

Private litigation in Namibia on trade policy measures and regional trade agreements

Background

- Namibia is a classic example of a country that primarily exports raw materials and imports finished goods
- As a consequence, Namibia like other countries in similar situation also experienced:
 - Steady but “jobless” growth for a substantial period
 - Growth linked to commodity cycles in international market demand
 - Near saturation of the domestic market with imported consumer goods and prohibitive competition from established foreign supply chains
 - Limited means of supporting emerging manufacturers

Industrialization agenda: SACU Art. 2. The objectives of this agreement are – e) to enhance the economic development, diversification, industrialization and competitiveness of member States

- Namibia's intention was never to remain a recipient of imported finished goods and there has been national consensus since Independence to pursue an import substitution strategy and a high value niche manufacturing strategy for both domestic and export markets
- The Ministry of Trade and Industry identified the need to develop measures to enhance industrialization and facilitate entry into the domestic (and export) market for goods manufactured in Namibia
- These includes the development of Namibia's first industrial policy and its implementation strategy "Growth at home" as well as a Retail Charter to break the (closed) supply chains used by foreign retailers

- Perhaps more important, MTI also instituted certain trade policy measures to assist Namibian producers to enter/stay in the domestic market under intense competition from imported products
- Quantitative restrictions were imposed on:
 - certain dairy products representing around 50% of the domestic market demand; and
 - certain poultry products

What was striking, is how aggressively the private sector wants to protect entrenched dominance or monopoly, which does not auger well for equitable economic development in southern Africa

Reaction from the market

- In both instances these measures were challenged by large companies or industry associations operating from another SACU Member State
- The main basis for challenge was that these measures are contraventions of the free movement of goods provisions in the SACU Agreement and the SADC Trade Protocol
- Further, that Namibia is bound to these two instruments by virtue of its Constitution
- The only way to support an industry in SACU is through infant industry protection

SACU Agreement

Article 18. Free Movement of Domestic Products

Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State to the area of another Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.

SADC Trade Protocol

Art. 7. Quantitative import restrictions

1. Member States shall not apply any new quantitative restrictions
2. Notwithstanding the provisions of paragraph 1 of this Article, Member States may apply a quota system [provided that the tariff rate under such a quota system is more favourable than the rate applied under this Protocol]

Constitution of the Republic of Namibia

Article 21 Fundamental Freedoms

All persons shall have the right to:

(j) practice any profession, or carry on any occupation, trade or business.

Article 144 International Law

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law Namibia.

In defense of the trade policy measures

These cases brought to light a number of issues that point to deficiencies in the regional trade agreements or aspects of their implementation or relation to domestic legislation which have not been thoroughly tested in Court

They also showed the need to: improve domestic legislation (e.g. better define public interest and create specific powers to support industrialization); and in future to bring to bear domestic Competition legislation in such instances as well, or to amend such legislation to have sufficient bearing on trade matters.

IMPORT AND EXPORT CONTROL ACT, 1994

2. (1) The Minister may, whenever it is necessary or expedient in the public interest, by notice in the Gazette prohibit-

a) the import into or the export from Namibia; or

b) the import into or the export from Namibia, except under the authority of and in accordance with the conditions stated in a permit issued by the Minister or by a person authorised by him or her, of any goods of a class or kind specified in such notice or of any goods other than goods of a class or kind specified in such notice.

Judgments

- In the dairy case the applicants won, but Government appealed, case is still before the Supreme Court
- In the poultry case, there is no judgment yet

The bottom line is that it is extremely difficult for smaller countries to industrialize and for their producers to enter their own domestic markets let alone export markets in the face of overwhelming and very aggressive winner-takes-it-all competition from imports, bring into question the rationale for regional trade agreements and their inequitable outcomes and the future political instability which may bring.

“Any sensible discussion on protectionism is only possible if the assumption of equity and competitiveness is accurate, or else only the dominant economy in a regional integration arrangement will benefit significantly”

Joseph Stiglitz Lindeque, 2016