

CONFIDENTIAL

Legal opinion regarding the lawfulness of certain measures imposed by Namibia on exports of sheep and bovine livestock in terms of Namibia's commitments under the rules of the WTO, SADC and SACU

ANNEXURE F

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Terms of Reference

The following represents the terms of reference for the opinion requested from the South African Agricultural Processors Association:

Theme: The status and acceptability of the Namibian Small Stock Marketing Scheme in terms of WTO rules, the SADC Protocol on Trade as well as the SACU Agreement: A Trade Law Perspective

With the above theme in mind, you are requested to provide answers to the following questions:

Is the Namibian Small Stock Marketing Scheme in contravention of WTO rules;

Is the Namibian Small Stock Marketing Scheme in contravention of the SADC Protocol on Trade;

Is the Namibian Small Stock Marketing Scheme in contravention of the SACU Agreement;

Recommendations.

In addition, the opinion should also, where possible, address the lawfulness of a proposed export levy on weaners under the various legal instruments referred to in the Terms of Reference.

Executive Summary

Namibia has put in place a so-called "Small Stock Marketing Scheme. The object of the Scheme is to encourage local slaughtering of livestock in Namibia, through *inter alia* the imposition of restrictions on the export of live animals.

This opinion reflects on the legality in terms of international trade rules of these export restrictions imposed by Namibia on live sheep and bovine animals. Based on the background information provided by the NAMC we have concluded that Namibia is imposing an export **duty** on live bovine animals, an export restriction made effective through a **quota** on the export of live sheep and a restriction in the form of an export **permit system** on the exports of both sheep and bovine animals.

An analysis of the relevant provisions, in our view, of the WTO, the SADC Protocol on Trade and the SACU Agreement addressing trade restrictions was conducted. Namibia is a party to all three of these regulatory instruments.

Based on the information provided to us and on our subsequent analysis we have drawn the following conclusions –

- With respect to the **duty** charged on the exports of live bovine animals (including both mature cattle and weaners): the measure is permissible under the GATT, 1994 (Refer to Paragraph 3.1.2) , but that Namibia is in violation of both the SADC Protocol on Trade (Refer to Paragraph 4.1.3.1.2) as well as the SACU Agreement (Refer to Paragraphs 5.1.3 – 5.1.4); and
- With respect to restrictions on exports made effective through an **export quota** and/or a discretionary **export permit system**: both these measures are applied in violation with Namibia's commitments under the GATT (Refer to Paragraphs 3.1.1 – 3.3), the SADC Protocol on Trade (Refer to Paragraphs 4.1.3.1.1 and 4.1.3.2) and the SACU Agreement (Refer to Paragraphs 5.1.3 – 5.1.4).

To address within SACU the issue of export restrictions imposed by Namibia is probably the correct way of resolving the matter. SACU constitutes the deepest level of trade integration between South Africa and Namibia. This should include in our view the redrafting of the text of the SACU Agreement dealing with import and export restrictions. Failing diplomatic efforts to resolve the matter, the dispute can be brought before a dispute settlement forum for a judicial or quasi-judicial resolution. Whether the appropriate forum should be a WTO panel, a trade panel established in terms of the SADC Protocol on Trade or the SACU Tribunal will depend on various legal factors, but more importantly, political considerations.

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1 Introduction

Namibia has put in place a so-called "Small Stock Marketing Scheme (hereinafter referred to as the "Scheme"). The object of the Scheme is to encourage local slaughtering of livestock in Namibia, through the imposition of restrictions on the export of live animals. The restrictions take the form of export duties, export quotas and export licences.

The purpose of this opinion is to establish whether these export restrictions are compatible with Namibia's commitments under the World Trade Organisation, the Southern African Development Community as well as the Southern African Customs Union. The emphasis of this opinion will focus on **export** prohibitions and restrictions which, as we understand our brief, are the main concerns behind the request for this opinion.

2 The export measures at issue

2.1 The quantitative restriction on the export of live sheep

A duty of 15% was charged on the export of live sheep from Namibia. However, levying of the duty has been suspended subject to the full utilization of existing local slaughtering capacity in Namibia within four (4) years from the date of the implementation of the levy and subject to review.¹

In order to bring about full utilization of "*existing slaughtering capacity*" the Minister of Agriculture, Water and Rural Development put in place an **export quota** mechanism through various Government Notices published from time to time.² Namibian exporters of livestock were restricted in the number of stock they were permitted to export in accordance with a fixed ratio between livestock being slaughtered in Namibia and livestock exported. For example, for every sheep slaughtered in Namibia, one live sheep could be exported, or for every six sheep slaughtered in Namibia, one live sheep could be exported etc. The ratio varied from time to time and was in certain instances subject to timeframes.

¹ See Ministry of Finance Notice No. 61 of 2004, dated 18 March 2004 published in Government Gazette No.3181 dated 1 April 2004. The date of implementation of the levy was to be 1 April 2004.

² See Notice No. 129 of 2004 published in Government Gazette No. 3214 of 1 June 2004; Notice No.1 of 2005 published in Government Gazette No. 3365 of 3 January 2005; Notice No. 94 of 2006, published in Government Gazette dated 20 June 2006; Notice No.73 of 2007, published in Government Gazette No. 3819 of 2 April 2007. The last notice being published in terms of Section 20 of the Meat Industry Act, 1981 (Act No. 12 of 1981) as amended, regarding the import or export of *inter alia* sheep and cattle was Notice No.94 of 2007, published in Government Gazette No 3841 of 15 May 2007, withdrew Notice No.73 of 2007 without providing for any extension of the export quota mechanism for sheep. As "*full utilisation*" was to be reached by 1 April 2008 (i.e four years since the date of implementation of the levy in April 2004), it is unclear whether the quota mechanism has been extended, or if the suspended levy of 15% on the export of sheep has been reinstated.

2.2 The duty charged on the export of live cattle

The Minister of Finance imposed³ a duty of 30%, effective as from 1 April 2004 on the export of live bovine animals: slaughter-ready mature cattle - cattle that weigh in excess of 450kg. Exporters of weaners i.e. cattle older than a calf and younger than a long-weaner that weigh from 110kg up to 300kg were exempted from payment of an export duty for a period of three (3) years from the date of implementation of the export duty (i.e. from 1 April 2004) and subject to review by the Minister of Finance. From the background information it is unclear whether the exemption of the export duty on weaners, as defined herein, has been extended. Be that as it may, the nature of the export restriction as it pertains to bovine animals is that of an **export duty**.

2.3 Permits regulating the importation and exportation of live sheep and cattle

In many instances, the Government Notices regulated imports and exports of both cattle and sheep by means of a discretionary permit system.⁴ Both Notices published under Section 20 of the Meat Industry Act during 2007⁵ continued the practice of import and export permits, but omitted any reference to the discretionary powers of the Meat Board in granting the permits. We will address this in more detail elsewhere in this opinion.

We will now proceed with our analysis of the lawfulness of these measures under the WTO, the SADC Protocol on Trade and the SACU Agreement.

3 World Trade Organisation (WTO)

3.1 Relevant provisions under the General Agreement on Tariffs and Trade

3.1.1 General prohibition against quantitative export restrictions

The General Agreement on Tariffs and Trade, 1994 consists *inter alia* of the provisions of the General Agreement on Tariffs and Trade, 1947, including the Notes and Supplementary Provisions contained in Annex I to the latter agreement (hereinafter referred to as the "GATT").

The applicable provision dealing with the issue of import and export restrictions of a quantitative nature is Article XI.

³ See Notice No. 61 of 2004, published in terms of Section 54(4) of the Customs and Excise Act, 1998 (Act No. 20 of 1998) in Government Gazette No.3181 of 1 April 2004.

⁴ See Notice No. 129 of 2004 published in Government Gazette No. 3214 of 1 June 2004; Notice No.1 of 2005 published in Government Gazette No. 3365 of 3 January 2005 and Notice No. 94 of 2006, published in Government Gazette dated 20 June 2006.

⁵ See Notices No.73 of 2007, published in Government Gazette No. 3819 of 2 April 2007 and No.94 of 2007, published in Government Gazette No 3841 of 15 May 2007.

3.1.2 Article XI (General Elimination of Quantitative Restrictions)

Paragraph 1 of Article XI provides for a **general elimination** of quantitative restrictions (QRs):

*"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the **exportation** or sale for export of any product destined for the territory of any other contracting party."*⁶[Emphasis added].

The following becomes clear from reading paragraph 1 -

- i. The obligation to eliminate prohibitions or restrictions does not extend to the use of export duties, taxes or other charges. The prohibition is aimed at eliminating restrictions made effective through the use of quotas and import/export permits. The prohibition is very broad in its scope and covers "other measures" having the effect of restricting exports or imports and not being in the nature of a duty, tax or charge⁷; and
- ii. The prohibition against the use of QRs applies to both imports and exports of products to or from the territory of any other contracting party (read Member of the WTO).

⁶ A 1950 GATT Working Party Report of Quantitative Restrictions indicated that: "... the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchases of its materials, or by reducing the supply of such materials available to foreign competitors or by other means." See GATT/CP.4/33/Add.1, page 4.

⁷ According to Annex I "Notes and Supplementary Provisions" Ad Articles XI, XII, XIII and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state trading operations". Article XVII which deals with State Trading Enterprises, provides in paragraph 1(a) that any such enterprise shall "in its purchases or sales involving either imports or exports act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders". This is understood to mean that such an enterprise "shall make such purchases or sales solely in accordance with commercial considerations, ..., and shall afford the enterprises of the other contracting parties adequate opportunity to compete for participation in such purchase or sales." - see para. 1(b). Our understanding of the Namibian Meat Board, after studying the Meat Industry Act, 1981 is that the Meat Board is not directly involved in the sale or purchase of live stock. It regulates rather the purchase and sale of live stock by private parties. In this regards, it is important to observe the note made with respect to Ad article XVII in Annex I where a distinction is made between Marketing Boards established by Members of the WTO, involved in the sale and purchase of products, and those not so involved. In the latter instance where such Boards "lay down regulations covering private trade" their activities will be governed by the relevant articles of the GATT. In this sense, we are of the view that the activities of the Meat Board relating to the imposition of import and export restrictions and prohibitions will be governed by inter alia Article XI of GATT.

As Article XI does not prevent Namibia from imposing or maintaining an export duty, we will leave the issue of export duties, at least for the moment, while we discuss the provisions of Article XI.

As was also noted, the exportation (as well as importation⁸) of live sheep and cattle is subject to the granting by the Namibian Meat Board of a permit. Apart from the last two Notices published under Section 20 of the Meat Industry Act, 1981 (Act No 12 of 1981), provided to us as part of the background documentation, all the Notices provided for a non-automatic or discretionary permit allowing for the exports of both live cattle and sheep. With respect to non-automatic permits, the Panel in the *India – Quantitative Restrictions* case found that –

"These reports are consistent with the ordinary meaning noted above, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."⁹

Hence, it appears as if two types of export restrictions are applicable with respect to sheep (i.e. restrictions made effective through quotas as well as through discretionary export permits)¹⁰, whereas the export of live cattle is only subject to one export restriction (i.e. a restriction made effective through discretionary export permits¹¹). This being the case it will be necessary to establish whether these export restrictions, which *prima facie* appear to be in contravention of Article XI:1 can be justified under any other relevant WTO legal provision.

3.2 Exceptions to the general prohibition contained in Article XI:1 of GATT

3.2.1 Article XI: 2(a) and (b) of GATT

Paragraphs 2 (a) and (b) of Article XI provide that the general prohibition contained in paragraph 1 of that Article shall not apply to –

⁸ Any import licensing procedure will be governed by the provisions of both Article XIII of GATT, as well as the provisions of the WTO Agreement on Import Licensing Procedures. For example, Namibia is obliged to "inform the Committee [on Import Licensing] of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations" (Article 8:2(a)). The Agreement distinguishes between automatic (where approval of an application is granted in all cases) and non-automatic licensing, which shall "correspond in scope and duration to the measures they are used to implement" (Article 3:2).

⁹ See Panel Report on *India - Quantitative Restrictions* on Imports of Agricultural, Textile and Industrial Products, (WT/DS90/R dated 6 April 1999) at Para. 5.129.

¹⁰ Whether the use of discretionary permits in conjunction with an export quota, as in this case, will necessarily provide for an additional level of restriction over and above the restriction imposed by the quota, will depend on the manner in which the discretionary permit system is being operated – See in this regard the Panel Report on *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (WT/DS161/R; WT/DS169/R) at Para. 782.

¹¹ This is not taking count of export duties, which are compatible with Article XI.

"Export prohibitions or restrictions **temporarily** applied to prevent or relieve **critical shortages** of foodstuffs or other products essential to the exporting contracting party "[Emphasis added];

"...export prohibitions or restrictions necessary to **the application of standards or regulations** for the classification, grading or marketing of commodities in international trade"[Emphasis added].

It is necessary therefore to determine the reason(s) for the imposition by Namibia of export restrictions made effective through quotas and/or export permits.

Both the Namibian White Paper on Industrial Development, dated August 1992 as well as an Export Development Strategy for Namibia, dated March 1998 and prepared by the EU Transitional Trade and Investment Development Programme, emphasized the need for Namibia to increase its industrial capacity. The latter document mentioned that a shortcoming of the Namibian economy is that "*too much reliance is placed on a small number of unprocessed primary commodities*". It recommended a diversification of export products and markets which could be attained by increasing the level of domestic value addition in each of the exported products.

It will be recalled that export restrictions on sheep, as well as goats, were imposed in order to encourage domestic slaughtering by local abattoirs in Namibia. This is in line with the overall strategy to increase beneficiation of primary products in Namibia.

We did not find any basis in the background documentation which suggests that the export restrictions were imposed for any of the reasons provided for under paragraphs 2(a) or (b). **Hence we are of the view that neither of these subparagraphs justifies the imposition and/or maintenance of export quotas and/or export permits in violation with Article XI¹².**

3.2.2 Article XII (Restrictions to Safeguard the Balance of Payments)

Article XII constitutes another exception to the general prohibition against the use of border restrictions other than in the form of duties, taxes and similar charges¹³. It allows a WTO Member, under certain defined conditions, to impose restrictions on **imports** of products in order to "*safeguard its external financial position and its balance of payments*"¹⁴. As the main concern of the South African meat industry is rather the export restrictions put in place by Namibia with respect to live sheep and

¹² For the same reason we are of the view that Article 12 of the Agreement on Agriculture, which incorporates through reference paragraph 2(a) of Article XI of GATT is not applicable.

¹³ The provisions of Article XIV "*Exceptions to the rule of non-discrimination*" as well as Article XV "*Exchange Arrangements*" need to be read in conjunction with Article XII as well as Article XVIII, Section B. All these provisions deal with import restrictions for purposes of safeguarding external financial positions and to ensure adequate levels of reserves when facing balance of payments difficulties.

¹⁴ See Paragraph 1 of Article XII:1.

cattle, Article XII is not relevant in this context as it exclusively deals with import restrictions¹⁵.

3.2.3 Article XVIII (Governmental Assistance to Economic Development)

Article XVIII of GATT allows for WTO Members the economies of which can only support low standards of living and are in the early stages of development¹⁶ to temporarily deviate from the provisions of the other Articles of the GATT. However, the wording of this Article suggests that the measures anticipated in this Article relate to measures imposed on **imports** of products and **not exports**. It allows for a flexible tariff structure in order to grant protection for the establishment of a particular industry or for the imposition of quantitative restrictions on imports to ensure sufficient levels of monetary reserves. As a result, this exception does not apply to export measures of the nature under consideration in this opinion.

3.2.4 Article XX (General Exceptions)

Article XX provides grounds for justification of a measure, which in the absence of a justification will amount to a violation of WTO law. Apart from the requirements contained in the chapeau of Article XX namely that such a measure is not applied in "*a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*", Article XX lists a number of specific grounds of justification.

Paragraph (i) of Article XX is of particular importance for the purposes of this opinion. It reads as follows –

"... nothing in this Agreement [read GATT] shall be construed to prevent the adoption or enforcement by any contracting party [read WTO Member] of measures –

- (i) *Involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a government stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection*

¹⁵ However, we recall that both the import and export of cattle and sheep are being regulated by permits issued by the Namibian Meat Board. In this sense, Article XII is not altogether irrelevant either. It appears from the background documentation provided to us that the purpose of the import restrictions has more to do with sustainable economic growth, job creation and the alleviation of poverty through a program of beneficiation of unprocessed products rather than the reasons stated in paragraph 1 of this Article.

¹⁶ According to GATT, 1947 Annex I "Notes and supplementary provisions" *Ad Article XVIII*, para. 2 "*The phrase 'in the early stages of development' is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties [read Members] the economies of which are undergoing a process of industrialisation to correct an excessive dependence on primary production*".

afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination.”.

There are a number of important conditions in paragraph (i) that need to be met before it can be relied upon to justify a prohibited export restriction in terms of Article XI. These are (in addition to the conditions listed in the chapeau):

- The export restriction applied, must be **necessary**¹⁷ to ensure **essential** quantities of such materials to a domestic processing industry;
- The export measure must be imposed as part of a **governmental stabilization** plan to ensure that the domestic price of such restricted material is held below the world price;
- The export measure shall not operate to **increase the exports** of the particular processing industry;
- The export measure shall not operate to **increase the protection** afforded to the particular domestic industry; and
- The export measure shall not be applied in a **discriminatory** manner.

In the event that Namibia claims that the export restrictions provided for under the Scheme are being justified through reliance on paragraph (i) of Article XX, it will carry the burden of proof to show that its measures fall within the scope of this paragraph. We were unable to assess from the background documentation provided to us whether these measures are imposed by Namibia as part of a governmental stabilization plan. Further research may need to be done regarding the possible justification of the export restrictions under the Scheme in terms of this paragraph.

However, in view of the meaning ascribed by the Appellate Body to the term “necessary” in the *EC-Asbestos* dispute (see footnote below), a strong argument can be made out that Namibia has an alternative measure available in the form of an **export duty** which is in conformity with the provisions of Article XI, instead of resorting to export quotas and export permits, which as we have indicated, are not in conformity with the provisions of that Article. As such, it could be argued that these measures are not “*necessary*” to ensure essential quantities of sheep and cattle for purposes of the domestic slaughtering industry and that paragraph (i) of Article XX does not provide justification for Namibia’s use of export quotas and export permits with respect to livestock.

3.3 Conclusion

Based on our analyses of the measures imposed by Namibia on the export of sheep and cattle in light of the relevant provisions of the WTO and more specifically the GATT, we conclude that -

¹⁷ The Appellate Body has on occasion confirmed that a measure is “necessary”, at least within the context of Article XX(b), “if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is [not] available to it.”. (See Report of the Appellate Body on European Communities – Measures affecting Asbestos and Asbestos-containing products, WT/DS135/AB/R dated 12 March 2001) at Paras. 170 – 171.

- the export duty levied on cattle (and possibly weaners) is compliant with the provisions of the GATT;
- the quantitative export restriction imposed on sheep is *prima facie* a violation of Article XI and in our view, based on the information provided, is not justified by Articles XI or XX of GATT; and
- the export license scheme for sheep and cattle constitutes a "*prohibition or restriction other than duties, taxes or other charges*" prohibited by Article XI and based on the information provided, is not justified by Articles XI or XX of GATT.

4 SADC

4.1 The relevant provisions of the SADC Protocol on Trade

4.1.1 Objectives of the Protocol on Trade

Namibia is a Member State of the Southern African Development Community (SADC). It is also a party to the SADC Protocol on Trade (hereinafter referred to as "the Protocol"). One of the objects of the Protocol is to liberalise intra-regional trade in goods on the basis of fair, mutually equitable and beneficial trade arrangements.¹⁸ It also has as an objective the establishment of a free trade area in the SADC Region.¹⁹

4.1.2 General obligations on Member States

Member States are obliged to take *inter alia* the following measures –

- i. to ensure the effective and harmonious application of the provisions of the Protocol²⁰;
- ii. to prohibit unfair business practices²¹;
- iii. to promote competition within the Community²²;
- iv. to promote trade development within the Community²³; and
- v. to ensure the carrying out of obligations under the Protocol²⁴.

These and other general obligations establish the framework and spirit within which Member States undertake to regulate trade within the free trade area.

4.1.3 Restrictions on intra-SADC trade

The Protocol requires the elimination of both tariff and non-tariff barriers. Member States through the Trade Negotiating Forum shall negotiate the process and

¹⁸ See Article 2.1 of the Protocol.

¹⁹ See Article 2.5 of the Protocol.

²⁰ See Article 13 of the Protocol.

²¹ Ibid

²² See Article 25 of the Protocol.

²³ See Article 26 of the Protocol.

²⁴ See Article 33(1) of the Protocol.

method for the elimination of existing barriers to intra-SADC trade²⁵. However it shall be up to the Committee of Ministers (CMT) to **determine** the process and modalities for the **phased** elimination of both tariffs and non-tariff barriers (NTBs)²⁶.

4.1.3.1 Tariff restrictions

4.1.3.1.1 Article 3 (*Elimination of Barriers to Intra-SADC Trade*)

Article 3 of the Protocol provides for a period of eight (8) years from the entry into force of the Protocol in which **existing** barriers to trade (including tariff barriers and NTBs) must be phased out. However, if a Member State is of the opinion that it may be or has been adversely affected by the removal of tariffs and NTBs to trade, then such a Member State can apply to the CMT to be allowed additional time (so-called "grace-period") within which to eliminate these barriers. The CMT is supposed to develop and apply appropriate criteria for considering such applications. According to this provision all tariff and NTBs need to be **phased out** within SADC towards the end of 2008, unless application was made to the CMT for a grace period in the manner described.

4.1.3.1.2 Article 5 (*Elimination of Export Duties*²⁷)

Article 5 reads –

"ELIMINATION OF EXPORT DUTIES

1. *Member States shall not apply any export duties on goods for export to other Member States.*
2. *This Article shall not prevent any Member State from applying export duties necessary to prevent erosion of any prohibitions or restrictions which apply to exports outside the Community, provided that no less favourable treatment is granted to Member States than to third countries."*

Paragraph 1 of Article 5 is clear in its **prohibition** against the use of export duties. It appears as if paragraph 1 does not even allow for the phased elimination of export duties as opposed to Article 4.1 which allows for the *phased* elimination of *import* duties in accordance with Article 3. However, in our view, an interpretation to the effect that Article 3 informs Article 5.1 is more plausible. If Article 3 was not intended to cover also the phased elimination of export duties, it would have stated so.

According to this reading of Article 5(1) **Namibia** will have until the end of 2008 to abolish any form of export duties on intra-SADC trade that existed at the time of the entry into force of the Protocol, unless (i) it has applied for a "grace period"; or (ii) it can justify the continuation of the application of export duties by reliance on

²⁵ See Article 3.1(e).

²⁶ See Article 3.1 Chapeau.

²⁷ Article 4 of the Protocol provides for the elimination of import duties on intra-SADC trade.

Article 5(2). What is clear from the reading of paragraph (1) is that there is no legal basis for Namibia to introduce new duties on exports of intra-SADC trade, unless it can avail itself of paragraph (2) of Article 5.

The second paragraph of Article 5 of the Protocol provides for an **exception** to the prohibition contained in paragraph 1. However, "*any prohibitions or restrictions which apply to exports outside the Community*" referred to in paragraph 2 will have to comply with the provisions of GATT regulating the use of export restrictions and prohibitions, especially Article XI read with the exceptions to that article. We are of the view that paragraph 2 does not authorize a SADC Member State to prevent the erosion of WTO inconsistent prohibitions or restriction applied by such Member State to exports outside the Community. Moreover, any application of export duties needs to meet the requirement of **necessity**. In our view, the necessity test applied by the Appellate Body in the *EC-Asbestos* case could be applied in this instance²⁸. Thirdly, the export duty needs to prevent the **erosion** of any restriction applicable to exports outside the Community. Within this context, we understand "erosion" to mean that the absence of an export duty within the Community will limit the effectiveness to bring about the desired objective of any export restriction or prohibition in place on exports to countries outside of the Community.

We recall that **Namibia** imposed duties on all exports of cattle (and possibly weaners) as well as sheep, irrespective the export destination. From the background documentation it appears that the purpose of imposing the export duty was and continues to be to encourage the local slaughtering of livestock in Namibia. Trade data indicates that almost all exports by Namibia of small livestock are destined for South Africa²⁹. In light of this, we seriously question any suggestion that failing an export duty applied within SADC, the duty in force on exports of livestock to countries outside SADC would be eroded within the meaning of Article 5(2) as very little exports of livestock are destined for countries outside the Community. We are not convinced that Namibia can rely on the exception provided for in paragraph 2. **As a result, we are of the view that the imposition of an export duty on small livestock (once the suspension has been lifted) and bovine animals within SADC is contrary to provisions of Article 5(1).**

4.1.3.2 Non-tariff barriers

The Protocol defines a non-tariff barrier (NTB) in broad terms so as to include, in our view, quantitative restrictions in the form of quotas as well as import and export licences.³⁰ When addressing NTBs the Protocol makes a distinction between

²⁸ See footnote 17 *supra*.

²⁹ See "*The Impact of the Namibian Small Stock Marketing Scheme*", Report for the National Agricultural Marketing Council dated May 2008, compiled by Nick Vink and Ron Sandrey, on page 2. Whether the position is similar with respect to the exports of bovine animals needs to be confirmed.

³⁰ A non-tariff barrier is defined as "... any barrier to trade other than import and export duties" – See Article 1 of the Protocol. Borrowing from the wording of Article XI:1 of GATT, NTBs could include any "*prohibition or restriction other than duties, taxes or other charges whether made effective through quotas, import or export licences or other measures*".

NTBs existing upon the date of entry into force of the Protocol in 2000, which need to be phased out in accordance with Article 3 towards the end of 2008 (unless a "period of " has been granted) and NTBs not so in existence at the time.

4.1.3.2.1 **Article 6 (Non-tariff Barriers)**

The obligation on Member States to eliminate all **existing** forms of NTBs is repeated in Article 6(a) of the Protocol.

With respect to the imposition of **new** NTBs (i.e. NTBs not in existence at the entry into force of the Protocol), Article 6(b) makes it clear that "..., *Member States shall (b) refrain from imposing any new NTBs*".

However, Article 6 is qualified by the phrase "*Except as provided for in this Protocol...*". Hence, it is important to understand the circumstances provided for in the Protocol under which a Member State is allowed to maintain existing NTBs and/or to introduce new NTBs. We will deal with this matter by referring to the provision dealing with the elimination of quantitative export restrictions, i.e. Article 8.³¹

4.1.3.2.2 **Article 8 (Quantitative Export Restrictions)**

Member States are prohibited from applying quantitative restrictions³² on exports to intra-SADC trade. Again this general prohibition against quantitative export restrictions is qualified by the phrase "*except where otherwise provide for in this Protocol*"³³.

It appears as if paragraph 1 does not even allow for the phased elimination of quantitative export restrictions as opposed to Article 7.1 which allows for the *phased* elimination of quantitative *import* restrictions in accordance with Article 3. However, in our view, an interpretation to the effect that Article 3 informs Article 8.1 is more plausible. If Article 3 was not intended to cover also the phased elimination of quantitative export restrictions, it would have stated so.

According to this reading of Article 8(1) **Namibia** will have until the end of 2008 to abolish any quantitative export restrictions on intra-SADC trade that existed at the time of the entry into force of the Protocol, unless (i) it has applied for a "grace period" in accordance with Article 3(1)(c); or (ii) it can justify the continuation of the application of quantitative export restrictions by reliance on Article 8(2) or any other exception(s) provided for in the Protocol. Similarly, for Namibia to introduce a new quantitative restriction on exports within the Community it will have to find

³¹ Article 7 of the Protocol provides for the elimination of existing quantitative import restrictions in accordance with Article 3 as well as a prohibition against the introduction of new such measures. Article 7 has its own exception to the extent that it allows for the imposition of tariff quotas on imports provided that the in-quota tariff is below the rate applied under the Protocol.

³² The Protocol defines quantitative restrictions as "*prohibitions or restrictions on imports into, or exports from a Member State whether made effective through quotas, import licences, foreign exchange allocation practices or other measures and requirements restricting imports or exports*". See Article 1.

³³ See Article 8(1) of the Protocol.

justification for such measure in paragraph (2) of Article 8 or any other exception provided for in the Protocol.

The second paragraph of Article 8 of the Protocol provides for an **exception** to the prohibition contained in paragraph 1. However, "*any prohibitions or restrictions which apply to exports outside the Community*" referred to in paragraph 2 will have to comply with the provisions of GATT regulating the use of export restrictions and prohibitions, especially Article XI read with the exceptions to that article. We are of the view that paragraph 2 does not authorize a SADC Member State to prevent the erosion of WTO inconsistent prohibitions or restriction applied by such Member State to exports outside the Community. As we have indicated, our view is that both the export quota mechanism and discretionary export permit system applied by Namibia amount to a *prima facie* violation of the GATT, which are not justified under that agreement. Moreover, any application of quantitative export restrictions needs to meet the requirement of **necessity**. In our view, the necessity test applied by the Appellate Body in the *EC-Asbestos* case could be applied in this instance³⁴. Thirdly, the quantitative export restriction needs to prevent the **erosion** of any restriction applicable to exports outside the Community. Within this context, we understand "erosion" to mean that the absence of a quantitative export restriction within the Community will limit the effectiveness to bring about the desired objective of any export restriction or prohibition in place on exports to countries outside of the Community.

We recall that **Namibia** imposed quantitative export restrictions (in the nature of a quota and/or export permits) on all exports of cattle (and possibly weaners) as well as sheep, irrespective the export destination. From the background documentation it appears that the purpose of imposing these restrictions was and continues to be to encourage the local slaughtering of livestock in Namibia. Trade data indicates that almost all exports by Namibia of small livestock are destined for South Africa³⁵. In light of this, we seriously question any suggestion that failing these quantitative export restrictions applied within SADC, the restrictions in force on exports of livestock to countries outside SADC would be eroded within the meaning of Article 8(2) as very little exports of livestock are destined for countries outside the Community. For these reasons we are not convinced that Namibia can rely on the exception provided for in paragraph 2.

Two other Articles of the Protocol provide for exceptions to the general prohibition against the application of quantitative export restrictions namely (i) Article 9³⁶

³⁴ See footnote 17 *supra*.

³⁵ See "*The Impact of the Namibian Small Stock Marketing Scheme*", Report for the National Agricultural Marketing Council dated May 2008, compiled by Nick Vink and Ron Sandrey, on page 2. Whether the position is similar with respect to the exports of bovine animals needs to be confirmed.

³⁶ "...nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State:

- a) necessary to protect public morals or to maintain public order;
- b) necessary to protect human, animal or plant life or health;
- c) necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO;

dealing with general exceptions; and (ii) Article 10³⁷ providing for the so-called "security exception". Neither of these exceptions, in our view, speaks to the objective behind the imposition by Namibia of these quantitative export restrictions on sheep and bovine animals. Neither of them provides justification for the application of these restrictions.

As a result, we are of the view that the continued imposition of quantitative export restrictions on small livestock and bovine animals within SADC is contrary to provisions of Article 8(1).

4.2 Conclusion

Based on our analyses of the measures imposed by Namibia on the export of sheep and cattle in light of the provisions of the SADC Protocol on Trade, we conclude for reasons stated that -

- the imposition of an export duty on small livestock (once the suspension has been lifted) and bovine animals within SADC is contrary to provisions of Article 5(1) of the Trade Protocol and is not justified by other provisions of that Protocol;
- the imposition of quantitative export restrictions (whether in the form of an export quota or discretionary export license) on small livestock and bovine animals within SADC is contrary to provisions of Article 8(1) of the Trade Protocol and is not justified by other provisions of that Protocol.

5 SACU

Namibia is part of the Southern African Customs Union, established through the conclusion of the Southern African Customs Union Agreement, 2002. This Agreement replaces the previous Customs Union Agreement concluded on 11 December 1969 to which Namibia was also a party³⁸.

-
- d) necessary to protect intellectual property rights, or to prevent deceptive trade practices;
 - e) relating to transfer of gold, silver, precious and semi-precious stones, including precious and strategic metals;
 - f) imposed for the protection of national treasures of artistic, historic or archaeological value;
 - g) necessary to prevent or relieve critical shortages of foodstuffs in any exporting Member State;
 - h) relating to the conservation of exhaustible natural resources and the environment; or
 - i) necessary to ensure compliance with existing obligations under international agreements."

Note that paragraph (g) is similar to Article XI:2(a) of GATT.

³⁷ "1. Nothing in this Protocol shall prevent any Member State from taking measures which it considers necessary for the protection of its security interests or for the purpose of maintaining peace".

³⁸ Article 50 of the SACU Agreement, 2002 provides that any "obligation or arrangement of SACU which exists immediately before the entry into force of this Agreement shall, to the extent that it is not inconsistent with the provisions of this Agreement, continue to subsist, operate or bind Member States of SACU as if it were established or undertaken under this Agreement."

5.1 The relevant provisions of the SACU Agreement

5.1.1 Objectives of the SACU Agreement

Two of the objectives of the Agreement most relevant for the purposes of this opinion are found in Article 2 i.e. "(a) to facilitate the cross-border movement of goods between the territories of the Member States;" and "(e) to enhance the economic development, diversification, industrialization and competitiveness of Member States".

5.1.2 General obligations on Member States

The Agreement demands from Member States to *inter alia* –

- i. ensure the effective and harmonious application of the provisions of the Agreement³⁹;
- ii. develop common policies and strategies with respect to industrial development⁴⁰; and
- iii. co-operate on agricultural policies "in order to ensure the co-ordinated development of the agricultural sector within the Common Customs Area"⁴¹.

These objectives and obligations as well as the legal nature of a customs union provide the context and spirit within which Member States must conduct their trade relations with each other and exercise their rights and obligations.

5.1.3 Article 18 (Free Movement of Domestic Product)

Part Five of the Agreement deals with Trade Liberalisation⁴². A **general prohibition**⁴³ is provided for against the imposition of customs duties and quantitative restrictions on "importation from the area of one Member State to the area of another Member State" of goods grown, produced or manufactured in the Common Customs Area. This general prohibition is qualified with a similar phrase as found in Articles 6, 7 and 8 of the SADC Protocol on Trade i.e. "except as provided elsewhere in this Agreement".

The following observations can be made with reference to paragraph 1 of Article 18:

- Article 18(1) is restricted to **intra-SACU trade** and only with respect to goods grown, produced or manufactured in the Common Customs Area. Paragraph 2 of Article 18 could be open for an interpretation that it applies

³⁹ See Article 23(1) of the Agreement.

⁴⁰ See Article 38(2) of the Agreement.

⁴¹ See Article 39(2) of the Agreement.

⁴² See Articles 18 – 31 of the Agreement.

⁴³ See Article 18(1): "Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State to the area of another Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement" [Emphasis added].

to both intra-SACU trade as well as trade with third countries to cover both SACU produced goods as well as imported goods;

- The phrase "*on importation from the area of one Member State to the area of another Member State*" appears to be limiting the scope of the prohibition against the use of customs duties and quantitative restrictions to **imports**. We are of the view that the scope of paragraph 1 applies to restrictions imposed on **exports** as well, for the following reasons –
 - the heading of Article 18 refers to "**Free Movement of Domestic Products**". Free movement can only be attained if restrictions on both imports and exports are eliminated;
 - Article XXIV:8(a)(i) of GATT requires from SACU as a customs union to eliminate duties and other restrictive regulations on commerce with respect to substantially all intra-SACU trade. Paragraph 8 does not limit this prerequisite to imports only; and
 - the wording contained in the chapeau of paragraph 2 of Article 18, which provides for a qualification of paragraph 1. We deal with this matter below;
- The Agreement does not provide for a definition of "quantitative restrictions". The reference to quantitative restrictions should in our view, be interpreted broadly so as to include "*other restrictive regulations of commerce*"⁴⁴. The latter phrase, we believe, is informed by the wording used in paragraph 1 of Article XI of GATT i.e. "*... prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures ...*". It will therefore include measures such as quotas as well as licences or permits; and
- To give effect to the phrase "*except as provided elsewhere in this Agreement*", care should be taken to identify the exceptions provided for in the Agreement.

The text of paragraph 2 reads:

"Notwithstanding the provisions of paragraph 1 above, Member States shall have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of -

- (a) *Health of humans, animals or plants*⁴⁵;
- (b) *the environment*
- (c) *treasures of artistic, historic or archeological value*
- (d) *public morals;*
- (e) *intellectual property rights*
- (f) *national security; and*
- (g) *exhaustible natural resources*". [Emphasis added].

Paragraph 2 continues to provide for similar exceptions as are provided for in Article XX of GATT and Article 9 of the SADC Trade Protocol.

⁴⁴ See Article 8(a)(i) of Article XXIV of GATT.

⁴⁵ See also Article 30(2) of the Agreement where Member States reserve the right to apply sanitary and phyto-sanitary measures.

The following observations are pertinent:

- It is clear that paragraph 2 qualifies paragraph 1. It would not be necessary to put a qualification in place with respect to exports if there was no obligation in paragraph 1 to eliminate restrictions on exports;
- Paragraph 2 only refers to "restrictions". We are of the view that the term covers both customs duties and quantitative restrictions;
- The exceptions listed in paragraph 2 inform the phrase "*except as provided for elsewhere in this Agreement*" found in paragraph 1. This is in accordance with Article XXIV:8(a)(i) read with Article XX of GATT. To be noted however is that no reference is made in paragraph 2 to any requirement of "*necessity*" as found in both paragraph 8(a)(i) or in some of the paragraphs of Article XX⁴⁶. Moreover, there is no requirement that any measure imposed are not applied in "*a manner which could constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade*" as is provided for in Article XX⁴⁷.

The imposition and maintenance by Namibia of export duties and quantitative restrictions (in the form of an export quota as well as export permits) with respect to intra-SACU trade in small stock and bovine animals is *prima facie* in violation with the general prohibition contained in Article 18(1) of the Agreement. Moreover, none of the exceptions provided for in Article 18(2), in our view, speaks to the objective behind the imposition by Namibia of these restrictions on the export of live sheep and bovine animals. None of them provides justification for the application of these restrictions.

Two other Articles in the SACU Agreement are of particular relevance for the purpose of this section of the opinion namely Article 25 (Import and Export Prohibitions and Restrictions) and Article 29 (Arrangements for Regulating the Marketing of Agricultural Products).

5.1.4 Article 25 (Import and Export Prohibitions and Restrictions)

Article 25 addresses import and export prohibitions and restrictions. Due to the importance of this Article for the purposes of this part of the opinion, the text of the first three paragraphs is provided –

"1. Member States recognize the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council.

2. Except in so far as may be agreed upon between the Member States from time to time, the provisions of this Agreement shall not be deemed to suspend or

⁴⁶ See paragraphs XX(a), which corresponds with paragraph (d) of Article 18(2) of the SACU Agreement; paragraph XX(b) which corresponds with paragraph (a) of Article 18(2); paragraph XX(d) with no corresponding provision in Article 18(2).

⁴⁷ See the Chapeau of Article XX of GATT, 1947.

supersede the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods.

3. The provisions of paragraphs 1 and 2 shall not be so construed as to permit the prohibition or restriction of the importation by any Member State into its area of goods grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods."

The question before us is how to reconcile the provisions of Article 25 with the general prohibition contained in Article 18(1). More specifically, does Article 25 fall within the ambit of the phrase "*except as provided for elsewhere in this Agreement*" which qualifies the general prohibition in paragraph 1 of Article 18 or does Article 18 as a whole inform our understanding of Article 25? We will address this issue by commenting on each of the paragraphs of Article 25.

5.1.4.1 Ad paragraph 1

- The "right" referred to in this paragraph is not an unlimited right. Firstly, this provision is not limited to "*goods grown, produced or manufactured in the Common Customs Area*" as is the case with paragraph 1 of Article 18 Agreement. It pertains to "*any goods*" i.e. also goods grown, produced or manufactured outside the Common Customs Area. Secondly, it refers to both intra-SACU trade as well as trade with third countries outside SACU. Hence, the scope and meaning of this "right" is defined both by the provisions of the SACU Agreement (see below) and importantly, by the rules of the WTO to which each of these Member States are party⁴⁸.
- Paragraph 1 needs to be read with Article 18 of the SACU Agreement in so far as it relates to "*goods grown, produced or manufactured in the Common Customs Area*". Notwithstanding the qualification of paragraphs 1 and 2 contained in paragraph 3, if paragraph 1 should qualify as an exception to paragraph 1 of Article 18 (i.e. falling within the scope of the phrase "*except as provided elsewhere in this Agreement*"), it would, for all practical purposes render the wording of Article 18(1) without meaning or effect as almost any measure could be justified for "*economic*" reasons. It makes the detailed listing of exceptions provided for in paragraph 2 of Article 18 almost redundant.

5.1.4.2 Ad paragraph 2

- The meaning of the provisions of paragraph 2 is all but clear. Despite the provisions of Article 18 of the SACU Agreement, which go to great effort in regulating the use of trade restrictions by Member States, paragraph 2 appears to excuse any legislative measure⁴⁹ by which a restriction on imports or exports is applied, "*except in so far as may be agreed upon between the Member States from time to time*". Any legal instrument which

⁴⁸ See in this regard Article XI read with Articles XII, XIII, XIV, XV, XVIII, XX and XXI of GATT.

⁴⁹ Except, if a measure is aimed at protecting a domestic industry against imports (See Article 25(3)).

allows for the imposition of a measure contrary to the rules of the WTO will amount to a violation of a Member State's international trade commitments. As every Member of the WTO is under an obligation to bring its legislation into conformity with the WTO rules, this provision in paragraph 2 is meaningless in its aim to allow Member States to retain legislation which may be contrary to Article XI of GATT. Moreover, under international law, a nation cannot shy away from its international obligations by its reliance on its national legislation⁵⁰. Member States have agreed to the regulation of the use of trade restrictions under Article 18. It should not be necessary for the Member States to agree "from time to time" that a particular provision of the SACU Agreement "suspends or supersedes the provisions of any law". If a Member State's national legislation is contrary to Article 18, it should be obligated to bring its provisions in line with that Article. We believe that retaining any legislation which is contrary to the provisions of the Agreement amounts to a violation of the object, purpose and spirit of that Agreement and runs contrary to the principles of the international law of treaties⁵¹.

5.1.4.3 Ad paragraph 3

- As mentioned above, paragraph 3 qualifies paragraphs 1 and 2 of Article 25. The scope of paragraph 3 is however limited to –

- (i)
- (ii) only goods "grown, produced or manufactured in other areas of the Common Customs Area" whereas paragraph 1 relates to "any goods". As a result the qualification pertains only to imports from **within SACU**, which causes paragraph 1 to be without any qualification with respect to imports from outside the Common Customs Area. Clearly, this right of Member States of SACU referred to in paragraph 1 will have to be exercised in compliance with other international commitments with respect to countries not part of the customs union.
- (iii) The qualification is limited to prohibitions or restrictions on **imports** only and not exports. In view of the nature of a customs union and particularly the aim of the SACU Agreement to "facilitate cross-border movement of goods between the territories of the Member States", it is incomprehensible why paragraph 3 will only apply to protectionist import restrictions and not similarly to protectionist **export** restrictions.

⁵⁰ See Article 27 "Internal Law and Observance of Treaties" of the Vienna Convention on the Law of Treaties, 1969 which stipulates that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

⁵¹ See Article 26 "Pacta sunt Servanda" of the Vienna Convention on the Law of Treaties, 1969 which determines that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

Our view of Article 25 (1) is that it is too broad in scope for it to constitute an exception to the general prohibition against export restrictions contained in Article 18(1) of the Agreement. In our opinion, a proper understanding of Article 25 (1) is only possible by having regard to Article 18. Article 18 informs and gives meaning to Article 25.

5.1.5 Article 29 (Arrangements for Regulating the Marketing of Agricultural Products)

Article 29 concerns domestic marketing regulations imposed by Member States within their borders with respect to domestically produced agricultural commodities as well as to similar commodities imported from elsewhere in the Common Customs Area. It provides for national treatment to be afforded to imported agricultural commodities when implementing marketing regulations. Such marketing regulations shall not restrict the free trade of agricultural products between the Member States, except where such regulations are aimed at emergent agriculture and related agro-industries agreed upon by Member States or for such other purposes as the Member States may agree. In our view, this Article concerns conditions affecting market access for imported agricultural commodities. As a result, it is not relevant for the purpose of addressing export restrictions in this opinion.

5.2 Conclusion

Given the ambiguous wording of some of the provisions in the SACU Agreement dealing with trade restrictions, it is difficult to provide a clear assessment of the legality of the export regime of Namibia relating to sheep and cattle. However, we will limit our assessment to the following observations –

If we are correct in our assessment, which we believe we are for reasons stated, that the general prohibition against the use of customs duties and quantitative restrictions in paragraph 1 of Article 18 should equally apply to the **exportation** of goods "*grown, produced or manufactured in the Common Customs Area*", then **Namibia** will only be allowed to impose an export quota on sheep, an export duty on cattle as well as an import and export permit system on sheep and cattle if justified under one or more of the exceptions provided for in the SACU Agreement. We have identified paragraph 2 of Article 18 as well as paragraphs 1 and 2 read with paragraph 3 of Article 25 as possible exceptions to paragraph 1 of Article 18⁵².

Nothing in the documentation provided to us concerning the small stock marketing scheme suggest that the export measures are put in place for any one or more of the reasons provided for in paragraph 2 of Article 18.

Moreover, we have argued that paragraph 1 of Article 25 does not constitute an exception to Article 18(1), but should rather be informed by paragraph 1 of Article 18 (with respect to intra-SACU trade) to avoid nullifying the general prohibition

⁵² Another exception may be Article 26 dealing with infant industry protection.

contained in the latter paragraph. Furthermore, the "right of each Member State to prohibit or restrict" imports and exports (with respect to trade with other WTO Members not part of SACU) must be defined by reference to the WTO commitments (as well as commitment under the SADC Protocol on Trade, where applicable) which such Member States took upon themselves regarding import and export restrictions. We have also questioned the omission of any reference to export restrictions for purposes of domestic protection in paragraph 3 of Article 25.

Given our assessment of the provisions under the SACU Agreement dealing with trade restrictions, we are of the opinion that Namibia is acting contrary to the provisions of Article 18 of the SACU Agreement by imposing an export restriction on sheep and cattle in the form of export duties, quotas and/or permits.

In the unlikely event that our interpretation of Articles 25(1) and (3) is erroneous, then Article 25 (1) provides an almost unlimited exception to Article 18(1) with respect to export prohibitions and restrictions. This is because paragraph 3 would be seen as only applicable with respect to import restrictions (and not export restrictions) for purposes of domestic protection. Should this be the case, which we have argued it is not, Namibia will be within their rights, based upon Article 25, to impose restrictions on the export of sheep and cattle to South Africa.

6 WTO, SADC Protocol on Trade and SACU: Is there an opportunity for forum shopping?

South Africa and Namibia should first attempt to resolve this trade impasse through bilateral consultations. However, failing a satisfactory settlement of the matter through political avenues, what other remedies are available to South Africa to address this potential trade dispute with Namibia?

This raises several important questions related to forum shopping and re-litigation as well as to what the relationship is between SACU, the SADC Protocol on Trade and the WTO as international agreements all dealing with trade issues between two or more of the same countries? It falls outside the scope of this opinion to deal with these issues in a comprehensive manner, save the following terse remarks:

A dispute based upon the alleged violation of any WTO legal rule, can be brought before a panel in the WTO in terms of the Dispute Settlement Understanding, irrespective whether the WTO Members involved in the dispute are also parties to another regional trade agreement governing the same matter, for example the SADC Protocol on Trade. Hence, a WTO panel will have jurisdiction to entertain a claim of an alleged violation of Article XI of GATT. Similarly, if a claim can be based on the alleged violation of a legal provision found both in the SADC Protocol on Trade and in the SACU Agreement, South Africa may be able to bring the matter before the SADC Trade Panels or the SACU Tribunal (once it is established), as the case may be, to adjudicate over the matter.

7 Final conclusions and recommendations

We have studied the background information on certain restrictions imposed by