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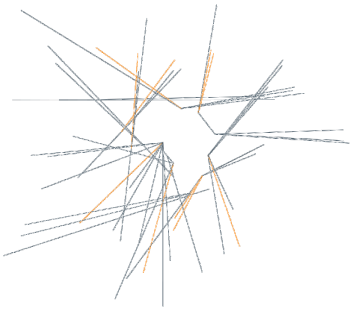

The Secretary
US International Trade Commission
500 E Street,SW
Washington, DC 20436
United States of America

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

Your reference	Our reference	Date
Inv. No. 332-564	Stephen Meltzer/Matthew Pool 2481346	06 February 2018

Dear Sirs

SECTION 332 INVESTIGATION: USA TRADE AND INVESTMENT WITH SUB-SAHARAN AFRICA

We act on behalf of the South African Poultry Association ("**SAPA**") and attach SAPA's written submissions.

If there is any further information you require, please do not hesitate to contact us.

Yours faithfully

Stephen Meltzer
Partner

WEBBER WENTZEL
Direct tel: +27 11 530 5249
Direct fax: +27115306249
Email: stephen.meltzer@webberwentzel.com

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IN THE MATTER OF: SECTION 332 INVESTIGATION: USA TRADE AND INVESTMENT WITH SUB-SAHARAN AFRICA

SUBMISSION BY THE SOUTH AFRICAN POULTRY ASSOCIATION

Wild Fig Business Park
1494 Cranberry Street
Honeydew Ext19
2194
South Africa

6 February 2018

1. INTRODUCTION

1.1 The South African Poultry Association ("**SAPA**") is a national South African organisation that represents the interests of the South African poultry industry in general. SAPA comprises 2 subsidiary organisations, of which the Broiler Organisation is one. The Broiler Organisation is a national organisation representing commercial growers of live birds and processors of table poultry in South Africa. SAPA's place of business is Wild Fig Business Park, 1494 Cranberry Street, Honeydew, Extension 19 South Africa 2194.

1.2 SAPA's submission is made pursuant to the invitation by the United States International Trade Commission ("**USITC**") for written submissions in respect of its investigation to examine trade in goods and services and investment in Sub-Saharan South Africa.

1.3 The purpose of this submission is to deal with the written testimony of Lawrence Lieberman ("**Lieberman**") in his own capacity and on behalf of the USA Poultry and Egg Export Council ("**USAPEEC**") and the National Chicken Council ("**NCC**") incorrectly dated Tuesday, January 14th 2014.

1.4 This submission deals principally with Lieberman's submission on the challenges facing Boston Agrex and other small and medium enterprises in exporting bone-in portions to South Africa. In doing so, SAPA does not intend to deal with all the allegations contained in Lieberman's testimony and its failure to so do must not be construed as an admission of the same. SAPA reserves its rights to deal with such allegations at a later stage should it deem it necessary or desirable.

1.5 I structure the submissions as follows:

1.5.1 firstly I present an overview of the submissions;

1.5.2 secondly I deal with the factual matrix of the dumping duties (as the USITC investigation is a fact based enquiry);

1.5.3 thirdly, I deal with Lieberman's submission on the quota and other miscellaneous matters.

1.5.4 fourthly, I deal with the Lieberman's legal arguments on the Anti-Dumping Duties.

2. OVERVIEW

2.1 Lieberman identifies the Anti-Dumping duties on frozen bone-in portions originating in or imported from the USA ("**Anti-Dumping duties**") as the major challenge facing small and medium USA enterprises ("**SME's**") in their exports to South Africa.

2.2 Lieberman's submission and in particular his submission's on Anti-Dumping Duties is word for word a repetition of the testimony given by William Roenigk on behalf of USAPEEC and the NCC before the USITC on Tuesday, January 14th 2014. Even the date Tuesday, January 14th 2014 which appears on Lieberman's submission is the same when, in fact, the submission was made on 23 January 2018.

2.3 There is nothing new in Lieberman's submission as requested by the USITC. Lieberman's attempt to dress up the submission with reference to small and medium enterprises ("**SME's**") as new, is transparent. The major exports to South Africa are produced by Tyson, which is a major corporation in the United States and not an SME.

2.4 Lieberman submits that the Anti-Dumping duties are unlawful and contrary to the World Trade Organisation ("**WTO**") Agreement on Implementation of Article VI of GATT 1994 ("**Anti-Dumping Agreement" or" AD Agreement**"). Although this is a legal issue and not a factual issue, SAPA for the sake of completeness will deal with this issue. SAPA contends that the Anti-Dumping duties are lawful and in accordance with the AD Agreement.

2.5 The purpose of Roenigk's submission before the USITC was to persuade the Government of the United States to remove South Africa as a beneficiary of the African Growth and Opportunity Act ("**AGOA**") unless it removed the Anti-Dumping Duties in force at that time. In the end result, after a full investigation in an out of cycle review, the United States Government, USAPEEC and the NCC accepted the continuation of the Anti-Dumping Duties subject to an Anti-Dumping duty free quota of 65 000 tonnes per annum (which may be adjusted upwards according to a formula) as satisfying the eligibility requirements of AGOA. Sanitary and phytosanitary issues which also presented an obstacle to the continuation of South Africa as a beneficiary under AGOA were resolved.

2.6 It is not clear what the purpose of Lieberman's submission is.

2.7 Lieberman does not complain about the quota (as it was "negotiated") but instead complains about the allocation of the quota and suggests that the quota be allocated on the basis on actual historical imports and vaguely, "*by using a transparent auction system that would, in an economically rational way, establish a value for the quota.*" However, contrary to what is alleged by Lieberman, this method of allocation would not be to the benefit of

Historically Disadvantaged Individuals ("**HDI's")** but would only benefit established importers. Significantly, USAPEEC and the National Chicken Council accepted the method of allocation.

2.8 Lieberman's complaints that the implementation of the quota has been erratic, inefficient and lacking in transparency are unsupported. SAPA is not aware of any complaint being lodged by Lieberman Boston Agrex, USAPEEC or the NCC to the appropriate authorities in South Africa concerning his criticism of the implementation of the quota. Moreover, what Lieberman has failed to mention is that the quota in the current quota year has, or will be, fully utilised. The trade data shows imports of frozen bone-in portions from the United States exceeded the quarterly quota of 16 250 tonnes in the first and third quarters of the current quota year, with only 6 785 tonnes remaining unutilised in the second quarter. This unutilised quota was or is likely to be re-allocated for use in the final quarter which ends on the 31 March 2018. It is estimated, therefore that the full 65 000 tonnes will be utilised in the current quota year.

2.9 Lieberman complains that the United States Government has failed to challenge the Anti-Dumping Duties in the WTO. What Lieberman neglects to mention is that neither USAPEEC, NCC nor any of their members have challenged the Anti-Dumping Duties in South African courts on their merits and none of the USA producers have co-operated in any of the Sunset Reviews of the Anti-Dumping Duties, as they were entitled to. SAPA contends that there is no basis for such challenge.

2.10 If the purpose of Lieberman's submission is an attempt to persuade the United States Government, despite the acceptance by it, USAPEEC and the NCC of the quota, to pressure South Africa to remove the Anti-Dumping Duties, this will be vigorously resisted by SAPA.

3. THE FACTUAL MATRIX

3.1 THE ORIGINAL ANTI-DUMPING INVESTIGATION

3.1.1 On 5 November 1999, the Board on Tariffs and Trade ("**Board**") initiated an Anti-Dumping investigation against the USA to investigate the allegation by the SACU industry that frozen bone-in portions were being dumped in SACU causing material injury to the SACU industry.

3.1.2 The applicant was Rainbow Farms (Pty) Ltd on behalf of the SACU industry.

3.1.3 Interested parties were granted the opportunity to respond and defend their interest. The following producers/exporters in the USA cooperated:

3.1.3.1 Tyson Foods, Inc (Producer)

3.1.3.2 Gold Kist, Inc (Producer)

3.1.3.3 Boston Agrex, Inc (Trader)

3.1.3.4 Central International Co. LLB (Trader)

3.1.3.5 Eastern Poultry Distributors (Trader)

3.1.4 The Anti-Dumping Duties were imposed after a full investigation by the Board in accordance with the AD Agreement and applicable South Africa law in 2000.

3.2 **THE FIRST SUNSET REVIEW INVESTIGATION OF THE DUMPNG DUTIES ON POULTRY FROM THE USA**

3.2.1 On 16 September 2005 the International Trade and Administration Commission, the successor of the Board ("**the Commission**") initiated a Sunset Review with regard to the Anti-Dumping Duties inviting interested parties such as producers/exporters in the USA and South African importers to respond.

3.2.2 In this Sunset Review the USA producers/exporters had the opportunity to try and terminate the duties by cooperating. In this regard, the Commission made a preliminary determination to terminate the Anti-Dumping Duties on bone-in portions on the basis of limited USA exports to South Africa and the acquisition by Brazil of USA market share of the products. However, the USA producers/exporters chose not to respond and cooperate with the Commission.

3.2.3 In the absence of cooperation from the USA producers/exporters the Commission used the best information available in accordance with the AD Agreement, being the data that the applicant, SAPA, supplied, and made a final determination that the expiry of the Anti-Dumping Duties would lead to the recurrence of injurious dumping.. The Anti-Dumping Duties were extended for a further 5 years to 26 October 2011.

3.3 **THE SECOND SUNSET REVIEW INVESTIGATION OF THE DUMPNG DUTIES ON POULTRY FROM THE USA**

3.3.1 On 24 Jun 2011 the Commission initiated a second Sunset Review.

3.3.2 Again it is very important to note that in this sunset review the USA producers/exporters also had the opportunity to cooperate and supply information that could persuade the Commission to terminate the duties. However, no USA producer/exporter responded and cooperated with the Commission. The only party that responded from the USA was USAPEEC. Although USAPEEC argued against the methodology used by the Commission in determining normal value, it did not complete the questionnaires and supply verifiable information which could be used in calculating the dumping margins of the producers/exporters.

3.3.3 In the absence of cooperation from the USA producers/exporters the Commission used the best information available in accordance with the AD Agreement, being the data that the applicant, SAPA, supplied, and made a final determination that the expiry of the Anti-Dumping Duties would lead to the recurrence of injurious dumping. The Anti-Dumping Duties were amended and extended for a further five years to 2017.

3.4 THE THIRD SUNSET REVIEW

3.4.1 A third Sunset Review was initiated during 2016 and finalised in 2017. Again one of the USA producers/exporters participated in the investigation, despite having being given every opportunity to do so. ITAC even went as far as to invite USAPEEC to comment on its essential facts letter although USAPEEC was not registered as an interested party. ITAC, in accordance with the AD Agreement relied on the best information available, being the information submitted by SAPA, as it had done in previous Sunset Reviews. ITAC made a final determination on 21 November 2017 that the expiry of the Anti-Dumping duties would lead to the recurrence of injurious dumping. The Anti-Dumping duties were extended for a further five years to 2022.

3.5 AGOA

3.5.1 The AGOA was set to expire on 30 September 2015. It was, however, renewed for a further 10 years by the 2015 Extension Act. During the course of 2014 and 2015, leading up to the expiration of the AGOA, USAPEEC argued that South Africa should not be included in the AGOA renewal process. This was due to the Anti-Dumping Duties. There were also complaints about Sanitary and Phytosanitary Measures ("**SPS**") issues related to chicken, pork and beef exports.

3.5.2 The United States Government supported the United States' poultry industry's claims and threatened to exclude South Africa from any renewal of the AGOA if the dispute surrounding the Anti-Dumping Duties was not resolved.

3.5.3 Following the enactment of the 2015 Extension Act, on 21 July 2015 President Obama initiated an out-of-cycle review of the eligibility of South Africa to receive benefits under the AGOA. The AGOA Implementation Subcommittee of the Trade Policy Staff requested public comments for the out-of-cycle review and conducted a public hearing.

3.5.4 Following the out-of-cycle review, on 5 November 2015, President Obama provided the requisite 60-day advance notification of his intention to suspend the application of duty-free treatment to all AGOA-eligible goods in the agricultural sector for South Africa. This was because, as at 5 November 2015, South Africa had not dealt with United States' concerns regarding the Anti-Dumping Duties and sanitary and phytosanitary issues to the satisfaction of the US. President Obama took this step because South Africa continued to impose several longstanding "*barriers to US trade*", including those affecting certain United States agricultural exports. The notification also stated that *"[a]lthough South Africa has to date failed to meet critical benchmarks required to address these issues, it continues to express an interest in resolving US concerns*."

3.5.5 On 18 December 2015, the South African Government, as agreed with the United States Government, implemented the Anti-Dumping Duty free quota by means of the creation of a rebate provision. Importantly, this satisfied the US's concerns regarding the Anti-Dumping duties. USAPEEC also agreed to the quota.

3.5.6 Agreements on the SPS issues pertaining to chicken, pork and beef were also reached.

4. **The Quota**

4.1 Mr Lieberman alleges that "South Africa is a deficit producer of poultry and its population needs additional supply of poultry meat as a basic food requirement." This is simply not true. As SAPA has repeatedly demonstrated in its submissions to the International Trade Administration Commission ("**ITAC**"), the Southern African Customs Union ("SACU") poultry industry has sufficient production capacity to meet SACU demand for poultry products without the need for any imports.

4.2 Mr Lieberman alleges that "Currently, South Africa imports more than 600,000 MT of poultry annually, most of it from either the European Union or Brazil." This is incorrect as only 556,049 tonnes of poultry was imported in 2017, less than the 600 000 tonnes referred to by Mr Lieberman. This is also misleading as Mr Lieberman refers to total imports of meat and edible meat offal of various types of poultry, including chicken, duck and turkey. The Anti-Dumping Duties only applied to frozen bone-in chicken portions. Only 233,072 tonnes of frozen bone-in portions was imported in calendar 2017, of which 78 420 tonnes (34%) was imported from the United States.

4.3 As pointed out above, the United States Government, USAPEEC and the National Chicken Council accepted and agreed to the continuation of the Anti-Dumping Duties subject to an anti-dumping duty free quota of 65 000 tonnes per annum. This quota was implemented through the temporary rebate of the full anti-dumping duty on imports of frozen bone-in portions from the United States, operates as follows:

4.3.1 the meat subject to the rebate may not exceed a basic annual quota of 65 000 tonnes;

4.3.2 the basic annual quota is divided into 4 quarterly quotas of 16 250 tonnes per quarter (the "Quarterly Quota");

4.3.3 if any portion of the Quarterly Quota is not used in the first quarter of a quota Year commencing on 1 April, the unused portion of the Quarterly Quota may be used in the second quarter of the quota year commencing on 1 July;

4.3.4 if any portion of the Quarterly Quota is not used in the third quarter of a quota year commencing on 1 October, the unused portion of the Quarterly Quota may be used only in the fourth quarter of the quota year commencing on 1 January;

4.3.5 any portion of the quota not utilised at the end of the second quarter the quota year may be re-allocated at the end of the third quarter of the quota year for utilisation in the fourth quarter of the quota year; and

4.3.6 any portion of the quota in each quota year, not used at the end of a quota year shall be forfeited.

4.4 Mr Lieberman alleges that "there has not been … full and effective utilization of the special quota." This is not supported by the trade data, which shows that imports of frozen bone-in portions from the United States exceeded the quarterly quota of 16 250 tonnes in the first and third quarters of the current quota year, leaving no additional quota for use in the

second or fourth quarters. Only 6 785 tonnes was unutilised in the second quarter. It is important to note that this unutilised quota was likely reallocated for use in the final quarter, which ends on 31 March 2018. It is envisaged, therefore, that the full 65 000 tonnes will be utilised in the current quota year. Please see the full calculation contained in Table 1 below.

Table 1 Quota Utilisation in Quota Year 2017-2018, showing the volume in tonnes of frozen bone-in portions (tariff heading 0207.14.9) imported from the United States

	Quarter 1 (Apr 17 - Jun 17)	**Quarter 2** (Jul 17 - Sep 17)	**Quarter 3** (Oct 17 - Dec 17)	**Quarter 4** (Jan 18 - Mar 18)
New Quota	16,250	16,250	16,250	16,250
Carried Over Quota		-		-
Reallocated Quota				6,785
Available Quota	16,250	16,250	16,250	23,035
Used Quota	16,361	9,465	18,292	
Unutilised Data	-111	6,785	-2,042	
Quota available for Carry-Over	-		-	
Quota available for Reallocation		6,785		

Source: Trade statistics obtained from the South African Revenue Service via email on Thursday, 01 February 2018.

4.5 Mr Lieberman also alleges that "A significant portion of the quota has been awarded to companies who neither know how to import, nor have the financial capacity to import in the volumes they are being awarded quota. And they do not have the distribution channels and infrastructure to commercialize the chicken once imported. As a result, much of the quota is being commercialized - i.e., sold or leased in secondary transactions - to non-HDI persons or firms." One of the objectives of the quota was to develop the import capacity of HDIs and USAPEEC undertook to train these individuals to allow them to take proper advantage of the quota. If this is not being done, the fault lies with USAPEEC. Mr Lieberman's allegation that the quota is being "commercialised" (which is contrary to ITAC's Guidelines for the Quota) i.e., sold or leased in secondary transactions to non HDI person or firms are unsupported and as far as SAPA is concerned, no complaint has been lodged by Boston Agrex Inc or USAPEEC or its members with the appropriate South African authorities. If Lieberman, Boston Agrex or USAPEEC has evidence of this, they should provide such evidence to the appropriate authorities. SAPA would welcome this. The solutions suggested by Mr Lieberman, namely awarding the quota based on actual historical imports or via an auction system will not benefit HDI importers as these would award the majority of

the quota to historic non-HDI importers. As explained above, the current allocation is expected to result in complete utilisation of the quota in the current quota year.

5. LEGAL ARGUMENTS

5.1 I now deal with the legal issues for completeness.

5.2 Lieberman's argues that in imposing Anti-Dumping duties on poultry from the USA, South Africa departed from the ordinary methods of determining dumping by using normal values based on domestic sales in the exporting country and instead determined the normal value by using the cost of production methodology. In so doing, South Africa applied to what he refers to as the "*weighted cost methodology*"[1] instead of calculating costs in accordance with the records of the producer and generally accepted accounting principles. The weighted cost methodology allocates common costs of the chicken product based on their weight. Lieberman contends that the South African authorities should have used the producers' books and records which allocated costs on a relative sales value based methodology; i.e. common costs are allocated amongst the various chicken products according to the proportion of revenue generated by the sale of these products. Lieberman tries to support his argument by referring to the recent WTO Panel decision in China - Anti-Dumping and Countervailing Duties on Broiler Products from the United States ("**the China case**").

5.3 Lieberman also refers to the Supreme Court of Appeal ("**SCA**") judgment of Associated Meat Importers and Exporters ("**AMIE")** and Others vs. The International Trade and Administration Commission ("**the Commission**") and Others ("**the AMIE case**") which he disrespectfully and without any basis claims USAPEEC lost as a "*home town decision*". That case concerned the duration of Anti-Dumping Duties which, if AMIE and USAPEEC were successful, would have had the effect of terminating the Anti-Dumping Duties against the USA.

5.4 There is no merit in Lieberman's arguments.

5.5 The relevant provisions of the AD Agreement provide as follows:

5.5.1 Article 2.2 of the Anti-Dumping Agreement provides as follows:

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[1] Lieberman describes the theory incorrectly as follows: *"Under this theory, all parts of a meat animal are assumed to have the same value by weight, even if the market demand for the various parts - and therefore the market prices of those different parts - are radically different."* Lieberman is confusing the concepts of "value" and "cost". The WTO Agreement deals with the cost of the product and whether that product is traded below or above the cost of production. Therefore, the conflation of the two concepts by Lieberman is not correct.

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

5.5.2 Article 2.2.1 of the Anti-Dumping Agreement provides as follows:

"Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time."

5.5.3 Article 2.2.1.1 of the Anti-Dumping Agreement states that:

"For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations."

5.6 The Board in some instances (but not all) in the investigation, in accordance with the AD Agreement, correctly did not use domestic sales in order to determine dumping for two reasons:

5.6.1 firstly, because of the particular market situation which existed in the USA, there were no sales in the ordinary course of trade: The United States market is characterised by a strong preference for white meat over dark meat which differs from the South African market and which causes distortions in the United States market. This reason is conveniently overlooked by Lieberman. It was clear from evidence that sales prices in the USA reflect an anomaly in that the price paid for the base product is higher than the price paid for the value added product. The base product is the whole bird and the value added product is the leg quarters that are cut up and, in the process, attract an added cost Thus, the price per kilogram for the valued added product ought to exceed the base price per kilogram;

5.6.2 secondly, the Board correctly determined that some of the domestic products were sold below cost and therefore not sold in the ordinary course of trade by calculating the costs in accordance with a "*weighted cost methodology.*" The Board correctly applied such methodology because it found that the methodology employed by the producers did not reasonably reflect the costs associated with the production and sale of the products under consideration. More particularly, the Board found in a carefully reasoned determination that the methodology used by the producers of calculating costs according to their relative sales value was not reasonable and did not reflect the costs associated with the production and sale of the products under consideration. The Board applied the weighted cost methodology in constructing the normal value for some of the products.

5.7 The Board in its final determination used the weighted cost methodology in order to determine whether the product was sold below cost and where it was sold below cost, the cost of production methodology was used for normal value purposes and the actual selling price where the prices were above cost.

5.8 In its Final Report, the Board also noted that the USA case law itself provides for such a situation. In this regard it referred to the matter of "*Fresh Atlantic Salmon From Chile*" (9 June 1998) where it was stated:

"The Department's long-standing practice, codified at section 773(f)(1)(A) of the Act (US Tariff Act 1930, as amended), is to rely on data from a respondent's normal books and records where those records are prepared in accordance with home country GAAP and

reasonably reflect the costs of producing the merchandise. Normal GAAP accounting practices provide both respondents and the Department a reasonably objective and predicable basis by which to compute costs for the merchandise under investigation. However, in those instances where it is determined that a company's normal accounting practices result in a misallocation of production costs, the Department will adjust the respondent's costs or use alternative calculation methodologies that more accurately capture the actual costs incurred to produce the merchandise."

5.9 The argument raised by Lieberman that there were sufficient sales of the subject product in the USA market for the Board to determine normal value is an oversimplification. The issue was not only whether there were sufficient sales of the subject product to determine normal value, but whether they were in the ordinary course of trade and whether those sales as a result of the particular market situation that exists in the USA do not permit a proper comparison with the export sales. The Board found in some instances that both factors were present to justify a departure from using the sales of the product in the domestic market.

5.10 The China case provides no support for Lieberman's arguments. The Panel in the China case specifically declined to make any finding on which of the two methodologies (i.e. the "weighted average costs" methodology or the relative sales value methodology) was more appropriate. It found that the Chinese authorities had not justified and provided an explanation for its departure from the norm of using the Respondents' books and records and why it used the weighted cost methodology it applied and rejected the alternatives opposed by the Respondents. This is in strong contrast to the carefully reasoned explanation and justification given by the Commission in its reports.

5.11 The judgment in the AMIE case was correct and in fact the decision of the SCA was supported by the opinion of Edwin Vermulst in respect of the relevant WTO provisions. Significantly, USAPEEC did not appeal against the judgment as it was entitled to do and as it did against the High Court judgment in the court below. We deal with this in more detail below.

5.12 **THE AMIE CASE**

5.12.1 The appeal in the AMIE case concerned the validity of various Anti-Dumping Duties imposed under the Customs and Excise Act, 91 of 1964. The proceedings were prompted by the decision of the SCA in *Progress Office Machines CC vs. The South African Revenue Service* ***("Progress Office Machines")***.

5.12.2 Progress Office Machines dealt with Anti-Dumping Duties imposed in respect of A4 paper products imported from Indonesia. In the Finance Minister's notice imposing these duties, it stipulated that the duties were imposed with retrospective effect.

5.12.3 It was common cause before the SCA that the Anti-Dumping Duties remained in force for a period of 5 years and the only question was when the 5 year period commenced to run and therefore when it expired. The SCA was required to determine whether this period commenced:

5.12.3.1 on the date of publication of the notice of the Government Gazette in terms of which the Anti-Dumping Duties were imposed pursuant to the original investigation; or

5.12.3.2 on the date on which the Anti-Dumping Duties were to have retrospective effect as provided for in the published notice.

5.12.4 The SCA held that the correct date from which to calculate the 5 year period was the date from which Anti-Dumping Duties were to have retrospective effect.

5.12.5 As a consequence of this finding, the SCA declared that the Anti-Dumping duty imposed by the Minister of Finance on A4 paper products imported from Indonesia had no force and effect being 5 years from the retrospective date contained in the notice.

5.12.6 Prior to the Progress Office Machines, the Commission had calculated the 5 year period from the date of publication of the notice in the Government Gazette in terms of which the Anti-Dumping Duties were imposed. The Commission sought to persuade the SCA that this was the correct approach in law but was ultimately unsuccessful.

5.12.7 After the judgment was handed down in Progress Office Machines, the Commission adopted the view that some Anti-Dumping Duties (including those in respect of United States frozen chicken bone-in portions) had lapsed and sought to regularise the position by bringing an application to the High Court.

5.12.8 SAPA argued in that case that the decision in Progress Office Machines was incorrectly decided and in support of its argument also relied on the opinion of Edwin Vermulst.

5.12.9 The SCA in the AMIE case, distinguished the case before it from the Progress Office Machine's case and held that the 5 year period commenced on the date of publication of the notice in the Government Gazette in terms of which Anti-Dumping Duties were imposed pursuant to the original investigation and not from the date on which Anti-Dumping Duties were to have retrospective effect as provided for in the published notice. In effect it upheld SAPA's contention. It held that the Anti-Dumping Duties, which were the subject of the application, were of full force and effect. It is significant to note that USAPEEC was a participant in the case and appealed against the judgment in the High Court below. It could well have appealed against the SCA decision but chose not to do so.

5.13 The United States has, with good reason, never complained to the WTO about the Anti-Dumping Duties. The Anti-Dumping Duties are lawful and in accordance with the AD Agreement. It is also significant that USAPEEC did not review the determinations of the Commission in our courts, as it was entitled to do, nor did the USA producers co-operate in the sunset reviews which took place after the initial investigation was completed in 2000.

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DR CHARLOTTE NKUNA
Acting Chief Executive Officer)
South African Poultry Association
Wild Fig Business Park
1494 Cranberry Street
Honeydew Ext19
2194
South Africa

Tel : +27 11 795 9920