There are no translations available.

As described in our previous post , at the beginning of August 2022, an arbitration panel decided on the first case of dispute on a bilateral safeguard measure adopted within a European Partnership Agreement (EPA) of the European Union (EU). Both the EU and the Southern African Customs Union (SACU) have been celebrating this decision, stating that it was more favourable to the one, rather than the other organisation. Now that the ruling has been published
, it seems to us that it is more favourable to SACU. This is, briefly, the description of the facts.

In 2015, the South African Poultry Association (SAPA) applied to the South African International Trade Administration Commission (ITAC) asking such body to enact safeguards against imports of frozen bone-in chicken cuts from the EU according to Article 16 of the Trade and Development Cooperation Agreement (TDCA), a bilateral trade agreement concluded in 1999 between the EU and South Africa. The ITAC started therefore investigations in February 2016 aimed at ascertaining whether the prerequisites for enacting the safeguards were met, i.e. the existence of a concrete injury (or threat thereof) to the domestic industry caused by an abnormal increase of EU exports in South Africa of the concerned product. In September 2016, ITAC announced that, as the TDCA was going to be suspended following the provisional entry into force of the EU-SADC EPA on 10 October 2016, such investigations would have continued on the basis of Article 34 of the new EPA with SADC (a regional agreement), which ITAC considered as equivalent to Article 16 TDCA.

In November 2016, ITAC confirmed that the application of provisional measures was justified. Starting from 15 December 2016, a provisional, 13.9% ad valorem import duty (set to expire after 200 days, on 3 July 2017), was therefore applied to EU imports in South Africa of frozen bone-in chicken cuts. ITAC continued its investigation during the months following to the adoption of this provisional measure to verify if the conditions for replacing it with a definitive measure were existing. On 14 August 2017 ITAC concluded that such conditions were met, and the provisional duty was converted into a definitive safeguard measure.

The SACU Council of Ministers, on the basis of
an ITAC recommendation, continued investigations at regional level, issuing on 27 June 2018 a safeguard measure for a period of 4 years, consisting in a 35.3% duty on the concerned products applied from 28 September 2018, and progressively reduced until expiration of the measure, occurred on 11 March 2022.

The EU argued that the safeguard measure adopted by SACU was not compliant with the EPA provisions, asking the nomination of an arbitration panel on 21 April 2020 to finally solve the dispute, as all the attempts to solve it in an amicable manner had failed. In its request, five main claims were submitted by the EU to the panel. Such claims are described hereunder together with the decision taken by the Arbitral Panel.

Claim 1: The safeguard measure adopted by SACU was based on an investigation that started under a different international instrument (the TDCA). Accordingly, there was no lawful basis for such investigation to be continued and concluded at regional level by SACU under the EPA, with the consequence that the safeguard measure was not valid. This claim has been rejected.

Claim 2: The safeguard measure does not relate to an injury (or threat thereof) to the domestic industry resulting from an “obligation incurred” under the EPA, in accordance with Article 34(2). Rejected. The Arbitral Panel however accepted the EU claim that the period of investigation used to determine the safeguard measure was too old or outdated by the time the measure was adopted, and ITAC should have considered data for the years 2017-2018. Too late however, as the safeguard measure, as indicated above, has elapsed.

Claim 3: SACU failed to adopt a proper causation analysis that identified the “causal link” between the increased EU imports and the alleged injury or serious disturbance (or threat thereof); in particular, SACU did not proceed to conduct a proper “non-attribution” analysis to verify that the injury or disturbance was not caused by other factors. Not decided, for reasons of judicial economy.

Claim 4: The geographical scope of the measure, the whole SACU area, is not in keeping with the scope of the underlying investigation, which only reviewed South African data. This claim has been rejected, even though the Arbitration Panel accepted the EU’s view that the level of the safeguard duty did not comply with the requirement that it shall not “exceed what is necessary to remedy or prevent the serious injury or disturbance”, in accordance with Article 34(2).

Claim 5: SACU did not provide the Trade and Development Committee (a body established by the EPA that seeks, among others, amicable solutions to disputes that are acceptable to both Parties), with all “all relevant information required for a thorough examination of the situation” under Article 34(7)(c) EPA. In particular, according to the EU SACU failed to provide information regarding: (i) the comparison between domestic and import prices; (ii) the calculation to

determine an unsuppressed selling price; and (iii) actual (as opposed to indexed) data demonstrating the alleged serious injury or disturbance. Rejected.

More importantly, the panel rejected the EU request to obtain a refund from SACU corresponding to the increased duties already paid on the EU imports in the region of the concerned product. Apart from doubting to have the power to impose such refund to SACU, the Arbitration Panel declared that the EU has failed to provide sufficient figures or estimates, and no means to calculate or assess, what safeguard duties to be refunded, and to whom such refund should be made.

However, the arbitral decision sets out two important principles to be respected in imposing safeguard measures under EPAs that will influence the application of such remedies also within other similar Agreements concluded by the EU with African, Caribbean and Pacific States. First, safeguard measures have to be proportionate and not go beyond what was needed to remedy or prevent any serious injury or disturbances to local industries. Second, the safeguard measure must be applied within a reasonable time from the investigation.

There is also a third implication, in our view, that arises from such decision. The EPA that the EU concluded with SADC explicitly mentions that bilateral safeguard measures can be activated both by a country individually and by a community body (in this case, the Southern Africa Customs Union). Differently from the EU-SADC EPA, other EPAs concluded by the EU do not mention the last possibility, like those concluded with Cote d'Ivoire or Ghana. A literal interpretation of such Agreements therefore casts doubts on the possibility to use the community safeguard measures available under the ECOWAS and WAEMU/UEMOA customs unions which are regulated by their respective establishing Treaties. A big handicap, considering that the customs legislations of such countries do no foresee any national safeguard measure as a tool of protection against abnormal increases of imports into their territories, including those originating from the EU.