Article

# A Critical Assessment of the Zimbabwe–South Africa Import Licensing Dispute

**Clive Vinti**
Lecturer of law at the University of the Free State
vintic@ufs.ac.za

## Abstract

The gravamen of the dispute between Zimbabwe and South Africa is the introduction by Zimbabwe of an import-licensing regime for various goods through Statutory Instrument 64 of 2016 ('the Instrument'). Zimbabwe alleges that the Instrument is primarily aimed at protecting local industries and alleviating balance of payment challenges. Consequently, this article assesses the legality of the Zimbabwe import-licensing regime implemented primarily against goods from South Africa by examining the grounds of justification proffered by Zimbabwe. The article contends, first, that the Instrument is a quantitative restriction that violates Articles XI.1 and XIII of the General Agreement on Tariffs and Trade (GATT). Secondly, the article argues that the Instrument falls foul of the WTO Agreement on Import Licensing Procedures in that the administration of the measure is unduly burdensome and goes beyond the extent necessary. Thirdly, the article contends that the Instrument fails to fulfil the requirements for a valid 'safeguard measure' in the manner contemplated by Article XIX of GATT and the Agreement on Safeguards. In the alternative, the article argues that the urgency of the situation in Zimbabwe is such that any delay would cause irreparable damage and therefore entitles Zimbabwe to exercise the right to implement safeguard measures. Lastly, the article contends that the Instrument is substantially in line with the 'balance of payments' exception as postulated by the Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994 and GATT.

**Keywords:** import licensing; quantitative restrictions; safeguards; balance of payments

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 34 | Number 1 | 2019 | #2959 | 29 pages

https://doi.org/10.25159/2522-6800/2959
ISSN 2219-6412 (Print) | 2522-6800 (Online)
© Unisa Press 2019

## Introduction

The gravamen of the dispute between Zimbabwe and South Africa is the introduction by Zimbabwe of an import licensing regime for various goods through the Statutory Instrument 64 of 2016 (the Instrument).[1] The Instrument operates as a new import-licensing regime on various goods. The promulgation of the Instrument is provided for by the Control of Goods Act, which authorises the president or the relevant minister to introduce measures for the control of imports or exports into Zimbabwe of any goods or class of goods.[2] The products cited as requiring import licences include, inter alia, coffee creamers, camphor creams, baked beans, cereals, bottled water, mayonnaise, vegetables, yoghurts, ice cream, cheese, dairy juice blends, peanut butter, jam and beds.[3] The Instrument will particularly affect women, who constitute the majority of informal cross-border traders.[4] It is estimated that internal cross-border trade contributes nearly half of the total intra-Southern Africa Development Community (SADC) trade.[5]

In essence, Zimbabwe alleges that the Instrument is a valid import-licensing regime meant to curb the importation of goods which are already being produced in Zimbabwe and that their importation has exacerbated unemployment, reduced investment into the Zimbabwean economy and resulted in balance of payments challenges.[6] Zimbabwe also contends that the Instrument is an interim measure whose main purpose is to revive the local industry and it is not open-ended but time-bound and sector-specific, with the expectation that the local industry will retool and address production inefficiencies during the period.[7] In short, Zimbabwe contends that the Instrument constitutes valid

1 Zimbabwe Statutory Instrument 64 of 2016 <http://www.mic.gov.zw/index.php/downloads/category/3-import-and-export-requirements> accessed 6 August 2016, read with s 3 of the Control of Goods Act Chapter 14:05 <http://www.vertic.org/media/National%20Legislation/Zimbabwe/ZW_Control_of_Goods_Act.pdf> accessed 22 September 2016 and the Control of Goods (Import and Export) (Commerce) Regulations, 1974 <http://www.tradebarriers.org/ntm/measures/view/874> accessed 5 August 2016.

2 Section 3 of the Control of Goods Act Chapter 14:05 <http://www.vertic.org/media/National%20Legislation/Zimbabwe/ZW_Control_of_Goods_Act.pdf> accessed 26 June 2016.

3 See Statutory Instrument 64 of 2016.

4 Jean-Guy Afrika and Gerald Ajumbo, 'Informal Cross Border Trade in Africa: Implications and Policy Recommendations' (2012) 4/3(10) Africa Economic Brief <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Economic%20Brief%20%20Informal%20Cross%20Border%20Trade%20in%20Africa%20Implications%20and%20Policy%20Recommendations%20-%20Volume%203.pdf> accessed 2 August 2016 at 4.

5 Afrika and Ajumbo (n 4) 4.

6 Mike Bimha, 'Statutory Instrument 64 of 2016 (SI 64.2016) is not an import ban' *The Sunday Mail* (10 July 2016) <http://www.sundaymail.co.zw/si-64-2016-is-not-an-import-ban/> accessed 10 August 2016.

7 Mike Bimha, 'Press Statement by the Honourable MC Bimha (MP) Minister of Industry and Commerce on the recently Gazetted Statutory Instrument 64 of 2016 in terms of Control of Goods Act [Chapter 14:05]' (2016) <http://www.tralac.org/images/Discussions/Zimbabwe_Ministry_of_Industry_and_Commerce_Press_statement_22_June_2016.pdf?utm_source=Weekly+tralac+Newsletter&utm_campaign=c4d9086cf

‘safeguard measures’ aimed at protecting local industry in line with the WTO Agreement on Safeguards (AGS), Article XIX of the General Agreement on Tariffs and Trade (GATT) and Article 20 of the Southern Africa Development Community Protocol on Trade (Protocol). Furthermore, Zimbabwe submits that the Instrument is targeted only at commercial and not individual importers.[8] Lastly, it has also been alleged that the Instrument is in retaliation for similar protectionist measures South Africa has employed against Zimbabwean exports of medicines to South Africa.[9]

South Africa, on the other hand, contends that Zimbabwe is in breach of the Protocol in that it should have first sought prior authorisation from the Committee of Ministers of Trade (CMT).[10] This is because the Protocol provides that upon application by a Member State, the CMT may authorise a Member State to suspend certain obligations of the Protocol, temporarily, in respect of like goods imported from other Member States, as a temporary measure in order to promote an infant industry.[11] In this regard, Zimbabwe could face a significant hurdle in proving that the affected industries in Zimbabwe qualify as ‘infant industry’. This is because the government of Zimbabwe submits that its manufacturing industry is large and diversified.[12] However, it is argued in this article that the local industry in Zimbabwe could qualify as ‘infant industry’ in the light of the barrage it has faced from hyperinflation, foreign-exchange shortages which have hindered the economy’s capacity to import essential inputs for industrial production and recurrent interruptions in essential utility supplies such as electricity.[13] These factors have conspired virtually to eviscerate the local industry in Zimbabwe in such a manner that it could be argued that the affected industries have been reduced to the size of ‘infant industry’. This could be the reason why Zimbabwe views the survival of local industry as the main thrust of its national trade policy.[14] However, the AGS and GATT do not make any reference to the ‘infant industry’ requirement. GATT and the

2-NL20160803&utm_medium=email&utm_term=0_a95cb1d7ad-c4d9086cf2-311091957> accessed 22 August 2016.

8 Bimha (n 7). See also Bimha (n 6). See, further, Godfrey Marawanyika, ‘Zimbabwe Denies Dispute with SA over Import Ban’ *Business Day* (27 July 2016) <http://www.businesslive.co.za/bd/> accessed 22 August 2016.

9 Business Reporter, ‘Mugabe Says Import Ban Retaliation against South Africa’ *New Zimbabwe* (8 August 2016) <http://www.newzimbabwe.com/business-30620-Imports+Mugabe+confirms+SA+retaliation/business.aspx> accessed 21 September 2016.

10 Xolisa Phillip, ‘EXCLUSIVE: DTI Heading to Zimbabwe to Thrash Out Ban on SA Goods’ *Business Day* (14 July 2016) <http://www.bdlive.co.za/business/trade/2016/07/14/exclusive-dti-heading-to-zimbabwe-to-thrash-out-ban-on-sa-goods> accessed 21 September 2016. The import dispute is playing out against the backdrop of South Africa’s establishing a new Africa Trade unit, whose sole mandate is promoting intra-African trade.

11 Article 21.1 of the Protocol.

12 Zimbabwe Ministry of Industry and Commerce, ‘National Trade Policy 2012–2016’ (date unknown) <http://www.zimtrade.co.zw/IMG/pdf/zimbabwe_national_trade_policy_document__2012_-_2016_.pdf> accessed 9 September 2016 at 7.

13 Zimbabwe Ministry of Industry and Commerce ‘National Trade Policy 2012–2016’ (n 12) 2–3.

14 Zimbabwe Ministry of Industry and Commerce (n 12) 24.

AGS simply require Zimbabwe to prove increased quantities and under such conditions that cause or threaten serious injury to the 'domestic industry/producers' that produce like or directly competitive products.[15]

Secondly, the South African government claims that Zimbabwe should have followed a process under the Protocol that sets out procedural requirements before cutting trade ties.[16] Thirdly, South Africa also demanded that Zimbabwe lower import duty and surtax levied on some products imported from South Africa.[17] Consequently, South Africa issued an ultimatum to Zimbabwe to roll back the ban imposed on imports from that country ahead of a meeting of the CMT in August 2016.[18] The CMT meeting resulted in an official notification of the dispute to the CMT and an agreement was reached between the two countries to negotiate further.[19]

Regardless of the outcome of these negotiations, the focus of this article is an examination of the merits of the grounds of justification for the Instrument contended by Zimbabwe in the event that the matter was argued before the Dispute Settlement Body of the World Trade Organization (DSB). Lehloenya opines that without participating in the World Trade Organization (WTO) dispute settlement system, it is difficult to conceive how else South Africa can address its cross-border trade problems in an environment that is not conducive to the power imbalances that permeate international trade.[20] The Instrument is an apt example of the cross-border trade problems that require the use of the WTO dispute-settlement mechanism. This is because a Member State that decides to impose safeguards can reasonably attain more than a two-year free ride before the WTO finds the measure to be in violation of the relevant rules.[21] Thereafter, several months could pass until compliance is agreed upon, and before any retaliation is likely to be implemented .[22] This is perhaps the reason why

---

15 Article 2.1 of the AGS and Art XIX.1 of GATT.

16 *The Financial Gazette*, 'South Africa gives Zimbabwe three weeks deadline over imports ban' The *Financial Gazette* (6 August 2016) <http://www.financialgazette.co.zw/south-africa-gives-zimbabwe-three-week-deadline-over-imports-ban/> accessed 16 September 2016. See also Gerhard Erasmus, 'How Can the Beitbridge Dispute be Resolved?' (11 August 2016) <https://www.tralac.org/discussions/article/10255-how-can-the-beitbridge-dispute-be-resolved.html#ftnref3> accessed 21 August 2016.

17 *The Financial Gazette* (n 16).

18 ibid.

19 *The Herald*, 'SADC Trade Ministers Endorse SA, Zim Talks on SI 64' *The Herald* (29 August 2016) <http://www.herald.co.zw/sadc-trade-ministers-endorse-sa-zim-talks-on-si-64/> accessed 21 September2016.

20 Michael Lehloenya, 'Reflections on South Africa's Continued Absence from the WTO Dispute Settlement System' (2011) 36(1) Journal for Juridical Science 69.

21 Youngjin Jung and Ellen Kang, 'Toward an Ideal WTO Safeguards Regime Lessons from US Steel' (2004) 38 International law 932.

22 ibid.

the Zimbabwean government has recently submitted that the protection of local industries through the Instrument will last between two and three years.[23]

The analysis of the veracity of the grounds of justification proffered by Zimbabwe is conducted through a detailed analysis of relevant cases and agreements. In this regard, it is now common cause that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are regarded as cumulative and Members must comply with all of them simultaneously.[24] This is the approach that will be used in this article to assess the legality of the Instrument through the lenses of GATT, the WTO Agreement on Import Licensing Procedures (ALIP), the Protocol and the Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994 (UBOP).

This analysis of the grounds of justification is divided into three parts. First, this article assesses the import licence ground of justification and it is found that the Instrument constitutes a quantitative restriction disguised as an import licence and therefore violates Articles XI.1 and XIII of GATT. In the same vein, it is also found that that the Instrument falls foul of the ALIP in that the administration of the measure is unduly burdensome, unfair and inequitable and it goes beyond the extent necessary. Secondly, the article examines the 'safeguard measure' ground of justification. In this respect it is found that the Instrument fails to fulfil the requirements for a valid safeguard measure in the manner contemplated by Article XIX of GATT and the Agreement on Safeguards (AGS) in that: (i) it goes beyond the extent necessary to protect the domestic industry; (ii) Zimbabwe would struggle to prove that products from South Africa are the cause of the injury to domestic industry, and (iii) the Instrument fails to fulfil the due notification and consultation requirements of the AGS. In the alternative, the article contends that the urgency of the situation in Zimbabwe is such that any delay would cause damage which may be difficult to repair and therefore entitles Zimbabwe to exercise the right to implement safeguard measures without regard to the due process notification and consultation requirements.[25] Lastly, the article reflects on the 'balance of payments' grounds of justification. In this regard it is found that the Instrument is substantially in line with the balance of payments exceptions as postulated by the Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994 (UBOP) and Articles XII and XVIII of GATT.

23 *The Financial Gazette*, 'SI 64 to Remain in Force for up to Three Years' *The Financial Gazette* (12 August 2016) <http://www.financialgazette.co.zw/si-64-to-remain-in-force-for-up-to-three-years/> accessed 12 August 2016.

24 WTO Appellate Body Report, *Korea-Definitive safeguard measure on imports of certain dairy products* (Appellate Body Report, *Korea Safeguards*), WT/DS98/AB/R, adopted 12 January 2000, para 74.

25 Article XIX.3(*b*) of GATT.

## Critical Assessment of Zimbabwe's Grounds of Justification

### The 'import licence' ground of justification

As a general rule, GATT prohibits the use of quantitative restrictions or quotas other than duties, taxes or other charges 'made effective through quotas, import or export licences or other measures'.[26] Tariffs are the preferred and acceptable form of protection under the GATT system for various reasons, including, *inter alia*, that, unlike quantitative restrictions, the impact of custom duties is immediately clear; that the price increase from quantitative restrictions simply accrues to the importers and not to the government, and, lastly, that the administration of quotas is more susceptible to corruption.[27] In essence, a quantitative restriction is a measure which limits the quantity of a product that may be imported or exported.[28]

Different types of quantitative restriction are used by countries: quotas, a prohibition or a ban on a product or automatic and non-automatic licensing.[29] The Zimbabwean government has repeatedly submitted that the purpose of the Instrument is not to ban the listed products but to regulate them.[30] The discussion that follows will show that irrespective of whether the Instrument operates as a ban or a non-automatic import licensing regime, the Instrument constitutes a quantitative restriction in violation of Article XI.1 of GATT. The orthodox method of administering quotas is usually through import or export licensing.[31] The Instrument is an example of a quantitative restriction in the form of a non-automatic import licensing regime. In this regard the Instrument falls within the parameters of the 'restriction' prohibited by Article XI.1 of GATT 1994 as per the reasoning of the WTO Panel Report, *India –Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*.[32] In fact, the Instrument

26 Article XI of GATT, there are exceptions in this Article, such as instances whereby export prohibitions or restrictions temporarily are applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party; import and export prohibitions or restrictions necessary to the application of standards or regulations for classifying, grading or marketing commodities in international trade, and import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of .governmental measures. See also WTO Appellate Body Report, *Argentina Measures Affecting the Importation of Goods* AB-2014-9, adopted 26 January 2015, para 5.218. See further Article 7.1 of the Protocol.

27 WTO Panel Report, *Turkey-Restrictions on imports of textile and clothing products* (Panel Report, *Turkey Textiles*), WT/DS34/R, adopted 19 November 1999, para 9.63. See, further, Peter van den Bossche, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (2006) 443. See also Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice and Policy* (2edn 2006) 270.

28 Van den Bossche (n 27) 441.

29 ibid.

30 Bimha (n 7) 2016. See also Bimha (n 6).

31 Matsushita et al (n 27) 274.

32 WTO Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (Panel Report, *India Quantitative restrictions*), WT/DS90/R, adopted 22 September 1999, para 5.129 and para 5.144. See also WTO Panel Report, *EEC – Quantitative Restrictions against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD

substantially resembles the measure invalidated by the WTO Panel Report in *India Quantitative restrictions* on the basis of Article XI.1 of GATT.[33] This reasoning was reiterated by the WTO Panel Report in *Colombia Indicative Prices and Restrictions on Ports of Entry*,[34] where it was held that while the terms used at the beginning of paragraph 1 of Article XI are 'prohibitions or restrictions' without further qualification, it is clear from the context in which these terms are employed that the kind of restriction cited in this provision refers to a limitation on the quantity of imports.[35] The Instrument operates within the broad scope of the term 'restriction', which denotes 'a limitation on action, a limiting condition or regulation'.[36] Therefore South Africa would have to show that the Instrument restricts trade.[37]

Moreover, WTO panels have recognised the applicability of Article XI in instances that 'create uncertainty, affect investment plans, restrict market access or make importation prohibitively costly'.[38] This is the case with the Instrument, which has made importation prohibitively costly and restricted market access for South Africa, which accounts for approximately more than half of all imports into Zimbabwe.[39] Furthermore, it appears that WTO panel decisions on quantitative restrictions hinge on the design of the measure and its potential to negatively affect importation 'as opposed to a standalone analysis of the actual impact of the measure on trade flows'.[40] It is sound to argue that the Instrument is targeted primarily against South Africa imports, hence the violent demonstrations by Zimbabwean cross-border traders and the reports of smuggling of goods by cross-border traders into Zimbabwe to reduce costs.[41]

In the alternative, if Zimbabwe contended that the Instrument is not a quantitative restriction within the meaning of Article XI of GATT, South Africa can argue that there

---

30S/129, para 31. See, further, WTO Panel Report, *EEC – Programmes of Minimum import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para 4.9. See further in this regard, Zimbabwe Ministry of Industry and Commerce, 'Criteria for the Application of Import/Export Licence' (2016) <http://www.tradezimbabwe.com/wp-content/uploads/2016/03/Requirements-for-an-application-for-import-export-license.pdf> accessed 21 September 2016.

33 Panel Report, *India Quantitative Restrictions* at para 5.144. See, further, WTO Panel Report, *EEC – Quantitative Restrictions against Imports of Certain Products from Hong Kong*, BISD 30S/129, adopted 12 July 1983, para 31 and WTO Panel Report, *Japan Trade in Semi-conductors*, BISD 35S/116, adopted 4 May 1988, para 118.

34 WTO Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry* (Panel Report, *Colombia Ports of Entry*), WT/DS366/R, adopted 20 May 2009.

35 Panel Report, *Colombia Ports of Entry* para 4.62.

36 Panel Report, *India Quantitative Restrictions* para 5.128.

37 Panel Report, *Colombia Ports of Entry* paras 4.63 and 7.2229.

38 Panel Report, *Colombia Ports of Entry* para 7.240.

39 Zimbabwe Ministry of Industry and Commerce, 'National Trade Policy 2012–2016' (n 12) 4.

40 Panel Report, *Colombia Ports of Entry* para 7.240.

41 Radio Voice of the People 'SA, Zimbabwe Goods Smuggling Incidents on the Rise' Radio Voice of the People (22 August 2016) <http://www.radiovop.com/index.php/national-news/14404-sa-zimbabwe-goods-smuggling-incidents-on-the-rise.html> accessed 29 September 2016.

have been several instances in which WTO panels have found that a non-quantitative restriction was in violation of Article XI.[42] Any measure implemented by a contracting party which restricted the exportation or sale for export of products is covered by this Article XI.1, irrespective of the legal status of the measure.[43] Therefore the guise of an 'import licence' in the Instrument could still fall foul of Article XI.1 of GATT because the Instrument restricts South African exports to Zimbabwe.

In addition, a violation of Article XI.1 simultaneously constitutes a violation of Article XIII of GATT.[44] Article XIII.1 of GATT provides that quantitative restrictions must be administered in a non-discriminatory manner against the like products of all third countries. It could be argued that the Instrument is implicitly targeted against products from South Africa by virtue of the fact that Zimbabwe is aware that South Africa is the largest exporter of the foodstuffs cited in the Instrument. Therefore, the Instrument could be found to be in violation of Article XIII.1 of GATT.

In the same vein, the Instrument would in this regard contravene the ALIP, which provides that the rules for import licensing procedures must be neutral in application and must be administered in a fair and equitable manner.[45] This reasoning is endorsed by the WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas III*, which held that Article 1.3 of the ALIP requires that the application and administration of import licensing procedures must be 'neutral, fair and equitable'.[46]

Furthermore, each import licence costs $30 per product.[47] This means that importers must obtain a licence for each product. This approach is a flagrant violation of the ALIP, which requires that non-automatic licensing measures such as the Instrument, must not be more administratively burdensome than absolutely necessary to administer the measure.[48] This has sparked violent protests by Zimbabwean cross-border traders that

---

42 Panel Report, *Colombia Ports of Entry* para 4.118. See, further, WTO Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (Panel Report, *Brazil Retreaded Tyres*), WT/DS332/R, adopted 17 December 2007, para 7.15.

43 WTO Panel Report, *Japan Trade in Semi-conductors* (L/6309 - 35S/116), adopted 4 May 1988, para 106.

44 Panel Report, *Turkey Textiles* para 9.66.

45 Article 1.3 of the ALIP.

46 WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* III, WT/DS27/AB/R, adopted 25 September 1997, para 197.

47 Zimbabwe Ministry of Industry and Commerce, 'Requirements for the application for import/export licensing' (2016) <http://www.mic.gov.zw/> accessed 25 September 2016. See, further, Joseph Cronje, 'How Will SA Respond to Zimbabwe's Import Restrictions?' (2016) <https://www.tralac.org/discussions/article/10216-how-will-sa-respond-to-zimbabwe-s-import-restrictions.html?utm_source=Weekly+tralac+Newsletter&utm_campaign=c4d9086cf2-NL20160803&utm_medium=email&utm_term=0_a95cb1d7ad-c4d9086cf2-311091957> accessed 21 September 2016.

48 Article 3.2 of the ALIP.

culminated in the burning down of a government warehouse at the Beitbridge border post.[49]

### The 'safeguard measures' ground of justification

Article XIX of GATT, Article 20 of the Protocol and Article 2 of the AGS permit the imposition of 'safeguard measures' in instances where any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products.[50] Safeguard measures are remedies that are imposed in the form of import restrictions in the absence of any allegation of an unfair trade practice.[51]

In the same vein, Ndlovu submits that safeguard measures such as the Instrument, together with escape clauses, are instruments of choice in the WTO to protect specific strategic local industries by impeding the market access of cheap imports out.[52] However, it has been argued that the countries that impose safeguards, whether legally or not, most often exempt their preferential trade agreement partners as well as small developing countries.[53] The WTO Appellate Body has been reluctant to decide on this issue.[54] However, it has been held that in a case involving the formation of a customs union, this exemption is available only when two conditions are fulfilled: first, the party claiming the benefit of this exemption must prove that the measure in question is

49 *The Financial Gazette* 'South Africa Gives Zimbabwe Three Weeks Deadline over Imports Ban' *The Financial Gazette* (6 August 2016) <http://www.financialgazette.co.zw/south-africa-gives-zimbabwe-three-week-deadline-over-imports-ban/> accessed 12 August 2016.

50 Article XIX.1(a) of GATT. This right is subject to the proviso that the contracting party shall be free, in respect of such product and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

51 WTO Appellate Body Report, *United States Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (Appellate Body Report, *US Line Pipe*), WT/DS202/AB/R, adopted 8 March 2002, para 80.

52 Lonias Ndlovu, 'Assessing the WTO Compliance of Selected Aspects of South Africa's International Trade Administration Amendment Bill' 2010 Obiter 315.

53 Patrick Messerlin and Hilda Fridh, 'The Agreement on Safeguards: Proposals for Change in the Light of the EC Steel Safeguards' (2006) 40(4) Journal of World Trade 729. Messerlin and Fridh make the case for the exemption of preferential trading partners on the basis of footnote 1 of the Agreement on Safeguards, which leaves the door open for an interpretation that favours the preferential trading partners through Article XXIV of GATT 1994. See also Gerhard Erasmus, 'When History and Governance Confusion Undermine Trade Certainty: The 1964 Trade Agreement between South Africa and Zimbabwe' (1 August 2016) <https://www.tralac.org/images/docs/10342/s16wp162016-erasmus-when-history-and-governance-confusion-undermine-trade-certainty-1964-sa-zimbabwe-trade-agreement-20160824-fin.pdf> accessed 27 September 2016.

54 WTO Appellate Body Report, *Argentina Safeguard Measures on Imports of Footwear* (Appellate Body Report, Argentina *Footwear*) WT/DS121/AB/R, adopted 26 January 2015, para 114 and WTO Appellate Body Report, *US Line Pipe* para 198.

introduced upon the formation of a customs union that fully complies with the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV of GATT and, secondly, that the party must prove that the formation of that customs union would be hindered if it were not allowed to introduce the impugned measure.[55] Unfortunately, this is not the case with the Instrument, which is primarily directed at goods from South Africa, a member of SADC together with Zimbabwe.[56] Safeguard measures therefore typically take the form of customs duties above the applicable binding or quantitative restrictions.[57] The Instrument operates as a quantitative restriction in the form of non-automatic import licensing.[58]

The text of Article XIX.1(*a*) of GATT, 'read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of GATT to be 'emergency actions'.[59] 'Emergency actions' are to be employed only when, as a result of obligations incurred under GATT 1994, an importing member has to contend with developments it had not 'foreseen' or 'expected' when it incurred that obligation.[60] Consequently, this enquiry into the safeguard measures ground of justification will assess the compatibility of the Instrument with the substantive and the procedural requirements of the AGS and GATT through an analysis of WTO case law.

*The substantive requirements*

In essence, there are two basic enquiries. First, is there a right to apply the safeguard measure?[61] And, secondly, if so, has that right been exercised through the application of such a measure within the confines of the AGS?[62] For this right to exist, the WTO member in question must have ascertained, as required by Article 2.1 of the AGS and in line with Articles 3 and 4 of the AGS, 'that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry'.[63] According to the Appellate Body, the phrase 'in such increased quantities' denotes that the increase must have been 'recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury'.[64] A determination of the existence of 'serious injury' must be based on facts and not merely on allegation,

55 WTO Appellate Body Report, *Turkey Restrictions on Imports of Textile and Clothing Products* WT/DS34/AB/R, adopted 19 November 1999, para 58.
56 Business Reporter (n 9).
57 Van den Bossche (n 27) 636.
58 Bimha (n 6).
59 Appellate Body Report, *Korea Safeguards* para 86.
60 Appellate Body Report, *Korea Safeguards* para 86.
61 Appellate Body Report, *US Line Pipe* para 84.
62 Appellate Body Report, *US Line Pipe* para 84.
63 Appellate Body Report, *US Line Pipe* paras 84 and 167–168.
64 WTO Appellate Body Report, *Argentina Footwear* para 131.

conjecture or remote possibility.[65] To this end, Zimbabwe submits that that one of the main tenets of its National Trade Policy is an export-led industrialisation strategy in which domestic firms should revise their business models towards the competitive production of higher-quality value-added goods and services with an export orientation.[66] This is because the Zimbabwean import bill escalated exponentially, increasing from US$2.2 billion in 1996 to approximately US$5.7 billion in 2012 and resulting in a negative trade balance since 2002.[67] Even more telling, South Africa remains Zimbabwe's single largest trading partner.[68] Significantly, the AGS accords a Member the latitude to determine its own in accordance with the principle of sovereignty.[69] Thus, Zimbabwe is entitled to institute safeguard measures because of the persistent negative trade balance and the escalating import bill.

Furthermore, Zimbabwe is required under GATT to prove that the increased imports have caused or threaten to cause serious injury to its domestic industry. In this regard, it must be noted that 'serious injury' denotes a significant overall impairment in the position of a domestic industry, whereas 'threat of serious injury' denotes serious injury that is clearly imminent.[70] The 'threat of serious injury' refers to 'serious injury' which has not yet occurred, but remains a future event whose actual materialisation cannot, in fact, be predicated with certainty.[71] The word 'imminent' refers to the moment in time when the 'threat' is likely to materialise and the use of this word implies that the anticipated 'serious injury' must be at the cusp of occurring.[72] In tandem with this, the word 'clearly', which qualifies the word 'imminent', is regarded as 'an indication that there must be a high degree of likelihood that the anticipated serious injury will materialise in the very near future'.[73] If only a threat of increased imports is present, rather than actual increased imports, this would not be regarded as adequate .[74] In fact, Article 2.1 of the AGS demands an actual increase in imports as a requirement for a

---

65 Article 4.1(*b*) of the AGS. See WTO Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, adopted 16 May 2001, para 7.129. See also Eva Johan, 'The Protection of Domestic Industry through Safeguards Instrument GATT/WTO and Its Implementation on Downstream Steel Industry in Indonesia' 2011 9 Indonesian Journal of International Law 631.

66 Zimbabwe Ministry of Industry and Commerce, 'National Trade Policy 2012–2016' (n 12) 8.

67 ibid 3–4.

68 ibid 4.

69 Appellate Body Report, *US Line Pipe* para 158. South Africa accounts for at least 40% of total exports and 60% of total imports.

70 Article 4.1(*a*) and Article 4.1(*b*) of the AGS.

71 Appellate Body Report, *US Line Pipe* para 169. See, further, WTO Appellate Body Report, *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (Appellate Body Report, *US Lamb*), WT/DS177/AB/R, adopted 16 May 2001 para 125.

72 Appellate Body Report, *US Lamb* para 125.

73 ibid.

74 WTO Panel Report, *Argentina Safeguard Measures on Imports of Footwear* (Panel Report, *Argentina Footwear*), DS121, adopted on 12 January 2000, para 8.284.

finding of either threat of serious injury or serious injury.[75] A determination of the existence of a threat of serious injury due to a threat of increased imports constitutes a finding based on allegation or conjecture rather than one supported by facts as required by Article 4.1(*b*).[76] However, Zimbabwe does not necessarily have to prove 'serious injury': a determination that there is a 'threat of serious injury' would be sufficient.[77] This is because the AGS, by defining 'threat of serious injury' distinctly from 'serious injury', operates to lower the threshold for establishing the right to apply a safeguard measure.[78] This delicate balance struck in the AGS implies that this was done so that an importing Member State may intervene earlier in order to take preventive action when increased imports pose a 'threat' of 'serious injury' to a domestic industry, but have not yet caused 'serious injury'.[79] Consequently, it does not matter if in the case of Zimbabwe, for the purposes of determining whether there is a right to apply a safeguard measure under the AGS, a domestic authority finds that there is 'serious injury' or a 'threat of serious injury': in either of these two events, the right to apply a safeguard is established.[80]

Concomitant with the right to apply the safeguard measure is the requirement for prior determination of a causal link between the increased imports of the cited foodstuffs from South Africa and serious injury or the threat of it.[81] This is taken to mean that the 'causal link' denotes a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury.[82] The Zimbabwean authorities must provide a 'reasoned and adequate explanation of how the facts support their determination'.[83] In this regard, Zimbabwe would struggle to prove that the increased South African exports are the cause of the injury to domestic industry because it would be difficult to prove that the South African imports are the 'sole cause or threat' to domestic industry in light of the myriad economic problems Zimbabwe has faced in the last decade, such as hyperinflation, the continuing deterioration in income distribution, persistent droughts and cash shortages.[84] This is because the AGS provides

75 Panel Report, *Argentina Footwear* para 8.284.
76 ibid.
77 Articles 2 and 4 of the AGS. See in this regard Appellate Body Report, *US Line Pipe* para 170.
78 Appellate Body Report, *US Line Pipe* para 169.
79 ibid
80 ibid para 171.
81 Article 4.2(*b*) of the AGS.
82 Appellate Body Report, *US Wheat Gluten* para 67.
83 Appellate Body Report, *US Line Pipe* para 181.
84 World Bank, 'Macro Poverty Outlook for Zimbabwe' (2016) <http://documents.worldbank.org/curated/en/201371468196138291/Macro-poverty-outlook-for-Zimbabwe> accessed 28 August 2016. See also International Monetary Funds, 'Dealing with the Gathering Clouds Regional Economic Outlook for Sub-Saharan Africa' (2015) <https://www.imf.org/external/ns/search.aspx> accessed 21 July 2016 at 21.

that when 'factors' other than 'increased imports' are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.[85]

This rationale contradicts the oft-reiterated WTO Appellate Body finding that Article 4.2(*b*) of the AGS does not suggest that 'increased imports' must be the sole cause of the serious injury, or that 'other factors' causing injury must be excluded from the determination of serious injury.[86] The language of Article 4.2(*b*), denotes that 'the causal link' between increased imports and serious injury may exist, 'even though other factors are also contributing, 'at the same time', to the situation of the domestic industry'.[87] This would mean that Zimbabwe could easily succeed in proving a causal link between serious injury and 'increased imports' from South Africa. The approach of the Appellate Body is, with respect, incorrect. First, this interpretation lacks any textual basis from Article 4.2(*b*) of the AGS and is tantamount to the Appellate Body's rewriting the text of the AGS. Secondly, it goes against the very gist of the purport of Article 4.2(*b*), which creates the 'sole cause test' that seeks to prohibit injury to domestic industry from 'increased imports' of the product concerned and not 'other factors'.[88] Thirdly, it would condone carte balance behaviour because the arbitrary move away from the 'sole cause test' makes the AGS susceptible to unscrupulous governments with a protectionist agenda: they could cite the factor of 'increased imports', which could, for instance, be a minor factor in terms of its effect, but could be used with other factors as the basis for imposing the safeguard measures. Consequently, this article suggests that Article 4.2(*b*) of the AGS be amended to replace the 'sole cause test' with the pragmatic 'major cause test', which would seek to identify and quantify the 'major cause' of the injury as the 'cause' of the injury.

If the first enquiry leads to the conclusion that there is a right to apply a safeguard measure in a particular case, then the interpreter must next consider whether the Instrument as a safeguard measure is applied 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', as required by Article 5.1 of the AGS.[89] Therefore, the right to apply a safeguard measure is not absolute.[90] In this regard, Zimbabwe could argue that the measure is applied only to the 'extent necessary' based on its recent 'clarification' that the measure is not targeting goods for individual consumption but traders who bring truckloads of products into the country for resale, in so doing threatening or causing serious injury to its infant domestic industry.[91] Circular

---

85 Article 4.2(*b*) of the AGS. See Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 987.

86 See Appellate Body Report, *US Wheat Gluten* para 67; WTO Appellate Body Report, *United States Hot-rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras 229–232 and Appellate Body Report, *US Line Pipe* para 209.

87 Appellate Body Report, *US Wheat Gluten* para 67.

88 Article 2 of the AGS. See Appellate Body Report, *US Line Pipe* para 209.

89 Appellate Body Report, *US Line Pipe* para 84.

90 ibid.

91 Bimha (n 6).

8 of 2016 authorises the import of specific goods for own use without exceeding a certain quantity—for instance, coffee creamers, baked beans, cereals, ice creams and potato crisps.[92] However, this pious victory is negated by the proviso that the allowance in the Circular is granted once a month on the first entry only.[93]

The test for whether the Instrument has been implemented 'only to the extent necessary' should hinge on the question whether or not the Instrument applies to products in which Zimbabwe lacks productive capacity, such as clothing.[94] If the Instrument were found to apply to goods in respect of which Zimbabwe lacks productive capacity, then South Africa could contend on the basis of Article 5.1 of the AGS that the Instrument constitutes measures that go beyond the 'extent necessary'. South Africa has said as much in negotiations.[95] Key stakeholders such as the Clothing Manufacturers Association of Zimbabwe and the Zimbabwe Textile Manufacturers Association allege that many of the fabrics classified in the Instrument cannot be manufactured in Zimbabwe at present and that the Instrument will increase the cost of doing business.[96] This implies that the Instrument could fall foul of the AGS in that it is implemented against goods which Zimbabwe does not have capacity to produce and thus goes beyond the 'extent necessary' to protect infant industries. The Zimbabwean government has conceded as much by submitting that the ban on fabric for clothing materials could have a negative impact on clothing manufacturers because there is uncertainty whether the local industry can supply what consumers need.[97] The Instrument in this regard therefore falls foul of GATT and the AGS in that it goes beyond the 'extent necessary' to protect infant local industry and the determination is based on speculation and uncertainty.

Lastly, Article XIX of GATT requires that the Instrument must be an 'extraordinary remedy'.[98] Therefore, Zimbabwe, on the back of an eviscerated manufacturing industry[99] and a heavily contracted economy which satisfies the 'emergency' threshold

---

92 Commissioner General's Circular 8 of 7 July 2016 (3 August 2016) <http://xa.co.za> accessed 21 September 2016 at 2.

93 Commissioner General's Circular 8 of 7 July 2016 (n XX) 2.

94 See Victoria Mtomba, 'Cross-border Traders Cry Foul over Imports Ban' *The Standard* (3 July 2016) <http://www.thestandard.co.zw/2016/07/03/cross-border-traders-cry-foul-imports-ban/> accessed 22 September 2016.

95 DTI, 'Media Statement: Zimbabwe to Address Trade Restrictions' (4 August 2016) <http://www.thedti.gov.za/editmedia.jsp?id=3816> accessed 12 August 2016.

96 Mtomba (n 94). See also Thupeyo Muleya, 'Importers Struggle to Get Restricted Goods Licences' *Chronicle* (1 July 2016) <http://www.chronicle.co.zw/importers-struggle-to-get-restricted-goods-licences/> accessed 23 September 2016. In this article the Shipping and Forwarding Agents Association of Zimbabwe (SFAAZ) commented that while they support the government initiative aimed at promoting the growth of local industries, there was a need for more consultations with the relevant stakeholders.

97 Mtomba (n 94).

98 Appellate Body Report, *Korea Safeguards* para 86.

99 Zimbabwe Ministry of Industry and Commerce (n 12) 6.

requirement, is entitled on the reasoning of the Appellate Body Report, *Korea Safeguards*, to implement the extraordinary remedy of the Instrument.[100] This reasoning has been endorsed by the Appellate Body Report, *US Line Pipe*, which held that the principal basis of Article XIX of GATT and the AGS is unquestionably that of giving a WTO member the opportunity, as trade is liberalised, to seek 'an effective remedy in an extraordinary emergency situation that, in the judgement of that member, makes it necessary to protect a domestic industry temporarily'.[101] This is the alleged basis of the Instrument.[102] The large trade deficit between Zimbabwe and South Africa further validates this contention.[103] Consequently, Zimbabwe could succeed on the ground of 'safeguard measures' despite the fact that taking safeguard action results in restrictions on imports arising from 'fair' trade with South Africa and other interested parties.[104]

*The procedural requirements*

The AGS compels the Zimbabwean government to give reasonable public notice to all interested parties and to hold public hearings or other appropriate means in which importers and exporters and other interested parties can present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest.[105] This requirement of notification and consultation with the relevant stakeholders would facilitate the transparency of the process.[106] However, these requirements were contravened because organisations with a direct and substantial interest in the Instrument such as the Clothing Manufacturers Association of Zimbabwe and the Zimbabwe Textile Manufacturers Association were not consulted.[107] Therefore the Instrument falls foul of the 'public interest' enquiry requirements.

In tandem with the 'public interest' requirement, the Instrument may be implemented only after notice in writing has been submitted to the WTO as far in advance as may be practicable and an opportunity has been afforded to all the relevant exporters of the affected products.[108] However, if agreement between the interested parties is not reached, Zimbabwe would be free to proceed with the safeguard action.[109] If Zimbabwe continues to apply the safeguard action, then Article XIX.3(*a*) of the GATT authorises South Africa, within 90 days after such action is taken to suspend, upon the expiration of 30 days from the day on which written notice of such suspension was received by the

100 Appellate Body Report, *Korea Safeguards* para 86.
101 Appellate Body Report, *US Line Pipe* para 82.
102 Bimha (n 6).
103 Zimbabwe Ministry of Industry and Commerce (n 12) 3–4.
104 Appellate Body Report, *Korea Safeguards* para 87.
105 Article 3.1 of the AGS read with Art 1.4 (*b*) of the ALIP.
106 Yong-Shik Lee, 'The WTO Agreement on Safeguards: Improvement on GATT Article XIX?' 2000 14(3) The International Trade Journal 291.
107 Mtomba (n 94). See also Muleya (n 96).
108 Article XIX.2 of GATT read with Art 12 of the AGS.
109 Article XIX.3(*a*) of GATT.

Contracting Parties, such substantially equivalent concessions or other obligations under GATT. However, the suspension of the concessions will only be valid if the Contracting Parties endorse it.[110] In short, South Africa would be entitled to retaliate within the framework of Article XIX of GATT and the AGS.[111] In this regard, the Protocol requires that Member States seek prior authorisation from the CMT before they retaliate.[112]

The AGS requires that Zimbabwe, prior to promulgation of the Instrument, should have provided South Africa with adequate information and time to allow for the opportunity, through consultations, for a 'meaningful exchange on the issues identified'.[113] A preliminary issue here is the fact that Zimbabwe notified South Africa and other interested parties through a Press Statement, in which it submitted that the Instrument was intended to operate as a safeguard measure. However, the Appellate Body Report *United States Line Pipe* held that the use of a Press Statement is insufficient to fulfil the notification requirements of Article 12.3 of the AGS.[114] In any event, Zimbabwe's Press Statement was issued *after* the promulgation of the Instrument and therefore woefully fails the test of Article 12.3 of the AGS.

The reference, in Article 12.3, to 'the information provided under' Article 12.2, indicates that Article 12.2 identifies the information that is required to ensure meaningful consultations to occur under Article 12.3.[115] Among the list of 'mandatory components' regarding information identified in Article 12.2 of the AGS are 'a precise description of the proposed measure and its proposed date of introduction'.[116] It is clear that the Zimbabwean government neither notified nor engaged meaningfully with interested parties both in Zimbabwe and South Africa.[117] The notion of a meaningful exchange assumes that Zimbabwe should have entered into consultations in good faith and should afford adequate opportunity for the consideration of any comments received from exporting members such as South Africa before implementing the measure.[118] A 'meaningful exchange' requires that the member proposing to apply a safeguard measure provides exporting Members with adequate information and time for consultations.[119]

110 Article XIX.3(*a*) of GATT read with Art 8.2 of the AGS.
111 See, further, Art 8.3 of the AGS.
112 Article 21 of the Protocol.
113 Article 12.3 of the AGS. See, further, Appellate Body Report, *US Wheat Gluten* para 136.
114 Appellate Body Report, *US Line Pipe* para 105.
115 Appellate Body Report, *US Wheat Gluten* para 136.
116 Appellate Body Report, *US Wheat Gluten* para 136.
117 Mtomba (n 94). See also Muleya (n 96).
118 Appellate Body Report, *US Line Pipe* para 110.
119 Appellate Body Report, *US Line Pipe* para 106. See also Appellate Body Report, *US Wheat Gluten* paras 99–101.

However, Article 12.3 of the AGS does indicate how much time should be made available for consultations.[120] Therefore, a finding on the adequacy of time in any particular case must always be dealt with on a case-by-case basis.[121] Furthermore, Zimbabwe is required to provide adequate opportunity for prior consultations with interested parties having substantial interest (such as South Africa) with a view, inter alia, to reviewing the information provided, exchanging views on the measure proposed and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.[122]

In the alternative, if South Africa's allegation that Zimbabwe did not seek prior approval from the CMT were proven to be true, then the Instrument would be deemed illegal as it would not have been lawfully authorised.[123] However, GATT offers an exception to the rule that there must be prior authorisation by the CMT: it provides that in instances where the requirement for prior notification and consultation has not been complied with, the Zimbabwean government could allege that the goods in question cause or threaten serious injury to the domestic producers of products affected by the action in the territory of Zimbabwe, and that any delay would cause irreparable damage.[124] Zimbabwe would then be entitled to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as might be necessary to prevent or remedy the injury.[125]

It must also be noted that Zimbabwe could implement these safeguard measures for such a period of time as may be necessary to prevent or remedy serious infringement and to facilitate adjustment subject to the proviso that that this period should not exceed four years unless it were extended in accordance with the pertinent provisions of the AGS.[126] The Protocol provides that the period of application of safeguard measures is eight years.[127] The AGS takes it a step further and provides that Zimbabwe, as a developing country member, is entitled to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period of eight years provided for in Article 7.3 of the AGS.[128] It is suggested that in instances where safeguard measures are imposed between 'developing' countries the least onerous time period in the Protocol be applicable. In this regard, it must be noted that although there are initial indications that South Africa joined the WTO as a developed country, Schlemmer

120 Appellate Body Report, *US Line Pipe* para 107.
121 ibid.
122 Article 12.3 of the AGS read with XIX.2 of GATT.
123 See Phillip (n 10).
124 Article XIX.3(*b*) of GATT.
125 ibid.
126 Articles 7.1 and 7.2 of the AGS.
127 Article 20.6 of the Protocol.
128 Article 9.2 of the AGS.

convincingly argues that South Africa has been accorded developing country status with access to special and differential treatment.[129]

However, South Africa cannot use its right to suspend equivalent concessions for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of the AGS.[130] The three-year peace clause might prevent the unintended consequences of a safeguard measure spreading as it may encourage the proliferation of protectionist measures, with South Africa responding with higher tariffs on Zimbabwean products.[131] Erasmus contends that that South Africa is reluctant to retaliate because the matter is 'too sensitive and that retaliation is technically difficult, undesirable and politically dangerous'.[132] Contrary to this assertion, the South African government has, in response to the Instrument, reportedly requested Zimbabwe to phase down the duty and surtax on 112 products.[133]

### The 'Balance of Payments' Exception as a Ground of Justification

In this regard, Zimbabwe contends that the Instrument seeks to alleviate the balance of payments challenges in the manner contemplated by the UBOP and GATT.[134] The UBOP works in tandem with Articles XII.1 and XVIII.2 of GATT, and together they authorise a contracting party to use import licences as a tool to correct a disequilibrium in its balance of payments.[135] A balance of payments problem is meant to connote a scenario where a country's foreign exchange reserves are eroding or are being maintained by borrowing from foreign lenders.[136] Article XII applies to a member that needs to safeguard its external financial position and balance of payments.[137] Significantly, 'publicity' is not a requirement in the consideration of whether to invoke Article XII.[138] In certain instances, importers may be required to obtain a licence from the government in order to import goods.[139] This is exactly what the Zimbabwean government has done with the Instrument. There is no quantitative test for invocation.[140] Consequently, if a member lacks 'hard' currency reserves to cover import payments for

---

129 Engela Schlemmer, 'South Africa and the WTO Ten Years into Democracy' (2004) 29 South African Yearbook of International Law 133.
130 Article 8.3 of the AGS.
131 Messerlin and Fridh (n 53) 726.
132 Erasmus (n 16).
133 Business Reporter, 'SA Hits Back at Zim Imports Ban' *The Standard* (7 August 2016) <https://www.thestandard.co.zw/2016/08/07/sa-hits-back-zim-imports-ban/> accessed 12 August 2016.
134 DTI 'Media Statement' (n 95).
135 See Panel Report, *Colombia Ports of Entry* para 7.246.
136 Bhala (n 85) 1007.
137 ibid 1009.
138 ibid.
139 ibid 1010.
140 ibid.

three months, that fact could justify the invocation, but does not constitute a necessary nor a sufficient condition.[141] A hard currency is one that is ‘freely convertible and widely acceptable as a form of payment’.[142] Therefore, Zimbabwe could succeed on the basis that its international reserves remained at around two weeks of import cover in 2015, leaving the country highly exposed to external shocks.[143] This is because, as a general economic policy rule, a country must seek to maintain ‘hard’ foreign exchange reserves that are sufficient to cover or exceed in value three months’ worth of imports.[144]

However, this exception is not unbridled, because the Instrument must avoid unnecessary damage to the commercial or economic interests of any other contracting party.[145] Furthermore, the provisions of the Instrument must not exceed those necessary to forestall the imminent threat of, or to halt, a serious decline in Zimbabwe’s monetary reserves or, in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in the party’s reserves.[146] Interpretive Note Ad Article XII, paragraph 3(*c*)(i) amplifies the ‘harm principle’ and provides that the Instrument should attempt to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.[147] In fact, Article XII.4 of GATT protects the exports of WTO members from being subjected to restrictive treatment.[148] The Instrument falls foul of this provision as it is blatantly targeted against imports from South Africa. Lastly, Zimbabwe is required to relax the restrictions of the Instrument progressively as conditions improve and maintain them only to the extent justified. It must also eliminate the restrictions when conditions no longer justify their institution or maintenance under Article XII.[149]

Alternatively, Article XVIII.2(*b*) of GATT also works as an exception to the prohibition against quantitative restrictions for balance of payments purposes in a manner which accords due consideration to the continued high level of demand for imports likely to be generated by programmes of economic development. Article XVIII is designed for use by less developed countries and operates as a form of special and differential treatment.[150] This exception aptly lends itself to Zimbabwe’s situation in that it applies, only temporarily, to a contracting party’s economy which can only support low standards of living and is in the early stages of development.[151] Zimbabwe’s position is

---

141 ibid.
142 ibid 1007.
143 World Bank (n 84). See also Reserve Bank of Zimbabwe, ‘January 2016 Monetary Policy Statement’ (2016) <http://www.zimtrade.co.zw/IMG/pdf/monetary-policy-statement-january-2016.pdf> accessed 21 June 2016, 21–22.
144 Bhala (n 85) 1007.
145 Article XII.3(*c*)(i) of GATT.
146 Article XII.2(*a*) of GATT.
147 Annex 1 to GATT: Notes and Supplementary Provisions.
148 See Art XII.4 of GATT and Bhala (n 85) 1011.
149 Article XII.2(*b*) of GATT.
150 Bhala (n 85) 1014.
151 Article XVIII.4 (a) of GATT.

further strengthened by the fact that the phrase 'in the early stages of development' is not meant to apply only to contracting parties that have just started their economic development, but also to contracting parties such as Zimbabwe whose economy is undergoing a process of industrialisation to correct excessive reliance on primary production.[152]

Specifically in terms of Article XVIII.9(*a*) of GATT, the balance of payments exception hinges on whether Zimbabwe is 'facing or threatened with a serious decline in its monetary reserves, and whether or not a decline of a given size is serious or not must be related to the initial state and adequacy of the reserves'.[153] Article XVIII.9 contemplates that a less-developed country may face a chronic problem and need to implement quantitative restrictions such as the Instrument, for a long time.[154] In this regard, Zimbabwe has had a long-standing foreign currency crisis that has resulted in a liquidity problem in the management of the economy; foreign exchange shortages that have hindered the economy's capacity to import essential inputs for industrial production; low and unstable commodity prices on the international market for primary exports such as gold, tobacco, cotton, and a massive external debt.[155] This situation has been exacerbated by the lack of balance of payments support from multilateral institutions such as the International Monetary Fund and the World Bank, which contributed to the contraction of the Zimbabwean economy by over 40% in the decade leading to 2010.[156] Furthermore, Zimbabwe's import absorption remains high relative to export performance, a development that has undermined efforts to build sustainably adequate foreign exchange reserve buffers and improve domestic money supply conditions.[157] More significantly, a huge import bill has essentially drained foreign exchange resources realised from exports, credit lines and remittances, and that has further tightened liquidity conditions, with constraining effects on economic growth potential.[158]

These problems have all conspired to create a serious decline in Zimbabwe's monetary reserves. This is the averment made by Zimbabwe in the negotiations with South Africa.[159] Further validating this averment, the Reserve Bank of Zimbabwe has reported that capital and current account developments in 2015 culminated in the deterioration

---

152 Ad Article XVIII paras 1 and 4 in Annex 1 to GATT: Notes and Supplementary Provisions. See in this regard Zimbabwe Ministry of Industry and Commerce, 'National Trade Policy 20122016' (12) 8.

153 Panel Report, *India Quantitative restrictions* para 5.173.

154 Bhala (n 85) 1014.

155 Zimbabwe Ministry of Industry and Commerce 'National Trade Policy 2012–2016' (n 12) 2–4. See also Bernard Mpofu, 'Zim Faces Currency Dilemma' *Zimbabwe Independent* (17 June 2016) <https://www.theindependent.co.zw/2016/06/17/zim-faces-currency-dilemma/> accessed 12 August 2016). Zimbabwe has suffered from hyperinflation that eviscerated the local currency and led to a multi-currency system incorporating the South African rand and the United States dollar.

156 Zimbabwe Ministry of Industry and Commerce 'National Trade Policy 2012–2016' (n 12) 4.

157 Reserve Bank of Zimbabwe (n 143) 21.

158 ibid.

159 DTI 'Media Statement' (n 95).

in the overall balance of payments deficit from US$40.3 million in 2014 to an estimated deficit of US$385.8 million in 2015.[160] These considerations are relevant in the context of Article XVIII.9 of GATT, which requires an evaluation of a developing country's development objectives.[161]

In addition, Zimbabwe is required to relax the restrictions in the Instrument progressively as conditions improve, and to maintain them only to the extent necessary under the terms of Article XVIII.9 of GATT; it must also eliminate them when the conditions justifying them no longer exist.[162] This is subject to the proviso that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions that it is applying under this Article.[163] However, Note Ad Article XVIII.11 provides that the second sentence in paragraph 11 shall not be interpreted to mean that Zimbabwe is required to relax or remove the restrictions if such relaxation or removal would produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII of GATT.[164] This would make it possible for Zimbabwe not to eliminate the remaining measures if doing so would result in the recurrence of the conditions that had necessitated their institution in the first place.[165]

In the same vein with the AGS, UBOP requires that restrictive import measures taken for balance of payments purposes, such as the Instrument, may be applied only to control the general level of imports and may not exceed what is necessary to address the balance of payments situation.[166] The UBOP also requires that Zimbabwe should confirm its commitment publicly, as soon as possible, time schedules for the removal of the Instrument.[167] Zimbabwe has substantially complied with this provision by officially submitting that the Instrument will not endure in perpetuity and are time bound even though this submission is vague on the anticipated date of removal.[168]

GATT also requires that Zimbabwe should enter into consultations with South Africa immediately after instituting the Instrument with a view to discussing the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effects of the restrictions on the economies of other contracting parties.[169] This requirement appears to have been complied with.[170] Article

160 Reserve Bank of Zimbabwe (n 143) 21–22.
161 Bhala (n 85) 1014.
162 Article XVIII.11 of GATT.
163 ibid.
164 Annex 1 to GATT: Notes and Supplementary Provisions.
165 Panel Report, *India Quantitative Restrictions* para 5.189.
166 Paragraph 4 of UBOP.
167 Paragraph 1 of UBOP.
168 Bimha 'Press Statement' (n 7).
169 Article XVIII.12 of GATT.
170 DTI 'Media Statement' (n 95).

XVIII.12 of GATT is significant in two respects: first, it is pragmatic in that it explicitly acknowledges that there are circumstances in which prior consultation is neither necessary nor possible and, secondly, it aligns the balance of payments regime of the WTO with that of the safeguard measures exception by permitting after-the-fact consultations with interested parties.[171]

It must also be borne in mind that the difficulties Zimbabwe is facing in expanding its internal markets and the instability of the country's trade are acknowledged by GATT.[172] More specifically, Zimbabwe is permitted under GATT to impose an import licensing regime, such as in the Instrument, in order to secure its external financial position and to ensure an adequate level of resources for its economic development.[173] However, this right is not absolute and the import licensing regime in the Instrument may be implemented only to the extent that it shall not exceed those necessary to forestall the threat of, or to halt, a serious decline in its monetary reserves or, in the case of a contracting party with inadequate monetary reserves, such as Zimbabwe, to achieve a reasonable rate of increase in its reserves.[174] In response, South Africa could contend that the Instrument must be applied in a manner that avoids unnecessary damage to its commercial or economic interests and not to unreasonably hinder the importation of any description of goods in minimum commercial quantities the exclusion of which would curtail the orthodox channels of trade.[175]

Significantly, on the basis of Article XIV of GATT, Zimbabwe, may apply balance of payments measures in a discriminatory fashion and may therefore justifiably target South African imports in the manner presumably contemplated by the Instrument.[176] Lastly, UBOP requires that in instances where quotas are used instead of price restrictions, Zimbabwe must provide reasons why price-based measures are not an adequate instrument to deal with the balance of payments situation.[177] Zimbabwe is also required to inform the General Council of the introduction of or any changes in the application of restrictive import measures taken for balance of payments purposes, as well as any changes in time schedules for the removal of such measures.[178] This rationale was confirmed by the Panel Report, *India Quantitative Restrictions*, where it was held that a contrary interpretation would be in conflict with the principle of *pacta sunt servanda*.[179]

---

171 See Article XIX.3(*b*) of GATT read with Art XVIII.12(*a*) of GATT.
172 Article XVIII.8 of GATT.
173 Article XVIII.9 of GATT.
174 Article XVIII.9(*a*) of GATT.
175 Article XVIII.10 of GATT.
176 Article XIV of GATT. See also Bhala (n 85) 1014.
177 Paragraph 3 of UBOP.
178 Paragraph 9 of UBOP.
179 Panel Report, *India Quantitative Restrictions* para 5.80.

Ultimately, the final determination in cases involving the criteria set forth in paragraph 2(*a*) of Article XII or in paragraph 9 of Article XVIII should be based on the determination by the International Monetary Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultations in such cases.[180]

## Conclusion

There is no doubt that Zimbabwe's economy has contracted significantly in size, with unprecedented levels of unemployment caused by an eviscerated manufacturing industry and that this has culminated in balance of payments problems. In response, Zimbabwe promulgated the Statutory Instrument 64 of 2016 to resuscitate the domestic manufacturing industry, which has collapsed in the face of cheaper imports. However, the Instrument is brazenly targeted at goods from South Africa.

Consequently, it is incumbent on South Africa to consider pursuing litigation through the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to test the veracity of the new import licensing regime. In this regard, this article assessed the grounds of justification for implementing the Instrument as proffered by Zimbabwe. First, the article contends that the Instrument is in actual fact a quantitative restriction implemented under the guise of an import licence in that it creates uncertainty, affects investment plans, restricts market access and consequently violates Articles XI.1 and XIII of GATT. Secondly, the article contends that the Instrument falls foul of the ALIP in that the administration of the measure is unduly burdensome, unfair and inequitable, to the detriment of South Africa.

Thirdly, the article contends that the Instrument does not constitute valid safeguard measures in the manner contemplated by the AGS in that it goes beyond the extent necessary to protect domestic industry. It contends further that Zimbabwe would struggle to prove that South African products are the cause of the injury to domestic industry, for two reasons: first, it would be difficult to prove that South African foodstuffs are the sole cause of the injury to domestic industry as required by the AGS; and, secondly, because the Instrument fails to fulfil the due notification and consultation requirements of the AGS .

In the alternative, this article contends that the urgency of the Zimbabwean situation is such that any delay would cause damage that would be difficult to repair. These circumstances therefore entitle Zimbabwe to invoke the right to implement safeguard measures without regard to the due process notification and consultation requirements

180 Article XV.2 of GATT.

of the AGS. Lastly, the article contends that the Instrument substantially complies with the balance of payments exceptions as postulated by UBOP and GATT.

## References


Afrika J and Ajumbo G, ‘Informal Cross Border Trade in Africa: Implications and Policy Recommendations’ (2012) 4/3(10) Africa Economic Brief <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Economic%20Brief%20%20Informal%20Cross%20Border%20Trade%20in%20Africa%20Implications%20and%20Policy%20Recommendations%20-%20Volume%203.pdf> accessed 2 August 2016.

Bhala R, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (Sweet and Maxwell 2005).

Bimha M, ‘Statutory Instrument 64 of 2016 (SI 64.2016) is not an import ban’ *The Sunday Mail* (10 July 2016) <http://www.sundaymail.co.zw/si-64-2016-is-not-an-import-ban/> accessed 10 August 2016.

Bimha M, ‘Press Statement by the Honourable MC Bimha (MP) Minister of Industry and Commerce on the recently Gazetted Statutory Instrument 64 of 2016 in terms of Control of Goods Act [Chapter 14:05]’ (2016) <http://www.tralac.org/images/Discussions/Zimbabwe_Ministry_of_Industry_and_Commerce_Press_statement_22_June_2016.pdf?utm_source=Weekly+tralac+Newsletter&utm_campaign=c4d9086cf2-NL20160803&utm_medium=email&utm_term=0_a95cb1d7ad-c4d9086cf2-311091957> accessed 22 August 2016.

Business Reporter, ‘SA Hits Back at Zim Imports Ban’ *The Standard* (7 August 2016) <https://www.thestandard.co.zw/2016/08/07/sa-hits-back-zim-imports-ban/> accessed 12 August 2016.

Business Reporter, ‘Mugabe Says Import Ban Retaliation against South Africa’ *New Zimbabwe* (8 August 2016) <http://www.newzimbabwe.com/business-30620-Imports+Mugabe+confirms+SA+retaliation/business.aspx> accessed 21 September 2016.

Cronje J, ‘How Will SA Respond to Zimbabwe’s Import Restrictions?’ (2016) <https://www.tralac.org/discussions/article/10216-how-will-sa-respond-to-zimbabwe-s-import-restrictions.html?utm_source=Weekly+tralac+Newsletter&utm_campaign=c4d9086cf2-NL20160803&utm_medium=email&utm_term=0_a95cb1d7ad-c4d9086cf2-311091957> accessed 21 September 2016.

Department of Trade and Industry (DTI), Media Statement, ‘Zimbabwe to Address Trade Restrictions’ (4 August 2016) <http://www.thedti.gov.za/editmedia.jsp?id=3816> accessed 12 August 2016.

Erasmus G, ‘How Can the Beitbridge Dispute be Resolved?’ (11 August 2016) <https://www.tralac.org/discussions/article/10255-how-can-the-beitbridge-dispute-be-resolved.html#ftnref3> accessed 21 August 2016.

Erasmus G, 'When History and Governance Confusion Undermine Trade Certainty: The 1964 Trade Agreement between South Africa and Zimbabwe' (1 August 2016) <https://www.tralac.org/images/docs/10342/s16wp162016-erasmus-when-history-and-governance-confusion-undermine-trade-certainty-1964-sa-zimbabwe-trade-agreement-20160824-fin.pdf> accessed 27 September 2016.

*The Financial Gazette*, 'SI 64 to Remain in Force for up to Three Years' *The Financial Gazette* (12 August 2016) <http://www.financialgazette.co.zw/si-64-to-remain-in-force-for-up-to-three-years/> accessed 12 August 2016.

*The Herald*, 'SADC Trade Ministers Endorse SA, Zim Talks on SI 64' *The Herald* (29 August 2016) <http://www.herald.co.zw/sadc-trade-ministers-endorse-sa-zim-talks-on-si-64/> accessed 21 September 2016.

Johan E, 'The Protection of Domestic Industry through Safeguards Instrument GATT/WTO and Its Implementation on Downstream Steel Industry in Indonesia' (2011) 9 Indonesian Journal of International Law 617.

International Monetary Fund, 'Dealing with the Gathering Clouds Regional Economic Outlook for sub-Saharan Africa' (2015) <https://www.imf.org/external/ns/search.aspx> accessed 21 July 2016.

Jung Y and Kang E, 'Toward an Ideal WTO Safeguards Regime Lessons from US Steel' (2004) 38 International Law 919.

Lehloenya M, 'Reflections on South Africa's Continued Absence from the WTO Dispute Settlement System' (2011) 36(1) Journal for Juridical Science 67 at 69. https://doi.org/10.4314/jjs.v36i1.71817

Marawanyika G, 'Zimbabwe Denies Dispute with SA over Import Ban' *Business Day* (27 July 2016) <http://www.businesslive.co.za/bd/> accessed 22 August 2016.

Matsushita M, Schoenbaumt T, Mavroidis P and Hahn M, *The World Trade Organization: Law, Practice and Policy* (2edn, Oxford University Press 2006).

Messerlin P and Fridh H, 'The Agreement on Safeguards: Proposals for Change in the Light of the EC Steel Safeguards' (2006) 40(4) Journal of World Trade 713.

Mpofu B, 'Zim Faces Currency Dilemma' *Zimbabwe Independent* (17 June 2016) <https://www.theindependent.co.zw/2016/06/17/zim-faces-currency-dilemma/> accessed 12 August 2016.

Mtomba V, 'Cross-border Traders Cry Foul over Imports Ban' *The Standard* (3 July 2016) <http://www.thestandard.co.zw/2016/07/03/cross-border-traders-cry-foul-imports-ban/> accessed 22 September 2016.

Muleya T, ‘Importers Struggle to Get Restricted Goods Licences’ *Chronicle* (1 July 2016) <http://www.chronicle.co.zw/importers-struggle-to-get-restricted-goods-licences/> accessed 23 September 2016.

Ndlovu L, ‘Assessing the WTO Compliance of Selected Aspects of South Africa’s International Trade Administration Amendment Bill’ 2010 Obiter 310.

Phillip X, ‘EXCLUSIVE: DTI Heading to Zimbabwe to Thrash out Ban on SA Goods’ *Business Day* (14 July 2016) <http://www.bdlive.co.za/business/trade/2016/07/14/exclusive-dti-heading-to-zimbabwe-to-thrash-out-ban-on-sa-goods> accessed 21 September 2016.

Radio Voice of the People, ‘SA, Zimbabwe Goods Smuggling Incidents on the Rise’ *SABC News* (22 August 2016) <http://www.sabc.co.za/news/a/21374a804df5beb5965af646a0a81a58/SA,-Zimbabwe-goods-smuggling-incidents-on-the-rise-20162208>.

Reserve Bank of Zimbabwe, ‘January 2016 Monetary Policy Statement’ (2016) <http://www.zimtrade.co.zw/IMG/pdf/monetary-policy-statement-january-2016.pdf> accessed 21 June 2016.

Schlemmer E, ‘South Africa and the WTO Ten Years into Democracy’ (2004) 29 South African Yearbook of International Law 125.

Van Den Bossche P, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (Cambridge University Press 2006). https://doi.org/10.1017/CBO9781139165143

World Bank, ‘Macro Poverty Outlook for Zimbabwe’ (2016) <http://documents.worldbank.org/curated/en/201371468196138291/Macro-poverty-outlook-for-Zimbabwe> accessed 28 August 2016.

WTO Appellate Body Report, *Argentina Measures Affecting the Importation of Goods*, AB-2014-9, adopted 26 January 2015.

WTO Appellate Body Report, *Argentina Safeguard Measures on Imports of Footwear* (Appellate Body Report, Argentina *Footwear*) WT/DS121/AB/R, adopted 26 January 2015.

WTO Panel Reportm Brazil – Measures Affecting Imports of Retreaded Tyres (Panel Report, Brazil Retreaded Tyres), WT/DS332/R, adopted 17 December 2007.

WTO Panel Report, Colombia – Indicative Prices and Restrictions on Ports of Entry (Panel Report, Colombia Ports of Entry), WT/DS366/R, adopted 20 May 2009.

WTO Panel Report, EEC – Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, adopted on 18 October 1978, BISD 25S/68.

WTO Panel Report, EEC – Quantitative Restrictions against Imports of Certain Products from Hong Kong, adopted on 12 July 1983, BISD 30S/129.

WTO Panel Report, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Panel Report, India Quantitative Restrictions), WT/DS90/R, adopted 22 September 1999.

WTO Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (Appellate Body Report, *Korea Safeguards*), WT/DS98/AB/R, adopted 12 January 2000.

WTO Appellate Body Report, *Turkey Restrictions on imports of textile and clothing products* WT/DS34/AB/R, adopted 19 November 1999.

WTO Appellate Body Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R; WT/DS178/AB/R, adopted 16 May 2001.

WTO Appellate Body Report, *United States Hot-rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001.

WTO Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Appellate Body Report, US Line Pipe), WT/DS202/AB/R, adopted 8 March 2002.

WTO Appellate Body Report, *United States Definitive Measures on Imports of Wheat Gluten* from the European Communities, WT/DS166/12, adopted 19 January 2001.

WTO Panel Report, United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/R, adopted 16 May 2001.

Lee Y, 'The WTO Agreement on Safeguards: Improvement on the GATT Article XIX?' (2000) 14(3) The International Trade Journal 283. https://doi.org/10.1080/08853908.2000.11668658

Zimbabwe Ministry of Industry and Commerce, 'Industrial Development Policy' (2012–2016) <http://www.zimtrade.co.zw/IMG/pdf/idp.pdf> accessed 8 August 2016.

Zimbabwe Ministry of Industry and Commerce, 'Criteria for the Application of Import/Export Licence' <http://www.tradezimbabwe.com/wp-content/uploads/2016/03/Requirements-for-an-application-for-import-export-license.pdf> accessed 21 September 2016.

Zimbabwe Ministry of Industry and Commerce, 'National Trade Policy 2012–2016' (2016) <http://www.zimtrade.co.zw/IMG/pdf/zimbabwe_national_trade_policy_document__2012_-_2016_.pdf> accessed 9 September 2016.

ZIMRA Commissioner General's Circular 8 of 7 July 2016 (3 August 2016) <http://xa.co.za> accessed 21 September 2016.

## Legislation, treaties, agreements

Agreement on Import Licensing Procedures (ALIP), article 1.4(*b*).

Control of Goods Act [Chapter 14:05], section 3 <http://www.vertic.org/media/National%20Legislation/Zimbabwe/ZW_Control_of_Goods_Act.pdf> accessed 22 September 2016

Control of Goods (Import and Export) (Commerce) Regulations, 1974 <http://www.tradebarriers.org/ntm/measures/view/874> accessed 5 August 2016.

General Agreement on Tariffs and Trade, articles XI, Article XII.2(*a*), XII.3(*c*)(i), XII.4, XIV, XV.2, XVIII.4, XVIII.8, XVIII.9, XVIII.10, XVIII.11, XVIII.12, XIX.1, XIX.2, XIX.3, XXIV, Annex 1.

General Agreement on Tariffs and Trade 1994, Balance of Payments Provisions, paragraphs 1, 3, 4, 9.

Southern Africa Development Community Protocol on Trade, articles 20.6, 21.1.

Understanding on Rules and Procedures Governing the Settlement of Disputes.

Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994.

WTO Agreement on Safeguards, articles 2, 2.1, 3.1, 4, 4.1, 4.2, 7.1, 7.2, 8.2, 8.3, 9.2, 12, 12.3.

Zimbabwe Statutory Instrument 64 of 2016 <http://www.mic.gov.zw/index.php/downloads/category/3-import-and-export-requirements> accessed 6 August 2016.