

EUROPEAN UNION – SOUTHERN AFRICAN  
DEVELOPMENT COMMUNITY ECONOMIC PARTNERSHIP  
AGREEMENT

*Southern African Customs Union – Safeguard Measure  
Imposed on Frozen Bone-In Chicken Cuts from the  
European Union*

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**Final Report of the Arbitration Panel**

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**Members of the Arbitration Panel**

Makane Moïse Mbengue (Chairperson)  
Hélène Ruiz Fabri  
Faizel Ismail

**Secretaries of the Arbitration Panel**

Damien Charlotin  
Nikita Panse

**3 August 2022**

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## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, at page 515
<i>Argentina – Automotive Leather</i>	Article 21.5 Panel Report, <i>Australia - Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/RW, adopted 11 February 2000, DSR 1999:III, at page 951
<i>Argentina – Preserved Peaches</i>	Panel Report, <i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> , WT/DS238/R, adopted 15 April 2003, DSR 2003:III, at page 1037
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, at page 167
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – WT/DS103/AB/R &amp; WT/DS113/AB/R</i> , adopted 27 October 1999, DSR 1999:V, at page 2057
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, at page 3127
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, at page 6251
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, at page 591

<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, at page 3791
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products</i> , WT/DS26/AB/R, adopted 13 February 1998, DSR 1998:I, at page 135
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, at page 3
<i>Mexico – Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/R, adopted 20 December 2005, DSR 2005:XXII, at page 10853
<i>Ukraine – Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , WT/DS468/R, adopted 20 July 2015, DSR 2015:VI, at page 3117
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002, DSR 2002:IX, at page 3779
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R, adopted 10 January 2001, DSR 2001:I, at page 373
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, at page 3
<i>US – Countervailing and Anti-Dumping Duties (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, at page 3027
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, at page 3

<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R & WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, at page 4051
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, at page 1403
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, at page 1473
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, at page 323
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, at page 717

## ABBREVIATIONS

<b>Abbreviation</b>	<b>Description</b>
AB	Appellate Body
ASG	Agreement on Safeguards
AMIE	Association of Meat Importers & Exporters
AVEC	Association of Poultry Processors and Poultry Trade in the EU
EPA	Economic Partnership Agreement
EU	European Union
EU-CS	EU's Closing Statement, delivered on 12 March 2022
EU-FWS	First Written Submission of the European Union, 20 December 2021
EU-IR	EU's Observations on the Interim Report, 19 July 2022
EU-NEWSG	EU's Response to SACU's Comments on "The New EU Safeguard Measure", 16 May 2022
EU-OS	EU's Opening Statement, delivered on 2 March 2022
EU-PHS	EU's Supplementary Written Submission per Article 9(13) of the Rules of Procedure, 18 March 2022
EU-PO	EU's Response to SACU's Preliminary Objections, 24 January 2022
FTA	Free-Trade Agreement
ITAC	International Trade Administration Commission
MFN	Most Favoured Nation

POI	Period of Investigation
REP	EU's Request for Establishment of Panel, 21 April 2020
SACU	Southern African Customs Union
SACU-AC	Comments of the Southern African Customs Union on the Amicus Curiae Submissions, 8 February 2022
SACU-CS	SACU's Closing Statement, delivered on 12 March 2022
SACU-FWS	First Written Submission of the Southern African Customs Union, 24 January 2022
SACU-IR	Comments of the Southern African Customs Union on the Interim Report of the Panel, 19 July 2022.
SACU-NEWSG	Comments of the Southern African Customs Union on the New EU Safeguard Measure, 12 May 2022
SACU-OS	SACU's Opening Statement, delivered on 3 March 2022
SACU-PHS	SACU's Post-Hearing Submission, 18 March 2022
SACU-PO	Preliminary Objection to Certain Claims in the EU First Submission, 31 December 2021
SADC	Southern African Development Community
SADC-M	South Africa, Botswana, Eswatini, Lesotho, Namibia and Mozambique
SAPA	South African Poultry Association
TDC	Trade and Development Committee under the EU-SADC EPA
TDCA	Agreement on Trade, Development and Cooperation
ToR	Terms of Reference
VCLTs	Vienna Convention on the Law of Treaties, 1989, 1155 U.N.T.S. 331 and Vienna Convention on the Law of

	Treaties Between States and International Organizations or Between International Organizations, VCLTIO, UN Doc. A/CONF.129/15
WTO	World Trade Organisation

# I. INTRODUCTION

1. This Final Report is issued in the context of a dispute between the European Union (EU) and the Southern African Customs Union (SACU). This dispute was lodged under the Economic Partnership Agreement (EPA) between the EU and six states from the Southern African Development Community (the SADC EPA States),<sup>1</sup> and relates to a bilateral safeguard measure adopted in 2018 by SACU in relation to the importation of frozen bone-in chicken cuts from the EU.<sup>2</sup>
2. Although not itself a party to the EPA, SACU is a customs union regrouping five SADC EPA States.<sup>3</sup> Pursuant to Article 75(2) EPA, the treaty Parties have agreed that “[f]or disputes that relate to the collective action of SACU, SACU will act as a collective for the purposes of [dispute settlement], and the EU shall act against SACU as such.”
3. In accordance with Article 81 EPA, this Final Report contains sections describing the dispute and the Parties’ contentions, as well as the findings and conclusions of the Arbitration Panel.

## *A. Procedural History*

### **1. Request for Consultation and Events up to the Arbitration Panel’s Establishment**

4. By letter dated 14 June 2019,<sup>4</sup> the EU initiated consultations with SACU under Article 77 EPA, with respect to the definitive safeguard measure adopted by SACU’s Council of Ministers on 27 July 2018 in relation to frozen bone-in chicken cuts imported from the EU.<sup>5</sup>

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<sup>1</sup> **Exh.** EU-2, Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJ L 250.

<sup>2</sup> The imports in question, portion of fowls of the species *Gallus Domesticus*, are covered under tariff subheadings 0207.14.91, 0207.14.93, 0207.14.95, 0207.14.96, 0207.14.97, 0207.14.98, and 0207.14.99.

<sup>3</sup> Namely, Botswana, Eswatini, Lesotho, Namibia, and South Africa. Mozambique is the sixth EPA state that is not part of SACU.

<sup>4</sup> **Exh.** EU-4.

<sup>5</sup> As recounted *infra*, at 60 *et seq.*

5. Consultations took place on 13 September 2019 in Gaborone, Botswana. The Parties, however, failed to reach a mutually acceptable solution.<sup>6</sup>
6. In its Request for Establishment of an arbitration Panel (**REP**) dated 21 April 2020,<sup>7</sup> the EU invoked Article 79 EPA and initiated the arbitral procedure under Chapter III of the same instrument.
7. The contemporary outbreak of COVID-19 prompted the Parties to agree on a suspension of the arbitral proceedings.<sup>8</sup> On 27 October 2020, the EU proposed to resume the proceedings and to proceed to the appointment of the arbitrators. In letters, dated 2 November 2020 and 2 December 2020, SACU explained that it did not agree that the conditions allowed for a resumption of the proceedings and the appointment of the Arbitration Panel.
8. The EU proceeded with the appointment of its appointee to sit on the Arbitration Panel. As SACU had failed to appoint an arbitrator by the applicable deadline,<sup>9</sup> the EU petitioned the chairperson of the Trade and Development Committee (**TDC**) to proceed to make appointment on behalf of SACU under Article 80(4) EPA.
9. On 15 December 2020, SACU appointed Faizel Ismail to the Arbitration Panel. On the following day, the EU withdrew the request made to the TDC's chairperson.
10. A dispute arose between the Parties regarding the implementation of the procedure for the nomination of the Chairperson of the Arbitration Panel. The Parties resolved that dispute through the invocation of Articles 80(3) and 80(4) EPA. Accordingly, on 2 March 2021, the TDC's chairperson selected Professor Makane Moïse Mbengue as Chairperson of the Arbitration Panel.
11. On 13 September 2021, the EU's original appointee resigned from the Arbitration Panel for personal reasons. On 27 September 2021, the EU appointed Professor H el ene Ruiz Fabri to sit on the Arbitration Panel.

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<sup>6</sup> **EU-FWS**, at 10.

<sup>7</sup> **Exh.** EU-5.

<sup>8</sup> **EU-FWS**, at 14; **SACU-FWS**, at 6(a).

<sup>9</sup> As agreed by the EU, the applicable deadline provided in Article 80 EPA (i.e., ten (10) days from the date of receipt of the request for establishment of a panel) started to run from 22 November 2020: see **EU-FWS**, at 17.

12. The Arbitration Panel was deemed to be constituted on 29 November 2021, as follows:

Chairperson	Makane Moïse Mbengue
Members	Hélène Ruiz Fabri Faizel Ismail

## 2. First Written Submissions and Preliminary Objections

13. Upon constitution of the Arbitration Panel, Terms of Reference (**ToR**) were adopted in line with Article 5(1) of the Rules of Procedure.<sup>10</sup> Additional Working Procedures (**WP**), including an indicative timetable, were agreed upon between the Parties and then signed by the arbitrators during the Organisational Meeting that took place virtually on 8 December 2021.
14. The arbitrators were not supported by a Secretariat, but instead used assistants, who provided the panel with substantial support in terms of research, administrative duties, and logistics.<sup>11</sup>
15. In accordance with the WP's timetable, the EU filed its First Written Submission (**EU-FWS**) on 20 December 2021,<sup>12</sup> accompanied by 38 Exhibits, EU-1 to EU-38.
16. On 31 December 2021, and in reaction to the EU-FWS, SACU raised preliminary objections,<sup>13</sup> and requested the Arbitration Panel to rule as a preliminary matter that a number of claims by the EU were "outside the Terms of Reference".<sup>14</sup> On 6 and 10 January 2022, the EU commented on SACU's preliminary objections.<sup>15</sup>

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<sup>10</sup> Rules of Procedure for Dispute Avoidance and Settlement, annexed to Decision N° 2/2019 of the EU-SADC EPA Joint Council (Rules of Procedure), OJ L 75/128, 19 March 2019.

<sup>11</sup> Chairperson Mbengue initially appointed Nikita Panse as Secretary to the Arbitration Panel. Faizel Ismail was assisted by Stuart Scott, while Hélène Ruiz Fabri was assisted by Edoardo Stoppioni. In order to replace Ms Panse, who stepped down in June 2022, Damien Charlotin was appointed as Secretary to the Arbitration Panel by Chairperson Mbengue on 6 June 2022.

<sup>12</sup> First Written Submission of the European Union, 20 December 2021 (**EU-FWS**).

<sup>13</sup> SACU, Preliminary Objection to Certain Claims in the EU First Submission, 31 December 2021 (**SACU-PO**).

<sup>14</sup> SACU-PO, at 31(a).

<sup>15</sup> Emails from the EU to the Arbitration Panel dated 6 and 10 January 2022.

17. On 10 January 2022, the Arbitration Panel directed the Parties to address the preliminary objections on 24 January 2022, the date planned for SACU to file its First Written Submission.<sup>16</sup>
18. Accordingly, on 24 January 2022, the EU filed its Response to the preliminary objections (**EU-PO**),<sup>17</sup> together with Exhibits EU-39 to EU-48.<sup>18</sup>
19. The same day, SACU filed its First Written Submission, which also reiterated and complemented its arguments with respect to the pending preliminary objections (**SACU-FWS**).<sup>19</sup> This submission was accompanied by 25 Exhibits, SACU-1 to SACU-25.
20. On 11 February 2022, the Arbitration Panel indicated to the Parties that the preliminary objections would be decided together with the merits.<sup>20</sup>

### **3. Amicus Curiae submissions**

21. The WP provided that, upon publishing notice of the Arbitration Panel’s constitution on their respective websites, the Parties would invite *amicus curiae* submissions to be filed within twenty (20) days of such notice.<sup>21</sup>
22. Three *amici curiae* submissions were filed within the deadline, by:

- a. The Association of Meat Importers and Exporters (**AMIE**);<sup>22</sup>

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<sup>16</sup> Email from the Arbitration Panel to the Parties dated 10 January 2022. In late December 2021, SACU had asked for, and obtained from the Arbitration Panel (upon hearing the EU’s view on the matter), a one-week extension to the deadline originally set for 17 January 2022: see email from the Arbitration Panel to the Parties dated 28 December 2021.

<sup>17</sup> EU’s Response to SACU’s Preliminary Objections, 24 January 2022 (**EU-PO**).

<sup>18</sup> By email dated 25 January 2022, SACU protested that **Exh.** EU-42 contained “the confidential minutes of a SACU Council Meeting.” In an email dated 4 February 2022, the EU agreed to mark these minutes as “confidential”. By email dated 16 February 2022, SACU repeated its questions as to the manner by which the EU had obtained these confidential minutes, and asked for the exhibit to be struck from the record, a request the EU opposed the same day. By email dated 24 February 2022, the Arbitration Panel decided to “remove this exhibit from the record of the proceedings.” See also *infra*, at 145.

<sup>19</sup> First Written Submission of the Southern African Customs Union, 24 January 2022 (**SACU-FWS**).

<sup>20</sup> Email from the Arbitration Panel to the Parties dated 11 February 2022.

<sup>21</sup> **WP**, at 2.

<sup>22</sup> AMIE, Amicus Curiae Submission to the Arbitration Panel Established in the Dispute Concerning the Safeguard Measure Imposed by SACU on Poultry Imports from the EU, 28 September 2021 (**AMIE-AC**).

- b. The Association of Poultry Processors and Poultry Trade in the EU (AVEC),<sup>23</sup> and
  - c. The South African Poultry Association (SAPA).<sup>24</sup>
23. In this context, the AMIE sought permission to intervene at the hearing, while SAPA asked to be provided with the non-confidential version of the EU's First Written Submission.
24. SACU filed comments to these submissions by email on 28 January 2022, and in a dedicated submission dated 8 February 2022.<sup>25</sup>
25. By email dated 28 January 2022, the EU indicated that it would not agree for the AMIE (or any other *amicus*) to participate in the upcoming hearing. The EU pointed out that although it had published its First Written Submission online, no *amicus* had a right to insist on receiving a Party's submissions and providing supplementary comments thereon.<sup>26</sup> Apart from this, the EU made no particular comment in answer to the *amici curiae*' submissions. By email sent on the same date, SACU agreed with the EU that *amici* did not have the right to participate in the hearing. SACU also noted that it was amenable to making available a non-confidential version of its First Written Submission.

#### 4. The Hearing

26. By email dated 28 January 2022, the EU sought clarifications about the upcoming hearing, sharing its preference for an online hearing in light of the ongoing COVID-19 pandemic. Alternatively, the EU sought further information as to any travel restrictions to Gaborone, Botswana, where the in-person hearing was intended to take place.<sup>27</sup> The

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<sup>23</sup> AVEC, Submission of Comments Regarding the Arbitration Proceedings Concerning the Bilateral Safeguard Imposed by SACU on Poultry Imports from the EU, 28 December 2021 (**AVEC-AC**).

<sup>24</sup> SAPA, Amicus Curiae Submissions by the South African Poultry Association, 28 September 2021 (**SAPA-AC**).

<sup>25</sup> Comments of the Southern African Customs Union on the Amicus Curiae Submissions, 8 February 2022 (**SACU-AC**). SACU's comments were accompanied by three exhibits, SACU-26 to SACU-29.

<sup>26</sup> Email from the EU to Arbitration Panel dated 28 January 2022. The EU noted that a non-confidential version of its First Written Submission had been posted online on 18 January 2022.

<sup>27</sup> Article 9(2) of the Rules of Procedure provides that, by default, hearings should take place in the territory of the respondent in the arbitral proceedings.

following day, the Arbitration Panel sought further input from the Parties with respect to the organisation of the hearing.

27. The Parties subsequently agreed, on 11 February 2022, to hold the hearing in Botswana on 2-4 March 2022. SACU provided information as to the applicable travel restrictions and health requirements on 14 February 2022.<sup>28</sup>
28. An in-person hearing took place in Gaborone, Botswana, on 2-4 March 2022. Present at the hearing were:

*Arbitration Panel*

Makane Moïse Mbengue	Chairperson
Hélène Ruiz Fabri	Co-Arbitrator
Faizel Ismail	Co-Arbitrator

*For the EU*

Jan Sadek	European Delegation to Botswana and SADC
Davide Grespan	European Commission Legal Service
George Dian Balan <sup>29</sup>	European Commission Legal Service
Flavia Marisi <sup>30</sup>	European Commission Legal Service
Giovanni Cifelli	European Commission DG Trade
Alexander Schubert	European Commission DG Trade
Minna Liira	European Delegation to Botswana and SADC
Folkert Graafsma	External Counsel, VVGB
Joris Cornelis	External Counsel, VVGB
Akhil Raina	External Counsel, VVGB

*For SACU<sup>31</sup>*

Gideon Mmolawa	Deputy Permanent Secretary of the Ministry of Investment, Trade and Industry of the Republic of Botswana
Don Ruhukwa	Assistant Secretary International and Commercial Services of the Attorney General's Chambers of the Republic of Botswana

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<sup>28</sup> Email from SACU to the Arbitration Panel dated 14 February 2022.

<sup>29</sup> Mr. Balan participated in the hearing remotely.

<sup>30</sup> Ms. Marisi participated in the hearing remotely.

<sup>31</sup> SACU indicated on the first day of the hearing that Kate Hofmeyr, Senior Counsel at Thulamela Chambers in South Africa, one of SACU's External Legal Counsel, would not be able to attend the hearing.

Johana Segotlong	Deputy Director of the Department of International Trade of the Republic of Botswana
Mosa Dube	Chief State Counsel for the Ministry of Investment, Trade and Industry of the Republic of Botswana
Onkgopotse Ramogapi	Chief Agricultural Officer of the Ministry of Agricultural Development and Food Security Department of Agribusiness of the Republic of Botswana
Martin Ntongana	Chief Trade Officer of the Ministry of Investment, Trade and Industry of the Republic of Botswana
Portia Dlamini	Senior Trade Policy Analyst of the Ministry of Commerce, Industry and Trade of the Kingdom of Eswatini
Nomalanga Gule	Legal Trade Advisor of the Ministry of Commerce, Industry and Trade of the Kingdom of Eswatini
Likonelo Lebone	Director of Legal Services of the Ministry of Trade and Industry of the Kingdom of Lesotho
Matseliso Lehohla	Chief Legal Officer of the Ministry of Trade and Industry of the Kingdom of Lesotho
Anna-Letu Haitembu	Deputy Chief: Legal Advice of the Office of the Attorney General of the Republic of Namibia
Josef Shikongo	Deputy Director: Weights, Measures and Standards of the Ministry of Industrialisation and Trade of the Republic of Namibia
Anton Faul	Senior Trade Advisor for the Ministry of Industrialisation and Trade of the Republic of Namibia
Niki Kruger	Chief Director: Trade Negotiations of the Department of International Trade and Competition of the Republic of South Africa
Mustaqeem Da Gama	Director: Legal-International Trade and Investment of the Department of International Trade and Competition of the Republic of South Africa
Carina Van Vuuren	Senior Manager: Trade Remedies I of the International Trade Administration Commission of the Republic of South Africa
Ndibo Oitsile	Chief Legal Officer of the Legal Unit of the SACU Secretariat

Rumbidzaishe Chinyoka	Legal Officer of the Legal Unit of the SACU Secretariat
Rejoice Karita	Trade Negotiations Coordinator of the Trade Negotiations Sub-Directorate of the SACU Secretariat
Eric White	Herbert Smith Freehills LLP – SACU External Legal Counsel
Morris Schonberg	Herbert Smith Freehills LLP – SACU External Legal Counsel

*Court Reporter*

NC Maischatz Transcription  
Services

*Assistants of the Arbitration Panel*

Nikita Panse	Secretary of the Arbitration Panel
Edoardo Stoppioni	Assistant to Professor Ruiz Fabri
Stuart Scott	Assistant to Advocate Ismail

29. The EU delivered its Opening Statement on the afternoon of 2 March 2022,<sup>32</sup> while SACU delivered its Opening Statement on the morning of 3 March 2022.<sup>33</sup> Due to the health condition of one counsel, the session of questions from the Arbitration Panel planned for the afternoon of 3 March 2022 was held by video conference, as agreed by the Parties.
30. A further session of questions planned for the following day could not be conducted, on account of one counsel confirming that he had contracted COVID-19, and other attendees feeling unwell. Instead, upon the invitation of the Arbitration Panel, and to preserve the equality of arms between the Parties, the Parties agreed to postpone the continuation of the hearing to another online session, which took place on 12 March 2022 by video conference. On the same occasion, the Parties delivered their Closing Statements.<sup>34</sup>

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<sup>32</sup> EU's Opening Statement, delivered on 2 March 2022 (**EU-OS**). The EU also introduced **Exhs. EU-49** and **EU-50** to the record.

<sup>33</sup> SACU's Opening Statement, delivered on 3 March 2022 (**SACU-OS**).

<sup>34</sup> EU's Closing Statement, delivered on 12 March 2022 (**EU-CS**); SACU's Closing Statement, delivered on 12 March 2022 (**SACU-CS**).

## 5. Post-Hearing Stage

31. As the EU objected to the introduction of Exhibit SACU-30 by SACU at the hearing, on 12 March 2022 the Arbitration Panel invited<sup>35</sup> both Parties to address the admissibility of this exhibit in their post-hearing submissions. The Arbitration Panel’s decision on this matter is recorded below.<sup>36</sup>
32. On 13 March 2022, SACU invoked Article 9(13) of the Rules of Procedure.<sup>37</sup> Following email exchanges, the Arbitration Panel directed both Parties to file any post-hearing submissions simultaneously, by 18 March 2022.<sup>38</sup> The Parties agreed that post-hearing submissions would be limited to 5 000 words (exclusive of footnotes). Both Parties filed their submissions by the applicable deadline.<sup>39</sup>
33. During and after the hearing, the Arbitration Panel sought information from the Parties regarding the transcript of the oral proceedings, and in particular with respect to the Q&A sessions of 4 and 12 March 2022. By email dated 23 March 2022, SACU replied that the final version of the transcript was not ready. The following day, the Arbitration Panel shared its concerns that delays in obtaining such transcripts would have an impact on its ability to proceed with its task, and notably to hold deliberations.<sup>40</sup>
34. By email on 7 and 12 April 2022, respectively, the EU and SACU informed the Arbitration Panel they were still struggling to obtain a complete and satisfactory transcript from their transcriber. On 20 April 2022, the Arbitration Panel proposed that the Parties submit, by 26 April 2022, “one consolidated transcript document of the Q&A session which includes their agreed amendments”, and which highlights every material disagreement between the Parties, accompanied by each Party’s proposed wording in relation to such disagreement.<sup>41</sup> The Arbitration Panel would thereafter determine what, if any, adjustments to the transcript were required in light of the audio recording of the

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<sup>35</sup> Email from the Arbitration Panel to the Parties dated 16 March 2022.

<sup>36</sup> *Infra*, at 147.

<sup>37</sup> Article 9(13) of the Rules of Procedure provides: “Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within ten (10) days of the date of the hearing.”

<sup>38</sup> Email from the Arbitration Panel to the Parties dated 15 March 2022.

<sup>39</sup> SACU’s Post-Hearing Submission dated 18 March 2022 (**SACU-PHS**); EU’s Supplementary Written Submission per Article 9(13) of the Rules of Procedure dated 18 March 2022 (**EU-PHS**).

<sup>40</sup> Email from the Arbitration Panel to the Parties dated 24 March 2022.

<sup>41</sup> Email from the Arbitration Panel to the Parties dated 20 April 2022.

Q&A session, the Arbitration Panel members' notes taken at the session, and the Parties' proposed wording. The Parties agreed to this proposal.

35. By email dated 25 April 2022, SACU and the EU eventually furnished the Arbitration Panel with an agreed final consolidated transcript of the Q&A sessions.<sup>42</sup> The Parties indicated in their cover email that, while they had different views in relation to certain parts of the transcript, they had agreed to the "compromise text" so as to avoid further delays.
36. By email dated 28 April 2022, SACU brought the Arbitration Panel's attention to a safeguard measure implemented by the EU with respect to imports from South Africa. Upon invitation by the Arbitration Panel,<sup>43</sup> both Parties commented on this development on 12 May 2022 (SACU),<sup>44</sup> and 16 May 2022 (EU).<sup>45</sup>

## **6. Adjustments to the Arbitral Schedule**

37. Article 81 EPA provides that the Arbitration Panel's Interim Report should be sent to the Parties "as a general rule not later than one hundred and twenty (120) days from the date of establishment of the arbitration panel." Article 82 EPA further provides that the Arbitration Panel "shall notify its ruling to the Parties and to the Trade and Development Committee within one hundred and fifty (150) days from the date of the establishment of the arbitration panel", and in any event no "later than one hundred and eighty (180) days from the date of the establishment of the arbitration panel." Article 96(2) EPA, however, provides that "[a]ny time limits [...] may be extended by mutual agreement of the Parties."
38. As the Arbitration Panel was constituted on 29 November 2021,<sup>46</sup> the deadline for the Interim Report originally fell on 29 March 2022.

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<sup>42</sup> Below, this transcript is referred to as **Tr.** [page]:[lines range].

<sup>43</sup> Email from the Arbitration Panel to the Parties dated 5 May 2022. In following email exchanges, the Arbitration Panel agreed to extend the original deadlines for the parties' submissions.

<sup>44</sup> Comments of the Southern African Customs Union on the New EU Safeguard Measure dated 12 May 2022 (**SACU-NEWSG**).

<sup>45</sup> EU Response to SACU's Comments on "The New EU Safeguard Measure" dated 16 May 2022 (**EU-NEWSG**).

<sup>46</sup> *Supra*, at 12.

39. Difficulties encountered during the hearing,<sup>47</sup> however, prompted the Arbitration Panel to seek the Parties' agreement to push the deadline for the Interim Report to 13 April 2022.<sup>48</sup> The Parties agreed to such extension by emails dated 9 (SACU) and 10 (EU) March 2022.
40. Likewise, in view of the aforementioned delays in obtaining the hearing transcript, which was hindering its deliberations, the Arbitration Panel sought an extension of the deadline, until 4 June 2022.<sup>49</sup> The Parties agreed to this extension on 6 (SACU) and 8 (EU) May 2022.
41. Finally, to ensure the completion of its deliberations, the Arbitration Panel sought the Parties' approval for a 30-day extension of the applicable deadline, to 4 July 2022.<sup>50</sup> The Parties agreed to this extension by emails, both dated 25 May 2022.
42. The Arbitration Panel sent the Interim Report to the Parties on 4 July 2022 in accordance with the amended schedule.

## **7. Interim Review**

43. Comments from the Parties on the Interim Report were received by the Arbitration Panel on 19 July 2022, in accordance with the amended schedule. In these submissions, both Parties made observations regarding precise aspects of the Interim Report, with suggestions and requests for the Arbitration Panel to consider.
44. The EU's observations addressed the following matters:<sup>51</sup>

- a. The causal link (Claim 3);<sup>52</sup>

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<sup>47</sup> *Supra*, at 29 and 30.

<sup>48</sup> Email from the Arbitration Panel to the Parties dated 4 March 2022. The Arbitration Panel further asked the parties for a corresponding extension of the deadline for the Final Report.

<sup>49</sup> Email from the Arbitration Panel to the Parties dated 5 May 2022.

<sup>50</sup> Email from the Arbitration Panel to the Parties dated 23 May 2022.

<sup>51</sup> EU's Observations on the Interim Report dated 19 July 2022 (**EU-IR**).

<sup>52</sup> **EU-IR**, at 3-14.

- b. The manner in which three of its arguments have been summarised and/or addressed by the Panel;<sup>53</sup> and
  - c. Several editorial observations.<sup>54</sup>
45. SACU’s comments addressed the following matters:<sup>55</sup>
- a. The developmental character of the EPA and the Panel’s description of safeguard measures as “extraordinary”;<sup>56</sup>
  - b. The structure of Article 34 EPA;<sup>57</sup>
  - c. The relevance of ITAC’s investigation (Claim 1);<sup>58</sup>
  - d. The delay between the investigation and the measure (Claim 2, second argument);<sup>59</sup>
  - e. The causal link (Claim 3);<sup>60</sup>
  - f. The proportionality of the safeguard measure (Claim 4, second argument);<sup>61</sup>
  - g. SACU’s procedural obligations (Claim 5);<sup>62</sup>
  - h. The Panel’s recommendations;<sup>63</sup> and
  - i. Several editorial observations.<sup>64</sup>
46. After deliberations, the Arbitration Panel opted to address the comments of the Parties in the context of its reasoning and its findings. Accordingly, some reference is made below,

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<sup>53</sup> **EU-IR**, at 15-18 (non-attribution analysis); 19-23 (identification of obligation at stake); and 24-27 (reverse parallelism).

<sup>54</sup> **EU-IR**, at 28 *et seq.*

<sup>55</sup> Comments of the Southern African Customs Union on the Interim Report of the Panel dated 19 July 2022 (**SACU-IR**).

<sup>56</sup> **SACU-IR**, at 4-11.

<sup>57</sup> **SACU-IR**, at 12-16.

<sup>58</sup> **SACU-IR**, at 17-19.

<sup>59</sup> **SACU-IR**, at 20-25.

<sup>60</sup> **SACU-IR**, at 26-33.

<sup>61</sup> **SACU-IR**, at 34-37.

<sup>62</sup> **SACU-IR**, at 38-40.

<sup>63</sup> **SACU-IR**, at 41-47.

<sup>64</sup> **SACU-IR**, at 48 *et seq.*

where appropriate, to the Interim Review stage and the responses of the Arbitration Panel to the observations by the Parties. For coherence purposes, other sections of the Final Report have also been amended in view of these responses from the Arbitration Panel. Editorial suggestions from the Parties, were, for the most part, adopted and implemented without need to refer to the Interim Review.

## ***B. Legal Framework***

### **1. The Economic Partnership Agreement**

47. The EU-SADC EPA began to be provisionally applied on 10 October 2016. Full entry into force will occur once all state Parties have ratified it.<sup>65</sup>
48. Most relevant for this dispute are Articles 34 and 35 EPA, both dealing with safeguards:

#### **Article 34 General bilateral safeguards**

1. Notwithstanding Article 33, after having examined alternative solutions, a Party or SACU, as the case may be, may apply safeguard measures of limited duration which derogate from the provisions of Articles 24 and 25, under the conditions and in accordance with the procedures laid down in this Article.

2. Safeguard measures referred to in paragraph 1 may be taken if, as a result of the obligations incurred by a Party under this Agreement, including tariff concessions, a product originating in one Party is being imported into the territory of the other Party or SACU, as the case may be, in such increased quantities and under such conditions as to cause or threaten to cause:

(a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party or SACU, as the case may be; or

(b) disturbances in a sector of the economy producing like or directly competitive products, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party or SACU, as the case may be; or

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<sup>65</sup> See Protocol 4 to the EU-SADC EPA, Articles 1(a)(i) and 2(a). Article 113(2) EPA provides that full entry into force will take place thirty (30) days after depositing the last instrument of ratification.

(c) disturbances in the markets of like or directly competitive agricultural products in the territory of the importing Party or SACU, as the case may be.

These safeguard measures shall not exceed what is necessary to remedy or prevent the serious injury or disturbances.

3. Safeguard measures referred to in this Article shall take the form of one or more of the following:

(a) suspension of the further reduction of the rate of import duty for the product concerned, as provided for under this Agreement; or

(b) increase in the customs duty on the product concerned up to a level which does not exceed the MFN applied rate at the time of taking the measure; or

(c) introduction of tariff quotas on the product concerned.

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

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

6. Safeguard measures referred to in this Article:

(a) shall only be maintained for such a time as may be necessary to prevent or remedy serious injury or disturbances as defined in paragraphs 2, 4 and 5;

(b) shall not be applied for a period exceeding two (2) years. Where the circumstances warranting imposition of safeguard measures continue to exist, such measures may be extended for a further period of no more than two (2) years. Where a SADC EPA State or SACU, as the case may be, apply a safeguard measure, or where the EU apply a measure limited to the

territory of one or more of its outermost regions, they may however apply that measure for a period not exceeding four (4) years and, where the circumstances warranting imposition of safeguard measures continue to exist, extend it for a further period of four (4) years;

(c) that exceed one (1) year shall contain clear elements progressively leading to their elimination at the end of the set period, at the latest; and

(d) shall not be applied to the import of a product that has previously been subject to such a measure, within a period of at least one (1) year from the expiry of the measure.

7. For the implementation of paragraphs 1 to 6, the following provisions shall apply:

(a) where a Party or SACU, as the case may be, takes the view that one of the situations referred to in paragraphs 2(a) to (c), 4 and/or 5 exists, it shall immediately refer the matter to the Trade and Development Committee for examination;

(b) the Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the Trade and Development Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within thirty (30) days of the matter being referred to the Trade and Development Committee, the importing party may adopt the appropriate measures to remedy the circumstances in accordance with this Article;

(c) before taking any measure provided for in this Article or, in the cases to which paragraph 8 applies, the Party or SACU, as the case may be, shall, as soon as possible, supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the Parties concerned;

(d) in the selection of safeguard measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement. If the MFN applied rate in effect the day immediately preceding the day of entry into force of this Agreement is lower than the MFN applied rate at the time of taking the measure, measures applied in accordance with the provisions of paragraph 3(b) may exceed the MFN rate in effect the day immediately preceding the day of entry into force of this Agreement. In such a case, the Party or SACU, as the case may be, shall supply, in accordance with the provisions of

paragraph (c), the Trade and Development Committee with the relevant information indicating that an increase of the duty up to the level of MFN applied at the time of entry into force is not sufficient and that a measure exceeding this duty is necessary to remedy or prevent the serious injury or disturbances pursuant to paragraph 2;

(e) any safeguard measure taken pursuant to this Article shall be notified immediately to the Trade and Development Committee and shall be the subject of periodic consultations within that body, particularly with a view to establishing a timetable for their abolition as soon as circumstances permit.

8. Where delay would cause damage which would be difficult to repair, the importing Party or SACU, as the case may be, may take the measures provided for in paragraphs 3, 4, and/or 5 on a provisional basis without complying with the requirements of paragraph 7.

(a) Such action may be taken for a maximum period of one hundred and eighty (180) days where measures are taken by the EU and two hundred (200) days where measures are taken by a SADC EPA State or SACU, as the case may be, or where measures taken by the EU are limited to the territory of one or more of its outermost region(s).

(b) The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraph 6.

(c) In taking such provisional measures, the interest of all Parties involved shall be taken into account.

(d) The importing Party or SACU, as the case may be, shall inform the other Party concerned and it shall immediately refer the matter to the Trade and Development Committee for examination.

9. If the importing Party or SACU, as the case may be, subjects imports of a product to an administrative procedure having as its purpose the rapid provision of information on the trend of trade flows liable to give rise to the problems referred to in this Article, it shall inform the Trade and Development Committee without delay.

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

### **Article 35**

#### **Agricultural safeguards**

1. Notwithstanding Article 34, a safeguard measure in the form of an import duty may be applied if, during any given twelve-month period, the volume of imports into SACU of an agricultural product listed in Annex IV originating in the EU exceeds the reference quantity for the product therein indicated.

2. A duty which shall not exceed 25 per cent of the current WTO bound tariff or 25 percentage points, whichever is higher, may be imposed to the agricultural products referred to in paragraph 1. Such duty shall not exceed the prevailing MFN applied rate.

3. Safeguard measures referred to in this Article shall be maintained for the remainder of the calendar year or five (5) months, whichever is the longer.

4. Safeguard measures referred to in this Article shall not be maintained or applied with respect to the same good at the same time as:

(a) a general bilateral safeguard measure in accordance with Article 34;

(b) a measure under Article XIX of the GATT 1994 and the WTO Agreement on Safeguards; or

(c) a special safeguard measure under Article 5 of the WTO Agreement on Agriculture.

5. Safeguard measures referred to in this Article shall be implemented in a transparent manner. Within ten (10) days after applying such a measure, SACU shall notify the EU in writing and shall provide relevant data concerning the measure. On request, SACU shall consult the EU regarding the application of the measure. SACU shall also notify the Trade and Development Committee within thirty (30) days after such imposition.

6. The implementation and operation of this Article may be the subject of discussion and review in the Trade and Development Committee. On request of either Party, the Trade and Development Committee may review the reference quantities and agricultural products as provided for in this Article.

7. The provisions of this Article may only be applied during the period of twelve (12) years from the date of entry into force of this Agreement.

49. In addition, this arbitration is proceeding in line with the provisions of Chapter III EPA, entitled "Dispute Settlement Procedures". In particular, Article 92 EPA provides:

**Article 92**  
**Rules of interpretation**

The arbitration panel shall interpret the provisions of this Agreement in accordance with the customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided for in this Agreement.

50. Finally, SACU's preliminary objections rely in part on Article 79 EPA, which reads:

**Article 79**  
**Initiation of the arbitration procedure**

1. Where the Parties have failed to resolve the dispute by recourse to consultations as provided for in Article 77, or by recourse to mediation as provided for in Article 78, the complaining Party may request the establishment of an arbitration panel.

2. The request for the establishment of an arbitration panel shall be made in writing to the Party complained against and the Trade and Development Committee. The complaining Party shall identify in its request the specific measures at issue, and it shall explain how such measures constitute a breach of the provisions of this Agreement.

**2. The Trade and Development Cooperation Agreement**

51. When it provisionally entered into force on 10 October 2016, in accordance with Paragraph 2 of its Protocol 4, the EPA suspended relevant provisions from an earlier Trade and Development Cooperation Agreement (**TDCA**) concluded in 1999 between the EU and South Africa.<sup>66</sup>
52. Particularly relevant for this dispute is (now suspended) Article 16 TDCA, entitled "Agricultural Safeguard", which read:

**Article 16**  
**Agricultural safeguard**

Notwithstanding other provisions of this Agreement and in particular Article 24, if, given the particular sensitivity of the agricultural markets, imports of products originating in one Party cause or threaten

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<sup>66</sup> Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, OJ L 311, 4 December 1999.

to cause a serious disturbance to the markets in the other Party, the Cooperation Council shall immediately consider the matter to find an appropriate solution. Pending a decision by the Cooperation Council, and where exceptional circumstances require immediate action, the affected Party may take provisional measures necessary to limit or redress the disturbance. In taking such provisional measures, the affected Party shall take into account the interests of both Parties.

53. Also relevant for this dispute is (now suspended) Article 24 TDCA:

**Article 24**  
**Safeguard clause**

1. Where any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products in the territory of one of the Contracting Parties, the Community or South Africa, whichever is concerned, may take appropriate measures under the conditions provided for in the WTO Agreement on Safeguards or the Agreement on Agriculture annexed to the Marrakech Agreement establishing the WTO and in accordance with the procedures laid down in Article 26.

2. Where any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious deterioration in the economic situation of the European Union's outermost regions, the European Union, after having examined alternative solutions, may exceptionally take surveillance or safeguard measures limited to the region(s) concerned, in accordance with the procedures laid down in Article 26.

3. Where any product is being imported in such quantities and under such conditions as to cause or threaten to cause serious deterioration in the economic situation of one or more of the other Members of the Southern African Customs Union, South Africa, at the request of the country or countries concerned, and after having examined alternative solutions, may exceptionally take surveillance or safeguard measures in accordance with the procedures laid down in Article 26.

**3. The Arbitration Panel's Terms of Reference**

54. This arbitration proceeded in line with the standard Terms of Reference provided under Article 5 of the Rules of Procedure, which mandate the Arbitration Panel:

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

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

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

55. A dispute has arisen between the Parties as to the interpretation of these Terms of Reference for the purpose of delimitating the Arbitration Panel's jurisdiction. This issue is dealt with in the relevant sections below.<sup>67</sup>

### ***C. Factual Background***

#### **1. The Process Leading to the Safeguard Measure**

56. In 2015, the South African Poultry Association (SAPA) petitioned the South African International Trade Administration Commission (ITAC) with a request to enact safeguards against imports of frozen bone-in chicken cuts from the EU.<sup>68</sup> SAPA's petition was filed under Article 16 TDCA, which provided for the Parties' right to enact "Agricultural Safeguards".<sup>69</sup>
57. ITAC started its investigation in February 2016,<sup>70</sup> and disclosed its preliminary findings in two Letters of Essential Facts issued respectively in August and September 2016.<sup>71</sup> In the second of these letters, ITAC indicated that, in view of the looming provisional application of the EPA, the investigation under Article 16 TDCA could continue on the basis of Article 34 EPA – which ITAC considered as equivalent to Article 16 TDCA.<sup>72</sup>
58. In November 2016, ITAC found that the circumstances justified the application of provisional measures. Accordingly, a provisional, 13.9% *ad valorem* import duty was applied to EU imports of frozen bone-in chicken cuts in South Africa starting from

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<sup>67</sup> *Infra*, at 105 *et seq.*

<sup>68</sup> **Exh.** EU-11.

<sup>69</sup> *Supra*, at 52.

<sup>70</sup> **Exh.** EU-13.

<sup>71</sup> **Exhs.** EU-15 and EU-16.

<sup>72</sup> **Exh.** EU-16, at 12-13. See also **Exh.** EU-19, also in the record as SAPA-Annex 6, ITAC's Continuation Letter, 22 December 2016.

15 December 2016, under Article 34(8)(a) EPA.<sup>73</sup> In accordance with its terms,<sup>74</sup> that provisional measure expired after 200 days, on 3 July 2017.<sup>75</sup>

59. ITAC continued with its investigation during the following months, with input from the EU.<sup>76</sup> This led to a Third Essential Facts letter issued by ITAC on 14 August 2017,<sup>77</sup> which concluded that the requirements for Article 34 EPA were met – and warranted a definitive safeguard measure. The EU provided comments to this Third Letter on 25 August 2017.<sup>78</sup> A Summary of Findings was issued by ITAC in September 2017,<sup>79</sup> which concluded that the requirements for a safeguard measure under Article 34 EPA were met.

## 2. The Safeguard Measure Itself

60. Pursuant to Article 34(7)(a), SACU put the matter before the TDC. The Parties discussed it on 21 October 2017,<sup>80</sup> yet failed to reach any agreement. The EU then filed a written submission on 31 October 2017.<sup>81</sup> Further discussions took place on 24 November 2017 in the context of the EPA Technical Consultative Meeting,<sup>82</sup> as well as in February 2018.<sup>83</sup>
61. On 27 June 2018, the SACU Council of Ministers approved the implementation of a safeguard measure for a period of 4 years, starting with a 35.3% safeguard duty applied from 28 September 2018, later progressively reduced until the measure lapsed in March 2022.<sup>84</sup>
62. As at the date of the Interim and Final Reports, the safeguard duty had thus lapsed, on 11 March 2022. Questioned on this point at the hearing, SACU’s delegates indicated that

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<sup>73</sup> **Exh.** EU-9.

<sup>74</sup> **Exh.** EU-20, at 2.

<sup>75</sup> See **Exh.** EU-10, at 4.

<sup>76</sup> As recounted in **EU-FWS**, at 52-56.

<sup>77</sup> **Exh.** EU-8.

<sup>78</sup> **Exh.** EU-26.

<sup>79</sup> **Exh.** EU-7.

<sup>80</sup> **EU-FWS**, at 63.

<sup>81</sup> **Exh.** EU-27.

<sup>82</sup> **Exh.** SACU-2.

<sup>83</sup> **Exh.** SACU-3.

<sup>84</sup> **Exh.** EU-10.

“[t]here is no intention at the moment for the Measure to be renewed”,<sup>85</sup> though no commitment was also given *not* to renew the measure.<sup>86</sup> As noted below,<sup>87</sup> this situation cannot prevent the Arbitration Panel from examining the validity of the measure under the EPA.

63. Both Parties have referred to the safeguard measure as the ‘measure at issue’. For sake of consistency, the Arbitration Panel will use the same designation and/or refer to ‘the safeguard measure’.

## **II. THE ESSENCE OF THE CLAIMS AND THE DEFENCE**

64. The following paragraphs provide a brief overview of the main arguments raised by the Parties: during the written phase of the proceedings;<sup>88</sup> at the hearing that took place on 2-4 March 2022 in Gaborone; and on 12 March 2022 by video conference.<sup>89</sup> Fuller descriptions of the Parties’ positions and arguments, issue by issue, can be found in **Section IV(C)(1)** below.

65. The Arbitration Panel stresses that it has carefully considered all relevant factual and legal arguments put forward by the Parties in their respective submissions. The fact that any argument, allegation, exhibit, submission, or piece of evidence is not specifically mentioned in the sections summarising the arguments of the Parties, or in the Arbitration Panel’s analysis, does not mean that the Arbitration Panel has not considered it.

### **A. *The EU***

66. In summary, the EU’s case is that the safeguard measure is not in compliance with the EPA. This case is predicated upon five claims, divided into seven distinct arguments, as follows:

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<sup>85</sup> **Tr.**, 10:8-9.

<sup>86</sup> **Tr.**, 10:16-18.

<sup>87</sup> *Infra*, note 161.

<sup>88</sup> *Supra*, at 13, and 16.

<sup>89</sup> Reference will also be made to the Parties’ answers to the Arbitration Panel’s questions, as recorded in the Transcript.

- a. Claim 1:<sup>90</sup> The safeguard measure has been adopted in light of an investigation that started under a different international instrument (namely, the TDCA). But there is no lawful basis for the investigation initiated by South Africa under the TDCA to be continued and concluded by SACU under the EPA; this irreparably tainted the validity of the safeguard measure.
- b. Claim 2:
- i. (first argument)<sup>91</sup> The safeguard measure does not relate to an injury (or threat thereof) resulting from an “obligation incurred” under the EPA, in accordance with the *chapeau* of Article 34(2).
  - ii. (second argument)<sup>92</sup> The period of investigation (POI) 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.
- c. Claim 3:<sup>93</sup> 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.
- d. Claim 4:
- i. (first argument)<sup>94</sup> 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.
  - ii. (second argument)<sup>95</sup> The level of the safeguard duty did not comply with the requirement that it shall not “exceed what is necessary to

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<sup>90</sup> EU-FWS, at 82-107.

<sup>91</sup> EU-FWS, at 108-135.

<sup>92</sup> EU-FWS, at 136-157.

<sup>93</sup> EU-FWS, at 158-204.

<sup>94</sup> EU-FWS, at 205-216.

<sup>95</sup> EU-FWS, at 217-240.

remedy or prevent the serious injury or disturbance”, in accordance with the *chaussette* of Article 34(2).

- e. Claim 5:<sup>96</sup> SACU did not provide the TDC with all “all relevant information required for a thorough examination of the situation” under Article 34(7)(c) EPA. In particular, 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.

67. In concluding its First Written Submission, the EU asked for the following recommendations from the Arbitration Panel:<sup>97</sup>

[...] the EU requests that the Panel recommend SACU to bring its measures into compliance with the EU–SADC EPA. In this regard, as per 82 (3) of the EU–SADC EPA, the EU suggests that, given the fundamental nature and pervasiveness of the inconsistencies that the EU has demonstrated to exist, the Panel recommend that SACU achieve compliance with the EU–SADC EPA by withdrawing the final safeguard measure imposed on frozen bone-in chicken cuts from the EU. The EU further suggests that the Panel recommend SACU to refund the safeguard duties already paid.<sup>98</sup>

## ***B. SACU***

68. SACU contends that the EU’s claims are predicated on a number of misconceptions, and notably that:
- a. The EU’s claims allege inconsistencies with Articles 34(2) EPA, whereas the measure was adopted solely under the requirements of Article 34(5) EPA, which have not been impugned;
  - b. The EU assumes that WTO law and case law are particularly relevant in this context, whereas the EPA contains its own particular requirements and

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<sup>96</sup> EU-FWS, at 241-247.

<sup>97</sup> According to Article 82(3) EPA, “[e]ither Party may request the arbitration panel to provide a recommendation as to how the Party complained against could bring itself into compliance.”

<sup>98</sup> EU-FWS, at 248.

context in line with its nature as a “development” agreement (and the relevance of WTO law is therefore limited); and

- c. That EU assumes that SACU bears the burden of proof on its right to adopt a safeguard, whereas the burden is on the EU to establish non-compliance with Article 34 EPA.

69. In addition, SACU considers that a number of claims by the EU are beyond the jurisdictional scope of this arbitration.<sup>99</sup>

70. On the merits, SACU considers that none of the EU’s five claims and seven arguments is made out on the facts. In particular, SACU argues that:

- a. Claim 1:<sup>100</sup> There is no particular requirement to conduct an investigation under Article 34 EPA. Accordingly, the circumstances of ITAC’s investigation cannot be a basis for a finding of breach of the EPA.

b. Claim 2:

- i. (first argument)<sup>101</sup> If the *chapeau* of Article 34(2) EPA applies – which is contested – then the injury or disturbance is indeed related to an obligation incurred under the EPA: namely, the removal of import duties on frozen bone-in chicken cuts for the SACU area.

- ii. (second argument)<sup>102</sup> The EPA mandates no particular period of investigation, and the one used in ITAC’s investigation was appropriate and timely; data for the 2017-2018 period was unrepresentative.

- c. Claim 3:<sup>103</sup> The causation analysis was sufficient, and there is no “non-attribution requirement” under the EPA. Even if such a requirement were to apply, then ITAC’s investigation properly concluded that other factors did

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<sup>99</sup> See *infra*, at 93 *et seq.*

<sup>100</sup> SACU-FWS, at 117-136.

<sup>101</sup> SACU-FWS, at 137-159.

<sup>102</sup> SACU-FWS, at 160-177.

<sup>103</sup> SACU-FWS, at 178-220.

not detract from the causal link between higher EU imports and the serious injury or serious disturbance (or threat thereof).

d. Claim 4:

i. (first argument)<sup>104</sup> ITAC could rightly focus on South African data since it amounts to a major proportion of SACU poultry production. In any event, SACU was entitled to adopt a SACU-wide measure, because it is a customs union.

ii. (second argument)<sup>105</sup> If the *chaussette* of Article 34(2) EPA applies – which is contested – then the level of the safeguard measure was in keeping with what was necessary to remedy the impact of the EU imports.

e. Claim 5:<sup>106</sup> SACU provided the TDC with all relevant and necessary information. At the time of the various engagements, the EU neither requested any further information during the lengthy TDC discussions, nor raised the alleged defects related to information provided to it (which it now raises before the Arbitration Panel). The EU’s complaint, SACU argued, was but “a cynical *ex post* attempt to incorrectly impugn the Measure at Issue.”<sup>107</sup>

71. SACU concluded its First Written Submission as follows:

SACU requests the Panel to find that the EU has failed to establish any inconsistency between the Measure at Issue and Article 34 of the EU-SADC EPA. In any event, SACU considers that there is no basis for the Panel to contemplate making the recommendation that the EU has requested.<sup>108</sup>

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<sup>104</sup> SACU-FWS, at 221-239.

<sup>105</sup> SACU-FWS, at 240-264.

<sup>106</sup> SACU-FWS, at 265-296.

<sup>107</sup> SACU-CS, at 275.

<sup>108</sup> SACU-FWS, at 302.

### III. AMICUS CURIAE SUBMISSIONS

72. As noted above,<sup>109</sup> three *amici curiae* delivered submissions to the Arbitration Panel in the context of this dispute. The Parties were offered a chance to comment on these submissions. In its analysis below, the Arbitration Panel has taken these submissions, together with the Parties' comments, into account.

#### A. Amicus curiae submissions

73. Below, the Arbitration Panel briefly summarises the content of the *amici* submissions.

##### 1. AMIE

74. The Association of Meat Importers and Exporters (AMIE) is “the representative body of SACU meat importers and exporters.”<sup>110</sup>
75. At the outset of its *amicus curiae* submission, AMIE noted that “[i]mport volumes of frozen bone-in chicken from the EU have fallen precipitously since 2015.”<sup>111</sup> For AMIE, in these circumstances, “[n]o evidence has been put forward to show why the safeguard duties should ever have been imposed, yet they remain, souring our relationship with our largest and most important trading partner.”<sup>112</sup> AMIE added that “[t]he local chicken sector is one of the most protected sectors in the country, inflating chicken prices at a time when few people can afford healthy protein.”<sup>113</sup>
76. In recounting how ITAC's investigation proceeded, AMIE recalled that, shortly after the start of ITAC's investigation, it “submitted comments opposing the imposition of provisional or final safeguard duties”.<sup>114</sup> AMIE further opined that “[i]n a bizarre twist of events however, the agricultural safeguard which had been imposed under Article 16

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<sup>109</sup> *Supra*, at 21.

<sup>110</sup> *AMIE-AC*, at 1.

<sup>111</sup> *AMIE-AC*, at 2.

<sup>112</sup> *AMIE-AC*, at 4.

<sup>113</sup> *Ibid.*

<sup>114</sup> *AMIE-AC*, at 4-5, citing *AMIE-Annex B*, AMIE's response to the TDCA safeguard investigation, 22 March 2016.

of the TDCA, was carried over to the EPA and imposed on bone-in chicken from the EU, even though the investigation had originally been initiated under the TDCA.”<sup>115</sup>

77. AMIE further contended that the “ITAC failed to establish a causal link between the injury or disturbance suffered by SAPA (the domestic industry) and the frozen bone-in chicken imports from the EU”,<sup>116</sup> and that the “agricultural safeguard investigation that was initiated under the TDCA involved the EU and South Africa and not SADC-M, so the resulting safeguard duty cannot then be imposed on the entire SADC (or even SACU) region when it was not part of the investigation that was carried out under the TDCA.”<sup>117</sup>

## 2. AVEC

78. AVEC “is the representative body for producers of chicken in the EU.”<sup>118</sup>
79. AVEC focused its *amicus curiae* submission on ITAC’s decision to substitute Article 34 EPA for Article 16 TDCA, under which the investigation had initially been conducted.<sup>119</sup> According to AVEC, ITAC has failed to put forward evidence that such a substitution was possible, and AVEC listed a number of reasons why, in its view, it was not.<sup>120</sup> AVEC further contended that Article 35 EPA was the relevant legal basis for bilateral safeguards, although the tariff code for frozen bone-in chicken is explicitly not covered by that Article.<sup>121</sup>
80. By way of providing context, AVEC further contended that “[t]he SACU chicken sector is highly protected”, and that “there is no shortage of protection on SACU-produced chicken.”<sup>122</sup> AVEC explained that “Europe’s market share of the South African chicken market has been steadily falling since 2015 and appears set to fall still further.”<sup>123</sup> As such, AVEC alleged that “it must be assumed the decision to continue with the safeguard is political.”<sup>124</sup>

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<sup>115</sup> AMIE-AC, at 6 (emphasis omitted). See also *ibid.*, at 12.

<sup>116</sup> AMIE-AC, at 7 (emphasis omitted).

<sup>117</sup> AMIE-AC, at 11 (emphasis omitted).

<sup>118</sup> AVEC-AC, at 1.

<sup>119</sup> AVEC-AC, at 2.

<sup>120</sup> AVEC-AC, at 2-3, items *a*) to *g*).

<sup>121</sup> AVEC-AC, at 2-3, item *g*).

<sup>122</sup> AVEC-AC, at 3.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

### 3. SAPA

81. The South African Poultry Association (SAPA) “is a South African national voluntary organisation [...] which represents the interests of the South African poultry industry in general”.<sup>125</sup>
82. SAPA started its 60-page *amicus curiae* submission by noting that, in its view, the arbitral proceedings “will be moot by the time the Arbitration Panel makes its ruling”,<sup>126</sup> since the safeguard measure is meant to lapse before the Final Report is notified to the Parties.<sup>127</sup> SAPA further argued that the burden of proof in these proceedings lies with the EU, as the complaining party.<sup>128</sup>
83. In interpreting Article 34 EPA, SAPA stressed that “[a] major objective of the EU-SADC EPA is development”,<sup>129</sup> and that this objective underlies Article 34(5) EPA, a safeguard provision “less onerous than the provisions which apply to the EU.”<sup>130</sup> SAPA relied on this context, as well as the differences in language, to argue that “[t]he standards required by the EU-SADC EPA are much lower than those required under the [WTO] Safeguards Agreement.”<sup>131</sup> In particular, SAPA contended that Article 34 EPA “does not include any requirement for a domestic investigation or the publishing of any report setting out the findings and ‘reasoned conclusions’ of the investigating authority.”<sup>132</sup>
84. According to SAPA, the applicable provision in this context is Article 34(5) EPA, and not Article 34(2) EPA as argued by the EU,<sup>133</sup> and ITAC was therefore warranted in using this legal basis following the provisional entry into force of the EPA (even though the investigation started under the aegis of Article 16 TDCA).<sup>134</sup> Indeed, SAPA argued that “the jurisdictional requirements for Article 16 of the TDCA and Article 34(5) as read with Article 34(2)(c) of the EU-SADC EPA are materially the same.”<sup>135</sup> SAPA added

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<sup>125</sup> SAPA-AC, at 2.1.

<sup>126</sup> SAPA-AC, at 5.1.

<sup>127</sup> SAPA-AC, at 5.9.

<sup>128</sup> SAPA-AC, at 6.5.

<sup>129</sup> SAPA-AC, at 9.1.

<sup>130</sup> SAPA-AC, at 9.8. See also *ibid.*, at 10.6.1.

<sup>131</sup> SAPA-AC, at 9.13.

<sup>132</sup> SAPA-AC, at 9.12.5.

<sup>133</sup> SAPA-AC, at 10.1.

<sup>134</sup> SAPA-AC, at 11.4.

<sup>135</sup> SAPA-AC, at 11.4.7.

that it is irrelevant in light of Article 34 EPA that the SACU Council of Ministers adopted the measure on the recommendation of ITAC, a South African institution.<sup>136</sup> As for the EU's contentions that the investigation and the measure relate to a different geographical scope,<sup>137</sup> SAPA contended that it is "factually incorrect."<sup>138</sup>

85. SAPA also sought to demonstrate that: (i) imports of frozen bone-in chicken cuts from the EU have surged;<sup>139</sup> (ii) there was a disturbance and/or serious injury to the market;<sup>140</sup> and (iii) there was a causal link between these two phenomena.<sup>141</sup> SAPA concluded that the safeguard measure was an appropriate remedy.<sup>142</sup>

## ***B. Comments by the Parties***

### **1. SACU**

86. On 8 February 2022, SACU submitted comments on the *amici curiae* submissions, as follows:
- a. With respect to AMIE, SACU noted that the data cited by the association contains no source, and thus is impossible to verify.<sup>143</sup> In any event, SACU argued that this data refers "to a period after the adoption of the safeguard measures", and arises from multiple factors.<sup>144</sup> To the extent that AMIE protested that ITAC substituted the legal basis for the investigation, SACU reiterated its position that this is irrelevant, as the relevant obligations in this dispute are only to be found under Article 34 EPA.<sup>145</sup>
  - b. With respect to AVEC, SACU disagreed that Article 35 EPA, on Agricultural Safeguards, was the only available legal basis for the safeguard measure, and notes that Article 34(2)(c) EPA itself provides for bilateral

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<sup>136</sup> **SAPA-AC**, at 11.5.3.

<sup>137</sup> Claim 4, first argument: see *infra*, at 279 *et seq.*

<sup>138</sup> **SAPA-AC**, at 11.6.1.

<sup>139</sup> **SAPA-AC**, at 13.5.

<sup>140</sup> **SAPA-AC**, at 13.6.

<sup>141</sup> **SAPA-AC**, at 13.7.

<sup>142</sup> **SAPA-AC**, at 14.

<sup>143</sup> **SACU-AC**, at 47.

<sup>144</sup> **SACU-AC**, at 47-48.

<sup>145</sup> **SACU-AC**, at 49.

safeguards in relation to agricultural products.<sup>146</sup> As for the alleged political motives underlying the safeguard, SACU contended that this argument is “entirely irrelevant to the Panel’s task and falls outside its Terms of Reference.”<sup>147</sup>

- c. With respect to SAPA, SACU disagreed that the arbitration is “moot”, opining instead that “there are many further differences of legal opinion between the EU and SACU that this case has brought to light and which a Panel Report would help to resolve.”<sup>148</sup> SACU further argued that, although likely “useful” for the Arbitration Panel, SAPA’s recounting of the investigation and the broader context of this dispute falls outside the Arbitration Panel’s mandate.<sup>149</sup>

On the other hand, SACU noted that SAPA’s submission supports its position that the legal basis for the safeguard measure is Article 34(5) EPA, and not Article 34(2) EPA.<sup>150</sup> In this respect, SACU considered that SAPA made “valid comments” as to the similarities between Article 16 TDCA and Article 34(5) EPA (read together with Article 34(2)(c)).<sup>151</sup> SACU further noted that SAPA’s information corroborates its position with respect to Claim 4 (geographical scope).<sup>152</sup>

Likewise, SACU considered that SAPA’s submission “provides further corroboration of the investigation’s findings of serious injury or disturbance and their causal relationship with the increased EU imports”,<sup>153</sup> as well as of the adequacy of the safeguard measure’s level under Article 34 EPA.<sup>154</sup> Finally, SACU noted that SAPA’s contentions regarding the information provided to the TDC support its own.<sup>155</sup>

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<sup>146</sup> SACU-AC, at 41.

<sup>147</sup> SACU-AC, at 42.

<sup>148</sup> SACU-AC, at 6.

<sup>149</sup> SACU-AC, at 10-14.

<sup>150</sup> SACU-AC, at 18.

<sup>151</sup> SACU-AC, at 22.

<sup>152</sup> SACU-AC, at 23.

<sup>153</sup> SACU-AC, at 29.

<sup>154</sup> SACU-AC, at 35.

<sup>155</sup> SACU-AC, at 38.

Concluding, SACU suggested that “SAPA’s submission provides valuable corroboration of SACU’s position as expressed in its first written submission”.<sup>156</sup>

## 2. The EU

87. As noted above,<sup>157</sup> the EU did not offer any comments in writing in response to the *amicus curiae* submissions.

## IV. FINDINGS

88. The following sections record both the Parties’ arguments in these proceedings, as well as the Arbitration Panel’s findings, in accordance with Articles 81 and 92 EPA.<sup>158</sup>
89. At the outset, the Arbitration Panel wishes to stress that this is the first arbitration to proceed under the EPA. It is also, to the Arbitration Panel’s knowledge, the first dispute related to the safeguard regime present in this type of international economic instruments.<sup>159</sup> The Arbitration Panel is, therefore, mindful of the scope of its task, as well as of its duty to respect the balance between the rights and obligations of both Parties under the Agreement, as reflected in Article 92 EPA. Equally, the Arbitration Panel has taken note of the objectives of this instrument in terms of sustainable development. These objectives have informed its analysis in the following sections.<sup>160</sup>
90. In accordance with its decision of 11 February 2022, the Arbitration Panel first sets out its ruling on SACU’s preliminary objections (A). In a second step, the Arbitration Panel

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<sup>156</sup> SACU-AC, at 59.

<sup>157</sup> *Supra*, at 25.

<sup>158</sup> Article 81 EPA provides, in relevant parts: “The arbitration panel shall notify to the Parties an interim report containing both the descriptive section and its findings and conclusions, as a general rule not later than one hundred and twenty (120) days from the date of establishment of the arbitration panel.” Article 92(2) EPA provides: “The [Arbitration Panel’s] ruling shall set out the findings of fact, the applicability of the relevant provisions of this Agreement and the reasoning behind any findings and conclusions that it makes.”

<sup>159</sup> It also appears to be the first known international arbitration involving international organisations on either side.

<sup>160</sup> See in particular *infra*, at 167 *et seq.*

resolves a number of preliminary issues (**B**), which are of general importance for the remaining claims on the merits, addressed to the extent necessary in a third part (**C**).<sup>161</sup>

### ***A. Preliminary Objections***

91. As noted above,<sup>162</sup> SACU has raised preliminary objections that challenged the Arbitration Panel’s jurisdiction over certain claims and arguments put forward by the EU.
92. On 11 February 2022, the Arbitration Panel decided to rule on these objections together with the merits, in the Final Report.<sup>163</sup>

#### **1. SACU**

93. In its preliminary objections, SACU contended that a number of claims and arguments put forward by the EU in its First Written Submission went beyond the claims that were set out in the EU’s REP,<sup>164</sup> in alleged breach of Article 79(2) EPA.<sup>165</sup>
94. In particular, SACU argued that Article 79(2) EPA<sup>166</sup> requires a party to identify the measure allegedly in breach of the EPA; since the EU only challenged the safeguard duty imposed in July 2018, SACU says, it cannot extend the scope of the arbitration to other measures, and in particular to the investigation undertaken by ITAC, which underpins the safeguard measure at issue.<sup>167</sup> SACU thus continued that the following four claims and arguments from the EU are beyond the scope of these arbitral proceedings:

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<sup>161</sup> The Arbitration Panel has taken note of SAPA’s contention that this dispute was moot (**SAPA-AC**, section 5). It is true that the safeguard measure expired on 11 March 2022, before the Arbitration Panel sent its Interim Report to the Parties. Yet, while delegates for SACU indicated at the hearing that the customs union had “no intention of renewing [the safeguard measure] at the moment” (**Tr.**, 10:14-15), as they are entitled to do under the Article 34(6)(b) EPA, they made “no commitment not to renew [it]” either (*ibid.*, at 16-18) – meaning that the validity of the measure remains at stake. Besides, the Parties disagree that the dispute is moot, and seek the Arbitration Panel’s decision on a number of questions (**SACU-AC**, at 6; **EU-PHS**, at 21). Finally, some issues (such as, e.g., the EU’s request for a refund, decided *infra*, at 373) remain pending, necessitating a determination as to the validity of the safeguard measure, irrespective of whether it might be renewed or not. For these reasons, the Arbitration Panel rejects the contention that the dispute is moot.

<sup>162</sup> *Supra*, at 16.

<sup>163</sup> Email from the Arbitration Panel to the Parties dated 11 February 2022. At the hearing, SACU said it was “content that the Panel rule on the jurisdictional issues in its final report”: see **SACU-OS**, at 18.

<sup>164</sup> **Exh.** EU-5, which SACU refers to as the “EU Arbitration Panel Request”.

<sup>165</sup> **SACU-PO**, at 8.

<sup>166</sup> Quoted *supra*, at 50.

<sup>167</sup> **SACU-PO**, at 8-11. See also **SACU-AC**, at 11: “SACU does not dispute that it came to the view that the Measure at Issue was justified under Article 34 of the EU-SADC EPA on the basis of the findings

- a. Claim 2, second argument, related to the period of investigation (POI) selected by ITAC in its investigation, with SACU contending that the REP never protested that it was too “old” or “outdated”,<sup>168</sup>
- b. Claim 3, which also relates to the safeguard investigation, in alleging that ITAC had failed to conduct a proper causation analysis, to the extent that the EU argues for a “correlation requirement” between the increase in imports and the worsening of the serious injury or disturbance factors, on the basis that no claim in relation to this “correlation requirement” is to be found in the REP;<sup>169</sup>
- c. Claim 4, first argument, with respect to the notion of “reverse parallelism”,<sup>170</sup> which SACU says is “nowhere to be found in the EU’s [REP] and therefore it is not within the Terms of Reference”, and with respect to the geographic scope of the data used to assess serious injury or disturbance, on the basis that the claim in the REP “concerns only the geographic scope of the import data used”;<sup>171</sup> and
- d. Claim 5, which relates to the information and data that ITAC allegedly failed to provide to the TDC, to the extent that the EU argues that such data should have included information as to ITAC’s comparison of domestic and imported prices, as well as in relation to ITAC’s unsuppressed price analysis, on the basis that the claim in the REP only related to the non-provision of actual figures but only indexed data.<sup>172</sup>

95. In its First Written Submission, SACU reiterated *verbatim* its preliminary objections<sup>173</sup> but also contended that none of the EU’s first four claims should be heard in these proceedings.<sup>174</sup> Indeed, this results from SACU’s main contention (further developed

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of ITAC’s investigation and its recommendation. However, while that makes the investigation and the recommendation a relevant part of the factual background, it does not make them part of the Measure at Issue.”

<sup>168</sup> SACU-PO, at 15-16. See also SACU-OS, at 90-92.

<sup>169</sup> SACU-PO, at 19. See also SACU-OS, at 99.

<sup>170</sup> See *infra*, at 279.

<sup>171</sup> SACU-PO, at 26. See also SACU-OS, at 112-117.

<sup>172</sup> SACU-PO, at 30. See also SACU-OS, at 150-151.

<sup>173</sup> See SACU-FWS, at 41-58.

<sup>174</sup> SACU-FWS, at 59.

above<sup>175</sup>) that Article 34(2) EPA is not the proper legal basis for this dispute, such that the EU's claims are "misdirected and without object since they allege a violation of a provision that is not applicable to the Measure at Issue."<sup>176</sup> In particular, SACU contended that Claim 2, first argument, and Claim 4, second argument, "must be dismissed" because they rely on language that is only found in Article 34(2) EPA.<sup>177</sup>

96. SACU also rejected the EU's contention<sup>178</sup> that there is no legal basis for the Arbitration Panel to issue a preliminary ruling on this issue, invoking "the inherent jurisdiction of the Panel to rule on the scope of its own competence".<sup>179</sup> SACU further advanced that claims regarding the conduct of ITAC itself are not within the ToR, and could be relevant only insofar as the EU claims that "SACU should not have taken the action it did in light of the findings of the investigation."<sup>180</sup>
97. At the hearing, SACU clarified that it "is merely asking the Panel to ensure full respect for the Terms of Reference."<sup>181</sup> In this respect, SACU reiterated that the EU's REP did not challenge ITAC's investigation in itself (which, for SACU, is unsurprising "since there are no rules in the EPA on the conduct of an investigation and the issuance of a report"<sup>182</sup>), meaning that that investigation in itself cannot be the basis of the EU's claims.
98. According to SACU, this does not prevent the EU "from raising issues relating to the investigation conducted by ITAC."<sup>183</sup> What the EU cannot do, however, SACU contended, is to focus exclusively on this investigation without also showing "that SACU was not justified in imposing *the Measure at Issue* because of some inconsistency with relevant obligations in Article 34 of the EPA."<sup>184</sup>

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<sup>175</sup> *Infra*, at 155 et seq.

<sup>176</sup> **SACU-FWS**, at 59. See also *ibid.*, at 33-34, noting that the EU may argue that Article 34(2) EPA applies even for safeguards adopted under the aegis of Article 34(5) EPA, but also claiming that such an approach "should not be entertained."

<sup>177</sup> **SACU-FWS**, at 40, and at 60. See also **SACU-OS**, at 27: "[...] the EU's failure [to address Article 34(5) EPA] has created a fatal flaw in its substantive case, with the result that all its claims that allege an inconsistency with the inapplicable Article 34(2) are misdirected and are without object."

<sup>178</sup> *Infra*, at 100.

<sup>179</sup> **SACU-FWS**, at 15.

<sup>180</sup> **SACU-FWS**, at 24 and 26.

<sup>181</sup> **SACU-OS**, at 17.

<sup>182</sup> **SACU-OS**, at 21. See also **SACU-CS**, at 6.

<sup>183</sup> **SACU-OS**, at 21.

<sup>184</sup> **SACU-OS**, at 25 (emphasis in the original).

## 2. The EU

99. At the outset, the EU contended that SACU has failed to identify a legal basis for its request that the Arbitration Panel rule as a preliminary matter on the objections,<sup>185</sup> and concluded that this request was therefore inadmissible.<sup>186</sup>
100. In any event, according to the EU, no such legal basis exists: the EU pointed to Article 82(2) EPA, which allows arbitration panels to issue a preliminary ruling “[i]n cases of urgency”, and contends that this is no such case.<sup>187</sup> The EU further disputed that SACU’s request could be granted by way of a procedural ruling, which the Arbitration Panel may issue in line with Articles 5, 7(5), and 7(6) of the Rules of Procedure.<sup>188</sup>
101. Turning to the merits of the preliminary objections, the EU argued that they stem from a “fundamental misunderstanding”,<sup>189</sup> i.e., a confusion between the “measure at issue”, and the claims arising from that measure.<sup>190</sup> For the EU, ITAC’s investigation and the safeguard duty are “two parts (or elements) of the same” measure (namely, the bilateral safeguard measure).<sup>191</sup> The EU next contended that ITAC’s investigation was mentioned several times in its REP, and was “extensively discussed” during the consultations with SACU.<sup>192</sup>
102. The EU added that, both as a matter of logic and “for the effective resolution of the dispute”,<sup>193</sup> it needed to be able to discuss the role of ITAC’s investigation in order to challenge the safeguard measure that is predicated upon this investigation.<sup>194</sup> According to the EU, ITAC is the entity tasked with conducting trade investigations on behalf of SACU, meaning that its investigation and determinations are “attributable” to SACU.<sup>195</sup> Moreover, the EU argued that – as a matter of law and practice – trade panels routinely review the investigation and determinations underlying challenged safeguard measures,

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<sup>185</sup> EU-PO, at 4.

<sup>186</sup> EU-PO, at 58(i).

<sup>187</sup> EU-PO, at 7-9.

<sup>188</sup> EU-PO, at 10-12.

<sup>189</sup> EU-PO, at 3.

<sup>190</sup> EU-PO, at 16, citing *EC – Selected Customs Matters*, at 130, and *US – Countervailing and Anti-Dumping Duties (China)*, at 4.12.

<sup>191</sup> EU-PO, at 17.

<sup>192</sup> EU-PO, at 18-19.

<sup>193</sup> EU-PO, at 27.

<sup>194</sup> EU-PO, at 21.

<sup>195</sup> EU-PO, at 25, citing *US – Corrosion-Resistant Steel Sunset Review*, at 81.

as such investigations and determinations constitute relevant “information/data”.<sup>196</sup> The EU provided a number of examples of WTO panels exercising their review over “the *entire* trade defence measure (*i.e.* the decision to impose duties and the underlying investigation/determination)”, even when a complainant only mentioned the safeguard measure itself in the underlying REP.<sup>197</sup> The EU noted, however, that its REP did mention ITAC’s investigation multiple times.<sup>198</sup>

103. As for SACU’s distinct challenges to specific claims, the EU contended as follows:

- a. With respect to the POI (claim 2, second argument), the EU argued that this argument was present in its REP, properly interpreted;<sup>199</sup>
- b. With respect to the “correlation requirement” (in claim 3), the EU argued that this claim was present in its REP, properly interpreted;<sup>200</sup>
- c. With respect to the argument about “reverse parallelism” (claim 4), the EU contended that SACU is trying to draw a distinction between this concept and the notion of “geographical scope”, and since the latter is mentioned in the REP,<sup>201</sup> this claim thus falls within the scope of the ToR;<sup>202</sup> and
- d. With respect to the provision of information to the TDC (claim 5), the EU contended that SACU is “simply playing grammatical games”,<sup>203</sup> and that a proper interpretation of the REP indicates that the EU took issue with all the ITAC data provided by SACU to the TDC.<sup>204</sup>

104. At the hearing, the EU reiterated that “the measure at issue covers *both*, SACU’s decision to impose final safeguard duties, *and* the underlying ITAC investigation on which (in SACU’s words) SACU’s decision is ‘*based*’.”<sup>205</sup> For the EU, since “ITAC is entrusted by the SACU Council to conduct all investigations for SACU and [since] SACU, by

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<sup>196</sup> EU-PO, at 29-31, citing as an example Panel Report, *Argentina – Preserved Peaches*, at 7.2-7.6.

<sup>197</sup> EU-PO, at 32 (emphasis in the original), with examples at 33-40.

<sup>198</sup> EU-PO, at 41.

<sup>199</sup> EU-PO, at 43-45, citing Exh. EU-5, at 1(e).

<sup>200</sup> EU-PO, at 46-47, citing Exh. EU-5, at 1(d).

<sup>201</sup> EU-PO, at 51-52, citing Exh. EU-5, at 1(c).

<sup>202</sup> EU-PO, at 52-53.

<sup>203</sup> EU-PO, at 55.

<sup>204</sup> *Ibid.*, citing Exh. EU-5, at 4(a).

<sup>205</sup> EU-OS, at 13 (emphasis in the original), citing SACU-PO, at 11.

expressly referring to the underlying ITAC investigation, endorsed the ITAC investigation and determination of facts and law [ , t]herefore, any defect in the ITAC investigation is attributable to SACU and affects the validity of SACU’s decision to adopt the safeguard measure at hand.”<sup>206</sup>

### 3. The Arbitration Panel’s Analysis

#### *Introduction*

105. As an international adjudicative body, the jurisdiction of the Arbitration Panel is circumscribed by the consent of the Parties.<sup>207</sup> It is well established that “it is not possible to presume that consent has been given by a state[; r]ather, the existence of consent must be established.”<sup>208</sup> In the case at hand, the Parties’ consent was provided in the EPA, whereby they agreed to submit to an arbitral procedure in order to arbitrate a certain category of disputes.

106. In this context, the mandate of the Arbitration Panel as set out in the ToR is:

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

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

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

107. The ToR strongly echo those applying in the context of WTO proceedings,<sup>209</sup> in line with Article 7(1) DSU.<sup>210</sup> Discussing this article, the Appellate Body (**AB**) noted that:

A panel’s terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective – they give the

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<sup>206</sup> **EU-CS**, at 20.

<sup>207</sup> Malcolm Shaw, *International Law* (9<sup>th</sup> ed., OUP 2021), at 881: “All the methods available to settle disputes are operative only upon the consent of the particular states.”

<sup>208</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, at 175.

<sup>209</sup> The relevance of WTO law and practice for these proceedings is explained *infra*, at 228 *et seq.*

<sup>210</sup> See Article 7(1) DSU: “1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: ‘To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document [...] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).’”

parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.<sup>211</sup>

108. Subsection (a) of the ToR makes reference to the REP.<sup>212</sup> For the Arbitration Panel, the REP is therefore crucial to circumscribe “the matter” to be “examine[d]” by the Panel in these proceedings. This is in keeping with a complaining party's obligation, under Article 79(2) EPA, to “identify in its request the specific measures at issue, and [to] explain how such measures constitute a breach of the provisions of this Agreement.”<sup>213</sup>
109. In other words, together with the ToR, the REP is the basis for the Arbitration Panel's jurisdiction, which is ultimately rooted in the EPA parties' consent to arbitrate. This jurisdiction circumscribes the role and power of the Arbitration Panel; ascertaining its boundaries is therefore critical to the resolution of the dispute. This is why SACU's preliminary objections are admissible and must be dealt with.<sup>214</sup>
110. To answer SACU's preliminary objections, the Arbitration Panel must interpret the terms of these instruments (the ToR and the REP) to determine whether certain issues fall within, or outside, the proceedings' jurisdictional scope. This interpretative exercise takes place under international law, which contains “no rule that requires a restrictive interpretation” of an instrument conferring jurisdiction.<sup>215</sup> Accordingly, it is for the Arbitration Panel “to determine from all the facts and taking into account all the arguments advanced by the Parties” whether jurisdiction exists over a given matter.<sup>216</sup>
111. In ascertaining the jurisdiction of WTO panels over an issue, the AB has insisted on whether the claims as described in a REP met a certain “standard of *clarity*”<sup>217</sup> and/or

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<sup>211</sup> *Brazil – Desiccated Coconut*, at 186.

<sup>212</sup> **Exh.** EU-5.

<sup>213</sup> Article 79(2) EPA, which echoes Article 6(2) DSU.

<sup>214</sup> As put in *US – Carbon Steel*, at 123, “certain issues going to the jurisdiction of a panel are so fundamental that they may be considered at any stage in a proceeding.”

<sup>215</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, 1996 I.C.J. Reports 803, at 847, Separate Opinion of Judge Higgins, at 857. The Arbitration Panel therefore rejects SACU's contention that the terms of the ToR “must be strictly construed”: see **SACU-FWS**, at 21.

<sup>216</sup> *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 1998 I.C.J. Rep. 432, at 38.

<sup>217</sup> *Korea – Dairy*, at 124 (emphasis in the original).

were “sufficiently precise”.<sup>218</sup> This echoes SACU’s contention that the EU had “a duty to specify its claims precisely”.<sup>219</sup> Given its duty to consider “all the facts”, the Arbitration Panel considers that it is also free to consider the content of the preceding consultations between the Parties.<sup>220</sup>

112. These standards are not mere formalities, as they fulfil an important purpose in terms of due process. For the International Court of Justice, it is the “legal security and the good administration” of justice that entails the inadmissibility of “new claims” that would transform the subject-matter of the dispute.<sup>221</sup> Notably at stake are the rights of the other party, which should not be prejudiced by such a transformation.<sup>222</sup> In assessing that subject-matter, however, the Arbitration Panel considers that the substance of claims – not the labelling operated by the Parties – is the more relevant consideration.<sup>223</sup>
113. Finally, in reviewing SACU’s preliminary objections, the Arbitration Panel is also mindful of the distinction between *claims* and *arguments*.<sup>224</sup> As put by the AB, whereas “any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request”, it is natural that “arguments” will be progressively developed and clarified in the course of the proceedings.<sup>225</sup>
114. With these considerations in mind, the Arbitration Panel turns to SACU’s preliminary objections.<sup>226</sup>

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<sup>218</sup> *EC – Bananas III*, at 142.

<sup>219</sup> **SACU-FWS**, at 21.

<sup>220</sup> As was done, e.g., in *EC – Computer Equipment*, at 70.

<sup>221</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 I.C.J. Rep. 265, at 69.

<sup>222</sup> As put by the AB in *Korea – Dairy*, at 127, the key question is indeed “whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings”. See also *EC – Bananas III*, at 142-143; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 2010 I.C.J. Rep. 639, at 44.

<sup>223</sup> In this respect, the Arbitration Panel considers that the terms used by the EU in its REP, and its formalistic approach in general, might have contributed to SACU’s understanding that some claims were outside of the ToR.

<sup>224</sup> *Korea – Dairy*, at 139. See also *EC – Bananas III*, at 143: “Article 6.2 of the DSU requires that the claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel”.

<sup>225</sup> *Korea – Dairy*, at 139.

<sup>226</sup> While, in its submissions on preliminary objections, SACU also contended that some of the EU’s claims were “misdirected and without object” (see *supra*, at 95), this argument was predicated on SACU’s interpretation of Article 34 EPA, and in particular on its contention that the safeguard

*The Measure at Issue*

115. Although not precisely cast as a jurisdictional objection, SACU insisted in its submissions that the “measure at issue” in these proceedings is the safeguard measure, such that the EU’s arguments and criticisms with respect to ITAC’s investigation fall beyond the ToR.<sup>227</sup>
116. For the Arbitration Panel, to the extent the REP mentions or discusses the underlying investigation, it is in relation to the final safeguard measure, in a manner that connects the process to the outcome. This approach was sensible and reasonable, as it offered context to the “measure at issue”, which did not arise out of a vacuum. While the relevance for the merits of ITAC’s investigation is further discussed below,<sup>228</sup> the Arbitration Panel considers that references to ITAC’s investigation in the EU’s submissions qualify as arguments and context, and not as “new claims” that fall beyond the ToR.

*SACU’s first preliminary objection*

117. In a first objection, SACU considers that the REP never foreshadowed the EU’s contentions under Claim 2, first argument, that the period of investigation (POI) was “outdated”.
118. The Arbitration Panel notes however that the EU did contend in its REP that:
- a. “[t]he assessment of the existence of a threat of disturbance and/or serious injury as a result of an increase in volume of imports was based on outdated import data”;<sup>229</sup> and
  - b. “the measure does not take into consideration that the imports during the period December 2016 – September 2018 greatly decreased compared to the period covered by the investigation.”<sup>230</sup>

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measure was governed solely by Article 34(5) EPA. Since the Arbitration Panel rejects this reading of Article 34 (*infra*, at 195 *et seq.*), these contentions no longer need to be addressed.

<sup>227</sup> See **SACU-FWS**, at 22-27.

<sup>228</sup> *Infra*, at 317.

<sup>229</sup> **Exh.** EU-5, at 1(a).

<sup>230</sup> **Exh.** EU-5, at 1(e).

119. On their own or taken together, these contentions are sufficiently precise to offer notice to SACU that the POI, and the extent of the data underlying it, fell within the EU’s claims.<sup>231</sup> Accordingly, the first jurisdictional objection is rejected.

*SACU’s second preliminary objection*

120. In a second preliminary objection, SACU argues that the EU’s Claim 3, on causation, did not foreshadow arguments about a lack of correlation between increasing imports and the alleged serious injury and/or disturbance.

121. The Arbitration Panel reiterates that what matters is the substance of the claims, not the labelling used by the Parties. The Arbitration Panel notes that the REP mentions at multiple times that the measure at issue should relate to “an alleged increase in imports”, and that this measure is invalid because of various qualifications to these import trends.<sup>232</sup> These statements offer context to the EU’s challenge to the “analysis of the existence and level of a threat of disturbance and/or serious injury because of an increase in volume of imports”<sup>233</sup> by SACU – a challenge that is expressed on distinctly causal terms.

122. For the Arbitration Panel, the EU’s overall challenge that the underlying causation analysis was lacking was therefore sufficiently precise to fall within the ToR. Accordingly, the second jurisdictional objection is rejected.

*SACU’s third preliminary objection*

123. In a third preliminary objection, SACU contends that Claim 4, second argument, about the measure’s geographical scope, is “nowhere to be found in the EU’s [REP]”.<sup>234</sup>

124. The Arbitration Panel disagrees: the REP did include the EU’s protest that “[t]he measure at issue concerns a different geographic scope than the investigation, which did not take into account the import data relating to SACU but was based on data relating exclusively to the Republic of South Africa.”<sup>235</sup> While SACU interpreted this language as only referring to the geographic scope of the *data*, the Arbitration Panel, as noted above,<sup>236</sup>

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<sup>231</sup> The Arbitration Panel further notes that, in the context of the TDC discussions, the EU contended that “international legal practices” mandated to “ensure the most recent information is considered”: see **Exh. SACU-2**, at 2.1(ii).

<sup>232</sup> See **Exh. EU-5**, at 2(b) and 3(a).

<sup>233</sup> **Exh. EU-5**, at 1(d), repeated at 3(a).

<sup>234</sup> **SACU-FWS**, at 54.

<sup>235</sup> **Exh. EU-5**, at 1(c).

<sup>236</sup> *Supra*, at 116.

reads references to ITAC’s investigation in the REP as linking the outcome (i.e., the safeguard measure) to the procedure that led to it. As such, the reference to a “different geographical scope” in the REP is sufficiently precise to allow Claim 4, second argument.

125. Accordingly, the third jurisdictional objection is rejected.

*SACU’s fourth preliminary objection*

126. In a fourth preliminary objection, SACU considers that originally the EU only complained of the fact that the TDC was not provided with “actual data”, as opposed to “indexed data”. As such, SACU says, further complaints regarding the type of data provided fall outside the ToR.

127. The Arbitration Panel does not share that reading of the REP, in which the EU complained that the TDC “was not provided with the necessary data or was provided only with indexed data, which made it impossible to thoroughly and fully examine the situation and propose a recommendation or satisfactory solution.”<sup>237</sup>

128. The Arbitration Panel further observes that this part of the EU’s REP is prefaced by the EU’s description of Article 34(7)(c) as requiring SACU to provide the TDC with “all relevant information”. Given the EU’s overarching contention that “the measure at issue [was] inconsistent with these requirements”, the Arbitration Panel considers that the reference to “necessary data” was sufficiently precise to encompass the EU’s claims that it was not provided with certain types of information.

129. Accordingly, the fourth jurisdictional objection is rejected, and the Arbitration Panel upholds jurisdiction over all claims.

***B. Preliminary Issues***

130. There is no dispute that the applicable law comprises the EPA and other relevant rules of general international law. The Arbitration Panel recalls that, under Article 92 EPA,<sup>238</sup> the Agreement should be interpreted in line with “customary rules of interpretation of public

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<sup>237</sup> **Exh.** EU-5, at 4(a).

<sup>238</sup> Reproduced *supra*, at 49.

international law, including those codified in the Vienna Convention on the Law of Treaties” (VCLT).<sup>239</sup> This is not in dispute between the Parties.<sup>240</sup>

131. The Parties do, however, disagree on a number of Preliminary Issues which fall for decision by the Arbitration Panel as a necessary step before delving into the merits. In particular, the Parties disagreed on the applicable standard of review, and on the admissibility of some evidence (1). Second, the Arbitration Panel shall resolve the dispute between the Parties as to the legal basis for the safeguard measure (2). Finally, the Parties have debated the relevance of the laws and practice of WTO panels and Appellate Body, requiring the Arbitration Panel to clarify its approach in this respect (3).

### **1. Standard of Review, Burden of Proof, and Admissibility of Evidence**

132. Two preliminary issues to be clarified by the Arbitration Panel are the applicable standard of review in these proceedings, as well as the Arbitration Panel’s approach to the evidence and proof.

#### The EU

133. With respect to the applicable standard of review, the EU disagreed that SACU’s determination of whether a safeguard measure could be adopted should be given a “margin of appreciation”,<sup>241</sup> or that the Arbitration Panel should “show *complete deference* to any action and decision that was taken by SACU”.<sup>242</sup> Instead, the EU contended that the Arbitration Panel “should objectively analyze the SACU decision and the ITAC investigation.”<sup>243</sup>

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<sup>239</sup> Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331 (VCLT). In addition, the Arbitration Panel notes that the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO, UN Doc. A/CONF.129/15), although not yet in force, reflects customary international law with respect to the rules of interpretation (Articles 31 to 33), and therefore applies between the parties. Since the VCLTIO also mirrors the provisions of the VCLT, the Arbitration Panel will make reference to the Vienna Conventions (VCLTs) in this Report.

<sup>240</sup> See EU-FWS, at 76-78; SACU-FWS, at 65.

<sup>241</sup> EU-OS, at 17.

<sup>242</sup> EU-OS, at 18 (emphasis in original). At the hearing, the EU argued that “[a] perusal of SACU’s first written submission makes it clear that this [‘manifest error’ standard] comes not from the EPA, not from any international agreement, but rather from US case law.” See Tr., 184:6-8.

<sup>243</sup> EU-OS, at 18.

134. As for the burden of proof, the EU at the hearing<sup>244</sup> described the applicable dynamic in the following terms: “the EU, as the complainant, is supposed to establish a *prima facie* case of violation (with the EPA), and [...] SACU, as the respondent, is supposed to rebut this *prima facie* case.”<sup>245</sup> According to the EU, SACU’s position in these proceedings is seeking to reverse the burden of proof.<sup>246</sup> The EU contends that an example of this reversal is evident in SACU’s contentions dissociating ITAC’s investigation from the conduct of SACU itself.<sup>247</sup>

### SACU

135. In its First Written Submission, SACU contended that, with respect to the standard of review, the “usual approach adopted is one of deference to those judgments [arrived at by sovereign entities after due consideration].”<sup>248</sup> For SACU, this means that the Arbitration Panel should merely confirm that “any applicable procedures required by the governing agreement have been complied with and that no manifest error has been committed in the assessment of the substantive requirements.”<sup>249</sup> SACU also argued that it had a “margin of appreciation” in adopting safeguard measures.<sup>250</sup>

136. As for the applicable burden of proof, SACU referred to the “principle that he or she who asserts the affirmative of a fact, not he or she who denies it, has the burden of proving it”.<sup>251</sup> SACU concluded that it is for the EU to prove that the requirements of Article 34(5) EPA have not been met.<sup>252</sup> In particular, SACU contended that the EU cannot simply criticise ITAC’s investigation without proving a “substantive inconsistency” by SACU itself.<sup>253</sup> At the hearing, SACU agreed that the EU had to make a *prima facie* case of breach of the EPA, but contended that no such case had been made

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<sup>244</sup> The EU’s First Written Submission had not addressed the question of the burden of proof and standard of review.

<sup>245</sup> **EU-OS**, at 14. The EU continued that “these are the responsibilities of complainants and respondents in all international disputes.”

<sup>246</sup> **EU-OS**, at 15.

<sup>247</sup> **EU-OS**, at 16.

<sup>248</sup> **SACU-FWS**, at 109.

<sup>249</sup> **SACU-FWS**, at 111; see also *ibid.*, at 115.

<sup>250</sup> **SACU-FWS**, at 112.

<sup>251</sup> **SACU-FWS**, at 104.

<sup>252</sup> **SACU-FWS**, at 105.

<sup>253</sup> **SACU-FWS**, at 107.

by the EU.<sup>254</sup> SACU further argued that the dynamic in terms of burden of proof proceeded from the nature of a safeguard as an “exception” in international trade law.<sup>255</sup>

137. SACU added that the WTO Agreement on Safeguards (**ASG**) reversed the usual burden of proof by providing that the state enacting safeguards should do so on the basis of an investigation. Since the EPA did not provide for such an investigation, SACU argued, the general burden of proof applies – meaning that it is for the EU to prove its case.<sup>256</sup>

### The Arbitration Panel’s Analysis

#### *The standard of review*

138. The standard of review applicable in these proceedings is a crucial issue, as it will inform the type and extent of the Arbitration Panel’s analysis on the merits. This is why the Arbitration Panel spent some time clarifying this issue at the hearing.<sup>257</sup> On this basis, it appears to the Arbitration Panel that the Parties’ position on this issue are not far off, as SACU agreed at the hearing that it “got a bit carried away” in its First Written Submission on this point,<sup>258</sup> and acknowledged that the terms “manifest error” are not to be found in the EPA.<sup>259</sup> Ultimately, both Parties called for the panel to adopt an approach that is “objective”.<sup>260</sup>
139. While the starting point, as always, should be the EPA, the Arbitration Panel concurs with the Parties that the treaty is silent with respect to the applicable standard of review.<sup>261</sup> At most, the Arbitration Panel notes that the EPA provides for *the TDC* (i.e., not the Arbitration Panel) to conduct a “thorough examination of the situation”.<sup>262</sup> The Arbitration Panel’s ToR are also silent, merely mentioning that the Arbitration Panel’s role is to “examine” and “make findings”.<sup>263</sup>

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<sup>254</sup> **SACU-CS**, at 43

<sup>255</sup> **Tr.**, 238:15-21.

<sup>256</sup> **SACU-OS**, at 46. See also *ibid.*, at 51.

<sup>257</sup> See **Tr.**, 174:8 to 189:6.

<sup>258</sup> **Tr.**, 180:1-3.

<sup>259</sup> **Tr.**, 180:4-5.

<sup>260</sup> **Tr.**, 177:10-21 (EU), and **Tr.**, 188:2-5 (SACU).

<sup>261</sup> **Tr.**, 175:22-23 (SACU), and **Tr.**, 184:12-15 (EU). See also **Tr.**, 182:20-23, where the EU pointed out that the standard of review is not specified in the ToR either.

<sup>262</sup> Article 34(7)(c) EPA.

<sup>263</sup> As reproduced *supra*, at 54.

140. In the view of the Arbitration Panel, this lack of particular guidance in the applicable instruments entails that the usual standard under international law, and especially in the context of international trade law, is applicable.<sup>264</sup> In this context, the Parties’ common reference to an “objective” assessment echoes the general standard of review found at Article 11 of the WTO’s Dispute Settlement Understanding (DSU).<sup>265</sup>
141. This standard calls for a review that is neither *de novo*, nor shows complete deference to the respondent’s actions.<sup>266</sup> Instead, the issue at hand should be critically examined in the light of all the facts.
142. This standard of review further requires the Arbitration Panel to take into account all related actions, conduct, and evidence.<sup>267</sup> As SACU itself put it, “the proper administration of justice dictates that *all relevant matters* should be taken into account”.<sup>268</sup> As such, this evidence includes ITAC’s investigation, irrespective of whether an investigation is mandated under Article 34 EPA.<sup>269</sup>

*Burden of proof*

143. This standard of review, together with firmly-established general principles of international law on burden of proof,<sup>270</sup> has informed the Arbitration Panel’s analysis of matters of proof and evidence. While an objective determination requires the Arbitration Panel to take into account the totality of the evidence, the Arbitration Panel agrees with

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<sup>264</sup> Alignment with international law standards was also SACU’s approach; see *Tr.*, 176:11-13: “We mentioned these issues about burden of proof because they are reflective in international [...], in standard review because they are reflective of international practice.”

<sup>265</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994), Article 11: “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”.

<sup>266</sup> *EC – Hormones*, at 117. See also *US – Lamb*, at 106: “although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities.” (emphasis in the original)

<sup>267</sup> *EC – Hormones*, at 133. See also *Korea – Dairy*, at 137, noting that “a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.”

<sup>268</sup> *SACU-NEWSG*, at 10, citing *Oil Platforms (Iran v United States)*, Merits, Judgment, 2003 I.C.J. Rep. 306, Separate Opinion of Judge Owada, at 47.

<sup>269</sup> See *infra*, at 315.

<sup>270</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, 9 February 2022, at 115-119. See also *SACU-FWS*, at 104.

the Parties that it is for the EU to make a *prima facie* case of breach on the facts.<sup>271</sup> Once that *prima facie* case is made, the other party should offer rebutting evidence, allowing the Arbitration Panel to rule in view of the record as a whole. Both Parties are, indeed, expected to assist the Arbitration Panel with the resolution of the dispute, and, in accordance with general principles of procedural law, to cooperate with the Arbitration Panel regarding evidentiary matters.

*The Arbitration Panel's Approach to the Admissibility of Evidence*

144. The Parties have introduced a number of evidential exhibits in the course of the proceedings. As they have also objected to the introduction of some documents by the other party, this section recounts the Arbitration Panel's decisions on the admissibility of such evidence.
145. The Arbitration Panel's approach in this respect has been guided by two principal concerns, in terms of:
- a. *Temporality*. While there is limited room to dispute the admissibility of evidence introduced together with the Parties' written submissions and in accordance with the agreed schedule, evidence introduced *ex tempore* faces a higher admissibility threshold.
  - b. *Materiality*. While the Arbitration Panel would likely admit evidence capable of assisting it in resolving the dispute, or of utmost relevance to that dispute, evidence that merely illustrates or complements the Parties' argumentation or the existing record faces a higher admissibility threshold.
146. It was in application of these principles that the Arbitration Panel decided to exclude exhibit EU-42 from the record of the proceedings, having found that it was not necessary to keep it in the record.<sup>272</sup>

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<sup>271</sup> See **Tr.**, 238:17-21 (SACU), and **EU-OS**, at 14.

<sup>272</sup> See *supra*, note 18.

147. The Arbitration Panel reaches the same conclusion with respect to exhibit SACU-30. Beside the fact that this exhibit was filed on the last day of the hearing,<sup>273</sup> the Panel considers that it is not pertinent given its interpretation of Article 34 EPA.<sup>274</sup>
148. As for SACU's request to introduce in the record evidence regarding the new EU safeguard measure,<sup>275</sup> the Arbitration Panel considers that this request fails on both aspects of temporality and materiality. While the Arbitration Panel is mindful that the measure is recent, it remains that SACU introduced it at a late stage of the proceedings, when the hearing and most of the Parties' submissions had already taken place. Besides, in view of the Arbitration Panel's findings and conclusions on the merits, this measure – which involves distinct considerations and legal requirements, notably of EU law – is not material to the Arbitration Panel's analysis. If, in view of the Final Report, SACU considers that the new EU safeguard measure is not in keeping with the Parties' obligations under the EPA, the treaty's dispute-resolution provisions would be available to address this matter.<sup>276</sup> The Arbitration Panel, for its part, declines to admit this evidence in the current proceedings.

## **2. Legal basis for SACU's Safeguard Duties**

149. The Parties do not agree on the legal basis underpinning SACU's decision to introduce the safeguard measure. While the EU's submissions, and in particular Claims 1, 2, 3, and 4, have focused on Article 34(2) EPA, SACU replied that Article 34(5) EPA is, in fact, the applicable legal basis.

### The EU

150. The EU focused on Article 34(2) EPA in its First Written Submission, and accordingly did not consider Article 34(5) EPA at length.<sup>277</sup>

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<sup>273</sup> *Supra*, at 31.

<sup>274</sup> *Infra*, at 162 *et seq.*

<sup>275</sup> *Supra*, at 36.

<sup>276</sup> The Arbitration Panel further considers that there is some force to the EU's contention (**EU-NEWSG**, at 4) that discussing this measure may lead the Arbitration Panel to pass some amount of judgment on the EU's compliance with the EPA's requirements – raising potential issues in terms of jurisdiction.

<sup>277</sup> While the EU's First Written Submission did consider at one juncture that "SACU [may] argue that the safeguard measure is imposed on the basis of Article 34 (5) of the EU-SADC EPA" (see **EU-**

151. At the hearing, the EU disagreed with SACU's contentions that Article 34(5) EPA constituted the sole legal basis for the safeguard measure, pointing to a number of instances when ITAC had referred to Article 34(2) EPA.<sup>278</sup> For the EU, ITAC's position at the time is attributable to SACU.<sup>279</sup>
152. The EU further considered that SACU's argument is based on a misinterpretation of the EPA, according to which Article 34(2) only applies to the EU for its developed regions, while Articles 34(4) and (5) would offer different regimes for the EU's outermost regions and SACU and the SADC EPA States, respectively. The EU pointed out, instead, that Article 34(2) EPA does refer to SACU as well.<sup>280</sup> While Article 34(5) EPA "provides that SACU or a SADC EPA State can impose surveillance or safeguard measures", the EU said, this does not mean that it should be interpreted so as to make Article 34(2) "superfluous as far as SACU is concerned."<sup>281</sup> In general, the EU protested that Article 34(5) does not offer a "separate legal basis"<sup>282</sup> for SACU to adopt safeguard measures.
153. The EU also stressed that the "without prejudice" language of Article 34(5) EPA means that this provision should apply in tandem with Article 34(2) EPA;<sup>283</sup> by contrast, when the EPA Parties wanted to derogate from another norm, they used the terms 'notwithstanding', or 'in derogation'.<sup>284</sup> The EU added that SACU's interpretation entails that safeguard measures could be applied regardless of the *chapeau* and *chaussette* of Article 34(2), i.e., without being associated with a product covered by the EPA, and without limits on the level of the safeguard measure. For the EU, this "interpretation runs against the very rationale of safeguard measures."<sup>285</sup>

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**FWS**, at 102), the accompanying footnote pointed out that ITAC's safeguard investigation had invoked Article 34(2) EPA, and not Article 34(5) EPA (See *ibid.*, at note 68.).

<sup>278</sup> **EU-OS**, at 34-35, citing **Exhs.** EU-8 and EU-9.

<sup>279</sup> **EU-OS**, at 36.

<sup>280</sup> **EU-OS**, at 38-39.

<sup>281</sup> **EU-OS**, at 40.

<sup>282</sup> **Tr.**, 110:4-10.

<sup>283</sup> **EU-OS**, at 30-31.

<sup>284</sup> **EU-CS**, at 31. At the hearing, the EU further relied on the Italian and Dutch texts of the EPA as supporting this reading: **Tr.**, 118:11 – 119:3.

<sup>285</sup> **EU-CS**, at 32-34. See also **EU-PHS**, at 35, where the EU opined that "if there is an increase in imports causing injury to SACU's industry, which is not the result of an obligation incurred under the EPA (e.g. a tariff concession), SACU does not need a provision in the EPA authorizing it to limit that import."

154. In the EU’s reading, by contrast, Article 34(5) EPA merely “defines the territorial scope of a safeguard measure that is adopted by a SADC EPA State or SACU”,<sup>286</sup> a specification that was necessary because “not all SADC EPA states are part of SACU.”<sup>287</sup> The EU added that this interpretation is in line with the structure of Article 24 TDCA.<sup>288</sup> In other words, the EU concluded, “Article 34 contains only one legal basis for the adoption of safeguard measures”,<sup>289</sup> and one set of requirements.

### SACU

155. In its First Written Submission, SACU argued that Article 34(5) EPA is the appropriate legal basis for the safeguard measure, with the result, SACU said, that claims 1 to 4 are “misdirected and without object.”<sup>290</sup> SACU contended that, during the consultations held in September 2019, it had conveyed to the EU its reliance on Article 34(5) EPA.<sup>291</sup>

156. SACU explained that Articles 34(4) and 34(5) EPA provide for a special safeguard regime for the EU’s “outermost regions”, and for the SADC EPA States (and SACU), respectively.<sup>292</sup> According to SACU, this regime incorporates some elements of Article 34(2) EPA, but not all of them, and therefore “set(s) out a lower substantive threshold for the imposition of a bilateral safeguard for the benefit of developing countries and regions.”<sup>293</sup> Since both articles are said to be “[w]ithout prejudice to” Articles 34(1) to (3) EPA, SACU continued, they operate independently of these provisions.<sup>294</sup> More precisely, SACU contended that these terms should be “understood as meaning *without prejudice to the right* of the relevant Party to avail itself of Article 34(2)” EPA.<sup>295</sup>

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<sup>286</sup> EU-CS, at 42.

<sup>287</sup> EU-CS, at 41, noting that Mozambique is a SADC EPA state that is not within SACU.

<sup>288</sup> Tr., 111:13 – 112:6.

<sup>289</sup> EU-CS, at 45. See also EU-PHS, at 33, where the EU disagrees that Articles 34(2) and (5) contain conflicting requirements.

<sup>290</sup> SACU-FWS, at 32 (emphasis in the original). See also *supra*, at 95.

<sup>291</sup> SACU-FWS, at 28.

<sup>292</sup> SACU-FWS, at 35.

<sup>293</sup> SACU-FWS, at 37. See also SAPA-AC, at 10.5-10.6.

<sup>294</sup> SACU-FWS, at 38-39.

<sup>295</sup> SACU-IR, at 48(i) (emphasis in original), referring to SACU-CS, at 31: “The main point that we made today is that the words ‘without prejudice’ under Article 34(5) – and also in Article 34(4) – must mean without prejudice to the right of the relevant Party to avail itself of Article 34(2).”

157. For SACU, this interpretation means that, in particular, the EU’s claims 2 (first argument) and 4 (second argument) are without object, since they rely on explicit language from Article 34(2) EPA that, SACU contended, is not applicable in the context of Article 34(5) EPA.<sup>296</sup>
158. As for the Third Essential Facts Letter cited by the EU,<sup>297</sup> SACU pointed out that, in line with its preliminary objections, ITAC’s alleged “actions and omissions” are “irrelevant” to this dispute.<sup>298</sup> In any event, SACU continued, ITAC referred in later correspondence to Article 34 in general – and not to Article 34(2) specifically.<sup>299</sup>
159. SACU’s Opening Statement at the hearing added that references to Article 34(2) EPA by ITAC should be read in a context where – it is not disputed – some parts of Article 34(2) remain applicable in the context of a safeguard adopted under Article 34(5) EPA – namely, the provisions found under Article 34(2)(a) to (c).<sup>300</sup> SACU added, in its Closing Statement, that it alerted the EU of the applicability of Article 34(5) already at the “first TDC meeting on 21 October 2017, well before the Measure at Issue was taken.”<sup>301</sup>
160. SACU further indicated that it agreed with the EU that the treaty should not be interpreted so as to render some provisions superfluous, but reached the opposite conclusion, in that the EU’s reading would make Article 34(5) bereft of *effet utile*.<sup>302</sup> For SACU, the “whole point of Article 34(5) EPA is that it contains fewer” requirements than Article 34(2) EPA, such that an interpretation finding them cumulative would reduce Article 34(5) EPA “to a nullity.”<sup>303</sup> SACU considered that both provisions cannot be applied cumulatively as they are conflicting.<sup>304</sup>
161. Finally, SACU argued that, if Article 34(5) EPA is ambiguous, then it should be interpreted in line with the rules of *contra proferentem* (since this language, SACU

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<sup>296</sup> SACU-FWS, at 40. As noted above, SACU contended more broadly that the entire claims 1 to 4 “should not be entertained” for the same reason: see *supra*, at 95.

<sup>297</sup> Exh. EU-8.

<sup>298</sup> SACU-FWS, at 30.

<sup>299</sup> SACU-FWS, at 31.

<sup>300</sup> SACU-OS, at 28.

<sup>301</sup> SACU-CS, at 36.

<sup>302</sup> SACU-OS, at 29-32.

<sup>303</sup> SACU-OS, at 31. SACU further observed that “it is quite normal in international trade agreements, including the WTO agreements, for trade defence provisions to overlap”: *ibid.*, at 33-34.

<sup>304</sup> SACU-CS, at 32.

alleged, originated from the EU),<sup>305</sup> and of *in dubio mitius* (since SACU is the party bearing the treaty obligations).<sup>306</sup>

## The Arbitration Panel's Analysis

### *Introduction*

162. As acknowledged by both Parties at the hearing, the interpretation of Article 34 EPA, and in particular the relationship between Articles 34(2) and (5) EPA, is far from straightforward.<sup>307</sup> This complex question was debated extensively at the hearings.<sup>308</sup>
163. The starting point, as always, should be the cardinal principles of treaty interpretation of the Vienna Conventions.<sup>309</sup> Article 31 VCLT, reproduced below, directs the Arbitration Panel to consider the “ordinary meaning” of the terms of the treaty, “in their context and in the light of [the treaty’s] object and purpose.”

## **Article 31**

### **General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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<sup>305</sup> SACU-OS, at 36.

<sup>306</sup> SACU-OS, at 37.

<sup>307</sup> Tr., 104:7-10 (SACU), and Tr., 121:1-2 (EU).

<sup>308</sup> See Tr., 94:12 to 136:24, and then 151:6 to 161:5.

<sup>309</sup> See *supra*, note 239.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

164. In light of this applicable customary rule of treaty interpretation, the Arbitration Panel considers that it should be particularly mindful of the following considerations when interpreting Article 34 EPA:

- a. The Article should be interpreted as a whole,<sup>310</sup> taking particular account of the context of each provision. The Arbitration Panel has noted, in particular, that the Parties' interpretative dispute has focused on two sub-provisions (i.e., Articles 34(2) and (5) EPA) found in a *single* article (i.e., Article 34). This circumstance should not be obscured.
- b. Each of this Article's provisions should be given effect under the principle "*ut res magis valeat quam pereat*",<sup>311</sup> according to which terms must be given "some meaning rather than none".<sup>312</sup> In this respect, the Arbitration Panel notes that both Parties have rightly centred the debate on whether their interpretation complied with this *effet utile* requirement.

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<sup>310</sup> *Korea – Dairy*, at 81.

<sup>311</sup> *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. Rep. 4, at 8: "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur." See also *Canada – Dairy*, at 133: the "applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility"; Mustafa K. Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, Collected Courses of the Hague Academy of International Law No. 151 (Martinus Nijhoff 1978), at 71-74.

<sup>312</sup> Richard Gardiner, *Treaty Interpretation* (2<sup>nd</sup> ed., OUP 2017), at 179-181.

- c. Finally, the Arbitration Panel adds that it should strive to reach a harmonious interpretation of the EPA's terms.<sup>313</sup> This interpretive rule was also acknowledged by the Parties.<sup>314</sup>

165. With these introductory remarks in mind, the Arbitration Panel will proceed to describe the structure of Article 34 EPA, before detailing its interpretation of the relationship between Articles 34(2) and (5) EPA. Article 34 *in toto* reads:

## **Article 34**

### **General bilateral safeguards**

1. Notwithstanding Article 33, after having examined alternative solutions, a Party or SACU, as the case may be, may apply safeguard measures of limited duration which derogate from the provisions of Articles 24 and 25, under the conditions and in accordance with the procedures laid down in this Article.

2. Safeguard measures referred to in paragraph 1 may be taken if, as a result of the obligations incurred by a Party under this Agreement, including tariff concessions, a product originating in one Party is being imported into the territory of the other Party or SACU, as the case may be, in such increased quantities and under such conditions as to cause or threaten to cause:

(a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party or SACU, as the case may be; or

(b) disturbances in a sector of the economy producing like or directly competitive products, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party or SACU, as the case may be; or

(c) disturbances in the markets of like or directly competitive agricultural products in the territory of the importing Party or SACU, as the case may be.

These safeguard measures shall not exceed what is necessary to remedy or prevent the serious injury or disturbances.

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<sup>313</sup> *Argentina – Footwear (EC)*, at 81: “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.” (emphasis in the original)

<sup>314</sup> *Tr.*, 109:6-10 (EU): “There is one thing that I think we can safely say is that the parties agree on is that you have to give a meaning to all the provisions of Article 34 and provide them harmonious interpretation.”

3. Safeguard measures referred to in this Article shall take the form of one or more of the following:

(a) suspension of the further reduction of the rate of import duty for the product concerned, as provided for under this Agreement; or

(b) increase in the customs duty on the product concerned up to a level which does not exceed the MFN applied rate at the time of taking the measure; or

(c) introduction of tariff quotas on the product concerned.

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

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

6. Safeguard measures referred to in this Article:

(a) shall only be maintained for such a time as may be necessary to prevent or remedy serious injury or disturbances as defined in paragraphs 2, 4 and 5;

(b) shall not be applied for a period exceeding two (2) years. Where the circumstances warranting imposition of safeguard measures continue to exist, such measures may be extended for a further period of no more than two (2) years. Where a SADC EPA State or SACU, as the case may be, apply a safeguard measure, or where the EU apply a measure limited to the territory of one or more of its outermost regions, they may however apply that measure for a period not exceeding four (4) years and, where the circumstances warranting imposition of safeguard measures continue to exist, extend it for a further period of four (4) years;

(c) that exceed one (1) year shall contain clear elements progressively leading to their elimination at the end of the set period, at the latest; and

(d) shall not be applied to the import of a product that has previously been subject to such a measure, within a period of at least one (1) year from the expiry of the measure.

7. For the implementation of paragraphs 1 to 6, the following provisions shall apply:

(a) where a Party or SACU, as the case may be, takes the view that one of the situations referred to in paragraphs 2(a) to (c), 4 and/or 5 exists, it shall immediately refer the matter to the Trade and Development Committee for examination;

(b) the Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the Trade and Development Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within thirty (30) days of the matter being referred to the Trade and Development Committee, the importing party may adopt the appropriate measures to remedy the circumstances in accordance with this Article;

(c) before taking any measure provided for in this Article or, in the cases to which paragraph 8 applies, the Party or SACU, as the case may be, shall, as soon as possible, supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the Parties concerned;

(d) in the selection of safeguard measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement. If the MFN applied rate in effect the day immediately preceding the day of entry into force of this Agreement is lower than the MFN applied rate at the time of taking the measure, measures applied in accordance with the provisions of paragraph 3(b) may exceed the MFN rate in effect the day immediately preceding the day of entry into force of this Agreement. In such a case, the Party or SACU, as the case may be, shall supply, in accordance with the provisions of paragraph (c), the Trade and Development Committee with the relevant information indicating that an increase of the duty up to the level of MFN applied at the time of entry into force is not sufficient and that a measure exceeding this duty is necessary to remedy or prevent the serious injury or disturbances pursuant to paragraph 2;

(e) any safeguard measure taken pursuant to this Article shall be notified immediately to the Trade and Development Committee and shall be the subject of periodic consultations within that body, particularly with a view to establishing a timetable for their abolition as soon as circumstances permit.

8. Where delay would cause damage which would be difficult to repair, the importing Party or SACU, as the case may be, may take the measures provided for in paragraphs 3, 4, and/or 5 on a provisional basis without complying with the requirements of paragraph 7.

(a) Such action may be taken for a maximum period of one hundred and eighty (180) days where measures are taken by the EU and two hundred (200) days where measures are taken by a SADC EPA State or SACU, as the case may be, or where measures taken by the EU are limited to the territory of one or more of its outermost region(s).

(b) The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraph 6.

(c) In taking such provisional measures, the interest of all Parties involved shall be taken into account.

(d) The importing Party or SACU, as the case may be, shall inform the other Party concerned and it shall immediately refer the matter to the Trade and Development Committee for examination.

9. If the importing Party or SACU, as the case may be, subjects imports of a product to an administrative procedure having as its purpose the rapid provision of information on the trend of trade flows liable to give rise to the problems referred to in this Article, it shall inform the Trade and Development Committee without delay.

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

166. Before proceeding to the analysis, the Arbitration Panel considers it useful to say a few words as to the EPA itself, as well as to the place of trade remedies in the context of this treaty.

*The developmental character of the EPA*

167. The EPA is not a standard, run-of-the-mill, free-trade agreement. To the contrary, it is undisputed that it aims not only at freer trade and greater economic relations between the EPA parties, but also that these goals are means to achieve a broader objective of

encouraging sustainable development in the SADC region.<sup>315</sup> Article 1 EPA (entitled “Objectives”) focuses on the development of SADC states, be it in view of the eradication of poverty (Article 1(a)), improved state capacity (Article 1(d)), or stronger economic growth (Article 1(e)). The expected mutually-beneficial relationship between trade and development is further expressed in Chapter II of the EPA, entitled “Trade and sustainable objectives”, and operationalised through a repeated commitment to “cooperation” between the EPA parties.<sup>316</sup>

168. Both Parties acknowledged the development objective that underpins the EPA in their submissions.<sup>317</sup> This objective is particularly apparent in the large number of asymmetrical obligations that permeate the treaty<sup>318</sup> and which serve to clarify the relation between the developed and developing parties to the EPA.<sup>319</sup> The EU has heralded, in its communication over the treaty, the fact that it “has never agreed before to such a degree of asymmetry in any free trade agreement.”<sup>320</sup>
169. In the Arbitration Panel’s view, the developmental character of the EPA is part of the context that should inform its interpretation of disputed provisions. This is not to say, as the EU feared at the hearing, that this objective “must color the interpretation of each provision in favor of SACU and against the EU”,<sup>321</sup> but instead that the Arbitration Panel will remain particularly attuned to this development objective when assessing the rights and obligations of *both* Parties under the EPA.

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<sup>315</sup> See, e.g., the EPA’s preamble, referring to “the Parties’ commitment to and support for economic development in the SADC EPA States to attain the Millennium Development Goals”. See also **Exh. SACU-11**, European Commission website, ‘Economic partnerships’, at 3: “The overall objective of EPAs is to contribute through trade to sustainable economic growth and poverty reduction [...]. The current EPAs include the following features that go well beyond access to EU markets”.

<sup>316</sup> See, e.g. and *inter alia*, Articles 2(3) and (4), 7(3), 11 EPA.

<sup>317</sup> **SACU-FWS**, at 95; **Tr.**, 221:20 – 222:1 (EU).

<sup>318</sup> See also Article 1(f) EPA, which refers to “a new trading dynamic between the Parties by means of the progressive, asymmetrical liberalisation of trade between them.”

<sup>319</sup> This asymmetry also has been acknowledged by the parties: **Tr.**, 221:13-19 (EU), and 226:11-18 (SACU).

<sup>320</sup> **Exh. SACU-9**, European Commission Fact Sheet: EU-SADC EPA, 10 October 2016, at 1.

<sup>321</sup> **Tr.**, 222:2-3. The Arbitration Panel has taken note of SACU’s concession that “it is not SACU’s position that provisions, that conditions or derogations should be incorporated into provisions, because it is a developing region and the EU is not and therefore laxer standards should apply even if they are not written into the provision”: **Tr.**, 225:12-16.

*The extraordinary nature of safeguard measures*

170. Trade remedies such as safeguards are one means agreed upon by the treaty parties with a view to strengthening their overall commitment to a deeper trade relationship (and therefore, as explained above, to greater development for the SADC area). As recognised by the Parties, such safeguard measures operate as a “safety valve”,<sup>322</sup> allowing an EPA party to impose restrictions on trade in certain given circumstances, in light of the overarching purpose of fostering freer trade.<sup>323</sup> The Arbitration Panel notes that, in its communications, the EU has highlighted the fact that there are “no less than five bilateral safeguards in the agreement, a number not replicated in any other EU trade agreement.”<sup>324</sup>
171. As a derogation from the general rule of trade liberalisation, however, WTO panels and the Appellate Body have stressed the “extraordinary nature” of such safeguard measures.<sup>325</sup> While the Parties have disputed the role of WTO law in this dispute,<sup>326</sup> the Arbitration Panel notes that the language of Article 34 EPA all but confirms this extraordinary nature, subjecting as it does general safeguard measures to several conditions and procedures,<sup>327</sup> and specifying that such measures: should “not exceed what is necessary to remedy or prevent the serious injury or disturbances”;<sup>328</sup> should “only be maintained for such a time as may be necessary”;<sup>329</sup> should result in measures

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<sup>322</sup> See **SACU-FWS**, at 77, referring to **Exh. SACU-9**, European Commission Fact Sheet: EU-SADC EPA, 10 October 2016, at 1.

<sup>323</sup> See also **Tr.**, 234:16 – 235:3 (SACU): “I mean, the logic of a safeguard measure is that it encourages countries to actually enter into tariff reduction commitments. Because, countries have high tariffs because they are afraid that their industry might be damaged by imports if they were to reduce their protection. So, in order to encourage countries to say we will give you this, exemption from this tariff, say well you know if it should turn out that this is causing a disturbance, then we can impose a safeguard measure. That was very much the logic behind Article [XIX], in GATT 1947.”

<sup>324</sup> **Exh. SACU-9**, European Commission Fact Sheet: EU-SADC EPA, 10 October 2016, at 1.

<sup>325</sup> See *Argentina – Footwear (EC)*, at 93-95; *US – Line Pipe*, at 81. Although these cases were based on Article XIX GATT 1994 and the ASG, the AB also held that the latter “both reiterates, and further elaborates on, much of what long prevailed under the GATT 1947”: see *ibid.*, at 82.

While SACU argued that the term ‘extraordinary’ has not been debated by the parties (**SACU-IR**, at 9), the Arbitration Panel notes that the two WTO cases just cited are part of the record, and have been relied upon by the Parties themselves. In any event, SACU itself noted (**SACU-IR**, at 8) that the Arbitration Panel’s analysis is also based on its interpretation of Article 34 EPA – an interpretation that is one of the main issues in the context of these proceedings, and which has, accordingly, been debated at length. As such, the Arbitration Panel is warranted in considering that safeguard measures, in the EPA as in general international economic law, have an extraordinary nature.

<sup>326</sup> For the Arbitration Panel’s approach to this question, see *infra*, at 228.

<sup>327</sup> Article 34(1) EPA.

<sup>328</sup> Article 34(2) EPA.

<sup>329</sup> Article 34(6)(a) EPA.

that “least disturb the operation of this Agreement”,<sup>330</sup> and should be abolished “as soon as circumstances permit.”<sup>331</sup>

172. This language firmly characterises Article 34 EPA as a trade remedy, which, under general international economic law, is to be distinguished from ‘exceptions’. Indeed, while SACU has proposed, at the hearing and at the Interim Review stage, that the safeguard measure at issue should be interpreted and approached as an “exception”,<sup>332</sup> the Arbitration Panel notes that Article 34 does not fall within the EPA’s part dedicated to “General exceptions”, comprising Articles 97 to 99 EPA.<sup>333</sup> The Arbitration Panel notes, besides, that under international law, “exceptions” generally qualify as a defence – meaning that the burden of proof would fall on the party asserting it, and therefore on SACU in this context. By contrast, the Arbitration Panel has found – and the Parties in fact agreed – that in this case the burden was on the EU to make a *prima facie* case.<sup>334</sup>
173. As with the developmental character of the EPA, therefore, the nature of safeguard measures as a trade remedy under the agreement shall inform the Arbitration Panel’s interpretation of its provisions.<sup>335</sup>

#### *The Structure of Article 34 EPA*

174. Before turning to Article 34(1) EPA, the Arbitration Panel considers it useful to restate its immediate context. Article 33 EPA provides that:

### **Article 33**

#### **Multilateral safeguards**

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<sup>330</sup> Article 34(7)(d) EPA.

<sup>331</sup> Article 34(7)(e) EPA.

<sup>332</sup> **SACU-IR**, at 9, referring to **Tr.**, 234:5 – 237:7, and 238:15 – 239:13.

<sup>333</sup> Instead, Article 34 is contained within a subsection entitled “Trade defence instruments”.

<sup>334</sup> *US – Wool Shirts and Blouses*, at pages 15-16.

<sup>335</sup> The Arbitration Panel stresses at this point that the two issues should not be conflated, and that the EPA’s developmental character does not entail that safeguards, under that agreement, are somehow to be interpreted in a manner that would deny their extraordinary nature, as proposed by SACU (**SACU-IR**, at 4-6). Indeed, the Arbitration Panel sees no difficulty in reconciling the EPA’s developmental character and the extraordinary nature of safeguards, as these considerations are not mutually exclusive; both, in fact, stem from an interpretation of the EPA in line with the interpretative principles of the VCLTs. In other words, the extraordinary nature of safeguard measures does not detract from the treaty’s developmental character. To the contrary: since such measures can be adopted by both parties, a high standard ensures that the EPA’s trade and development goals are not undermined by the developed parties’ use of safeguards, to the detriment of developing parties.

1. Subject to the provisions of this Article, nothing in this Agreement shall prevent a Party from adopting measures in accordance with Article XIX of the GATT 1994, the WTO Agreement on Safeguards, Article 5 of the WTO Agreement on Agriculture annexed to the Marrakesh Agreement Establishing the World Trade Organisation ('WTO Agreement') and any other relevant WTO Agreements.

2. Notwithstanding paragraph 1, the EU shall, in the light of the overall development objectives of this Agreement and the small size of the economies of the SADC EPA States, exclude imports from any SADC EPA State from any measures taken pursuant to Article XIX of the GATT 1994, the WTO Agreement on Safeguards and Article 5 of the WTO Agreement on Agriculture.

3. The provisions of paragraph 2 shall apply for a period of five (5) years, beginning from the date of entry into force of this Agreement. Not later than one hundred and twenty (120) days before the end of this period, the Joint Council shall review the operation of paragraph 2 in the light of the development needs of the SADC EPA States, with a view to determining their possible extension for a further period.

4. The provisions of paragraph 1 shall not be subject to the provisions of Part III.

175. Article 33 EPA therefore restates the treaty parties' ability to adopt safeguard measures under the relevant WTO rules or agreements, while barring the EU (but not SACU, or the other SADC EPA States) from doing so for a transitory 5-year period. That transitory period has lapsed. As things stand, therefore, all EPA parties now retain the ability to enact safeguard measures "in accordance with" the applicable WTO rules or agreements.

176. It is in this context that Article 34(1) EPA, entitled "General bilateral safeguards", provides that:

1. Notwithstanding Article 33, after having examined alternative solutions, a Party or SACU, as the case may be, may apply safeguard measures of limited duration which derogate from the provisions of Articles 24 and 25, under the conditions and in accordance with the procedures laid down in this Article.<sup>336</sup>

177. On its face, Article 34(1) EPA provides for a regime of *bilateral* safeguards distinct from the *multilateral* safeguards of the preceding article; that is, it allows parties to take safeguard measures beyond those available under the applicable WTO rules or

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<sup>336</sup> Articles 24 and 25 EPA relate to the customs duties applicable to products originating from the SADC EPA States and the EU, respectively.

agreements.<sup>337</sup> The language used (“of limited duration”, “derogate”, “under the conditions and in accordance with the procedures”) underlines the derogatory nature of such EPA-specific safeguard measures, while the verb “may” connotes an ability granted to the treaty parties, as opposed to an obligation. This introductory language is, in other words, the ‘key’ that allows the entire Article 34 to stand. Indeed, the concluding reference to “this Article” indicates that Article 34(1) EPA, and the ability it embodies to adopt safeguard measures in certain circumstances, cannot be read on its own; self-evidently, the operation of that provision depends upon the “conditions” and “procedures” found in other parts of Article 34 EPA.

178. Article 34(2) EPA then specifies that:

2. Safeguard measures referred to in paragraph 1 may be taken if, as a result of the obligations incurred by a Party under this Agreement, including tariff concessions, a product originating in one Party is being imported into the territory of the other Party or SACU, as the case may be, in such increased quantities and under such conditions as to cause or threaten to cause:

(a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party or SACU, as the case may be; or

(b) disturbances in a sector of the economy producing like or directly competitive products, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party or SACU, as the case may be; or

(c) disturbances in the markets of like or directly competitive agricultural products in the territory of the importing Party or SACU, as the case may be.

These safeguard measures shall not exceed what is necessary to remedy or prevent the serious injury or disturbances.

179. The first sentence of Article 34(2) EPA explicitly indicates that its role is to flesh out the safeguard regime introduced by Article 34(1) EPA. The verb “may” that connoted in the preceding provision the possibility for the parties to adopt such a trade remedy is echoed

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<sup>337</sup> In this respect, the Arbitration Panel has noted that Article 24 TDCA, which also provides for safeguards, was, by contrast, explicitly yoked to the WTO Rules and Agreements.

here (though in the passive form), yet the thrust of the article is to provide for the conditions underlying the adoption of such a trade remedy. Some (though not all) of these conditions are at stake in these proceedings, such as those specified in the *chapeau* and *chaussette* of the article. Notably, under Article 34(2) EPA, safeguard measures:

- a. Should result from “the obligations incurred by a Party under this Agreement”;
- b. Should relate to “a product originating in one Party [that] is being imported into the territory” of another party (or SACU);
- c. Such imports should be in “such increased quantities and under such conditions as to cause or threaten to cause” a set of circumstances, specified in sub-provisions (a) to (c) (see below); and
- d. Should “not exceed what is necessary to remedy or prevent the serious injury or disturbances.”

180. The Article’s *chapeau* and *chaussette* demarcate three sub-provisions, (a) to (c), whose role is to provide the circumstances in which a safeguard measure “may be taken”. In turn, these circumstances are accompanied by their own distinct conditions (e.g., that a “serious injury” relate to a “domestic industry producing like or directly competitive products”).

181. All in all, therefore, Article 34(2) EPA specifies some of the “conditions” foreshadowed by the preceding article, and attached to the parties’ ability to adopt safeguard measures.

182. Article 34(3) then specifies the form that safeguard measures may take. Making sure that a safeguard measure takes “one or more” of the listed forms is, in other words, another condition as foreshadowed by Article 34(1) EPA.

3. Safeguard measures referred to in this Article shall take the form of one or more of the following:

- (a) suspension of the further reduction of the rate of import duty for the product concerned, as provided for under this Agreement; or

(b) increase in the customs duty on the product concerned up to a level which does not exceed the MFN applied rate at the time of taking the measure; or

(c) introduction of tariff quotas on the product concerned.

183. All of this is undisputed. Where the Parties diverge is in relation to the role of Articles 34(4) and (5) EPA in this context. These provisions read:

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

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

184. As can be seen, and as the Parties acknowledged,<sup>338</sup> these provisions parallel one another, dealing first with the EU's outermost regions, and then with the SADC EPA States (including SACU). Such parallelism is frequent in the EPA, and is cogent with the treaty's asymmetrical character. Articles 24 and 25 EPA, which are cited in Article 34(1) EPA, offer a good example: they both deal with "custom duties", but one provides for the regime governing imports in the EU (Article 24, referring to Annex I), as distinct from the regime governing imports in the SADC region (Article 25, referring to Annexes II and III). This being said, these provisions differ in one important respect: Article 34(4) EPA is the only provision to extend the "circumstances" under Article 34(2)(a) to (c) to a "like or directly competitive production sector"; no such language is found in Article 34(5) EPA.

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**Tr.**, 153:7-12 and 225:22-26 (SACU), and 110:5-9 (EU).

185. The Arbitration Panel will return to the interpretation of Article 34(5) EPA below. For now, the Arbitration Panel notes four points of interest:

- a. Both Articles 34(4) and 34(5) EPA are prefaced by the terms “[w]ithout prejudice to paragraphs 1 to 3”, which is an explicit reference to the preceding provisions. As seen, these provisions include the ‘key’ to the EPA-specific safeguard regime (in Article 34(1) EPA), as well as a number of “conditions” for such safeguard measures to be taken (in Articles 34(2) and (3) EPA). The Arbitration Panel will return below to the interpretation to be given to the terms ‘without prejudice’.<sup>339</sup>
- b. Just like Articles 34(1) and (2) EPA, Articles 34(4) and 34(5) EPA use the verb “may”, connoting the fact that a certain trade remedy can be adopted, while also prescribing “conditions” for the exercise of that remedy. In particular, one of these conditions pertain to the territorial “limit” of “surveillance or safeguard measures”: Article 34(4) specifies that measures adopted in view of the EU’s “outermost regions”<sup>340</sup> shall be “limited” to these regions, while Article 34(5) provides that measures taken by an EPA state or SACU should be “limited” to “its territory”.
- c. Both provisions repeat that the measures that “may” be taken should comply with the “procedures laid down in paragraphs 6 to 8”, mirroring (in more specific terms), the language of Article 34(1) EPA.
- d. Finally, Articles 34(4) and (5) are the only provisions in Article 34 EPA, but also in the EPA as a whole, that refer to the ability to adopt “surveillance” measures.

186. Continuing with its reading of Article 34 EPA, the Arbitration Panel now turns to Article 34(6), which is reproduced below.

6. Safeguard measures referred to in this Article:

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<sup>339</sup> *Infra*, at 198.

<sup>340</sup> The Arbitration Panel notes that, although the EPA contains special provisions for the EU’s “outermost regions” (see Article 109 EPA), this term is seemingly never defined in the Agreement.

(a) shall only be maintained for such a time as may be necessary to prevent or remedy serious injury or disturbances as defined in paragraphs 2, 4 and 5;

(b) shall not be applied for a period exceeding two (2) years. Where the circumstances warranting imposition of safeguard measures continue to exist, such measures may be extended for a further period of no more than two (2) years. Where a SADC EPA State or SACU, as the case may be, apply a safeguard measure, or where the EU apply a measure limited to the territory of one or more of its outermost regions, they may however apply that measure for a period not exceeding four (4) years and, where the circumstances warranting imposition of safeguard measures continue to exist, extend it for a further period of four (4) years;

(c) that exceed one (1) year shall contain clear elements progressively leading to their elimination at the end of the set period, at the latest; and

(d) shall not be applied to the import of a product that has previously been subject to such a measure, within a period of at least one (1) year from the expiry of the measure.

187. For the Arbitration Panel, Article 34(6) EPA contains yet another set of “conditions” for the adoption of a safeguard measure, in particular with respect to such measure’s implementation and duration. This article also includes the parties’ ability, introduced by the verb “may”, to extend the temporal scope of the measure in certain circumstances.
188. The Arbitration Panel considers that the “procedures” foreshadowed in earlier provisions are then to be found in Article 34(7) EPA, reproduced below.

7. For the implementation of paragraphs 1 to 6, the following provisions shall apply:

(a) where a Party or SACU, as the case may be, takes the view that one of the situations referred to in paragraphs 2(a) to (c), 4 and/or 5 exists, it shall immediately refer the matter to the Trade and Development Committee for examination;

(b) the Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the Trade and Development Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within thirty (30) days of the matter being referred to the Trade and Development Committee, the importing party

may adopt the appropriate measures to remedy the circumstances in accordance with this Article;

(c) before taking any measure provided for in this Article or, in the cases to which paragraph 8 applies, the Party or SACU, as the case may be, shall, as soon as possible, supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the Parties concerned;

(d) in the selection of safeguard measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement. If the MFN applied rate in effect the day immediately preceding the day of entry into force of this Agreement is lower than the MFN applied rate at the time of taking the measure, measures applied in accordance with the provisions of paragraph 3(b) may exceed the MFN rate in effect the day immediately preceding the day of entry into force of this Agreement. In such a case, the Party or SACU, as the case may be, shall supply, in accordance with the provisions of paragraph (c), the Trade and Development Committee with the relevant information indicating that an increase of the duty up to the level of MFN applied at the time of entry into force is not sufficient and that a measure exceeding this duty is necessary to remedy or prevent the serious injury or disturbances pursuant to paragraph 2;

(e) any safeguard measure taken pursuant to this Article shall be notified immediately to the Trade and Development Committee and shall be the subject of periodic consultations within that body, particularly with a view to establishing a timetable for their abolition as soon as circumstances permit.

189. More specifically, Article 34(7) EPA lists a number of procedural requirements for the “implementation” of safeguard measures. These requirements relate to notification and referral (Article 34(7)(a) and (e)), negotiations and cooling-off (Article 34(7)(b)), and supply of information (Article 34(7)(c) and (d)).

190. It is in this context that the EPA provides, in Article 34(8) EPA, for the possibility to adopt provisional measures, which includes the “conditions/procedures” dynamic seen in preceding articles.

8. Where delay would cause damage which would be difficult to repair, the importing Party or SACU, as the case may be, may take the measures provided for in paragraphs 3, 4, and/or 5 on a provisional basis without complying with the requirements of paragraph 7.

(a) Such action may be taken for a maximum period of one hundred and eighty (180) days where measures are taken by the EU and two hundred (200) days where measures are taken by a SADC EPA State or SACU, as the case may be, or where measures taken by the EU are limited to the territory of one or more of its outermost region(s).

(b) The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraph 6.

(c) In taking such provisional measures, the interest of all Parties involved shall be taken into account.

(d) The importing Party or SACU, as the case may be, shall inform the other Party concerned and it shall immediately refer the matter to the Trade and Development Committee for examination.

191. Lastly, Article 34(9) adds an additional procedural notification obligation in certain circumstances, while Article 34(10) deals with dispute-settlement.

9. If the importing Party or SACU, as the case may be, subjects imports of a product to an administrative procedure having as its purpose the rapid provision of information on the trend of trade flows liable to give rise to the problems referred to in this Article, it shall inform the Trade and Development Committee without delay.

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

192. Finally, the Arbitration Panel notes that, while Article 34 is entitled “General bilateral safeguards”, this contrasts with Articles 35 (“Agricultural safeguards”), 36 (“Food security safeguards”), 37 (“BLNS transitional safeguards”), and 38 (“Infant industry protection safeguards”) EPA. These four articles provide for distinctive safeguards regimes, as evidenced by the fact that they all are introduced by the terms “[n]otwithstanding Article 34 [EPA]”. Most of these regimes follow the pattern of introductory language enunciating the ability to take a safeguard regime, with such ability later qualified by conditions and procedures in the following provisions.

193. To sum up, following the ‘key’ that is Article 34(1) EPA, Articles 34(2) to 34(6) EPA provide for the conditions to the adoption of safeguard measures under this Article, while Articles 34(7) to (10) contain procedural requirements (with room for provisional safeguard measures in Article 34(8) EPA). The sequence of the terms in Article 34(1)

EPA (“under the conditions and in accordance with the procedures laid down in this Article”) foreshadows the sequence of the provisions that follow; the general ability to adopt EPA-specific safeguard measures as a trade remedy, announced in Article 34(1) EPA, is qualified and informed by the provisions that follow it. There is thus unity and continuity in the logic of Article 34 EPA, which further supports the Arbitration Panel’s duty to read it holistically, as a whole.

*The Arbitration Panel’s Interpretation*

194. The Arbitration Panel now turns to a key issue that divides the Parties, and which can be summed up in a single question: whether Articles 34(2) and (5) EPA offer distinct legal bases for a safeguard measure, or whether they are to be applied cumulatively.
195. The Arbitration Panel considers that the better reading is that Articles 34(2) and (5) EPA are cumulative, and meant to apply conjointly.
196. As noted above, the applicable customary rules of treaty interpretation mandate the Arbitration Panel to interpret the terms of the EPA in their context, such that Article 34 EPA is read as a whole. This gives particular salience to Article 34(1) EPA, which, as seen above, is the ‘key’ to the entire Article, in providing for an EPA-specific safeguard regime derogating from the usual regime under the WTO rules and agreements.
197. In adopting this interpretation, the Arbitration Panel has taken into account a number of considerations.
198. **First**, the Parties have discussed at length the meaning to be given to the “without prejudice” language opening both Articles 34(4) and (5) EPA. On this issue, SACU considers that, while other terms might have been more appropriate, “without prejudice” at this juncture means “independently of”,<sup>341</sup> and/or is used in a “colloquial sense” to this purpose.<sup>342</sup> The EU rejects that interpretation.<sup>343</sup>
199. The Arbitration Panel considers that, in a treaty context, when provision X is specified to be “without prejudice” to Y, these terms typically means that X and Y are meant to apply

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<sup>341</sup> **Tr.**, 114:19-23.

<sup>342</sup> **Tr.**, 129:10-12. See also 157:10-13 (SACU): “It just goes to show that whoever was drafting the EPA, did not take particular care about using the term ‘without prejudice’ in order to avoid all ambiguity.”

<sup>343</sup> See, e.g., **EU-CS**, at 31.

conjointly, and/or that provision *X* should operate taking into account (but without departing from) provision *Y*.<sup>344</sup> In some contexts, the “without prejudice” language is therefore functionally equivalent to the terms “for greater understanding”: it clarifies that the scope of application and operation of provision *Y* does not prevent *X* from being given force or from being applied concurrently,<sup>345</sup> but does not connote a hierarchical distinction between the two provisions.<sup>346</sup> This meaning therefore differs from a *derogation*, which is often introduced by the term “notwithstanding”, and entails that the operation of *X* departs, and can even contradict the operation of *Y*. To the contrary, the terms “without prejudice” means that, in case of conflict, provision *Y* should remain “safe” from the operation of *X*. The equivalent terms used in other EU languages, which are all equally authentic under the EPA,<sup>347</sup> support this interpretation.<sup>348</sup>

200. SACU, however, contends that there is such a conflict between Article 34(2) and Articles 34(4) and (5) EPA, in that the former – according to SACU – conditions safeguard measures upon the existence of imports at the level of the “whole of the territory” of the party seeking to avail itself of that trade remedy.<sup>349</sup> For SACU, this requirement is incompatible with a measure being enacted only for one of the outermost regions of the EU, as allowed under Article 34(4) EPA.<sup>350</sup>
201. However, the Arbitration Panel sees no such “whole of the territory” condition in Article 34(2) EPA: the treaty merely requires imports to take place *in* a treaty party’s territory. The EPA parties could therefore, without contradiction or conflict, specify

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<sup>344</sup> Article 49(2) EPA, entitled “Transitional arrangements”, offers a good example, as it states in relevant parts that: “In view of the need to enhance their capacity in the area of customs and trade facilitation and without prejudice to their WTO rights and obligations [...]”

<sup>345</sup> Article 105(1) EPA, entitled “Exchange of information”, offers a good example: when stating that “[t]he designation of a coordinator for the exchange of information is without prejudice to the specific designation of competent authorities under specific provisions of this Agreement”, this provision clarifies that these two actions (designation of a coordinator and designation of competent authorities) can proceed concurrently and need not lead to a situation where the first needs to be assessed under the provisions governing the second.

<sup>346</sup> See *Report of the International Law Commission*, UN Doc. A/76/10, at 83, noting that “the Commission had frequently used without prejudice clauses in its previous work, and that they had served to delimit the scope of a topic rather than create hierarchical relationships.”

<sup>347</sup> Article 120 EPA.

<sup>348</sup> For instance, the Arbitration Panel notes that the Italian text uses the terms “Fatto salvo”, which likewise connotes the fact that one provision (Article 34(5)) leaves “safe” the other (Article 34(2)).

<sup>349</sup> **Tr.**, 154:1-2.

<sup>350</sup> **Tr.**, 153:17 – 154:6. See also **SACU-CS**, at 32.

distinct, non-derogating rules for specific parts of their territory in need of special treatment – as the EU did with its outermost regions in Article 34(4) EPA.

202. At the Interim Review stage, SACU has also insisted on an interpretation that would read the terms “without prejudice” as “*without prejudice to the right* [to adopt safeguard measures under Article 34(2) EPA]”.<sup>351</sup> This suggestion, however, invites the Arbitration Panel to read terms that are not included in the treaty (i.e., the suggested reference to a “right”), while ignoring terms that are (i.e., the express reference to paragraphs 1 to 3), in complete disregard of the rules of treaty interpretation under general international law. Likewise, the Arbitration Panel is unconvinced by SACU’s reliance on other “without prejudice” provisions in the EPA.<sup>352</sup> SACU’s interpretation does not give these words their ordinary meaning in context. The examples chosen by SACU are, in any event, unconvincing and anecdotal, such that the Arbitration Panel does not see a difference in the way the terms “without prejudice” are used in these other contexts.<sup>353</sup>
203. This reasoning leads the Arbitration Panel, **second**, to the *effet utile* of Articles 34(4) and (5) EPA. While the analysis in the preceding paragraph finds an *effet utile* to Article 34(4), the Arbitration Panel acknowledges that there is greater ambiguity with

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<sup>351</sup> SACU-IR, at 14(a), and (e) (emphasis in the original).

<sup>352</sup> *Ibid.*, referring to Tr., 154:22 – 157:14.

<sup>353</sup> SACU has emphasised in particular Article 3(2) Protocol 1 EPA, which is said to be “[w]ithout prejudice to the provisions of Article 2(2) of this Protocol”. In the Arbitration Panel’s reading, Article 2(2) Protocol 1 EPA defines, in general, what qualifies as a product originating in a SADC EPA state, while Article 3(2) allows for the practice of “bilateral cumulation”, with the result of expanding the definitions found in Article 2(2) to different circumstances – as explicitly provided in Article 3(2) (“materials [...] shall be considered as materials originating in a SADC EPA state”, which is indeed what is defined in Article 2(2)). The two provisions therefore have a synergy and can apply cumulatively. They are not independent (in the sense of being unrelated and self-standing) as suggested by SACU, let alone being “without prejudice to the right in [Article] 2(2)” (Tr., 157:2-3), with the Arbitration Panel struggling to see what “right” is contained in Article 2(2) Protocol 1 EPA. Likewise, the Arbitration Panel is unconvinced that Article 43(7) Protocol 1 EPA supports SACU’s interpretation of Article 34(5) EPA (Tr., 157:15 – 158:15). Article 43 Protocol 1 EPA relates to derogations from the Protocol on rules of origin. Articles 43(1) to (6), but also Articles 43(8) to (9), are provisions setting out the procedure, criteria, and powers of the Committee in relation to the adoption of such derogations. Article 43(7), stipulates that such a derogation “shall be granted” in the circumstances set out therein. In this context, the fact that Article 43(7) is said to be “[w]ithout prejudice to paragraphs 1 to 6” does not mean that the procedure before the Committee can be bypassed. It merely means that in the particular case of a situation falling within the scope of Article 43(7), this procedure should lead to a particular outcome – and it remains for the Committee to “grant” the request, especially since Articles 43(8) to (9) remain applicable. By contrast, Articles 43(10) and (11) are said to be “[n]otwithstanding paragraphs 1 to 9”, and relate, on their own terms, to an “automatic derogation” – evidencing that the treaty drafters were well aware of the difference between the “without prejudice” and “notwithstanding” languages.

respect to Article 34(5). *Prima facie*, this provision adds little to Articles 34(1) and (2), as the reader might assume that safeguard measures adopted under these provisions by a state (including a SADC EPA state, or SACU) would be limited to their territory.

204. At the hearing, SACU speculated that, upon the EU introducing Article 34(4) to the draft treaty, SADC sought a parallel provision applying to its own context.<sup>354</sup> The EU, for its part, suggested that Article 34 EPA was inspired from Article 24 TDCA, which already included parallel provisions dealing with the EU's outermost regions (Article 24(2) TDCA) and the states within SACU, which were then not party to the TDCA (Article 24(3) TDCA).<sup>355</sup> The Arbitration Panel has not been provided with any piece of evidence from the *travaux préparatoires* or the EPA's negotiations, and therefore these speculations can be put to rest.
205. In any event, the Arbitration Panel does not consider that Article 34(5) EPA lacks *effet utile*, given the fact, as noted above, that it is the only provision that allows SADC EPA states (as well as SACU) to adopt "surveillance" measures. As well, given the provision in the preceding Article 34(4) EPA that, in the case of the EU's outermost regions, the geographical scope of a measure may be varied, it might serve a purpose to specify that measures for the SADC EPA States and SACU should be limited to their territory.<sup>356</sup> Besides, the Arbitration Panel notes that provisions specifying that safeguard measures should be limited to the territory at stake are common in international trade instruments, and notably in trade instruments executed by the EU<sup>357</sup> – justifying the presence, and *effet utile*, of such a provision in the EPA.
206. These considerations are given a greater force by the fact that a contrary interpretation would, by contrast, clearly deprive Article 34(2) EPA itself of its *effet utile*. Indeed, the subjects of that provision are "a Party or SACU, as the case may be". That explicit reference to SACU, together with the implicit reference to the SADC EPA states in the

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<sup>354</sup> **Tr.**, 131:13-15.

<sup>355</sup> **Tr.**, 111:13 – 112:6.

<sup>356</sup> By contrast, the Arbitration Panel is unconvinced by the suggestion of the EU, first aired in post-hearing submission (**EU-PHS**, at 33-34), that Article 34(5) is a rule of competency, laying out which party (SACU or an EPA SADC State) should adopt a measure in which circumstances.

<sup>357</sup> Many examples of equivalent language can be found in **Exh.** SACU-8, Bilateral Safeguard Clauses in International Agreements Referred to in SACU's First Written Submission.

terms “a Party”, would lack any *effet utile* if, as suggested, these parties might be able to rely on the (allegedly laxer) safeguard standard under Article 34(5) EPA.

207. In this context, the Arbitration Panel understands the distinction SACU sought to make, at the hearing, between *de jure* and *de facto effet utile*, but remains unconvinced. Indeed, both terms, *effet* and *utile*, connote this principle’s concern with the *practicalities* of the legal provision at stake; these terms, and the principle they embody, direct the Arbitration Panel to discount an interpretation that would lead to the “redundancy or inutility”<sup>358</sup> of any treaty provision – again, terms that cover *de facto* as well as *de jure* application of the treaty.<sup>359</sup> As such, the Arbitration Panel struggles to find any way to reconcile the mention of SACU in Article 34(2) EPA with an interpretation that would see no actual circumstances in which SACU would avail itself of that provision.
208. The Arbitration Panel acknowledges that the language of Article 34 EPA arguably might support the notion that Articles 34(2) and (5) are “distinct remedies”. Articles 34(4) and (5) EPA do repeat at length conditions for a safeguard measure found in Article 34(2) (i.e., that it is related to “any product [...] being imported in such increased quantities and under such conditions as to cause or threaten to cause”), suggesting a different, laxer test. Besides, the Arbitration Panel notes that Article 34(7)(a) makes reference to “one of the situations referred to in paragraphs 2(a) to (c), 4 and/or 5”. However, both these drafting choices can be understood, and receive *effet utile*, in light of the fact that Articles 34(4) and (5), and only them, provide the ability to adopt “surveillance” measures.<sup>360</sup>
209. **Third**, and as noted above,<sup>361</sup> the EPA’s drafters did include several safeguard regimes, in Articles 35 to 38 EPA, distinct from the general one found in Article 34. Were

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<sup>358</sup> *Canada – Dairy*, at 133.

<sup>359</sup> The Arbitration Panel adds that this possible lack of practical *effet utile* for Article 34(2) EPA would not be at issue had Article 34(5) been *derogating* from it, just like the safeguard regime under Article 34 EPA explicitly departs from Article 33 EPA, and thus from the safeguard regime under the WTO rules and agreements, in a manner that does not contravene the *effet utile* principle (*supra*, at 177). However, there is no indication that such a derogation is at play here: if anything, the “without prejudice” language of Article 34(5) EPA (*supra*, at 198 *et seq.*), as well as Article 34 EPA’s immediate context (*infra*, at 209), militate against such reading.

<sup>360</sup> The reference to different “situations” in Article 34(7)(a) may also merely be a reference to the broader set of circumstances in which the EU might enact a safeguard for its outermost regions: see *supra*, at 184.

<sup>361</sup> *Supra*, at 192.

Article 34(5) EPA really a distinct trade remedy, entailing a lower standard for SADC EPA states and SACU, then the Arbitration Panel considers that the EPA would have specified that distinct regime in a different article. Also relevant in this context is the fact, noted above,<sup>362</sup> that asymmetrical obligations permeate the treaty; had the EPA drafters truly wanted to adopt two different standards for safeguard measures depending on whether the EU or SADC/SACU took them, they would have clearly provided for it, just like they clearly provided for such asymmetry elsewhere in the EPA. Instead, Article 34(2) EPA, on its face, applies agnostically for “a Party, or SACU, as the case may be”.<sup>363</sup>

210. **Fourth**, the Arbitration Panel considered the nature of the difference between the allegedly differing standards for safeguard measures under Articles 34(2) and (5) EPA. Interpreting Article 34(5) as a distinct remedy would entail that safeguards adopted under this Article are not required to arise from an obligation incurred under the treaty, or not required to be “to the extent necessary”. Given the extraordinary nature of trade remedies,<sup>364</sup> the Arbitration Panel finds it very unlikely that the treaty drafters would have agreed for such safeguard measures to be adopted in situations unrelated to the treaty’s obligations, or in a manner that is not proportionate to the alleged harm.<sup>365</sup>

211. **Fifth**, and lastly, the text of Article 34 EPA itself suggests that these provisions are cumulative. Indeed, Article 34(8) provides, in relevant parts, that:

Where delay would cause damage which would be difficult to repair, the importing Party or SACU, as the case may be, may take the measures provided for in paragraphs 3, 4, **and/or** 5 on a provisional basis without complying with the requirements of paragraph 7.<sup>366</sup>

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<sup>362</sup> *Supra*, at 168.

<sup>363</sup> While SACU stressed, at the Interim Review stage, that Article 34 already contains asymmetries (**EU-IR**, at 14(c), referring to Article 34(6)(b) and 34(8)(a)), the Arbitration Panel notes that these asymmetries in favour of SACU are (a) explicit; and (b) bear on matters (i.e., time periods) of a markedly less substantial nature than the asymmetry SACU seeks to read in Article 34(5) (i.e., a laxer standard to adopt a safeguard measure).

<sup>364</sup> *Supra*, at 171.

<sup>365</sup> The Arbitration Panel is further unpersuaded by the alleged absence of similar requirements for safeguard measures taken under Articles 35 to 38 EPA (**SACU-IR**, at 14(d)). The fact that these specific safeguard regimes apply in more limited circumstances, while some of them (Articles 35 and 37 EPA) will cease to be available 12 years after the conclusion of the EPA, belies SACU’s contention that they “reflect[] the fundamental developmental character of the EPA and the logic that the ‘safety valves’ should consequently be easier to access” (*ibid.*).

<sup>366</sup> (emphasis added)

212. The mention of “and/or” in this context belies any interpretation that seeks to isolate Articles 34(4) and (5) EPA from the three preceding articles; it indicates that measures under these two provisions can be implemented concurrently<sup>367</sup> with the measures adopted under Article 34(3), which, as seen above, describe the form measures taken under Article 34(2) can take. While one may argue that Article 34(3) remains applicable to Article 34(4) or (5), this both undermines the argument relying on the language “without prejudice to paragraphs 1 to 3”,<sup>368</sup> and begs the question of why *only* the *chapeau* and *chaussette* of Article 34(2) EPA would not be applicable for a measure taken under Article 34(5) EPA, whereas *all other* provisions in Article 34(1) to 34(3) EPA would remain applicable.
213. The Arbitration Panel concludes that the entirety of Article 34 EPA is applicable to the safeguard measure, which should therefore meet all its conditions and procedures to be valid under the treaty.

### 3. Relevance of WTO Law

214. SACU opened its First Written Submissions by arguing that:

[...] the EU’s complaints all essentially rest on an entirely mistaken legal premise, namely that the requirements and standards of the World Trade Organisation (“WTO”) safeguard rules, and in particular, the WTO Agreement on Safeguards (“WTO [ASG]”), can simply be transplanted to Article 34 of the EU-SADC EPA even though it concerns a very different subject-matter and it makes no reference to such requirements and standards.<sup>369</sup>

215. Accordingly, the Arbitration Panel needs to clarify the role of WTO law and the case law of WTO dispute settlement bodies in interpreting the obligations bearing on the Parties under the EPA.

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<sup>367</sup> Or, more accurately, that measures adopted in line with Article 34(3) EPA can be implemented concurrently with those provided in Article 34(4) *or* those in Article 34(5), since “the importing party or SACU” would only have the choice between one or the other, depending on whether or not it is a member of the EU. By contrast, these terms do not refer to a party adopting measures under Articles 34(4) *and* (5), since those are mutually exclusive (i.e., there is no overlap between the treaty parties concerned by Article 34(4) and those concerned by Article 34(5)).

<sup>368</sup> Terms that are analysed by the Arbitration Panel *supra*, at 199.

<sup>369</sup> SACU-FWS, at 2.

## The EU

216. The EU noted that WTO panels and the AB have found that WTO law should be interpreted in line with the VCLT.<sup>370</sup> As such, the EU continued, its approach to the interpretation of the EPA is the same as the approach generally obtaining in the WTO context.<sup>371</sup>
217. The EU next contended that, upon conducting “an independent analysis and interpretation of the EU–SADC EPA”, it has found that in “all instances, its conclusions match those of the WTO panels and the AB.”<sup>372</sup> This is why, the EU concluded, it was warranted in citing WTO case law that supports its interpretation of the EPA. Even when the text of the EPA differs from that of the relevant WTO provisions, the EU considered that WTO case law “represents a reasonable and sensible way to interpret” the EPA.<sup>373</sup>
218. The EU added that the EPA makes mention of the Parties’ WTO obligations.<sup>374</sup> For the EU, this is material in view of Article 31(3)(c) VCLTs, which mandates that the interpretation of a treaty should take into account “any relevant rules of international law applicable in the relations between the Parties.”<sup>375</sup>
219. At the hearing, the EU added that WTO law is relevant for another reason: given that the “EPA is intended to build on the achievements of the TDCA”, the EU contended that Article 24 TDCA “constitutes relevant context in the interpretation of” Article 34 EPA.<sup>376</sup> Article 24(1) TDCA, the EU pointed out, had allowed parties to take safeguards in line with the requirements of the ASG – meaning that this agreement (and the associated WTO law) should be relevant to the interpretation of Article 34 EPA.<sup>377</sup>

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<sup>370</sup> **EU-FWS**, at 79, citing *US – Gasoline*, at 17 and 23.

<sup>371</sup> **EU-FWS**, at 80.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*

<sup>374</sup> **EU-FWS**, at 81, citing Article 1(f) EPA, as well as the Preamble. This is also noted in **AMIE-AC**, at 13-14.

<sup>375</sup> See also **EU-CS**, at 11-12.

<sup>376</sup> **EU-OS**, at 26. See also *ibid.*, at 46.

<sup>377</sup> **EU-OS**, at 28. At the hearing, the EU also noted that ITAC conducted its investigation under the International Trade Act, which “is the national law that implements South Africa’s commitments under the WTO and the safeguard agreements”: **Tr.**, 40:21-23.

220. The EU further observed that “the WTO is mentioned no less than 97 times in the 122 Articles of the EPA, and thus the EPA cannot be read in clinical isolation from WTO rules”,<sup>378</sup> and that SACU itself had cited GATT/WTO case law in its submissions.<sup>379</sup>
221. Summing up its approach in its Closing Statement, the EU said that when the WTO rules and agreements and the EPA’s “provisions contain language that is identical or closely resembling, it is logical and reasonable to interpret them in the same way, as both this Panel, the WTO panels and the Appellate Body are bound by the same customary rules of interpretation of public international law”.<sup>380</sup>

### SACU

222. On this issue, SACU pointed out that, beyond directing the Arbitration Panel to apply the customary rules of treaty interpretation, Article 92 EPA also provides that the “rulings of the arbitration panel cannot add to or diminish the rights and obligations provided for in [the EPA].”<sup>381</sup> For SACU, by relying on WTO case law, the EU’s approach is not in keeping with this obligation.
223. In particular, SACU contended that the EU cannot rely on the “similarity of certain words and expressions in Article 34 of the EPA and the WTO provisions”,<sup>382</sup> while overlooking key differences between these legal provisions. SACU contended that these include key differences in the text, context, object and purpose of the provisions. SACU further listed a number of differences between Article 34 and the relevant WTO provisions,<sup>383</sup> and observed that international law contains several different regimes governing safeguards,<sup>384</sup> as evidenced by the EU’s own treaty practice.<sup>385</sup> SACU next argued that the EPA operates a distinction between multilateral WTO-based safeguards (provided for in Article 33 EPA), and bilateral safeguards (governed by Article 34 EPA).<sup>386</sup>

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<sup>378</sup> EU-OS, at 29 (emphasis in the original).

<sup>379</sup> *Ibid.*

<sup>380</sup> EU-CS, at 10.

<sup>381</sup> SACU-FWS, at 65, citing Article 92 EPA, reproduced *supra*, at 49.

<sup>382</sup> SACU-FWS, at 68.

<sup>383</sup> SACU-FWS, at 70.

<sup>384</sup> SACU-FWS, at 76.

<sup>385</sup> SACU-FWS, at 78-79.

<sup>386</sup> SACU-FWS, at 86.

224. As for Article 31(3)(c) VCLT, SACU contended that the WTO obligations invoked by the EU are not applicable to this dispute – meaning that they do not need to be taken into consideration.<sup>387</sup> SACU further pointed out that Article 34(10) EPA explicitly bars the parties from bringing a dispute about safeguards under that article within the aegis of the WTO.<sup>388</sup>
225. At the hearing, SACU further argued that there were “no less than eight important differences between the provisions of Article 34 of the EPA and the WTO safeguards rules”.<sup>389</sup> For SACU, the similarities in wording between the EPA and WTO law are less relevant than the differences.<sup>390</sup> In reply to the EU’s argument regarding the reference to the ASG in Article 24(1) TDCA, SACU pointed out that “[i]t is far more relevant that the specific reference to the WTO safeguard rules in Article 24 of the TDCA was *not* carried over into Article 34 of the EPA.”<sup>391</sup> SACU added that, by contrast, reference to the ASG was included in recent Free-Trade Agreements (**FTAs**) signed by the EU.<sup>392</sup>
226. Furthermore, SACU argued that the interplay between Article 33 EPA (which refers to the right of the Parties to adopt safeguard measures under the ASG) and Article 34 EPA (which applies “notwithstanding” Article 33) could serve as “an express textual basis for excluding WTO SGA rules and precedent.”<sup>393</sup>
227. SACU further protested that it did not propose to interpret the EPA “in clinical isolation from other international law.”<sup>394</sup> Instead, SACU considered that while “WTO and other international law **may** be relevant in **confirming** an interpretation of the EPA”, this is only “when the wording, context and object and purpose are sufficiently similar.”<sup>395</sup> Questioned on this point at the hearing, SACU concluded that “WTO law or case-law

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<sup>387</sup> SACU-FWS, at 89: “Since these WTO agreements do not apply, there is no reason for them to be taken into consideration.”

<sup>388</sup> SACU-FWS, at 91, citing Article 34(10) EPA, *supra*, at 48.

<sup>389</sup> SACU-OS, at 44.

<sup>390</sup> SACU-OS, at 46.

<sup>391</sup> SACU-OS, at 47 (emphasis in the original).

<sup>392</sup> SACU-OS, at 52, referring to **Exh. SACU-8**.

<sup>393</sup> SACU-CS, at 18.

<sup>394</sup> SACU-CS, at 11.

<sup>395</sup> SACU-CS, at 17 (emphasis in the original). At the hearing, SACU added that “[s]ince the EPA does not include or incorporate these kinds of obligations from the WTO SGA, if an analogy were to be made, it would therefore be with the pre-WTO GATT Article XIX before it was supplemented by the much more detailed and rigorous requirements of the WTO SGA, as epitomised by the *Hatters Fur* case”: see SACU-OS, at 51.

can be relevant like many, like lots of case-law is relevant because another body is considering a similar issue and you find its reasoning convincing, you follow it.”<sup>396</sup>

### The Arbitration Panel’s Analysis

228. The starting point of the Arbitration Panel’s analysis should be the text of the EPA and the commitments made by the Parties under the agreement; in particular, the Panel is mindful of Article 92 EPA, which provides that the Panel “cannot add to or diminish the rights and obligations provided for in this Agreement.” In other words, the Arbitration Panel is not empowered to import obligations or requirements from other treaties or contexts: it remains bound by the strictures of the EPA, which embodies the Parties’ consent under international law.<sup>397</sup> What the Arbitration Panel is empowered to do, however, as also provided in Article 92 EPA, is to interpret the treaty and its provisions “in accordance with the customary rules of interpretation of public international law”. For the Arbitration Panel, the Parties have sought guidance from the decisions and practices of other international bodies to shed light on the obligations that are binding on them under the EPA.
229. The Arbitration Panel notes that, regardless of the Parties’ abstract views on this issue, both of them in their pleadings have relied on (or criticised) WTO panel and AB reports, while also referencing further international practice and jurisprudence. Indeed, most of the reports and decisions cited by the Arbitration Panel in this Final Report stems from the discussions between the Parties. WTO case law was also cited in the context of the ITAC proceedings.<sup>398</sup>
230. This is unsurprising as the Parties’ positions regarding the role of international practice and jurisprudence (and in particular as it proceeds from the WTO) in this dispute are not as far apart as they might seem. The EU has summarised its position as being that “when [WTO and EPA] provisions contain language that is identical or closely resembling, it is

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<sup>396</sup> **Tr.**, 78:11-18.

<sup>397</sup> For the critical role of consent in circumscribing the Arbitration Panel’s powers and jurisdiction, see *supra*, at 105.

<sup>398</sup> As pointed out in **EU-OS**, at 29, referring to **Exh.** EU-16, at 9-10.

logical and reasonable to interpret them in the same way”,<sup>399</sup> while SACU at the hearing acknowledged that WTO law could be relevant when “the wording is the same”.<sup>400</sup>

231. In a context where both Parties agree that WTO case law is not binding,<sup>401</sup> this leaves much room for the Arbitration Panel to discuss this case law in terms of persuasiveness and relevance to the issues at hand. This is the case-by-case approach taken by the Arbitration Panel in this Final Report, and all citations to the practice and jurisprudence of WTO panels and the AB should be understood as pertaining to this approach. The Arbitration Panel further notes that this approach is in keeping with Article 31(3)(c) VCLT, according to which “[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties.” It is common cause between the Parties that the EPA parties are all members of the WTO, and bound by the WTO rules and agreements.
232. In adopting this approach, the Arbitration Panel remains mindful that it is constituted under the EPA, an agreement outside of the WTO context. In particular, and as noted above,<sup>402</sup> the general safeguard regime of Article 34 EPA relies on language that deliberately departs from that of related WTO agreements, and which therefore qualifies as *lex specialis* between the Parties. At the same time, the EPA frequently refers to the WTO and the parties’ obligations, and most notably in its Preamble, as well as in Article 1 EPA (Objectives).
233. Indeed, the Arbitration Panel bears in mind that trade agreements, such as the EPA, do not emerge from a vacuum; they do not seek to isolate their parties from the multilateral trade regime, but only to deepen and qualify their common relationship in light of Article XXIV GATT.<sup>403</sup> The language adopted by the EPA is key, and it is not a

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<sup>399</sup> EU-CS, at 10.

<sup>400</sup> Tr., 76:17-23. See also Tr., 74:7-13. In fact, SACU’s position on this issue has somewhat shifted during the proceedings, including at the hearing, when SACU also suggested that WTO law “can be looked at sometimes and it may be useful as a confirmatory of an interpretation that has been reached in any event” (Tr., 149-15:17; SACU-IR, at 48(j)). However, the latter proposition, which would equate other rules of international law (such as WTO law) with subsidiary means of interpretation under Article 32 VCLTs, is unacceptable as a matter of treaty interpretation.

<sup>401</sup> See EU-CS, at 10; Tr., 74:8-9.

<sup>402</sup> *Supra*, at 177.

<sup>403</sup> The EPA’s multiple references to the WTO rules and agreements is a testimony to this instrument’s role as implementing Article XXIV GATT. The Arbitration Panel further notes that Article 112 EPA, entitled “Relations with the WTO Agreement”, recorded the parties’ agreement that “nothing in this Agreement requires them to act in a manner inconsistent with their WTO obligations.”

coincidence if it tracks or substantially follows that of the multilateral trade regime; when this is the case, the harmonious development and coherence of international (economic) law require the Arbitration Panel to give special care and consideration to the examples and findings of earlier decisions by international trade panels. As these decisions, in turn, frequently draw from the law and practice of other international courts and tribunals, the Arbitration Panel considers that its approach also encompasses this broader range of law and practice, notably with respect to issues that are common to international law adjudication.<sup>404</sup>

### ***C. Merits***

234. Having upheld jurisdiction over all claims,<sup>405</sup> the Arbitration Panel will thus turn to the merits, first by setting out the Parties' arguments in this respect (1), and then by detailing its analysis (2). Subject to the Arbitration Panel's findings, appropriate recommendations will be made (3).

#### **1. The Parties' Arguments**

235. As spelt out in the EU's written and oral submissions,<sup>406</sup> five claims (comprising seven distinct arguments) are before this Arbitration Panel. The claims relate to (i) the legal basis underlying the safeguard measure; (ii) the data used by ITAC in its safeguard analysis; (iii) ITAC's causation analysis; (iv) the resulting scope of the safeguard measure; and (v) the information provided to the TDC under Article 34(7) EPA.

#### **Claim 1: The Legal Basis for the Investigation**

236. The EU's first claim relates to the legal basis upon which the circumstances justifying the safeguard measure have been investigated.<sup>407</sup>

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<sup>404</sup> The Arbitration Panel's approach is also in line with the fact that it is meant to know the law, under the principle *iura novit curia*: see *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, 1974 I.C.J. Rep. 3, at 9.

<sup>405</sup> *Supra*, at 129.

<sup>406</sup> **EU-FWS**, at 70-74.

<sup>407</sup> As put in the **EU-FWS**, at page 28: "Violation of Article 34 (2) of the EU-SADC EPA Because the Measure at Issue was Adopted by a Different Authority From the One Which Opened the Investigation, and On a Different Legal Basis".

*The EU*

237. In its submissions, the EU contended, and protested, that the safeguard measure had been adopted by SACU, under Article 34 EPA, but on the basis of an investigation that originated with ITAC, under Article 16 TDCA.<sup>408</sup>
238. As recounted by the EU, ITAC explicitly and deliberately changed the legal basis for its investigation from Article 16 TDCA to Article 34 EPA shortly before the latter was bound to be provisionally implemented.<sup>409</sup> For the EU, however, this change of legal basis was not an option open to ITAC, for a number of reasons:
- a. The EU contended that Article 16 TDCA was suspended upon the EPA's provisional application,<sup>410</sup> and the EPA is not a successor to the TDCA;
  - b. Subsidiarily, if the EPA were considered a successor to the TDCA, then the EU argued that:
    - i. Article 16 TDCA would have been succeeded by Article 35 EPA, as both provisions relate to "Agricultural Safeguards";<sup>411</sup> in turn, Article 34 EPA could only be the successor to Article 24 TDCA, since both pertained to "bilateral safeguards";<sup>412</sup>
    - ii. In addition, according to the EU, Article 16 TDCA only provided for the imposition of "provisional" safeguards, whereas Article 34 EPA allows Parties to enact provisional as well as final safeguard measures;<sup>413</sup> and
    - iii. The conditions to enact safeguards under Article 16 TDCA and Article 34 EPA are not comparable – be in matters of procedure,<sup>414</sup> or substance.<sup>415</sup>

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<sup>408</sup> EU-FWS, at 84.

<sup>409</sup> EU-FWS, at 86, citing Exh. EU-8, at 6-7.

<sup>410</sup> EU-FWS, at 88 and 92.

<sup>411</sup> EU-FWS, at 94. This is echoed in AMIE-AC, at 6.

<sup>412</sup> EU-FWS, at 94-95.

<sup>413</sup> EU-FWS, at 97-98.

<sup>414</sup> EU-FWS, at 99.

<sup>415</sup> EU-FWS, at 100-101; the EU further notes that even Article 34(5) contains more requirements than Article 16 TDCA: see *ibid.*, at 102.

239. Summing up Claim 1 in its First Written Submission, the EU concluded that “there is no legal and logical basis for considering that a safeguard investigation initiated under a set of procedural and substantive requirements can be continued and concluded by a different authority under a new and different set of procedural and substantive requirements (which moreover do not provide explicitly for that continuation).”<sup>416</sup>
240. At the hearing, the EU stressed that the requirements for a safeguard under Article 34 EPA are “substantially different” from those under Article 16 TDCA – such that an investigation started under the aegis of the latter could not justify a measure adopted under the former.<sup>417</sup> The EU further advanced that Article 34 EPA cannot be understood as a “continuation” of Article 16 TDCA – if anything, it would be a continuation of Article 24 TDCA, which also dealt with bilateral safeguard measures.<sup>418</sup>

*SACU*

241. SACU, for its part, considered this claim irrelevant, as it interprets Article 34 EPA as providing for no particular duty to conduct an investigation prior to the enactment of safeguard duties.<sup>419</sup> SACU’s argument is predicated upon a reading of Article 34 EPA as providing for a “notify and negotiate” model, to be contrasted with “the ‘investigate and justify in a report’ model that applies in the WTO and in some FTAs.”<sup>420</sup> For SACU, the only question before the panel is therefore whether it complied with Article 34 – and in particular Article 34(5) EPA – meaning that the TDCA is not relevant to this analysis.<sup>421</sup>
242. In any event, SACU disagreed with the EU on the question of whether the EPA qualifies as a successor agreement to the TDCA, and contended that it does. SACU referred in particular to Article 111 EPA,<sup>422</sup> and to Protocol 4, and concluded that “the very existence

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<sup>416</sup> EU-FWS, at 104. See also AMIE-AC, at 8, for similar arguments.

<sup>417</sup> EU-OS, at 22.

<sup>418</sup> EU-OS, at 24.

<sup>419</sup> SACU-FWS, at 118: “there is no requirement in the EU-SADC EPA for any investigation to be conducted, let alone that it be conducted by a particular authority under a particular legal basis.” See also SACU-AC, at 12: “The WTO [ASG] therefore makes an indissoluble link between a safeguard measure and the required investigation and report such that they must be considered as together constituting the measure. This is not the case under Article 34 of the EU-SADC EPA.”; SAPA-AC, at 8.5.1: “Neither the TDCA nor the EU-SADC EPA require an investigation by a party or SACU, as the case may be, prior to the imposition of a Safeguard Measure.”

<sup>420</sup> SACU-FWS, at 80.

<sup>421</sup> SACU-FWS, at 121, 129.

<sup>422</sup> Article 111 EPA provides: “The relationship between this Agreement [i.e., the EPA] and the TDCA shall be governed by the provisions of Protocol 4.”

of Article 111 and Protocol 4 of the EU-SADC EPA and its provisions on termination or suspension of the TDCA on definitive and provisional application of the EU-SADC EPA respectively demonstrates that the second is a successor to the first.”<sup>423</sup>

243. As for which provision from the EPA can be held as a successor to Article 16 TDCA, SACU considered that the question is irrelevant given that the provision at stake is Article 34 EPA.<sup>424</sup> Nevertheless, SACU disagreed that Article 35 EPA is, as the EU contended, the only possible successor to Article 16 EPA: in particular, SACU pointed out that the conditions to enact safeguard measures under Article 35 EPA differ markedly from those that applied under Article 16 TDCA.<sup>425</sup> For SACU, there is “no reason why several provisions of the EU-SADC EPA cannot be considered to be the continuation of Article 16 of the TDCA.”<sup>426</sup> SACU concluded, in its First Written Submission, that “the EU’s first claim [is] misconceived, irrelevant and in any event unfounded.”<sup>427</sup>
244. At the hearing, SACU clarified that it did not suggest that “it would impose a safeguard measure under Article 34 of the EPA without any investigation, but rather that it is free under the EPA to choose to or not to conduct one.”<sup>428</sup> In other words, SACU said, the fact that it did conduct an investigation “does not allow the EU to base its case on an alleged defect in the investigation if this does not correspond to an obligation under the EPA.”<sup>429</sup> SACU also reiterated that it saw no EPA obligation that would have been breached by substituting the basis of the investigation from the TDCA to the EPA.<sup>430</sup>

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<sup>423</sup> SACU-FWS, at 126. SACU adds: “Why otherwise, would an agreement between one set of Parties provide for its transition to an agreement between a different set of Parties?”

<sup>424</sup> SACU-FWS, at 129.

<sup>425</sup> SACU-FWS, at 133-134.

<sup>426</sup> SACU-FWS, at 135. See also **SAPA-AC**, at 11.4.7, claiming that “the jurisdictional requirements for Article 16 of the TDCA and Article 34(5) as read with Article 34(2)(c) of the EU-SADC EPA are materially the same.”

<sup>427</sup> SACU-FWS, at 136.

<sup>428</sup> SACU-OS, at 56. See also *ibid.*, at 82, where SACU explains that “there was an investigation in the present case because SACU wanted to be sure of the facts”, and that “there is no inherent need for a safeguard measure to be preceded by an investigation, much less one that is based on WTO standards”.

<sup>429</sup> SACU-CS, at 46. See also **SACU-PHS**, at 30: “The fact that SACU did more than it was required to do does not justify the EU sitting back and throwing stones at the investigation.”

<sup>430</sup> SACU-OS, at 84.

## Claim 2: ITAC’s Safeguard Analysis and Import data

245. The EU’s second claim relates to the analysis performed by ITAC, and notably to its approach to assessing the level of imports in SACU of frozen bone-in chicken cuts. The EU contended, in two distinct arguments, that:

- a. The *chapeau* of Article 34(2) EPA requires safeguard measures to be based on increased imports that are the “result of the obligations incurred by a Party under” the EPA,<sup>431</sup> and
- b. ITAC’s investigation was based on “old” or “outdated” data and failed to take into account more recent data.<sup>432</sup>

### *The EU*

246. The EU argued that the *chapeau* of Article 34(2) EPA requires the party enacting safeguard duties to: (a) establish a causal link between the “obligations incurred” under the EPA and the circumstances said to warrant such duties; and (b) to take into account, logically, only those imports that postdate the entry into force of the EPA.<sup>433</sup> For the EU, SACU erred on both counts:

- a. First, the EU cited WTO case law in support of its contention that the *chapeau* of Article 34(2) EPA requires SACU to demonstrate “as a matter of fact”<sup>434</sup> the existence of an EPA obligation and its “logical connection” with an increase in imports.<sup>435</sup> For the EU, this required SACU to pinpoint the exact obligation at stake in the alleged imports increase.<sup>436</sup> The EU further pointed out that, if anything, the *chapeau* of Article 34(2) EPA provides for a more stringent test than the one applicable under WTO law,

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<sup>431</sup> See **EU-FWS**, at page 33: “Violation of Article 34 (2) of the EU-SADC EPA Because The Alleged Increase in Quantity of Imports Did Not Result From Obligations Incurred Under the EU–SADC EPA, and Any Import Increase that Occurred Prior to the Application of the EU– SADC EPA Cannot Be a Result of the Obligations Incurred Under the Same Agreement”.

<sup>432</sup> See **EU-FWS**, at page 39: “Violation of Article 34 (2) of the EU-SADC EPA Because the ITAC’s Assessment of the Existence of a Threat of Disturbance and/or Serious Injury as a Result of an Increase in Volume of Imports was Based on Outdated Import Data, and the Measure Does Not Take Into Consideration that the Imports During the Period December 2016 – December 2017 and January 2018 – March 2018 Greatly Decreased Compared to the Period Covered by the Investigation.”

<sup>433</sup> **EU-FWS**, at 110.

<sup>434</sup> **EU-FWS**, at 114, citing Appellate Body Report, *Korea –Dairy*, at 84.

<sup>435</sup> **EU-FWS**, at 115.

<sup>436</sup> **EU-FWS**, at 119.

since it refers to obligations that “result” in increased imports, while Article XIX:1 GATT only requires that increased import stem from the effect of the relevant obligation(s).<sup>437</sup>

The EU contended that SACU has not met this requirement,<sup>438</sup> as ITAC’s published reports did not specify which obligation from the EPA resulted in the alleged increase in imports.<sup>439</sup> For context, the EU observed that “the EU–SADC EPA did not result in any further tariff concessions to the product concerned compared to the concessions agreed under the TDCA.”<sup>440</sup>

- b. Second, the EU clarified that, as a logical consequence of the *chapeau*’s “obligation incurred” requirements, only imports postdating the EPA’s entry into force are relevant for the analysis.<sup>441</sup>

Yet, the EU argued, ITAC’s investigation initially took into account a timespan ranging from 2011 to 2015.<sup>442</sup> While the investigation later added data for 2016, which included 2 months and 21 days of data postdating the EPA’s entry into force, the EU contended that “essentially all investigated imports occurred prior to the application of the EU–SADC EPA.”<sup>443</sup>

In this respect, the EU pointed out that imports in fact “decreased substantially” following the EPA’s entry into force.<sup>444</sup>

247. At the hearing, the EU further stressed that the requirement for a logical link between an “obligation incurred” and the alleged injury is a substantive requirement, as opposed to a procedural condition under WTO law.<sup>445</sup> The EU also pointed out that the *chapeau* of

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437 EU-FWS, at 116.

438 EU-FWS, at 117.

439 EU-FWS, at 125.

440 EU-FWS, at 118.

441 EU-FWS, at 129.

442 EU-FWS, at 131.

443 EU-FWS, at 132.

444 EU-FWS, at 134.

445 EU-OS, at 48.

Article 34(2) EPA referred to “obligations incurred by a Party under this Agreement” – meaning that the obligation at stake needed to be a new one.<sup>446</sup>

248. In this context, the EU reiterated its contention that ITAC’s investigation “essentially did not take into consideration imports that occurred *after* the entry into force of the EPA”.<sup>447</sup> For the EU, while SACU could take into account the level of import predating the EPA’s provisional application, this should be compared to a “sufficiently long” period after that date – to ascertain whether the imports did increase because of an “obligation incurred” under the EPA.<sup>448</sup>
249. As for the data underlying the investigation, the EU stressed that the *chapeau* of Article 34(2) EPA refers to a product that “is being imported [...] in such increased quantities” in the territory of the party seeking to take safeguard measures.<sup>449</sup> On the basis of this language, the EU contended that the period of investigation (**POI**) used by ITAC should have been “recent” – with the EU suggesting January 2016 to March 2018 as the right timeframe for a measure that entered into force in September 2018.<sup>450</sup>
250. For the EU, since ITAC focused on the 2011-2016 period to assess levels of imports, the safeguard measure was not related to products that “[are] being imported”,<sup>451</sup> but instead pertained to “old and outdated data.”<sup>452</sup> Relatedly, the EU alleged that ITAC erred in failing to consider the most recent import data, i.e., for the year 2017 and for the first months of 2018.<sup>453</sup> Taking this data into consideration would have revealed to ITAC that EU imports were actually decreasing, the EU argued.<sup>454</sup> In particular, the EU contended that imports for 2017 were even lower than in 2011, which ITAC took as a baseline to assess the evolution of imports.<sup>455</sup>

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<sup>446</sup> **EU-OS**, at 49.

<sup>447</sup> **EU-OS**, at 50.

<sup>448</sup> **EU-OS**, at 53.

<sup>449</sup> **EU-FWS**, at 136-137.

<sup>450</sup> **EU-FWS**, at 141. At the hearing, the EU referred to *Argentina – Footwear (EC)*, at 130, in support of the idea that “is being” requires consideration of “recent import trends”: **Tr.**, 276:4-11 (EU).

<sup>451</sup> **EU-FWS**, at 143.

<sup>452</sup> **EU-FWS**, at 144; see also **EU-OS**, at 56: the “ITAC improperly selected a *lengthy* and *outdated* POI.” (emphasis in the original)

<sup>453</sup> **EU-FWS**, at 145. The EU contends that, even providing for some lag, data for the first quarter of 2018 data would have been “reasonably available” to SACU when it adopted the safeguard duty in June 2018: see *ibid.*, at 141.

<sup>454</sup> **EU-FWS**, at 145.

<sup>455</sup> **EU-FWS**, at 149.

251. In other words, the EU concluded, SACU could not adopt the safeguard measure without a “proper demonstration of increase in imports”, which required taking into account a “correct POI.”<sup>456</sup> The EU added that “ITAC did not provide ‘*an adequate, reasoned and reasonable explanation*’ as to how the facts before it supported its determination that there existed an increase in imports.”<sup>457</sup>
252. At the hearing, the EU further contended that by the time the safeguard measure entered into force, the situation it was meant to remedy “had become entirely stale”.<sup>458</sup> As such, the EU argued that this resulted in an “*improper time-lag* between the end of the POI and the final determination (9 months) and between the end of the POI and the application of the safeguard measure (18 months).”<sup>459</sup> The EU also contested SACU’s allegations that data for the period 2017-2018 would have been unrepresentative by arguing that “the EPA does *not* allow the ITAC to *pick and choose* data, as it were, per its convenience and predetermined conclusions.”<sup>460</sup> The EU was further unconvinced that considering this data would have had consequences in terms of additional delays before adopting the safeguard measure,<sup>461</sup> or fewer possibilities to verify the data.<sup>462</sup>
253. As for SACU’s contentions that the process took so long because it was rigorous and allowed all interested Parties – including the EU – to participate, the EU made a distinction between the investigation itself, and “the fact that SACU improperly delayed the *imposition* of the safeguard duties *after* the expiry of the POI.”<sup>463</sup> More generally, the EU contended that undertaking a thorough examination and enacting the safeguard measure promptly are not mutually exclusive paths of action.<sup>464</sup> At the hearing, the EU cited the panel report in *Ukraine – Cars* for the proposition that “even ongoing, good

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<sup>456</sup> EU-FWS, at 156.

<sup>457</sup> *Ibid.*, citing Panel Report, *US – Line Pipe*, at 7.194.

<sup>458</sup> EU-OS, at 57. See also EU-CS, at 54.

<sup>459</sup> EU-OS, at 58(iii) (emphasis in the original).

<sup>460</sup> EU-OS, at 62 (emphasis in the original). See also EU-OS, at 111, citing the panel report in *Mexico – Rice*, at 7.167, in support of the argument that “significant delays between the period of investigation and the imposition of the duty may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and the current injury.”

<sup>461</sup> EU-OS, at 63.

<sup>462</sup> EU-OS, at 64.

<sup>463</sup> EU-OS, at 66 (emphasis in the original).

<sup>464</sup> EU-OS, at 68.

faith consultations would not justify a departure from the requirements” of a valid safeguard measure.<sup>465</sup>

*SACU*

254. SACU, for its part, considered that Article 34(5), and not 34(2) EPA, is the proper legal basis for the safeguard duties<sup>466</sup> – and that the former provision does not include the *chapeau* found in Article 34(2).<sup>467</sup> In the event that the Arbitration Panel disagrees and reviews the matter under Article 34(2) EPA, SACU replied as follows.
255. Starting with the EU’s contention that the *chapeau* of Article 34(2) EPA requires evidence of a “logical link” between an obligation incurred under the EPA and the imports increase, SACU protested the EU’s reliance on WTO case law to support this argument.<sup>468</sup> For SACU, such reliance is improper, as the case law cited by the EU relates to a different obligation, whereas the EPA should be interpreted on its own “on the basis of all the words used in their context and taking account of the object and purpose.”<sup>469</sup>
256. SACU then interpreted the *chapeau* of Article 34(2) EPA as simply referring to an obligation that “if not present, would have led to no, or to a lesser, increase in imports.”<sup>470</sup> SACU contended that the burden of proof in this respect lies on the EU, which should have evidenced that no increase in imports would have taken place, absent the EPA.<sup>471</sup>
257. In any event, SACU contended that “the removal of the MFN duty of 37% on imports of frozen bone-in chicken cuts from the EU does have a logical connection with the increase of imports that occurred.”<sup>472</sup> For SACU, the *chapeau* of Article 34(2) EPA does not require the obligation at stake to be a “new” obligation, such that an obligation carried out from the TDCA would qualify; besides, the tariff concession on frozen bone-in chicken cuts was new for the SACU countries that had not been a party to the TDCA.<sup>473</sup>

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<sup>465</sup> *Ukraine – Cars*, at 7.182. While this case related to Article 2.1 SGA, the EU contended that this provision “has exactly the same words as EPA Article 34 (2)”: see **Tr.**, 267:14-17.

<sup>466</sup> *Supra*, at 155.

<sup>467</sup> **SACU-FWS**, at 140.

<sup>468</sup> **SACU-FWS**, at 142.

<sup>469</sup> **SACU-FWS**, at 143.

<sup>470</sup> *Ibid.*

<sup>471</sup> **SACU-FWS**, at 144-145.

<sup>472</sup> **SACU-FWS**, at 145.

<sup>473</sup> **SACU-FWS**, at 147. At the hearing, SACU further noted that the removal of MFN duty was a “new” obligation for 4 out of the 5 SACU States: see **SACU-OS**, at 87.

258. Finally, it was SACU’s case that the reporting requirements under Article 34 EPA are not similar to those applicable under the ASG – leading SACU to deny that ITAC needed to identify a specific obligation alleged to have resulted in the increase in imports, as argued by the EU.<sup>474</sup>
259. Turning to the POI, SACU disagreed with the EU that Article 34(2) EPA logically requires a party to focus on imports that postdate the entry into force of the Agreement.<sup>475</sup> Instead, SACU considered that ITAC was free to compare the imports postdating the Agreement’s entry into force “with an earlier moment and there is no reason why this cannot be before the provisional application of the EU-SADC EPA.”<sup>476</sup>
260. At the hearing, SACU also pointed out that the EU’s reading entails that “a significant period would need to pass before disturbance caused could be said to result from goods imported because of obligations under the EPA”, leaving domestic industries unprotected “for a significant period”.<sup>477</sup>
261. As for the data underlying the investigation, SACU contended that, since Article 34 EPA does not provide for any particular procedure, ITAC was free to select the most relevant period of investigation (POI).<sup>478</sup>
262. SACU further pointed out that updating the POI, as argued by the EU, was not warranted, stressing that it is “not possible to constantly update a POI since otherwise an investigation would never end.”<sup>479</sup> In this respect, SACU observed that the EU in earlier communications had advised against updates to the POI, in what SACU argues were “self-interested advice about acceptable practice in trade defence investigations”.<sup>480</sup>
263. SACU explained the lapse of time between the POI’s end and the adoption of the safeguard duty by ITAC’s “investigative diligence in undertaking rigorous verification of the information”,<sup>481</sup> and by the consultations undertaken with the EU and internally

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<sup>474</sup> SACU-FWS, at 149-151.

<sup>475</sup> SACU-FWS, at 154.

<sup>476</sup> SACU-FWS, at 156.

<sup>477</sup> SACU-PHS, at 32.

<sup>478</sup> SACU-FWS, at 161.

<sup>479</sup> *Ibid.*, as well as identical language at 164.

<sup>480</sup> SACU-FWS, at 162-163.

<sup>481</sup> SACU-FWS, at 165.

prior to the adoption of the measure.<sup>482</sup> For SACU, the EU is inconsistent in claiming that the investigation lacked rigour, and then protesting the time spent to make sure it was rigorous enough.<sup>483</sup>

264. As to the EU's allegations that it has failed to consider more recent import data, SACU argued that there is no requirement in Article 34 EPA that the increase in imports should have taken place "in the most recent period."<sup>484</sup> On the contrary, SACU said, the nature of the EPA as a development agreement indicates that "the safeguard regime under Article 34 of the EU-SADC EPA is intended to give SACU / the SADC EPA States much greater flexibility in applying safeguard measures."<sup>485</sup>
265. Finally, SACU contended that the decrease in imports over the period 2017-2018 was taken into account, though ultimately deemed non-representative,<sup>486</sup> for two reasons: (a) sanitary and phytosanitary (SPS) measures that impacted imports from a number of EU states between November 2016 and 2017;<sup>487</sup> and (b) the impact of the provisional safeguard duty applied from December 2016.<sup>488</sup>
266. At the hearing, SACU argued that the EPA did not require for safeguard measures to be adopted quickly after an investigation, stressing that the fact that a provisional measure could be adopted under Article 34(8) EPA suggested "that adequate time can be devoted to considering the justification of a definitive measure."<sup>489</sup> For SACU, the fact that a measure can last four years further undermines the stress put by the EU about outdated data: "at the end of the four years of course, the data could be even more out of date."<sup>490</sup>

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482 SACU-FWS, at 166.

483 SACU-FWS, at 170.

484 SACU-FWS, at 172.

485 *Ibid.*; see also SACU-FWS, Section V.B., entitled "The EU-SADC EPA is a development agreement as well as a trade agreement".

486 SACU-FWS, at 173. See also SAPA-AC, at 13.5.8.

487 SACU-FWS, at 174.

488 SACU-FWS, at 176; see also *supra*, at 58. See also SACU-OS, at 93: "if a decrease of imports after the imposition of a provisional safeguard measure meant that a definitive safeguard measure could not be imposed, then provisional measures will never be followed by definitive measures."

489 SACU-OS, at 72.

490 *Tr.*, 272:4-5. See also *Tr.*, 273:15-19, where SACU asks: "since the Agreement provides that the measure can be imposed for four years based on data prior to its imposition, then why should that data be up to date to the last month or so before the measure is imposed?"

### Claim 3: The Causation Analysis

267. The EU's third claim relates to the causation analysis underlying the safeguard measure, and notably to the question whether other factors might have explained the serious injury or disturbance (or threat thereof).<sup>491</sup>

#### *The EU*

268. The EU claimed that Article 34(2) EPA requires the party adopting a safeguard measure to do so on the basis of a proper causation analysis between the increase of imports and the "serious injury (or threat thereof) to the domestic industry or disturbances in a sector of economy (or threat thereof)."<sup>492</sup> Referring to WTO case law,<sup>493</sup> the EU continued that this requirement, in turn, entails two distinct inquiries:

- a. The existence of a causal link between the imports increase and the serious injury (the "correlation requirement").<sup>494</sup> According to the EU, no such causal link was evidenced by SACU, and sales of domestic producers "were not negatively affected by the imports."<sup>495</sup>
- b. Evidence that the aforesaid injury has not been caused by other factors (the "non-attribution requirement").<sup>496</sup> In this respect, the EU contended that, despite acknowledging the role of other factors,<sup>497</sup> ITAC "did not carry out the necessary analysis in order to reach a reasoned conclusion [and] therefore failed to adequately analyse other factors that might have contributed to serious injury/disturbance, or threat thereof."<sup>498</sup>

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<sup>491</sup> See **EU-FWS**, at page 46: "Violation of Article 34 (2) of the EU-SADC EPA Because Other Factors Were Not Appropriately Taken Into Account in the Analysis of the Existence and Level of Disturbance and/or Serious Injury, or Threat Thereof Because of an Increase in Volume of Imports".  
<sup>492</sup> **EU-FWS**, at 159.

<sup>493</sup> Notably, *US – Line Pipe*, at 208. While SACU contested this reliance on WTO case law, the EU at the hearing contended that it was warranted as both the ASG and the EPA share the language "under such conditions" from which the causation requirement is said to be derived: see **EU-OS**, at 80 citing *US – Wheat Gluten*, at 77-78; **EU-CS**, at 57. SACU disagreed that this language could offer a basis for the "non-attribution analysis": see **SACU-OS**, at 97.

<sup>494</sup> **EU-FWS**, at 160(i). As noted above, SACU claims that this second requirement is not within the scope of the Arbitration Panel's Terms of Reference: *supra*, at 94.b.

<sup>495</sup> **EU-FWS**, at 162.

<sup>496</sup> **EU-FWS**, at 160(ii).

<sup>497</sup> See **EU-FWS**, at 169, citing **Exhs.** EU-8, at 5, and EU-7, at 4.3.

<sup>498</sup> **EU-FWS**, at 165.

The EU also criticised ITAC for, in particular, disregarding the potential role of other factors in its investigation and failing to conduct a “reasoned and adequate” non-attribution analysis;<sup>499</sup> failing to distinguish the effects of different factors on the alleged injury;<sup>500</sup> and failing to perform a “forward-looking” analysis to assess how these factors would impact a mere threat of serious injury, for instance by using “the most recent data”.<sup>501</sup>

The EU further provided evidence related to other factors, such as feed costs,<sup>502</sup> costs of labour, diesel, electricity, plastic, and cardboard boxes;<sup>503</sup> and imports from other countries (namely, the United States and Brazil).<sup>504</sup>

For the EU, “if the other factors had been properly considered, it would have been clear that the alleged serious injury/disturbance, or threat thereof, was not caused by the allegedly increased EU imports.”<sup>505</sup>

269. The EU concluded that “ITAC failed to demonstrate (i) that other factors had no relevance to any serious injury/disturbance, or threat thereof; and (ii) that the alleged injury/disturbance, or threat thereof, was caused by the allegedly increased EU imports”, entailing a breach of Article 34 EPA.<sup>506</sup>
270. At the hearing, the EU clarified that the non-attribution requirement proceeds, “as a matter of plain logic”, from the notion that safeguards should not be misused in circumstances when competition from imports is not the main cause of the poor performance of the domestic industry.<sup>507</sup> For the EU, a proper causation analysis would take care to: (i) distinguish the effects caused by different factors; (ii) exclude the effect

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<sup>499</sup> EU-FWS, at 171, where the EU argued that “[m]erely listing other factors and unreasonably disregarding them does not constitute a ‘*reasoned and adequate explanation*’ by the investigating authority in the sense established by the AB in [*US – Line Pipe*]. It follows that a ‘*reasoned and adequate explanation*’ and a non-attribution analysis should have been conducted by the ITAC.” (emphasis in original, footnotes omitted). The EU repeated this argument in EU-OS, at 81.

<sup>500</sup> EU-FWS, at 173.

<sup>501</sup> EU-FWS, at 176.

<sup>502</sup> EU-FWS, at 180-183.

<sup>503</sup> EU-FWS, at 184-192.

<sup>504</sup> EU-FWS, at 193-201.

<sup>505</sup> EU-FWS, at 178 (emphasis in the original).

<sup>506</sup> EU-FWS, at 203.

<sup>507</sup> EU-OS, at 74. See also *ibid.*, at 80: “there is logically no way for the ITAC to objectively determine that the South African industry was being harmed by EU imports, *unless* the ITAC discounted the possible negative effects of *other factors*.” (emphasis in original) See also EU-CS, at 58.

caused by factors other than the alleged increase in imports; and (iii) establish “that effects caused by EU imports *alone* caused the injury/disturbance/threat thereof for which these safeguard measures have been applied.”<sup>508</sup> The EU also saw no basis for SACU’s alleged “lower standard on causation”.<sup>509</sup>

271. As to the causation analysis undertaken by ITAC, the EU considered that it only proved the correlation between higher imports and the alleged injury – but “*correlation does not imply causation* and Article 34(2) clearly requires causation.”<sup>510</sup> The EU further argued that ITAC had failed to sufficiently consider other factors in relation to the “non-attribution” analysis, notably by failing to apportion the contribution of different factors to the alleged injury (or threat thereof).<sup>511</sup> The EU pointed, in particular, to the increase in feed costs,<sup>512</sup> and to the role of imports from other regions, namely the US and Brazil.<sup>513</sup> For the EU, SACU’s distinction in reply between “temporary” and “permanent” factors was unconvincing: “whether the increase was temporary or permanent is entirely immaterial as long as it breaks the alleged causal link”.<sup>514</sup>

#### *SACU*

272. SACU, for its part, advanced that WTO law and case law cannot simply be applied in this case, which is instead governed solely by the EPA.<sup>515</sup> For SACU, Article 34 EPA only requires that “the increased imports cause or threaten to cause serious injury or disturbance.”<sup>516</sup> Likewise, SACU argued that the “non-attribution” requirement put forward by the EU has its roots in WTO law, and notably in Article 4.2(c) ASG, which is not applicable in this case.<sup>517</sup>
273. While causation analyses under WTO law proceed under a “substantial cause” test, SACU said, Article 34 EPA requires only a “contributory cause” test.<sup>518</sup> According to

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<sup>508</sup> EU-OS, at 74 (emphasis in the original).

<sup>509</sup> EU-OS, at 76.

<sup>510</sup> EU-OS, at 78 (emphasis in the original).

<sup>511</sup> EU-OS, at 81-82.

<sup>512</sup> EU-OS, at 83(i) and (iii).

<sup>513</sup> EU-OS, at 83(iv).

<sup>514</sup> EU-OS, at 83(iii) (emphasis in the original).

<sup>515</sup> SACU-FWS, at 181. See *supra*, at 222 et seq.

<sup>516</sup> SACU-FWS, at 182.

<sup>517</sup> SACU-FWS, at 197.

<sup>518</sup> SACU-FWS, at 183.

SACU, the EU’s burden of proof requires it to “demonstrate that the EU imports were not a contributing cause to the serious injury or disturbance or threat thereof.”<sup>519</sup>

274. In any event, SACU contested the arguments of the EU with respect to both: (a) the “correlation requirement”;<sup>520</sup> and (b) the “non-attribution requirement”:

a. As for the correlation requirement, SACU contended that the EU’s allegations of a lack of injury are “clearly erroneous.”<sup>521</sup> According to SACU, since 2011, “9 out of the 11 serious injury or disturbance factors worsened”.<sup>522</sup>

SACU added that, under Article 34 EPA, the threshold of harm is either “serious injury” or “disturbance” – the latter being, SACU argues, “a significantly lower threshold than ‘serious injury’, which is the only standard that applies under the WTO [ASG].”<sup>523</sup>

b. As for the “non-attribution requirement”, SACU disagreed that ITAC had disregarded or failed to consider other factors in its investigation.<sup>524</sup> For SACU, ITAC had concluded that these factors, whatever their impact, “did not sufficiently detract from the causal link between the EU imports and the serious injury or disturbance, or threat thereof, which had been established.”<sup>525</sup>

SACU further considered that the data provided by the EU with respect to other costs does not evidence a greater role in the injury. In particular, SACU argues that these costs were often transitory, as opposed to the

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<sup>519</sup> SACU-FWS, at 185 (emphasis in the original). See also *ibid.*, at 189, where SACU further contended that the EU has not established either that EU imports “were not a substantial cause of serious injury or disturbance or threat thereof.”

SACU elaborated on this standard in answer to questions from the Arbitration Panel: see SACU-PHS, at 40: “the assessment – whether the increased imports were a real contributing cause to the threat of disturbance – by necessity, cannot be a mathematical analysis, but must take into account all relevant circumstances in the domestic industry”.

<sup>520</sup> As noted above, SACU claims that this second requirement is not within the scope of the Arbitration Panel’s Terms of Reference: *supra*, at 94.b.

<sup>521</sup> SACU-FWS, at 187.

<sup>522</sup> SACU-FWS, at 188.

<sup>523</sup> SACU-FWS, at 193.

<sup>524</sup> SACU-FWS, at 198.

<sup>525</sup> SACU-FWS, at 204.

permanent competition on prices caused by EU imports.<sup>526</sup> As for imports from the US and Brazil, SACU contended that these imports rose only after 2016, as a consequence of the restrictive measures on EU imports,<sup>527</sup> and therefore are irrelevant for “the injury or disturbance to the SACU domestic industry that occurred during the 2011-16 period.”<sup>528</sup>

275. SACU’s First Written Submission concluded that “the cause of this injury or disturbance has been and would have always remained, the EU imports.”<sup>529</sup>

276. At the hearing, SACU further argued that the “fact that EU imports were a contributing cause to the threat of disturbance was clearly established by the investigation”, and the conjunction between the two phenomena (higher imports and threat of disturbance) could not be considered a “coincidence”.<sup>530</sup>

277. As for the non-attribution requirement, SACU maintained that it is not applicable in this context,<sup>531</sup> yet would have been met anyway: ITAC investigated other factors and concluded that “they did not detract from the causal link that had been identified”, SACU said.<sup>532</sup> In particular, SACU noted that the increase in feed costs usually entails higher prices – but that prices could not be raised in this case due to the EU imports,<sup>533</sup> which, contrary to other factors, was a “permanent” change in the business environment.<sup>534</sup>

#### Claim 4: The Scope of the Safeguard Measure

278. In its fourth claim, the EU contended that the measure as adopted by SACU is not in keeping with the obligations under the EPA, in two respects. For the EU:

- a. The measure applies to a geographical scope that was not the one at stake in the investigation;<sup>535</sup> and

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<sup>526</sup> SACU-FWS, at 211. See also, on this point, SAPA-AC, at 13.7.

<sup>527</sup> SACU-FWS, at 216.

<sup>528</sup> SACU-FWS, at 215.

<sup>529</sup> SACU-FWS, at 218.

<sup>530</sup> SACU-OS, at 100 (emphasis omitted).

<sup>531</sup> SACU-OS, at 95-97.

<sup>532</sup> SACU-OS, at 102.

<sup>533</sup> SACU-OS, at 105-106.

<sup>534</sup> SACU-OS, at 107.

<sup>535</sup> See EU-FWS, at page 58: “Violation of Article 34 (2) of the EU–SADC EPA Because the Measure at Issue Concerns a Different Geographic Scope Than the Investigation, Which Did Not Take Into

- b. The measure does not apply “to the extent necessary” to remedy the injury, disturbance, or threat thereof.<sup>536</sup>

*The EU*

279. As for the safeguard measure’s geographical scope, the EU contended that, in view of Articles 34(1) and (2) EPA, “only the Party in whose territory the increased imports enter (and cause injury or disturbances) is allowed to impose the safeguard measure.”<sup>537</sup> For the EU, the language of Article 34 EPA embodies a principle of “reverse parallelism”: i.e., “[i]f imports into a *certain country* are causing injury, only that country should have the right to impose a safeguard measure.”<sup>538</sup> This also means, the EU continued, that “only the Party that is economically injured or disturbed can impose the safeguard measure.”<sup>539</sup> In other words, the EU concluded, a SACU-wide safeguard measure should be adopted only in response to an injury or disturbances impacting the “whole SACU industry.”<sup>540</sup>
280. However, the EU continued, ITAC’s investigation used information only relevant to South Africa,<sup>541</sup> and as a result focused exclusively on injury or disturbance in this geographical area.<sup>542</sup> According to the EU, ITAC did so although “there is a poultry industry that exists *within* SACU but *outside* South Africa.”<sup>543</sup>
281. The EU continued, relying on the *chaussette* of Article 34(2) EPA as well as WTO case law, that there should be a “rational connection” between the safeguard measure and the injury or threat underlying it.<sup>544</sup> According to the EU, by extending the safeguard measure to the whole of SACU without evidencing any injury for non-South African producers, this “rational connection” was lacking.<sup>545</sup>

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Account the Import Data Relating to SACU But Was Based on Data Relating Exclusively to South Africa”.

<sup>536</sup> See **EU-FWS**, at page 61: “Violation of Article 34 (2) of the EU– SADC EPA Because the Measure Exceeds What Is Necessary to Remedy or Prevent the Serious Injury or Disturbance.”

<sup>537</sup> **EU-FWS**, at 207.

<sup>538</sup> **EU-FWS**, at 210 (emphasis in the original).

<sup>539</sup> **EU-FWS**, at 212.

<sup>540</sup> **EU-FWS**, at 207.

<sup>541</sup> **EU-FWS**, at 211.

<sup>542</sup> **EU-FWS**, at 213. See also **AMIE-AC**, at 11.

<sup>543</sup> **EU-FWS**, at 208 (emphasis in the original). See also *ibid.*, at 214.

<sup>544</sup> **EU-FWS**, at 215, citing Panel Report, *Chile – Price Band System*, at 7.183.

<sup>545</sup> *Ibid.*

282. At the hearing, the EU completed this argument by contending that, given the scope of ITAC’s investigation, “*only South Africa* had the right to impose the safeguard measure [... and] *legally speaking*, SACU could not have imposed a pan-SACU safeguard based on *only* South African import data.”<sup>546</sup> As such, the EU considered it irrelevant that South African data was considered “representative” by ITAC,<sup>547</sup> and argued that the “letters of support” received by ITAC from non-South African producers cannot relieve ITAC of its obligation to consider SACU-wide data for a SACU-wide measure.<sup>548</sup>
283. Finally, in the context of the Interim Review, the EU offered the following clarification of its position on this issue:<sup>549</sup>

The EU’s position, as stated in its First Written Submission as well as its Opening Statements, is that the issue at hand is about the *territorial scope* of the measure.<sup>550</sup> The EU argues that ITAC was not at liberty to *ex ante* exclude the entire territory of Botswana, Eswatini, Lesotho and Namibia, when conducting the analysis of the imports.<sup>551</sup> The EU’s view is therefore that the *whole territory* that will impose the safeguard (*in casu*, SACU) has to be analyzed, and only *then* can a decision about ‘representativeness’ be made. The EU recalls that SACU has admitted that non-South African SACU imports were *not* analyzed by ITAC (*i.e.* that these were omitted in its imports assessment).<sup>552</sup> The EU considers that it was ITAC’s failure to analyze the entire territory of SACU, when imposing a pan-SACU safeguard that resulted in the violation of Article 34 (2) of the EPA.

284. Turning to the second argument under Claim 4, the EU pointed out that the *chaussette* of Article 34(2) EPA provides that “safeguard measures shall not exceed what is necessary

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<sup>546</sup> EU-OS, at 91 (emphasis in the original).

<sup>547</sup> EU-OS, at 92.

<sup>548</sup> EU-OS, at 96. The EU further considers that these letters contain “*quasi-identical wording*” and “seem to have been drafted by the same hand”, and concludes that this should “reduce[] the relevance and legal value of these letters.” See *ibid.* (emphasis in the original).

<sup>549</sup> EU-IR, at 25. The Arbitration Panel has formatted the EU’s footnotes (*infra*, notes 550 to 552) in line with the style of this Final Report.

<sup>550</sup> EU-FWS, at 207-211; EU-OS, at 86-89. The EU had also clarified this issue in its response to SACU’s preliminary objections. EU-PO, at 51-53.

<sup>551</sup> EU-FWS, at 211 stating that “there is no evidence on record to prove that imports of frozen bone-in chicken cuts from the EU, into non-South African SACU Members, were in fact considered by the ITAC, when determining an alleged increase in imports.”; *ibid.*, at 216, the EU concludes that “[t]he ITAC only analyzed alleged increased imports [...] with respect to South Africa. Thus, there is no basis under the EU–SADC EPA for the ITAC to impose safeguard measures for the **entire territory** of SACU.” (emphasis added) See also EU-OS, at 87.

<sup>552</sup> The EU refers to, e.g., SACU-FWS, at 223.

to remedy or prevent the serious injury or disturbance.”<sup>553</sup> According to the EU, this indicates that one should distinguish between the right to impose a safeguard measure and whether this measure has been applied to the extent necessary.<sup>554</sup>

285. For the EU, the safeguard measure adopted by SACU “exceeded the level of what was necessary to remedy or prevent serious injury or disturbance”.<sup>555</sup> In support of this argument, the EU contended that:

- a. Other factors underlying the disturbance and/or serious injury (or threat thereof) were not taken into account by ITAC’s investigation. The EU referred to its arguments as to the non-attribution analysis and added that this is “closely intertwined” with the necessity standard.<sup>556</sup> In particular, the EU considered that “the (initial) 35.3% safeguard duty was set on the basis of the ‘price disadvantage’ between EU import prices and SACU sales prices during the year 2016, without even examining the extent to which SACU sales prices were affected by other factors.”<sup>557</sup>
- b. The measure entered into force in September 2018 on the basis of data from 2016. Referring to Claim 2, the EU argued that the measure was based on “outdated import data” that did not take into account the post-2016 drop in imports and was therefore “no longer necessary”.<sup>558</sup>
- c. The measure did not take into account existing anti-dumping duties, set at varying rates, that were impacting frozen bone-in chicken cuts from Germany, the Netherlands, and the UK,<sup>559</sup> although these countries accounted for the majority of imports from the EU.<sup>560</sup> For the EU, since these anti-dumping import duties “already remedy any injury by the dumped

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<sup>553</sup> EU-FWS, at 217.

<sup>554</sup> EU-FWS, at 231.

<sup>555</sup> EU-FWS, at 222.

<sup>556</sup> EU-FWS, at 225, citing *US – Line Pipe*, at 252.

<sup>557</sup> EU-FWS, at 227.

<sup>558</sup> EU-FWS, at 230, and 232.

<sup>559</sup> EU-FWS, at 233.

<sup>560</sup> EU-FWS, at 235-236.

imports”,<sup>561</sup> failing to take them into account “result[ed] in an excessive and double duty for the individual exporters subject to anti-dumping duties”.<sup>562</sup>

286. At the hearing, the EU further argued that there was no basis for the eventual 35.3% duty adopted as a definitive measure, suggesting it exceeded what was necessary to remedy the impact of the EU imports.<sup>563</sup> As for the time lag between the POI and the safeguard’s entry into force, the EU argued that SACU cannot contend that “2016 was representative for the duty level to be imposed in 2018”.<sup>564</sup> Lastly, the EU also disagreed with SACU’s explanations as to: (i) how the existing anti-dumping duties were taken into account; and (ii) how the 3.3% overall adjustment had been determined.<sup>565</sup>

#### *SACU*

287. Regarding the EU’s contention in relation to the safeguard measure’s geographical scope, SACU contended that this argument is outside the Terms of Reference of the panel,<sup>566</sup> and protested that the notion of “reverse parallelism” is “a new term of art invented by the EU for the present arbitration.”<sup>567</sup>

288. On the merits, SACU argued that this claim is “based on incorrect factual and legal premises”,<sup>568</sup> and addressed both: (a) the EU’s contention regarding “reverse parallelism”; and (b) the contention that ITAC only focused on injury or disturbance affecting South African producers:

- a. SACU explained that “the overwhelming majority of poultry imports in SACU as a whole would have come through South Africa, which has all of the major ports in Southern Africa” – meaning that an investigation focusing on South African imports “effectively covered the whole of SACU”.<sup>569</sup> In

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<sup>561</sup> **EU-FWS**, at 236.

<sup>562</sup> **EU-FWS**, at 237.

<sup>563</sup> **EU-OS**, at 108(iii). The EU further notes that the provisional safeguard duty of 13.9% was half a percent higher than the “non-injurious price” determination, at 13.4%: see *ibid.*, at 108(ii).

<sup>564</sup> **EU-OS**, at 112. See also **EU-CS**, at 65(3): “[t]he enormous delay between the period of investigation and the imposition of the duty has raised real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and the current injury, rendering the determination no longer reliable and creditworthy.” (footnote omitted)

<sup>565</sup> **EU-OS**, at 113-119.

<sup>566</sup> *Supra*, at 94.c.

<sup>567</sup> **SACU-FWS**, at 211.

<sup>568</sup> **SACU-FWS**, at 221.

<sup>569</sup> **SACU-FWS**, at 223.

any event, SACU reported that four of the five developing countries composing SACU “do not have ready access to import data into their territories at the 8 digit level.”<sup>570</sup> SACU concluded that it was “entirely justified” to focus on South African data.<sup>571</sup>

SACU added that the EU bears the burden of proof to establish that this “import data would not cover practically all imports of frozen bone-in chicken cuts into the SACU region.”<sup>572</sup>

Lastly, SACU pointed out that it “is a customs union with a common external tariff”, as recognised by the EPA’s recitals.<sup>573</sup> For SACU, the principle of “reverse parallelism” argued by the EU is, therefore, “incompatible with the EU-SADC EPA.”<sup>574</sup>

- b. According to SACU, ITAC was provided with information covering “SACU as a whole”,<sup>575</sup> in a context in which South African producers account for “98.67% of total SACU production.”<sup>576</sup> For SACU, the injury or disturbance “can be established with respect to a proportion of the domestic industry that is sufficiently representative.”<sup>577</sup> SACU observed that this is the EU’s own practice in its trade investigations.<sup>578</sup>

289. At the hearing, SACU further argued that the EU’s position boiled down to “even if a single import into SACU had not been analysed, that would have been sufficient to render the Measure at Issue as inconsistent with Article 34 of the EPA”, and that this was not credible.<sup>579</sup> By contrast, SACU said, “[e]stablished practice in trade-defence investigations” indicates that it is enough to demonstrate harm in relation to a “major

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<sup>570</sup> SACU-FWS, at 226.  
<sup>571</sup> SACU-FWS, at 227.  
<sup>572</sup> SACU-FWS, at 225.  
<sup>573</sup> SACU-FWS, at 228.  
<sup>574</sup> SACU-FWS, at 230.  
<sup>575</sup> SACU-FWS, at 232.  
<sup>576</sup> SACU-FWS, at 234.  
<sup>577</sup> SACU-FWS, at 235.  
<sup>578</sup> SACU-FWS, at 235, 237.  
<sup>579</sup> SACU-OS, at 120-121.

proportion” of the industry – which was the case here.<sup>580</sup> SACU considers, however, that the investigation properly took into account non-South African data.<sup>581</sup>

290. SACU further stressed that it is a “customs union with a common external tariff”, whose consolidation is one of the “explicit objectives” of the EPA,<sup>582</sup> and which must therefore “impose safeguard measures collectively.”<sup>583</sup> SACU also distinguished the language of Article 34 EPA – which, it said, offers no basis for the EU’s alleged principle of reverse parallelism<sup>584</sup> – with Articles 36, 37, and 38 EPA, which explicitly circumscribe other kinds of trade defences to the SADC EPA state at stake.<sup>585</sup>
291. As for the requirement found in the *chaussette* of Article 34(2) EPA, SACU explained that it does not apply to a safeguard measure adopted under Article 34(5) EPA.<sup>586</sup>
292. In the event that the Arbitration Panel finds otherwise, SACU contended that in any event the safeguard measure was “calibrated precisely to the impact of the EU imports.”<sup>587</sup>
- a. As for the EU’s contentions that the safeguard measure failed to consider other factors, SACU argued that the methodology employed was “fully disclosed during the investigation”,<sup>588</sup> and of a kind “commonly deployed in trade defence investigations, including by the EU itself.”<sup>589</sup> SACU further observed that the safeguard duty rate was progressively decreased, until its expiry in March 2022.<sup>590</sup>
  - b. As for the EU’s contentions that the safeguard measure was adopted without taking into account more recent data, SACU reiterated its analysis with

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580 SACU-OS, at 125.  
581 SACU-OS, at 122.  
582 SACU-OS, at 128, citing Articles 1(b) and (f) EPA.  
583 SACU-OS, at 131.  
584 SACU-OS, at 129.  
585 SACU-OS, at 130.  
586 SACU-FWS, at 242.  
587 SACU-FWS, at 244.  
588 SACU-FWS, at 246.  
589 SACU-FWS, at 248.  
590 SACU-FWS, at 250.

respect to Claim 2,<sup>591</sup> according to which the period 2017-2018 was non-representative.<sup>592</sup>

- c. Lastly, with respect to the anti-dumping duties that were already in force, SACU argued that “there is no principled reason [...] that prevents the imposition of both anti-dumping and safeguard duties.”<sup>593</sup> In any event, SACU contended that the investigation did take these anti-dumping duties into account, through a 3.3% adjustment to the average FOB import price.<sup>594</sup> SACU justified this approach by arguing that an approach taking into account the individual anti-dumping duty for each exporter would have been “overly complex and burdensome”, “disproportionate”, and out of line with Article 34 EPA (which provides for a “single safeguard tariff to be applied to all imports”).<sup>595</sup> Besides, SACU contended that the alleged “double counting” for exporters affected by anti-dumping duties “is balanced out by the benefit of the adjustment to those exporters that were not subject to anti-dumping duties.”<sup>596</sup>

293. At the hearing, SACU, after arguing that the *chaussette* of Article 34(2) was not applicable to this case,<sup>597</sup> defended the methodology used to arrive at an unsuppressed selling price: while it took into account factors such as higher feed costs, SACU explained that “it is quite normal for agricultural producers to respond to cost increases by increasing their prices in turn, but this was impossible for the SACU domestic industry due to the continuing major increase in low-priced imports from the EU and the consequent competitive pressure.”<sup>598</sup> The methodology was therefore appropriate, according to SACU.

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<sup>591</sup> As summarised *supra*, at 265.

<sup>592</sup> **SACU-FWS**, at 253.

<sup>593</sup> **SACU-FWS**, at 257. SACU further contends that the EU itself, in its trade practice, “has frequently applied safeguard measures in conjunction with other trade-defence measures”: see *ibid.*, at 258.

<sup>594</sup> **SACU-FWS**, at 259.

<sup>595</sup> **SACU-FWS**, at 261.

<sup>596</sup> **SACU-FWS**, at 262.

<sup>597</sup> **SACU-OS**, at 133-134.

<sup>598</sup> **SACU-OS**, at 136.

294. SACU further argued that the methodology to arrive at the level of import duties had been disclosed in ITAC’s Third Essential Facts Letter.<sup>599</sup> As for the impact of the anti-dumping duties, SACU considered that it had properly been taken into account by applying an overall 3.3% adjustment calculated “based on information on the actual anti-dumping duties paid as a percentage of all imports from the EU.”<sup>600</sup>

### Claim 5: The Information Provided to the TDC

295. Finally, the EU’s fifth claim relates to the information provided to the TDC prior to the adoption of the safeguard measure,<sup>601</sup> under Article 34(7)(c) EPA.

#### *The EU*

296. The EU contended that the TDC was not provided with “all relevant information” allowing it to conduct “a thorough examination”, pursuant to Article 34(7)(c) EPA.<sup>602</sup> Relying on WTO case law, the EU argued that “relevant information” should include “the matrix of facts, law and reasons that logically fit together to render the decision [of the investigating authority] to impose final measures.”<sup>603</sup> To the extent that some of this information had ultimately been provided during the 2019 consultations, the EU added that, under Article 34(7)(c), the information should have been provided (i) to the TDC (and not to the other party), (ii) “before taking” the measure at stake.<sup>604</sup>

297. For the EU, SACU did not provide the TDC with three categories of “crucial information”:

- a. Information as to ITAC’s “comparison of the prices of domestic and imported products”, notably regarding the adjustments made to perform this

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<sup>599</sup> SACU-OS, at 139.

<sup>600</sup> SACU-OS, at 142.

<sup>601</sup> See EU-FWS, at page 66: “Violation of Article 34 (7) (a) (b) and (c) Because the TDC (and therefore the EU) Was Not Provided with the Necessary Data or Was Provided Only With Indexed Data, Which Made It Impossible to Thoroughly and Fully Examine the Situation and Propose a Recommendation or Satisfactory Solution”.

<sup>602</sup> EU-FWS, at 242.

<sup>603</sup> EU-FWS, at 241, citing Appellate Body Report, *China – GOES*, at 258.

<sup>604</sup> EU-FWS, at 245, referring to the information as to the “reasonable profit margin” used to calculate unsuppressed selling price: see *infra*, at 297.b.

comparison, such as a “14% [adjustment for] shipping, insurance and clearing costs” that, the EU advanced, remained unexplained.<sup>605</sup>

- b. Information regarding ITAC’s method to compute the “unsuppressed selling price”, and in particular the “reasonable profit margin” applied by ITAC on the total production costs of the applicants in the safeguard investigation.<sup>606</sup>
- c. Non-indexed data (i.e., actual figures) for the “analysis of price undercutting, price depression and suppression, market share, profit/losses, inventories, and price disadvantage”, with the EU arguing that confidentiality concerns cannot justify ITAC’s decision to supply only indexed data.<sup>607</sup>

298. At the hearing, the EU further contended that “[b]y keeping the EU in the dark about the technical details underlying the safeguard measure, SACU prevented a ‘*thorough examination of the situation*’ and destroyed any hope for a mutually acceptable solution.”<sup>608</sup> Considering that SACU agrees that Article 34(7) EPA embodies due process rights for interested Parties,<sup>609</sup> the EU pointed out that SACU cannot defend itself by contending that the EU did not ask for this information, as “the fulfilment of the legal obligation in Article 34 (7) EPA is *entirely the responsibility of SACU*.”<sup>610</sup>

#### SACU

299. As noted above,<sup>611</sup> SACU considered that part of Claim 5 falls outside the Terms of Reference, which – SACU said – only protested the provision of indexed data to the TDC, but did not mention the alleged failures to provide data on the price comparison and unsuppressed selling price analysis.

300. In the event that the Arbitration Panel upholds jurisdiction over Claim 5 in its entirety, SACU further contended that the EU “entirely misconstrues the purpose of Article

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<sup>605</sup> EU-FWS, at 243.

<sup>606</sup> EU-FWS, at 244.

<sup>607</sup> EU-FWS, at 246.

<sup>608</sup> EU-OS, at 123 (emphasis in the original).

<sup>609</sup> EU-OS, at 124.

<sup>610</sup> EU-OS, at 128 (emphasis in the original).

<sup>611</sup> *Supra*, at 94.d

34(7)(c) of the EU-SADC EPA and distorts its meaning.”<sup>612</sup> In particular, SACU considered that WTO case law “cannot be simply translated across to the present case.”<sup>613</sup> For SACU, the case law cited by the EU relates to different provisions under WTO law, obeying different purposes,<sup>614</sup> while the purpose of Article 34(7)(c) is merely “to provide the TDC with sufficient information in order to consider and put forward an alternative solution to the application of the proposed safeguard measures that may be acceptable to the Parties.”<sup>615</sup>

301. In this context, SACU also argued that it did provide the TDC with sufficient information, and observed that the EU, before the TDC, was able to propose alternatives to the safeguard measure, while failing to request additional information at that juncture.<sup>616</sup>

302. With respect to the specific categories of information at stake in this Claim, SACU argued that the EU has failed to explain how the provision of such information “would have led the Parties to find an alternative acceptable solution to the proposed safeguard measure, within the meaning of Article 34(7)(c) of the EU-SADC EPA.”<sup>617</sup> Besides:

- a. SACU contended that it did offer sufficient information regarding ITAC’s comparison between domestic and imported products. In particular, to the extent the EU challenged the 14% adjustment, SACU advanced that this adjustment related to “shipping, insurance and clearing costs” – which was sufficient for the EU to understand it.<sup>618</sup>
- b. As to the unsuppressed selling price calculation, and in particular, the profit margin used in this calculation, SACU contended that the TDC was provided with sufficient information.<sup>619</sup> SACU further argued that the EU

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<sup>612</sup> SACU-FWS, at 269. SACU also argued that the EU’s claim, despite invoking sub-provisions (a) and (b) of Article 34(7) EPA, was in fact only based on sub-provision (c): see *ibid.*, at 266.

<sup>613</sup> SACU-FWS, at 270.

<sup>614</sup> SACU-FWS, at 279.

<sup>615</sup> SACU-FWS, at 272.

<sup>616</sup> SACU-FWS, at 273-274.

<sup>617</sup> SACU-FWS, at 279, 286, and 294.

<sup>618</sup> SACU-FWS, at 278.

<sup>619</sup> SACU-FWS, at 284.

knew of this profit margin already during the technical consultative meeting of 24 November 2017.<sup>620</sup>

- c. Lastly, with respect to the provision of indexed (instead of actual, if amalgamated) data, SACU argued that this is “a standard practice in trade defence investigations, including by the European Commission itself.”<sup>621</sup> SACU explained that this practice “is supported by basic market logic”, even in a context where multiple operators are taken into account, given that amalgamated data can be deciphered “to derive a great deal of commercially sensitive information”.<sup>622</sup> SACU pointed out that the EPA itself records the Parties’ concern for the protection “of confidential information in order to protect legitimate commercial interests”.<sup>623</sup>

303. At the hearing, SACU argued that Article 34(7)(c) EPA merely seeks to provide the TDC with sufficient information so that the Committee can “consider and put forward an alternative solution that may be acceptable to both Parties.”<sup>624</sup> For SACU, this had been complied with, as the EU did indeed “put forward possible alternatives to the proposed safeguard measure at the TDC which the EU specifically indicated would be acceptable to it.”<sup>625</sup>

### Prayer for relief

304. Should the Arbitration Panel agree with the EU that SACU has breached the treaty, Article 82(3) EPA provides that “[e]ither Party may request the arbitration panel to provide a recommendation as to how the Party complained against could bring itself into compliance.”
305. The Parties have, however, disagreed as to what recommendations can be made by the Panel, and in particular, if a recommendation can be made to the effect that SACU would “refund the safeguard duties already paid”, as suggested by the EU.<sup>626</sup>

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<sup>620</sup> *Ibid.*, citing **Exh. SACU-2**, at 2.

<sup>621</sup> **SACU-FWS**, at 291.

<sup>622</sup> **SACU-FWS**, at 292. See also, in this context, **SAPA-AC**, at 15.

<sup>623</sup> **SACU-FWS**, at 293, citing Article 106(3) EPA.

<sup>624</sup> **SACU-OS**, at 146.

<sup>625</sup> **SACU-OS**, at 147.

<sup>626</sup> See **EU-OS**, at 131.

### *The EU*

306. The EU asked for such a refund in its First Written Submission. At the hearing, the EU explained that this remedy would be in keeping with a number of WTO precedents.<sup>627</sup>
307. In answer to questions from the Panel, the EU further suggested that this remedy was available in view of the customary international law standard of full reparation, as set out in the *Factory at Chorzow* judgment by the Permanent Court of International Justice.<sup>628</sup>

### *SACU*

308. SACU stated that the request for a refund is a “rather extraordinary request”, and argued that the EPA provides only for prospective – not retroactive – remedies.<sup>629</sup>
309. In its Post-Hearing Submission, SACU added that the precedents cited by the EU did not support its case.<sup>630</sup> SACU also suggested that the EPA is *lex specialis* with respect to the standard of reparation under general international law and that a refund would, “in practice, lead to unjust enrichment of certain importers”.<sup>631</sup> Finally, pointing to the language of Article 82(3) EPA, SACU suggested that the terms “[a] Party shall bring itself into compliance” denoted the prospective character of any recommendation by the Arbitration Panel.<sup>632</sup>

## **2. The Arbitration Panel’s Analysis**

### Introduction

310. As explained above,<sup>633</sup> SACU’s preliminary objections have been dismissed, meaning that all claims by the EU are ripe for decision by the Arbitration Panel.
311. In so doing, however, the Arbitration Panel is not strictly bound by the way in which the Parties have framed or argued their case. Indeed, the Arbitration Panel notes that some issues (such as the role of ITAC’s investigation, or the quality of the data underlying it)

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<sup>627</sup> EU-OS, at 131(2), and the panel reports cited therein.

<sup>628</sup> See Tr., 356:3-23.

<sup>629</sup> SACU-FWS, at 299.

<sup>630</sup> SACU-PHS, at 50.

<sup>631</sup> SACU-PHS, at 54(c).

<sup>632</sup> Tr., 358:6-9.

<sup>633</sup> *Supra*, at 234.

cut across and are relevant to multiple claims, as evidenced by the EU's REP, in which some arguments were repeated *verbatim* in relation to distinct claims.<sup>634</sup>

312. Accordingly, and for purposes of judicial economy, the Arbitration Panel has opted to review in turn:

- a. The relevance of ITAC's investigation;
- b. The source of the safeguard measure;
- c. The scope of the safeguard measure;
- d. The validity of the safeguard measure under Article 34 EPA; and
- e. SACU's compliance with its procedural obligations.

#### The relevance of ITAC's investigation (Claim 1)

313. A large part of the Parties' submissions, and Claim 1 in particular, has focused on the investigation conducted by ITAC. As recounted above,<sup>635</sup> that investigation concluded with a recommendation that SACU adopt the safeguard measure. The factual record contains several exhibits originating from that investigation, a fact that is unsurprising as the EU (and some of the *amici curiae*) have taken part and/or challenged ITAC's investigation as it was unfolding, and ever since. Before the Arbitration Panel, both Parties have referred to ITAC's conduct and relied on these exhibits, which form part of the background to these proceedings.

314. Yet, the Parties have also debated whether such investigation was in fact *required* under Article 34 EPA. SACU considers that it was not, seeing no language to that effect.<sup>636</sup> The EU, in reply, dubbed this argument "nonsensical", and argued that "you always have to make a fact-finding exercise, you can call it investigation, you can call it examination, you [...] always have to look in the facts that supports your decision."<sup>637</sup>

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<sup>634</sup> **Exh.** EU-5, compare 1(d) and 3(a). Likewise, the EU's claim that the investigation was based on outdated data (Claim 2, second argument) was repeated with respect to Claim 3 (**EU-FWS**, at 176-177), and Claim 4, second argument (**EU-FWS**, at 230).

<sup>635</sup> *Supra*, at 59.

<sup>636</sup> **SACU-FWS**, at 118.

<sup>637</sup> **Tr.**, 208:20 – 209:4.

315. In the Arbitration Panel’s view, SACU is correct that the EPA is silent as to any requirement to conduct an investigation prior to a decision to adopt a safeguard measure under Article 34 EPA – a fact conceded by the EU at the hearing.<sup>638</sup> The Arbitration Panel recalls that Article 34(1) EPA provides for a safeguard regime that departs from the regime available under the WTO rules and agreements.<sup>639</sup> In this context, one of the most salient differences between Article 34 EPA and the ASG, is that the former contains none of the extensive procedural guidelines found in the latter – which explicitly conditions the validity of safeguard measures upon a dedicated investigation.<sup>640</sup> While Article 34(1) EPA subjects the validity of safeguard measures to “procedures”, these procedures, strikingly, include no reference to a preliminary investigation.
316. This is not to say that *nothing* would be expected, in most instances, from a party that seeks to adopt a valid safeguard measure under the EPA. Indeed, there is truth to the EU’s observation that, *de facto*, before exercising a trade remedy, an EPA party would commonly proceed to a fact-finding exercise,<sup>641</sup> a reality that is in keeping with the limited and extraordinary nature of safeguard measures.<sup>642</sup> The fact that SACU adopted the safeguard measure following, and on the basis of, an investigation by ITAC, and the further fact that SACU is now seeking to justify that measure’s validity by reference to the investigation’s findings, despite having – on its own case – strictly no obligation to do so, is a stark testimony to that reality. And because SACU elected to use ITAC’s investigation as the basis for the adoption of its safeguard measure, it follows that this investigation’s reasoning and findings can and should be tested against the requirements for a safeguard measure set out in Article 34 EPA. This is, again, what the Parties invited the Arbitration Panel to do by referring to, relying on (or criticising), and generally extensively engaging with these findings in their submissions.
317. In other words, while it is correct that Article 34 EPA does not prescribe any investigation prior to the adoption of a safeguard measure, a party that bases a safeguard measure on some form of fact-finding exercise cannot expect to dissociate itself from that exercise

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<sup>638</sup> **Tr.**, 205:21-23: “[i]t is true that the EPA does not say what specific rules, I mean there are no specific rules regulating the investigation”.

<sup>639</sup> *Supra*, at 177.

<sup>640</sup> See Article 3 ASG: “A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member.” See also Article 4(2) ASG.

<sup>641</sup> **Tr.**, 208:20 – 209:4.

<sup>642</sup> *Supra*, at 170.

and its conclusions, or claim that this fact-finding exercise (and/or its alleged flaws) lacks any relevance to the validity of the safeguard measure. While that validity should be assessed under the substantive requirements of Article 34 EPA, this assessment can and should evaluate the evidence on which SACU relied in order to demonstrate that these requirements were satisfied; the investigation and its findings, indeed, are part of the factual record and serve to shed light on the measure's validity – even if their form and extent is not a matter prescribed under Article 34 EPA. As such, while an absent or deeply flawed investigation would not *per se* breach the treaty, it may certainly cast doubt over a measure's compliance with Article 34 EPA.<sup>643</sup> In the sections that follow, the references to ITAC's investigation should therefore be understood as pertaining to this approach.

318. This being said, as held above by the Arbitration Panel, the EPA contains no express obligation to conduct an investigation, and especially an investigation meeting some (unspecified) procedural or formal characteristics.<sup>644</sup> Consequently, the Arbitration Panel cannot pass judgment on whether ITAC was justified, under international law or its domestic statutory obligations, in substituting bases for the investigation between the TDCA and the EPA.<sup>645</sup> Claim 1 cannot therefore be upheld.

### The source of the safeguard measure (Claim 2, first argument)

319. The Arbitration Panel turns to the requirement that the safeguard measure be taken only “as a result of the obligations incurred by a Party under this Agreement”, as found in Article 34(2) EPA.

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<sup>643</sup> This position ultimately echoes SACU's position that it is its “action in light of the findings of ITAC's investigation that is determinative”: **SACU-FWS**, at 26.

<sup>644</sup> For these reasons, the Arbitration Panel further finds it unnecessary for the resolution of the dispute to act upon the following requests made in the context of the Interim Review:

- The EU's request to specify that a “reasoned and adequate explanation” as to non-attribution was required from ITAC (**EU-IR**, at 18); and
- The EU's request to “indicate precisely where SACU (or ITAC) mentioned that the obligation at stake was the relevant tariff concession” (**EU-IR**, 23).

Further, with respect to SACU's request to specify that “there is also no requirement under the EPA for a safeguard measure to be justified by a reasoned report” (**SACU-IR**, at 19), the Arbitration Panel agrees that the EPA is silent on the need for a reasoned report. This does not mean, however, that safeguard measures should not comply with the substantive requirements under Article 34 EPA.

<sup>645</sup> The Arbitration Panel need not therefore delve into the question of the exact relationship in terms of succession between these two treaties.

320. There is little doubt, and this is not disputed, that the safeguard measure should be related to a product or an import that falls within the scope of the EPA – the very extraordinary nature of safeguards, understood as a “safety valve”, implies as much.<sup>646</sup>
321. Yet, the Arbitration Panel sees no reason to doubt that the safeguard measure was adopted in relation to SACU’s EPA obligations. Although the EU complains that the measure has its roots in a different treaty and different circumstances, this conflates the factual situation that underpinned the measure with the measure itself. As explained above,<sup>647</sup> as long as the safeguard measure complies with Article 34 EPA, it is irrelevant that it stemmed from an investigation originally undertaken under the TDCA. Ultimately, it is undisputed that the safeguard measure was adopted in 2018, at a time when the EPA was provisionally applied, and the TDCA had been suspended; the measure was therefore adopted in relation to “the obligations incurred by a Party under this Agreement”, namely, the relevant tariffs concessions.
322. As for the requirement that the safeguard measure “result” from an EPA obligation, the Arbitration Panel notes that this is not a situation where the “obligation” at stake in the EPA was radically new. To the contrary, the EU itself, in its written submission, conceded that “the importation of the product under investigation into SACU under the EU-SADC EPA took place under the exact same conditions as under the TDCA.”<sup>648</sup> The “obligation” at stake was therefore *continuing* in substance between the TDCA and the EPA. Although the EU invoked this continuity to suggest that there was no “new” obligation under the EPA,<sup>649</sup> the Arbitration Panel is unconvinced: following the EU’s approach would shield countless, if not most products from safeguard measures under the EPA, for the sole reason that the relevant tariff concessions had been granted under the previous, now-suspended TDCA. This cannot have been the parties’ intent when entering the EPA.

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<sup>646</sup> *Supra*, at 170.

<sup>647</sup> *Supra*, at 315.

<sup>648</sup> **EU-FWS**, at 118, continuing: “Indeed, the EU–SADC EPA did not result in any further tariff concessions to the product concerned compared to the tariff concessions agreed under the TDCA.”

<sup>649</sup> *Ibid*: “Hence, since the relevant obligations were identical, it is difficult to understand how the increased [sic] in import could be the result of an obligation incurred by a Party under the EU–SADC EPA (given that the obligation had already been incurred).”

323. By contrast, the Arbitration Panel considers that a party wishing to exercise a trade remedy is entitled to reasonably believe that the same causes will produce the same effects: if a tariff concession under one treaty warrants the exercise of a trade remedy, the substantially-similar concession under a subsequent treaty may warrant it as well; how that concession is labelled (i.e., as a TDCA or EPA trade concession) cannot trump the substance of the underlying situation. The Arbitration Panel further notes that Article 2 EPA (entitled “Principles”) provides that the treaty “shall be implemented in a complementary and mutually reinforcing manner with respect to the [...] TDCA.”<sup>650</sup>

324. The Arbitration Panel’s finding is reinforced by three further considerations:

- a. *First*, the Arbitration Panel is mindful, notably in view of the EPA’s developmental nature, not to fall into excessive formalism. To follow the EU’s position to its logical extreme, had SACU wanted to enact a safeguard measure for the period straddling the start of the EPA’s provisional application, the following scenario should have been followed:
  - i. SACU should have conducted an investigation under the TDCA, but before the treaty was replaced by the EPA;
  - ii. The resulting TDCA safeguard would lapse with the EPA’s provisional application (which suspended the TDCA’s operations);
  - iii. A *new* investigation should have been conducted, this time under the EPA.<sup>651</sup> That investigation should have necessarily waited for the consequences of the EPA obligations to appear in the available data, time during which no safeguard would be available, despite the possible serious injury occurring; and
  - iv. A new safeguard measure could then be adopted.

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<sup>650</sup> Article 2(2) EPA. Article 2(1) EPA also notes that the EPA “shall build on the achievements of [...] the TDCA”.

<sup>651</sup> This was an explicit argument by the EU in the context of the TDC negotiations: see **Exh. SACU-2**, at 2.1(i).

For the Arbitration Panel, excessive formalism is not in keeping with the object and purpose of the EPA, its developmental character, and the nature of trade remedies as, ultimately, enhancing free trade.<sup>652</sup>

- b. *Second*, the Arbitration Panel notes that most, if not virtually all imports in the SACU region come through South Africa, which thus appears representative of the SACU area in this respect and in the specific context of the present dispute.<sup>653</sup> This fact enhances the continuity of the obligation at stake (i.e., the tariff concession) between the TDCA and the EPA – a continuity that, as noted just above, is stressed by the EPA itself.<sup>654</sup>
- c. *Third*, the EPA explicitly recognises the key objective of strengthening SACU as a customs union.<sup>655</sup> Having opted to update its trade relationship with South Africa by dealing with the broader customs union, the EU cannot later complain that SACU took over from the TDCA’s obligations and rights under the TDCA.<sup>656</sup>

325. Accordingly, Claim 2, first argument, cannot be upheld.

#### The scope of the safeguard measure (Claim 4, first Argument)

326. The same considerations in terms of formalism, representativity of South Africa for the SACU region, and relevance of SACU as a customs union informed the Arbitration Panel’s review of the EU’s Claim 4, first argument.

327. Without entering into the EU’s complex and abstract semantic conceptualisations, and notably without passing judgment on the notion of “reverse parallelism”, the Arbitration Panel considers that there is force to the idea that, in general, a safeguard measure’s

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<sup>652</sup> This is also why the Arbitration Panel agrees with SACU that, in view of adopting a safeguard measure shortly after the EPA’s provisional application, it could reasonably take into account pre-EPA data: see **SACU-FWS**, at 156.

<sup>653</sup> See *infra*, at 330. The Arbitration Panel notes that the key role of South Africa for the SACU region was reflected in Article 24 TDCA, which allowed it to take safeguard measures on behalf of one or more of the SACU states – who were not parties to the TDCA.

<sup>654</sup> *Supra*, at 323.

<sup>655</sup> Article 1(f) EPA, entitled “Objectives”; Article 3(3) EPA, entitled “Regional Integration”.

<sup>656</sup> In this respect, Article 104(3) EPA, entitled “Definition of the Parties and fulfilment of obligations” provides that “[w]here reference is made to SACU in this Agreement, as in Articles 25(1), 34, 35 and 101 and in PART III, Botswana, Lesotho, Namibia, South Africa and Swaziland, shall act collectively as provided for in the SACU Agreement.”

geographical scope should roughly mirror the territory that suffered the underlying injury. Indeed, that common-sense understanding is what underlies Articles 34(4) and (5) EPA.

328. This being said, the Arbitration Panel is also satisfied that, in this case, this principle is satisfied since South Africa is representative of the entire SACU region, such that the injury suffered by South Africa in the poultry sector can serve as a proxy for the region.
329. To the extent that the EU complains of the scope of the data that underpinned the investigation, the Arbitration Panel reiterates that it cannot review the validity of the investigation itself, in the context where Article 34 EPA includes no obligation to conduct such investigation.<sup>657</sup> In any event, the EU has not rebutted SACU's contention that South Africa "has all of the major ports in Southern Africa"<sup>658</sup> – a fact that is unsurprising given that three of the remaining four SACU countries are landlocked – and that ITAC was therefore entitled to rely on South African import data.
330. Likewise, the EU has failed to rebut SACU's contention that over 95% of the total poultry production in the SACU area originates from South Africa.<sup>659</sup> Pointing to the existence of non-South African producers and of a poultry industry in a non-South African context<sup>660</sup> does not disprove the fact, unrebutted by the EU, that this production is dwarfed by that of South African producers. Here as well, the Arbitration Panel considers that undue formalism is not in keeping with the EPA and its developmental character.
331. Besides, the Arbitration Panel observes that the applicable provisions under Article 34(2)(a) to (c) refer to the "domestic industry", "economic sector", and/or "markets" – i.e., aggregates. Under this light, just like a safeguard investigation in a single jurisdiction is not obliged to take into account *all* producers (however small their production) to conclude that the requirements for a safeguard measure are met, the Arbitration Panel considers that a customs union is entitled to adopt a measure in view of a situation that is sufficiently representative of the union's whole area.

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<sup>657</sup> *Supra*, at 315.

<sup>658</sup> **SACU-FWS**, at 223.

<sup>659</sup> **SACU-FWS**, at 233-234.

<sup>660</sup> **EU-FWS**, at 214.

332. Indeed, and finally, the Arbitration Panel agrees with SACU that its status as a customs union, which therefore sets “a common external tariff”,<sup>661</sup> is relevant to this issue. In presenting the EPA to the EU Council, the Commission stated that the “EPA is designed to be compatible with the operation of SACU, in particular by fully harmonising SACU’s import trade regime.”<sup>662</sup> The Arbitration Panel sees no reason to put this compatibility into doubt.

333. Accordingly, Claim 4, first argument, cannot be upheld.

### The validity of the safeguard measure

334. The Arbitration Panel now turns to the Parties’ broader debate as to the validity of the measure under Article 34 EPA, which has centred in particular around: (i) the temporality of the safeguard measure; (ii) the causal link between the EU imports and the alleged harm; and (iii) the proportionality of that measure. In the EU’s parlance, this reflects respectively Claims 2 (second argument), Claim 3, and Claim 4 (second argument), though, as explained above,<sup>663</sup> these arguments have tended to overlap with one another in the Parties’ submissions. Albeit divided in three sections, the analysis of the Arbitration Panel below should therefore be understood as a whole.

#### *The delay between the investigation and the measure (Claim 2, second argument)*

335. The Arbitration Panel starts with the question of the temporality of the measure. Article 34 EPA provides, in relevant part, that:

Safeguard measures referred to in paragraph 1 may be taken if, as a result of the obligations incurred by a Party under this Agreement, including tariff concessions, a product originating in one Party **is being imported** into the territory of the other Party or SACU, as the case may be, **in such increased quantities** and under such conditions as to cause or threaten to cause.<sup>664</sup>

336. In challenging the safeguard measure, the EU has focused in particular on the allegedly “outdated” character of the data reviewed by ITAC during the investigation,<sup>665</sup> as well as

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<sup>661</sup> SACU-FWS, at 227.

<sup>662</sup> Exh. SACU-23, European Commission, Proposal for a Council Decision on the signing and provisional application of the EU-SADC EPA, Explanatory Memorandum, 22 January 2016, at 4.

<sup>663</sup> *Supra*, at 311.

<sup>664</sup> Article 34(2) EPA (emphasis added).

<sup>665</sup> See, e.g., EU-FWS, at 140-144, 151, 156, and 230.

on ITAC's refusal to take "more recent data" into account. As explained above,<sup>666</sup> the Arbitration Panel is not empowered to challenge the validity of the investigation underlying the safeguard measure, in a context where Article 34 EPA provides for no particular obligation in this respect. However, that investigation, and its findings, can and should shed light on whether the safeguard measure is in compliance with the substantive requirements of Article 34 EPA.

337. Rather than focusing on the investigation and the data that underpins it, the Arbitration Panel prefers to focus on the fact that Article 34(2) EPA explicitly links safeguard measures to a product that "is being imported [...] in such increased quantities". The Parties have debated the use of this grammatical tense in this context, including in reference to WTO case law and jurisprudence, since similar language can be found in the ASG.<sup>667</sup> The Arbitration Panel agrees that the ordinary meaning of these terms, read in their context and in light of the treaty's object and purpose, further taking into account the extraordinary nature of safeguard measures, entails that the imports at stake "cannot be divorced in time from the actual imposition of the measure" – as put by the EU.<sup>668</sup>
338. For the Arbitration Panel, the terms "is being imported" further entail that a dynamic approach should govern a party's decision to adopt a safeguard measure, i.e., an approach capable of taking into account changing circumstances. That dynamic approach is further reinforced by the context of this provision, which includes the *chaussette* of Article 34(2) EPA (providing that the obligation shall not exceed what is necessary to remedy or prevent the serious injury/disturbance), Article 34(6)(a) (providing that the measure should "only be maintained for such a time as may be necessary"),<sup>669</sup> and Article 34(7)(e) (which provides that the measure should be abolished "as soon as circumstances permit").<sup>670</sup> Also relevant are the parts of Article 34 EPA that provide for cooperation between the EPA parties with respect to the safeguard measure, be it before,<sup>671</sup> or after,<sup>672</sup> its adoption.

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<sup>666</sup> *Supra*, at 316.

<sup>667</sup> See, e.g., **EU-FWS**, at 140.

<sup>668</sup> **Tr.**, 266:15-16 (EU).

<sup>669</sup> Article 34(6)(a) EPA.

<sup>670</sup> Article 34(7)(e) EPA.

<sup>671</sup> Article 34(7)(c) EPA.

<sup>672</sup> Article 34(7)(e) EPA.

339. In other words, the safeguard regime under Article 34 EPA does not contemplate a mechanistic model, whereby a safeguard measure is adopted following a set of irreversible steps and then left on its own, but rather connotes the need for a dynamic relationship between the EPA parties, designed to minimise the impact of that measure and ensure that it fits and answers a real need in the circumstances.
340. The Arbitration Panel observes that, while ITAC was concluding its investigation, SACU decided to enact a provisional safeguard measure pursuant to Article 34(8) EPA. When that measure lapsed, in July 2017, it took 11 months for SACU to adopt a definitive safeguard measure (in June 2018), and then another three months for the measure to enter into force (in September 2018).
341. For the Arbitration Panel, this delay in taking the safeguard measure is excessive. In particular, the Arbitration Panel is struck by the fact that the provisional measure lapsed long before the definitive measure was adopted. If, as SACU acknowledged, provisional measures are allowed under Article 34(8) EPA so that “adequate time can be devoted to considering the justification of a definitive measure”,<sup>673</sup> it begs the question of why the duration of the provisional measure, which was 200 days, did not suffice to come to a definitive decision. There is no evidence in the record showing that SACU then endeavoured to confirm that the underlying facts still justified the adoption of a definitive safeguard measure, be it when the provisional measure lapsed, or at any time preceding the adoption of the measure.<sup>674</sup> By contrast, the EU offered *prima facie* evidence that this factual situation had changed, and notably that the EU imports had decreased substantially to an “all-time low” when the definitive measure was ultimately adopted.<sup>675</sup>
342. In this context, the debate about the representativeness of the period 2017-2018 is of less importance. While SACU argues that “it would not have made sense to reopen the investigation”,<sup>676</sup> the Arbitration Panel, as noted above,<sup>677</sup> does not consider it necessary to delve into the detail of the investigation. More relevant is that, in light of SACU’s failure to verify that the conditions justifying a safeguard measure were still prevailing,

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<sup>673</sup> SACU-OS, at 72.

<sup>674</sup> *Ukraine – Cars*, at 7.174, where the panel noted that “no effort appears to have been made to update the data after the date of the determination and revisit the determination in that light.”

<sup>675</sup> EU-FWS, at 150.

<sup>676</sup> SACU-FWS, at 158.

<sup>677</sup> *Supra*, at 315.

neither the Parties at the time, let alone the Arbitration Panel now, could ascertain that the measure was related to a product that “is being imported” – as it should have. In other words, up until its adoption, SACU has sought to justify its safeguard measure on a situation that, day by day, ran the risk of being disconnected to the prevailing reality; for the Arbitration Panel, the delay in this case was therefore not in keeping with the regime governing safeguard measures under Article 34 EPA.

343. SACU has also sought to justify the delay by the “required consultations with the EU at the TDC” under the EPA.<sup>678</sup> While the Parties should be commended for their willingness to cooperate, the Arbitration Panel does not see why these negotiations, which in any event were unsuccessful, prevented SACU from adopting the measure in the first place if it believed it had sufficient evidence to consider that the measure was valid under the EPA. As noted above, Article 34 EPA provides for a dynamic model of monitoring, consultations, and negotiations between the Parties, and such consultations would have continued in the framework of the TDC.<sup>679</sup> As such, it is not “paradoxical and counterproductive to criticise SACU for a delay in these circumstances”,<sup>680</sup> as this delay, without proper monitoring of the situation, in fact increased the odds that the measure was not justified anymore – making an agreement between the Parties all the more unlikely.<sup>681</sup> Indeed, the Arbitration Panel notes that the EPA itself seeks to prevent such a situation from occurring, as Article 34(7)(b) EPA explicitly allows the adoption of the proposed safeguard measure thirty (30) days after the matter has been referred to the TDC, if no recommendation has been made by the TDC, or if no other satisfactory solution has been reached.<sup>682</sup>
344. Nor is the Arbitration Panel satisfied by SACU’s contention that the delay is excusable by “the necessary internal consultations between SACU Member States”.<sup>683</sup> As provided

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<sup>678</sup> SACU-FWS, at 166.

<sup>679</sup> In accordance with Article 34(7)(e) EPA.

<sup>680</sup> SACU-FWS, at 166.

<sup>681</sup> See, e.g., **Exh.** SACU-3, Joint Report of the 3rd TDC Meeting, 22 and 23 February 2018, at 2-3, where the EU complained of “the long time span between the period of investigation and the possible future imposition of a safeguard.”

<sup>682</sup> In light of this provision, it is therefore of limited relevance that the TDC negotiations lasted until February 2018 – a date that, in any event, still predates by several months the adoption of the measure (see **SACU-IR**, at 23(a)). And while SACU argued at the Interim Review stage that adopting the measure earlier would have run the risk of neglecting its procedural obligations (**SACU-IR**, at 23(a)-(b)), the Arbitration Panel declines to engage in such hypotheticals.

<sup>683</sup> SACU-FWS, at 166.

by the draft Articles of the International Law Commission on the Responsibility of International Organisations, an “international organization may not rely on its rules as justification for failure to comply with its obligations”.<sup>684</sup> Accordingly, this circumstance cannot excuse SACU’s excessive delay in adopting the definitive measure.<sup>685</sup> The Arbitration Panel, lastly, notes that the substance or extent of these internal consultations has remained unclear, with SACU acknowledging at the hearing that there was nothing on the record to evidence their content.<sup>686</sup>

345. These findings are not to be read as holding that *any* delay between a safeguard measure and the situation underlying it would put that safeguard in breach. The Arbitration Panel agrees with SACU that “in the real world there is always a delay”, notably because relevant data needs to be collected and investigated.<sup>687</sup> In the WTO context, panels and the AB have noted that there could be some time gap between the facts underlying a safeguard investigation and the final determination,<sup>688</sup> while further time might elapse between that determination and the ultimate adoption of the measure, especially in circumstances where “consultations in good faith [...] could still influence the decision to apply a safeguard measure.”<sup>689</sup>
346. Yet, it is also undisputable, in view of the extraordinary nature of safeguard measures, that “the right to apply a safeguard measure, once established, cannot be saved for future use.”<sup>690</sup> The Arbitration Panel considers that the excessive character of a delay requires a case-by-case analysis. In the case at hand, given: (i) the length of the period separating

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<sup>684</sup> International Law Commission, Draft articles on the responsibility of international organizations (2011), Article 32. While these articles have not been adopted by SACU or the EU, Article 32 mirrors the corresponding provision in the Articles on State Responsibility, as well as Article 27 VCLTs, all of which have customary character.

<sup>685</sup> During the Interim Review, SACU further argued (**SACU-IR**, at 23(c)-(d)) that the Arbitration Panel’s caution against “undue formalism” under the EPA (see *supra*, at 330) cannot be reconciled with its finding that SACU’s internal consultations could not excuse the delay in adopting the measure. The Arbitration Panel, however, does not consider that the argument against undue formalism can be overstretched in this manner.

<sup>686</sup> **Tr.**, 264:22 – 265:5 (SACU): “And as I said, as regards the discussions that took place on the phasing down of the measure, we will have a look to see if there are any documents we can produce, but as I said the discussions were diffuse within the member states as well as between them and there is nothing at the moment on the record.” See also **Tr.**, 268:1-6 (EU).

<sup>687</sup> **SACU-FWS**, at 167. The EU agrees with this, since it argued (**EU-FWS**, at 141) that a measure adopted in September 2018 could have been based on data up to March 2018.

<sup>688</sup> *Ukraine – Cars*, at 7.165.

<sup>689</sup> *Ibid.*, at 7.167.

<sup>690</sup> *Ibid.*, at 7.170.

the investigation from the adoption of the measure; (ii) the fact that a provisional measure had been allowed to lapse without being replaced by the definitive measure; and (iii) *prima facie* evidence of a sharp drop in the imports at stake, the Arbitration Panel concludes that the delay was excessive.

347. Accordingly, the Arbitration Panel upholds Claim 2, second argument.

*The causal link (Claim 3)*

348. The Arbitration Panel recalls that Article 34(2) EPA requires that a safeguard measure be related to a product imported “in such increased quantities and under such conditions as to cause or threaten to cause” a number of detrimental situations. This causation requirement is, in any event, implicit in the concept of a safeguard measure as an extraordinary remedy, a derogation from the usual principle of trade liberalisation, available to a treaty party in some strictly-limited circumstances.

349. While these specific circumstances are listed in Articles 34(2)(a) to (c) EPA, the Arbitration Panel notes that neither party has been particularly helpful in identifying which of these provisions is governing this case, and whether the relevant test was met.<sup>691</sup> This has complicated the task of the Arbitration Panel, which notes that Articles 34(2)(a) to (c) EPA encompass different situations, whereas the notion that some of these situations entail a lower threshold<sup>692</sup> does not seem to take sufficiently account of their differing language,<sup>693</sup> and of the way these standards are articulated with Article 34 EPA’s application to a “threat” of these situations occurring.

350. Be that as it may, the Arbitration Panel starts by noting that it is undisputed that, at the very least, a correlation between increased imports and the serious injury/disturbance or threat thereof is implicit in Article 34(2) EPA’s causal link requirement.<sup>694</sup> While the EU

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<sup>691</sup> The Arbitration Panel observes that the EU has complained of such lack of clarity in correspondence with ITAC: see **Exh.** EU-26, at 2, complaining that the 3<sup>rd</sup> Essential Facts Letter (**Exh.** EU-8) “still does not specify whether the injury consists of a threat of serious disturbance in the SACU market or a threat of injury to the SACU domestic industry.” In its submissions (see **SACU-AC**, at 22 and 41; and **SACU-FWS**, at 205), SACU has proposed that Article 34(2)(c) EPA was the relevant basis in this respect, but has never sought to explain how the requirements under that provision were met.

<sup>692</sup> See **SACU-FWS**, at 205, which alleges that Article 34(2)(c) EPA “sets out a lower threshold of harm for safeguard measures.”

<sup>693</sup> Notably, the Arbitration Panel notes that the “serious injury” standard in Article 34(2)(a) pertains to “the domestic industry”, while the “disturbance” standard in Articles 34(2)(b) and (c) pertains, respectively, to “a sector of the economy” or the relevant agricultural “markets”.

<sup>694</sup> See **SACU-FWS**, at 189.

has challenged the extent of ITAC's analysis in this respect,<sup>695</sup> the Arbitration Panel is satisfied that the available data displays a correlation between increased EU imports and the worsening of most factors evidencing serious injury or disturbance, in a manner sufficient, under the Arbitration Panel's standard of review, to meet the causal link requirement.

351. Harder to evaluate is the EU's contention that SACU has failed to conduct a proper non-attribution analysis, and to dissociate the role of the alleged EU imports in the alleged serious injury/disturbance (or threat thereof) from other likely causes.
352. In this respect, the Arbitration Panel is cautious in its approach to the causal link requirement under Article 34(2) EPA. While a non-attribution analysis may well be implied in such requirement (at the very least to confirm that the identified cause is the *main or principal* cause underpinning the serious injury/disturbance), there is also force to SACU's contention<sup>696</sup> that such analysis is explicitly required under the ASG, and conspicuously absent from the language of Article 34 EPA,<sup>697</sup> which, as explained above, deliberately departs from the standards and conditions applicable under the WTO rules and agreements.
353. Besides, part of the EU's case on this ground pertains to the conduct of the investigation and the way that ITAC addressed the non-attribution analysis, issues over which the Arbitration Panel, as explained above,<sup>698</sup> need not pass detailed judgment. Suffice it to say, however, that the Arbitration Panel shares the EU's concerns that ITAC's analysis was less than enlightening, and could even be described as conclusory, since no specific reason was offered why, having acknowledged the plausible role of other factors, ITAC ultimately considered that these did not "sufficiently detract from the causal link".<sup>699</sup> While the nature of the issue of causation may include a degree of judgment, one would have expected more from ITAC in the circumstances when the EU had raised specific and pointed concerns on this issue, and indeed may be taken as having established a *prima facie* case in this respect.

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<sup>695</sup> **EU-FWS**, at 161-162.

<sup>696</sup> **SACU-FWS**, at 182.

<sup>697</sup> *Supra*, at 177.

<sup>698</sup> *Supra*, at 315.

<sup>699</sup> *Ibid.*, at 13-14.

354. In offering counter-arguments to the EU's case on causation in these proceedings, SACU has insisted on the (unrebutted) substantial importance of the EU imports throughout the POI.<sup>700</sup> The Arbitration Panel is however doubtful that a test in terms of materiality meets the concerns underlying the question of attributability, which aims at matching a trade remedy to the corresponding injury. In other words, the fact that an injury might have occurred on the strength of the EU imports does not necessarily mean that the measure adopted – without weighing up other contributory causes – is appropriate and proportional.<sup>701</sup>
355. Likewise, the Arbitration Panel is unconvinced by SACU's arguments that appear to link the threshold of harm (injury or disturbance, or threat thereof), with the question of causation.<sup>702</sup> A lower threshold of harm does not absolve a party from its obligation to establish the causal link between imports and that harm, under Article 34 EPA.
356. On the other hand, the Arbitration Panel notes that one of the three other sets of factors identified by the EU, namely the increase in imports from Brazil and the US, is not borne out by the facts: these imports did increase in large quantities, but only starting after ITAC's POI.<sup>703</sup> Had the investigation focused on more recent data, the role of these imports would indeed have been an important question – yet, since the investigation covered a period during which they played a smaller role, the Arbitration Panel is unconvinced that the argument has much force in the context of the causal link requirement. As for the various increases in production costs identified by the EU, the Arbitration Panel understands SACU's logic in terms of local producers being unable to pass these costs through to customers, in the context of competitive pressure from the EU imports.<sup>704</sup> Yet, nowhere did SACU claim that *all* of these costs would have been passed on, absent the alleged competitive pressure from the EU imports, leaving some (undefined) role for these factors in contributing to the ultimate serious injury and/or disturbance.

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<sup>700</sup> SACU-FWS, at 199.

<sup>701</sup> *Infra*, at 361(b).

<sup>702</sup> SACU-FWS, at 193 and 205.

<sup>703</sup> See AMIE-AC, at 3.

<sup>704</sup> SACU-FWS, at 173.

357. The case before the Arbitration Panel appears, therefore, to be conflicted. On the one hand, the EU is right to insist on the lack of rigor in the causation analysis from ITAC and SACU, and, in making these arguments, the EU may even have made a *prima facie* case that SACU's causation analysis was not in keeping with the non-attribution analysis allegedly required under Article 34 EPA. On the other hand, SACU has offered arguments that would appear to rebut the EU's *prima facie* case, or at least certain aspects thereof, yet the aforementioned lack of rigor in this respect means that the robustness of these counter-arguments is difficult to gauge.
358. Ultimately, this aspect of claim 3 is neither decisive nor necessary to resolve the dispute between the Parties, with the result that, for reasons of judicial economy, the Arbitration Panel declines to decide in favour of one or the other Party.<sup>705</sup> Indeed, the matter can be laid to rest, because – as explained below – the Arbitration Panel considers that SACU's failure to account for the contribution of other factors amounts to a breach of another part of Article 34 EPA.
359. Accordingly, and subject to the analysis that follows, Claim 3 is not decided, and therefore not upheld.

*Proportionality of the safeguard measure (Claim 4, second argument)*

360. The last part of Article 34(2) EPA, the *chaussette*, provides that a safeguard measure adopted under this Article “shall not exceed what is necessary to remedy or prevent the serious injury or disturbances.” As noted above,<sup>706</sup> this is consonant with other provisions of Article 34 that together emphasise the extraordinary nature of safeguard measures. The EPA's procedural obligations in terms of consultations are also geared towards ensuring that the measure is adapted to the alleged serious injury or disturbance.<sup>707</sup> Ultimately, the language of the *chaussette* of Article 34(2) EPA embodies a requirement of proportionality between the safeguard measure and the situation it seeks to remedy.<sup>708</sup>

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<sup>705</sup> See *Norwegian Loans (France v. Norway)*, Judgment, 6 July 1957, I.C.J. 157 Rep. 9, at 34, Separate Opinion of Judge Sir Hersch Lauterpacht, at 36, opining that there is “force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious”.

<sup>706</sup> *Supra*, at 170.

<sup>707</sup> *Infra*, at 366.

<sup>708</sup> See **Tr.**, 122:14-17 (EU).

361. The Arbitration Panel finds that this requirement was not complied with, for two main, interrelated reasons:

- a. *First*, and as found above,<sup>709</sup> the measure taken by SACU was temporally disconnected from the situation that allegedly gave rise to it. Accordingly, it is impossible to assess whether the proportionality requirement is met in such circumstances: the situation might have changed so drastically that the safeguard measure was, when adopted, either insufficient or excessive. Given the EU's *prima facie* case that, in the period between ITAC's analysis and the adoption of the measure, the level of imports dropped substantially, the Arbitration Panel is therefore not satisfied that the measure as adopted at the time complied with the proportionality requirement.
- b. *Second*, ITAC in its investigation acknowledged that factors other than the EU imports were contributing to the injury suffered by SACU poultry producers – but merely concluded that this did not detract from the causal link. While the Arbitration Panel is not ready to impugn SACU's reliance on this finding as a matter of causation,<sup>710</sup> it remains relevant in terms of proportionality.<sup>711</sup> Simply put, without a proper view or analysis of what portion of the serious injury/disturbance was or was not attributable to the EU, SACU ran the risk of shifting the entire cost of that serious injury/disturbance onto the EU – a circumstance that would not only be disproportionate, but also unfair.

362. These considerations being sufficient to find that the safeguard measure exceeded what was necessary to remedy the alleged serious injury or disturbance, the Arbitration Panel, for the sake of judicial economy, does not need to delve into the EU's further concerns regarding the calculation of the import duty level, especially in view of the anti-dumping duties.

363. Accordingly, Claim 4, second argument, is upheld.

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<sup>709</sup> *Supra*, at 341 *et seq.*

<sup>710</sup> *Supra*, at 358. As noted, this matter was not decided, on grounds of judicial economy.

<sup>711</sup> The AB in *US – Line Pipe*, at 252, noted that the question of attribution was relevant both to the question of causation and that of proportionality.

### SACU's procedural obligations (Claim 5)

364. Having reviewed the safeguard measure's compliance with the "conditions" laid down in Article 34 EPA, the Arbitration Panel now turns to that same measure's compliance with the "procedures" found in the same Article.

365. In this respect, the EU complained of a violation of Article 34(7) EPA, which reads, in relevant parts:

7. For the implementation of paragraphs 1 to 6, the following provisions shall apply:

[...]

(c) before taking any measure provided for in this Article or, in the cases to which paragraph 8 applies, the Party or SACU, as the case may be, shall, as soon as possible, supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the Parties concerned;

366. In interpreting this provision, the Arbitration Panel is, as ever, mindful of its context. As explained above,<sup>712</sup> the EPA is permeated by considerations related to its parties' dynamic obligations to cooperate. Safeguard, as trade remedies, are also meant to be proportional.<sup>713</sup> In this context, in the Arbitration Panel's view, Article 34(7)(c) EPA encompasses a procedural mechanism designed to corral disputing EPA parties towards reaching an agreement, under the auspices of the TDC; proposals and counter-proposals should be put forward by the parties in view of the available evidence as well as their respective positions. In other words, this procedure offers a chance, before the measure is adopted, for the parties to opt for an alternative solution agreeable to both of them, but also to hash out their arguments and positions, so that the safeguard measure bears the utmost chance of falling within the strict requirements of the treaty. Cooperation and comity between the disputing parties before the TDC is key to this provision, as it is to the entire EPA.<sup>714</sup>

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<sup>712</sup> *Supra*, at 167.

<sup>713</sup> *Supra*, at 170.

<sup>714</sup> See *supra*, at 167.

367. In this light, the Arbitration Panel considers that the term “relevant” in the expression “all relevant information” indicates that the scope of the obligation should vary, on a case-by-case basis; what information is relevant in one case is not necessarily relevant in another case, and such relevance would also depend on the dynamic of the negotiations between the disputing parties before the TDC.
368. As such, rather than pronouncing in the abstract on what information should have been provided, the Arbitration Panel finds that the issue is whether the object and purpose of Article 34(7)(c) EPA has been met. In this context, the Arbitration Panel finds that:
- a. The EU has failed to prove that it had complained, at the time, of SACU’s alleged failure to provide this *specific* information to the TDC.<sup>715</sup> The EU’s claim, besides, is strongly premised on ITAC’s alleged failure to disclose information or explanation *in the context of the investigation* – not before the TDC.<sup>716</sup>
  - b. Given the dynamic and cooperative nature of the Parties’ obligations under Article 34(7)(c) EPA, the fact that the EU did not request that specific information at the time means that SACU was not compelled to produce it at that juncture. Accordingly, in the circumstances, there is no basis for any assertion that SACU deliberately withheld that information so as to undermine or defeat the object and purpose of the TDC negotiations.

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<sup>715</sup> While the EU considered that the safeguard was invalid under Article 34 “on the basis of the information exchanged” (as noted in **Exh. SACU-2**, Joint Report of the Joint SADC EU-EPA Technical Consultative Meeting on Poultry Safeguards, 24 November 2017), the Arbitration Panel does not read this statement as requesting further information, let alone the information cited in these proceedings.

The Arbitration Panel further notes that the EU did challenge ITAC on the information provided during the investigation (see **Exh. EU-26**), yet this did not take place in the context of the TDC proceedings.

<sup>716</sup> See **EU-FWS**, at 243-244, which refers to ITAC and the investigation. The Arbitration Panel also takes note of the EU’s further contention (*ibid.*, at 245) that “[s]uch delayed relaying of information robbed the EU from exercising its rights of defence during the ITAC’s safeguard proceeding.” However, Article 34(7)(c) EPA is concerned with the parties’ negotiations in the context of the TDC, not with the underlying fact-finding exercise.

- c. Ultimately, the EU *did* put forward alternative solutions to the safeguard measure contemplated by SACU,<sup>717</sup> in line with the object and purpose of Article 34(7)(c) EPA.

369. Accordingly, Claim 5 cannot be upheld.<sup>718</sup>

370. The Arbitration Panel emphasises that the Parties' negotiations in the context of the TDC and otherwise are key to the success of the EPA, and of its developmental character. A treaty is a living instrument, and is only as good as the efforts put by its parties into making a reality of its object and purpose. Despite the difficulties which led to the present arbitration, the Arbitration Panel is hopeful that the Parties will continue to cooperate in good faith, and to strive to achieve the developmental objectives of the EPA through regular exchanges and consultations.

### 3. Findings and Recommendations

371. The Arbitration Panel has concluded that the safeguard measure breached Article 34 EPA, specifically because: (i) it was not related to a product that "is being imported" (given the time lapse between the determination, provisional measure, and definitive measure); and (ii) because it exceeded "what is necessary to remedy or prevent the serious injury or disturbances."

372. The EU has asked the Arbitration Panel to recommend that SACU "bring its measures into compliance with the EU-SADC EPA."<sup>719</sup> Given the fact that the safeguard measure has lapsed while the proceedings were under way,<sup>720</sup> the Arbitration Panel does not make any recommendation as regards the measure at issue, but expects that, going forward, any renewal of the same safeguard measure, if such renewal were possible – a matter on

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<sup>717</sup> **Exh.** EU-27, EU submission of 31 October 2017 following the TDC meeting dated 31 October 2017, at 4.

<sup>718</sup> While, at the Interim Review stage, SACU requested the Final Report to mention explicitly that the EU had "had in fact received 'all relevant information' even on the basis of its *ex post* claims and that this explains why it did not ask for more during the TDC consultations themselves" (**SACU-IR**, at 40), the Arbitration Panel finds this unnecessary for the resolution of the dispute.

<sup>719</sup> **EU-FWS**, at 248.

<sup>720</sup> *Supra*, at 62.

which the Arbitration Panel does not pronounce – would have to comply with the Arbitration Panel’s findings in this Report.<sup>721</sup>

373. By contrast, the Arbitration Panel cannot recommend that SACU “refund the safeguard duties already paid”, as requested by the EU. While the Arbitration Panel doubts that it has the power to make such a recommendation under the applicable EPA provisions, which is a question it need not decide,<sup>722</sup> the EU simply has failed to make out any case in this respect. The EU did not provide the Arbitration Panel with sufficient figures or estimates, and no means to calculate or assess, what safeguard duties should be refunded, and to whom. This kind of recommendation – sought on a blanket basis without any particular facts and figures – would be particularly undesirable given the developmental character of the EPA (discussed above), since the Arbitration Panel has no basis on which to assess the extent of such a recommendation’s effect and impact.

## V. CONCLUSIONS

374. In light of what precedes, the Arbitration Panel concludes that:

- a. SACU’s preliminary objections are dismissed, and all of the EU’s claims are properly before the Arbitration Panel.
- b. With respect to the claims on the merits:
  - i. Claim 1 is not upheld.
  - ii. Claim 2, first argument, is not upheld.

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<sup>721</sup> The Arbitration Panel declines, however, to provide “guidance”, as requested by SACU (**SACU-IR**, at 45), as to “(i) what would be a permissible lapse of time between the investigation and the adoption of a safeguard measure having regard to relevant factors; and (ii) the required exercise to apportion the serious injury or disturbance between the increased imports and other potential factors contributing to the serious injury or disturbance”. The Arbitration Panel is not empowered under the provisions of the EPA to proffer legal advice or guidance to any of the Parties. That falls within the province of their respective legal advisors. Even if SACU’s request fell within the Arbitration Panel’s mandate (*quod non*), the Arbitration Panel considers that the answers to SACU’s questions depend on the particular facts and circumstances of each case, and thus require a case-by-case analysis.

<sup>722</sup> The Arbitration Panel has taken note of the difficulties, in the WTO context, involved in awarding retrospective remedies such as compensation: see Article 21.5 Panel Report, *Australia – Automotive Leather*; and Panel Report, *US – Certain EC Products*, in particular at 6.106: “retroactive remedies are alien to the long-established GATT/WTO practice where remedies have traditionally been prospective.”

- iii. Claim 2, second argument, is upheld.
  - iv. Claim 3 is not decided, for reasons of judicial economy.
  - v. Claim 4, first argument, is not upheld.
  - vi. Claim 4, second argument, is upheld.
  - vii. Claim 5 is not upheld.
- c. The EU's request for a refund is denied.



**Hèle Ruiz Fabri**

Member

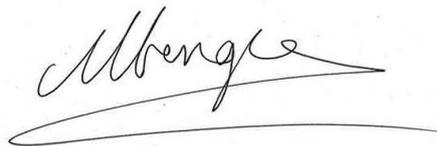
Luxembourg, Luxembourg, 3 August 2022



**Faizel Ismail**

Member

Hamburg, Germany, 3 August 2022



**Makane Moïse Mbengue**

Chairperson of the Arbitration Panel

Geneva, Switzerland, 3 August 2022