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RESEARCH TOPIC:

A CRITICAL ANALYSIS OF THE COMPATIBILITY OF STATUTORY INSTRUMENT (S.I) 122 OF 2017 WITH THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA) LAW.

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DECLARATION

I, MUNYARADZI CHIZHANDE, hereby declare that this dissertation is the result of my

Investigation and research, except to the extent indicated in the acknowledgements,

References and by comments included in the board of the report, and that it has not been submitted in part or full for any other degree at any other University.

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APPROVAL FORM

The undersigned certify that they have read and recommended to the **MIDLANDS STATE UNIVERSITY** for acceptance, a dissertation entitled: **A CRITICAL ANALYSIS OF THE COMPATIBILITY OF STATUTORY INSTRUMENT (S.I) 122 OF 2017 WITH AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA) LAW**, submitted by MUNYARADZI CHIZHANDE in partial fulfilment of the requirements for the award of the Bachelor of Laws (Honours) Degree.

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DEDICATION

To my parents, Mr M and Mrs R Chizhande, my siblings and entire family.

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I`m humbled by the boundless love of the Almighty, for taking me thus far, with adequate provisions, principally the gift of life itself, without which the success of this study would have been rendered impossible.

To my parents, siblings and entire extended family, thank you so much for everything you have done for me. I`m forever indebted to you for the love, generosity, endurance, guidance, encouragement, inspiration and unwavering support in every form. May the good Lord richly bless you. My project supervisor, Miss C Hamadziripi, thank you so much for guiding me throughout the writing of this study. Your spirited and warm guidance and input made this final product worthy all the pain. Last but not least, my friends and colleagues, thank you for being there. God bless you abundantly!

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CHAPTER 1:

An outline of the study.

1.1 Introduction:

A quantitative restriction on trade in goods is a measure which limits the quantity of a product that may be imported or exported and these take many forms such as bans, quotas and import or export licenses.[1] This means that all products subject to a quota or tariff quotas are administered through an import licensing procedure which calls upon any parties interested in importing a product to apply for an import license or a permit to import.[2]

There has been a sharp increase in global trade over the years with the advent of technology which has seen smooth flow of goods across borders promoting more economic global integration as a result of a combination of influential factors such as;

> *"*the liberalization of tariffs and other barriers to trade; foreign direct investment through trade and investment negotiations and agreements; autonomous unilateral structural reforms; technological innovations in transport and communications; international solidarity through supportive measures (like trade preferences); and the strategic use of policies, experimentation and innovation."[3]

This phenomenon is known as globalisation defined as the *"*inexorable integration of markets, nation-states and technologies..."[4] It is a "process driven by international trade and investment and aided by information technology."[5] As a result of globalisation and the benefits that have been understood to come with it, nations have created regional and global blocs to regulate the conduct of international trade among themselves. Examples of such blocs are the World Trade Organisation (WTO) and other regional free trade areas such as the 8 recognised by the African Union namely; Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African

[1] P V Bossche, W Zdouc, *The Law and Policy of the World Trade Organisation*, (2013) 538
[2] P V Bossche & W Zdouc (n 1 above) 538
[3] United Nations Conference on Trade and Development: *Globalization for development: the international trade perspective*, (2008) United Nations Publication vii
[4] T. Friedman *The Lexus and the Olive Tree: Understanding Globalisation* (1999) 9
[5] G A Solank "Globalization and Role of WTO in Promoting Free International Trade" (2012) Vol.3 Issue 1 *IOSR Journal of Humanities and Social Science.* 11

Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).[6]

These blocs provide rules that are negotiated by Member States and become binding agreements upon ratification and these agreements govern the conduct of trade between states.

African States are on the move to establishing one huge continental trading bloc to be known as the African Continental Free Trade Area (AfCFTA) whose chief objective is to create a single market for all 54 African States through a progressive elimination of all trade barriers and tariffs. The ultimate objective is to promote free trade among African countries without any barrier save for exceptional circumstances. However, free trade agreements have led to more countries heavily conflicted when it comes to committing to their obligations to open their borders while they also seek to implement various safeguard measures to protect domestic industries.

In as much as countries enter into these Free Trade Agreements, of particular interest to note is the fact that they do have domestic legislations pertaining to trade of goods and services. These internal laws and instruments have to be chiselled in a manner which conform to the requirements provided for under the agreements countries would have signed up for and thus binding on them.

1.2 Background of the study:

Zimbabwe is a member of the WTO and a variety of other regional free trade agreements. Over the past years, Zimbabwe has adopted a protective regime by implementing a series of import regulations meant to restrict free flow of imports. These included SI 8 of 1996, SI 22c of 2000, SI 171 of 2005, SI 137 of 2007, SI 138 of 2007, SI 150 of 2011, SI 6 of 2014, SI 126 of 2014, SI 18 of 2016, SI 20 of 2016 and SI 64 of 2016.[7]

In 2016, Zimbabwe through the Ministry of Industry, Trade and Commerce added onto the list of these import regulations by introducing Statutory Instrument 64 of 2016 which required importers to acquire an import license in order to import the products

[6] M.A Farahat "African Continental free trade Area: Policy and negotiation options for trade in Goods" (2016/7) *United Nations Publications* p1

[7] Section 3, Schedule to Statutory Instrument 122 of 2017

listed in the Instrument. The measure was, "aimed at resuscitating the local industry whose performance had been immensely affected by the influx of imported products.[8] The rationale behind the implementation of the measure was that the influx of imported products and the subsequent displacement of locally produced goods from the market resulted in high import bill, plummeting capacity utilisation and closure of companies.[9]

Following the promulgation of S.I 64 of 2016, there were threats of retaliation from neighbouring countries who were Zimbabwe`s main trading partners such as Zambia which registered a formal complaint with SADC and COMESA NTB number NTB000721 calling for the removal of Statutory Instrument 64 of 2016[10] and South Africa through their Minister of Industry and Trade attacked the instrument as violating "the spirit of free trade which the SADC Protocol seeks to promote"[11].

Consequently, Statutory Instrument 64 of 2016 was repealed and in its stead was promulgated Statutory Instrument 122 of 2017. Statutory Instrument 122 of 2017 did two things. Firstly, it provided a comprehensive procedure and requirements for obtaining a license to export or import the listed products requiring licenses.[12] Secondly, it consolidated all the previously promulgated import and export regulations into one instrument for easy of reference under one regulation by repealing all of them.[13]

Regardless of the displeasure that SI 64 of 2016 brought and the subsequent repeal of it and replacement by SI 122 of 2017, it is important to note that Zimbabwe is not yet prepared to let go of its import licensing regime as Statutory Instrument 122 of 2017 still holds the same purpose as its predecessors.

In March of 2018, Zimbabwe became a signatory to the Agreement establishing the African Continental Free Trade Area (AfCFTA) along with other 44 African nations. The aim of the AfCFTA, upon ratification by member countries, is to create a single

[8] Ministerial Statement: Impact of S.I 64 of 2016 by the Minister of Industry and Commerce, available at www.veritaszim.net (accessed 20 September 2018) 1
[9] Ministerial Statement (n 8 above)p 1-2
[10] SI Murangwa & T Njaya "An Evaluation of the Effects of Statutory Instrument 64 of 2016 on Zimbabwe's Neighbours" (2017) Vol.5 *International Journal of Management and Commerce Innovations.* 6
[11] SI Murangwa & T Njaya (n 10 above) 6
[12] Explanatory Note annexed to Statutory Instrument 122 of 2017. It does not, however, form part of the regulation but merely provides for the procedure and requirements for obtaining a license. The requirements covers both applications by individuals and companies.
[13] Section 3, Schedule to the Statutory Instrument 122 of 2017

market for goods and services in Africa by facilitating free trade among member States and thus each Member State will be required to progressively eliminate trade tariffs and non-tariff barriers. The dictates of free trade entail opening of borders to allow free movement of goods and services without any restrictions or prohibitions. All countries that seek to put in place these internal measures such as import licenses should do so in accordance with the African Continental Free Trade Agreement.

1.3 Problem Statement:

International trade is expected to rapidly grow between African States as a result of an increase in intra-regional economic integration and market penetration. Zimbabwe is an interested party which is also seeking to avoid being alienated from the enjoyment of the economic benefits to precipitate from this regional intra-trade regime. As such, there is need to ensure that trade restrictive measures effected by the government of Zimbabwe which are protectionist in nature, are so put in place within the confines of the enabling provisions of the AfCFTA law. By ensuring compatibility with AfCFTA law, Zimbabwe shields itself against a plethora of dispute settlement proceedings being instituted by other fellow African member States. Therefore, it is against this background that this study seeks to analyse Statutory Instrument 122 of 2017 and determine its compatibility with the AfCFTA law.

1.4 Research Methodology:

The study will undertake a desktop research method. This entails gathering primary sources such as relevant text books on the subject, international treaties and conventions and local legislation. Secondary sources such as internet sources, journal articles, and newspaper articles will also be consulted. The research will then adopt a doctrinal analysis and descriptive methodology by describing the principles of quantitative restrictions under AfCFTA and then analyse the provisions and policy objectives underlining Statutory Instrument 122 of 2017 to determine its compatibility with AfCFTA.

1.5 Research Objectives:

The main objective of this study is to analyse Statutory Instrument 122 of 2017 and determine its compatibility with AfCFTA law.

To help achieve the main objective, the following sub-objectives will be pursued;

1) An overview of the objectives of AfCFTA and the obligations it will impose on State parties with regards to liberalisation of trade.
2) The compatibility of S.I 122 of 2017 with AfCFTA law.
3) The consequences of non-compatibility of S.I 122 of 2017 with AfCFTA law.
4) Conclusion and Recommendations.

1.6 Literature Review:

Free trade is a "system in which the trade of goods and services between or within countries flows unhindered by government-imposed restrictions and interventions."[14] Vast literature has been written concerning the turf between trade liberalisation and protectionism. Zimbabwe`s experience with trade liberalisation has been debated by a number of authors and scholars in the context of evaluation of trade liberalisation and its impact on the economy.

A research by the African Economic Research Consortium concluded that Zimbabwe`s trade liberalisation which It embarked on in the period 1991 to 1995 under the Economic Structural Adjustment Programme (ESAP) was "credible and sustainable for the period 1991-1995, after which credibility was lost and the liberalisation process became unsustainable."[15] The research point out that the reason for the unsustainability was a "direct result of policy reversals that were instituted after 1995 while accumulated balance of payments (BOP) deficits and budget deficits resulted in payments incompatibility"[16]

The resultant effect of the unsustainability saw the country embark on a wave of policies meant to restrict trade moving away from the concept of trade liberalisation. Chidhakwa and Jubenkanda as quoted by Murangwa and Njaya, suggests that the imposition of import restrictions boosts volume of production of companies in the local

[14] R.A.N Fouda "Protectionism and Free Trade: A country`s Glory or Doom?" (2012) Vol 3 No.5 *International Journal of Trade, Economics and Finance* p351
[15] A Makochekanwa, J T Hurungo & P Kambarami, "Zimbabwe`s experience with trade liberalisation" (2012) *African Economic Research Consortium, Research Paper 245* p30
[16] A Makochekanwa, J T Hurungo & P Kambarami (n 15 above) 30

economy.[17] They also argue that the imposition of import restrictions is justifiable in circumstances where the local economy is in a recession or depression.[18]

In their research, commenting on import licensing, Murangwa and Njaya opine that Zimbabwe`s economy is in a recession and the government wants to stimulate local production, protect local infant firms from foreign competition and avoid dumping of products by China, India, Japan and South Africa.[19] Murangwa and Njaya also quotes Dumbu and Karonga who are of the opinion that import restrictions can be used to protect infant industries so that they grow and compete with foreign firms in the future and prohibit the dumping of sub-standard products in the domestic market.[20]

The above positions also have international support from a number of authors for example D.S MacRae, commenting on Kenya`s use of import licensing argues that, the licensing system, where it effectively bans competing imports, it brings forth a compelling incentive to international companies to come and establish themselves in the country maintaining import licensing and thus safeguard the local market from international competition.[21]

Quantitative restrictions are argued to be the best method in preventing imports from exceeding a certain value which will in turn, create confidence among local manufacturers to produce with a guarantee that the local market for their products is secure from international competition.[22] It is also further argued that import licensing, if imposed for a restrictive function helps to avoid speculative stock-piling and resolve foreign exchange crisis.[23] However, this reason holds more value in circumstances where, "reserves are low, since speculative imports may be desirable when they result

[17] Chidhakwa A & Jubenkanda R.R (2003) *Intermediate Macroeconomics*, quoted in SI Murangwa & T Njaya "The effects of Statutory Instrument 64 of 2016 on clearing agents based at Beitbridge Border Post in Zimbabwe" (2016) Vol 5 Issue II *International Journal of Business and Management Invention 45*
[18] Chidhakwa A & Jubenkanda (n 17 above) 45
[19] SI Murangwa & T Njaya "The effects of Statutory Instrument 64 of 2016 on clearing agents based at Beitbridge Border Post in Zimbabwe" (2016) Vol 5 Issue II *International Journal of Business and Management Invention* 45
[20] Dumbu E and Karonga R.M (2013) *Principles of Economics II (Macroeconomics),* quoted in SI Murangwa & T Njaya "The effects of Statutory Instrument 64 of 2016 on clearing agents based at Beitbridge Border Post in Zimbabwe" (2016) Vol 5 Issue II *International Journal of Business and Management Invention 45*
[21] D.S MacRae "The Import Licensing System in Kenya" (1975) Vol 17 No.1 *The Journal of Modern African Studies* 42
[22] D.S MacRae (n 21 above) 45
[23] D.S MacRae (n 22 above) 46

from importers hedging against overseas price increases and exchange-rate fluctuations."[24]

MacRae also goes further to suggest that there is a certain behaviour observed among local buyers in developing countries that they have a tendency of buying goods from outside than from their local firms and thus the use of quantitative restrictions on imports may be a sure means to "force" the buyers to try local products and in the process protect the local firms.[25]

Azamat argues that while free trade entails non-intervention by government, sometimes the government may find it necessary to intervene for either political reasons or economic reasons.[26] Political factors include, "protecting jobs, industries which are important for national security, outflow of natural resources, fighting against unfair foreign competition, consumer protection from dangerous products, supporting human rights of exporting countries and foreign policy objectives."[27] On the economic side, the author states that the economic argument is the one mainly based on the one proposed by Alexander Hamilton in 1792 which speaks to protection of infant industries, shielding them against foreign competition until they have fully capacitated themselves to withstand such competition.[28]

Apart from the dominant political and economic arguments proffered by a number of literature, Fouda brings in a more social-cultural argument by arguing that the process of trading entails taking into consideration cultural differences which may end up presenting challenges to the importing country rendering "a lot of countries to think twice by staying at home and enjoying home industries` goods and products, denying therefore to practice import and export."[29] The author further states that import and exporting crisis such as transacting deals in foreign languages, foreign laws customs and regulation are reduced.[30]

[24] D.S MacRae (n 23 above) 46
[25] D.S MacRae (n 24 above) 46
[26] A Sulaymonov, "Privileges of free trade, factors and arguments towards protectionism" (2017) Vol 6 Issue 3 *International Journal of Economics & Management Sciences* p2
[27] A Sulaymonov (n 26 above) 2
[28] A Sulaymonov (n 27 above) 2
[29] R.A.N Fouda (n 14 above) 351
[30] R.A.N Fouda (n 29 above) 351

While it is true from the literature that import restrictions brings about a plethora of benefits and impacts to a certain extent, positively on the economy, it is this writer`s contention that little attention is being paid to the compatibility of these measures with free trade agreements, regional and global alike. Free trade agreements aim to liberalise trade by eliminating trade barriers that take many different forms. These agreements, however, also provide room for deviation from the norms but only in certain circumstances which must fall within the confines of the exception to the rules. Since AfCFTA is a newly born child, Zimbabwe`s Statutory Instrument 122 of 2017`s compatibility with it has not yet been explored and this study seeks to do that.

1.7 Limitations of the Study:

The study will focus on analysing Statutory Instrument 122 of 2017 and determine its compatibility with AfCFTA law. The study will pity the policy objectives behind the promulgation of SI 122 of 2017 against the enabling provisions of the AfCFTA law. Having determined its compatibility, the study will conclude and provide recommendations.

1.8 Chapter Synopsis:

Chapter 1 will focus on providing an outline of the study. It will provide the introduction to the study, the background of the study, the problem statement, the research objectives, literature review, research methods, limitations of the study, and finally, the chapter synopsis.

Chapter 2 will focus on outlining the objectives of AfCFTA. This chapter will also look at the historical background of AfCFTA. This chapter will also look at the specific provisions governing quantitative restrictions as provided for by the Agreement establishing the AfCFTA.

Chapter 3 will focus on S.I 122 of 2017 and its provisions. This chapter will also look at the policy objectives underpinning S.I 122 of 2017. This chapter will explore the compatibility of S.I 122 of 2017 with AfCFTA.

Chapter 4 will look at the reasons militating against use of quantitative restrictions. The chapter will then focus on outlining the consequences of non-compatibility of S.I 122 of 2017 with AfCFTA Agreement.

Chapter 5 will provide the conclusion and recommendations.

CHAPTER 2:

An overview of AfCFTA`s objectives and its provisions on quantitative restrictions.

2.1 Introduction:

AfCFTA seeks to create a single market for all African States, a market which constitutes 1.2 Billion people and a gross domestic product (GDP) of $2.5 trillion, across all 55 member States of the African Union making AfCFTA the world's largest free trade area since the formation of the World Trade Organization.[31] Future African population projections point to a staggering 2.5 billion people by 2050 at which point Africa will be contributing 26% of the World`s working age population with an economy doubling that of the developed world.[32] It is believed that "consolidating this continent into one trade area provides great opportunities for trading enterprises, businesses and consumers across Africa and the chance to support sustainable development in the world's least developed region."[33]

However, the average rate of tariffs is inhibiting trade within Africa as it is high. AfCFTA seeks to deal with this challenge and this chapter will uncover how it intends to do so by providing a brief historical background of AfCFTA, unpack its objectives and detail its provisions relating to use of quantitative restrictions.

2.2 Historical background of AfCFTA:

Trade has always existed as a driver of economic, social and political integration of African countries since time immemorial before Africa conceived the idea of formulating its first regional body initially known as the Organization of African Unity (OAU), in 1963.[34] The first regional body (OAU) was aimed at boosting intra-African cooperation and integration in the economic field at the continental level.[35] Out of it were birthed a number of regional economic communities (RECs), firstly, to amalgamate the economic space of identified regions in a bid to exploit the potential

[31] African Continental Free Trade Area Questions & Answers compiled by African Trade Policy Centre (ATPC) of the Economic Commission for Africa (ECA) in association with the African Union Commission available at www.uneca.org/atpc (accessed 15 November 2018) p1
[32] African Continental Free Trade Area Questions & Answers (n 31 above) 1
[33] African Continental Free Trade Area Questions & Answers (n 32 above) 1
[34] M.A Farahat "African Continental free trade Area: Policy and negotiation options for trade in Goods" (2016/7) *United Nations Publications* p1
[35] M A Farahat (n 34 above) 1

benefits that oozed from such integrations; and secondly, develop these RECs into becoming a single huge continental economic community.[36]

Regardless of the increasing number of trade integration programmes and institutions that were put in place to see the attainment of a single continental market, the level and rate at which these programmes were implemented at regional economic communities was very weak leading to their failure which also foiled efforts to attain the ultimate goal of creating a huge continental market.[37] The OAU stepped up its efforts to realise the continental market objective by adopting the OAU Abuja Treaty Establishing the African Economic Community in June 1991.[38] The Treaty was to become a building block towards the realisation of the continental market project which bore its first fruits by witnessing the formation of the African Union (AU) in 2002, which replaced the OAU.[39]

The efforts to establish the continental market were re-ignited in 2012 during the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union in Addis Ababa where it was agreed to establish the African Continental Free Trade Area (AfCFTA).[40] The agreement was set out to see the light of day after an effluxion of a five year time frame. In June 2015, at the 25th Summit of the African Union, held in South Africa, African Heads of State and Government agreed to launch negotiations on the creation of the CFTA by 2017 through negotiations on the liberalization of trade in goods and services.[41]

On the 21st of March 2018, at the Kigali Summit in Rwanda, 44 African States including Zimbabwe signed the consolidated text of AfCFTA which comprised of; the Agreement establishing the African Continental Free Trade Area (AfCFTA), the Protocol on Trade in Goods, Protocol on Trade in Services and Protocol on Rules and Procedures on the Settlement of Disputes. Upon ratification by 22 of the signatory Member States, Zimbabwe included, the Agreement establishing the African Continental Free Trade

[36] M A Farahat (n 35 above) 1
[37] M A Farahat (n 36 above) 1
[38] M A Farahat (n 37 above) 1
[39] M A Farahat (n 38 above) 1
[40] M Saygili, R Peters & C Knebel "African Continetal Free Trade Area: Challenges and opportunities for tariff Reduction" (2018) *UNCTAD Research Paper No.15* p5
[41] M Farahat (n 39 above) 1

Area will come into force, finally achieving the objective which has its roots back in 1963.

2.3 Objectives of (AfCFTA):

The AfCFTA has objectives split into two namely general objectives listed under Article 2 of the Agreement and Specific objectives listed under Article 3. AfCFTA is set to make Africa a one market for all African member states by facilitating free movement of goods, services as well as persons thereby boosting economic fortunes of the continent which will in turn, ameliorate the livelihoods of the African population across all cultures through co-operation of all State Parties, inclusivity and regional integration.[42]

The objectives are to be achieved if all Member States commit to a spontaneous elimination of tariffs and move towards liberalisation of trade in goods and services, ensuring that State Parties abide to their obligations under the agreement and ensuring that all Member States work together to reach a common ground on contentious issues to do with trade facilitation measures, intellectual property rights, competition policies and that AfCFTA provides an efficient platform that is rule-based for the enforcement of rights and obligations and resolution of disputes.[43]

2.4 Quantitative restrictions under AfCFTA law:

A quantitative restriction on trade in goods is a measure which limits the quantity of a product that may be imported or exported and these take many forms such as bans, quotas, and import or export licenses.[44] This entails that all products subject to a quota or tariff quotas are administered through an import license or a permit to import or export.[45] AfCFTA sets out as one of its specific objectives by calling on Member States to progressively eliminate tariffs and non-tariff barriers to trade in goods.[46] AfCFTA does not have a separate agreement that deals with the administration of import and export licenses so import and export licenses, which Zimbabwe uses under its S.I 122 of 2017, will be dealt with under quantitative restrictions. The Protocol on Trade in

[42] Article 3 (a)-(h) AfCFTA Agreement
[43] Article 4 (a)-(g) AfCFTA Agreement
[44] P V Bossche & W Zdouc n 2 above) 538
[45] P V Bossche & W Zdouc (n 44 above) 538
[46] Article 4 (a) AfCFTA Agreement

Goods has a specific provision that deals with quantitative restrictions which provides as follows:

> "The State Parties shall not impose quantitative restrictions on imports from or exports to other State Parties except as otherwise provided for in this Protocol, its Annexes and Article XI of GATT 1994 and other relevant WTO Agreements."[47]

The position of AfCFTA is explicit in its disregard for use of quantitative restrictions. This is in line with its objective of creating a single market for all African Member States. In general, various reasons have been proffered by scholars as to why the use of quantitative restrictions is prohibited under free trade agreements but these will be discussed in much more detail in Chapter 4 of this research.

However, the use of quantitative restrictions is not entirely prohibited by AfCFTA but there are exceptions to the prohibition provided the country implementing the measure has done so within the confines of the enabling provisions to justify the exception.

2.5 Exceptions under AfCFTA:

Quantitative restrictions are allowable in certain circumstances which circumstances form the basis to invoke the exception to Article 9 of AfCFTA Protocol on Trade in Goods. Under AfCFTA Protocol on Trade in Goods, quantitative restrictions may be used by the importing country if it is experiencing or is about to experience balance of payments (BOP) difficulties.[48] Balance of payments is where a country`s trade and its finance flows converge.[49] A balance of payment problem thus occurs when a country`s demand for its currency plummets so sharply creating a downward pressure on the currency value.[50] The subsequent depreciation of the currency value creates a turmoil in market transactions resulting in citizens finding it difficult to buy products.[51]

One of the solutions to deal with BOP problems is through coming up with a trade policy to "counterbalance the increased demand for imports by imposing restrictions to force a reduction in trade deficit"[52] and such a trade policy is using quantitative restrictions which may take up various forms such as import quotas, import licenses

[47] Article 9 of AfCFTA Protocol on Trade In Goods
[48] Article 28 AfCFTA Protocol on Trade in Goods
[49] C Thomas , "Balance of Payments Crises in the Developing World: Balancing Trade, Finance & Development in the New Economic Order" (2000) Vol 15 Issue 6 *American University International Law Review* p 1253
[50] C Thomas (n 49 above) 1253
[51] C Thomas (n 50 above) 1253
[52] C Thomas (n 51 above) 1254

or healthy and safety regulations.[53] However, under AfCFTA, for a Member State to be justified in its implementation of such measures on the basis of BOP difficulties, such measures, "shall be equitable, non-discriminatory, in good faith, of limited duration and may not go beyond what is necessary to remedy the balance of payments situation."[54] The implementing Member State is also mandated to "inform the other State Parties forthwith and submit, as soon as possible, a time schedule for their removal."[55] This entails that measures which do not have a specific life-span are outlawed.

Quantitative restrictions may also be implemented to protect an infant industry which has a strategic economic importance at a national level.[56] However, for this exception to be justified under AfCFTA, the State implementing the measure for this purpose should have "taken reasonable steps to overcome the difficulties related to such infant industry" before imposing such measures to protect such an industry and the measure must be applied on a "non-discriminatory basis and for a specified period of time."[57] The Agreement goes further to mandate the Council of Ministers to come up with guidelines to allow for an orderly implementation of this exception.[58] Such guidelines are not available as of yet but hopefully they will be in the not so distant future once the biggest trading bloc in Africa comes into full swing.

AfCFTA also provides for general exceptions which include implementing measures necessary for protecting public morals, protecting human and plant life,[59] as well as security exceptions where a State implements measures for its security interests.[60] If a member state decides to implement quantitative restrictions, it is imperative that such a country do so within the confines of the aforementioned exceptions. Any measure implemented outside the enabling provisions constitute a violation of the agreement and consequences will definitely befall such a Member State. Such consequences will be discussed in detail in chapter 4 of this research.

[53] C Thomas (n 52 above) 1254
[54] Article 28 (1) AfCFTA Protocol on Trade in Goods
[55] Article 28 (2) AfCFTA Protocol on Trade in Goods
[56] Article 24 (1) AfCFTA Protocol on Trade in Goods
[57] Article 24 (1) AfCFTA Protocol on Trade in Goods
[58] Article 24 (2) AfCFTA Protocol on Trade in Goods
[59] Part VIII Article 26 of AfCFTA Protocol on Trade in Goods
[60] Article 27 of AfCFTA Protocol on Trade in Goods

Furthermore, AfCFTA incorporates World Trade Organisation (WTO) law on the issue of quantitative restrictions by specifying that quantitative restrictions can only be implemented in accordance with, "AfCFTA`s Protocol, its Annexes and Article XI of General Agreement on Trade and Tariffs (GATT) 1994 and other relevant WTO Agreements."[61] The AfCFTA Agreement has been framed to be in tandem with WTO Agreements in a bid to ensure that it does not function in contra to the spirit of the WTO.[62] AfCFTA should thus in no way attempt to reduce the importance of the already established WTO Members' commitments and obligations but should actually advocate for the adoption of those commitments among the AfCFTA Members who do not double as AfCFTA and WTO Member States.[63]

The effect of the invocation of WTO/ GATT 1994 law is only as an exception and not as the norm.[64] This is meant to avoid rendering AfCFTA inefficient where those Members who double as both WTO and AfCFTA can just invoke WTO law to circumvent their obligations under AfCFTA to the detriment of WTO non-members.[65] So to avoid that from happening, WTO law is invoked as an exception or where AfCFTA specifically subordinates its own provisions to WTO/GATT 1994 law, then WTO law takes precedence calling upon even those Member States who are not WTO members to adopt and implement WTO/GATT 1994 law.[66] As such, Zimbabwe is a Member of WTO, meaning it is allowed by Article 9 of AfCFTA to invoke WTO law. It is thus against this background that WTO Agreement on Import Licensing Procedures becomes relevant to determine whether the administration of import licenses in Zimbabwe is compatible with this agreement.

GATT Agreement exempts "export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting country."[67] or "imports or export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of

[61] Article 9 of AfCFTA Protocol on Trade In Goods
[62] International Trade Centre, "A business guide to the African Continental Free Trade Area Agreement." (2018) ITC, Geneva, p9
[63] International Trade Centre (n 62 above) 9
[64] International Trade Centre (n 63 above) 22
[65] International Trade Centre (n 64 above) 22
[66] International Trade Centre (n 65 above) 20
[67] Article XI:2 (a) GATT

commodities in international trade"[68] or "import restrictions on any agricultural or fisheries products, imported in any form necessary to the enforcement of governmental measures."[69] The other exceptions also relate to protection of domestic industries[70], measures implemented to deal with balance of payments issues[71] and for national security concerns.[72]

2.6 WTO Agreement on Import Licensing Procedures:

Import licensing was first debated during the Tokyo Round in the context of quantitative restrictions resulting in the adoption of an Import Licensing Code in 1980 subscribed to by 19 Contracting Parties.[73] Few changes were then effected to the Code during the Uruguay Round giving birth to the Agreement on Import Licensing Procedures effective from 1995 which became binding on all GATT/WTO Members and the Agreement was also made subject to the Understanding on Dispute Settlement.[74]

The Agreement has provisions relating to import licenses and has divided them into automatic import licensing and non-automatic import licensing.[75] However, it has been noted that the disciplines as contained in the Agreement on Import Licensing procedures do not speak to import licensing rules but are concerned with import licensing procedures and their administration.[76] Automatic import licenses do not have trade restrictive effects and thus they are not a contentious issue because approval for their "application is granted in all cases."[77] Non-automatic import licenses, on the other hand, have trade restrictive effects because they are the opposite of automatic licenses.

The relevant parts to the Agreement requires that non-automatic systems "shall not have trade-restrictive or distortive effects on imports additional to those caused by the imposition of the restriction and shall be no more administratively burdensome than

[68] Article XI:2(b) GATT
[69] Article XI:2 (c) GATT
[70] Article XVIII (c) GATT
[71] Article XVIII (b) GATT
[72] Article XXI GATT
[73] A F Lowenfield, *International Economic Law* (2002) 87
[74] A F Lowenfield (n 73 above) 87
[75] A H Quresh, *International Economic Law* (1999) 265
[76] A H Quresh, (n 75 above) 266
[77] Article 2.1 WTO Agreement on Import Licensing Procedures.

absolutely necessary"[78] and "the period of processing applications should not be longer than 30 days if applications are considered as and when received or 60 days if applications are considered simultaneously"[79] and "if a licence is denied, the applicant should be given an explanation and should have a right of appeal"[80] and "the period of licence validity shall be of reasonable duration and not be so short as to preclude imports"[81].

2.7 Conclusion:

There is no doubt that African States have gone an extra mile in creating something huge for themselves that will see the transformation of the African Continent in terms of the economic fortunes of the continent which will in turn, ameliorate the livelihoods of the many poverty-stricken African households. This chapter has traced the historical background of Africa`s largest single market trading bloc as well as the benefits to accrue from the single market. The chapter has also looked at quantitative restrictions under AfCFTA and the circumstances under which they are allowed. As AfCFTA incorporates WTO Law, this chapter has also looked at the relevant WTO law relating to quantitative restrictions and has also looked at the WTO Agreement on Import Licensing Procedures which seeks to provide guidelines to countries using import and export licensing to administer quantitative restrictions.

[78] Article 2 (a) WTO Agreement on Import Licensing Procedures.
[79] Article 3 (2) WTO Agreement on Import Licensing Procedures.
[80] Article 3 (5) (e) WTO Agreement on Import Licensing Procedures.
[81] Article 3 (5) (g) WTO Agreement on Import Licensing Procedures.

CHAPTER 3:

Import Licensing regime in Zimbabwe, policy objectives and its compatibility with AfCFTA law:

3.1 Introduction:

Zimbabwe`s import/export licencing regime is currently being governed through Statutory Instrument (S.I) 122 of 2017. The regulatory S.I lists all the products and goods that requires an import license for their importation,[82] as well as goods and products that do require licences for their exportation.[83] The S.I contains a further explanatory note meant to explain the procedure for applying for the licences both for companies and individuals. This chapter seeks to explore the policy objectives underlining the use of such measures and analyse compatibility of S.I 122 of 2017 with AfCFTA.

3.2 Brief background to Zimbabwe`s Import/Export Licensing regime:

In the year 1991, Zimbabwe embarked on a program called Economic Structural Adjustment Policy (ESAP) whose objectives were to, "…phase import licensing regime, eliminate foreign currency controls, do away with export incentives, removal of surtax and raising of the minimum duty of 10%, achieving export growth rate of 9% over a 5 year period."[84] The government liberalised the market during this period from 1991-1995 allowing for free importation of goods without the need for licenses.

However, the liberalisation period brought its own wave of problems. A research by the African Economic Research Consortium concluded that Zimbabwe`s trade liberalisation through (ESAP) was "credible and sustainable for the period 1991-1995, after which credibility was lost and the liberalisation process became unsustainable."[85] The research point out that the reason for the unsustainability was a "direct result of policy reversals that were instituted after 1995 while accumulated balance of payments (BOP) deficits and budget deficits resulted in payments incompatibility"[86]

[82] First Schedule (Section 5) of S.I 122/2017
[83] Second Schedule of S.I 122/2017
[84] S.K Ndudzo, *Zimbabwe`s Import Structure and its Impact on Economic Growth(1980-2012),* Unpublished MBA thesis, University of Zimbabwe (2014) 6
[85] A Makochekanwa, J T Hurungo & P Kambarami (n 25 above) 30
[86] A Makochekanwa, J T Hurungo & P Kambarami (n 85 above) 30

The resultant effect of such unsustainability saw the country embark on a wave of policies meant to restrict trade moving away from the concept of trade liberalisation. The government, post-ESAP period, adopted a protective regime by implementing a series of import regulations meant to restrict free flow of imports. These included SI 8 of 1996, SI 22c of 2000, SI 171 of 2005, SI 137 of 2007, SI 138 of 2007, SI 150 of 2011, SI 6 of 2014, SI 126 of 2014, SI 18 of 2016, SI 20 of 2016 and SI 64 of 2016.[87] The current instrument, which is the main focus of this research, is S.I 122 of 2017 which consolidated all previously promulgated instruments for easy of reference by importers from across all sectors.

3.3 Policy objectives underlining Zimbabwe`s use of QRs in the form of Import Licensing: (S.I 122 of 2017)

The then Minister of Trade and Commerce, proffered the underlining policy objectives in a Ministerial Statement as follows:[88]

3.3.1 High Import Bill.

The statistics showed that the country imported a hefty US$ 5.2 billion worth of imports in 2016 against exports of a measly US$ 2.8 billion thereby creating a negative trade balance of about US$ 2.4 billion which, arguably was unsustainable.[89] The resultant balance of payment problem prompted the government to restrict imports.

3.3.2 Zimbabwe`s use of multi-currencies

Zimbabwe`s use of multi-currencies mainly the United States Dollar, arguably a very strong currency, increased volume of imports into the country as exporting neighbouring countries were being lured by the strong dollar [90]and while this benefitted neighbouring countries, Zimbabwe bore the negative effects of such a trade imbalance which called on the government to restrict imports.

3.3.3 Falling capacity utilisation

The country`s manufacturing industry`s capacity utilisation had plummeted significantly from the period extending from 2011 from a peak of 57.2% to a low of 34% by 2015.[91] Capacity utilisation of every company is contingent upon the uptake

[87] Section 3, Schedule to Statutory Instrument 122 of 2017
[88] Ministerial Statement (n 9 above)1
[89] Ministerial Statement (n 88 above)1
[90] Ministerial Statement (n 89 above)1
[91] Ministerial Statement (n 90 above)2

or demand for its products on the market.[92] Thus, if there is low demand for a company`s products, its capacity utilisation declines as an indication that the company is not operating at its potential full capacity.[93] The government thus restricted imports to curtail demand for foreign products while promoting demand for local products.

3.3.4 Company closures

Statistics states that by mid-year 2016, a record number of about 231 companies had shut down, laying off about 5 333 workers.[94] The resultant company closures were due to plummeting capacity utilisation caused by waning demand for their products. As a result, companies experienced difficulties remaining afloat.

The import restrictions are also meant to "result in cost reduction, improvement in competitiveness through economies of scale, job creation, increased uptake of local inputs, reduction of the country's gap between imports and exports, create space for the Government and business to come up with more comprehensive measures to encourage industrial development."[95]

3.4 Compatibility of S.I 122 of 2017 with AfCFTA

AfCFTA, unlike the WTO has not promulgated a set of rules to deal with the administration of import/export licenses. It only has provisions dealing with quantitative restrictions in general without targeting a specific type of quantitative restriction. A quantitative restriction on trade in goods is a measure which limits the quantity of a product that may be imported or exported and these take many forms such as bans, quotas and import or export licenses.[96]

Zimbabwe`s use of quantitative restriction is in the form of import/export licensing which is administered through an import licensing procedure which calls upon any parties interested in importing or exporting a product to apply for an import/export license or a permit to import/export.[97] The purpose of a quantitative restriction is to limit or restrict imports and the purpose of S.I 122 of 2017 is to limit imports by

[92] B Markgraf "Capacity Utilization and Effects on Product and Profit." Available at http://smallbusiness.chron.com/capacity-utilization-effects-product-profit-67046.html. (Accessed 04 March 2019.)
[93] B Markgraf (n 92 above)
[94] Ministerial Statement (n 91 above)2
[95] *"Objectives of S.I 122 of 2017 still valid-Dongo"* 03 November 2018 available at www.herald.co.zw (accessed 18 April 2019)
[96] P V Bossche, W Zdouc (n 1 above) 538
[97] PV Bossche & W Zdouc (n 96 above) 538

restricting importation of products that are locally available hence the requirement to justify the need to import a product as a ground to grant or decline to grant the import license. Thus, the instrument governing the import licensing regime in Zimbabwe and its compatibility shall be measured against AfCFTA provisions on quantitative restrictions.

AfCFTA sets out as one of its specific objectives by calling on Member States to progressively eliminate tariffs and non-tariff barriers to trade in goods.[98] The Protocol on Trade in Goods has a specific provision that deals with quantitative restrictions which states:

> "The State Parties shall not impose quantitative restrictions on imports from or exports to other State Parties except as otherwise provided for in this Protocol, its Annexes and Article XI of GATT 1994 and other relevant WTO Agreements."[99]

As a default position, AfCFTA is clear on its disregard for use of quantitative restrictions. This is in line with its main objective of creating a one market for all African Member States. However, there are few exceptions to the use of quantitative restrictions and these exceptions should be the justification behind any Member State`s use of them. The question that quickly pops to mind is whether or not the policy objectives proffered by the Zimbabwean government falls within the scope of the exceptions as provided for by AfCFTA?

The first exception to the use of quantitative restrictions is when a country is experiencing or is about to experience balance of payments difficulties.[100] Balance of payments is where a country`s trade and its finance flows meet.[101] A balance of payment problem or difficulty thus occurs when a country`s demand for its currency plummets so sharply leading to a devaluation of its currency.[102] The fall in value of the currency creates a commotion on market transactions robbing citizens of their ability to afford local products.[103] As a result, citizens resort to imports thus resulting in a high import bill against a shortfall in exports creating a trade deficit.

[98] Article 4 (a) AfCFTA Agreement
[99] Article 9 of AfCFTA Protocol on Trade In Goods
[100] Article 28, AfCFTA Protocol on Trade in Goods
[101] C Thomas (n 53 above) 1253
[102] C Thomas (n 101 above) 1253
[103] C Thomas (n 102 above) 1253

The Zimbabwean government argues that it is experiencing balance of payment problems as a result of a high import bill.[104] Statistics showed that the country imported a hefty US$5.2 billion worth of imports in 2016 against exports of a measly US$2.8 billion thereby creating a negative trade balance of about US$2.4 billion which, arguably was unsustainable.[105] Under AfCFTA, for a Member State to rely on balance of payment problems, such measures, "shall be equitable, non-discriminatory, in good faith, of limited duration and may not go beyond what is necessary to remedy the balance of payments situation."[106] There is no doubt that the government was experiencing BOP difficulties as reflected from the statistics aforementioned.

However, this measure must be implemented only for a limited duration but as has been shown earlier in this Chapter, the Zimbabwean government`s import licensing regime dates back to as early as 1996 hitherto where a successive list of Statutory Instruments have been implemented.[107] Moreover, the Reserve Bank of Zimbabwe governor working together with the Ministry of Finance and Economic Development have put together a string of austerity measures to deal with the BOP problem and in their October 2018 Monetary Policy, it was revealed that the country`s BOP problem is improving as a result of the measures they are undertaking which have seen a current account deficit falling from a high of 20.4 % in 2011 to 1.8% in 2017.[108]

From the preceding, it is crystal-clear that the measures have been in place for virtually two decades and continuing which is arguably a long time. It can therefore be argued that this length of time has gone beyond "limited duration" requirement. Also, considering that the BOP problem is being managed and improving as reflected from the Monetary Policy, one can strongly question the rationale behind the government`s continued use of the measures and whether such use is still within and not going "beyond what is necessary to remedy the balance of payment situation."[109]

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[104] Ministerial statement (n 94 above)1
[105] Ministerial Statement (n 104 above)1
[106] Article 28 (1) AfCFTA Protocol on Trade in Goods
[107] Section 3, Schedule to Statutory Instrument 122 of 2017. The list of statutory regulations that the government of Zimbabwe has implemented over the years are: SI 8 of 1996, SI 22c of 2000, SI 171 of 2005, SI 137 of 2007, SI 138 of 2007, SI 150 of 2011, SI 6 of 2014, SI 126 of 2014, SI 18 of 2016, SI 20 of 2016, SI 64 of 2016 and SI 122 of 2017.
[108] October 2018 Monetary Policy presented by the governor of the Reserve Bank of Zimbabwe, Dr J Mangudya available at https://www.rbz.co.zw/index.php (accessed 04 April 2018) p22
[109] Article 28 (1) AfCFTA Protocol on Trade in Goods.

The second exception is where quantitative restrictions are implemented to protect an infant industry which has a strategic economic significance at a national level.[110] Infant industries speaks mainly to newly established, with virtually no capacity to shield competition from already established industries. In order for this exception to be justified under AfCFTA, the State implementing the measure for this purpose should have "taken reasonable steps to overcome the difficulties related to such infant industry"[111] and the measure must be applied on a "non-discriminatory basis and for a specified period of time."[112] The Agreement goes further to mandate the Council of Ministers to come up with guidelines to allow for an orderly implementation of this exception.[113]

Zimbabwe argues that its measures are necessary to protect infant industries whose capacity utilisation has been falling and to avoid company closures.[114] The influx of foreign products onto the local market shifted the demand trajectory away from local products to foreign products. Statistics showed that the country`s manufacturing industry`s capacity utilisation had plummeted significantly from the period extending from 2011 from a peak of 57.2% to a low of 34% by 2015.[115] As a direct consequence of companies` failure to operate at full capacity, company closures became rampant. Statistics pointed out that by mid-year 2016, a record number of about 231 companies had shut down, laying off about 5 333 workers.[116]

However, for this exception to be implemented, the government is mandated to "take reasonable steps to overcome the difficulties related to such an infant industry"[117] The company closures in Zimbabwe have affected both major and small companies alike and the reasons for their closures have been attributed mainly to the ailing economy and ineffectiveness of judicial management which failed to resuscitate the companies to their original state of economic viability.[118] The country`s production capacity utilisation has been on a downward spiral from the turn of the millennium as a result

[110] Article 24 (1) AfCFTA Protocol on Trade in Goods
[111] Article 24 (1) AfCFTA Protocol on Trade in Goods
[112] Article 24 (1) AfCFTA Protocol on Trade in Goods
[113] Article 24 (2) AfCFTA Protocol on Trade in Goods
[114] Ministerial statement (n 105 above)2
[115] Ministerial Statement (n 114 above)2
[116] Ministerial Statement (n 115 above)2
[117] Article 24 (1) AfCFTA Protocol on Trade in Goods
[118] R.S.Dzvimbo, *Should Zimbabwean Companies Act move away from judicial management and adopt business rescue?* Published LLM thesis, University of Cape Town (2013) 2

of poor productivity in the agricultural sector, debilitating infrastructure, declining levels of capital injection from local and foreign investors.[119]

From the above, it can justifiably be argued that the influx of foreign products onto the local market did not cause the company closures in Zimbabwe but imports increased to fill in the gap on the market that local companies had created when they halted operations. As such, the government needed to act decisively on dealing with the falling productivity instead of rushing to implement import restrictions. One can therefore strongly argue that the government has not taken reasonable steps to avert declining capacity utilisation and company closures and therefore, its import licensing regime fails to convincingly satisfy the "reasonable-step" test.

Moreover, the exception also demands that there be a specific timeframe within which the measure will be in effect for.[120] As has been noted from the preceding paragraphs, the Zimbabwean government has implemented and maintained import restrictions for almost two decades and continuing. This undoubtedly is a clear violation of the enabling exception which speaks of a specified timeframe.

AfCFTA endeavours to ensure that Member States do not impose measures through customs laws that hinder trade facilitation. To promote trade facilitation, AfCFTA sets as one of its objectives to "simplify and harmonise international trade procedures and logistics to expedite the processes of importation, exportation and transit…"[121] Firstly, Member States are obliged to make all the information relating to import and export, movement of goods, customs among other information, to be published through electronic sources for easy access by any other Member State.[122] It also provides that documentation and data requirements for any purposes be maintained at minimum levels to avoid hindering trade facilitation.[123] Furthermore, it also provides that Member States provide mechanisms to allow for reviews or appeals against decisions of administrative bodies on a non-discriminatory basis.[124]

[119] B Sibanda, "Zimbabwe`s Statutory Instrument (SI) 64 of 2016 on Control of Goods on the Open General Import License: The Gains and Pains" Policy Brief No.4, p3
[120] Article 24 (1) AfCFTA Protocol on Trade in Goods
[121] Article 2 (a) Annex 4, AfCFTA Protocol on Trade in Goods
[122] Article 4 (1) a-n, Annex 4 AfCFTA Protocol on Trade in Goods
[123] Article 13 (5) (a-g) Annex 4, AfCFTA Protocol on Trade in Goods
[124] Article 22 (1) Annex 4, AfCFTA Protocol on Trade in Goods

From the above, it can be noted that S.I 122 of 2017 has some provisions which hinders trade facilitation under AfCFTA in that, Member States are urged to make use of Information Technology in all processes involving documentation[125] but S.I 122 of 2017 still requires applications for licenses to be done through physical submission of documents and the process itself is not electronic yet. Under WTO law, such a process is referred to as non-automatic licensing and it is automatically restrictive in nature.[126]

Moreover, S.I 122 of 2017`s procedure for applying for an import license is burdensome as the amount of paperwork required is magnanimous. Company applications have to be accompanied by company documents such as CR14, Tax Clearance Certificates in addition to a full description of products to be imported as well as a detailed justification for importing in lieu of buying local.[127] Also, each product requires its own application.[128] These inconveniences associated with the administration of import licensing procedures is undoubtedly against the provisions of AfCFTA with regards to facilitating international trade.

Furthermore, AfCFTA incorporates WTO law that quantitative restrictions can only be implemented in accordance with, "*AfCFTA`s Protocol, its Annexes and Article XI of GATT 1994 and other relevant WTO Agreements."*[129] The AfCFTA Agreement has been framed to be in tandem with WTO Agreements in a bid to ensure that it does not function in contra to the spirit of the WTO.[130] AfCFTA should thus in no way attempt to reduce the importance of the already established WTO Members' commitments and obligations but should actually advocate for the adoption of those commitments among the AfCFTA Members who do not double as AfCFTA and WTO Member States.[131]

The effect of the invocation of WTO/ GATT 1994 law is only as an "exception" and not as the "norm."[132] This is meant to avoid rendering AfCFTA inefficient where those Members who double as both WTO and AfCFTA can just invoke WTO law to circumvent their obligations under AfCFTA to the detriment of WTO non-members.[133]

[125] Article 17 (1) Annex 4,AfCFTA Protocol on Trade in Goods
[126] A.H Quresh (n 76 above) 266
[127] Statutory Instrument 122 of 2017, Explanatory Note (a) (ii)
[128] Statutory Instrument 122 of 2017, Explanatory Note (a) (iv)
[129] Article 9 of AfCFTA Protocol on Trade In Goods
[130] International Trade Centre (n 66 above) 9
[131] International Trade Centre (n 130 above) 9
[132] International Trade Centre (n 131 above) 22
[133] International Trade Centre (n 132 above) 22

So to avoid that from happening, WTO law is invoked as an exception or where AfCFTA specifically subordinates its own provisions to WTO/GATT 1994 law, then WTO law takes precedence calling upon even those Member States who are not WTO members to adopt and implement WTO/GATT 1994 law.[134] As such, Zimbabwe is a Member of WTO, meaning it is allowed by Article 9 of AfCFTA Protocol on Trade in Goods, to invoke WTO law. It is thus against this background that WTO Agreement on Import Licensing Procedures becomes relevant to determine whether the administration of import licenses in Zimbabwe is compatible with this agreement.

3.5 Is the administration of import licensing in line with the WTO Agreement on Import licensing procedures?

Import licensing was first debated during the Tokyo Round in the context of quantitative restrictions resulting in the adoption of an Import Licensing Code in 1980 subscribed to by 19 Contracting Parties.[135] Few changes were then effected to the Code during the Uruguay Round giving birth to the Agreement on Import Licensing Procedures effective from 1995 which became binding on all GATT/WTO Members and the Agreement was also made subject to the Understanding on Dispute Settlement.[136]

The Agreement has provisions relating to import licenses and has divided them into automatic import licensing and non-automatic import licensing.[137] However, it has been noted that the disciplines as contained in the Agreement on Import Licensing procedures do not speak to import licensing rules but are concerned with import licensing procedures and their administration.[138] Automatic import licenses do not have trade restrictive effects and thus they are not a contentious issue because approval for their "application is granted in all cases."[139] Non-automatic import licenses, on the other hand, have trade restrictive effects because they are the opposite of automatic licenses. The government of Zimbabwe uses non-automatic import licenses.

[134] International Trade Centre (n 133 above) 20
[135] A F Lowenfield (n 74 above) 87
[136] A F Lowenfield (n 135 above) 87
[137] A H Quresh (n 126 above) 265
[138] A H Quresh, (n 137 above) 266
[139] Article 2.1 WTO Agreement on Import Licensing Procedures.

The relevant parts to the Agreement requires that non-automatic systems "shall not have trade-restrictive or distortive effects on imports additional to those caused by the imposition of the restriction and shall be no more administratively burdensome than absolutely necessary"[140] It can be argued that, the application process is burdensome in that, the amount of paperwork required is magnanimous. Company applications have to be accompanied by company documents such as CR14, Tax Clearance Certificates in addition to a full description of products to be imported as well as a detailed justification for importing in lieu of buying local.[141] Also, each product requires its own application[142] which further compounds the amount of paperwork involved.

In terms of the Agreement, applications should be processed within "30 days if applications are considered as and when received or 60 days if applications are considered simultaneously"[143] The Statutory Instrument is silent on the time frame within which the application is processed. It simply mentions the fee that the applicant should pay upon collection of the application.[144] This means that, the applicant has to embark on regular visits or telephone the office of the Permanent Secretary of Trade and Industry to check up on the progress of their applications.

The Agreement further accords an applicant with a right to appeal in the event of application being denied and to be furnished with reasons for such denial.[145] Statutory Instrument 122 of 2017 is silent on the issue and has no provision affording such rights. However, the S.I may be silent on the issue of appeals but under Zimbabwean law, proceedings of all Administrative Bodies/Tribunals are subject to review by the High Court of Zimbabwe.[146] The grounds which form the basis for such review are when the Administrative body has acted *ultra vires* its powers and secondly when principles of natural justice were not adhered to.[147] Thus, it is within an applicant`s rights, whose application for a license has been declined to apply for a review of the decision to the High Court of Zimbabwe.

[140] Article 2 (a) WTO Agreement on Import Licensing Procedures.
[141] Statutory Instrument 122 of 2017, Explanatory Note (a) (ii)
[142] Statutory Instrument 122 of 2017, Explanatory Note (a) (iv)
[143] Article 3 (2) WTO Agreement on Import Licensing Procedures.
[144] Statutory Instrument 122 of 2017, Explanatory Note (c) (i)
[145] Article 3 (5) (e) WTO Agreement on Import Licensing Procedures.
[146] G Feltoe, *A Guide to Zimbabwean Administrative Law* (2002) 10
[147] G Feltoe (n 146 above) 11, *See also* Sec 27 (1) of the High Court Act (*Chapter 7:06*)

The Instrument is also silent on the timeline of the license`s validity as provided for under the Agreement which requires that the period be reasonably long enough to promote imports.[148] All these factors aforementioned in the preceding paragraphs are evidently showing that the administration of import licensing in Zimbabwe falls short of the WTO Agreement on Import Licensing Procedures provisions.

3.5 Conclusion:

The Zimbabwean government faces a herculean task of having to align its import restrictions laws with the enabling provisions of AfCFTA. By reference, a look at the WTO Agreement on Import Licensing Procedures established that the administration of import licenses by the government falls short on many aspects as the application procedure and requirements are burdensome to applicants, signifying the government`s reluctance to even grant the licenses to allow imports.

[148] Article 3 (5) (g) WTO Agreement on Import Licensing Procedures.

CHAPTER 4:

Reasons militating against use of import licenses and possible consequences for non-compatibility of S.I 122 of 2017 with AfCFTA.

4.1 Introduction:

It is undoubtedly clear that governments will frequently be tempted to impose import restrictions to achieve certain policy objectives as has been discussed in Chapter 3 of this research. This Chapter intends to outline the reasons that have been propounded as militating against the use of quantitative restrictions. The Chapter will then proceed to look at the possible likely scenarios to befall those countries that use quantitative restrictions deviating from their obligations and commitments under AfCFTA.

4.2 Why is the use of quantitative restrictions in the form of import licences prohibited?

4.2.1 License processing inconveniences

The process of applying for licenses to import goods is replete with inconveniences attached to it. There are delays occasioned from the time of making the application through processing until the time the license is granted. These delays in processing licenses pose a great disadvantage to applicants intending to capitalise on temporary price fluctuations on the market.[149] Moreover, the licensing system does not offer assurance as to which applications will be successfully approved, and within how much time as well as the examination process adopted in determining applications to decline or to grant.[150] Added on to the pile of inconveniences is the burdensome quantity of paperwork involved in preparing the applications[151] as each product requires its own separate application.[152]

4.2.2 Restricts international trade

Another reason proffered against the use of import licensing systems is that the use of non-automatic import licenses has trade restrictive effects which can go beyond the measure itself.[153] Import licensing also frustrate the facilitation of trade in that the system is subject to many flaws for example, “the government procedures for

[149] D.S MacRae (n 21 above) 44
[150] A.F Lowenfield (n 136 above) 82
[151] A. F Lowenfield (n 150 above) 82
[152] Statutory Instrument 122 of 2017, Explanatory Note (a) (iv)
[153] A.F Lowenfield (n 151 above) 82

administering quotas can be abused, leading to corruption or to delay and expense from the procedures themselves."[154] The burdensome license application process is to a greater extent prohibitive leading to a decline in the number of importers. As a result, international free trade is heavily compromised as movement of products across borders is hindered by the requirement of licenses to import from across the border.

On a more broader perspective, the idea of protectionism has been attacked on the grounds that the more the government incessantly intervenes in issues of international trade resorting to more protective measures, it has the effect of distorting prices of commodities on the market, rigidifying economies, and making public and private actors be unwilling to adapt to ever changing global trends.[155]

4.2.3 Manipulation of the system

Not to be overlooked are the vices associated with the administration of the system itself. Considering how burdensome the process of applying for a license is, the likelihood of the system being manipulated is undoubtedly at its peak. The granting authorities wield a significant amount of power which is not subject to any checks and balances increasing chances of corrupt and rent-seeking behaviour. In the case of Zimbabwe, it has been argued that the government is merely commercialising government services in a bid to raise revenue for the treasury[156] and the application fee paid to accompany license applications is not clear whether it is being properly expropriated to retool local industries or it is being used for other unintended purposes.[157]

4.2.4 Promotes smuggling of goods

A research carried out at the port of entry at Beit Bridge Border post[158] revealed that the requirement of licenses to import products resulted in massive smuggling of

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[154] J.H Jackson, *The World Trading System: Law and Policy of International Economic Relations,* (1997) 153

[155] F Erixon and R Sally, *Trade, Globalisation and Emerging Protectionism since the Crisis*, European Centre for International Political Economy (ECIPE) Working Paper No. 02/2010 p8

[156] *"Zimbabwe rebrands Statutory Instrument 64"* available at https://www.tralac.org/discussions/article/12411-zimbabwe-re-brands-statutory-instrument-si-64.html (accessed 15 March 2019)

[157] www.tralac.org (n 157 above)

[158] SI Murangwa & T Njaya "The effects of Statutory Instrument 64 of 2016 on clearing agents based at Beit bridge Border Post in Zimbabwe" (2016) Vol 5 Issue II *International Journal of Business and Management Invention*

products subject to licences as importers resorted to cheaper and illegal means of importing products.[159] The increase in smuggling is attributable to the burdensome process associated with applying for licenses forcing importers to circumvent the process thereby ending up resorting to illegal means.

4.2.5 Adverse effects of elimination of foreign competition

The policy objective of implementing trade restrictive measures might be genuinely imposed in order to protect local industries to re-capacitate in order to withstand foreign competition but this good deed might create a monopoly vulnerable to abuse by local producers to the detriment of the consumer. Local producers might end up producing poor quality products as a result of reduced foreign competition leading to consumers buying sub-standard products.[160] Moreover, the monopoly might result in local producers or those few importers who would have managed to acquire licenses, selling their products at highly inflated prices[161], profiteering from the consumers` limited options as a result of reduced or eliminated foreign competition.

4.3 Possible consequences for using quantitative restrictions (QRs) under AfCFTA:

4.3.1 Retaliation from other Member-States

Member States retaliating to another member`s digression from the rules is the most likely scenario to play out in international trade. The retaliation leads to a trade war. A trade war is a situation whereby countries impose tariffs or import restrictions on each other`s goods thereby making trade difficult.[162] The imposition of high tariffs raises prices of goods imported making them expensive for local buyers to afford who then resort to buying local and in as much as this is beneficial to the local economy of the imposing country, the trade war caused by retaliation impacts negatively on countries` economies with potential of raising political animosity between them.[163]

These typical trade wars have played out throughout history. The Smoot-Hawley Tariff of 1930 whereby the United States of America (USA), in an attempt to shield local agriculture and production and to secure jobs, it increased tariffs on world exports into

[159] SI Murangwa & T Njiva (n 158 above) 49
[160] SI Murangwa & T Njiva (n 159 above) 49
[161] SI Murangwa & T Njiva (n 160 above) 49
[162] M. Havranekora, The United States –China Trade War, *Institute for Politics and Society*, Policy Paper/January 2019 p1
[163] M. Havranekora (n 162 above) 1

USA from 15% in 1929 to 60% in 1930.[164] This was argued to be the worst decision ever to be made because during the 1930s economic crash, the USA was supposed to keep its markets open to allow other countries to export into USA to provide the much needed finance to avoid a liquidity crunch, but the USA decided to close its markets triggering a ruinous retaliation from other countries impacting heavily on world trade.[165]

In the year 1934, global trade had plummeted significantly.[166] The promulgation of the Smoot-Hawley Tariff was interpreted as a declaration of a trade war by USA against other countries of the world, who in turn, embarked on series of aggressive tariff increases in retaliation to USA`s measure and in so doing, disintegrated world trade into shambles.[167]

At the time this research is being compiled, there is an ongoing trade war between the USA and China which began in the year 2018 when the President of USA, Donald Trump, imposed high tariffs on tens of billions worth of Chinese goods imported into USA prompting an aggressive reaction from China which also responded by raising tariffs on USA goods imported into China degenerating the situation into a trade war[168] which is likely to put a dent on world trade considering that the two countries are the biggest economies of the world according to International Monetary Fund (IMF) data.[169]

Zimbabwe itself has not been spared from these retaliations from its neighbouring trading partners as a result of its use of import restrictions measures. Following the promulgation of S.I 64 of 2016, there were threats of retaliation from neighbouring countries and the nation of Zambia actually registered a formal complaint with Southern African Development Committee (SADC) and Common Market for Eastern and Southern Africa (COMESA) under NTB number NTB000721 calling for the

[164] K. Matziorinis, "The Causes of the Great Depression: A Retrospective", (2007) p 8
[165] K Matzioniris (n 164 above) 8
[166] K. Matziorinis (n 165 above) 8
[167] K Matziorinis (n 166 above) 9
[168] M. Havranekora (n 163 above) 1
[169] M. Havranekora (n 168 above) 1

removal of S.I 64 of 2016[170] and South Africa attacked the instrument as violating the "spirit of free trade which SADC Protocol seek to promote"[171].

It is of significance to mention that, in principle, retaliation should be the measure of last resort and should be approved by the governing body after establishing that there has been violation of trade rules and that the retaliation is commensurate to the effect caused by the violation.[172] However, in reality, countries do retaliate without following procedure which casts aspersions on the efficiency of these rules. As AfCFTA commences operations, one cannot be further from the truth to presuppose that Member States will retaliate against Zimbabwe`s continued use of import and export restrictions through S.I 122 of 2017 as it will be entering the room with dirty hands.

4.3.2 Dispute Settlement Proceedings against Zimbabwe

Another potential ramification is having dispute settlement proceedings instituted against Zimbabwe. AfCFTA has laid down procedures that Member States should take in the event there is a fellow Member deviating from its obligations and commitments.

The governing legal instrument is Annex 5 to the AfCFTA Protocol on Trade in Goods which governs Non-Tariff Barriers (NTB). Its objective is explicitly stated as being "to implement the provisions of the Protocol on Trade in Goods concerning the elimination of NTBs."[173] The Annex provides a general categorization of the potential sources of Non-Tariff Barriers and import licensing is categorized under Customs and Administrative Entry Procedures and Specific Limitations.[174]

Under AfCFTA, any aggrieved Member State is entitled to "register a complaint or trade concern through the mechanism provided for in Appendix 2 of this Annex."[175] The said Appendix 2 of Annex 5 provides the procedure which must be followed by the Member State in instituting proceedings as follows;

Firstly, the State Parties must exhaust their respective Regional Economic Committees (RECs) as a forum of first instance before raising their grievances,

[170] SI Murangwa & T Njaya (n 10 above) 6
[171] SI Murangwa & T Njaya (n 170 above) 6
[172] C. P Bown & J Pauwelyn *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (2010) 1
[173] Article 2, Annex 5 to AfCFTA Protocol on Trade in Goods
[174] Part II & V of Appendix 1, Annex 5 to AfCFTA Protocol on Trade in Goods
[175] Article 12 (2), Annex 5 to AfCFTA Protocol on Trade in Goods

concerns or disputes to AfCFTA level.[176] In the case of Zimbabwe, the available RECs would be SADC and COMESA which Zambia made use of when it registered its complaint against Zimbabwe under NTB number NTB000721 calling for the removal of Statutory Instrument 64 of 2016[177] In the event this procedure has not yielded any positive results, only then will a party escalate the matter to AfCFTA level.[178]

Secondly, when the first procedure has not yielded results, parties can then put in motion AfCFTA procedure which is again in sequences which must be religiously followed. The first stage[179] is initiated by the requesting party writing to the responding Member and the Secretariat, identifying the specific NTB being complained of and the impact it is having on trade. The responding State Party will have 20 days to provide a written response concerning the NTB in question which response is submitted directly to the requesting State Party and the Secretariat for record purposes.

If the requesting party is satisfied with the responding State Party`s explanation with regards to the complaint, the issue is regarded as resolved. However, if the requesting party is not in agreement and the matter is not satisfactorily resolved under Stage 1 proceedings, the parties, by mutual consent and through a written and signed agreement, proceed to invoke Stage II procedure to resolve their matter. Stage 1 proceedings should not exceed 60 days.

Corollary to Stage 1 procedure debacle, parties proceed to utilise Stage II procedure.[180] This stage involves using a Facilitator to try and resolve the dispute between the parties whom the Secretariat must oversee his/her appointment with the consent of the parties. The facilitator will engage the parties in a bid to bring clarity to the NTB in question and its alleged impact on trade.

When proceedings terminate, the facilitator, within 10 days must produce, in writing, a draft factual report recording the contentious NTB, adopted procedure, solutions reached as well as areas of disagreement. The parties will equally have 10 days to deliberate on the draft report and submit their comments to the Facilitator who, in turn, considers the parties` comments to produce a final report. Where the parties reach a

[176] Appendix 2 (1), Annex 5 to AfCFTA Protocol on Trade in Goods
[177] SI Murangwa & T Njaya (n 171 above) 6.
[178] Appendix 2 (2), Annex 5 of AfCFTA Protocol on Trade in Goods
[179] Appendix 2 (2.1.1-2.1.13), Annex 5 to AfCFTA Protocol on Trade in Goods
[180] Appendix 2 (2.2.1-2.2.4), Annex 5 to AfCFTA Protocol on Trade in Goods

common ground during this stage, the dispute is resolved and the outcome circulated to other Member States. However, if parties fail to reach a solution under this stage, the requesting party may escalate the matter further to the dispute settlement stage which stage is governed by AfCFTA Protocol on Rules & Procedures on the Settlement of Disputes.[181]

Under the Settlement of Disputes stage, there is an established Dispute Settlement Body (DSB) that has various functions[182] among them setting up Dispute Settlement Panels to preside over parties disputes. Various dispute settlement proceedings adopted involve consultations[183], Good offices/conciliation and Mediation.[184] When these mechanisms fail to resolve the dispute, a dispute settlement panel is set up to preside over the matter and produce a report which is submitted to the DSB whose decision on the report will be final[185] with room for appeals to the Appellate Body established by the DSB.[186] State parties are obliged to comply with recommendations and rulings of the DSB.[187]

The decision of the DSB will be final. The Member States would be under an obligation to comply with the decision. As this procedure has not been tested as of yet, it is to be seen whether it will be as effective as it should be in settling disputes among Member States. However, it is of utmost importance to applaud the setting up of such a rule-based system as it will go a long way in ensuring that Member States adhere to the decisions of the Body and they also conduct themselves in accordance with their obligations and commitments under AfCFTA.

4.4 Conclusion:

The use of quantitative restrictions is against the spirit of international free trade and as such, the use of such measures is only allowed in limited circumstances. This Chapter has endeavoured to discuss in detail the reasons in general which have been proffered in a bid to decipher the inductive reasoning behind the indisposition by countries to brook the use of such measures. The Chapter also gave a breakdown of the possible ramifications associated with the use of such measures within the

[181] Article 16, Annex 5 to AfCFTA Protocol on Trade in Goods
[182] Article 5 (3), AfCFTA Protocol on Rules & Procedure on the Settlement of Disputes
[183] Article 7, AfCFTA Protocol on Rules & Procedure on the Settlement of Disputes
[184] Article 8, AfCFTA Protocol on Rules & Procedure on the Settlement of Disputes
[185] Article 19 (4), AfCFTA Protocol on Rules & Procedure on the Settlement of Disputes
[186] Article 20,AfCFTA Protocol on Rules & Procedure on the Settlement of Disputes
[187] Article 24 (1) AfCFTA Protocol on Rules & Procedure on Settlement of Disputes

confines of AfCFTA and from the Member-States. In the process of discussing the ramifications, the Chapter, for greater particularity and clarity, even shade light on the procedures that have been put in place under AfCFTA for Member States to follow when registering their complaints and the processes involved up until the dispute is resolved.

CHAPTER 5

Recommendations and Conclusion:

5.1 Introduction:

A critical analysis of Statutory Instrument 122 of 2017 introduced by the government of Zimbabwe revealed that, while the policy objectives underpinning it are consistent with AfCFTA law, its continued use no longer satisfies the exceptions under which S.I 122 of 2017 is allowed under AfCFTA. There are conditions which must be satisfied and these have not been met. This chapter intends to outline the summary of findings and proceed to provide recommendations to the government of Zimbabwe and conclude this research.

5.2 Summary of Findings:

This study sought to analyse the compatibility of Statutory Instrument 122 of 2017 with AfCFTA law. Guided by the formulated objectives of the study as shown in Chapter 1, the study draws the following conclusions:

5.2.1 The status of quantitative restrictions under AfCFTA:

Chapter two (2) discussed the main objective of AfCFTA which is to create a single market for all African Member-States by facilitating free movement of goods, services as well as persons thereby boosting economic fortunes of the continent which will in turn, ameliorate the livelihoods of the African population across all cultures through co-operation of all State Parties, inclusivity and regional integration.[188]

A detailed discussion of quantitative restrictions revealed that AfCFTA law prohibits the use of these measures in a bid to buttress its main objective of eliminating all potential barriers to trade to create a single market for all African Member States. However, AfCFTA provides room for deviation from the prohibitive rule. The measure is allowed only in exceptional circumstances, the two chief ones being a situation whereby a Member country is experiencing BOP problems and secondly, to protect infant industries.

By reference, Chapter Two (2) discussed the provisions of WTO Agreement on Import Licensing Procedures as they are incorporated by AfCFTA, which offers guidelines on the proper administration of import licenses. Having discussed the provisions of

[188] Article 3 (a)-(h) AfCFTA Agreement

AfCFTA on quantitative restrictions and WTO Agreement on Import Licensing Procedures, it was revealed that AfCFTA prohibits use of quantitative restrictions and in very limited circumstances are they allowed provided the enforcing Member satisfy the pre-set conditions before invoking the exception to the prohibitive rule. The study also revealed that AfCFTA does not yet have Import Licensing guidelines of its own and as such, the WTO guidelines are referred to for guidance on the administration of import licenses.

5.2.2 Compatibility of S.I 122 of 2017 with AfCFTA:

Chapter Three (3) explored the import licensing regime in Zimbabwe and expounded on the policy objectives behind their use. This discussion revealed that the policy objectives behind S.I 122 of 2017 are consistent with AfCFTA provisions as they are the ones recognised by AfCFTA as the only circumstances which justifies invoking the exception to the general prohibitive rule. However, a closer analysis of the provisions of AfCFTA revealed that, for the exception to be invoked, certain conditions have to be satisfied first by the enforcing Member. The exception is not a blank cheque. A Member cannot just invoke the exception without initially fulfilling the pre-set conditions.

The exception should not override the rule but should be construed narrowly.[189] This means that when the general overriding rule has been violated, it becomes even more difficult to justify such violation on the backing of an exception. Such failure by the government of Zimbabwe to satisfy the conditions needed to invoke the exception to use quantitative restrictions in the form of import/export licensing renders their use a complete violation of AfCFTA and they are hindering trade facilitation. This study thus concluded that, Statutory Instrument 122 of 2017 is not compatible with AfCFTA.

5.2.3 Consequences for non-compatibility:

Chapter Four (4) began by discussing the reasons that have been put forward as militating against the use of quantitative restrictions. From the reasons, it is concluded that the benefits that accrue to a country that uses import restrictions are outweighed by the disadvantages associated with their use and that their use is no longer viable with the modern world which is poised for greater integration and trade liberalisation. As S.I 122 of 2017 has been rendered to be incompatible with AfCFTA, the study

[189] C Thomas (n 104 above) 1276

discussed the consequences for such non-compatibility. The discussion of the consequences revealed that Zimbabwe is likely to face either of the two main ramifications which is retaliation from fellow Member States or risk having Dispute Settlement Proceedings being instituted against Zimbabwe. Consequently, to avoid the aforementioned ramifications from taking place, the following recommendations are hereby propounded:

5.3 Recommendations:

5.3.1 Repeal of S.I 122 of 2017.

The Instrument has been shown to be incompatible with AfCFTA. As such, its continued use under AfCFTA will only invite trouble and will expose Zimbabwe as a country that is not willing to co-operate with other African Member States to realise the successful implementation of AfCFTA and its objectives. Such aggressive attitude will be met with resistance from other Members and considering the fact that the trading bloc is going to be one of the biggest in Africa, coming only second to the WTO, the benefits to accrue from it are tremendous and Zimbabwe undoubtedly cannot afford to be isolated. Therefore, this study recommends that Statutory Instrument 122 of 2017 be repealed in its totality and allow imports without restrictions.

5.3.2 Use of Monetary Policy measures

There are basically two solutions to deal with balance of payments problems.[190] Apart from using trade policies, a government can invoke monetary policy to, "increase demand and reduce supply of domestic currency by exchanging foreign currency for domestic currency, ultimately relieving the downward pressure on currency value."[191] The country`s BOP problem is improving which has seen a current account deficit falling from a high of 20.4 % in 2011 to 1.8% in 2017.[192] This means that the balance of payment problems is improving and thus there is no longer need to restrict imports.

5.3.3 Government subsidies

It is further recommended that the government embarks on a government-funded subsidy program aimed at infant firms with strategic economic significance. These firms are swimming in the deep ends of incessant financial doldrums making it difficult

[190] C. Thomas (n 189 above) 1254
[191] C. Thomas (n 190 above) 1254
[192] October 2018 Monetary Policy presented by the governor of the Reserve Bank of Zimbabwe, Dr J Mangudya available at https://www.rbz.co.zw/index.php (accessed 04 April 2018)p22

for them to operate at full capacity. Production costs are high and as they bear these inordinate amounts of production costs on their own, the ultimate products are sold at highly inflated prices and some ultimately succumb and shut down. The government should thus help by financing part of the production of goods and services by either offering tax breaks or reimbursements.[193]

This in turn, will capacitate producers to produce more goods thereby accelerating the supply of those products on the market, satisfying the demand and persuading the producers to significantly reduce prices of commodities.[194] Once these companies become more productive and producing enough to satisfy local demand, they can begin to export thereby earning the country the much needed foreign currency. However, the government has to ensure that the subsidisation of these infant industries does not hinder trade as subsidies may potentially distort international trade.[195]

5.3.4 Boosting the country`s productivity

It is further recommended that the government embarks on a massive industrial revival program. This will entail, capacitating all parastatal companies to begin operations meant to turn around the economic fortunes of the country. There is no point protecting an industry that is non-productive. What needs to be done is to expose these companies to foreign competition so that they can be compelled to produce quality goods at affordable prices. As productivity shoots up, demand for local products will also increase. As demand increases, economic viability for local firms will escalate placing them at a strong economical competitive position with external firms.

5.3.5 Introducing own currency

The government needs to boost production and in the process introduce local currency. The use of the United States dollar, which is arguably one of the strongest currencies in the world, is unsustainable in a country whose production is on its lowest and consumers import almost everything. The countries Zimbabwe trades with are

[193] E Tarver, "How do government subsidies help an industry?" available at https://www.investopedia.com/ask/answers/060215/how-do-government-subsidies-help-industry.asp (accessed 04 April 2019)
[194] E Tarver (n 193 above)
[195] M Trebilcock, R Howse & A. Elliason *The Regulation of International Trade* (2013) 376

lured by the strong currency and they take it away. As a result, the country is hit with a liquidity crunch.

5.3.6 Leverage on what the country can effectively produce

Zimbabwe is an agrarian country where the agricultural sector has been the backbone of the economy. However, agricultural production is constantly being jeopardised by the effects of climate change. On the other hand, the country is rich in mineral deposits. The mining sector can become the backbone of the country. The country needs to leverage on the vast quantity of high value minerals such as diamonds, gold, platinum and chrome.

The country will have to be in charge of the whole production chain from extraction to beneficiation and make it the major exported product with high value in order to contain the trade deficit. This study revealed that, Africa`s population is poised to reach 1.2 billion people with a GDP crossing over US$2.5 trillion. This will arguably be one of the largest market and Zimbabwe needs to commence preparing itself to participate in this huge market by ensuring that the country identifies that which it can bring to the market and leverage on it and reap the benefits instead of shunning away by maintaining protective measures.

5.4 Conclusion:

The study aimed at achieving its main objective which was to analyse the compatibility of Statutory Instrument 122 of 2017 with AfCFTA. To achieve the main objective, a set of sub-aims were formulated in a bid to assist the researcher to come to an informed conclusion. This chapter has given the summary of the findings that addresses each and every formulated objective.

AfCFTA is going to provide a huge market for African Member States. Its objective attests to that ambitious vision. AfCFTA is very clear on the pathway that it will take to realise its vision and that will involve a progressive elimination of all barriers to trade and allow for free movement of goods and services across borders with minimum to no hindrances.

The position of AfCFTA is crystal clear on its disregard for quantitative restrictions. The use of these measures will run contra to its spirit of liberalising trade among

African Member countries. However, as was noted in this study, AfCFTA does realise challenges that countries do face which might hinder them from subscribing fully to their obligations and commitments. As such, it affords room for deviation from its rules, otherwise known as exceptions to the rule. However, the exception is not given in a vacuum. There are set-conditions that have to be satisfied or duly followed and when a Member is fully satisfied that such conditions have been satisfied, only then will that Member be allowed to invoke the exception to the rule and use quantitative restrictions. This study concludes that this has not been done by the government of Zimbabwe and such failure renders S.I 122 of 2017 non-compatible with AfCFTA.

As a result of the non-compatibility of S.I 122 of 2017 with AfCFTA, Zimbabwe is at risk of facing immense retaliation from its trading partners which might culminate in a trade war which will definitely not be desirable for the parties involved. On the other hand, Zimbabwe is also at risk of provoking other countries to not only retaliate but compel them to institute dispute settlement proceedings against it under AfCFTA.

To avoid the immediately aforementioned repercussions from happening, this study proffered a number of recommendations which the researcher strongly believes that if well implemented they will assist the country to move towards the right direction as far as international trade is concerned. The study identified that the country`s production capacity is down. The study revealed that the use of S.I 122 of 2017 is even giving the country more problems prompting the government to suspend operation of some sections of the S.I 122 of 2017 to allow imports in order to aid the supply gap.[196]

[196] "*Government lifts import ban"* Newsday 24 October 2018 available at www.newsday.co.zw (accessed 04 April 2019)

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