



NATIONAL UNIVERSITY OF LESOTHO

LEGITIMATE POLICY JUSTIFICATIONS FOR CONFORMITY OF LESOTHO'S
REGULATORY FRAMEWORK FOR IMPORTED USED VEHICLE RETAILERS WITH ITS
WORLD TRADE ORGANIZATION OBLIGATIONS

By Thoor Semela 200200201

A mini-dissertation submitted in partial fulfilment of the requirements of the degree of Master of
Laws (LL.M.) of the Faculty of Law of the National University of Lesotho

Supervised by: Dr. Tsotang Tsietsi

June 2023

Table of Contents

Declaration.....	6
Acknowledgements.....	7
List of Abbreviations and Acronyms.....	8
Chapter 1 Introduction.....	9
1.1 Background.....	9
1.2 Research Problem.....	12
1.3 Hypothesis.....	12
1.4 Keywords.....	12
1.5 Research Questions.....	13
1.6 Literature Review.....	13
1.6.1 Structural Framework.....	13
1.6.2 Conformity.....	13
1.6.3 Non-Discrimination.....	14
1.6.4 Transparency.....	16
1.6.5 Domestic Regulation.....	17
1.6.6 Legitimate Policy Objectives.....	17
1.7 Significance of the Research.....	21
1.8 Scope of the Research.....	21
1.9 Purpose of the Research.....	21
1.10 Methodology.....	22
1.11 Chapter Outline.....	22
Chapter 2: Definitions.....	23
2.1 Introduction.....	23
2.2 Conformity.....	23
2.2.1 Overview.....	23
2.3 Conformity within the WTO Regime.....	24
2.3.1 Legal Basis.....	24
2.3.2 Conformity in Article XVI: 4 GATT.....	24
2.4 Non-Discrimination.....	26
2.4.1 Overview.....	26

2.5 Non-Discrimination in the WTO	26
2.5.1 Overview.....	26
2.5.2 Purpose.....	27
2.6 Non-Discrimination under the GATS	27
2.6.1 Elements.....	27
2.7 Domestic Regulation.....	28
2.7.1 Overview	28
2.7.2 Purpose.....	29
2.7.3 Requirements	29
2.7.4 Scope.....	29
2.8 Transparency.....	29
2.8.1 Overview.....	29
2.8.2 Characteristics of Transparency in WTO Law.....	30
2.8.3 Scope.....	30
2.8.4 Application.....	30
2.9 Legitimate Policy Objectives	30
2.9.1 General.....	30
2.9.2 Legitimate policy objectives under the GATS.....	31
2.9.3 Necessity.....	31
2.9.4 The Two-tier Analysis	32
2.9.5 The Chapeau	32
2.9.6 Scope.....	32
2.10 Conclusion	33
Chapter 3: Policy Justifications for Lesotho’s Regulatory Framework.....	34
3.1 Introduction.....	34
3.2 The Evolution of Lesotho’s Regulatory Framework	34
3.2.1 The Trading Enterprises Order	34
3.2.2 The Trading Enterprises Regulations.....	36
3.2.3 The Business and Licensing Registration Act	37
3.2.4 The Business Licensing and Registration Regulations	37
3.2.5 The Business Licensing and Registration (Amendment) Regulations.....	38
3.3 Policy Justifications for Lesotho’s Regulatory Framework.....	39

3.3.1	Justifications under the Non-Discrimination Obligation	39
3.2.2	Policy Justifications for Lesotho’s Framework under Article XIV GATS.....	42
3.2.3	The Money-Laundering Issue from Article XIV (a) GATS Perspective	44
3.3.4	Assessment of Contribution of Lesotho’s Measures to Achievement of Its Policy Goals	45
3.3.5	Assessment of Lesotho’s Measures under GATS Domestic Regulation Disciplines	46
3.3.6	Justifications for Conformity with GATS’ Impartial Administration Requirements	47
3.3.7	Assessment of Lesotho’s Measures under the Transparency Principle	47
3.4	Conclusion	48
Chapter 4	A Comparative Study of Mauritius’ Regulatory Framework	49
4.1	Introduction.....	49
4.1.1	Common Country Characteristics.....	49
4.2	Mauritius’ Regulatory Framework for Imported Used Vehicle Retailers	49
4.2.1	Tax Evasion Control in Mauritius’ Perspective	50
4.2.2	The Money Laundering Concern: A Learning Tool	51
4.2.3	Consumer Protection Values in Mauritius’ Framework	52
4.3	Conclusion	52
Chapter 5:	Conclusion and Recommendations	52
5.1	Introduction.....	53
5.2	Conclusion	53
5.3	Recommendations.....	54
5.3.1	Introduction of the Local Bank Security or Insurance Guarantee.....	54
5.3.2	Adoption of Anti-Money Laundering Measures into Regulatory Framework	55
5.3.3	Enhancement of Consumer Protection Values.....	55
Additional Recommendation:	Schedules of Commitments	56
Books	.....	57
Cases	.....	57
Handbooks	.....	58
International Instruments	.....	58
Journal Articles	.....	58
National Legislation	.....	59
A.	Lesotho.....	59
B.	Mauritius	59


Papers..... 59
Theses..... 60
 Newspaper Articles 60
 Websites 61

Declaration

Declaration

I THOORA SEMELA, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

Name: THOORA SEMELA

Signature: 

Date: 17 JUNE 2023

Place LERIBE, LESOTHO.

Acknowledgements

Foremost, I extend all praise to God for granting me the endurance to complete this study. I also thank my mother 'Mathoora, my family – 'Mamatekane, Mokhantšo and Mahlapane for the moral support you showed me throughout the research. To all my neighbours at home and my friends, especially 'Uncle KB' Morobe and Machakela Mopeli, thank you for the varying gestures of encouragement. Sincere gratitude also goes to my colleagues, Mrs. 'Makhotso Kabi in particular, for affording me time off work to further my research. Most importantly, I thank my supervisor, Dr Tsotang Tsietsi, for patiently aiding me to construct this academic work. This paper could have not seen the light of day without your guidance.

List of Abbreviations and Acronyms

DSB	Dispute Settlement Body
EC	European Communities
ECJ	European Court of Justice
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
ICJ	International Court of Justice
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
ICDAL	Import Car Dealers Association of Lesotho
LDC	Least Developed Country
MFN	Most Favoured Nation
MSMEs	Micro, Small and Medium Enterprises
NT	National Treatment
NTBs	Non-Tariff Barriers
PCIJ	Permanent Court of International Justice
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TFEU	Treaty for the Functioning of the European Union
UK	United Kingdom
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Chapter 1 Introduction

1.1 Background

The World Trade Organization (WTO) is the premier international global organisation encompassing agreements aimed at ensuring smooth, predictable and free trade between its members.¹ It came into being in 1995 during the Uruguay Round of negotiations in the General Agreement on Tariff and Trade (GATT), 1947.² This resulted in the adoption of the Marrakesh Agreement establishing the World Trade Organization and its four annexes, including the General Agreement on Tariffs and Trade (GATT), 1994.³

The GATT is a WTO agreement with goals of eliminating discrimination, tariff reduction and removal of barriers incidental to international trade in goods.⁴ WTO Members' key obligations under the GATT are; non-discrimination⁵ and the general rule against quantitative restrictions.⁶ The Uruguay Round also ushered new rules for trade in services through the General Agreement on Trade in Services (GATS).⁷ It is found upon the same objectives as GATT.⁸ It recognises Members' rights to regulate the supply of services in pursuit of their own policy objectives.⁹ It, however, requires impartial, objective and reasonable administration of services regulations.¹⁰

The GATS categorises Members' key obligations as; general obligations applicable across members and service sectors and 'those that apply to the sectors inscribed in a Member's schedule of commitments'.¹¹ General obligations include the most favoured nation (MFN),¹² and transparency obligations.¹³ Specific commitments, which include market access and national treatment (NT), are laid down in individual schedules and may differ across members.¹⁴

¹ <www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.pdf> accessed 10 December 2022.

² *ibid.*

³ <www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed 14 December 2022.

⁴ <https://unctad.org/system/files/official-document/edmmisc232add33_en.pdf> 3.

⁵ Article I and Article III GATT 1994.

⁶ Article XI GATT 1994.

⁷ <www.wto.org/english/docs_e/legal_e/26-gats.pdf> accessed 26 May 2023.

⁸ <www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 26 May 2023.

⁹ Article VI GATS.

¹⁰ *ibid.*

¹¹ (n 7).

¹² Article II GATS.

¹³ Article III GATS.

¹⁴ (n 7).

The GATT and the GATS provide identical general exceptions to these obligations.¹⁵ The basic function of these general exceptions is to allow members to justify WTO inconsistent measures as one of the exceptions provided for under either Article XX of the GATT or Article XIV of the GATS.¹⁶

Lesotho is a least developed country (LDC).¹⁷ It has been a WTO Member since 31 March 1995.¹⁸ It is, like other Members, bound to ensure the conformity of its domestic laws, regulations and administrative procedures with its WTO obligations.¹⁹

International trade in used motor vehicles occurs when developed nations such as Germany, Japan and United Kingdom (UK), exclude depreciated cars from their local markets, which makes them available for export to low-income countries.²⁰ This is predominantly the case with Japan, where used motor vehicles are sold through online auctions by owners and dealers, with exporters acting as bidding agents for importers.²¹ These importers are, largely, South Asian family businesses who establish global motor vehicle retail networks with major market access in low income countries.²² This is also the case with Lesotho, where these retailers, who are represented by the Import Car Dealers Association of Lesotho (ICDAL), are foreigners.²³

¹⁵ Glynn Ayres and A Mitchell, 'General and Security Exceptions Under the GATT 1994 and the GATS' in Indira Carr, Jahid Bhuayian and Shawkat Aslam (eds) *International Law and the WTO* (Federation Press 2011), 226.

¹⁶ Ayres and Mitchell (n 15) 227.

¹⁷ <www.worldbank.org/en/country/lesotho/overview> accessed 12 December 2022.

¹⁸ <www.wto.org/english/thewto_e/countries_e/lesotho_e.htm> accessed 12 December 2022.

¹⁹ Article XVI: 4 GATT.

²⁰ Andrew Brooks 'Networks of Power and Corruption: The Trade of Japanese Used Cars to Mozambique' [2011] *Geographic Journal Royal Geographic Society (with the Institute of Royal Geographers)* 4 <www.researchgate.net/publication/263180172_Networks_of_power_and_corruption_The_trade_of_Japanese_used_cars_to_Mozambique> accessed 21 December 2022.

²¹ *ibid* 8.

²² Thabiso Molapo, then minister of trade, indicated that government records showed only five local enterprises in this sector. Mabeleme Mokete, Motor Dealer License Fee Set at M150 000 *Lesotho Tribune* (Maseru 12 February 2022) <<https://lesothotribune.co.ls/motor-dealership-license-fee-set-at-m150-000/>> accessed 29 December 2022.

Lesotho's law for the regulation of imported used motor vehicle retailers is the Business Licensing and Registration Act.²⁴ The objectives of the Act are:

- (a) to promote private sector development through a conducive investment climate,²⁵
- (b) to facilitate the inclusion of all types of businesses into the formal business sector,²⁶
- (c) to facilitate the speedy issuing of licences and registration of businesses,²⁷
- (d) to simplify and streamline business licensing and registration procedures and,²⁸
- (e) to facilitate registration of business names²⁹

The Act imposes additional licensing requirements for foreign enterprises.³⁰ It further provides conditions for the cancellation or suspension of a license.³¹ It also obliges imported used motor vehicle retailers to bank their proceeds with local banks.³²

Lesotho, further, seeks to address other concerns raised by the surge in retail trade of imported used vehicles, such as tax evasion and trade-related money laundering, through this legislation.³³ These additional goals are remnants of tentative amendments to past frameworks, which initially indigenized the retail trade of imported used motor vehicles.³⁴ These enactments are, however, subject to outcry from foreign imported used motor vehicle retailers.³⁵ This clamour is based on the view that the framework discriminates against foreign imported used retailers.³⁶ It is, further, found on the view that the framework is non-transparent.³⁷ Lastly, the affected retailers allege that Lesotho has arbitrarily exercised its right to regulate through this promulgation.³⁸

²⁴ Business Licensing and Registration Act 2019 (Lesotho).

²⁵ Business Licensing and Registration Act 2019 (Lesotho).

²⁶ Business Licensing and Registration Act 2019 (Lesotho) s 3(a).

²⁷ Business Licensing and Registration Act 2019 (Lesotho) s 3(b).

²⁸ Business Licensing and Registration Act 2019 (Lesotho) s 3(c).

²⁹ Business Licensing and Registration Act 2019 (Lesotho) s 3(d).

³⁰ Business Licensing and Registration Act 2019 (Lesotho) s 4(1).

³¹ Business Licensing and Registration Act 2019 (Lesotho) s 12.

³² Business Licensing and Registration Act 2019 (Lesotho) s 4(4).

³³ Nthatuoa Koeshe, Motor Vehicle Dealership Hub of Money Laundering – Minister *News Day* (Maseru 11 February 2022) <

www.newsdayonline.co.ls/motor-vehicle-dealership-hub-of-money-laundering-minister/> accessed 30 December 2022.

³⁴ Business Registration and Licensing Act (Lesotho) s 34(1).

³⁵ Poloko Mokhele, Car Dealers, Minister in War of Words *The Reporter* (Maseru 21 February 2022) <www.thereporter.co.ls/2022/02/21/car-dealers-minister-in-war-of-words/> accessed 30 December 2022.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

This paper is, thus, propelled by the exigency to justify Lesotho's objectives policy objectives for the regulation of imported used vehicle retailers as;

1. Non-discriminatory,
2. Transparent measures of domestic regulation, and
3. Necessary to achieve Lesotho's legitimate policy objectives.

1.2 Research Problem

Governments enact regulatory frameworks to combat concerns raised by the recent sprout in the retail trade of imported used vehicles. Lesotho is not an exception, as its statutes reflect. However, States may struggle to ensure conformity of their regulatory framework with their WTO obligations of non-discrimination, transparency, and domestic regulation. This has been the case with Lesotho's history of regulating trade in used motor vehicles.

1.3 Hypothesis

This research establishes that Lesotho's current regulatory framework for imported used vehicle retailers tilts the level playing field against foreign imported used vehicle retailers through its regulatory framework. If it does, this paper seeks to establish justifications, if any, for Lesotho to slant this level.

1.4 Keywords

It is worthwhile to construe phrases that are constantly alive throughout a topic of research.

A policy objective is a desired outcome of a policy maker.³⁹ Legitimacy entails that an action is 'lawful, legal, or recognised by law'.⁴⁰ Conformity means that, if something happens, it does so according to the law.⁴¹

Regulatory frameworks mean the law and all 'institutional, administrative, political, social, and economic conditions or arrangements' necessary for its functioning.⁴² A national framework

³⁹

<[www.economicsonline.co.uk/definitions/policy_objective.html/#:~:text=Policy%20objective%20%E2%80%93%20definition,\(the%20target%20for%20inflation\).](http://www.economicsonline.co.uk/definitions/policy_objective.html/#:~:text=Policy%20objective%20%E2%80%93%20definition,(the%20target%20for%20inflation).>)> accessed 12 April 2023.

⁴⁰ <www.collinsdictionary.com/dictionary/english/legitimate-objective> accessed 12 April 2023.

⁴¹ <www.collinsdictionary.com/dictionary/english/conformity> accessed 12 April 2023.

⁴² Peter Howsan and E Gerlach 'Regulatory Tools: Legal Policy Framework' (2006) DFID Knowledge and Research Contract 3 <https://assets.publishing.service.gov.uk/media/57a08c44ed915d3cfd00129e/R8320-Sum19.pdf>> accessed 13 March 2023.

comprises; ‘international treaties, the legislature, judiciary, the regulator, the regulated and the public’.⁴³

Lastly, importing refers to the legal movement of goods or services, from one country to another, especially if the other country has shortages of such goods or services.⁴⁴ Used, pre-owned or second-hand motor vehicles are motor vehicles that have been previously owned by one or more retail owner.⁴⁵

1.5 Research Questions

This work addresses three research questions, *viz*,

1. What are Lesotho’s obligations, as a member of the WTO, with respect to the governance of imported used vehicle retailers?
2. To what extent does Lesotho’s current regulatory framework for imported used vehicle traders conform to its obligations as a member of the WTO?
3. Should the current regulatory framework be revised in order to attain conformity to the outlined principles of the WTO?

1.6 Literature Review

1.6.1 Structural Framework

This section surveys literature that contributes to address the research questions. Firstly, it assesses literature on the principle of conformity. This literature is necessary to maintain the argument that conformity is central to assessment of compliance of a WTO member with its obligations. Contributions from available literature on these obligations are essential for this paper to construe the principle of conformity. This paper then applies that deconstruction of this principle to justify Lesotho’s conformity with its WTO obligations. This review, further, finds authorities that contribute necessary knowledge to advance justifications for the conformity of Lesotho’s regulatory framework for imported used vehicle retailers to its WTO obligations.

1.6.2 Conformity

This paper notes that advocates for conformity hail it as the foundation of compliance with other WTO obligations. This is advanced because, Chaisse, in dissecting this obligation, observes that

⁴³ *ibid*.

⁴⁴ <www.investopedia.com/terms/i/import.asp> accessed 12 April 2023.

⁴⁵ <www.lexology.com/library/detail.aspx?g=0db3efc8-2836-4481-9221-dfa5d839736b> accessed 13 April 2023.

its impact is understood when read with other provisions.⁴⁶ He, further, argues that the obligation on members to ensure conformity of their national laws to WTO laws attributes ‘cardinal importance’ to the conformity obligation.⁴⁷ Charmody, however, differs from this view.⁴⁸ He bases his divergence on the argument that most WTO rules are unclear in scope and application, thus, says that it is impossible to regard conformity is a primary obligation.⁴⁹ His counter argument is, also, that there is a lack of consensus on characteristics of the conformity obligation among WTO members.⁵⁰ He also notes that the interpretation of conformity is often contextualised.⁵¹ He, therefore, on these grounds, proposes that conformity should be analysed on a case to case basis.⁵² This paper contributes to this work because it advocates for assessment of Lesotho’s conformity with its WTO obligations with due regard to its LDC status. This study, however, upholds the view that this principle is elemental to compliance.

1.6.3 Non-Discrimination

This obligation requires states to treat similar or like goods and services alike regardless of origin. There is, however, no clear approach to the determination of likeness within the WTO. This is noted by Qin, who suggests a ‘purpose oriented and internally coherent approach’ to be applied uniformly to likeness.⁵³ She submits that this approach addresses the obvious difference between ‘like conditions’ in the GATS opposed to ‘same conditions’ under GATT.⁵⁴ She advocates this approach because she says that a determination of whether two like groups should be treated alike should be done with due regard to the reason for comparison of such groups.⁵⁵

⁴⁶ Julien Chaisse, ‘Deconstructing the WTO Conformity Obligation: A Theory of Compliance as A Process’ (2015) 38 (1) *Fordham International Law Journal*, 61.

⁴⁷ Chaisse (n 46) 64.

⁴⁸ Chios Charmody, ‘Remedies and Conformity Under the WTO Agreement’ (2002) 5 (2) *Journal of International Economic Law*, 17.

⁴⁹ Chaisse (n 46) 64.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Julia Ya Qin, ‘Defining Non-Discrimination Under the Law of the World Trade Organization’ (2005) 23 *Boston University International Law Journal* 215-298, 220.

⁵⁴ *ibid.*

⁵⁵ *ibid.* 223.

The different engagement of ‘like’ services in the GATS is confirmed by Ortino to apply to the Most Favoured Nation (MFN) principle of discrimination obligation in the GATS.⁵⁶ He observes that the GATS establishes a test based on whether; (a) the measure falls under the GATS, (b) whether the service or service suppliers are ‘like’ and, (c) whether the measure manifests as less favourable treatment to the services or services suppliers of another Member.⁵⁷

This leads to determination of whether regulation for imported used vehicles traders is within the purview of the GATS. In reply to this, Zhang first notes the lack of the definition of services under the GATS.⁵⁸ She says that it only defines trade in services through the four modes of supply, mainly; (a) cross-border supply, (b) consumption abroad, (c) commercial presence and (d) movement of natural persons.⁵⁹ She, therefore, observes that this enables a flexible undertaking of market access and national treatment (NT) obligations by Members in their schedules of commitments.⁶⁰ She says that this approach should also apply to the general MFN obligation because it is imperative to identify the concerned service to assess differential treatment among Member states.⁶¹

She, further, advances that assessment of likeness of services must be made with regard to their intrinsic nature’.⁶² She then submits that the intended end-use of the output of a service determines its intrinsic nature.⁶³ Teksten also notes this end-use assessment as a key departure by the GATS from GATT in assessment of likeness.⁶⁴ This paper applies the end-use assessment test to likeness of imported used vehicle retailers. This test is followed by a determination of whether imported used vehicle retailers are covered by the GATS. In this regard, Jaiswal argues that used motor

⁵⁶ Federico Ortino, ‘The Principle of Non-Discrimination and its Exceptions in GATS: Selected Legal Issues’ (2006) King’s College Dickinson Poon School of Law Research Paper, 28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481> accessed 26 May 2023.

⁵⁷ *ibid.*

⁵⁸ Ruosi Zhang, ‘Covered or Not Covered: That is the Question – Services Classification and Its Implications for Specific Commitments under the GATS’ (2015) WTO Staff Working Paper, NO-ERSD 2015-11, 9. <www.wto.org/french/res_f/reser_f/ersd201511_f.htm> accessed 26 May 2023.

⁵⁹ *ibid* 9ff.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Ryan Teksten ‘ A Comparative Analysis of GATS and GATT: A Trade in Services Departure from the GATT’s MFN Principle and the Effect on National Treatment and Market Access’ (L240 Thesis, ILO 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664584> accessed 27 May 2023.

vehicle retail services fall within the Distribution Services Sector.⁶⁵ She advances this on the basis of the reading of the GATS Distribution Services Sector which she notes to include retail services.⁶⁶

1.6.4 Transparency

Literature on this subject aids the submission that regulatory measures embodied by an opaque regulatory framework constitute non-tariff barriers. This is observed by Zoellner through his deconstruction of the transparency obligation as enshrined by Article X of the GATT.⁶⁷ He notes that it obligates members to reduce non-tariff barriers (NTBs) and transaction costs imposed by opaque regulatory regimes.⁶⁸ He says that transaction costs and NTBs are significantly reduced by the provision of valuable information necessary to players in international trade.⁶⁹ He founds his observation upon the game and information theories in similar vein as Mock, who adopts these classical economics theories to indicate the significance of a transparent regulatory framework.⁷⁰ He says that market participants in an opaque regime incur additional costs to obtain the necessary information. He, thus, says, ‘opaque legal regimes create the conditions for regulatory games of imperfect knowledge’.⁷¹

This paper also applies the game and information theories to justify the conformity of Lesotho’s regulatory framework for imported used vehicles with its WTO transparency obligations under the GATS. This is, because, Delimatsis notes that the GATS replicates the GATT in many respects but for the following distinctions; (a) that the GATS actually employs the word ‘transparency’ in its text,⁷² (b) that in the GATS, transparency is assessed by consideration of a nation’s policy goals, regulation and the latitude of slow implementation by developing country Members and LDCs of

⁶⁵ Anindita Jaiswal, ‘GATS and Retail Services: India Perspective’ (2014)15 (1) The Estey Centre for International Law and Trade Policy 12, 26 <<https://law.usask.ca/documents/research/estey-journal/jaiswal15-1annex.pdf>> accessed 26 May 2023.

⁶⁶ *ibid.*

⁶⁷ Carl-Sebastian Zoellner, ‘Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law’ (2006) 27(2) Michigan University Journal of International Law 579, 587.

⁶⁸ *ibid.*

⁶⁹ Zoellner (n 67) 588.

⁷⁰ William Mock, ‘An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development’ (2000) 18 (2) Dickinson Law Journal 293, 295.

⁷¹ *ibid.*

⁷² Panos Delimatsis, ‘Article III GATS: Transparency’ in Rudiger Wolf, Peter-Tobias Stoll, Clemens Feinäugle (eds) Max Planck Commentaries on World Trade Law, WTO – Trade in Services (Vol. 2 Martinus Nijhoff Publishers 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280204> accessed 28 May 2023.

transparency obligations that may ‘impose an intolerable administrative burden’,⁷³ and (c) that this obligations under the GATS overlaps between publication and notification requirements⁷⁴ and domestic regulation.⁷⁵ This contribution aids the research to assess the justification for conformity of Lesotho’s regulatory regime with its transparency obligation as embodied in the GATS.

1.6.5 Domestic Regulation

A review of the available literature on this obligation reveals that it is disciplined solely by the GATS within the WTO. This is noted through the observation by Trebilcock, Howse and Eliason, that the GATT Secretariat approaches the right to regulate from the GATS perspective.⁷⁶ They also note that ‘the “right to regulate” begs the critical question of how little or much the exercise of this right may be constrained or qualified by any particular set of GATS disciplines’.⁷⁷

They consider the necessity test as applied in Article XX of the GATT as ideal to determine the right to regulate services but reject it due to WTO members not reaching a consensus on its application.⁷⁸ It is also rejected by McDonald, who suggests assessment of domestic regulation from the Technical Barriers to Trade Agreement (TBT) approach.⁷⁹ This is, because, as he observes, it introduces ‘a least restrictive measures requirement and adoption of international standards’.⁸⁰ On this basis, he recommends its uniform application to domestic regulation within the WTO.⁸¹ This suggestion is considered as an alternative to advance justifications for conformity of Lesotho’s regulatory framework for imported used vehicle retailers with its transparency obligation.

1.6.6 Legitimate Policy Objectives

Ayers and Mitchell note that, under the WTO, legitimate policy goals are not obligations.⁸² They are exceptions invoked against a complaint that a Member’s measures are inconsistent with its

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of Multilateral Trade* (4th ed Routledge 2019), 497.

⁷⁷ *ibid.*

⁷⁸ *ibid* 497ff.

⁷⁹ Jan Mc Donald, ‘Domestic Regulation: International Standards, Technical Barriers to Trade’ (2005) 4 (2) World Trade Review 249 – 274, 253.

⁸⁰ *ibid* 254 ff.

⁸¹ *ibid.*

⁸² Ayres and Mitchell (n 15) 226.

WTO obligations.⁸³ The extent and manner of conformity of Lesotho's regulatory framework with its WTO obligations is assessed in light of contributions of literature on these exceptions.

Lesotho's regulatory framework for imported used vehicle retailers reflects public policy goals aimed at economic development.⁸⁴ Hoekman and Nicita duly observe that states use non-tariff barriers (NTBs) to pursue public policy objectives, (such as protection of health and the environment) and to suit their trade policies to their economic and development goals.⁸⁵ Ramires reiterates this but is concerned that governments also engage them to substitute tariffs, and as protectionist tools.⁸⁶ She argues that, often, the protectionist or restrictive non-tariff measures have a trade-restrictive effect.⁸⁷ Diebold says that this leads to complaints against States imposing such measures.⁸⁸ He then adds that in those cases, the complainant must prove the protectionist purpose.⁸⁹ He notes that in most cases the complainant relies on evidence relating to the design, structure and application of the measure.⁹⁰

The respondent in this case, as Ayres and Mitchell observe, may invoke one of the exceptions provided for by either the GATT or GATS.⁹¹ They indicate that the WTO Dispute Settlement Body (DSB) jurisprudence⁹² places the onus on the respondent to prove; (a) that the measure 'relates to' or 'is necessary' to achieve any of the objectives outlined in the general exceptions Articles and (b) that it does not constitute unjustifiable and arbitrary treatment or a disguised restriction on international trade.⁹³

⁸³ *ibid.*

⁸⁴ Business Licensing and Registration Act 3 2019 (Lesotho) s 3.

⁸⁵ Bernard Hoekman and A Nicita, 'Non-Tariff Measures and Trade Facilitation: WTO Disciplines and Policy Space for Development' in Jaimie de Melo and A Nicita (eds) *Non-Tariff Measures: Economic Assessment and Policy Options for Development in UNCTAD* (2018) 14 <https://unctad.org/system/files/official-document/ditctab2018d3_en.pdf#page=93> accessed 20 December 2022.

⁸⁶ Karina Ramires 'The Impact of Abusive Use of Article XX GATT WTO on Developing Countries (Latin America and Caribbean)' (Masters Thesis, Universidade Catolica Portuguesa Global School of Law 2021) 19 <<https://repositorio.ucp.pt/handle/10400.14/35082?locale=en>> accessed 22 December 2022.

⁸⁷ *ibid.*

⁸⁸ Nicolas Diebold, 'Non-discrimination and the Pillars of International Economic Law' (2010) International Institute for Law and Justice Emerging Scholars Paper 18/2010, 16 <<https://ijl.org/wp-content/uploads/2016/08/Diebold-Non-Discrimination-and-the-Pillars-of-International-Economic-Law-2010.pdf>> accessed 22 January 2023.

⁸⁹ *ibid.*

⁹⁰ *ibid.* 17.

⁹¹ Ayres and Mitchell (n 15) 229.

⁹² They referred to the AB Report in United States – Standards for Conventional and Reformulated Gasoline (US – Gasoline) WT AB/R/DS52 (25 September 1997).

⁹³ Ayres and Mitchell (n 15) 230.

The above literature suggests a two-pronged evaluation of Lesotho's regulatory framework. This entails, firstly, an inquiry into whether measures imposed by Lesotho's framework 'relate to' or are 'necessary' to achieve its policy goals. This leads to application of the necessity test, which, Fontanelli notes to require; (a) weighing and balancing of the effects of the measure and (b) least trade-restrictive means assessment.⁹⁴ He differentiates these tests in that, 'whereas the weighing and balancing test yields a "preliminary" conclusion, the "confirmation" comes from the least trade-restrictive means test'.⁹⁵ The assessment of whether a measure 'relates to' the policy objective, as Ayres and Mitchell note, 'entails a lesser degree of connection between the measure and the objective'.⁹⁶

Numerous scholars like Qin, as noted earlier, propose departure from application of the necessity test in WTO disciplines.⁹⁷ The basis for the departure for most of these scholars, like Mattoo and Subramanian, is that it is too stringent.⁹⁸ They further argue that, in light of new developments in international trade, 'it may well be politically more acceptable' for nations to prioritise economic efficiency in pursuit of their policy goals than 'put the rights of trading partners above all else'.⁹⁹

They, therefore, advocate for an efficiency based approach rather than application of the necessity test to legitimate policy objectives.¹⁰⁰ They submit that it will allow members to implement policies in pursuit of objectives other than those listed as general exceptions while 'preserving the efficacy of the multilateral trading system'.¹⁰¹ Cottier and Oesch also argue that the necessity test is too confined.¹⁰² They, therefore, propose that the WTO should accord a broader definition to policy objectives.¹⁰³ They, however, suggest a 'compelling interest and proportionality test' that is

⁹⁴ Filippo Fontanelli, 'Necessity Killed the GATT: Art XX GATT and the Misleading Rhetoric About 'Weighing and Balancing' (2013) *European Journal of Legal Studies* 5(2) 36 – 52.

⁹⁵ Fontanelli noted this from the recital of the Appellate Body Report in *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres) WT/DS332* (25 September 2009).

⁹⁶ Ayres and Mitchell (n 15) 249.

⁹⁷ Qin (n 53) 267.

⁹⁸ Aaditya Mattoo and Arvind Subramanian, 'Domestic Regulation and Multilateral Disciplines: The Dilemma and A Possible Resolution' (1998) WTO Staff Working Paper NO. TISD-98-02, 20 <<https://ideas.repec.org/p/zbw/wtowps/tisd9802.html>> accessed 22 February 2023.

⁹⁹ *ibid* 19ff.

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*.

¹⁰² Thomas Cottier and M Oesch, 'Direct and Indirect Discrimination under the EU and WTO Law' (2011) Swiss Centre for Competence in Research Working Paper 16/2011. 141-175, 155 <www.wti.org/media/filer_public/48/a9/48a96a1d-c754-4961-820c-8fa012587411/cottieroeshnccrwp16.pdf> accessed 23 January 2023.

¹⁰³ *ibid*.

adopted at the EU level¹⁰⁴ because it covers a broader scope.¹⁰⁵ This paper accordingly contributes to this literature by submitting that a wider scope should be afforded to assess conformity of Lesotho's regulatory measures to WTO law. This submission is based on the context of Lesotho's economic development goals as a LDC.

The second leg of the assessment of conformity with WTO obligations by Lesotho's regulatory framework entails evaluation of whether the measures it imposes are; (a) unjustifiable and arbitrary, and (b) a disguised restriction on international trade. This evaluation is made in with reference to the chapeau¹⁰⁶ to Article XVI of the GATS, which as Ayres and Mitchell submit, prevents abuse of the legitimate policy objectives exceptions.¹⁰⁷ They note that this is because it directs attention to application of the measure rather than the measure.¹⁰⁸ They, further, observe that it is trite to evaluate a measure under the general exceptions subparagraphs before the inquiry under the chapeau.¹⁰⁹ Their submission is, however, disputed by Bartels. He says that the chapeau should be considered as two independent policy justifications provisions that apply to all measures, including those not provided for in the subparagraphs.¹¹⁰

This paper models the approach to adopt for justification of Lesotho's conformity with its WTO obligations on these reviewed works. This approach starts by first, noting that conformity is central to Lesotho's compliance with its WTO obligations of non-discrimination, transparency and domestic regulation. It, however, notes this with regard to Lesotho's context as a LDC. This, therefore, buttresses the submission that conformity should be assessed on a case to case basis. This study then explores into the legitimate policy objectives justification available to Lesotho under WTO law. This is achieved by dissecting these justifications in light of the knowledge contributed by the reviewed authorities.

¹⁰⁴ Article 36 of the Treaty on the Functioning of the European Union (TFEU) considers this approach.

¹⁰⁵ Cottier and Oesch (n 102) 159.

¹⁰⁶ The chapeau is an introductory clause to Article XX GATT and Article XIV GATS.

¹⁰⁷ Ayres and Mitchell (n 15) 252.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 *American Journal of International Law* 95, 98ff.

1.7 Significance of the Research

This study highlights the conformity of Lesotho's measures on the regulation of imported used motor vehicle retailers with its WTO obligations of non-discrimination, transparency and domestic regulation. It aids the development of Lesotho's regulatory framework by identifying the loopholes Lesotho must fill to ensure further conformity. A further essence of this paper is to demonstrate the aspiration of Lesotho towards conformity with WTO obligations to other WTO members. It, thus, provides a learning tool for those members to ensure the conformity of their frameworks to WTO law. Lastly, this study is necessary to unravel the rhubarb between the government and the imported used motor vehicle retailers.

1.8 Scope of the Research

The scope of this research focuses on principles of WTO law encompassed in varying articles of the GATT 1994, the GATS. In the GATT these include:

1. Article XVI:4 on conformity; and
2. Article XX on general exceptions.

The scope of this research under the GATS extends to:

1. Article XVII on NT,
2. Article III on transparency,
3. Article VI on domestic regulation; and
4. Article XIV on general exceptions.

This research also extensively covers Lesotho's Business Licensing and Registration Act and the regulations it propagates. It also studies the national laws of Mauritius on regulation of imported used vehicle retailers. This aids a comparative analysis to determine the conformity of Lesotho's measures with its WTO obligations.

1.9 Purpose of the Research

The goal of this research is to justify Lesotho's measures in light of its WTO obligations. This is achieved by demonstrating that Lesotho's measures are not inconsistent with its WTO obligations of non-discrimination, domestic regulation, and transparency. Based on that illustration, this study, thus, aims to quell the imported used motor vehicle retailers' tirades on Lesotho's regulatory framework.

1.10 Methodology

This study employs a desktop analysis of existing literature on conformity and primary sources, *to wit*, the GATT and the GATS. It also consults Lesotho's domestic framework on the regulation of the trade in imported used motor vehicles, mainly the Business Licensing and Registration Act. It also consults secondary sources, such as journal articles, academic textbooks, academic commentaries, working papers, newspaper articles, online publications and internet sources.

1.11 Chapter Outline

This study is divided into five chapters. Chapter 1 sets out the basis of the research. It details the historical background, the statement of the research problem, methodology, and scope of the study. Further, it outlines the research aims and objectives, research questions, the literature review and an outline of the chapters.

Chapter 2 defines the WTO obligations with which Lesotho must ensure conformity of its regulatory framework for imported used vehicle retailers.

Chapter 3 provides an overview of the evolution of Lesotho's domestic regulatory framework for imported used vehicle retailers. It then advances justifications for Lesotho's measures on regulation of imported used vehicle retailers. This is achieved by analysis of the nature of the obligations and the exceptions for non-conformity with each obligation. The chapter then makes a submission, on the basis of that analysis, whether Lesotho's regulatory regime conforms to WTO obligations under the GATS.

Chapter 4 provides a comparative study by discussing the measures employed by Mauritius' regulatory framework for regulation of imported motor vehicle retailers. The aim of this comparative analysis is to identify gaps that Lesotho should address to ensure further conformity of its regulatory framework to its WTO obligations.

The last chapter details an overview of the study and a conclusion. Lastly, it provides recommendations to Lesotho to ensure further conformity of its laws with its WTO obligations.

Chapter 2: Definitions

2.1 Introduction

This chapter defines the central principle to this research, conformity. This is achieved by elucidation of the development, legal basis, key elements and exceptions it embodies. The chapter further defines the WTO obligations of non-discrimination, transparency and domestic regulation. This is achieved through an examination of their historical development, rationale, scope and application. The historical development is discussed with reference to international economic law, broadly, and the WTO regime in particular. The rationale is discussed from analysis of the interpretation of the obligations as provided by the GATS. A discussion on the scope and application of each obligation is achieved by studying the WTO DSB decisions on measures regarding these obligations. Secondly, this chapter defines legitimate policy objectives exceptions through a discussion of the requirements, tests placed by the GATS on these exceptions.

2.2 Conformity

2.2.1 Overview

Conformity is found in the Vienna Convention on the Law of Treaties (VCLT), which obliges States to perform their treaty obligations.¹¹¹ It further insists on ‘the execution of a treaty in good faith and in compliance with the classical *pacta sunt servanda* rule’.¹¹² Under this rule, states are always presumed to have observed good faith in performance of their treaty obligations.¹¹³

Application of this rule in international law disputes dates to the 1932 case of Free Zones of Upper Savoy and the District of Gex.¹¹⁴ In this case, the Permanent Court of International Justice (PCIJ) held that domestic legislation could not be invoked to justify non-enforcement of an international obligation.¹¹⁵ This rule was further endorsed in the Nuclear Test (Australia v France)¹¹⁶ case by the International Court of Justice (ICJ) which accentuated that ‘the binding character of an international obligation is, like the *pacta sunt servanda* rule, also based on good faith’.¹¹⁷

¹¹¹ Article 26 Vienna Convention on the Law of Treaties 1969.

¹¹² art. 27 VCLT 1969.

¹¹³ Chaisse (n 46) 67.

¹¹⁴ 1932 PCIJ A/B 46.

¹¹⁵ *ibid.*

¹¹⁶ 1974 ICJ Rep 273.

¹¹⁷ *ibid.*

Pacta sunt servanda, however, is not an absolute and strict principle.¹¹⁸ It is, like other legal principles, subject to exceptions ‘where justice and fairness so require’.¹¹⁹ This means that there should be a legal basis for a state to invoke the exceptions. These exceptions are, mainly; necessity,¹²⁰ force majeure,¹²¹ change of circumstances,¹²² and supervening impossibility of performance.¹²³

2.3 Conformity within the WTO Regime

2.3.1 Legal Basis

In WTO law, the conformity principle also finds its basis on the *pacta sunt servanda* rule. This is noted from the Canada – Export Credits and Loan Guarantees for Regional Aircraft case,¹²⁴ wherein the dicta in the Nuclear Test¹²⁵ case was further propounded. It was held, in that case, that the VCLT specified that, ‘obligations under internal law cannot excuse states from complying with their international obligations’.¹²⁶

2.3.2 Conformity in Article XVI: 4 GATT

This Article obliges Members to ensure that their regulatory frameworks conform with their WTO obligations as contained in the Annexes to the WTO Agreement.¹²⁷ Perusal of these Annexes indicates that it also applies to conformity within the GATS. This is, because, Article XVI: 4 of the GATT is incorporated into the Agreement Establishing the WTO, meaning that it applies to all other WTO Agreements even if they do not specifically express.¹²⁸

2.3.2.1 Meaning

The WTO resorts to the literal definition of conformity within the regime.¹²⁹ This is observed in the Appellate Body Report of European Communities (EC) – Measures Affecting Meat and Meat Products (Hormones).¹³⁰ In brief, this dispute concerned a contention by the US that measures by

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ Article 25 International Law Commission Treaties.

¹²¹ Article 23 International Law Commission Treaties.

¹²² Article 62 VCLT.

¹²³ Article 61 VCLT.

¹²⁴ WT/DS222/ABR (7 February 2003).

¹²⁵ Nuclear Test (n 116).

¹²⁶ Canada – Export Credit (n 124).

¹²⁷ art. XVI: 4 GATT (n 20).

¹²⁸ Chaisse (n 46) 64.

¹²⁹ *ibid.*

¹³⁰ WT/DS26AB/R 1998 (29 May 1998).

the EC prohibiting import and marketing of meat treated with certain growth hormones were inconsistent with the Sanitary and Phytosanitary Agreement (SPS).¹³¹ The AB rejected the Panel's decision that 'based on' in the text of the SPS meant 'in conformity with'.¹³² It resorted to the contextual interpretation of conformity in assessing the measure.

2.3.2.2 Elements

The literal interpretation of conformity in this case also assisted the WTO to identify key elements of conformity.¹³³ These entail;

- (a) that there must be an action by a WTO Member,¹³⁴
- (b) that there must be a degree of similarity between domestic law and WTO law,¹³⁵
- (c) that the domestic law must strive to resemble WTO law;¹³⁶ and
- (d) That, ultimately, domestic laws of all WTO members should have similar national laws on trade policies.¹³⁷

2.3.2.3 Scope

The scope of conformity within the WTO covers laws, regulations and administrative processes enacted by a WTO Member.¹³⁸

2.3.2.4 Exceptions

This part provides an illustration of exceptions to conformity in the GATS context. These exceptions are;

1. Economic integration¹³⁹
2. General exceptions,¹⁴⁰
3. Article II exemptions to the MFN obligation;¹⁴¹ and

¹³¹ EC – Hormones (n 130).

¹³² Articles 3.1 and 3.3 TBT.

¹³³ Chaisse (n 46) 64.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Guigio Wang, 'Radiating Impact of the WTO on its Members' Legal Systems: A Chinese Perspective' in *Collected Courses of The Hague Academy of International Law* (2010) 349, 352 <www.researchgate.net/publication/291754298_Radiating_Impact_of_WTO_on_Its_Members'_Legal_System_The_Chinese_Perspective> accessed 13 April 2023.

¹³⁸ This was propounded in the United States – Sections 301 to 310 of the Trade Act 1974 (US – Section 310) WT/DS 152 (25 January 2000).

¹³⁹ Article V GATS.

¹⁴⁰ Article XIV GATS.

¹⁴¹ Article II Exemptions are provided for in Article XXIX (Annexes) of the GATS.

4. Market Access¹⁴² and National Treatment,¹⁴³ which are subject to a Member's undertakings in a schedule of specific commitments.

2.4 Non-Discrimination

2.4.1 Overview

Non-discrimination in international law is founded on the concept of equality.¹⁴⁴ This concept entails a basic idea that persons in similar situations should be treated alike.¹⁴⁵ International law prohibits direct and indirect discrimination.¹⁴⁶ Direct discrimination is less favourable treatment on the grounds of characteristics.¹⁴⁷ Indirect discrimination ensues when a regulatory framework appears neutral but affects particular groups disproportionately without justification.¹⁴⁸ Non-discrimination does not have a clearly defined meaning in international economic law despite being provided for in different treaties.¹⁴⁹ This is because different international agreements apply differing standards to non-discrimination in their provisions.¹⁵⁰

2.5 Non-Discrimination in the WTO

2.5.1 Overview

This principle is embodied by both the GATT¹⁵¹ and the GATS.¹⁵² The GATS provides two non-discrimination obligations.¹⁵³ These are the Most-Favoured Nation (MFN) and National Treatment (NT).¹⁵⁴ The latter is provided for as a general obligation whereas the former is subject to a WTO member's schedule of commitments.¹⁵⁵

¹⁴² (n 140).

¹⁴³ Article XVII GATS.

¹⁴⁴ Kevin Kitching, 'Non-Discrimination for Practitioners Handbook' (2005) 18 <<https://documentation.lastradainternational.org/lisidocs/Handbook%20on%20nondiscrimination.pdf>> accessed 26 May 2023.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.* 20.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ Nicholas Diebold, 'Non-Discrimination and the Pillars of International Economic Law' Institute for International Law and Justice Working Paper 18 (2010) 831, 834 <<https://ijl.org/wp-content/uploads/2016/08/Diebold-Non-Discrimination-and-the-Pillars-of-International-Economic-Law-2010.pdf>> accessed

¹⁵⁰ *ibid.*

¹⁵¹ GATT Articles I and III.

¹⁵² GATS Article II and XVII.

¹⁵³ *ibid.*

¹⁵⁴ Ortino (n 56) 16.

¹⁵⁵ BISD 36th Supp. 345 (7 November 1989).

2.5.2 Purpose

The purpose of non-discrimination obligations in the WTO context is to provide effective equal opportunities to Members in like situations.¹⁵⁶

2.6 Non-Discrimination under the GATS

This obligation prohibits both de facto and de jure discrimination.¹⁵⁷ This is found on the WTO DSB jurisprudence in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (III) (EC – Bananas III)*.¹⁵⁸ This dispute concerned licensing procedures for imports of bananas into the EC.¹⁵⁹ The issue was, whether licensing procedures that were not based on origin but accorded more favourable treatment to EC Banana distributors constituted discrimination.¹⁶⁰ The Panel held that EC's rules on import licensing were discriminatory despite being origin-neutral.¹⁶¹ It based its decision on the adverse impact that the measures had on competing market actors.¹⁶²

2.6.1 Elements

The elements of this obligation entail;

- (a) That there must be a measure,¹⁶³
 - (b) That it must affect trade in like services,¹⁶⁴ and
 - (c) That it must constitute less favourable treatment.¹⁶⁵
- (a) Measure

This simply entails that there must be a measure that affects trade in services.¹⁶⁶ The GATS provides that a measure is an action undertaken by a regulatory authority in exercise of its autonomy.¹⁶⁷

¹⁵⁶ *ibid.*

¹⁵⁷ *Ortino* (n 56) 24.

¹⁵⁸ *WT/DS27* (25 September 1997).

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² *ibid.*

¹⁶³ *Ortino* (n 56) 24.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ art. I: 3 GATS

(b) Affect Trade in Like Services

The Appellate Body in *Canada – Measures Affecting the Automotive Industry (Canada – Autos)*,¹⁶⁸ examined Canada’s appeal that even if the GATS had applied to the measure in dispute, and the Panel had not set the standard to determine like services.¹⁶⁹ The AB upheld Canada’s contention that the Panel should have set a threshold to its determination of ‘like services’.¹⁷⁰ This threshold culminates in additional factors to the literal interpretation of likeness.¹⁷¹

These are;

- (i) The service’s end-use,¹⁷²
- (ii) Consumer tastes and characteristics of the service¹⁷³; and
- (iii) Classification of the services in a Member’s schedule.¹⁷⁴

(c) Less Favourable Treatment

Article XVII of the GATS prohibits both de facto and de jure discrimination.¹⁷⁵ It then proceeds to set a less favourable treatment standard upon competition conditions in the particular market.¹⁷⁶ Thus, a measure accords less favourable treatment to a service or service supplier if it adversely impacts on conditions of competition in a particular market.¹⁷⁷

2.7 Domestic Regulation

2.7.1 Overview

In the GATT, Members may invoke tariffs or quotas for protectionist purposes.¹⁷⁸ The same may also be pressing for the trade in services environment.¹⁷⁹ This informs the observation by Members that non-quantitative and non-discriminatory measures relating to licensing and qualification

¹⁶⁸ WT/DS139 (19 June 2000)

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ Zhang (n 58) 9.

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ (n 56).

¹⁷⁵ Article XVII: 2 GATS.

¹⁷⁶ Article XVII: 3 GATS.

¹⁷⁷ *ibid.*

¹⁷⁸ Joost Pauwelyn, ‘Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS’ *World Trade Review* (2005) 4(2) 131-170, 134

¹⁷⁹ *ibid.*

procedures and requirements could also adversely affect trade in services.¹⁸⁰ This, therefore, led to negotiations on this discipline.¹⁸¹ They culminate in Article VI: 4 of the GATS.¹⁸²

2.7.2 Purpose

The purpose of this discipline in the GATS is to ‘place a check’ on regulatory interference in trade in services.¹⁸³ This is because some interventions constitute quantitative restrictions on access of foreign services to a domestic market.¹⁸⁴ In some instances they effectively bar foreign services from establishing themselves in the domestic market. This occurs when the regulatory interference is not based on the criterion envisaged in Article VI: 4 of the GATS.

2.7.3 Requirements

The criterion alluded to above entails;

1. That the measure must objective and transparent;¹⁸⁵ and
2. That the measure, is not burdensome than necessary to ensure the quality of the service.¹⁸⁶

2.7.4 Scope

The scope of domestic regulations disciplines in the GATS covers;

1. Article VI,
2. Article XVII; and
3. Article XVIII of the GATS.¹⁸⁷

2.8 Transparency

2.8.1 Overview

Transparency means that a regulation, law or legal procedure must be easily accessible and comprehensive.¹⁸⁸ Thus, it entails the availability and accessibility of knowledge and information about the meaning of norms, rules and procedures established by a treaty.¹⁸⁹ The rationale for this obligation is to enable parties to conduct their affairs with full knowledge of the relevant laws and regulations on them.¹⁹⁰

¹⁸⁰ <www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm>

¹⁸¹ *ibid.*

¹⁸² Article VI: 4 GATS.

¹⁸³ Pauwelyn (n 178) *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid* 135.

¹⁸⁶ *ibid.*

¹⁸⁷ Pauwelyn (n 178) 136.

¹⁸⁸ Mock (n 70) 296.

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

2.8.2 Characteristics of Transparency in WTO Law

This obligation in WTO law is divided into three categories;

1. the obligation to publish,¹⁹¹
2. the obligation to notify,¹⁹² and;
3. The obligation to duly administer.

These encompass;

- (a) making all relevant rules and regulations of general application that affect trade available,¹⁹³
- (b) informing the WTO of changes to domestic legislation¹⁹⁴, and
- (c) Administering such measures accordingly and further and providing domestic review mechanisms to address legal redress.¹⁹⁵

2.8.3 Scope

The obligation zeroes in on mostly discriminatory obligations.¹⁹⁶ It, however, due to the overlap noted with the ‘transparent and clear objective’ element of domestic regulations, also traverses into origin-neutral measures.¹⁹⁷ It, therefore, in this regard reaches into the disciplines enshrined in Article VI; 4 of the GATS.¹⁹⁸

2.8.4 Application

Violations of this obligation can be invoked on a stand-alone basis but the common trait among Members is to invoke them as secondary allegations.¹⁹⁹ This has led to adjudicating bodies not addressing them upon finding a violation of another commitment.²⁰⁰

2.9 Legitimate Policy Objectives

2.9.1 General

Legitimate policy objectives are exceptions, not obligations.²⁰¹ They allow a member to impose WTO inconsistent measures provided they are covered under Article XX of the GATT or Article

¹⁹¹ Delimatsis (n 72) 7.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ Delimatsis (n 72) 8.

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

²⁰⁰ This was the Panel’s approach in *Indonesia – Certain Measures Affecting the Automobile Industry (Indonesia – Autos 3) WT/DS54/R (2 July 1998)*.

²⁰¹ Ayres and Mitchell (n 15) 229.

XIV of the GATS.²⁰² There are, however, notable differences, which renders a wider scope to this exception under the GATS.²⁰³

2.9.2 Legitimate policy objectives under the GATS

They mainly involve measures invoked for the public good of:

1. Public morals or maintain public order;²⁰⁴
2. Necessary to protect human, animal, plant life or health and the environment;²⁰⁵
3. Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement including those relating to:
 - a) The prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;²⁰⁶
 - b) The protection of the privacy individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;²⁰⁷
 - c) Safety²⁰⁸
4. Measures inconsistent with article XVII, provided that the difference in treatment is aimed at ensuring the (equitable or effective) imposition or collection of direct taxes in respect of services or service suppliers of other members;²⁰⁹
5. Inconsistent with article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound;²¹⁰

2.9.3 Necessity

Article XIV of the GATS stipulates that a measure maybe justified only if it is necessary to achieve the policy objectives in question.²¹¹ It provides for three necessity tests that group identical objectives in one test. These are;

1. Articles XIV (a) – (c) apply to deviation to any GATS obligations.
2. Articles XIV (d) applies only to measures which are inconsistent with the NT principle of non-discrimination in Article XVII.
3. Article XIV (e) applies only to measures which are contrary to the MFN obligation in Article II.

²⁰² *ibid.*

²⁰³ Thomas Cottier, Panos Delimatsis and Nicholas Diebold Article XIVGATS: General Exceptions in Rudiger Wolf, Peter-Tobias Stoll, Clemens Feinäugle (eds) Max Planck Commentaries on World Trade Law, WTO – Trade in Services (Vol. 2 Martinus Nijhoff Publishers 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280204> accessed 28 May 2023.

²⁰⁴ Article XIV (a) GATS.

²⁰⁵ art. XIV (b) GATS.

²⁰⁶ art. XIV(c) (i) GATS.

²⁰⁷ art. XIV(c) (ii) GATS.

²⁰⁸ art. XIV(c) (iii) GATS.

²⁰⁹ art. XIV (d) GATS.

²¹⁰ art. XIV (e) GATS.

²¹¹ Cottier, Delimatsis and Diebold (n 203).

2.9.4 The Two-tier Analysis

It entails that a Member's measure must;

1. exhibit some nexus between the measure and the objective,²¹² and
2. That it must be necessary to achieve the objective.²¹³

This is called 'weighing and balancing a series of factors'.²¹⁴ It culminates in;

1. Evaluation of the relative importance of the measure to the policy goals pursued
2. Assessment of the contribution the measure makes to achieve the policy goals pursued.

2.9.5 The Chapeau

The Chapeau is an introductory clause to the general exceptions provisions.²¹⁵ Its purpose is to ensure reasonable exercise of a member's right to pursue measures inconsistent with Article XIV of the GATS.²¹⁶ It, thus, inquires into whether the manner of application of a measure does not lead to;

- (a) Unjustifiable or arbitrary discrimination,²¹⁷ or
- (b) A disguised restriction on international trade in services.²¹⁸

2.9.6 Scope

As illustrated, Articles XIV (a) – (c) of the GATS apply to deviations from any GATS obligations.²¹⁹ An illustration is gleaned from the application of Article XIV to 'public morals' in United States – Measures Affecting the Cross-Border Supply Gambling and Betting Services.²²⁰ The Panel therein alluded to previous AB decisions on other general exceptions that members should define public morals in the context of their own societies.²²¹ It then examined the statement of objectives of the policy of the US and other Members to establish that the measures at issue were pursued to protect against money laundering, organised crime, fraud under-age gambling and pathological gambling.²²² It found that, in the societal context of the US, these issues related to public morals.²²³ This far-reaching scope was further noted by the Panel in China – Measures

²¹² United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling) WT/DS285/26 (25 April 2013).

²¹³ US – Gambling (n 212) para 296.

²¹⁴ US – Gambling (n 212) *ibid*.

²¹⁵ Ayres and Mitchell (n 15) 230.

²¹⁶ *ibid*.

²¹⁷ US – Gambling (n 212) para 304.

²¹⁸ *ibid*.

²¹⁹ *ibid*.

²²⁰ *ibid*.

²²¹ *ibid*.

²²² *ibid*.

²²³ *ibid*.

Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products (China – Publications and Audio-visual Products)²²⁴ that ‘the concept of “public morals” can vary from Member to Member, as they are influenced by each Member’s prevailing social, cultural, cultural ethical and religious values’.²²⁵

2.10 Conclusion

These definitions are central to this paper because they illuminate that the conformity obligation is primal to compliance with other WTO obligations. The definition of conformity in this chapter suffices to inform the rationale for compliance with WTO law. This chapter also defines non-discrimination, domestic regulation and transparency. It has, in defining these obligations, directed this research to the key elements of each obligation. A clear construction of the key elements of each obligation is basal to assessment of the extent of conformity of Lesotho’s regulatory framework to Lesotho’s WTO obligations. Lastly, this chapter highlights the distinction that legitimate policy objectives are exceptions but not obligations in WTO law. It has, further, divulged that since these legitimate policy goals are exceptions, they are invoked once a measure has been invoked and a complaint has been tabled before the DSB. These definitions are essential for evaluation of Lesotho’s conformity despite no formal complaint from the States of the concerned imported used motor vehicle retailers. This is because, in essence, on the basis of the classical *pacta sunt servanda* rule, Lesotho is obliged to ensure conformity with its WTO obligations in promulgation of its rules, laws and administrative processes. The next chapter, thus, in light of this conclusion, assesses the extent and manner of conformity of Lesotho’s regulatory framework to its WTO obligations of non-discrimination, domestic regulation and transparency.

²²⁴ WT/DS363/19 (24 July 2012).

²²⁵ *ibid.*

Chapter 3: Policy Justifications for Lesotho's Regulatory Framework

3.1 Introduction

This chapter begins with a brief overview of the development of Lesotho's regulatory framework for imported used motor vehicle retailers. The overview is essential to highlight the stages of development of Lesotho's framework to the current position. This chapter identifies changes to Lesotho's regime with each stage. The implications of each change to the regime are necessary to form a basis for what necessitated that change. An assessment of these changes is important to shed light on whether, (a) Lesotho strived towards conformity with its WTO obligations with the changes, or (b) whether the changes constituted a protectionist non-compliant regime that warranted further reform.

This chapter also identifies the measures alleged non-conformant to Lesotho's WTO obligations by the foreign imported used vehicle retailers. This identification is essential to determine whether those measures are covered under WTO law. This is followed by an analysis of each measure under the obligation with which it does not allegedly conform. These allegations are gathered from communications between the imported used motor vehicle retailers and Lesotho's ministry of trade and industry. Such communications are obtained from secondary sources.²²⁶ Lastly, this chapter seeks justifications for non-conformity of Lesotho's legal framework in light of the general exceptions embodied by Article XIV of the GATS.

3.2 The Evolution of Lesotho's Regulatory Framework

3.2.1 The Trading Enterprises Order

This Order set the criteria for licensing of enterprises in Lesotho.²²⁷ It specified that granting of a business license would be subject to; (a) merits of the applicant²²⁸ and (b) national priorities.²²⁹ It also laid down the following factors for consideration of the granting of a licence²³⁰;

²²⁶ These communications are documented in newspaper articles. Thabiso Molapo, then minister of trade, had several consultative engagements with these retailers. The government was also represented by Maile Masoebe, Monaheng Monaheng and other civil servants. The imported used motor vehicle retailers were represented by Mohammed Raizen, president of ICDAL. Raizen is a Pakistani national.

²²⁷ Trading Enterprises Order 11 1993(Lesotho).

²²⁸ Trading Enterprises Order 11 1993(Lesotho) s 5.

²²⁹ Trading Enterprises Order 11 1993(Lesotho) s 5.

²³⁰ Trading Enterprises Order 11 1993(Lesotho) Section 5(1).

1. Magnitude and origin of the tangible assets,²³¹
2. Employment generation,²³²
3. Strategic nature of enterprise,²³³
4. Transfer of business expertise,²³⁴
5. Provision of advancement of business undertakings owned by citizens,²³⁵ and
6. Environmental protection.²³⁶

This legislation further outlined the procedures for licensing.²³⁷ It also stipulated that licensing fees would be subject to a schedule provided by the minister.²³⁸ It further provided for businesses to publish their transfer of expertise contracts.²³⁹ Most notable provisions in the context of this research are, however, those relating to suspension or cancellation of a license.²⁴⁰ In this regard, the Order provided for suspension or cancellation of a license if the business posed danger to human health or public morality.²⁴¹ Further, the license of a business whose continued dealings were not conducive to the economic development of the country could also be revoked.²⁴²

An overview of this framework indicates that it embodied economic development goals. This is advanced because it contained the provisions that impose strategic nature of the enterprise and employment generation requirements on the applicant enterprise. This is further submitted on the basis of the provisions imploring the applicant enterprise to provide advancement for Basotho undertakings. Lastly, the Order duly observed the relationship between trade and the environment by imposing the environmental protection requirements. These provisions were, however, revised following Lesotho's trade policy reviews.²⁴³ Such reviews recommended the revision in

²³¹ Trading Enterprises Order 11 1993(Lesotho) s 5(1) (a).

²³² Trading Enterprises Order 11 1993(Lesotho) s 5(1) (b).

²³³ Trading Enterprises Order 11 1993(Lesotho) s 5(1) (c).

²³⁴ Trading Enterprises Order 11 1993(Lesotho) s 5(1) (d).

²³⁵ Trading Enterprises Order 11 1993(Lesotho) s 5(1) (e).

²³⁶ Trading Enterprises Order 11 1993(Lesotho) s 5(1) (f).

²³⁷ Trading Enterprises Order 11 1993(Lesotho) s 14.

²³⁸ Trading Enterprises Order 11 1993(Lesotho) s 16.

²³⁹ Trading Enterprises Order 11 1993(Lesotho) s 19.

²⁴⁰ Trading Enterprises Order 11 1993(Lesotho) s 20.

²⁴¹ Trading Enterprises Order 11 1993(Lesotho) s 20 (1) (a).

²⁴² Trading Enterprises Order 11 1993(Lesotho) s 20 (1) (b).

²⁴³ <www.lesothotradeportal.org.ls/kcfinder/upload/files/Trading%20enterprise%20act%201993.pdf > accessed 28 May 2023.

consideration of modern developments in trade.²⁴⁴ This led to the enactment of the Trading Enterprises Regulations.

3.2.2 The Trading Enterprises Regulations

These regulations were promulgated pursuant to the Trading Enterprises Order.²⁴⁵ They ushered a regime that distinguished between foreign and Basotho enterprises.²⁴⁶ The scope of foreign enterprises under these regulations also extended to partnerships in which any partner was a non-citizen.²⁴⁷ This also applied in case of a director of a body corporate.²⁴⁸ They, further, promulgated a list of reserved businesses for Basotho. These included ‘agent of a foreign firm’.²⁴⁹ This is defined as a representative of a manufacturing or trading establishment trading outside Lesotho.²⁵⁰ The regulations further implored the agent of a foreign firm to provide names of its principals.²⁵¹

A further examination of the Schedules to the Trading Enterprises Regulations indicates that they contained provisions for application of a license by a motor dealer.²⁵² This category was, however, not strictly reserved for Basotho. This entails that foreign enterprises were not precluded from selling motor vehicles. The prohibition on foreign enterprises would only be invoked if a foreign enterprise applied as an agent of foreign firm that exported motor vehicles. This scenario, in the case of the current imported used motor vehicle retailers, entails that they would, however, be barred from operating in Lesotho. This is because, as observed in the first chapter, these foreign retailers are agents for online auctioneers.²⁵³ They would, under this regime, be considered as agents of foreign firms that exported motor vehicles to Lesotho. These provisions were however also revised on the basis of Lesotho’s need to revise its trade and industrial licensing regime.²⁵⁴ This sheds light on what led to the current regime.

²⁴⁴ *ibid.*

²⁴⁵ Trading Enterprises Order (Lesotho) s 34.

²⁴⁶ Trading Enterprises Regulations (Lesotho) Regulation 3

²⁴⁷ Trading Enterprises Regulations (Lesotho) Regulation 3 (2) (b).

²⁴⁸ Trading Enterprises Regulations (Lesotho) Regulation 3 (2) (c).

²⁴⁹ Trading Enterprises Regulations (Lesotho) Regulation 11 (a).

²⁵⁰ Trading Enterprises Regulations (Lesotho) Schedule 1.

²⁵¹ Trading Enterprises Regulations (Lesotho) sch 1.

²⁵² Trading Enterprises Regulations (Lesotho) sch 1.

²⁵³ Brooks (n 20) 9.

²⁵⁴ Business Licensing and Registration Regulations 2020 (Lesotho)

3.2.3 The Business and Licensing Registration Act

The Business Licensing and Registration Act introduced a business permit requirement to complement the requisite trading license.²⁵⁵ It, further, calls for a submission of a business plan by a foreign enterprise upon application for a license.²⁵⁶ The requirements of the contents of this business plan to reflect similar provisions to the Trading Enterprises Order. A notable difference is that this Act set a requirement for the foreign enterprise to submit certificates of capital reserves of not less than 2 Million Maloti.²⁵⁷

3.2.4 The Business Licensing and Registration Regulations²⁵⁸

These regulations were enacted pursuant to the Business Licensing and Registration Act. They ushered in a regime that contained specific regulatory provisions for the retail of imported used motor vehicles. They provided, inter alia, that;

1. A license for the retail sale of used motor vehicles would have to be renewed every six months.²⁵⁹
2. An enterprise would not import more than 100 motor vehicles in a year, including its branches and subsidiaries;²⁶⁰
3. Imported used vehicle enterprises should bank the proceeds of the business within the local financial institutions.²⁶¹
4. Imported used vehicle enterprises could not receive payments in cash,²⁶²
5. Small and medium imported used vehicle enterprises pay a license renewal fee of M 50 000.00, whereas 'other' retailers of imports of used motor vehicles would pay a license renewal fee of M150 000.00.²⁶³
6. That the retail services of motor dealers were to be reserved exclusively for citizens of Lesotho, excluding naturalized and registered citizens.

The regime cited objectives of these regulations as promotion and development of local entrepreneurship, micro, small and medium enterprises (MSMEs). This significant change led to

²⁵⁵ Section 4(4) (a) (n 20).

²⁵⁶ Business Licensing and Registration Act (Lesotho) Section 4 (4) (b).

²⁵⁷ Business Licensing and Registration Act (Lesotho) Section 4.

²⁵⁸ Business Licensing and Registration Regulations 2020 (Lesotho).

²⁵⁹ Business Licensing and Registration Regulations 2020 (Lesotho) Regulation 9.

²⁶⁰ Business Licensing and Registration Regulations 2020 (Lesotho) Regulation 37 (f).

²⁶¹ Business Licensing and Registration Regulations 2020 (Lesotho) Regulation 4(4) (b).

²⁶² Business Licensing and Registration Regulations 2020 (Lesotho) reg 37 (j).

²⁶³ Business Licensing and Registrations 2020 (Lesotho) Regulation 33(1) schedule 15.

the initial debate that this research now settles. The implication of this change; as reflected by the uproar from foreign imported used motor vehicles was that there was a total ban on their trade. Further implications of the change also reflect the ultimate pursuit of Lesotho's legitimate policy objectives; which is the promotion of inclusive business by making special provisions for MSMEs. The regime is, however, submitted to have protectionist characteristics. This is because it constituted a restriction on international trade in services. It is submitted, on this basis, that this change amounted to non-conformity of Lesotho's regime with its non-discrimination obligations. The regime, however, alluded to these protectionist features of the regulatory framework and considered amendments.²⁶⁴ These amendments were also made following meetings between the government and the foreign retailers.²⁶⁵

3.2.5 The Business Licensing and Registration (Amendment) Regulations

These Regulations ushered in the following changes to the regime;

1. They reversed the provision that that a license for retailers of used motor vehicles, be renewed every six months.²⁶⁶
2. They re-opened the trade in motor vehicles to foreign enterprises.²⁶⁷
3. They removed the quantitative restriction on the number of motor vehicles to be imported by a used vehicle retailer per annum.²⁶⁸

The implications of these changes entailed a regime that conforms to its WTO obligations. This is, because, it removed the barriers to trade in services that initially sparked concern.²⁶⁹ These changes do not, however, convince the foreign imported used vehicles.²⁷⁰ They further debate that the provisions of Section 4 of the Act still constitute indirect discrimination.²⁷¹ They attribute this to the categorised schedule of fees contained in the Schedules to this Act. This categorisation imposes lower licence renewal fees for MSMEs that provide retail services of imported used

²⁶⁴ Bereng Mpaki, Govt Reverses Indigenisation of Motor Dealership Industry *Sunday Express* (Maseru 4 March 2022) <<https://sundayexpress.co.ls/govt-reverses-indigenisation-of-motor-dealership-industry/>> accessed 20 November 2022.

²⁶⁵ Mokete (n 22).

²⁶⁶ Business Licensing and Registration (Amendment) Regulations 2021(Lesotho) Regulation 5.

²⁶⁷ Business Licensing and Registration (Amendment) Regulations 2021(Lesotho) r 7(2) (a).

²⁶⁸ Business Licensing and Registration (Amendment) Regulations 2021(Lesotho).

²⁶⁹ Mpaki (n 264).

²⁷⁰ Nthatuoa Koeshe Car Dealers Threaten to Leave *News Day* (Maseru 18 February 2022)<www.newsdayonline.co.ls/car-dealers-threaten-to-leave/> accessed 22 December 2022

²⁷¹ Mokhele (n 35).

motor vehicles.²⁷² Thus, they say that Lesotho's measures do not conform to its obligations of non-discrimination, transparency and domestic regulation. Lesotho, however, as noted, bases these changes on legitimate policy objectives. This paper advances justifications for these changes in the next part.

3.3 Policy Justifications for Lesotho's Regulatory Framework

3.3.1 Justifications under the Non-Discrimination Obligation

This paper addresses the concern by examining whether the categorisation of license renewal fees does not conform to Lesotho's non-discrimination obligations. This entails an analysis in light of Article XVII of the GATS. This analysis begins with a view into Lesotho's Schedule of Commitments.²⁷³ This is necessary to inform the research whether Lesotho has made any commitments in relation to these retailers. This examination reflects that Lesotho's commitments are open to retail services.²⁷⁴ This means that retail trade in imported used motor vehicles in Lesotho is not restricted on the basis of any commitment previously tabled by Lesotho in its Schedules.

A determination of whether a measure violates the non-discrimination obligation under Article XVII follows these steps:

1. The measure must affect the supply of services in that sector,
2. The measure must apply to foreign and domestic 'like' suppliers, and;
3. The measure must be proved to accord less favourable treatment to foreign services suppliers.

The measure under scrutiny imposes an M 150 000.00 annual license renewal fee for other categories of imported used motor vehicles opposed to a third of that amount for MSMEs. The allegation that it constitutes de facto discrimination is founded on the view by the foreign retailers that the 'other' category is implicitly directed at them. A determination of whether this measure is discriminatory follows the assessment follows the steps tabled above.

²⁷² Koeshe (n 270)

²⁷³ A Schedule of Commitments is a legal instrument that describes the treatment the Member must give to the trade of other WTO Members.

²⁷⁴ <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC114.pdf&Open=True>> accessed 28 May 2023.

Foremost, it is established that there is a measure and that it affects trade in services. This is followed by a determination of whether the domestic and foreign imported used vehicle retailers in Lesotho's used vehicle market are 'like' services. The 'end-use' assessment advanced earlier indicates that the end use of the retail services of both the foreign and domestic imported used vehicle retailers is the same. The likeness of these services also manifests in that consumers have similar choice for vehicles provided by both types of retailers. Lastly this determination entails an examination of a Member's commitments in a Schedule. In this regard, it is established that Lesotho has not tabled any commitments in relation to the retail services of imported used vehicles.

The bone of contention, however, arises in the following form; the foreign imported used vehicle retailers maintain that the higher license renewal fees constitutes less favourable treatment. This is because, in their opinion, there should be no demarcation between them and MSMEs. The government has, however, clarified that the demarcation serves to promote an inclusive business environment. This is evident from the differentiation on the basis of the size of the retailer and not its origin. This means that a domestic retailer who is not covered as a MSME under the Act is subject to similar fees as the foreign retailers. The foreign retailers, however, are adamant that the measure is discriminatory despite being origin-neutral.

It is noted that the AB in European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas)²⁷⁵ considered the discriminatory nature of an origin-neutral measure. In that dispute, a measure which placed banana distributors from developing countries in a category with fewer rights than was the case for 'like' distributors from developed countries was found discriminatory despite being origin-neutral.²⁷⁶ This, however, is not the present scenario. Lesotho's measure does not discriminate against foreign imported used vehicle retailers of any nation by the categorisation of the license renewal fees. It, rather, merely differentiates enterprises. This means that, in the unlikely situation that a foreign enterprise operates as a small business, it would not be subject to the higher licence renewal fees. It is, however, advanced that this is unlikely because the Act does not consider applications for licenses for small foreign enterprises. This is submitted on basis of the capital reserves requirements it sets for foreign enterprises that apply to trade in Lesotho.

²⁷⁵ WT/DS27/98.

²⁷⁶ *ibid.*

This measure is further analysed in light of Article XVII: 3 of the GATS. It inquires into the beneficial effects of a measure upon competing ‘like’ domestic services suppliers. It is advanced that Lesotho’s measures do not affect any advantage to domestic retailers. They, rather, are aimed at achieving Lesotho’s policy objectives of inclusive business environment. This is indicated by the wording of the schedule of fees. It categorises MSMEs and ‘other’ retailers. The beneficial effect of this measure upon these MSMEs is to include them into the business environment. This measure, rather affords MSMEs similar advantage to these foreign retailers. This is, because, it lets them participate in a market that they otherwise could not if the licensing fees were uniformly scheduled. In this regard, Lesotho’s conformity with its WTO obligation of non-discrimination is justified.

The foreign imported used motor vehicle dealers further attribute discrimination to the measure on basis of the imbalance in imported used vehicle retailer statistics in Lesotho’s registries. This invokes an examination of whether this measure constitutes de facto discrimination. De facto discrimination manifests if a law prima-facie appears neutral, but the manner in which it applies discriminates.²⁷⁷ This paper advances that manner which Lesotho’s measure is applied does not constitute indirect discrimination on foreign imported used motor vehicle retailers. This is because it does not apply in a manner that changes the condition of competition between foreign retail services of imported used vehicles and the domestic traders. This reasoning is based on application of the test propounded by Article VII: 3 of the GATS. This Article makes particular provisions on modification of competition as the basis for assessment of an indirectly discriminatory measure.²⁷⁸

It is further advanced that the AB in EC – Bananas²⁷⁹ was accessing the likeness in terms of a measure which placed the concerned banana distributors from developing countries in a category with fewer rights than was the case for ‘like’ distributors. It, thus, held that the measure placed ‘like’ distributors at an advantage despite being not categorising on basis of origin.²⁸⁰ This paper advances that, the foreign retailers and MSMEs are not ‘like’ categories. This is indicated by the provisions on licensing and registration of a foreign enterprise. These provisions do not apply to MSMEs. This is because, by their constitution, they are in their development stages whereas the

²⁷⁷ Kitching (n 144) 8.

²⁷⁸ Article XVII: 3 GATS.

²⁷⁹ EC – Bananas (n 275).

²⁸⁰ *ibid.*

foreign retailers are large global retail networks. Therefore, on this basis, the foreign retailers misconstrue the intention of the legislature by anticipating that it should treat them like the budding Basotho businesses.

3.2.2 Policy Justifications for Lesotho's Framework under Article XIV GATS

A further analysis of Lesotho's framework reflects an obligation imposed upon retailers of imported used vehicles to confine their financial dealings to financial institutions of Lesotho.²⁸¹ This measure resonates to Lesotho's economic or fiscal goal as enshrined by the Statements of Objects and Reasons of the Business Licensing and Registration Act.

Whereas argument may be advanced that this provision is inconsistent with the GATS, this paper observes otherwise. This is submitted on the basis of assessment of Lesotho's measure in light of Article XIV (d) (iii) of the GATS. This Article provides that measures that are aimed at ensuring equitable or effective imposition or collection of direct taxes include measures applied to residents and non-residents.²⁸² This, therefore, informs the submission that Lesotho not impose the measure in Section 4 of the Business Licensing Act in a manner that is inconsistent with the GATS. The formulation of this submission is illustrated below.

As illustrated in *US – Gambling*,²⁸³ Article XIV of the GATS also applies a two-tier approach to a measure sought to be justified.²⁸⁴ This requires determination of a link between the legitimate policy goal pursued and the measure.²⁸⁵ This entails an enquiry of whether a measure is 'necessary' or 'related to' the objective pursued.²⁸⁶ Then, if a measure falls within the relevant subparagraph to Article XIV of the GATS, it is analysed under *chapeau*.²⁸⁷

The AB noted the objective standard of necessity provided for in Article XIV of the GATS²⁸⁸ to entail retrospection into member's legislative history to 'determine from the pattern of enactment or government communications, if the nature of the objective renders it necessary'.²⁸⁹ It, further,

²⁸¹ Business Licensing and Registration Act (Lesotho) s 4(b) (ii).

²⁸² Article XIV (d) bears a footnote to illustrate these measures.

²⁸³ *US – Gambling* (n 212) para 296.

²⁸⁴ *ibid.*

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ *ibid* para 304.

²⁸⁹ *ibid.*

illustrated that this test encompasses weighing and balancing a series of factors.²⁹⁰ This entails evaluation of the relative importance to the goals. Further, once a determination is made, the necessity of the measure is assessed.²⁹¹ This assessment seeks into the contribution that the measure makes to achieve the desired goal.²⁹² It further culminates into an inquiry of the trade-restrictiveness of such measure.

The above test in light of Lesotho's measure achieves the following;

Firstly, Lesotho as a LDC obviously has goals aimed at economic development. It is, therefore, necessary for Lesotho to impose this measure. This is, because, this measure is necessary to achieve the objectives Lesotho alludes to in the legislative history leading to this enactment.²⁹³ A view of this legislative history reflects that from the onset, Lesotho has aimed at a risk-based regulation to achieve its goals through this enactment.²⁹⁴ It is thus, advanced, that this measure attains this goal. This is because it curtails tax evasion by imposing this direct requirement accounts with local banks. It essentially serves the objective of protecting Lesotho's goals under Article XIV (d) of the GATS. It is, therefore, justified as necessary to achieve Lesotho's economic development goals.

The determination of whether a measure is necessary also embarks on an inquiry of whether there are any reasonable alternatives to the measure.²⁹⁵ This inquiry made by looking into the numerous amendments to Lesotho's framework. These amendments ensued pursuant to consultations between the ministry of trade and imported used motor vehicle retailers.²⁹⁶ These consultations informed the government of the reasonable alternatives to its measure, hence the amendments. This is submitted on the basis that the measure had initially neglected the reasonable alternatives but through these consultations it accordingly considered them. This led to the tabling of this framework that is accordingly covered by Article XIV (d) (iii) of the GATS. It is, thus, advanced that the government in its legislative wisdom duly considered other alternatives, as reflected by the several changes to this legislature.

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ Business Licensing and Registration Act 2019 Statement of Objects and Reasons.

²⁹⁴ Business Licensing and Registration Act 2019 Statement of Objects and Reasons.

²⁹⁵ US – Gambling (n 212) para 304.

²⁹⁶ Mpaki (n 264).

Lesotho's measure is further justified on the grounds that it is important to attain its legitimate policy goals. This importance is assessed in view of the Argentina – Measures Affecting Trade in Goods and Services (Argentina – Financial Services) dispute.²⁹⁷ In that dispute, the Panel noted that tax collection was important to any country because of the revenue it provides for the functioning of a state.²⁹⁸ It then concluded that the measure at issue, which was invoked by Argentina to protect its tax system and fight against harmful tax practices and money laundering, was justified as those were significant goals to Argentina.²⁹⁹ The same is advanced for Lesotho. This is because, as a LDC, a secure tax collection system is necessary for Lesotho's economic growth. This is advanced from the view of the Panel that the risks posed by harmful tax practices are important for developing countries because they deprive them financial resources vital to promotion of their economic development and implementation of their domestic policies.

3.2.3 The Money-Laundering Issue from Article XIV (a) GATS Perspective

The AB Report of US – Gambling indicates that the statement of objectives of policy maker is necessary to determine inconsistency with this Article.³⁰⁰ Lesotho's objectives are clearly aimed at achieving a risk free investment climate. This is accordingly reflected by the characteristics of Lesotho's measures relating to financial regulation of enterprises. This regulation is consistent with protection against public morals such as money laundering. This paper submits that money laundering is addressed in Article XIV (a) of the GATS. This is because this Article applies generally to other GATS-inconsistent measures not provided for in Articles XIV (d) and (e) of the GATS. Thus, it is accordingly submitted that Lesotho's measures aimed at curbing money laundering through regulation of the foreign retailers are justified under the protection of public morals exception. This made on the basis of the pronouncement in US – Gambling. In this dispute, Antigua and Barbuda's claimed that the US had failed to show that the restriction of online gambling was necessary for the protection of public morals. The contention was, however, dismissed because the WTO considers a determination of public morals on the context of each member's societal values. This illustration is also adopted in determining the extent and manner of conformity of Lesotho's regulatory regime with its WTO obligations. In the dispute, the US said that one of the public morals it sought to protect was money laundering and crimes resultant

²⁹⁷ WT/DS453/12 (11 May 2016)

²⁹⁸ *ibid.*

²⁹⁹ *ibid.*

³⁰⁰ US – Gambling (n 212) paras 296 - 304.

from online gambling.³⁰¹ Lesotho has indicated in various press statements that it also seeks to curb trade related money laundering through its measures.³⁰² It cites the retail business of imported vehicles is a potential hub of money laundering.³⁰³ It also indicates that its measures are pursuant to its commitments to the East and Southern African Anti-Money Laundering Group (ESAAMLG).³⁰⁴ This is a non WTO regional agreement which serves to address regional money laundering concerns.³⁰⁵ Its members are developing countries in the same context as Lesotho.³⁰⁶ Developing countries and LDCs are at the centre of the WTO's objectives.³⁰⁷ This is reflected by the numerous provisions that consider developing countries in the WTO law.³⁰⁸ This analysis therefore addresses the issue of whether, Lesotho, in imposing this measure to curb money-laundering, has not conformed to its WTO obligations, especially in its context as a LDC.

It suffices that public morals cover a broad scope within WTO law.³⁰⁹ Further, contextualisation is elemental in determination of what constitutes such morals. Lesotho as a LDC is, thus, justified to curb money laundering through this measure. This is, because, the manner of this trade constitutes online transactions, which Lesotho suspects are likely to contribute to money laundering. There is, therefore, a basis for concern to Lesotho. Lesotho, therefore, in addressing this concern enacted this measure. This measure is submitted to accordingly curtail the money laundering that the government believes is harboured by the retail services of imported used vehicles. This measure is, therefore, justified as consistent with Article XIV (a) of the GATS.

3.3.4 Assessment of Contribution of Lesotho's Measures to Achievement of Its Policy Goals

It is advanced that Lesotho's contribute towards the achievement of the goals it pursues. This is made with reference to the Panel Report in Argentina – Financial Services.³¹⁰ The Panel indicated that this is made by a determination of whether the measure contributes to securing compliance with the provisions of national laws. This illustration informs the argument Lesotho's measures also serve to secure compliance with its financial regulation laws. This is advanced because it

³⁰¹ *ibid.*

³⁰² Mokete (n 22).

³⁰³ Mokhele (n 35).

³⁰⁴ *ibid.*

³⁰⁵ <www.esaamlg.org/index.php/countries> accessed 14 April 2023.

³⁰⁶ *ibid.*

³⁰⁷ <https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 27 January 2023.

³⁰⁸ *ibid.*

³⁰⁹ US – Gambling (n 212).

³¹⁰ Argentina – Financial Services (n 297).

provides for inspection of the financial records of retailers. This would be to a certain degree impractical if retail service did not bank its proceeds with the banks of Lesotho. Thus, it suffices to say that Lesotho's measures contribute to securing compliance with its laws on financial regulation.

3.3.5 Assessment of Lesotho's Measures under GATS Domestic Regulation Disciplines

This discipline allows governments to intervene in the services industry to address the quality of a service or its supplier.³¹¹ It, therefore, conditionally permits members to enact laws affecting services if they do not discriminate between domestic and foreign services or services suppliers.³¹² It, further, extends to regulations that are not discriminatory.³¹³ This means that the measure can still be considered GATS inconsistent even if it does not give less favourable treatment to foreign over domestic services.³¹⁴ This discipline further overlaps into transparency in that a measure may be found to be against transparency or impartial administrative requirements.³¹⁵ It may also be found to restrict trade more than necessary.³¹⁶

This illustration directs the assessment of Lesotho's conformity with its WTO obligations of Domestic regulation. This entails an examination of the measure imposed through of Section 12 of the Business Licensing and Registration Act by Lesotho. It provides for the cancellation or suspension of a business license of a retailer whose business activity poses a risk to human, animal or plant life or health and the environment. This measure has raised concern among the motor vehicle dealers in that it seeks to oust them out of international trading space.³¹⁷ They say that this is because they trade in vehicles that are widely known to pose these risks. This is because, as illustrated in the introduction, these vehicles are depreciated. They otherwise say that used motor vehicles sourced domestically pose similar harms. This, therefore, requires assessment of whether this measure is inconsistent with impartial administration requirements of this obligation.

³¹¹ Pauwelyn (n 178) 137.

³¹² *ibid.*

³¹³ Article VI and XVII of the GATS.

³¹⁴ Pauwelyn (n 178) 137.

³¹⁵ Article VI: 1 GATS.

³¹⁶ Article VI: 5 GATS.

³¹⁷ Koeshe (n 270).

3.3.6 Justifications for Conformity with GATS' Impartial Administration Requirements

These are covered by Article VI: 4 of the GATS. It requires that rules should be objective and based on transparent criteria,³¹⁸ not be excessively burdensome to ensure service quality,³¹⁹ and that license procedures should not constitute a restriction on trade.³²⁰ Assessment of the conformity of Lesotho measures with these requirements reflects that they are indeed founded on clear criterion. This is based on the notion that these measures clearly indicate that the suspension of the license is considered following inspection of the suspected business activity. This entails that it applies in relation to all retailers of imported vehicles. The risk to the environment or potential harm to human, animal or plant life or health in this regard is not assessed on the basis of the origin of the used vehicle but on its quality. Further, the impartial administration of this measure is justified because the suspension or cancellation is only enforced after the enterprise has duly been afforded a hearing to advance grounds to mitigate the impending action.³²¹

3.3.7 Assessment of Lesotho's Measures under the Transparency Principle

The foreign motor vehicle traders are noted to have raised concerns that Lesotho's measures were opaque. This clearly cannot be the case. This is because the government indicates that due consultations were made with these retailers.³²² The government further says that the outcome of those consultations led to the current regime. As observed, this obligation entails notification, publication and administration of a State's laws and processes that are likely to affect trade in services. An analysis of Lesotho's framework in this regard entails an evaluation of whether Lesotho had duly made notifications of this enactment. The notification is duly justified from the publishing of the Government Gazette to this legislation. This also serves to make the legislation known to the public and the foreign imported used vehicle retailers. The administration aspect of this obligation is noted to also be addressed by the overlap of the domestic regulation disciplines into the principle of transparency. It has, therefore, in light of the discussion under that topic, been established that Lesotho's measures conform with its administration disciplines requirements of clear objectives and impartial administration. This brief discussion suffices to justify Lesotho's

³¹⁸ Article VI: 4(a) GATS.

³¹⁹ Article VI: 4(b) GATS.

³²⁰ Article VI: 4(c) GATS.

³²¹ The affected party is given a chance to justice to advance reasons to the contrary.

³²² Mpaki (n 264).

conformity in this regard. This is more so because due to the nature of this obligation, justifications are not necessary once made in other aspects like non-discrimination and domestic regulation.³²³

3.4 Conclusion

This chapter has established that Lesotho's regulation framework ensures conformity with its WTO obligations. It has, further, shown that Lesotho measures on retailers of imported motor vehicles are necessary and related to the objectives envisaged in Lesotho's economic development goals. It has, therefore, advocated for these measures. This chapter has not established any instances of non-conformity of the measures with its WTO obligations. In light of this observation, it is submitted that the measures embodied in Lesotho's regulatory framework are accordingly justified to conform with its WTO obligations. This submission is further advanced by a comparative analysis of measures of another country on regulation of imported used vehicle retailers. This is because the principle of conformity entails an ultimate degree of similarity across national laws. The next chapter is based upon such analysis.

³²³ Delimatsis (n 73).

Chapter 4 A Comparative Study of Mauritius' Regulatory Framework

4.1 Introduction

A bird's eye view of Mauritius' regulatory framework displays identical provisions to that of Lesotho. There are, however, some notable differences. These differences are under scope in this chapter. The purpose of their scrutiny is to identify how Lesotho should reform its framework. This is, because, as noted earlier, the conformity obligation presumes that there should be a degree of similarity between Member's laws.³²⁴ It, further, presumes that ultimately all laws of members would bear similarity to WTO law.³²⁵ This chapter identifies measures in Mauritius's regulatory framework that Lesotho could use as a learning tool for further conformity with its WTO obligations.

4.1.1 Common Country Characteristics

It is noteworthy that Lesotho and Mauritius have similarity in this regard;

1. Mauritius is also a WTO member.³²⁶
2. It does also not have specific Article XVII commitments in regards to retail services.³²⁷
3. Mauritius is also a member of the ESAAMLG³²⁸

4.2 Mauritius' Regulatory Framework for Imported Used Vehicle Retailers

Mauritius' principal legislation in this regard is the Consumer Protection (Prices and Supplies) Act.³²⁹ It provides for enactment of regulations aimed at, inter alia, issuance of business licenses and permits.³³⁰ These regulations are;

1. The Consumer Protection (Importation and Sale of Second-hand Vehicles) Regulations;³³¹
and
2. The Consumer Protection (Licensing of Authorised Dealers in Imported Second-hand Motor Vehicles) Regulations.³³²

³²⁴ Chaisse (n 64).

³²⁵ *ibid.*

³²⁶ www.wto.org/english/thewto_e/countries_e/mauritius_e.htm accessed 12 April 2023.

³²⁷ <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC55S2.pdf&Open=True>> accessed 28 May 2023.

³²⁸ <www.esaamlg.org/index.php/countries> accessed 12 April 2023.

³²⁹ Consumer Protection (Prices and Supplies) Act 12 1998(Mauritius).

³³⁰ Consumer Protection (Prices and Supplies) Act 12 1998(Mauritius) s.35 (2).

³³¹ Consumer Protection (Importation and Sale of Second-hand Vehicles) 2004 amended by Consumer Protection (Importation and Sale of Second-hand Vehicles) (Amendment) Regulations 169 2017 (Mauritius).

³³² Consumer Protection (Price Controls and Supplies) Regulations (Mauritius) Regulation 6 (1).

These regulations limit an authorised dealer to a company in their definition.³³³ They further provide for the procedure of application of a license by an authorized dealer.³³⁴ The provisions are in this case identical to Lesotho's regulation framework. A notable difference, however, is that Mauritius stipulates that the authorized dealer shall be a registered company.³³⁵ It provides for similar requirements to that of Lesotho for such company to obtain a trading permit.³³⁶ Mauritius, however, notably diverges from Lesotho because it imposes an additional condition. This condition obliges an authorized dealer to submit a security by a local bank guarantee or insurance company in favour of the government for a period of two year from the issuing of the license.³³⁷

4.2.1 Tax Evasion Control in Mauritius' Perspective

It is submitted that this measure addresses Mauritius' economic and fiscal goals. This is, because, it serves to cover any liability that the government incurs should an authorized dealer not adhere to the conditions of its license. This is advanced with basis on the general application of bank guarantees.³³⁸ This imposition of a bank guarantee reduces the financial risk involved in businesses transactions.³³⁹ It further ascertains creditability of a business.³⁴⁰ The credibility of these imported used vehicle retailers has earlier been noted to be under a shadow of doubt. This measure is, therefore, advocated for as means to ascertain the credibility of foreign imported used vehicle retailers. This measure further addresses any potential financial risk involved in the retail of imported used vehicles.

It is, further, submitted that this measure efficiently reduces imminent risks such as tax evasion by the authorised imported used vehicle retailers. This measure is, therefore, on this basis, advanced as justified toward achievement of the legitimate policy goals covered under Article XIV (d) of the GATS. This is because, an assessment of inconsistency with this measure finds that it is necessary and related to policy objectives of curbing tax evasion. It is, thus, submitted that a

³³³ Consumer Protection (Price Controls and Supplies) Regulations (Mauritius) Regulation 6(1) (a) (iii).

³³⁴ Consumer Protection (Price Controls and Supplies) Regulations (Mauritius) Regulation 6 (1).

³³⁵ Consumer Protection (Price Controls and Supplies) Regulations (Mauritius) Regulation 6 (1).

³³⁶ Business Licensing and Registration Act (Lesotho)

³³⁷ Consumer Protection (Licensing of Authorised Dealers in Imported Second-hand Motor Vehicles) Regulations 2017 (Mauritius) Regulation (4) (2) (b).

³³⁸ <www.investopedia.com/terms/b/bankguarantee.asp> accessed 05 June 2023.

³³⁹ <<https://cleartax.in/s/bank-guarantee?>> accessed 05 June 2023.

³⁴⁰ *ibid.*

consideration of the adoption of this measure for a country that seeks to achieve similar goals is essential.

4.2.2 The Money Laundering Concern: A Learning Tool

Another difference between these countries' measures is that Mauritius cancels a retailer's license if such retailer fails to sell more than ten imported used vehicles per annum.³⁴¹ An assessment of this measure is made in light of Articles XIV (a) and (b) of the GATS. They provide for exceptions for legitimate policy objective measures imposed for the protection of public morals³⁴² and to main public order.³⁴³ The application of Article XIV (a) to public morals in US – Gambling³⁴⁴ was made with due consideration of what constituted public morals in the context of each member's society.³⁴⁵ Money laundering was, on that basis, held to amount to a practice that violated public morals.³⁴⁶ In that dispute, this practice was alleged to result from the online betting offered by services suppliers in Antigua and Barbuda to consumers in the US.³⁴⁷

This roundabout leads to the following analogy; the regulatory frame work in Mauritius sets a high share capital requirement for registration of an authorized dealer.³⁴⁸ Logically, it is submitted, a business that affords such share capital should, in any way, reflect optimal business results, unless it is a front. A front occurs when a bank account is opened by a company with illicit motives under the guise of legitimate business.³⁴⁹ Small amounts of money are then 'smurfed' into the account through multiple but insignificant transactions.³⁵⁰ These fronts, therefore, exists as fully operational despite their low sales.³⁵¹ They owe their continued existence to the parent company.³⁵²

The measure by Mauritius is, thus, advanced to be a prudent and viable means of dealing with these fronts. This effectively curbs any retailers of imported used vehicles being established as front companies. It, therefore, addresses the issue of the public moral of money laundering as

³⁴¹ Consumer Protection (Licensing of Authorised Dealers in Imported Second-hand Motor Vehicles) (Amendment) Regulations 2017 (Mauritius) Regulation 6 (c) Regulations 2017 (Mauritius).

³⁴² Article XIV (a) GATS.

³⁴³ Article XIV (b) GATS.

³⁴⁴ US – Gambling (n 212) paras 296-304.

³⁴⁵ *ibid.*

³⁴⁶ *ibid.*

³⁴⁷ *ibid.*

³⁴⁸ Consumer Protection (Licensing of Authorised Dealers in Imported Second-hand Motor Vehicles) (Amendment) Regulations 2017 (Mauritius) Regulation 6. Regulations 2017.

³⁴⁹ <www.anti-moneylaundering.org/> accessed 05 June 2023.

³⁵⁰ *ibid.*

³⁵¹ <<https://financialcrimeacademy.org/shell-companies-in-money-laundering/>> accessed 05 June 2023.

³⁵² *ibid.*

embodied in Article XIV (a) of the GATS. This is because, on the basis of the decision in US – Gambling, money laundering activities can constitute violations of public morals, if they constitute an act inconsistent with the context of morals of a particular society.³⁵³

Finally, this demonstration indicates that this measure by Mauritius is not inconsistent with its WTO obligations. It is rather, necessary to curb money laundering both domestically and regionally. The latter is advanced because Mauritius is also a member of the ESAAMLG.³⁵⁴ Thus, any state wishing to address the money laundering that is apparently rife in the retail services of imported used motor vehicles would consider adoption of this measure.

4.2.3 Consumer Protection Values in Mauritius' Framework

This titular framework is observed to aptly embody consumer protection values. This is reflected by the provisions that bind a retailer to relinquish its bank guarantee to the consumer upon breach of guarantee of the sale of an imported used vehicle. This provision does not reflect in Lesotho's framework. It is advanced that, Mauritius through this measure, does not violate its obligations to ensure conformity of its measure to WTO laws. This is, because, GATS recognizes consumer protection as an illustration of the public policy objectives that need regulatory support.³⁵⁵ It, thus, gives governments the autonomy to pursue such objectives.³⁵⁶ It, remarkably, permits this even in the case of a member with full market access or NT obligations.³⁵⁷ It is, therefore, advanced on this basis that this is another area which Lesotho's regulatory framework should review.

4.3 Conclusion

This chapter has illustrated that Lesotho's regulatory framework is in conformity with its WTO obligations under the GATS. This is, because, it reflects similar features to those of Mauritius. This submission is made on the basis of the deconstruction of the principle of conformity. This principle, as noted in the second chapter, entails an ultimate degree of similarity of State laws. The differences, conversely, should inform transformation to Lesotho's framework.

Chapter 5: Conclusion and Recommendations

³⁵³ US – Gambling (n 212) para 305.

³⁵⁴ ESAAMLG (n 328).

³⁵⁵ <www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm> accessed 01 June 2023.

³⁵⁶ *ibid.*

³⁵⁷ *ibid.*

5.1 Introduction

This chapter provides conclusions on the research. These conclusions address the questions posed in the research. It establishes whether Lesotho's regulatory framework for imported used motor vehicle retailers does not conform to its WTO obligations. It also resorts to a conclusion based on the comparative study it undertook. Lastly, it proposes areas of transformation Lesotho should consider for its framework.

5.2 Conclusion

The obligation on a WTO member state to ensure conformity of its laws, rules, regulations and administration processes with its WTO obligations such as non-discrimination, domestic regulation and transparency is central to compliance with those obligations.³⁵⁸ It embodies the good faith element of the *pacta sunt servanda* rule.³⁵⁹ This, in the context of Lesotho, means that it is expected to ensure conformity of its regulatory framework for imported used motor vehicle retailers to its obligations under WTO law. This paper establishes that, the obligation to conform is, however, subject to exceptions. It, further, establishes that Lesotho's regulatory framework is covered by these exceptions. It, then, advances measures from Lesotho's regulatory framework that are covered by such exceptions. This paper, thus, justifies the conformity of those measures to Lesotho's WTO obligations on the basis of the case-to-case approach advanced in the first chapter. This is, further, buttressed by the WTO's consideration of the societal context of a nation in determination of its legitimate policy objectives under Article XIV of the GATS. This is, because, it is necessary to consider a country's own societal context in the assessment of conformity, especially in the wake of modern developments in trade.

Lesotho's context is that it is a LDC. This sheds light on the economic and fiscal objectives it pursues through regulations for imported used vehicle retailers. These objectives are aimed at an inclusive economic space. This is indicated by prioritisation of MSMEs in Lesotho's Statement of Objects and Reasons of the Business Licensing and Registration Act. This, therefore, accordingly justifies Lesotho's categorisation of licensing fees schedules between macro and small businesses. In this manner, the fiscal goals of the regime are revealed from the country's licensing procedures. These goals are, therefore, accordingly achieved by the imposition of the obligation to use only

³⁵⁸ Chaisse (n 64) 77.

³⁵⁹ *ibid.*

domestic financial institutions on foreign retailers. These goals also overlap into a money laundering, another area of concern. Lesotho therefore in this case achieves two feats in one attempt; the protection of public morals, of which money laundering can violate, and collection of direct taxes under Article XIV(c) (ii) the GATS.

In essence, as alluded to in the second chapter, conformity entails that ultimately, all laws of member states will ultimately bear semblance to that of the WTO. This, in practical terms, entails that the assessment of the conformity of each member's conformity is done with due regard made that it does not entail absolute similarity but a certain degree of similarity. The peculiar circumstances of each WTO Member are essential to the assessment. Thus, this paper, on the basis of this, concludes that Lesotho's regulation framework for imported used motor vehicle retailers is non-discriminatory, transparent and imposes measure that are not inconsistent with Article XIV of the GATS. This, therefore, informs the justification to Lesotho to keep this framework intact. A few changes will, however, suffice to address other areas of concern that Lesotho overlooks. These changes are explored in the following section.

5.3 Recommendations

This section is based on the comparative study in the previous chapter. It submits that due consideration of the suggested reforms will not only ensure conformity of Lesotho with its WTO obligations but also achieve its legitimate policy goals as a LDC. These reforms are;

5.3.1 Introduction of the Local Bank Security or Insurance Guarantee

This measure addresses concerns of tax evasion and money laundering. This is, because, in Mauritius' framework, this security or guarantee is relinquished to the government upon violation of conditions of a license by an authorised dealer. This reform is, therefore, recommended for Lesotho to address its tax evasion concerns. Thus, by introduction of this measure into its framework, Lesotho will ensure the investment climate that it envisages in its Statements of Objects and Reasons of the Business Licensing and Registration Act. This is because, as noted, the general purpose of these securities or guarantees is to reduce the financial risks involved in a transaction. Further, this measure serves to ensure that only creditable businesses operate within the imported used vehicle sector. This measure is, therefore, submitted for consideration for Lesotho to adopt. This, is because, this measure is accordingly covered in Article XIV (d) of the GATS. Therefore, in essence, Lesotho's adoption of this measure would be under the ambit of

legitimate policy exceptions for GATS-inconsistent measures. This means that Lesotho would not breach its WTO obligations by this measure.

5.3.2 Adoption of Anti-Money Laundering Measures into Regulatory Framework

This paper has illuminated the rationale for Lesotho to insist that trade-related laundering is prevalent in the retail services of imported used motor vehicles. It has elucidated that this is, because, some imported used vehicle retailers may be used as fronts by money laundering companies. This paper, further, observes, that front companies are characterised as companies with high capital reserves and low sales. This leads to the proposal that Lesotho should consider addressing these fronts by adoption of measures similar to those of Mauritius. This will be achieved by introduction of measures that provide for the cancellation of the license of a retailer who fails to sell a set number of motor vehicles within a determined period. This eradicates money laundering entities that enter Lesotho's market under the cloak of retail services of imported used vehicles. Lesotho, thus, by the adoption of this measure, achieves the policy goals of ensuring a lucrative investment environment through its regulatory framework. It should, thus, look into Mauritius measures as a learning tool.

5.3.3 Enhancement of Consumer Protection Values

A regulatory framework, as indicated in the first chapter, extends to the public at large. This means that due consideration of public interests must be embodied in a functional legal regime. Lesotho's regulatory framework should, thus, consider public interest issues such as consumer protection and address them in its framework. This is advanced because the GATS itself has consumer protection as one of its core principles.³⁶⁰ The introduction of these measures into Lesotho's regulatory framework serves to protect gullible buyers from any potential risks they may endure in the purchase of motor vehicles. The condition that an authorised dealer relinquishes their bank security or insurance guarantee to the buyer for failure to abide by conditions of the sale agreement serves to ensure protection of buyers from those risks. This accordingly curbs complaints and litigation against the retailers. This, in essence, efficiently protects the consumer from incurring legal costs to pursue the retailer. This measure is sufficiently covered under Articles XIV (a) to (c) of the GATS. These Articles cover general GATS-inconsistent regulatory measures. Thus, Lesotho

³⁶⁰ <www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf> accessed 05 June 2023.

would not breach any of its WTO-obligations by adoption of these consumer protection measures in its framework.

Additional Recommendation: Schedules of Commitments

It has been noted in the first chapter that Lesotho's concern rests largely on the imported used vehicles retailers of South East Asian descent. These retailers purchase the imported used motor vehicles predominantly, from Japan. Lesotho should, therefore, consider specific means to address these particular retailers while ensuring conformity to its WTO obligations. A recommendation for Lesotho in this regard is to consider the Schedule of Commitment provisions envisaged in Article XVII of the GATTs. These provisions enable WTO Members to commit to certain obligations in relation to specific service sectors. Lesotho should consider tabling its schedules and specify commitments to address this particular manner of trade with which it is mainly concerned. This is advanced to be within the scope of Article XVII of the GATS. In that manner, Lesotho will have indicated its obligations against those particular retail services while ensuring conformity with its WTO obligations.

These recommendations, if followed and adopted, will lead to the ultimate requirement of the conformity principle – some degree of similarity to WTO law.

Bibliography

Books

1. Ayres G and Mitchell A, 'General and Security Exceptions Under the GATT 1994 and the GATS' in Carr I, Bhuayian J and A Shawkat (eds) *International Law and the WTO* (2011, Federation Press)
2. Trebilcock M, Eliason A and Howse R *The Regulation of Multilateral Trade* (2013, Routledge)

Cases

1. Argentina – Measures Relating to Trade in Goods and Services (Argentina – Financial Services) WT/DS453/12 (11 May 2016)
2. Australia v France (Nuclear Test) 1974 ICJ Rep. 273
3. Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres) WT/DS332 (25 September 2009)
4. Canada – Export Credits and Loan Guarantees for Regional Aircraft (Canada – Aircraft Credits and Guarantees WT/DS222 (7 February 2003)
5. Canada – Measures Affecting the Automotive Industry (Canada – Autos) WT/DS/139 (19 June 2000)
6. China – Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audio Visual Entertainment Products (China – Publications and Audio Visual Products WT/DS363 (24 July 2012)
7. European Communities – Measures Concerning Meat and Meat Products (Hormones) WT/DS26/29AB/R (EC – Hormones) (17 April 2012)
8. European Communities – Regime for the Importation, Sale and Distribution of Bananas (III) (EC – Bananas III) WT/DS27/AB/RW/ECU (26 November 2008)
9. Free Zones of Upper Savoy and The District of Gex 1932 PCIJ SER A/B NO. 46
10. Indonesia – Certain Measures Affecting the Automobile Industry (Indonesia – Autos) WT/DS54/R (2 July 1998)
11. United States – Measures Affecting the Cross Border Supply of Gambling and Gambling Services (US – Gambling) WT/DS 285/26 (21 December 2007)
12. United States – Sections 301-310 of the Trade Act 1974 (US – Section 301 Trade Act) WT/DS152/14 (28 February 2000)

13. United States – Standards for Conventional and Reformulated Gasoline (US – Gasoline)
WT AB/R/DS52 (25 September 1997)

Handbooks

1. Kitching K ‘Non-Discrimination for Practitioners’ (2005) 18 Interights

International Instruments

1. General Agreement on Tariffs and Trade, World Trade Organization 1994 (GATT)
2. General Agreement on Trade in Services, World Trade Organization 1994 (GATS)
3. International Law Commission Treaties, United Nations 1947 (ILC Treaties)
4. Vienna Convention on the Law of Treaties, United Nations 1969 (VCLT)

Journal Articles

1. Bartels L, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction’ (2015) 109 American Journal of International Law
2. Brooks A, ‘Networks of Power and Corruption: The Trade of Japanese Used Cars to Mozambique’ (2011) Geographic Journal Royal Geographic Society (with the Institute of Royal Geographers)
3. Chaisse J, ‘Deconstructing the WTO Conformity Obligation: A Theory of Compliance as A Process’ (2015) 38 (1) Fordham International Law Journal
4. Charmody C, ‘Remedies and Conformity under the WTO Agreement’ (2002) 5 (2) Journal of International Economic Law
5. Fontanelli F, ‘Necessity Killed the GATT: Art. XX GATT and the Misleading Rhetoric About “Weighing and Balancing”’ (2013) European Journal of Legal Studies
6. McDonald J, ‘Domestic Regulation, International Standards, Technical Barriers to Trade’ (2005) 4(2) World Trade Review
7. Mock W, ‘An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development’ (2000) 18(2) Dickinson Law Journal
8. Pauwelyn J, ‘Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS’ (2005) 4(2) World Trade Review
9. Qin J, ‘Defining Non-Discrimination under the Law of the World Trade Organization’ (2005) 23 Boston University International Law Journal
10. Wang G, ‘Radiating Impact of the WTO on its Members’ Legal Systems: A Chinese Perspective (2010) 5(2) World Trade Review

11. Zoellner C, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law' (2006) 27(2) Michigan University Journal of International Law

National Legislation

A. Lesotho

1. Business Licensing and Registration Act 3 2019
2. Business Licensing and Registration Regulations 71 2020
3. Business Licensing and Registration (Amendment) Regulations 65 2021
4. Trading Enterprises Order 11 1993
5. Trading Enterprises Regulations 107 1999

B. Mauritius

1. Consumer Protection (Prices and Supplies) Act 12 1998
2. Consumer Protection (Importation and Sale of Second-hand Vehicles) Regulations 65 2004
3. Consumer Protection (Licensing of Authorised Dealers in Imported Second-hand Motor Vehicles) Regulations 169 2017

Papers

1. Cottier T and M Oesch, 'Direct and Indirect Discrimination under the EU and WTO Law' Swiss Centre for Competence in Research Working Paper (2011) Bern
2. — and Delimatsis P and Diebold N, 'Article XIV GATS: General Exceptions' in Wolf R Stoll and Feinäugle C (eds), Max Planck Commentaries on World Trade Law, WTO – Trade in Services (Vol. 2 Martinus Nijhoff Publishers 2008) Tilburg
3. Delimatsis, P 'Article III GATS: Transparency' in Rudiger Wolf, Peter-Tobias Stoll, Clemens Feinäugle (eds) Max Planck Commentaries on World Trade Law, WTO – Trade in Services (Vol. 2 Martinus Nijhoff Publishers 2008) Tilburg
4. Diebold N, 'Non-discrimination and the Pillars of International Economic Law' International Institute for Law and Justice Emerging Scholars Paper 18 (2010) Barcelona
5. Hoekman B and Nicita A, 'Non-Tariff Measures and Trade Facilitation: WTO Disciplines and Policy Space for Development' in de Melo J and Nicita A (eds), 'Non-Tariff Measures: Quantitative Data Analysis Tools for Economic Assessment and Policy Options for Development (2018) United Nations Conference for Trade and Development (UNCTAD)

6. Howsan P and Gerlach E, 'Regulatory Tools: Legal Policy Framework' DFID Knowledge and Research Contract (2006) Bristol
7. Mattoo A and Subramanian A, 'Regulatory Autonomy and Multilateral Disciplines: The Dilemma and A Possible Resolution' WTO Staff Working Paper No. TISD-98-02 (1998) Geneva
8. Ortino F, 'The Principle of Non-Discrimination and its Exceptions in GATS' King's College Dickinson Poon School of Law Research Paper (2006) London
9. Zhang R, 'Covered or Not Covered? That is the Question – Services Classification and Its Implications for Specific Commitments under the GATS' WTO Staff Working Paper, NO-ERSD 2015-11 (2015) Geneva

Theses

1. Ramires K 'The Impact of Abusive Use of Article XXIV GATT WTO on Developing Countries (Latin America and Caribbean)' (Masters Thesis, Universidade Catolica Portuguesa Global School of Law 2021) <<https://repositorio.ucp.pt/handle/10400.14/35082?locale=en>> accessed 22 December 2022
2. Teksten R 'A Comparative Analysis of GATS and GATT: A Trade in Services Departure from the GATT's MFN Principle and the Effect on National Treatment and Market Access' (L240 Thesis, ILO 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664584> accessed 27 May 2023

Newspaper Articles

1. Koeshe N, Car Dealers Threaten to Leave *News Day* (Maseru 18 February 2022) <www.newsdayonline.co.ls/car-dealers-threaten-to-leave/> accessed 22 December 2022
2. — Motor Vehicle Dealership Hub of Money Laundering – Minister *News Day* (Maseru 11 February 2022) <www.newsdayonline.co.ls/motor-vehicle-dealership-hub-of-money-laundering-minister/> accessed 30 December 2022
3. Mokete M, Motor Dealer License Fee Set at M150 000 *Lesotho Tribune* (Maseru 12 February 2022) <<https://lesothotribune.co.ls/motor-dealership-license-fee-set-at-m150-000/>> accessed 29 December 2022
4. Mokhele P, Car Dealers, Minister in War of Words *The Reporter* (Maseru 21 February 2022) <www.thereporter.co.ls/2022/02/21/car-dealers-minister-in-war-of-words/> accessed 30 December 2022
5. Mpaki B, Govt Reverses Indigenisation of Motor Dealership Industry *Sunday Express* (Maseru 4 March 2022) <<https://sundayexpress.co.ls/govt-reverses-indigenisation-of-motor-dealership-industry/>> accessed 20 November 2022

Websites

1. <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm> accessed 22 November 2022
2. <www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.pdf> accessed 10 December 2022
3. <www.worldbank.org/en/country/lesotho/overview> accessed 12 December 2022
4. <www.wto.org/english/thewto_e/countries_e/lesotho_e.htm> accessed 12 December 2022
5. <www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed 14 December 2022
6. <www.researchgate.net/profile/Andrew-Brooks-6/publication/263180172_Networks_of_power_and_corruption_The_trade_of_Japanese_used_cars_to_Mozambique/links/59e0783145_8515371611e652/Networks-of-power-and-corruption-The-trade-of-Japanese-used-cars-to-Mozambique.pdf> accessed 15 December 2022
7. <https://unctad.org/system/files/official-document/ditctab2018d3_en.pdf#page=93> accessed 20 December 2022
8. <https://unctad.org/system/files/official-document/edmmisc232add33_en.pdf> accessed 22 December 2022
9. <<https://iilj.org/wp-content/uploads/2016/08/Diebold-Non-Discrimination-and-the-Pillars-of-International-Economic-Law-2010.pdf>> accessed 22 January 2023
10. <https://web.archive.org/web/20201104201310id_/https://boris.unibe.ch/115709/1/S0020589311000418.pdf> accessed 22 January 2023
11. <www.wti.org/media/filer_public/48/a9/48a96a1d-c754-4961-820c-8fa012587411/cottieroeschnrcrwp16.pdf> accessed 23 January 2023
12. <www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 27 January 2023
13. <<https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1168&context=facpubs>> accessed 28 January 2023
14. <<https://ideas.repec.org/p/zbw/wtowps/tisd9802.html>> accessed 22 February 2023
15. <<https://assets.publishing.service.gov.uk/media/57a08c44ed915d3cfd00129e/R8320-Sum19.pdf>> accessed 13 March 2023

16. <[www.economicsonline.co.uk/definitions/policy_objective.html/#:~:text=Policy%20objective%20%E2%80%93%20definition,\(the%20target%20for%20inflation\).](http://www.economicsonline.co.uk/definitions/policy_objective.html/#:~:text=Policy%20objective%20%E2%80%93%20definition,(the%20target%20for%20inflation).)> accessed 12 April 2023
17. <www.collinsdictionary.com/dictionary/english/conformity> accessed 12 April 2023
18. <www.collinsdictionary.com/dictionary/english/legitimate-objective> accessed 12 April 2023
19. <www.investopedia.com/terms/i/import.asp> accessed 12 April 2023
20. <www.lexology.com/library/detail.aspx?g=0db3efc8-2836-4481-9221-dfa5d839736b> accessed 13 April 2023
21. <www.researchgate.net/publication/291754298_Radiating_Impact_of_WTO_on_Its_Members'_Legal_System_The_Chinese_Perspective> accessed 13 April 2023
22. <www.esaamlg.org/index.php/countries> accessed 14 April 2023
23. <<https://documentation.lastradainternational.org/lsidocs/Handbook%20on%20nondiscrimination.pdf>> accessed 26 May 2023.
24. <<https://law.usask.ca/documents/research/estey-journal/jaiswal15-1annex.pdf>> accessed 26 May 2023
25. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481> accessed 26 May 2023
26. <www.wto.org/english/docs_e/legal_e/26-gats.pdf> accessed 26 May 2023
27. <www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 26 May 2023
28. <www.wto.org/french/res_f/reser_f/ersd201511_f.htm> accessed 26 May 2023
29. <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC114.pdf&Open=True>> accessed 28 May 2023
30. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280204> accessed 28 May 2023
31. <www.lesothotradeportal.org.ls/kcfinder/upload/files/Trading%20enterprse%20act%201993.pdf> accessed 28 May 2023
32. <<https://cleartax.in/s/bank-guarantee?>> accessed 05 June 2023
33. <www.anti-moneylaundering.org/> accessed 05 June 2023
34. <<https://financialcrimeacademy.org/shell-companies-in-money-laundering/>> accessed 05 June 2023
35. <www.investopedia.com/terms/b/bankguarantee.asp> accessed 05 June 2023
36. <www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf> accessed 05 June 2023

