THE LEGALITY OF BOTSWANA'S IMPORT BANS UNDER THE SACU AGREEMENT OF 2002: AN ANALYSIS OF THE SACU AGREEMENT'S TRADE LIBERALIZATION FRAMEWORK

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the *Master of Laws in International Trade Law* in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of *Master of Laws in International Trade Law* dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

DECLARATION

Research Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws (LL.M.) in International Trade Law in approved courses and Minor Dissertation. The other part of the requirement for this qualification was the completion of a program of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws in International Trade Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and this dissertation conforms to those regulations.

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THABO MHAPHA **13 FEBRUARY 2025**

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ABSTRACT

The Southern African Customs Union (SACU) is the world's oldest functioning customs union, founded in 1910. A key objective of SACU, evident through its 2002 Agreement (the Agreement), is to facilitate the cross-border movement of goods between the territories of the respective member countries, or in other words, trade liberalisation. SACU's trade liberalisation objectives are in line with Article XXIV of the General Agreement on Tariffs and Trade (GATT). Article XXIV of the GATT provides the legal framework for customs unions under international trade law. The overarching objective of the multilateral trading system is to achieve freer trade. However, in recent years, the Government of Botswana has introduced and implemented a series of import bans mainly on agricultural products from SACU member states. These bans have been reasoned on Botswana's need to attain self-sufficiency and reduce its import bill. Even more recently, Botswana has announced an extension of its import bans on fresh produce, which includes tomatoes, potatoes, onions and other produce and has doubled the number of restricted items to 32. This extension has been met with wide criticism from neighbouring South Africa, which is Botswana's largest import partner. South African farmers have raised serious concerns about the bans, asserting that the bans constitute a violation of the Agreement. These claims have found support within the South African government which has indicated its intention to initiate talks on the issue. This research examines these developments to establish whether these bans contradict Botswana's trade liberalisation requirements as stipulated by the Agreement. The study delineates the legal framework for trade liberalisation under the Agreement to determine whether these bans are legal under the Agreement and determine the extent to which SACU member countries may limit trade amongst themselves. Additionally, as customs unions exist within the broader framework of the GATT, the research then analyses whether the extent of trade liberalisation provided for under the Agreement is consistent with Articles XI and XXIV of GATT.

ABBREVIATIONS

AB	Appellate Body
BLNS	Botswana, Lesotho, Namibia and Eswatini
BLS	Botswana, Lesotho and Eswatini
CET	Common External Tariff
CRP	Common Revenue Pool
CRTA	Committee on Regional Trade Agreements
CU	Customs Union
EAC	East African Community
EACCU	East African Community Customs Union
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HCT	High Commission Territories
ITO	International Trade Organisation
MFN	Most Favoured Nation
NT	National Treatment
NTB	Non-Tariff Barriers
RSF	Revenue Sharing Formula
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
USA	United States of America

WTO World Trade Organisation

1. CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

The multilateral trading system is the global network of rules agreed upon by countries that govern trade between them. This network consists of multiple agreements and "understandings" that set out in clear terms how countries relate to each other in terms of trade and matters ancillary thereto at a multilateral level. Today, this system is administered by the World Trade Organisation (WTO) through its various agreements. Chief amongst them is the General Agreement on Tariffs and Trade (GATT), which is a treaty that provides for, *inter alia*, the reduction of tariffs and quotas and the elimination of non-tariff barriers (NTBs) to trade. At its core, the multilateral trading system purports to achieve freer trade "on a reciprocal and mutually advantageous basis"[1].

Within this broader framework of the multilateral trading system, Customs Unions (CU) are permitted as an exception to the general rules of the multilateral trading system under Article XXIV of the GATT. The rationale behind such an exception is that CUs, along with other regional groupings, are deemed useful as a way of achieving deeper integration and higher levels of trade liberalisation and free trade.[2] CUs by definition, are a form of deeper economic integration that, goes beyond being a Free Trade Area (FTA) but fall short of being a Common Market.[3] They are defined by the existence of a common external tariff (CET) and by the elimination of duties and other restrictive regulations of commerce with respect to substantially all trade between their members.[4] At the time of this research, there are at least 17 CU presently in operation and over 118 countries worldwide are members of at least one CU.[5]

It is trite that international trade cannot exist without countries having access to the domestic markets of other countries. As such, the reduction of barriers to trade is an essential element of

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[1] Preamble to the General Agreement on Tariffs and Trade of 1947 (GATT).
[2] Preamble to The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
[3] B Balassa *The Theory of Economic Integration* (1961).
[4] Article XXIV:8 of the GATT.
[5] T Yasui 'Customs Administrations Operating Under Customs Union Systems' WCO Research Paper No. 29 (January 2014).

the WTO's objectives. There is thus a general obligation amongst member countries of the WTO to grant access to each other's markets.[6] In that respect, there are two main categories of barriers to market access, mainly tariff barriers, which include customs duties and other duties and charges, and non-tariff barriers (NTBs), which include quantitative restrictions, technical barriers to trade and sanitary and phytosanitary measures.[7] Quantitative restrictions are discussed in more detail later in this paper as they are the broad category under which the focus of the research, namely import bans, fall.

The elimination of quantitative restrictions is embodied in Article XI of the GATT, which provides for the general elimination of restrictions on the importation and exportation of goods. However, there are exceptions to these requirements, which include general exceptions, security exceptions, and waivers, all embodied under the GATT. Article XI, together with these exceptions, is discussed more fully later in this paper. It is nonetheless sufficient to note that CUs are bound by these requirements by virtue of the fact that they exist under and are created in terms of the GATT. Notwithstanding this, there has been a recent global regression towards protectionism as noted by many scholars, which has not spared CUs and in particular, the Southern African Customs Union (SACU).[8]

1.2 TRADE LIBERALISATION: A BRIEF OVERVIEW

Trade liberalisation or market access is regarded as a crucial component of economic growth and development. It refers to measures undertaken by countries to eliminate constraints on the free movement of goods and includes, for example, the elimination of tariffs and NTBs to trade.[9] Notwithstanding this, the concept of trade liberalisation has many detractors. Opposing views to freer trade argue that there is a need to maintain restrictions and higher tariffs in order to protect

[6] Article XI of the GATT.
[7] P Van den Bossche, & W. Zdouc *The Law and Policy of the World Trade Organisation: Text, Cases, and Materials* (2021) Cambridge: Cambridge University Press. doi:10.1017/9781108784542.003. at page 456.
[8] PK Goldberg and T Reed 'Is the Global Economy Deglobalizing? If So, Why? And What Is Next?' (Spring 2003) Brookings Papers on Economic Activity (BPEA).
[9] W Odhiambo and G Otieno 'Trade Policy Reforms and Poverty in Kenya: Processes and Outcomes' (2005) Kenya Institute for Public Policy Research and Analysis.

infant industries and to shield local producers from unfair trade and competition from larger, foreign entities.[10] This is often referred to as protectionism.

Nonetheless, there are decades worth of arguments in favour of liberalisation. Proponents of liberalisation argue that it opens economies to global competition, which in turn weakens monopolies and results in cheaper goods.[11] Moreover, trade liberalisation frameworks such as free trade agreements result in improved availability of goods and services and firms are provided with greater market access which provides a springboard for export growth.[12] Whatever the benefits, it can at the very least be said that trade liberalisation facilitates economic growth.[13]

The multilateral trading system itself, through the World Trade Organisation (WTO) has made significant efforts to achieve freer trade through liberalisation. The WTO has led this process as the only organisation charged with overseeing international trade.[14] Its origins lie in the General Agreement on Tariffs and Trade (GATT)[15] which is a far-reaching agreement by multiple countries to reduce barriers to trade. Since its promulgation in 1947, there have been eight rounds of trade negotiations.[16] At first these focused on lowering tariffs on imported goods, and as a result of the negotiations, by the mid-1990s, industrial countries' tariff rates on industrial goods had fallen steadily to less than 4%.[17] By the 1980s, and even more recently, negotiations have expanded to cover non-tariff barriers on goods.[18]

As mentioned above, CU are permitted as part of the multilateral trading system as they are viewed as important elements in achieving the aims of the system. It therefore, becomes necessary to determine, as this research set out to do, the extent to which a customs union

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[10] LP Ebrill 'The Revenue Implications of Trade Liberalisation' in *Trade Reform and Regional Integration in Africa* (3 December 1998) USA: International Monetary Fund available at https://doi.org/10.5089/9781557757692.071.ch005.
[11] J Viner *The Customs Union Issue* (1950) Oxford University Press.
[12] G Mugano and M Brookes *Trade Liberalisation and Economic Development in Africa* (31 May 2023) Routledge.
[13] HN Syal 'The Role Of Trade Liberalisation In Economic Growth Theories, Evidence, And Challenges' (Autumn 2007) Strategic Studies, Vol. 27, No. 3.
[14] What is the WTO, available at *https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm*, accessed on 26 Aug 2023.
[15] Van den Bossche and Zdouc op cit (n7) at page. 84-172.
[16] Principles of the Trading System, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 20 May 2023.
[17] Ibid.
[18] Ibid.

provides for the liberalisation of trade. In this case, the customs union in question is SACU and such an analysis will be conducted in the chapters to follow.

1.3 THE SOUTHERN AFRICAN CUSTOMS UNION: A HISTORICAL OVERVIEW

The Southern African Customs Union (SACU) is the oldest customs union in the world having had come into existence in 1889 when the Cape Colony of Good Hope and the Orange Free State Republic concluded a Customs Union Convention.[19] This union morphed into a more substantive arrangement that was extended to the Union of South Africa and the so called British High Commission Territories (HCT) being Basutoland (Lesotho), Bechuanaland (Botswana), and Eswatini.[20] Today, SACU is one of the most successful schemes.[21] It has stood the test of time, holding fast even through renegotiations of the agreement that were a result of the changing political and economic situation in the region.

However, SACU has had long standing divergences in its members' levels of development. From inception, South Africa has always been more developed than the rest of the members. This position still prevails today. In 2017, intra-SACU exports amounted to US$14 billion with South Africa dominating the intra-SACU exports, accounting for 71%, ahead of Namibia (13%), Eswatini (9%), Botswana (5%) and Lesotho (2%).[22] Thus, the economies of Botswana, Eswatini, Lesotho and Namibia are heavily reliant on imports from South Africa.[23]

SACU was notified to the WTO in 2007 as prospective members of CUs or interim agreements leading to the formation of CUs, are required by the GATT to notify the WTO of their agreement.[24] SACU's notification to the WTO was in keeping with its objective of deeper

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[19] M Ovádek and I Willemyns 'International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice' (May 2019) European Journal of International Law, Volume 30, Issue 2, Pages 361–389.
[20] South West Africa (Namibia) "was a *defacto* member, since it was administered as part of South Africa" before it became a *dejure* member.
[21] K Tsotetsi 'Contextualizing The Ban On South African Vegetables By Namibia & Botswana Within The Prism Of Regional Integration' available at http://www.thedtic.gov.za/wp-content/uploads/SACU-Opinion-Piece.pdf, accessed on 4 March 2024.
[22] Southern African Customs Union (SACU)'s trade and tariff profile, available at https://www.tralac.org/blog/article/13807-southern-african-customs-union-sacu-s-trade-and-tariff-profile.html#:~:text=Intra%2DSACU%20exports%20amounted%20to,diamonds%2C%20petroleum%20oils%20and%20gold, accessed on 23 May 2023.
[23] Ibid.
[24] Article XXIV (7)(a) of the GATT.

integration into the global trading system.[25] In fact, SACU was recently praised during the fifth Trade Policy Review of the Southern African Customs Union, where the member countries of SACU were applauded for their commitment to the multilateral trading system and their active participation in the WTO.[26] With the above in mind, it is now prudent to delve into the history of SACU and the several renegotiations that have brought the agreement to where it is today.

1.3.1 THE 1910 SACU AGREEMENT

The agreement concluded in 1889 between the Cape Colony of Good Hope and the Orange Free State Boer Republic represents the start of what is now known as SACU. This agreement was extended to the High Commission Territories in 1910 and thus bringing the then Basutoland, Bechuanaland and Swaziland into the fold. Whilst spanning only a mere six articles, the agreement was comprehensive in so far as it made provision for the free movement of SACU manufactured products within SACU, without any duties or quantitative restrictions. [27] The 1910 agreement also created a CET on all goods imported into the CU from the rest of the world.[28] It also made it such that the tariff policy of the CU would be as it existed in the Union of South Africa.[29] This was because at the time, and today, South Africa was far more advanced on issues of trade and tariffs and therefore it was convenient to simply adopt its already existing policy.

Other key provisions of the agreement included provision for a common pool of customs duties as per the total volume of external trade and for excise duties based on the total production and consumption of excisable goods.[30] In terms of free movement of goods, Article 6 of the agreement provided for free movement of local goods with some exceptions to spirits and beers. There was no provision made for the members' rights to restrict certain goods into their markets. The agreement was short and pointed but sufficed for the members' needs at the time.

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[25] Statement By Tswelopele C. Moremi Executive Secretary Of SACU At The Xxxvii Regular Meeting Of The Common Market Council (Cmc) And The Summit Of The State Parties Of Mercosur And Associated States 23 July 2009, Ascuncion, Paraguay, accessed on 27 May 2023

[26] The World Trade Organisation 'Concluding remarks by the Chairperson' available at https://www.wto.org/english/tratop_e/tpr_e/tp547_crc_e.htm

[27] Article 2 of the SACU Agreement, 1910.

[28] Article I of the SACU Agreement, 1910.

[29] Article 1 of the SACU Agreement, 1910.

[30] Article 3 of the SACU Agreement, 1910.

1.3.2 THE 1969 SACU AGREEMENT

The 1969 agreement was negotiated on the backdrop of the HCT gaining independence and becoming sovereign states and thus was signed by the sovereign states of Botswana, Lesotho, Eswatini and South Africa. The initial agreement retained most of the key features of the 1910 Agreement including *inter alia* the free exchange of domestic goods and the application of South Africa's duties, laws and regulations as the SACU CET. This new agreement kept the newly independent states' markets open for South Africa's products and provided a guaranteed source of revenue for them which was crucial at the time.[31] Thus, the agreement was considered a satisfactory deal by all parties.[32]

Article 2 of the agreement prohibited the imposition of quantitative restrictions or duties on goods domestic to the customs union. Article 6 permitted Botswana, Lesotho and Swaziland (BLS) to implement duties to enable new industries in their domestic markets to meet competition in the customs area. These duties had to be equally applied to like products from outside the customs area[33] and could only be implemented after consultations with the other members[34] and for a period not exceeding eight years.[35]

Article 11 (1) recognized the right of each member to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons. Although it did not define what would qualify as "economic, social, cultural or other reasons" there was provision made against the application of such restrictions for protectionist purposes.[36] Nonetheless, the generally accepted view is that the right of members to restrict intra-trade was too widely drawn.[37] Whilst the 1969 Agreement introduced this new mechanism that allowed members to restrict trade, it wasn't couched with sufficient clarity to ensure the proper

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[31] R Kirk and M Stern 'The New Southern African Customs Union Agreement' (June 2003) Africa Region Working Paper Series No. 57.
[32] Ibid.
[33] Article 6(1) of the SACU Agreement, 1969.
[34] Article 6(2) of the SACU Agreement, 1969.
[35] Article 6(3) of the SACU Agreement, 1969.
[36] Article 11(3) of the SACU Agreement, 1969.
[37] C Ng'ong'ola 'Evolution and Development of the Legal Framework for the Southern African Customs Union' (June-December 2016) University of Botswana Law Journal at pg. 108.

functioning of the customs union. Unfortunately, this problem persists even in the latest agreement as this paper will later discuss.

The 1969 agreement made allowance for any of the members to seek "safeguard restrictions".[38] It provided for "bilateral consultations", as soon as possible, and the search for a mutually acceptable solution, "if as a result of unforeseen developments" any product was being introduced into the area of one of the parties "in such increased quantities and under such conditions as to cause or threaten serious injury to producers or manufacturers of like or directly competitive products" in its area.[39] This was an attempt to curb any form of dumping.

Despite this, the agreement was considered flawed for an array of reasons[40]. The agreement did not make provision for effective mechanisms to ensure compliance with the agreement nor a dispute settlement procedure. Moreover, there was no joint decision making. SACU was administered by the annual meetings of the Customs Union Commission on an ad hoc basis.[41] Although there had been numerous discussions on the 1969 Agreement prior to 1994, these lacked serious commitment from South Africa and were largely aimed at resolving technical aspects of the 1969 Agreement.[42] Nonetheless, the aspect of the 1969 Agreement that has received the most attention is the Revenue Sharing Formula (RSF) designed to distribute the Common Revenue Pool (CRP) between the members of SACU.[43] The renegotiation of the agreement in its entirety only began in November 1994 and was eventually concluded 8 years later.[44] The result of these negotiations was the 2002 Agreement.

1.3.3 THE 2002 AGREEMENT

The 2002 Agreement, which forms the basis of this paper, represented a renaissance for SACU. It expanded the 1969 Agreement significantly and redefined SACU as a modern institution. The objectives of the 2002 Agreement are *inter alia*:

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[38] Article 17 of the SACU Agreement, 1969.
[39] Ibid.
[40] Kirk and Stern op cit (n31).
[41] History of SACU available at *www.sacu.int/about/history.html*, accessed on 5 June 2023.
[42] Kirt and Stern op cit (n31).
[43] Ibid.
[44] Ibid.

"*(a) to facilitate the cross-border movement of goods between the territories of the Member States;*

(c) to promote conditions of fair competition in the Common Customs Area;

(e) to enhance the economic development, diversification, industrialization and competitiveness of Member States; and

(f) to promote the integration of Member States into the global economy through enhanced trade and investment."[45]

Some of the key changes made were, *inter alia*, the establishment of SACU as an international organisation, and the creation of common SACU institutions including the SACU Secretariat.[46] Institutionally, the Secretariat was established as an independent administrative body responsible for the day-to-day administration of SACU.[47] There are several other independent institutions created under the new agreement, including, the Council of Ministers, the Customs Union Commission, the ad hoc SACU Tribunal and the SACU Tariff Board. These institutions were designed to enhance equal participation by member countries and joint decision making.[48] Moreover, there was a more robust attempt to coordinate policy in areas such as agriculture, industry, competition, and unfair trade practices, and protection of infant industries. A new revenue sharing formula was also devised by the new agreement to include a customs excise and development component.[49]

Central to the present discussion, however, are the amendments regarding the free movement of domestic products. The new agreement, save for a change in the terminology, from "free interchange of goods" to "free movement of domestic products" did not make any significant changes from the 1969 agreement with regards to the free movement of products within the customs union. The agreement maintained a central pillar of the customs union, being that goods grown, produced or manufactured within SACU shall be free of customs duties or quantitative restrictions upon importation from one member country to another.[50] Moreover, the agreement

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[45] Article 2 of the Agreement.
[46] Article 4(1) of the Agreement.
[47] Article 10 of the Agreement.
[48] About SACU, available at *https://www.sacu.int/show.php?id=394*, accessed on 1 June 2023.
[49] Article 34(4) and 34(5) of the Agreement.
[50] Article 18(1) of the Agreement.

also provided for goods imported from outside SACU to also be free of duty when imported from one member country to another, after duty has been paid upon first importation.[51]

However, much like the agreement before it, the rules espoused above did not come without exceptions. These exceptions will be dealt with in greater detail in the following chapter as they form a crucial part of this paper, but it suffices to say that these included, for example, the ability of members to limit trade not only for economic or cultural reasons but also for the protection of infant industries, national security and public morals.[52]

The history of SACU demonstrates its long-standing aim of achieving free trade amongst its member countries. This study addresses the question of whether the SACU Agreement of 2002 (the Agreement) is true to that objective.

1.4 BOTSWANA'S AGRICULTURAL PRODUCTS IMPORT BANS

Despite SACU's expansive history in the movement towards free trade, some of its members, and in particular, Botswana, has adopted measures which may appear contrary to that history. Over the past few years, Botswana has adopted temporary measures in the form of import bans primarily on fresh agricultural products. In 2020, these bans were given permanency by the promulgation of the Control of Goods (Import and Export of Agricultural Products) Regulations, Statutory Instrument No. 109 of 2020 (the Regulations) which introduced a ban on the importation of *inter alia*, fresh agricultural produce. In terms of section 3 the Regulations, no person shall import any of the agricultural products in the first schedule without a permit.

The First Schedule of the Regulations provided that the banned products included animal feed for poultry and livestock, bananas, beetroot, broccoli, butternuts, cabbage, carrots, cauliflower, cucumber, fresh milk, gem squash, green pepper, green beans, lettuce, maize, maize products, mangoes, onions, oranges, potatoes, pulses, pumpkin, sorghum, sorghum products, sweet potatoes, tomatoes, water melon and wheat.

[51] Article 19 of the Agreement.
[52] See Article 18 and 26 of the Agreement.

This ban was to last for an initial period of two (2) years and was implemented purportedly out of Botswana's need to promote its local production.[53] Currently, agriculture makes up less than two per cent (2%) of Botswana's Gross Domestic Product (GDP), meaning that the country is heavily reliant on imports. In terms of horticulture, Botswana's local production is only able to satisfy fifty-four per cent (54%) of local demand.[54] It is these sets of facts that the government of Botswana relies on as the rationale behind their import bans. At the end of 2023, Botswana announced an extension of its import bans on fresh produce which includes tomatoes, potatoes, onions and other produce and has now doubled the number of restricted items to 32.

The extension of the import bans has received wide criticism as potential violations of the SACU Agreement.[55] Unsurprisingly, the bans have been a source of great controversy within the region as relatively large quantities of South Africa's vegetable products are exported to countries in the SACU region and beyond.[56] Botswana in particular, is a significant trading partner to South Africa.[57] Thus, South African farmers and other industry stakeholders have come out to lament the measures as potentially catastrophic to South Africa's agricultural industry.[58] The argument is that the measures are not only unilateral on Botswana's part, but they also violate their commitments under the Agreement and thwart any real efforts towards full regional economic integration.[59]

Therefore, in this context, this study seeks to analyse the legality of the above-mentioned import bans under the Agreement. Furthermore, this research aims to determine the extent to which the Agreement makes provision for trade liberalisation, and more specifically, the extent to which SACU members are permitted to limit trade liberalisation. It proceeds to assess whether the

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[53] Tsotetsi op cit (n21).
[54] Botswana Country Commercial Guide – Agriculture Sector available at https://www.trade.gov/country-commercial-guides/botswana-agricultural-sectors, accessed on 5 November 2023.
[55] T Nkunjana and S Ntombela 'What are the Potential Implications of Vegetable Import Bans from South Africa by Botswana and Namibia?' available at Https://Www.Namc.Co.Za/Wp-Content/Uploads/2022/09/What-Are-The-Potential-Implications-Of-Vegetable-Imports-Ban-From-South-Africa-By-Botswana-And-Namibia.Pdf, accessed on 12 May 2023.
[56] Ibid.
[57] Ibid.
[58] SABC News 'SA Agricultural Producers Say Import Restrictions from Botswana and Namibia Hurting Their Businesses' available at *https://www.sabcnews.com/sabcnews/sa-agricultural-producers-say-import-restrictions-from-botswana-and-namibia-hurting-their-businesses/,* accessed on 1 June 2023.
[59] Tsotetsi op cit (n21).

Agreement's trade liberalisation provisions, that is the extent to which it allows for, among others, import bans, is in line with the requirements of Article XXIV of the GATT and in conformity generally with the rules of the multilateral trading system. As a starting point, this chapter provides a brief synopsis of the concept of trade liberalisation and gives a historical overview of SACU.

1.5 RESEARCH QUESTION AND OBJECTIVES

The main research question this study seeks to address is whether Botswana's import bans on agricultural products are consistent with the Agreement and in turn, whether the Agreement provides for trade liberalisation to the extent required by the rules of the GATT. In this regard, the study has the following objectives:

a) To critically analyze the Agreement and the extent to which it makes provision for trade liberalisation;

b) To critically assess whether the Agreement is consistent with Article XXIV of the GATT;

c) To review the provisions of the Agreement and determine whether Botswana's import bans are consistent with the Agreement;

d) To conduct a comparative analysis of the Agreement with other regional economic groupings namely, the East African Community Customs Union and the Economic Community of West African States.

1.6 RESEARCH METHODOLOGY

This research is literature based. Both primary and secondary resources are relied upon. Primary resources include the Agreement, the GATT, and other agreements, protocols and declarations of SACU, the WTO, Economic Community of West African States (ECOWAS) and the East African Community Customs Union (EACCU). Secondary resources utilised include books, journal articles, publications by international and non-governmental organisations, as well as unpublished academic articles. Internet sources will also be used to obtain additional information.

1.7 STRUCTURE OF THE STUDY

The outline of the study is as follows:

Chapter One

Chapter One provides a background and introduction to the paper with an overview of trade liberalisation generally, and a brief historical overview of SACU, including the renegotiated agreements that led to the promulgation of the 2002 agreement. It also discusses Botswana's recently implemented import bans, and delineates the objectives of the paper, and the methodology used.

Chapter Two

Chapter Two discusses the multilateral trading system and Article XXIV of the GATT, outlining the trade liberalisation principles and obligations applicable to World Trade Organisation (WTO) members and customs unions.

Chapter Three

Chapter three provides an analysis and review of the trade provisions of the Agreement, assessing their compliance with Article XXIV of the GATT.

Chapter Four

Chapter Four makes a comparative analysis of the Agreement with the East African Community Customs Union's Protocol and The Economic Community of West African States's Treaty of Lagos, which constitute foundational documents of other economic groupings in Africa.

Chapter Five

Chapter five provides the conclusion to this paper and in this chapter, the dissertation is summarised, observations are captured and recommendations are made.

2. CHAPTER TWO: THE MULTILATERAL TRADING SYSTEM

2.1 INTRODUCTION

It has been noted in the preceding chapter that Customs Unions (CUs) exist under the broader framework of the multilateral trading system as regulated by the World Trade Organisation (WTO). Whilst CUs can be argued to be a departure from the rules of the multilateral trading system, they are nonetheless permitted on the basis that they must promote deeper integration and freer trade amongst their member countries. Therefore, the legitimacy of any CU and that of any measures taken pursuant to any CU Agreement is derived from the General Agreement on Tariffs and Trade (GATT). Therefore, whereas the focus of this paper is on the legality of Botswana's import bans under the SACU Agreement of 2002 (the Agreement), it is nonetheless worthwhile to briefly explore the multilateral trading rules within which the Agreement operates before attempting to analyse Botswana's import bans as against these rules and the Agreement.

On that basis, this chapter serves a two-pronged purpose. First, this chapter sets the background for the analysis of the legality of import bans under the Agreement and to the assessment of whether the Agreement is compliant with the rules of the multilateral trading system. It provides a brief discussion on the history and rules of the multilateral trading system with a particular focus on market access (also known as trade liberalisation). Second, this chapter discuss Article XXIV of the GATT as an exception to these rules and delineates its requirements of a valid CU.

2.2 THE HISTORY OF THE WORLD TRADE ORGANIZATION

Trade has always been critical in advancing economic development and promoting peace among countries.[60] In fact, it can be argued that the rules that govern global trade today were born out of a desire to achieve, restore, and guarantee peace.[61] These rules make up the multilateral trading system. This system is regulated by the World Trade Organisation (WTO) whose origins lie in the General Agreement on Tariffs and Trade (GATT).[62] Before the GATT came into place, trade

[60] Mugano and Brookes op cit (n12).
[61] Ibid.
[62] Van den Bossche and Zdouc op cit (n7).

was conducted on a bilateral basis.[63] Trade relations were based on bilateral treaties and there was no multilateral cooperation, nor was there any institution solely responsible for overseeing international trade.[64]

The negotiations that ultimately led to the conclusion of the GATT were largely influenced by the interwar period of 1920 to 1940.[65] The adoption of restrictive and protectionist trade policies was seen as the cause of the economic troubles that prevailed at the time, and the war itself.[66] Consequently, there was a strong desire to create a new global economic system that fell on more liberal and non-discriminatory lines.[67] Thus the move towards trade liberalisation gained momentum with the hope of achieving the levels of integration and international cooperation that prevailed during the period before the war.[68]

As such, the United States of America (USA) entered into negotiations with its allies in 1945 with the objective of establishing an agreement for the reciprocal reduction of tariffs on trade in goods.[69] This agreement would eventually become known as the GATT. However, important as these negotiations were, they were only a part of a much bigger picture, which was the overarching intention of creating an international organisation dealing specifically with trade.[70] To this end, a Preparatory Committee was established in 1946 and convened to begin work on a charter for such an organisation. By October 1947 however, negotiations on the GATT were concluded in Geneva whilst those on the International Trade Organisation (ITO) trailed behind.[71]

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[63] Irwin and Douglas 'The GATT in Historical Perspective' (1995) The American Economic Review 85, no. 2: 323–28. http://www.jstor.org/stable/2117941.
[64] Ibid.
[65] H Zakir 'Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs' (2003) North Dakota Law Review: Vol. 79: No. 4, Article 3.
[66] Ibid.
[67] Pomfret and Richard. 'The Economics of Regional Trade Arrangements' (2001) 10.1093/0199248877.001.0001.
[68] DS Jacks and D Novy 'Trade Blocs And Trade Wars During The Interwar Period' (May 2019) Working Paper 25830 http://www.nber.org/papers/w25830 National Bureau Of Economic Research 1050 Massachusetts Avenue Cambridge, MA 02138.
[69] Van den Bossche and Zdouc op cit (n7).
[70] Ibid.
[71] Ibid.

Consequently, a decision was made to bring the provisions of the GATT into force immediately whilst negotiations on the ITO continued.[72] In 1948, the negotiations on the ITO were concluded in Havana, Cuba, however, the organisation suffered what has been termed as a "stillbirth". This is because although the negotiations were successfully concluded, the USA, which was the ITOs biggest proponent, could not achieve congressional approval. Therefore, given the non-participation of what was at the time the world's leading economy, the creation of the ITO was a failure.[73] Thus, the GATT as the only source of rules governing trade at the time, soared, and thrived with many countries looking to it to regulate their trade relations.[74] The agreement found itself as the *de facto* international organisation for trade.[75]

The GATT involved trade liberalisation through the reduction of tariffs and removal of quotas. Countries engaged in negotiations on specific issues regarding particular goods or affecting particular countries. On a larger scale, multilateral negotiations were held which are called "rounds" and these were very successful throughout the years, achieving average tariff levels of less than 4 percent between its inception and 1994.[76] During this period, eight rounds of negotiations took place. The first few of these were solely focused on tariff reduction. It is only during the Kennedy Round which began in 1964, where negotiations focused on other forms of trade liberalisation and on broader topics such as non-tariff barriers. However, because these issues involved more than just reducing tariff levels, very little progress was made as it was more difficult for member countries to reach consensus on the issues.[77]

The objectives of the Kennedy round were to reduce tariffs by half, to reduce restrictions of agricultural related trading and to remove non-tariff barriers.[78] As stated above, the Kennedy round had its own difficulties. First, participation in the negotiations had increased to over 60 countries, which itself made things much more complicated. Second, the discussions also expanded to include new trade rules on anti-dumping measures, for example. Nonetheless, the

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[72] R Santana 'GATT 1947 and the Grueling Task of Signing' available at *https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm*, accessed on 16 September 2023
[73] Van den Bossche and Zdouc op cit (n7).
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] HG Johnson 'The Kennedy Round' (August 1967) The World Today, Vol. 23, No. 8 pp. 326-333.

Kennedy round of negotiations is widely considered as very successful because the fifty-per cent reduction of tariffs was to a large extent achieved. [79]Notwithstanding that, it is during the Uruguay round, which took place from 1986 to 1994, that the face of international trade was truly changed forever. It at this point that the WTO was established after a formal proposal from Canada.[80] The Agreement Establishing the World Trade Organisation (Marrakesh Agreement) was concluded and subsequently signed in Marrakesh in April 1994 and entered into force in January 1 1995.

The latest round of negotiations is the Doha Round which was initiated in 2001 with the aim of reforming the international trading system by lowering barriers to trade and revising the trade rules in existence today.[81] In particular, these objectives were pursued out of the desire to improve the trading prospects of developing countries.[82] Today, however, the Doha Round is largely deemed to have failed.[83] The reasons for this failure will differ depending on who one asks, however, it appears that these reasons varied from the tensions arising out of the increased negotiating power of developing countries to general fears of increased globalization.[84] Despite this, the WTO continued to operate and is now described as "*…the only global international organisation dealing with the rules of trade between nations*."[85] Its functions include *inter alia*, the implementation and administration of multilateral and plurilateral agreements, to provide a forum for negotiations and to administer the Dispute Settlement Understanding.[86] At the time of

[79] Ibid.
[80] Ibid.
[81] The World Trade Organisation 'The Doha Round' available at *https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#:~:text=The%20Doha%20Round%20is%20the,about%2020%20areas%20of%20trade*, accessed on 3 February 2024
[82] Ibid.
[83] J Baghwati 'The Broken Legs of Global Trade', available at *https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art10.htm#:~:text=The%20Doha%20Round%2C%20the%20latest,all%20eminent%20trade%20scholars%20today*, accessed on 8 November 2023.
[84] Jones and Kent 'The Doha Round: What Went Wrong and What is at Stake?' (18 December 2014)) *Reconstructing the World Trade Organisation for the 21st Century: An Institutional Approach* (New York) Online edn, Oxford Academic, *https://doi.org/10.1093/acprof:oso/9780199366040.003.0001*, accessed on 6 January 2024.
[85] The WTO, available at *https://www.wto.org/english/thewto_e/thewto_e.htm*, accessed on 17 September 2023.
[86] Article III of the Agreement Establishing the World Trade Organisation.

this study, there are 166 members of the WTO which include all the members of the Southern African Customs Union (SACU).[87]

2.3 THE RULES OF THE MULTILATERAL TRADING SYSTEM

As mentioned above, the General Agreement on Tariffs and Trade (GATT) is the centre of the multilateral trading system. In addition to the GATT, there are also vast rules, agreements and other legal texts covering topics ranging from agriculture to intellectual property that regulate trade amongst countries. This entire system of multilateral agreements forms the multilateral trading system which governs international trade. However, all these legal texts are founded on basic principles considered fundamental to the multilateral trading system. Among them are, non-discrimination, market access and tariffication, binding tariffs and reciprocity.[88] For purposes of this research, this paper concerns itself with the principles of the market access and non-discrimination as they are core to trade liberalisation and are the rules to which CUs are an exception to.

2.3.1 NON-DISCRIMINATION

Non-discrimination is widely regarded as the foundational principle of the General Agreement on Tariffs and Trade (GATT) and consists of two principles encapsulated by Articles I and III of the GATT. The first, regarded as the most important of the WTO rules,[89] is the Most-Favoured Nation (MFN) principle which prohibits countries from discriminating between their trading partners. The second principle is the National Treatment (NT) principle which prohibits countries from discriminating against imported or foreign products.[90] The principle of secure and predictable access to markets is another foundational principle of the GATT. Member countries

[87] The World Trade Organisation '*Members and Observers*' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed on 16 September 2023.
[88] The World Trade Organisation 'Principles of the Trading System' available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#:~:text=More%20accurately%2C%20it%20is%20a,gain%20market%20share)%20and%20subsidies*, accessed on 16 September 2023.
[89] Van den Bossche and Zdouc op cit (n7).
[90] Ibid.

are generally required to eliminate quantitative restrictions on the import or export of goods.[91] Quantitative restrictions include import quotas and bans, subsides and technical barriers.

In terms of MFN principle/obligation, Article I (1) of the GATT prohibits the discrimination of like products from or destined for different countries.[92] It requires WTO member countries to give no less favourable treatment to one country than it does to any other WTO member or other country. The rationale for the principle was explained by the WTO Appellate Body (AB) in *EC – Bananas III* (1997)[93] where it held that the obligation called for equality in treatment of goods regardless of their origin. Thus, for example, Denmark, as a European member country may be in breach of its MFN obligations if it were to establish a new import regime that had higher tariffs and stricter rules for bananas from Colombia in Latin America than it applied to bananas from other countries outside of Latin America.[94] Therefore, any *"…advantage, favor, privilege, or immunity*" extended to one country must, in terms of the MFN obligation, be extended to all other countries as well. In terms of scope, MFN applies to both border measures and internal measures and includes *inter alia*, customs duties or charges levied in connection with importation or exportation, internal taxes or other charges and laws and regulations affecting the internal sale of goods.[95]

There is no stipulation that this obligation only applies to discriminatory laws and regulations, it also applies where measures seem origin neutral on their face but are in fact discriminatory as established by the jurisprudence from the Panel Reports and the AB.[96] For example, in the *Canada Autos case*,[97] Canada had implemented duty exemptions that applied to motor vehicle imports by certain manufacturers. Whilst these exemptions did not mention any country, upon close inspection, the main beneficiaries were US based auto manufacturers and in practice they

[91] Ibid.
[92] Appellate Body Report, Canada Autos DSI139, 142 (2002).
[93] DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas.
[94] This example is borrowed from the facts of EC Bananas III (1997).
[95] Van den Bossche and Zdouc op cit (n7).
[96] Panel Reports are decisions issued by Panels established in terms of Article 6 of the Dispute Settlement Understanding which governs the procedure for the settlement of disputes between WTO member countries. Whilst panel reports are not binding, they create legitimate expectations amongst WTO member countries. See Japan Alcoholic Beverages II WT/DS11.
[97] DS139: Canada — Certain Measures Affecting the Automotive Industry.

imported only their own automobiles duty-free.[98] Thus, the AB ruled that the exemptions violated Canada's MFN obligations as they constituted de facto discrimination.

With regards to the NT obligation, and in distinction to the MFN obligation, member countries are prohibited from discriminating against other countries. Article III of the GATT prohibits the less favourable treatment of imported goods than that afforded to like domestic goods upon entry into the market. The purport of Article III is to guard against protectionism.[99] In summation therefore, WTO members are not permitted to discriminate against or between countries and their goods regardless of whether the discrimination is in the form of laws, regulations, or practice. The GATT covers a wide range of instances that prohibit this.

2.3.2 MARKET ACCESS

Market access, or trade liberalisation is considered to be the core of the rules of the multilateral trading system as there cannot be any international trade if countries do not have access to each other's markets.[100] As briefly mentioned in the first chapter of this paper, market access can be restricted by either tariff barriers or non-tariff barriers (NTBs). Tariff barriers include customs duties, other duties and charges that may be applied on imports and exports.[101] On the other hand, non-tariff barriers essentially include all other measures that are not tariff barriers but are nonetheless barriers to trade.[102] These include inter alia, quantitative restrictions, quotas, import and export bans, and unjustified imposition of sanitary and phytosanitary (SPS) measures and other technical barriers to trade.[103]

As import bans form the subject of this paper, this chapter focuses on NTBs which are the broader category to which import bans belong. To that end, NTBs are generally governed by Article XI of the GATT as well as the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the WTO Agreement on Technical Barriers to Trade. For purposes of this paper, only the obligations emanating from Article XI of the GATT

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[98] Ibid.
[99] Japan – Alcoholic Beverages II (1996) at 16.
[100] Van den Bossche and Zdouc op cit (n7) at page 456.
[101] Ibid.
[102] Van den Bossche and Zdouc op cite (n7) at page 522.
[103] Ibid. See also 'Non-Tariff Barriers To Trade' available at https://tradebarriers.org/ntb/non_tariff_barriers.

will be discussed. Article XI of the GATT prohibits the imposition of prohibitions or other restrictive measures on the importation or exportation of any goods or on the exportation of any goods for sale.[104]

In particular, Article XI:1 of the GATT reads as follows:

> "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party*."

In *Japan – Semi Conductors* the Panel held that Article XI:1 applied to all measures that prohibited or restricted the importation, exportation or sale for export of products other than measures that are in the form of duties, taxes or other charges.[105] The broadness of this provision has been noted to include not just laws and regulations but all types of measures that may be implemented by a country.[106] Therefore, in terms of the GATT, countries are required to provide predictable market access to other member countries and this requirement comes in the form of a prohibition of quantitative restrictions in terms of Article XI as discussed.

However, paragraph 2 of Article XI of the GATT makes provision for certain instances where member countries can temporarily deviate from this requirement. Article XI:2 of the GATT provides that:

> "*The provisions of paragraph 1 of this Article shall not extend to the following:*
>
> *(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;*

[104] Article XI of the GATT.
[105] Panel Report Japan – Semi Conductors (1988).
[106] Ibid.

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:*

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible."

Thus Article XI:2 permits members to restrict trade through measures necessary for the obtainment of the objectives stated therein. Despite the existence of Article XI as discussed, there were some challenges with adherence to the provision which led to the adoption of the Agreement on Agriculture during the Uruguay Round, which governs quantitative restrictions in relation to agricultural products.[107] Article 4 of the agreement mandates member countries to eliminate quantitative restrictions and instead, transform them into tariffs. Thus generally, member countries of the WTO are mandated to eliminate NTBs including import restrictions and bans and this is a core principle of the rules of the multilateral trading system.

[107] Van den Bossche and Zdouc op cit (n7).

2.4 EXCEPTIONS TO THE RULES OF THE MULTILATERAL TRADING SYSTEM

The previous section highlighted some rules of the multilateral trading system. However, there are specific instances in the GATT where WTO members are permitted to deviate from the core rules of the multilateral trading system. These exceptions can be categorized into general exceptions, security exceptions and waivers. It is not the intention of this part to engage into a detailed discussion of all of these exceptions, but to highlight the key exceptions, particularly those that may be relevant in the imposition of trade restrictive measures such as import bans.

2.4.1 GENERAL EXCEPTIONS

Article XX of the GATT provides the general exceptions to the GATT principles and provides that:

> "*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*
>
> *(a) necessary to protect public morals;*
>
> *(b) necessary to protect human, animal or plant life or health; .....*
>
> *(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;*
>
> *(e) relating to the products of prison labour;*
>
> *(f) imposed for the protection of national treasures of artistic, historic or archaeological value;*
>
> *(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"*

The omitted provisions of Article XX quoted above are not commonly used in the WTO and as such a discussion on them is not necessary. Nonetheless, Article XX allows member countries to adopt measures that are inconsistent with the GATT provided that they fall within the categories listed in Article XX. In this regard, Article XX starts off with a *chapeau* of which the relevant part states that *"…Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures...*"

The *chapeau* forms part of the two-tiered test required in order to invoke Article XX. The first tier of the test is that a restrictive measure must fall within one of the exceptions listed in in the provision, namely the categories in Article XX(a)-(j) . The second tier of the test is that the restrictive measure must satisfy the *chapeau* of Article XX. In this regard, the measure must not constitute "a means of arbitrary or unjustifiable discrimination" nor can it constitute "a disguised restriction on trade".[108] In interpreting this provision, the AB in *Brazil – Retreated Tyres*[109] held that in determining whether a measure is "*necessary*" several factors were worthy of consideration. Chief amongst them, "…the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness".[110]

If upon undertaking this exercise the result is that the measure is necessary, then a further inquiry must be carried out into the availability of less restrictive trade measures.[111] Thus the "*necessary*" qualifier as used in paragraphs (a), (b), (d) and (i) has a clear definition with rich jurisprudence from the AB and various panel reports on the paragraphs exact content and meaning.[112] Thus, the extent to which WTO members can impose trade restrictive measures

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[108] US - Gasoline WT/DS2//AB/R 29 Aprill 1996.
[109] DS332: Brazil — Measures Affecting Imports of Retreaded Tyres.
[110] Ibid.
[111] Ibid.
[112] See GATT Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand–Cigarettes), BISD 37S/200; see also GATT Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand – Cigarettes), BISD 37S/200, 223 and see also Korea-Measures Affecting Imports of

under Article XX is delineated quite clearly. The GATT Panel in US – Section 337 Tariff Act stated that the defence in Article XX(d) is a "limited and conditional" exception to GATT provisions. The GATT Panel used the term "limited" because the list of exceptions in Article XX is exhaustive and no other exceptions are permissible thereunder. Furthermore, the Panel also used the term "conditional" because Article XX only provides for the justification of a GATT-inconsistent measure when the conditions set forth in Article XX are fulfilled.[113]

It is important to note that Article XX can only be invoked by a member country when a measure has already been found to be inconsistent with another provision of GATT.[114] From the above, it is also appropriate to characterize Article XX essentially as a balancing provision between trade liberalisation, market access and non-discrimination and societal values and interests. As Van Den Bosche notes, Article XX recognizes that whilst trade liberalisation is an important objective of the member countries', there are other objectives and values that at times, may have to be prioritized over trade liberalisation.

Notwithstanding this, this study takes the position that Article XX is drafted in strict terms that prevent member countries from being able to sneak in restrictions on the basis of protecting other values. Article XX requires measures to be, among others, necessary and connected to the objectives envisaged and overall not to be a disguised restriction on trade. This is an important limitation which guards against the abuse of the exception offered to member countries. For purposes of this research, it is worthwhile to note that Article XX does not recognize developing local production or protecting infant or local industries as an objective which may justify the imposition of restrictions. Therefore, at least in terms of Article XX, a country cannot adopt trade restrictive measures in order to encourage their own local production.

2.4.2 EXCEPTIONS RELATING TO REGIONAL TRADE AGREEMENTS

Regional Trade Agreements (RTAs), including customs unions, represent an exception to the principles discussed above as espoused by Articles I, III and XI of the GATT. As already

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Fresh, Chilled and Frozen Beef, adopted on 10 January 2001, [WT/ DS169/, Panel Report, WT/DS169/AB/R, AB Report].

[113] DS186: United States — Section 337 of the Tariff Act of 1930 and Amendments thereto.

[114] Van den Bossche and Zdouc op cit (n7).

mentioned at the beginning of this chapter, the proliferation of RTAs is well noted by many scholars, with some suggesting that they can no longer be regarded as only an exception to the rules of the multilateral trading system. The legal framework for these exceptions is found in Article XXIV of the GATT.

Article XXIV of the GATT has not been without controversy, and it is necessary to traverse its history briefly. As noted at the beginning of this chapter, the interwar period was catalytic in the negotiations that culminated in the GATT. The prevailing view at the time, particularly from the USA was that the adoption of protectionist policies was the cause of the political and economic troubles that persisted at the time, and therefore there was great appetite for the creation of a post-war multilateral economic order that was on more liberal terms.[115] In fact, it is well documented that the USA was a strong advocate for the MFN principle.[116]

However, there was some opposition to the USA's all liberal multilateral trade desires. For the British, a multilateral trading regime posed a challenge as Britain was faced with a growing number of its Commonwealth members becoming independent countries. As a result, there was a strong desire to keep and strengthen its ties with these countries, and maintaining trade relations on a preferential basis with these countries was seen as an important way of doing so.[117] Despite the USA's reservations, there was an appreciation of the potential economic benefits of CUs and more importantly, CUs were considered integral for the unification of Europe.[118]

Consequently, an exception allowing for the formation of CUs "…for customs purposes of any customs territory and any other customs territory" first appeared as Article 33 of the Suggested Charter for an International Trade Organisation (Suggested Charter).[119] From there, throughout the several negotiations and drafts, the exception developed from only applying to CUs to

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[115] JH Jackson *World Trade and the Law of GATT: (A Legal Analysis of the General Agreement on Tariffs and Trade)* (1969) Indianapolis: Bobbs-Merrill.
[116] Ibid.
[117] Zakir op cit (n65).
[118] Ibid.
[119] K Chase 'Multilateralism compromised: the mysterious origins of GATT Article XXIV' (2006) *World Trade Review*, *5*(1), 1–30. doi:10.1017/S1474745605002624.

including Free Trade Agreements and interim agreements and becoming the Article XXIV of present day.[120]

It is important to highlight that Article XXIV accepts the position that CUs are consistent with the WTO's market access and non-discrimination principles and to that end, are viewed as key building blocks to multilateralism.[121] Paragraph 4 of Article XXIV expresses the desirability of freer trade that can be achieved through deeper integration between parties to a RTA.[122] It further provides that the purpose of RTAs should be to "…facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."[123] Thus an important element of these regional groupings made pursuant to Article XXIV of the GATT is that they must facilitate trade between their members. Article XXIV recognizes and classifies various forms of RTAs according to the level of economic integration existing in each one of them. It specifically mentions CUs, FTAs and interim agreements. RTAs can also be in the form of common markets and economic unions as well.[124]

However, as this paper is solely concerned with the Agreement, which creates the Southern African Customs Union (SACU), the focus of the discussion on Article XXIV and its requirements will be on the requirements relating to CUs only. Article XXIV(5) provides for what is often referred to as the "external requirement" that ought to be met for the formation of a GATT compliant CU. Article XXIV(5)(a) allows for the formation of a CU if "...the duties and other regulations of commerce imposed upon its formation are not, on the whole, higher or more restrictive than the general incidence of those applicable in the constituent territories before the CU was formed." This provision mandates that the formation of CUs must have no negative impact on, or in other words, have a "neutral effect" on other countries that are non-members of the CU.[125]

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[120] Ibid.
[121] Zakir op cit (n65).
[122] Article XXIV(4) of the GATT.
[123] Ibid.
[124] Zakir Supra op cit (n65).
[125] JT Gathii 'African RTAs in the context of Article XXIV of the GATT,' in *African Regional Trade Agreements as Legal Regimes* (2011) Cambridge: Cambridge University Press (Cambridge International Trade and Economic Law), pp. 86–142. doi: 10.1017/CBO9780511994821.007.

Moreover, there is a transparency obligation imposed on CUs by requiring their formation be notified to the WTO.[126] From the requirements discussed thus far, no significant issues arise. Much of the challenges present themselves in the provisions that follow. In defining a CU, paragraph (8)(a) of Article XXIV of the GATT is instructive. It provides that a CU means the substitution of a single customs territory for two or more customs territories.[127] This means that instead of each country having its own and separate "foreign trade regime" the members of a CU would adopt a single common one.[128]

Article XXIV (8)(a) then continues to define a CU based on two key characteristics. First, a CU must make provision for the liberalisation of substantially all trade between its members.[129] Second, a CU must create a Common External Tariff (CET) applicable to imports from outside the CU.[130] In terms of the latter requirement, it only calls for a CU to have a tariff rate uniformly applied to countries from outside the union. It is the former requirement which has been the cause of great debate, and which this portion of the chapter shall consider in more detail.

In terms of this requirement, a CU is required to provide for the liberalisation of *"substantially all trade"* between its members. Within this requirement, the term “substantially all trade” has been a contentious issue in international trade circles, particularly as the term is not defined in the GATT. To this day, there has not been agreement as to the true meaning of the term and therefore the extent to which a CU must liberalize trade amongst its members is not clear. In an attempt to cure this vagueness, in 1994 members adopted The Understanding on the Interpretation of Article XXIV (the Understanding).

However, this Understanding is criticized for not being useful in addressing the “substantially all trade” issue.[131]Indeed ironically, the Understanding does not assist in understanding the issue. Aside from a vague reference to “all trade” in its preamble, the Understanding does not as one author put it, “…clarify the provision in any meaningful way”.[132] Whereas this criticism is true

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[126] Article XXIV 7(a) of the GATT.
[127] Article XXIV 8(a) of the GATT.
[128] Turkey - Restrictions on Imports of Textile and Clothing Products Panel Report at para 144.
[129] Article XXIV 8(a)(i) of the GATT.
[130] Article XXIV 8(a)(ii) of the GATT.
[131] Gathii op cit (n125).
[132] Ibid at pg. 101.

in that the Understanding does not provide any guidance on "understanding" the provision, a reasonable assumption can be made that some trade may be left out of a CU's trade liberalisation framework by virtue of the fact that Article XXIV does not use a more all-encompassing term such as "all trade" and instead opted for "*substantially all trade*" in Article XXIV 8(a)(i).[133] Exactly how much however, is what remains unclear. To this end, there are three main schools of thought that have prevailed over the years on the definition of the term "*substantially all trade*".

The first one is a quantitative approach to defining the term. It posits that the term means that a certain percentage of trade between member countries, preferably a high one, must be liberalized regardless of which sectors are included or excluded from that percentage.[134] For example, countries belonging to a CU can agree to liberalize 85% of trade between them. Under this interpretation, an entire industry can be excluded from a CU's liberalisation framework and the CU would nonetheless be considered GATT compliant as long as it meets the 85% threshold.[135] The European Union (EU) for example, has indicated a preference for this interpretation, at least in its free trade agreements with other countries opting for defining "*substantially all trade*" as meaning liberalizing 90% of trade. This interpretation is problematic for obvious reasons. It means that a CU can exclude a major industry from its liberalisation framework as long as it has liberalized the required percentage of trade. However, it is worthwhile to note that despite this erstwhile position, the EU has indicated an openness to the position that the requirement under Article XXIV 8(a)(i) is much stricter than 90% and requires that no sector be left out.[136]

The second interpretation is a qualitative one which takes cognizance of the problem that arises when a purely quantitative approach is taken in interpreting the internal trade requirement of Article XXIV. The qualitative approach requires that no sector be left out of a CU's intra-trade liberalisation scheme.[137] It prevents the exclusion of any sector by measuring the quality, and not quantity of the elimination of barriers to trade.[138] For example, under this interpretation of the

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[133] Chase op cit (n119).
[134] Zakir op cit (n65).
[135] Ibid.
[136] S Woolcock 'European Union policy towards Free Trade Agreements' (2007) ECIPE Working Paper, No. 03/2007, European Centre for International Political Economy (ECIPE), Brussels available at: *http://hdl.handle.net/10419/174818*.
[137] Zakir op cit (n65).
[138] Zakir op cit (n65).

term it would not be enough to only liberalize a certain percentage of trade without ensuring that every sector is liberalized as well.

The third approach seeks to achieve harmony between the conflicting interpretations, accepting the position that *"substantially all trade"* consists of both qualitative and quantitative requirements. This approach is derived from the fact that the term "substantially" only appears again in paragraph 8(a)(ii), a provision which the AB has had the opportunity to opine on. In *Turkey's Restrictions on Textiles case*[139] India had launched a dispute against Turkey for its restrictions on the imports of some categories of textiles and clothing that affected India. India alleged that these restrictions violated Articles XI and XII of the GATT as well as Article 2.4 of the Agreement on Textiles and Clothing. In its defence, Turkey argued that the restrictions were in terms of its CU with the European Community and where therefore legal in terms of Article XXIV of the GATT.

Whilst the Panel rejected Turkey's defence in this regard, the more important decision came from the AB which held that "*substantially*" in the context of Article XXIV 8(a)(ii) accommodated both qualitative and quantitative components.[140] Therefore, if one were to borrow from this interpretation on the basis of the similar wording used, it would appear that the "*substantially all trade*" requirement in paragraph 8(a)(i) also encompasses both quantitative and qualitative requirements. That is to say, in providing for the extent to which trade in goods may be excluded from a country's internal trade liberalisation programme within an RTA such as a CU, an RTA cannot be couched in such a manner so as to allow its member countries to be able to exclude an entire industry.

It is worthwhile to note that the case law discussed above demonstrates the jurisprudence on assessing RTA compliance with Article XXIV and the difficulties inherent therein. To that end, it is important to highlight that the WTO has other mechanisms of assessing RTA compliance and these mechanisms have equally faced their own difficulties. As discussed above, Article XXIV requires that all RTAs be notified to the WTO. Pursuant to this, the notification of RTAs

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[139] DS34: Turkey — Restrictions on Imports of Textile and Clothing Products.
[140] Ibid *at* para. 49.

in practice triggered the formation of Working Parties which were responsible for assessing RTAs for GATT compliance.[141]

The mandate of a Working Party is usually to examine an RTA in light of the relevant provisions of the GATT.[142] After examination, a report is prepared and sent to the General Council which then adopts the reports and makes recommendations.[143] Whilst this process seems simple enough, the Working Party system has been far from successful. Only one Working Party has ever made the conclusion that an RTA was in full conformity.[144] In somewhat of a paradox, no RTA has ever after the examination process, been found to not be in conformity with the GATT.[145] The somewhat inconclusive and essentially ineffective nature of the Working Party's reports was because of the reluctance to shun any RTA whose members were members of the WTO.[146] Naturally, this stunted the work and nullified the purpose of Working Parties.[147]

Consequently, as an attempt to improve this process, the General Council in 1996 instituted the Committee on Regional Trade Agreements (CRTA) in order to replace the Working Party process. In particular, the terms of reference of the Committee were:

(a) to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action;
(b) to consider how the required reporting on the operation of such agreements should be carried out and make appropriate recommendations to the relevant body;
(c) to develop, as appropriate, procedures to facilitate and improve the examination process;

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[141] J Crawford and S Laird 'Regional Trade Agreements and the WTO' Centre for Research in Economic Development and International Trade, University of Nottingham CREDIT Research Paper No. 00/3.
[142] Ibid.
[143] Ibid.
[144] J Crawford 'A New Transparency Mechanism For Regional Trade Agreements' (2007) Singapore Year Book of International Law and Contributors.
[145] Ibid.
[146] Ibid.
[147] Ibid.

(d) to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them, and make appropriate recommendations to the General Council; and
(e) to carry out any additional functions assigned to it by the General Council.[148]

According to the WTO, the establishment of the CRTA helped improve the efficacy of examining RTAs and also created a platform for the discussion of issues involving RTAs and their relationship to the multilateral trading system at a wider level.[149] However, at the time of writing this paper, no report had been forthcoming that covered the issue of *substantially all trade vis a viz* the Agreement.

CONCLUSION

In conclusion therefore, this chapter has traversed the general rules of the multilateral trading system and has highlighted that chief amongst these rules, is market access. Under the GATT, member countries are mandated to grant each other access to each other's markets and to eliminate all quantitative restrictions such as import bans. This is a key prohibition that emanates from Article XI of the GATT and from the Agreement on Agriculture. However, this chapter has also discussed that there are some general exceptions and regional trade agreement exceptions through which members may be able to derogate from the market access obligations. Through the discussion on exceptions, it has become clear that in order to comply with the rules of the multilateral trading system, a customs union must conform to the requirements of Article XXIV of the GATT and must, to that end, liberalize substantially all trade amongst its members.

This chapter has revealed that the requirement under Article XXIV of the GATT regarding customs unions is not clear. However, for purposes of this paper, preference is made to the approach that a in its trade liberalisation scheme, must embrace qualitative and quantitative elements such that the members of a customs union are not permitted to exclude an entire industry from its trade liberalisation scheme. This means that any agreement creating a customs union that allows for its members to be able to exclude entire industries from liberalisation is not

[148] General Council, Committee on Regional Trade Agreements, Feb. 6, 1996, WTO Doc. WT/L/127 (Feb. 6, 1996).
[149] The World Trade Organisation 'Work on RTAs prior to the establishment of the Committee on RTAs' available at https://www.wto.org/english/tratop_e/region_e/rta_prior_establishment_e.htm, accessed on 17 August 2023.

in compliance with Article XXIV of the GATT. This approach is preferred because it is more in line with the principles of free trade and the GATT as it goes against the notion of being able to exclude an entire industry as discussed above. This paper takes the position that such an approach appears to be a more reasonable middle ground, and an interpretation of Article XXIV which is more purposive. Having laid the foundation of the international trading system constructed by the GATT, the next chapter directs the focus to the Southern African Customs Union Agreement 2002, which is the current governing instrument for SACU.

3. CHAPTER THREE: THE SACU AGREEMENT OF 2002: AN ANALYSIS

3.1 INTRODUCTION

The SACU Agreement of 2002 (the Agreement) was a renaissance moment for the Southern African Customs Union (SACU) ushering the Customs Union (CU) into the 21st century. The Agreement came into force on the 15th of July 2004 and was signed by Botswana, Lesotho, Namibia, South Africa and Swaziland (now Eswatini) (BLNS).

This chapter provides a brief overview of the Agreement, highlighting only in passing some of its key provisions. The chapter focuses on the provisions relating to trade liberalisation which are found in Part Five of the Agreement. Thus, this chapter critically analyses some of these provisions with the aim of establishing to what extent they provide for trade liberalisation. This is done with the objective of determining whether Botswana's import bans are legal under the Agreement. This chapter winds up by analysing whether the Agreement's trade liberalisation framework is consistent with the GATT.

3.2 THE SACU AGREEMENT OF 2002: AN OVERVIEW

The SACU Agreement of 2002 (the Agreement) came on the back of significant political changes particularly in Namibia and later, South Africa. The Agreement was borne out of the inadequacy of its predecessor and the need to align the CU with the needs of modern times.[150] It had the effect of dissolving South Africa's dominant position in SACU with regard to the setting of the customs tariffs and placed the powers of democratic decision making in the Council of Ministers which represented all member countries. Furthermore, it reinvented SACU as an organisation with various institutions including a Secretariat.[151] Additionally, it sought to address the vast economic disparities between South Africa and the BLNS States, and moved towards policy harmonisation, coordination and developed a more equitable and sustainable revenue-sharing formula.[152]

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[150] Preamble of the Agreement.
[151] Article 7 and 8 of the Agreement.
[152] Article 2 of the Agreement.

The Agreement has nine parts spanning over fifty-one provisions. As a Regional Trade Agreement (RTA), it was crafted with the rules of the multilateral trading system in mind, as well as the members' existing obligations under other RTAs.[153] Article 3 of the Agreement establishes SACU as a CU with its headquarters in Windhoek, Namibia.[154] It is established as an international organisation with full legal capacity to *inter alia*, enter into contracts, and sue and be sued.[155] Provision is also made for the admission of new members by unanimous decision of the Summit.[156]

Institutions such as the Heads of State or Government (the Summit), the Council of Ministers (the Council), the Secretariat and an *ad hoc* Tribunal are also created under Article 7 of the Agreement. The Summit is the highest institution of SACU, and it determines the direction of the CU, oversees the work of the Council, and passes the relevant legislation.[157] The Council is the central authority of SACU charged with making decisions on policy and the functioning of the institutions, together with appointing key personnel, approving budgets and overseeing the implementation of policies of SACU.[158]

The Secretariat is responsible for the day-to-day administration of the CU.[159] In particular, it "…shall coordinate and monitor the implementation of all decisions of the Summit, the Council and the Commission."[160] It is also responsible for other mundane tasks such as arranging meetings and keeping records.[161] Other institutions created by the Agreement include a Tariff Board, a Customs Union Commission, Technical Liaison Committees and an ad hoc Tribunal.[162] Aside from the creation of institutions and trade liberalisation, the Agreement also makes provision for a common revenue pool (Part 6), revenue sharing (Part 7) and common policies (Part 8).

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[153] Ibid.
[154] Article 3(1) and Article 3(2) supra.
[155] Article 4(1) supra. SACU is also clothed with the powers to own or dispose of immovable property.
[156] Article 6(2) supra.
[157] Article 7A(2), (3), and (4) supra.
[158] Article 8 supra.
[159] Article 10(1) supra.
[160] Article 10(2) supra.
[161] See Article 10(3) to (10) supra.
[162] See Articles 11, 9, 12 and 13 respectively of the Agreement.

As stated in the first chapter, the objectives of the Agreement include, *inter alia*, the facilitation of cross border movement of goods between member countries and the promotion of integration between them through enhanced trade and investment. In that respect, the Agreement takes into account "…the results of the Uruguay Round of Multilateral Trade Negotiations on global trade liberalisation".[163] This round is regarded as the most successful of the WTO rounds of negotiations spanning over eight issues including agriculture, market access, intellectual property, technical barriers to trade, sanitary and phytosanitary measures and rules of origin. Generally, the round led to more clarity as regards trade rules and a strengthening of the same.

The Agreement's commitment to the results of this round is evidenced by the first objective of the Agreement being to facilitate the movement of goods between member countries.[164] Therefore, trade liberalisation is a key objective of the Agreement. Trade liberalisation is provided for under Part five of the Agreement and thus a more in-depth discussion on Part five follows below.

3.3 IMPORT BANS AND TRADE LIBERALIZATION UNDER THE SACU AGREEMENT OF 2002

In terms of trade liberalisation, it is important to recall that as part of its own objectives, the SACU Agreement of 2002 (the Agreement) aims to facilitate the cross-border movement of goods between the territories of the member countries.[165] Also important to recall from Chapter One, is that trade liberalisation generally involves the elimination of barriers to trade including non-tariff barriers (NTBs) such as import bans. To this end, Article 18 of the Agreement provides that except in the circumstances provided for elsewhere under the Agreement, "…Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one member country to the area of another member country, shall be free of customs duties and quantitative restrictions…".

Thus, as a general rule, the free movement of locally produced goods is guaranteed under the Agreement. This guarantee is also provided for goods imported from outside SACU by SACU

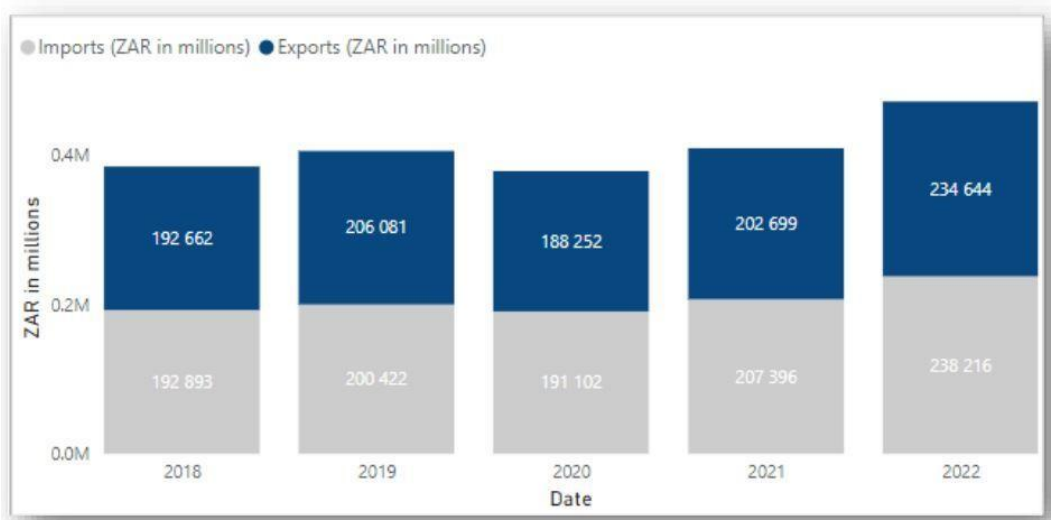
[163] Preamble supra.
[164] Article 2(a) of the Agreement.
[165] Ibid.

members, when they are being traded from one member country to another, after duty has been paid upon first importation.[166] Therefore, by guaranteeing the free movement of goods Article 18 guarantees the liberalisation of trade within the CU. As such, Article 18 is generally in line with the definition of a CU provided for in Article XXIV of the General Agreement on Tariffs and Trade (GATT) which as discussed in Chapter Two, provides that "duties and other restrictive regulations of commerce" shall be eliminated with respect to substantially all of the trade between the members. Consequently, in relation to goods from the members of SACU, Article 18 is compliant with the "elimination of duties and other restrictive regulations of commerce" aspect of the obligation espoused in Article XXIV.

The regulatory aspects of the free movement of goods provided for under Article 18 are stipulated in Article 28 of the Agreement which states that member countries shall apply product standards in accordance with the contents of the World Trade Organisation Agreement on Technical Barriers to Trade (TBT Agreement) and shall further strive to harmonize product standards and technical regulations. The guarantee on the free movement of goods in Article 18 appears to be fruitful as in terms of intra-SACU trade. Statistics, as at the time of writing, indicate that intra-SACU imports totalled R238.2 billion in 2022 reflecting an increase of R30.8 billion from R207.4 billion recorded in 2021.[167] As regards intra-SACU exports, these have also been recording as increasing following a decline in 2020.

[166] Article 19 of the Agreement.
[167] The SACU Revenue Management Sub-Directorate 'SACU in Figures 2023' 30th January 2024.

Figure 12: Intra-SACU Trade (R million)



Source: *SACU in Figures 2023* Prepared by the Revenue Management Sub-Directorate 30th January 2024.

However, the free movement of goods as provided for by Article 18 of Agreement is subject to limitations. Under these exceptional circumstances member countries are permitted to impose restrictions. First, Article 18(2) of the Agreement of 2002 provides that member countries are permitted to impose restrictions on imports or exports in accordance with their domestic legislation for purposes of the protection of:

"(a)health of humans, animals or plants;

(b) the environment;

(c) treasures of artistic, historic or archaeological value;

(d) public morals;

(e) intellectual property rights;

(f) national security; and

(g) exhaustible natural resources."[168]

Therefore, it appears from a plain reading of Article 18(2) that member countries are permitted to adopt trade restrictive measures for the purposes espoused therein which are often termed as "legitimate objectives". It is worthy to note that the exception under Article 18(2) was not present in the 1969 Agreement. As previously discussed in Chapter Two, Article XX is the general exceptions clause of the GATT which allows members to adopt trade-restrictive legislation for the protection or promotion of "legitimate objectives".

A side-by-side comparison of Article 18(2) of the Agreement and Article XX of the GATT reveals that Article 18(2) was an attempt to replicate Article XX of the GATT or at the very least, drew inspiration from it. However, despite this, Article 18(2) of the Agreement lacks some key features in the form of wording, that would allow it to function in the same way as Article XX. As discussed in Chapter Two, Article XX contains a two-tier test which requires that any measures adopted must be for the furtherance of the objectives stated therein, and that they must satisfy the *chapeau*, that is, not be a disguised restriction on trade. Whilst Article 18(2) may be said to have the first tier of the test, it does not have a *chapeau* to prohibit disguised restrictions against trade. In amplification of this, Article XX enjoys a broader range of justifications for the adoption of trade restrictive measures compared to Article 18(2). Moreover, unlike Article 18(2), does not make reference to national security. It contains qualifiers within the different paragraphs that are important in its interpretation.[169] For example, paragraph (b) allows members to adopt restrictive measures "necessary to protect human, animal or plant life or health...".

Article XX of the GATT takes cognisance of the fact that trade liberalisation, market access, non-discrimination and other trade principles and objectives may conflict with other societal objectives and thus it reconciles the former with the need to protect and promote the latter.[170] Similarly, Article 18(2) of the Agreement also recognizes other objectives that may need to be prioritized over trade liberalisation. However, Article 18(2) of the Agreement does not share the same wording of Article XX of the GATT, despite what appears to be both provisions' similar

[168] Article 18(2) (a)-(g) of the Agreement.
[169] Ng'ong'ola op cit (n37).
[170] Ibid.

intentions. Whilst Article 18(2) of the Agreement it is an attempt at replicating Article XX, it is not a complete one. In Article 18(2), the paragraphs under which SACU member countries can rely on as justification for imposing trade restrictive measures do not have the qualifiers such as the word "*necessary*" that the paragraphs in Article XX have. One then wonders whether this omission was deliberate. Particularly so as the Agreement came some years after the promulgation of the GATT, and after there had been case law on the issue. That being the case, does this then means that SACU members are not subject to requirements of necessity of their measures and the inquiry into whether other less trade restrictive measures were available? It would appear that as the Agreement does not mention these requirements, SACU's members are exempted therefrom.

Moreover, unlike Article XX, Article 18(2) does not have a *chapeau*. There is no introductory paragraph with pre-requisites that must be met before the provision's invocation. The purpose of a *chapeau* has been laid out succinctly in the *US – Gasoline case* wherein the AB held that:

> "The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the GATT 1994. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[171]

Thus, the purpose of the *chapeau* of Article XX is to prevent measures that are only temporarily allowed, from being abused and used to negate rights and obligations created under the GATT.[172] Consequently, in the absence of a *chapeau*, a provision would be open to being abused as aforesaid. The Agreement does not contain a requirement for the measures adopted by member countries to not be arbitrary or unjustifiable and to not constitute a disguised restriction on trade. Consequently, it seems that member countries can impose any restrictions to achieve any of the

[171] US - Gasoline WT/DS2//AB/R supra.
[172] Van den bosche and Zdouc op cit (n7).

goals listed in Article 18(2) without having to meet the requirements under Article XX of the GATT.

Whereas certainly Article 18 may have been drafted with good intentions, its current form leaves it open to being abused. Member countries of SACU may take advantage of the liberal nature in which it is drafted and impose restrictions that are not necessarily compatible with the objectives envisaged under Article 18(2). As traversed above, Article 18 of the Agreement does not have the requirement mandating that a measure should not be used as a restriction on trade. This means that, at least in terms of the Agreement, member countries may be able to impose measures that are disguised restrictions on trade. Consequently, Article 18 of the Agreement may not be in conformity with Article XXIV of the GATT.

As already discussed in the previous chapter, Article XXIV requires member countries of a customs union to make provision for the liberalisation of substantially all trade between them. This paper has already discussed and adopted the position that this phrase means that a CU must not allow for a member to be able to completely exclude an industry from its trade liberalisation scheme. However, in the manner that it is presently couched, Article 18 appears to permit SACU Member States to exclude industries on the basis of pursuing the objectives set out in the provision which would not be liberalizing substantially all trade. As a result, Article 18 is not compliant with the substantially all trade requirement embodied in Article XXIV of the GATT.

Although it may be expected that the rules of a CU established under the GATT would follow the requirements of Article XXIV of GATT, that is not the case with respect to the Agreement. As already mentioned above, whilst Article 18(2) was clearly drafted with Article XX as its inspiration, it lacks the key wording and features that would justify the imposition of a similar interpretation. Moreover, the problem of the vagueness of the provision is compounded on by the fact that no SACU member has ever formally used the provision as a defence to a challenge to any restrictions imposed. Therefore, there is no jurisprudence on the interpretation of the provision.

The exclusion of limitations in Article 18 is one example of the Agreement's incompatibility with the GATT. Another example can be found in Article 24 of the Agreement which imposes an obligation upon member countries to allow free passage of goods from and destined to other member countries. However, it further states that "…a Member State may impose such

conditions upon such transit as it deems necessary to protect its legitimate interests in respect of goods of a kind of which the importation into its area is prohibited on grounds of public morals, public health or security, or as a precaution against animal or plant diseases, parasites and insects, or in pursuance of the provisions of a multilateral international agreement to which it is a party; and provided further that a member country shall not be precluded from refusing transit, or from taking any measures deemed necessary by it in connection with such transit, for the purpose of protecting its security interests."[173] Thus, in pursuit of the legitimate interests espoused, member countries are permitted under the Agreement to impose conditions necessary for transit of certain goods or refusing transit completely. This is another instance where the member countries are able to essentially limit trade.

In addition to the above, Article 25 of the Agreement is also relevant. It recognizes the right of each member country to prohibit the importation or exportation of goods for "…economic, social, cultural or other reasons".[174] Akin to Article 18, the drafters of the provision did not describe in detail, or at least give some indications in the language, as to what would be sufficient economic, social, cultural or other reasons. Nonetheless, Article 25 does make it clear that member countries cannot impose such prohibitions for the purposes of protecting their domestic goods against competition.[175] Despite that, Article 25 still constitutes a significantly wide exception to the liberalisation of trade within the CU. *Ex facie* the Agreement, member countries are permitted to restrict trade for any economic, social, cultural or for other reasons which may be agreed upon.

Another relevant, and equally concerning provision is Article 26 which speaks to the protection of infant industries. Under this provision, the countries of Botswana, Lesotho, Namibia and eSwatini are permitted to adopt temporary measures in the form of additional levies and duties on imported goods for purposes of enabling their infant industries a fair chance at meeting the competing goods in the CU. South Africa is excluded from this exception. In terms of Article 26(2) infant industry means "…an industry which has been established in the area of a Member

[173] Article 24 of the Agreement.
[174] Article 25(1) of the Agreement.
[175] Article 25(3) of the Agreement.

State for not more than eight (8) years." Therefore, an industry which has been established for more than eight years cannot be sought to be protected under this provision.[176]

However, the difficulty with the above cited provision is that it does not provide any guidance as to which industries any of SACU's member countries can validly claim to be unestablished, nor does the provision or the Agreement in its entirety provide any criteria for assessing whether an industry is established or not. As it is apparent from the preceding chapters of this paper, international trade has been ongoing for a significant number of years with countries trading across a spectrum of industries. The definition of infant industry cited above is clearly not sufficient. It does not state when such an industry must have been established and when the eight years begin counting.[177] As a result, it becomes difficult to imagine an industry that a country can claim to be unestablished for less than eight (8) years. At the most, the list of any such industries would be quite limited.

Due to the ambiguity of Article 26, member countries may be at risk of violating the Agreement of they adopt measures to protect what they consider infant industries. In the same breath, another country may take advantage of the vagueness and the seeming openness to interpretation of Article 26 and adopt measures under the guise of protecting an infant industry which is not in truth an infant industry. Consequently, based on the above analysis, the extent and circumstances under which member countries can limit trade or impose further restrictions on the basis of protecting their infant industries under the Agreement is not clear.

Additionally, another author has argued that the Article 26 of the Agreement needs to be aligned with the rules of the multilateral trading system.[178] In terms of the GATT, Article XVIII gives flexibility to developing countries to use measures to inter alia, protect infant industries. However, under the GATT, a country purporting to take such measures has to notify the other

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[176] In fact, in assessing whether Botswana's wheat levy at the time was in violation of the Agreement, Lekgowe in his assessment found that the levy could not be justified under Article 26 as the wheat industry was much older than eight years. See: G.R. Lekgowe Botswana's Wheat Levy: Is it in Violation of the SACU Agreement? Electronic copy available at: https://ssrn.com/abstract=2349272.

[177] S Susa 'The protection of infant industries in SACU: The Namibian poultry industries case' (LLM) North Western University (May 2014).

[178] Ng'ong'ola op cit (n37).

members first, and negotiate with those that may be substantially affected by the measures.[179] These requirements are not present under the Agreement. Whilst the general desire for cooperation and comity between the member states dictates that a member would notify and seek to negotiate whenever intending on imposing a measure that would affect another member, this is not mandatory but discretionary.

3.4 THE LEGALITY OF BOTSWANA'S IMPORT BANS UNDER THE SACU AGREEMENT OF 2002

Therefore, having embarked on a critical analysis of the SACU Agreement of 2002 (the Agreement)'s trade liberalisation provisions, it is now possible to answer one of the questions of this paper as espoused in Chapter One, being whether Botswana's import bans are lawful under the Agreement. To that end, it is important to revisit the import bans imposed by Botswana. As discussed in Chapter One, Botswana has implemented a series of import bans on agricultural products through the promulgation of regulations. There has been no official justification provided by the Government of Botswana for these bans, nor has there been any attempt to justify them under any provision of the Agreement.

However, as previously stated, it has been widely reported in Botswana that these bans have been implemented with the goal of attaining self-sufficiency and reducing Botswana's import bill.[180] Therefore, an assessment of the bans must take them and their reasoning, as they are. In that respect, the first point to note is that the attainment of self-sufficiency and reducing import bills is not an objective recognized by the Agreement through which trade restrictive measures may be justified. Second, the reasoning behind the import bans does not fit into any of the paragraphs in Article 18(2) of the Agreement and it is the position of this paper that they cannot be justified thereunder. The import bans imposed by Botswana were, as reported, not imposed for the protection of health of humans, animals or plants, the environment, treasures of artistic, historic or archaeological value, public morals, intellectual property rights, national security or

[179] See for example, Article XVIII(7)(a) of the GATT.
[180] Reuters 'Botswana to extend and expand fresh-produce import restrictions' available at https://www.reuters.com/world/africa/botswana-extend-expand-fresh-produce-import-restrictions-2023-12-04/, accessed 20 January 2024.

exhaustible natural resources as Article 18(2) requires. Therefore, the import bans cannot be justified under Article 18 of the Agreement.

Article 25 on the other hand appears to permit, as previously discussed, member countries to impose restrictive measures such as import bans for economic, social, cultural or other reasons as agreed by the council. As already discussed, the Agreement does not provide any guidance on what qualifies as economic, social or cultural reasons. Therefore, this leaves a window for the justification of Botswana's import bans. To the extent that the bans were implemented to improve Botswana's economic standing and make it a self-sufficient nation and reduce its import bills, the argument may be made that the bans are justifiable under Article 25(1) of the Agreement.

However, Article 25(3) of the Agreement prohibits the imposition of restrictions for the purpose of protecting domestic industries, which in essence is what Botswana purports to do. Therefore, it appears that even under Article 25, Botswana's import bans are not justifiable. It is a forceable consequence that Botswana's bans will have the effect of protecting local industries, and by virtue of that fact, they are caught by the proviso of Article25(3) and would thus be a violation thereof. It appears that the only provision left which may be used to justify the import bans is Article 26 of the Agreement which provides for the adoption of restrictive measures in order to protect infant industries.

The challenge, however, is that "infant industry" under Article 26(2) is defined to mean an industry that that has not been established for more than eight years. Consequently, Botswana would have to prove that its agricultural industry is younger than eight years in order for its import bans to be justifiable. It is the position of this paper that this would be a difficult task as most nations around the world have had agricultural industries for years. The issue is likely to turn on the definition of "established" as used in the Agreement. There has been no jurisprudence or guidance from SACU on this point. Therefore, if Botswana is able to prove that its agricultural industry is an infant industry as defined in the Agreement, then its import bans may be justifiable therein.

This paper, however, takes the position that Botswana is unlikely to succeed in this for the reasons already stated. Consequently, as the bans are not justifiable under any provision of the Agreement, this paper takes the position that Botswana's import bans on agricultural products

violate the provisions of the Agreement. In particular, in so far as the bans are to protect Botswana's local industries, they violate, *inter alia* Articles 18(1), 24 and 25(3) of the Agreement.

3.5 THE SACU AGREEMENT OF 2002'S COMPLIANCE WITH THE GATT

With the above discussion, it is now appropriate to determine the compatibility of the SACU Agreement of 2002 (the Agreement) with the GATT and in particular with Article XXIV of the same with a particular focus on the trade liberalisation requirements. Article XXIV requires that CUs provide for the liberalisation of substantially all trade between its members. It has also been traversed that this requirement has both qualitative and quantitative elements to it. This means that a CUs trade liberalisation framework cannot allow members of that CU to be able to exclude an entire industry from liberalisation or in other words, to be able to for example, ban the importation or exportation of products from an entire industry or product line.

To this end, the Agreement as discussed above makes attempts to provide for trade liberalisation by providing for the free movement of goods between member countries under Article 18. However, the Agreement appears to allow exactly that which Article XXIV prohibits. Whereas CUs are required to liberalize substantially all trade amongst their members, Article 18(2) of the Agreement permits member countries to impose restrictions on imports or exports for purposes of protecting the health of humans, animals or plants, the environment; treasures of artistic, historic or archaeological value, public morals, intellectual property rights; national security, and exhaustible natural resources. Therefore, this means that for the reasons espoused therein, a SACU member country can ban the importation of goods from an entire industry. To the extent that Article 18(2) of the Agreement lacks the necessary qualifiers present in Article XX of the GATT, it is inconsistent with the provisions of the GATT.

Furthermore, Article 25 of the Agreement may also be problematic as it allows member country to prohibit the importation or exportation of goods for economic, social, cultural or other reasons, without properly defining the same. However, Article 25 does make a proviso that such prohibition cannot be made in order to insulate domestic products from competition, and this rescues the provision from being inconsistent with the GATT. The same however cannot be said for Article 26 which provides for the temporary imposition of measures for the protection of infant industries. This provision may also be a violation of the GATT, however, as the measures

are intended to be temporary and only apply to infant industries, this paper takes the position that it is generally in line with the spirit of the GATT and may therefore be deemed to be compliant.

Therefore, from this short analysis, the view that is taken by this paper is that the Agreement does not derogate too far off from the principles of the GATT. Despite this, in so far as it may be argued that Article 18 of the Agreement does not meet the *substantially all trade* requirement, then the agreement is not entirely complaint with the GATT.

CONCLUSION

In conclusion therefore, the Agreement makes provision for and guarantees liberalisation of trade amongst its members. The Agreement sets out specific instances where member countries may deviate from this and in the assessment done by this paper, Botswana's import bans are not justifiable under any of these instances. Therefore, Botswana's import bans are not legal under the Agreement. Notwithstanding this, Article 18 of the Agreement is drafted in terms that are too broad and general with the exceptions espoused therein lacking the necessary protections to make it effective. Through this provision trade restrictions that are in violation of the basic rules of the multilateral trading system may be justified. Therefore, in this respect Article 18 of the Agreement is not consistent with the GATT. The discussion of the SACU Agreement conducted in this chapter is followed in the next chapter by an assessment of corresponding agreements in other regional blocs, specifically the East African Community (EAC) and the Economic Community of West African States (ECOWAS).

4. CHAPTER 4: A COMPARATIVE ANALYSIS

4.1 INTRODUCTION

Regional Agreements, including customs unions (CUs), have increasingly gained popularity both in Africa and across the world. All such agreements have the common underlying objective of achieving freer trade amongst them. There are over thirty (30) regional trade agreements in Africa, and it has been reported that each African country belongs to at least four of such agreements.[181] Chapter Three has analysed the provisions of the SACU Agreement of 2002 (the Agreement) *viz a vis* the requirements of Article XXIV of the GATT, it may prove worthwhile to embark on a comparative analysis of the Agreement against other Customs Unions (CUs) in the African continent.

This is done with the objective of establishing whether the Agreement's trade liberalisation provisions and the limitations imposed therein are an anomaly within CUs, or in fact are entirely in keeping with the trend when compared to other CUs. To do this, the Agreement will be compared to the Protocol on the Establishment of the East African Community Customs Union and the Treaty of the Economic Community of West African States (ECOWAS) as these are fellow regional economic communities established and functioning within the African region.

4.2 THE EAST AFRICAN COMMUNITY

The East African Community (EAC) is often praised as one of the most integrated regional groupings in Africa, despite being one of the smallest in terms of number of members. The regional organisation consists of Burundi, Democratic Republic of Congo, Somalia, Kenya, Rwanda, South Sudan, Uganda and Tanzania.[182] The EAC first came into being in 1967 with the three founding members being Kenya, Uganda, and Tanzania. These three countries lasted as a union initially for 10 years until 1977, when the EAC was dissolved. The reasons for this dissolution were varied, including a lack of political will, the uneven levels of development and

[181] Y Yang and S Gupta 'Regional Trade Arrangements in Africa' (2005) Washington, D.C.: International Monetary Fund, 2005 ISBN 1-58906-439-9.
[182] The East African Community 'Overview of EAC' available at https://www.eac.int/overview-of-eac, accessed on 4 April 2024.

Tanzania's opposition to a zero-tariff regime, as it held the view that the three countries could not be treated as if they were all at the same level of economic development.[183]

However, the EAC was re-established in 2000, with renewed political will, mutual interests, and the recognition of potential gains from the integrated economy.[184] Pursuant to this, a Customs Union was established in 2005, followed by a Common Market in 2010. The Customs Union Protocol came into effect in 2005, allowing all goods manufactured in one EAC country and sold in another to be treated as if they were manufactured locally, thus eliminating internal tariffs among members. For purposes of this research, focus will be given to analysing the Customs Union.

The Protocol on the Establishment of the East African Community Customs Union (the Protocol) establishes the East African Community Customs Union (EACCU). Its establishment is based on Article 75 of the Treaty for the Establishment of the East African Community which is the founding document of the EAC. Conscious of the member countries' obligations under the WTO and under various other regional economic partnerships,[185] the Protocol establishes the EACCU under Article 2,[186] and makes provision for the elimination of customs duties and other charges within the EACCU.[187] It also provides for the removal of non-tariff barriers (NTBs)[188] and creates a common external tariff (CET) applicable to goods imported into the EAC by non-member countries.[189] The EACCU's objectives include *inter alia*, the further liberalisation of intra-regional trade on a mutually beneficial basis, the promotion of production efficiency within the EAC, and the promotion of economic diversification and development within the EAC.[190] With trade liberalisation being one of its core objectives, it is therefore appropriate to consider the provisions of the Protocol that affect the liberalisation of trade within the EACCU.

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[183] B Wolfe 'Regional Integration in Africa: Lessons from the East Africa Community' (2008) Johannesburg: South Africa Institute of International Affairs.
[184] Ibid.
[185] Preamble.
[186] Article 2(1).
[187] Article 4(a).
[188] Article 4(b).
[189] Article 4(c).
[190] Article 3.

To that end, the Protocol mandates all member countries to cooperate in all matters concerning trade liberalisation.[191] This includes cooperation on tariff classifications, temporary import procedures, customs requirements and export promotion schemes.[192] In terms of the Protocol, co-operation is defined to include "any undertaking by the Partner States, jointly or in concert, of activities undertaken in furtherance of the objectives of the Community, as provided for under the Treaty or under any contract or agreement made under the Treaty or in relation to the objectives of the Community". Thus, it is commendable that the member countries of the EACCU saw it fit to make specific mandatory provisions for cooperation between themselves towards further liberalisation of trade. Certainly, this demonstrates a commitment to the trade liberalisation effort.

This commitment is further evident in the trade liberalisation provisions of the Protocol as well. Article 10 of the Protocol requires member countries to eliminate all internal tariffs and charges between themselves.[193] Article 13 of the Protocol proceeds to address NTBs with the member countries agreeing to remove, and not further implement, any new NTBs that apply to imported goods from within the EACCU area.[194] In juxtaposition, the Agreement in Article 18 also prohibits the imposition of quantitative restrictions which fall under the broader category of NTBs. The Protocol continues by including a provision dealing with the prohibition of national treatment (NT), which prohibits member countries from discriminating against the like products of other member countries either through legislation or administrative measures.[195]

Furthermore, member countries of the EACCU are prohibited from protecting their own products through the application of internal taxes.[196] They are also prohibited from applying taxes in excess of those applied to similar domestic products.[197] These provisions are aimed at preventing protectionism. Comparatively, the Agreement does not have equivalent provisions, possibly because of the view the non-tariff obligations are read into Agreement by virtue of SACU being

[191] Article 4(a).
[192] Article 4(2)(a)-(h).
[193] Article 10(1).
[194] Article 13(1).
[195] Article 15(1)(a).
[196] Article 15(1)(b).
[197] Article 15(2).

part of the broader framework of the WTO and the GATT as discussed in Chapter Two of this paper.[198] However, it is noteworthy that the framers of the Protocol chose to restate and indeed reaffirm those obligations and the framers of the Agreement did not which may speak to the level of commitment and enforceability of these obligations under the Agreement.

Another protection offered to trade liberalisation under the Protocol is in Article 21 wherein member countries of the EACCUs are prohibited from adopting anti-competitive practices that affect free trade.[199] The only exception is if those practices are consented or agreed to, they must be geared towards the improvement of production or distribution of goods and economic development amongst others.[200] This is the first provision in the Protocol thus far, that appears to permit member countries to adopt some form of trade restrictive measures, at least in the context of competition. However, as discussed above, it creates some caveats as those practices can only be permitted if they are agreed to between member countries and even then, they must be done with the object of achieving the goals discussed above.

In contrast, the Agreement only goes as far as providing that each member country shall have a competition policy, and that member countries shall co-operate with each other in connection therewith.[201] The Agreement does not provide any guidance on the contents of those policies (at least in so far as the Agreement is concerned), nor is there any prohibition on the adoption of anti-competitive practices. In continuing with the analysis of the Protocol, Article 22 makes provision for restrictions and prohibitions to trade. In this regard, member countries after giving notice to the Secretary General are permitted to adopt or continue prohibitions and restrictions affecting:

> *"(a) the application of security laws and regulations;*
>
> *(b) the control of arms, ammunition and other military equipment or*

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[198] This argument arises from the fact that customs unions amongst other regional trade agreements, are created in terms of the GATT, and by necessary consequence thereof, would be subject to the provisions thereof. See for example, A Alajmi 'The Jurisdictional Conflict Between Regional Trade Agreements and the World Trade Organisation' World Customs Journal Volume 15, Number 2.
[199] Article 21(1).
[200] Ibid.
[201] Article 40 of the Agreement.

items;

(c) the protection of human life, the environment and natural resources,

public safety, public health or public morality; and

(d) the protection of animals and plants."

The right to invoke this provision cannot be used to restrict the free movement of goods within the community.[202] This provision appears to be an attempt at replicating the GATT's general exceptions clause, and the equivalent of Article 18(2) of the Agreement. However, much like the Agreement's attempt to replicate the provision, the Protocol's attempt also suffers from not being an accurate replication, albeit for slightly different reasons. First, as discussed in Chapter Three, Article XX of the GATT purports to promote and protect other societal objectives outside of free trade and trade liberalisation. To this end, it has a proviso that measures implemented in the pursuance of these other objectives must not be a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or constitute a disguised restriction in trade.

As already discussed, this proviso, or *chapeau* is critical in the interpretation of Article XX. It forms an important part of the general exceptions and essentially prevents misuse by WTO members by permitting them to pursue other objectives in a manner that is not arbitrary or amount to unjustifiable discrimination or constitute a disguised restriction on trade. In contrast, this safeguard is not present in the Protocol. *Ex facie* the Protocol, member countries are permitted to adopt any measures as long as they are for the attainment of objectives espoused in Article 22. This may mean that member countries would be able to adopt measures that are arbitrary or unjustifiably discriminatory. To this end, the provision suffers from a similar plight as the Agreement, which is that of being too widely drawn.

However, this interpretation may be countered by the argument that the Protocol read as a whole protects against this. Nonetheless, the criticism that the Protocol lacks the safeguards present in the provision it seemingly attempted to emulate still stands.

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[202] Article 22(2).

4.3 THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES

The establishment of the Economic Community of West African States (ECOWAS) dates back to 28 May 1975 when the Treaty Establishing the Economic Community of West African States (the Lagos Treaty) was initially signed. The Lagos Treaty was signed by the respective countries of Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone, Senegal and Togo who make the membership of ECOWAS until today.[203] ECOWAS was created with the objective "to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African Continent."[204]

The Lagos Treaty also makes provision for the establishment of an economic and monetary union and for relations with other countries and international organisations. Article 3 of the Lagos Treaty provides that in order to achieve the aims of the ECOWAS, the member countries shall ensure *inter alia*:

> "*d) the establishment of a common market through;*
>
> *i) the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition, among Member States, of non-tariff barriers in order to establish a free trade area at the Community level;*
>
> *ii) the adoption of a common external tariff and a common trade policy vis-a-vis third countries;*
>
> *iii) the removal, between Member States, of obstacles to the free movement of persons, goods, services and capital, and to the right of residence and establishment;*

[203] Trade Law Centre 'ECOWAS Legal texts and policy documents' available at https://www.tralac.org/resources/by-region/ecowas.html, accessed on 7 September 2024.
[204] Article 3(1) of the Lagos Treaty.

e) the establishment of an economic union through the adoption of common policies in the economic, financial, social and cultural sectors, and the creation of a monetary union."

Chapter VIII of the Lagos Treaty makes provision for the establishment of a customs union with a common external tariff amongst the member countries.[205] In terms of trade liberalisation, Article 35 therein mandates the removal of all quotas, quantitative restrictions or prohibitions and administrative obstacles to trade within the member countries. Furthermore, Article 36 provides for the reduction and ultimate removal of customs duties and any other charges amongst member countries. Similar prohibitions apply to fiscal charges and internal taxation.[206] Of particular interest to this paper is Article 41 of the Lagos Treaty which addresses quantitative restrictions on the ECOWAS community goods.

Article 41 requires member countries to gradually remove *inter alia*, all existing quantitative restrictions or like restrictions and prohibitions. Member countries were given four years after the launch of the trade liberalisation scheme established under Article 54 of the Treaty to achieve this gradual removal.[207] The trade liberalisation scheme was promulgated in May 2004, which means this obligation has been in effect since 2008. Notwithstanding this, Article 41(1) of the Lagos Treaty also provides that member countries are exempted from this obligation if they are unable to comply with the obligation by virtue of an already existing contract, provided that such contract is not renewed on expiry.

However, the Lagos Treaty makes provision for instance where member countries are permitted to continue or impose the restrictions prohibited in Article 41(1). In particular, Article 41(3) of the Lagos Treaty proceeds to provide that:

"*A Member State may, after having given notice to the Executive Secretary and the other Member States of its intention to do so, introduce or continue to execute restrictions or prohibitions affecting:*

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[205] Article 35 of the Lagos Treaty.
[206] Article 40 of the Lagos Treaty.
[207] Article 41(1) of the Lagos Treaty.

(a) the application of security laws and regulations;

(b) the control of arms, ammunition and other war equipment and military items;

(c) the protection of human, animal or plant health or life, or the protection of public morality;

(d) the transfer of gold, silver and precious and semi-precious stones;

(e) the protection of national artistic and cultural property;

(f) the control of narcotics, hazardous and toxic wastes, nuclear materials, radioactive products or any other material used in the development or exploitation of nuclear energy."

Therefore, for the purposes and objectives set out in Article 41(3)(a)-(f), ECOWAS member countries are allowed to impose restrictions which include quantitative restrictions and import bans. Article 41(3) of the Lagos Treaty is worded similarly to Article 18(2) of the Agreement discussed in Chapter Three of this paper. However, this paper takes the view that the wording in the Lagos Treaty is couched, and mirrors more closely, Article XX of the GATT as discussed in Chapter Three. As already discussed, Article XX is the general exceptions clause of the General Agreement on Tariffs and Trade (GATT) and the objectives set out therein, the attainment of which members countries may be exempted from their liberalisation obligations resemble those in the Lagos Treaty unlike those set out in the Agreement.

Further to that, article 41(5) of the Lagos Treaty prohibits member countries from imposing or continuing restrictions as a way of stifling the free movement of goods. This provision is also similar to the second part of the *chapeau* to Article XX which requires that measures adopted under the provision must not constitute "a disguised restriction on trade". This paper does not make any conclusion as to whether the Lagos Treaty is complaint with the GATT, however, it suffices to note that the Lagos Treaty mirrors the provisions of the GATT far more closely than the Agreement. In light of this, it can at the very least be said that it has provided for safeguards against members imposing measures that are purely meant to restrict trade.

Thus, it appears that the Lagos Treaty provides for a much narrower window for member countries to be able to restrict trade. Akin to the GATT, the Lagos Treaty requires member

countries to ensure that any measures adopted or continued which restrict trade fall within the objectives espoused in Article 41(3) and further, that they meet the requirement in Article 41(5) mentioned above. Whilst it is not a perfect replication of Article XX of the GATT, it certainly thrives in comparison to the Agreement. Moreover, in terms of Article 46 of the Lagos Treaty, member countries are required to harmonize and standardize their customs regulations and procedures in order to facilitate the free movement of goods.

Article 49 permits members who suffer "serious disturbances" in their economies to impose certain measures but only after informing the Executive Secretary and other members and only for a period of a year.[208] However, Article 49 of the Lagos Treaty does not define "serious disturbance" and as such it is unclear what would amount to a serious disturbance. This poses a challenge as it makes the term subjective and open to interpretation which can lead to abuses by member countries falsely claiming serious disturbances and adopting the envisaged measures. Nonetheless, in contrast to the Agreement, the Lagos Treaty mandates that members be notified if any restrictive measures are to be imposed and further limits the duration in which these measures may be imposed. It is recalled that the Agreement does not make any provision for this, hence Botswana has been able to recently renew its import ban.

CONCLUSION

In conclusion therefore, this chapter has conducted a comparative analysis of the EACCU's Protocol and the Lagos Treaty with the Agreement, with a particular focus on the provisions relating to the liberalisation of trade. From this analysis, the three appear to be on equal footing, suffering the similar pitfall of not having the necessary qualifications to their exceptions clauses. The Lagos treaty however is the better of the three as it has provisions that require members not to impose restrictions as a disguised way of limiting trade which as discussed mirrors part of the *chapeau* of Article XX of the GATT. Nonetheless, the differences between the three agreements are minor and potentially negligible.

[208] Article 49(2).

5. CHAPTER FIVE: CONCLUSION

5.1 RESEARCH SUMMARY

This study examined the recent import bans that have been implemented by Botswana which is a member of the Southern African Customs Union (SACU). It is these bans, and their recent extension by Botswana, that have put the spotlight on the SACU Agreement of 2002 and its relevance in the trade relationship between its member States. This paper has first, provided the setting of international trade, which at its core is governed by the General Agreement on Tariffs and Trade (GATT). In particular, the study explored some of the foundational principles of the GATT such as predictable market access and non-discrimination. Secondly, it also provided a brief analysis of the exceptions to these principles including Article XXIV of the GATT in so far as it makes provision for the requirements of a valid customs union (CU).

5.2 FINDINGS AND OBSERVATIONS

To this end, the study has established that stripped to their most simplistic terms, customs unions must meet two requirements. First, in terms of Article XXIV they must provide for the liberalisation of *substantially all trade* amongst their members and secondly, they must provide for a common external tariff. As regards the liberalisation of substantially all trade, this paper has discussed and indeed demonstrated the challenges that come with establishing the true meaning of this requirement. However, the research has nonetheless led to the conclusion that whilst the requirement remains mostly undefined, academic literature together with World Trade Organisation (WTO) jurisprudence points to the requirement incorporating both qualitative and quantitative elements. This means that a Regional Trade Agreement (RTA) cannot allow its member states the latitude to exclude entire industries from their trade liberalisation schemes. This means that any RTA that makes such an allowance would not be in compliance with Article XXIV of the GATT.

This research has reviewed the provisions of the SACU Agreement of 2002 (the Agreement) and has established that the Agreement provides for the liberalisation of trade under Article 18, wherein it guarantees the free movement of domestic goods amongst its member countries. However, this paper has also noted that this free movement of goods comes with an array of limitations provided for under the Agreement. Under the Agreement, this paper has noted that

member countries are permitted to impose restrictions on imports or exports in accordance with their domestic legislation for purposes of the protection of various values. Despite this, an analysis of Botswana's import bans against the Agreement has revealed that the import bans were not made pursuant to any of the objectives recognized by the Agreement.

Furthermore, the import bans cannot be justified under any provision of the Agreement. Thus, the finding of this study is that the import bans imposed by Botswana are not consistent with the SACU Agreement. As a corollary to that, this study has conducted an analysis of the SACU Agreement's compliance with the GATT. In that respect, it has been noted in this paper that the exceptions provided for under the Agreement lack the necessary qualifiers that are present in, for example Article XX of the GATT. The effect of this is that the circumstances under which member countries may impose such restrictions are too broad and undefined. Consequently, the conclusion arrived at is that Article 18 constitutes a violation of the GATT to the extent that it is couched in the broad terms discussed.

This research has also conducted a comparative analysis of the Agreement as against the East African Community Customs Union's Protocol and the Economic Community of West African States' Lagos Treaty. The comparative analysis has revealed that the East African Community Customs Union's Protocol (the Protocol) requires all member countries of the community to cooperate on all matters concerning trade liberalisation. In particular, this study has revealed that Article 10 of the Protocol Mandates the removal of all non-tariff barriers and Article 21 calls for the elimination of all anti-competitive practices that affect trade. However, the Protocol, much like the Agreement has its limitations as member countries are permitted to deviate from these rules on agreement with other countries and for purposes of improving production and economic development. This research has shown that the Protocol, much like the Agreement lacks the necessary qualifiers that are present in Article XX of the GATT and is therefore too, not an accurate replication of Article XX of the GATT.

On the other hand, this study has demonstrated that the ECOWAS Lagos Treaty equally calls for the removal of quotas, quantitative restrictions and prohibitions amongst its members. Article 41 thereof requires prohibits the imposition of quantitative restrictions and is worded similarly to Article 18 of the Agreement. However, unlike the Agreement, the Lagos treaty mirrors more closely the values espoused in Article XX of the GATT. Further to that, the Lagos treaty

prohibits restrictions on trade that are imposed as a way of stifling the free movement of goods. Thus, in comparison to the Agreement, the Lagos Treaty provides for a much narrower window within which member countries can limit trade and deviate from the trade liberalisation obligations espoused therein. Nonetheless, this study has found that the Agreement is not dissimilar from other customs unions agreements as discussed above. The comparative analysis conducted in this research has shown that other regional groupings too suffer from provisions that are couched in broad terms, and do not reflect the spirit of Article XX of the GATT.

5.3 **RECOMMENDATIONS**

In terms of recommendations, the overarching recommendation is a renegotiation and redrafting of Article 18 of the SACU Agreement. It is apparent from this research that whilst Botswana's import bans may not be justifiable under the provision, the provision nonetheless leaves far too many issues open to interpretation. As set out in Chapter Three of this research, Article 18 of the Agreement gives member countries a blanket license to limit the free movement of goods based on the values espoused therein. The provision does not set out any other requirement for the imposition of limitations, save that such restrictions must be for achieving the values set out in Article 18. To that end, Article 18(2) of the Agreement is not a true reflection or reproduction of Article XX of the GATT. As discussed in this research, Article 18(2) of the Agreement lacks some important wording which affects how the provision may be used and interpreted.

Chapter Two analysed how Article XX of the GATT contains a two-tier test which requires that any measures adopted must be for the furtherance of the objectives stated therein, and that they must satisfy the *chapeau*, that is, not be a disguised restriction on trade. Therefore, Article 18 must certainly be reviewed with this in mind and be couched in terms that are more mandatory. This is to say that the free movement of goods must be made an overarching obligation which member countries must not be permitted to easily depart from. Thus first, the values espoused in Article 18 must be aligned with those in the GATT. In particular, national security must be removed from Article 18(2) of the Agreement. The values must be expanded upon by adding those recognized under Article XX of the GATT.

Second, Article 18 of the Agreement must adopt the qualifiers in Article XX of the GATT as discussed in Chapter Three of this dissertation.[209] As already stated above, these qualifiers are crucial in how the provision will be interpreted and used and how member countries will be able to invoke it. As such, a provision must be included that ensures that measures adopted by member countries must be for the furtherance of the objective set out therein. Therefore, Article 18 must be amended so as to ensure that only measures that are designed or implemented for the attainment of the stated objectives are to be implemented, and any measure which is not, would be in contravention of the Agreement. Such an amendment could include, for example, the addition of the word "necessary" as a qualifier.

Lastly, Article 18 must also be amended to include provisions that require that measures adopted must not be arbitrary or unjustifiable, and further, must not be disguised restrictions on trade amongst member countries. Essentially, much like Article XX of the GATT has a *chapeau*, Article 18 of the Agreement must also be amended to include a chapeau or similar provision. The addition of such a provision is to ensure that where trade liberalisation is limited, this is done legitimately to protect or advance values recognized under the GATT and not to frustrate the legal obligations of the member countries under the Agreement.

5.4 CONCLUSION

Botswana's import bans are reflective of the various developments in international trade today, particularly towards the return to protectionism. Most notable of these developments has been the trade war between the United States of America and China, and the former's embracing attitude towards protectionism, particularly under its new President Donald Trump.[210] However, this study has come at a timely, and opportune time, where Botswana has itself recently undergone a regime change. The Botswana Democratic Party, which has been in power and in charge of the country's trade policy for over 58 years, has recently lost the 2024 general elections and made way for the coalition party, Umbrella for Democratic Change. As at the time of this study, Botswana's new government has indicated an intention to lift the import bans in a

[209] See 3.3.
[210] D Nelson 'Trump Trade 2.0' Commentary Published on 20 December 2024 on Centre for Strategic & International Studies available at https://www.csis.org/analysis/trump-trade-20.

phased manner with the country's new Vice President and Minister of Finance citing the import bans as bad economics.[211]

This decision by Botswana's new government is most likely out of a realisation of the consequences that have come about as a result of the import bans. According to South Africa's National Agricultural Marketing Council (NAMC), the continuation of the import bans has had a significant cost to both Botswana and South Africa.[212] According to NAMC, between the period of 2021 and 2023, the import bans have resulted in a marked decrease of over 15% in vegetable exports from South Africa.[213] This is reported to have led to a deflation in vegetable prices in South Africa. On the other hand, consumers in Botswana are reported to be labouring under increased food inflation which has been a significant challenge particularly to the lower- and middle-income class in the country.[214] Therefore, the decision to lift the import bans could not come at a better time, and in the context of the findings of this study, was a necessary decision.

Thus, the outlook for the Southern African Customs Union is one that is promising. Particularly as most of its member countries have deposited their instruments of ratification to the African Continental Free Trade Area (AfCFTA) agreement. The AfCFTA is an audacious free trade agreement that aims to increase free trade and development in Africa. Therefore, the proposed lifting of the import bans and Botswana's participation in the AfCFTA are indicative of a positive future for SACU, particularly in the context of free trade.

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[211] 'Importation ban bad economics' Botswana Daily Newspaper 8 December 2024 available at https://dailynews.gov.bw/news-detail/83578, accessed on 18 January 2025.
[212] National Agricultural Marketing Council 'Botswana Lifts Import Restrictions on Vegetables from South Africa' Press Release 18 December 2024 available at https://www.namc.co.za/wp-content/uploads/2024/12/BOTSWANA-LIFTS-IMPORT-RESTRICTIONS-ON-VEGETABLES-FROM-SOUTH-AFRICA.pdf, accessed on 18 January 2025.
[213] Ibid.
[214] Ibid.

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