

Food Security as a Consideration in Anti-Dumping Investigations Conducted by the International Trade Administration Commission: Lessons for South Africa from the European Commission

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Abstract

Following the decision by the South African Minister of Trade, Industry and Competition to suspend anti-dumping duties in the International Trade Administration Commission (ITAC) *Chicken Meat Dumping Investigation* case, and the subsequent outbreak of disease amongst poultry, this article analyses the need to consider food security as part of the ‘public interest’ during anti-dumping investigations relating to essential food products. ITAC and the Minister of Trade are mandated, in terms of the relevant legal framework, to consider public interest as an additional fourth requirement on an ad hoc basis during anti-dumping investigations that may impact food security in South Africa and other Southern African Customs Union countries. Accessibility and availability elements of food security are affected by factors such as the type of product and whether it is an essential food, possible supply constraints impacting local food production, the prevalence or risk of disease outbreak, and the likelihood that price increases following the imposition of anti-dumping duties will be passed on to the end consumer. ITAC should consider these factors during anti-dumping investigations in a manner similar to the European Union’s consideration of the Union interest, ultimately assisting the Minister of Trade in making a decision regarding the imposition of anti-dumping duties in matters related to essential food products. If such an approach is adopted, it would be in line with the government’s obligation and responsibility to protect, promote and fulfil the right to access to sufficient food.



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Introduction

International trade is vital to global economic development.¹ However, without clear rules and regulations, countries might engage in unfair trading practices, which could negatively impact a country's economic growth.² To ensure fair trading practices, the World Trade Organization (WTO) sets out multilateral trade agreements that regulate international trade.³ Trade remedies, including anti-dumping measures, form part of these multilateral trade agreements, which WTO members can use against unfair trading practices such as dumping.⁴ When dumping occurs, the WTO members have an obligation to comply with the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement or ADA).

Dumping occurs when a product is imported into a country (the importing country) at a price lower than its normal value in the country from which it is exported.⁵ The imported product causes injury to the domestic industry in the importing country that produces a like product.⁶ An import duty can then be imposed on the dumped imports to bring the imported products closer to the normal value of the price of the products offered for sale by the relevant domestic industry of the importing country.⁷

Before a WTO member can impose anti-dumping duties, the competent authority must conduct an anti-dumping investigation to determine whether the relevant requirements have been met.⁸ There are essentially three requirements in the ADA and the General Agreement on Tariffs and Trade 1994 (GATT 1994) that WTO members must

- 1 Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law* (3rd edn, Hart Publishing 2018) 6, 13.
- 2 Ngozi Okonjo-Iweala, 'Informal Trade Policy Review Body Meeting—Trade Monitoring Report' (WTO 29 July 2021) <https://www.wto.org/english/news_e/spno_e/spno13_e.htm> accessed 16 December 2024.
- 3 Alan WM Wolff, 'Paradigm Lost? US Trade Policy as an Instrument of Foreign Policy' (WTO 5 February 2018) <https://www.wto.org/english/news_e/news18_e/ddgra_09feb18_e.htm> accessed 16 December 2024.
- 4 WTO, 'Briefing Note: Anti-Dumping, Subsidies and Safeguards' (2013) <https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_adp_e.htm> accessed 26 September 2025.
- 5 Article 2(1) of the ADA.
- 6 Article 3 of the ADA; Article VI (6)(a) of the GATT; Gustav Brink, 'Anti-Dumping in Southern Africa' in Kholofelo Kugler and Franziska Sucker (eds), *International Economic Law: (Southern) African Perspectives and Priorities* (Juta 2021) 327.
- 7 Lester (n 1) 513.
- 8 Lester (n 1) 65, 517, 521; Tilman Krüger, 'Moving Ahead While Standing Still: Dynamics of Institutional Evolution in a Gridlocked WTO' in Christoph Herrmann, Markus Krajewski and Jorg P Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2014) 130.

investigate and establish before they can impose anti-dumping duties, namely: (1) dumping, (2) injury and (3) causation.

Interestingly, some members conduct a public interest assessment as a fourth requirement during an anti-dumping investigation.⁹ South Africa's legal framework governing anti-dumping investigations does not expressly provide for a public interest assessment as a fourth requirement. In South Africa and other Southern African Customs Union (SACU) countries, the International Trade Administration Commission (ITAC) is the investigating authority that conducts anti-dumping investigations in terms of the International Trade Administration Act 71 of 2002 (the ITA Act) and the Anti-Dumping Regulations¹⁰ that were promulgated in terms of the ITA Act.¹¹ This article considers the need to introduce a public interest assessment on an ad hoc basis in terms of the ITA Act and the Anti-Dumping Regulations during ITAC investigations relevant to essential food products. This is done by considering the approach of the European Commission (EC), which considers the European Union (EU) interest as a fourth requirement during anti-dumping investigations. This is set out in the EU's Anti-Dumping Regulation.¹²

This article discusses the imposition and subsequent suspension of anti-dumping duties in the investigation initiated by the South African Poultry Association (SAPA) relating to the alleged dumping of frozen bone-in portions of chicken originating in or imported from four EU states (Denmark, Ireland, Poland and Spain) and Brazil in ITAC *Chicken Meat Dumping Investigation*.¹³ In this case, ITAC made a final determination that dumping had taken place and subsequently made a recommendation to the Minister of Trade, Industry and Competition (Minister of Trade) that definite anti-dumping duties should be imposed.¹⁴ The Minister of Trade approved ITAC's recommendation, but exercised his discretion to suspend the anti-dumping duties for twelve months, because the imposition of duties would harm the poor citizens in South Africa.¹⁵ This decision

9 Examples include Singapore, the USA, Canada and Chile. See Gustav Brink, 'National Interest in Anti-Dumping Investigations' (2009) SALJ 325; Omphemetse S Sibanda, 'Public Interest Considerations in the South African Anti-Dumping and Competition Law, Policy, and Practice' (2015) International Business & Economics Research Journal 739.

10 See GN 3197 in GG 25684 of 14 November 2003.

11 Anti-Dumping Regulations 2003.

12 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21.

13 ITAC Investigation into the Alleged Dumping of Frozen Bone-In Portions of Fowls of the Species *Gallus Domesticus* Originating in or Imported from Brazil, Denmark, Ireland, Poland and Spain: Final Determination, Report No 695 (2022) (hereafter ITAC *Chicken Meat Dumping Investigation*).

14 *ibid* para 1.9.

15 GN 1209 in GG 47201 of 5 August 2022; Izaak Breitenbach, 'Announcement on Anti-Dumping Duties Disappoints South African Poultry Association Members' (SA Poultry, 1 August 2022) <<https://www.sapoultry.co.za/announcement-on-anti-dumping-duties-disappoints-south-african-poultry-association-members/>> accessed 16 December 2024.

by the Minister of Trade is indicative that the public interest, in the context of food security, is a relevant consideration.

The discussion that follows commences with comments on anti-dumping measures in South Africa and the rest of the SACU region, including brief comments on the historic background. The current requirements that are considered in terms of the ITA Act and Anti-Dumping Regulations during an anti-dumping investigation are briefly unpacked, as well as the role of ITAC and its investigation process. This is followed by the factual background on the anti-dumping investigation in ITAC *Chicken Meat Dumping Investigation*, and recent developments following the outbreak of disease amongst poultry in South Africa. ITAC's *Chicken Meat Dumping Investigation* case serves as the backdrop for considering the potential implications of anti-dumping duties on food security and the right to food. Following a discussion on the interplay between human rights and trade law vis-à-vis food security, the discussion then turns to considering the public interest during anti-dumping investigations relating to basic foods. After considering the relevant provisions of the ADA, the discussion turns to the fourth requirement of Union interest in the EU, followed by a discussion of the inclusion of public interest, on an ad hoc basis, during anti-dumping investigations by ITAC that may impact food security.

Anti-Dumping Measures in South Africa and Other SACU Countries

A Brief History

As a WTO member, South Africa has an international obligation to comply with the provisions of the WTO agreements, specifically Article VI of the GATT and the ADA.¹⁶ South Africa was one of the first countries to implement its own anti-dumping provisions in 1914.¹⁷ Despite this early adoption of anti-dumping legislation, anti-dumping measures were not implemented in practice until 1990, near the end of apartheid.¹⁸

In 1994, South Africa created a special committee to restructure the country's anti-dumping laws to be in line with the ADA.¹⁹ This came to an end in 2003 and resulted in the promulgation of the ITA Act and the Anti-Dumping Regulations.²⁰ ITAC was then established in terms of the ITA Act, which also mandated ITAC to investigate

16 Gustav Brink, 'On "Dumping" and the Competition Act of South Africa: No "Double Remedy"' (2021) *De Jure Law Journal* 15. This was confirmed in *Progress Office Machines CC v South African Revenue Service* [2008] 2 SA 13 (SCA), paras 5–7.

17 Leora Blumberg, 'South African Trade Policy and Regulation in the 1990s: The Late Years of the Uruguay Round and the Early Days of the WTO' in Kholofelo Kugler and Franziska Sucker (eds), *International Economic Law: (Southern) African Perspectives and Priorities* (Juta 2021) 44.

18 Article 8 of the Customs Tariff Act 26 of 1914; Blumberg (n 17) 44.

19 Blumberg (n 17) 45.

20 The ITA Act was finally published on 22 January 2003 in the Government Gazette. The Anti-Dumping Regulation were published on 14 November 2003 in the Government Gazette. See ss 7, 64 of the ITA Act; GG 24287 of 22 January 2003; GN (n 10).

dumping from 2003.²¹ To date, ITAC has initiated a total of 271 investigations.²² ITAC is responsible for investigating the alleged dumping of goods in South Africa by following the ITA Act and the Anti-Dumping Regulations.²³ However, ITAC is still subject to directives made by the Minister of Trade.²⁴

Brief Comments on the Requirements to Impose Anti-Dumping Duties in Terms of the ITA Act and Anti-Dumping Regulations

As previously mentioned, there are three requirements that ITAC must investigate and establish before it can impose anti-dumping duties, namely: dumping, injury and causation. As these requirements are inherently complex, only a brief overview is provided here.

The first investigation done by ITAC is to make an affirmative finding that dumping has taken place in the SACU region.²⁵ Dumping is the importation of products into the SACU region at an export price that is lower than its normal value in the exporting country, which causes economic harm to the SACU industry that is producing a like product of the export product from the exporting country.²⁶ To establish dumping, ITAC will first calculate the normal value of the export product produced in the exporting country.²⁷ Then ITAC will calculate the export price of the said product exported to the SACU region.²⁸ Finally, ITAC will calculate the margin of dumping by subtracting the export price from the normal value.²⁹ The margin of dumping is calculated as a percentage and should be above two per cent in order for dumping to be present.³⁰

Once ITAC has made an affirmative finding of dumping, it proceeds to establish whether injury and causation have taken place in the SACU region. During its investigation, ITAC determines whether the dumped imports have caused injury (economic harm) to the SACU industry producing a like product.³¹ Once ITAC makes

21 Sections 7, 16 of the ITA Act.

22 WTO, 'Anti-Dumping Initiations by Reporting Member' (2026) <https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf> accessed 30 May 2026.

23 Sections 16 and 30(2) of the ITA Act. The Constitutional Court confirmed this in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* [2012] 4 SA 618 (CC) (hereafter *Scaw*), para 6.

24 Sections 7, 5, 15 of the ITA Act.

25 Section 1(2) of the ITA Act.

26 Section 1(2) of the ITA Act; Lester (n 1) 521; Marucia Fick, 'A Comparative Analysis on the Requirements to Impose Anti-Dumping Duties on Goods Imported into the European Union and South Africa' (LLM thesis, North-West University 2024) 55–56.

27 Section 32(2)(b)(i) of the ITA Act; s 8 of the Anti-Dumping Regulations; Fick (n 26) 59.

28 Section 32(2)(a) of the ITA Act; s 10 of the Anti-Dumping Regulations; Fick (n 26) 69.

29 Article 11 of the Anti-Dumping Regulations; Fick (n 26) 73–74.

30 Section 32(3) of the ITA Act; Art 12(3) of Anti-Dumping Regulations; for an example, see Fick (n 26) 76.

31 Articles 1, 13(2) and 16 of the Anti-Dumping Regulations; Fick (n 26) 79.

an affirmative finding of injury and causation, the investigation process outlined below is followed.

A Brief Overview of the ITAC Investigation Process

The application to investigate dumping is submitted by the domestic industry to ITAC.³² After ITAC has conducted an investigation and determined that all the requirements for the imposition of anti-dumping duties have been met, it will make a preliminary determination and recommend to the Minister of Trade that anti-dumping duties be imposed.³³ If the Minister of Trade makes an affirmative finding, the Minister will request the Minister of Finance to impose customs duties under the Customs and Excise Act 91 of 1964 (Customs and Excise Act).³⁴ The Minister of Finance will then publish a notice in the Government Gazette regarding the imposition of anti-dumping duties.³⁵

After considering submissions made by interested parties, ITAC will then make final recommendations to the Minister of Trade regarding the implementation of anti-dumping duties.³⁶ If the Minister of Trade makes an affirmative finding, he will request the Minister of Finance to impose final customs duties.³⁷ The final determination is then implemented through publication in the Government Gazette.³⁸

ITAC as the Investigation Authority in the SACU Region

South Africa is one of five member states of SACU. The other member states are Botswana, Lesotho, Namibia and Eswatini.³⁹ South Africa, with the other SACU members, signed the Southern African Customs Union Agreement (2002) (SACU Agreement) on 21 October 2002, and it became part of South African law in July 2004.⁴⁰

32 Article 3(1) of the Anti-Dumping Regulations.

33 Section 57A of the Customs and Excise Act.

34 Section 30(5)(a) of the ITA Act; s 56(1) of the Customs and Excise Act; Clive Vinti, 'The Right of "Interested Parties" to Be Heard During an Anti-Dumping Investigation Conducted by the National Treasury on Behalf of the Minister of Finance' (2020) SALJ 714.

35 Section 56(1) of the Customs and Excise Act.

36 Brink 'Anti-Dumping in Southern Africa' (n 6) 312; Krüger (n 8) 130.

37 Section 30(5)(a) of the ITA Act; s 56(1) of the Customs and Excise Act; SARS, 'What are Customs Duties and Taxes?' (2024) <<https://www.sars.gov.za/customs-and-excise/duties-and-taxes/>> accessed 17 December 2024.

38 ITAC, 'Trade Remedies' (2011) <<http://www.itac.org.za/pages/services/trade-remedies>> accessed 17 December 2024.

39 Eswatini was formerly known as Swaziland. See Daniel Mumbere, 'Swaziland Name Change to Eswatini is Now Official' *Africa News* (13 August 2024) <<https://www.africanews.com/2018/05/19/swaziland-name-change-to-eswatini-is-now-official/>> accessed 16 September 2025.

40 See GN 800 in GG 26537 of 2 July 2004, which amended the Customs and Excise Act to include the SACU Agreement with effect from 15 July 2004.

Today, SACU links the five member states to each other as a single customs territory through a single import tariff and where no customs duties are payable.⁴¹

The SACU Agreement makes provision for the establishment of, inter alia, a Tariff Board responsible for making recommendations regarding anti-dumping duties to the SACU Council.⁴² To date, however, the Tariff Board has not yet been established.⁴³ On this basis, the SACU Council has delegated its decision-making power to ITAC to investigate anti-dumping on behalf of the entire SACU industry.⁴⁴ As a result, a domestic industry in the SACU region will approach ITAC to conduct an anti-dumping investigation for the whole SACU industry in terms of the ITA Act and the Anti-Dumping Regulations. In September 2023, the WTO confirmed ITAC's standing in a trade policy review and stated that ITAC is to investigate dumping for the whole SACU region.⁴⁵

For example, in 2013, the government of Botswana, on behalf of its domestic industry, approached ITAC (through the Minister of Trade) to investigate the alleged dumping of soda ash into the SACU market.⁴⁶ ITAC then conducted the investigation in terms of the ITA Act and the Anti-Dumping Regulations.⁴⁷ After establishing the existence of dumping, injury and causation, ITAC made recommendations to the Minister of Trade to impose anti-dumping duties.⁴⁸ Since Botswana is a member of SACU, it must adopt anti-dumping duties determined by ITAC.⁴⁹ This means that when the Minister of Finance imposes anti-dumping duties via publication in the Government Gazette, it does so for the entire SACU tariff system.⁵⁰ Botswana's Minister of Trade will then impose

41 *ibid*; SACU, 'History of SACU' (2024) <<https://www.sacu.int/about-sacu/history-of-sacu>> accessed 17 December 2024. For a discussion on customs unions, see Trade Policy Review Report by the Secretariat SACU WT/TPR/S/447 (2023) <https://www.wto.org/english/tratop_e/tptr_e/s447_sum_e.pdf> accessed 8 October 2025.

42 Article 7(a)–(f) of the SACU Agreement (n 40).

43 SACU, 'SACU Institutions Information Brochure' (2024) <https://www.sacu.int/uploads/documents/SACU%20INSTITUTIONS%20INFORMATION%20BROCHURE%205_9-211024-095721.pdf> accessed 25 September 2025; SACU, 'Tariff Board' (2024) <<https://www.sacu.int/about-sacu/sacu-institutions/tariff-board>> accessed 16 December 2024.

44 The Tariff Board will act as the national body for South Africa when it is established. See SACU, 'Tariff Board' (n 43); Brink 'Anti-Dumping in Southern Africa' (n 6) 311; Article 14 of the SACU Agreement (n 40).

45 Trade Policy Review Report (n 41) 5, 16, 26, 33.

46 ITAC Investigation into the Alleged Dumping of Disodium Carbonate (Soda Ash) Originating in or Imported from the United States of America (USA): Final Determination, Report No 476 (2014).

47 *ibid* para 1.1.

48 *ibid* synopsis.

49 UNCTAD, 'Trade Policy Framework Botswana' (2017) <https://unctad.org/system/files/official-document/ditctncd2016d1_en.pdf> accessed 17 December 2024.

50 Trade Policy Review Report (n 41) 5, 16, 26, 33; Maria Immanuel, 'Brazil and EU Dumps Poultry in Sacu Market ... Implications and Lessons for Namibia' *The Namibian* (2 April 2022) <<https://www.namibian.com.na/brazil-and-eu-dumps-poultry-in-sacu-market-implications-and-lessons-for-namibia-2/>> accessed 17 December 2024.

the anti-dumping duties in that country as published by the Minister of Finance.⁵¹ In essence, this means that all SACU member states are subject to decisions made by ITAC and, indirectly, the Minister of Trade. Ultimately, when the Minister of Trade suspended the anti-dumping duties on the imported frozen chicken in 2022, it suspended those duties for all five SACU member countries.⁵² When the imposition of anti-dumping duties was conversely resumed in 2023, it applied to all SACU member countries.⁵³

ITAC's Chicken Meat Dumping Investigation

On 20 July 2020, SAPA submitted an application to ITAC on behalf of the SACU poultry industry to investigate the alleged dumping of frozen bone-in portions of chicken originating in or imported from four EU states (Denmark, Ireland, Poland and Spain) and Brazil.⁵⁴ ITAC initiated the investigation after establishing that the application contained prima facie information that the product had been imported at dumped prices, which caused material injury to the SACU industry.⁵⁵ After considering representations made by various stakeholders, including the domestic industry, importers and exporters, ITAC made a preliminary determination that the product had indeed been dumped in the SACU market, causing material injury to the SACU poultry industry.⁵⁶ As a result, the Minister of Finance imposed provisional anti-dumping duties against the importation of frozen bone-in chicken for six months ending on 14 June 2022.⁵⁷

After receiving and considering comments from the stakeholders mentioned above as part of the investigation, ITAC made a final determination that dumping had taken place and made a recommendation to the Minister of Trade that definite anti-dumping duties should be imposed.⁵⁸ To the domestic poultry industry's surprise, the Minister of Trade suspended the anti-dumping duties for twelve months. The reason provided for this suspension was that the imposition of duties would have a negative impact on the poor citizens in South Africa.⁵⁹ Moreover, in the Government Gazette issued on 5 August 2022, the notice stated that:

51 UNCTAD (n 49) 54; The Botswana Trade Commission Act (2013) established the Botswana Trade Commission to investigate requests received from the Tariff Board (currently ITAC) regarding the imposition of anti-dumping duties. The Botswana Trade Commission can also investigate dumping according to art 31 of the Botswana Trade Commission Act (2013).

52 See discussion of ITAC *Chicken Meat Dumping Investigation* (n 13) matter below.

53 Matthew Dlamini, 'Suspension of Anti-Dumping Duty to Hurt Nam Poultry' *The Namibian* (21 September 2022) <<https://namibian.com.na/suspension-of-anti-dumping-duty-to-hurt-nam-poultry/>> accessed 17 December 2024; GN 1925 in GG 49065 of 2 August 2023.

54 ITAC *Chicken Meat Dumping Investigation* (n 13).

55 *ibid* para 1.5.

56 *ibid* para 1.8.

57 *ibid* (n 13).

58 *ibid* (n 13) para 1.9.

59 GN (n 15); Breitenbach (n 15).

the Minister considered the current rapid rise in food prices in the SACU market and globally and the significant impact this has, especially on the poor, as well as the impact that the imposition of the anti-dumping duties may have on the price of chicken as one of the more affordable protein sources. The Minister, therefore, decided to suspend the imposition of the anti-dumping duties for a period of twelve (12) months or a shorter period of time depending on the prevailing circumstances at the time.⁶⁰

The Minister of Trade also took into account that the war in Ukraine and the COVID-19 pandemic had disrupted the supply chains and significantly spiked the prices of food.⁶¹ These issues are non-attributable factors that cause injury to the SACU industry.⁶² The Minister of Trade defended the suspension by stating that there was a need to find a ‘proper balance to ensure that we have food security and to take every reasonable step to protect jobs and assist consumers.’⁶³ It follows that the Minister of Trade suspended anti-dumping duties to mitigate the rising food prices on poor and vulnerable households for whom chicken is a staple source of protein.⁶⁴

The South African poultry producers asserted that the suspension of the anti-dumping duties contravenes the South African Poultry Sector Masterplan (Poultry Masterplan), which was developed by the Department of Trade, Industry and Competition in 2019.⁶⁵ The Poultry Masterplan provides a framework for growing the poultry sector in South Africa.⁶⁶ It stipulates that there should be action ‘against unfair forms of trade and any attempts to dump poultry products in our market.’⁶⁷ The poultry producers, therefore, asserted that the anti-dumping duties imposed on dumped chicken imports were necessary and justified.⁶⁸ Further, it was argued that the suspension of duties affected all poultry producers throughout the SACU region, not just those located in South Africa.⁶⁹ It was argued on behalf of SAPA that the suspension of the anti-dumping duties called into question the Poultry Masterplan and assumed that dumping was acceptable.⁷⁰ Some of the local producers argued that the suspension did not protect the local farmers as envisaged by the Poultry Masterplan.⁷¹ It was highlighted that South

60 *ibid*; see also GN 1179 in GG 47156 of 1 August 2022.

61 Bi Phakathi, ‘Patel Defends the Government’s “Balanced” Stance on Trade Tariffs’ *Business Day* (29 September 2022) 3.

62 Article 16(5) of the Anti-Dumping Regulations; see also Fick (n 26) 105.

63 Bi Phakathi, ‘Patel Defends Tariff Stance’ *Daily Dispatch* (30 September 2022) 12.

64 Dieketseng Maleke, ‘Hume Warns of High Chicken Tariffs if SA Doesn’t Reduce Anti-Dumping Duties’ *Pretoria News* (12 May 2023) 10.

65 DTIC, ‘South African Poultry Sector Masterplan’ (November 2019) <http://www.thedtic.gov.za/wp-content/uploads/Poultry_Sector_Master_Plan.pdf> accessed 17 December 2024.

66 *ibid*.

67 *ibid*.

68 Breitenbach (n 15).

69 Dlamini (n 53).

70 These arguments were put forward by Izaak Breitenbach, the chief executive officer of SAPA. See Breitenbach (n 15).

71 *ibid*; see also Ina Opperman, ‘Local Poultry Farmers Irked by Patel Move’ *The Citizen* (5 August 2022) 6; Michelle Gumede, ‘Questions About Poultry Master Plan After U-Turn’ *Business Day* (8 August 2022) 1.

Africa needs to establish a healthy, sustainable poultry industry that creates jobs, which cannot occur if imports take over the poultry industry.⁷²

In considering whether the Minister of Trade was permitted to suspend the imposition of anti-dumping duties, the Constitutional Court held in *Scaw*⁷³ that the ITA Act ‘clothes the Minister with far-reaching authority in relation to trade policy.’ This authority stems from sections 5⁷⁴ and 59⁷⁵ of the ITA Act, which empower the Minister of Trade to issue trade policy statements and make trade directives.⁷⁶ The Constitutional Court further confirmed that the Constitution of the Republic of South Africa 1996 (the Constitution) allows the Minister of Trade to exercise authority in terms of the ITA Act.⁷⁷ This means that ITAC is subject to trade policy statements published by the Minister of Trade.⁷⁸ The Minister of Trade has a wide discretion and can accept or reject ITAC’s recommendations.⁷⁹ The Constitutional Court noted that the Minister of Trade can only suspend anti-dumping duties after taking into account ITAC’s recommendations.⁸⁰ Following these principles, when the Minister of Trade suspended the anti-dumping duties on frozen chicken, he did take into account ITAC’s recommendation and was exercising his powers within sections 5 and 59 of the ITA Act.⁸¹

72 Breitenbach (n 15).

73 *Scaw* (n 23) para 32. Sections 5 and 59 of the ITA Act.

74 Section 5 provides that the Minister of Trade may, by notice in the Government Gazette and in accordance with procedures and requirements established by the Constitution of the Republic of South Africa 1996 or any other relevant law, issue trade policy statements or directives. See also s 6(1) of the ITA Act, which sets out the broad powers of the Minister of Trade to regulate imports and exports.

75 Section 59 empowers the Minister of Trade to make regulations (a) regarding the proceedings and functions of ITAC; (b) to give effect to the objects of the ITA Act; and (c) on any matter that may or must be prescribed in terms of the ITA Act.

76 See *Scaw* (n 23) para 32; *South Africa Sugar Association v Minister of Trade and Industry* [2017] 4 All SA 555 (GP), para 30.

77 *Scaw* (n 23) para 42; ss 85(2)(a), (b) and (c) of the Constitution (n 74) permit the Minister of Trade to implement national legislation, develop and implement national policy and perform his functions as provided in national legislation.

78 *Scaw* (n 23) para 32; ss 5, 7 and 59 of the ITA Act.

79 *Scaw* (n 23) para 98, 110; *South Africa Sugar Association* (n 76) para 31.

80 *Scaw* (n 23) para 109.

81 The term ‘ultra vires’ means acting beyond or outside a given authority’s powers. See Alexandra Nickerson, ‘Ultra-Apa Ultra Vires Review: Implied Equitable Actions for Statutory Violations by Federal Officials’ (2021) *Columbia Law Review* 2522. For example, in *Minister of Health v Alliance of Natural Health Products (South Africa)* [2022] JOL 52860 (SCA), para 26, it was found that the Minister of Health acted ultra vires by publishing certain regulations that did not fall within the power afforded to him in terms of the relevant legislation, namely the Medicines and Related Substances Act 101 of 1965. However, in *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* [2021] JDR 0660 (GP), paras 62, 63, 68, 72, it was held that the Minister of Trade acted within his power as provided for by the relevant legislation, notably the Consumer Protection Act 68 of 2008. See also Fick (n 26) 122.

On 2 August 2023, the Minister of Trade requested the Minister of Finance to re-impose anti-dumping duties against the four EU member states.⁸² The Minister of Trade did not expand on reasons for resuming the imposition of anti-dumping duties, simply commenting that it was warranted under the ‘circumstances’.⁸³ However, the Minister of Trade stated that the anti-dumping duties can be suspended again in the future. In the Government Gazette issued, it was noted that:

The Minister [of Trade] will be requesting the Competition Commission to closely monitor the prices of frozen bone-in portions and if there are price increases aimed at taking advantage of the introduction of the anti-dumping duties, the Minister [of Trade] may request the Minister of Finance to suspend the anti-dumping duties for a period.⁸⁴

The domestic poultry industry welcomed the re-imposition of anti-dumping duties.⁸⁵

This perceived victory for the domestic industry was, however, short-lived. Due to an outbreak of highly pathogenic avian influenza (HPAI or bird flu)⁸⁶ causing a domestic shortage of chicken meat, a notice was published in the Government Gazette in December 2024,⁸⁷ confirming that a rebate would be granted on imported frozen chicken.⁸⁸ A description of the rebate, consisting of the full duty less twelve per cent and effective from 1 January 2025, appears below:

Boneless cuts, frozen of fowls of the species *Gallus domesticus*, in such quantities, at such times and subject to such conditions as [ITAC] may allow by specific permit after consultation with the Director General: The Department of Agriculture, for the duration of a shortage of chicken as a result of an outbreak of highly pathogenic avian influenza in South Africa, provided that ITAC or equivalent authority in SACU Member States, is satisfied that – (i) the chicken is only for consumption or manufacture of products for

82 GN (n 53).

83 *ibid.*

84 GN (n 53).

85 Susan Marais, ‘Anti-Dumping Duties on Frozen Bone-In Chicken Reinstated’ *Biz Community* (15 August 2023) <<https://www.bizcommunity.com/Article/196/742/241009.html>> accessed 17 December 2024.

86 The HPAI virus is highly contagious and can be contracted in several food-producing birds, including chicken, and humans. This virus, therefore, poses a health risk to both animals and humans. See Department of Agriculture, ‘Avian Influenza: H5 and H7 Outbreak Update Report’ (6 December 2024) <<https://www.nda.gov.za/images/outbreaks/Avian%20Influenza/Reports/2024/h5-and-h7-update-dec2024.pdf>> accessed 24 September 2025.

87 GN 5621 in GG 51709 of 6 December 2024. The notice was issued in terms of s 75 of the Customs and Excise Act.

88 A rebate is either a full waiver or a partial reduction of customs duties, including anti-dumping duties, relating to a specific imported product, upon compliance with certain requirements and may be subject to the granting of a permit by ITAC. See ss 75(1)(b) and 75(4) of the Customs and Excise Act; and SARS, ‘An Overview of Manufacturing Rebate and Drawback Procedures’ (2024) <<https://www.sars.gov.za/wp-content/uploads/Ops/Guides/Legal-Pub-Guide-CE15-An-Overview-of-Manufacturing-Rebate-and-Drawback-Procedures.pdf>> accessed 24 September 2025.

consumption, in the country of import; and (ii) the chicken imported in terms of this rebate item is not re-exported to any other SACU Member State.⁸⁹

In essence, this means that frozen chicken may be imported into SACU without anti-dumping duties imposed if the stipulated conditions are met. This permit is specific and limited to the shortage of chicken caused by the bird flu outbreak.

Considering the Potential Impact of Anti-Dumping Duties on Food Security and the Right to Food

According to the Food and Agriculture Organization of the United Nations (FAO),⁹⁰ food security exists when ‘all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life.’⁹¹ At the household level, food insecurity in South Africa is a concern and appears to be worsening.⁹² In this regard, Johnstone⁹³ notes:

the proportion of households experiencing moderate to severe food insecurity rose from 15.8 per cent in 2019 to 19.7 per cent in 2023. Similarly, households facing severe food insecurity increased from 6.4 per cent to 8.0 per cent over the same period. These findings reflect a deterioration in access to food over time, confirming the deepening nature of food insecurity in South Africa.

According to the Office of the High Commissioner for Human Rights, in fighting poverty, people should have sufficient food to meet demand.⁹⁴ This is echoed in the Constitution,⁹⁵ which affords everyone the right to have access to sufficient food. The state must protect and promote this right.⁹⁶ Food security (or insecurity), therefore, is

89 GN (n 87).

90 FAO, ‘The State of Food Insecurity in the World’ (2001) <<https://www.fao.org/4/y1500e/y1500e.pdf>> accessed 24 September 2025. See also UN General Comment No 12: The Right to Adequate Food (Art 11 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/1999/5 (1999), para 6. For a discussion on the development of the term ‘food security’ over time, see para 2.1 of FAO’s ‘Trade Reforms and Food Security’ (2003) <<https://www.fao.org/4/y4671e/y4671e00.htm#Contents>> accessed 8 October 2025.

91 See also Weng Peng and Elliot M Berry, ‘The Concept of Food Security’ in Pasquale Ferranti, Elliot M Berry and Jock R Anderson (eds), *Encyclopedia of Food Security and Sustainability* (Elsevier 2019) 1.

92 Food security is also a concern for surrounding countries. See Chenaimoyo LF Katiyatiya and Adrino Mazenda, ‘Food Trade Policy Coherence for Food Security in the Southern African Development Community—A Case of South Africa’ (2026) 6(85) SN Social Sciences 1.

93 Shehaam Johnstone and Jaap de Visser, *Food Security and Local Government in South Africa: The Role of Municipalities in a Food Systems Approach* (Juta and Company (Pty) Ltd 2026) 21.

94 OHCHR, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ (2006) <<https://www.refworld.org/docid/46ceaf92.html>> accessed 17 December 2024.

95 Section 27(1)(b) of the Constitution (n 74).

96 *ibid* s 7(2). Also see Johnstone (n 93) 39–40.

directly linked to the right to food, which is ‘a legally enforceable socio-economic right.’⁹⁷ In this regard, Zhang⁹⁸ points out:

Food security means the right to food in terms of human rights. Food insecurity threatens the right to food. International human rights law imposes upon States obligations to respect, protect and fulfil this right, like any other basic human right. Thus, to ensure food security is in fact the implementation of obligations under international human rights law.

Various international human rights instruments protect the right to food. The Universal Declaration of Human Rights (1948) (UDHR) affords everyone the right to a standard of living adequate for their health and well-being, including food.⁹⁹ It also affirms that everyone ‘is entitled to a social and international order’ in which this right can be fully realised.¹⁰⁰ In terms of Article 11.1 of the International Covenant on Economic, Social and Cultural Rights (1966) (the ICESCR), everyone has the right to adequate food. This right is interpreted broadly and is realised when every person has physical and economic access, at all times, to adequate food or means for the procurement of such.¹⁰¹ States have an obligation to ‘take appropriate steps’ to realise this right.¹⁰² In *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*,¹⁰³ the African Commission on Human and Peoples’ Rights affirmed that both international law and the African Charter on Human and Peoples’ Rights (1981) (African Charter) require and bind states to protect and improve existing food sources, and to ensure access to adequate food for all citizens within a nation.¹⁰⁴ It was further highlighted that:

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.¹⁰⁵

97 Johnstone (n 93) 41.

98 Ruosi Zhang, ‘Food Security: Food Trade Regime and Food Aid Regime’ (2004) 7(3) *Journal of International Economic Law* 567.

99 Article 25(1) of the UDHR.

100 *ibid* Art 28.

101 This right to adequate or sufficient food should be achieved through progressive realisation. See s 27(2) of the Constitution (n 74); UN General Comment No 12 (n 90) para 6.

102 The right to be free from hunger is expressly recognised as a fundamental human right. See Art 11.1 and 11.2 of the ICESCR.

103 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* 155/96 dated 27 October 2001 (SERAC).

104 SERAC (n 103) para 65. While the right to food is not explicit in the African Charter, it is informed collectively by other rights in the African Charter such as the right to life, right to health, as well as the right to economic, social and cultural development in Arts 4, 16 and 22 of the African Charter. See SERAC (n 103) para 64.

105 SERAC (n 103) para 65.

In addition to the above, various other international and human rights instruments also recognise the right to food as a fundamental human right.¹⁰⁶ The right to food incorporates both an availability element and an accessibility element.¹⁰⁷ As far as food availability is concerned, food of an acceptable quality should be available in sufficient quantities.¹⁰⁸ Turning to accessibility, people should have access to food in a sustainable manner without there being an interference with their enjoyment of other human rights.¹⁰⁹ Furthermore, Goal One of the United Nations' Sustainable Development Goals is to 'end poverty in all its forms everywhere.'¹¹⁰ This is read with Goal Two to 'end hunger, achieve food security and improved nutrition and promote sustainable agriculture.'¹¹¹

Chicken meat is regarded as an essential food commodity on the African continent.¹¹² Moreover, frozen chicken is one of South Africa's most important sources of affordable protein.¹¹³ The discussion that follows considers the impact of anti-dumping duties on both the availability element and the accessibility element of food security.

Poultry Availability Considerations

Hume International, an importer and distributor of frozen chicken based in South Africa, has pointed out that South Africa does not currently produce sufficient quantities of frozen chicken to satisfy the domestic demand.¹¹⁴ For this reason, it relies on the

106 For example, Art 14(2)(c) and (d) of the African Charter on the Rights and Welfare of the Child (1990) place an obligation on states to 'ensure the provision of adequate nutrition' to children and to combat malnutrition among children. The preamble of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) stipulates that, in situations of poverty, women should at least have access to food, amongst other basic necessities. Article 12.2 also places an obligation on state parties to ensure that women have adequate nutrition during pregnancy and lactation. Persons with disabilities are also afforded the right to an adequate standard of living, which includes adequate food. See Art 28(1) of the Convention on the Rights of Persons with Disabilities (2008). For a further discussion on the right to food in the international and regional context, see Johnstone (n 93) 30–38.

107 UN General Comment No 12 (n 90) para 8; Jeanette Visagie, 'The Advertising and Labelling of Unhealthy Foodstuffs' (LLD thesis, North-West University 2025) 132.

108 *ibid.*

109 UN General Comment No 12 (n 90) para 8. See also *ibid.*

110 The UN established 17 goals that the whole world should work together to achieve by 2030. See UN 'The 17 Goals' (2024) <<https://sdgs.un.org/goals>> accessed 18 December 2024.

111 *ibid.*

112 Jamie MacLeod, 'Africa's Trade, Food Security and Climate Risks' in David Luke (ed.), *How Africa Eats* (LSE Press 2025) 13. Other basic or essential foods include maize, wheat, fish and meat.

113 GN (n 15); Thobela T Nkukwana, 'Global Poultry Production: Current Impact and Future Outlook on the South African Poultry Industry' (2018) *South African Journal of Animal Science* 869; Lawrence Edwards and Matthew Stern, 'How Trade Restrictions Affect Consumers: The Case of Frozen Chicken' *Econ3x3* (2023) <<https://www.polity.org.za/article/how-trade-restrictions-affect-consumers-the-case-of-frozen-chicken-2023-01-19>> accessed 17 December 2024.

114 Maleke (n 64). See also Willem A Lombard and Yonas T Bahta, 'Overview of the South African Poultry Industry' (2018) *FarmBiz* 7; Edwards (n 113). This also relates to Franziska Sucker, '(Southern) African Priorities in International Economic Law' in Kholofelo Kugler and Franziska

importation of frozen chicken to satisfy consumer demand.¹¹⁵ A report issued by the Association of Meat Importers and Exporters South Africa (AMIE SA) in July 2023,¹¹⁶ also points out that the domestic poultry industry is unable to meet the demand for chicken meat.

On this basis, chicken imports play an important role in ensuring food security by maintaining the availability of an affordable protein source that forms a critical part of many consumers' diets, particularly those of low-income households.¹¹⁷ Chicken meat imports therefore further food security by increasing the availability of this important source of affordable protein in South Africa.

An important consideration in this context is a disease outbreak affecting domestic poultry production and availability. South Africa has seen periodic outbreaks of bird flu since 2017. A significant surge of this outbreak in 2023 resulted in the culling of 9.6 million chickens.¹¹⁸ As noted earlier, since the beginning of 2025, a rebate has been available on frozen chicken imports due to the recent outbreak of bird flu in South Africa. The HPAI virus is highly contagious and can be contracted in several food-producing birds, as well as humans. This virus, therefore, poses a health risk to both animals and humans.¹¹⁹ This factor also directly impacts the availability of acceptable quality chicken that is safe for human consumption. Without chicken meat imports, the food industry would not be able to supply the consumer demand. If there is a supply shortage, it is likely to lead to higher chicken meat prices, adversely affecting the pockets and mouths of low-income households.¹²⁰

Poultry Accessibility Considerations

Linking with the discussion above, food availability shortages have a direct impact on accessibility to food, both elements posing a risk to food security. As a developing country, South Africa has a high poverty rate.¹²¹ According to the World Bank, about

Sucker (eds), *International Economic Law: (Southern) African Perspectives and Priorities* (Juta 2021) 16.

115 Maleke (n 64). See also Lombard (n 114) 7; Edwards (n 113).

116 AMIE SA, 'Challenging Anti-dumping Duties: Supporting Food Security in South Africa' (July 2023) <https://amiesa.co.za/wp-content/uploads/2023/08/Challenging_Anti-dumping_Duties.pdf> accessed 9 May 2025.

117 ibid 3, 5.

118 SAPA, 'Media Statement: South Africa's Imminent Bird Flu Crisis' (2025) <<https://www.sapoultry.co.za/wp-content/uploads/2025/02/003-MEDIA-STATEMENT-SOUTH-AFRICAS-IMMINENT-BIRD-FLU-CRISIS.pdf>> accessed 24 September 2025.

119 Department of Agriculture (n 86).

120 SAPA (n 118).

121 Poverty is usually when a person's basic human rights are not being met, such as the right to food and a sufficient quantity of food. See OHCHR (n 94) 2, 28; Duduzile G Mbajjorgu and Kola O Odeku, 'Fighting Food Insecurity, Hunger, and Poverty: The Content and Context of the Socio-Economic Right of Access to Sufficient Food in South Africa' (2022) *Obiter* 467.

sixty per cent of the South African population lives in poverty.¹²² Furthermore, over thirteen million people live in extreme poverty.¹²³ Poverty is closely associated with food insecurity, where many people cannot afford enough food.¹²⁴ This means that many South Africans experience hunger and food insecurity.¹²⁵ Food supply chain disruptions during and after the COVID-19 pandemic have exacerbated these challenges in recent years.¹²⁶

It has also been pointed out that the imposition of anti-dumping duties has added to an increase in the price of domestic chicken, which has placed an additional financial burden on consumers.¹²⁷ Increased food prices negatively impact the accessibility element of food security. This aspect has been one of the arguments raised in urging the government to act and allow chicken imports without imposing anti-dumping duties, arguing that such measures jeopardise consumer accessibility to chicken as part of their diet.¹²⁸

Following the Minister of Trade's announcement of a twelve-month suspension of anti-dumping duties in the ITAC *Chicken Meat Dumping Investigation* matter, SAPA argued in support of their re-imposition, contending that the duties would not increase domestic prices for these products.¹²⁹ In highlighting that there should be a causal link between the anti-dumping measures and the rising selling prices, it was pointed out that poultry prices are rising globally and not just in South Africa.¹³⁰ On this basis, SAPA submitted that there was no causal link between the anti-dumping duties and the rising prices of chicken and, therefore, the suspension of anti-dumping duties was incorrect.¹³¹

122 World Bank, 'South Africa' (2026) <<https://www.worldbank.org/en/country/southafrica/overview>> accessed 30 May 2026.

123 World Data Lab, 'World Poverty Clock' (2024) <<https://worldpoverty.io/map>> accessed 18 December 2024; see also Statista, 'Number of People Living in Extreme Poverty in South Africa from 2016 to 2030' (2024) <https://www.statista.com/statistics/1263290/number-of-people-living-in-extreme-poverty-in-south-africa> accessed 18 December 2024.

124 Food insecurity can be caused by multiple factors, such as poverty and conflicts; Sucker (n 114) 14; Mbajiorgu (n 121) 467; Asanda Mtintsilana, 'Hunger in South Africa: Study Shows One in Five are at Risk' *The Conversation* (15 February 2023) <<https://theconversation.com/hunger-in-south-africa-study-shows-one-in-five-are-at-risk-199133>> accessed 18 December 2024.

125 Mfaniseni W Mbatha, Hlanganani Mnguni and Mandla Mubecua, 'Subsistence Farming as a Sustainable Livelihood Approach for Rural Communities in South Africa' (2021) *African Journal of Development Studies* 56.

126 This was because the nationwide lockdown impacted supply chains; Jacob Mokhutso, 'Exploring the Trends and Dynamics of Poverty in South Africa' (2022) *Gender & Behaviour* 19008.

127 AMIE SA (n 116) 4–5.

128 *ibid* 5–6.

129 Edwards (n 113).

130 Breitenbach (n 15).

131 *ibid*.

However, this view seems to contradict the findings of an econometric study by Edwards and Stern.¹³² In 2023, they published a study examining the impact of trade restrictions imposed on frozen chicken from 2010 to 2021 and the effect of those protectionist measures on consumers. The report concluded that the protective measures, which included an increase in tariffs and anti-dumping duties, raised consumer prices of frozen chicken in South Africa.¹³³ Frozen chicken prices in South Africa were raised from about nine per cent in 2012 to as much as fifty-three per cent in 2021.¹³⁴ These increased prices are carried by South African consumers.¹³⁵ Edwards and Stern¹³⁶ point out that there was a sixteen per cent rise in consumer prices for frozen chicken imported from the EU from 2012 to 2021. They calculated that the increase in trade duties on frozen chicken affected poor consumers most severely.¹³⁷ This study demonstrates that imposing anti-dumping duties in relation to frozen chicken in the past has had a significant negative impact on poor consumers in South Africa.¹³⁸ This, in turn, impacts economic accessibility to this basic food product, which jeopardises food security.

Following the above, Edwards and Stern recommend that, in the context of dumping investigations relating to frozen chicken, ITAC consider a holistic approach in assessing the combined impacts during their investigation to protect the welfare of poor consumers.¹³⁹ Mackay¹⁴⁰ agrees with Edwards and Stern in support of the Minister of Trade's decision to suspend the anti-dumping duties in the ITAC *Chicken Meat Dumping Investigation* matter. Mackay also highlights that 'public interest is a long overdue consideration in anti-dumping investigations.'¹⁴¹

Contemplating the Interplay Between Human Rights and Trade Law

At this point, a key consideration is whether, in the context of anti-dumping regulations, human rights norms such as food security may be superior to trade-related considerations. Moreover, are there circumstances where human rights (the right to food in this instance) may triumph over trade norms in instances where trade norms are inconsistent with the former or at least at variance? How should this tension be resolved?

132 Edwards (n 113).

133 *ibid.*

134 *ibid.*

135 *ibid.*

136 *ibid.*

137 *ibid.*

138 *ibid.*

139 *ibid.*

140 Donald Mackay is the CEO of Global Advisors. Donald Mackay, 'South Africa Moves to a More Carefully Considered Trade Policy—Yay!' (XA Global Trade Advisors, 19 March 2023) <<https://www.xagta.com/south-africa-moves-to-a-more-carefully-considered-trade-policy-yay/>> accessed 18 December 2024.

141 *ibid.*

Several theories may justify why human rights norms, such as food security, should be considered pertinent to anti-dumping investigations that may impact the right to food.¹⁴² Whilst the ADA does not explicitly address human rights considerations,¹⁴³ there is support for interpreting that provision and others within the GATT in a manner that protects public interest and promotes human rights.¹⁴⁴ According to Makore, Osode and Lubisi,¹⁴⁵ sustainable development can serve as a possible theoretical justification for integrating the right to food with WTO rules on agriculture. As the anti-dumping investigation in ITAC *Chicken Meat Dumping Investigation* concerned an agricultural product,¹⁴⁶ these arguments also support the adoption of a human rights-based approach to anti-dumping duties that directly affect consumers' right to food. This is supported further by the fact that the ADA forms part of the Agreement Establishing the World Trade Organisation (1994) (WTO Agreement)¹⁴⁷ which, in its preamble, provides:

... the field of trade and economic endeavour should be conducted with a view to raising standards of living ... while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*...¹⁴⁸

In terms of constitutional theory,¹⁴⁹ Petersmann¹⁵⁰ points out that aspects such as the pursuit of democracy, social justice, and market competition aimed at improving prosperity and welfare within nations and internationally, support the importance of human rights considerations in trade disputes, where required.¹⁵¹ Fakhri¹⁵² also supports the contention that, in considering human rights principles for food trade, the aim should

142 For a comprehensive discussion on possible theories that may or may not inform the right to food and international agricultural trade rules, see Shelton TM Makore, Patrick C Osode and Nombulelo Lubisi, 'Re-Theorising International Agricultural Trade Regulation to Realise the Human Right to Food in Developing Countries' (2022) 47(2) *Journal for Juridical Science* 90–105.

143 In addition to the fact that it is a trade-related instrument, another plausible reason for this is to avoid conflicting with the differing domestic rules or laws of individual WTO members. See Ernst U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13(3) *European Journal of International Law* 625.

144 Petersmann (n 143) 633–634, 648.

145 Makore (n 142) 105.

146 Regulations relating to poultry meat have been issued under the Agricultural Product Standards Act 119 of 1990. See, for example, Regulations Regarding the Control Over the Sale of Poultry Meat published as GN R946 in GG 13876 of 27 March 1992, as amended.

147 See Annex 1A of the WTO Agreement.

148 Own emphasis added. Preamble of the WTO Agreement, para 2. Also see Makore (n 142) 104.

149 For a comprehensive discussion on this theory, see Ernst U Petersmann, 'Human Rights and International Economic Law in the 21st Century' (2001) 4(1) *Journal of International Economic Law* 3–39.

150 Petersmann (n 143) 641.

151 This theory also links with the social justice (or distributive justice) theory as discussed in Makore (n 142) 92–95.

152 Michael Fakhri, 'Human Rights Principles for Trade' (2022) *American Journal of International Law Unbound* 116, 123.

be ‘to create markets that operate to meet human needs instead of pursuing profit’ and highlights the following:

With principles of dignity, self-sufficiency, and solidarity in hand, and in the right institutional space, social movements and governments can transform trade policy in food so that trade can instead ensure that the right to food is fulfilled and everyone has access to a good, healthy meal.¹⁵³

With reference to the EU, Petersmann¹⁵⁴ points out that regional law in Europe has, over time, integrated constitutional human rights guarantees and international economic law. It is further highlighted that:

...markets and democracy are both based on organized dialogues about value judgements and are both necessary consequences of, and an indispensable means for, the effective protection of human rights. European integration confirms the insight of ‘functional theories’, namely, that citizen-driven market integration can provide strong incentives for transforming ‘market freedoms’ into ‘fundamental rights’ which – if directly enforceable by producers, investors, workers, traders and consumers through courts (as in the EC) – can reinforce and extend the protection of basic human rights (e.g. to liberty, property, food and health).¹⁵⁵

Global integration of WTO law must collectively pursue economic legitimacy as well as social justice and democratic legitimacy within the context of human rights.¹⁵⁶ With specific reference to the right to food, Petersmann¹⁵⁷ points out that global trade regulation ‘must be accompanied by the stronger legal protection of social human rights’ to limit the abuse of deregulation, support vulnerable groups and their accompanying human rights, and to ensure that governments protect the human rights of their citizens in addition to business interests in international trade. These sentiments are also shared in the African context for developing nations. With specific reference to the right to food, Makore, Osode and Lubisi¹⁵⁸ point out that:

states are obliged to ensure that international trade agreements, including those pertaining to agriculture concluded under the auspices of the WTO, have no adverse impacts on the realisation of the human right to food.

Where possible, states should adopt a balanced approach aimed at reconciling market competition and the globalisation of trade on the one hand, with human rights considerations on the other.¹⁵⁹ However, where there is a conflict between international

153 *ibid* 123.

154 Petersmann (n 143) 623.

155 *ibid* 629.

156 *ibid* 624.

157 *ibid* 624.

158 Makore (n 142) 91.

159 Petersmann (n 143) 641. For additional reading, see Matias E Margulis, ‘Rights Redux: The Return of Human Rights at the WTO’ (2024) 31(2) 781–803. Also see Emilia Korkea-Aho and Suvi Sankari,

trade norms and human rights considerations in the balancing of competing interests, the human rights considerations are likely to prevail.¹⁶⁰ The decision to suspend anti-dumping duties may very well be justified from a constitutional point of view considering the public's right to access to sufficient food. The right of the broader public to access to affordable chicken meat as a protein source, when balanced against the domestic industry's interest in stifling cheap imports to maintain their market share and business, would tip the scales in favour of food security objectives. This is especially the case when the domestic industry is unable to meet local demand sufficiently, and a disease outbreak impacts the certainty of current and future supply. Whilst this argument may not apply to all consumer goods, it carries weight in the context of an essential source of protein such as chicken meat. In such circumstances, the public's need for and demand for the product would justify a decision not to impose anti-dumping duties, even where the other requirements for such a trade remedy have been satisfied.

Adequate representation of all interested parties, which includes consumers as legal subjects of international law, or consumer organisations, is required for the sake of transparency and upholding of human rights.¹⁶¹ The United Nations (UN) Guiding Principles on Business and Human Rights¹⁶² affirm that States should ensure that government departments, agencies and other State institutions, including ITAC, are both aware of and comply with the States' human rights obligations when fulfilling their respective mandates. The Minister of Trade complied with this obligation in ITAC *Chicken Meat Dumping Investigation* by implementing measures that promote food security. To uphold the government's obligation to respect, protect, and fulfil the right to food,¹⁶³ it is proposed that ITAC should take the public interest into account in anti-dumping investigations where food security and the right to food are at stake. As will be discussed in more detail below, at a multilateral level, the ADA makes it clear that '[a]ll interested parties' should be given notice of an anti-dumping investigation,¹⁶⁴ and 'shall have a full opportunity for the defence of their interests' throughout the anti-dumping investigation.¹⁶⁵ Moreover, Article 6.12 of the ADA provides that, in cases where the relevant product is sold at the retail level (which would include chicken pieces and other foods), the relevant authorities (being ITAC in this instance), should afford

'External Participants v Internal Interests: Principles of EU Administrative Law in Anti-Dumping Investigations' (2017) (2) European Papers: A Journal on Law and Integration 553.

160 Petersmann (n 143) 635, 645.

161 *ibid* 646, 650.

162 UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) clause 8.

163 This approach also aligns with the commentary on clause 8 of the UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011).

164 Article 6.1 ADA

165 Article 6.2 ADA. Also see Art 6.9 of the ADA, which provides further, '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.'

representative consumer organisations the opportunity to provide information relevant to the anti-dumping investigation. Sibanda¹⁶⁶ has noted that consumers may very well be interested parties to anti-dumping investigations in South Africa, and that both the law and practice in this country further ‘the protection of consumers’ even if this is not stipulated explicitly in the ITA Act or Anti-Dumping Regulations. This view is supported, particularly as this national legislation and accompanying regulations are subject to upholding the fundamental rights in the Constitution and to the government’s obligations to protect, respect and fulfil those rights, including the right to food.¹⁶⁷

Against this background, the discussion that follows considers the public interest as a requirement on an ad hoc basis during anti-dumping investigations relating to food products.

Considering the Public Interest During Anti-Dumping Investigations Relating to Food Products

In South Africa, there is currently no obligation in the ITA Act or the Anti-Dumping Regulations to take public interest into account during an anti-dumping investigation. This factor was, however, the main consideration when the Minister of Trade suspended the imposition of anti-dumping duties in the ITAC *Chicken Meat Dumping Investigation* matter. The discussion that follows considers the permissibility of considering public interest during anti-dumping investigations and makes suggestions in this regard with lessons from the EU based on the approach adopted by its investigation authority, the EC.

The Permissibility of Public Interest Considerations Under the ADA

Public interest refers to an assessment of the interests of consumers, producers, importers and the relevant industry that can be affected by the imposition of anti-dumping duties.¹⁶⁸ From 2002 to 2008, several negotiations took place between the WTO and certain Members to specifically incorporate a ‘public interest’ requirement into the ADA as an additional consideration during investigations.¹⁶⁹ However, the negotiations proved unsuccessful. As such, there is currently no specific obligation in the ADA for Members to consider the public interest during an anti-dumping investigation.

166 Omphemetse S Sibanda, ‘The Effects of the South African Anti-Dumping and Competition Measures Upon Foreign Direct Investment’ (2014) 9(1) *Journal of Business and Retail Management Research* 130.

167 See ss 7(1) and 7(2) of the Constitution and the discussion below.

168 Aradhna Aggarwal, ‘The WTO Anti-Dumping Agreement: Possible Reform Through the Inclusion of a Public Interest Clause’ (2004) *Indian Council for Research on International Economic Relations* 5.

169 Negotiating Group on Rules—Public Interest TN/RL/W/174 (2005); Negotiating Group on Rules—Public Interest TN/RL/GEN/85 (2005); Negotiating Group on Rules—Public Interest TN/RL/W/222 (2008).

Article 6(11) of the ADA provides that, for the purposes of the ADA, the term ‘interested parties’ shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
- (ii) the government of the exporting Member; and
- (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

The words ‘shall include’ imply that the definition is left open-ended, and that it is not limited to the parties listed in items (i)–(iii) above. In fact, the sentence at the end of Article 6.11 confirms that other persons, entities or organisations may, at least in certain instances, be permissible as interested parties in an anti-dumping investigation. There is nothing in the ADA that prohibits WTO members from considering the public interest during an anti-dumping investigation.¹⁷⁰ All interested parties to the anti-dumping investigation can make their views known.¹⁷¹ Furthermore, consumer organisations can provide Members with relevant information pertaining to the anti-dumping investigation.¹⁷²

It follows, therefore, that the ADA permits WTO Members to take public interest considerations into account during anti-dumping investigations in matters where doing so is deemed necessary or warranted. Horvath¹⁷³ states that the ADA provides investigating authorities with wide discretion during anti-dumping investigations. WTO Members that do include a public interest requirement are simply exercising their wide discretion within the ADA. As a result, even though public interest is not a requirement in terms of the ADA, several WTO Members have included some form of public interest requirement in their national legislation.¹⁷⁴

170 Van Bael and Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (6th edn, Kluwer Law International 2019) para 6.03.

171 Article 6(2) of the ADA.

172 Article 6(12) of the ADA provides that ‘the authorities [of a member state] shall provide opportunities ... for representative consumer organizations [sic] in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.’

173 Balazs Horvath, ‘The Concept of “Union Interest” in EU External Trade Law’ (2014) *Acta Juridica Hungarica* 265.

174 In Canada, a public interest inquiry is conducted in terms of art 45(1) of the Special Import Measures Act (1985). In China, a public interest inquiry is conducted in terms of art 37 of the Anti-Dumping

Public Interest as Part of Union Interest Considerations by the EC

The EU's Anti-Dumping Regulation includes the three basic requirements that the EC must consider when investigating the imposition of anti-dumping duties, notably dumping, injury and causation.¹⁷⁵ Additionally, it introduces a fourth requirement stating that the imposition of anti-dumping duties should not be against the Union interest.¹⁷⁶ During an anti-dumping investigation, the EC will assess whether the anti-dumping duties will be beneficial or detrimental to the relevant Union industry, which includes, amongst others, consumers of the relevant product.¹⁷⁷

Article 21 of the EU's Anti-Dumping Regulation is used to determine whether it is in the Union's interest for the EC to intervene and impose or extend anti-dumping duties. Relevant parts of Articles 21(1) and 21(2) appear below:

A determination as to whether the Union's interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers. A determination pursuant to this Article shall only be made where all parties have been allowed to make their views known pursuant to paragraph 2 ... Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Union's interest to apply such measures.

In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Union's interest, the complainants, importers and their representative associations, representative users and representative consumer organisations may, within the time limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission...

During the Union interest assessment, the EC examines whether or not anti-dumping duties will be beneficial or detrimental to four categories of interested parties.¹⁷⁸ The interests of consumers, producers,¹⁷⁹ importers and the relevant Union industry are

Regulations of the People's Republic of China (2001). In Brazil, the Council of Ministers may suspend an anti-dumping duty or not impose anti-dumping duties for reasons under the public interest inquiry in terms of art 3 of their Anti-dumping Regulation Decree 8058/2013 (2013). In Argentina, the public interest is also considered during the investigation in terms of arts 25 and 30 of their Anti-Dumping Regulation Decree 1393/2008 (2008).

175 Articles 2 and 3 of the EU's Anti-Dumping Regulation.

176 Article 21 of the EU's Anti-Dumping Regulation.

177 *ibid*; Van Bael and Bellis (n 170) para 6.02.A.

178 Van Bael and Bellis (n 170) para 6.02.A.

179 The Commission Implementing Regulation (EU) 2017/367 of 1 March 2017 imposing a definitive anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China following an expiry review and terminating the partial interim review investigation [2017] OJ L56/131, para 220 was relevant to producers in the Union. In that case, the EC concluded that the imposition of anti-dumping duties would safeguard employment in the EU. The EC specified that, without anti-dumping duties, the

considered collectively.¹⁸⁰ According to Davis,¹⁸¹ the rationale behind the inclusion of the Union interest is to analyse all the economic interests that are relevant to a particular case. Ahamat¹⁸² notes that the ultimate aim of considering the Union interest during anti-dumping investigations is to provide a holistic approach in balancing all the relevant interests. Even if it has been determined that dumping has caused material injury, no anti-dumping duty should be imposed if the EC can clearly conclude that the imposition of anti-dumping duties is against the Union interest.¹⁸³

In the EC's *Atlantic Salmon* investigation,¹⁸⁴ the product concerned was salmon imported into the EU from Norway, Chile and the Faeroe Islands. After concluding that the three basic requirements to impose anti-dumping duties had been met, the EC turned to considering the fourth requirement of Union interest. This was done to determine if there were any overriding interests against the imposition of anti-dumping duties despite the existence of dumping that caused material injury to the domestic industry.¹⁸⁵ The EC determined that, if anti-dumping duties were to be imposed, the price increase of the imported salmon would have a negative impact on the importers, food producers and consumers.¹⁸⁶ Competition amongst producers in the salmon industry had increased, which led to a decline in prices for EU consumers and resulted in more consumers buying salmon because of its health benefits.¹⁸⁷ However, the imposition of anti-dumping duties would result in a price increase and a subsequent decrease in consumer purchases, which the salmon industry did not want.¹⁸⁸ Furthermore, one of the EU producers used the salmon imported from Chile to produce ready-made meals for middle- and lower-income consumers.¹⁸⁹ A price increase would result in lower-income consumers being unable to afford the meals, leading to a decline in demand for the

producers of the product would lose their jobs and that imposing anti-dumping duties was necessary to recover from dumping.

180 Van Bael and Bellis (n 170) para 6.02.A.

181 Lucy Davis, 'Anti-Dumping Investigation in the EU: How Does it Work?' (2009) European Centre for International Political Economy 5.

182 Haniff Ahamat, 'Addressing Competition Concerns in the Use of EC Anti-Dumping Regime' (2008) Manchester Journal of International Economic Law 60.

183 Article 21(1) of the EU's Anti-Dumping Regulation; see also Case T-399/19 *Polskie Górnictwo Naftowe i Gazownictwo S.A. v European Commission* [2022], para 46; Case T-459/07 *Hangzhou Duralamp Electronics Co. Ltd v Council of the European Union* [2013], para 182; Case T-1/07 *Apache Footwear and Apache II Footwear v Council* [2009] ECR II-232, para 113; Case T-432/12 *Volžskij trubnyi zavod OAO (VTZ OAO) v Council of the European Union* [2015], para 163; Case T-781/16 *Puma v Commission* [2021], para 68. See also Fick (n 26) 101.

184 Council Regulation (EC) 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands [2003] OJ L133/1, para 217 (hereafter EC's *Atlantic Salmon* investigation).

185 *ibid* paras 243, 245–247.

186 *ibid* para 238.

187 *ibid* para 232.

188 *ibid*.

189 *ibid* para 228.

salmon.¹⁹⁰ It was highlighted that the imposition of anti-dumping duties against the imports of salmon from Chile would risk thousands of jobs in the EU food processing industry.¹⁹¹ Ultimately, EU importers would be disadvantaged.¹⁹² In considering all the factors, the EC determined that it was not in the Union's interest to adopt anti-dumping duties and the investigation was terminated without imposing anti-dumping measures.¹⁹³

The EC's *PSF Malaysia* investigation,¹⁹⁴ is another case in which the Union interest weighed against imposing anti-dumping duties. The EC terminated an investigation on the grounds that it would not be in the Union's interest to impose anti-dumping duties on the imported synthetic staple fibres of polyesters (PSF).¹⁹⁵ The EC determined that anti-dumping duties would have a significant impact on EU producers, who used PSF as a raw material during the production of the goods, and should not be imposed.¹⁹⁶ The EC held that the overall advantages gained by the Union industry must be weighed against the probable disadvantages to the EU producers in particular and, to some extent, to the consumers.¹⁹⁷ At the time, there was a supply problem in the Union market for the PSF, and the EU producers were not able to meet the demand on their own.¹⁹⁸ Furthermore, certain users had a very low profit margin and would have passed on any price increase to the consumers.¹⁹⁹ Based on these findings, the EC held that it was not in the Union's interest to impose anti-dumping duties.²⁰⁰ Whilst this case did not concern a food product, it does demonstrate that, in the EU, considerations forming part of the Union interest requirement include producers using the imported product during domestic production of processed goods, domestic supply constraints and the likelihood of price increases being shifted to consumers and accompanying price hikes in the relevant goods. It is essentially these factors that underpin public interest considerations for many consumer products, but in particular, basic commodities such as chicken as a food protein source.

190 *ibid* para 232.

191 *ibid* para 228.

192 *ibid* para 236.

193 *ibid* paras 245–247.

194 Commission Decision 2007/430 of 19 June 2007 terminating the anti-dumping proceeding concerning imports of PSF originating in Malaysia and Taiwan [2007] OJ L160/30, para 5 (hereafter *EC PSF Malaysia* investigation).

195 *ibid* para 5.

196 *ibid* para 39.

197 *ibid* para 40.

198 *ibid*.

199 *ibid*.

200 *ibid* para 41.

Public Interest Considerations as Part of ITAC Anti-Dumping Investigations When Food Security is at Stake

Neither the ITA Act nor the Anti-Dumping Regulations currently stipulate, specifically, that the public interest is a relevant consideration in an anti-dumping investigation.²⁰¹ However, during anti-dumping investigations, ITAC considers interested parties' comments on the imposition of anti-dumping duties.²⁰² Regulation 1 of the Anti-Dumping Regulations provides the following definition for 'interested parties':

'interested parties' may include known-

producers in SACU;

exporters;

foreign producers;

importers;

trade or business associations whose members are SACU or foreign producers, exporters or importers; and/or

the governments of the countries of origin and of export,

of the product under investigation or the like product.

This does not preclude [ITAC] from accepting *other parties as interested parties* at the behest of [ITAC] in an anti-dumping investigation.²⁰³

These interested parties overlap with those considered under the EU's Union interest requirement, and the sentence at the end of the definition is an adapted version of the provision in the ADA. It is submitted that the term 'other parties as interested parties' in regulation 1 is wide enough to empower ITAC to take public interest into consideration during anti-dumping investigations relating to food products.

201 In 2006, draft regulations were published, which proposed amending the Anti-Dumping Regulations to include a public interest consideration as part of anti-dumping investigations. Those draft regulations did, however, not come into force. In a communication to the WTO, South Africa noted that it was considering the inclusion of a public interest consideration. However, this inclusion would add a significant administrative burden on ITAC, which is probably why the draft regulations never came into force. See GN 1606 in GG 29382 of 10 November 2006; Negotiating Group on Rules—Proposals on issues relating to the Anti-Dumping Agreement TN/RL/GEN/137 (2006) 4; see also Brink, 'National Interest in Anti-Dumping Investigations' (n 9) 358.

202 See Art 29 of the Anti-Dumping Regulation; s 26(5) of the ITA Act.

203 Own emphasis added.

In arguing for the inclusion of public interest as an additional requirement during anti-dumping investigations, Aggarwal²⁰⁴ points out that the three basic requirements during an anti-dumping investigation only consider whether the domestic industry is being harmed by the dumped imports. The public interest requirement should take into account that the dumped imports can actually benefit other interests, such as the consumers' interests.²⁰⁵ Public interest considerations are necessary to balance the interests of domestic producers with those of consumers.²⁰⁶ If not, there is a risk that producers' interests may be protected at the expense of the interests of other interested parties, such as consumers.²⁰⁷ Sibanda²⁰⁸ proposes that the ITA Act be amended to include a public interest consideration during the anti-dumping process.²⁰⁹ While there may be challenges in imposing a public interest requirement for every anti-dumping investigation, it is submitted that ITAC and the Minister of Trade do have the mandate, in terms of the ITA Act and Anti-dumping Regulations, to take public interests into consideration where warranted. Moreover, in matters such as *ITAC Chicken Meat Dumping Investigation* where the outcome of the investigation would have implications for food security in South Africa and other countries in the SACU region, there is arguably an obligation to call for comments on the impact of the proposed anti-dumping duties on the broader public. Factors to be included in the interest consideration would depend on the facts and circumstances of each case. Taking *ITAC Chicken Meat Dumping Investigation* into consideration, relevant factors would include aspects such as:

the type of product, in this case being an essential basic food and the most affordable protein source;

domestic supply constraints impacting local production of processed products;

the risk and uncertainty of existing domestic supply being stifled by disease outbreak (such as bird flu); and

the likelihood of price increases, following anti-dumping duties, being shifted to the end-consumer.

204 Even though this case concerns India and anti-dumping, the discussion regarding a public interest requirement is still relevant to South Africa. See Aggarwal (n 168) 5.

205 *ibid.*

206 *ibid.*

207 *ibid.*

208 Sibanda argued that ITAC should have considered a public interest assessment as the imposition of duties would negatively impact consumers' rights to food security in *ITAC Investigation into the Alleged Dumping of Frozen Meat of Fowls of the Species Gallus Domesticus, Whole Bird and Boneless Cuts, Originating in or Imported from Brazil: Preliminary Determination*, Report No 389 (2012). See Sibanda (n 9) 735, 738.

209 Brink did not argue in favour of the consideration of a public interest during anti-dumping investigations based on various reasons, such as an additional administrative burden on ITAC, which may delay the process; see Brink, 'National Interest in Anti-Dumping Investigations' (n 9) 358.

It is essentially these factors that underpin public interest considerations for many consumer products, particularly basic commodities such as chicken as a food protein source. It is also apparent that these factors are directly linked to food security in South Africa and should, in comparable cases, be considered when determining whether the imposition of anti-dumping duties would be in the interests of SACU. If such an approach is adopted, it will also be in line with the government's obligation and responsibility to protect, promote and fulfil the right to access to sufficient food.

To determine whether the Union interest calls for intervention, the EC considers 'the various interests taken as a whole.'²¹⁰ This means that an assessment of the Union interest should take place during the anti-dumping investigation.²¹¹ Similarly, in South Africa, the assessment of consumers' right to food as part of the broader public interest inquiry can be conducted during ITAC's anti-dumping investigation and should be conducted in cases where such consideration is warranted. Following the EC's *Atlantic Salmon* investigation, ITAC might have come to a similar conclusion as the EC that the price increase of the frozen chicken would have a negative impact on poor consumers.²¹² Following its *PSF Malaysia* investigation, ITAC might have considered the supply problem regarding locally produced chicken in South Africa and not imposed anti-dumping duties.²¹³ However, ITAC would have to weigh the possible harm suffered by the local poultry producers (interest of producers) against the poor consumers who cannot afford a price increase (interests of consumers).²¹⁴ Since South Africa is a developing country with a high poverty rate, the weight of the interests of consumers would most likely outweigh the interests of producers, especially if food security is at risk.²¹⁵ In the circumstances, it is submitted that the Minister of Trade was justified in suspending the anti-dumping duties.²¹⁶

Introducing public interest considerations as an additional fourth requirement may pose certain practical challenges. As an immediate hurdle, this may cause delays during the investigation process and impose additional administrative tasks on ITAC.²¹⁷ Secondly, as ITAC currently conducts anti-dumping investigations on behalf of the SACU industry, it would be required to consider the interests of SACU as a whole, including the public interests of Botswana, Lesotho, Namibia and Eswatini. Concerns regarding possible delays in the investigation process are therefore warranted, especially if

210 Article 21(1) of the EU's Anti-Dumping Regulation; see also Case C-236/17 *Canadian Solar Emea GmbH v Council of the European Union* [2019], para 168; see also Case C-461/18 *Changmao Biochemical Engineering Co. Ltd v Distillerie Bonollo SpA* [2020] para 67.

211 Case C-612/16 *C & J Clark International Ltd v Revenue and amp Customs Commissioners* [2019], para 65.

212 Fick (n 26) 123.

213 *ibid.*

214 *ibid.*

215 *ibid.*

216 *ibid.*

217 Brink listed six reasons. See Brink, 'National Interest in Anti-Dumping Investigations' (n 9) 358. See also Aggarwal (n 168) 3.

implemented across the board for all anti-dumping investigations. It is for this reason that it is proposed that this fourth requirement only be considered on an ad hoc basis through consultation between ITAC and the Minister of Trade. Where an essential consumer product (such as a staple food), is at play and other factors, such as those mentioned above, appear at least *prima facie* relevant considerations, opportunity should be afforded to consumers and consumer organisations as interested parties to make representations on the public interest. Of course, representations made should be supported by substantiated supporting evidence and be made available to other stakeholders for consideration and comment.

This leads to an anticipated third challenge, namely, increased complexity of investigations. Anti-dumping investigations are already complex by nature. Adding a fourth requirement might make the process more complex. There is a risk that the interests of all SACU member countries would not be equally or adequately assessed, especially where their interests conflict or do not align. On a practical level, it may be difficult for interested parties throughout the other SACU countries to provide comments to ITAC regarding all of SACU's interests. However, the interests of justice require that all interested parties, including consumers and consumer organisations should, at a minimum, be invited to make representations on the public interest in cases where food security is relevant. ITAC would then be able to consider that evidence as part of the investigation process and include its findings on that requirement in the recommendation that it ultimately made to the Minister of Trade.

Concluding Remarks

Against the backdrop of the Minister of Trade's decision to suspend the imposition of anti-dumping duties in ITAC's *Chicken Meat Dumping Investigation* and the subsequent outbreak of disease amongst poultry, this article has analysed the need to consider factors affecting consumers' food security as part of the public interest assessment during ITAC anti-dumping investigations relating to essential food products. In considering the relevant provisions of the ADA and local anti-dumping legislation against the backdrop of the interplay between human rights and trade law norms, as well as the approach adopted by the EC, which considers public interest as an additional fourth requirement of Union interest during anti-dumping investigations in the EU, it is submitted that ITAC and the Minister of Trade have the mandate to consider factors impacting consumers' right to food, which includes food availability and accessibility, where warranted.

Moreover, in matters such as ITAC *Chicken Meat Dumping Investigation*, where the outcome of the investigation may have negative implications for food security and directly impact the right to food in South Africa and other SACU countries, there is arguably an obligation to call for submissions from consumers or consumer organisations on the impact of the proposed anti-dumping duties on members of the public. The Minister of Trade's decision to suspend anti-dumping duties necessitates a balancing of the different interests of domestic producers and consumers in South

Africa, particularly when dealing with a basic food product. Consumer interest and possible food security considerations within the broader public interest should, however, not be the sole responsibility of the Minister of Trade. Rather, ITAC should take these considerations into account during anti-dumping investigations in a manner similar to the EU's consideration of consumer interests as part of its broader Union interest assessment, in cases that may warrant such an approach.

Factors relevant to the public interest assessment that may affect the accessibility and availability dimensions of food security include the type of product and whether it constitutes an essential food; potential supply constraints affecting domestic food production; the prevalence of, or risk of, disease outbreaks; and the likelihood that price increases resulting from the imposition of anti-dumping duties will be passed on to consumers. These factors underpin consumer interest within public interest considerations for basic commodities such as essential foods.

In cases comparable to ITAC's *Chicken Meat Dumping Investigation*, food security should be considered when determining whether the imposition of anti-dumping duties would be in the interests of SACU. If such an approach were adopted, it would be in line with the government's constitutional obligation to protect, promote and fulfil consumers' right of access to sufficient food. Whilst introducing public interest considerations as an additional fourth requirement during ITAC's investigation process may pose certain practical challenges if implemented for all anti-dumping matters, this suggestion is made specifically for investigations on an ad hoc basis where the outcome may impact food security. The interests of justice require that all interested parties, including consumers and consumer organisations, are, as a minimum, invited to make submissions on consumer interest in cases where food security is relevant. In such cases, ITAC would be able to consider that evidence as part of the investigation process and include its findings on the public interest in the recommendations made to the Minister of Trade, ultimately assisting the Minister of Trade in making a better-informed decision as to whether or not to impose, extend or suspend anti-dumping duties, as the case may be, in matters that relate to essential food products.

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