

AfCFTA and Digitalisation: The Role of Trade Facilitation Measures through the Electronic Single Window (ESW) in improving Intra-Africa Trade.

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Dedication

I dedicate this paper to my hero, my late father, Abibu Omari and my loving mother, Jeanny Omari.

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Keywords

Trade Facilitation.

Customs.

African Continental Free Trade Area.

Electronic Single Window.

African Union Agenda 2063.

Technology.

Digitalisation.

Acronyms

AACE	African Alliance for E-commerce
AfCFTA	African Continental Free Trade Area
AU	African Union
AUC	African Union Commission
BIAT	Boosting Intra-Africa Trade
CFI	Capital Finance International
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EACMA	East African Customs Management Act
ECOWAS	Economic Community of West African States
ESP	Emerging Senegal Plan
ESW	Electronic Single Window
ETLS	Trade Liberalization Scheme
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICC	The International Chamber of Commerce
ICT	Information and Communications Technology
IFC	International Finance Corporation
IT	Information Technology
ITC	International Trade Centre
NTB	Non-tariff barrier
OECD	The Organization for Economic Co-operation and Development
PPP	Public and Private Partnership
PRFE	Trade Facilitation Programme
RECs	Regional Economic Communities
SADC	Southern African Development Community
TFA	Trade Facilitation Agreement
TFWA	Trade facilitation of West African
UN/CEFACT	United Nations Centre for Trade Facilitation and Electronic Business
UNCTAD	The United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
WAEMU	West African Economic and Monetary Union

WB World Bank
WCO World Customs Organisation
WTO World Trade Organisation

Abstract

International trade has increased significantly over the years and to enable this trend of increased volume of trade, there is a core focus on trade facilitation. Furthermore, customs play a key role in the movement of goods and have come to the spotlight as key role players in trade facilitation efforts. However, the problem that exists in modern international trends, specifically in Africa, is that the present customs administrations are inefficient to combat the increase in trade volumes and ensuring trade facilitation efforts are sufficiently implemented. With the current development of the African Continental Free Trade Area (AfCFTA) there is a potential for increased inter and intra-Africa trade and to strengthen regional integration. With such developments, African states must create an appropriate environment to advance and realise the trade objectives of AfCFTA. This thesis therefore aims to argue for an improved trading environment in Africa through a digitalised customs reformative tool, such as the Electronic Single Window (ESW), to ensure some beneficiation under the AfCFTA. The ESW is a trade facilitation tool aimed at easing and improving trade, and as this thesis argues, it can be a significant tool to realise the objectives of the AfCFTA.

This thesis carried out desktop research based on literature to assess and provide the usefulness of the ESW in improving inter and intra-Africa trade. This was done by providing for key regional theories and approaches to integration efforts, assessing international trade facilitation regulatory frameworks, providing for the conditions of customs in Africa, the analysis of the ESW, and the implementation of the ESW in two African countries. Conclusively, this paper found that African states have several international and regional commitments to reform their customs and facilitate trade, and importantly, with the current era of digitalisation and a sound trade regulatory environment, the implementation of the ESW is achievable. Highlighting that digitalisation and a sound legal environment maximise the benefits of the ESW, which help improve inter and intra-Africa trade.

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CHAPTER 1 INTRODUCTION

1.1 Introduction and Background to Study

In its quest for growth and development, Africa recently created the African Continental Free Trade Area (AfCFTA) as envisioned in the African Union Agenda 2063. The AU Agenda 2063 aims to accelerate and sustain economic development for Africa and harness African integration for inclusive growth.¹ The AfCFTA, a flagship initiative based on the AU Agenda 2063, seeks to boost intra-Africa trade and cement Africa's position in international trade by promoting the free movement of goods, services, labour, and people.² However, as the AfCFTA is a recent initiative, there still exists the need for more development to realise the full objectives of the Agreement. Nonetheless, various trade facilitating mechanisms need to be in play to reach the objectives of the AfCFTA. One such way would be the implementation of the Electronic Single Window (ESW) to improve intra-Africa Trade.

This study, therefore, analyses the ESW as a trade facilitation tool to improve intra-Africa trade. The subsequent section, as a background to this thesis, discusses the AfCFTA and intra-Africa trade, highlighting the low level of intra-African trade and the challenges around cross-border trade in the continent. Following that discourse, key theories and approaches to regional integration and concepts relevant to this thesis will be examined.

1.1.1 AfCFTA and Intra-Africa Trade.

The foundation of the African Continental Free Trade Area (AfCFTA) is based on the aspiration of the African Union (AU) Agenda 2063, which is:

‘[The] desire for shared prosperity and well-being, for unity and integration, for a continent of free citizens and expanded horizons, where the full potential of women and youth are realised, and with freedom from fear, disease, and want.’³

The Agenda 2063 is a strategic plan drawn up by the AU as ‘Africa’s blueprint for transforming Africa into the global powerhouse of the future.’⁴ Over time, the world and the continent have

¹ African Union ‘Agenda 2063: The Africa We Want’ available at <https://au.int/en/agenda2063/overview> accessed on 03 September 2021.

² African Union ‘About AfCFTA’ available at <https://au.int/en/cfta> accessed on 03 September 2021.

³ African Union ‘Agenda 2063: The Africa we want’ available at <https://au.int/en/agenda2063/overview> accessed on 04 April 2020).

⁴ African Union ‘Agenda 2063: The Africa we want’ available at <https://au.int/en/agenda2063/overview> accessed on 04 April 2020.

experienced technological advancements or inventions that have helped with developments, such as telecommunication advancements, artificial intelligence, and the technology that has advanced transportation.⁵ With such growing interventions, it can be inferred that technological advancements have played and can play a pivotal role in global development and shaping society.⁶ Given that the AfCFTA aims to solve Africa's trading deficiencies by integrating markets and strengthen intra-Africa trade, incorporating technology into trade processes can help achieve Africa's goal of development. The AfCFTA should thus concern itself in utilising the use technology in the context of digitalising trade procedures to meet its vision and transformation objectives.

Key to achieving the AfCFTA objectives of an economically integrated Africa and the boosting of intra-Africa trade is through the various forms of trade facilitation.⁷ The various forms of trade facilitation solutions are provided under the AfCFTA Agreement. For example, Article 4 of the Agreement establishing the AfCFTA in providing various ways in which State parties can aid in meeting the desired main objectives and trade liberalisation, provides for State parties to 'cooperate on customs matters and the implementation of trade facilitation measures.'⁸ Under the same Agreement, Article 11⁹ reads that states should provide ways to assist with the application of e-customs and electronic data interchange for customs measures.¹⁰ Similarly, looking at the AfCFTA agreement, Article 18 of annexure 4 approves for the usage of the ESW and where possible, the usage of technology to support such a system.¹¹ The aforementioned provisions in the AfCFTA Agreement, in essence, encourages State parties to implement or develop trade facilitation measures that would meet the essential objectives (of improving trade) under the Agreement. Thus, parties to the AfCFTA, according to the Agreement, have a duty to incorporate measures that will reduce or eliminate trade barriers, which includes the adoption of an ESW amongst other measures to address trade barriers.¹²

Nonetheless, intra-Africa trade has been low and has been disrupted by trade barriers. Looking at the African Union Commission (AUC) annual trade data from 2013 to 2019 it highlights that

⁵ For example, social media/networking, manufacturing robots, and drone transportation.

⁶ Gröbler Arnulf *Technology and global change* (2003) 38.

⁷ Gerhard Erasmus 'The AfCFTA: Overview and Implications' (2018) *Tralac Trade Brief*.

⁸ Article 4(e) of the Agreement Establishing the African Continental Free Trade OF 2019.

⁹ Annex 3 on Customs Co-Operation and Mutual Administrative Assistance.

¹⁰ Annex 3 of Article 11 of The Agreement Establishing the Continental Free Trade Area of 2019.

¹¹ Annex 4 of Article 18 of The Agreement Establishing the African Continental Free Trade Agreement of 2019.

¹² International Finance Corporation 'Taking Advantage of a Window of Opportunity: The Rwanda Electronic Single Window for Trade Efficiency' (2017) available at https://www.tfafacility.org/sites/default/files/case-studies/2017 - rwanda_single_window_trade_wto.pdf, accessed on 04 April 2020.

the trade balance for AU members was negative, with intra-African imports averaging a low of 13% and 20% for exports from the period 2013 to 2019.¹³ Data likewise provided that intra-African trade imports between AU member states decreased from 621 (million US Dollars) in 2013 to 560 (million US Dollars) in 2019.¹⁴ The total exports between AU members likewise declined from 575 (million US Dollars) in 2013 to 456 (million US Dollars) in 2019.¹⁵ One of the major contributor to the low flow of trade between African states is trade barriers such as customs bottlenecks.¹⁶

Trade barriers have been identified as a concern by several trade-leading organisations. For example, the Organisation for Economic Co-operation and Development (OECD) states that 'excessive customs and administrative procedures are inhibitors to trade.'¹⁷ Excessive customs and administrative procedures are considered inappropriate in this section of this thesis as they can be categorised as a non-tariff barrier (NTB) to trade. NTBs are measures put in place by a country's government that restrict market access.¹⁸ An inefficient customs agency is one such way that market access can be restricted, evidently, the OECD has identified that customs and administrative procedures and technical trade barriers are the main non-tariff barriers of concern.¹⁹ This is because NTBs can restrict market access and such restriction can distort trade.²⁰ Examples of inappropriate customs procedures which may influence trade and restrict market access include burdensome clearance procedures, cumbersome customs practices, costly regulations and fraud.²¹ The problems created by inefficient customs procedures include inconsistency and lack of predictability, which provide the opportunity for corruption at the border, time delays, inaccessible information and many more issues.²² The aforementioned are

¹³ African Union Commission 'African Trade Statistics; 2020 Annual Yearbook' (2020) 21. See also 'Tralac' 'Summary of Intra-African Trade 2019' (2019)

¹⁴ African Union Commission 'African Trade Statistics; 2020 Annual Yearbook' (2020) 35.

¹⁵ Ibid.

¹⁶ African Union 'Boosting Intra-African Trade; Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast tracking of a Continental Free Trade Area' (2012) 19 – 21.

¹⁷ Moïsé Evdokia & *OECD Trade Policy Studies Overcoming Border Bottlenecks: The Costs and Benefits of Trade Facilitation* (2009) 52.

¹⁸ Meyer N. et al. 'Bilateral and Regional Trade Agreements and Technical Barriers to Trade: An African Perspective' (2010) 96 *OECD Trade Policy Papers* 7.

¹⁹ OECD 'Protectionism? Tariffs and Other Barriers to Trade' *International Trade: Free, Fair and Open* (2009) 62.

²⁰ Moïsé Evdokia & *OECD Trade Policy Studies Overcoming Border Bottlenecks: The Costs and Benefits of Trade Facilitation* (2009) 7.

²¹ OECD *Policy Framework for Investment: A Review of Good Practices. Organisation for Economic Co-operation and Development* (2006) 69.

²² Pamela Ugaz & Sijia Sun 'Making African cross-border trade cheaper, easier and faster: Highlights from the first African forum for national trade facilitation committee' *UNCTAD Transport and Trade Facilitation*

examples of issues which has the potential to “thicken the border”²³ according to the OECD. In essence, inefficient customs procedures may make it more or unnecessarily difficult for traders to penetrate through a countries border. Thus, to improve trade, a country must identify factors that are hindering the free flow of movement of goods across its border, to eliminate or reduces those factors.

According to Fraud and Rocha, in general, a country may improve its trade by addressing problematic customs procedures, for example addressing customs procedure that causes time delay may increase trade by 7%.²⁴ Wilson highlights the potential of an increase in trade by 10% by reducing inappropriate customs procedures and administration such as the number of days goods are spent at the border and the number of signatures and documents required by the importing country.²⁵ Addressing customs issues in trade is critical to achieving adequate market accessibility and making trade more beneficial. The ESW accordingly as a suggestive form of trade facilitation and customs reform as seen in the AfCFTA Agreement, can enable and facilitate trade on the continent.²⁶ In making an argument for the ESW, this thesis addresses the following questions.

1.2 Research Questions.

The primary research question to be answered in this study is ‘What role can digital solutions such as the ESW play in improving continental trade in the context of AfCFTA?’ The sub-questions below will be dealt with in answering the primary question:

- a) What are the obligations placed on signatories to the AfCFTA by international law to implement trade facilitation measures, in the context of customs reform?
- b) What is the ESW and the legal environment for its implementation in Africa, particularly in countries like Senegal and Kenya?
- c) What applicable lessons can be learnt to inform other African States on the use and implementation of the ESW?

Newsletter 13 March 2019 available at <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2014>, accessed on 04 April 2020.

²³ OECD ‘Reducing the Thickness of Borders to Promote Trade and Participation In Global Value Chains’ (2012) 3.

²⁴ Freund Caroline & Rocha Nadia ‘What constrains Africa's exports?’ (2011) 25(3) *The World Bank Economic Review* 385.

²⁵ Wilson, N. ‘Examining the Trade Effect of Certain Customs and Administrative Procedures’ (2007) *OECD Trade Policy Papers* 5-19.

²⁶ World Bank Doing Business 2014 ‘Understanding Regulations for Small and Medium-Size Enterprises’ 2014.

1.3 Research Rationale.

Trade in Africa, both international and intra-Africa trade continues to be negatively affected by ineffective customs and customs procedures.²⁷ With the gradual and constant increase in trade volumes, African states must develop the capacity to handle the increase in trade volumes. African states thus need to ensure their respective customs administration have the necessary capacity to move goods freely, through a simplified and speedy approach. As facilitating trade will combat negative trade barriers and adequately process the progressive trade volumes.²⁸ One approach to tackle trade barriers and their impact is the use and implementation of the ESW as a digitalised trade facilitation reform tool, such reform will allow for modernise customs which creates an efficient trading system.²⁹ An efficient trading system not only put the continent in a significant position on the global trading market, but the approach likewise will increase intra-Africa trade which then creates the opportunity for integration to strengthen on the continent.

Regional integration is a great opportunity to improve the efficacy of trade within the region because regional integration provides for the appropriate movement of goods and services, amongst other things, through coordination and cooperation.³⁰ Deepening regional integration is one way in which the AfCFTA strengthen cooperation on cross-border infrastructure such as the Electronic Single Window (ESW).³¹ This thesis, therefore, seeks to argue for a better trading environment in Africa, considering the vision and growing implementation of the AfCFTA.

1.4 Answer to The Problems.

The answer to the problem questions is achieved by assessing the importance and need for trade facilitation through customs reform measure to achieve the AfCFTA objectives. The assessment is achieved by looking at the WTO Trade Facilitation Agreement (TFA), the

²⁷ Maliszewska, Maryla & Michele Ruta *The African Continental Free Trade Area: Economic and Distributional Effects* (2020) 11-13.

²⁸ Lethabo Sithole 'The Role of Trade Facilitation in Addressing Non-Tariff Barriers in the African Continental Free Trade Area' (2021) 1-8.

²⁹ AfronomicsLaw 'Border Posts Infrastructure Concessioning Regime and Trade Efficiency under the AfCFTA' (2021) Adam Willie available at <https://www.afronomicslaw.org/category/analysis/border-posts-infrastructure-concessioning-regime-and-trade-efficiency-under> accessed on 29 September 2021.

³⁰ The World Bank 'Regional Integration: Overview' available at <https://www.worldbank.org/en/topic/regional-integration/overview>, accessed on 16 February 2021.

³¹ Akinkugbe Olabisi D 'Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)' (2020) 1 *African Journal of International Economic Law* 305.

General Agreement on Tariffs and Trade (GATT), the World Customs Organisation (WCO) and the AfCFTA agreement. The main understanding of the organisations/conventions/treaties is the standard-setting and the imposed obligation of implementing trade facilitation measures for an efficient trading system. For example, the AfCFTA main objective is to create an efficient trading market for Africa ‘through better harmonisation and coordination of trade liberalisation and facilitation.’³² Thus, the importance of implementing trade facilitation measures can be appreciated through realising the number of provisions that provide for and endorse trade facilitation.

1.5 Research Methodology and Chapter Outline

The research methodology will be desktop study/research with a critical evaluation of existing works of literature. This is because the evaluation of literature and supporting laws and regulations are sufficient to convey the central message of this thesis. The research is conducted utilising both primary and secondary sources. The primary sources will be legislation, treaties, and conventions. The secondary sources will be books, law journals/journal articles, law reviews, and various internet databases and newspaper articles.

This research is structured in the following five chapters:

Chapter 1 is the introductory chapter. This chapter aims to introduce and outline a general overview of the thesis. The chapter provides for the background of the thesis, the significance of the thesis, the rationale behind the thesis as well as the established problem to the topic and the supportive answer to the problem. This chapter is a short introduction to the thesis to set an ideal foundation for the rest of the paper.

Chapter 2 first explores the definition of trade facilitation by looking at the narrow and broader definition provided by the WTO and other authors. Additionally, this chapter critically examines the binding obligation of implementing trade facilitation measures by looking at several legal instruments. The legal instruments used to explore the obligation imposed on African countries to employ trade facilitation measures are international instruments such as the WTO TFA, Article V, Article VII, Article X and Article VIII of GATT, the WCO Revised Kyoto Convention the WCO Safe Framework, as well as the WCO ICT guidelines and lastly,

³² Tralac ‘African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents’ available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#moredownloads>, accessed on 12 April 2020.

the UN/CEFACT Recommendation 33 on Establishing the Single Window. These instruments provide for the standards and importance of using trade facilitation measures for the betterment of customs processes, to attain a desired and less restrictive trading system.

Chapter three discusses the link between customs and international trade. This is done by highlighting the recent trends, the concept of customs and the role customs play in international trade. Thereafter, the Electronic Single Window is discussed and critically assessed as a customs reformative measure, underlining the basic models and general benefits of the ESW.

Chapter four examines the Electronic Single Window System implemented in Africa, specifically in Senegal and Kenya. The assessment of the Single Window in those two African Countries is done to provide some lessons for other AfCFTA members.

Chapter five provides a summary of the previous four chapters and recommendations.

1.6 Theoretical and Conceptual Underpinnings.

1.6.1 Functional and Neo-Functional Integration.

The Functional Integration (Functionalism) theory assumes that political fragmentation amongst nations is what causes the state division.³³ To eliminate political division amongst states, functionalism essentially proposes that states should deal with issues that are not too far out of reach.³⁴ Meanwhile, issues concerning the creation or increase of welfare should be destined for the “international systems”³⁵ to deal with, as such systems are not meant to function on the sole interests of states or be susceptible to political interests of the state.³⁶ This theory fails to recognise the diverse economic climates that exist, and how such theory will accommodate other economic environments other than that of European states.³⁷ The inflexibility of this theory is likewise echoed by Walter in his research on the theories of integration. Walter describes the failure of functionalism, by providing that functionalism is a

³³ Mattli Walter ‘A review of theoretical approaches to integration’ In *The Logic of Regional Integration: Europe and Beyond* (1999) 22.

³⁴ Bouwhuis Stephen ‘*The International Law Commission’s Definition of International Organizations*’ (2012) 9(2) *International Organizations Law Review* 453.

³⁵ ‘International System’ occurs when an organisation with its own legality is formed from states coming together or developed by a way of a legal instrument, in addition, such a system is governed by international law. See Bouwhuis Stephen ‘*The International Law Commission’s Definition of International Organizations*’ (2012) 9(2) *International Organizations Law Review* 453.

³⁶ Ernst B Haas ‘Beyond the Nation State: Functionalism and International Organization’ (2008) 74, 96.

³⁷ Forere M ‘Is Discussion of the ‘United States of Africa’ Premature? Analysis of ECOWAS and SADC Integration Efforts.’ (2012) 56(1) *Journal of African Law* 32.

‘normative method’ rather than a theory because functionalism provides requirements to integration.³⁸ The criticism and question of functionalism and its appropriateness for integration led to the development of neo-functional integration, which is an updated and rationalised concept of functionalism.

With the foundation of functionalism theory, Ernest Haas developed the theory of neo-functionalism as an approach to integration.³⁹ Neo-Functionalism provides that states and parties within the states can achieve peace and security through cooperation with one another and unlike Functionalism, where much emphasis is placed on the states, Neo-functionalism recognises the importance of non-state players in aiding the integration process.⁴⁰ Neo-functionalism likewise accounts for the ‘spill over’ effect, providing that integration in one sector can only be achieved as the result of the integration in the other sectors.⁴¹

The ‘spill over’ effect would not be an ideal situation for Africa’s because of its low developmental stage. Additionally, neo-functionalism was theorised for developed states. It is an unrealistic theory for Africa, as the African continent consist of mainly developing and least developed states.⁴² What is necessary is for African states to adopt a regional model that is tailored to the situation and needs of the African continent. This will allow African states to localise and utilise solutions such as the ESW. Nonetheless African states have largely adopted the equally criticised market integration theory, which will be discussed in subsequent heading.

1.6.2 Market Integration.

Market integration is otherwise known as the *Customs Union Theory* or *Vinerian Model*.⁴³ Market integration theory is progressive in nature and as analysed by Gabb, starts with an easier

³⁸ Mattli Walter ‘A review of theoretical approaches to integration’ In *The Logic of Regional Integration: Europe and Beyond* (1999) 23.

³⁹ Green, Andrew Wilson ‘Review Article Mitrany Reread With The Help Of Haas And Sewell’ (1969) 8.1 *Journal of Common Market Studies* 54.

⁴⁰ Schmitter Philippe C ‘Neo-neofunctionalism’ in Wiener, Antje and Thomas Diez, eds. *European Integration Theory 3* (ed) (2019) 46

⁴¹ Forere Malebakeng. ‘Is Discussion of the ‘United States of Africa’ Premature? Analysis of ECOWAS and SADC Integration Efforts’ (2012) *Journal of African Law* 56(1) 32.

⁴² United Nations ‘Country classification; Data sources, country classifications and aggregation methodology’ available at https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf accessed on 21 September 2021.

⁴³ Cooper C. A and Massell B. F. ‘A New Look at Customs Union Theory’(1965) 75 *The Economic Journal* 742–747.

level of integration then ‘progresses to higher and more complex levels of integration.’⁴⁴ The generally accepted view was that Customs Unions increased a countries welfare.⁴⁵ Although market integration is an appreciable theory, the request for the high-level implementation of market integration is why such theory is not best suited for Africa, as it does not attend to the different economic environments that exist, and the non-economic aspects required for integration in Africa.⁴⁶ The theory that has borne in mind the African context and involving non-economic sectors for deeper integration is the developmental regional integration model (developmentalism) which will be discussed subsequently.

1.6.3 *Developmental Regionalism.*

The suggestion and position that this thesis take would be a hybrid approach of the market integration theory enhanced by the proposals of developmental regionalism. This is because market integration is still at play in Africa, particularly in the context of AfCFTA, however market integration efforts can be further enhanced with developmental approach.

The realisation of an integration model that focuses on development on broader aspects than just economics is not contemporary. This is because developmental integration is not a new model in Africa, for example in the early 1980’s, the Southern African Development Coordinating Conference (SADCC) which is now known as SADC (Southern African Development Community) was established as a response to the challenges that halt the development in Africa.⁴⁷ The United Nations Conference on Trade and Development (UNCTAD) encourages African states to adopt developmental regionalism and explains it to mean:

‘Cooperation among countries in a broader range of areas than just trade and trade facilitation, to include, for example, investment, research and development, as well as policies aimed at

⁴⁴ Gibb, Richard ‘Regional Integration and Africa’s Development Trajectory: Meta-Theories, Expectations and Reality.’ (2009) 30.4 *Third World Quarterly* 706.

⁴⁵ Granger, Wilfrid ‘Customs Unions and Potential World Welfare: a Proof of Viner’s Conjecture.’ (2001) *Journal of Economic Integration* 16 (4) 637.

⁴⁶ Jaime de Melo, Jean-Marc Solleder & Zakaria Sorgho Market Integration Across Africa: Progress and Challenges Ahead (2020) *Working Paper* 342 2-14.

⁴⁷ Francis David J ‘Linking Peace, Security and Developmental Regionalism: Regional Economic and Security Integration in Africa’ *Journal of peacebuilding & development* (2006) 2.3 16.

accelerating regional industrial development and regional infrastructure provisions, such as the building of better networks of roads and railway.’⁴⁸

Akinkugbe defines developmental regionalism as a wholistic response to African states needs by providing that developmental regionalism is “an analytical framework that centres the social, economic, political, environmental and associated concerns of African states.”⁴⁹ In criticism of the UNCTAD definition of developmental regionalism, Akinkugbe provides that the definition should not be a one size fits all definition and African states should not be bound by the international definition, because developmental needs or priorities differ from country to country in Africa and hence development regionalism should not be formally defined.⁵⁰ This thesis agrees with Akinkugbe notion in that developmental regionalism should be defined broadly enough to allow the definition to meet the narrative of the specific African state.

Sören Scholvin defines developmental regionalism as policies put in place to assist the development of a region by providing that:

‘Developmental regionalism is about proactive economic policies advanced and coordinated by the states of the region in question – as opposed to a politically passive approach of mere liberalisation.’⁵¹

Developmental regionalism proposes to reconcile the specific needs of Africa and situations which previous models of regional integration, namely market, functional and neo-functional integration have failed to recognise.⁵² For example, the Neo-functionalism ‘spill over effect’ does not consider that African countries face different social and economic barriers such as inequality, and political instability that may hamper its implementation. Market integration is not suitable for Africa, because it requires countries to be on the same level, and it is abundantly clear that African states are not on the same level.⁵³

⁴⁸ UNCTAD ‘Shift from traditional approach to integration to ‘developmental regionalism’ available at <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=146> accessed on 25 July 2020.

⁴⁹ Akinkugbe Olabisi D ‘Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)’ (2020) 1 *African Journal of International Economic Law* 302.

⁵⁰ Akinkugbe Olabisi D ‘Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)’ (2020) 1 *African Journal of International Economic Law* 301.

⁵¹ Sören Scholvin ‘Developmental Regionalism and Regional Value Chains: Pitfalls to South Africa’s Vision for the Tripartite Free Trade Area’ (2018) 53(3) *Africa Spectrum* 118.

⁵² See Chapter 2.1.3.

⁵³ See chapter 2.1.1.

The realisation of disparities between African states is crucial because developmental regionalism seeks to ensure that the benefits of integration are spread out evenly, to afford every member state the appropriate benefit according to its country's need.⁵⁴ Functionalism, Neo-functionalism and market integration theory are not suitable for Africa because such theories were developed within the European context and simply has no bearing on the realities of the African continent and its demands. Forere further opines that the theories are not suitable because Africa has "low levels of integration" and hindrances through "political patriotism".⁵⁵

The inappropriateness of the Eurocentric models is noted by African states as the AU, United Nations Economic Commission for Africa (UNECA) and the Africa Development Group note that "Africa has placed "developmental regionalism" at the centre of its strategy for growth and structural transformation."⁵⁶ This is further evident by Akinkugbe statement, that developmental regionalism plays a crucial role not only for Africa's intentions but for the implementation of agreements such as the AfCFTA.⁵⁷ Ismail is also of this view and proposes that developmental regionalism should be based on four pillars namely "trade integration, industrial transformation, cross-border infrastructure and democracy, governance, peace and security."⁵⁸ Drawing from Ismail's perspective this thesis will focus on the aspect of improving cross-border infrastructure because that is where the ESW relates the most. In his research on AfCFTA and developmental regionalism, Ismail argues that the increase in trade has created opportunities, amongst other things, for Africa.⁵⁹ Ismail further maintains that one of such opportunities derived from the trade increase over the last 20 years is the opportunity for African states to prioritise their market while still maintaining close relations with donors from developed countries. Ismail shows the need for the African market to be prioritised by providing that when cooperating on cross-border infrastructure, African states should employ

⁵⁴ Mukamunana R and Kabelo Boikutso Moeti 'Challenges of Regional Integration in Africa: Policy and Administrative Implications.' (2005) *Journal of Public Administration* 94.

⁵⁵ Forere Malebakeng 'Is Discussion of the 'United States of Africa' Premature? Analysis of ECOWAS and SADC Integration Efforts.' (2012) 56 (1) *Journal of African Law* 32-33.

⁵⁶ African Union, United Nations Economic Commission for Africa, The African Development Group, 'Assessing Regional Integration in Africa VIII' 2017, 12.

⁵⁷ Akinkugbe OD 'Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)' (2020) *African Journal of International Economic Law* 294.

⁵⁸ Ismail Fiazal 'A Developmental Regionalism Approach to the African Continental Free Trade Area' (2020) 9(4) *Journal of Reviews on Global Economics 1779-1781*.

⁵⁹ Ismail Faizel 'A Developmental Regionalism Approach to the African Continental Free Trade Area' (2020) 9 *Journal of Reviews on Global Economics* 1774.

African labour, materials, and businesses to create a strong force of integration and ensure that AfCFTA equally benefits all the member states.⁶⁰

The notion of African solutions for African problems is very much evident throughout Ismail's research. One such statement is Ismail suggesting that although there exist several projects and policies showing the intentions of funding the implementation of cross-border infrastructures, Africa still need to commit to further research and solutions on supporting the implementation of cross-border infrastructure due to the funding gap for cross-border infrastructure.⁶¹ Hendrich-Franke similarly distinguishes that developing cross-border infrastructure is an essential means to cultivate regional integration.⁶² In a recent research assessing the risk of cross-border transport infrastructure projects, likewise to Ismail, the research recognises digital cross-border infrastructure as an important trade facilitation tool and its role in the integration process.⁶³ The border infrastructure suggested in this thesis is the Electronic Single Window (ESW) which will be discussed in greater detail in chapter 3. The subsequent section explores the idea of digitalisation.

1.6.4 Trade Facilitation and Digitalisation.

It is crucial that signatories meet their obligations to improve and digitalise customs, as aforementioned, the movement of goods and efficient operation of customs and its procedures require large numbers of documents and the exchange of data.⁶⁴ With the development in ICT, improvements have occurred in many areas of society, with international trade being one of those areas.⁶⁵ For example, with the development in ICT and advancement in technology, information and documents can now be processed faster and more efficiently.⁶⁶ When discussing digitalisation in the context of customs, the central message is moving from a

⁶⁰ Ismail Faizel 'A Developmental Regionalism Approach to the African Continental Free Trade Area' (2020) 9 *Journal of Reviews on Global Economics 1771-1783*

⁶¹ Ismail Faizel 'A Developmental Regionalism Approach to the African Continental Free Trade Area' (2020) 9 *Journal of Reviews on Global Economics*.

⁶² Henrich-Franke Christian. 'Comparing Cultures of Expert Regulation: Governing Cross-Border Infrastructures.' (2018) 27.2 *Contemporary European history* 281.

⁶³ Li, Jianping, Jin Zhang & Weilan Suo 'Risk Assessment in Cross-Border Transport Infrastructure Projects: A Fuzzy Hybrid Method Considering Dual Interdependent Effects.' (2019) 488 *Information sciences* 140.

⁶⁴ Abeywickrama, M. H & Wickramaarachchi W 'Study on the Challenges of Implementing Single Window Concept to Facilitate Trade in Sri Lanka: A Freight Forwarder Perspective.' (2015) 3(9) *Journal of Economics, Business and Management* 883.

⁶⁵ Tralac 'How ICT-driven concept can boost Africa's trade ranking' available at <https://www.tralac.org/news/article/9288-how-ict-driven-concept-can-boost-africa-s-trade-ranking.html>, accessed on 9 December 2021.

⁶⁶ Lauro Vives 'Study on Single Window Systems' International Interoperability: Key Issues for Its Implementation' (2018) *APEC Policy Support Unit* 11.

physical process to an automated system. As described by Cheng and Clara digitalisation can be described as a concept of ‘transforming the economy and redefining trade’, changing from physical to electronic submission of documents for customs can ‘transform the economy and redefine trade.’⁶⁷ ICT can enhance and improve the implementation of trade facilitation measures, and the call for the use of digital tools has been emphasised in a number of frameworks and provisions such as the AfCFTA referred to earlier in this chapter and the Trade Facilitation Agreement (TFA) as will be seen in the subsequent chapter.⁶⁸ As this thesis emphasises the need for trade facilitation to further enhance trade and develop Africa, it is thus crucial to define trade facilitation.

There is no standard definition of trade facilitation. Trade facilitation, in the narrow sense, as defined by the WTO is centralised on ‘improving administrative procedures at the border’⁶⁹ for example costs and clearance of transport and goods. Trade facilitation in the broader sense focuses on the improvement, aligning or developing regulatory framework governing borders or simply put ‘technical barriers to trade...’.⁷⁰ A broad definition of trade facilitation can include reform measures in ‘the business environment, the quality of infrastructure, transparency, and domestic regulations.’⁷¹ Thus, the WTO presents trade facilitation to include measures behind the border, by providing that trade facilitation is ‘the simplification, modernization and harmonization of export and import processes.’⁷²

The Organisation for Economic Co-operation and Development (OECD), an international organisation, defines trade facilitation as a ‘specific set of measures that streamline and simplify the technical and legal procedures for products entering or leaving a country to be traded internationally.’⁷³ The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) similarly to the WTO defines trade facilitation as ‘the simplification, standardisation and harmonisation of procedures and associated information flow required to

⁶⁷ Cheng, Wallace, and Clara Brandi ‘*Governing digital trade—a new role for the WTO*’ (2019) 6 *Briefing Paper*.

⁶⁸ Article 17 of annexure 4 to AfCFTA Agreement, calls for members states to make use of ICT and Article 10.4 of The Trade Facilitation Agreement provides that the custom reform should use ICT, if possible.

⁶⁹ World Trade Organization ‘Speeding up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement’ (2015) *World Trade Report* 35.

⁷⁰ World Trade Organization ‘Speeding up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement’ *World Trade Report* (2015) 35.

⁷¹ Portugal-Perez Alberto & John S Wilson ‘Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure.’ (2012) 40.7 *World development* 1295.

⁷² World Trade Organisation ‘*Trade facilitation*’ available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm accessed on 22 August 2020.

⁷³ OECD, ‘*Why trade facilitation matters in today’s global economy*’, available at <https://www.oecd.org/trade/topics/trade-facilitation/>, accessed on 22 August 2020.

move goods from seller to buyer and to make payment.’⁷⁴ UN/CEFACT in defining trade facilitation thus illustrates the crucial role of having efficient procedures and administration in the process of movements of goods. The International Chamber of Commerce (ICC) links trade facilitation to its effectiveness in trade by providing that trade facilitation consist of “improving the efficiency of the processes associated with trading in goods across national borders”.⁷⁵

The United Nations Conference on Trade and Development (UNCTAD), an international organisation that is prevalent in the discussion on trade facilitation, defines trade facilitation in the broad sense, as a way to create a:

‘transparent and predictable environment for cross-border trade transactions based on simple, standardized customs procedures and practices, documentation requirements, cargo and transit operations, and trade and transport arrangements.’⁷⁶

In examining the definition of trade facilitation by UNCTAD, in the simplest of terms, trade facilitation can be achieved through the modernisation, harmonisation and digitalisation of the customs procedures, which is exactly what reform tools like the ESW aims to attain. Portugal-Perez and Wilson define trade facilitation as ‘any policy measure aimed at diminishing trade cost.’⁷⁷ This definition is a plausible definition for Africa as it is wide enough to cater to the developmental needs of a specific state. The definition allows states to adopt country-specific reform to improve their trade performance. To further contribute to the above definition, Portugal-Perez and Wilson provide that trade facilitation can be a way of improving either hard and soft infrastructure, in which hard infrastructure is ‘related to tangible infrastructures such as roads, ports, highways, telecommunications’ and soft infrastructure is ‘related to transparency, customs management, the business environment, and other institutional aspects that are intangible.’⁷⁸ The ESW would be categorised as a soft infrastructure because it’s a customs management tool that aids in the efficacy of customs procedures and information.⁷⁹

⁷⁴ Trade Facilitation Implementation Guide ‘Trade Facilitation – Principles and Benefits’ available at <https://tfig.unece.org/details.html>, accessed on 01 June 2021.

⁷⁵ International Chambers of Commerce “ICC recommendations for trade facilitation through effective customs duty relief programmes” available at <https://iccwbo.org/publication/icc-recommendations-for-trade-facilitation-through-effective-customs-duty-relief-programmes/>, accessed on 06 June 2021.

⁷⁶ UNCTAD ‘Technical Notes on Trade Facilitation’ (2011) 1.

⁷⁷ Portugal-Perez Alberto & John S Wilson ‘Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure’ *World development* (2012) 40.7 1296.

⁷⁸ Portugal-Perez Alberto & John S Wilson ‘Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure’ (2012) 40.7 *World development* 1296.

⁷⁹ Portugal-Perez Alberto & John S Wilson ‘Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure’ (2012) 40.7 *World development* 1299.

The ESW propose to facilitate trade in the broad sense, by simplifying customs procedures and information for the smooth movement of goods. Therefore, developing countries can consider the ESW as a reform tool that can increase export performance, as Portugal-Perez and Wilson assessed, developing countries can increase their export performance by implementing trade facilitation reform.⁸⁰

Similar to the ICC definition, Duval defines trade facilitation in a broad sense and argues that trade facilitation enhances the efficacy of trade, and the definition should not be limited only to at-the-border measures, but rather inclusive of all other processes that can facilitate trade. Based on a trade efficiency model, Duval provides that:

‘Trade facilitation involves making customs, transport, and banking and insurance (services and infrastructure) more efficient. Trade facilitation cannot simply be limited either to at-the border or to customs control processes, since these two sets of processes are only two of a number of other processes...’⁸¹

Grainger examines the facilitation of trade in the context of beyond-the-border measures, such as modernisation, harmonisation and simplification of customs procedures.⁸² Grainger, therefore, provides that trade facilitation examines ‘how procedures and controls governing the movement of goods across national borders can be improved to reduce associated cost burdens and maximize efficiency while safeguarding legitimate regulatory objectives.’⁸³

The central focus, when analysing trade facilitation definition by the different organisations and authors, is the need for harmonised policies and the modernisation of customs processes through the adaption, evolution, and alignment of border administration with current global trends. Nonetheless, for relevancy, this thesis adopts the broader definition of trade facilitation. The broad definition captures measures to improve customs procedures, infrastructure, telecommunications, and the regulatory environment, amongst many other things not covered by the narrow definition. On that note, a broad definition of trade facilitation wholly captures and enables the use of digital solutions such as the ESW as a trade facilitation tool to ease the

⁸⁰ Portugal-Perez Alberto & John S Wilson ‘Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure’ (2012) 40.7 *World development*.

⁸¹Duval Yann ‘Trade Facilitation beyond the Doha Round of Negotiations’ (2007) 50 Asia-Pacific Research and Training Network on Trade ARTNeT Working Paper Series 4.

⁸² Grainger Andrew ‘Trade facilitation: a conceptual review’ (2011) 45.1 *Journal of World Trade* 42.

⁸³ Grainger Andrew ‘Trade facilitation: a conceptual review’ (2011) 45.1 *Journal of World Trade* 42.

flow of goods. As ESW includes beyond-the-border factors, such as customs procedures and policies, information, and communication technology (ICT), the broad definition will thus encapsulate all the necessary elements to ensure that the ESW is an effective method to improve intra-Africa trade through customs efficacy. Furthermore, to highlight the ESW as a facilitative tool, the next chapter of this thesis will discuss trade facilitation in the context of the international regulatory frameworks. The international regulatory frameworks include the GATT, WTO TFA and WCO frameworks.

1.7 Conclusion

With the current development of the AfCFTA, it is vital that countries in Africa take the right steps to enable and ensure the free flow of goods. This chapter therefore provides the theoretical and conceptual foundation for this dissertation centered on the need for a developmental approach to integration with an emphasis on trade facilitation to improve customs processes. This idea of trade facilitation is viewed more broadly for the purpose of this thesis, to encompass all other processes that can facilitate trade beyond the border. The definition of trade facilitation was strengthened by offering discussion on the concept as provided by several international organisations and authors. Furthermore, the discussion of authors and international organisations assess the concept of trade facilitation as a way to create a sound international trading ecosystem.

Having recognised the suggested approach of incorporating developmental regionalism as well the need for improved cross border infrastructure in the African integration process, the subsequent chapter builds on the discourse by examining the international frameworks that inform trade facilitation.

CHAPTER 2 INTERNATIONAL REGULATORY FRAMEWORK ON TRADE FACILITATION

2.1 Introduction.

International regimes such as the WTO (World Trade Organisation) and WCO (World Customs Organisation) have been key players in establishing standards for the betterment of international trade. In most recent times, the international bodies have shifted their focus from tariff to non-tariff barriers to advance international trade.⁸⁴ The focus has since been shifted to trade facilitation and the need to modernise trading systems for the efficacy of international trade. States must recognise the importance of having an efficient trading system. This is because trade plays a critical role not only in the development of a State but likewise a crucial role in deepening regional integration. It is thus important that States embark on a journey to eliminate or reduce trade bottlenecks by reforming their customs, implementing trade facilitation tools and draw on international best practices in the context of facilitating trade. Nonetheless, one of the key issues with the international frameworks is the lack or slow implementation of its provisions, especially by African states.

This chapter thus discusses the international regulatory frameworks prescribing trade facilitation and customs reform to highlight the importance of implementing such provisions to advance the development of the State. For this endeavour, the discussion in this chapter is structured as follows. First, the chapter renders a brief historical overview of the concept of trade facilitation. Secondly, the concept of trade facilitation is discussed under several international arrangements such as the General Agreement on Tariffs and Trade (GATT), Trade Facilitation Agreement (TFA), the World Customs Organisation (WCO) International Convention On The Simplification and Harmonization Of Customs Procedures (Revised Kyoto Convention), the SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework), the Kyoto Convention on the Application Of Information and Communication Technology (Kyoto ICT Guidelines) and the UN/CEFACT Recommendation 33 establishing a Single Window to enhance the efficient exchange of information between trade and government (Recommendation 33).

⁸⁴ Marco Fugazza 'The Economics Behind Non-Tariff Measures: Theoretical Insights And Empirical Evidence' (2013) 57 *United Nations Conference on Trade and Development* 1-2.

2.2. Brief Historical Overview of Trade Facilitation.

Historically, the elimination or reduction of trade barriers such as tariffs was more of a concern than non-tariff barriers for the achievement of an efficient trading system.⁸⁵ Tariffs are ‘custom duties on imports’⁸⁶ which has the potential to create a price advantage to domestic goods over foreign goods.⁸⁷ Thus, simply defined, a tariff is a tax levied on foreign/imported goods, usually for the protection of domestic goods.⁸⁸ The past agenda on the removal of tariffs to facilitate international trade is evident through organisations such as the World Trade Organisation (WTO), a successor of the 1947 General Agreement on Trade and Tariff (GATT).⁸⁹ The GATT, which was agreed on in 1947, largely focused on the reduction of tariffs on trading goods, as per the preamble, the agreement is meant to create ‘arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.’⁹⁰

As aforementioned, prominent multilateral concerns with trade facilitation began with the development of the GATT Articles V, VIII, X.⁹¹ However, the replacement of the GATT⁹² with the WTO provided members with further opportunity to negotiate new ways to deal with global trade and address trade deficits where GATT had failed. Consequently, the WTO council on goods decided to negotiate and further define the scope and rules on trade facilitation from 1996.⁹³ A final text on trade facilitation (The Trade Facilitation Agreement) was subsequently agreed on in 2013 and enforced in 2017.⁹⁴ These rules will be discussed in greater

⁸⁵ Funke Norbert ‘The world trading system: Recent trends’ (1994) 646. *Kiel Working Paper 2*. See also: Hanson David *Limits to free trade: Non-tariff barriers in the European Union, Japan and United States* (2010) 7-8.

⁸⁶ World Trade Organisation ‘Tariffs’ available at https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm#:~:text=Customs%20duties%20on%20merchandise%20imports,they%20raise%20revenues%20for%20governments. accessed on 16 August 2020.

⁸⁷ World Trade Organisation ‘Tariffs’ available at https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm#:~:text=Customs%20duties%20on%20merchandise%20imports,they%20raise%20revenues%20for%20governments. accessed on 16 August 2020.

⁸⁸ Matsushita M, Schoenbaum, T.J & Mavroidis, P.C. et al *The World Trade Organization: law, practice, and policy* 3 ed (2015) 219.

⁸⁹ The General Agreement on Trade and Tariff 1994.

⁹⁰ General Agreement on Tariff and Trade 1994. Negotiations on the removal of tariffs began in 1947 in Geneva. For further details on the historical starting point of GATT and the negotiation process for tariff removal, see the book: Bown, C.P. & Irwin, D.A ‘The GATT’s starting point: tariff levels circa 1947.’ in Elsig M, Hoekman B & Paulwelyn J (eds) *Assessing the World Trade Organisation: Fit for purpose?* (2017).

⁹¹ Tsofeng Tsetsi ‘Trade facilitation in the Southern African development community: the potential contribution of the world trade organization’s trade facilitation agreement’ (2021) *LLD Dissertation* 46.

⁹² General Agreement on Tariff and Trade 1994.

⁹³ World Trade Organisation ‘The Uruguay Round’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, accessed on 1 December 2021.

⁹⁴ World Trade Organisation ‘Trade Facilitation’ available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm, accessed on 1 December 2021.

detail in subsequent headings. The discovery of the need for trade facilitation was thus progressive in nature.⁹⁵ As global trade increased and trade tariffs were reduced or eliminated, the need for eliminating bureaucratic delays and red tapes under the theme of trade facilitation became more apparent.

The next section of this thesis proffers trade facilitation regulatory frameworks.

2.3. Trade Facilitation Under the GATT.

The idea of trade facilitation was earlier regulated under GATT Articles V, VIII and X.⁹⁶ These Articles call for a smooth and quick movement, release, and clearance of goods.

2.3.1 GATT Article V.

GATT Article V – a *freedom of transit* provision prescribes that member states should treat goods and transport carrying goods in transit⁹⁷ equally, free of any conditions, relating to the holding of the goods or transport, such as “flag of vessels, the place of origin, departure, entry, exit or destination.”⁹⁸ More importantly, Article V disallows “unnecessary delays or restrictions”⁹⁹ and payment of customs duties or any related charges¹⁰⁰, the charges imposed should be rational¹⁰¹ and be extended equally to all member states, including administrative procedures and policies.¹⁰²

The objective of Article V is to facilitate trade by ensuring that goods *en route* can cross from one country (member state) to another without undue delay and unnecessary cost. Undue delay and unnecessary costs impact global and regional trade because such elements have the potential to dissuade trading partners and trade as a whole.¹⁰³

⁹⁵ Roy Santana & Lee Anne Jackson ‘Identifying non-tariff barriers: evolution of multilateral instruments and evidence from the disputes (1948–2011).’ (2012) 11(3) *World Trade Review* 462–463.

⁹⁶ General Agreement on Tariff and Trade of 1994.

⁹⁷ Article V(1).

⁹⁸ Article V(2).

⁹⁹ Article V(3).

¹⁰⁰ Article V(3).

¹⁰¹ Article V(4).

¹⁰² Article V(5).

¹⁰³ GATT Article V of General Agreement on Tariff and Trade of 1994.

2.3.2 GATT Article VIII.

Another provision regarding trade facilitation under GATT is Article VIII. Article VIII deals with fees and formalities of imports and exports. It provides for trade facilitation opportunities since the provision aims at discouraging officials from imposing inappropriate charges on goods and mitigation of multiple formalities.¹⁰⁴ The Article states that the charges imposed should not be based on the value of the import or export but rather be appropriate to the “cost of services rendered.”¹⁰⁵ Accordingly, a fee based on the value of an item is an *ad valorem* tax, which Article VIII 1(a) particularly prohibits.¹⁰⁶

The intentions of Article VIII are clear, for members to implement appropriate customs charges and utilise bureaucracies that will not cause “unnecessary delay or restrictions” to trade.¹⁰⁷ Meaning that states have a legal mandate to ensure that the charges imposed should be proportionate with the services rendered.

2.3.3 GATT Article X.

This article concerns transparency and publications of trade laws by providing that laws concerning customs shall not be enforced¹⁰⁸ unless made publicly available without delay¹⁰⁹, and such laws must be operated in a non-discriminatory and reasonable manner.¹¹⁰ Article X requires member states to be transparent and treat all traders equally, as evident by requiring members to ‘publish’¹¹¹ relevant information and apply such information in ‘uniformity’.¹¹² Essentially Article X calls for member states to be transparent, as explained by the Appellate Body, transparency, amongst other situations, can be ‘fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.’¹¹³

¹⁰⁴ Trade Facilitation Implementation Guide ‘Article VIII’ United Nations. Available at <http://tfig.itcilo.org/contents/gattviii.html#:~:text=Article%20VIII%20covers%20all%20fees,connected%20to%20import%20and%20export.&text=It%20stipulates%20that%20fees%20and,hence%20prohibiting%20ad%20valorem%20fees>, accessed on 29 August 2020.

¹⁰⁵ Article 1(a) of The General Agreement of Tariff and Trade 1994.

¹⁰⁶ Paragraph 6.74-6.75 of *Panel Report, Argentina – Textiles and Apparel* (1998) WT/DS56/AB/R.

¹⁰⁷ See chapter 2.2 discussion on Article V(3).

¹⁰⁸ Article X;2 of The General Agreement of Tariff and Trade 1994.

¹⁰⁹ Article X:1 of The General Agreement on Tariff and Trade 1994.

¹¹⁰ Article X:3(a) of The General Agreement on Tariff and Trade 1994.

¹¹¹ Article X:1 of General Agreement on Tariff and Trade 1994.

¹¹² Article X:3(a) of General Agreement on Tariff and Trade 1994.

¹¹³ Appellate Body Report on Thailand - H-Beams, WT/DS122/AB/R para. 88

In addition, Article X calls for the uniform publication of laws and regulations. Having applicable information readily available, that is applied equally, creates “legal certainty and predictability.”¹¹⁴ Thus members are entitled to a reliable system that provides for legal certainty, predictability which creates accountability and transparency respectively. Equally, having the appropriate regulatory information creates the chance for members “to protect and adjust their activities.”¹¹⁵

Other prominent agreements which extend and highlight the obligations under GATT Article VIII and X include the Trade Facilitation Agreement (TFA) which will be discussed subsequently.

2.4 The Trade Facilitation Agreement (TFA): Brief Overview of Relevant TFA Provisions.

The objective and goals of trade facilitation are so inherently sought after that an entire Agreement, dedicated to trade facilitation was decided upon. The Agreement is called the Trade Facilitation Agreement (TFA), which is the first multilateral Agreement by the WTO.¹¹⁶ Stemming from initial negotiations in the 1996 Ministerial round in Singapore, the TFA was finally adopted in 2017 after two-thirds of members ratified the Agreement, making it legally binding to members that have ratified the Agreement.¹¹⁷

The Agreement acknowledges the past efforts for the facilitation of trade, by incorporating GATT Article V, VIII and X.¹¹⁸ Essentially, the TFA expands on the respective GATT articles. The TFA is trisected, Section I contains the expanded provisions to the aforementioned GATT Articles, with rules on transparency the desirability for speedy clearance, movement and release of goods and provisions on cooperation between customs authorities.¹¹⁹ This is evident from Article 1- 5 which calls for transparency by requesting members to publish information, and further affords traders powers to assess and take action on such information.¹²⁰ Section II concerns implementation timelines for Section I, with three different time specific categories,

¹¹⁴ Przybilla K ‘*The “WTOisation” of the customs administration: Uniformity of the administration of law according to Article X: 3 (a) GATT 1994 and its implications for EU customs law.*’ (2010) 1.

¹¹⁵ Appellate Report of US – Underwear, WT/DS24/AB/R p21.

¹¹⁶ World Trade Organisation ‘Trade Facilitation Agreement: Easing the Flow of Goods Across Borders’ available at https://www.wto.org/english/thewto_e/20y_e/wto_tradefacilitation_e.pdf, accessed on 16 September 2020.

¹¹⁷ World Trade Organisation ‘Trade Facilitation Agreement’, *Trade Facilitation Agreement Facility*, available at <https://www.tfafacility.org/trade-facilitation-agreement-facility%20>, accessed on 16 September 2020.

¹¹⁸ Preamble of The Agreement on Trade Facilitation of 2017.

¹¹⁹ World Trade Organisation, ‘*Trade Facilitation Agreement*’, Trade Facilitation Agreement Facility. Available at <https://www.tfafacility.org/trade-facilitation-agreement-facility%20> Accessed 16 September 2020.

¹²⁰ Article 1 – 5 of the Trade Facilitation Agreement.

namely category A,¹²¹ category B¹²² and category C.¹²³ Section III provides provisions for members to develop a board or more so a “permanent committee” that will address and deal with trade facilitation issues.¹²⁴ When observing Section II closely regarding implementation, a State can tailor and implement certain provisions particularly Articles 1-12 to the needs and demands of its developmental capacity. That is possible because the TFA allows developing and least developed countries to implement the provisions under Section I within a specified period of time as per their country’s capacity and neediness for support. For example, a country can provide and notify other members that it will apply certain provisions under Category A and other provisions under Category B thus customising the TFA to the country’s need.¹²⁵ This approach to implementation allows States to assess the readiness for the implementation of certain trade facilitation measures, which in turn allows States to develop their capacity to suit their desired trade reforms.

Nonetheless, there are key provisions in the TFA that are relevant to this thesis. The provisions can be classified to allow for transparency, efficiency, and predictability. In terms of the first category, the TFA calls for transparency in the context of web publication and enquiry points.¹²⁶ Article 1.1 and 1.2 calls for members to make easily available through the internet (where possible) relevant information for the movement of goods, information such as the procedures, required documents, laws and regulations, fees, tariffs and any other applicable information that is relevant parties should be familiarised with.¹²⁷ The TFA further calls for

¹²¹ ‘Category A contains provisions that a developing country will implement upon entry into force of the TFA. Least-developed countries (LDCs) are required to implement their Category A provisions within one year after entry into force.’ See TRALAC ‘An update on the implementation of the Trade Facilitation Agreement by African countries as of July 2019’ available at <https://www.tralac.org/blog/article/14181-an-update-on-the-implementation-of-the-trade-facilitation-agreement-by-african-countries-as-of-july-2019.html>, accessed 9 December 2021.

¹²² ‘Category B contains provisions that developing, or least-developed countries designate for implementation on a date after a transitional period following the entry into force of the TFA.’ See TRALAC ‘An update on the implementation of the Trade Facilitation Agreement by African countries as of July 2019’ available at <https://www.tralac.org/blog/article/14181-an-update-on-the-implementation-of-the-trade-facilitation-agreement-by-african-countries-as-of-july-2019.html>, accessed 9 December 2021.

¹²³ ‘Category C contains provisions that developing, and least-developed countries will implement on a date after a transitional period; the assistance they need to implement such provisions is also noted.’ See TRALAC ‘An update on the implementation of the Trade Facilitation Agreement by African countries as of July 2019’ available at <https://www.tralac.org/blog/article/14181-an-update-on-the-implementation-of-the-trade-facilitation-agreement-by-african-countries-as-of-july-2019.html>, accessed 9 December 2021. See also; World Trade Organisation, ‘Trade Facilitation Agreement’, Trade Facilitation Agreement Facility. Available at <https://www.tfafacility.org/trade-facilitation-agreement-facility%20>, accessed on 9 December 2021.

¹²⁴ World Trade Organisation, ‘Trade Facilitation Agreement’, Trade Facilitation Agreement Facility. Available at <https://www.tfafacility.org/trade-facilitation-agreement-facility%20>, accessed on 16 September 2020.

¹²⁵ Section II of The TFA of 2017.

¹²⁶ Article 1, 1.2 & 1.3 of the TFA of 2017.

¹²⁷ Article 1.1 – 1.2 of the TFA of 2017.

transparency by providing that members should ensure that there exists a (web-based) hub, where relevant parties can have easily regular and reliable access to enquire on information provided for in article 1 of the TFA and receive the applicable answers.¹²⁸ Further transparency provisions include Article 6 which provides that information on tariff duties should be published.¹²⁹

Besides transparency, the TFA calls for efficiency by providing rules on reducing complex procedures and ensuring the process to move goods across borders are simplified. The TFA ensures such simplification and efficiency as provided under Article 10 which is relevant to this thesis, calls for electronic processing of customs regulations and required documents, international standards application, implementation of a Single Window System, customs coordination and harmonised border management.¹³⁰ The efficacy of customs is further highlighted in Article 8 and 12, which expands on GATT Article VIII. Article 8 calls for customs cooperation as well as members sharing a border post to harmonise laws and policies.¹³¹ Article 12 further highlights customs coordination by providing that customs official should cooperate by a way of information sharing.¹³²

GATT Article V is likewise expanded under Article 11 of the TFA in the context of predictability, as Article 11 provide that members must only impose which trade-related charges and formulates and restrain from imposing measures that cause trade restriction or undue delays and discrimination.¹³³ The TFA further supports GATT Articles VIII and V and highlights the need for predictability in the movement of goods process the context of pre-arrival processing, through electronic processing, electronic payment of related fees, risk management for customs control, post-clearance audit to expedite goods and the publication of average release time, as provided under Article 7.¹³⁴ In addition, predictability and certainty in the context of customs administration and its procedures can be achieved by adhering to Article 3 which calls for advance rulings.¹³⁵ As highlighted by the UNCTAD, advance rulings does

¹²⁸ Article 1.3 of The TFA of 2017.

¹²⁹ Article 6 of The TFA of 2017.

¹³⁰ Article 10 of the TFA of 2017.

¹³¹ Article 8 of the TFA of 2017.

¹³² Article 12 of the TFA of 2017.

¹³³ Article 11 of the TFA of 2017.

¹³⁴ Article 7.1, 7.2, 7.4, 7.5 & 7.6 of the TFA of 2017.

¹³⁵ Article 3 of The TFA of 2017.

not only create certainty and predictability but likewise provides customs authorities with integrity and lowers the chances of corruption and preferential treatment.¹³⁶

All three categories of the TFA, namely, transparency, efficiency and predictability can be seen as interconnected. This is because transparency will create predictability and predictability can create an efficient system. Thus, it is crucial that when a member is implementing trade facilitation reform, the reform meets the obligations of all three categories in order to ensure that there is a smooth, fast and simplified movement of goods.

It is easy to see why much effort is going into implementing trade facilitation measures, simply, trade facilitation does not only benefit the country specifically implementing the facilitation measures, but benefits are felt by the global trading community too.¹³⁷ This is why organisations such as the WTO and the WCO exists. The trading community requires all members to play its part, including Africa, for there to be an effective and smooth trading ecosystem.

2.5 The World Customs Organisation (WCO).

Another international arrangement encouraging trade facilitation is the World Customs Organisation (WCO).¹³⁸ The WCO, an international organisation formulated in 1952, has a primary mandate is to simplify customs, for easier trade, by “[enhancing] the effectiveness and efficiency of customs administrations.”¹³⁹ The philosophy behind the crystallisation of the WCO was to circumvent global trade barriers through the unification and harmonisation of customs procedures and their supporting regulations.¹⁴⁰ As explained by the Security General of the WCO, Dr Kunio Mikuriya, the purpose of the WCO is to:

¹³⁶ World Customs Organization & UNCTAD ‘Advance Rulings’ (2011) *Technical Note No.22* 1.

¹³⁷ Organisation for Economic Co-operation and Development, ‘Why trade facilitation matters in today’s global economy’ available at [https://www.oecd.org/trade/topics/trade-facilitation/#:~:text=Trade%20facilitation%20benefits%20businesses%20and,global%20value%20chains%20\(GVCs\)](https://www.oecd.org/trade/topics/trade-facilitation/#:~:text=Trade%20facilitation%20benefits%20businesses%20and,global%20value%20chains%20(GVCs),), accessed on 16 September 2020.

¹³⁸ The World Custom Organisation was formerly known as the Customs Co-operation Council when it was created in 1950.

¹³⁹ World Custom Organisation ‘Discover the WCO’ available at <http://www.wcoomd.org/en/about-us/what-is-the-wco/discover-the-wco.aspx>, accessed on 17 September 2020.

¹⁴⁰ World Custom Organisation ‘Discover the WCO’ available at https://click.wcoomd.org/mod/scorm/player.php?a=3832¤torg=articulate_rise&scoid=34276, accessed on 21 September 2020.

‘[Develop] international standards, foster cooperation and [build] capacity to facilitate legitimate trade, to secure fair revenue collection and protect society, providing leadership, guidance and support to Customs administrations.’¹⁴¹

The WCO has several relevant recommendations that inform the facilitation of trade in the context of customs procedures, such as, the WCO Recommendation on the Dematerialization of Supporting Documents, WCO Recommendation on Electronic Transmission and Authentication of Customs, amongst many others. Further provided tools by the WCO include, the International Convention on the Simplification and harmonisation of Customs Procedures (Revised Kyoto Convention), the WCO Safe Framework of Standards and the ICT Guidelines (Kyoto ICT guidelines) which will be discussed in the subsequent sections of this chapter.

2.4.1 Revised Kyoto Convention.

The Revised Kyoto Convention developed in 1999 and implemented in 2006 as an updated version of the 1974 International Convention on the Simplification and Harmonisation of Customs Procedures was a result of the WCO call for transformation and alignment to modern trade practices.¹⁴² Similar concerns form the core basis of and are aligned to the recommendations advanced by this thesis. This is because the Convention explicitly advocates for the establishment of a Single Window.¹⁴³

The WCO highly endorses the establishment of the single window, by constantly highlighting its importance, with guidelines such as the *WCO Data Model, Single Window Data Harmonisation*,¹⁴⁴ *Single Window Environment Maturity* and a series of materials on how to build an ESW, consisting of volumes, all the guiding principle and tools are aimed at assisting in the development of a single window.¹⁴⁵ What can be assessed from the WCO multiple publications concerning the ESW is that the organisation's reiteration of the development of the ESW, should qualify as an essential tool to improve states trading system. To date, there

¹⁴¹ World Customs Organisation ‘Discover the WCO: Mission’ available at https://clikc.wcoomd.org/mod/scorm/player.php?a=3832¤torg=articulate_rise&scoid=34276, accessed on 21 September 2020.

¹⁴² World Customs Organisation ‘The Revised Kyoto Convention’ available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx, accessed on 06 September 2021.

¹⁴³ The International Convention on the Simplification and Harmonization of Customs procedures of 2006.

¹⁴⁴ World Customs Organisation, ‘WCO Data Model, Single Window Data Harmonisation’ (2007).

¹⁴⁵ World Customs Organisation ‘Building a Single Window Environment Recourse Material’ available at <http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/single-window-guidelines.aspx>, accessed on 06 September 2021.

are 126 signatories to the Revised Kyoto Convention with 39 of the 126 signatories being African states.¹⁴⁶

The objectives of the Revised Kyoto Convention as provided in the Convention`s general annexure are:

‘Transparency and predictability of Customs actions; standardization and simplification of the goods declaration and supporting documents; simplified procedures for authorized persons; maximum use of information technology; minimum necessary Customs control to ensure compliance with regulations; use of risk management and audit-based controls. coordinated interventions with other border agencies.’¹⁴⁷

The Convention thus call for customs to improve its efficacy in international trade and to align itself with modern trade practices by facilitating and harmonising customs procedures.¹⁴⁸ The aforementioned objectives of the Revised Kyoto Convention are similar to the objectives of the TFA, which is to play a role in deepening trade facilitation efforts and streamlining trade. Lenaghan and Victor likewise arrive to the conclusion that the TFA and the Revised Kyoto Convention contain ‘uniformed principles’ as both regulatory frameworks create collaborative efforts to ensure the facilitation of trade.¹⁴⁹

The Revised Kyoto Convention provides standards like Articles 1, 7, 8, 10, 11 and 12 of the TFA which warrants efficiency, transparency and predictability by way of customs cooperation and coordination as well as ensuring streamlined and standardised customs procedures. For example, standard 3 calls for digitalisation of customs process in the context of electronic filing, customs cooperation, the use of international standards in terms of document processing, the use of electronic processing for processing exports and imports, using national legislation to provide means for the pre-arrival of goods procedure, amongst many other formalities.¹⁵⁰

¹⁴⁶ World Customs Organisation ‘List of the Contracting Parties to the Revised Kyoto Convention’ available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv/instruments.aspx, accessed on 06 September 2021.

¹⁴⁷ World Customs Organisation ‘Revised Kyoto Convention’ available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx, accessed on 21 September 2020.

¹⁴⁸ McLinden, Gerard, Enrique Fanta & David Widdowson, et al. *Border Management Modernization* (2010) 178-179.

¹⁴⁹ Patricia Lengaghan & Victor Amadi ‘Facilitating Trade and Strengthening Market Access in the Southern African Customs Union: A focus on South Africa’s Customs reform’ (2020) 32(3) *South African Mercantile Law Journal* 319.

¹⁵⁰ Standard 3 of The International Convention on the Simplification and Harmonization of Customs Procedures (As Amended) Of 2006.

The Convention further ensures the efficacy of customs by calling for transparency in the context of the publication of customs fees.¹⁵¹

As article 7.4 of the TFA, the Convention further provides for efficiency, by prescribing risk management and audit-based controls tools, cooperation amongst customs agencies, with such customs control using ICT, where possible.¹⁵² The use of ICT is also prescribed in standard 7 which provides that members shall utilise technology to simplify customs procedure, where it is feasible to do so, with the electronic process using international standards, ensuring that national legislation accommodates such modernisation.¹⁵³ Predictability and transparency are ensured by prescribing that relevant customs information should be publicised and easily accessible, with the help of ICT.¹⁵⁴

One of the main principles of the Convention is the implementation of the provisions of the Convention, which is ensured by Standard 1. Standard 1 of the Convention provides that members should ensure that their obligations under the Convention, as provided in the annexes and specific annexes of the Convention, be adopted into its national legalisation.¹⁵⁵ Thus ensuring obligation on customs to create a smooth and efficient environment for the movement of goods.

What is clear is that the Convention advocates for the implementation of a modernised customs system to help increase international trade, as well as support the increase in trade volume. In addition, because of the modernisation sought by the framework, it is important for members to likewise implement other complementary guidelines, such as the Revised Kyoto Convention discussed above and the Kyoto ICT Guidelines. The Kyoto ICT guidelines will be briefly discussed subsequently.

¹⁵¹ Standard 4.4 of The International Convention on the Simplification and Harmonization of Customs Procedures (As Amended) Of 2006

¹⁵² Standard 6 of The International Convention on the Simplification and Harmonization of Customs Procedures (As Amended) Of 2006

¹⁵³ Chapter 7 of The International Convention on the Simplification and Harmonization of Customs procedures (As Amended) of 2006.

¹⁵⁴ Standard 9.1 & 9.3 of The International Convention on the Simplification and Harmonization of Customs procedures (As Amended) of 2006.

¹⁵⁵ Standard 1.2 of The International Convention on the Simplification and Harmonization of Customs Procedures (As Amended) Of 2006.

2.4.2 The Kyoto ICT Guidelines.

The Kyoto ICT guidelines are recommendations that are complementary guidelines to the Revised Kyoto Convention. This is because the Kyoto ICT guidelines were put forward as an aiding tool for the implementation of the revised Kyoto Convention.¹⁵⁶ The ICT guidelines aim to highlight to customs administration the impact of ICT on its control and procedures.¹⁵⁷ As ICT acts as a supportive tool to reform measures, the guideline thus encourages customs to assess their capacity to implement ICT before introducing such a supportive tool.

The guideline serves as a useful tool when customs intend to use ICT based solutions to improve its processes. Furthermore, the customs administration can use such guidelines to determine the feasibility of implementing ICT based solutions. This is because the guideline highlights possible obstacles such as legal constraints and security issues amongst many others that may arise from using ICT based solutions. However, the guideline does not provide for the software or hardware solution as states need to align the implementation of any software to its country's technological capacity as well as its trading needs.

Certain key sections of the ICT guidelines that are relevant to this thesis, will be highlighted. Like standard 7.1 of the Revised Kyoto Convention, section 6 of the Kyoto ICT guidelines specifically highlights the importance of electronic applications in customs processes and highlights those customs should cooperate to develop an ESW.¹⁵⁸ Section 6.4 provides that customs should seek to use an electronic system for the goods declaration processing to simplify data submission, allowing customs to make necessary decisions in the context of the admissibility and the release of goods.¹⁵⁹ Furthermore, Section 6.18 of the ICT guidelines provides that customs should seek to automate its processes and its key functional areas such as good declarations functions, risk management and data storage amongst other things.¹⁶⁰ Section 8, provides that customs should cooperate to develop information systems based on an

¹⁵⁶ World Custom Organisation 'ICT GUIDELINES' available at <http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/ict-guidelines.aspx>, accessed on 14 September 2021.

¹⁵⁷ World Custom Organisation 'ICT GUIDELINES' available at <http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/ict-guidelines.aspx>, accessed on 14 September 2021.

¹⁵⁸ Section 6.1 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

¹⁵⁹ Section 6.4 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

¹⁶⁰ Section 6.11 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

integrated interface infrastructure which will act as a key foundation for the development of the ESW.¹⁶¹ Section 9 provides for the exchange of electronic information between traders, the state and other customs agencies.¹⁶² Section 11 concerns ICT security by providing that a risk assessment should be done to assess the risks and vulnerabilities of implementing information technologies.¹⁶³ Section 12 of the ICT guideline concerns the most common legal issues concerning ICT implementation, such as applicability constraints with the international regulatory frameworks, national laws and regional law, as well as anticipating amendments to existing laws and encountering legal issues such as formalistic requirements of data use, data protection, security linked issues such as standard of data mode and issue on data privacy and protection.¹⁶⁴

The aforementioned sections can be seen as crossed reference with standard 3.11, 6.9, 7.2, and 7.4 of the Revised Kyoto Convention thus evidencing that the ICT guideline is complementary to the Revised Kyoto Convention. To further showcase the WCO calling for customs reform tool as the way to facilitate trade, the WCO SAFE framework, a guideline on customs cooperation and coordination is discussed below.

2.4.3 WCO Framework of Standards to Secure and Facilitate Global Trade (SAFE FRAMEWORK).

The WCO SAFE Framework of Standards was enforced in 2005 during one of the WCO Council meetings.¹⁶⁵ The framework establishes customs agencies as the frontiers of supply chain security in the context of combating terrorism, increasing revenue collection, and accelerating international trade facilitation efforts.¹⁶⁶

Secure supply chain and increase in trade facilitation can be achieved by the frameworks main guiding principles which include the digitalisation of customs processes and information,

¹⁶¹ Section 8 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

¹⁶² Section 9.1, 9.2 & 9.3 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

¹⁶³ Section 11 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

¹⁶⁴ Section 12 of the Kyoto Convention Guidelines on Application of Information and Communication Technology.

¹⁶⁵ World Customs Organisation 'WCO SAFE Package: WCO tools to secure and facilitate global trade' available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/frameworks-of-standards/safe_package.aspx accessed on 13 September 2021.

¹⁶⁶ World Customs Organisation 'WCO SAFE Package: WCO tools to secure and facilitate global trade' available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/frameworks-of-standards/safe_package.aspx accessed on 13 September 2021.

customs cooperation and harmonization of processes.¹⁶⁷ The Framework provides two pillars, namely customs to customs provisions and custom to business provisions for secure trade facilitation and to secure private sectors partnership and its benefits. In terms of the customs to customs provisions, it suggests that customs should cooperate and harmonise its system, by a way of an electronic system.¹⁶⁸ The electronic system will subsequently provide customs with risk management tools.¹⁶⁹ The advanced risk management system will thus allow customs to meet the aims of the framework, which is to prevent terrorism through consignment detection risk management, improve economic development and strengthen trade facilitation efforts.¹⁷⁰

Although, all the standards are important to achieve the objectives of the SAFE Framework, for relevancy to this thesis, only certain standards are highlighted. Standards such as standard 1 which calls for an integrated supply management system.¹⁷¹ The integrated supply chain management should include the use of an advanced electronic submission system for the exchange of information and data along with cross-border cooperation.¹⁷² The integrated supply chain management thus eases international trade by optimising risk management in the context of risk assessment as well as effective customs control. In addition, standards 2, 3, 4 and 6 likewise call for the digitalisation of customs processes and tools. The provisions provide that members should have the power to inspect goods¹⁷³ and use modern technology in such inspection equipment¹⁷⁴ and automate risk management systems based on international standards¹⁷⁵ while using ICT for the exchange of information.¹⁷⁶ Furthermore, standard 10 calls for the integrity of customs, providing that customs agents need to ensure that systems and measures are put in place to support trade facilitation efforts afford by the framework.¹⁷⁷ Efforts such as the publication of information will provide for transparency, thus highlighting the integrity of customs sought after under standard 10. The aforementioned standards essentially provide for a digitalised customs system and tools for a strengthened supply chain and the easing of the movement of goods across borders.

¹⁶⁷ Article 1.1 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁶⁸ Gordhan Pravin 'Customs in the 21st Century' 2007 1(1) *World Customs Journal* 52.

¹⁶⁹ Article 1.2 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷⁰ Gordhan Pravin 'Customs in the 21st Century' 2007 1(1) *World Customs Journal* 52.

¹⁷¹ Standard 1 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷² Standard 1 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷³ Standard 2 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷⁴ Standard 3 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷⁵ Standard 4 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷⁶ Standard 6 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

¹⁷⁷ Standard 10 of the WCO Framework of Standards to Secure and Facilitate Global Trade of 2005.

The framework is updated regularly, and the most recent updates, include efforts to modernise customs and cooperation, which include, standards on resumption on the coordination of border management and cooperation between customs and the state.¹⁷⁸ The recent updates support digitalised customs reform as a trade facilitation measure by strengthening ‘co-operation between customs and other government agencies, promoting smart security devices to optimise customs control and effectively monitor the movement of goods in a real-time basis.’¹⁷⁹

To achieve the objectives of the framework, member states need to ensure that the framework is implemented holistically. That is because the framework is in constant development and there is always room for advancement and adjustments to the provisions. In addition to, the regulatory frameworks highlighted above, there are international best practices that informs and recommends the implementation of reform tools like the ESW. Such recommendation would be UN/CEFACT Recommendation 33 which will be subsequently discussed.

2.8 UN/CEFACT Recommendation and Guidelines Establishing a Single Window (Recommendation 33).

Recommendation 33 provides best practices for the implementation of the ESW as a trade facilitation tool. The purpose of the recommendation is to provide states with a guideline on implementing the ESW to facilitate trade and meet international trade regulatory requirements. Published in 2004, this guideline was the first guideline issued by an international body regarding the implementation of the ESW. The guideline was developed based on the existence of the ESW in Mauritius, Sweden and the USA.¹⁸⁰ The document provides different sections, beginning with the different interface models that can be adopted, the document then goes on to highlight the advantage of an ESW for traders, and customs, as well as the functions and services of the ESW. Lastly, the document provides for standards and steps to ensure the effective implementation of the ESW.

Thus, before implementing the ESW, a state needs to assess its environment for the readiness to use and implement an ESW. The guideline provides that the state would need to research

¹⁷⁸ World Customs Organisation ‘WCO SAFE Package: WCO tools to secure and facilitate global trade’ available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/frameworks-of-standards/safe_package.aspx accessed on 13 September 2021.

¹⁷⁹ World Customs Organisation ‘WCO SAFE Package: WCO tools to secure and facilitate global trade’ available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/frameworks-of-standards/safe_package.aspx accessed on 13 September 2021.

¹⁸⁰ Trade Facilitation Implementation Guide ‘Recommendation 33’ available at <https://tfig.unece.org/contents/recommendation-33.htm> accessed on 18 September 2021.

the factors such as the feasibility of the project, the legal environment, the need and demand for the project, the risk, international standards, the time frame and many other factors (specific to the state) that might play a role in the implementation of an ESW.¹⁸¹ One of the most relevant factors to this chapter is that Recommendation 33 calls for a sound legal environment for the implementation of the ESW and thus crucial for such factor to be briefly discussed.¹⁸² If the ESW is not implemented on the basis of a legal enabling foundation, the ESW will fail without supporting legislation(s). Reform being halted by an inadequate legal environment is especially true for most African countries as ‘slow implementation [of trade facilitation reforms] is due to the significant legal requirements to harmonise inter-agency operations.’¹⁸³ The UN/CEFACT Recommendation 33 provides that laws either need to be developed, amended or retracted, depending on its effect on the implementation of the ESW.¹⁸⁴ As the recommendation is considered best practice, it can be assessed that the ESW can only be well implemented if there are laws and policies put in place that allow for its implementation.

2.9 Conclusion.

This chapter deepened the discussion on trade facilitation by providing an in-depth discussion on the international regulatory framework calling for trade facilitation and trade facilitation reform. Beginning with key GATT articles as a foundation for trade facilitation, then further complimenting the GATT articles. The TFA was discussed as a developed and modernised framework adopted by the WTO. Furthermore, this chapter highlighted the crucial role of customs reform to facilitate trade by discussing regulatory frameworks such as the Revised Kyoto Convention, the SAFE framework, the Kyoto ICT guidelines as provided for by the WCO as well as the Recommendation 33 of the UN/CEFACT.

The discussion on the international regulatory framework on trade facilitation indicates that there is a need to modernise customs to meet the demands of international trade and the increase in trade volumes. Thus, this chapter served as a foundation to discuss trade facilitation reforms tools such as the ESW which is discussed in-depth in the next chapter.

¹⁸¹ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 3.

¹⁸² UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005).

¹⁸³ Msemburi, Christine, and Larry Liza ‘Trade Facilitation in East and Southern Africa’ (2014) *Research papers presented at the 1st ROCB ESA Research Conference* 72.

¹⁸⁴ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 16.

CHAPTER 3 THE ELECTRONIC SINGLE WINDOW AS A TRADE FACILITATION TOOL

3.1 Introduction.

Trade facilitation and its international regulatory framework were discussed in the previous chapter of this study. What is evident from the previous chapters is that the movement of goods and efficient operation of customs and its processes requires a huge volume of documents and the exchange of data.¹⁸⁵ With the development in ICT and advancement in technology, information and documents can now be processed faster and more efficiently.¹⁸⁶ Furthermore, chapter 2 highlighted how customs play a key role in achieving trade facilitation and the advancement in international trade.¹⁸⁷ Considering that customs are an important catalyst to facilitate trade and enable the economic development of developing and least developing African countries, the state must align its customs administration to contemporary international trade trends to meet international trading demands.¹⁸⁸ To align customs with the circumstance of international trade, customs administration needs to continuously reform its operations, to be on par with the current milieu of international trade.¹⁸⁹

Customs have thus transitioned from being predominantly purposed as a revenue avenue for states to being a trade facilitation tool.¹⁹⁰ Although there has been internationally calls and recommendations for customs reform to facilitate trade, many customs administrations, specifically in Africa have failed to fully implement most the desired reforms.¹⁹¹ One reason

¹⁸⁵ Abeywickrama M. H & W. A. D. N. Wickramaarachchi 'Study on the Challenges of Implementing Single Window Concept to Facilitate Trade in Sri Lanka: A Freight Forwarder Perspective' (2015) 3(9) *Journal of Economics, Business and Management* 883.

¹⁸⁶ Lauro Vives 'Study on Single Window Systems' International Interoperability: Key Issues for Its Implementation' (2018) *APEC Policy Support Unit* 11.

¹⁸⁷ See Chapter 2.1

¹⁸⁸ Montagnat-Rentier & Gilles Parent 'Customs Administration Reform and Modernization in Francophone Sub-Saharan Africa' (2012) *International Monetary Fund* 16-18.

¹⁸⁹ Moisé, Evdokia 'Overcoming Border Bottlenecks the Costs and Benefits of Trade Facilitation' (2009) 52-53.

¹⁹⁰ Zake Justin 'Customs Administration Reform and Modernization in Anglophone Africa- Early 1990s to Mid-2010' (2012) 11/184 *IMF Working Paper* 10.

¹⁹¹ Marcus bartley johns, Christina Busch & Gerard Mclinden 'Implementing Trade Facilitation Reform in Africa' in Patrick Low, et al. *African Perspectives on Trade and the WTO : Domestic Reforms, Structural Transformation and Global Economic Integration* (2016) 295 – 307. See also; Rodrik Dani 'Why Is Trade Reform so Difficult in Africa?' (1998) 7(1) *Journal of African Economies* 12.

for this is, is poor implementation.¹⁹² For example, developing and least developing African countries have the lowest rates in implementing WTO TFA measures.¹⁹³

This chapter aims to further emphasise the need for custom reform measures to facilitate trade by demonstrating the usefulness of the ESW as a trade facilitation tool. To achieve this, this chapter, first defines the concept of customs, and thereafter provides an overview of the state of customs in Africa. Ultimately, an in-depth discussion of ESW as a trade facilitation tool is rendered highlighting its strengths and weakness.

3.2. Customs in International Trade

International trade can be conceptualised as ‘the exchange of capital, goods, and services across international borders or territories.’¹⁹⁴ The current trend in international trade, is the liberalisation of cross-border movements and the use of trade facilitation tools to streamline and ease the increase in trade volumes amongst others.¹⁹⁵ The link between international trade and customs is that customs play a critical role in ensuring the efficiency of trade.¹⁹⁶ As in more recent times, customs administration can be seen as key role players in facilitating trade, as customs control the movement of goods.¹⁹⁷ The current trend in international trade such as increase in trade volume and increase in non-tariff barriers create an opportunity for customs to align itself with modern international trends and combat barriers to trade.¹⁹⁸ One such way is digitalising customs processes in order to efficiently handle the increase in trade and eliminate non-tariff barriers to increase inter and intra-Africa trade.¹⁹⁹

¹⁹²Michael Keen *Changing Customs: Challenges and Strategies for the Reform of Customs Administration* (2003) 48.

¹⁹³ World Trade Organisation ‘Implementation progress by measure’ Trade Facilitation Agreement Database, available at <https://tfadatabase.org/implementation/progress-by-measure>, accessed on 24 June 2021.

¹⁹⁴ ICC Academy ‘International Chamber of Commerce (ICC) Academy - Certifications in Int'l Trade & Finance’ available at <https://www.edumaritime.net/icc-academy>, accessed on 24 June 2021.

¹⁹⁵ Wu Hao *Trade Facilitation in the Multilateral Trading System: Genesis, Course and Accord* (2018) 29 – 37. See also Gamal Ibrahim, Witness Simbanegavi & Anita Prakash et al. *Industrial Development and ICT in Africa: Opportunities, Challenges and Way Forward* (2019) 4-9.

¹⁹⁶ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf, Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 7.

¹⁹⁷ Montagnat-Rentier & Gilles Parent ‘Customs Administration Reform and Modernization in Francophone Sub-Saharan Africa’ (2012) *International Monetary Fund* 16-18.

¹⁹⁸ Abeywickrama M. H & W. A. D. N. Wickramaarachchi ‘Study on the Challenges of Implementing Single Window Concept to Facilitate Trade in Sri Lanka: A Freight Forwarder Perspective’ (2015) 3(9) *Journal of Economics, Business and Management* 883.

¹⁹⁹ Moisé, Evdokia ‘Overcoming Border Bottlenecks the Costs and Benefits of Trade Facilitation’ (2009) 52-53.

Essentially, customs play a pivotal role in international trade and the expansion of trade has further placed customs under the spotlight.²⁰⁰ Thus it is important to provide an overview of the definition of customs to underline its role in trade and how the ESW fits into customs objectives.

3.2.1 Brief Definition of Customs.

Customs can be defined as a government agency that manages imports, exports and its applicable laws as well as collecting taxes from imports and exports.²⁰¹ To be more specific the WCO defines customs as:

‘Government Service which is responsible for the administration of Customs law and the collection of duties and taxes, and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.’²⁰²

The WCO further notes that customs agents do more than just clear goods, customs department equally ‘develop and implement an integrated set of policies and procedures that ensure increased safety and security, as well as effective trade facilitation and revenue collection’ to ensure that the trading system is simplified and efficient.²⁰³ To further expand on this, the role of customs will be discussed in the next section.

3.2.2 Customs Role in International Trade.

International trade consists of the movement of goods across borders, and as mentioned earlier in this thesis, customs play a pivotal role in the process of moving goods from one border to another.²⁰⁴ Within that process, customs are required to collect revenue, provide protection to domestic traders, and apply risk management strategies to prevent illicit or illegal trade all through enforcing rules that are aligned with international commitments such as the WTO and WCO.²⁰⁵ Customs are expected to perform their role effectively and efficiently while ensuring

²⁰⁰ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf, Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 7.

²⁰¹ World Customs Organisation *Glossary of International Customs Terms* (2018) 9.

²⁰² Standard 2 of the Revised Kyoto Convention of 2006.

²⁰³ World Customs Organisation ‘Customs in The 21st Century Enhancing Growth and Development Through Trade Facilitation and Border Security’ (2008) in *Meeting: Brussels* 5.

²⁰⁴ See chapter 3.2

²⁰⁵ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 5.

that trade facilitation efforts are being met.²⁰⁶ As Widdowson asserts, traditionally customs role has been:

‘[To] Implement a wide range of government policies, spanning areas as diverse as revenue collection, trade compliance and facilitation, interdiction of prohibited substances, protection of cultural heritage and enforcement of intellectual property laws’.²⁰⁷

Hors provides that although customs have a principal function of collecting revenue, their particular role might vary depending on several factors such as the state’s development level, level of state interference, the functioning role of the private sector and the capacity of the state.²⁰⁸ Hors furthermore, in highlighting the role that customs administration play in the economic development of developing state, describes that the movement of goods is generally achieved by customs controlling goods that enter and exit the country through the clearance process.²⁰⁹ As aforementioned, customs function may differ from one state to another and their role depends on changes in trading trends.²¹⁰ However, generally, customs have been considered the ‘gatekeepers’ that acts as a barrier to international trade to penetrate any given state.²¹¹ Similarly, the International Trade Centre (ITC) has observed customs controls and compliance requirements for the movement of goods to be a ‘gate’ in which goods need to pass, if regulatory requirements are not met, extra costs arise or the ‘gate’ closes. The ‘gate’ can be a hindrance rather than a passage to enter or exit.²¹²

Notwithstanding the aforementioned, the role of customs has changed over the recent years to reflect state priorities rather than the traditional customs role.²¹³ As the role of customs continuously evolve, in more recent years customs are seen as ‘the key border agencies’ responsible for all transactions to process the movement of goods and people across the

²⁰⁶ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 5.

²⁰⁷ Widdowson C ‘The Changing Role of Custom: Evolution or Revolution?’ (2007) 1 (1) *World Custom Journal* 31.

²⁰⁸ Hors Irene ‘Fighting Corruption in Customs Administration: What Can we Learn from Recent Experiences?’ (2001) 175 *OECD Development Centre Working Papers* 13.

²⁰⁹ Hors Irene ‘Fighting Corruption in Customs Administration: What Can we Learn from Recent Experiences?’ (2001) 175 *OECD Development Centre Working Papers* 13-15.

²¹⁰ Widdowson C ‘The Changing Role of Custom: Evolution or Revolution?’ (2007) 1 (1) *World Custom Journal* 31.

²¹¹ Widdowson C ‘The Changing Role of Custom: Evolution or Revolution?’ (2007) 1 (1) *World Custom Journal* 31 – 32.

²¹² Tuomisto, Victoria, Christine Pulvermacher & Craig Atkinson. ‘Faster customs, faster trade: Using technology for trade facilitation’ (2018) *International Trade Centre* 13.

²¹³ Widdowson C ‘The Changing Role of Custom: Evolution or Revolution?’ (2007) 1 (1) *World Custom Journal* 31.

border.²¹⁴ The shift in customs role includes responsibility in ensuring trade facilitation efforts are met, as per commitments to the international frameworks such as WTO TFA and the WCO Kyoto Convention of reducing trade costs, streamlining customs procedures and reducing required documents.²¹⁵ Although as customs now play a key role in facilitating international trade, the shift will not deter customs administrations from playing their traditional roles. Such as being key revenue collectors, especially in Africa, collecting trade data for statistical and regulatory purposes, ensuring trade facilitation by being responsible for effective and efficient management of borders and ensuring safe and secure national borders.²¹⁶ As customs now engage in this evolving role, De Wulf provides that for customs to be effectively achieve in their role in the coming years, customs will have to modernise its system by using effective ICT for data exchange and electronic submission of documents and at the same time ensuring coordination and cooperation with other customs administrations as well as government agencies.²¹⁷ De Wulf further alludes to ESW by arguing that for customs to effectively carry out its role in the 21st century, customs need to implement a border management system that ‘involve the merger of several different border management functions under one administrative and policy umbrella.’²¹⁸

What is clear from the above is that there has been a shift in the function of customs, with customs administration required to be continuously effective in their role the trade environment. Thus, customs have the key responsibility to modernise and digitalise its processes by introducing ICT in its border management strategies.

The next section of this chapter provides an overview of the condition of customs in Africa.

3.2.3 Overview of The Customs Conditions in Africa.

The state of customs in Africa differs from state to state due to the developmental disparities.²¹⁹ However, the general notion is that customs administration in Africa is filled with

²¹⁴ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 5.

²¹⁵ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 5-6.

²¹⁶ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 6.

²¹⁷ Ibid.

²¹⁸ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 7.

²¹⁹ Barka, Habiba Ben. ‘Border posts, checkpoints, and Intra-African trade: challenges and solutions’ (2012) *OPEV Newsletter* 4.

overburdensome procedures, outdated laws and policies, uncoordinated sectors and illicit costs and corruption.²²⁰

Overburdensome customs procedures and times goods spend at the border can increase trade costs and cause unnecessary delays.²²¹ As UNCTAD estimates that in Africa ‘the average customs transaction involves 20–30 different parties, 40 documents, 200 data elements (30 of which repeated at least 30 times), and the rekeying of 60-70% of all data at least once’ highlighting the rigorous process to move goods across the border.²²² For example, a study on South African Customs with data collected over 2 years revealed that only 10% of the delays were warranted whereas 90% of the delay was unnecessary due to overburdensome documentation.²²³ The World Bank (WB) notes in its recent data that the average time that exports are spent at the borders to be cleared by customs is 11 days in sub-Saharan African countries and 8 days on average in the Middle East and North African countries compared to 5 days for the European Union (EU) and 4 days for Central Asia.²²⁴

The aforementioned hindrances at the borders create a “thickening” of the border, meaning it becomes much more difficult for traders to transport goods through a particular country.²²⁵ For example, a “thickened” border between Kinshasa and Brazzaville discourages imports and exports between the two cities.²²⁶ ‘Thickening’ of a border negatively affect trade and states should avoid ‘thickening’ by reforming their customs administration. As recommended by Newfarm, this reform can be done by reconciling customs administration to facilitate trade and prevent ‘thickening’ of the border.²²⁷

²²⁰ Buyonge, Creck & Irina Kireeva ‘Trade facilitation in Africa: challenges and possible solutions’ (2008) 21 *World Customs Journal* 41-42.

²²¹ Tuomisto, Victoria, Christine Pulvermacher & Craig Atkinson ‘Faster customs, faster trade: Using technology for trade facilitation’ (2018) *International Trade Centre* 16.

²²² Barka, Habiba Ben. ‘Border posts, checkpoints, and Intra-African trade: challenges and solutions’ (2012) *OPEV Newsletter* 2. See also; UNCTAD ‘OECD Ministerial Conference’ available at <https://unctad.org/osgstatement/oecd-ministerial-meeting>, accessed on 1 June 2021.

²²³ Hoffman Alwyn J, Sonja Grater & Willem C. Venter et al ‘An explorative study into the effectiveness of a customs operation and its impact on trade’ (2018) 12(2) *World Customs Journal* 75-84.

²²⁴ World bank ‘Average Time to Clear Exports (days) – Sub-Saharan Africa and Middle East and North Africa’ available <https://data.worldbank.org/indicator/IC.CUS.DURS.EX?end=2020&locations=ZO-ZG&start=2020>, accessed on 30 June 2021.

²²⁵ ‘Overcoming Border Bottlenecks: The Costs and Benefits of Trade Facilitation, OECD Trade Policy Studies’ OECD (2009) 54.

²²⁶ OECD ‘African Economic Outlook 2015 Regional Development and Spatial Inclusion.’ Organization for Economic Cooperation & Development (2015) 76.

²²⁷ Newfarmer R ‘Reducing the thickness of borders to promote trade and participation in global value chains’ (2012) *OECD Issue Paper* 6.

As overburdensome procedures and high transactions costs hinder the smooth flow of goods, traders tend to try to circumvent those hindrances.²²⁸ To the same degree, Buyonge and Kireeva points out that as traders seek ways to avoid dealing with the effects of overburdensome procedures, there consequence would be the creation of the corruption opportunities.²²⁹ Traders thus pay customs agencies to perform tasks that are already within their scope of authority, which Buyonge and Kireeva term ‘facilitation fees.’²³⁰ In that sense, Buyonge and Kireeva recommend that there needs to be transparency by publishing information on the laws and capacity of customs agents, to avoid agents overstepping their powers or demanding illicit payment to perform duties that are within their mandate.²³¹

The preceding sentiment is likewise echoed by Barka, providing that corruption in customs is ‘extremely high’ in Africa because ‘the transparency and predictability of trade and business administrations are lacking.’²³² This high level of corruption of customs officials is very much evident in most African countries, for example for every 100km a bribe between 3\$ and 23\$ is facilitated at borders within West Africa,²³³ amongst other countries with high customs corruption levels in the Democratic Republic of Congo,²³⁴ Cameroon²³⁵ and Nigeria.²³⁶

The lack of co-operation and inefficient exchange of data is another obstacle for customs administration in Africa. The project manager of the Southern African Customs Union – World Customs Organisation (SACU-WCO) project, indicated that trade and development of the region is being negatively affected due to customs that are not co-operating, and the exchange of data is crippled with errors to advance the trading system in Africa, customs need to coordinate and harmonise standards.²³⁷ As Nxumalo puts it, there needs to be interdependency

²²⁸ Hors I ‘Fighting Corruption in Customs Administration: What Can we Learn from Recent Experiences?’ (2001) 175 *OECD Development Centre Working Papers* 18.

²²⁹ Buyonge Creck & Irina Kireeva ‘Trade facilitation in Africa: Challenges and Possible Solutions’ (2008) 2.1 *World Customs Journal* 45-6.

²³⁰ Ibid.

²³¹ Ibid.

²³² Barka, Habiba Ben. ‘Border posts, checkpoints, and Intra-African trade: challenges and solutions’ (2012) 5.

²³³ Barka, Habiba Ben. ‘Border posts, checkpoints, and Intra-African trade: challenges and solutions’ (2012) 6.

²³⁴ Buyonge, Creck & Irina Kireeva ‘Trade facilitation in Africa: challenges and possible solutions’ (2008) 2.1 *World Customs Journal* 46.

²³⁵ Enact ‘Central Africa / Cameroon’s customs agency said to be the most corrupt’ available at <https://enactafrica.org/enact-observer/camerouns-customs-agency-said-to-be-the-most-corrupt>, accessed on 01 July 2020.

²³⁶ Onogwu Daniel ‘Corruption and the Efficiency of Customs Clearance Process in Selected Countries’ (2018) *Review of Public Administration and Management* 1-8.

²³⁷ Dalton Nxumalo ‘Customs systems interconnectivity: the challenges and opportunities for Customs administrations in the SACU region’ *World Customs News* available at <https://mag.wcoomd.org/magazine/wco-news-85/interconnectivity-sacu-region/>, accessed on 1 June 2021.

of customs administrations to meet the vision of a united Southern Africa.²³⁸ Lack of interconnectivity has also negatively impacted most of the states in East Africa, ultimately the lack of harmonisation, ICT and automated customs systems has created obstacles to reduce trade cost and trade efficiency.²³⁹

It is apparent from above that customs administration in Africa contains numerous bottlenecks and red tapes. Whether it is corruption, time delays, high transaction costs, unnecessary document requirements, uncoordinated departments, the state needs to acknowledge these obstacles, to enable implementation of a trade facilitation measures. The subsequent section of this paper addresses whether trade facilitative measures like an ESW can aid in the curbing these challenges.

3.3 The Electronic Single Window Concept.

The implementation of the ESW is the process of moving from a physical to an automated system. As highlighted in chapter 1 of this thesis digitalisation can be defined as moving from physical to electronic submission.²⁴⁰ Thus, the ESW can be seen as a digitalised trade facilitation tool. Furthermore, the digitalisation of customs processes is widely encouraged and recognised. The Secretary-General of the WCO, Kunio Mikuriya coined the term “digital customs” and it means:

‘Using digital systems to collect and safeguard Customs duties, to control the flow of goods, people, conveyances and money, and to secure cross-border trade from crime, including international terrorism which continues to rear its head across the globe’.²⁴¹

‘Digital Customs’ can likewise be defined as:

‘.. any automated or electronic activity that contributes to the effectiveness, efficiency, and coordination of Customs activities, such as automated Customs clearance systems, the Single

²³⁸ Ibid.

²³⁹ Barka, Habiba Ben ‘Border posts, checkpoints, and Intra-African trade: challenges and solutions’ (2012) 8.

²⁴⁰ See chapter 1.6.4

²⁴¹ Kunio Mikuriya ‘Digital Customs, the opportunities of the Information Age’ World Customs Organisation news available at <https://mag.wcoomd.org/magazine/wco-news-79/digital-customs-the-opportunities-of-the-information-age/>, accessed on 10 January 2021.

Window concept, electronic exchange of information, websites to communicate information and promote transparency, and the use of smartphones.’²⁴²

It is submitted in this thesis that the ESW is relevant to the description of digitalisation in the context of customs. This study further expands on the ESW concept below.

The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Recommendation No.33 defines the concept of the ESW to be:

‘a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single-entry point to fulfil all import, export, and transit related-related regulatory requirements. If information is electronic, then individual data elements should only be submitted once.’²⁴³

The description by the UN/CEFACT is the widely accepted as the standardised definition of an ESW.²⁴⁴ The definition recognises the limiting role that non-tariff barriers play in international trade. The UN/CEFACT further recognises the importance of curbing non-tariff barriers through the use of modernisation and harmonisation for the efficacy of customs and their procedures. The ESW is thus aligned to the UN/CEFACT vision to simplify and harmonise the process for an effective international commerce system.²⁴⁵

The WCO describes the ESW similarly to the UN/CEFACT Recommendation 33 by providing that the ESW is a “cross border, ‘intelligent’ facility that allows parties involved in trade and transport to lodge standardized information, mainly electronic, with a single entry point to fulfil all import, export and transit-related regulatory requirements.”²⁴⁶ While the WCO definition of the ESW is largely similar to that provided by UN/CEFACT, the main difference with the

²⁴² World Customs Organisation ‘World Customs Organization declares 2016 to be the year of Digital Customs’ available at <http://www.wcoomd.org/en/media/newsroom/2015/november/world-customs-organization-declares-2016-to-be-the-year-of-digital-customs.aspx#:~:text=The%20term%20Digital%20Customs%20refers,to%20communicate%20information%20and%20promote>, accessed on 10 January 2021.

²⁴³ The United Nations Economic Commission for Europe Recommendation on Establishing a Single Window (Recommendation 33, ECE/TRADE/352).

²⁴⁴ World Customs Organisation ‘Understanding the Single Window Environment’ (2017) 1(1) *Single Window Compendium* 18.

²⁴⁵ UNECA ‘Mission Statement’ available at <https://unece.org/trade/uncefact/introduction>, accessed on 21 June 2021.

²⁴⁶ World Customs Organisation ‘Understanding the Single Window Environment’ (2017) 1.1 *Single Window Compendium* 20.

description between the WCO and UN/CEFACT is that the WCO emphasises the use of ICT by providing the involvement of electronic submission of data.

The World Bank (WB) defined the ESW as ‘a system that receives trade-related information and disseminates it to all the relevant governmental authorities, thus systematically coordinating controls throughout trade processes.’²⁴⁷ The WTO, under the Trade Facilitation Agreement (TFA), defines the ESW as a tool “enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies.”²⁴⁸

The African Alliance for e-Commerce (AAEC) is a framework supporting trade facilitation efforts, by advocating for the implementation of a single window, both nationally and regionally, aligned with international guidelines.²⁴⁹ The AAEC provides an inclusive and elaborate view of the ESW, which is similarly worded to that of the UN/CEFACT definition. The AAEC propose that the ESW be defined as:

‘The Single Window for trade is a national or regional system mainly built on a computer platform initiated by a Government or an ad hoc entity to facilitate the performance of import, export or transit-related formalities, by offering a single point of submission of standardized data and documents in a bid to fulfil official requirements and facilitate logistics.’²⁵⁰

In analysing the AAEC definition of the ESW, the terms ‘government or *ad hoc* entity’ can be interpreted to accommodate the private sector to address issues around the ESW.

In an empirical research on the ESW and its implementation, Vive understood the ESW to be:

‘... a single-entry point and single-submission (or single interface), enabling traders to comply with regulatory requirements of export and import in a more efficient manner. Furthermore, SWS enables coordination and connection among different border government agencies ensuring that trade activities and transactions are safe, legitimate and seamless across trade and supply chains.’²⁵¹

²⁴⁷ World Bank *Doing business 2017: Equal opportunity for all* 14th ed. (2016) 79.

²⁴⁸ Article 10.4 of the Trade Facilitation Agreement of 2017.

²⁴⁹ AAEC ‘Presentation’ available at <https://african-alliance.org/AAEC/presentation/>, accessed on 23 June 2021.

²⁵⁰ AAEC ‘Guideline for the Implementation of a Single Window for Africa’ (2013) 16.

²⁵¹ Lauro Vives ‘Study on Single Window Systems’ International Interoperability: Key Issues for Its Implementation’ (2018) *APEC Policy Support Unit* 11.

To further expound on the concept of the ESW, Ahn and Han provides a simplified definition by describing the ESW as a trade facilitation system that would allow traders to submit all documents only once through a single platform to fulfil regulatory requirements.²⁵²

From the above-mentioned perspectives of the concept of the ESW, it is clear that the ESW does not have an official definition. However, most of the definitions provided above recognise that the ESW is a system that creates an environment where information need only be submitted once, and such a system creates a platform for traders and relevant agencies to exchange data. What is clear from the above is that ESW is a tool that can be enhanced with digitalisation or ICT. For example, the WCO language usage of ‘electronic’ and ‘intelligent’ clearly calls for modernisation, digitalisation, and the use of ITC to optimise the experience of the ESW user.²⁵³ The ESW should aim to be electronic to align itself with modern digital area and current international trends. As provided by the WCO, the ESW, if not electronic, would be strenuous or difficult to process hard copy documents.²⁵⁴ The next section of this chapter thus provides for the basic electronic system for the ESW which is considered best practice.

3.3.1 Brief Overview of The Basic Models of the ESW.

There are different types of ESW models that States can adopt. States can adopt the ESW that is tailored to fit the needs and demands of that particular state.²⁵⁵ The need for a tailored reform approach has been reiterated in this thesis,²⁵⁶ highlighting the importance of African states to implement reform strategies that are aligned with their developmental position.

The ability to adopt an ESW model that is country-specific is exemplary because it eliminates the one-size fit all approach which conflicts with the situation of the disparities between African States. However, the basic models act as guidance mechanism to help inform countries when proposing to implement the ESW.

²⁵² Ahn, Byung-Soo & M. Han ‘A Comparative Study on the Single Window Between Korea and Singapore’ (2007) 11 *Journal of Korea Trade* 279-303.

²⁵³ World Customs Organisation ‘Building a Single Window Environment’ (2017) 1(1) *Single Window Compendium* 20.

²⁵⁴ World Customs Organisation ‘Building a Single Window Environment’ *Single Window Compendium Vol 1* (2017) 6.

²⁵⁵ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 7.

²⁵⁶ See chapter 1.1.7

As mentioned in chapter 2 of this thesis, UN/CEFACT in Recommendation 33, is widely considered as best practice and thus the standard to judge the adoption of an ESW.²⁵⁷ Recommendation 33 provides three basic models for the ESW. These three basic models are outlined below as follows:

- a. **A Single Authority:** There exists a single authority that receives relevant information. The single entity then sends the received information to the relevant authorities and coordinates controls of the different agencies to ensure the unhindered flow of the logistic chain.²⁵⁸
- b. **A Single Automated System:** This is an electronic system that process information through an automated system. This system can be integrated, which is when information is processed through a single entity, or the system can be categorised as interference which is when information is received and is coordinated with other interfaces to send the information to the different relevant governmental agencies. The Single Automated system can be a consolidated system of both the integrated and interface system.²⁵⁹
- c. **An automated Information Transaction System:** This system receives and sends information electronically. The trader sends declarations or any required documents electronically, and the agent's response is sent back electronically to the trader. Transactional costs such as taxes and duties are likewise processed electronically.²⁶⁰

What is common in all the three basic models provided by UN/CEFACT is that they all have a single authority which creates an ecosystem for traders and government agencies to exchange data. Regardless of what model is adopted, in most instances, the ESW should have the key characteristics highlighted in the definition of the ESW by UN/CEFACT Recommendation 33.²⁶¹ The key features of the ESW are: a tool for traders and relevant trading businesses, the tool allows for uniformed data, there is single access, parties submit data only once to satisfy required rules and procedures.²⁶² The key features need to be present in the ESW not only to

²⁵⁷ African Alliance for E-Commerce 'Guideline for Single Window Implementation for Africa' (2013) 14.

²⁵⁸ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 7.

²⁵⁹ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 8.

²⁶⁰ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 9.

²⁶¹ World Customs Organisation 'Understanding the Single Window Environment' (2017)1(1) Single Window Compendium 17.

²⁶² UN/CEFACT Recommendation 33.

be categorised as an ESW but to likewise assess and maximise the benefits of the ESW. Thus, the benefits of the ESW will be discussed in the next section.

3.3.2 Benefits of The ESW.

The general benefit of the ESW is echoed throughout this study²⁶³ it has been highlighted that a system which allows relevant agents and traders to electronically exchange information for the efficient movement of goods, has considerable benefits to several key players.²⁶⁴ Such a system that simplifies a trading system improves trade performance through the elimination of unnecessary measures, costs and time delays to move goods, which benefits traders, customs officials and the state as a whole.²⁶⁵ The benefits provided by the ESW to the mentioned parties will be discussed below.

3.3.2.1 States.

The ESW serves as a trade facilitation tool that can ‘help facilitate regional collaboration, integration and exchange of regional trade information’ which is a substantial approach to accelerate the development of the AfCFTA and its objectives.²⁶⁶ The modernisation of customs processes and procedures in the context of solutions such as the ESW will increase the competitiveness of the state because of the reduction in trade costs associated with the reform.²⁶⁷ The automation of the documentation process provides better control of documents, as automation ensures that all documents are recorded and thus increase revenue collection.²⁶⁸ In addition, the ESW affords easier cooperation with not only other customs agencies but likewise with other government agencies, states need to ensure that the ESW is backed by strong political will and government support.²⁶⁹ This is because the ESW aids economic development and acts as an effective solution to meet the efforts to deepen regional integration in the context of improving intra-Africa trade, ultimately being in alignment with the objectives of the AfCFTA.

²⁶³ See chapter 3.3.2.

²⁶⁴ See chapter 3.3.2.

²⁶⁵ Tuomisto, Victoria, Christine Pulvermacher, and Craig Atkinson ‘*Faster Customs, Faster Trade: Using Technology for Trade Facilitation.*’ (2018) 3-5.

²⁶⁶ Economic and Social Commission for Western Asia (ESCWA) ‘Key Factors in Establishing Single Windows for Handling Import/Export Procedure and Formalities: Trade Facilitation and the Single Window’ (2011) 9.

²⁶⁷ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 11.

²⁶⁸ De Wulf Luc ‘Strategy for Customs Modernization’ in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 17.

²⁶⁹ See chapter 3.5

3.3.2.2 Customs.

The implementation of the ESW provides an opportunity for customs to consolidate its processes, creating a harmonised system of control.²⁷⁰ Having better control of systems allow customs to manage risk more efficiently and effectively facilitate trade.²⁷¹ This is because the ESW provides a systematic risk management tool. Customs likewise benefit from the systemic management tool because data can be accurately stored and collected allowing better security and accuracy of regulatory measures.²⁷²

Having a system that can secure and facilitate payments of tax and duties, not only creates faster payment but can likewise eliminate bottlenecks such as fraud and corruption in customs, allowing for a more efficient and secure trading system.²⁷³ The ESW allows for information to be published, creating a relationship of transparency between traders and customs agents.²⁷⁴ Consequently, this creates accountability and better trust in customs officials. In addition, the publication of information creates a greater chance of compliance from traders and eliminates abuse of power or unrelated discretionary powers from customs agents which can trigger the prospect for fraud and corruption.²⁷⁵ In essence customs have better control, can better assess risks, facilitate trade, and can optimise more revenue because the system will allow for better compliance from traders.²⁷⁶

3.3.2.3 Traders.

The electronic submission of documents creates a less physical exchange of data, which is particularly important in recent times, given the disruption due to the COVID-19 pandemic. The move from physical to electronic submission of data provides a decrease in cost to the traders because traders will not have to travel across states to submit various documents to

²⁷⁰ De Wulf Luc 'Strategy for Customs Modernization' in De Wulf Luc & José B Sokol *Customs Modernization Handbook* World Bank (2005) 11.

²⁷¹ World Customs Organization 'Risk Management Guide' (2003) 4-5.

²⁷² World Customs Organization 'Risk Management Guide' (2003) 4-5.

²⁷³ United Nations Economic and Social Commission for Western Asia (Escwa) 'Key Factors In Establishing Single Windows For Handling Import/Export Procedures And Formalities: Trade Facilitation And The Single Window' (2011) 10.

²⁷⁴ See chapter 3.5

²⁷⁵ United Nations Economic and Social Commission for Western Asia 'Establishing the Single Window for Handling Import/Export Procedures and Formalities' (2010) 10.

²⁷⁶ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 3.

various customs agents and relevant parties.²⁷⁷ The digitalisation of customs processes means that goods can be moved easier and quicker across the border. This is because the ESW aims to reduce the time that goods spend at the border by streamlining customs procedures.²⁷⁸

Publishing important information such as the ‘opening hours of border crossings, applicable fees and tariff schedules, and descriptive outlines of the procedures and formalities’ through the ESW platform is important because an information portal provides traders with reliable and clear information.²⁷⁹ The electronic publication of information can decrease traders costs, as traders can access the information where ever they are, removing the barrier of having to travel to access reliable and accurate information. In addition, with the ESW aim to publicise documents through the system, the ESW would be satisfying international calls from the WTO, WCO and AfCFTA amongst others, for traders needs to be considered holistically, and for information to be published in a timely, accessible, and accurate manner, as provided in this thesis.²⁸⁰

Essentially, predictability can be made asserted easier because the information is published transparently. The publication of information likewise creates transparency and reliability of frameworks, reducing corruption and unforeseen decisions.²⁸¹ Furthermore, the traders can also rely on the information to settle disputes.

Notwithstanding the benefits of implementing the ESW, there are challenges in the implementation process of the ESW. Evaluating the challenges in the decision process of implementing the ESW provide a crucial step in maximising the benefits of the ESW. Several international organisations have provided guides that highlight the common challenges states face when implementing the ESW. For example, UNECA highlighted challenges such as strategic alignment and infrastructure alignment challenges. Strategic alignment provides that states are challenged with aligning customs business strategies, such as reducing the number of documents required, reducing trade transactions costs and time and achieving trade facilitation goals with its IT strategy such as automating regulatory requirements and enabling

²⁷⁷ Bill Gain ‘Trade facilitation: Critical to COVID-19 recovery’ 2 November 2021 *World Bank Blogs* available at <https://blogs.worldbank.org/trade/trade-facilitation-critical-covid-19-recovery>, accessed 5 December 2021.

²⁷⁸ See chapter 3.5

²⁷⁹ United Nations Conference on Trade and Development ‘Technical Notes on Trade Facilitation Measures’ (2011) 4.

²⁸⁰ See chapter 2.

²⁸¹ UN/CEFACT Recommendation and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government: Recommendation No. 33 (2005) 3.

the exchange of documents and data.²⁸² Infrastructure alignment means that states are often faced with the challenge of aligning the organisation structure of customs which include the operational model, governance mechanism as well as the legal framework with a well-designed and suitable IT solution.²⁸³

Also, the Inter-American Development Bank (IDB) has highlighted common challenges faced by states when implementing the ESW. These challenges include lack of political will and government support, inadequate legal environment, insufficient cooperation and coordination, non-compliance and lack of lead agency.²⁸⁴ The mentioned impediments mirror those of the Recommendation 33 standard practice for implementing an ESW which has been highlighted in chapter 2 of this thesis.²⁸⁵ Being that those standards have been noted as an impediment to the efficient implementation of the ESW, states need to ensure that Recommendation 33 standards are prioritised and implemented to avoid encountering barriers that can lead to delays or failure of implementing the ESW.

What is clear from the challenges highlighted above is that states need to align customs functions with an effective IT strategy and solutions. Furthermore, states should avoid such impediments by have good governance and government support, enable a sound legal environment, ensure standardisation and harmonisation of policies and deciding on a lead agency.

3.4 Conclusion.

This chapter laid down the reasons and argument in advocating for customs reforms as a means to facilitate trade. This was achieved by, first, defining customs administration, the role customs play in international trade and then highlighting the condition of customs administration in Africa. Regarding the role of customs, it was highlighted that the traditional key role that customs play in both international trade and Africa specifically, is that of a revenue collector. However, it was noted that the role of customs has shifted with added key roles such as championing trade facilitation.

²⁸² United Nations Economic Commission for Europe 'Single Window information framework' (2011) 23-4.

²⁸³ United Nations Economic Commission for Europe 'Single Window information framework' (2011) 23-4.

²⁸⁴ Inter-American Development bank '*Interoperability at The Border Coordinated Border Management Best Practices & Case Studies*' (201) 25-32.

²⁸⁵ See chapter 2.7.

While assessing the state of customs in Africa, this chapter established that despite the differences in the state of customs administration in Africa, customs in Africa commonly face red tapes and bottlenecks that are creating barriers to trade. The chapter pointed to the need for digitalisation and modernisation of customs processes.

Customs reforms were discussed within the context of the ESW. In doing so, this chapter discussed the concept of the ESW, highlighting the definitions as provided by different international organisations and thereafter highlighting the relevance of the ESW as a fitting digitalised custom reform tool. Notwithstanding the benefits of the ESW, this chapter highlighted the need for states to draw lessons from international recommendations such as Recommendation 33 and other countries that have implemented the ESW. This will help provide best practices. That is why the next chapter of this thesis will analyse the implementation of the ESW in Kenya and Senegal to provide a case analysis for other countries to use as guidance when deciding to implement the ESW. Such analysis showcases the role and impact of customs modernisation in the form of ESW in both countries.

CHAPTER 4 THE ESW IN AFRICA - A CASE STUDY OF SENEGAL AND KENYA

4.1 Introduction.

The previous chapter looked at the customs situation in Africa. Based on the research in chapter 3 it was established that customs administration in Africa is plagued with complex processes, overburdensome procedures, time delays, fraud, illicit costs, amongst many others.²⁸⁶ This chapter thus seeks to further the discourse from chapter 3 by highlighting reformative tools such as the Electronic Single Window (ESW) to tackle complex customs processes, particularly in Senegal and Kenya.

The two countries are chosen as a case study for this thesis because both Senegal and Kenya have implemented the ESW as a customs reform to simplify its process for the movement of goods across its border. The choice of countries accords with the objective of this thesis which is to advance digitalisation of customs processes in Africa. This is shown by contextualising the legal environment for the implementation of the ESW in Africa, what applicable lessons can other countries in Africa draw from such implementation and its role in deepening regional integration as well as increasing intra-Africa trade. Furthermore, Senegal is chosen because of the widely renowned success of its ESW, creating a recognised blueprint for the implementation of the ESW and boost as best practice, per international standards. Kenya is chosen to allow for a broader overview of the trends on the African continent given the heterogeneity of African countries in terms of needs, development and policy. The case study on Kenya's ESW acts as a second perspective, to the first study on the implementation of Senegal's ESW. Essentially, representing a broader view for the assessment of the ESW in Africa.

To provide context on the ESW as a customs reform strategy in Senegal and Kenya, the first section of this chapter provides a brief overview of the customs situation in both countries. This is followed by highlighting the countries' trade facilitation commitments, for the adopted ESW, subsequently, the chapter discusses the legal environment for the implementation of the ESW in both countries. Furthermore, the discussion is backed up by an analysis on the benefits of the customs reform tool implemented by both countries and lastly providing the lessons for a sound legal environment.

²⁸⁶ See chapter 3.2.3

4.2 The Case of Senegal.

This section of the chapter provides a brief overview of Senegal's customs situation before implementing the ESW, further provide overview of their relevant international trade facilitation commitments, followed by a discussion on the implemented ESW. A discussion on the legal environment of the ESW is provided, thereafter the benefits derived from implementing the ESW are highlighted.

4.2.1 Brief Overview of Senegal's Customs Situation Before the development of their ESW.

As mentioned in chapter 3 of this thesis, Customs play an important role in the economic development of African states.²⁸⁷ This is true for Senegal where customs aid in the development of the state by performing the crucial roles of collecting duties and taxes as a fiscal mission for the state; implementing the regulatory framework; ensuring secure borders and facilitating trade.²⁸⁸ The customs sector's importance in revenue collection in Senegal is well established, as indicated by the World Bank database. It is indicated that a big portion of the state's fiscal revenue comes from customs duties and taxes, for example for the year 2019, Senegal's customs revenue collection for imports amounted to 39% and export to 24% of its GDP.²⁸⁹ Thus, with the significant role that customs play for its economy, Senegal must make a continuous effort to ensure that the customs administration is sufficient and facilitates the developmental level of its economy as well as global trade.

Before Senegal took steps to facilitate its trading system, the customs administration was overwhelmed with customs bottlenecks such as overburdensome customs administration, time delays, high transactions costs and corruption.²⁹⁰ The bottlenecks were likewise noted in the World Bank (WB) series regarding trade reform projects, where it provided that Senegal's clearance process fostered duplication, was time-consuming, as it took traders four days to collect documents and the process often created many errors.²⁹¹ This was because traders had

²⁸⁷ See chapter 3.

²⁸⁸ Douanes Senegal 'Customs Mission' available at <https://www.douanes.sn/en/node/205>, accessed on 07 July 2021.

²⁸⁹ World Integrated Trade Solutions 'Senegal Monthly Trade Data' *World Bank* available at <https://wits.worldbank.org/countrysnapshot/en/SEN>, accessed on 07 July 2021.

²⁹⁰ Santander 'Senegal; Customs and Transportation' available at <https://santandertrade.com/en/portal/international-shipments/senegal/customs-and-transportation>, accessed on 08 July 2021.

²⁹¹ Diagne, Ibrahima *Developing a Single Window to Facilitate Trade in Senegal Investment Climate in Practice* (2010) 2.

to submit the same documents to different agencies.²⁹² Besides the unnecessary and time-consuming procedures, Senegal's customs was also plagued with corruption in the context of avoiding payment of customs duties and taxes but as provided by David and Daubrée, due to Senegal's trade facilitation strides, fraud in the aforementioned context has decreased.²⁹³

The modernisation of customs and its neediness for reform can likewise be attributed to the regional and international responsibility to facilitate trade and improve international trade. Senegal has both international and regional obligations to reform its customs to meet trade facilitation objectives, these legal obligations and whether these obligations have been incorporated in domestic legal frameworks will be discussed subsequently.

4.2.2 Senegal Trade facilitation Commitments.

Besides reforming customs because of the important role that the customs administration plays in Senegal's economic development, Senegal being a party to several international organisations places an obligation on the state to reform its customs administration and procedures. Therefore Senegal's trade policy environment is partly due to its regional and international commitments.²⁹⁴ For example, since late 1963, Senegal has been a member of GATT and in 1995 became a member of the WTO, in addition in 2001 Senegal ratified the WCO Kyoto Convention, and in 2016, the state ratified the Trade Facilitation Agreement (TFA).²⁹⁵ More recently in 2019, as a member of the African Union (AU), Senegal ratified the AfCFTA.²⁹⁶ As mentioned earlier in this thesis, the WTO, WCO and AfCFTA universally promote the ESW as a trade facilitation tool and a way to deepen regional trade and integration.²⁹⁷

In terms of the TFA, Senegal initially committed to 19 measures of the TFA provisions to be implemented by 22 February 2018.²⁹⁸ Two of such relevant measures that Senegal committed to implementing by 22 February 2018 was Article 10.4 calling for the implementation of an

²⁹² Diagne, Ibrahima Developing a Single Window to Facilitate Trade in Senegal Investment Climate in Practice (2010) 2.

²⁹³ Stasavage, David & Cécile Daubrée 'Determinants of customs fraud and corruption: Evidence from two African countries' (1998) 138 OECD Development Centre Working Papers 12-31.

²⁹⁴ World Trade Organisation 'Annex 7 Senegal' (2016) 423.

²⁹⁵ World Trade Organisation 'Senegal and the WTO' available at https://www.wto.org/english/thewto_e/countries_e/senegal_e.htm, accessed on 05 August 2021.

²⁹⁶ Tralac 'Status of AfCFTA Ratification' available at <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>, accessed on 5 October 2021.

²⁹⁷ See chapter 1, 2 & 3.

²⁹⁸ World Trade Organisation 'Annex 7 Senegal' Trade Policy Review (2016) 429.

ESW and Article 8 calling for customs cooperation.²⁹⁹ Article 10.4 and Article 8, amongst other Articles, are closely interlinked and act as a prerequisite for customs reform, as mentioned in chapter 3, cooperation of customs agency is crucial for the proper functioning and efficacy of the ESW.³⁰⁰

In addition to being a member of the AU, Senegal belongs to two regional bodies, namely, the Economic Community of West African States (ECOWAS)³⁰¹ and the West African Economic and Monetary Union (WAEMU).³⁰² Both regional bodies have advanced the promotion of the ESW, for example in 2006, the WAEMU held a meeting in Dakar with the council of Trade Ministers, where the council recognised that implementing the ESW ‘can efficiently contribute to the removal of obstacles hindering trade’ this then establishes that the ESW is can act as a tool to combat trade bottlenecks.³⁰³ Since 2013, the WAEMU also implemented the Trade Facilitation Programme (PRFE) aimed to facilitate trade, modernise the customs administrations, increase the transparency and predictability of trade transactions and improve coordination and cooperation of border management.³⁰⁴ In addition, the WAEMU and the WCO concluded a memorandum of understanding (MoU) in 2017 which acts as a framework between the two organisations to promote customs cooperation and the modernisation of customs administration while prioritising key pillars such as trade facilitation and the WCO Kyoto Convention.³⁰⁵ WAEMU founding objectives, provided under Article 3 of its Treaty advocates for the removal of non-tariff barriers for the free movement of goods, services and people within the region.³⁰⁶ Senegal being a member of the WAEMU thus has a regional obligation to meet its commitments in the context of trade facilitation and customs reform to deepen regional integration and increase trade.

²⁹⁹ World Trade Organisation ‘Annex 7 Senegal’ *Trade Policy Review* (2016) 430.

³⁰⁰ See chapter 3.

³⁰¹ ECOWAS is made up of 15 Countries and advocates for regional integration, peace and stability.

³⁰² International Monetary Fund ‘West African Economic and Monetary Union documents’ available at <https://www.imf.org/en/Publications/SPROLLS/WAEMU-362#sort=%40imfdate%20descending>, accessed on 05 October 2021.

³⁰³ African Alliance for Electronic Commerce (AACE) ‘About AACE’ available at http://www.swguide.org/single_window/about_aace.php, accessed on 05 October 2021.

³⁰⁴ International Trade Centre ‘Targeting support for trade facilitation in West Africa’ available at <https://www.intracen.org/layouts/2coltemplate.aspx?pageid=47244640256&id=47244644563>, accessed on 05 October 2021.

³⁰⁵ World Customs Organisation ‘WCO and WAEMU conclude MOU’ available at <http://www.wcoomd.org/en/media/newsroom/2015/april/wco-and-waemu-conclude-mou.aspx>, accessed on 05 October 2021.

³⁰⁶ Article 3 of the WAEMU Treaty.

Just like WAEMU, ECOWAS has the Trade Facilitation West Africa (TFWA) program which aims to improve the efficiency of the movement of goods to increase both inter and intra-Africa trade.³⁰⁷ Furthermore, ECOWAS has established a framework that advocates for the free movement of goods, free trade area and establishment of a customs union under the 1979 Trade Liberalization Scheme (ETLS) to deepen regional integration.³⁰⁸ The program and scheme essentially compliment Article 3 of the ECOWAS revised treaty which highlights the objective to remove non-tariff barriers (NTB) in the region.³⁰⁹

Furthermore, Senegal has several national frameworks aimed at facilitating trade and improving regional integration. For example, in 2014, the state adopted the Emerging Senegal Plan (ESP) which aims to deepen regional integration, remove trade barriers and improve intra-Africa trade, through the reform of infrastructure and modernisation of public administrations, amongst other key pillars for social and economic development to accelerate an emerged market by 2035.³¹⁰

From the above discussion, it is apparent that Senegal's trade facilitation policy aims to increase trade and strengthen regional integration, by introducing reforms to contribute to its trade facilitation commitments. This is evident by Senegal's Strategic orientation document compiled by the Ministry of Trade, Industry and the Informal Sector which provides that Senegal's trade policy which consists of both international and regional commitments and has a trade policy environment that aims to reduce the trade deficit, deepen regional integration, improve supply chain, and penetrate the international trade market.³¹¹

Besides having a sound trade facilitation environment, the Senegal government likewise realised that although there exists a sound trade facilitation foundation, the overburdensome customs regulatory requirements harmed both inter and intra-regional trade.³¹² Thus in 2004, the government launched the ESW called ORBUS. This ESW was established with financial aid from the African Development Bank (AfDB) and is run by a company called GAINDE

³⁰⁷ Trade Facilitation West Africa 'About the TFWA Program' available at <https://tfwa.projects.ecowas.int/index.php/en-us/>, accessed on 05 October 2021.

³⁰⁸ Safaeimanesh, Shahrzad & Glenn P Jenkins. 'Trade Facilitation and Its Impacts on the Economic Welfare and Sustainable Development of the ECOWAS Region' (2021) 13.1 *Sustainability (Basel, Switzerland)* 3.

³⁰⁹ Article 3 of the ECOWAS Revised Treaty.

³¹⁰ Presidency of Senegal 'Emerging Senegal' available at <https://www.presidence.sn/en/pse/emerging-senegal>, accessed on 05 October 2021.

³¹¹ Decree No. 2013-1280 of 2013.

³¹² Diagne Ibrahima 'Developing a Single Window to Facilitate Trade in Senegal. Investment Climate in Practice' *Trade Policy Review* (2010) 3.

2000 which is the Public and Private Partnership (PPP) developed to aid Senegal's customs administration reform. The enabling legal environment for the implementation of the ORBUS system is discussed below.³¹³

4.2.3 The Legal Environment for the Implementation of ORBUS.

With customs playing a crucial role in the security of the State, the administration of trade, revenue collection and the development of a state, it is important for customs administration to have a sound legal environment to carry out their duties and responsibilities.³¹⁴ A sound legal environment creates transparency, predictability and regulates procedures.³¹⁵ Thus, in the absence of a sound legal environment, the State creates a determinant of unfavourable development, as the state seems less attractive for business and particularly foreign direct investment, which is crucial for African states.³¹⁶

As mentioned earlier in this thesis, Senegal trade policy calls for trade facilitation in the context of reform and more specifically, the trade facilitation policy is aligned with the implementation of the ESW as a reformative measure.³¹⁷ However, the State had to still provide regulatory reform and introduce new laws to maximise the efficiency of ORBUS.

With the launch of the paperless project in 2008, the State needed to ensure that the ORBUS is supported by a comprehensive legal environment. Thus, in 2008, a new legislation was enacted to protect the information passing through the ORBUS system. Laws such as Law No. 2008-08 of January 25 was developed for electronic transactions in the context of protecting the information provided for in a document.³¹⁸ Essentially, the law was enacted to protect 'electronic transactions, including transactions related to electronic commerce, electronic contract conclusion, electronic signatures and proof electronics and electronic transmission of documents or administrative acts'.³¹⁹ Concerning support for electronic documents, the State adopted Information Society law 'No. 2008-12 of January 25, 2008' which is a law protecting

³¹³ Trade Facilitation Implementation Guide 'A Road Toward Paperless Trade: Senegal's Experience' *UNECE* (2016) 1.

³¹⁴ Kunio Mikuriya 'Legal framework for customs operations and enforcement issues' in De Wulf, L & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 51.

³¹⁵ Kunio Mikuriya 'Legal framework for customs operations and enforcement issues' in De Wulf, L & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 51.

³¹⁶ Ibi Ajayi S 'The Determinants of Foreign Direct Investment in Africa' in *Foreign Direct Investment in Sub-Saharan Africa: Origins, Targets, Impact and Potential* (2006) *African Economic Research Consortium* 19-20

³¹⁷ See chapter 4.2.1

³¹⁸ Law No. 2008-08 of January 25, 2008.

³¹⁹ Law No. 2008-08 of January 25, 2008.

an individual's data to combat privacy breaches that may occur when processing personal data that links directly or indirectly person.³²⁰

It is established in this thesis that Senegal has several international and regional commitments, however for maximum impact those commitments have to be domesticated. As 'the main vehicle to achieving harmonisation, standardisation and simplification of rules, procedures and documentation are through the accession to and ratification of international conventions on transit transport and trade facilitation.'³²¹ Thus, aligned with the state international and regional objectives of customs reform, in 2014 a new Customs Code Act was implemented, repealing the outdated 1987 Customs code, the 2014 Customs regulates the Senegal customs regime.³²² The Customs Code Act, functions as a way to administrate and regulate the customs procedures in Senegal. Such administration and regulation will not only help facilitate trade but to likewise provides an opportunity to have a comprehensive trade strategy, that will help States meet intra-African and international trade desires.

Senegal's 2014 regulatory reform features several of its international and regional commitments, incorporating measures of the WTO Customs Valuation Agreement,³²³ the aforementioned, the International Convention on the Simplification and Harmonization of Customs Procedures (revised Kyoto Convention), the Johannesburg Convention on Mutual Administrative Assistance in Customs Matters (Johannesburg Convention) and the WAEMU Customs Code.³²⁴ For example, article 18 of the Custom code incorporates WTO Customs Valuation Agreement, by providing that goods should be valued per the WTO Customs Valuation Code, and if such is not possible, the valuation should be as far as possible following the rules of WTO customs valuation code.³²⁵ The Customs Code Act likewise provides that customs clearance procedures must be simplified and streamlined.³²⁶ The Senegal state thus have a legislation background to develop the ESW, as the ESW is a tool aimed to facilitate customs procedures.

³²⁰ Law No. 2008-12 of January 25, 2008.

³²¹ Mwachita, Mwanaulu Issa 'The effects of the implementation of the Kenya National Electronic Single Window System on trade facilitation' *Dissertation* (2016) 59.

³²² World Trade Organisation Annex 7 Senegal of 'Trade Policy Review' (2016) 429.

³²³ The customs value agreement is a way to standardized and harmonization customs valuation processes by ensuring just, uniformed and a neutral valuation of goods system.

³²⁴ Muhammad Shoaib Anwar Trade & Investment Attaché 'IMPORT PROFILE OF SENEGAL' 21

³²⁵ Article 18 of Law No. 2014- 10 of February.

³²⁶ Article 120(1) of Law No. 2014-10 of February.

Besides the regulatory framework, it is also crucial for the state to meet international standards to provide a comprehensive legal environment.³²⁷ GAINDE 2000 used several international standards when developing the Information Technology (IT) system for ORBUS.³²⁸ The ORBUS system implemented standards such as UN/CEFACT Recommendation 33, which provides guidelines and recommendations on the ESW.

The United Nations/Electronic Data Interchange for Administration, Commerce and Transport (UN/EDFICAT) provides standards and guidelines for the interchange of electronic data for IT systems.³²⁹ Further international standards include the United Nations Layout Key For Trade Documents (UNLK) which provides templates for trading documents, such as display, size, format and layout of the document³³⁰ and the United Nations Code for Trade and Transport Locations (UN/LOCODE) a trade facilitation project which provides states with codes for trading purposes.³³¹

From the above discussion, the legal environment, particularly through the developments in 2008 created an opportunity for ORBUS to be sustained because of the favourable regulatory framework. Laws enacted not only provide a conducive environment for ORBUS and the state's mission for paperless trade but likewise makes traders more trusting of the system, as the laws guarantee privacy and security under a judicial mandate. This then makes the operation of ORBUS more efficient and mandatory use more desirable. The efficiency and full use of the reformative measure is crucial to realise its full benefits. As highlighted by De Wulf and McLinden one of the obstacles that arise when implementing ICT base reform, the solution is not used to its full potential, thus failing to realise the full benefits of the reform tool.³³² Nonetheless, the ORBUS system has generated benefits that are discussed in the next section below.

³²⁷ Kunio Mikuriya 'Legal framework for customs operations and enforcement issues' in Luc De Wulf & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 53

³²⁸ United Nations Centre for Trade Facilitation and Electronic Business 'Senegal Single Window' available at https://unece.org/fileadmin/DAM/cefact/single_window/sw_cases/senegal.htm accessed 12 July 2021.

³²⁹ UNECE 'Introducing UN/EDIFACT' available at <https://unece.org/trade/uncefact/introducing-unedifact> accessed on 12 July 2021.

³³⁰ Recommendation 1 United Nations Layout Key For Trade Documents of 1981.

³³¹ UNECE 'UN/LOCODE' available at <https://unece.org/trade/uncefact/unlocode> accessed 13 July 2021.

³³² Luc De Wulf & Gerard McLinden 'The role of information Technology in Customs Modernization' in Luc De Wulf & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 286.

4.2.4 ORBUS – Senegal’s Electronic Single Window.

Before the launch of ORBUS in 2004, Senegal’s customs clearance procedure had been computerised by the localised system, called GAINDE³³³ which focused on automating the management of customs clearance processes.³³⁴ GAINDE and ORBUS are interlinked as their processes are used for the efficiency of the movement of goods. Nonetheless, the discussion under this section will be limited to ORBUS, as ORBUS is the ESW and not merely a customs clearance system.

ORBUS is a paperless system designed for traders and customs to exchange documents through a single pathway for the easier procedure of international trade.³³⁵ The objectives of ORBUS are to ‘bring stakeholders of foreign trade into closer contact, improve working conditions, simplify and harmonise procedures, reduce the costs and time to trade, and introduce new technologies in the administration and among the trade community.’³³⁶ ORBUS has been globally recognised for its success, for example winning 1st place in 2012 for the UN Public Service Awards,³³⁷ winner of the Technology in Government in Africa (TIGA) in 2007 and in 2016, the Senegal ORBUS ESW won the Capital Finance International (CFI) award for ‘best Digital Solution in West Africa.’³³⁸ Furthermore, because of ORBUS Senegal ranked number 1 as atop reformer, in easing the administrative requirements for trading across borders in the *Doing Business 2009* report.³³⁹ The recognition and success of ORBUS thus create a credible opportunity for other African states to assess and be guided by the way the project was and is implemented. The system is still functioning as expected by the Senegal state, the system has also been developed to include traders with a platform to access statistics and introduced a national repository of trade and relevant stakeholders.³⁴⁰ In the context of ORBUS, the state further aims to be completely paperless and such objective is accelerated by projects such as

³³³ Senegal Douanes ‘ORBUS’ available at <http://www.douanes.sn/en/node/194>, accessed on 19 October 2021.

³³⁴ United Nations Network of Experts for Paperless Trade in Asia and the Pacific ‘Towards a Single Window Environment; Senegal’s Transition from a Paper-based System to a Paperless Trading System’ (2011) 2.

³³⁵ United Nations Network of Experts for Paperless Trade in Asia and the Pacific ‘Towards a Single Window Environment; Senegal’s Transition from a Paper-based System to a Paperless Trading System’ (2011) 3.

³³⁶ United Nations Network of Experts for Paperless Trade in Asia and the Pacific ‘Towards a Single Window Environment; Senegal’s Transition from a Paper-based System to a Paperless Trading System’ (2011) 2.

³³⁷ United Nations ‘UN awards 44 organizations for public service excellence’ available at <https://www.un.org/en/development/desa/news/administration/un-public-service-awards.html> accessed on 08 July 28, 2021.

³³⁸ GAINDE 2000 ‘Cfi.Co Announces Gainde 2000 As Winner of The Best Digital Security Solutions West Africa 2016 Award’ available at <https://www.gainde2000.com/cfi-co-announces-gainde-2000-as-winner-of-the-best-digital-security-solutions-west-africa-2016-award/?lang=en>, accessed on 08 July 2021.

³³⁹ World Bank ‘Doing Business 2009’ (2008).

³⁴⁰ Trade Facilitation Implementation Guide ‘A Road Toward Paperless Trade: Senegal’s Experience’ (2016) 3.

the Paperless Trade Project and the Accelerated Growth Strategy.³⁴¹ Notwithstanding the development of ORBUS, the full impact of the ESW on the growth of the economy is being halted by the lack of participation of major seaports in Senegal.³⁴² However, trade facilitation commitments and state trade facilitation initiatives, such as the paperless trade project, amongst others, can help address hindrance of the full impact of ORBUS.

With its international recognition, the ORBUS can be optioned as best practice for African states. The section below assesses the legal environment for the implementation of the ESW, bearing in mind the international guidelines include other factors which were highlighted in chapter 2 to be used as best practice.³⁴³

4.2.5 Benefits of Senegal's ORBUS for Traders.

As reiterated throughout this thesis, digitalisation of customs procedures, streamlines processes, making it easier for traders to move goods across the border. This is achieved by a reduction in trade cost for traders, reduced time that goods spend at the border and electronic exchange of information creates increased transparency and predictability, amongst other things.³⁴⁴ Traders have benefited from the implementation of ORBUS, as it takes traders 0.5 days to complete regulatory requirements as opposed to 5 days before ORBUS was implemented.³⁴⁵

Additionally, ORBUS reduced the border pre-clearance and clearance processing time by 90%, from an average of two weeks to just one day.³⁴⁶ The cost of border processes has decreased by 60%.³⁴⁷ This was because ORBUS streamlined document processing, allowing for the process to be more efficient and speedily.³⁴⁸ Nonetheless, digitalisation of customs procedures

³⁴¹ The Trade project aims reduce the trade delays and high trade costs, by facilitating and digitalising systems of paperless electronic customs procedures. The Accelerated Growth Strategy prioritizes foreign investment and the development of the economy, both through regional and international integration and increasing harmonization and modernization of customs.

³⁴² Trade Facilitation Implementation Guide 'A Road Toward Paperless Trade: Senegal's Experience' (2016) 3.

³⁴³ Factors such as such as political will, legal environment, payment system. collaboration between stakeholders and state, clear goals and objectives, accessibility and international standards as highlighted by Recommendation 33.

³⁴⁴ UN/CEFACT 'Paperless trade' (2018) (1) *White Paper* 8.

³⁴⁵ United Nations Centre for Trade Facilitation and Electronic Business 'Senegal Single Window' available at https://unece.org/fileadmin/DAM/cefact/single_window/sw_cases/senegal.htm, accessed on 12 July 2021.

³⁴⁶ African Alliance for E-Commerce & World Bank 'AACE Single Window Peer Review: Senegal' (2014).

³⁴⁷ African Alliance for E-Commerce & World Bank 'AACE Single Window Peer Review: Senegal' (2014)

³⁴⁸ Diagne, Ibrahima 'Developing a Single Window to Facilitate Trade in Senegal. Investment Climate in Practice' (2010) 4.

does not only benefit traders but likewise provide benefits for customs and their proper function. The benefits for customs, derived from ORBUS will be discussed next.

4.2.6 Benefits of Senegal’s ORBUS for The Customs Administration.

Several key benefits derive from the automation of customs processes, particularly when the automation is well implemented. These benefits have been highlighted in the previous chapter.³⁴⁹ However, a clear benefit derived from the ORBUS was a more efficient revenue collection system, which essentially increased revenue. The benefit of increased revenue collection can be also attributed to other benefits such as increased control of goods coming into the border, efficient risk management and post-audit tools.³⁵⁰ Thus, as aforementioned, it is crucial to take advantage of all the benefits that can be derived from the ESW, as the derived benefits are complementary to each other.

Custom Revenue was around 625 million USD in 2005 and dramatically increased to more than 1 billion USD in 2020.³⁵¹ Thus, the ORBUS increased customs revenue by more than 60% since it came into operation.³⁵² An increase in revenue collection is particularly beneficial as customs revenue provides public service of better-quality improvement the states developmental levels.³⁵³

Having an analysis of Senegal’s ESW, its implementation and the benefit derived from such strategy is important as it creates an insightful platform for countries which have not yet implemented the ESW. However, as mentioned earlier, Africa development differs from state to state, thus this thesis provides for another analysis on a different country, namely Kenya, to provide a broader view on the ESW. The next section will provide a brief overview of the customs situation in Kenya, to cultivate the implementation and benefits of its ESW.

³⁴⁹ See Chapter 3.3.2

³⁵⁰ Luc De Wulf & Gerard McLinden ‘The role of information Technology in Customs Modernization’ in Luc De Wulf & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 289.

³⁵¹ Dounes ‘2020 Customs’ Revenues: 1000 Billion Crossed’ available at <https://www.douanes.sn/en/printpdf/1657> accessed on 12 July 2021.

³⁵² United Nations Centre for Trade Facilitation and Electronic Business ‘Senegal Single Window’ available at https://unece.org/fileadmin/DAM/cefact/single_window/sw_cases/senegal.htm accessed 12 July 2021.

³⁵³ United Nations Centre for Trade Facilitation and Electronic Business ‘Senegal Single Window’ available at https://unece.org/fileadmin/DAM/cefact/single_window/sw_cases/senegal.htm accessed 12 July 2021.

4.3 The Case of Kenya.

This section, like the outline provided in section 4.2 of this thesis, aims to discuss elements of the implementation of the ESW in Kenya. The elements consist of first, highlighting the customs situation in Kenya before the implementation of the ESW, secondly, Kenya's trade policy will be discussed and thirdly, the ESW as implemented in Kenya will be looked at. Furthermore, this section provides a discussion on the legal environment developed for the implementation of the ESW and the benefits of the ESW.

4.3.1 Brief Overview of Kenya's Customs Situation before the implementation of their ESW.

Kenya's ports play a critical role as the gateway port for the surrounding countries such as Burundi, Rwanda, Uganda, South Sudan, Democratic Republic of Congo (DRC) and Ethiopia.³⁵⁴ As such, Kenya's Mombasa corridor caters for the movement of goods for those surrounding countries thus, Kenya has a critical role to facilitate regional trade and integration in the East African region.³⁵⁵

As Kenya is surrounded by landlocked countries, trade is significantly high in the region because the landlocked countries rely on Kenya's seaports as their trading hub.³⁵⁶ However, like Senegal and most African countries, Kenya's customs procedures have been negatively impacted by overburdensome and complex procedures, time delays, corruption and high transactions costs.³⁵⁷ In addition, the requirement of physical submission of documents to over 29 agents increased costs for traders. Furthermore such requirement was overburdensome for both traders and customs administration and bearing in mind the increase in trade volumes fashioned an inefficient way to process trade.³⁵⁸ For example, it took agents 6 days to process submitted documents, the manual process also created erroneous declarations and the overburdensome procedure saw plenty of non-compliance such as incomplete declarations.³⁵⁹

³⁵⁴ International Finance Corporation 'Impact Evaluation of the Kenya National Electronic Single Window' (2019) 1.

³⁵⁵ International Finance Group 'Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window' (2019) 8.

³⁵⁶ International Finance Corporation 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' World Bank Group (2017) 1.

³⁵⁷ International Finance Corporation 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' World Bank Group (2017) 1.

³⁵⁸ International Finance Corporation 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' World Bank Group (2017) 1.

³⁵⁹ Mwajita, Mwanaulu Iss 'The effects of the implementation of the Kenya National Electronic Single Window System on trade facilitation' (2016) *World Maritime University Dissertations* 38-9.

As result, more than 50% of the time to move goods through Kenya's trading system was used by regulatory requirements, document processing and clearance protocols.³⁶⁰

As the International Finance Corporation (IFC) provides, due to the volume of trade through Kenya's ports, trade and regional integration would be positively influenced if Kenya facilitated its trading system.³⁶¹ Thus, it was important for the government to introduce trade facilitation measures to combat the negative effects such as an increase in trade cost, time delays, overburdensome procedures and illicit cost amongst other things.

Therefore in 2008, based on the strategy to facilitate trade, the Kenyan government introduced Vision 2030, a project intended to improve the country's GDP through various sector reforms.³⁶² One of the key initiatives under vision 2030 is the development of the ESW.³⁶³ As a result, the Kenya Trade Network Agency (KenTrade) an organ developed by the state to improve trade facilitation measures was granted the mandate to develop an ESW in early 2011. This mandate was provided for by Legal Notice No 6 of 2011 of the States Corporation Act, which called for the implementation of the ESW.³⁶⁴

Besides the mandate calling for the implementation of the ESW, Kenya has international, regional, and national commitments to facilitate trade. Kenya's Trade facilitation commitments are crucial to provide a sound legal environment for the development of the ESW. Accordingly, Senegal's Trade policy environment must be highlighted, to show that the implementation of TradeNet is meeting its international and regional demands. Hence, Kenya's Trade Policy will be discussed next in this chapter.

³⁶⁰ International Finance Group 'Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window' (2019) 3.

³⁶¹ International Finance Corporation 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' World Bank Group (2017) 1.

³⁶² Kenya Vision 2030 'about Vision 2030' available at <http://vision2030.go.ke/about-vision-2030/> accessed 16 July 2021.

³⁶³ Kenya Vision 2030 'Economic and Macro Pillar' available at <http://vision2030.go.ke/economic-pillar/#61> accessed on 16 July 2021.

³⁶⁴ Mwajita, Mwanalu Iss 'The effects of the implementation of the Kenya National Electronic Single Window System on trade facilitation' (2016) *World Maritime University Dissertations* 34

4.3.2 Kenya's Trade Facilitation Commitments.

Similar to Senegal, Kenya is a member of the WTO and was one of the first few African states to ratify the TFA.³⁶⁵ In addition to the TFA, Kenya has also acceded to the WCO Kyoto Convention, highlighting its international obligation to facilitate trade and streamline its customs administration and procedures.³⁶⁶ On the regional level, Kenya is part of the East African Community (EAC) which has established the East African Customs Union. The EAC calls for trade facilitation and customs reform in several of its regulatory frameworks. For example, under the Customs Union Protocol, relevant Articles such as Article 5, 6, 7 and 13 provides that member states should ensure customs co-operate with member states, facilitate trade, standardise and harmonise customs documents and ensure to eliminate non-tariff barriers.³⁶⁷ Such commitments aligns with the idea of the ESW, as the ESW entails, customs coordination and cooperation, streamlining of customs procedures to make it easier for goods to penetrate through the border. Kenya's ratification of the EAC Elimination of Non-Tariff Barriers (NTB) Act is another example of Kenya's regional obligation. The EAC Elimination of NTB Act provides for regulation and elimination of NTB within the EAC, to enhance intra-regional trade and create an efficient trading community.³⁶⁸

In addition, the East African Customs Management Act (EACMA) goes on to further highlight the EAC commitment to customs development and trade facilitation. Customs development and trade facilitation is emphasised as the Act provides for regulatory support for the 'management and administration of customs'³⁶⁹ which includes calls for customs co-operation and facilitation of the movement of goods.³⁷⁰ These regional and international obligations act as a guiding tool that will 'undoubtedly' regulate its trade facilitation efforts, as highlighted by Kenya's Institute of Economic affairs.³⁷¹ Further regional obligation for customs development and trade facilitation calling would be the AfCFTA agreement which Kenya has ratified.³⁷² As

³⁶⁵ World Trade Organisation 'Kenya ratifies Trade Facilitation Agreement in advance of Nairobi Ministerial Conference' available at https://www.wto.org/english/news_e/news15_e/fac_10dec15_e.htm accessed on 12 August 2021.

³⁶⁶ World Customs Organisation 'Philippines and Kenya accede to the Revised Kyoto Convention' available at <http://www.wcoomd.org/en/media/newsroom/2010/june/philippines-and-kenya-accede-to-the-revised-kyoto-convention.aspx> accessed on 12 August 2021.

³⁶⁷ Article 5, 6, 7 and 13 of The Protocol on The Establishment of The East African Customs Union of 2004.

³⁶⁸ East African Community Elimination of Non-Tariff Barriers Act of 2017.

³⁶⁹ Preamble of the East African Community Customs Management Act of 2004.

³⁷⁰ East African Community Customs Management Act of 2004.

³⁷¹ Institute of Economic Affairs 'Trade Facilitation: Issues for Kenya and Kenya's Position at the WTO' (2006) 15

³⁷² TRALAC 'Status of AfCFTA Ratification' available at <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> accessed on 12 August 2021.

already highlighted in this thesis, AfCFTA calls for reformative measures in the context of digitalising customs procedures using ICT tools.³⁷³

Kenya has introduced the National Trade Policy to steer the states' trading developments.³⁷⁴ The National Trade Policy was developed as a backdrop of Vision 2030, a development guide framework for the implementation policy for all sectors in Kenya.³⁷⁵ The robust framework underpins the state's aforementioned international and regional commitments and provides for their domestication in the policy.³⁷⁶ The National Trade Policy mandates digitalisation, as one of its trade agenda include ICT sector, as well as the agriculture, industry and infrastructure sector.³⁷⁷ Additionally, the National Trade Policy aims to provide a conducive environment for trade and aim to achieve that objective by enhancing the efficiency of the movement of goods in both the domestic and international market.³⁷⁸ This policy thus fit in with the argument in this thesis for customs reform as a trade facilitation tool to enhance a state's development and strengthen both inter and intra trade.

From the discussion on Kenya's Trade facilitation commitments, it is clear that the state aims to be an efficient trading partner to both its regional and international partners. Hence, the states trade facilitation commitments under both regional and multilateral trade agreements, such as the EAC, AfCFTA, the WTO and the WCO, amongst others. Furthermore, the discussion articulates the states commitment to facilitate trade and create an environment for efficient trade developments, emphasising the role that an efficient trade policy has on the development of the state. It is thus not surprising that Kenya would implement the ESW, as such a system promotes trade.³⁷⁹ The Kenyan ESW, called TradeNet was implemented and launched in 2014. Kenya's TradeNet system will be briefly dealt with below.

³⁷³ See Chapter 1.

³⁷⁴ The Kenya National Trade Policy of (2017) 2.

³⁷⁵ Kenya Vision 2030 'The Vision 2030' available at <https://vision2030.go.ke>, accessed on 20 October 2021.

³⁷⁶ As mentioned earlier in this chapter, International commitments such as the WTO TFA agreement, WCO Kyoto Convention. Regional commitments as being part of regional bodies such as the East African Community (EAC) and Common Market for Eastern and Southern Africa (COMESA).

³⁷⁷ Kenya National Trade Policy of 2017.

³⁷⁸ Socrates Kraido Majune & Davis Kimuli Mwanja 'On the Economic Thought of Trade Practices And Policies In Kenya' (2020) 38 *Estudios Económicos* 197.

³⁷⁹ Socrates Kraido Majune & Davis Kimuli Mwanja 'On the Economic Thought of Trade Practices And Policies In Kenya' (2020) 38 *Estudios Económicos* 200

4.3.3 TradeNet: Kenya's Electronic Single Window.

Like Senegal, Kenya's TradeNet is a reform tool implemented to electronically process trade documents, such as pre-clearance documents, import declarations, permits and other relevant documents.³⁸⁰ TradeNet is the mandatory system that provides a single-entry point for the submission and exchange of trade data between traders and relevant agents, intending to achieve 'trade facilitation, customs clearance, competitiveness and to reduce the cost of trade thus promoting the economy' while maintaining regulatory requirements.³⁸¹ In addition, TradeNet provides for electronic payment which is harmonised with the Kenya Revenue Authority.³⁸² There were clear goals and objectives from the introduction of the ESW. The goal was to facilitate Kenya's trading system. This was achieved by implementing the ESW to reduce the number of days it takes to export and import from 26 to 19 days and 24 to 18 days respectively, decreasing documents required for both import and exports from 7 to 6 and 8 to 7 documents, respectively.³⁸³

However, before the desired results could have been achieved, as mentioned earlier in this thesis, there needs to be a suitable implementation plan and execution for the TradeNet to strive in.³⁸⁴ Also, as mentioned earlier, there needs to be a sound legal environment and measures put in place to support the functions of the ESW, for example, the transactions and contractual features.³⁸⁵ Thus, before assessing the derived benefits of TradeNet, the legal environment will be discussed next..³⁸⁶

4.3.4 The Legal Environment for the Implementation of Kenyan TradeNet.

As mentioned earlier, a sound legal environment is seen as best practice, as seen under UNCEFACT Recommendation 33 and the United Nations Economic Commission for Europe (UNECE) Recommendation 35 which recommends that states develop and improve their

³⁸⁰ International Finance Corporation 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' World Bank Group (2017) 2.

³⁸¹ KenTrade 'Welcome to Kenya TradeNet System' available at <https://kenyatradenet.go.ke/kesws/jsf/login/KESWSLoginPage.jsf> accessed on 16 July 2021.

³⁸² International Finance Corporation 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' World Bank Group (2017) 2.

³⁸³ International Finance Group 'Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window' (2019) 3.

³⁸⁴ See Chapter 4.3.2

³⁸⁵ See Chapter 2.8

³⁸⁶ See chapter 4.

regulatory framework to maximise the full benefits of the ESW.³⁸⁷ Adopting the necessary enabling laws is exactly what the Kenya government did. First, in 2011, the Kenyan state provided a legal notice in the State Corporation Act, which provided for the implementation of TradeNet.³⁸⁸ Then with the aid from the IFC of the World Bank, the Kenyan government introduced the National Electronic Single Window System Bill (draft) in 2016.³⁸⁹

The status of the National Electronic Single Window System Bill is that the Bill has been put forward to the Kenya National Assembly in April 2021 to be implemented, as published by Kenya's Government Gazette.³⁹⁰ The National Electronic Single Window Bill aims to provide the establishment and operationalisation of the ESW to facilitate trade and aid in the customs electronic processes and transactions.³⁹¹ The Bill is split into six sections, with three of the sections being the most relevant to this thesis. The relevant sections are, parts I, II and III. Part I contains clauses 1-2 which provides for preliminary matters such as the short title and definition of terms used in the Bill. Part II contains clauses 3-10 providing measures on the objective, establishment and administration of the ESW and recommended use of international standards to guide the implementation of the ESW.³⁹² All the above legislation can be complimented by the Kenyan Information and Communication Act of 1998 which the states utilise as a legal liability regime and administration of the digitalisation of data and communication that passes through TradeNet.³⁹³

The Kenyan state ensured to use of international standards. As evident by the IFC declaration that an assessment of TradeNet provided that international standards such as UN/CEFACT Recommendations 33 and UNECE Recommendation 35 were used when implementing TradeNet.³⁹⁴ Lastly, Part III contains clause 11-22, comprising of measures that provide for certainty in the context of electronic information and communication, and provides for the legal effect and requirements of the electronic process in terms of document dispatch, records and

³⁸⁷ UNECE 'Recommendation 35 Establishing a legal framework for international trade Single Window' (2010) 6.

³⁸⁸ Legal Notice No. 6 of The State Corporation Act of 2011.

³⁸⁹ National Electronic Single Window System Draft Bill of 2016.

³⁹⁰ Bill No. 15 of the Kenyan Government Gazette of 2021.

³⁹¹ The Preamble of the National Electronic Single Window System Bill of 2016.

³⁹² Article 3(b) specifically provides for the facilitation of electronic payments, fees and levies. Article 7 explicitly calls for the use of international standards

³⁹³ Kenyan Information and Communication Act of 1998

³⁹⁴ International Finance Group 'Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window' (2019) 12.

receipt that go through the system.³⁹⁵ From the brief overview of the above provisions, it is clear that the legal environment not only creates transparency but enables secure and safe data collection and distribution, establishes confidentiality, privacy and legal consequences for the use of the electronic process. Such an environment is crucial when implementing the ESW, as highlighted by UNECE, it is essential to create ‘transparency and security of trade data information exchange’ to maximise the derived benefits.³⁹⁶

Further analysis of the Bill in comparison with international standards shows that the Bill is aligned with the WTO TFA, WCO Kyoto convention and AfCFTA measures calling for the implementation of the ESW to facilitate trade.³⁹⁷ This is because both the Bill and the aforementioned agreements create a legal commitment for digital customs reformative tools and provisions for the proper functioning of the ESW.³⁹⁸ Furthermore, the national legal framework to develop and maintain an ESW aligns with international standards such as UN/CEFACT Recommendation 33 and UNECE Recommendation 35 guiding standards.³⁹⁹

As a sound legal environment is one of the key ways to ensure the full benefits of the ESW, the benefits of TradeNet will be discussed subsequently. However, as the benefits of the ESW has already been discussed in the thesis, the next section of this chapter will highlight the derived benefits specifically from TradeNet, bearing in mind the estimated benefits such as streamlined customs process, decrease in trade cost, reduced clearance time, transparency and improved predictability, compliance, and efficient risk management and audit solution and faster movement of goods.⁴⁰⁰

4.3.5. Benefits of TradeNet for Traders.

The benefits of the implementation of TradeNet are clear and in some instances, the benefits have been quantified. For example, TradeNet managed to reduce traders costs, which the IFC estimated to be around 2.6 million dollars in trade cost reductions.⁴⁰¹ Associated costs are

³⁹⁵ Article 11 creates certainty by using the Kenya Information and Communication Act of 1998 to regulate the electronic process.

³⁹⁶ UNECE ‘Recommendation 35 Establishing a legal framework for international trade Single Window’ (2010) 6.

³⁹⁷ See chapter 2.

³⁹⁸ See chapter 2 which provides the Articles under these agreements which calls for the implementation of the ESW and for states to develop and review legal frameworks for the efficiency of the ESW.

³⁹⁹ UNECE ‘Recommendation 35 Establishing a legal framework for international trade Single Window’ (2010)

⁴⁰⁰ See chapter 3.

⁴⁰¹ International Finance Group ‘Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window’ (2019) 14.

likewise reduced because traders no longer have to go ‘office to office’ to obtain the necessary documents, as TradeNet provides for the immediate release of the permit once it meets the approval requirements.⁴⁰² The release of information on the system provides transparency, which then provides traders with a more predictable outcome.⁴⁰³

Further benefits of a digital custom reform tool include time reduction in the movement of good processes.⁴⁰⁴ With the implementation of TradeNet, traders time to obtain trading permits have been reduced by more than 50%.⁴⁰⁵ The time to process documents to issue trading licenses has been reduced to 18 days.⁴⁰⁶ The number of documents needed to move goods has been reduced from 281 to 157, almost a 50% decrease.⁴⁰⁷ Benefits have not only derived for traders, but benefits of digitalised customs would spread to the customs administration as well, which will be highlighted next.⁴⁰⁸

4.3.6 Benefits of TradeNet for Customs Administration.

As highlighted previously, the implementation of the ESW provides for a simpler and faster system for customs.⁴⁰⁹ This then allows customs and other agencies to process documents and issue clearance documents more efficiently, saving costs and reducing error which causes delays.⁴¹⁰ TradeNet provided customs administration with the benefit in the context of consistency and better compliance.⁴¹¹ As highlighted by De Wulf and McLinden, transparency, consistency and compliance will help customs in terms of risk management and establishing non-compliance.⁴¹² The transparency would in addition instil integrity and accountability

⁴⁰² International Finance Group ‘Opening Opportunities: Kenya’s Electronic Single Window Connects East Africa to Global Value Chains’ (2017) 3.

⁴⁰³ International Finance Group ‘Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window’ (2019) 14.

⁴⁰⁴ Mbithi Mary ‘Trade Facilitation: Issues for Kenya and Kenya’s Position at the WTO’ (2005) 5 *IEA Research Paper Series* 20.

⁴⁰⁵ International Finance Group ‘Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window’ (2019) 16.

⁴⁰⁶ International Finance Group ‘Opening Opportunities: Kenya’s Electronic Single Window Connects East Africa to Global Value Chains’ (2017) 3.

⁴⁰⁷ International Finance Group ‘Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window’ (2019) 16.

⁴⁰⁸ Mbithi Mary ‘Trade Facilitation: Issues for Kenya and Kenya’s Position at the WTO’ (2005) 5 *IEA Research Paper Series* 22

⁴⁰⁹ International Finance Group ‘Opening Opportunities: Kenya’s Electronic Single Window Connects East Africa to Global Value Chains’ (2017) 3.

⁴¹⁰ International Finance Group ‘Opening Opportunities: Kenya’s Electronic Single Window Connects East Africa to Global Value Chains’ (2017) 3.

⁴¹¹ International Finance Group ‘Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window’ (2019) 19.

⁴¹² Luc De Wulf & Gerard McLinden ‘The Role of Information Technology In Customs Modernization’ in Luc De Wulf & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 289.

within the agency.⁴¹³ TradeNet likewise allows customs to collect efficient and reliable data that can aid in research, statistics and the improvement of the system.⁴¹⁴ More importantly, TradeNet has increased revenue collection to over 22.19 million US Dollars, positively contributing to Kenya's GDP.⁴¹⁵ This benefit is crucial, considering that revenue collection plays an important role in the state's development and is one of the primary roles of customs administration in Africa.⁴¹⁶

4.4. Lessons Learned.

As mentioned in chapter 2 of this thesis, the best practice for the implementation of the ESW, encompass various factors such as political will, lead agency, the collaboration between state and relevant stakeholders and an appropriate payment system, amongst others. However, for relevancy and concise the lesson learned under the context of a sound legal environment are highlighted. The lessons learned are highlighted as a way to provide other African states with a useful guide when developing or revising a legal environment for the implementation of the ESW. Several key factors played a role in the legislative framework developed for the implementation of the ESW in both Senegal and Kenya. Firstly, Senegal repealed the custom code of 1987 and introduced a new customs code which provided a legislative framework that aligns with modern international trends and a framework to enable the implementation of customs reform. Kenya has the Customs and Excise Act in place which provides for the valuation of customs and its administration. Both Kenya⁴¹⁷ and Senegal⁴¹⁸ are members of the WTO and thus have based their customs valuation on the WTO Customs Valuation Code Agreement.

Secondly, what is evident in the discussion of the trade policy and the legal environment for the implementation of the ESW is the consistency with international standards. For example, Kenya's National Electronic System Bill and its trade facilitation policy, as well as Senegal's trade policy incorporate their international commitments under WTO and WCO.⁴¹⁹

⁴¹³ International Finance Group 'Opening Opportunities: Kenya's Electronic Single Window Connects East Africa to Global Value Chains' (2017) 3.

⁴¹⁴ International Finance Group 'Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window' (2019) 22.

⁴¹⁵ International Finance Group 'Kenya Investment Climate Program-II Trade Logistics Impact Evaluation of the Kenya National Electronic Single Window' (2019) 20.

⁴¹⁶ See chapter 3.2.3

⁴¹⁷ Section 122 and Fourth Schedule of the EAC Customs Management Act of 2004,

⁴¹⁸ See chapter 4.2.2

⁴¹⁹ See chapter 4.2.2 and chapter 4.3.2

Furthermore, when implementing the ESW both states was guided by international best practices such as Recommendation 33 and 35, in addition, Senegal used international standards such as United Nations Layout Key (UNLK) which provides template for trade documents⁴²⁰ and the United Nations Code for Trade and Transport Locations (UN/LOCODE) a geographical code scheme for trade and transport.⁴²¹

Thirdly, both states had in place or introduced a regulatory framework that enables and secures the electronic process for data, documents and communication through the ESW. Senegal introduced the Information Society law, Law No 2008 of February, as well as using international data protection and administration frameworks such as UN/EDIFACT for the implementation of the ORBUS. Kenya likewise implemented the National Electronic Single Window System Bill which provided for the administration and regulation of the electronic documents and data, as well as the use of the Kenyan Information and Communication Act.⁴²²

Lastly, for both states, the trade facilitation policy, as well as the legal environment for the implementation of the ESW, was put in place for trade facilitation without comprising the primary role of customs administration in the context of revenue collection. The legislation and trade facilitation policy put in place in both Senegal and Kenya merely promoted key functions to the customs administration, such as being a key border agency to facilitate trade rather than removing any of its other functions, such as border security and protection, amongst others. Such an approach is crucial as trade liberalization has been noted to provide a reduction in customs revenue collection, which is not an ideal case for African states, as revenue collection is a big part of the GDP of African states.⁴²³

4.5 Conclusion.

The two states have the desire to meet trade facilitation objectives and reform their respective customs administration and procedures. This is evident by the commitment to several regulatory frameworks, both internationally and regionally. Intra-African trade and regional integration in Africa is burdened by a trading system that is halted by non-tariff barriers. Such

⁴²⁰ Trade Facilitation Implementation Guide 'UN Layout Key' available at <https://tfig.unece.org/contents/unlk-recomm-1.htm>, accessed on 5 December 2021.

⁴²¹ UNECE 'UN/LOCODE Code List by Country and Territory' available at <https://unece.org/trade/cefact/unlocode-code-list-country-and-territory>, accessed on 5 December 2021.

⁴²² Kenyan Information and Communication Act of 1998.

⁴²³ Paul Duran & José B. Sokol 'Policy and Operational Lessons Learned From Eight Country Case Studies' in De Wulf, L & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 188.

sentiments are true for both Senegal and Kenya, where customs bottlenecks create a thick border. This thick border makes the movement of goods much more difficult across borders. With both states recognising the effects of its inefficient customs department to streamline trade and its commitment to develop its customs and implement trade facilitation measures, the implementation of a national ESW is a valuable response to the customs situation.

The implementation of both Orbus and TradeNet underpins a legislative environment which enables the realisation of the custom reformative tool and its benefits. The benefits derived from both ESW provide easier and more effective processes for the movement of goods, which benefits both customs and traders. The benefits include revenue increase, risk management tool, integrity and transparency, better customs control of goods, and a more effective security tool and faster clearance of goods. Traders benefited in the context of cost-saving, reduction in time delays, better transparency from customs procedures and an easier and streamlined process to move their goods across the borders quicker and smoother.

The examination of the implementation of the ESW in both countries allows for other countries to gain valuable lessons from the experience of both countries, particularly with regards to the legal conditions. Lessons such as developing or repealing ineffective regulations, aligning national laws with international standards, as well as using international best practices as a guide for the implementation of the ESW. In addition, states must ensure that for a digitalised tool such as the ESW, there needs to exist laws that enable and administrate the use of digitalisation. This is crucial to provide confidentiality, transparency, and a liability regime to protect electronic data and communication through the system.

The next chapter is a summary of chapters 1 to 4 and furthers the discussion on the ESW in Africa by providing recommendations advanced in all 4 chapters as a way to conclude the discussion on reformative digitalisation tools as a way to increase intra-Africa trade and realise the AfCFTA.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction.

This thesis concentrated on the Electronic Single Window (ESW) intending to highlight the ESW as a trade facilitation tool to complement the implementation of the African Continental Free Trade Area (AfCFTA) and increase intra-Africa trade. With that background, this chapter summarises and concludes the discussion on the ESW as a customs reform tool. The summary comprises the discussion of the previous 4 chapters. The recommendations propose how African states can maximise the benefits of the ESW when considering the legal environment for the implementation of the ESW, to ensure trade facilitation and increase of intra-Africa trade.

5.2 Summary of the Chapters.

Chapter 1 set an introductory discussion of the research, highlighting the role of international trade and the appropriate regional integration approach in the economic development of states.⁴²⁴ The chapter further highlighted recent trends and problems in international trade.⁴²⁵ Such findings include the increase in international trade volumes and how the customs administration is unequipped to meet modern trade trends.⁴²⁶ This chapter thus emphasised the need of digitalisation reformative measures to facilitate trade and eliminate customs bottlenecks. The digitalisation measure proposed is the ESW, which acts as a customs reform tool to improve the customs and trade environment and consequently enable the realization of the AfCFTA objectives.

Chapter 2 looked at the concept of trade facilitation, the historical overview of trade facilitation and the relevant trade facilitation regulatory frameworks. Historically, the focus was on tariff reduction, however, the shift in focus to non-tariff barrier resulted in the emphasis on trade facilitation.⁴²⁷ The concept of trade facilitation was defined narrowly and broadly. The narrow definition was restricted to the customs procedures, meanwhile, the broader definitions saw the

⁴²⁴ See chapter 1.1

⁴²⁵ See chapter 1.3

⁴²⁶ See chapter 1.1

⁴²⁷ See chapter 2.2.

incorporation of beyond the border measures.⁴²⁸ This thesis adopted the broader concept of trade facilitation because the ESW captures beyond the border measures, such as customs procedures and policies as well as ICT.⁴²⁹

Chapter 2 further examined the legal and policy framework on trade facilitation. Enabling provisions under GATT as GATT Art V, VIII, and X was look at, the TFA, the Revised Kyoto Convention, the SAFE Framework, The Kyoto ICT Guidelines and lastly Recommendation 33 were also discussed.⁴³⁰ These instruments highlighted the responsibility of members state to modernise their customs to facilitate trade, promote transparency and predictability and remove bottlenecks that thicken the border. Central to all the international agreements is the call for the implementation of the ESW for an easier and smooth process of the movement of goods.⁴³¹ The international frameworks indicates that, to achieve the full benefits of trade facilitation commitments, members must incorporate such commitments into their national frameworks.⁴³²

Chapter 3 looked at the definition of customs, the role customs play in international trade and the conditions of customs in Africa. Such discussion was provided to showcase the neediness for customs reform and the crucial role customs play in meeting international trade objectives. In assessing customs in Africa, it was found that customs play a key role in the development of the state as revenue collectors which contribute to the country's GDP.⁴³³ However, it is was noted that customs does not only primarily focus on being revenue collectors but likewise include trade facilitation in its primary mandate.⁴³⁴ In assessing the customs situation in Africa, it was clear that trade is halted by customs red tapes and thus providing an indication for customs reform.⁴³⁵

The customs reform suggested in chapter 3 was the ESW.⁴³⁶ Providing for the definition of the ESW, as a digitalisation tool that fosters trade facilitation and improves both inter and intra-African trade. The derived benefits for the states, such as strengthen regional integration, increase in compliance for customs and decrease in trade costs for traders was too highlighted. This chapter showcased the ESW as a fitting digitalisation and reformative tool meeting the

⁴²⁸ See chapter 2.2.1.

⁴²⁹ See chapter 2.3.

⁴³⁰ See chapter 2.3 – 2.7

⁴³¹ See chapter 2.3 – 2.8.

⁴³² See chapter 2.8.

⁴³³ See chapter 3.2.3

⁴³⁴ See chapter 3.2.2

⁴³⁵ See chapter 3.2.3

⁴³⁶ See chapter 3.3

demands of a modernised strategy to trade facilitation by the international trade community. Chapter 3 concluded by providing that African states should consider their disparities and tailor the implementation of the ESW accordingly, while bearing in mind international guidelines and standards, such as Recommendation 33.

Chapter 4 provided an analysis of the ESW in two countries, namely Senegal and Kenya. The chapter provided the trade policy and customs conditions of both countries. Revealing that the trade policy of both states consists of international and regional commitments to trade facilitation and customs reform. The customs conditions in both states were riddled with bottlenecks that made it difficult for goods to penetrate through its border, thus negatively affecting its trading system and halting its economic developments. This chapter went on to assess the legal environment that enabled the implementation of the state`s ESW, namely ORBUS and TradeNet. It was analysed that the implementation of the ESW was attributed to the development in legal and regulatory frameworks that enable and administrate the digitalisation of customs processes, such as electronic documents and communication through the ESW system.

Chapter 4 likewise highlighted the benefits derived from the implementation of ORBUS and TradeNet. Showcasing the benefits for both traders and customs such as reduced time delays, increase transparency and predictability and increase in revenue collection. Finally, chapter 4 discussed the lesson learned in the implementation of the ORBUS and TradeNet in the context of the development of a legal environment.⁴³⁷ The lessons learned provided a compendium for other African states that are considering implementing of the ESW.

The above discussion shows that Africa is on the right path to facilitate trade and deepen regional integration. With the backing of international and regional trade facilitation commitments and standards, the advancement in regional integration theory and the modern digital era, Africa has the appropriate tools to improve inter and intra-Africa trade, which will aid in the boosting of the AfCFTA objectives.

⁴³⁷ See chapter 4.4.4.

5.3 Recommendations.

One of the key factors to consider when developing the ESW is the development of a sound legal framework and the assessment of existing legal frameworks that would act as a barrier to effectively implementing the ESW for Africa's trade and regional objectives. The recommendations under this section are based on best practice proposed by international organisations and as well as recommendations based on the discussions from the previous four chapters in this thesis. The recommendations include assessing existing laws that might be a barrier to the implementation of the ESW, developing African specific guidelines and introducing an ESW committee and an ESW digital Hub.

5.3.1 Assess Existing Laws and Develop Enabling Laws.

As mentioned earlier, when states intend to implement an ESW, there need to be laws in place that enable the interchange and effectiveness of electronic documents, data and communication.⁴³⁸ Furthermore, there needs to be an assessment of existing laws. This will allow the identification of potential barriers to the efficacy of the digital custom reform, specifically, the administration and regulation electronic exchange of documents and communications. Assessing existing laws and developing enabling laws that are complimentary, will allow states to discover any gaps, whereby the law will have to be developed to fill such gaps.

As seen in the case of Senegal wherein 2008, the government developed its legal framework to protect and administer the electronic information passing through the system.⁴³⁹ Senegal has likewise assessed its existing laws and in doing so, repealed its old customs code, and introduced a new customs code that is aligned with its objective of electronic customs processes. Kenya developed laws for example the introduction of the National Trade policy which regulates the use of the electronic process in customs and provides legal liability of such process.⁴⁴⁰ Such steps by Senegal and Kenya played a key role to further enable the effective running and administration of the electronic exchange of documents and information through the ESW system.

⁴³⁸ See chapter 4

⁴³⁹ See chapter 4.2.3

⁴⁴⁰ See chapter 4.3.3

5.3.4 African Single Window Committee and Digital ESW Hub.

As more African states introduce the ESW to improve their trading system and deepen regional integration, there needs to be a repository of these. Thus, this thesis proposes the introduction of a committee to check the implementation of the ESW and ensure its maintenance. The committee would consist of various customs administration in Africa and relevant stakeholders involved in developing the ESW. The monitoring committee will help standardise the process of implementing the ESW by administrating the implementation process of ESW. The committee will also aid in the objective of cooperation and coordination of customs which is sought after by both international and regional communities, specifically the AfCFTA, as customs will work together in the committee. Furthermore, the ESW digital hub would act as an easily accessible database of all the implemented ESW in Africa, providing statistics and researchable data. The statistics and research will allow the committee to advance and develop best practices for African states, provide other states with easily available lessons learned and data which will help African states develop a sound legal environment.

The ESW digital hub will act and provide similar key benefits, as seen by the UNECE Single Window Repository which provides customs administration and relevant stakeholders best practices and challenges to implementing ESW, based on different ESW implemented in different countries.⁴⁴¹ The analysis of benefits of different ESW on the continent will provide a crucial method of states following or incorporating another states implementation steps of ESW that derived benefits that are specifically sought out by that state as per their development needs.

5.3.4.1 African Specific Guidelines and Recommendations.

African states face disparities and are on different developmental levels. However, the general notion is that Africa is underdeveloped, has weak implementation status and its customs administration is generally riddled with bottlenecks that thicken the border.⁴⁴² The trade and customs administration problems faced by African states are different to those faced in developed states.⁴⁴³ There are international guidelines and recommended best practices for all

⁴⁴¹ UNECE 'Single Window Repository' available at <https://unece.org/trade/uncefact/SW-repository>, accessed on 23 October 2021.

⁴⁴² See chapter 3.2

⁴⁴³ Luc De Wulf and Gerard McLinden 'The Role Of Information Technology In Customs Modernization' in Luc De Wulf & José B. Sokol (Eds.) *Customs modernization handbook* (2005) 286.

trading members to consider when implementing the ESW. However, the problem international standards and guidelines, such as the UN/CEFACT Recommendations 33 and UNECE Recommendation 35 are developed not specifically bearing in mind the African legal context.

It is thus important to provide a more African specific implementation guide and recommendations while bearing in mind international standards and guidelines. For example the guideline for the implementation of the ESW in Africa, provided by the African Alliance for E-commerce (AACE).⁴⁴⁴ This will help African states to assess guidelines that are Africa specific and more relatable. Thus, the legal environment guidelines to implement the ESW would be easier to incorporate because such guidelines would be in the African context. The African Single Window Committee can develop such guidelines based on the data and analysis gathered by the Committee.

5.4 Conclusion.

Modern international trends consist of the aim to remove non-tariff barriers and achieve trade facilitation objectives. One of the key players to drive trade facilitation efforts is the customs administration, especially in Africa. Thus, African states must align modernise their customs process to meet modern international trade trends. However, as established, African states face different development levels thus have different development needs. Nonetheless, the ESW is a reformative tool that can be tailored to specific developmental levels and demands of the state, while ensuring trade facilitation commitments are met.

This chapter summarised the discussion on implementing a digitalised trade facilitation tool such as the ESW to meet international trade demands and improve intra-Africa trade. The recommendation was against the background of advocating for a sound legal environment when planning to implement the ESW. Those recommendations aid in the aim of this thesis of implementing the ESW as a trade facilitation tool that would help realise the objectives of the AfCFTA. In Africa, challenges still exist in the context of the low implementation of commitments. However, with the international and regional commitments, international standards and best practices as well as recommendations, and modern technology and comprehensive trade facilitation African states can effectively implement the ESW, bearing in

⁴⁴⁴ African Alliance 'Guidelines for Single Window Implementation in Africa; (2013)

mind the challenges, such as low implementation status, outdated laws and weak compliance, in creating a sound legal environment for the ESW.

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