ibid.*, para 186.

¹⁹⁸ Exhibit EU-8, 3rd Essential Facts Letter, 14 August 2017, paragraph 4.

¹⁹⁹ The composition of the EU's poultry trade association, AVEC, is instructive in this regard. Its membership comprises national poultry organisations in 16 EU Member States which in turn, have very high numbers of members and therefore possible exporters. By way of example, the website of the German poultry organisation, ZDG, states that it has approximately 8,000 members, alone.

dumping duties. The impact on the level of EU trade at the overall level is therefore appropriate, and consequently the EU cannot argue that the Measure at Issue exceeds what is necessary.

263. Finally, while the EU complains about an alleged lack of disclosure regarding the adjustment, this is belied by the fact that the EU itself describes how the adjustment featured as part of the price-disadvantage calculation.²⁰⁰ In any event, as mentioned above,²⁰¹ the methodology for setting the level of the Measure at Issue, including making the adjustment to the average FOB price, was fully disclosed during the investigation.²⁰² Thus, even though there is no requirement in Article 34 of the EU-SADC EPA to disclose information to interested parties, ITAC did so as required by its domestic legal framework, going beyond the requirements of the EU-SADC EPA. The methodology was also provided again to the EU during the consultations.

4. Conclusion

264. For the above reasons, it must be concluded that the EU has failed to establish its Claim 4.

G. Comments on EU Claim 5 (information provision to the TDC)

265. The EU argues that the Measure at Issue was adopted in breach of Articles 34(7)(a), (b) and (c) of the EU-SADC EPA, on the basis that the TDC was not provided with all relevant information. Specifically, the EU argues that the TDC was not provided with: (i) adequate information on the comparison of the prices of domestic and imported products;²⁰³ (ii) adequate information on the unsuppressed selling price calculation;²⁰⁴ and (iii) actual data in relation to certain of the serious injury or disturbance factors, but only indexed data.²⁰⁵
266. Although the EU refers to three provisions at the start of its Claim 5, namely, Articles 34(7)(a), (b) and (c), it is clear that its arguments only relate to the information requirements under Article 34(7)(c), which provides that before taking any safeguard measures, the relevant Party must "*supply the [TDC] with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the parties concerned*".²⁰⁶
267. In addressing the EU's Claim 5, SACU will first set out preliminary observations on the proper interpretation of this provision, before addressing each of the EU's points in turn.

²⁰⁰ EU FWS, para 237.

²⁰¹ See para 246.

²⁰² Exhibit EU-8, 3rd Essential Facts Letter, 14 August 2017, paragraph 4 and **Exhibit SACU-25**, ITAC letter of 20 September 2016, version available on ITAC's non-confidential file.

²⁰³ EU FWS, para 243.

²⁰⁴ EU FWS, paras 244-245.

²⁰⁵ EU FWS, para 246.

²⁰⁶ Indeed, this is the only provision that the EU specifically quotes from in support of its Claim 5 (see EU FWS, para 241). Article 34(7)(a) EPA requires the relevant Party to refer the situation to the TDC and Article 34(7)(b) EPA requires that the Party may only take safeguard measures if the TDC does not make any recommendation to remedy the circumstances or no other satisfactory solution has been reached within 30 days. There is no question that SACU did not comply with the requirements of these Articles.

1. The EU distorts the meaning of Article 34(7)(c) of the EU-SADC EPA

268. The EU equates Article 34(7)(c) of the EU-SADC EPA with the disclosure obligations that apply to an investigating authority imposing trade defence measures under WTO law, referring to various WTO case-law and explaining that the purpose behind such disclosure is "*to ensure fairness and due process and to enable interested parties to pursue judicial review of the investigative authority's decision*".²⁰⁷
269. This entirely misconstrues the purpose of Article 34(7)(c) of the EU-SADC EPA and distorts its meaning.
270. First, and as explained in Section V.A above, WTO case-law cannot be simply translated across to the present case. Rather, the Measure at Issue must be assessed in light of the specific requirements under Article 34 of the EU-SADC EPA, and not requirements based on other provisions that are inapplicable to the Measure at Issue. The WTO case-law referred to by the EU relates to specific express obligations regarding the provision of detailed information regarding the authority's final determination to interested parties, publication and judicial review of such determinations,²⁰⁸ and the WTO case-law referred to by the EU is based specifically on those provisions.
271. By way of example, the WTO case-law drawn upon by the EU relates, *inter alia*, to the following provisions of the WTO ADA:
- a. Article 6.9, which appears in a section entitled, "Evidence", and which required that: "*The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.*"
 - b. Article 12.2, which appears in a section entitled "Public Notice and Explanation of Determinations", and which requires that: "*Public notice shall be given of any preliminary or final determination, whether affirmative or negative [...]. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.*"
 - c. Article 12.2.2, which appears in the same section, and which requires that: "*A public notice of conclusion or suspension of an investigation providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information*

²⁰⁷ EU FWS, para 241.

²⁰⁸ WTO ADA, Articles 6.9, 12.2, 12.2.1 and 13; WTO Agreement on Subsidies and Countervailing Measures ("WTO ASCM"), Articles 12.8, 22.3, 22.4, 22.5 and 23 and WTO SGA. Articles 3.1, 3.2 and 4.2(c).

described in subparagraph 2.1, [including a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value] as well as the reasons for the acceptance or rejection or relevant arguments or claims made by the exporters and importers [...]."

- d. Article 13, entitled "Judicial Review", which requires that: *"Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, internal alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations [...]. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question."*
272. Article 34(7)(c) of the EU-SADC EPA on the other hand, only requires that the relevant Party must, *"supply the [TDC] with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the parties concerned."* The purpose of Article 34(7)(c) is therefore not to enable "interested parties to pursue judicial review" or for the TDC and the EU to "second-guess" SACU's assessment of whether the requirements of Article 34(5) of the EU-SADC EPA have been met. But rather, it is to provide the TDC with sufficient information in order to consider and put forward an alternative solution to the application of the proposed safeguard measures that may be acceptable to the Parties.
273. It is clear that sufficient information was provided to the TDC in order for this function to be discharged. In particular, SACU provided the TDC with: (i) the ITAC summary report; (ii) a complete copy of ITAC's non-confidential file in the investigation; and (iii) the methodology for calculating the price disadvantage on which the level of the Measure at Issue was based. Furthermore, on the basis of the information provided, the EU was able to put forward possible alternatives to the proposed safeguard measure that the EU specifically indicated would be considered as acceptable to it, namely that SACU either: (i) apply a safeguard duty at only 13.9%, in line with the provisional measure; (ii) take into account data until mid-2017, which would lead to a lower level of duty; or (iii) apply a lower price disadvantage and consequently, a lower level of duty.²⁰⁹ While these proposals were rejected by SACU, it is therefore clear that sufficient information was provided to the TDC in order to seek a solution that may be acceptable to the Parties.
274. Indeed, while DG Trade may have complained about the information provided to it earlier as an interested party during the investigation, the EU notably did not request any further information in the context of the lengthy TDC discussions themselves in relation to the proposed safeguard measure, namely, at the TDC meeting of 21 October 2017,²¹⁰ in its written submission of 31 October 2017 to SACU following that TDC meeting,²¹¹ in the Joint SADC EU-EPA Technical Consultative Meeting

²⁰⁹ Exhibit EU-27, EU submission of 31 October 2017 following the TDC meeting dated 31 October 2017, page 4. The EU introduced these proposals stating as follows: *"the Commission submits that there are basically three possible approaches to come to a remedy that could be acceptable to the parties concerned"*.

²¹⁰ *[[***]]*

²¹¹ Exhibit EU-27, EU submission of 31 October 2017 following the TDC meeting dated 31 October 2017.

on 24 November 2017 that the Parties agreed to hold following that TDC meeting,²¹² and finally, at the TDC meeting of 22 and 23 February 2018.²¹³

275. The EU's arguments are consequently contradicted by its behaviour at the TDC discussions themselves, which is the pertinent forum for the purposes of Article 34(7)(c) of the EU-SADC EPA. The EU's Claim 5 should therefore be seen for what it is – a cynical *ex post* attempt to impugn the Measure at Issue.
276. SACU will nevertheless proceed to address the specific areas of information provision that the EU argues was inadequate.

2. Adequate information was provided on the comparison of the prices of domestic and imported products

277. The EU argues that DG Trade was not provided with adequate information that would enable it to understand the comparison of the prices of domestic and imported products. The EU admits that the ITAC summary report that was provided to the TDC explained that "*the landed cost [of the imported product] includes all costs incurred from the ex-factory export price of R14.91/kg plus 14% shipping, insurance and clearing costs to where the goods cleared in the SACU*" (emphasis added by EU).²¹⁴ But the EU complains that ITAC did not explain how it reached this figure of 14%. The EU argues that such an explanation was "*critical for the EU*" to understand the methodology and refers to WTO case-law that found that non-disclosure of facts relating to price comparisons of domestic and imported products violated WTO disclosure obligations.²¹⁵
278. SACU is puzzled by this complaint. It was explained that the 14% figure was added based on shipping, insurance and clearing costs. The EU was therefore provided with sufficient information to understand the basis for the 14% adjustment and could have contested the use of this figure if it so wished.
279. SACU further points out that the WTO case-law on which the EU relies,²¹⁶ concerns specific disclosure obligations under the WTO ADA and WTO ASCM for the purposes of allowing interested parties to contest the authority's findings,²¹⁷ which are not to be found in Article 34(7)(c) of the EU-SADC EPA.²¹⁸ The EU does not

²¹² **[[***]]**

²¹³ **[[***]]**

²¹⁴ EU FWS, para 243. SACU notes that the EU is incorrect to claim that this information was only provided to the EU in the ITAC summary report – it had already been provided in the SAPA Updated Information, 12 June 2017 (Exhibit EU-23), pages 18, 19, 20, 21, 35, 36, 43 and 46; and by ITAC itself earlier during the investigation (see para 246 above).

²¹⁵ EU FWS, para 243.

²¹⁶ Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII p. 6251 ("*China – GOES*"), para 251.

²¹⁷ Namely, Article 6.9 WTO ADA which as noted above, provides that, "*The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests*", and Article 12.8 WTO ASCM, which provides for something very similar.

²¹⁸ Furthermore, the case-law on which the EU relies can also be distinguished on its own facts, as the trade authority in question essentially provided no information *whatsoever* about the price comparison, with the Appellate Body noting that: "*the Preliminary Determination and the Final Injury Disclosure only*

explain how the provision of further information in relation to the 14% adjustment would have led the Parties to find an alternative acceptable solution to the proposed safeguard measure, within the meaning of Article 34(7)(c).

280. The EU's claim in relation to information provided on the comparison of the prices of domestic and imported products should therefore be dismissed.

3. Adequate information was provided on the unsuppressed selling price calculation, including the profit margin used

281. The EU argues that it was not provided with adequate information on the unsuppressed selling price calculation, and in particular, the specific profit margin used. The EU claims that the profit margin was only provided for the first time at the consultations held on 13 September 2019 and this hampered the EU in seeking a solution acceptable to the Parties within the meaning of Article 34(7)(c) of the EU-SADC EPA. The EU claims that this also "*robbed the EU from exercising its rights of defence during the ITAC's safeguard proceeding*".²¹⁹
282. Again, SACU has been left puzzled by this complaint. The methodology for the price disadvantage calculation, including the unsuppressed selling price calculation methodology and the 8% profit margin used, was disclosed during investigation. The full methodology was set out in the context of the provisional measure²²⁰ and it was explained in the 3rd Essential Facts Letter that the methodology for the proposed final measure would be the same as used for the provisional measure.²²¹ For ease of reference, SACU reproduces the methodology as was disclosed in the context of the provisional measure:

"Unsuppressed Selling Price (2015)

<i>Total cost of production</i>	<i>R*****/kg</i>
<i>+8% profit</i>	<i>R*****/kg</i>
<i>+SG&A</i>	<i>R*****/kg</i>
<i>Total</i>	<i>R*****/kg</i>

Landed cost (2015)

<i>Fob</i>	<i>R15.10/g</i>
<i>Freight and insurance (14%)</i>	<i>R2.11/kg</i>
<i>Total</i>	<i>R17.21/kg</i>
<i>3.3% AD</i>	<i>R0.57/kg</i>
<i>Total</i>	<i>R17.78/kg</i>

Price disadvantage

state that subject imports were at a 'low price', without providing any facts relating to the price comparisons of subject imports and domestic products" (para 251).

²¹⁹ EU FWS, paras 244-245.

²²⁰ **Exhibit SACU-25**, ITAC letter of 20 September 2016, version available on ITAC's non-confidential file.

²²¹ Exhibit EU-8, 3rd Essential Facts Letter, 14 August 2017, paragraph 4.

<i>Unsuppressed SP</i>	<i>R*****/kg</i>
<i>Landed cost</i>	<i>R17.78/kg</i>
<i>Price disadvantage</i>	<i>R*****/kg</i>
<i>% of FOB (R15.10)</i>	<i>13.4%</i>

283. The full methodology was therefore disclosed, including the specific profit margin used.
284. As explained in Section III above, ITAC's full non-confidential file was provided to the TDC, including the document containing this information. The methodology itself was also separately provided to the TDC. The fact that the EU was already aware at the TDC stage of the specific profit margin used is indeed apparent from the *[[***]]*²²².
*[[***]]*²²³
285. The EU has therefore misrepresented the position.
286. Finally, the EU argues that even if the specific profit margin had been provided (which it was), this would still have been insufficient, as there was no explanation of "*the economic or financial logic behind the ITAC's profit margin calculation*".²²⁴ But the EU does not in any way explain how the provision of further information in relation to the calculation of the 8% profit margin would have led the Parties to find an alternative acceptable solution to the proposed safeguard measure, within the meaning of Article 34(7)(c) of the EU-SADC EPA.
287. Again, a comparison with the European Commission's own practice in safeguard investigations is instructive, and in particular, the *Steel Safeguard* investigation referred to in Section VI.F.1 above, in which the European Commission set a safeguard measure using an out-of-quota rate using a similar unsuppressed selling price methodology based on the cost of production, plus a profit margin of 8%. The European Commission only provided the following explanation in relation to the profit margin chosen:
*"This profit margin was considered reasonable as it refers to profits of the Community producers in a normal trading situation unaffected by rising imports."*²²⁵
288. In other words, notwithstanding that this investigation was conducted in accordance with the WTO SGA, under which specific disclosure obligations going beyond Article 34(7)(c) of the EU-SADC EPA apply, the European Commission did not itself appear to provide any further information than was provided in the present case.
289. The EU's claim in relation to information provided on the unsuppressed selling price calculation, including the profit margin used, must therefore be dismissed.

²²² *[[***]]*

²²³ *[[***]]*

²²⁴ EU FWS, para 245.

²²⁵ EU Provisional Safeguards Decision, para 68.

4. Adequate information was provided in relation to the serious injury and disturbance factors

290. The EU's final complaint relates to the provision of indexed data only for certain of the serious injury and disturbance factors, namely, price undercutting, price suppression and depression, market share, profit/losses, inventories and price disadvantage.²²⁶ The EU argues that there ought not to have been any confidentiality concerns given that the data did not involve a single domestic producer only, but five participating producers, and consequently the actual data should have been provided. Furthermore, even if there were valid confidentiality concerns, the EU argues, with reference to WTO case-law, that ITAC was obliged to provide an explanation of that data "to the fullest extent possible" and to provide a "non-confidential summary".
291. In addressing these arguments, SACU first points out that the use of indexing for confidential data is a standard practice in trade defence investigations, including by the European Commission itself. By way of example, in its recent *Corrosion Resistant Steels anti-dumping investigation*, the EU used indexed data for the EU domestic industry's sales prices, labour costs, profitability, cash flow, investments and return on investments.²²⁷ The use of indexed data in trade defence investigations is widely seen as an appropriate means to balance the interests of the various parties involved. Indeed, when confronted with a challenge to its use of indexing in a recent anti-dumping investigation by an interested party exercising its rights of defence, the European Commission explained that "*indexing is considered an appropriate approach because it protected the confidentiality of data but also provides meaningful information to interested parties*".²²⁸
292. A cursory look at the practice of trade remedies authorities also shows, contrary to the EU's assertion, that the use of indexed data is considered appropriate even where the data involves more than one (or even more than two) companies. Indeed, in the European Commission's recent *Corrosion Resistant Steels anti-dumping investigation* referred to above, the European Commission used indexed data even though it involved four separate producers.²²⁹ This practice is supported by basic market logic – in concentrated industries, where there is already a lot of transparency and available market intelligence, access even to amalgamated data can allow companies to derive a great deal of commercially sensitive information about their competitors' performance.
293. In light of the above, it was entirely appropriate for indexed data to be used. As the EU noted, the data involved five South African participating producers only, which is not a large number, and the poultry market in South Africa is concentrated – indeed the EU itself described the market as "highly concentrated" and oligopolistic²³⁰ –

²²⁶ EU FWS, para 246.

²²⁷ European Commission Implementing Regulation (EU) 2017/1444 of 9 August 2017 imposing a provisional anti-dumping duty on imports of certain corrosion resistant steels originating in the People's Republic of China, OJ L207/1 10.8.2017, available [here](#), Tables 10, 11 and 12.

²²⁸ See European Commission Implementing Regulation (EU) 2018/186 of 7 February 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain corrosion resistant steels originating in the People's Republic of China, OJ L34/16 8.2.2018, available [here](#), at para 72.

²²⁹ *Ibid.*, paras 10-16.

²³⁰ EU FWS, para 49(v).

meaning that the use of actual data could have had anti-competitive consequences. The safeguarding of confidential information in order to protect legitimate commercial interests is specifically recognised under the EU-SADC EPA,²³¹ and therefore no infringement of Article 34(7)(c) can be entertained.

294. Furthermore, and as with its other complaints in this section, the EU does not in any way explain how the provision of actual data rather than indexed data in relation to certain of the serious injury and disturbance factors would have led the Parties to find an alternative acceptable solution to the proposed safeguard measure, within the meaning of Article 34(7)(c) of the EU-SADC EPA.
295. Finally, in terms of the EU's claims based on WTO case-law that further explanations and / or non-confidential summaries should have been provided, it suffices to say that this case-law arises in the context of the specific disclosure and publication obligations under the WTO ADA, ASCM and SGA.²³² Such obligations do not appear in Article 34(7)(c) of the EU-SADC EPA and this case-law is therefore not relevant.

5. Conclusion

296. For the above reasons, it must be concluded that EU has failed to establish its Claim 5.

VII. THE RECOMMENDATION REQUESTED BY THE EU

297. Finally, SACU considers that it should comment on the rather extraordinary request for a recommendation for reimbursement of the duties paid that the EU adds at the very end of its first written submission²³³ without any explanation or justification. Although the issue will not arise since the EU has not demonstrated any incompatibility between the Measure at Issue and the cited provisions of the EU-SADC EPA, SACU considers that it should nonetheless comment.
298. The obligation incumbent upon a party complained against in the event that a Panel finds an inconsistency between the measure under review and an obligation in the EU-SADC EPA, is, according to its Article 83, to take any steps necessary to comply with the arbitral ruling (which can only relate to inconsistencies of that measure under review with the agreement) and for this purpose the Parties shall seek to agree on the period of time to comply with that ruling.
299. If the Parties do not agree on the reasonable period of time, it is established by the arbitration panel according to the procedure and the criteria set out in Article 84 of the EU-SADC EPA. The intention is therefore to achieve *prospective* compliance and not to provide a retroactive remedy or compensation. Accordingly, while the Panel is entitled under Article 82(3) of the EU-SADC EPA, to make non-binding recommendations as to *how* the compliance can be secured, any such recommendation can only relate to how the Measure at Issue (that is the definitive safeguard measure) could be brought into compliance with the EU-SADC EPA and cannot relate to other matters such as the duties collected.

²³¹ EPA, Article 106(3).

²³² In the case of the WTO ADA, Article 12.2.2; in the case of the WTO ASCM, Article 22.5; and in the case of the WTO SGA, Articles 3.1, 3.2 and 4.2(c).

²³³ EU FWS, para 248.

VIII. CONCLUSION

300. SACU reiterates its request to the Panel to decide on the jurisdictional issues as a preliminary issue – and therefore by means of a preliminary ruling – at as early a stage in these proceedings as possible. This will allow the Panel and the Parties to concentrate on the claims that are properly within the scope of these proceedings.
301. As noted above, SACU has responded to the EU's claims on a subsidiary basis so as not to delay the proceedings. SACU does however consider it important that the scope of the proceedings be clarified and must reserve the right to submit further arguments once this is done.
302. SACU requests the Panel to find that the EU has failed to establish any inconsistency between the Measure at Issue and Article 34 of the EU-SADC EPA. In any event, SACU considers that there is no basis for the Panel to contemplate making the recommendation that the EU has requested.