



TRADE FACILITATION IN THE SOUTHERN AFRICAN  
DEVELOPMENT COMMUNITY: THE POTENTIAL CONTRIBUTION  
OF THE WORLD TRADE ORGANIZATION'S TRADE  
FACILITATION AGREEMENT

By Tsotang Tsietsi

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Supervised by: Professor Faizel Ismail & Professor Ada Order

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## Declaration

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Date: 7 December, 2020

## Abstract

This PhD thesis studies the facilitation of trade in the Southern African Development Community (SADC). It considers the fact that there have been several regional and international agreements that the SADC countries have entered into with the objective of alleviating trade facilitation obstacles in their region. In addition to these agreements, the states have devised national strategies to implement their regional and international commitments. However, despite all of these efforts, the effects on the easing of obstacles to trade facilitation have been minimal and the positive impact on the development of these countries predicted by mainstream trade theory is not evident. This is the first conundrum or question that this study explores. Second, while there have been several studies on the general challenges related to treaty compliance and implementation in the Southern African Development Community, few have attempted to explain why there has been poor compliance in these countries. This study uses the insights from several theoretical frameworks to illuminate this question. Third, the study reviews the World Trade Organization's Trade Facilitation Agreement and explores whether its unique advantages may enable it to be more effective in resolving the trade facilitation challenges of the SADC member states.

The study consists of a desk review of relevant academic literature, as well as an empirical study of the state of trade facilitation in the SADC region in general, and in the Kingdom of Lesotho, in particular. This entails the use of case studies and interviews with trade policy makers, trade negotiators, border officials as well as traders. The study concludes that the previous agreements suffered from inabilities to secure the compliance of state parties. In addition, the states themselves faced a plethora of domestic implementation challenges. The study observes that the WTO Trade Facilitation Agreement has unique features that address the compliance and implementation issues in innovative ways. It is argued that its distinctions make it likelier to be a more successful tool for the countries in the Southern African Development Communities to use to improve trade facilitation in their

region. This research is a contribution to the academic literature on trade, law and development and seeks to provide policy insights to developing country practitioners engaged in the negotiation and implementation of trade facilitation agreements.

Dedication

*For Thabo Patrick Tsietsi*

*Forever in our hearts.*

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## List of Abbreviations and Acronyms

ACBF	African Capacity Building Foundation
ACP	African Caribbean and Pacific
ADB	African Development Bank
ADF	African Development Fund
AEC	African Economic Community
AfCFTA	African Continental Free Trade Agreement
AIDI	Africa Infrastructure Development Index
AMU	Arab Maghreb Union
APC	African Caribbean and Pacific
ASYCUDA	Automated System for Customs Data
AU	African Union
BIAT	Boosting Intra-Africa Trade
BOS	Bureau of Statistics
CCC	Customs Cooperation Council
CEFACT	Centre for Trade Facilitation and Electronic Business
CISG	Convention on the International Sale of Goods
CTIG	Council for Trade in Goods
COMESA	Common Market for Eastern and Southern Africa
CMT	Committee of Ministers of Trade
DBSA	Development Bank of South Africa
DCEO	Directorate for Corruption and Economic Offences
DDA	Doha Development Agenda
DDR	Doha Development Round
DoA	Department of Agriculture
DoAR	Department of Agricultural Research
DRC	Democratic Republic of the Congo
DTT	Department of Traffic and Transport
EAC	East African Community
EC	European Commission
ECOWAS	Economic Community of West African States
EFT	Electronic Funds Transfer

ESA	Eastern and Southern Africa
EU	European Union
EU-ITF	European Union Infrastructure Trust Fund
FDI	Foreign Direct Investment
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEG	Global Economic Governance
GPN	Global Production Network
GVC	Global Value Chain
HOD	Head of Delegation
HS	Harmonised System
IATA	International Air Transport Association
ICAO	International Civil Aviation Organisation
ICBS	Interfront Customs and Border Management Solution
ICC	International Chamber of Commerce
ICT	Information and Communications Technology
IFC	International Finance Corporation
IFI	International Financial Institutions
IMO	International Migration Organisation
ISO	International Standardisation Organisation
ITC	International Trade Centre
ITF	Infrastructure Trust Fund
JICA	Japan International Cooperation Agency
LCCT	Lesotho Coordination Committee on Trade
LDC	Least Developed Country
LLDC	Land-Locked Developing Country
LLLDC	Land-Locked Least Developed Country
LNDB	Lesotho National Dairy Board
LNDC	Lesotho National Development Corporation
LRA	Lesotho Revenue Authority
LTDC	Lesotho Tourism Development Corporation

MCST	Ministry of Communication, Science and Technology
MTI	Ministry of Trade and Industry (Lesotho)
NAMA	Non-Agricultural Market Access
NEPAD	New Partnership for African's Development
NGTF	Negotiating Group on Trade Facilitation
NTFC	National Trade Facilitation Committee
NSS	National Security Services
OAU	Organisation of African Unity
OECD	Organisation Economic Co-operation and Development
OSBP	One Stop Border Post
PCTF	Preparatory Committee on Trade Facilitation
PTA	Preferential Trade Agreement
REC	Regional Economic Community
REC-TCC	Regional Economic Community Transport Coordination Committee
RIDMP	Regional Infrastructure Development Masterplan
RVC	Regional Value Chain
S&DT	Special and Differential Treatment
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAIIA	South African Institute of International Affairs
SARS	South African Revenue Services
SDG	Sustainable Development Goal
SEA	Single European Act
SPS	Sanitary and Phytosanitary
SSATP	Sub-Saharan Africa Transport Policy Program
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TFAF	Trade Facilitation Agreement Facility
TFI	Trade Facilitation Indicators
TFTA	Tripartite Free Trade Agreement
TFTACBSU	Trade Facilitation Technical Assistance and Capacity Building Support Unit

TNC	Trade Negotiation Committee
Tralac	Trade Law Centre
TRIPS	Trade Related Aspects of Intellectual Property Rights
TRS	Time Release Study
UN/CEFACT	The United Nations Centre for Trade Facilitation and Electronic Business
UNDP	The United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
UNCTAD	United Nations Commission for Trade and Development
UNO	United Nations Organisation
UN-OHRLLS	The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
VCLT	Vienna Convention on the Law of Treaties
VPoA	Vienna Programme of Action
WBG	World Bank Group
WDI	World Development Index
WCO	World Customs Organization
WTO	World Trade Organization

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## Chapter 1 - Introduction

### 1.1. Background to the Research

The Organisation for Economic Co-operation and Development (OECD) defines international trade as a process that involves either importing or exporting.<sup>1</sup> 'Importing' occurs when products are brought into the territory of a state for their consumption by its residents or for their further processing. Conversely, 'exporting' involves products being taken out of the territory of a state for their consumption or further processing in other states.<sup>2</sup> Trade can also occur where goods are transmitted through one state on their way to another destination state. This is referred to as 'transit trade.'<sup>3</sup> These simple definitions make it sound as though the processes are uncomplicated. However, in reality the movement of goods across national borders can be fraught with numerous obstacles. These include:

- requirements for excessive documentation for approval to trade
- time-consuming and complicated border processes
- exorbitant service fees and penalties which make trading expensive
- human resources deficiencies (for example insufficient, unskilled or un-coordinated workers) slowing down service delivery.

These, and other delay-inducing and cost-compounding factors, contribute to the lengthening of the time that goods take to cross borders and to the

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<sup>1</sup> The Organisation for Economic Cooperation and Development, *Glossary of Statistical Terms: International Trade*, (2007), available at <https://stats.oecd.org/glossary/detail.asp?ID=1405> accessed on 3 April 2017).

<sup>2</sup> R Schaffer, B Earle & A Filiberto *International Business Law and its Environment* 4 ed (1999) at 7. It is not only goods which are traded, services can also be traded. This happens via four modes of trade, namely: cross-border supply, consumption abroad, commercial presence, and through the movement of natural persons (art I:2 of the General Agreement on Trade in Services (GATS)). However, the scope of this current research is limited to examining trade in goods to the exclusion of trade in services.

<sup>3</sup> Transit trade has been the subject of policy and treaty focus, in documents such as the Vienna Programme of Action, the Convention and Statute on Freedom of Transit (1921), the General Agreement on Tariffs and Trade (1947), the Convention on the High Seas (1958), the Convention on Transit Trade of Land-Locked States (1965) and, the United Nations Convention on the Law of the Sea, 1982.

escalation of the costs of trade.<sup>4</sup> This could have negative ramifications on traders as well as on the general economy of the country that is experiencing these challenges. The discourse that addresses this phenomenon is called trade facilitation. Moisé and Sorescu define trade facilitation as ‘policies and measures aimed at reducing trade costs by improving efficiency at each stage of the international trade chain’.<sup>5</sup> Wilson, Mann and Otsuku explain that trade facilitation relates to ‘the logistics of moving goods through ports’.<sup>6</sup> Nora Neufeld writes that it is concerned with ‘quickenning the movement of goods across borders by measures such as faster clearance and release of goods’.<sup>7</sup> The common thread among all of these definitions is that trade facilitation measures are efficiency-enhancing and cost-reducing measures.<sup>8</sup>

One strategy that countries resort to in order to try to facilitate trade is to enter into regional and multilateral agreements wherein they commit to reducing the delays and costs that are associated with cross-border trade.<sup>9</sup> This is because, if countries were to only apply domestic reforms, in the absence of international cooperation, this would be of limited utility. Goods typically move across several borders in regional and global value chains

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<sup>4</sup> Michel M Kostecki International Trade Centre (UNCTAD/WTO) (2000) at 113.

<sup>5</sup> E Moisé & S Sorescu *Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries’ Trade*, Organisation for Economic Co-operation and Development (OECD) Trade Policy Papers 144 (2013) at 7.

<sup>6</sup> John Wilson, Catherine Mann & Tsunehiro Otsuku, *Assessing the Benefits of Trade Facilitation: A Global Perspective*, World Bank Policy Research Working Paper Series, (2005) at 842–843.

<sup>7</sup> Nora Neufeld *Implementing the Trade Facilitation Agreement: From Vision to Reality*, World Trade Organization Economic Research and Statistics Division, Working Paper ERSD-2016-14 (2016).

<sup>8</sup> Other definitions of the concept are given by various international organisations. The World Trade Organization (WTO) defines it as the ‘simplification and harmonisation of international trade procedures’ available at [http://gtad.wto.org/trta\\_subcategory.aspx?cat=33121](http://gtad.wto.org/trta_subcategory.aspx?cat=33121) accessed on 30 June 2017). The United Nations Conference on Trade and Development (UNCTAD) defines trade facilitation measures as those which seek to ‘establish a transparent, consistent and predictable environment for border transactions based on simple and standardised customs procedures and practices, documentation requirements, cargo and transit operations, and trade and transport conventions and arrangements’. UNCTAD *Trade Facilitation Handbook: Part 1: National Facilitation Bodies: Lessons and Experience* (2006) at 6.

<sup>9</sup> States also implement domestic reforms through policies and laws, and they enter into bilateral agreements on trade facilitation. However, these will not form the focus of this particular work.

(RVCs and GVCs) or global production networks (GPNs).<sup>10</sup> Therefore, even if one border is made more efficient (by the implementation of successful domestic reforms) goods may still be blocked when they have to pass through other borders. This is why cooperation in implementing regional and international reforms is crucial. This sentiment is echoed by Wilson et al who note that “a country’s trade flows will change not only through its own reforms but also the reforms of its trading partners.”<sup>11</sup> For the members of the Southern African Development Community (SADC)<sup>12</sup> - these frameworks comprise of the following instruments:

- The Southern African Development Community Protocol on Trade<sup>13</sup>
- The Agreement establishing the Southern African Customs Union (SACU)<sup>14</sup>
- The Tripartite Free Trade Agreement (TFTA)<sup>15</sup>
- The African Continental Free Trade Agreement (AfCFTA)<sup>16</sup>
- The General Agreement on Tariffs and Trade (GATT)<sup>17</sup> and other instruments of the World Trade Organization (WTO), such as the Agreement on Import Licensing
- Instruments of the World Customs Organization (WCO), such as the Revised Kyoto Convention.<sup>18</sup>

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<sup>10</sup> Kano, L., Tsang, E. and Wai-chung Yeung, H., *Global Value Chains: A Review of the Multidisciplinary Literature*, Journal of International Business Studies (2020) 577–622.

<sup>11</sup> Op cit note 6 at 841.

<sup>12</sup> <https://www.sadc.int/member-states> accessed 4 November 2020.

<sup>13</sup> It was signed in 1996 and it entered into force in 2000.

<sup>14</sup> It was signed in 2002 and it entered into force in 2004.

<sup>15</sup> It was signed in 2015 to establish a free trade area (FTA) between the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and SADC. It has not yet entered into force due to an insufficient number of ratifications.

<sup>16</sup> It was signed in 2018 and it entered into force in 2019.

<sup>17</sup> It was signed in 1947. It was only in force provisionally until it was adopted as one of the WTO’s multilateral agreements on trade in goods (i.e., as GATT 1994). The WTO Agreement itself entered into force on January 1, 1995, available at [https://www.wto.org/english/docs\\_e/legal\\_e/legalexplgatt1947\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legalexplgatt1947_e.htm), accessed on 6 October, 2019).

<sup>18</sup> The original Kyoto convention entered into force in 1974. It was revised in 1999 and the revised convention entered into force in 2006. World Customs Organization *Revised Kyoto Convention: Let’s Talk: Your Questions Answered* (2006) available at <https://www.wcoesaroeb.org/wp-content/uploads/2018/07/1.-WCO-Revised-Kyoto-Convention.pdf>, accessed on 6 October 2019).

The most recent international agreement, which is aimed at addressing impediments to the conduct of cross-border trade, is the World Trade Organization's Trade Facilitation Agreement (TFA).<sup>19</sup> It was concluded at the Bali Ministerial Conference in 2013 and it entered into force on February 22, 2017. This research investigates the potential contribution of this new agreement on the facilitation of trade in the Southern African Development Community region.<sup>20</sup>

The International Law Commission defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.<sup>21</sup> States enter into treaties in order to cooperate on the attainment of mutually-beneficial objectives. Doing so keeps them accountable to one another and allows for monitoring and for enforcement should there be non-compliance. The conclusion, by SADC states, of agreements to facilitate trade was expected to have led to the easing of the costs and delays that are associated with trade in the region. The indicators that the treaties are being effective would be, for example, decreased time to move goods through borders, decreased costs of trade, increased trade flows between the states and possibly even improved regional development. However, these results have not materialised.<sup>22</sup>

World Bank statistics indicate that, on average in SADC, it takes 63.8 hours to fulfil documentary compliance for exporting and 56.6 hours to fulfil

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<sup>19</sup> Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, General Council Decision of November 27, 2014, WT/L/940.

<sup>20</sup> In this work, the 'Southern African Development Community (SADC)' is taken to refer to a continental sub-region that comprises Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mozambique, Namibia, South Africa, eSwatini, Tanzania, Zambia and Zimbabwe. Although there are island states in SADC, they are excluded from the scope of this work. This is because this work focuses on trade facilitation challenges that are related to land borders only, and not ports. The island states experience slightly different trade facilitation challenges than those faced by the land-based states.

<sup>21</sup> *United Nations Organisation Yearbook of the International Law Commission* 'Draft Articles on the Law of Treaties (with commentaries) art 2 (1) (a)' (1966) II.

<sup>22</sup> The World Economic Forum has reported that 'Sub-Saharan Africa remains, on average, one of the weaker performing regions on the Border administration pillar'. World Economic Forum, *Global Enabling Trade Report*, (2016) at 22.

documentary compliance for importing.<sup>23</sup> The same report finds that it takes, on average, 97.3 hours to fulfil border compliance when exporting and 102 hours when importing.<sup>24</sup> Therefore, there continue to be delays in moving goods across borders. One of the culprits of the delays is the manner that inspections are carried out. They are generally not conducted on the basis of risk assessment and they are not efficiently executed.<sup>25</sup>

Despite commitments to make trade cheaper, trade costs continue to remain high in the region. Some of these costs are: toll fees, fuel levies, transit fees, value added tax (VAT) and fees for the provisional import of goods. The World Bank reports that the average cost of exporting is USD 605.8 for border compliance and USD 194.9 for documentary compliance.<sup>26</sup> The figures for importing are USD 636.2 and USD 188.4 respectively.<sup>27</sup> The South African Institute of International Affairs (SAIIA) reports on a complaint about the cost of trade in the Democratic Republic of Congo.

The multiplicity of taxes levied on imports in the DRC is also striking: at least eight public services collect taxes on imports at DRC's borders: State Customs Agency (DGDA), International Trade Bureau, Export and Import Control Agency (OCC), Health Service, Industry Promotion Fund (FPI), General Office of Sea Freight (OGEFREM) and the General Services of Taxes (DGI).<sup>28</sup>

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<sup>23</sup> World Bank, *Doing Business: Training for Reform, Regional Profile of the Southern African Development Community*, 16<sup>th</sup> edition, 2019, at 47 and 51.

<sup>24</sup> *Ibid* at 45 and 49.

<sup>25</sup> Namibia Dairies is a dairy processor. It has reported a complaint that inspections at some SADC borders can take weeks. Because they trade in time sensitive products which have a short shelf-life, these inefficiencies cause significant damage and loss to them. Namibia Dairies- <https://saiia.org.za/saiia-toolkit/namibia-dairies/>, accessed 4 May 2019.

<sup>26</sup> *Op cit* note 23 at 46 and 50.

<sup>27</sup> *Ibid* at 48 and 52.

<sup>28</sup> Based on information provided by Shenimed, a firm involved in the distribution of cigarettes <http://www.saiia.org.za/sadc-business-case-studies/shenimed>, accessed 4 May 2019.

Trade flows between SADC members have also not been increasing, as expected.<sup>29</sup> Furthermore, there has not been much improvement in the development levels of the states, nor in the livelihoods of the people over the past two decades.<sup>30</sup> Several treaty commitments remain unimplemented. For example, the states pledged to harmonise their trade procedures and requirements and to standardise their trade documents.<sup>31</sup> However, there have been reports that this ambition has not been realised.<sup>32</sup> This failure contributes to the creation of confusion and resultant delays for traders at SADC borders.<sup>33</sup> Trade facilitation efforts in SADC also continue to be

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<sup>29</sup> James Maringwa notes that intra-regional SADC trade fell to below 10% of total exports between 2000 and 2006. *Trade Policy and Trade Flow Analysis: SADC Regional Integration: What Role Have Bilateral Trade Agreements Played in Promoting Intraregional Trade?* December 2009 at 13. Marie-Agnès Jouanjean, Dirk Willem te Velde, Neil Balchin, Linda Calabrese & Alberto Lemma report that African states typically trade more with nations from other regions than with each other. *Regional Infrastructure for Trade Facilitation: Impact on Growth and Poverty Reduction* (2016) at 44. The SADC's *Selected Economic and Social Indicators* (2018) provide statistics on intra-SADC imports and exports as a percentage of total imports and exports. Between 2010 and 2018 the former declined from 19.8% to 19.1% with a peak of 20.7% in 2016 and a low of 17.7% in 2014. The latter slightly increased from 17.9% in 2010 to 19.3% in 2018 with a peak of 22.6% in 2016 and a low of 16.5% in 2011. Available at [https://www.sadc.int/files/6215/6630/2592/SADC\\_Selected\\_Indicators\\_2018.pdf](https://www.sadc.int/files/6215/6630/2592/SADC_Selected_Indicators_2018.pdf), accessed on 6 June 2020).

<sup>30</sup> For example, statistics from the World Bank show a decline in annual growth in Gross Domestic Production (GDP) for the region from 6.2% in 2005 to 2.8% in 2015, available at <https://databank.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/1ff4a498/Popular-Indicators>, accessed on 6 June 2020). The United Nations Development Programme (UNDP) *Human Development Report* (2019) shows that the region has the lowest human development index of all the regions, with very little growth over the years – from an index of 0.402 in 1990 to 0.541 in 2015. United Nations *Human Development Report* (2019) at 307, available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf>, accessed on 6 June 2020). The same report, at 321, also shows that 44.7% of the population in the region live below the poverty line. The SADC *Selected Economic and Social Indicators* (2018) show poor indicators in indices such as life expectancy, enrolment and unemployment, available at [https://www.sadc.int/files/6215/6630/2592/SADC\\_Selected\\_Indicators\\_2018.pdf](https://www.sadc.int/files/6215/6630/2592/SADC_Selected_Indicators_2018.pdf), accessed on 6 June 2020).

<sup>31</sup> Annex II to the Southern African Trade Protocol on Trade manifests the states' intention to simplify and to harmonise their trade laws and procedures. It calls for the creation of a SADC Sub-Committee on Customs and a Sub-Committee on Trade Facilitation. These are intended to be forums for cooperating on harmonising trade laws, procedures and documentation.

<sup>32</sup> Jan Bronauer and Ji Yoon cite the lack of harmonisation as being one of the factors that is sabotaging integration efforts in SADC. They advise that “the region must prioritise the coordination and harmonisation of regulatory frameworks” in order to meet their trade and economic aspirations. *Regional Economic Development in SADC: Taking Stock and Looking Ahead*, South African Institute of International Affairs, August 2018 Report, at 48.

<sup>33</sup> Rab Processors is a Malawian exporter of agricultural products. The firm has complained that inconsistencies in the procedures that are applied by the customs authorities of different SADC member states is a major contributor to border delays. Rab Processors Ltd, <http://www.saiia.org.za/sadc-business-case-studies/rab-processors-ltd>, accessed 24 April 2019.

subverted by the generally poor state of infrastructure. The SADC Regional Infrastructure Development Master Plan (RIDMP) (2012 – 2027) was adopted in 2012 to strategize the upscaling of infrastructural development in support of regional development.<sup>34</sup> However, Daniel Mlambo argues that both hard and soft infrastructure continue to be under-developed in the region.<sup>35</sup> Rupa Ranganathan and Vivien Foster report that, among others, the transport corridors are in a state of disrepair, there are low levels of access to power and many of the landlocked states have limited connectivity to submarine cables, thus impairing their access to Information and Communication Technology (ICT) services.<sup>36</sup> Almost ten years after the Plan these challenges continue to persist. Current statistics of the African Development Bank (ADB) show the SADC region as being among the lowest performers, in terms of infrastructural development, on the African continent.<sup>37</sup> This renders reforms related to expediting trade processes difficult to achieve due to the unavailability of technology and access to reliable energy etc. Some SADC firms have argued that lack of automation hampers the ease and efficiency of trade clearance.<sup>38</sup>

The above picture provokes us to question why these obstacles persist despite commitments to address them. Furthermore, to consider whether any improvements could arise from the implementation of the new World Trade Organization Trade Facilitation Agreement.

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<sup>34</sup>[https://www.sadc.int/files/7513/5293/3530/Regional\\_Infrastructure\\_Development\\_Master\\_Plan\\_Executive\\_Summary.pdf](https://www.sadc.int/files/7513/5293/3530/Regional_Infrastructure_Development_Master_Plan_Executive_Summary.pdf), accessed 13 November 2020.

<sup>35</sup> Daniel Mlambo, *Unearthing the Challenges and Prospects of Regional Integration in Southern Africa*, Wiley Journal of Public Affairs, Volume 19, Issue 1, February 2019.

<sup>36</sup> Rupa Ranganathan and Vivien Foster, *African Infrastructure Country Diagnostic, The SADC's Infrastructure: A Regional Perspective*, June 2011, at 6.

<sup>37</sup> The report is produced by the African Development Bank to chronicle the status of infrastructural development across the African continent. Out of 54 countries, the SADC countries rank among the worst performers. For example, Tanzania is at position 40, Mozambique 44, Madagascar 47 and the Democratic Republic of Congo at position 50. African Development Bank, *Africa Infrastructural Development Index*, June 2020.

<sup>38</sup> Walvis Bay Corridor Group (Botswana, Mozambique, Namibia, South Africa ) - <https://saiia.org.za/saiia-toolkit/walvis-bay-corridor-group/>, accessed 4 May 2019.

## 1.2. Problem Statement

The problem that is of interest in this work is that, despite participating in several regional and international trade facilitation treaties, the SADC countries have experienced limited positive results therefrom. This would be, for example, in the form of quicker and cheaper trade and the expected positive impacts on their overall development trajectory.

## 1.3. Research Questions

This thesis addresses the following questions:

1. How can trade facilitation support development?
2. What have been the challenges to compliance with, and implementation of, regional and multilateral trade facilitation treaties, which have rendered these frameworks ineffective in facilitating trade in the Southern African Development Community?
3. Can the World Trade Organization's Trade Facilitation Agreement be leveraged by the countries in the Southern African Development Community to increase their implementation of trade facilitation measures in support of their development?

This thesis has three broad arguments. First, that facilitating trade can be beneficial for development. Secondly, that participating in trade agreements is an important component of a country's strategy to facilitate trade. It recognises that there are many challenges to compliance with, as well as to implementation of such treaties. Left unaddressed, these challenges can negate the effectiveness of the treaties. Therefore, an understanding of the challenges is necessary, along with sound policies to address them. Thirdly, that the Trade Facilitation Agreement has distinct advantages over pre-existing treaties, which advantages render it likelier to have a greater impact on facilitating trade in SADC than what currently obtains. However, this is

not a given. The countries will need to adopt prudent strategies on how to get the most out of the TFA.

The study relies on three sets of theories:

- on trade and development,
- law and development and
- theories on state compliance with international commitments.

These theories are introduced in chapter 2 of this work. The chapter debates various theories on trade and development, including mercantilism, the classical theory of international trade and heterodox theories of international trade. It concludes that the theories of heterodox economics are the most useful in analyses that focus on developing country perspectives because, unlike the former theories, heterodox economics strongly recognises that the effect of trade openness on development can be affected by the development levels of the country concerned. In particular, developing countries have certain vulnerabilities that may render traditional views on the positive correlation between trade openness and development questionable.

The law and development theory provides us with insight that, while law may be important to support development, this will depend on factors such as the regulatory design, regulatory compliance and the quality of implementation of the law. Enmeshment theory and the managerial approach to compliance support the view that the quality of norms, the nature of institutional arrangements and state capacity are important determinants of treaty compliance. Embedded liberalism adds to our understanding of compliance from a perspective on the World Trade Organization in particular. It is a theory that views the WTO regime as one where non-compliance is not necessarily tantamount to cheating, or evading regime rules. It argues that there is explicit recognition (for instance by the allowance of measures such as safeguards, exemptions, exceptions, etc.) that governments require

flexibility in implementing interventions, as may be required by domestic exigencies.

In asking these questions and exploring these issues this thesis contributes to the academic literature in at least three significant ways. First it provides a detailed review of the legal and academic literature on trade facilitation in SADC. Second, the case study on Lesotho provides an empirical analysis of the legal frameworks and challenges to the implementation of trade facilitation reforms in a land-locked and Least Developed Country (LDC). Third, the thesis contributes to an understanding of the theory of law and development by exploring its application in a new context (SADC) and to a novel discipline (trade facilitation). The thesis also contributes to the policy discourse on trade facilitation by suggesting the considerations that should be taken on board by policy makers seeking to improve the effectiveness of domestic, regional and multilateral trade facilitation reforms.

#### 1.4 Research Justification

This research deals with a very relevant and significant topic for countries in the Southern African Development Community. Studies have shown that inordinate delays and high transaction costs at SADC borders are impeding trade every moment of every day. This is argued to have negative impacts on business profitability, consumer welfare, government revenues and, consequently, on the regional economy as a whole.<sup>39</sup> Therefore, it is imperative to have an analysis of the causes and the impacts of this phenomenon so that we can have a better understanding of the appropriate policies to implement to correct the problem. This is what this study sets out to do.

Secondly, there have been many interventions that have been undertaken by the SADC states as they have tried to facilitate their trade. However, the challenges have continued unabated. Therefore, it is critical to have dedicated research on why these have failed and what approaches the countries could

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<sup>39</sup> Organisation for Economic Cooperation and Development (OECD) *Overcoming Border Bottlenecks: The Costs and Benefits of Trade Facilitation* (2009) at 11.

consider going forward, that would be more effective. Lastly, the entry into force of the Trade Facilitation Agreement makes this study all the more timely. This is because it is vital to consider and to anticipate the potential impacts (both positive and negative) of this new instrument on the improvement of trade facilitation in the region. Being a new agreement, not much has been written about its potential impacts on SADC, in particular.

### 1.5 Research Methodology and Scope of Study

Moses and Knutsen argue that it is up to individual researchers to select different ontologies depending on what they will be studying and that the research methods that they ultimately employ for their study will differ according to their chosen ontology.<sup>40</sup> Adding to this Kothari explains that

There are two basic approaches to research, viz *quantitative approach* and the *qualitative approach*. The former involves the generation of data in quantitative form which can be subjected to rigorous quantitative analysis in a formal and rigid fashion. Qualitative approach to research is concerned with subjective assessment of attitudes, opinions and behaviour. Research in such a situation is a function of researchers insights and impressions. Such an approach to research generate results either in non-quantitative form or in the form which are not subjected to rigorous quantitative analysis.<sup>41</sup>

This research has elected a qualitative approach. Firstly, it undertakes a desk review of relevant literature, (such as academic writing, the reports of regional and international organisations, as well as regional and multilateral agreements). This is done to formulate an understanding of the nature of trade facilitation, the trade facilitation commitments of the SADC states as well as the extent of the border impediments in the region. Fieldwork is undertaken in order to uncover the peculiar challenges that exist at one of the SADC border posts (the Maseru Bridge, which lies between the Kingdom of Lesotho and the Republic of South Africa). This case study involves:

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<sup>40</sup> Jonathon W. Moses & Torbjørn L. Knutsen, *Ways of Knowing: Competing Methodologies in Social and Political Research*, 3<sup>rd</sup> edition, (2019) at 5.

<sup>41</sup> C. R. Kothari, *Research Methodology: Methods and Techniques* (2004) at 5.

- evaluation of the policies and laws that affect cross-border trading
- observations of the trading processes at the border
- interviews with the government agencies that are responsible for regulating cross-border trade, as well as with border officials and border users.

Although the exercise of conducting the case study involved the use of quantitative methods (for example, the employment of questionnaires during some interviews) the intention of this was not to eventually report quantitative results. This work does not have any hypothesis which is being tested. Its objective is to discover the unique perspectives and experiences of the various stakeholders in the trade facilitation discourse, as it relates to Lesotho. The case study provides a practical lens from which to study the phenomenon of trade facilitation and its challenges in a focused manner.

## 1.6. Chapter Outline

This work consists of eight chapters.

### Chapter 1 – Introduction

The first chapter presents a background to the study, the problem statement and the research questions. It outlines the thesis arguments as well as the methodology and the justification for the work.

### Chapter 2 – Theoretical Framework

This chapter introduces the key theories on which this thesis is based: the theory of international trade, the law and development theory and theories on compliance. Heterodox economics theorises that there can be a positive correlation between trade openness and development, but that this relationship is not a given. The law and development theory posits that there may be a positive relationship between law and development if due attention is paid to regulatory design, regulatory compliance and the quality of the implementation of the law. Theories on compliance explain the factors that

can affect treaty compliance. These theories are used in the following chapters to analyse a different facet of the overall research topic.

### Chapter 3–Trade Facilitation and its Relationship to Development

This chapter tackles the research question of how trade facilitation can be supportive of development. It explores trade facilitation as a concept: its definition, content and the controversies that surround the implementation of its measures. The chapter utilises heterodox economics to analyse the relationship between trade facilitation and development. It argues that there can be positive development outcomes from trade facilitation. It explains the benefits to traders, consumers, governments and to the economy at large. However, it cautions that facilitating trade does not always automatically correlate with the touted benefits (for example, increased trade flows, and improved development).

### Chapter 4 – The Regional and Multilateral Frameworks for Trade Facilitation in the Southern African Development Community

This chapter describes the regional and multilateral agreements that SADC countries participate in, in an effort to facilitate their trade.<sup>42</sup> It employs insights from compliance theories to understand why these frameworks have remained largely ineffective in facilitating trade in the region. The enmeshment theory helps us to understand how normative and institutional weaknesses partly explain the lack of effectiveness. The lack of capacity building is another explanation that is proposed by the managerial approach to compliance. This is especially so because trade facilitation reforms are

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<sup>42</sup> The regional agreements are: the Southern African Development Community Protocol on Trade, the Southern African Customs Union Agreement, the Tripartite Free Trade Agreement and the African Continental Free Trade Agreement. The international agreements consist of instruments of the World Customs Organization and of the World Trade Organization. The former are: the Customs Convention on the A.T.A Carnet for the Temporary Admission of Goods, the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, the Convention on Temporary Admission, the International Convention on the Harmonized Commodity Description and Coding System and the International Convention on the Simplification and Harmonization of Customs Procedures). The latter are: the General Agreement on Tariffs and Trade, the Agreement on Rules of Origin, the Agreement on Pre-shipment Inspection, the Customs Valuation Agreement, the Import Licensing Agreement, the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Inspections.

usually heavily resource-dependent and require some support to be given to less developed state parties. The argument that is made in the chapter is that committing to arrangements is not enough to deliver benefits. The agreements have to consider the compliance challenges of their members and devise strategies to mitigate these. Failing which, compliance will be impeded, regardless of the quality of the instruments or the good intentions of the parties.

#### Chapter 5–Trade Facilitation and Implementation Challenges in the Southern African Development Community

The law and development theory is used in chapter 5 to consider the general implementation challenges that are experienced in the SADC states. It recounts the various impediments to trade facilitation that are often reported in the region. It does so with reference to studies that have been conducted by regional and international organisations, as well as to complaints that have been submitted by traders in the region. It advances the argument that, despite the extensive regulatory regime that was explored in chapter 4, barriers to cross border trade continue to abound in SADC due to challenges to the parties' implementation abilities. It argues that this contributes to the retardation of development in the region and that, thus, there is a need to address implementation challenges if trade is to have any impact on the attainment of development gains.

#### Chapter 6 – An Exploration of the Challenges to the Implementation of Trade Facilitation Measures in the Kingdom of Lesotho

After having detailed the efforts that the SADC countries have made to facilitate their trade (in chapter 4), and having argued that these have had limited results on the ground (in chapter 5), chapter 6 contains a focused case study of one of the SADC states. This is done so that we can better understand the nature of the challenges. The law and development theory is instructive in explaining the dichotomy between the commitments, on the one hand, and the poor development outcomes on the other. Applying the theory, the key factors include: poor regulatory design, institutional weaknesses and lack of

trader compliance. It is argued that these are some of the deficits that countries in the Southern African Development Community will need to redress in order to benefit from the laws that are in place to facilitate trade.

#### Chapter 7 – The World Trade Organization’s Trade Facilitation Agreement: Prospects for Advancing Trade Facilitation in the Southern African Development Community

The aim of this research is to debate the potential utility of the Trade Facilitation Agreement to the SADC trade facilitation project. Therefore, this chapter discusses the TFA in detail so that such an analysis can take place. It traces the evolution of the agreement and discusses its structure and contents. It analyses, in particular, its suitability for addressing the peculiar trade facilitation challenges that are faced by the SADC countries, (as have been examined in chapter 5 of this work). As with the analysis of the pre-existing instruments using theories on compliance, this chapter uses the same analytical lens to determine whether this agreement addresses compliance challenges in a more robust way, which is likely to render it more effective than the other agreements have been. The thesis argues that the TFA addresses the challenges and that its contents and approach can assure it improved prospects of success in resolving the trade facilitation impediments.

#### Chapter 8–Thesis Conclusions and Recommendations

This chapter concludes on the potential of the Trade Facilitation Agreement to assist the SADC countries to address their trade facilitation challenges. It argues that participating in trade facilitation agreements is an important component of a country’s trade strategy to achieve the developmental benefits of trade. However, the agreements need to be sound, not only in terms of the normative frameworks, but also the compliance mechanisms that are built into them. In addition to this, the parties themselves need sound implementation strategies. The chapter concludes that the Trade Facilitation Agreement is not a perfect instrument. However, it has unique features that give it distinct advantages over previous trade facilitation agreements, which advantages make it likely to be more impactful in resolving trade facilitation

impediments in the SADC region. The chapter concludes with recommendations on how best the states could exploit the agreement in a manner that will meet their needs, interests and peculiar circumstances.

The next chapter reviews the literature on the theories of trade and development, law and development and theories on compliance. It builds the theoretical framework that is utilised to analyse the empirical framework in chapters four, five, six and seven.

## Chapter 2- Theoretical Framework

### 2.1. Introduction

This thesis aims to contribute to efforts to understand the factors that can affect the facilitation of trade. The ultimate goal of trade facilitation is development. Therefore, this chapter first begins with an exploration of the concept of development. It argues that development is not purely an economic construct, but that it is a multifaceted phenomenon. The chapter then introduces the main theories that will drive the thesis analysis. Two of the theories aim to explain the conditions that can influence development. The international trade theory posits that there is a nexus between trade and development. However, this work argues that the freeing of trade, in and of itself, will not necessarily lead to development. The law and development theory proposes that the nature of a country's laws (regulatory design, regulatory compliance and the quality of implementation) can affect the laws' ability to be development-inducing. This thesis argues that these theoretical insights may be helpful in analysing the cogency of the legal reforms that the SADC countries have undertaken in the hope of facilitating their trade.

Finally, because this thesis analyses the effectiveness of trade agreements, three theories on compliance with treaties are introduced in this chapter. These are: enmeshment theory, the managerial approach and embedded liberalism. This thesis argues that there are many intervening factors that may hinder a state's ability to comply with its treaty commitments, thus diminishing the impact of the instrument. These three theories capture some of the factors that are relevant in the case of the SADC countries.

### 2.2. The Concept of Development

Traditionally, development was perceived purely as an economic phenomenon. With this conceptualisation, development was to be evidenced by indicators such as increases in the national income and the structural

transformation of an economy.<sup>43</sup> However, with time this economics-centred view of development changed. Seers was one of those who asked ‘why do we confuse development with economic growth?’<sup>44</sup> This was because there was a growing disillusionment with the promises of this economics-centred definition of development. Economic advancement alone was not translating into improved living conditions for the broader society. Despite rising national incomes and structural transformation there also arose less-desirable fruits from economic growth, such as environmental degradation, rising inequality and social upheaval.<sup>45</sup> This led to scholars becoming critical of the limited conceptualisation of the term ‘development’ and realising that economic indicators alone can be misleading as exclusive markers of development.<sup>46</sup>

Thus, over time, ideas about what ‘development’ really means began to change. It became accepted that development did not only refer to improvements in economic indicators, but that it also required improvements in political, social, cultural and other aspects of human existence.<sup>47</sup> Amartya Sen, in his work *Development as Freedom*, similarly argues that it is narrow-minded to define development exclusively in terms of improved economic indicators.<sup>48</sup> Instead he defines it as ‘a process of expanding the real freedoms that people enjoy.’<sup>49</sup> This means that it is the *ends* that are important. This thesis adopts this evaluation of the concept of development. That is, the notion of development stretches beyond the economic aspect alone. It has a wider and more multi-dimensional connotation. The relevance of economic indicators in development discourse is indisputable. However, the argument is that we should move away from a purely economic and

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<sup>43</sup> This can be seen, for example, in the linear development theories of economists such as Walt Whitman Rostow ‘Stages of Economic Growth’ *Economic History Review* (1959) XII (1).

<sup>44</sup> David Lehmann (ed) *The Meaning of Development in Development Theory: Four Critical Studies*, (1979) at.9.

<sup>45</sup> Gilbert Rist ‘Development as a buzzword’ (2007) 17 (4/5) *Development in Practice* at 488.

<sup>46</sup> Barbara Ingham, ‘The Meaning of Development: Interactions between “new” and “old” Ideas’ (1993) 21 (11) *World Development* at 1819.

<sup>47</sup> For example, Ha Joon Chang ‘*Hamlet* without the Prince of Denmark: How development has disappeared from today’s ‘development’ discourse’ in Shahrukh Rafi Khan & Jens Christiansen (eds) *Towards New Developmentalism: Market as Means Rather than Master* (2010).

<sup>48</sup> Amartya Sen *Development as Freedom* (1999) at 3.

<sup>49</sup> *Ibid.*

productionist understanding of the concept of development and include in it social, political, environmental and other factors as being equally important elements of the concept.<sup>50</sup>

We see this holistic interpretation of development reflected in instruments such as the World Bank's Comprehensive Development Framework (CDF). These are a set of principles that underpin the Bank's international development agenda. The premise of the framework is that development encompasses several interdependent elements being - social, structural, human, governance, environmental, economic and financial.<sup>51</sup> The same understanding is further captured in the United Nations sustainable development goals. These are a collection of seventeen goals that, together, are intended to support sustainable development for all. The goals are: no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace, justice and strong institutions and partnership for the goals.<sup>52</sup>

The argument is that this broader definition of development should be the central objective of SADC states when they elect to participate in initiatives to facilitate their trade; that is: can those initiatives help them to achieve this multi-faceted nature of development?

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<sup>50</sup> [http://web.worldbank.org/archive/website01013/WEB/0\\_PAGEP.HTM](http://web.worldbank.org/archive/website01013/WEB/0_PAGEP.HTM) accessed on 2 January, 2020. Similarly, the United Nations Development Programme (UNDP) concept of sustainable development, presented in its *The Sustainable Goals Report* (2019) <https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf>, accessed on 2 January 2020.

<sup>51</sup> Available at [http://web.worldbank.org/archive/website01013/WEB/0\\_PAGEP.HTM](http://web.worldbank.org/archive/website01013/WEB/0_PAGEP.HTM) accessed on 2 January, 2020. Similarly, the United Nations Development Programme (UNDP) concept of sustainable development, presented in its *The Sustainable Goals Report* (2019) <https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf>, accessed on 2 January 2020.

<sup>52</sup> <https://sdgs.un.org/goals>, accessed 24 October 2020.

After defining development, the next question becomes: how is development to be achieved? Many theories abound on this. This thesis considers two of them. The first is the theory of international trade, which has been controversially used to argue that there is a positive correlation between trade and development. The second theory is the law and development theory. It proposes that law is an important tool for positively influencing development.

## 2.3. Theories on Development

### 2.3.1. International Trade Theory

Perspectives on the relationship between trade and development can be broadly traced back from the era of mercantilism, to the classical theory of international trade, to heterodox economics theories. It remains controversial whether promoting free trade will lead to the improvement of development.

#### 2.3.1.1. *Mercantilism*

Between the sixteenth and eighteenth centuries mercantilism was the dominant trade policy of states.<sup>53</sup> It championed the view that, in order to develop, governments needed to gain a positive balance of trade over their trading partners by increasing their exports and restricting imports. Mercantilism viewed trade as a zero-sum game where only one state could win as against its competitors. This economic domination was to be the key to political supremacy.<sup>54</sup> There were several mercantilist proponents across the whole of Europe at the time. For instance, in Italy in 1613 Antonio Serra wrote about the imperative of a state to accumulate an abundance of gold and silver by achieving greater financial inflows than outflows.<sup>55</sup> In France, Jean-Baptiste Colbert wrote about the need to conquer new markets by, for instance, granting state aid and subsidies to exporters so as to boost their

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<sup>53</sup> A seminal work on the various facets of mercantilism is Eli F. Heckscher's *Mercantilism* (1935).

<sup>54</sup> Patrick J McGowan, Scarlett Cornelissen & Philip Nel (eds) *Power, Wealth and Global Equity: An International Relations Textbook for Africa* 3 ed (2006), at 72–73.

<sup>55</sup> Antonio Serra *A Short Treatise on the Wealth and Poverty of Nations* tr Jonathan Hunt (2011). See also Italian mercantilist Giovanni Botero's *Cause della Grandezza e Magnificenza delle Città (Causes of the Greatness and Magnificence of Cities)* (1589).

competitive advantages.<sup>56</sup> In England Thomas Mun advised that a nation should employ measures such as quantitative restrictions, customs duties, discriminative taxation, and currency manipulation in its trade policy.<sup>57</sup>

Understanding mercantilism is useful for our analysis because it is informative about the reasons why governments, to this day, continue to restrict trade in various ways. For example, the “America First” trade policy under President Donald Trump<sup>58</sup> and Britain’s exit from the European Union after a 2016 referendum on the issue. Mercantilism explains the fears that governments can have that trade will harm their domestic producers. It also explains the aspirations that governments hold of economic dominance by out-competing others in trading. Such sentiments and policies are generally now argued to be counter-productive and anti-developmental. Thus, countries are being advised to eschew them and to, instead, liberalise and facilitate trade.

### 2.3.1.2. *The Classical Theory of International Trade*

Mercantilism has faced centuries of criticism from economists. For example, David Hume argued that free trade was important as a means by which a state could learn the skills, arts and innovations of others, to its own

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<sup>56</sup> Philippe Minard Altern *The Market Economy and the French State: Myths and Legends around Colbertism* (2008/1) 37 *L'Économie Politique* at 77–94. Another influential French mercantilist was Jean Bodin.

<sup>57</sup> Thomas Mun *Englands Treasure by Forraign Trade. or The Ballance of our Forraign Trade is The Rule of our Treasure* 1st pub 1664 (1895) available at [https://books.google.co.za/books?hl=en&lr=&id=YCypQuKRhcUC&oi=fnd&pg=PA1&dq=thomas+mun&ots=jyqP1j7H5C&sig=CsOD5po\\_L-OgK795NjapIPR3QiY&redir\\_esc=y#v=onepage&q=thomas%20mun&f=false](https://books.google.co.za/books?hl=en&lr=&id=YCypQuKRhcUC&oi=fnd&pg=PA1&dq=thomas+mun&ots=jyqP1j7H5C&sig=CsOD5po_L-OgK795NjapIPR3QiY&redir_esc=y#v=onepage&q=thomas%20mun&f=false), accessed 23 November 2019. Another English mercantilist was Edward Misselden who, in his treatise *Free Trade (or the Meanes to Make Trade Flourish)* (1622), opined that ‘the general remote cause of our want of money, is the great excesse of this Kingdom, in consuming the Commodities of Forreine Countries’, available at <https://www.sapili.org/subir-depois/en/mc000214.pdf>, accessed 23 November 2019.

<sup>58</sup> This has led to measures such as United States’ withdrawal from the Trans-Pacific Partnership (TPP) (<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> accessed 24 October 2020); the renegotiation of the North Atlantic Free Trade Agreement (NAFTA) to the United States – Mexico – Canada Agreement (USMCA) (<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>, accessed 24 October 2020); its trade war with China, and its blocking of the appointments of the World Trade Organization’s Appellate Body members.

betterment.<sup>59</sup> John Stuart Mill added that foreign exchanges allowed for the division of labour and for each country to acquire a specialisation.<sup>60</sup> However, the most prominent critics of mercantilism were Adam Smith<sup>61</sup> and David Ricardo.<sup>62</sup> They were advocates of the classical trade theory. Smith wrote that limiting trade did not make economic sense. He argued that restrictive policies could spark retaliation from trading partners, thus leading to a race to the bottom and to trade wars, which would, ultimately be to the detriment of all nations. Thus, Smith proposed that each country should specialise in products in which it has an advantage (can produce most efficiently and competitively) and trade freely in those products in exchange for those that it is not competitive in producing. This is the theory of absolute advantage.

If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.<sup>63</sup>

This raised the question of whether gains flowed from free trade only when a country had an absolute advantage in the production of certain goods. What if it had an absolute advantage in everything? Or an absolute disadvantage in everything? These questions were addressed by Ricardo who moved the classical theory of international trade further by arguing that an absolute advantage was not necessary for gains to flow from trade. He proposed that a nation, which focused its production where its advantage was greater, or its disadvantage least (their comparative advantage) would still benefit from the gains of trade.

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<sup>59</sup> David Hume 'Of the jealousy of trade' (1771 –1785) *Hibernian Magazine* at 623–625, <https://search.proquest.com/openview/e5ffc5c71ac23c89/1?cbl=7060&pq-origsite=gscholar>, accessed on 23 November 2019.

<sup>60</sup> John Stuart Mill, *Principles of Political Economy* (1848) at 349. Others were Thomas Robert Malthus's *Principles of Political Economy* (1820) and John Baptiste Say's *A Treatise on Political Economy: or the Production, Distribution, and Consumption of Wealth* (1836).

<sup>61</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) bk IV ch. III (part II).

<sup>62</sup> David Ricardo *On the Principles of Political Economy and Taxation* (1817).

<sup>63</sup> Op cit note 61 at bk IV, ch I.

[A] nation, like a person, gains from trade by exporting the goods or services in which it has its greatest comparative advantage in productivity and importing those in which it has the least comparative advantage.<sup>64</sup>

However, one of the shortcomings of Smith and Ricardo's models was that they did not explain exactly *how* a country could determine its absolute or its comparative advantage. The Heckscher-Ohlin Factor Proportions Theory<sup>65</sup> addressed this gap by proposing that a country should examine its factors of production (for example, land, labour, capital etc.) and export those products that best took advantage of its factor endowments. For example, a country that had abundant capital should export capital intensive goods and one that had abundant labour should export labour-intensive goods.

These three theories (Smith's theory of absolute advantage, Ricardo's theory of comparative advantage, and the Heckscher and Ohlin's factor proportions theory) became the backbone of the classical theory of international trade. This propounded that trade restrictions were economically harmful and that trade liberalisation was more beneficial for development.<sup>66</sup> The theories correlate free trade with increased employment, economic growth, improvements in the standard of living and increased global prosperity and peace.<sup>67</sup> Nevertheless, classical economics did acknowledge limited circumstances which could justify the imposition of some restrictions to trade, as a temporary measure.

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<sup>64</sup> Op cit note 62.

<sup>65</sup> This theory was the creation of two Swedish economists, Eli Heckscher and Bertil Ohlin.

<sup>66</sup> Roger Bennett, *International Business* 2ed (1999); W.M Corden 'The normative theory of international trade' in P B Kenen & R W Jones (eds) *Handbook of International Economics* vol 1 (1984) at 63–130.

<sup>67</sup> These ideas are supported by other writers of the time, such as Jeremy Bentham in his *In Defence of Usury*, (1787). They are still championed by more contemporary writers such as Richard M Ebeling in his *The timeless wisdom of Adam Smith* (2016), available at <https://fee.org/articles/the-timeless-wisdom-of-adam-smith>, published by the Foundation for Economic Education, accessed on 2 January 2019. He writes that free trade has led to the 'betterment of the world' and that Adam Smith had 'underestimated the power of his own ideas'.

The only case in which, on mere principles of political economy, protecting duties can be defensible, is when they are imposed temporarily (especially in a young and rising nation) in hopes of naturalizing a foreign industry, in itself perfectly suitable to the circumstances of the country.<sup>68</sup>

The classical theory of international trade grew to influence governments to reduce their barriers to trade. For example, the United Kingdom (UK) repealed its Corn Laws.<sup>69</sup> It also influenced the prescriptions of International Financial Institutions (IFIs).<sup>70</sup> Initially the theory was used to primarily influence the removal of tariffs because tariffs were, originally, the most prominent form of trade barrier. This move was referred to as trade liberalisation. However, over time, as nations dismantled high tariffs, they began to replace them with non-tariff barriers (NTBs), such as the enforcement of standards and phytosanitary measures etc.<sup>71</sup> Therefore, the theory was extended to similarly censure such measures. Thus, the idea emerged that trade should not only be *liberalised* but that also it should also be *facilitated* in order for development to be realised.<sup>72</sup>

There are many different definitions of the concept of trade facilitation. However, despite the different phrasing, all of the definitions have certain features in common regarding what trade facilitation entails. It is about

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<sup>68</sup> Mill Op cit note 60 at 922. Another example of an acceptable exception could be the institution of safeguard measures to give domestic producers temporary reprieve against inflows of more competitive foreign products that threaten their viability.

<sup>69</sup> These were laws that had regulated the internal trade, importation and exportation of grain from 1660. They had instituted high tariffs in order to restrict grain imports. Donald Grove Barnes *A History of English Corn Laws from 1660–1846* (1930).

<sup>70</sup> For example, Shang-Jin Wei & Zhiwei Zhang found that between 1993 and 2003 ninety-nine countries participated in the structural adjustment programmes of the International Monetary Fund (IMF). In 78% of the cases, the countries were required to implement trade openness as a condition of the programme. See their 'Do external interventions work? The case of trade reform conditions in IMF supported programs' (2010) 92(1) *Journal of Development Economics* at 71–81.

<sup>71</sup> For example, in the first five multilateral negotiation rounds of the General Agreement on Tariffs and Trade (GATT) the CONTRACTING PARTIES focused exclusively on negotiating tariff reductions. These rounds were: Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1956), and the Dillon Round (1960). Non-tariff barriers were first tackled only in the Kennedy Round of 1964. This resulted in the adoption of an anti-dumping code. See Dilip K Das *The Evolving Global Trade Architecture* (2007) at 14.

<sup>72</sup> The international trade theory posits that, where trade barriers are reduced, it then becomes easier for products to penetrate export markets. This can increase business profits from trading activities and government revenue through the taxation of business profits. This revenue can be applied for developmental purposes.

quicken the movement of goods across borders, reducing trade costs and ensuring the security of trade. World Bank publications have defined it as addressing

the logistics of moving goods through ports or more efficiently moving documentation associated with cross-border trade. In recent years, the definition has been broadened to include the environment in which trade transactions take place, to include transparency and professionalism of customs and regulatory environments, as well as harmonization of standards and conformance to international or regional regulations. In addition, the rapid integration of networked information technology into trade means that modern definitions of trade facilitation need to encompass a technological concept as well.<sup>73</sup>

Capaldo explains that 'liberalization and facilitation share the same basic logic: reducing trading costs leads to higher net exports and economic activity'.<sup>74</sup> Thus, the international trade theory gave birth to both the concept of trade liberalisation as well as that of trade facilitation. The only difference being that one evolved before the other, due to changes in the trade policies of states over time. Grainger agrees that 'trade facilitation can be viewed as an extension of the efforts to liberalise international trade'.<sup>75</sup>

The classical theory of international trade becomes important to this work because of its postulation that trade correlates positively with development. This is because this thesis considers the possible implications of the Trade Facilitation Agreement on development in the Southern African Development Community. Some scholars have proposed that positive results can emanate from nations pursuing free trade for development.<sup>76</sup> Some empirical studies have confirmed this position. For example, Andersen and Babula conducted

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<sup>73</sup> John Wilson, Catherine Mann & Tsunehiro Otsuki *Trade Facilitation and Economic Development: Measuring the Impact*, (2003) at 4.

<sup>74</sup> Jeronim Capaldo *Trade Hallucination: Risks of Trade Facilitation and Suggestions for Implementation, No 14-02, GDAE Working Papers, GDAE, Tufts University (2014)* at 2.

<sup>75</sup> Andrew Grainger 'Customs and trade facilitation: from concepts to implementation' (2008) 2(1) *World Customs Journal* at 20.

<sup>76</sup> Alan Winters proposes that trade liberalisation assists with economic growth and that this should, in turn, alleviate poverty. He, however, recognises that there are winners and losers in trade liberalisation and that compensatory policies should be used to ameliorate the effects on the poor. L Alan Winters 'Trade policies for poverty alleviation' in Bernard Hoekman, Aaditya & Philip English (eds) *Development, Trade, and the WTO: A Handbook* at 28–38.

a study after which they concluded that, generally, empirical evidence shows that there is a positive relationship between international trade and economic growth.<sup>77</sup> Another found a correlation between trade openness and greater income equality.<sup>78</sup> However, it is argued that such perspectives, although important to show the potential value of trade to development outcomes, do not tell the full story. Because this research studies African developing countries in particular, it is imperative to consider theorists who interrogate the trade and development nexus from the perspective of the unique position of such countries.

### 2.3.1.3. *Heterodox Theories of International Trade*

Heterodox economics challenges the orthodox economic thinking of the classical trade theory. It cautions that markets are imperfect and that openness, in and of itself, will not necessarily lead to development. For example, the classic theory assumes that all countries are productive enough to export something competitively and to gain from their exports. However, where these preconditions do not exist, freeing trade will not lead to improved development for the states concerned. One of the classic heterodox economists was Frederich List (1789–1846). He disagreed with the classical theory of trade and argued that emerging states (which were France, Germany and the United States at the time) could not compete with established empires (primarily England) and that they needed to exercise some measure of

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<sup>77</sup> They, however, drew a caveat that the theory seems inappropriate to assist developing countries to gain productivity growth through trade liberalisation. See also Lill Andersen & Ronald Babula 'The link between openness and long-run economic growth' (2008) *United States International Trade Commission Journal of International Commerce and Economics*,, available at [https://www.usitc.gov/publications/332/journals/openness\\_growth\\_link.pdf](https://www.usitc.gov/publications/332/journals/openness_growth_link.pdf), accessed on 7 October 2019.

<sup>78</sup> Stephen Dobson & Carlyn Ramlogan 'Is there an Openness Kuznets curve?'(2009): 62 (2) *Kyklos International Review for Social Sciences*, at 226–238. The authors studied 18 Latin American countries and advised that developing countries should not only pursue trade openness, but that they should also implement redistribution policies simultaneously in order to reduce any possible adverse effects of trade liberalisation.

protectionism in order to catch up.<sup>79</sup> He argued that the benefits of free trade, as espoused by Smith *et al*, only make sense if states are equally developed, not between states that are at different levels of economic development. Thus, he did not dispute the benefits of free trade but cautioned that the policy is appropriate or inappropriate regard being had to the status of the countries that are involved.<sup>80</sup>

a person who... does not possess the power of producing objects of more value than he consumes... will become poorer. The reverse is also true: a person may be poor; if he, however, possesses the power of producing a larger amount of valuable articles than he consumes, he becomes rich.<sup>81</sup>

Modern heterodox economists continue to criticise the assertions of the classical theory of international trade. They argue that the economic vulnerabilities of developing countries require more state intervention in the economies and that a free market system will not be beneficial for their development. For example, Stiglitz argues that liberalism has led to globalisation<sup>82</sup> which, in turn, has not born positive fruits for developing countries in particular. In *Globalization and its Discontents*<sup>83</sup> he contests the traditional notion that if all countries trade freely then they will all benefit (i.e., that ‘a rising tide lifts all boats’ and ‘trickle-down economics’). Wade concurs that evidence shows that globalisation has not led to convergence

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<sup>79</sup> In his *The National System of Political Economy* (new ed) (2014) at 5 List commented that ‘a small state, as against great empires, cannot apply or maintain beneficially that system, and that a power having once, by the help of restrictions, attained manufacturing and commercial ascendancy, must return to the principle of free trade as soon as it becomes safe to do so <https://vernonpress.com/file/148/57a0740e5a149d62a31372e62a7d119b/1388082146.pdf>, accessed on 28 July 2019.

<sup>80</sup> *Das Nationale System der Politischen Ökonomie* (*The National System of Political Economy*) (1841). Translated by Sampson S Lloyd in *The National System of Political Economy* (1909).

<sup>81</sup> Fredrich List *Outlines of American Political Economy*, (1827) at 133. Jeffrey Sachs & Andrew Warner also conducted a study of the experiences of openness, or otherwise, on development in developing countries. They concluded that free trade was not a cause of development, but that development was a consequence of wider economic reforms. See their ‘Economic reform and the process of global integration’ *Brookings Papers on Economic Activity* (1995)26 (1)1–118.

<sup>82</sup> Peter Temin in his ‘Globalization’ (1999) 15 (4) *Oxford Review of Economic Policy* at 76–89 defines globalisation as the institution of a global economy i.e., where all economies of the world are integrated into a single economy. One of the consequences of this is that shocks in one economy reverberate in other economies because of the inter-linkages.

<sup>83</sup> Joseph Stiglitz *Globalization and its Discontents* (2002).

and catching up.<sup>84</sup> He opines that developing countries are often worse off after having followed the advice to concentrate on the areas of their comparative advantage - mainly to export commodities. He says that their economies have suffered and they have found themselves at the mercy of the West for market access and decisions on the terms of trade.<sup>85</sup> Others blame liberalisation as the major source of corruption, worker exploitation and inequality in the developing world, especially in Africa.<sup>86</sup>

It becomes important to consider the ideologies of heterodox economics because the application of *laissez-faire* economics seems to have not had its peddled advantages in the developing world.<sup>87</sup> Some empirical studies seem to confirm that free trade can be injurious to the economies of developing countries. One study illustrated how Mexico, by adopting liberalism under the then North Atlantic Free Trade Agreement (NAFTA) relations won in some

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<sup>84</sup> Robert Hunter Wade, 'Return of industrial policy?' (2012) 26(2) *International Review of Applied Economics*, at 223–239.

<sup>85</sup> Robert Hunter Wade (2003) 'What strategies are viable for developing countries today? The World Trade Organization and the shrinking of 'development space' (2003) 10 (4) *Review of International Political Economy* at 631. Further, Dillon writes that 'the story of trade between the north and the south reflects "vestiges of colonialism, global racism, and a long past of global exploitation.' S. Dillon 'A farewell to "linkage": International trade law and global sustainability indicators' (2002), 55 (1) *Rutgers Law Review* at 152.

<sup>86</sup> Yong-Shik Lee, Gary Horlick, Won-Mog Choi & Tomer Broude (eds) *Law and Development Perspective on International Trade Law* (2011), at.8. See also Wade Op cit note 85.

<sup>87</sup> See, for example, Francisco Rodríguez & Dani Rodrik 'Trade policy and economic growth: A skeptic's guide to the cross-national evidence' in Ben Shalom Bernanke & Kenneth S Rogoff (eds) NBER Macroeconomics Annual (2002). They suggest that, instead of there being an outright relation between trade and development, 'the relationship is likely a contingent one which is dependent on a host of country and external factors, and not just the one factor of trade openness'. Rodrik reaches this conclusion in several other works. For instance, in *In Search of Prosperity: Analytic Narratives on Economic Growth* (2003) and Dani Rodrik, Arvind Subramaniam & Francesco Trebbi in *Institutions rule: The Primacy of Institutions over Geography and Integration in Economic Development* (2000) 9 *Journal of Economic Growth* at 131–165. Here the authors conclude that 'openness, in and of its own, is a weak factor in determining the propensity for growth at 153. See also Dani Rodrik & Mark R Rosenzweig (eds) 'Development policy and development economics: An introduction' in Dani Rodrik & Mark Rosenzweig (eds) *Handbook of Development Economics* vol 5 (2010) at *xvi* in which they surmise that 'the policies that impact development are wide-ranging, all the way from broad macroeconomic policies such as monetary and exchange-rate policies to interventions in microfinance... one cannot associate the field of development with policies in just a narrow set of domains' at *xvi*.

respects but lost heavily in others.<sup>88</sup> Although its economy grew, it continued to battle problems such as poverty and inequality. The study argues that free trade is not a panacea for developing countries.

This thesis finds the heterodox approach to be the most instructive and insightful in helping us to understand the relationship between trade and development, particularly in the context of developing nations. The classic theory of trade is valuable in explaining that freeing trade can have some beneficial effects on development. However, it ignores that openness may be harmful to some states under some circumstances. The heterodox position appears to be more moderate and appropriate for the countries that are being studied herein – *viz* developing countries. From the inception of the GATT, developing countries have always argued that some of the *laissez faire* principles are unfair because they do not take account of their unique economic, political, geographical and other characteristics.<sup>89</sup> Developing countries need to produce competitively in order for their trade to lead to development. Prematurely liberalising trade when they are not competitive may be damaging to their economies. This thesis examines the extent to which the Trade Facilitation Agreement’s framework balances the desire to reduce trade barriers to achieve development, with the imperative to maintain appropriate policy interventions to contain any possible negative ramifications that may arise from its implementation.

### 2.3.2. The Law and Development Theory

This theory postulates on the relationship between law and development. One argument is that law is crucial for development to take place. By way of

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<sup>88</sup> Eduardo Zepeda, Timothy A Wise & Kevin P Gallagher *Rethinking Trade Policy for Development: Lessons from Mexico under NAFTA* (2009), available from [https://www.researchgate.net/profile/Kevin\\_Gallagher12/publication/265003188\\_Rethinking\\_Trade\\_Policy\\_for\\_Development\\_Lessons\\_from\\_Mexico\\_under\\_NAFTA/links/5624cd5408ae35f2686fa11/Rethinking-Trade-Policy-for-Development-Lessons-from-Mexico-under-NAFTA.pdf](https://www.researchgate.net/profile/Kevin_Gallagher12/publication/265003188_Rethinking_Trade_Policy_for_Development_Lessons_from_Mexico_under_NAFTA/links/5624cd5408ae35f2686fa11/Rethinking-Trade-Policy-for-Development-Lessons-from-Mexico-under-NAFTA.pdf), accessed on 17 August 2019.

<sup>89</sup> See, for example, submissions made by Brazil in 1946 and 1947 at meetings of the United Nations Economic and Social Council (ECOSOC), for example, Preparatory Committee of the International Conference on Trade and Employment Amendment to the American Suggested Charter, note by the Brazilian Delegation (1946-) available at <https://docs.wto.org/gattdocs/q/UN/EPCT/CII-6.PDF>, accessed on 6 May 2020.

example it is said that, in order for capitalism to have emerged and flourished, laws were needed to protect property rights and to ensure contract enforcement.<sup>90</sup> This is an illustrative and very basic example that the realisation of economic goals can be supported by complementary laws. Other legal developments that have been introduced to influence economic consequences include: the criminalisation of corruption (aimed to incentivise investment by improving a country's business climate) and the provision of free and compulsory education (which may improve education rates thus leading to a higher skilled labour force that could be more productive).

The SADC states wish to develop. One of the research questions that was posed herein is whether legal instruments are important tools to assist SADC member states to advance their development. The countries have already signed onto many agreements that have trade facilitation provisions. However, seemingly, these agreements have yielded limited results as far as improving their development is concerned. This us leads to question whether there is indeed a relationship between the laws that they have put in place and the development outcomes that they are experiencing.

The relationship between law and development has been discussed in the academic literature since the 1950s.<sup>91</sup> However, despite this, there had been no comprehensive theory to support the practices of reformers, i.e., there had not, as yet, emerged a general theory of law and development. More recently, Yong-Shik Lee has attempted to develop such a comprehensive theory.<sup>92</sup> According to this scholar, in order for law to have an impact on development, three aspects are of importance:

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<sup>90</sup> Amartya Sen 'What is the role of legal and judicial reform in the development process?' (2006) 2 *The World Bank Legal Review: Law, Equity, and Development* at 42.

<sup>91</sup> David M Trubek & Alvaro Santos *The Third Moment in Law and Development: Theory and the Emergence of a New Critical Practice* (2006).

<sup>92</sup> Yong-Shik Lee, *Law and Development: Theory and Practice*, (2019).

- regulatory design (how optimally the law is designed to achieve its regulatory objectives)
- regulatory compliance (the conduct of the general public in complying with the law) and
- quality of implementation (the degree to which a state undertakes the mandate to fulfil the objectives of the law).

Y.S. Lee applied this theory to determine the extent to which it might explain countries' development successes or failures. He found that, in South Korea, the government used formal law to implement development-led policies. For example, it used laws that enabled it to provide support for certain identified manufacturing industries<sup>93</sup> and to support exports in particular.<sup>94</sup> In addition to this, the country had effective institutions<sup>95</sup> that were able to secure compliance. Finally, it had good quality implementation of laws by an efficient and well-organised administration. He concluded that all of these aspects contributed to South Korea's successful attainment of development. Conversely, in post-apartheid South Africa, there has been a lack of development-facilitating laws and no effective institutional architecture to secure compliance by the general populace. The quality of implementation has been constrained by the lack of resources and educated/skilled human resources, corruption and inconsistent political will. These are some of the explanations offered as to why South Africa had not achieved the same development success as Korea, according to Lee's law and development theory.

Lee writes that laws can 'facilitate or inhibit development by influencing actors in the economy and society'.<sup>96</sup> However, his Analytical Law and Development

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<sup>93</sup> For example, the Act for Temporary Measures for the Grant of Export Subsidies (1961), Export Promotion Act (1962), Regulation of Tax Reduction and Exemption Act (1965).

<sup>94</sup> For example the Act on Temporary Measures for Textile Industrial Facilities (1967), Shipbuilding Industries (1967), Electronic Industries (1969), Petrochemical Industries (1970) and Steel Industries (1970), etc. at 72 e.g. by loans, tax exemptions, subsidies, rants, rebates, etc.

<sup>95</sup> Such as the Economic Planning Board which coordinated all other government departments, and financial institutions such as the Korea Development Bank.

<sup>96</sup> Yong-Shik Lee, General Theory of Law and Development, Cornell Int'l LJ, 2017 pp 415-468

Model (ADM) proposes that, in order for law to be effective in reforming economies, laws, legal frameworks, and institutions<sup>97</sup> are all equally important elements. The theory holds that the causal relationship between law and development cannot be divorced from the context of the socio-economic conditions in a state. Socio-economic conditions will affect the effectiveness of law reform projects and thus they must be considered when engaging in an analysis of regulatory design, compliance and implementation.<sup>98</sup>

This thesis similarly argues that, although law is necessary for development, it is not sufficient. For a positive developmental outcome, laws are required to be appropriate in relation to the characteristics of the society or country in which they are applied. For instance, the state will have to have the infrastructure and the institutions that are needed to enforce the laws. Context is everything.<sup>99</sup> This fact is sometimes not acknowledged or catered for in international agreements where there are diverse participating countries that are at different levels of development. Rodrik *et al* explain that the

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[https://heinonline.org/HOL/Page?handle=hein.journals/cintl50&div=21&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/cintl50&div=21&g_sent=1&casa_token=&collection=journals) accessed 5 November 2019.

<sup>97</sup> Dani Rodrik, Arvind Subramanian & Franscesco Trebbi Op cit note 64 at 131–165 discuss how economists have attributed economic differences between countries either as being due to geography, international trade (integration) or institutions (in particular property rights or the rule of law). After conducting some studies, they conclude that the institutional environment plays a stronger role than the others.

<sup>98</sup> Lee explains these three concepts thus: “Regulatory Design” means a law that is optimally designed to meet its objectives. ‘Compliance’ refers to the conduct of the public in complying with the law. ‘Implementation’ is the degree to which the state works to fulfil the objectives of the law, for example, through legislative, administrative and judicial action. State capacity and political will is therefore crucial for law to impact development. Yong-Shik Lee ‘General theory of law and development (2017) *Cornell International Law Journal* at 419, 469.

<sup>99</sup> Dani Rodrik *Straight Talk on Trade: Ideas for a Sane World Economy* (2018) available at <https://www-jstor-org.ezproxy.uct.ac.za/stable/j.ctvc779z4>, accessed on 20 April, 2019. In Yong-Shik Lee et al *Law and Development* (Op cit note 86 at 224) the authors explain that economists used to hold a ‘universalist’ conception of institutions. This caused them to presume that what worked well in one country could suitably be transplanted in another. This informed the workings institutions such as the World Bank, the International Monetary Fund and the Organization for Economic Co-operation and Development which tried to model institutional reform in the developing world on western templates, ignoring the ‘context specificity of institutional designs’, i.e., what institutions are required and in what form will depend on country-specific context (at 94). They advise, therefore, that countries should apply regulations and institutions which they believe will better serve them, instead of having other countries or organisations imposing such choices on them under fear of sanctions or other pressures (at 224).

question is not ‘does it work’; instead it is a question of ‘when does it work and when not and why?’<sup>100</sup> This means that there are no rules of thumb and that context is important. Therefore, it is important to consider whether the Trade Facilitation Agreement (TFA) is sensitive to the different contexts of its member states. Also, whether the SADC countries will be able to implement its reforms in light of their idiosyncratic socio-economic characteristics. Laws are only as effective as the compliance and implementation capacities of the parties. These have real challenges in SADC and partly explain why trade facilitation has not improved by much in the region. Therefore, this thesis will investigate the extent of these challenges and also whether, and how, the TFA can address them.

#### 2.4. Theories on the Compliance of States with International Law

Another research question that this thesis considers is: why do excessive cross-border costs and delays continue, despite the several treaties that SADC members participate in to address these challenges? Theories on why states comply with international law, and why they sometimes do not comply with international law, might be insightful in assisting us to understand why there is this dichotomy.

There is a distinction between the concepts of compliance, implementation and effectiveness. Jacobson and Brown Weiss have devised very useful definitions of these concepts. They write that “implementation refers to measures that states take to make international accords effective in their domestic law” (i.e., if the treaty is non-self-executing).<sup>101</sup> ‘Compliance’ refers to whether states adhere to the substantive and procedural provisions, as well

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<sup>100</sup> Rodrik & Rosenzweig Op cit note 87.

<sup>101</sup> Beth Simmons defines it as ‘the adoption of domestic rules or regulations that are meant to facilitate, but do not in themselves constitute, compliance with international agreements’ in ‘Compliance with international agreements’ (1998) 1 *Annu Rev Polit Sci.* at 77–78.

as to the spirit of a treaty.<sup>102</sup> ‘Effectiveness’ refers to a treaty achieving its stated objectives, or addressing the problems that had led to its creation. Compliance with a treaty may not necessarily lead to its effectiveness – compliance is not sufficient for effectiveness.<sup>103</sup>

A famous quotation asserts that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.<sup>104</sup> This work does not seek to measure the exact *extent* of the SADC states’ compliance with trade facilitation treaty obligations. Rather, it interrogates whether compliance challenges could be one of the explanatory factors of why there has been little progress with facilitating trade on the sub-continent.<sup>105</sup> There are various arguments on why states comply with their international obligations. It could be out of a conviction that there is a moral obligation for them to do so. This is captured in the maxim *pacta sunt*

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<sup>102</sup> Oran R Young explains it thus: “compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and noncompliance or violation occurs when actual behavior departs significantly from prescribed behaviour.” In *Compliance and Public Authority: A Theory with International Applications* (1979) 104. This definition is also followed in Sylvia I Karlsson-Vinkhuyzen & Antto Vihma ‘Comparing the legitimacy and effectiveness of global hard and soft law: An analytical framework’ (2009) 3(4) *Regulation & Governance* 405. See also Roger Fisher *Improving Compliance with International Law* (1981).

<sup>103</sup> Harold K Jacobson & Edith Brown Weiss ‘Strengthening compliance with international environmental Accords: Preliminary observations from a collaborative project’ ( 1995) 1(2) No. *Global Governance*, Vol 2 ( at 125–127). Their research emanated from a research consortium to explore the extent to which countries implement and comply with international environmental treaties. They found that the factors that may influence a country’s compliance with a treaty are the following: (a) the characteristics of the treaty, (b) country characteristics (i.e., the social, cultural, political, and economic characteristics of the country), (c) a country’s policy history in relation to the subject matter of the treaty, (d) leadership, (e) availability of information on the treaty issues, (f) the role played by nongovernmental organisations, multinational corporations and international governmental organisations and (g) the actions of other states (whether they are complying or not)..

<sup>104</sup> Louis Henkin *How Nations Behave: Law and Foreign Policy* 2ed (1979) at 4. See also Jose Alvarez, ‘Why nations behave’ (1998) 19 (2) *Michigan Journal of International Law*.

<sup>105</sup> Many writers argue that it is impossible to measure the exact extent of treaty compliance. For example, Young Op cit note 102 at 104–105 and Jacobson Weiss Op cit note 103 at 123. They conclude that compliance is never perfect and that substantial compliance is what is sought by those who advocate for treaties and agreements.

*servanda*, which refers to the sanctity of contract.<sup>106</sup> It could be out of habit of continued observance<sup>107</sup> or to preserve their reputation.<sup>108</sup> Finally, Trachtman has an interesting theory that a state's compliance depends more on domestic decision-making processes than on external conditions. He argues that "... there will ordinarily be target state constituencies that benefit from compliance and target state constituencies that are harmed by compliance. The decision to comply will depend on the relative influence exercised by these constituencies."<sup>109</sup>

The above insights show that there are many views on the causes of compliance. However, this thesis will concentrate on three theories in particular that might be helpful, not only in understanding compliance challenges in the current trade facilitation treaty architecture as far as it applies to the SADC states, but also in debating whether the Trade Facilitation Agreement may fare better in terms of securing the compliance of members. These theories are:

- Enmeshment theory
- The Managerial approach to compliance
- Embedded liberalism

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<sup>106</sup> Malcolm P Sharp 'Pacta sunt servanda' (1941) 41 (5) *Columbia Law Review*. Harold Hongju Koh 'Why do nations obey international law' (1996-1997) 106 *Yale L.J.* writes that Natural Law that applied during the classical period of the development of international law held that states should obey their commitments because international law was part of a higher law of nature. Thus, treaty compliance had religious/theological/moral undertones to it. See also Alfred Verdross's 'Le fondement du droit international' (1927) 16 *RdCI* and Nathaniel Berman 'The paradoxes of legitimacy: Case studies in international legal modernism' (1991) 32 *Harv Int'l LJ* at 585.

<sup>107</sup> Henkin Op cit note 107 at 58.

<sup>108</sup> Robert Keohane 'Compliance with international commitments: Politics within a framework of law' (1992) 86 *Proceedings of the Annual Meeting (American Society of International Law)*, at 178; IFI Shihata 'The attitude of new states toward the International Court of Justice' (1965) 19 (2) *International Organizations* 203-222; Tanja A Börzel, Tobias Hofmann, Diana Panke & Carina Sprungk 'Obstinate and inefficient: Why member states do not comply with European Law' (2010) 43 (11) *Comparative Political Studies* at 1363-1390; George W Downs & Michael A Jones 'Reputation, compliance, and international law' (2002) 31 (S1) *The Journal of Legal Studies*; Roda Mushkat NIB 'State reputation and compliance with international law: Looking through a Chinese lens' (2011) 10 (4), *Chinese Journal of International Law* at 703-737.

<sup>109</sup> Joel P Trachtman 'International law and domestic political coalitions: The Grand Theory of Compliance with International Law' (2010) 11 (1) *Chicago Journal of International Law* at 135.

#### 2.4.1. The Enmeshment Theory on Compliance with International Law

Enmeshment is said to occur when a state's interests mirror those of the international regime. Thus, a state will obey regime rules where they match its own interests. When this happens, according to the theory, the regime rules will become self-enforcing. Kelly explains that 'as nations' interests and the regime's interests become coextensive, states will self-enforce regime rules and the regime will become a constraining regime'.<sup>110</sup> Keohane argues that enmeshment is critical to compliance because, apart from it, states will not have incentive to refrain from cheating regime rules.<sup>111</sup> For enmeshment to be able to secure compliance by motivating states to self-enforce rules, the nature of the commitments and that of the institutions are critical.

#### The Nature of the Commitments

According to the theory, for enmeshment to follow, the international rules must be precise, obligatory, and interpretable.<sup>112</sup> 'Precise' means that a treaty should not contain vague statements of principles or ambiguous provisions that would lead to a broad interpretation of what is acceptable. Precise language is more favourable for ensuring future compliance. Precision, therefore, requires detailed prescriptions of concrete actions that are to be taken and those that are to be avoided. 'Obligatoriness' means that the language should indicate that conduct is mandatory (i.e., that states are legally bound to comply). Compliance mechanisms may also be built into an agreement as an indication of the compulsory nature of commitments.<sup>113</sup> The

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<sup>110</sup> Claire R Kelly 'Enmeshment as a theory of compliance' (2005) 37(2) *New York University Journal of International Law and Politics* at 305.

<sup>111</sup> Keohane Op cit note 108 at 179. He falls into the same school of thinking as Axelrod and Young, e.g. Robert M Axelrod *The Evolution of Cooperation* (1984); Robert M Axelrod 'An evolutionary approach to norms', (1986) 80 *Am Pol Sci Rev*. See also Michael Taylor *Anarchy and Cooperation* (1976); Michael Taylor *The Possibility of Cooperation* (1987) at 127. See also Op cit note; Oran R Young *International Cooperation: Building Regimes for Natural Resources and the Environment* (1989); Oran R Young *International Governance: Protecting the Environment in a Stateless Society* (1994); Oran R Young 'The effectiveness of international institutions: Hard cases and critical variables' in James N Rosenau & Ernst-Otto Czempiel (eds) *Governance without Government: Order and Change in World Politics* (1992) at 160.

<sup>112</sup> Kelly, Op cit note 110 at 305.

<sup>113</sup> That is, mechanisms which allow for the evaluation of compliance and the taking of action in the event of non-compliance.

strength of the commitment can affect compliance. For example, whether there was signature or ratification.<sup>114</sup>

Enmeshment theory proposes that compliance is further enhanced when states view international rules as being legitimate. This is where rules are perceived as being fair,<sup>115</sup> and where all parties are satisfied that they have been able to play a genuine role in the law-making process. International law-making should be transparent about what is trying to be achieved and accommodative of the needs and the capacities of different participating members. There should be fruitful communication and mutual compromise. Thus, not only is the substance of the rules important for compliance, but the *process* of norm-creation is equally so. Thus, the negotiation phase is an integral aspect of securing future compliance. Scholars have emphasised the contribution of participatory negotiation to eventual compliance.<sup>116</sup> It is said to affect enmeshment and the motivation of states to invest in the rules. However, the reality is that, in practice, the stronger states (politically and economically) tend to be more assertive in negotiations and thus better able to shape the legal processes according to their preferences. This means that, at the implementation stage, those states will have less costs to endure, because the commitments are likely to bear a close resemblance to their articulated interests and to their calculated capacity to implement. Conversely, weaker states are less able to influence decision-making and thus arising costs of compliance may influence their willingness to abide by provisions of the instrument.<sup>117</sup>

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<sup>114</sup> Vienna Convention on the Law of Treaties (VCLT) arts 11 to 17 and 19 to 23. See also Wade Cole 'Human rights as myth and ceremony? Re-evaluating the effectiveness of human rights treaties, 1981–2007' (2012) 227 (4) *American Journal of Sociology*'.

<sup>115</sup> Thomas M. Franck has written about the importance of the fairness of international law, for example in *The Power of Legitimacy among Nations* (1990) and *Fairness In International Law and Institutions* (1995).

<sup>116</sup> Simmons Op cit note 101 at 89.

<sup>117</sup> Börzel et al Op cit note 108.

## The Nature of the Institutional Arrangements

The theory also suggests that the likelihood of compliance is amplified by the existence of strong institutions that can make rules, interpret them, monitor compliance, resolve disputes and enforce compliance. In order to fulfil this broad mandate, it is imperative for institutions to have strong compliance mechanisms of a political and/or economic nature.

### 2.4.2. The Managerial Approach to Compliance with International Obligations

This approach to compliance argues that non-compliance is largely involuntary and that it is due to the absence of the preconditions that enable states to comply with their commitments. This could be due to insufficient state capacity or to unrealistic timetables within which compliance is to be achieved. These are pertinent issues to explain the compliance challenges of less-developed countries, such as SADC states, in particular. Chayes and Chayes note that, compliance requires ‘scientific and technical judgment, bureaucratic capability, and fiscal resources. Although there are surely differences among developing countries, the characteristic situation is a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems’.<sup>118</sup> Thus, the suggestion of the managerial theory is that compliance is to be secured by bolstering a state’s capacity, for example, by providing it with access to information, training, or adequate financial resources. According to the theory, barring such interventions, rule-consistent behaviour may simply not be possible for some states. According to this school, the function of international agreements is not only to specify obligations and to punish lack of conformity. It is also to facilitate the attainment of implementation capacity for those states that require it.<sup>119</sup>

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<sup>118</sup> Abram Chayes & Antonia Handler Chayes ‘On compliance’ (1993) 47 (2)*International Organization* at 194.

<sup>119</sup> P M Haas R O Keohane & M A Levy. *Institutions for the Earth: Sources of International Environmental Protection* (1993).

<sup>119</sup> John G Ikenberry ‘The end of liberal international order (2018) 95(1) *International Affairs* Simmons Op cit note 101.

### 2.4.3. Embedded Liberalism and Compliance with Multilateralism

Liberal internationalism envisions international order as emanating from the cooperation of states for their mutual benefit.<sup>120</sup> This is seen as best achieved through liberalism that is facilitated by institutions. This is described as ‘multilateralism.’ Some view multilateralism as a form of coordination that requires harmonised conduct of states and protectionism as a threat to multilateralism.<sup>121</sup> However, Ruggie understands this differently. He argues that protectionism is not a deviation from liberalisation but that it is ‘an integral feature of it.’<sup>122</sup> He calls this philosophy embedded liberalism.

Embedded liberalism challenges assumptions about the function and workings of the international trade regime.<sup>123</sup> It proposes that the international trade regime, while advocating for non-discrimination and non-protectionism, equally leaves room for governmental intervention in an economy, should such a necessity arise. So, there is liberalism, but embedded into this, is also scope for limited and modest intervention in support of domestic stability. This is why the General Agreement on Tariffs and Trade, which was the first multilateral trade liberalisation instrument, contained several ‘safeguards, exemptions, exceptions and restrictions to protect various social objectives’.<sup>124</sup> This was so long as there was no unjustified or arbitrary discrimination involved.<sup>125</sup> Even the mechanisms of surveillance and dispute

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<sup>120</sup> Ikenberry Ibid.

<sup>121</sup> For example, a *Wall Street Journal* article entitled ‘Surge in protectionism worries and perplexes leaders of many lands’ 14 April 1978, as cited in Melvyn B Krauss, *The New Protectionism: The Welfare State in International Trade* (1978) at *xix-xx*.

<sup>122</sup> J G Ruggie International regimes, transactions, and change: embedded liberalism and the postwar economic order (1982), 36 (2) *International Organization* at 410.

<sup>123</sup> Andrew T F Lang Reconstructing embedded liberalism: John Gerard Ruggie and constructivist approaches to the study of the international trade regime’ (2006) 9 (1) *Journal of International Economic Law*.

<sup>124</sup> Ruggie Op cit note 122 at 386. See also Blonigen B A & T J Prusa ‘*Dumping and antidumping duties*’ in Bagwell, Kyle & Staiger, Robert (eds) *Handbook of Commercial Policy* vol 1 part B (2016).

<sup>125</sup> Robert Howse ‘From politics to technocracy—and back again: The fate of the multilateral trading regime’ (2002) 96 (1) *The American Journal of International Law* at 97.

resolution were meant to resolve disputes considering this balance between liberalism and stability.<sup>126</sup>

Therefore, Ruggie's conclusion is that it is misguided to characterise the international trade regime as being a strictly legal one with lots of cheating taking place. Instead, he argues that it was the very intention of the regime to accommodate both liberalisation and the ability of states to respond to socially disruptive domestic adjustment costs. He argues that multilateralism 'expresses aspirations, not specific commitments and detailed blueprints for action'.<sup>127</sup> In other words, in his view, it is not possible to always have strict adherence (compliance) to multilateralism.

Of particular interest to this thesis is that Ruggie argues that 'both the substantive policy agenda as well as the rhetoric of multilateralism have shifted over time, as policy makers have learned from past mistakes or simply seek to defuse political criticism'.<sup>128</sup> This suggests that it is timely for developing countries to capitalise on this shifting of the focus and principles of the international trading system in such a way as to make or force the system to finally begin to accommodate their interests as well. Ruggie further alleges that 'the compromise of embedded liberalism has never been fully extended to the developing countries'.<sup>129</sup> He argues that, instead, these countries have been disproportionately subject to the strict, unbending orthodox measures of the international trade system and that the kind of liberalisation that has followed from this has not benefitted them. Embedded liberalism is not a *fait accompli*. It is dependent on constant renegotiation if trade liberalisation is going to be sustainable in the long term. States need to constantly reinvent embedded liberalism and evolve new ways to successfully

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<sup>126</sup> Jeffrey L Dunoff 'How should international economic disputes be resolved' (2001) *S Tex L Rev* at 1219 (2001). He writes that writes that WTO dispute resolution is not about securing compliance, but that it's about honouring these compromises between compliance and flexibility, calling it the compromise of embedded legalism.

<sup>127</sup> John Gerard Ruggie 'Third try at world order? America and multilateralism after the Cold War' ( 1994) 109P (4) *Political Science Quarterly* at 557.

<sup>128</sup> Ruggie Op cit note 122 at 558.

<sup>129</sup> Ruggie Op cit note 122 at 413-414.

balance the need for domestic protection with their commitment to free trade.<sup>130</sup> This thesis considers whether the Trade Facilitation Agreement reflects these objectives of liberalisation and flexibility, especially considering the needs and interests of developing countries, not only in terms of the contents of the agreement, but also the processes involved. The table below summarises the assumptions and expectations of the theories that have been introduced as being pertinent to this study.

Table 1: Summary of Theories

Theory	Assumption	Expectation
<i>I. International trade theories: they share a common assumption that trade influences development. They, however, differ on how trade should be regulated to achieve positive development outcomes. They all recognise the role of protectionism, but adopt differing views on its role in trade policy.</i>		
Mercantilism	Trade is a zero-sum game. There are winners and losers in trading. Each state should strive to be a winner	Trade protectionism is the key to economic and political domination
Classic theory of international trade	Every nation has unique advantages and should be free to exploit those in a free market setting. Trade restrictions are harmful and should only be used, non-discriminately, in limited circumstances.	The free exchange of goods leads to the development of all nations. There are no winners and losers because every state has something to gain from its unique advantages.
Heterodox economics	Markets are imperfect, therefore, trade openness, per se, cannot guarantee development	Appropriate policy interventions can contain the adverse effects of free trade which hurt development prospects
<i>II. Law and Development</i>		
	Law is crucial for development	Well-designed laws, which are complied with and soundly implemented will support development
<i>III. Compliance Theories: they share a common assumption that compliance challenges impede the effectiveness of treaties which could, otherwise, support development. They differ in their characterisation of what causes compliance challenges and how the challenges should be mitigated.</i>		
Enmeshment theory	States will comply with treaties that have clear and firm norms and a supportive institutional structure	Where these conditions are present, treaties will become self-enforcing and their goal of contributing to development will be actualised
Managerial approach	Non-compliance with treaties is due to a lack of capacity on the part of states	With capacity assistance states will be enabled to comply with treaty norms which support development
Embedded liberalism	Liberalism enhances treaty compliance	Recognising flexibility in the assumption of treaty obligations will ensure greater compliance and thus treaties will be effective in their development-enhancing mandate

<sup>130</sup> Lang Op cit note 123 at 88–89, 97.

## 2.5. Chapter Conclusion

This chapter has discussed the concept of development and has argued the perspective of development that informs the analysis in this research. This thesis asks: how can trade facilitation support development? Considering the theories that have been introduced in this chapter on the relationship between trade and development, the picture that seems to emerge is that trade can be beneficial for development. However, there are instances where governments may have legitimate policy reasons for electing to restrict trade in order to protect other vital interests.<sup>131</sup> Heterodox economics has been found to be the most instructive theory for examining the trade and development analysis in relation to developing countries, such as the SADC states. It counsels that the context and the timing of freeing trade are important considerations which can impact the results thereof. The insights of heterodox economics will be used to interrogate the trade and development nexus in the following chapter.

The second research question is: do compliance challenges explain the ineffectiveness of trade facilitation treaties in SADC? This chapter has discussed how enmeshment theory and the managerial approach seem to be particularly relevant to the context of SADC countries, given their attributes such as institutional weaknesses and capacity constraints. These theoretical insights will be used in chapters 4 and 7 to interrogate whether their observations apply to SADC trade facilitation agreements. Embedded liberalism argues that a balance is necessary between multilateralism and social purpose. Chapter 7 discusses the evolution of the Trade Facilitation Agreement and addresses it incorporates respect for both elements in this balance and, therefore, whether there is a likelihood of it securing treaty compliance and, subsequently, effectiveness.

Finally, the law and development theory argues that law is a potentially valuable tool for implementing reforms that can lead to development.

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<sup>131</sup> It has been argued that there is good protectionism and bad protectionism. Good protectionism is temporary and targeted and it is part of a holistic industrial policy: Erik Reinert *How Rich Countries Got Rich and Why Poor Country Stay Poor* (2007) appendix IV.

Following this theoretical insight states have conducted legal reforms in order to implement changes that will, they hope, have a positive influence on their development trajectory. Chapter 6 will discuss how SADC governments have attempted to use laws to implement trade facilitation strategies. The argument is that law, on its own, is not enough, and that other factors, such as the quality of compliance and institutions are also important determinants of the effectiveness of legal reform.

## Chapter 3 - Trade Facilitation and its Relationship to Development

### 3.1. Introduction

This chapter considers the question of how trade facilitation can support development. Chapter 2 introduced theories on the relationship between international trade and development.<sup>132</sup> Mercantilism was shown to favour the restriction of trade as a means of ensuring development, even at the expense of one's trading partners. Conversely, the classical theory of international trade<sup>133</sup> posits that it is free trade, and not protectionism, which correlates positively with development. Thus, that free trade is good for all states; the freer the better. This thesis has elected to follow the insights of heterodox economics to answer the question on the relationship between trade and development.<sup>134</sup> This is because of its appropriateness to developing country perspectives in particular. This school proposes that trade is good, but it equally cautions that nations must open their trade strategically, regard being had to their own unique circumstances. This is because, it argues, trade is not inherently positively correlated to development. Thus, trade can have anti-developmental outcomes if not undertaken tactically.

This chapter begins with an exposition of the concept of trade facilitation. It explains that trade facilitation contributes to trade openness by addressing the removal of cross-border barriers to trade. This is followed by an argument that this openness can contribute to development by, for instance, improving the competitiveness of domestic producers and their ability to participate in value chain production. It is also argued that there can arise negative anti-developmental consequences from facilitating trade. These cannot be ignored. They should be seriously considered by developing nations, such as the SADC states. These states should, therefore, carefully consider how they can

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<sup>132</sup> Section 2.3.1 above.

<sup>133</sup> Smith's Theory of Absolute Advantage, Ricardo's Theory of Comparative Advantage, and the Heckscher and Ohlin Factor Proportions Theory. Section 2.3.1.2 above.

<sup>134</sup> Chapter 2 argued that the rationale for trade facilitation is the same as that for trade liberalisation, i.e., both seek to use trade as a tool to contribute positively to development. See Capaldo Op cit note 74.

strategically open up their trade under trade facilitation instruments so that desirable developmental effects are attained and negative ones are contained.

### 3.2. The Evolution of Trade Facilitation

The facilitation of trade can be achieved unilaterally through domestic reforms, or through bilateral, regional, or multilateral efforts. The first attempts at facilitating trade emerged under bilateral subject-specific cooperation agreements or bilateral customs treaties. For example, the Liechtenstein-Austria-Hungary customs treaty of 1852 and the 1923 Switzerland-Liechtenstein customs union agreement, which created a common regime for goods and required the harmonisation of laws pertaining to customs. These arrangements, however, had limited provisions on trade facilitation.

[they were] typically limited to a narrowly defined area of customs reforms (often linked to fees and charges aspects as well as basic transparency disciplines). Later agreements expanded their coverage to include areas such as simplification of trade documents and border agency cooperation. The scope expanded further in subsequent treaties, which incorporated measures like risk management, advance rulings, appeal rights, authorized operators, express shipments, single window, temporary admission or procedures for the rapid release of goods.<sup>135</sup>

The 1960s saw the advent and growth of regional trade agreements (RTAs).<sup>136</sup> Initially these RTAs focused only on trade liberalisation. However, in the 1970s RTAs began to contain a smattering of provisions that indirectly related to trade facilitation (for example, measures on sanitary and phytosanitary measures and technical barriers to trade). From the 1980s there began to be more focused trade facilitation provisions in RTAs, although still not very

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<sup>135</sup> Nora Neufeld. 'Trade facilitation under the regional trade agreement umbrella: Origins and evolution' in Rohini Acharya (ed) *World Trade Organization, Regional Trade Agreements and the Multilateral Trade System*, ((2016) at 114.

<sup>136</sup> Jaime de Melo & Arvind Panagaria (eds) *New Dimensions in Regional Integration* (1993).

comprehensive nor binding.<sup>137</sup> Multilateral concern with barriers to trade facilitation began in earnest with the advent of the General Agreement on Tariffs and Trade (GATT). It addressed these types of barriers in its Articles V, VIII and X.<sup>138</sup> Article V protects the freedom of transit by prohibiting unnecessary delays, restrictions and charges related to transit trade. Article VIII regulates the fees and formalities that are connected with importation and exportation. It is meant to ensure that such fees and charges are reasonable and that they do not serve as an indirect restriction of trade. Article X concerns the publication and administration of trade regulations. It requires that all laws, decisions and international agreements relating to trade shall be promptly published so that all interested parties can become acquainted with them. Subsequent agreements that addressed specific trade facilitation impediments were the agreements on Rules of Origin, Pre-shipment Inspection, Customs Valuation, Import Licensing, Technical Barriers to Trade, and Sanitary and Phytosanitary Inspections.<sup>139</sup>

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<sup>137</sup> A study on the prevalence of trade facilitation provisions in regional trade agreements shows that the proportion of trade facilitation provisions in RTAs grew over the years from 14% of RTAs in the 1970s, to 50% of RTAs in the 1980s, 92% of treaties in the 1990s, until the high of 95% of RTAs concluded between the year 2000 and mid 2013. Nora Neufeld *Trade Facilitation Provisions in Regional Trade Agreements Traits and Trends*(2014) at 7, available at <https://www.econstor.eu/bitstream/10419/90709/1/776567853.pdf>, accessed 1 December 2019.

<sup>138</sup> Articles VII and IX can also be argued to have some relation to trade facilitation. Article VII deals with valuation for customs purposes. It speaks to harmonisation, which is key for trade facilitation. Article IX governs marks of origin. Amongst others, it recognises that requirements relating to marks of origin may cause difficulties and inconvenience to traders. It requires that such requirements be kept at a minimum level which is necessary for consumer protection, and, further, that traders should not be unduly penalised for failing to affix marks unless, for example, some form of deception was intended.

<sup>139</sup> Chapter 4 discusses the GATT framework and these other agreements in more detail.

### 3.3. The Definition of Trade Facilitation

It is a well-established principle of international law that every state is sovereign.<sup>140</sup> This means that, generally, every state is free to do as it likes within its territory.<sup>141</sup> This includes the freedom to control the movement of people and of goods in to and out of its territory.<sup>142</sup> This is why states designate specific points along their territories, *viz.* borders,<sup>143</sup> where such movements can occur and why they have an array of laws governing such movements.<sup>144</sup> There are various officials who are involved in the regulation of cross-border movements. Immigration officials control the movement of persons across borders. Officials from Customs control the movement of goods. Agriculture and Forestry departments may also be represented at borders because the cross-border movements of goods may present a threat to the plant life in the importing country or may violate laws to protect endangered species in the country of export. Officials from the health sector

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<sup>140</sup> Oppenheim describes sovereignty as a 'supreme authority, an authority which is independent of any other earthly authority.' L Oppenheim, quoted in the seminal work edited by Hersch Lauterpacht, namely, *International Law: A Treatise* vol I, 8 ed (1955) 118–119. Article 2(1) of the United Nations Charter of Economic Rights and Duties of States (1974) pronounces that every state has sovereignty over all its economic activities. This signifies that states can control all of their internal and external economic activities. In 1986, at the Seoul Conference of the International Law Association, members recognised that art 2(1) is a recognised principle of international law as seen in the International Law Association's *Report of the 62 Conference: Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order* (1986) at 6 para 5.1.

<sup>141</sup> Barring certain internationally banned actions, for example: genocide (Convention on the Prevention and Punishment of the Crime of Genocide (1948); discrimination (International Convention on the Elimination of all Forms of Racial Discrimination (1965), International Convention on the Elimination of all Forms of Discrimination Against Women (1979), and the convention on the Rights of Persons with Disabilities (2006) and financing terrorism (International Convention for the Suppression of the Financing of Terrorism (1999) etc.

<sup>142</sup> Hans van Houtte *The Law of International Trade* 2ed (2002) at 10–11. This was emphasised at the 2017 G20 Summit where the leaders affirmed 'the sovereign right of states to manage and control their borders and in this regard to establish policies in their own national interests and national security'. See also *G20 Leaders' Declaration: Shaping an Interconnected World* 7–July 2017 at 14.

<sup>143</sup> A border has been defined by Siphon Khumalo as 'a built-up facility that enables/facilitates the movement of desirable persons and goods whilst it prevents/blocks the movement of unwanted persons and goods through the use of monitoring devices and control facilities' in 'Unlocking South African cross-border transport challenges: A case study of Beitbridge Border Post' in Proceedings of the 33rd Southern African Transport Conference at 835. Another definition says it includes 'a set of things that facilitate (roads, bridges, ferries), prevent (fences, military installations), monitor (cameras, motion detectors) and control (border crossing facilities) movement across the boundary'. William Anderson & Jean-Paul Rodrigue, *Transborder and Crossborder Transportation* (2013), available at <https://people.hofstra.edu/geotrans/eng/ch5en/conc5en/ch5c1en.html>, accessed on 1 December 2019.

<sup>144</sup> For example, customs laws, immigration laws, etc.

ensure that traded goods do not pose a threat to the health of persons and/or of animals. There are also members of the security sector who are at borders to monitor, prevent and respond to security threats or breaches. Lastly, department of transport officials verify the authorisations of vehicles and of drivers. These are the officials that interact with traders, be they importers or exporters, or their agents. Trade facilitation concerns the implementation, by these officials, of measures that will allow goods to be processed across borders in a quicker, cheaper and more secure manner.

A World Bank report found that,

[I]n Denmark, an exporter needs three documents ... and two signatures... to complete all requirements for shipping cargo abroad. It takes on average five days from the time he starts preparing documents to the time the cargo is ready to sail. In contrast, it takes 11 documents, 17 visits to various offices, 29 signatures and 67 days on average for an exporter in Burundi to have his goods moved from the factory to the ship.<sup>145</sup>

These discrepancies are due to the extent to which trade is facilitated in the respective countries. There are certain practices which can increase delays, add costs and compromise the security of trade. This is potentially to the detriment, not only of traders, but also of consumers, governments and the economy as a whole. The concept of trade facilitation concerns addressing these barriers in the hopes that development gains can flow from trade. Trade facilitation is about making cross border trade faster, cheaper and more secure.<sup>146</sup> It aims to balance the interests of government with those of the private sector. On the one hand, government desires to gain revenue from the collection of duties and other charges related to trade.<sup>147</sup> It also wants to protect national interests, such as public health and security. On the other hand, traders desire to have efficient, transparent, and cost-effective border

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<sup>145</sup> Simeon Djankov, Caroline Freund & Cong S Pham *Trading on Time*, (2006) at 9.

<sup>146</sup> Vinod Rege, *Negotiating at the World Trade Organization: Lessons from the Commonwealth, No.2, Commonwealth Secretariat* (2011).

<sup>147</sup> Global Alliance for Trade Facilitation. *Can Trade Facilitation Drive Manufacturing FDI?* (2017) 6, available at <http://www.tradefacilitation.org/uploads/6/4/3/2/64320759/icc-trade-facilitation-2017-global-alliance-fdi-report.pdf>, accessed on 6 July 2019.

procedures so that they can conduct their trade with minimal interruptions and maintain a competitive edge in their exports. Trade facilitation does not mean that there is zero control at borders. It simply means that ‘any disruption of trade [is kept] to a minimum, without losing the capacity to intervene if required’.<sup>148</sup>

The relationship between trade facilitation and development is controversial. There are different interests that are involved in trade facilitation. These interests include: importers, exporters, consumers and governments. Trade facilitation can be used to serve one or more of these interests in a manner that either serves the general developmental interests of the country or that undermines it. Trade facilitation can serve to merely make trading more efficient - in the sense of allowing goods to enter and to leave a country with fewer hindrances. However, this may have no effect on the country’s development. For trade facilitation to have developmental effects, the efficiency must be linked with broader policy reforms that seek to amplify the competitiveness of domestic production. The next section discusses typical trade facilitation measures. It argues that these can, collectively, contribute to development. However, it similarly cautions that there can be negative anti-developmental ramifications that can flow from applying such measures. Therefore, the chapter argument is that trade facilitation has to be undertaken in a carefully considered manner if it is to positively and concretely contribute to the development of the SADC states.

#### 3.4. Measures to Facilitate Trade

When Smith and Ricardo argued for trade to be liberalised the types of barriers that they most had in mind were, for example, tariffs, discriminatory domestic taxation and regulations, quantitative restrictions, or the use of subsidies to give an unfair competitive advantage to exported goods. These are barriers to liberalised trade. However, it soon transpired that barriers to

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<sup>148</sup> Marina van Twisk *South African Revenue Services (SARS) Presentation on Customs and Trade Facilitation, World Customs Organization (WCO) – Eastern and Southern Africa (ESA) Regional Workshop on Trade Facilitation*, 15 September 2015.

the physical movement of goods across borders can be just as detrimental to trade as these traditional policies. Therefore, the argument was extended that, in seeking to improve their development, countries should not only focus on *liberalising* trade, but also on *facilitating* it. The question is, what kind of regulatory barriers hamper the cross-border movement of goods and what are the measures that are recommended to address them?

Some typical border impediments are the following:

- Poor policy and legal framework governing cross-border trade;
- Inadequate border infrastructure;
- Bureaucratic obstacles;
- High costs of trade;
- Inadequacies in staffing; and
- Lack of cooperation and coordination of border authorities.

#### Poor Policy and Legal Framework Governing Cross-Border Trade

In order for goods to be quickly, easily and cost-effectively movable across borders there needs to be policies and laws that establish efficient procedures. There are several ways in which policy and legal frameworks can inhibit efficient trading. First, where laws and policies are outdated and have not been modified to keep pace with global trends in trade,<sup>149</sup> or with international best practices (such as the standards set by the World Customs Organization (WCO)). Secondly, where they institutionalise cumbersome procedures. Thirdly, where there are diverse scores of applicable regulations. This can make the law difficult to ascertain and, consequently, to comply with. Inadequate frameworks are also those that fail to penalise illicit trade so that trading can take place in a more secure manner. Finally, policies and laws

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<sup>149</sup> The other extreme (rules that change too frequently) is also not desirable because it undermines predictability. Rules and processes should change for legitimate reasons as necessary (for example, in order to implement best practice). The principle goal of trade regulation should be predictability and the avoidance of uncertainties. Business functions best in a transparent and predictable environment. Moreover, many firms do not have the resources (financial, time, labour, etc.) to constantly check for legislative and policy amendments for compliance-sake.

can hamper facilitated trade where they are inappropriate because they have not been informed by engagements with stakeholders. Traders are the principle stakeholders in trade facilitation. Therefore, it is imperative for governments to take their needs into consideration in the formulation of trading rules. The failure to do so can lead to the promulgation of rules that are not appropriate to experienced issues.<sup>150</sup>

### Inadequate Border Infrastructure

The absence of critical trade-related hard infrastructure can compromise competitiveness and trade and undermine regional integration efforts. For example, the use of technology to automate border processes, strengthens “reliability, predictability, safety and competitiveness.”<sup>151</sup> However, automation requires access to information and communication technology (ICT). This in turn depends on factors such as stable and cost-efficient energy and telecommunications services. Yet, African countries have the lowest global internet diffusion rates and unreliable energy supplies. These render them largely unable to make full use of ICT to mechanise border processes.<sup>152</sup> Low technology use can also exacerbate incidents of arbitrariness, fraud and corruption because ‘paper-based procedures allow for easy manipulation or arbitrary decision-making by customs officials’.<sup>153</sup> When border procedures are done manually,<sup>154</sup> progress can be slow and this can incentivise fraud and corruption as people try to bypass the sluggish systems and procedures. It has been proposed that investing in infrastructural development can “act as a catalyst for development, by bringing down the time, and thereby the costs, of cross-border trade and transport, which in turn would foster trade, the creation of decent jobs, inclusive green growth and lead to an integrated

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<sup>150</sup> Kostecki Op cit note 4 at 9.

<sup>151</sup> World Bank *Doing Business Report : Equal Opportunities for All* 14<sup>th</sup> ed (2017) at 83.

<sup>152</sup> Charles Abuka *Infrastructure, Regional Integration and Growth in Africa* (2005), available at [https://www.researchgate.net/publication/252697847\\_](https://www.researchgate.net/publication/252697847_), accessed on 20 April 2019; Mothae Maruping ‘Challenges for regional integration In Sub-Saharan Africa: Macroeconomic convergence and monetary coordination’ in Jan Joost Teunissen & Age Akkerman (eds) *Africa in the World Economy: The National, Regional and International Challenges* (2005) at 124.

<sup>153</sup> Kostecki Op cit note 4 text box 4.5 at 112.

<sup>154</sup> For example, where inspections cannot be done by scanning and instead require time-consuming physical inspections.

continent as a pathway to sustainable development.”<sup>155</sup>

### Bureaucratic Obstacles

The conduct of trade involves documentary compliance as well as border compliance.<sup>156</sup> Documentary compliance refers to the requirement for traders to provide information (by way of documents) as a condition for the authorisation to move goods across borders.<sup>157</sup> Border compliance refers to adherence to the procedures that are applicable at national borders. These procedures may include:

- Obtaining licenses to import or to export
- Paying charges that are applicable to cross border trade<sup>158</sup>
- Compliance with any quantitative restrictions that may be applicable<sup>159</sup>
- Compliance with documentary and physical inspections

Despite the legitimacy of the above requirements and procedures, nonetheless they can contribute to border delays. This can occur, for example, when documents cannot be submitted electronically for the relevant authorities to verify the information and process the documents. Or where there are excessive documentary requirements or long and complex border procedures. Impediments to trade should ideally be kept at a minimum if the gains from trade are to be realised.

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<sup>155</sup> Christian Kingombe ‘How can transport infrastructure promote trade and sustainable development on the African continent? (2017) 6 (2) *Bridges Africa*, available from <https://www.ictsd.org/bridges-news/bridges-africa/news/how-can-transport-infrastructure-promote-trade-and-sustainable>, accessed 8 May 2020.

<sup>156</sup> The International Bank for Reconstruction and Development *Doing Business: Training for Reform* 16 ed (2019), available at [https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report\\_web-version.pdf](https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf), accessed 7 October 2019.

<sup>157</sup> Some of the important documents for documentary compliance can include: the commercial invoice (used by customs officials to calculate the customs duties that are payable for the trade), a certificate of origin (as proof of where the goods were produced) and a packing list (which itemises all of the contents of every package in a shipment).

<sup>158</sup> For example, customs duties, excise duties, anti-dumping duties, countervailing duties, environmental levies, etc.

<sup>159</sup> Van Houtte Op cit note 142 at 110. See also R Schaffer, B Earle & A Filiberto Op cit note 2 at 322. They define that a quota ‘may be expressed with reference to the quantity of goods, or to their value, or “as a percentage share of the domestic market for that product’.

## High Costs of Trade

Governments seek to collect revenue from trade.<sup>160</sup> This revenue can be in the form of fees which are charged for the rendering of services related to trade, for example, for licensing traders, processing documents, conducting inspections, or for storing goods pending the fulfilment, by the trader, of any conditions.<sup>161</sup> Governments also collect revenue from the imposition of penalties for non-compliance with trading rules. Fees can become a barrier to trade when they are not commensurate to the costs of the services that are rendered or where there are a multitude of fees, causing the costs to add up and become prohibitive. Negative ramifications can also arise where trade fees are too high or where the processes for their payment are too cumbersome. Similarly, where the rates of penalties are unreasonable and are not commensurate to the offences this also increases the cost of trading and can become an impediment to trade. High fees and penalties can correlate to bribery and corruption. This is because border users may become tempted to bribe officials in order to escape the fees and penalties.

## Inadequacies in Border Staffing

The quantity and the quality of staff operating at a border can affect the efficiency of the processes thereat. In terms of the former, border processes are slow when there is an inadequate number of personnel serving clients. In terms of the latter, if staff do not have the skills that are necessary for them to quickly discharge their duties this will negatively affect their service delivery. Lack of training prevents officials from acquiring knowledge of new technologies or techniques for more expeditiously executing their tasks.<sup>162</sup> Unfortunately, for many developing countries there are limited resources for

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<sup>160</sup> Jean-Christophe Maur *Trade Facilitation, Preferential Trade Agreement Policies for Development: A Handbook* (2011) at 331.

<sup>161</sup> Developing countries have been found to charge a multitude of fees, such as: customs surcharges, tax on foreign exchange transactions, stamp taxes, import license fee, consular invoice fees, statistical taxes, tax on transport facilities, taxes and charges on sensitive product categories, additional charges, fees related to customs procedures and community levies. Rege Op cit 146 at 185-191.

<sup>162</sup> It has been suggested that 'traders apply new technologies in the international trade environment at a faster pace than customs, which is slow to adjust and innovate'. Kostecki Op cit note 4 at 111-112.

imparting and developing the skills that are needed by officials.

#### Lack of Cooperation and Coordination between Border Officials

There is an internal aspect and an external aspect to border cooperation and coordination. The internal aspect refers to how the border officials of one government work together. The external aspect refers to how the officials of two neighbouring states work together. The quality of the inter-relationships, and the extent of the cooperation between border officials affects the ability of a border to function efficiently. Issues such as turf wars, the duplication of processes, differing requirements and processes and lack of system inter-connectivity sabotage trading efficiency.

The concept of trade facilitation addresses impediments such as those outlined above. As an extension of the international trade theory, trade facilitation proposes the dismantling of barriers so that there can be greater trade flows which, in turn, are expected to lead to greater levels of development. Typical trade facilitation measures include the following:<sup>163</sup>

- Consultations with traders. Prior engagement with traders is viewed as the first step towards informing border users about any impending legal changes so that they can begin to prepare for compliance therewith. This includes their being constantly kept apprised of any amendments to requirements
- The transparency and accessibility of all information affecting trade, for example, the required documentation, trade procedures, the applicable fees, etc.
- Reasonable documentary requirements. This includes the simplification and harmonisation of required documentation
- Reasonable and efficient procedural arrangements, including the streamlining of border controls

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<sup>163</sup> The Organization for Economic Co-operation and Development (OECD) has developed a set of trade facilitation indicators that explain the content of trade facilitation, available at <http://www.oecd.org/trade/facilitation/indicators.htm#About-TFI>, accessed 8 May 2020.

- The use of technology, for example, to electronically exchange data and to automate border processes
- Internal and external cooperation and coordination to create one seamless trade process as well as to maximise the efficiency of the use of resources, for example by conducting joint investigations or training
- Reasonable disciplines on fees, charges and penalties applicable in trading
- The installation of trade dispute resolution mechanisms. This comprises clear complaints or grievance procedures and an efficient appeals procedure.

### 3.5. Perspectives and Controversies on the Relationship between Trade Facilitation and Development

Much like with trade liberalisation, trade facilitation is similarly controversial. Heterodox economics acknowledges that there can be positive developmental outcomes from trade facilitation. It can be argued that facilitating trade can be beneficial for traders, consumers, governments as well as for the wider economy as a whole.<sup>164</sup> We can take the different interests one by one and contemplate how they can be assisted by the facilitation of trade. For one, traders can be adversely affected in significant ways where trade is not facilitated. First, trade delays increase their business costs. These additional costs make their final products more expensive and therefore compromises their competitive advantage in exporting. In addition, some goods may have to cross several borders before they reach their final destination (transit trade). If there are delays at every border this compounds the costs and

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<sup>164</sup> Antoni Estevadeordal *Why Trade Facilitation Matters Now More than Ever: Policy Brief* (2017). Tomasz Iwanow & Colin Kirkpatrick in 'Trade facilitation and manufacturing exports: Is Africa different' (2009) 37 (6) *World Development* argue that trade facilitation improves investment and manufacturing exports. Alberto Portugal-Perez & John S Wilson *Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure* (2011) show a correlation between trade facilitation and manufacturing export performance. Maria Persson in *Trade Facilitation and the Extensive Margin* (2010) questions whether trade facilitation only leads to expanded trade flows in the traditional exports or whether it can actually lead to export diversification. She concludes that the latter is the case. Bagai, Shweta; Newfarmer, Richard & Wilson, John S 'Trade facilitation: Using WTO disciplines to promote development' (2004) 15 *The World Bank Group International Trade Department Trade Note*.

uncertainties for traders. Exporters can lose their contracts and be liable for compensation if their goods are delayed and they become unable to deliver their products timeously in order to meet the strict time demands in international supply contracts.<sup>165</sup> This failure may have ramifications even beyond the immediate sales contract. It can lead to the seller not getting another contract from the buyer, or from firms that are associated with the buyer as a result of impairments to their reputation as a reliable supplier. Trade delays can also lead to the spoilage of perishable goods, which is a cost to the traders. Where traders are thus detrimentally affected, this can lead to them going out of business. This will undermine the sustainable development goals (SDGs) that relate to the reduction of poverty and hunger (goals 1 and 2).

Border costs and delays also hamper the ability of traders to participate in inter-regional, intra-regional, and global value chain production.<sup>166</sup> Value chain production has been made possible by falling transport costs, greater interconnectedness (due to developments in information and communication technologies), increasing openness in global markets, competition by countries in offering low-wages for labour-intensive manufacturing and the international mobility of managerial and technical skills.<sup>167</sup> Such production requires that borders are efficient so that intermediate inputs can be quickly imported, processed and re-exported.<sup>168</sup> Traders cannot participate in value

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<sup>165</sup> If border delays cause goods to arrive to the customer late, this may amount to a fundamental breach of contract. The 1980 Vienna Convention on the International Sale of Goods (CISG) obligates a seller to physically deliver the goods to the buyer at a place and time that has been agreed to by the parties (art 30). Failing which the buyer can pursue remedies (arts 74–77). For an exploration of the impact of trade facilitation barriers on exports see, for example, Jordaan, Andree C 'The impact of trade facilitation factors on South Africa's exports to a selection of African countries' (2014) 31 (4) *Development Southern Africa*.

<sup>166</sup> Defined as 'where firms specialize in a particular set of activities in one country to produce parts and components for other countries.' Antonio Andreoni 'A generalised linkage approach to local production systems development in the era of global value chains, with special reference to Africa, in Ravi Kanbur, Akbar Noman & Joseph Stiglitz (eds) *The Quality of Growth in Africa* (2019) at 3; and Richard Baldwin *Trade and Industrialisation after Globalisation's 2nd Unbundling: How Building and Joining a Supply Chain are Different and why it Matters* (2011) at 6.

<sup>167</sup> World Trade Organization *Global Value Chain Development Report: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World* (2019) at 10.

<sup>168</sup> Brian Rankin Staples 'Trade facilitation: Improving the invisible infrastructure' Op cit note 76 at 139.

chain production if there is uncertainty about their delivery times as a result of inefficiencies in border-crossing procedures.<sup>169</sup> Traders in some developing countries (such as China, Thailand, Indonesia, Brazil and Turkey) have managed to take advantage of this opportunity. However, many African traders are struggling to get plugged into these chains, in part as a result of obstacles related to low rates of trade facilitation on the continent. This hampers, in particular, the attainment of SDGs 8 and 9 which relate to economic growth and industrialisation.<sup>170</sup>

The consequences of inefficient borders can be particularly disastrous for small, medium and micro enterprises (SMMEs). The larger the firm, the larger its scale of production and, thus, the better able it is to absorb the costs of border delays. Larger firms also typically have a larger labour force and can therefore, potentially, have employees who are specifically devoted to researching about the barriers at various border crossings through which they conduct their trade so that they can adequately prepare for such well ahead of time. They also tend to have representation at government briefing sessions and to have personal contacts with relevant officials. This makes them better able to effectively lobby government to address their specific challenges. This is not so with smaller enterprises whose members are more dispersed and lack economic and political clout. They may eventually be driven out of business due to trade costs and delays.<sup>171</sup> This has implications on employment and poverty.

Consumers are another faction that stands to lose out where trade is not facilitated. This is because trade delays can affect the domestic supply of goods and, therefore, also the domestic prices of goods. Furthermore, where

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<sup>169</sup> African Entrepreneurs Council (AEC) interview with Janvier Litse, Director- NEPAD Regional Integration and Trade, African Development Bank, 29 October 2013 available at <https://www.afdb.org/en/news-and-events/aec-2013-interview-with-janvier-litse-director-nepad-regional-integration-and-trade-afdb-12438/> accessed on 12 July 2018.

<sup>170</sup> Neil Foster-McGregor, Florian Kaulich & Robert Stehrer show that Africa's participation in global value chains is increasing, but that it remains lower than the rate of participation by other developing regions in *Global Value Chains in Africa* (2015) at 9.

<sup>171</sup> Kostecki Op cit note 4 at 48–49.

the costs of trade rise for traders, these costs will often be passed on to the consumers. This negatively impacts their quality of life and impinges on the realisation of the SDGs that concern reducing poverty and hunger and achieving good health and well-being.

Government can also benefit from trade facilitation in direct and indirect ways. If trade is facilitated, and this results in increased trade flows and business profits, then the government can receive more revenue from taxes. These taxes could be applied to stimulate the economy and to provide critical public needs, such as water, energy, housing, education, healthcare, sanitation etc.<sup>172</sup> Indirectly, government can gain from the fact that trade facilitation seeks to enhance lawfulness. Where trading is costly and cumbersome this can result in high incidents of illegal practices, such as bribery and corruption,<sup>173</sup> the commission of forgeries and the conduct of illicit trade.<sup>174</sup> The Anti-Corruption Resource Centre lists factors that make borders particularly high risk for illicit practices. The features tend to match the typical conditions at developing country borders. These are:

poor external oversight; the level of autonomy and discretionary authority border officials enjoy; high tariffs and complex regulatory frameworks that provide traders with incentives to bribe; the pressure of organised crime networks; the inadequate salary and working conditions of border officials; and the specific organisational features of border protection agencies.<sup>175</sup>

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<sup>172</sup> These all have a relationship to SDGs: 1, 2, 3, 4, 6, 7, 8, and 9.

<sup>173</sup> This is defined as 'paying bribes to corrupt government bureaucrats to get "favors" such as permits, investment licenses, tax assessments, and police protection' See Ali Al-Sadig 'The effects of corruption on FDI inflows (2000) 29 *Cato Journal* at 267. Transparency International defines it as 'the abuse of entrusted power for private gain; available at <https://www.transparency.org/what-is-corruption>, accessed on 12 February 2020.

<sup>174</sup> For example, under-declaration (usually of highly taxed goods such as alcohol and cigarettes), smuggling (usually of banned goods such as arms or cultural artefacts), trading in counterfeit goods or in products that breach intellectual property rights, or health and safety standards, drug trafficking, money laundering, and transshipping (where products are re-labelled to conceal their country of origin).

<sup>175</sup> Marie Chêne, Corruption at borders, Anti-corruption resource centre (2018) available at <https://www.u4.no/publications/corruption-at-borders>, accessed 13 October 2020. A 2007 USAID study on corruption along the northern corridor in Kenya, Uganda, Tanzania, Rwanda, Burundi and Democratic Republic of Congo found that approximately 28% of all shipments were subject to bribery. The greater the consignment value; the higher the value of the bribe. USAID, *Assessment Study on Corruption At the Northern Corridor Transit Point* <http://eastafrika.usaid.gov/documents/document/document/1185>, accessed 24 November 2019.

These illicit activities cause losses to the government. First, they result in less revenue being collected from trade. Secondly, the challenges do not bode well for a country's business climate as a whole and can impede a government's ability to attract Foreign Direct Investment (FDI).

The forgoing grounds are the reasons why it is argued that trade facilitation can be a critical strategy to secure benefits for traders, consumers and governments, and that these benefits are all linked to one aspect or another of development. However, there are equally compelling opposing arguments that facilitating trade may have no impact at all on development, or worse, that it may be anti-developmental and may not be particularly beneficial for developing countries, in particular. Many proponents of trade facilitation argue that there is very little to be gained from further trade liberalisation and that, consequently, policy emphasis must now shift to trade facilitation.<sup>176</sup> However, this has been rejected as not being entirely accurate. There is an argument that there are still many traditional restrictions on international trade, for example tariff barriers on developing countries' textiles and agricultural products. The WTO Statistical Review notes that, between 2015 and 2016, WTO members applied 154 new trade-restrictive measures.<sup>177</sup> These were in the form of new or increased customs duties and the introduction of quantitative restrictions.<sup>178</sup> This shows that, despite nations having professed commitment to trade liberalisation for decades, barriers still remain. The implementation of trade facilitation measures, in the face of

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<sup>176</sup> Mary Amiti & John Romalis argue that on average, tariffs on goods from non-least developed countries into the United States and the European Union are below 3%. They, therefore, conclude that there would only be market access gains of 2.28% if there was to be a further 40% reduction in tariffs. Amiti, M., Romalis, J. Will the Doha Round Lead to Preference Erosion?. *IMF Econ Rev* 54, 338–384 (2007). <https://doi.org/10.1057/palgrave.imfsp.9450009> accessed on 7 November 2019. Kim Anderson, Will J Martin & Dominique van der Mensbrugghe *Distortions to World Trade : Impacts on Agricultural Markets and Farm Incomes* (2005) available at <https://openknowledge.worldbank.org/handle/10986/8642>, accessed on 24 November 2019 estimate that world exports would only increase by about 10% if there was complete global trade liberalisation. See also Djankov, Freund & Pham Op cit 145 at 22.

<sup>177</sup> The report says that this was a significant increase compared with the previous year, and that it was the highest since 2011.

<sup>178</sup> Paul Krugman & Maurice Obstfeld *International Economics: Theory and Policy* 7 ed (2006) at 66.

continuing barriers to liberalised trade, may not have much of an impact on trade flows, and thus on possible development prospects.

Chapter 2 argued that trade liberalisation does not always correlate to increased trade flows and improved development.<sup>179</sup> The same can be said of trade facilitation. We can begin with the relationship between trade facilitation and trade flows. There are many factors that can impact trade flows. Events such as economic recessions in major trading partners and exchange rate volatility can affect the demand for imports, regardless of how efficient and cost-effective borders are designed to be. With respect to the relationship between trade facilitation and development, even where the former does lead to increased trade flows, it is not a given that this will automatically lead to improved economic conditions. An illustrative example is the experience of the European Community (EC). The EC was created as a customs union by the 1957 Treaty Establishing the European Economic Community (also called the Treaty of Rome).<sup>180</sup> In 1986, members signed the Single European Act (SEA).<sup>181</sup> Among other goals it focused on targeting inefficient border procedures and harmonising standards in the community. The European Commission had high expectations of the benefits of the trade facilitation that was initiated by the Single European Act. However, by 2003 it was estimated that the gains to the European economies from these reforms stood at approximately only 1.8 per cent of Gross Domestic Product (GDP). This shows that the gains from facilitating trade may not be as much as they are sometimes hyped up to be.<sup>182</sup>

It has been argued that trade facilitation could lead to expanded trade flows and, consequently, to more government revenue, which revenue could be

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<sup>179</sup> Section 2.3.1.3 above.

<sup>180</sup> It was signed on 25 March 1957 and entered into force on 1 January 1958.

<sup>181</sup> It entered into force on 1 July 1987.

<sup>182</sup> However, despite the meagre results of the SEA, the European Commission concluded that it was 'a mild disappointment but hardly a failure'. They pointed to improvements in competition, innovation, price and quality benefits for consumers. They concluded that those made up for the more modest gains in GDP, see Krugman & Obstfeld *Op cit* note 178 at 212. This shows that the implementation of trade facilitation reforms can have positive knock-on effects that are not necessarily reflected in substantially quantitative impacts.

applied to stimulate the economy and to provide public goods. However, this is not a reliably certain correlation. The ability of trade flows to impact government revenue depends on many factors, for example, the Dollar value of the exports. This means that, even if trade flows are high, if the value of the flows is low then this will not have much impact on government revenue. Further, because facilitating trade means cutting trade costs, often facilitating trade will have the effect of compromising government revenue, rather than enhancing it.<sup>183</sup> This means that government budgets can be even more stretched after implementing trade facilitation measures than before. This can have anti-developmental outcomes because it will mean that the government will have to make budget cuts, even to socially important programmes, such as the provision of public healthcare and education, etc.

The statistics that are used to back up the claim that trade facilitation can increase global revenue from trade have also come under critique. Statistics have been quoted that facilitating trade can potentially increase global revenue from trade by \$1 trillion and create more than eighteen million jobs in the lesser developed economies.<sup>184</sup> However, these predictions have been questioned.<sup>185</sup> The arguments mainly relate to the reliability of the methods that have been used to arrive at the figures. It is argued that there is evidence of erroneous assumptions, the use of small sample studies that inaccurately scale-up the findings to make generalisations and reliance on outdated statistics (for example, on Gross Domestic Product and commodities growth). Furthermore, that trade facilitation indicators do not lend themselves well to establishing concrete correlations with other variables, such as employment. Thus, it is proposed that, conversely, trade facilitation can actually cause a loss of revenue and employment, particularly in developing countries.

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<sup>183</sup> This issue is further elaborated upon in section 3.4.3.

<sup>184</sup> International Chamber of Commerce (ICC) available at <https://iccwbo.org/media-wall/news-speeches/business-gives-last-push-to-seal-bali-deal-and-salvage-doha-round/>, accessed on 2 December 2017.

<sup>185</sup> Jeronim Capaldo 'The uncertain gains from trade facilitation' (2013) 1 (13-02) *Global Development and Environment Institute Policy Brief* at 1.

Trade facilitation has been touted as being potentially beneficial to a country's ability to attract investment (especially into manufacturing). This is expected to lead to improved employment rates, thus higher incomes and standards of living. However, these effects too are not a given. Investors are attracted to a country by many factors that are related to the general investment climate and ease of doing business. Facilitated trade is just one of the many factors that they consider; it is not decisive on its own. The Global Alliance for Trade Facilitation conducted a study on this very issue. They begin from an assumption that attracting investment into the manufacturing sector (especially for export) is a good development strategy that will lead to increased employment and development. They then seek to determine whether addressing the ease and costs of cross-border trading has any positive link to attracting foreign direct investment into manufacturing. They find that 'investment into manufacturing is driven by a number of factors—from proximity to markets and cost of labor, to tax incentives and the overall market size—and trade facilitation reform alone cannot attract FDI'.<sup>186</sup>

These two sides of the 'trade facilitation and development argument' lead us to the realisation that trade facilitation cannot guarantee development. Facilitating trade can merely increase efficiency and not necessarily increase development. Thus, it is imperative that governments configure their trade facilitation policies in a manner that best serves their development policies. Trade facilitation should be mainstreamed into governments' development policies and strategies in a manner that strikes a balance between openness and protectiveness in order to contain any possible negative consequences of openness. For one, nations will have to be prepared for an influx of imports. These could decimate unproductive competing industries. In addition, their own export industries should be able to produce goods that can successfully be marketed and sold in other countries. Otherwise, there will be no benefit of having facilitated trade. This is important to understand because the producers in the SADC region struggle to achieve productivity and

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<sup>186</sup> Global Alliance for Trade Facilitation Op cit note 147 at 10. This is not to say that trade facilitation is unimportant but that it is not singularly important.

competitiveness. If border barriers are reduced in such environments, then this could be a potential threat to their viability.

Many developing countries and Least Developed Countries lack ‘the educational, industrial, financial, and political capabilities’ to initiate industrialisation projects.<sup>187</sup> Thus, their ability to benefit from trade facilitation could be jeopardised. This is why trade facilitation has to go hand in hand with other reforms.<sup>188</sup> Otherwise it can have a negative effect on poor countries, ultimately exacerbating trade and current account deficits. Therefore, yes, governments should address these issues, but in a strategic and well-thought out manner, taking into account their own peculiar circumstances and readiness for such reforms.

Finally, the cautions of heterodox economics help us to notice other glaring reasons why trade facilitation measures may not be entirely appropriate for lesser-developed countries (such as the SADC countries) as compared to more developed nations. There are three broad reasons why trade facilitation can be particularly onerous for developing countries and potentially destructive to their economic prospects. These are:

- The cost implications of implementing trade facilitation measures
- The difficulties of catching up from behind the curve
- The risks of harmonisation.

#### The Cost Implications of Implementing Trade Facilitation Measures

It is difficult for developing countries, in particular, to implement trade facilitating measures because many of the measures have huge cost implications that they cannot easily afford. The OECD estimates the costs at between \$5 to \$25 million for implementation and approximately \$3.5 million in annual operating costs.<sup>189</sup> Many developing countries are grappling with

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<sup>187</sup> Yong-Shik Lee et al Op cit note 86 at 24.

<sup>188</sup> Staples Op cit note 168 at 144.

<sup>189</sup> *OECD\_Trade\_Facilitation\_Indicators\_updated*, available at Trade Facilitation [https://www1.oecd.org/tad/facilitation/-flyer\\_May\\_2013.pdf](https://www1.oecd.org/tad/facilitation/-flyer_May_2013.pdf), accessed on 1 May 2017.

severe socio-economic challenges, such as poverty and unemployment, and are unable to deliver social services, such as healthcare, education and social welfare. They can, therefore, scarcely afford the costs of trade facilitation reforms and would likely have to divert money from social programmes in order to implement them. It is true that there is some technical and financial assistance that may be available for these costs. The OECD estimates that donor support for trade facilitation was \$477 million in 2012 and that the largest beneficiary of this money was Africa, which received \$290 million out of the total support.<sup>190</sup> However, donor support is never free and unlimited. It comes with stipulations attached. The donor will make demands on the recipient, sometimes to the detriment of the latter. Furthermore, resorting to assistance perpetuates the dominance-dependency relationship between rich nations and poor nations, which the latter is trying to shed.

A major cost implication of trade facilitation is the acquisition of technology. Most of the technology that is required to facilitate trade is owned by western corporations and organisations. It is very expensive for developing countries to acquire it. Compounding this is the fact that technology becomes obsolete after a while, thus developing country governments will need to continually upgrade and maintain systems at a huge cost. They can scarcely find funds for such recurrent costs in their already over-stretched budgets. At times they even lack the supporting infrastructure, (e.g. reliable energy and ICT services) that will allow them to make full use of the technologies.

Another cost of facilitating trade is that of improving staffing. This element requires implementing strategies to ensure that there is an adequate number of staff to deliver services (hiring) and providing training to upgrade knowledge and skills. Both of these involve recurrent expenditure. For example, with respect to training, staff will have to continually refresh their

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*Why Trade Facilitation Matters in Today's Global Economy*, available at [https://www1.oecd.org/tad/facilitation/OECD\\_Trade\\_Facilitation\\_Indicators\\_Updated-Flyer\\_May\\_2013.Pdf](https://www1.oecd.org/tad/facilitation/OECD_Trade_Facilitation_Indicators_Updated-Flyer_May_2013.Pdf), accessed on 11 May 2017.

<sup>190</sup> The report adds that donors have also allocated specific funds directed at trade-related infrastructure amounting to \$11.5 billion for transport and storage and \$617 million for the improvement of communications in 2011 OECD *ibid*.

training as new practices and technologies emerge. This is so that they can continually have the relevant skills. Donors cannot support recurring costs forever. They are becoming aid weary and, moreover, they have their own domestic challenges to address. For instance, the United States and the United Kingdom have been traditional donors. However, recently their ability or willingness to proffer support has been diminishing.

A final example of how exorbitant costs can arise in facilitating trade can be seen with respect to the interventions that address excessive documentary and procedural requirements. Trade facilitation mandates that the documents that are required for trading should be reduced and simplified. Procedural requirements should be streamlined<sup>191</sup> and time-saving interventions must be introduced in order to expedite processes. These include strategies such as:

- post-clearance audits<sup>192</sup>
- risk management strategies<sup>193</sup>
- advance rulings<sup>194</sup> and
- the creation of modalities for the appeal and review of administrative decisions.

The United Nations Economic Commission for Europe (UNECE) argues that such measures will lead to increased trader compliance, a more efficient bureaucracy, more security, less corruption and the attraction of investment. Furthermore, that traders will benefit from operating in an environment that is more transparent and predictable and has speedier processing and lower

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<sup>191</sup> For example, by the installation of single windows or according select firms authorised economic operator status which gives them access to expedited procedures.

<sup>192</sup> To identify where blockages exist in order to rectify them.

<sup>193</sup> To determine the appropriate thoroughness of the screening or requirements that should be imposed on different traders or shipments.

<sup>194</sup> These are prior rulings by customs administration given to traders regarding the classification, origin, method of valuation etc of goods. They inform traders of the treatment that their goods will receive at the time of importation. This assures that goods will arrive at a border in a compliant state, because the trader will have known beforehand what the assessment thereof would be.

costs. Ultimately, they will have improved competitiveness, which will have a favourable impact on their export potential.<sup>195</sup> However, the costs of making these amendments to documentary and procedural requirements can be vast. These costs include:

- conducting a diagnostic assessment of the border deficiencies in order to identify where the inefficiencies lie and to determine the interventions that will be necessary to address them
- establishing new procedures (for example, for appeal and review, pre and post clearance audits, and single windows etc.)
- acquiring risk assessment techniques and databases
- reforming laws and institutions
- hiring and/or training staff to implement the new requirements
- improving infrastructure and purchasing equipment.

Developed countries do not struggle with the same budgetary constraints as poorer nations do.<sup>196</sup> Developing countries would need money every step of the process to tackle these documentary and procedural reforms. It is argued that they would struggle to afford such investments and they would likely need to have assistance.

### The Difficulties of Catching Up From Behind the Curve

Besides the issue of affording the reforms, it is also easier for developed countries to implement trade facilitation measures that are imposed in treaty commitments. This is because their practices already largely conform to the ideal standards. Their manner of operations mirror the recommendations of

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<sup>195</sup> United Nations Economic Commission for Europe, Trade Facilitation Implementation Guide, available at <http://tfig.unece.org/details.html>, accessed 8 August 2019).

<sup>196</sup> Russell Hillberry & Carlos Zurita-Castro analysed the relationship between the level of GDP per capita and the number of category A commitments that were notified under the TFA. They found “a positive relationship between the number of type A commitments and logged per capita income” and conclude that “higher income countries are likely to have greater capacities to implement trade facilitation measures.” A Cross-country Assessment of Commitment Behavior in the Trade Facilitation Agreement, December 2019, at 11, available at [https://www.russellhillberry.net/uploads/6/4/1/0/64104535/tfa\\_dec2.pdf](https://www.russellhillberry.net/uploads/6/4/1/0/64104535/tfa_dec2.pdf), accessed 19 March, 2020.

organisations such as the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT). Conversely, the practices of developing countries are so far behind the international standards that the learning and adjustment curve will be a steep one for them. They would, therefore, need more time to incrementally improve their practices in order to reach the ideal standard. This is a fact that any organisation or treaty concerning trade facilitation must be aware of and cater for.

Three examples highlight the difficulties that developing nations face in attempting to catch up to the international standards. First, in order to counter the impediment of lack of information on the part of traders, trade facilitation requires that information be made available to traders in an accessible way. The often-touted ways are by publication on the internet or at enquiry points. The implementation of these interventions can be financially onerous for poorer governments. Therefore, there should be an allowance for them to use alternative methods that are more accomplishable for them, as long as they similarly satisfy the goal of keeping traders informed on all issues pertaining to their trade.

Another example can be seen with the requirement for consultations with traders. These are mandated so that traders' inputs can be taken on board when formulating reforms, to secure buy-in on their part and to prepare them for any measures that the government will implement in the future which may affect their manner of operating. This obligation also has to be measured when being implemented by developing countries because of the administrative burdens that can arise from its execution. It should be up to individual states which mechanisms they employ to satisfy the general objectives of the measure. Finally, trade facilitation reforms require the continual review of trade requirements and the making of improvements as necessary. Such projects can cause a significant administrative burden on poorer countries. These examples show that, despite the desirability of trade facilitation measures, developing countries may need longer transition

periods to get their practices aligned with the standards. In the meantime, they should be allowed the flexibility to continue with their current practices, as long as they too contribute to addressing inefficiencies, while gradually growing into greater and greater conformity over time.

### The Risks of Harmonisation

Another reason why trade facilitation reforms may be inappropriate for developing countries is because the notion of trade facilitation encourages the harmonisation of practices, standards, and requirements. Harmonisation between asymmetrical countries cannot work because of the wide difference in their economic muscles and therefore in their implementation capacities. Thus, there will be a need to afford flexibility to poorer states. This involves taking into account the peculiar realities of each country. Where there are compelling and legitimate reasons for deviations in practices, then that should be allowed. For example, the characteristics of traders is one factor that impacts on the clearance processes that are adopted by a country's border agencies and, consequently, on the delays or otherwise at the border. In the case of developed countries, the majority of traders are large, formal firms which trade in bulk. Their shipments can be processed much quicker. However, in developing countries, the majority of traders are small firms and individuals, who import numerous small shipments. Processing these types of trade takes longer and may require different clearance strategies. Rege puts it thus

the procedures and practices adopted by customs and other government departments in relation to imported and exported goods, have to be tailored to the trading environment, prevalence of corruption and other constraints confronting the authorities in applying them. The methods used and rigour with which rules are applied would be greatly different.<sup>197</sup>

Thus, harmonisation in vastly diverse contexts is a complicated undertaking. We can also take the example of physical inspections to show why harmonising practices can fail to meet the peculiar challenges or needs of

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<sup>197</sup>Rege Op cit note 146 at 171.

developing countries. Physical inspections are conducted at ports for various reasons.<sup>198</sup> Most importantly they are used in order to detect criminal activities during trading. Developing countries face far more illicit trade than developed countries do. Examples of this are rampant under-declaration and smuggling.<sup>199</sup> The fact that customs duties tend to be high in developing countries (on average) incentivises traders to resort to these types of fraud in order to evade declaring and paying the required fees. This challenge influences the behaviour of border agents in developing countries who, consequently, become stricter about conducting thorough inspections. Conversely, developed countries do not experience similar magnitudes of these challenges and therefore the need for inspections is less. This can make it undesirable for developed and developing countries to adhere to the same practises because the motivations for the practices that they adopt are not the same.

Another example relates to the issue of reducing trade costs. Trade facilitation requires nations to adopt measures that will make trading cheaper. Governments are required to implement disciplines on fees, charges and penalties that ensure commensuration between costs and the services rendered. However, measures that are applied to reduce trade costs may not necessarily be in the best interests of poorer countries because they depend heavily on trade fees as a vital source of their revenue. Trade liberalisation efforts have already reduced their revenue; therefore, the remaining trade fees are important from a budgetary perspective. In contrast, the share of trade costs as a percentage of a typical developed country's revenue is relatively minute. They have alternative sources of revenue and can afford to forego

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<sup>198</sup> At times it can be to verify information that will inform revenue-related decisions, such as the rates of fees to be charged. Other times they are conducted to determine the safety of imported goods (SPS or TBT measures).

<sup>199</sup> This is because the rates of tariffs in developing countries tend to be higher than those applicable in developed countries. Therefore, traders have more incentive to resort to under-declaring or smuggling goods in order to evade these high fees.

revenue from trade.<sup>200</sup> This is another area where harmonising a practice can be very risky for the poorer state.

### 3.6. Chapter Conclusion

Chapter 2 defined development as a multifaceted concept that includes not only improvements in economic indicators but also in the social, political, cultural, environmental and other conditions, for the betterment of the lives of all people. This chapter has debated the relationship between trade facilitation and development. Trade facilitation has been explained as concerning the easing of trade impediments which manifest as time delays and increased costs in cross border trading. The classical theory of international trade advocates that freeing trade will bring about development. This chapter has argued that yes, this can be the case. It has shown that, by facilitating trade, traders can benefit from increased profits from increased trade flows, consumers can gain cheaper access to greater quantities of goods and that governments can earn more tax revenue, which can be applied to provide social services for the improvement of the lives of their people.

However, this chapter has also argued that simply facilitating trade will not automatically be sufficient to impact development in a meaningful way. This is why, as Ismail writes, African leaders ‘adopted an Action Plan for Boosting Intra-African Trade (BIAT) that includes seven clusters including trade policy, trade facilitation, productive capacity, trade-related infrastructure, trade finance, trade information and factor markets’.<sup>201</sup> Therefore, trade facilitation has to be part of a broader development strategy that encompasses other important interventions that can complement openness, such as

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<sup>200</sup> The World Bank Organization reports on trade taxes as a percentage of total government revenue. Its statistics show that the average trade taxes as a percentage of revenue for a high income country is 0.9% (2013), for a middle income country it’s 4.8% and for Least Developed Countries it’s 9.9%. The average for Sub-Saharan Africa is 11%. Therefore, there is an inverse relationship between development levels and trade tax dependency. <https://data.worldbank.org/indicator/GC.TAX.INTT.RV.ZS>, accessed 13 October 2020.

<sup>201</sup> Faizel Ismail *Transformative Industrialization and Trade in the Context of the CFTA: Opportunities and Challenges* (2017) at. 89. See also Mbekeani, Kennedy K ‘Infrastructure, trade expansion and regional integration: Global experience and lessons for Africa’ (2007) 119 (AERC suppl) *Journal of African Economies*, at 88–113 and Mills, Greg ‘Africa and regional integration: What works and why’ (2004) 11 (2) *South African Journal of International Affairs*.

infrastructural development. In fact, there are those who argue that infrastructure problems largely explain the relatively low levels of African trade and that opening borders will not greatly assist a country that does not have sound infrastructure.<sup>202</sup> This chapter has similarly argued that we cannot ignore the potential negative consequences of facilitating trade, for example, the decimation of uncompetitive domestic industries and exacerbated trade deficits.

This thesis is arguing that participating in trade facilitation agreements has not resulted in significant positive changes to facilitated trade on the ground in the Southern African Development Community. The next chapter discusses the regional and multilateral agreements that SADC countries have entered into in their bid to address cost and time delays in their trade. It argues that compliance deficits may help to explain why the agreements have largely been ineffective in addressing the barriers. Chapter five highlights the prevalent barriers while chapter six takes a closer look at the situation by way of a case study of one SADC state – the Kingdom of Lesotho. It uses the law and development theory to argue that weaknesses in regulatory design, compliance and implementation also contribute to the ineffectiveness of regional and multilateral instruments. Chapter seven then debates whether the Trade Facilitation Agreement has unique features which will assist it to overcome these challenges to the attainment of facilitated trade in SADC.

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<sup>202</sup> Benno Ndulu, Lolette Kritzinger-van Niekerk & Ritva Reinikka 'Infrastructure, regional integration and growth in Sub-Saharan Africa' in Jan Joost Teunissen & Age Akkerman (eds) *Africa in the World Economy : National, Regional and International Challenges* (2005).

## Chapter 4- The Regional and Multilateral Framework for Trade Facilitation in the Southern African Development Community

### 4.1. Introduction

The discussion thus far has supported a case for reducing trade barriers, arguing that this may lead to increased trade flows, which could be beneficial to development. It has been argued that trade barriers do not only emanate from restrictive trade policies but also from inefficient cross-border processes. Chapter 3 explored the factors that can increase time delays and transactional costs at borders. It explained that redressing such barriers can be achieved by measures that are taken unilaterally by individual states, bilaterally between neighbouring states or under the auspices of regional or international agreements. The introductory chapter of this work outlined one of the research questions as being: what have been the challenges to compliance with regional and multilateral treaties, which have rendered these frameworks ineffective for facilitating trade in the Southern African Development Community? This thesis applies theoretical insights on compliance to interrogate this question. These theories were introduced in chapter 2. Compliance was defined as referring to when states adhere to the substantive and procedural provisions and to the spirit of a treaty.<sup>203</sup> Compliance differs from implementation. Implementation relates to the measures that states employ in order to domesticate their international obligations.<sup>204</sup>

This chapter applies theories on compliance to the regional and multilateral frameworks for facilitating trade in Southern Africa. The two theories that are applied in this regard are the enmeshment theory and the managerial approach to compliance. The former proposes that the nature of commitments (whether treaty provisions are precise, obligatory and interpretable or whether

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<sup>203</sup> Harold K Jacobson & Edith Brown Weiss Op cit note 103.

<sup>204</sup> Beth Simmons defines it as the adoption of domestic rules or regulations that are meant to facilitate, but do not in themselves constitute, compliance with international agreements' Op cit note 101 at 77-78.

they are vague, ambiguous and broad)<sup>205</sup> and the nature of institutional arrangements (whether there are strong institutions supporting implementation)<sup>206</sup> are important determinants of whether or not there will be treaty compliance. The latter theory posits that non-compliance is an involuntary occurrence, usually induced by the lack of capacity to comply. This chapter studies each treaty in turn and discusses the extent to which these theories explain non-compliance, by the SADC states, with their frameworks. The argument is that, if there is non-compliance with instruments, then there will not be transformation to the state of trade facilitation in the region. However, it is recognised that compliance alone is not the singular factor that is inhibiting the effectiveness of the legal frameworks. It is argued that it is one of the prominent factors. Implementation is another factor that will be discussed in chapters 5 and 6 of this work.

#### 4.2. The Regional Framework for Trade Facilitation in the Southern African Development Community

From independence, the vision of African leaders across the continent has been the pursuit of unity via regional integration. Maruping explains that countries pursue integration in order to ‘foster competition, subsidiarity, access to wider market (via trade), larger and diversified investment and production, socio-economic and political stability and bargaining power’.<sup>207</sup> Therefore, there are political as well as economic reasons that motivate countries to seek greater coordination.<sup>208</sup> Regional integration is allowed as

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<sup>205</sup> Kelly Op cit note 110 at 305.

<sup>206</sup> For example, by interpreting rules, monitoring compliance, resolving disputes, etc.

<sup>207</sup> Maruping Op cit note 152 at 131. See also Balassa, Bela *The Theory of Economic Integration* (2011), Byiers, B & Vanheukelom, J, *What Drives Regional Economic Integration? Lessons from the Maputo Development Corridor and the North-South Corridor* (2014) European Centre for Development Policy Management, Machlup, Fritz *A History of Thought on Economic Integration* (1977) and Sakyi, Daniel & Eric Evans Osei Opoku *Regionalism and Economic Integration in Africa: A Conceptual and Theoretical Perspective* (2014), African Capacity Building Foundation, Addis Ababa.

<sup>208</sup> Wolff-Christian Peters also agrees that there are these two rationales for regional integration: an economic one and a political one. In *The Quest for an African Economic Community: Regional Integration and its Role in Achieving African Unity: The Case of SADC* (2010). Peter Robson adds that the economic, political and social considerations cannot easily be disentangled from each other, see his *Economic Integration in Africa* (2011) at 11.

an exception to Article I of the General Agreement on Tariffs and Trade (GATT), by its article XXIV. The rationale was that regionalism was expected to supplement and to accelerate multilateralism.<sup>209</sup> The regional integration agreements that the SADC countries have entered into, which aim at facilitating their trade are:

- The Southern African Development Community Protocol on Trade
- The Southern African Customs Union Agreement
- The Tripartite Free Trade Agreement
- The African Continental Free Trade Agreement.

This section discusses each treaty in turn. It describes the legal and institutional arrangements therein. It debates the extent to which each framework supports members' compliance with trade facilitation disciplines.

#### 4.2.1 The Southern African Development Community Protocol on Trade

The first instrument to address trade facilitation barriers in the SADC region was the Protocol on Trade in the Southern African Development Community Region (SADC Trade Protocol). It was signed on August 1, 1996<sup>210</sup> and currently has twelve members.<sup>211</sup> The preamble to the protocol refers to some goals that are related to trade facilitation. These are: strengthening customs cooperation and combatting illegal trade. The preamble of a treaty outlines its principle purposes. Therefore, including trade facilitation objectives in the preamble of the protocol makes it a central mandate; not merely incidental. The substantive provisions of the protocol refer to trade facilitation in Part 3, which is titled 'Customs Procedures'. The section refers us to annexes II, III and IV to the protocol. All of these annexes relate to one aspect or another of trade facilitation. It would seem favourable that different issues are covered in stand-alone annexes, because it would give opportunity for each annex to devote sufficient attention to each individual facet of trade facilitation.

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<sup>209</sup> Jagdish Bhagwati 'Regionalism versus multilateralism (1992) 15 (5) *The World Economy*.

<sup>210</sup> It entered into force on January 25, 2000.

<sup>211</sup> Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, eSwatini, Tanzania, Zambia and Zimbabwe.

Annex II concerns customs cooperation. The preamble acknowledges that differing customs laws and procedures hinder intra-SADC trade. Thus, the annex has three goals: simplification, harmonisation and cooperation. Chapter 3 referred to this as soft infrastructure. In terms of simplification, members are bound to simplify their customs laws and procedures. Their laws should also reflect internationally accepted principles.<sup>212</sup> In terms of harmonisation, members are bound to:

- Harmonise their customs laws and procedures
- Use common customs and statistical nomenclature that is consistent with the Harmonised System (HS)
- Publicise trade statistics in conformity with the HS system<sup>213</sup>
- Harmonise their valuation laws and practices in accordance with the World Trade Organization's disciplines on customs valuation<sup>214</sup>
- Develop a single customs document for trade<sup>215</sup>
- Adopt common customs systems.<sup>216</sup>

There are three components to the cooperation obligation. The first is related to security. Because the proliferation of customs offences sabotages legitimate trade, members agree to cooperate to investigate and to fight such offences.<sup>217</sup> Secondly, because of the importance of the quality of the human resources at border posts, members agree to cooperate in training customs officials by developing joint training programmes. Finally, parties to the protocol are required, by article 8, to cooperate by enhancing communication.

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<sup>212</sup> Article 5(1). Reference is made to standards and guidelines that are set by organisations such as the World Customs Organization (WCO), The United Nations Economic Commission for Europe (UN-EC), the International Maritime Organization (IMO), the International Civil Aviation Association (ICAO), the International Standards Organization (ISO), the International Chamber of Commerce (ICC) and the International Air Transport Association (IATA).

<sup>213</sup> Article 3.

<sup>214</sup> Article 4.

<sup>215</sup> Article 5(3).

<sup>216</sup> Article 6(5).

<sup>217</sup> In article 7 of the annex.

Annex III to the protocol concerns the simplification and harmonisation of trade documentation and procedures. The preamble recognises the negative effect of arduous trade documentation and procedural requirements. It advocates that members should simplify these, based on internationally recognised standards.<sup>218</sup> Members pledge to reduce the costs of trade documentation and procedures<sup>219</sup> and to standardise trade documents and information.<sup>220</sup> International standards are to be used as a basis for formulating trade documents and data processing techniques are to be used to process trade data. Furthermore, parties to the protocol are to initiate trade facilitation programmes.<sup>221</sup>

Finally, annex IV concerns transit trade. It is important that goods that are in transit are not subjected to as equally stringent requirements as those goods that have arrived at their final destination (imports). Thus, article 2 of this annex provides for the freedom of transit for goods that are destined for other community countries or for international markets. This freedom is defined as meaning that members should not levy duties on transit traffic,<sup>222</sup> or restrict/prohibit or control transit trade,<sup>223</sup> or permit practices that discriminate against such trade or the persons engaged in such trade.<sup>224</sup> Transiting goods are also to be exempted from customs examinations.<sup>225</sup> In an effort to harmonise practice, article 7 requires that all parties adopt the standard form usage of SADC transit documents.<sup>226</sup> In terms of physical infrastructure, members agree to ensure the construction of warehouses for the temporary storage of transit goods<sup>227</sup> as well as clearing offices.<sup>228</sup>

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<sup>218</sup> Article 2 on the objectives of the annex.

<sup>219</sup> Article 3.

<sup>220</sup> Article 4.

<sup>221</sup> Article 5.

<sup>222</sup> Save for administrative or service charges. Article 2(2).

<sup>223</sup> Article 2(4).

<sup>224</sup> Article 2(3).

<sup>225</sup> Article 8(1) (b). Except that, where customs officials suspect any irregularity, they may subject the goods to examination under Article 8(2).

<sup>226</sup> This is to be approved by the Committee of Ministers responsible for trade matters (CMT).

<sup>227</sup> Article 11(1).

<sup>228</sup> Article 11(2).

These three annexes are quite extensive in terms of the policies and the practices that they capture. There is a fairly comprehensive coverage of trade facilitation measures. The substantive provisions of the annexes identify relevant trade facilitation impediments and institute correlating relevant interventions. However, there are two glaring omissions that may compromise the optimality of the protocol. First, it is silent on some key issues, such as on the reduction of direct costs related to trade.<sup>229</sup> Trade facilitation requires that not only are processes expedited, but also that the transactional costs of trade are reduced. Furthermore, there is no mention of dispute resolution mechanisms between traders and officials. Chapter 3 discussed how important it is that traders have recourse to appeal and review procedures where they have grievances about the application of rules or the quality of services, etc. If a treaty neglects to deal with critical aspects of the problem that it is aiming to solve, this will hinder its ability to be effective.

How does this treaty contribute to the ability, or otherwise, of members to comply with its provisions? First, it does so by couching provisions in precise and obligatory terms. By and large the annexes provide for concrete measures that are to be installed. They use the words ‘undertake to’ or ‘shall’ to refer to the incumbency of compliance. The enmeshment theory of compliance argues that this obligatory phrasing bodes well for securing compliance by states. However, it falls short in terms of the strength of the institutional arrangements that it installs. African regional institutions have been criticised as tending to be weak and, thus, ineffective in guiding member states towards compliance.<sup>230</sup> The enmeshment theory explains that the strength of a treaty’s institutional arrangements can correspond to the probability of members’ compliance. The annexes to the trade protocol create a Committee of Ministers (CMT) that adopts implementing regulations.<sup>231</sup> It also appoints a Sub-

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<sup>229</sup> For example, service costs.

<sup>230</sup> Ashimizo Afadameh-Adeyemi & Evance Kalula ‘SADC at 30: Re-examining the legal and institutional anatomy of the Southern African Development Community in Bösl, Anton, Willie Breytenbach, Trudi Hartzenberg, Colin McCarthy & Klaus Schade (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2011) at 20.

<sup>231</sup> For instance, in art 12 in annex I.

Committee on Customs Co-operation.<sup>232</sup> The Sub-committee undertakes studies and makes recommendations on the covered areas. However, these bodies are not given much power to monitor or to enforce the compliance of members. Without these capacities the otherwise stellar legal obligations may go un-implemented because of the lack of follow-through.

The managerial approach to compliance cautions that states may be unable to comply with a treaty due to shortfalls in their capacity. The SADC trade protocol requires the implementation of heavily resource-dependent reforms (for example the institution of training programmes, infrastructural development, etc.). However, it does not provide the means for these to be afforded by the member states (for example, provisions on technical assistance). Neither are the institutions that are created given any resources to assist members who might experience compliance challenges. This becomes a bar to compliance with the commitments because the members are all poor developing and least developed countries who have limited resources to implement the costly measures. These are some of the weaknesses of the framework that may explain why this protocol has not greatly assisted in the resolution of trade facilitation challenges in the region.

#### 4.2.2 The Southern African Customs Union Agreement

Some members of the Southern African Development Community are also members of the Southern African Customs Union (SACU).<sup>233</sup> The SACU agreement<sup>234</sup> facilitates trade because it calls for the application of common tariffs on goods from non-members and for common trade regulations. However, despite trade facilitation being listed in the objectives of the

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<sup>232</sup> Article 11 of annex I, and art 6 of annex IV.

<sup>233</sup> These are: Botswana, Lesotho, eSwatini, Namibia and South Africa.

<sup>234</sup> Of October 21, 2002. The predecessor agreements were the Customs Agreement between the government of the Union of South African and the Territories of Basutoland, Swaziland, and Bechuanaland Protectorate (of 30 July, 1910) and the Customs Union Agreement between the Governments of The Republic of South Africa, The Republic of Botswana, The Kingdom of Lesotho and The Kingdom of Swaziland (of 11 December, 1969). The Republic of Namibia acceded to it on 6 July 1990). All of the agreements are available at <http://www.sacu.int/list.php?type=Agreements>.

treaty,<sup>235</sup> the agreement only has two substantive provisions that are specifically related to facilitating trade. These are articles 23 and 24.

Article 23(2) provides that members shall take measures that are necessary to ensure the simplification and harmonisation of trade documentation and procedures. However, there are no specific details about what exactly should be done in respect of this obligation. The same article also mentions that members' customs authorities "shall cooperate," but again without details of cooperating on what and how. The enmeshment theory argues that such imprecision of commitments hampers treaty effectiveness.

Article 24 of the agreement is on the freedom of transit. This provision is limited in that the freedom is defined as applying only between the territories of the member states. The SADC Trade Protocol guarantees freedom of transit even when the destination country is a third country. Therefore, this agreement is very shallow in terms of the obligations that it imposes on members. Its provisions lack sufficient coverage and specificity. This may, therefore, hamper its ability to achieve compliance and, therefore, effectiveness.

Article 7 of the agreement establishes an extensive network of institutions of the customs union. There is an organ that is responsible for making rules,<sup>236</sup> those that enforce rules<sup>237</sup> and one that interprets rules and resolves disputes.<sup>238</sup> However, even though these institutions are given these responsibilities, they are not given political or economic tools to enforce them. This compromises their effectiveness to enforce member compliance. A final concern regarding the agreement is that there is no assistance that is given to parties to implement treaty obligations. This is despite the managerial approach to compliance insisting that capacity constraints should be

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<sup>235</sup> Article 2 of the SACU treaty.

<sup>236</sup> The Summit was created in art 7A. It is responsible for the strategic direction of the organisation and adopts its rules.

<sup>237</sup> The Council of Ministers (art 8), Customs Union Commission (art 9) and the Secretariat (art10) are all involved in some aspect of enforcing rules.

<sup>238</sup> The ad hoc tribunal that is established in art 13 of the agreement.

addressed in treaty provisions so as to enhance the ability of parties to comply with the framework.

#### 4.2.3 The Tripartite Free Trade Agreement

The tripartite free trade area is composed of the members of three African Regional Economic Communities (RECs): the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC). The idea for this free trade area originated with the Kampala Communique of the Tripartite Summit of October 22, 2008.<sup>239</sup> Therein the Heads of States and Governments of the three RECs agreed to the establishment of a free trade area amongst themselves as a stepping-stone to the eventual establishment of a customs union. The resultant agreement was signed in Egypt on June 10, 2015. The Tripartite Free Trade Agreement (TFTA) has been signed by 22 out of the 28 member states but it has not yet entered into force due to an insufficient number of ratifications.<sup>240</sup>

The goals of the TFTA are contained in its article 5. Customs cooperation and trade facilitation are mentioned in article 5(c). These goals are fleshed out in more detail in articles 13, 14 and 15 respectively, as well as in annexes IV, V and VII to the agreement. The annexes are mirror images of annexes II, III, and IV to the SADC Protocol on Trade. Therefore, the same comments that were made about the protocol, regarding the nature of the commitments, the institutional arrangements, as well as capacitation, equally apply here.<sup>241</sup> Nevertheless, the mere fact that this agreement was concluded evidences that the SADC members have been keen to address trade facilitation barriers even

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<sup>239</sup> <http://meac.go.ke/wp-content/uploads/2017/03/Tripartite-Summit-Final-Communique-Kampala-20081022-1.pdf>, accessed on 27 May 2020 .

<sup>240</sup> Eight countries have ratified it so far. These are: Botswana, Burundi, Egypt, Kenya, Namibia, Uganda, Rwanda and South Africa. Another seven countries (Comoros, eSwatini, Malawi, Sudan, Tanzania, Zambia and Zimbabwe) are in advanced stages of the ratification process: <https://www.comesa.int/implementation-of-the-tripartite-free-trade-area-now-in-sight/> accessed on 23 May 2020.

<sup>241</sup> See the discussion in section 3.2.1. above.

beyond their immediate region. The challenge remains to address the compliance challenges that may impede the TFTA from achieving its goals.

#### 4.2.4 The African Continental Free Trade Agreement

The negotiations for the African Continental Free Trade Area (AfCFTA) were launched in South Africa on June 15, 2015.<sup>242</sup> The agreement was signed on March 21, 2018 at an African Union (AU) Summit that was held in Kigali, Rwanda. This launched phase I of the agreement.<sup>243</sup> The agreement entered into force on May 30, 2019. It is currently the largest (in terms of scope and membership – 32 members) and the most ambitious African project for regional integration that has ever been achieved. Trade facilitation is mentioned in the specific objectives of the AfCFTA. It is stated that parties shall ‘cooperate on customs matters and the implementation of trade facilitation measures’.<sup>244</sup> Reservations are not allowed to be made to the agreement<sup>245</sup> and a member may not withdraw from it within the first five years of its establishment.<sup>246</sup> This is indicative of the level of commitment that is expected of the members. The enmeshment theory argues that the strength of commitments can affect compliance with an agreement.<sup>247</sup>

The African Continental Free Trade Agreement has a Protocol on Trade in Goods. Articles 13, 14, and 15 of the protocol are relevant to trade facilitation. They refer to annexes 3, 4 and 5 (respectively) to the agreement.<sup>248</sup> Annex 3 is on customs cooperation and mutual administrative assistance.<sup>249</sup> It

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<sup>242</sup> African Union Assembly Decision, Assembly/AU/Dec. 569 (XXV).

<sup>243</sup> Phase I encompasses: trade in goods (including customs cooperation, trade facilitation, and transit trade), trade in services and a dispute settlement mechanism. Phase II of the agreement will cover investment, intellectual property rights, and competition policy (Article 7 of the AfCFTA- rendezvous clause).

<sup>244</sup> Article 4(e).

<sup>245</sup> Article 26.

<sup>246</sup> Article 28.

<sup>247</sup> For example, was there just signature, or ratification? Are reservations allowed? How easy is it to withdraw, etc.?

<sup>248</sup> The status of the protocols and annexes to the agreement is discussed in art 8 of the main agreement. It explains that they are part and parcel of the agreement and the undertakings of members, and that they form part of the single undertaking and will enter into force simultaneously with the entry into force of the main agreement.

<sup>249</sup> Annex II of the SADC Protocol on Trade, and Annex IV of the Tripartite Free Trade Agreement.

contains significant repetition of the provisions of the correlating annexes to the SADC Trade Protocol and the Tri-partite Free Trade Agreement.<sup>250</sup> For example, the AfCFTA keeps the same disciplines as these previous agreements with respect to the harmonisation of customs tariff nomenclatures and statistical nomenclatures,<sup>251</sup> the harmonisation of valuation laws and practices,<sup>252</sup> the prevention, investigation and suppression of customs offences,<sup>253</sup> and communication on customs information.<sup>254</sup> However, there are some key differences in the new agreement that may give it advantages over the previous ones. First, the language used in the previous regimes regarding computerisation (TFTA language) or automation (AfCFTA language) is not obligatory. Members are ‘encouraged to’,<sup>255</sup> or ‘should’,<sup>256</sup> or ‘whenever practicable’,<sup>257</sup> or members shall ‘consider’<sup>258</sup> etc. This is a weaker legal regime because it is largely devoid of legal consequences. In contrast, the AfCFTA provisions on this issue are more binding. For example, it is provided that members ‘undertake to establish, use and continually upgrade’ their processing systems. According to the enmeshment theory, the obligatory nature of treaty provisions is important for enhancing compliance. Therefore, this feature may assist the AfCFTA to be more successful in securing the compliance of members, as compared to the previous agreements.

Secondly, the regime on customs cooperation is more extensive than that which obtains in the previous regional agreements. For example, with regard to the advance exchange of information,<sup>259</sup> confidentiality during customs

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<sup>250</sup> Annex II to the SADC Trade Protocol, and annex IV to the Tripartite Free Trade Agreement.

<sup>251</sup> Article 3.

<sup>252</sup> Article 4.

<sup>253</sup> Article 7 of the AfCFTA’s annex and article 8 of the TFTA’s annex, although the TFTA provisions are a little bit more detailed on the type of information that may be requested.

<sup>254</sup> Article 12 of the AfCFTA’s annex and article 9 of the TFTA’s annex.

<sup>255</sup> Article 6(1) on the use of data processing techniques to support customs operations.

<sup>256</sup> Article 6(3) on customs authorities reviewing existing manual procedure with a view to modernising.

<sup>257</sup> Article 6(4) that computer applications should be based on internationally accepted standards.

<sup>258</sup> Article 6(5) on the development and adoption of customs application systems in common with other members.

<sup>259</sup> Article 7 requires the exchange of information in advance of arrival, at a border crossing, of persons or goods or means of transport. The previous agreements do not have a similar provision.

cooperation<sup>260</sup> and the scope of cooperation in training.<sup>261</sup> On a balance, the annex has stronger norms than those contained in the previous agreements. This counts in its favour in terms of favouring potential compliance.

Annex 4 to the AfCFTA is on Trade Facilitation.<sup>262</sup> In many ways it is an improvement on what obtained in the previous regional instruments. The annex is more comprehensive in that it covers a wider range of trade facilitation measures that members must implement.<sup>263</sup> Furthermore, the majority of the measures are couched in legally binding language.<sup>264</sup> Therefore, even with this annex there is evidence of stronger obligations, thus giving greater confidence for compliance.

The regime on transit trade is provided for in annex 8 to the AfCFTA.<sup>265</sup> It is almost an exact mirror image of the previous annexes. However, it has an interesting provision that is absent from the previous instruments. It mandates that parties should accord one another 'expedited implementation of the provisions of the annex'. At first glance it may appear to be a strong commitment. However, the provision is troublesome because, as the enmeshment theory explains, states cannot comply with obligations which are vague and difficult to interpret. This is the case with this phrasing because the ambits of the commitment are not explained. It is not clear exactly what

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<sup>260</sup> Article 10.

<sup>261</sup> Article 11.

<sup>262</sup> The corresponding annexes are annex III to the SADC Trade Protocol and annex V to the Tripartite Free Trade Agreement.

<sup>263</sup> Publication, the establishment of enquiry points, advance rulings, pre-arrival processing, electronic payment, separation of release from final determination of customs duties, taxes, fees and charges, risk management, post-clearance audit, establishment and publication of average release times, trade facilitation measures for authorised operators, expedited shipments, perishable goods, use of international standards, use of information technology, single window, freedom of transit, documentation, fees, charges and penalties, review and appeal, use of customs brokers, pre-shipment inspection, and border agency co-operation.

<sup>264</sup> In two other instances, the language is binding but it also allows members to prioritise implementation in light of their existing policies, or subject to listed exceptions. However, in six instances, the measures are couched in non-binding terms by use of language such as 'shall, to the extent possible/practical;', or that members are 'encouraged to', or that they shall 'endeavour to'.

<sup>265</sup> Annex IV to the SADC Trade Protocol and annex VII to the Tripartite Free Trade Agreement.

timeframes are expected from the members. Thus, it will not be helpful in guaranteeing action from the member states.

The enmeshment theory postulates that a robust institutional framework is necessary to support compliance. It was argued that the Trade Protocol and the Tripartite Free Trade Agreement have weak institutional arrangements. Those of the AfCFTA have been fortified to provide for a more sound institutional structure. There are decision-making bodies in the form of the Assembly of Heads of States and Governments<sup>266</sup> and the Council of Ministers.<sup>267</sup> There is also a body that is responsible for implementing programmes and monitoring and reviewing the functioning of the agreement.<sup>268</sup> There is also a dispute settlement mechanism which is established in article 20 of the agreement. It makes reference to the AfCFTA's Protocol on Rules and Procedures for the Settlement of Disputes. It institutionalises arrangements that harken to those of the World Trade Organization's Dispute Settlement Understanding (DSU). It establishes a dispute settlement body (DSB)<sup>269</sup> which is responsible for, *inter alia*, establishing panels and an appellate body to preside over disputes by members and to make recommendations which will be adopted by the DSB. This more comprehensive structure and diverse responsibilities may assist in empowering the institutions to secure member compliance.

The managerial approach to compliance recognises that capacity constraints must be overcome in order for members to be able to comply with treaties.<sup>270</sup> To its credit, the AfCFTA recognises that members are at varying levels of development and seeks to mitigate this inequality which can impact on their ability to comply with the regime. This is reflected in Article 30 of the Protocol

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<sup>266</sup> Article 10 of the AfCFTA. It is responsible for the strategic direction of the free trade area and provides interpretations of the provisions of the AfCFTA.

<sup>267</sup> Article 11 of the AfCFTA. It is tasked with ensuring the enforcement of the agreement. State parties must implement any decision of the Council of Ministers.

<sup>268</sup> That is the Committee of Senior Trade Officials, which is established in art 12 of the agreement.

<sup>269</sup> In art 5 of the Protocol.

<sup>270</sup> Chayes & Chayes Op cit note 118.

on Trade in Goods which provides for special and differential treatment (S&DT). This is in the form of flexibilities that are given to certain states; mindful of their diminished capability to implement obligations. The dispensations are in the form of ‘special consideration and additional transition periods’ for implementation. This is given on a case by case basis. This latitude can greatly improve prospects of compliance.

#### 4.3. The Multilateral Framework for Trade Facilitation in the Southern African Development Community

There are several international organisations that promote the global facilitation of trade. These include the United Nations Conference on Trade and Development (UNCTAD),<sup>271</sup> the Organization for Economic Co-operation and Development (OECD),<sup>272</sup> the International Chamber of Commerce (ICC),<sup>273</sup> the International Trade Centre (ITC),<sup>274</sup> and the United Nations Organization (UNO), amongst others.<sup>275</sup> However, the two most prominent

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<sup>271</sup> UNCTAD created a no-cost customs modernisation software system called the Automated System for Customs Data (ASYCUDA) which is used in over 90 countries including in many SADC states, available at <http://new.asycuda.org/>, accessed on 13 August 2018.

<sup>272</sup> The OECD developed the trade facilitation indicators (TFIs). They identify areas for action for trade facilitation, and address how countries may assess the potential impact of reforms. Available at <http://www.oecd.org/trade/facilitation/indicators.htm>, accessed on 28 October 2017.

<sup>273</sup> The ICC is part of the Global Alliance for Trade Facilitation. This is a partnership of public and private entities that aims to identify and to implement reforms that will facilitate trade in developing and Least Developed Countries. <https://www.tradefacilitation.org>, accessed 10 October 2017.

<sup>274</sup> The ITC runs a trade facilitation programme that assists primarily small and medium enterprises to improve their competitiveness. <http://www.intracen.org/itc/trade-facilitation-programme>, accessed 10 October 2017.

<sup>275</sup> The United Nations adopted the Almaty Programme of Action (APoA) in 2003 in Almaty Kazakhstan at the First International Ministerial Conference of Landlocked and Transit Developing Countries. The aim was to address the trade facilitation needs and challenges of land locked developing countries (LLDCs). The programme covers transit policy, infrastructural development and international support for implementation. In November 2014, the Second United Nations Conference on Landlocked Developing Countries was held in Vienna. The Vienna Programme of Action for the Landlocked Developing Countries for the Decade 2014 to 2024 (VPoA) A/CONF.225/L.1 is the successor programme to the APoA. It concentrates on building partnerships between LLDCs and transit countries, (for instance in infrastructure development, technical and administrative support, customs and logistics connectivity, the harmonisation, simplification and standardisation of rules and documentation, and the implementation of relevant international, regional and bilateral agreements). See also UN-OHRLLS *Africa Regional Report on Improving Transit Cooperation, Trade and Trade Facilitation for the Benefit of the Landlocked Developing Countries* (2015) 1–2, available at <http://unohrlls.org/UserFiles/File/Elle%20Wang%20Uploads/LLDCs%20Publication.pdf>, accessed on 23 December 2017.

organisations are the World Customs Organization (WCO) and the World Trade Organization (WTO). The SADC countries are members of both of these organisations. They have, therefore, assumed international commitments to facilitate trade. This next section discusses the instruments that have been created by these two institutions. It assesses their abilities to enhance compliance by the SADC states, so that they may facilitate their trade as a strategy towards the achievement of greater development gains.

#### 4.3.1. The Instruments of the World Customs Organization

The World Customs Organization<sup>276</sup> is an intergovernmental organisation that was created to advise its members on customs matters. It aims to assist governments to improve the efficiency of their customs administrations so that global trade can expand.<sup>277</sup> The WCO has membership of 183 customs administrations.<sup>278</sup> It promotes customs cooperation, proposes strategies to harmonise customs operations, prepares conventions, publicises information on customs regulations and procedures and advises governments on customs issues. The WCO is responsible for many important trade facilitating conventions. The SADC states are members of the following five instruments:

- The Customs Convention on the A.T.A Carnet for the Temporary Admission of Goods
- The International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences
- The Convention on Temporary Admission

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<sup>276</sup> <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx>, accessed 24 November, 2018.

<sup>277</sup> It was created by virtue of the 1952 Customs Cooperation Convention. This was signed in Brussels on 15 December, 1950 and it entered into force on November 4, 1952. The organisation was initially called the Customs Cooperation Council (CCC) but was subsequently renamed the World Customs Organization in 1994, due to its growing global membership.

<sup>278</sup> WCO Secretary General, *Position as Regards Ratifications and Accessions* DATE SG0205E1a, available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/conventions/sg0205e1.pdf?la=en>.

Membership is governed by Articles XVI and XVIII of the Customs Cooperation Convention. The former article deals with original membership while the latter one deals with accessions. Save for Western Sahara and Equatorial Guinea every African state is a member of the WCO.

- The International Convention on the Harmonized Commodity Description and Coding System
- The International Convention on the Simplification and Harmonization of Customs Procedures

#### The Customs Convention on the ATA Carnet for the Temporary Admission of Goods

This is also known as the A.T.A Convention. It entered into force on July 30, 1963 and currently has 63 members.<sup>279</sup> Eleven members are African states; three of which are SADC states.<sup>280</sup> The A.T.A carnet is a document that is used when goods are temporarily admitted into a territory, but where the goods will not remain in that country (for example, where they are imported as samples, or for display at exhibitions, etc.). It excludes goods that will undergo any further processing or repair while in the country. By virtue of the convention, contracting parties accept A.T.A carnets in the place of their national customs documents. The carnet can be valid for up to one year and in multiple territories, thus giving an importer access to many markets. It gives security to the government of the state into which the goods are being imported because they have a guarantee that, should the conditions of the carnet be breached, then the customs duties and taxes will become payable. The system facilitates international trade because, when customs formalities are not applied to goods that are only temporarily being imported, this saves traders time and costs. It also facilitates trade by encouraging harmonisation because the annex to the agreement provides a model carnet.

#### The International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences

This convention is also known as the Nairobi Convention. It was concluded on June 9, 1977. It entered into force on May 21, 1980. It currently has 52

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<sup>279</sup> World Customs Organization *General Secretariat, Position as Regards Ratifications and Accessions* Brussels, PG0233E1. February 22, 2018.

<sup>280</sup> South Africa (1975), Mauritius (1982) and Lesotho (1983).

members.<sup>281</sup> Seventeen members are African states; seven being from the SADC region.<sup>282</sup> The convention recognises that customs offences are detrimental to the economic, social and fiscal interests of states and to legitimate trade.<sup>283</sup> It, therefore, mandates members to take joint action against such offences. This is to be achieved by customs administrations affording each other mutual assistance in the prevention, investigation and repression of customs offences. The improvement of cooperation between customs officials is an essential pillar of trade facilitation. Furthermore, because customs offences undermine the legitimacy of trade, any instrument that concerns making trade safer and more secure also serves the mandate of trade facilitation.

However, the convention lacks a strong institutional pillar to ensure compliance from enforcement. Article 12 of the agreement creates a Council and a Permanent Technical Committee. These organs are not given much power. The Committee gives opinions on interpretations and makes proposals of amendments to the Council. The Council, in turn, tables the proposals before the Contracting Parties. Neither of the organs can take or enforce any decisions. This undermines the quality of the institutional arrangements. This, as enmeshment theorises, weakens compliance prospects.

The convention's annexes are well-designed to cover numerous areas of cooperation. These are:

- Annex 1 - Assistance by a Customs administration on its own initiative
- Annex II - Assistance, on request, in the assessment of import or export duties and taxes
- Annex III - Assistance, on request, relating to controls
- Annex IV - Assistance, on request, relating to surveillance

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<sup>281</sup> World Customs Organization General Secretariat *Position as Regards Signatures, Ratifications and Accessions*. Brussels (8 August 2012) EG0019E1a.

<sup>282</sup> Malawi (1978), Mauritius (1985), the Seychelles (2012), the Republic of South Africa (1993), eSwatini (2000), Zambia (1984) and Zimbabwe (1982).

<sup>283</sup> In the preamble to the convention.

- Annex V - Enquiries and notifications, on request, on behalf of another Contracting Party
- Annex VI - Appearance by Customs officials before a court or tribunal abroad
- Annex VII - Presence of Customs officials of one Contracting Party in the territory of another Contracting Party
- Annex VIII - Participation in investigations abroad.

However, the ability of a customs administration to participate in these kinds of exchanges and areas of assistance would require significant resources of a human and financial nature. The SADC countries do not have such resources to spare, and none are offered under the auspices of the agreement. Therefore, even though the framework contains a well-designed scheme for nations to collaborate, it will likely remain largely ineffective in the SADC states because it does not address their capacity constraints for compliance.

#### The Convention on Temporary Admission

This agreement is also called the Istanbul Convention.<sup>284</sup> It has sixty-nine contracting parties. Eleven of them are African countries; three of which are SADC states.<sup>285</sup> It was created in reaction to the proliferation of international conventions governing the temporary admission of goods into territories. It is an amalgamation of thirteen international instruments on temporary admission that existed as of 1990. The fear was that this proliferation would continue with more and more new instruments added, each governing the admission of a separate category of goods, thus leading to a complicated and convoluted regulatory framework. The convention contains thirteen annexes. Each annex is made specific to a particular good. It provides for temporary

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<sup>284</sup> Of 26 June 1990. It entered into force on 27 November 1993.

<sup>285</sup> Mauritius (1995), the Republic of South Africa (2004) and Zimbabwe (1992).

admission as well as the period for re-exportation.<sup>286</sup> According to Article 2 of the convention, temporary admission is to be granted without the payment of any import duties or other taxes and free from any import restrictions or prohibitions. States can accept temporary admission documents in lieu of the presentation of a customs document and the furnishing of security. As has been mentioned (above), not imposing costs and procedures on goods that enter temporarily facilitates the import and export of such goods.

However, despite its well-intentioned trade facilitation mandate, some of the requirements in the agreement require costly reforms, yet there is no provision of assistance towards these costs. For example, article 15 requires the reduction of formalities. It provides that contracting parties should reduce the customs formalities that are required in connection with the temporary admission of goods and that all related regulations governing such formalities shall be promptly published. The conduct of regulatory reform can be a taxing exercise because it has to begin with the collation of applicable regulations, followed by the identification of dispensable formalities and then a regulatory reform process. All of these require time, labour, skills and finances, which the SADC countries may not have, given their levels of under-development. Another example is article 22 which anticipates the use of electronic data processing techniques for implementing the provisions of the convention. Poorer countries struggle to acquire such technology and thus may remain non-compliant with the commitment.

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<sup>286</sup> Annex A governs temporary admission papers for A.T.A carnets and C.P.D carnets. Annex B contains nine sub-annexes on different goods (Annex B.1 is the Annex Concerning Goods for Display or Use At Exhibitions, Fairs, Meetings Or Similar Events, Annex B.2 is the Annex Concerning Professional Equipment, Annex B.3 is the Annex Concerning Containers, Pallets, Packings, Samples and other Goods Imported in Connection With a Commercial Operation, Annex B.4 is the Annex Concerning Goods Imported in Connection With a Manufacturing Operation, Annex B.5 is the Annex Concerning Goods Imported for Educational, Scientific or Cultural Purposes, Annex B.6 is the Annex Concerning Travellers' Personal Effects and Goods Imported for Sports Purposes, Annex B.7 is the Annex Concerning Tourist Publicity Material, Annex B.8 is the Annex Concerning Goods Imported as Frontier Traffic, and Annex B.9. is the Annex Concerning Goods Imported for Humanitarian Purposes. Annex C governs the temporary admission of means of transport. Annex D concerns animals, while Annex E is primarily related to goods which are not mentioned in such other annexes.

## The International Convention on the Harmonized Commodity Description and Coding System

This instrument entered into force on January 1, 1988. It replaced the former Convention on Nomenclature for the Classification of Goods in Customs Tariffs (and the protocol of amendment thereto).<sup>287</sup> The new convention has one hundred and fifty-four parties. Forty-four parties are African states,<sup>288</sup> with fourteen being SADC members.<sup>289</sup> Its key objectives are to facilitate the collection and use of international trade statistics and to harmonise the classification of goods and of trade documentation. The latter objectives are meant to reduce the expense, confusion and time wastage that ensue from the lack of coordination. Harmonisation is a fundamental pillar of trade facilitation. The agreement defines the Harmonised Commodity Description and Coding System (or HS system) as ‘nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System’. Article 3 of the convention provides that members must ensure that their customs tariff and statistical nomenclatures are in conformity with the Harmonized System.

The convention contains two measures in support of compliance. First, flexibility is provided for developing nations, such as the SADC states. Article 4 of the convention allows them to temporarily delay the application of some, or all, of the subheadings of the system if they are unable to apply them immediately upon entry into force of the agreement. Furthermore, article 5 imposes an obligation on developed countries to extend technical assistance to developing countries in order to enable them to fully apply the convention.

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<sup>287</sup> The former convention had been signed in Brussels on December 15, 1950 and entered into force on September 11, 1959. However, by the 1980s it was thought to be outdated and to not be keeping in touch with the needs of member states and advancements in the conduct of international trade. Hence its replacement with the current convention.

<sup>288</sup> World Customs Organization General Secretariat *Position as Regards Signatures, Ratifications and Accessions* Brussels (6 July 2016) NG0231E1a.

<sup>289</sup> Angola (2013), Botswana (88), the Democratic republic of the Congo (1998), Lesotho (1988), Madagascar (1988), Malawi (1989), Mauritius (1988), Mozambique (2014), Namibia (2006), the republic of South Africa (1988), eSwatini (1988), Tanzania (2008), Zambia (1988) and Zimbabwe (1988).

This encompasses, for example, assistance with training personnel and converting their existing nomenclatures to the HS system. Therefore, there are clear ambitions on the scope of the assistance that may be sought and an understanding that there should be engagement and agreement on the terms of the assistance. However, the limitation of this arrangement is that there is no guarantee that a party will get exactly what it has requested, nor on its own acceptable terms and conditions. Thus, this can be a barrier to developing countries using such opportunities to adequately address their capacity challenges in a manner that they find most apposite to their circumstances.

#### The International Convention on the Simplification and Harmonization of Customs Procedures

The first version of this convention was the Kyoto Convention.<sup>290</sup> On June 26, 1999 it was amended by the current convention, which is referred to as the Revised Kyoto Convention.<sup>291</sup> It has one hundred and twelve state parties. Of these, thirty-two are African states; twelve of which are members of SADC.<sup>292</sup> The convention aims to simplify and to harmonise the customs procedures of its member states. This is because inconsistencies in these practices can hinder the flow of international trade. The convention aims to strike a balance between facilitating trade while maintaining adequate customs control. It contains a multitude of measures to facilitate trade. For example:

- Members must designate and publicise where their customs offices shall be and the opening hours, paying particular attention to the needs of traders<sup>293</sup>

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<sup>290</sup> Of the 18 May, 1973. It entered into force on September 25, 1974.

<sup>291</sup> Which entered into force on February 3, 2006. World Customs Organization *General Secretariat Position as Regards Signatures, Ratifications and Accessions*. Brussels (11 August 2017) PG0277E1a.

<sup>292</sup> Angola (2017), Botswana (2006), the Democratic Republic of Congo (signature 2000, pending ratification), Lesotho (2000), Malawi (2013), Mauritius (2008), Mozambique (2012), Namibia (2006), the Republic of South Africa (2004), eSwatini (2012), Zambia (2006) and Zimbabwe (2003).

<sup>293</sup> Standard 3.1 of the General Annex.

- All the applicable customs formalities, duties and taxes<sup>294</sup> and laws related to customs must be published<sup>295</sup>
- States must impose reasonable information requirements<sup>296</sup> and apply reasonable clearance procedures and practices<sup>297</sup>
- States must balance traders' need for expediency with the public interest of legitimate customs control<sup>298</sup>
- There must be cooperation and collaboration between customs officials<sup>299</sup>
- Professionalism is required of staff<sup>300</sup>
- Traders must be furnished with reasons and an opportunity to appeal adverse decisions taken against them.<sup>301</sup>

In conclusion on the World Customs Organization, its instruments are well designed in terms of having a wide coverage of trade facilitation measures, for example, the simplification of procedures and requirements, cooperation between administrations, publication and appeal and review procedures. As the next chapter will show, these are real experienced hindrances to facilitated trade in SADC. One problem, however, is that the rules are dispersed across several agreements, rather than being contained in one instrument. This means that not all members are subject to the same disciplines. This introduces a coordination problem. Furthermore, this may make ascertaining applicable rules difficult.

The managerial approach to compliance recognises the importance of support for capacity-building. This issue is somewhat addressed in the WCO's instruments. For example, the SADC states are able to benefit from flexibilities in some of the agreements. However, the problem is that not all

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<sup>294</sup> Standards 4.1, 4.3, 4.4, 4.6, 4.15, 4.16 and 5.1 of the General Annex.

<sup>295</sup> Standard 9.1 of the General Annex.

<sup>296</sup> Standards 3.12, 3.13, 3.15, and 3.16 of the General Annex.

<sup>297</sup> Standard 3.31 of the General Annex.

<sup>298</sup> Standards 3.33, 4.21, and 6.1 - 6.3 of the General Annex.

<sup>299</sup> Standards 3.3, 3.4, 3.35 and 6.7 of the General Annex.

<sup>300</sup> Standard 3.39 of the General Annex.

<sup>301</sup> Standards 9.8 and 10.1 of the General Annex.

of the agreements provide for flexibilities. Secondly, although there is mention of possible technical assistance from developed member states, the ambit of this is narrow and there is no guarantee that assistance will ultimately be provided. Therefore, the measures that are required by the instruments may not be successfully complied with by the SADC states because of these shortcomings.

Finally, the enmeshment theory endorses strong institutional capacity to support compliance. The WCO has institutions that advise and support members to implement programmes. This is important for developing countries, such as the SADC states, because where they lack capacity (in terms of knowledge and skills) they can approach the organisation for assistance in this regard. However, a key weakness, from a compliance standpoint, is that the organisation does not have the power to enforce obligations under any of its instruments. This is because its constituent document<sup>302</sup> does not give it authority to do so. Furthermore, it cannot resolve disputes between members that are related to its agreements. It can only 'make recommendations, in a conciliatory capacity, for the settlement of disputes concerning the interpretation or application of the Conventions'. Members are left to resolve disputes through negotiations between themselves. Enmeshment theory suggests that the failure to have a dispute resolution function as part of the institutional arrangements could compromise compliance.

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<sup>302</sup> Convention Establishing a Customs Cooperation Council. Signed in Brussels on 15 December 1950, entered into force on 4 November 1952.

#### 4.3.2. The Instruments of the World Trade Organization

There are currently one hundred and sixty-four members of the World Trade Organization (WTO).<sup>303</sup> Of these, forty-two are African nations;<sup>304</sup> thirteen of which are SADC member states.<sup>305</sup> There were primarily seven WTO agreements that addressed trade facilitation issues before the WTO Trade Facilitation Agreement came about. These are:

- The General Agreement on Tariffs and Trade
- The Agreement on Rules of Origin
- The Agreement on Pre-shipment Inspection
- The Customs Valuation Agreement
- Import Licensing Agreement
- Agreement on Technical Barriers to Trade
- Agreement on Sanitary and Phytosanitary Inspections.

As has been done with the regional frameworks for trade facilitation and the instruments of the World Customs Organization, this section will apply the compliance theories to the WTO's pre-TFA trade facilitation regime.<sup>306</sup>

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<sup>303</sup> Articles XI and XII of the Marrakesh Agreement govern membership of the World Trade Organization (WTO). The former describes the original members of the WTO as those nations which were contracting parties to the General Agreement on Tariffs and Trade (GATT) upon the entry into force of the Marrakesh Agreement. Article XII is on accessions. It provides that any 'state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements' may accede to the agreement.

<sup>304</sup> All African States are members of the WTO except for the following which merely have Observers Status: Algeria, the Comoros, Equatorial Guinea, Ethiopia, Liberia, Libya, São Tomé and Príncipe, the Seychelles and Sudan.

<sup>305</sup> Angola (1996), Botswana (1995), The Democratic Republic of the Congo (1997), Lesotho (1995), Malawi (1995), Mauritius (1995), Mozambique (1995), Namibia (1995), the Seychelles (2015), the Republic of South Africa (1995), eSwatini (1995), Tanzania (1995), Zambia (1995), and Zimbabwe (1995).

<sup>306</sup> The Trade Facilitation Agreement is the subject of chapter 7.

## The General Agreement on Tariffs and Trade

The GATT addresses trade facilitation in articles V, VIII and X.<sup>307</sup> Article V provides for the freedom of transit. It prohibits the subjection of transit traffic to unnecessary delays or restrictions and exempts it from customs duties, transit duties or other charges, (except those that are related to transportation or administrative and other costs of services rendered). It requires that all charges and regulations related to transit traffic be reasonable.

Article VIII regulates the fees and formalities that are connected with importation and exportation. It requires that all fees and charges (apart from import and export duties and taxes, which are governed by Article III) shall be limited to the cost of services rendered and shall not serve as an indirect protection of domestic products, or as a taxation for fiscal purposes. Members are to work towards reducing the number of fees and charges, as well as the complexity of formalities and documentation requirements. Further, it prohibits the levying of harsh penalties for minor incidences of lack of conformity with regulations or requirements.

Finally, Article X concerns the publication and administration of trade regulations. It imposes an obligation of transparency. It requires members to promptly publish all of their laws, judicial and administrative decisions and international trade agreements so that other governments and traders can become acquainted with them. Furthermore, any amendments to their duties, requirements, restrictions or prohibitions etc. (in particular where trade is made more burdensome) are not to be enforced before being officially published. It requires timely publication so that all stakeholders who might be affected by the changes may have sufficient time and opportunity to

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<sup>307</sup> Articles VII and IX can also be argued to have some relation to trade facilitation. Article VII deals with valuation for customs purposes. It speaks to harmonisation, which is key for trade facilitation. Article IX governs marks of origin. Amongst others, it recognises that requirements relating to marks of origin may cause difficulties and inconvenience to traders. It requires that such requirements be kept at a minimum level which is necessary for consumer protection. Further, that traders should not be unduly penalised for failing to affix marks unless, for example, some form of deception was intended.

acquaint themselves with the changes and ready their compliance. Members are also required to establish independent judicial, arbitral or administrative processes to review actions that are related to customs matters. This includes installing appellate procedures.

The GATT was a good first step that was taken by members to reduce barriers to trade facilitation. However, the agreement lacks sufficient coverage of the many different trade facilitation impediments that may arise in trading. Secondly, the measures that *are* covered, lack depth in terms of comprehensively prescribing required actions. Therefore, the quality of the norms is weak. The agreement also fails the ethos of the managerial approach in that it does not sufficiently address the economic imbalances between members which may render developing members less capable of implementing commitments as compared to more developed members.

#### Post-GATT Subject- Specific Trade Facilitation Agreements

With the advent of the World Trade Organization in 1995 there came six agreements that each focused on a particular aspect of trade facilitation. This next section will discuss the essence of the agreements and summarise the key takeaways on compliance aspects thereof.

#### The Agreement on Rules of Origin

Rules of origin are used to determine the country of origin of traded goods.<sup>308</sup> The preamble to the Agreement on Rules of Origin highlights the need to “*facilitate* (own emphasis) the flow of international trade,” and to ensure that the application of rules of origin do not cause unnecessary barriers to trade. There is a work programme to harmonise rules of origin so that all members apply the rules in the same way. Harmonisation is important to trade facilitation.

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<sup>308</sup> The World Trade Organization defines rules of origin as “the criteria used to define where a product was made and are important for implementing other trade policy measures, including trade preferences (preferential rules of origin), quotas, anti-dumping measures and countervailing duties (non-preferential rules of origin).” [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_e.htm) accessed 14 September 2018.

## The Agreement on Pre-shipment Inspections

Article 1 of the agreement defines pre-shipment inspections as assessments for verifying the quality, quantity, price and/or the customs classification of goods.<sup>309</sup> Despite their utility, inspections have the potential for increasing expenses, delays and uncertainties in trading. The agreement, therefore, requires that transparent regulations and processes be put in place so that traders will know what to expect of the assessments and be prepared for them.<sup>310</sup> Delays to trade are to be avoided by only conducting inspections when strictly necessary.<sup>311</sup> Finally, effective dispute resolution processes are to be created so that there can be compensation if the rules are not respected.<sup>312</sup>

## The Customs Valuation Agreement

This agreement was created to implement Article VII of the GATT, which deals with customs valuation. It facilitates trade because it seeks to harmonise trade procedures<sup>313</sup> and safeguard transparency in the regulation of trade,<sup>314</sup> while protecting the legitimate interests of customs control.<sup>315</sup> Article 20 (3) of the agreement addresses the capacity challenges of members by providing for special and differential treatment (S&DT) for the less developed member states. They can delay the application of some of the provisions of the agreement for a period. It also accords them eligibility to gain technical assistance from the more developed members of the organisation, for example, for the training of their personnel, the preparation of implementation

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<sup>309</sup> See also Autar Krishen Koul, *Guide to the WTO and GATT: Economics, Law and Politics*, (2018) at 489 – 496 and Talat Kaya & Tolga Tuncer, *the Legal Status of Pre-shipment Inspection Before and After: The WTO Trade Facilitation Agreement*, *Global Trade and Customs Journal*, Volume 12, Issue 4 (2017) at 149 – 157.

<sup>310</sup> Article 2 (5).

<sup>311</sup> Article 2 (15).

<sup>312</sup> Articles 2(21) and Article 4.

<sup>313</sup> Articles 1 to 9 contain rules for valuing goods.

<sup>314</sup> Article 12 requires the publication of all laws, regulations, judicial decisions and administrative rulings of general application related to the agreement.

<sup>315</sup> Article 17 empowers customs officials to take action to verify, to their satisfaction, ‘the truth or accuracy of any statement, document or declaration presented for customs valuation purposes’.

measures, as well as information and advice on the application of the agreement.<sup>316</sup>

### The Import Licensing Agreement

This agreement governs the administrative procedures for the issuance of import licenses.<sup>317</sup> The preamble recognises that international trade can be “impeded by the inappropriate use of import licensing procedures.” Therefore, its provisions seek to encourage transparency,<sup>318</sup> predictability, simplification,<sup>319</sup> fairness and equity<sup>320</sup> in licensing procedures. It also recognises the need to speedily resolve disputes, so that trade can quickly resume.

### The Agreement on Technical Barriers to Trade

This agreement governs the use of technical regulations, standards and conformity assessment procedures in international trade. The application of such measures (despite the legitimacy of their objectives) can impede trade flows. The application of the Agreement on Technical Barriers to Trade (TBT) can facilitate trade because it requires TBT measures to not be applied in a manner that will obstruct trade.<sup>321</sup> This could be, for example, by the implementation of procedures that are slow, information requirements that are burdensome<sup>322</sup> and fees that are not equivalent to the costs of the service that is provided.<sup>323</sup> The agreement promotes harmonisation in that states must use international standards where these exist.<sup>324</sup> They are also

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<sup>316</sup> This is phrased in a similar fashion to art 5 of the International Convention on the Harmonised Commodity Description and Coding System in that it requires a request to be made by the developing member, followed by engagement between the donor and recipient until mutually agreed terms are reached.

<sup>317</sup> Article 1 of the Import Licensing Agreement.

<sup>318</sup> For example, it requires that rules on import licensing should be published.

<sup>319</sup> For example, arts 1.5 and 1.6 require that application forms and procedures should be as simple as possible.

<sup>320</sup> For example, art 1.3 requires that rules should be neutral and fairly administered. Article 1.7 provides that no application should be rejected on the grounds of a minor error in the documentation and art 1.8 that no import should be rejected because of minor variations between it and the information in the licence used to import it.

<sup>321</sup> Articles 2.2 and 5.1.2.

<sup>322</sup> Article 5.2.3.

<sup>323</sup> Article 5.2.5.

<sup>324</sup> Articles 2.4 and 5.4

encouraged to accept the regulations and standards of other members as equivalent to their own, despite any minor differences that might exist between them.<sup>325</sup> It requires transparency in that regulations and standards must be published timeously before their entry into force<sup>326</sup> and inquiry points should be established where anyone can get information on the applicable measures and relevant documents.<sup>327</sup> Finally, the agreement obliges members to implement mechanisms for the review of complaints and the taking of corrective action. Articles 11 and 12 concern S&DT and technical assistance for developing members. The regimes for these are similar to those seen in the Customs Valuation Agreement.

The Agreement on Sanitary and Phytosanitary Measures.

The cross-border movement of goods can lead to the spread of pests and diseases that could harm the plants, animals or humans in the countries of import. However, measures to halt such spread could adversely affect the international movement of goods. Therefore, the Agreement on Sanitary and Phytosanitary (SPS) Measures seeks to regulate the taking of such measures, in the interests of balancing the opposing interests. Articles 3 and 4 of the agreement concern harmonisation, which is the backbone of trade facilitation. Article 7 is on transparency. It requires members to provide information on changes to their SPS measures. Articles 9 and 10 relate to the granting of technical assistance and of special and differential treatment to developing countries. The contents are similar to those in the Customs Valuation and Import Licensing agreements.

Therefore, in conclusion on the WTO regime predating the Trade Facilitation Agreement, it can be seen that there are different pros and cons. Positive aspects are that there is a wide expanse of measures that target multiple possible trade facilitation impediments. Furthermore, although the legal regime is dispersed among several agreements, unlike with the WCO, the

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<sup>325</sup> Articles 2.7 and 6.1.

<sup>326</sup> Articles 2.11 and 5.8.

<sup>327</sup> Article 10.

WTO's regime is uniform in that all members must agree to all of the covered agreements. Furthermore, the commitments are couched in legally binding terms. This lends more seriousness to them, and, as per enmeshment theory, this may assist with securing member compliance. In terms of the dictates of the managerial approach (that capacity be accorded to enable compliance) the WTO regime provides for the special and differential treatment of lesser-developed members. This is by way of flexibilities that are related to the timing of implementation. There is also some scope, albeit limited, for technical assistance for members. Lastly, as recommended by the enmeshment theory on compliance, the WTO has strong institutions which are tasked with ensuring the implementation of its agreements. There is more security to the regime because there is ambit for disputes to be brought before the Dispute Settlement Body (DSB) for non-compliance.<sup>328</sup> However, the special and differential treatment and the technical assistance provisions are generally weak in all of the agreements, for reasons that have been explained in the discussion above.

#### 4.4. Chapter Conclusion

The discussion in the previous chapters argued that there may be a correlation between inefficient and costly trade regulations and procedures and the lack of development in Southern Africa. However, it has equally been suggested that the slow growth and the low levels of development are also related to structural factors, such as the inability of members to industrialise. Furthermore, that poor quality infrastructure (hard and soft) compounds the structural deficiencies. Therefore, trade facilitation alone will not enhance the capacity to export and, thus, improve welfare and prosperity. Nevertheless, trade facilitation reforms remain an important component of an overall economic policy to strengthen industrial and export capacity.

This chapter has discussed how Southern African countries have entered into regional and multilateral treaties as part of their reform efforts. This thesis

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<sup>328</sup> Section 7.3 discusses the pros and cons of the dispute settlement regime in greater detail.

primarily concentrates on the World Trade Organizations' Trade Facilitation Agreement. Yet it is important to understand that the treaty did not arrive to find a vacuum in the regulation of trade facilitation. Therefore, it is important to examine the pre-dating arrangements and to consider why, seemingly, they have had little impact on trade facilitation in the SADC region and to surmise whether the TFA has any advantages that may assist it to fare better than they have. This chapter has argued that compliance deficiencies may partly explain the disconnect between the legal frameworks and what has been experienced practically on the ground. It used the enmeshment theory and the managerial approach to compliance to analyse the agreements.

It has been discovered that the regional and multilateral frameworks are generally sound, in terms of their substantive provisions. They have established disciplines that target critical threats to trade facilitation, such as lack of coordination, skills shortages, inefficient bureaucracy, the lack of expediting technologies etc. Apart from the extensive regulatory regimes, there are also institutional arrangements that are created in support of the frameworks. Some of the conventions include flexibilities and some ambits for technical assistance for developing countries. Furthermore, there is complementarity between the regional and the multilateral arrangements.<sup>329</sup>

However, some weaknesses have also been unearthed. These include the presence of vague or non-binding treaty language, the installation of

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<sup>329</sup> The regional rules replicate international best practice. For instance, the African Directors General of Customs held their 5th Ordinary Session in Cotonou, Benin in September 2013. In that session they recommended that the Continental Free Trade Area text should include the provisions of the Revised Kyoto Convention 'such that any Party that would have agreed/signed the texts will be bound to implement the elements of the Convention' (UNECA, *Trade Facilitation from an African Perspective* (2013) at 38). This shows the desire to have conformity with WCO provisions as harmonising disciplines in the African arrangement. Further, many regional agreements mandate that members use the harmonised system. This also shows deference to multilateral principles. As another example, the preamble to the AfCTA, specifically mentions that members seek to build on their commitments in multilateral frameworks, such as the Marrakesh Agreement. So, again, we see the desire to harmonise what is happening regionally with what is happening globally. The GATT, GATS and WTO Agreement are also part of key definitions in the AfCFTA. The obligations in the AfCFTA are so concrete that reservations are not allowed to be made to the agreement. This may be because members wanted to replicate the WTO's principle of accepting the regime as a single package.

institutions which are not endowed with political and economic power to enforce rules and limited flexibilities and scope for technical assistance for poorer members to assist their capacity to comply.

Non-compliance is one explanation of why instruments may be ineffective. The other side of the coin is implementation deficiencies. The following chapter provides an overview of the state of trade facilitation in the Southern African Development Community. It considers whether implementation difficulties may also explain why the agreements have not been impactful. Chapter 6 contains a deeper examination of this by way of a case study of one SADC state – the Kingdom of Lesotho. Chapter 7 considers whether, and how, the Trade Facilitation Agreement may address the compliance and implementation challenges that are being argued as being hinderances to improvements trade facilitation in the sub-region.

## Chapter 5 - Trade Facilitation and Implementation Challenges in the Southern African Development Community

### 5.1. Introduction

Chapter 3 of this work interrogated the concept of trade facilitation. This included a description of the various impediments to facilitating trade. The previous chapter discussed the regional and multilateral agreements that the SADC countries have entered into with the intention of addressing these barriers. This thesis argues that the challenges continue unabated, regardless of these arrangements. The previous chapter argued that compliance challenges might partly explain why the instruments have not been markedly fruitful. This chapter argues that implementation challenges might also be part of the explanation. Therefore, it seeks to unearth the implementation challenges that the SADC countries face, which may have compromised the success of the instruments to positively affect trade and development.

The chapter begins with an overview of the state of trade facilitation in the SADC region. This is to support the contention that is being advanced that barriers to trade facilitation are still widespread despite the instruments that were discussed in chapter 4 that were designed to alleviate them. It then discusses, one by one, the most prominent obstacles. These are: poor regulatory environments, high trade transaction costs, poor infrastructure, excessive documentary and procedural requirements and human resource deficiencies. This analysis will reference reports and filed complaints by traders. Thereafter, the chapter considers the general implementation challenges that make it difficult for members to abide by their treaty commitments. The conclusion that is reached is that implementation challenges are indeed an important contributing factor to the lack of progress in redressing trade facilitation barriers in the SADC region.

## 5.2. Overview of the State of Trade Facilitation in the Southern African Development Community

Although the rate of intra-SADC trade has been improving over the years<sup>330</sup> it still remains comparatively low in terms of its total value, as well as the total percentage value of the states' overall trade. This is common for African countries.<sup>331</sup> However, it is not common for countries in other regions of the world. The United Nations Conference on Trade and Development (UNCTAD) notes that the proportion of intra-continental exports stood at more than two thirds in Europe, half in Asia and less than one fifth in Africa.<sup>332</sup> One of the reasons for the low rates of African trade is the long delays and high costs at borders. The fact that the majority of the countries are landlocked<sup>333</sup> means that goods have to cross several borders in order to reach ports or export destinations.<sup>334</sup> This further compounds delays and costs.

The World Bank found that the Sub-Saharan Africa region is the poorest performer in terms of three of the four indicators that are used to judge the time and costs of trade.<sup>335</sup> It has the longest time to export (in terms of both

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<sup>330</sup> For example, SADC reports that, since the launch of the Free Trade Area (in August 2008), trade between members grew from an initial \$13.2 billion in 2000, to approximately \$34 billion in 2009. <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> accessed 10 October 2019.

<sup>331</sup> UCTAD reports that "Intra-African trade, defined as the average of intra-African exports and imports, was around 2% during the period 2015–2017." <https://unctad.org/press-material/facts-figures-0>, accessed 12 October 2019.

<sup>332</sup> United Nations Conference on Trade and Development, "Trade structure by partner, Handbook of Statistics: International Merchandise Trade (2017) #2 *Fact Sheet*" at 1. For example, the value of intra-SADC exports in 2009 was \$16 billion. This represented only 12.2% of the share of total exports. Kennedy K Mbekeani *Understanding the Barriers to Regional Trade Integration in Africa* (2013) at 14.

<sup>333</sup> Angola, Mozambique, Namibia, South Africa, and Tanzania are coastal states, whereas Botswana, the DRC, eSwatini, Lesotho, Malawi, Zambia and Zimbabwe are all land-locked. They, therefore, lack direct access to the seas, which is vital for access to foreign markets.

<sup>334</sup> For instance, goods to and from the DRC, Zambia, Zimbabwe and Malawi have to be transported to and from the Mozambican port of Beira.

<sup>335</sup> World Bank *Doing Business: Reforming to Create Jobs* 15 ed (2018).

border compliance and documentary compliance) as well as the highest costs of border compliance for export.<sup>336</sup>

Table 2: Comparison of the Time and Cost of Trade per Region<sup>337</sup>

	Time to Export Border Compliance (hours)	Cost to Export Border Compliance (US\$)	Time to Export Documentary Compliance (hours)	Cost to Export Documentary Compliance (US\$)
East Asia & the Pacific	55.9	387.5	68.2	112.1
Europe & Central Asia	28.0	191.4	27.9	113.8
Latin America & the Caribbean	62.5	526.5	53.3	110.4
Middle East and North Africa	62.6	464.4	74.3	243.6
OECD High Income	12.7	149.9	2.4	35.4
South Asia	59.4	369.8	77.0	179.5
Sub-Saharan Africa	100.1	592.1	87.8	215.1

The World Bank has also ranked countries in terms of their trade logistics.<sup>338</sup> The SADC countries do not fare well in these rankings either. Angola appears at number 162 out of 163 economies. The others are not far behind.<sup>339</sup> This is also indicative of trade not being facilitated in the region.

<sup>336</sup> The same is confirmed in the World Bank's *Time Release Study for eSwatini*, (2012). It reports that it can take up to 1 hour 20 minutes to process exports and 1 hour 50 minutes to process imports at some of eSwatini's borders. The reasons for the time delays were elaborated in a speech by Zodwa Mabuza (CEO of the Federation of eSwatini Employers and Chamber of Commerce) at the launch of the Swaziland-World Bank Time Release Study (24 January 2012). Quoted in the WTO's *Trade Policy Review for eSwatini* WT/TPR/S/324 (2012) at 380.

<sup>337</sup> World Bank *Doing Business: Measuring Business Regulations: Trading across Borders* (2020), available at <http://www.doingbusiness.org/data/exploretopics/trading-across-borders>, accessed on 27 March 2020. Two columns (Trading Across Borders- Distance to Frontiers, and Rank) have been omitted from the original table in this reproduction.

<sup>338</sup> World Bank Logistics Performance Index (LPI) Scores and Rankings (2018), available at <https://lpi.worldbank.org/international/global>, accessed 14 January 2019.

<sup>339</sup> South Africa has the best ranking, at 36. It is followed by Malawi (100), Zambia (114), the DRC (123), Lesotho (142), and Zimbabwe (155).

The Southern African Development Community, as an organisation, has recognised that trade facilitation is a serious issue for the region. It reports that ‘stakeholders and businesses in the private sector have identified difficulties at borders as a major impediment to trade throughout the Southern African Development Community (SADC) region’.<sup>340</sup> Most of the borders are traditional two-way border posts. This does not bode well for the speed of processing goods for import and for export.<sup>341</sup>

The SADC countries experience common trade facilitation challenges. The principle challenges appear to be the following:

- Poor regulatory environments
- High fees and other charges
- Poor infrastructure (including low mechanisation and technology)
- Excessive trade documentation and procedural requirements
- Deficiencies in human resources (including poor cooperation and coordination of officials and agencies).

The next section analyses these challenges. In doing so it makes use of complaints that have been collected by the South African Institute for International Affairs (SAIIA) from firms that conduct trade in the region. These are used as case studies to highlight the nature of the challenges.

### 5.3. Poor Regulatory Environments

Trade facilitation requires that the trade regulatory environment be up to date, transparent and create favourable conditions for trading. ‘Being up to date’ means that it should reflect the current best practices. ‘Transparency’ requires that states publicise the policies, laws and procedures that are applicable to trading. This will assist to ameliorate the costs of searching for

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<sup>340</sup> South African Development Community *Towards a Common Future* (nd), available at <http://www.sadc.int/themes/economic-development/trade/customs-trade-facilitation/>, accessed on 17 February 2019.

<sup>341</sup> The Road Transport Agency *State of Cross-Border Operations Report* (2018) March at 31, accessed 17 February 2019.

information. Publication should be done on easily accessible platforms that are non-discriminatory (i.e., that do not favour one type of trader (large, formal, etc.) over others (small, informal etc.)). ‘Favourable conditions’ includes, for example, operating in environments where there are simplified regulations. This will reduce the costs of deducing requirements and add greater clarity so that there is less scope for corruption. Consultation with traders is important for the creation of a favourable regulatory environment. This is because it enables the government to gain and to consider traders’ inputs before implementing or modifying rules. However, these aspects are not always reflected in trade in SADC.

There are two primary ways to meet the publication requirement. One is by the installation of trade portals. The other is by the establishment of enquiry points. The World Bank gives a basic definition of a trade portal as being “the primary site where one can obtain all the information on regulatory requirements needed to undertake international trade.”<sup>342</sup> Only seven of the SADC states have trade portals. These are: Botswana,<sup>343</sup> Lesotho,<sup>344</sup> Malawi,<sup>345</sup> Namibia,<sup>346</sup> Tanzania,<sup>347</sup> Zambia,<sup>348</sup> and Zimbabwe.<sup>349</sup> Enquiry points are a portal for receiving answers to enquiries submitted by governments, traders and any other interested parties on issues such as applicable laws, procedures, restrictions, rates of duties /charges/ fees/ penalties, etc. An enquiry point should also provide relevant forms and

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<sup>342</sup> World Bank, International Trade Department *Developing a Trade Information Portal*, available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/TIP-Complete-Version.pdf>, accessed on 24 August 2019.

<sup>343</sup> Botswana Trade Portal *Facilitating Cross-Border Trade to Foster Economic Growth in Botswana*, available at <https://botswanatradeportal.org.bw/index.php?r=site/index>, accessed on 7 September 2019.

<sup>344</sup> Lesotho Trade Portal *The Medical, Dental and Pharmacy Order 1970*, available at <https://www.lesothotradeportal.org.ls/index.php?r=site/display&id=48>, accessed on 7 September 2019.

<sup>345</sup> Malawi Trade Portal *Welcome to the Malawi Trade Portal*, available from <https://malawitradeportal.gov.mw/>, accessed on 7 September 2019.

<sup>346</sup> <http://ncci.org.na/page/trade-information-portal>, accessed 25 August 2019.

<sup>347</sup> Tanzania National Trade Portal *A Transparent Trade and Business Environment*, available at <https://trade.business.go.tz/>, accessed on 7 September 2019

<sup>348</sup> <https://www.zambiatradeportal.gov.zm>, accessed 20 June 2020.

<sup>349</sup> The National Trade Development and Promotion Organisation of Zimbabwe *Think Zimbabwe*, available at <http://www.tradezimbabwe.com/>, accessed on 7 September 2019.

documents. Botswana, eSwatini, Lesotho, Mozambique and Zambia do not have enquiry points. They have all requested technical assistance for instituting them.<sup>350</sup>

The failure of the SADC states to publish trade information by instituting trade portals and enquiry points has dire consequences on traders. It contributes to a non-transparent and unpredictable trading environment. It prevents traders from being well-apprised of what will be required of them when their goods arrive at borders. They are, therefore, often ill-prepared and non-compliant. They waste time trying to rectify defects and they may even become liable for penalties as a result of the unintended non-compliance. Often they are pressed to resort to corruption in order to get officials to turn a blind eye to their non-conformity. Some traders have resorted to informal trade because they struggle to obtain information on the formal formalities, or due to the arduousness of conformity.<sup>351</sup>

Buyonge and Kireeva<sup>352</sup> have found that African traders are not regularly engaged by regulatory authorities when trade policies are being devised or amended.<sup>353</sup> This is the case also in SADC. This has led to the implementation of regulations that do not adequately take traders' needs and interests into account. For instance, some regulations institute inconvenient operating hours for borders. DD Williamson (a company incorporated in eSwatini) has reported that, at times, their imports from South Africa have remained at the border overnight due to border closure. This not only disrupts their production, but it has also soured their relationships with some trucking companies which now refuse to deliver to them because of the losses that they incur as a result of the standing time at the border due to border closure.<sup>354</sup>

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<sup>350</sup> In their Category C notifications to the WTO.

<sup>351</sup> Sally Peberdy, *Hurdles to Trade? South Africa's Immigration Policy and Informal Sector Cross-border Traders in the SADC* (2002) at 37.

<sup>352</sup> C Buyonge & I Kireeva, *Trade facilitation in Africa: Challenges and Possible Solutions* (2008) 2 (1) 1.

<sup>353</sup> Buyonge & Kireeva *ibid* at T44–48.

<sup>354</sup> SAIIA SADC Business Barriers *DD Williamson* (2012), available at <https://saiia.org.za/saiia-toolkit/dd-williamson/>, accessed on 1 June 2018.

A firm called Mohammed Enterprises Tanzania Ltd (MeTL) (which imports and exports from/to the DRC, Malawi, Mozambique, South Africa, Tanzania and Zambia) has similarly complained about the lack of engagement by the Tanzanian government when implementing or abrogating laws.<sup>355</sup> Vodacom (South Africa) also decries the fact that tariff and customs legislation seemingly change overnight without any warning.<sup>356</sup> When firms become frustrated by the trade regulatory environment this may disincentivise them to continue operating, or to make further investments into their business. This will have a negative impact on the country's trade, economic growth and development prospects.

#### 5.4. High Trade Transaction Costs

Trade Facilitation is not only about making trade faster, it is also about making it more cost-effective.<sup>357</sup> This is particularly important if traders are to maintain an international competitive advantage with respect to the pricing of their goods. Despite this, there are a multitude of fees and other charges that are levied at SADC borders.<sup>358</sup> These include:

- Consular fees
- Transit fees
- Security penalties
- Value Added Tax (VAT).

In Zimbabwe alone traders can find that they need to pay: carbon pollution tax (the amount depends on the engine capacity of the vehicle), toll fee, road

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<sup>355</sup> SAIIA SADC Business Barriers *Mohammed Enterprises Tanzania* (2012), available at <http://www.saiia.org.za/sadc-business-case-studies/mohammed-enterprises-tanzania>, accessed on 5 June 2018.

<sup>356</sup> SAIIA SADC Business Barriers *Vodacom (South Africa)* (2012) available at <https://saiia.org.za/saiia-toolkit/vodacom-south-africa/>, accessed on 1 June 2018.

<sup>357</sup> See section 2.4.4. above.

<sup>358</sup> The World Bank *Doing Business Report* reflects that Africa has the highest cost of trade compared to all other regions. Op cit note 337. UNCTAD has also reported that "Sub-Saharan Africa has the highest cost to export compared with all other regions and the highest cost to import with the exceptions of Latin America and the Caribbean based on border compliance, and South Asia, based on documentary compliance." Op cit note 331.

access fee (the amount is based on the vehicle's size), border post fee, exit pass, compulsory third party insurance, overload fees, road transit fees and a fuel levy.<sup>359</sup> Tristan Export (a South African firm that exports throughout the SADC region) reports that the South African Department of Agriculture, Fisheries and Forestry requires exporters to have obtained an export permit to export fish into the Republic. The cost is R200 per permit, per species, per consignment. This results in very high trading costs.<sup>360</sup> There is a direct correlation between high costs of trade and rising informal trade.<sup>361</sup> When trade costs are high (either due to exorbitant rates or to multifarious charges),<sup>362</sup> this can incentivise informal and illicit trade (for example, practices such as such as smuggling, under-invoicing, etc.). Governments lose out on collecting vital revenue when such practices occur. Therefore, reducing trade costs in SADC should help to reduce informality, thus allowing more revenue to be collected by state agencies. Revenue that can be applied to develop the nations.

Apart from high direct fees, there are other less direct ways that the costs of trade add up in SADC. Logistics companies in the region report that just 3 per cent of their costs are due to direct border charges and fees — 60 per cent of their high and uncompetitive logistics costs are due to standing costs

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<sup>359</sup> <https://www.aa.co.za/zimbabwe-cross-border-information> and <https://www.zinara.co.zw>, accessed 27 August 2018.

<sup>360</sup> SAIIA SADC Business Barriers *Tristan Export*, available at <https://saiia.org.za/saiia-toolkit/tristan-export/>, accessed on 1 June 2018.

<sup>361</sup> Caroline Lesser & Evdokia Moisé-Leeman *Informal Cross-Border Trade and Trade Facilitation Reform in Sub-Saharan Africa* - (2009) at 17.

<sup>362</sup> Alaska is a firm from the Democratic Republic of Congo. It has claimed that the costs of customs clearing procedures constantly change every two or three months. The uncertainty, due to the fluctuations, is costly to them because it means that they have to keep researching the current applicable charges. *SADC Business Barriers: Alaska*, available at <https://saiia.org.za/saiia-toolkit/alaska/>, accessed on 1 June 2018. Another DRC company (Ets ALBARTOS) complains about the multiplicity of trade fees that have to be paid and over-taxation by dishonest customs agents. It says that 'companies are obliged to use consultants to avoid being ripped off by customs officials'. See SAIIA <https://saiia.org.za/saiia-toolkit/ets-albartos/>, accessed 1 June 2018.

(border delays).<sup>363</sup> Standing time is not only costly because of the fuel costs of an idle vehicle (especially where refrigeration has to be kept on) but also because vehicles are depreciating assets and therefore they need to make as many deliveries as possible so that they can earn money. Anytime that they remain idle is a loss to the owners. Therefore, addressing these direct and indirect trade costs should have favourable consequences on the competitiveness of businesses, which will improve their viability, which, in turn, will be to the benefit of the economy as a whole (for example, tax and employment impacts).

#### 5.5. Poor Infrastructure, Including Low Mechanisation and Technology

Chapter 3 discussed the negative implications of infrastructural deficiencies on economic development. The SADC states suffer from poor quality infrastructure across their economies as a whole. Infrastructure deficits at the border, in particular, can hinder expediency in trade processing. Trade facilitation requires the use of technology to automate trading processes. This includes, for example, the use of electronic data interchange systems and the implementation of electronic single windows.<sup>364</sup> The 2017 World Bank Doing Business Report argues that ‘automation improves reliability, predictability, safety and competitiveness of operations’.<sup>365</sup> Many SADC states struggle to acquire and to update their use of modern technologies. Therefore, they fail to mechanise and to automate trade processes.

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<sup>363</sup> Anna Ngarachu, Christopher Wood, Heinrich Krogman et al *Border Economies Linkages to the Development of Trade Corridors and Regional Value Chains in SADC* (2018) at 9. Fleetwatch, *Truck Operating Benchmarks* (2016) available at <https://fleetwatch.co.za/truck-operating-benchmarks-2015/>, accessed on 24 June 2020. Gamberoni, Elisa, Lanz, Rainer & Piermartini, Roberta, *Timeliness and Contract Enforceability in Intermediate Goods Trade* World Trade Organization Economic Research and Statistics Division (2010) World Trade Organization, Geneva.

<sup>364</sup> The Southern African Development Community defines a single window as ‘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 regulatory requirements. If information is electronic, then individual data elements should only be submitted once. It is essentially a political / organizational / procedural concept – it is not a technology system!’ SADC *Draft SADC Guidelines for Coordinated Border Management* (2011) at 17. See also United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) *Recommendation and Guidelines on Establishing a Single Window to Enhance the Efficient Exchange of Information between Trade and Government* 33 of 2005.

<sup>365</sup> World Bank *Doing Business Report : Equal Opportunities for All* 14 ed (2017) at 83.

As an example, DHL has complained about issues related to information and communications technology (ICT) infrastructure in some SADC countries. It claims that, although South Africa rolled out an e-filing system in order to speed up border crossings, the infrastructure required to render the system functional is not present at the borders. Furthermore, that the implementation of the e-filing system at the Beitbridge Border between South Africa and Zimbabwe was sabotaged by the lack of bandwidth capacity at the border, as well as by the lack of adequate equipment to run the e-filing system. These shortcomings have led to backlogs in customs processing.<sup>366</sup> Border officials have then become forced to rely on cumbersome manual processes.<sup>367</sup> Where processes are done manually this takes time and may add to the likelihood of human error or manipulation.

#### 5.6. Excessive Trade Documentation and Procedural Requirements

In SADC, bureaucratic obstacles that manifest as excessive trade documentation and procedural requirements threaten the facilitation of trade. With respect to the former (documentation requirements) not only do traders have to submit customs declaration forms, but governments can also require a multitude of other supplementary documentation such as:

- Import/Export permits
- Certificate of origin
- Commercial invoice
- Packing list
- Transit documents
- Cross-border road transport permits
- Certificate of fitness and roadworthiness certificates for vehicles.

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<sup>366</sup> South African Institute of International Affairs (SAIIA) *SADC Business Barriers: DHL*, available at <http://www.saiia.org.za/sadc-business-case-studies/dhl>, accessed on 5 June 2018.

<sup>367</sup> A report of the SADC Sub-Committee on Customs Co-operation notes that that the use of information technology in goods clearance in Southern Africa is largely restricted to main urban border posts. 2006 report, at 10.

Although these documents may serve important purposes (for instance, to assist in the correct calculation of revenue due (e.g. the commercial invoice), or to contribute to the protection of public health/ policy/ security (e.g., the road worthiness certificate), etc.) securing these documents can prove to be time-consuming and costly for traders.<sup>368</sup> When documentary requirements increase, so too do compliance costs, delays, and incentives for corruption to avoid the excessive requirements. One example of exorbitant requirements is that of Zimbabwe introducing surtaxes in 2012. This necessitated that traders apply for import licenses<sup>369</sup> and undergo conformity assessments. License applications could only be made on two days of the week (Wednesdays and Thursdays) and it could take up to two weeks for a trader to obtain the license. Analysts found that the policy led to a decline in imports and an increase in smuggling.<sup>370</sup> These are adverse to trade and economic improvements.

Convoluting border procedures are also regularly experienced in trade in SADC.<sup>371</sup> The biggest culprit for causing these delays is inspections. They often take time when they are done manually and are not conducted based on a risk assessment. Furthermore, coordination failures can result in multiple inspections being conducted by different border agencies. For example, traders in Tanzania complain about numerous stops for inspections, for instance at weighbridges and police checkpoints.<sup>372</sup> Another example

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<sup>368</sup> The Bakhresa Group of companies (incorporated in Tanzania) complains about the multiplicity of agencies that are involved in seeking authorisation to import or to export. They give the example that, in order to import grain, they are required to secure approval from nine different agencies, and for exports they need at least four different approvals. These lengthy procedural requirements take time and are too onerous. <https://saiia.org.za/saiia-toolkit/bakhresa-group/>.

<sup>369</sup> Schedule to the Control of Goods (Open General Import License) 1996, in Statutory Instrument 8 of 1996 (as amended) lists the goods for which an import license needs to be obtained in Zimbabwe.

<sup>370</sup> Elisha Tshuma *South Africa and Zimbabwe trade: How does it work?* (2016) S16TB17 *Trade Law Centre* at 9. The report in the press that is being referred to is an article in the *Zimbabwe Chronicle* titled 'Import restrictions fuel rampant smuggling in Beitbridge' 9 August 2016.

<sup>371</sup> TradeMark Southern Africa, SADC's Slow Customs Procedures Drives up Prices of Goods <http://www.trademarksa.org/news/sadc-s-slow-customs-procedures-drive-prices-goods>. The Rice Milling Company (Pvt.), a Malawian company, has complained about delays in processing goods at Malawian borders <http://www.saiia.org.za/sadc-business-case-studies/rice-milling>, accessed 31 March 2018.

<sup>372</sup> United Nations Economic Commission for Africa, African Union, African Development Bank, *Assessing Regional Integration in Africa: Bringing the Continental Free Trade Area About*, 2017.

relates to the application of rules of origin. Rules of origin have to be applied in SADC because it is Free Trade Area and not a customs union. The determination of origin can be time-consuming.<sup>373</sup> Another aggravation for traders is that some countries apply requirements and procedures inconsistently.<sup>374</sup>

When processes are complicated, this slows down the time taken to trade and can increase traders' motivation to engage in corrupt practices in order to attempt to accelerate clearance time.<sup>375</sup> Some delays can frustrate traders to the point that they may reconsider importing from or exporting to certain destinations. For example, Nakara CC is a small Namibian firm that exports 90 per cent of its leather products to South Africa. If a South African importer has not set up a Deferred Value Added Tax (VAT) Account with the South African Revenue Services (SARS), then Nakara has to pay VAT before export. The amount can be reclaimed, but it claims that the repayment procedures can take up to two months, thus negatively impacting their cash flow.<sup>376</sup>

Excessive documentation and procedural requirements prolong the processing time of goods. These goods may be perishable and their being held up at borders may lead to spoilage, which is a cost to traders. Or the goods may be the subject of an international sales contract whereby they need to reach their destination within strict deadlines. The failure to do so will expose the trader to lawsuits for breach of contract. Delays can also affect the ability

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<sup>373</sup> UNCTAD has reported that “in 23 developing countries (13 in Africa) and LDCs during 2010–2013, 35% of the most difficult non-tariff measures applied by partner countries to manufacturing exports concern rules of origin and related documentation.” And that “the most frequent complaints registered on the non-tariff barriers reporting, monitoring and eliminating mechanism of the Tripartite Free Trade Agreement relate to rules of origin (11% of filed complaints.” Op cit note 331.

<sup>374</sup> Rab Processors Ltd (a Malawian agricultural company) has complained about the lack of consistency in the application of customs procedures. See SAIIA SADC Business Barriers *Rab Processors Ltd*, available at <http://www.saiia.org.za/sadc-business-case-studies/rab-processors-ltd>, accessed on 1 June 2018.

<sup>375</sup> This is attested to by Shenimed (a cigarette distribution company in the DRC). It reported that customs clearance procedures are ‘long, time consuming and very costly and that often the only way to expedite clearance is by the payment of a bribe.’ <http://www.saiia.org.za/sadc-business-case-studies/shenimed>, accessed 4 May 2019.

<sup>376</sup> SAIIA SADC Business Barriers: *Nakara CC*, available at <https://saiia.org.za/saiia-toolkit/nakara-cc/>, accessed on 5 June 2018.

of traders to participate in value chain production. All of these compromise the ease of trading. This has a knock-on effect on the economy because, if traders are unable to maximise their profits, this could reduce government tax revenue. This augurs poorly for the ability of the government to provide social services (such as education, healthcare and others). Reducing documentary and procedural requirements would be particularly helpful for small traders because the costs are disproportionately heavy on them.<sup>377</sup> Facilitating trade could assist the small, low value consignments of small traders to get through the borders quicker, thus incentivising them to formalise, and perhaps to even trade even more.

#### 5.7. Deficiencies in Human Resources Including Poor Cooperation and Coordination by Officials and Agencies

Chapter 3 explained that one of the impediments to trade facilitation is poor human resources. This aspect relates to both the quantity and the quality<sup>378</sup> of staff who operate border agencies. If there is an inadequate number of staff, or if staff are insufficiently trained to speedily execute their duties, this will result in excessive delays at border crossings. Border security is also compromised by staffing deficiencies, for instance, if practices such as the smuggling goods or of narcotics etc. cannot be detected because of an overwhelmed work force. The former can negatively affect government revenue, whereas the latter compromises public health, welfare and security.

Poorer nations tend to struggle with human resource capacity because of the significant costs that are involved in employing and in training personnel. This is the case in the SADC region, as many firms will attest. Coca-Cola (eSwatini) exports to more than twenty African countries. It complains that African customs officials are not always sufficiently knowledgeable about the procedures at their own borders. This is said to lead to inconsistencies in

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<sup>377</sup> Lesser & Moisé-Leeman Op cit note 361 at 27.

<sup>378</sup> Poor quality human resources may manifest in many forms, for example, unskilled, unprofessional, unmotivated and untrained border officials.

practices, which confuses and frustrates traders.<sup>379</sup> This is because border agents suffer from the lack of training opportunities. This affects the quality of service delivery at borders and hampers the ability to facilitate trade.

The low levels of internal and external cooperation and coordination between border agencies is another aspect of the human resource challenge. Cooperation and coordination can manifest in practices such as information-sharing, regular interaction, joint programmes and the installation of one-stop border posts (OSBPs), etc. At a One Stop Border Post the border agencies of two countries are stationed together on one side of the border (i.e., at the entry or at the exit).<sup>380</sup> The trader receives services from the authorities of both nations simultaneously. This means that any inspections, etc. are done by both authorities in succession. Thus, clearance happens concomitantly and there is no need to queue again on the other side of the border.<sup>381</sup> One example is the Chirundu OSBP that lies between Zambia and Zimbabwe.<sup>382</sup> Despite a few challenges generally the implementation of the One Stop Border Post has led to faster clearing times. As a result more OSBPs are being considered at the following borders:

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<sup>379</sup> SAIIA SADC Business Barriers *Coca-Cola Swaziland (CONCO LTD)*, available at <https://saiia.org.za/saiia-toolkit/coca-cola-swaziland-conco-ltd/>, accessed on 1 June 2018.

<sup>380</sup> Road Transport Agency, *The Annual State of Cross-Border Operations Report* (March 2018) gives guidance on four core elements for the successful implementation of OSBPs at 49–50.

<sup>381</sup> Greater customs efficiency by streamlining the customs clearance of two administrations into one smooth process can result in cost saving to the two governments (by sharing staff, information, and resources, for example, joint offices or warehouses etc.); increased trade flows and revenue (due to lower trade costs for traders); reduction in consumer prices (due to traders passing off their savings on trade costs to consumers); job creation and economic growth (as a result of increased trade and economic activity) and the fostering of good relations between neighbouring countries. Habiba Ben Barka, *Border Posts, Checkpoints, and Intra-African Trade: Challenges and Solutions* (2012) at 12, available at <https://www.afdb.org/en/news-and-events/border-posts-checkpoints-and-intra-african-trade-challenges-and-solutions-12377/>, accessed on 11 July 2019. See also the *Draft SADC Guidelines for Coordinated Border Management* Op cit note 364 at 21 and UN-OHRLLS Op cit note 275.

<sup>382</sup> Barney Curtis, *The Chirundu Border Post: Detailed Monitoring of Transit Times*, Sub-Saharan Africa Transport Policy Program (SSATP) S (2009) at *xiv* and 18; Ngarachu, Wood, Heinrich Krogman *et al* Op cit note 363 at 21–22.

- Lebombo (South Africa) and Ressano Garcia (Mozambique)<sup>383</sup>
- Kazungula (Zambia) and Kasumbalesa (the Democratic Republic of Congo)<sup>384</sup>
- Mamuno (Botswana) and Trans Kalahari (Namibia)<sup>385</sup>
- Forbes (Zimbabwe) and Machipanda (Mozambique)<sup>386</sup>
- Tunduma (Tanzania) and Nakonde (Zambia).<sup>387</sup>

However, the general status in SADC is that border agencies often work in an uncoordinated manner, both internally and externally.<sup>388</sup> This can be caused by systems and processes not being integrated, or by the lack of harmonisation or the mutual recognition of forms, processes, etc. The SADC Sub-Committee on Customs Cooperation notes that, although there are several bilateral Memoranda of Understanding (MOUs) regarding cooperation on customs matters ‘there remain few exchanges of information, joint investigations and or other such actions’.<sup>389</sup> This has been attested to by different organisations. For example, the World Trade Organization’s Trade Policy Review for the Southern African Customs Union (SACU)<sup>390</sup> discovered that some regulations, documentary and procedural requirements are not yet

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<sup>383</sup> There has been the construction of supporting physical infrastructure, such as a commercial freight clearance facility away from the border, a freight by-pass road and separate passenger clearance facilities. The legal framework is still to be signed by the two governments.

<sup>384</sup> Some critical infrastructure is being constructed, for instance, an access road, parking and office facilities on the Zambian side.

<sup>385</sup> The legal framework is being constructed as a precursor to the launch of the project.

<sup>386</sup> This has been proposed.

<sup>387</sup> It is in the process of being transformed into a OSBP. The Road Transport Agency Op cit note 380 at 25.

<sup>388</sup> ‘Internally’ refers to coordination amongst the various border agencies of one a state. ‘Externally’ relates to the relationship between the border agencies of neighbouring states.

<sup>389</sup> Southern African Development Community *Strategic Plan 2012-2017* at 11. This is echoed in the European Union’s Capacity Building Diagnostic Study, Annex C, at 10.

<sup>390</sup> World Trade Organization Trade Policy Review Body *Trade Policy Review for the Southern African Customs Union*, (2015) at 19.

harmonised<sup>391</sup> and that states have different customs systems.<sup>392</sup> The report concludes that this impedes the coordination of trade processing and trade facilitation because the systems do not speak to each other.<sup>393</sup> The Road Transport Agency confirms that variable Information Communication Technology (ICT) and customs data systems limit and delay the exchange of information and that this delays cross border trade.<sup>394</sup>

Traders in the region have also attested to these problems. An importer of frozen food in the Democratic Republic of Congo (Madel Food) reports that, in their experience, border agents in the DRC operate their own inspections even if other border agents already conducted inspections, thus causing duplication of inspection and resultant time delays.<sup>395</sup> Palfridge Limited t/a The Fridge Factory complains that the South African Revenue Services (SARS) and the eSwatini Revenue Authority (SRA) use different tariff codes. The result for traders is that they fall foul of one authority or the other when filling in the two sets of contradictory forms. This has led to penalties being levied on them<sup>396</sup> or to their imports being stopped at the borders,<sup>397</sup> therefore adding to time-consuming delays and unexpected costs.<sup>398</sup> Wesbank Transport, (a Namibian transport company) reports that the standardisation of customs documents in SACU has been helpful but that what still remains is that there

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<sup>391</sup> Article 22 of the SACU agreement requires members to adopt similar legislation on customs duties and excise duties. Article 23 mandates customs cooperation. The members launched a customs modernisation programme in 2009 with the aim of facilitating trade in the region. Further, a Regional Customs Policy Document was adopted by the SACU Council of Ministers on 25 December, 2011. This document specified that trade facilitation should be borne in mind when implementing customs projects.

<sup>392</sup> Botswana, Lesotho, Namibia and eSwatini use UNCTAD's Automated System for Customs Data (ASYCUDA) while South Africa uses the Interfront Customs and Border Management Solution (ICBS).

<sup>393</sup> WTO Trade Policy Review Body Op cit note 390 at 20.

<sup>394</sup> The Road Transport Agency Op cit note 380 at 2.

<sup>395</sup> SAIIA SADC Business Barriers *Madel Food*, available at <https://saiia.org.za/saiia-toolkit/madel-food/>, accessed on 5 June 2018.

<sup>396</sup> They report penalties which have, at times, reached R10, 000.

<sup>397</sup> They report delays of up to three days at times.

<sup>398</sup> SAIIA SADC Business Barriers *Palfridge Limited t/a The Fridge Factory*, available at <https://saiia.org.za/saiia-toolkit/the-fridge-factory/>, accessed 1 June 2018.

should be harmonisation of customs clearance procedures in order to have more meaningful impact on trade delays.<sup>399</sup>

## 5.8. Implementing Trade Facilitation Reforms in the Southern African Development Community

The African Capacity Building Foundation (ACBF) calculated that, in August 2013, only 25 out of 42 agreements of the African Union had been ratified by members.<sup>400</sup> The Kagame report on the African Union notes that the African Union Assembly has adopted more than 1,500 resolutions, yet very few of them have been implemented.<sup>401</sup> This, it says, has resulted in an implementation crisis. The evidence of this implementation crisis, says Hartzenberg, can be seen from practices such as: delays in the ratification and domestication of legal instruments, missed targets (collectively) by members in achieving the successive steps in their linear regional integration path, the failure of individual members to implement provisions of agreements and the failure to apply any form of sanctions to deter the lack of implementation.<sup>402</sup> This implementation crisis can also be observed with respect to trade facilitation agreements. They have been ineffective, partly due to implementation challenges.<sup>403</sup> In 2011, an audit was taken of the SADC countries' implementation of regional and international conventions. Some of these conventions concern trade facilitation. The general trend that emerges from the findings is one of low implementation rates.

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<sup>399</sup> SAIIA SADC Business Barriers *Wesbank Transport*, available at <https://saiia.org.za/saiia-toolkit/wesbank-transport/>, accessed on 5 June 2018. See also SAIIA SADC Business Barriers *Lobatse Clay Works*, available at <https://saiia.org.za/saiia-toolkit/lobatse-clay-works/>, accessed on 5 June 2018.

<sup>400</sup> African Capacity Building Foundation *A Digest of OAU-AU Treaties, Conventions, and Agreements, 1963 to 2014* (2016).

<sup>401</sup> Paul Kagame *The Imperative To Strengthen Our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union* (2017).

<sup>402</sup> Trudi Hartzenberg *Regional Integration in Africa* (2011) at 18. See also Asante, SKB, *Regionalism and Africa's Development: Expectations, Reality and Challenges* (1997) and Gibb, Richard 'Regional integration and Africa's development trajectory: Meta-theories, expectations and reality' (2009) 30 (4) *Third World Quarterly* at 701–721.

<sup>403</sup> See also See Habiba Ben Barka, *Border Posts, Checkpoints, and Intra-African Trade: Challenges and Solutions* (2012) Op cit 381.

Table 3: Implementation of Trade Facilitation Conventions in SADC

Convention	Number of Countries who have implemented
Revised Kyoto Protocol	8
International Convention on the Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences	5
Convention on Temporary Admission	5
Customs Convention on the A.T.A Carnet for the Temporary Admission of Goods	4
World Trade Organization Customs Valuation Agreement	13
International Convention on the Harmonized System	11
Declaration of the Customs Cooperation Council Concerning Integrity in Customs	5

Even though the audit was taken some years ago, the fact still remains that the conventions had been there for decades, and yet there was still evidence of low rates of implementation by SADC members. The researchers found the reasons for non-implementation to be: lack of hard infrastructure, lack of administrative capacity, lengthy delays in ratification and gazetting and lack of coordination by the states in implementation.<sup>404</sup> It is argued that these challenges continue to persist even to this day.

Y.S. Lee's theory of law and development that was discussed in chapter 2 of this work provides insights on the importance of regulatory design, regulatory compliance and implementation if law is to have an impact on development.<sup>405</sup> The theory is useful for our analysis of what could possibly be causing the dichotomy between the legal frameworks that were explored in chapter 4 and the practical realities that have, so far, been discussed above in this chapter. Lee writes that "it is the quality of implementation that determines the

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<sup>404</sup> Ranga Munyaradzi & Agnes Katsonga Phiri *Audit of the Implementation of Regional SADC Customs Instruments and International Conventions: Technical Report* (2011). Saurombe, Amos 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15 (2) *Potchefstroom Electronic Law Journal*.

effectiveness of law.”<sup>406</sup> Implementation can be defined as the actions that are taken by states (legislatively, administratively and judicially) to execute the objectives of a law. Lee notes some factors that can affect implementation. These are:

- inappropriateness of the laws. This can be brought about by legal transplant
- lack of political will to implement and
- capacity constraints, be they financial, technological, or administrative.

The next section considers the extent to which these might explain the implementation challenges that are plaguing the region.

#### Inappropriateness of Laws due to Legal Transplant

The law and development theory argues that, for law to have a positive effect on development, it must resonate with the political, social, economic, cultural, and other conditions in the state in which it is to apply. This is why laws that embody developed country perspectives may be ineffective in developing country contexts. The legal regulatory design may not accord with the practical realities in the developing country and this may either diminish a state’s willingness to implement or be above its capabilities to implement.<sup>407</sup>

The trade facilitation measures that were discussed in chapter 4 have been argued to largely reflect developed country perspectives.<sup>408</sup> One reason is because developing members, such as the SADC countries, had little influence on the creation of most of the rules. This is on account of several reasons. First, they were not independent states at the founding of the organisations that came up with the rules. Most of the SADC states were still colonies when the General Agreement on Trade in Goods was founded on 30

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<sup>406</sup> Lee Op cit note 96 at 450.

<sup>407</sup> Lee ibid at 448

<sup>408</sup> Davie Malungisa, *The Informal Trade Sector in SADC Legal, Policy and Programmatic Support* (2015) Study at 3.

October, 1947<sup>409</sup> and when the World Customs Organization was founded on 26 January, 1952.<sup>410</sup> This means that they had no say in the organisations' founding principles and rules. Neither were they independent states at the conclusion of some of the agreements that are related to trade facilitation. For example, only South Africa, the Democratic Republic of Congo, Madagascar, and Tanzania existed as sovereign states on 30 July, 1963 when the Convention on the ATA Carnet was concluded.<sup>411</sup> Namibia and Zambia became sovereign states only after the conclusion of some of the instruments<sup>412</sup> – such as the Nairobi Convention,<sup>413</sup> the Istanbul Convention,<sup>414</sup> and the revised Convention on the Harmonized System.<sup>415</sup> Not having been independent states means that they were not party to the negotiations on the terms of these agreements and, therefore, the provisions would not have included their perspectives.

Secondly, poorer countries pay relatively smaller contributions in the organisations and are often under-represented in the executive bodies. These factors may diminish their power in the organisations and their say in the agreements. The agreements may, thus, end up largely incorporating the perspectives, interests and practices of developed parties. This may explain why the instruments that were discussed in chapter 4 have not had a significant impact in assisting the SADC countries to resolve their trade facilitation challenges.

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<sup>409</sup> It was constituted of just twenty-three members: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States, available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/chrono.htm](https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm), accessed on 11 October 2019). South Africa had obtained nominal independence from Britain on 31 May 1910.

<sup>410</sup> World Customs Organization [website], available at [http://www.wcoomd.org/en/about-us/what-is-the-wco/au\\_history.aspx](http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx), accessed on 11 October 2019).

<sup>411</sup> South Africa as at 31 May 1910 (from Britain), the Democratic Republic of the Congo as at 30 June 1960 (from Belgium), Madagascar as at 26 June 1960 (from France) and Tanzania as at 9 December 1961 (from Britain).

<sup>412</sup> Zimbabwe on 18 April 1980 (from Britain) and Namibia on 21 March 1990 (from South Africa).

<sup>413</sup> It was concluded on 9 June 1977.

<sup>414</sup> It was concluded on 26 June 1990.

<sup>415</sup> Of 1988.

Lastly, some of the trade facilitation provisions in the regional and multilateral instruments<sup>416</sup> contain commitments that may have been too ambitious for the countries to successfully apply. For example, article 6 of annex II to the SADC Protocol on Trade requires the computerisation of customs. Articles 9 and 10 of annex 3 to the AfCFTA's Goods Protocol requires the use of information technologies and the institution of single windows. These represent policies which, although common in the developed world, may be too arduous for poor countries, like those in SADC, to meet. Their attempts to benchmark their practices with those of more developed nations might be setting them up for failure.

### Political Will

Political will is required of governments to implement commitments. 'Political leaders and senior officials are responsible for setting the tone and pace—generating a sense of urgency and creating the necessary enabling frameworks.'<sup>417</sup> However, sometimes this resolve can be lacking where the government considers that certain national political imperatives outweigh the regional or multilateral interests.<sup>418</sup> African leaders can refuse to subordinate the sovereignty of their nations (and their own self-interest) to the interests of the region as a whole.<sup>419</sup> This is especially so with respect to programmes such as trade facilitation, in particular, which can result in the reduction of revenue from customs payments and, thus, require fiscal adjustment. African countries are grappling with various socio-economic crises (ranging from unemployment, poverty, social unrest, etc.) which take their attention away from broader regional issues as they try to contain the dire situations within

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<sup>416</sup> Regional instruments tend to adopt multilateral approaches as best practice.

<sup>417</sup> Erich Kieck & Jean-Christophe Maur 'Regional integration and customs unions' in Gerard McLinden, Enrique Fanta, David Widdowson & Tom Doyle (eds) *The World Bank, Border Management Modernization* (2011) at 246.

<sup>418</sup> Jaime de Melo & Yvonne Tsikata 'Regional integration in Africa: Challenges and prospects' in Célestin Monga and Justin Yifu Lin (eds) *The Oxford Handbook of Africa and Economics; Volume 2: Policies and Practices*, 2015.

<sup>419</sup> Evengelista Mudzonga 'Implementation challenges for the SADC FTA: Tariff and non-tariff barriers; in Institute for Global Dialogue *Implementation Challenges for the 2008 SADC FTA and Beyond*, (2008) at 21–22.

their borders. They, therefore, prefer to dedicate their limited resources to addressing these domestic pressures first.

#### Lack of Organisation and Coordination

Kieck and Maur explain that, where reforms are to be made, 'good practice dictates that the policy objectives should be underpinned by clear actions and timeframes and a clear allocation of responsibilities and resources, with political and administrative buy-in to the strategic framework and with institutional focus and support'.<sup>420</sup> However, instead what seems to be the case in the SADC countries is that the bureaucracies are disordered and there's little impetus to organise around implementation.

Another aspect of organisation is that of bringing all domestic structures, (the public sector, civil society, trade unions, industry citizens in general, etc.) on board so that they understand the vision and the strategies, and can help to contribute to the attainment of the goals. However, consultation and sensitisation mechanisms are lacking in the SADC states. This leads to national stakeholders not understanding the regional vision, nor their role in helping to bring it about. Ultimately this leaves governments working on their own, having failed to have garnered the necessary implementation support from stakeholders.

Not only are the individual members disorganised, but the region collectively is disorganised. For one, there is no regional implementation plan. This has been one challenge to implementation.<sup>421</sup> There is also poor organisation between the regional economic communities (RECs).<sup>422</sup> Members have multiple memberships in the regional economic communities. This undermines their ability to implement all of their varied, and sometimes

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<sup>420</sup> Kieck & Maur Op cit note 417 at 246.

<sup>421</sup> Munyaradzi & Phiri, Op cit note 404.

<sup>422</sup> The states in southern Africa are members of the Southern African Customs Union (SACU), the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA).

conflicting, commitments.<sup>423</sup> As a result, implementation can become overly complicated, confusing, arduous and expensive.

### Capacity

Lee observes that often developing countries lack adequate financial, technological and administrative resources to effectively implement laws.

Law reform projects, regardless of their specific content or ideological orientation, have not been very successful where the host state lacks the essential capacity to implement the law, which is necessary to meet the projects' objectives.<sup>424</sup>

This is true of the conditions in the SADC states. The states have massive debt and dependency burdens, which hamper their ability to rally the resources that are necessary to effect their commitments. Thonke and Spliid agree that budgetary constrictions are real impediments to African treaty implementation.<sup>425</sup> The fact that there are states which are at diverse levels of development, yet the regional agreements lack compensatory funds to address these imbalances, is one factor that fuels the discouragement to abide by commitments.<sup>426</sup> The Audit of the Implementation of Regional SADC Customs Instruments and International Conventions revealed that 'several Member States have limited financial resources and capacity to implement a modernization program, hence their progress depends on technical assistance'.<sup>427</sup> The (then) President of the Africa Development Bank (Donald Kaberuka) made a statement at the World Trade Organization's Fourth Aid for Trade Global Review that the failure of trade reforms in Africa appears to be attributable to capacity constraints. He remarked that 'legislation and texts are often adequate, sometimes even better than elsewhere. It is

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<sup>423</sup> Surabhi Singh & Ajay S Singh 'Trade blocs and economic integration of Southern African countries: Prospects and challenges (2015) III (4)' *International Journal of Economics, Commerce and Management* at 10.

<sup>424</sup> Lee Op cit note 92 at 469.

<sup>425</sup> Ole Thonke & Adam Spliid 'What to expect from regional integration in Africa'(2012) 21 (1) *African Security Review* at 63.

<sup>426</sup> De Melo & Tsikata Op cit note 418.

<sup>427</sup> Munyaradzi & Phiri Op cit note 404 at 22.

implementation which does not always follow, often due to poor capacities to follow through'.<sup>428</sup>

Financial issues do not only affect individual members' ability to implement, they also affect the quality of implementation by the regional institutions.<sup>429</sup> Strong institutions should, ideally, not only have *political* capacity to enforce, but also *economic* capacity to enforce. This is a challenge for African institutions, which are heavily dependent on donor funding. Their lack of secure financial capacity restricts their ability to fulfil their mandates. The Kagame report cites that, in 2014, half of the budget of the African Union (AU) was financed by donors. Over the years this figure climbed until it was approximately 75 per cent of the budget that was financed by donors in 2017, with 97 per cent of its programmes being donor-funded.<sup>430</sup>

Despite these challenges, two successful trade facilitation projects can be mentioned. These help us to identify challenges to implementation and the approaches that worked in resolving them. The first is the Chirundu One Stop Border Post. It was created between Zambia and Zimbabwe to expedite customs processing and to relieve congestion at the border.<sup>431</sup> Before the intervention, the Zambian Revenue Authority (ZRA) had been taking an average of 17.4 hours to process one truckload of goods.<sup>432</sup> The main challenges to implementing trade facilitation reforms were the incompatibility of the systems between the two nations, as well as broader infrastructural challenges, such as poor ICT and energy services.<sup>433</sup> The following actions

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<sup>428</sup> Donald Kaberuka *Africa and the Global Value Chain: Time to Raise the Bar* (2013), available at <https://www.afdb.org/en/news-and-events/africa-and-the-global-value-chain-time-to-raise-the-bar-afdb-president-donald-kaberuka-12092/>, accessed 13 December, 2019.

<sup>429</sup> Soumana Sako, *Challenges Facing Africa's Regional Economic Communities in Capacity Building* (2006) African Capacity Building Foundation, Addis Ababa.

<sup>430</sup> Paul Kagame Op cit note 401 at 5.

<sup>431</sup> Chirundu was chosen as a pilot for a One Stop Border Post at a Transport Coordination Committee meeting of the Regional Economic Communities (REC-TCC) that was held in Nairobi. Chirundu was chosen over Beitbridge for the pilot because it was believed that it would be easier to convert it into a OSBP because of the facilities that it already had, and some steps that had been already been taken towards OSBP processing there.

<sup>432</sup> Barney Curtis Op cit note 382 at *xiv* and 18.

<sup>433</sup> Ngarachu, Wood, Krogman et al Op cit note 363 at 21–22.

assisted the nations to overcome the challenges and to ensure the ultimate success of the project:<sup>434</sup>

- The establishment of sound legal frameworks before the operationalisation of the OSBP<sup>435</sup>
- The countries signed a bilateral agreement on August 27, 2009, signalling their political will
- Adequate OSBP facilities were built
- Organisationally, a lead ministry and project manager were selected and all border agencies were involved in the steering committee that planned the project
- Staff training was provided before and after the opening of the OSBP.

The second example is the Kazungula Bridge Project.<sup>436</sup> This has led to improved speed of trade processing, increased trade flows and improved security of cross border trade between Botswana and Zambia. In August 2007, the two governments agreed to seek funding to construct a road, a rail bridge and new border facilities at their border. Construction began on October 12, 2014. The project cost approximately US\$259.3 million. It was funded through the efforts of the two governments,<sup>437</sup> the Japan International Cooperation Agency (JICA),<sup>438</sup> an EU-ITF (Infrastructure Trust Fund) Grant,<sup>439</sup> and the African Development Bank (ADB) from the African Development Fund (ADF) window.<sup>440</sup> Before the advent of the bridge the transit times for goods could take as long as thirty hours, or even as long as one month during peak times. This was reduced to six hours after the

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<sup>434</sup> *One Stop Border Post Sourcebook 2ed* (2016) at 13-10 to 13-11.

<sup>435</sup> Zimbabwean OSBP Control Act.21 of 2007 and the Zambian OSBP Control Act. 8 of 2009.

<sup>436</sup> Infrastructure Consortium for Africa (ICA) *Briefing Memorandum on Kazungula Bridge Project – Botswana and Zambia* (2007), available at [https://www.icafrica.org/fileadmin/documents/Transport\\_Meeting/S4-Kazungula-Bridge-Final-EN.pdf](https://www.icafrica.org/fileadmin/documents/Transport_Meeting/S4-Kazungula-Bridge-Final-EN.pdf), accessed 24 June 2020.

<sup>437</sup> Which covered 9.2% of the costs.

<sup>438</sup> Which covered 57.5% of the cost.

<sup>439</sup> Which covered 1.8% of the project cost.

<sup>440</sup> African Development Bank Group *Kazungula Bridge: Bridging the Regional Divide* (2013) <https://www.afdb.org/en/projects-and-operations/selected-projects/kazungula-bridge-bridging-the-regional-divide-98/>, accessed on 24 June 2020.

completion of the bridge.<sup>441</sup> This shows the importance of coordination, political will and technical assistance in the implementation of successful reforms.

## 5.9. Chapter Conclusion

The purpose of this chapter was to show how trade facilitation impediments manifest in the Southern African Development Community. The key challenges have been found to be poor regulatory environments, high trade transaction costs, low levels of automation, excessive documentary and procedural requirements and deficiencies in human resources. That these challenges are still continuing bears evidence to the argument that the legal frameworks that were discussed in chapter 4 are not having a significant impact on the facilitation of trade in the region. The reports of regional and international organisations, as well as the complaints of traders in the region, have attested to the continuation of these challenges. Abuka similarly notes that ‘despite these notable efforts to integrate Africa’s economic space and improve its international competitiveness, most of the trade facilitation initiatives have yielded limited results’.<sup>442</sup>

This chapter has argued that implementation challenges partly explain the reasons for the underwhelming impact. The reasons for the implementation challenges are: lack of capacity, lack of political will, the inappropriateness of the legal frameworks and the lack of coordination of members. The following chapter looks at the implementation challenges of one SADC state (the Kingdom of Lesotho) to add on to the regional analysis that has been undertaken in this chapter.

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<sup>441</sup> Donald Kaberuka, President of the African Development Bank, 18th African Union Summit, Addis Ababa, Ethiopia, 23-30 January ‘Slow implementation of infrastructure projects constrains intra-African trade’ February 2012. available at <https://www.afdb.org/en/news-and-events/slow-implementation-of-infrastructure-projects-constrains-intra-african-trade-says-afdb-president-8808/>, accessed on 4 February 2019. Similar construction projects have been undertaken between Zambia and Zimbabwe at Victoria Falls, as well as between Namibia and Zambia at Katima Mulilo. However, large infrastructural projects such as these are not widespread in the SADC region because of the financial implications, as well as the lack of coordination between the member states.

<sup>442</sup> Abuka Op cit note 152 at 125.

## Chapter 6 – An Exploration of the Challenges to the Implementation of Trade Facilitation Measures in the Kingdom of Lesotho

### 6.1. Introduction

The previous chapter provided an overview of the typical trade facilitation challenges that are experienced throughout the Southern African Development Community (SADC). It did so by analysing the reports of regional and international organisations that have conducted studies on the phenomenon in the region. In addition to this, it reviewed complaints that have been lodged by traders regarding the obstacles to trade that they encounter. The chapter demonstrated that, despite the SADC states participating in many regional and international legal regimes that are designed to improve trade facilitation, time delays and high costs continue to hamper trade in the region. This is frustrating the states' intentions to stimulate their development through improved trade and regional integration. The chapter argued that it is not adequate for the SADC states to merely commit to regional and international rules. For any reform to successfully take place there must be impactful domestic implementation of treaty commitments.

The theoretical framework on law and development that was developed by Y.S. Lee provides the framework for the research and analysis that is undertaken in this chapter. The theory seeks to explain the factors that may affect regulatory impact. These factors are: regulatory design, regulatory compliance and the quality of the implementation. This chapter discusses how these factors may explain why there can be minimal development impact in a country despite the extensive trade facilitation commitments that it has assumed in various treaty regimes.

What follows is a focused case study of one of the SADC countries – the Kingdom of Lesotho. The Maseru Bridge (a border post that lies between Lesotho and the Republic of South Africa) is the research focal point. The chapter begins with a background to the research that was undertaken. This

gives the research justification, scope and methodology. Section 3 details Lesotho's regional and international commitments for facilitating trade. Section 4 outlines what cross-border trading conditions are like on the ground and reflects on whether they point to the implementation of the commitments. Sections 5, 6 and 7 use the theory of law and development to analyse the impact of trade facilitation laws, in terms of their regulatory design, regulatory compliance and the quality of implementation. The chapter concludes that, in most cases, the failure of Lesotho to devise appropriate policies, laws and strategies, as well as to establish and equip implementing institutions, are the reasons why the treaty commitments have not significantly led to improved trading efficiencies.

## 6.2. Research Justification, Scope and Methodology

### Research Justification

The problem that was argued in chapter 1 of this work was that the arrangements that the SADC countries have elected to participate in have led to few noticeable improvements in trading on the ground.<sup>443</sup> The research proposed to determine whether this is the case by, *inter alia*, conducting a focused case study. The aim is to assess the extent and the impact of trade facilitation reforms following the assumption of trade facilitation commitments by a SADC country.

Only one country was chosen for a detailed study. This was due to the limited resources and time available to the researcher.<sup>444</sup> Because there are so many stakeholders in trade facilitation, attempting to add another country would have taken an inordinate amount of time and resources, and would have led to a bulky fieldwork chapter in order to have done justice to both countries' regimes. For instance, had South Africa been added, the researcher would have had to consult regulators *and* border agents of the South African

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<sup>443</sup> Section 1.2.

<sup>444</sup> George R. Taylor explains that factors, such as cost and the amount of time one has to conduct research, are some of the important factors that can determine the scope of the research that is adopted. *Integrating Quantitative and Qualitative Approaches in research*, 2 ed (2005) at 6.

departments of: home affairs, agriculture, forestry, fisheries, police, health, environmental affairs and revenue services. Not to mention South African traders. This would have been excessive for the scope of this work and for the point of this exercise. Therefore the study captured data on the impediments to importing and exporting on the Lesotho side of the border only.

Lesotho was deliberately selected because it makes a particularly interesting case study for two main reasons. First, because it is a Land-Locked Least Developed Country (LLLDC).<sup>445</sup> The United Nations Office of the High Representative for the Least Developed Countries (UN-OHRLLS) explains that the characteristic of being land-locked is ‘trade-reducing’ and that, due to their location, LLLDCs are inherently more disadvantaged than their coastal counterparts in terms of their trade and development.<sup>446</sup> Freedom of transit is very important for LLLDCs because they do not have direct access to ports. Trade facilitation issues can impede their freedom of transit by adding to the cost and time taken to move goods across numerous internal borders. Therefore, it is important to identify where bottlenecks exist and how policy and legal interventions can be made more effective.

Secondly, Lesotho is one of only three enclave states in the world. This means that it is a sovereign state that is entirely surrounded by only one other state (the Republic of South Africa). One would assume that this forced geographical symbiosis would mean that trade flows freely between the two countries. Yet this study shows that, even in such cases, trade facilitation

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<sup>445</sup> There are sixteen African Land-Locked Least Developed Countries (LLLDCs): Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, South Sudan, Uganda, Zambia and Zimbabwe. The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) Op cit note 273 at 3.

<sup>446</sup> UN-OHRLLS ibid at 1. The UN-OHRLLS report *The Development Economics of Landlockedness: Understanding the Development Costs of being Landlocked* is also instructive of these challenges, available at <http://unohrlls.org/custom-content/uploads/2013/09/The-Development-Economics-of-Landlockedness-Understanding-the-Development-Costs-of-Being-Landlocked.pdf>, accessed on January 23 2019. Government of Mongolia in Partnership with the United Nations Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, the United Nations Development Programme the United Nations Conference on Trade and Development and the Mission of Paraguay in Geneva *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007).

challenges can persist and, therefore, it is important to figure out how to resolve them, in the interests of poor countries.

### Research Scope

The study collected data on the processes and costs that are involved in trading across the Maseru Bridge. This is a bridge that crosses the Mohokare River, which is a designated boundary between the Kingdom of Lesotho (Maseru district) and the Republic of South Africa (Orange Free State province). There are five designated 'commercial border posts' in Lesotho.<sup>447</sup> Trade can only be conducted through commercial border posts. The other border posts can only be used for the movement of persons. Of these five, only Maseru Bridge and Maputsoe Bridge are open 24 hours a day, seven days a week.<sup>448</sup> The Maseru Bridge was selected because it is the principle port of entry and exit. Thus, it receives the bulk of cross-border trade movements. One would anticipate, therefore, that it would be the focus of trade facilitation reforms in Lesotho. Granted there are limitations of focusing on only one border, for instance it may somewhat dilute the reliability of the study. The findings may be less accurate than had a broader scope been adopted. However, in this case these shortcomings were not judged to be fatal because the research findings were not intended to be definitive but predominantly illustrative from drawing on the insights from the interviewees.

### Research Methodology

Moses and Knutzen explain that there are two different methodological perspectives that can be identified in the social sciences. These different perspectives influence individual researchers to employ different technical tools in conducting their research.<sup>449</sup> The primary perspectives are naturalism and constructivism. The former represents a positivist or empiricist view which was initially favoured predominantly by pure scientists. Naturalists usually begin their research with an assumption, from which they coin a

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<sup>447</sup> There are thirteen border posts across the country. A list of these is provided in Annex 1.

<sup>448</sup> The other border posts are only open between 6:00am and 10:00pm.

<sup>449</sup> Moses Jonathan & Knutsen, Torbjørn L. *Ways of Knowing: Competing Methodologies in Social and Political Research*, 3ed (2019).

hypothesis. Data is then collected and statistically analysed in order to report on whether or not the hypothesis holds.

The latter approach, constructivism, does not necessarily require the collection and reporting of a quantitative set of data. Instead, it seeks to discover new insights on the phenomenon that is being investigated. This view of research arose out of a criticism of positivism; that it is not particularly helpful in the context of social sciences because the real world is very complex and no single analytical framework is adequate to explain it. Therefore, constructivists use different disciplines (for example: history, politics, sociology, economics etc.) when they analyse phenomena, so that they can better understand the social and contextual influences. They believe that there are tensions between different interest groups in society and they argue that it is only in speaking with different stakeholders, that one can truly understand all of the perspectives to an issue. There is no one correct view. Constructivism is more interested in *what* is experienced, rather than in *how many* experiences there are of a thing (quantity). Its interest is in gaining insights and not, as such, in forming firm immutable conclusions. The insights are meant to help us to develop a deeper understanding of an issue.

Depending on the methodology, different tools will be employed in conducting the research. *Methodology* refers to the lens from which the researcher views the research, whereas *methods* refers to the tools that are used to conduct the research. Patricia Leavy succinctly differentiates between naturalist (quantitative) and constructivist (qualitative) methods. She notes that the former methods are used with the aim of proving or disproving existing theories. The tools are used for “measuring variables and testing relationships between variables in order to reveal patterns, correlations, or causal relationships.”<sup>450</sup> On the other hand, the aim of qualitative tools is “to learn about social phenomenon; to unpack the meanings people ascribe to activities, situations, events, or artefacts; or to build a depth of understanding

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<sup>450</sup> Patricia Leavy, *Quantitative, Qualitative, Mixed Methods, Arts-Based, and Community-Based Participatory Research Approaches* (2017) at 9.

about some dimension of social life.”<sup>451</sup> This is because constructivism ascribes importance to people’s subjective experiences. The report of the findings of qualitative research “has a flexible structure... that honors an inductive style, a focus on individual meaning, and the importance of rendering the complexity of a situation.”<sup>452</sup>

The Lesotho fieldwork used a mix of methods. Some quantitative tools (such as questionnaires) were used to gather inputs from traders. Interviews (for example with regulators) were used to discover the different perspectives and experiences of various stakeholders. The responses are analysed within the theoretical framework that has been developed since chapter 2 of this work. The challenging development context of Lesotho suggested that the use of one research method would be inadequate to provide the study with an informative explanation for the lack of effectiveness of Lesotho’s trade facilitation commitments. The reasons would be very complex. Thus, a multidisciplinary and blended approach was utilised. Therefore, the discussion that will follow will not have the same rigour as a purely quantitative study. This chapter does not report findings or results, *per se*, but rather insights that were gained from discussing the unique perspectives of the various stakeholders and applying the theoretical framework thereto. However, some quantitative findings have been presented in Annex 9 of this work.

The fieldwork involved a desk review of the policies and laws that govern the conduct of trade in Lesotho.<sup>453</sup> These would be relevant to a determination of whether or not there has been appropriate domestication of treaty commitments. Other important documents were also consulted, such as the reports of regional and international organisations on the state of trade

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<sup>451</sup> *Ibid.*

<sup>452</sup> John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Approaches*, 4ed, (2014) at 4.

<sup>453</sup> A list of these is provided in annex 2.

facilitation in the country.<sup>454</sup> Secondly, the fieldwork entailed site visits to the Maseru bridge in order to study the trade requirements and processes thereat. Lastly, face-to-face interviews were conducted with stakeholders.<sup>455</sup> There were four categories of respondents:<sup>456</sup>

- Representatives of regulatory institutions that determine the policies and procedures that are applicable to cross border trade
- Border officials who implement the policies and procedures on the ground
- Traders (importers, exporters and clearing agents)<sup>457</sup>
- Others.<sup>458</sup>

There were a total of 43 respondents: 12 representatives of regulating institutions, 11 border officials,<sup>459</sup> 14 traders and 4 others.<sup>460</sup> Their responses were used to inform impressions regarding where the bottlenecks lie at border posts, what the causes thereof are, what interventions have been devised to address the challenges and their effectiveness or otherwise.

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<sup>454</sup> For example, the World Bank's *Time Release Study Plus (TRS+) of Lesotho* (2018), the World Bank Group (WBG) World Trade Organization Trade Facilitation Agreement: Validation Reform Map (May 2016), Lesotho's Investment Climate Reform Implementation Framework (2016), the Lesotho Heads of Border Management: Border Management Strategy (June 2015), the Lesotho Revenue Authority (LRA) Activity Plan for Trade Facilitation Reforms (2015), and minutes of the meetings of Lesotho's National Trade Facilitation Committee (NTFC). See also United States Agency for International *Development Diagnostic Trade Integration Study: Update for Lesotho* (2012).

<sup>455</sup> Phase 1 of this exercise was conducted from October to December 2018. A second phase was undertaken between January and February 2019.

<sup>456</sup> A full list of all respondents is provided in annex 5.

<sup>457</sup> An attempt was made to get a fair representation of the different types of businesses: small traders, large businesses, preferred traders, etc. A questionnaire was employed for this exercise. However, unlike a quantitative questionnaire (which contains primarily close-ended questions) this one contained primarily open-ended questions, to give respondents latitude in describing their perceptions, understandings and opinions.

<sup>458</sup> These were individuals who were not directly engaged in trade, such as officials from the bureau of statistics who could provide trade statistics and those from the Lesotho National Development Corporation (LNDC) who could provide information on the general ease of doing business in Lesotho.

<sup>459</sup> Two requested anonymity.

<sup>460</sup> Five requested anonymity.

### 6.3. Regional and International Frameworks for Trade Facilitation in Lesotho

Lesotho is a member of three regional agreements that have trade facilitation provisions. The first is the Southern African Customs Union agreement. It signed the agreement on October 21, 2002 and ratified it on March 24, 2004. The second is the Southern African Development Community Protocol on Trade. It signed it on August 1, 1996 and ratified it on August 12, 1999. Lesotho signed the African Continental Free Trade Agreement on July 2, 2018, and deposited its instrument of ratification on 2 November, 2020. It has not signed the Tri-Partite Free Trade Agreement.<sup>461</sup>

Lesotho is party to three instruments of the World Customs Organization which aim to facilitate trade. These are the Customs Convention on the A.T.A. Carnet for the Temporary Admission of Goods (1963),<sup>462</sup> the International Convention on the Harmonized Description and Coding System (1988)<sup>463</sup> and the International Convention on the Simplification and Harmonization of Customs Procedures (1999).<sup>464</sup> Because the World Trade Organization operates on the basis of the concept of the “single undertaking” Lesotho is obliged by all of the Uruguay Round agreements that target different facets of non-tariff barriers. These are: the General Agreement on Tariffs and Trade, the Import Licensing Agreement, the Agreement on Pre-Shipment Inspections, the Agreement on Rules of Origin, the Customs Valuation Agreement as well as the agreements on Sanitary and Phytosanitary Measures and on Technical Barriers to Trade. Lesotho ratified the WTO’s Trade Facilitation Agreement on the January 4, 2016.<sup>465</sup> The implications of each of these regional and multilateral frameworks have already been discussed in chapter 5. In summary, under these agreements Lesotho has committed to:

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<sup>461</sup> Lesotho is also party to the 1996 SADC Protocol on Transport, Communications and Meteorology and the 2005 SADC protocol on the Facilitation of the Movement of Persons (Of the 18 August, 2005. It is not yet entered into force. Both of these also address some aspects of border efficiency, but not in aspects that are directly related to the scope of this present research.

<sup>462</sup> Lesotho ratified this treaty in 1983.

<sup>463</sup> Lesotho ratified this treaty in 1988.

<sup>464</sup> Lesotho ratified this treaty in 2000.

<sup>465</sup> <https://tfadatabase.org/members/lesotho>, accessed 7 December, 2018.

- publicising trade laws and other information
- maintaining consultations with stakeholders
- curbing excessive documentary and procedural requirements
- limiting fees associated with importing and exporting
- respecting the freedom of transit and
- ensuring the collaboration of border agencies.

#### 6.4. Trade Processes and Bottlenecks at Maseru Bridge

Given Lesotho's regional and international commitments, the question becomes: what does trading look like in the country? This section discusses the processes and costs at the Maseru Bridge in a bid to get an answer to this question. The first observation that can be made about the Maseru Bridge is that it is a small and congested border post. One of the major causes of the congestion is that there is very little physical space at the border. One consequence of this is that there is little room to designate certain areas for specific functions (for example inspections), or to have ample lanes for the free flow of traffic. Historically, the borders between South Africa and her neighbours were based on apartheid South Africa's security interests. South Africa wanted to avoid external destabilisation threats. Therefore, borders were created to restrict movements, rather than to promote them. Such is the case with the Maseru Bridge. There is no space for expansion where it currently lies because it is flanked by a river, a railroad and built up commercial and residential buildings on its sides.<sup>466</sup>

All trade transactions at the bridge begin with customs clearance. The Lesotho Revenue Authority (LRA) is the agency that is tasked with controlling the entry and exit of goods and collecting revenue from trade. There are three steps to the customs clearance process: customs payments, documentary inspection and physical inspections.<sup>467</sup> Importers must first make all customs payments

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<sup>466</sup> Hloulhla Lelosa, Operations Manager, Department of Traffic and Transport. Interview 2 October 2018

<sup>467</sup> Tseko Ngatane, Border Manager, Lesotho Revenue Authority. Interview 12 October 2018.

before their goods can be conveyed to the Lesotho border. The payments which have to be made with respect to imports include:

- Value Added Tax (VAT) – if it had not been paid to the supplier upon purchase of the goods
- Customs duties on goods which are from extra-SACU territories
- Provisional payment for temporary importation.

Traders can pay using cash, bank-guaranteed cheques, electronic funds transfer (EFT) or a speed-point. There is an inconvenience to those who pay by EFT because they will have to physically go to the office of the Team Leader who will verify receipt of their payments. There is usually a queue at that office because the role of the Team Leader is broad (for example, they receive complaints and settle disputes).<sup>468</sup> When payment has been received, a trader will be issued with a document called the 'Proceed to Border' which allows them to proceed for customs clearance.

Documentary inspection follows customs payment. The basic documents that are required for trade are the goods declaration form,<sup>469</sup> CN1 and CN2 forms,<sup>470</sup> invoices and any applicable permits. In terms of the costs of this process, traders use clearing agents who charge M50 (USD 3.14) per page for processing SAD 500, and M70 (USD 4.40) a page for processing SAD 501.<sup>471</sup> The costs can add up when a trader has a large shipment because usually only three items can fit on one page of the forms. One trader reported that, for them, clearing agent fees (for processing on the Lesotho side of the border) were M15, 000 (USD 942.19) for the month of September 2018 alone. They

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<sup>468</sup> Liteboho Mahase, Team Leader, Lesotho Revenue Authority. Interview 16 October 2018.

<sup>469</sup> The form that is used for imports and exports in Lesotho is the SACU Single Administrative Declaration (SAD) form that is used by all of the SACU countries, by virtue of them being in a common customs area. The basic form is the SAD 500. The SAD 501 is the continuation sheet for the SAD 500. The SAD 502 is for transit control.

<sup>470</sup> These evidence that the goods have been cleared by the South African Revenue Services (SARS).

<sup>471</sup> The Lesotho Loti (M) and South African Rand (R) are at par. M1 is equivalent to USD 15.92. As of November 4, 2020.

use other agents to clear on the South African side of the border. They use clearing agents because such agents become adept at manoeuvring the procedures for goods processing, through executing numerous such transactions on a daily basis. They have also developed a good rapport with the border staff. However, this efficiency comes at a significant cost for a trader, especially when they have to use two agents, one on the South African side of the border and another on the Lesotho side.

In terms of the ease of the documentary clearance process, the documents are submitted through the United Nations Conference on Trade and Development's (UNCTAD) Automated System for Customs Data (ASYCUDA). This is an online system that customs officials use to receive and check trade documentation. A trader can be requested to, for example, ascertain some unclear details in an invoice or other document. Traders reported that such verifications usually take five to ten minutes, maximum one hour. The officials at the border then relay the documents to the Customs Clearing House or Clearance Hub. This office is located at the LRA headquarters. The Hub does a final documentary check and gives instructions to the customs officials on whether or not to conduct a physical inspection. This directive will be based on a risk assessment.<sup>472</sup>

A physical inspection requires that all of the items in a shipment must be offloaded and inspected. This sometimes has to be done at the premises of the business if there is insufficient space at the border to do so.<sup>473</sup> Because of limited staffing and equipment, a very large truck could take an entire shift (eight hours) to inspect. Once an inspection has been conducted, the customs official has to write a report on the findings and relay it to the Clearance Hub for authorisation to furnish the trader with an exit note. Therefore, the procedural step of inspections can cause major delays for traders, not only through the inspection time, but also the consequent reporting process that

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<sup>472</sup> It was reported that sometimes the system can be offline which can cause delays. Risk depends on factors such as: the origins, classification or the quantity of the goods etc.

<sup>473</sup> When it is done at the border it can exacerbate congestion, due to lack of space.

has to be completed afterwards. An alternative would be to employ the use of x-ray scanners for conducting inspections. These are defined by the World Customs Organisation as ‘equipment/technology that is deployed to inspect all types of cargo and conveyances, such as a road vehicle, train, aircraft or ship, in a non-intrusive manner.’<sup>474</sup> The scanners use x-ray to view the contents of a container and to verify whether the contents match the descriptions that have been declared by the trader. They can also check whether there are any illicit goods in carriage. The South African Revenue Services (SARS) is an example of a customs authority that uses scanners in order to expedite customs clearance.<sup>475</sup>

After concluding customs processes, those traders that are importing animals and animal products must then obtain clearance from the Ministry of Agriculture’s Department of Livestock. The mandate of this agency is disease control. Like the customs officials, these officials also conduct documentary and physical inspections. With documentary inspections they check that the trader has a health attestation<sup>476</sup> and an import permit. Physical inspections are randomly conducted. They may be cursory or a full inspection of an entire shipment.<sup>477</sup> The fieldwork discovered that, although there is only one officer in this department, traders do not wait long if their papers are compliant. The process was observed to only take a few minutes.

Traders in animals and animal products also require clearance from the Port Health inspectors. These officials conduct yet another set of documentary and physical inspections. This is now the third, after Customs and Livestock. In terms of documentary compliance, Port Health officials mainly check for

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<sup>474</sup> World Customs Organisation, Guidelines for the Procurement and Deployment of Scanning/Nii Equipment, December 2018. [http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/safe-package/nii-guidelines-2018/nii-guidelines-en\\_dec-2018.pdf?la=en](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/safe-package/nii-guidelines-2018/nii-guidelines-en_dec-2018.pdf?la=en), accessed 4 November 2020.

<sup>475</sup><https://www.sars.gov.za/ClientSegments/CustomsExcise/Inspection/Pages/default.aspx>, accessed 4 November 2020. The Lesotho Revenue Authority only has one scanner.

<sup>476</sup> This is given by veterinary practitioners in South Africa who give farms, dairies, abattoirs, etc. clearance to export their products. This clearance certifies that their products are disease-free.

<sup>477</sup> Tšeliso Lethunya, Ministry of Agriculture port official. Interview 15 October 2018.

import permits. Physical inspections of vehicles, seals, goods etc. are conducted at random. The officials reported that, although there is only one official on duty at a time, they try to take no more than 10 to 20 minutes for an inspection. They explained that if, upon inspection, they find that products do not meet the required standards (for example, there is spoilage) then the goods will be rejected or condemned. Otherwise, there is no penalty that is charged for non-compliance.<sup>478</sup>

A weighbridge was introduced at the Maseru Bridge in the year 2000. Its purpose is to prevent overloaded vehicles from crossing over from South Africa into Lesotho. This is in order to preserve the integrity of the roads, which have been constructed to carry a maximum axle load of nine tonnes. In South Africa, the roads can bear axle loads of up to thirteen tonnes.<sup>479</sup> After completing Customs, Agriculture and Health checks and being furnished with an exit note in evidence thereof, traders must then proceed to the weighbridge. The Department of Traffic and Transport (DTT) operates the weighbridge on behalf of the Road Fund. The weighbridge is on one of the three lanes that exit the border. The procedure is that a vehicle parks in the weighbridge lane and its mass is recorded. The truck driver has to exit the vehicle (leaving it in the lane) and go inside the office of the DTT to get a print-out of the vehicle mass. The officials also perform documentary checks. This is primarily of cross-border driving permits.<sup>480</sup> During the fieldwork this process was observed as taking approximately five to ten minutes, if the vehicle is within the weight limits.

There are three instances that can cause delays at the weighbridge. The first is if a vehicle is found to be over the weight allowance. This is because the driver will be required to offload the excess goods there and then, blocking other trucks from accessing the weighbridge. This is also despite there being no storage facilities at the border for the secure stowing of off-loaded goods.

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<sup>478</sup> Melida Letlola, Port Health border official. Interview 15 October 2018.

<sup>479</sup> The axle load depends on the thickness of the road.

<sup>480</sup> As per the Road Transport Act 8 of 1981.

Secondly, officials reported that, at times traders dispute the accuracy of the scales. The resolution of such arguments can take significant time.<sup>481</sup> Finally, the fact that there is only one lane that has a weighbridge means that all of the goods-conveying vehicles have to queue in that one lane to await compliance checks. Furthermore, the lane with the weighbridge is not only dedicated to weighing commercial vehicles. Passenger vehicles also use that lane. This adds to the traffic attempting to exit the border through that lane. Ideally, there shouldn't be any weighbridge at a border because of the delays that they cause.<sup>482</sup> In South Africa the weighbridges are on highways, not at borders.

Finally, all vehicles must pay a toll before leaving the border. The tolls that are at the Maseru Bridge are under the responsibility of the Road Fund, but the Lesotho Revenue Authority administers them on their behalf. Costs range from M40.00 to M280.00, depending on the weight of the vehicle.<sup>483</sup> There are three toll gates at Maseru Bridge, one exclusively for pre-paid users,<sup>484</sup> one for cash payments, and one at the weighbridge. Despite this designation of the tolls, there is no clear signage. This can cause confusion for drivers who are not accustomed to this border.

Lesotho does not fare too poorly in terms of rankings on the ease of conducting cross-border trade. For example, the World Bank's Doing Business Report (2020) ranks Lesotho at number 40 out of 190 economies in terms of the ease of trade (with respect to the time and costs of trade).<sup>485</sup> However, the fieldwork revealed that, nevertheless, there remain a number of trade facilitation challenges in Lesotho, as evidenced by the processes at the Maseru Bridge.

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<sup>481</sup> M Mothabeng, Inspector, Department of Transport. Interview 16 October, 2018.

<sup>482</sup> E Chibira & B Mdlankomo in *The Impact of Corridor Delays on Cross Border Road Transport in the SADC Region: Findings From Research Conducted by the Cross-Border Road Transport Agency* advise that "the SADC region need (*sic*) to adopt technologies that limits (*sic*) dwell time and the need for stopping a vehicle". The main culprits for such delays are explained as being weighbridges and tolls. At 669.

<sup>483</sup> From USD 2.50 to USD 17.50. As at 4 November 2020.

<sup>484</sup> Drivers who have pre-paid the toll swipe their cards in order to proceed through the border.

<sup>485</sup> World Bank Group, *Doing Business 2020, Lesotho*. <https://www.doingbusiness.org/en/data/exploretopics/trading-across-borders>. Accessed 27 October 2020.

These include: inadequate infrastructure, onerous documentary requirements and time-consuming processes. These lead to goods taking a long time to gain clearance from their arrival at the border to their exit. Delays are further exacerbated by staffing deficiencies, including limited internal and external cooperation. There are some costs of trading and penalties for non-compliance. The relations between traders and officials are threatened by poor communication and lack of effective dispute resolution processes. Finally, safety and security breaches occur at the border and the mechanisms for addressing such are inefficient.

Cognisant of these challenges, and with the aim of addressing them, the Lesotho government devised several policies and laws to redress them. This was also done in order to implement its regional and international commitments. The next section applies insights from the law and development theory to evaluate the regulatory design, regulatory compliance and quality of implementation of these laws and policies. It does so in seeking to understand whether these factors can explain the discrepancies that exist between, on the one hand, the commitments and the laws meant to implement them and, on the other hand, the bottlenecks that are still experienced by traders on the ground. In other words, the law and development theoretical framework is used to gain insights on the development outcomes of Lesotho's trade facilitation commitments. In the sections below the three key conceptual issues identified in the theory advanced by Lee (regulatory design, regulatory compliance and quality of implementation) are discussed with reference to the challenges that are faced by traders in Lesotho.

### 6.5. Regulatory Design

The law and development theory proposes that, in order for law to have an impact on development, regulatory design is important. This refers to whether the law is optimally designed to meet its objectives. There are three sub-elements of this:

- Policy outcome
- Structural organisation and dynamics among law, legal frameworks and institutions
- Adaptability to conditions on the ground.<sup>486</sup>

With respect to the first sub-element, in Lesotho there are few policy instruments that underpin promulgated trade legislation. There are only three policy instruments that speak to trade. These are: a 2010 National Industrial Policy,<sup>487</sup> a National Quality Policy and a National Food Safety Policy, both of 2014. However, none of these are specific on trade facilitation in particular. Where there is a dearth of policies underpinning laws, it becomes difficult to design laws that address specific policy objectives. Laws are supposed to deliver particular policy outcomes.

In terms of the structural organisation of the law, the observation is that there are several laws that regulate one aspect or another of trade. The ones that regulate customs processes in particular are: the Customs and Excise Act,<sup>488</sup> Export and Import Control Act<sup>489</sup> and the Value Added Tax Act.<sup>490</sup> Laws controlling agriculture and health issues are: the Import and Export of Livestock and Livestock Products Proclamation,<sup>491</sup> Stock Disease Proclamation,<sup>492</sup> Public Health Order<sup>493</sup> and the Drugs of Abuse Act.<sup>494</sup> The toll gate is provided for under the Toll Gates Act.<sup>495</sup> Issues related to cross border transport are regulated under the National Road Traffic Act.<sup>496</sup> The relevant trade laws are thus spread out among diverse instruments and may be difficult for traders to determine. Propounding this is the fact that some external laws are also applicable to trade in Lesotho. In the main this is the

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<sup>486</sup> Lee Op cit note 96 at 435.

<sup>487</sup> It calls for export-oriented industrialisation, financed by foreign investment.

<sup>488</sup> Act no. 10 of 1982.

<sup>489</sup> Act no. 16 of 1984.

<sup>490</sup> Act no. 9 of 2001.

<sup>491</sup> Proclamation 57 of 1952.

<sup>492</sup> Proclamation 10 of 1896.

<sup>493</sup> Order no. 12 of 1970.

<sup>494</sup> Act no. 5 of 2008.

<sup>495</sup> Act no. 2 of 1976.

<sup>496</sup> Act no. 93 of 1996.

South African Customs and Excise Act.<sup>497</sup> This also complicates the determination of the laws that are applicable to trade. Finally, some laws are old, and have not been updated in quite some time. They may, thus, be inappropriate for the current lived experiences. The law and development theory proposes that laws must be adaptable to realities.

In addition to the expansive legal framework, the institutional arrangements for implementing the trade laws are as confusing. The different laws have installed many different institutions, each with a specific role to play in the regulation of trade. There is little interplay or coherence to their functions. A trader thus has to go from one institution to another for different authorisations regarding different aspects of their compliance and may meet with conflicting interpretations and rules.<sup>498</sup>

Good regulatory design for trade facilitation requires that laws establish efficient procedures that will cut time and costs for traders. However, this is not the case with the laws in Lesotho. This can be seen particularly with the multitude of behind-the-border requirements that delay trade in Lesotho. These are the processes that are required for acquiring permits, certificates and licenses necessary for trade. Although such authorisations may be informed by cogent motives, when the processes for securing them become too cumbersome this can lead to gratuitous costs, inconvenience and delays to traders. In Lesotho twenty-five per cent of the time delay in trade is said to be caused by behind-the-border processes.<sup>499</sup>

The main licenses and permits are the: traders license, general import and export permits and specific import and export permits. Anyone who intends

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<sup>497</sup> Act no. 91 of 1964. The Customs and Excise Act makes schs 1 to 7 of South Africa's Customs and Excise Act applicable to trade in Lesotho.

<sup>498</sup> The institutions are: the Lesotho National Dairy Board, Central Bank of Lesotho and the ministries of Trade and Industry, Agriculture and Food Security, Natural Resources, Tourism, Environment and Culture, Health and Social Welfare, Home Affairs, Police and Mining. World Bank Group, World Trade Organization Trade Facilitation Agreement Lesotho Validation and Reform Map, Working Draft, May 2016.

<sup>499</sup> Ibid at 4.

to engage in the import or the export of goods for commercial purposes must first be in possession of a traders licence.<sup>500</sup> The application requirements are cumbersome and time-consuming. The trader must submit nine documents, pay a license fee and wait for a minimum of five working days for processing. The One-Stop Business Facilitation Centre (OBFC) was created within the Ministry of Trade and Industry (MTI) to expedite all services related to the conduct of business in Lesotho, including trade licensing.<sup>501</sup> However, this has not had much impact on redressing delays because the unit is responsible for many other functions (such as company registration) and cannot commit focus to expediting trade licensing processes. It might have been more impactful to have addressed the excessiveness of the requirements, rather than to have created an institution to administer them.

General import and export permits authorise the import of restricted commodities and goods that are imported from outside the Southern African Custom Union or exported outside SACU. They are also granted by the One-Stop Business Facilitation Centre. Consequently, the process suffers the same defects as with the traders' license regime, in terms of the inefficiency of the application procedures. Lastly, specific import and export permits can be required for the import or export of different categories of goods. For example, trade in milk and milk products is authorised by the Lesotho National Dairy Board (LNDB), medications by the Ministry of Health, the import of eggs is approved by the Ministry of Small Business Development, Cooperatives and Marketing and trade in crops, animals and animal products are authorised by the Ministry of Agriculture and Food Security.<sup>502</sup> The problem with this requirement for vast permits is that any business that uses or sells a multitude of different products (for example restaurants and supermarkets) will find that it constantly needs a plethora of different permits from different institutions in order to import. The application processes can be time-

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<sup>500</sup> Trading Enterprises Order No. 11 of 1993.

<sup>501</sup> <http://www.obfc.org.ls/licensing/default.php>, accessed 17 December, 2018.

<sup>502</sup> Other agencies which may require certificates, permits and licenses (depending on the type of goods concerned) are: the Ministry of Environment, the Ministry of Telecommunications, and the Ministry of Mining. The full list of goods that require licenses, permits and certificates is provided in Annex 6.

consuming and costly, because the permits are valid on a once-off basis (per import/export). A good regulatory design would establish a more integrated and efficient process.

Traders reported that they take between three to five days between application and collection of most permits. They have to physically go to offices, fill out paper forms and make cash payments. The processes cannot be done online. This is despite trade agreements requiring members to automate processes as much as possible, including making provision for electronic payments.<sup>503</sup> The time needed for these processes have led some traders to employ additional staff who focus making the applications, or they pay agents to do so on their behalf. Either way, there are cost repercussions for the trader. Traders also complain that the procedures are inconvenient because there can be restrictions on the days that applications can be made and collected,<sup>504</sup> that the application procedures constantly change without warning, and that the permits can take too long to process.

The third and final aspect of good regulatory design requires adaptability. This means that laws should conform to local conditions. This encompasses

social, political, economic, and cultural conditions that are essential to the successful operation of law, including social or religious norms... competent personnel, technical expertise, financial resources, and cultural and political acceptance of their regulatory objectives.<sup>505</sup>

The research discovered that some trade laws in Lesotho are not sensitive to the local conditions. For example, some laws institute processes that are difficult to enforce. A good example is the requirement that every vehicle that is over the weight allowance should be offloaded. Yet, there are no storage facilities at the border. If enforced, this rule would subject a consignment of

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<sup>503</sup> For example, in art 8 of annex 4 to the AfCFTA's Goods Protocol and art 7.2 of the Trade Facilitation Agreement.

<sup>504</sup> For example, for the importation of animals and animal products, licences are granted by the Livestock Division of the Ministry of Agriculture. Applications are made only on Mondays and Tuesdays between 8:00a.m. and 4:30p.m and to be collected only on Thursdays and Fridays. Interview Livestock Division 3 October 2018.

<sup>505</sup> Lee Op cit note 96 at 445.

perishable goods to spoiling, or generally leave goods at risk of theft while they lie out in the open. Laws should take cognisance of the availability of resources that are present on the ground for their enforcement. Another example of the disjunct between law and local realities was pointed out by traders who reported that requirements do not take into account business expediencies. For example, traders may have credit facilities with their suppliers yet, when they import goods, the law requires that they must furnish proof of payment. This means that they have to make an upfront payment to suppliers when they source goods, even though the suppliers are willing to give them credit.

#### 6.6. Regulatory Compliance

In addition to the importance of good regulatory design, the law and development theory also proposes that, in order for laws to be impactful, there must be compliance by those who are subject to the application of the law. In this instance we will look at compliance on the part of traders, since trade laws are to be complied with by them. Different border authorities reported different impressions of compliance by traders. The Livestock Division reported that, by and large, traders are compliant with their procedures and requirements. The same was reported by Port Health authorities. Conversely, customs officials reported higher incidents of non-compliance. They spoke of their frequent discovery of offences, (such as trading without requisite permits, under-declaration, smuggling, etc.) when conducting inspections. The variance between the institutions is understandable because there are higher and more direct revenue implications for traders' compliance with revenue laws than there are for their compliance with the mandates of the other agencies.

Law and development theory submits that rates of compliance can be improved. It makes a connection between, on the one hand the extent of participation in law-making and knowledge of laws and, on the other hand,

rates of compliance.<sup>506</sup> This idea of the importance of participation and knowledge of the law is reflected in articles 1 and 2 of the Trade Facilitation Agreement. The former calls for governments to promptly publish trading information (including through the internet, or enquiry points, if possible).<sup>507</sup> The latter urges that traders should be given ample time and opportunity to comment on proposed laws before their implementation. Further, that governments should maintain regular consultation with stakeholders. Where traders have participated in law-creation, understand the rationale behind the laws, and see their interests reflected in the final outcomes, then there should be greater likelihood of their compliance with the laws.

The fieldwork unearthed evidence of lack of knowledge of the rules on the part of traders. For example, as discussed above, customs documentary compliance requires the submission of the SAD forms, CN1 and CN2 forms, invoices and any applicable permits. However, when traders were asked which documents are required for trade, some also mentioned company registration certificates, Value Added Tax (VAT) registration and tax clearance certificates, among others. This shows that they are confused about the documents that are actually required and, perhaps, not enough is being done to inform them of the legal requirements.

In addition, traders seemed to also not understand the reasons for some of the requirements and attendant procedures. For example, they complained that the revenue authority is not sensitive to business expediencies because, when there are minor variances between the invoice and the shipment ('overs' or 'shorts') the revenue authorities become suspicious and implement extensive documentary and physical examinations, despite there not having been an intention by the trader to commit a fraud. This can delay their trade by days. Lack of knowledge and understanding of why things are done increases the motivation to avoid compliance (e.g. by not

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<sup>506</sup> Lee Op cit note 96 at 447.

<sup>507</sup> Arts 1.1, 1.2 and 1.3 of the WTO Trade Facilitation Agreement.

declaring/smuggling).<sup>508</sup> However, such reactions will only serve to cause the authorities to become even stricter since non-compliance threatens revenue collection.<sup>509</sup>

In terms of the publication of trade laws and procedures, the World Bank Group found that, although the various authorities, which regulate trade in Lesotho have websites, many of the sites contain incomplete information (for example, they do not include the forms that are required for the processes) or they contain outdated and/or incorrect information.<sup>510</sup> To date there are still examples of regulators who do not provide full information to traders on their websites. One example is the website of the One-Stop Business Facilitation Centre. This is an institution that is responsible for general trade licensing and for registering exporters. The website contains the procedural steps for these, but the forms that are required are not provided on the site. Nor is there any information on the fees that are payable for these licenses.<sup>511</sup> The Lesotho Revenue Authority fares better because it provides all of the relevant forms for customs processes on its website.<sup>512</sup> When traders do not have access to the correct information this contributes to them arriving at the border non-compliant and, thus, they end up spending an inordinate amount of time correcting their non-conformity in order to successfully complete the required processes.

In order to rectify this challenge, Lesotho launched a trade portal in 2014 where importers and exporters can obtain complete and up-to-date information on trade regulation, processes, and requirements.<sup>513</sup> Relevant forms are also available on the site. The Ministry of Trade and Industry is

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<sup>508</sup> They also reported that they do not understand the requirement of a health attestation by the Livestock Division.

<sup>509</sup> Rege argues that in many developing countries rampant under-declaration and smuggling cause customs officials to become generally more suspicious and leads them to over-inspect. Rege Op cit note 146 at 156.

<sup>510</sup> World Bank Group, WTO Trade Facilitation Agreement, Lesotho Validation and Reform Map (2016) at 19–23.

<sup>511</sup> <http://www.obfc.org.ls/licensing/default.php> and <http://www.obfc.org.ls/business/default.php>, accessed November 4, 2020.

<sup>512</sup> <http://www.lra.org.ls/forms>, accessed November 4, 2020.

<sup>513</sup> [www.lesothotradeportal.org.ls](http://www.lesothotradeportal.org.ls), accessed 2 June, 2018.

responsible for the portal. However, finances are a threat to its viability. This is because of the substantial license fees that are paid to the domain host, and the fact that the technology that is applied to the portal constantly needs to be upgraded. In addition to this initiative, the Lesotho Revenue Authority conducts public awareness campaigns through its Taxpayer Unit. It meets with clearing agents on a monthly basis to educate them about the required procedures and requirements.<sup>514</sup> These efforts are hoped to bridge the knowledge gap and to support greater regulatory compliance.

Compliance can also be motivated by incentivisation. An example of this can be seen with the launch of a pilot programme on preferred traders in Lesotho. This is an approximation of the Authorised Economic Operator (AEO) concept in Article 7 of the TFA. This was a project of the Lesotho Revenue Authority. Preferred traders would be exempted from compliance with customs formalities when their goods cross the border. In order for a trader to be “preferred” they had to undergo several evaluations and audits. Only those with high compliance records earned the benefit. Fourteen traders qualified for the treatment.<sup>515</sup> One reported that the process was taxing but that it has eased the time and costs of trading because they are permitted to bypass the customs clearance queues at the border.

Finally, compliance can also be affected by the quality of state action taken to enforce compliance. States can use penalties to encourage compliance. In Lesotho, if non-compliance is discovered during customs clearance, the punishment is usually the payment of a penalty,<sup>516</sup> or the detention of the goods, if the trader is unable to immediately pay the penalty. Other penalties can be the confiscation of goods, embargo, or imprisonment for a period not exceeding six months. The Trade Facilitation Agreement recommends that penalties be commensurate with the offence.<sup>517</sup> Harsh penalties can motivate

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<sup>514</sup> Tseko Nyesemane, Deputy Commissioner of Customs (Central Region), Lesotho Revenue Authority. Interview 10 October 2018.

<sup>515</sup> A list of these traders is provided in Annex 7.

<sup>516</sup> Under the Customs and Excise Act no.10 of 1982 or the Value Added Tax Act no. 9 of 2001. The Clearance Hub determines the penalty amount.

<sup>517</sup> Art 6.3.3 of the Trade Facilitation Agreement.

corruption. However, where penalties are too lenient, they may not have the effect of compelling the desired behaviour. For example, vehicles park on the bridge that lies between the South African side of the border and the Lesotho side of the border (no man's land). This is against the law because the bridge was not constructed to withstand the weight of moving vehicles as well as of stationary vehicles loaded with cargo. This is a threat to the structural integrity of the bridge. Fines were instituted for this transgression by the Lesotho Revenue Authority. They were subsequently reviewed upwards because the infraction continued. Despite this, the violation continues because of the failure to set the penalties at a significant level to counter the behaviour.<sup>518</sup>

#### 6.7. Quality of Implementation

The final factor that may affect the ability of a law to positively impact development is the quality of the implementation of the law. This factor speaks to whether a state executes suitable measures to ensure the fulfilment of the requirements of the law.<sup>519</sup> Its ability to do so depends on several factors. For example, whether there is the political will to implement, the extent of its capacity to implement and the ability to curb threats to effectiveness, such as corruption. This section analyses the quality of implementation of trade facilitation laws in Lesotho. It argues that the most salient factors that are negatively affecting implementation appear to be lack of capacity (human, financial and technical resources) and the paucity of arrangements to counteract threats to efficacy, the biggest one being corruption on the part of those who are entrusted with the role of executing the laws.

#### Human Resources and the Quality of Implementation

The state needs to engage an adequate number of personnel to execute its functions. Otherwise, implementation will stall. The Lesotho Time Release Study found that

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<sup>518</sup> The fine was originally M100 (USD 6.30). As of 27 November 2018 it is now M1,000 (USD 62.80), rate accurate as at 4 November, 2020.

<sup>519</sup> Lee Op cit note 96 at 451–452.

traders experience delays in the process of receiving approved certificates, permits and licenses as a result of the unavailability of relevant ministerial officials to either receive or approve applications. This was particularly the case for the Ministry of Health and the Ministry of Agriculture, Department of Livestock.<sup>520</sup>

During the fieldwork licensing officials complained that they receive an excess of applications to process on a weekly basis and that there are few staff to process them - sometimes only two or three.<sup>521</sup> Staff deficiencies are also seen at the border. Some agencies only have one member of staff on hand per any shift. This is so with the Livestock Division and Port Health. This can cause delays in receiving services from these agencies, especially during peak business times. The situation is exacerbated when inspections have to be conducted because it means that staff have to leave their offices vacant for long periods of time while they conduct the inspections. Meanwhile traders cannot receive services during such time.

Besides the quantity of staff, the adequacy of human resources also depends on the quality of staff. This relates to the knowledge and skills that are possessed by the staff who have to administer measures. In Lesotho, trade delays are, in part, caused by having few border agencies that use risk assessment principles to inform their inspections (i.e., when to inspect and the degree of inspection). This is because staff are not skilled in making such assessments.<sup>522</sup> Both the African Continental Free Trade Agreement and the Trade Facilitation Agreement require post clearance audits to be conducted in order to determine how expeditiously clearance is being conducted.<sup>523</sup> In addition, states are recommended to establish and to publish average release times.<sup>524</sup> However, Lesotho does not have the capacity to implement either of

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<sup>520</sup> Op cit note 454 at *xiii*.

<sup>521</sup> For example, there is only one veterinary surgeon who approves permits for the import of animals and animal products in the Livestock Division of the agricultural ministry. This is besides their other duties and is why they insist on dealing specifically with permits only on specified days. Interview, Livestock Division, 3 October 2018.

<sup>522</sup> Only the Lesotho Revenue Authority relies on risk assessments in making decisions on which actions to take in processing goods.

<sup>523</sup> Art 11 of annex 4 of the AfCFTA protocol and art 7.5 of the TFA.

<sup>524</sup> Art 12 of the AfCFTA protocol and art 7.6 of the TFA.

these measures. The closest approximation to these is that the revenue authority has monthly meetings to assess its inspection experiences. This is meant to help them with case selection analysis so that they can better select and not over-inspect.

The Impact of Cooperation and Collaboration on the Implementation of Laws  
Good human resource arrangements also includes the extent of cooperation between agencies. It is important that border agencies work well together, so as to avoid duplication and conflicts, which increase delays. The inefficiencies of one agency can hold up the chain of connected processes. There is an internal dimension to cooperation and an external dimension. The former refers to the border agencies of one country working together. The latter refers to the extent of collaboration between the agencies of two countries. The fieldwork discovered that there is some evidence that the domestic border agencies at Maseru Bridge sometimes do cooperate. For example,

- At times the Lesotho Revenue Authority allows officials from the other agencies to use its one scanner to conduct their physical inspections
- Officials from the Department of Livestock and Port Health collaborate with each other to check import permits and health attestations
- Officials from the Department of Livestock are only at the port Mondays to Fridays from 8:00am until 4:30pm. In their absence, customs officers (who are posted at the border twenty four a day, seven days a week) fulfil their duties on their behalf.<sup>525</sup>
- The tolls that are at the Maseru Bridge are under the responsibility of the Road Fund. There is, however, a Memorandum of Understanding (MoU) between the Road Fund and the Lesotho Revenue Authority (LRA) whereby LRA collects the tolls on behalf of the Road Fund, and does the reconciliations for collections.

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<sup>525</sup> However, some traders reported that sometimes police officers stop them from importing animals and animal products if the Department of Livestock official has knocked off. This shows that there are conflicting approaches that are taken by the different agencies.

However, despite these examples, there remains scope for improvement. For example, the different agencies implement different working shifts.<sup>526</sup> This prevents seamless co-operation across agencies. Secondly, there is no inter-connectivity between the systems of the various agencies. Thirdly, the lane that operates as both a weighbridge and a toll is operated by two different agencies (The Lesotho Revenue Authority (for tolls) and the Department of Traffic and Transport (for the weighbridge)). They have two different mandates and procedures. This can sometimes lead to conflicts and delays. Another conflict exists between customs and immigration. The customs arm requires a trader to lodge a declaration before arriving at the border, but immigration requires persons to report to them before doing any business in the country. Lastly, every agency can conduct individual inspections of the same goods, for different reasons, with different risk profiles for the same client; some do not have risk profiles at all. Traders reported that, in their experience, the officials of the various agencies operate independently and that is a major cause of delays. They asserted that the agencies have inconsistent policies and procedures and that this leads to conflicts and confusion. All of these create the perception of arbitrariness and frustrate traders.

The World Bank's Time Release Study for Lesotho and the World Bank Group's validation exercise both propose that Lesotho should implement a single window.<sup>527</sup> This has been defined as:

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 regulatory requirements.<sup>528</sup>

The aim of a single window is to have one point for the submission of documents and processing of trade transactions. This entrance point should

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<sup>526</sup> See annex 8.

<sup>527</sup> Both Op cit note 545.

<sup>528</sup> The United Nations Commission for Europe (UNECE) Recommendation 33 [tfig.unece.org/contents/recommendation-33.htm](http://www.unece.org/contents/recommendation-33.htm) and The United Nations Economic Commission for Europe (UNECE) *The Single Window Concept: Enhancing the Efficient Exchange of Information between Trade and Government*, available at [http://www.unece.org/fileadmin/DAM/trade/ctied7/ece\\_trade\\_324e.pdf](http://www.unece.org/fileadmin/DAM/trade/ctied7/ece_trade_324e.pdf), both accessed 16, August 2019.

be managed by one lead agency. As yet there is no such facility in Lesotho. However, as a step towards that, an important intervention that has been implemented towards greater collaboration is the creation of the Heads of Border Agencies (HOBA) Committee in 2013.<sup>529</sup> It meets once a month (or when necessary) to collaborate on strategies to improve the coordination of border agencies.<sup>530</sup> The ultimate intention is to have one agency that will serve the client at the border, in implementation of article 8 of the Trade Facilitation Agreement. The HOBA is at the stage of trying to assess the roles of the different agencies at Maseru Bridge in order to understand how they all serve the client. There is also a Memorandum of Understanding (MoU) that has been signed. A Business Process Map will be devised as a stepping-stone to the launch of the one border agency.<sup>531</sup>

The border agencies also work together in the National Trade Facilitation Committee (NTFC). This was established in September 2017 in furtherance of Article 23.2 of the Trade Facilitation Agreement. It is made up of public sector and private sector representatives. It is responsible for monitoring Lesotho's compliance with the TFA and determining what interventions are necessary to ensure its further compliance. It makes recommendations for approval by the Lesotho Coordinating Committee on Trade (LCCT).

With respect to external cooperation, it is only the revenue authority that reported that it has some semblance of relations with their external counterparts.<sup>532</sup> The Lesotho Revenue Authority and the South African

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<sup>529</sup> It contains representatives from the Road Fund, Department of Traffic and Transport of the Ministry of Public Works and Transport, Department of Immigration and Passport Services of the Ministry of Home Affairs, Lesotho Mounted Police Service, Customs and Excise Administration of the Lesotho Revenue Authority, Lesotho Tourism Development Corporation (LTDC), Department of Livestock Services of Ministry of Agriculture and Food Security, Port Health from the Ministry of Health and National Security Service (NSS) of the Ministry of Defence and National Security.

<sup>530</sup> For example, devising a common policy and legal framework, common risk management approaches, and developing a common strategic development plan. Heads of Border Management, Border Management Strategy, June 2015.

<sup>531</sup> The one border agency should have been launched by 1 April 2019 according to the plans. However, this has been delayed.

<sup>532</sup> Tseko Nyesemane, Deputy Commissioner of Customs (Central Region), Lesotho Revenue Authority. Interview 11 October 2018.

Revenue Services (SARS) have monthly meetings of their border managers. They discuss operational issues and any other updates.

#### The Role of Committed Administration in Driving Implementation

It is not only the quantity, quality and collaboration of staff on the ground that affects the quality of implementation. The seriousness of administrators also counts. Often, administrative arrangements fail due to lack of planning, coordination and dedication, thus stalling efforts to implement. For example, section 6.5 of this work reported that the Maseru Bridge is a congested border and that there is little room to effect design and infrastructural improvements that would assist to facilitate trade. A proposal was made that the border should be moved 5 kilometres inland, into South African territory, so that there could be more space to expand the border. However, this never materialised because of constant changes in the portfolios of the responsible ministers in both countries. This scuppered the continuity of the plans.<sup>533</sup> The failure to install sound administrative follow-ups obstructed implementation of a very necessary improvement.

A second example relates to infrastructural upgrades. The United States Agency for International Development Diagnostic Trade Integration Study update for Lesotho (2012), the Time Release Plus and the Investment Climate Reform Implementation Framework are all reports that advise that infrastructural development is a pressing need for enhancing in Lesotho.<sup>534</sup> However, infrastructural deficiencies persist at Maseru Bridge because there has been little administrative follow-through with implementing improving strategies. For example, in a bid to implement the 1996 SADC Protocol on Transport, Communications and Meteorology Lesotho made plans to improve the layout and infrastructure at the border. However, the plans were shelved due to the absence of an implementing strategy. A few aspects of the plans

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<sup>533</sup> Hloulhla Lelosa, Operations Manager, Department of Traffic and Transport. Interview October 2, 2018.

<sup>534</sup> For example, the World Bank's Time Release Study for Lesotho (Op cit note 454) advises construction to separate traffic flows at the border, based on risks and controls.

only began to be implemented starting from 2019.<sup>535</sup> Another example is that, in 2005, the governments of Lesotho and South Africa entered into a memorandum of understanding on cooperation in science and technology. This included the mandate to grow their trade by cooperating in seeking external assistance to apply technology to trade. However, nothing came of it because there was no implementation strategy. This was until the two governments approached the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 2018 seeking technical assistance to devise an action plan to operationalise the MOU.<sup>536</sup> Therefore, a significant challenge is that, while there can be laws or plans in place, administrative failure to devise strategies on implementation impede progress.

A final example of how poor administrative arrangements can sabotage the quality of implementation of trade facilitation efforts is with respect to the police services. Police are stationed at borders to detect and to respond to crimes, such as drug trafficking, human trafficking, etc. There is a police presence at the Maseru Bridge, but it is not fully capacitated to respond to all security events. For example, on the 15 October, 2018, the researcher witnessed a traffic accident at the border. A large truck had collided with the boom gate at the weighbridge. The police at the border could not respond because they said that the law only empowers the Traffic Police to respond to accidents on a public road.<sup>537</sup> It took over four hours for the traffic police to arrive at the scene. Meanwhile, the truck remained stationary in the lane and other vehicles could not pass because they had to be weighed in the very same lane. This led to unnecessary delays.

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<sup>535</sup> For example, a drive-through Home Affairs service, which allows clients to be served without alighting from their cars.

<sup>536</sup> Lefa Thamae, Director of Science and Technology. Interview at the Ministry of Science and Technology. 8 October, 2018.

<sup>537</sup> Section 88(1) (e) of the Road Traffic Act 8 of 1981 says that, in the event of an accident, those concerned '(e) shall notify the police and remain on the scene of the accident, or return to it and wait there until such police arrive'. Section 88(1) (a) says that the vehicles involved shall not be moved before the police arrive.

In 2014 the Lesotho government created an Investment Climate Reform Implementation Framework. The purpose of this exercise was to include all stakeholders in the designing of a plan to improve Lesotho's ranking across all of the World Bank Doing Business indices.<sup>538</sup> Many of the plans that are made under the 'Trading Across Borders' mandate target the weaknesses that have been identified in sections 6.4, 6.5, 6.6 and 6.7 of this chapter. For example,

- To improve transparency and stakeholder consultation, the Lesotho Revenue Authority is tasked with spearheading the web-based trade portal; developing an education programme to train all stakeholders (such as clearing agents and freight forwarders) on border control (including the relevant documents and procedures) and devising a communication strategy to inform stakeholders on any changes to trade regulations and/or procedures.<sup>539</sup>
- To improve procedural efficacy by simplifying formalities, procedures and documents; enabling online permit processing; automating customs procedures; and developing a single window.<sup>540</sup>
- To encourage compliance, a Compliance Reward system is to be created to incentivise compliant traders.<sup>541</sup>
- Trade infrastructure is to be improved in order to enhance trade facilitation. This includes, for example, the installation of automated goods clearance (e.g. by the use of scanners/sensors); the construction of inspection shelters; provision of adequate lanes to channel traffic and of and appropriate parking and fencing to secure the border area.<sup>542</sup>
- To improve internal cooperation, the National Trade Facilitation Working Group (NTFWG) is to be capacitated so that it can better

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<sup>538</sup> The areas are: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency. Available at <https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020>, accessed 13 October, 2020.

<sup>539</sup> At 17.

<sup>540</sup> All agencies are to collaborate in this, led by the revenue authority. At 15.

<sup>541</sup> Ibid.

<sup>542</sup> All agencies are to collaborate on these improvements. At 14.

coordinate all of the agencies that are represented in the committee. Furthermore, all border agencies are to harmonise their practices (for example, by agreeing on a common approach to risk management) to avoid the duplication of processes.<sup>543</sup>

- To improve external cooperation, there is a call to engage with South African authorities to address cross border issues that cause delays at the border. This includes plans to link border systems and to harmonise laws and regulations<sup>544</sup>

Hopefully these arrangements will bear fruit because, not only are there plans, but there are also concrete strategies on what needs to be done and how. This had been missing in many of the previous initiatives, thus impeding implementation. Furthermore, there are clearly allocated responsibilities that are shared across all stakeholders and there is yearly monitoring and reporting back. Time will tell whether this framework will lead to improvements in trade facilitation in Lesotho.

#### Technological Capacity and the Quality of Implementation

The successful implementation of reforms that will stimulate development can require the application of technology. This is particularly true of trade facilitation reforms. For example, automation can assist to speed up trade processing. However, where there is little use of machinery and systems at a border, this can cause border clearance processes to be slow. In Lesotho equipment deficiencies hamper the efficient processing of cross-border trade at all stages of processing. For example, the office of the Department of Livestock at Maseru Bridge only has one computer for capturing data. The Port Health authorities also reported that the lack of appropriate equipment hinders their ability to discharge their functions. For example, they are supposed to check the refrigeration temperature in vehicles. This is because sometimes truckers will turn off their engines because they have been idling

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<sup>543</sup> At 17.

<sup>544</sup> The Ministry of Trade and Industry, Ministry of Finance and Ministry of Foreign Affairs are designated to follow up on this commitment. At 17.

for long periods of time at the border, thus depleting their fuel. Switching off the ignition turns off the refrigeration in the truck, thus causing a threat to the safety of the conveyed products. However, staff reported that they do not have their own thermometers to check temperatures in the trucks. They rely on the readings on the vehicles' thermometers (if they are there/working/accurate), instead of being able to independently verify the temperatures for themselves. They also do not have their own scanners to speedily conduct physical inspections, nor do they have food safety testing equipment to test whether products have spoiled or expired and are no longer fit for human consumption. Technological capacity constraints also disrupt processes at the weighbridge. When the scale is due for service (which happens on a quarterly basis) or for repair, the government issues a tender. Only South African firms respond to the tender because there is no expertise for such services in Lesotho. Waiting for the tendering process can mean that the scale is not working for long periods of time, thus impeding weighbridge processes.

In an attempt to address its technology gaps, the revenue authority introduced a Customs Modernisation and Automation programme in 2017. This was with an aim of reducing customs clearance time by using information and communications technology (ICT). The initiative saw the use of the United Nations Conference on Trade and Development's (UNCTAD) Automated System for Customs Data (ASYCUDA) World System for customs clearance processes. This has brought many visible improvements to the speed of trade. For example, before the system was adopted, there was no possibility of pre-clearance. However, currently goods arrive at the border with the traders having already lodged their declarations online. However, automation requires solid infrastructure, which is a challenge in Lesotho. Electricity interruptions and network failures often disrupt operations. Thus, traders cannot always enjoy the benefit of initiatives that are geared towards expediting their trade.<sup>545</sup>

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<sup>545</sup> Tseko Nyesemane, Deputy Commissioner of Customs (Central Region), Lesotho Revenue Authority. Interview 10 October 2018.

### The Threat of Finances to Successful Implementation

Financial capacity is another aspect that is instrumental in supporting effective implementation of trade facilitation strategies. For example, to install necessary trade infrastructure. The Ministry of Communications, Science and Technology is responsible for coordinating and facilitating scientific and technological innovation countrywide. However, it does not have adequate funds nor the expertise to fulfil this mandate in a manner that is economically impactful.<sup>546</sup> Where technology is acquired, lack of financial resources pose a challenge to sustainability because technology becomes obsolete quickly and replacing it or upgrading it is a costly venture. Lastly, many trade reforms require education and change management. There are few resources for that. Therefore, the roll-out of such programmes becomes obstructed.

### The Need to Install Internal Controls to Avoid Threats to Implementation

Finally, the quality of implementation can be impaired by lack of internal controls against implementation threats. One example of this is that of corruption, which undermines effective implementation. Corruption can arise at several stages of the trade process. For example, vehicles which are discovered as being overloaded at the weighbridge are not only forced to offload the extra weight, but drivers are also fined a flat rate of M300.00.<sup>547</sup> However, the fine cannot be paid at the border. It is to be paid at the Head Office of the Department of Traffic and Transport. This is approximately five kilometres away from the border post. This procedure was implemented after allegations of corruption. Money was being misappropriated when payments were being made at the border. However, it adds great inconvenience and delays when payments are to be made far from the scene of infringement. This has not cured corruption, if anything it has increased incentive for it. A more efficient payment system that also caters for the curbing of corruption has to be urgently implemented.

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<sup>546</sup> Lefa Thamae, Director Science and Technology, Ministry of Communications, Science and Technology, interview 8 October 2018.

<sup>547</sup> USD 18.84, as at 4 November 2020.

## 6.8. Chapter Conclusions

Chapter five revealed that there are many trade facilitation challenges that broadly arise in the Southern African Development Community. The cumulative effect of these has been the perpetuation of subdued regional trade and integration. The theory of international trade postulates that trade can have positive effects on development. Because of this, SADC states have entered into numerous regional and multilateral agreements hoping to address impediments to trade.<sup>548</sup> However, not much has visibly changed with respect to the speed and cost of trade in SADC, despite these efforts.

This chapter studied the Kingdom of Lesotho as an example of a SADC state. Although Lesotho does rank comparatively better than its regional counterparts in terms of the ease of trading across borders,<sup>549</sup> it still experiences impediments to trade which, if addressed, it is argued, may contribute to improved development prospects for the country. The purpose of this chapter was two-fold. First, to discover the trade facilitation challenges that manifest in Lesotho. Secondly, to interrogate why the challenges persist despite domestic, regional and multilateral efforts to address them. The chapter proposed that the theory of law and development may be instructive in assisting us to uncover the reasons. The theory proposes that regulatory design, regulatory compliance and the quality of implementation of domestic efforts may determine the effectiveness of laws.

The theory was applied to trade facilitation efforts in Lesotho. The conclusions of the exercise are as follows: first, deficiencies in regulatory design can be observed from the lack of strong policy frameworks as a basis for legal reforms. They are also apparent from the failure of laws to create streamlined processes, with coordinated institutional arrangements and requirements that fit the local conditions. Secondly, there are weaknesses in regulatory compliance. It is not enough to simply have laws. Those who are subject to the laws have to comply with them in order for the laws to be successful in

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<sup>548</sup> These were discussed in sections 4.2 and 4.3.

<sup>549</sup> World Bank Doing Business, Trading Across Borders (2020), Op cit note 337.

meeting their objectives. Compliance can be supported by ensuring that those who are subject to laws know and understand the laws at all times (be it law creation, amendment, supplementation, abrogation etc). This requires publication and consultation with stakeholders. Compliance should also be incentivised and non-compliance should be punished. In Lesotho there have been a few efforts to publicise and to consult, but the fieldwork exposed that perhaps not enough is being done because there is still confusion among traders regarding requirements. Compliance has been somewhat incentivised by the launch of the preferred trader scheme, but it could also be expanded to accommodate more firms. Non-compliance has been found to not be adequately punished, regard being had to continuing breaches of rules.

Thirdly, this chapter concludes that a state's efforts to implement laws is key to the effectiveness of legal regimes. The quality of implementation can be affected by state capacity (personnel, technological, financial and otherwise), political will, as well as curtailing implementation threats. In Lesotho capacity constraints have undermined the quality of implementation. Political will may exist, but poor organisation has led to the stalling of much-needed reforms. Implementation threats (i.e. corruption) have been addressed in ways that frustrate trade processes.

The theory on law and development, as applied to the case study of Lesotho, provides researchers and policy makers with key insights on the limited developmental impact of SADC states' commitments in regional and multilateral trade facilitation agreements. Notwithstanding its membership in regional and multilateral trade facilitation agreements, Lesotho has not experienced significant economic development. The insights gained from the case study are suggestive of the reasons for the similar lack of developmental outcomes in other SADC countries that have made similar trade facilitation commitments. In the next chapter the World Trade Organization's Trade Facilitation Agreement is studied in terms of how it may potentially assist the SADC states to escape the disparity between participation in legal instruments and successful trade and development outcomes.

## Chapter 7 – The World Trade Organization’s Trade Facilitation Agreement: Prospects for Advancing Trade Facilitation in the Southern African Development Community

### 7.1. Introduction

Previous chapters have argued that freer trade can be beneficial for development.<sup>550</sup> Free trade encompasses both trade *liberalisation* as well as trade *facilitation*. The World Trade Organization (WTO) defines trade facilitation as ‘the simplification, modernization and harmonization of export and import processes’.<sup>551</sup> Trade facilitation contributes to the freeing of trade by assisting to reduce obstacles to the physical movement of goods across national borders. Regional and multilateral agreements can be used to cooperate on facilitating trade. Chapter four discussed the regional and multilateral initiatives that the countries in the Southern African Development Community have engaged in to facilitate their trade. This thesis argues that the impact of these efforts has been minimal, regard being had to the experiences of traders and to reports and statistics on trade and development in the region. Chapter five and six considered why these arrangements have achieved limited success. They propose that compliance and implementation challenges are convincing reasons.

This chapter evaluates the World Trade Organization’s Trade Facilitation Agreement (TFA). In particular it considers how this treaty addresses compliance and implementation challenges. It has been argued, in the previous chapters, that it is insufficient for a treaty to merely contain good provisions; what is most important is its inclusion of mechanisms to ensure that members can comply with and implement the rules. It is argued that the TFA has these. The chapter, first, gives a brief history to the Trade Facilitation Agreement, including the negotiation process that brought it into being. It then reviews the main treaty provisions. Using the enmeshment theory and

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<sup>550</sup> Chapters 2 and 3.

<sup>551</sup> WTO *Trade Facilitation* (2020), available at [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm#I](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm#I), accessed 7 April 2020.

the managerial approach to compliance, it considers the compliance implications thereof. Finally, it assesses the treaty's mechanisms to enhance the implementation capacities of members. It concludes that the TFA is likely to contribute to the improved facilitation of trade in SADC, over and above what the existing agreements have managed to achieve.

## 7.2. Background to the Trade Facilitation Agreement

The inaugural WTO Ministerial Conference was held in Singapore in 1996 to set the agenda (or the 'work programme') of the organisation. The declaration that ensued therefrom identified four main areas as being ripe for the development of WTO rules:<sup>552</sup>

- Trade and competition policy
- Trade and investment<sup>553</sup>
- Transparency in government procurement and
- Trade facilitation.<sup>554</sup>

These came to be known as the 'Singapore Issues'. There are different views and perspectives, rooted in different interests, on the importance of these 'Singapore issues'.<sup>555</sup> With respect to trade facilitation, the Council for Trade in Goods (CTIG) was tasked with conducting studies to determine the

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<sup>552</sup> The Singapore Ministerial Declaration, adopted on 13 December, 1996. WT/MIN (96)/DEC of 18 December 1996. Singapore Ministerial Declaration, available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm), accessed on 6 March 2017.

<sup>553</sup> This inclusion was first proposed by the European Communities. It is contained in paragraph 20 of the declaration. Working Groups were created to study the correlation between trade and investment and trade and competition policy. Further, to identify areas that may warrant further action.

<sup>554</sup> The former was proposed by the United States and the latter was a proposal of the European Communities. They appear in paragraph 21 of the declaration. For the former, a Working Group was established to conduct a study on transparency in government procurement practices and to develop elements for their inclusion in an agreement.

<sup>555</sup> See, for example, Rorden Wilkinson, Erin Hannah & James Scott (2014) 35 (6) 'The WTO in Bali: what MC9 means for the Doha Development Agenda and why it matters' *Third World Quarterly* at 1039, available at <http://dx.doi.org/10.1080/01436597.2014.9077>, accessed on 13 July 2019.

feasibility of WTO rules on trade facilitation.<sup>556</sup> The results of the studies were discussed at the Doha Ministerial Conference.<sup>557</sup> The conclusion that was reached thereat was that there was indeed scope for WTO rules on trade facilitation. The developed members were anxious to have binding rules on the issue. They felt that it was important to have members commit to the uniform application of harmonised rules. On the other hand, developing country members agreed, in principle, that trade facilitation was important to global trade and that border inefficiencies should be reduced. For example, in paragraph 12 of the Cairo Declaration African ministers of trade express that they

recognize the potential benefits that would accrue to African countries from undertaking trade facilitation measures. The critical importance of trade facilitation for enhancing the competitiveness of African economies, for promoting intra-African trade and for harnessing the benefits of globalization cannot be overemphasized.<sup>558</sup>

However, they also expressed fears that they would not be able to commit to trade facilitation reforms without assistance. Paragraph 13 of the declaration notes that ‘there are costs associated with the pursuit of trade facilitation as a legitimate policy objective.’ Therefore, they call for ‘closer collaboration and enhanced coordination among relevant international, regional and sub-regional organizations in the delivery of technical assistance and capacity building support to African countries.’<sup>559</sup> Furthermore, for special and differential treatment provisions that are ‘precise, effective and operational’ as well as ‘policy space and flexibility for African countries.’<sup>560</sup> A research paper by Oxfam argues that the WTO’s special and differential treatment regime was

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<sup>556</sup> The mandate was expressed as ‘to undertake exploratory and analytical work . . . on the simplification of trade procedures in order to assess the scope for WTO rules in this area.’ Paragraph 21 of the Singapore Ministerial Declaration. Working Groups were also established to conduct similar exercises for the other issues.

<sup>557</sup> Doha Ministerial Declaration, Adopted 14<sup>th</sup> November, 2001, WT/MIN(01)/DEC/1 of 20 November 2001.

<sup>558</sup> The Cairo Declaration and Road Map on the Doha Work Programme, African Union, 9 June 2005, TI/TMIN/EXP/6 – b (III) Rev. 4.

<sup>559</sup> Ibid paragraph 14.

<sup>560</sup> Ibid paragraph 15.

inadequate in promoting development, since it consisted in many cases merely of extended deadlines for compliance with WTO rules that were not necessarily pro-development in the first place. Further, the timelines for compliance were arbitrary and unrelated to the level of members' economic development. This meant that at some arbitrary point in time, developing countries and LDCs would have to implement Uruguay Round rules, whether their economies were ready or not. And the provisions requiring rich countries to assist developing countries with technology transfer, enhanced market access, or other development needs consisted of 'best endeavours' language only and were never enacted.<sup>561</sup>

In addition, developing nations expressed that they had far more pressing developmental issues to deal with and that that trade facilitation wasn't as urgent a matter.<sup>562</sup> They were also opposed to having binding rules because this would subject them to the stringent WTO dispute settlement mechanisms, should they fail to honour their commitments.<sup>563</sup> Dani Rodrik proposes that this was a reasonable position.

When other worthwhile policy objectives are competing for scarce administrative resources and political capital, deep trade liberalization often does not deserve the high priority it typically receives in development

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<sup>561</sup> *Africa and the Doha Round: Fighting to Keep Development Alive*, Oxfam Briefing Paper 80. November 2005 <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/114077/bp80-africa-doha-091105-en.pdf?sequence=1&isAllowed=y>, accessed 4 July, 2019.

<sup>562</sup> Jensen and Gibbon agree that the issues put forward in the Doha round were of limited relevance to the African context and to its development aspirations. Further, that they were unlikely to create any new opportunities for the states but would, instead, likely create undue challenges. Michael Friis Jensen & Peter Gibbon, *Africa and the WTO Doha Round: An Overview*, Development Policy Review, Vol. 25, No. 1, 2007, 5-24. See also Kevin P. Gallagher, *Understanding developing country resistance to the Doha Round*, Review of International Political Economy, Volume 15, Number 1, (2007) 62-85.

<sup>563</sup> Martin Khor explains that, although there was a mutual understanding that trade facilitation would have positive effects, there was disagreement on what should be required of members to bring about the improvements; in particular whether binding multilateral rules were appropriate, or merely international cooperation, or possibly domestic initiatives. Martin Khor 'Many developing countries against trade facilitation rules in WTO' *Third World Network Info Service on WTO Issues* 28 June 2003, <https://www.twn.my/title/twninfo35.htm>, accessed 10 July 2019.

strategies. This is a lesson that is of particular importance to countries, such as those in Africa, that are in the early stages of reform.<sup>564</sup>

Regardless of the reservations, the TFA negotiations were scheduled to be launched at the Cancun Ministerial Conference that was to be held in Mexico in 2003. However, the negotiations were not launched as planned, due to a breakdown in talks between WTO members.<sup>565</sup> The disagreement was not about trade facilitation *per se*. It was broadly related to all of the issues in the Doha Development Agenda (DDA), which the developing countries felt were being ignored. For example, they had demanded that the developed countries should dismantle their export subsidies.<sup>566</sup> They had also wanted the other Singapore issues to be taken off the negotiating table. They wanted the granting of non-agricultural market access (NAMA) by the reduction of tariffs.<sup>567</sup> They were also pushing for an expansion of special and differential treatment (i.e., for it to stretch beyond merely the granting of longer transition periods before implementation but to include increased financial support to overcome implementation challenges). They expressed their sentiment that the WTO seemed to advance issues that were only in the interests of more developed members and side-lined those that were in their interests.

With respect to trade facilitation in particular, they agreed that it was an important barrier to address but they felt that it would be inappropriate to

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<sup>564</sup> Dani Rodrik 'Trade policy reform as institutional reform' Op cit note 76 at 10. Several letters were sent to delegates in Geneva by Non-Governmental Organisations (NGOs) advising against developing country participation in the TFA. For example, on 6 June, 2013 the OWISFS Group (endorsed by 188 regional, international, and national NGOs from developed and Developing nations) criticised the policy implications of trade facilitation for development and alleged that there is no empirical evidence of benefits for developing countries. <http://www.ourworldisnotforsale.org/en/article/international-civil-society-opposes-binding-rules-trade-facilitation-wto/> Another letter was sent on 18 July by a coalition of 150 civil society groups and trade unions that called on members to condition the entry into force of the TFA on the conclusion of the Doha Development Round negotiations.

<sup>565</sup> The conference was suspended on day 5 (14 September 2003). The WTO reports that 'Chairperson Luis Ernesto Derbez concluded that, despite considerable movement in consultations, members remained entrenched, particularly on the 'Singapore Issues', available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm), accessed on 10 July, 2019.

<sup>566</sup> Expressed, for example, in the Cairo Declaration. Ibid note 558.

<sup>567</sup> Expressed, for example, in the Livingstone Declaration. This was concluded during the 4th LDC Trade Ministers' Meeting in Livingstone, Zambia, on 26 June 2005.

attempt to create uniform rules for all WTO members, in light of their differing levels of development and, thus, differing capacities. They felt that international efforts in that regard could be better managed by other organisations such as the World Customs Organization or the United Nations Centre for Trade Facilitation and Economic Business.<sup>568</sup> On the other hand, developed countries were not ready to give up their subsidies and they felt that the demands of the developing countries were too intrusive on their policy autonomy. They were also against more advanced developing countries (such as China, India and Brazil) claiming the benefits of ‘developing’ status in the WTO.

These conflicts led to the breakdown of talks in Cancun. The tensions continued until the impasse was finally ended in 2004 when the General Council agreed on what was termed ‘the July Package.’ This was a set of decisions that aimed to bring the derailed trade facilitation talks back on track and to a conclusion.<sup>569</sup> In order to bring the developing countries on board six assurances were given. First, the negotiations were to have a limited scope. Paragraph 1 of Annex D to the July 2004 Decision stipulated that

[T]he negotiations shall aim to *clarify and improve* (own emphasis) relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit.

This phrasing seemed to exclude the addition of any new commitments. Secondly, the negotiations were to be held ‘without prejudice’. This suggests that members would not be bound by the result at the end of negotiations, should they choose not to be.<sup>570</sup> Thirdly, it was agreed that implementation

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<sup>568</sup> Rege Op cit note 146 at 154.

<sup>569</sup> Doha Work Programme, Decision Adopted by the General Council on 1 August 2004. WT/L/579, 2 August 2004. Annex A is the Framework for Establishing Modalities in Agriculture, Annex B is the Framework for Establishing Modalities in Market Access for Non-Agricultural Products, Annex C is the Recommendations of the Special Session of the Council for Trade in Services and Annex D is the Modalities for Negotiations on Trade Facilitation.

<sup>570</sup> Footnote 4 in the annex indicated that the negotiations were to be held ‘without prejudice to the possible format of the final result of the negotiations and would allow consideration of *various forms of outcomes*’ (own emphasis). This left open the possibility of a non-binding outcome.

challenges would be addressed by the more developed members availing technical assistance.<sup>571</sup> The developing members were also assuaged by the promise that the principle of special and differential treatment (S&DT) would be expanded beyond how it had previously been applied. Paragraph 2 of Annex D provided that

this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least developed Members.

Furthermore, developing countries were promised certain concessions that they had long demanded. For example, the developed countries agreed to eliminate their agricultural export subsidies by 2013. The other Singapore issues were to be taken off the work programme and future negotiations in the WTO were to prioritise non-agricultural market access and services. Further, they were encouraged by article 47 of the Doha Declaration that connoted that the TFA would be taken as part of a larger single undertaking.

With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking.

Therefore, the developing members believed that the TFA would not be enforceable until the other DDA issues also became enforceable. Because they already believed, in principle, that trade facilitation was important, and that it could potentially have a positive impact on their economies, these further assurances secured their conviction that they should participate in the negotiations.

A Negotiating Group on Trade Facilitation (NGTF) was established on 12 October 2004 by the Trade Negotiations Committee (TNC). Members were

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<sup>571</sup> Paragraph 27 of the Doha Declaration provided that ‘adequate technical assistance and support for capacity building’ would be sought for them. According to para 1 of Annex D to the July 2004 Decision of the WTO General Council ‘negotiations shall also aim at enhancing technical assistance and support for capacity building’.

invited to submit proposals to the NGTF. The SADC countries are members of various WTO groups that made submissions to this body.<sup>572</sup> These are primarily the African Group,<sup>573</sup> the group of Least Developed Countries,<sup>574</sup> the Core Group of Developing Countries<sup>575</sup> and the African, Caribbean and Pacific (ACP) Countries.<sup>576</sup> The submission of proposals continued until the Draft Consolidated Negotiating Text was finally concluded on 14 December 2009.<sup>577</sup> The negotiations were concluded at the Bali Ministerial Conference in December 2013.<sup>578</sup> Two thirds of the WTO membership<sup>579</sup> deposited valid acceptance instruments, allowing the treaty to enter into force on 22 February 2017. This made the TFA the first significant addition to the WTO agreement since its creation in 1995.

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<sup>572</sup> World Trade Organization *Groups in the Negotiations* (2017) , available at [https://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm#grp001](https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp001), accessed on 10 July 2019.

<sup>573</sup> This has 43 WTO members. The SADC members are: Angola, Botswana, Democratic Republic of the Congo, eSwatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe [https://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm). Accessed January 13 2019. Notable examples of their submissions include TN/TF/W/33 of 28 April 2005, TN/TF/W/56 of 22 July 2005 and TN/TF/W/95 of 9 May 2006.

<sup>574</sup> This has 36 WTO members. The SADC members are: Angola, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mozambique, Tanzania, and Zambia. [https://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm). Accessed January 13 2019.

<sup>575</sup> Notable examples of their submissions are TN/TF/W/161 of 29 October 2009 and TN/TF/W/173 of 22 September 2011.

<sup>576</sup> This group has 62 WTO members. The SADC members are: Angola, Botswana, Democratic Republic of the Congo, eSwatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe [https://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm). Accessed January 13 2019. Notable examples of their submissions are: TN/TF/W/73 of 10 November 2005, TN/TF/W/161 of 29 October 2009 and TN/TF/W/173 of 22 September 2011.

<sup>577</sup> First Draft Consolidated Negotiating Text (TN/TF/W/165).

<sup>578</sup> Ministerial Conference, Ninth Session, Bali, 3-6 December 2013. Adopted 7 December 2013. WT/MIN (13)/DEC. It was at this conference that the initial negotiation agenda of the DDA was narrowed down after the constant collapse of negotiations. This was narrowed down to the so-called Bali Package which consisted of trade facilitation, agriculture (for example public stockholding for food security and the administration of tariff rate quotas), cotton, and LDC issues. Therefore, trade facilitation remained as one of few issues that were seen as being viable and likely to secure agreement among the members. WTO Bali Package and November 2014 Decisions (2014), available at [https://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/balipackage\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm), accessed on 10 July, 2019. The other issues have not been totally abandoned, there is still hope that they will be returned to at a later, more feasible, stage.

<sup>579</sup> That is 110 members.

The next sections discuss the extent to which the agreement supports compliance with, and the implementation of, its rules. Compliance and implementation have been identified as being crucial to treaty effectiveness. The enmeshment theory is used to examine whether the quality of norms and the institutional arrangements favour compliance. The managerial approach is used to analyse whether capacity challenges, which could potentially hinder compliance, are adequately addressed in the treaty. Finally, we discuss what means have been provided in support of domestic implementation. The conclusion is that, overall, the agreement caters for compliance and implementation challenges and is likely to be impactful in the gradual resolution of impediments to trade facilitation in the Southern African Development Community.

### 7.3. Assessment of the Trade Facilitation Agreement's Compliance Mechanisms

This section concentrates on how compliance may be better assured by the TFA as compared to the previous regional and multilateral agreements that were studied in chapter 4. It argues that the quality of the norms, the quality of the institutions and the provisions that address technical assistance and capacity building may assist to support compliance by developing nations, such as the SADC states. Insights from the theories on compliance will inform the analysis.

#### The Quality of the Norms

In order for an agreement to be successful in fulfilling its mandate, the enmeshment theory proposes that the quality of its norms is important. The norms should be precise and obligatory, rather than being ambiguous and broad. The Trade Facilitation Agreement is divided into three sections. Section I consists of twelve articles. These contain the substantive obligations.<sup>580</sup> It contains disciplines on the following trade facilitating measures:

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<sup>580</sup> Section II addresses support for developing countries in articles 13 to 22. This is in the form of special and differential treatment (S&DT) and technical assistance. Section III outlines the institutional arrangements.

Article 1	Publication and availability of information
Article 2	Opportunity to comment, information before entry into force and consultation
Article 3	Advance rulings
Article 4	Procedures for appeal and review
Article 5	Other measures to enhance impartiality, non-discrimination and transparency
Article 6	Disciplines on fees and charges imposed on or in connection with import and export and penalties
Article 7	Release and clearance of goods
Article 8	Border agency cooperation
Article 9	Movement of goods intended for import under customs control
Article 10	Formalities connected with import, export and transit
Article 11	Freedom of transit
Article 12	Customs cooperation.

There are some provisions which express compulsory commitments. This is achieved by use of the word 'shall'. This appears, for example, in article 6 disciplines on fees and charges. However, in many other instances, non-binding language is used. The phrasing that is adopted to indicate such includes: 'whenever practicable', 'members are encouraged to', 'within available resources', 'shall, as appropriate', 'to the extent possible', and 'shall endeavour to'. These signify that the measures in question are not binding on members. While this may appear to compromise the obligatoriness of the norms, it reflects the desire to accommodate the varying capacities of member states. If all of the norms had been made strictly applicable, then developing countries might not have been able to participate in the regime. Therefore, the language makes sense, given the agenda of the agreement, which is to balance harmonisation with inclusivity.

The substantive section of the TFA builds on the General Agreement on Tariffs and Trade (GATT) - *viz*, Articles V, VIII and X- by providing more detailed provisions on customs regulations. It aims to modernise customs regulations

because technologies have become more advanced since the GATT. It also seeks to harmonise customs rules and to strengthen the obligations of members. The TFA builds on the rules of the World Customs Organization which are non-binding, as the WCO is not a negotiating body but more of a technical institution that provides assistance and seeks to harmonise customs rules. The TFA thus adds value to the WCO regime by creating concrete obligations on its disciplines. In terms of how it compares to the multilateral agreements of the World Trade Organization that pre-date it, it builds on them too. The previous agreements addressed trade facilitation reforms in a piecemeal manner across several agreements that looked at one aspect or another of facilitating trade. The TFA, on the other hand, is a single consolidated and comprehensive agreement.

Normatively, the Trade Facilitation Agreement also compares favourably to the current regional instruments. Its measures are far more wide-ranging than those of the SACU agreement, which only has two articles on trade facilitation.<sup>581</sup> It also compares favourably with the SADC Protocol on Trade in that it has many provisions that are not in the protocol at all.<sup>582</sup> Even where there are some areas of overlap of coverage<sup>583</sup> the TFA contains more extensive

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<sup>581</sup> Article 23(2) on the simplification and harmonisation of trade documentation and procedures and customs cooperation. Also, art 24 on the freedom of transit. See s 3.2.2. above.

<sup>582</sup> These are: appeal and review, enquiry points, use of international standards, use of customs brokers, rejected goods, advance rulings, pre-arrival processing, pre-shipment inspections, enhanced controls (SPS inspections), fees, charges and penalties, electronic payments, separation of release from final determination of customs duties, taxes, fees and charges, adoption of risk management systems, post clearance audit, establishment and publication of average release times, authorised operators, perishable goods, expedited shipments, outward and inward processing, temporary admission of goods, border agency cooperation, consultation, and single window.

<sup>583</sup> For example, both instruments mandate members to review their trade requirements in order to ensure a reduction in the time and cost implications of trade documents and procedures. They also prescribe many different actions that are to be taken to achieve this (arts 3 and 5 of Annex III to the protocol and art 10 of the TFA). Further, freedom of transit is another area where both instruments contain quite detailed stipulations for facilitating transit trade (arts 2, 8 and 11 of Annex IV to the SADC Protocol on Trade and art 11 of the TFA). Customs Cooperation for efficiency and for security in trade is covered by arts 7 and 9 of Annex II to the protocol and arts 8 and 12 of the TFA.

disciplines (i.e., deeper commitments).<sup>584</sup> However, there are some respects where the SADC trade protocol has advantages over the TFA. For example, the protocol provides more specific measures on customs cooperation. Members are to consider developing common customs application systems,<sup>585</sup> to develop joint training programmes and staff exchanges, to share facilities and resources<sup>586</sup> and to consult each other on the establishment of common border posts.<sup>587</sup> The TFA does not have such specificity of obligations on customs cooperation. However, it is understandable that the trade protocol has been able to achieve this, and that the TFA has not. Calls for this level of uniformity in a multilateral agreement would be harder to secure.

Comparing the TFA provisions to those of the African Continental Free Trade Agreement (AfCFTA), a different picture emerges. The AfCFTA negotiations were launched in 2015.<sup>588</sup> By this time the TFA negotiations had already been concluded. Because the African states had been party to the TFA negotiations, they incorporated many of its provisions into their regional instrument. This has largely been the case throughout the history of international trade treaty making - regional agreements that are concluded after or during the time of multilateral negotiations tend to resemble the provisions of the latter. There are a few commitments that are in the AfCFTA<sup>589</sup> that are not in the TFA, and others which are in the TFA and not the AfCFTA.<sup>590</sup> However, by and large, most of the provisions in the two instruments are comparable. Since the AfCFTA is similar to the TFA, the implementation of the AfCFTA will *ipso facto* be the implementation of the TFA.

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<sup>584</sup> For example, with respect to publication. Article 3.1.b of Annex II to the SADC Protocol on Trade requires the publication of trade statistics in conformity with the Harmonised System (HS) codes. However, art 1 of the TFA requires the publication of a much wider range of information. For example, trade procedures, required forms and documents, applied rates of duties, taxes, fees, charges and penalties, rules, laws, regulations, and administrative rulings, import, export or transit restrictions or prohibitions, etc.

<sup>585</sup> Art 6.5 of Annex II.

<sup>586</sup> Art 8 and 10 of Annex II.

<sup>587</sup> Art 7 of Annex II.

<sup>588</sup> See s 3.2.4. above.

<sup>589</sup> These are: the duty of harmonisation (art 3 of Annex 3), computerisation (art 6 of Annex 3 and art 17 of Annex 4).

<sup>590</sup> These are: notifications for enhanced controls or inspections (art 5.1), temporary admission and inward and outward processing (art 9) and rejected goods (art 10.8).

## The Quality of the Institutional Arrangements

The enmeshment theory argues that the installation of a sound institutional framework is of vital importance for securing compliance with any agreement. One of the primary reasons why the developed countries wanted the Trade Facilitation Agreement to be created under the World Trade Organization, even though the issue was already regulated under the World Customs Organization, was because of the credibility of the WTO as organisation and its strong dispute resolution system – through the Dispute Settlement Understanding (DSU). Characteristics such as: the employment of reverse consensus to prevent the blocking of processes, the authorisation of compensation and the suspension of concessions, and the ability to monitor compliance with recommendations and to exercise oversight over the methods of compliance have made the WTO's dispute resolution processes one of the most effective in international law. Vazquez and Jackson adjudged it 'far better developed and more intrusive than other dispute settlement regimes that exist internationally'.<sup>591</sup>

However, this initial advantage of the WTO has since been compromised by the crisis facing the Appellate Body. The United States of America has blocked the appointment of new members of the Appellate Body as old members' terms expire. It argued judicial overreach by the body.<sup>592</sup> Therefore, as of 10 December 2019, when the terms of two Appellate Body members expired, (leaving only one member remaining) the appellate procedure has been suspended, because at least three members are required to hear a case.<sup>593</sup>

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<sup>591</sup> Carlos M Vazquez & John H Jackson, Some reflections on compliance with WTO Dispute Settlement decisions (2001) 33 (4) *Law & Pol'y Int'l Bus-* at 561–562.

<sup>592</sup> Chad P Brown 'The 2018 Trade War and the end of dispute settlement as we knew it' in Meredith A Crowley (ed) *Trade War: The Clash of Economic Systems Endangering Global Prosperity* (2019) at 15.

<sup>593</sup> Joost Pauwelyn 'WTO Dispute Settlement post 2019: What to expect?' (2019) 22 (3) *Journal of International Economic Law*. Cosette D Creamer 'From the WTO's crown jewel to its crown of thorns; (2019) 113 *American Journal of International Law*. In a speech on 28 May 2019, Ambassador Ujal Bhatia of India (who had been one of the three remaining members of the Appellate Body) remarked that it was 'the transformation of the AB from 'crown jewel' to a problem child'. Launch of the WTO Appellate Body's Annual Report for 2018, Address by Ambassador Ujal Singh Bhatia, 2018, Chair of the Appellate Body, May 28, 2019, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_report\\_launch\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm), accessed on 1 March 2020.

These threats to the WTO dispute resolution system are important to consider because they jeopardise compliance. Therefore, they cannot be ignored. However, besides these broader issues that are facing the organisation as a whole, with respect to the Trade Facilitation Agreement in particular, it provides for good quality institutions that are empowered to take decisions, to scrutinise the implementation of the agreement and to take remedial actions, when necessary. These elements can support member compliance. The arrangements are contained in section III of the agreement. Article 23 establishes the Committee on Trade Facilitation. This body is responsible for overseeing the implementation of the agreement. Members have several binding obligations to submit notifications to this body.<sup>594</sup>

The TFA institutional provisions are an improvement on those that had existed in the agreements that pre-dated it. As far as the regional agreements are concerned, the SACU Agreement did not have strong institutional support for trade facilitation. The institutions that it creates are responsible for a diverse range of general issues; there is no particular organ that is devoted to exclusively focus on trade facilitation. The SADC Protocol on Trade creates a Committee of Ministers Responsible for Trade Matters (CMT)<sup>595</sup> and two sub-committees – one on customs cooperation and another on trade facilitation.<sup>596</sup> This is an improvement on the SACU regime because trade facilitation activities are not left to the general executive structures of the organisation; there are micro-structures that are explicitly created to specifically focus on the trade facilitation project. However, the lack of political and economic power have constrained the effectiveness of these institutions. The African Continental Free Trade Agreement has specialised sub-committees on trade facilitation, customs cooperation and transit.<sup>597</sup> However, the African Union,

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<sup>594</sup> For example, under art 1 (publication), art 10 (single window and customs brokers, category A, B and C implementation dates and shifting between categories (arts 16-19). Further, donors must notify the Committee on Trade Facilitation on their arrangements for technical assistance.

<sup>595</sup> The CMT is created in art 12 of Annex II, art 7 of Annex III, and art 12 of Annex IV to the Trade Protocol.

<sup>596</sup> The sub-committees are created in art 11 of Annex II and art 6 of Annex III respectively.

<sup>597</sup> Art 13 of annex 3, art 27 of annex 4 and art 12 of annex 8.

like the SADC, faces financial challenges to the effectiveness of its institutions.

In terms of the World Customs Organization and the previous World Trade Organization institutional frameworks, the WCO is weak because its organs cannot compel members to act. The previous WTO agreements also had different institutional weaknesses. For example, some agreements did not create specific institutions that would be responsible for the monitoring and enforcement of the agreement; rather they relied on the general organisational structures to administer the agreement.<sup>598</sup> This is not as efficient because general institutions are responsible for a multitude of functions. Others fared better by creating one institution for policy-making and enforcement,<sup>599</sup> or creating a dual structure with a policy-making body and an implementing body.<sup>600</sup> The TFA remains an improved model on these arrangements.

#### Addressing Capacity Constraints to Enhance Prospects for Compliance

The managerial approach to compliance argues that non-compliance is involuntary and that members fail to comply with treaties when they are not capacitated to do so (i.e. provided with scientific, technical, bureaucratic, financial, etc. capacity) and given reasonable timelines within which to comply. Section II of the TFA attempts to address these compliance issues by addressing special and differential treatment.

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<sup>598</sup> For example, the Agreement on Pre-shipment Inspections does not create its own independent organs. Instead it refers members to submit their notifications to the general WTO Secretariat. Article 6 of the same agreement provides that 'the ministerial conference shall review the provisions, implementation and operation of this Agreement, taking into account the objectives thereof and experience gained in its operation. As a result of such review, the Ministerial Conference may amend the provisions of the Agreement.' Therefore, it relies on the general structures of the organisation, rather than creating specific institutions to advance the peculiar interests of the agreement.

<sup>599</sup> Such as art 12 of the Agreement on Sanitary and Phytosanitary Measures which creates a Committee for Sanitary and Phytosanitary Measures, a forum for consultation and that monitors implementation and receives notifications from members. Article 13 of the Agreement on Technical Barriers to Trade is similar. Arts 4 and 7 of the Import Licensing Agreement also create a committee as a forum for consultation and accords review powers.

<sup>600</sup> For example, arts 4 and 6 of the Agreement on Rules of Origin and art 18 of the Customs Valuation Agreement.

The WTO has generally favoured the adoption of harmonised rules, with very little scope for opting out of commitments, regardless of implementation difficulties.<sup>601</sup> This was despite the compliance challenges that were experienced by the lesser-developed members.<sup>602</sup> African WTO members have worked hard to try to change this dynamic. As far as the TFA is concerned, the African Union Ministers of Trade adopted a declaration that

obligations and measures being negotiated under the Trade Facilitation consolidated text must include binding, effective and operational rules on Special and Differential Treatment. The obligation on developing countries and Least Developed Countries (LDCs) to implement the Trade Facilitation Agreement should be based upon their acquisition of capacity to implement, including through fulfilling, by developed countries, the obligation of delivering binding, new and long-term technical and financial assistance and capacity building necessary for African countries to achieve full implementation capacity.<sup>603</sup>

Section II of the TFA represents an attempt to take cognisance of the special position of developing members, such as the SADC countries. The section showcases the novel architecture of the TFA's provisions on special and differential treatment for developing and least developed WTO members. This is to assist them to be able to comply with the commitments that are contained in Section I of the agreement.

### Special and Differential Treatment

The concept of special and differential treatment means that the lesser-developed members are excused from having to grant full reciprocity in the implementation of an agreement. They are either exempted from some of the rules or they are given longer transition periods for implementing obligations.

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<sup>601</sup> Robert Wolfe 'The WTO single undertaking as negotiating technique and constitutive metaphor' (2009) 12 (4) *Journal of International Economic Law*; Michael Trebilcock, *Between Theories Of Trade And Development: The Future Of The World Trading System*, (2016); Diana Tussie & Miguel F. Lengyel 'Developing countries: Turning participation into influence' Op cit note 76.

<sup>602</sup> Finger & Schuler 'Implementation of WTO commitments: The development challenge' Op cit note 76.

<sup>603</sup> Conference of the African Union Ministers of Trade 24 - 25 October 2013, Addis-Ababa (Ethiopia), Addis Ababa Declaration On WTO Issues, available at AU/TI/TD/Camot-8/WTO/DECL.FINA, accessed on 17 February 2019. They also pushed for these approaches in their submissions to the Negotiating Group on Trade Facilitation

Special and differential treatment is an essential component of the multilateral trading system.<sup>604</sup> The original imagination of the concept primarily focused on giving lesser developed members longer timeframes to implement obligations as well as assistance to mitigate capacity challenges. This can be seen in agreements such as those on customs valuation and sanitary and phytosanitary measures.<sup>605</sup> However, there has been some controversy regarding the principle. Some believe that it is not helpful because it prevents developing countries and LDCs from dealing with their unhelpful trade policies by granting them flexibility and exemption from applying necessary reforms.<sup>606</sup> Delaying implementation is argued to be tantamount to delaying the taking of much needed corrective actions. Finger and Schuler argue that

[W]e should be careful not to be lulled into the mercantilist ethic of reciprocal negotiations in which delay is itself victory. Nor should we ignore the potential benefits of pursuing multilateral reform. Where reform is needed, to delay improvements is to prolong the time that people in developing countries remain poor. Time will, of course, be needed for implementation, but implementation periods should be based on the engineering requirements for accomplishing the required infrastructure improvements and making the investments associated with complementary, supporting institutional strengthening, not handed out as a second prize in a tough negotiation.<sup>607</sup>

However, this is not to completely discount the importance of S&DT. The principle is necessary to ensure ‘that there is proportionality in the commitments undertaken between developed and developing countries, reflecting their different levels of development and gains from the trading system’.<sup>608</sup> It is important that the characteristics of developing countries, and

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<sup>604</sup> Faizel Ismail *Mainstreaming Development in the WTO Developing Countries in the Doha Round*, 2007, Chapter 6, available at <http://library.fes.de/pdf-files/bueros/genf/04888.pdf>, accessed on 23 August, 2019. See also J. Michael Finger & John S Wilson *Implementing a WTO Agreement on Trade Facilitation: What Makes Sense?*, World Bank Policy Research Working Paper 3971, WPS 3971, August 2006, p.9.

<sup>605</sup> Michael Finger & Philip Schuler ‘Implementation of WTO commitments: The development challenge’ Op cit note 76 at 500.

<sup>606</sup> T Ademola Oyejide ‘Special and differential treatment’ in Bernard Hoekman, Aaditya Mattoo & Philip English (eds) *Development, Trade, and the WTO: A Handbook*, (2002). He traces the application of S&DT from UNCTAD II (1968), to the GATT and through the Tokyo Round Enabling Clause.

<sup>607</sup> Finger & Schuler Op cit note 605 at 501.

<sup>608</sup> Ismail Op cit note 604 at 84.

their capabilities (economic, technical or otherwise) be considered in expecting their compliance.

Of the regional agreements, only the African Continental Free Trade Agreement recognises the principle of S&DT. Article 30 of its Protocol on Trade in Goods provides for special and differential treatment to be given whereby flexibilities are extended to certain states in view of their weak capacity to implement obligations. The flexibilities are in the form of 'special consideration and additional transition periods' for implementation, on a case by case basis. Those states that want to comply with measures, but would struggle to do so if there was pressure to do so immediately, are given some breathing space to get capacitated before attempting to comply. Furthermore, article 29.2 of annex 4 and article 13.2 of annex 8 to the Protocol on Trade in Goods both provide that the extent and the timing of implementation of their provisions shall be tied to the capacities of states, as notified to the Sub-Committee for Trade Facilitation, Customs Cooperation and Transit or under the TFA. Despite the other regional arrangements (SADC and SACU) also having members that are at differing levels of economic development, they do not provide for any special considerations of this fact. This means that those countries that have lower levels of capacity are still required to undertake the same level of commitments as those countries that have more capacity. This may contribute to compliance problems under those arrangements.

Likewise, special and differential treatment does not feature in the agreements of the World Customs Organization, save for in the Convention on the Harmonised Description and Coding System.<sup>609</sup> Its article 4 grants developing countries S&DT in that they can delay the implementation of some of its provisions. This is a limited construction of S&DT (i.e., limited to only extending implementation time, without linking implementation to capacitation). The WTO Agreements on Import Licensing Procedures and on

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<sup>609</sup> Also called the HS Convention of 14 June 1983, as amended by the Protocol of Amendment to the International Convention on the Harmonized Commodity Description and Coding System of 24 June 1986.

Rules of Origin are both silent on special and differential treatment. The other WTO agreements recognised the principle, but they considered it in narrow terms (i.e., as merely the delaying of implementation).<sup>610</sup> In contrast, the TFA goes further in its conceptualisation of S&DT. Not only are members granted longer transition periods for implementing obligations, but they are also allowed to implement based on their self-determined capacity to do so. This is done by self-designating categories of commitments. This is made possible by article 14 of the agreement, which differentiates between three categories of commitments.

- Category A commitments<sup>611</sup> are those obligations which members pledge to implement immediately upon the entry into force of the agreement<sup>612</sup>
- Category B commitments<sup>613</sup> are those measures which members will only implement after a notified transitional period following the entry into force of the agreement<sup>614</sup>
- Category C commitments<sup>615</sup> relates to measures which a member notifies that they can only implement after a transitional period, provided that they are given technical assistance (TA).<sup>616</sup>

This reflects the theory of embedded liberalism.<sup>617</sup> It argues that the international trade system is not unbending, but rather that it recognises scope for flexibilities, when needed. This is achieved in that the TFA offers policy space for countries to self-designate capacity to implement. There is no

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<sup>610</sup> For example, art 10 (3) and art 14 of the Agreement on Sanitary and Phytosanitary measures, art 12 of the Agreement on Technical Barriers to Trade, and art 20 of the Agreement on Customs Valuation.

<sup>611</sup> Art 15 of the TFA.

<sup>612</sup> However, Least Developed Countries are given an allowance to implement Category A commitments up to a year after entry into force (art 15.2).

<sup>613</sup> Art 16.1 of the TFA.

<sup>614</sup> Developing countries were given one year after the entry into force of the agreement to definitively notify implementation dates. LDCs were given up to two years. The time could be extended upon application (Art 16.2 (a) and (b)).

<sup>615</sup> Art 16.2 of the TFA.

<sup>616</sup> Least Developed Countries had one year after the entry into force of the agreement to notify category C commitments. It is possible for a member to shift provisions between category B and category C by notifying the Committee.

<sup>617</sup> Section 2.4.3. above.

expectation that all members will assume all obligations all at once. Policy autonomy is safeguarded. This is because substantial resources will be needed to comply with the agreement, (for example, to develop and amend policies and laws, to train officials, to install systems, etc.) These will take time and the TFA provides scope for this time. This heightens the probability that nations will be able to comply with the provisions that they commit to, because they will be those commitments of their choosing.

Special and differential treatment in the Trade Facilitation Agreement also involves the granting of flexibilities regarding the prescribed deadlines. Any member who experiences problems meeting the deadlines may notify the Committee on Trade Facilitation and the deadline may be extended or other assistance granted.<sup>618</sup> Article 17 recognises that, even though a member may have designated certain timeframes, it may not be able to ultimately meet them when the time comes. It provides for an early warning mechanism. The Committee can be notified of the challenge and a member may be granted additional time to implement. This can be up to 18 months for a developing country and up to three years for a Least Developed Country. These extensions can be repeated if the member still fails to meet the deadline. There are mechanisms in place to prevent the abuse of the flexibilities.<sup>619</sup> These are useful flexibilities for lesser-developed countries and may contribute towards alleviating compliance pressures. However, the reasons for the failure to implement may be such that being granted additional time is not enough. Sometimes the state will need special support in order to implement. This will be in the form of technical assistance and capacity-building, which are also catered for in the agreement.

#### 7.4. Assessment of the Trade Facilitation Agreement's Implementation Mechanisms

It is recommended that, in order to improve the prospects of implementation, it is essential to examine a state's capacity to implement, to identify any gaps

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<sup>618</sup> Art 16.3.

<sup>619</sup> Art 18.

in capacity, and to build up capacity through technical assistance.<sup>620</sup> The concept of technical assistance refers to members being supported to implement their treaty obligations. The assistance can be of a technical, financial, advisory or other nature. This includes assistance with policy formulation or towards the improvement of human, institutional, and infrastructural capacities.<sup>621</sup> The 4<sup>th</sup> Ordinary Session of the African Union - African Economic Community (AU-AEC) Ministers of Trade was convened in Abuja, Nigeria from 22 to 23 September 2001. It was a high-level brainstorming meeting in preparation for the Doha Ministerial Conference. Members thereat agreed that, in order for them to be able to implement trade facilitation measures, they would require 'technical and financial assistance to narrow the technology and human resources gaps that exist between developed and developing countries'.<sup>622</sup>

LDC ministers reiterated this same sentiment in their meeting leading up to the Cancun ministerial conference.<sup>623</sup> The countries were, therefore, using their external meetings to build consensus on what their common approach would be in the WTO negotiations. They consistently insisted that the TFA should take cognisance of their resource and capacity constraints. They rationalised that, because they have many developmental challenges, they cannot devote significant resources to trade facilitation reforms (as the more developed members could) and that they would need assistance with closing the resource gap.

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<sup>620</sup> Lee Op cit note 74 At 469.

<sup>621</sup> David F Luke 'Trade-related capacity building for enhanced African participation in the global economy' in Bernard Hoekman, Philip English & Aaditya Mattoo (ed) *Trade, Development and the WTO: A Handbook* at 509–510.

<sup>622</sup> The document is titled *Africa's Negotiating Objectives for the Fourth Ministerial Conference of the WTO*.

<sup>623</sup> Dhaka Declaration, Second LDC Trade Ministers' Meeting, Dhaka, Bangladesh, 31 May to 2 June 2003.

## Technical Assistance and Capacity- Building in the Trade Facilitation Agreement

There are many costs that are associated with implementing the Trade Facilitation Agreement.<sup>624</sup> First, legislation may have to be promulgated or amended in order for it to be in line with the provisions of the agreement. Secondly, there are costs involved in sensitising stakeholders about potential changes to policy and practice. Thirdly, there are institutional costs in that members may have to create new institutions, such as enquiry points. Investments will also be required to boost human resources, for example, training costs may be incurred to capacitate officials who will have to apply new processes to expedite the movement of goods. The requirement to ensure coordination among all entities involved in cross-border trading may also result in costs related to implementing the channels for such coordination. Lastly, there are costs involved in upgrading equipment and infrastructure (for example, ICT systems).

Developing countries demanded that there be ‘a linkage between the implementation of each provision under the Trade Facilitation agreement and the delivery of technical assistance’.<sup>625</sup> The United Nations has estimated the implementation cost of trade facilitation measures to be in the range of \$1-15 million for each country (excluding the cost of hard infrastructure). The Organisation for Economic Cooperation and Development estimated the cost at likely being on average about €11.6 million over a three to five year period.<sup>626</sup> It is difficult to estimate the costs because they depend on various factors, such as the systems, equipment, etc. that a country will elect to install.

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<sup>624</sup> Archana Jatkar & Chenai Mukumba *Unpacking the Bali Package: A Snapshot of the Bali Ministerial Decisions of the WTO Members* (2014) at 5.

<sup>625</sup> Jatkar & Mukumba *ibid* at 3–4.

<sup>626</sup> Christian K M Kingombe *Multi-year Expert Meeting on Transport, Trade Logistics and Trade Facilitation Second Session: Trade Facilitation Rules as a Trade Enabler: Options and Requirements Geneva, 1–3 July 2014: Hard and Soft Infrastructure Development in Africa, Implementing the WTO Trade Facilitation Agreement in Africa, the Role of the AfDB* (2014) at 23, available at <https://www.semanticscholar.org/paper/Multi-year-Expert-Meeting-on-Transport-%2C-Trade-and-Kingombe/10d9d3e647be5e0b1542ea989bc5fa78d46b3769>, accessed on 11 July 2019.

These cost implications have led some scholars to conclude that developing countries do not need the Trade Facilitation Agreement and that it will actually do them more harm than good should they set out to implement it. They say that developing countries cannot afford the costs of trade facilitation in the long term. This is also because some of the costs are not once-off; they will require recurring expenditure. For example, a United Nations study estimated that the installation of a single window can cost anywhere between €8 - 40 million, depending on the size of the country and the complexity of the system. Apart from this implementation cost, the running costs can range from €160,000 - 6.5 million per annum.<sup>627</sup> This is the reason for some of the criticisms that have been levelled against developing country participation in the TFA. However, conversely, there are other writers who argue that the costs are moderate in comparison to the potential gains from improved trade efficiency.<sup>628</sup> They even suggest that some of the initial costs could be transferred to traders through charges for the improved services that they will be receiving at borders. However, traders in the developing world are already struggling with low profit margins in their businesses, so this may not be a feasible solution.

It is argued that cost implications cannot be downplayed when the countries that are involved are poor countries, such as the SADC states. This is more so when we also consider that there are costs that are incurred even before implementation begins. For example, studies will have to be undertaken in order to determine where the impediments lie. Expert knowledge will be needed to identify present capacity and to determine the assistance that should be requested. Poorer countries may lack this expertise internally or the finances to pay for the engagement of external expertise. They would, therefore, need assistance even in this regard. Therefore, Jatkar and Mukumba argue that the developing countries were correct to insist that their implementation be dependent on their capacity, and that developed countries

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<sup>627</sup> UNECA Op cit note 329 at 43.

<sup>628</sup> See, for example, Yann Duval *Cost and Benefits of Implementing Trade Facilitation Measures under Negotiations at the WTO: An Exploratory Survey*, Asia-Pacific Research and Training Network on Trade (2006).

be compelled to give such assistance, especially since they were the *demandeurs* of the trade facilitation project in the WTO.<sup>629</sup>

The TFA is advantageous over the regional agreements because it has provisions on technical assistance while the regional agreements lack any mechanisms for such. The SACU agreement and the SADC Trade Protocol are completely silent on the issue of technical assistance.<sup>630</sup> The Protocol on Trade in Goods to the AfCFTA does contain provisions regarding technical assistance, capacity building and cooperation.<sup>631</sup> It gives the Secretariat<sup>632</sup> the role of coordinating these issues and of investigating the means to secure the resources that will be required for reforms. The problem, however, is that there are no concrete explanations of where the resources will be sourced, nor how they will be requested, nor how they will be implemented and monitored, etc. There is reference to ‘engagement with partners,’ but no mention of which partners these are, nor the channels or modalities for this engagement. There is just the awareness that resources will be needed, and that there is need for engagement and coordination. However, the provisions are too shallow to be helpful in practically assuring that any concrete assistance is ultimately secured. This compromises the effectiveness of the technical assistance provisions and will probably not assist the members to secure the funding that they will require to assist them to implement the regime.

With respect to the international agreements, the instruments of the World Customs Organization do not have binding commitments on the provision of technical assistance. For example, the agreement on the Harmonised Commodity Description and Coding System provides that developing and developed members should engage with each other and agree on the terms of assistance. There is no mechanism that is outright provided for this engagement, nor any guarantee that a state will get the assistance sought.

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<sup>629</sup> Op cit note 624.

<sup>630</sup> Save for that the latter agreement provides for undertaking joint training programmes to assist each other with capacity constraints.

<sup>631</sup> Art 28 of the Protocol on Trade in Goods to the AfCFTA.

<sup>632</sup> The AfCFTA Secretariat, as defined in art 1 of the main agreement, and established in art 14.

Neither is there any monitoring of the fruits of these engagements. Likewise, past WTO agreements were also weak in that they either did not provide scope for technical assistance at all (for example the Agreements on Rules of Origin and Import Licensing Procedures) or they limited technical assistance (for example to the giving of advice<sup>633</sup>), or they framed the provisions on technical assistance in a non-binding manner (for example in the Agreement on Sanitary and Phytosanitary Measures).<sup>634</sup>

The Trade Facilitation Agreement represents only a slight improvement on the current regional and multilateral arrangements. Technical assistance is to be given by the more developed member states, either bilaterally or through multilateral organisations.<sup>635</sup> However, the ‘commitment’ to render this support is worded very weakly. The agreement provides that the developed countries pledge to ‘*facilitate* (own emphasis) the provision of assistance and support for capacity building,’ not that they pledge to *provide* assistance and support. This evidences that there is no concrete obligation to render assistance. This has led some scholars to question the utility of the technical assistance provisions.<sup>636</sup> The agreement requires that the transfer of assistance be mutually agreed upon between the parties. This is meant to avoid a situation where developing countries receive inappropriate assistance. However, it leaves the poorer countries at the mercy of the unequal power dynamics in such bilateral negotiations because the WTO is largely not involved in them, save for in a coordinating capacity to avoid duplications.

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<sup>633</sup> For example, art 3 of the Agreement on Pre-shipment Inspections and art 11 of the Agreement on Technical Barriers to Trade.

<sup>634</sup> Art 9 of the agreement uses the phrasing ‘Members agree to *facilitate the provision* of technical assistance’ and members ‘shall consider providing’ technical assistance. Similarly, art 3(3) of the Agreement on Pre-shipment Inspection reads ‘Exporter Members shall offer to provide to user Members, if requested, technical assistance directed towards the achievement of the objectives of this Agreement on mutually agreed terms’. Such statements do not bind developed members to extend concrete assistance as a justiciable commitment.

<sup>635</sup> Art 21 of the TFA. See also Nora Neufeld *The Long and Winding Road: How WTO Members Finally Reached A Trade Facilitation Agreement* (2014).

<sup>636</sup> ‘WTO negotiations on trade facilitation: development perspectives *South Centre Bulletin* 78, 4 March 2014, available at <https://www.southcentre.int/question/wto-negotiations-on-trade-facilitation-development-perspectives/>, accessed 18 May 2020. Also, in Communication TN/TF/W/191 of 26 April 2013 members complained that the provisions on technical assistance were not precise, effective, or operational, and that there were no mechanisms to ensure efficient, timely, and secure delivery of assistance.

The lesser developed WTO members are expected to describe the assistance that they will require. For example, Least Developed Countries have two years after the entry into force of the agreement to notify the assistance that they are seeking. Precision in the formulation of a request is very important. The member has to know exactly what assistance is needed and to couch the request as clearly and as specifically as possible. This will assist donors to determine whether, and to what extent, they can assist. It has already been argued that lesser developed countries may experience challenges with making such determinations, without assistance to do so. This could result in the request of inappropriate assistance, which would undermine the effectiveness of the eventual support that is gained. For these reasons, at the behest of developing country members, the WTO launched a Trade Facilitation Agreement Facility (TFAF) on the 22 July 2014. Among other functions, it assists these members to identify their technical assistance needs and potential development partners (be they bilateral donors, or regional or international agencies) that can assist them with those needs.<sup>637</sup>

Transparency and monitoring are critically important elements for ensuring aid effectiveness. WTO members have one year after the entry into force of the TFA to inform the Committee on Trade Facilitation of the arrangements that have been agreed upon between a donor and a recipient with respect to the furnishing of technical assistance. Going forward they are required to update the committee on progress in the delivery of the assistance.<sup>638</sup> This is meant to monitor whether there has been any assistance that has actually been rendered, or merely empty promises. It is a way to determine whether the recipient is any closer to implementation of the agreement, having had its capacity needs met. This is a positive aspect of the TFA in support of implementation. The major limitation is that the committee cannot take any action if assistance has not been forthcoming. This is because there is no obligation for assistance to be given. This may, thus, compromise the

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<sup>637</sup> World Trade Organization, About the Trade Facilitation Agreement Facility, <https://www.tfafacility.org/about-the-facility>, accessed 20 June, 2019.

<sup>638</sup> Arts 16, 21 and 22.

effectiveness of these efforts.<sup>639</sup> However, a redeeming feature is that the Trade Facilitation Agreement Facility offers some limited assistance in the form of grants if a member is unable to secure any other source of funding.<sup>640</sup> This is an important role, although limited in scope.

Lastly, in support of implementation, the Trade Facilitation Agreement requires members to establish national trade facilitation committees.<sup>641</sup> These are very important to implementation prospects because they provide a forum for domestic stakeholders to consult, collaborate and strategize on the national position with respect to TFA implementation (i.e. to ‘facilitate both domestic coordination and implementation of the provisions of [the] Agreement’).<sup>642</sup> Chapter 5 and 6 discussed how the lack of domestic organisation and collaboration can scupper implementation efforts.<sup>643</sup> Therefore, this is an advantageous aspect of the TFA in that it attempts to address this challenge.

## 7.5. Conclusions

Chapter 1 asked: can the World Trade Organization’s Trade Facilitation Agreement be leveraged by the countries in the Southern African Development Community to increase their implementation of trade facilitation measures in support of their development? In order for this to be able to happen, the treaty would have to provide measures in support of compliance and implementation. This chapter set out to determine whether the Trade Facilitation Agreement does so. This would entail determining whether it provides SADC countries with sufficient flexibility to comply with the

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<sup>639</sup> It has been argued that it may be difficult for developing countries to implement the agreement in light of the lack of binding commitments on the nature of the support that they can expect from the developed countries. ‘WTO’s MC9: Summary of Issues, *South Centre Informal Note* SC/TDP/AN/MC9/1 November 2013, available at [https://www.southcentre.int/wp-content/uploads/2013/12/AN\\_MC9\\_1\\_WTOs-MC9-Summary-of-Issues\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/12/AN_MC9_1_WTOs-MC9-Summary-of-Issues_EN.pdf), accessed on May 18 2019 and D Ravi Kanth ‘What happened at the Bali WTO meet and why(2014) XLIX (2) *Economic and Political Weekly* at 17.

<sup>640</sup> Ibid note 637.

<sup>641</sup> Art 23 of the Trade Facilitation Agreement.

<sup>642</sup> Art 23.2.

<sup>643</sup> Section 5.8 above.

agreement, with the capacity building and technical assistance to implement, and with strong institutions to monitor their implementation.

The chapter analysed the content and structure of the agreement using insights from compliance theories – enmeshment, the managerial approach to compliance as well as embedded liberalism. This was with a view to determining its suitability for application by the SADC countries in their drive to reduce trade obstacles in their region. It found that, normatively, it is an improvement on the regional and multilateral agreements that came before it. This is because it has many provisions which target the trade facilitation challenges that were shown to be hindrances in the conduct of trade in SADC.<sup>644</sup> It has more norms than many of the previous agreements and deeper provisions. Secondly, it provides for institutional support of compliance in the form of the Trade Facilitation Committee and National Trade Facilitation Committees. Lastly, in support of compliance, the unique structure of the agreement affords an opportunity to the SADC states to control the extent and timing of their assumption of commitments. This flexibility is argued to improve compliance prospects because it should ensure that the states do not assume commitments that are beyond their capacity. It will remain incumbent upon the SADC states to carefully consider the crafting of their category notifications so that they can benefit from this privilege.

In terms of supporting implementation, Hoekman argues that the TFA ‘addresses the concerns of developing nations regarding implementation costs and capacity constraints’.<sup>645</sup> This, he says, is because it provides avenues for international organisations to collaborate in the extension of technical assistance to developing and least developed members.<sup>646</sup> This chapter has argued that this is not an entirely accurate assessment. What is commendable about the agreement is that it recognises the importance of technical assistance and capacity building for lesser-developed states. Secondly, that

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<sup>644</sup> Discussed in chapter 5, above.

<sup>645</sup> Bernard Hoekman *The WTO Trade Facilitation Agreement: Milestone, Mirage, or Mistake?* (2014) at 1.

<sup>646</sup> *Ibid* at 11-12.

institutional arrangements have been established to coordinate and to review progress on the rendering of such assistance. However, two failings have also been discovered. First, that the provisions on technical assistance and capacity building are couched in non-binding terms, thus rendering the ‘commitments’ unjusticiable, and therefore, of limited assistance to the African countries. Secondly, the developed members and developing members are expected to negotiate assistance bilaterally or under the auspices of international organisations. This takes the negotiations out of the WTO and renders them subject to the flaws of power politics in North-South aid negotiations. These two issues may undermine the resolution of implementation constraints.

However, despite these shortcomings, this chapter concludes that the TFA is a useful agreement and that it is positive that the SADC states elected to participate in it. Although it is still too early to judge its impact on the ground,<sup>647</sup> it nevertheless appears to be an improved regulatory framework over the regional and multilateral frameworks that predate it. The Trade Facilitation Agreement is just one of the many instruments that the SADC states now have in their arsenal. One report predicts that ‘the TFA has the potential to be quite structurally transformative for African countries’.<sup>648</sup> Perhaps. It remains to be seen. However, it will be for the states to figure out how to best exploit the agreement so that it can assist them to meet their trade facilitation goals. The following chapter discusses the thesis conclusions and recommendations.

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<sup>647</sup> Although the agreement entered into force three years ago the member states have not been fully implementing the commitments therein. This is because of the scheduling of commitments that was explained in section 7.3 above. Some commitments became implementable immediately after entry into force of the agreement (category A), others will only become implementable after a designated transitional period, and yet others will remain unimplementable as long as technical assistance is not forthcoming. It will take time for parties to make these notifications and to engage in negotiations for technical assistance. So far only 319 notifications have been made: 121 category A, 104 category B and 94 category C. This means that less than 38% of commitments are currently implementable. This makes it difficult to conclude on the impact of the agreement at this point in time. <https://www.tfafacility.org/notifications> accessed 1 November 2020.

<sup>648</sup> Dr. Christian Kingombe Op cit note 626.

## Chapter 8 – Thesis Conclusions and Recommendations

A problem statement was outlined in the introduction of this thesis. The puzzle that was identified for research was as follows: the governments in the Southern African Development Community have signed onto several agreements over the years with the intention of ameliorating the costs and delays that are associated with their cross-border trade. However, despite this, there has been little visible evidence of the quickening and cheapening of trade in the sub-region. Furthermore, there have been few improvements in their development indicators. Consequently, the thesis identified a number of research questions:

1. How can trade facilitation support development?
2. What compliance and implementation challenges have obstructed the efficacy of trade facilitation agreements in SADC?
3. Can the World Trade Organization's Trade Facilitation Agreement assist the SADC countries to overcome their compliance and implementation challenges?

The first section of this chapter discusses the thesis conclusions. These are the main theoretical and empirical insights that are gained from this study. The second section makes some recommendations for academic scholars and for policy makers.

### 8.1. Thesis Conclusions

Three main conclusions can be made in answer to the three research questions. First, facilitating trade *can* have positive effects on development. The concept of 'development' goes beyond merely the expansion of economic indicators (such as national income and income per capita, etc.). Development is a multifaceted phenomenon that includes social, political, cultural, environmental and other improvements. Chapters 2 and 3 asked whether trade facilitation initiatives can help SADC countries to achieve this multidimensional nature of development. The conclusion is that yes it can

support this goal; but not on its own. For example, open markets can give consumers access to diverse goods, traders access to inputs, technologies and markets for their exports, and governments increased revenues from greater trade flows. All of these can contribute to improved livelihoods and development indicators. However, there are also disadvantages to trade facilitation. There will be winners and losers. For example, non-competitive domestic industries may be harmed if trade facilitation leads to an influx of more competitive imports.<sup>649</sup> Despite the potential drawbacks, it is argued that it is more beneficial for a country to promote trade with others, rather than to pursue autarkic policies which will leave it excluded from accessing trade privileges, and also subject to trade barriers and retaliation from other nations.

Mercantilism and classical economics were studied and found to be unhelpful in explaining the link between trade and development. Instead, heterodox economics was found to be more useful because it explains that underdevelopment can affect the outcome of trade openness. It advises that a cautious and pragmatic approach be taken to trade openness by developing countries, such as the SADC states. This includes determinations of which measures are appropriate and when and how to implement them.

This thesis has argued that participating in regional and international agreements is an important component of a country's strategy to facilitate trade. However, it has found that there are many challenges to international compliance, as well as to domestic implementation of treaties. It has argued that these need to be addressed in order for the agreements to be effective.

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<sup>649</sup> Jeronim Capaldo argues that the TFA 'requires all countries to implement reforms from which only some countries will be able to benefit. Who wins and who loses remains to be seen but ... trade facilitation is likely to reinforce the current pattern of global income distribution, with potential negative impacts on developing countries and already disadvantaged individuals therein. Trade facilitation is only useful to trade expansion if countries face enough net external demand. But all countries cannot at the same time face higher net external demand. To believe they can is a trade hallucination.' Jeronim Capaldo, *Trade Hallucination: Risks of Trade Facilitation and Suggestions for Implementation*, No 14-02, GDAE Working Papers, GDAE, Tufts University (2014).

The thesis investigated the challenges to compliance and to implementation of trade facilitation agreements in SADC. Some significant insights can be drawn from the empirical studies that were undertaken in chapters 5 and 6. These identified several compliance and implementation challenges such as: lack of financial capacity to implement reforms, outdated laws that fail to install efficient structures and procedures in support of implementation, lack of political will, poor domestic and regional organisation, weak institutions that lack political and/or economic power to enforce commitments,<sup>650</sup> inadequate supporting infrastructure for reforms (e.g. ICT services), conflicting and duplicating commitments in diverse arrangements, human resource deficiencies, deficiencies in the agreements themselves,<sup>651</sup> and the agreements being too strict, in the sense that they do not leave room for variable geometry and, instead, insist on all of the members assuming the same obligations without flexibility and special and differential treatment.

The reason why states are willing to spend time and resources working on treaties is because they believe that, ultimately, they will reach an accord to cooperate to improve a situation to their mutual benefit. If, after all of those efforts, some states are unable to comply, or are able to evade their commitments, this will undermine the entire negotiation process and will threaten the willingness of other states to continue to comply and to implement the agreement. The compliance theories and Yong-Shik Lee's law and development theory provide us with insights on the connection between compliance and implementation deficiencies and the lack of progress in attaining treaty objectives. These theoretical insights highlight that factors such as the appropriateness of treaties to the country context, regulatory design, the quality of institutions and flexibility and capacitation are all necessary to support compliance and implementation.

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<sup>650</sup> The weakness can relate to their structure, powers, functionality or funding.

<sup>651</sup> For example, those that contain shallow provisions on trade facilitation, or fail to impose specific legally binding obligations on the parties, thus preventing the provisions from being usable as the basis of any concrete programmes on trade facilitation, or for any action to be taken to force compliance, because there is no concrete obligation.

The third concluding insight relates to the World Trade Organization's Trade Facilitation Agreement itself. This research finds that the TFA has many features that make it advantageous over the other frameworks for trade facilitation, and that these features make it likely that it will have a more positive impact on trade facilitation in the region. Its advantages were discussed in Chapter 7. At least four significant advantages for developing countries, such as those in SADC, can be highlighted. First, it allows members to assume only those obligations which they judge are within their capacity to implement and they may implement at their own pace.<sup>652</sup> This is important given that implementation challenges are unique to each country. The developed nations have already been implementing TFA-like provisions for years, so it is not as burdensome for them to comply with the TFA as it would be for poorer countries which are in the process of attempting to catch up. They also generally have more resources for the infrastructure, technologies, and the human capital that are needed to improve border functioning. Conversely, developing nations have less experience with implementing such measures. In addition, they often have other pressing developmental challenges that they are required to deal with. Their budgets do not easily allow for the accommodation of the costs of trade facilitation measures. Therefore, they will need more time and flexibility to implement such. The TFA provides for these flexibilities.

Secondly, it is likely that the TFA will be successful because there are many indications of the seriousness with which members take the agreement. For example, the protocol amending the Marrakesh agreement provides that "reservations may not be entered in respect of any of the provisions of this Protocol without the consent of the other members."<sup>653</sup> This was meant to fortify the security of the agreement. Further, the speed, and the spread of

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<sup>652</sup> Articles 13 –19.

<sup>653</sup> WT/L/940. The SADC Trade Protocol and the Southern African Customs Union agreement are both silent on the issue of reservations. Where a treaty is silent on the making of reservations the law is that reservations can be made as long as they are not 'incompatible with the object and purpose of the treaty.' Article 19 of the Vienna Convention on the Law of Treaties, 1969. The AfCFTA, following the Trade Facilitation Agreement, provides, in its article 25, that 'no reservation shall be made to this agreement.'

the ratifications which were received for the TFA might also indicate that members were keen to sign on to the regime. We also see its provisions being replicated again and again in various other agreements. For example, the African Continental Free Trade Agreement copies much of the TFA. This would not have been the case if the contents of the agreement were negatively perceived.

Thirdly, treaties are more likely to be successful if there is monitoring of implementation. This is made possible by the TFA's Trade Facilitation Committee. This oversight mechanism means that it will be perceivable if a country falls behind schedule in implementation and support can be extended to address the challenge. The agreement is also advantageous because the parties are required to establish national trade facilitation committees. This also improves monitoring and can also assist the SADC countries to overcome challenges that stem from domestic coordination failures. A further positive aspect is that the SADC states are protected from dispute resolution procedures in the TFA, for a certain period, as they adjust to its disciplines. There is also some scope (although limited and not concrete) for assistance from developed members and from the Trade Facilitation Facility. These elements all contribute to the addressing of some of the implementation challenges which have stymied the improvement of trade facilitation in southern Africa.

Finally, the TFA is also likely to be impactful because its contents are consistent with the SADC states' existing regional trade facilitation objectives and projects. No state is starting from scratch as far as trade facilitation reforms are concerned. The agreement contributes to ongoing efforts that involve development partners that are supporting the countries' implementation of trade facilitation measures. One example is the World Customs Organization's (WCO) Mercator Programme that was launched in

June 2015 as an initiative to support the implementation of the TFA.<sup>654</sup> It will be beneficial to have all of these ongoing programmes brought under the auspices of the TFA (by the Trade Facilitation Committee) because this may help to avoid coordination failures.<sup>655</sup>

These conclusions do not mean that the TFA is a perfect instrument. Nor that it is guaranteed to finally put an end to the trade facilitation challenges in SADC. It has been shown that the TFA is not without its faults or its critics.<sup>656</sup> The TFA is a highly controversial instrument. Many have levelled criticisms about the history of its creation, as well as its contents. For example, there are those who contend that the poorer WTO members were forced into agreeing to the agreement in order to obtain, or to continue to benefit from,

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<sup>654</sup> The WCO is one of the implementing agencies of the TFA through its Annex D status (along with the International Monetary Fund, Organisation for Economic Co-operation and Development, the United Nations Conference for Trade and Development and the World Bank), and special relationship with the WTO. Two days after the conclusion of the TFA, the WCO Policy Commission met in Dublin (9-11 December) and issued a document entitled the Resolution of the Policy Commission of the World Customs Organization on the Conclusion of an Agreement on Trade Facilitation by the World Trade Organization” (also known as the Dublin Resolution). The resolution welcomed the new agreement and committed to engage with the WTO on how the WCO could assist WTO members in the practical aspects involved in the implementation of the agreement (for example, needs-assessment, technical assistance). The WCO established a Working Group on the Implementation of the TFA (TFAWG). The history of cooperation and collaboration between the WCO and the WTO is also discussed in Hans Van Houtte, *The Law of International Trade*, Second Edition, Sweet and Maxwell, London, 2002, at 87 - 88.

<sup>655</sup> UNECA Op cit note 329 at 47 – 48.

<sup>656</sup> See for example, Alessandrini, Donatella, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (2010) Hart Publishing, Oxford; & Portland Ore.

certain concessions.<sup>657</sup> Other analysts aver that trade facilitation is not a pressing need for the SADC states. They note that these countries are grappling with more pressing developmental challenges and that, therefore, trade facilitation should not have been a priority area for their concern and their expenditure, in light of other greater challenges.<sup>658</sup>

Further criticisms are that that the provisions on technical assistance and capacity building are very weak and that this may render them ineffective. Trade facilitation interventions have been shown to be very costly. Many reforms will require huge capital investments which may take years to yield any observable positive effects. Other reforms will require recurrent expenditure. Developing countries cannot begin to plan and to effect such reforms without adequate assurance of sustainable support. The TFA does not extend such assurances. That the arrangements for funding are largely placed beyond the purview of the WTO is worrying. The WTO is only informed of progress in negotiations for funding, but it is not involved in monitoring the actual negotiations. This leaves room for exploitation and other consequences

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<sup>657</sup> The Third World Network reports that the Philippines (speaking on behalf of the Core Group of Developing Countries in the WTO) made a statement during a meeting of the NGTF (7<sup>th</sup> to 9<sup>th</sup> February 2005) wherein they quoted from a World Bank publication on trade facilitation which cautioned against ‘trying to compel countries’ reforms to adopt particular institutions or forms under threat of trade sanctions.’ Third World Network Info Service on WTO and Trade Issues, 17 February 2005, <https://twm.my/title2/twninfo184.htm>, accessed June 28 2019. The African countries had attempted to insist that entry into force of the TFA be provisional on the conclusion of other DDR issues. World Trade Organization, Negotiating Group on Trade Facilitation, TN/TF/M/3, 21 March 2005. Summary Minutes of the Meeting, held on 7 and 9 February 2005. However, the WTO Director General responded to this by stating that their actions ‘could compromise what was negotiated in Bali last December. As Chair of the Trade Negotiations Committee, I have no doubt that you are all very much aware of the implications of revisiting what was agreed in Bali. It would not only compromise the Trade Facilitation Agreement — *including the technical assistance element. All of the Bali decisions — every single one of them — would be compromised. Everything we worked together to achieve in Bali would potentially be lost.* (own emphasis). Trade Negotiations Committee, Informal TNC Meeting at the Level of Head of Delegation, JOB/TNC/39, 25 June 2014. This could be interpreted as an attempt to pressurise developing countries to abandon their proposal, even though it was in line with paragraph 47 of the Doha Declaration. Trade Negotiations Committee, Informal.

<sup>658</sup> Shawn Donnan ‘US calls time on Doha trade negotiations’ *Financial Times*, December 13, 2015, available at <https://www.ft.com/content/2f9a7ee4-a190-11e5-bc70-7ff6d4fd203a>, accessed on 7 April 2020. Rorden Wilkinson, Erin Hannah & James Scott Op cit note 555 at 1041.

that can stem from traditional development assistance programmes.<sup>659</sup> Therefore, as things stand, there is the potential for a stalemate where poor countries will argue that they cannot implement and the rich countries will argue that they cannot help.

These criticisms, and the politics behind them, are not irrelevant or to be swiftly over-looked or under-estimated. However, they do not completely negate the value of the agreement, nor what it may be able to achieve. They do not detract from its utility as yet another important tool at the disposal of the SADC states for facilitating their trade. The TFA's provisions cover many of the challenges that have been plaguing trade facilitation in SADC.<sup>660</sup> Therefore, the overall conclusion is that the World Trade Organization's Trade Facilitation Agreement will potentially contribute favourably towards the process of improving trade facilitation in SADC.

The Trade Facilitation Agreement cannot rectify all that is going wrong with trade and development in SADC. Trade facilitation is not, in and of itself, a main driver of trade flows or of economic development. Instead, there are a multitude of other factors that are also responsible for growth in the flows and value of trade, which the TFA cannot address. Therefore, other complimentary interventions will need to be under-taken, alongside trade facilitation reforms, if trade and development prospects are to improve. This brings us to recommendations on how the SADC countries should seek to maximise benefits from their participation in the TFA.

## 8.2. Thesis Recommendations

In terms of the theoretical insights gained, mercantilism and classical economics have been found to be largely unhelpful in convincingly explaining

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<sup>659</sup> As supposed by the dependency theory. This theory was conceived in the late 1950s by the Argentine economist Raúl Prebisch. See, for example, Love, Joseph, Raul Prebisch and the Origins of the Doctrine of Unequal Exchange, *Latin American Research Review* 15, no. 3 (1980): 45-72.

<sup>660</sup> For instance: publication (art 1), stakeholder consultations (art 2), advance rulings (art 3), appeal and review mechanisms (art 4) and border agency cooperation (art 8).

the relationship between trade and development. This is because they tend to be idealised and to ignore the realities of developing countries and the potential harm that could arise from them opening up their trade without due circumspection. The approach of heterodox economics is more useful to our analysis. It favours openness over closed markets. However, it equally recommends that a thoughtful and measured approach be taken to adopting measures to liberalise, as well as to facilitate trade. This approach is more appropriate, given the development context of the SADC countries. Therefore, on the guidance of heterodox economics, the SADC countries are advised to adopt a nuanced and strategic approach to their assumption and implementation of trade facilitation policies. They must carefully consider what policies are needed to advance their holistic development, and not just accept measures for acceptance sake. This will require them to base their decisions on concrete data. Time Release Studies, or other similar studies, can assist the countries to determine where the bottlenecks lie. They will need to accurately assess their needs (financial, technical and otherwise) and their current capacity to implement reforms. From there, they can then begin to plan needed reforms, prioritising those interventions that can be met more easily and which most align with their development goals.

SADC members need to recognise that inefficient borders are not an isolated phenomenon. The World Bank has reported that there is a correlation between performance in trade facilitation and the general ease of doing business in an economy.<sup>661</sup> Therefore, the countries must address issues that are related to broader structural transformation in their economies (for example, corruption, transparency, weak institutions, efficacy of dispute resolution etc.). Doing so might relieve some of the problems that are experienced at their borders.

In order to benefit from trade facilitation, SADC countries have to structurally transform their economies and move away from the production and export of

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<sup>661</sup> Op cit note 337.

primary goods (which are of low value, and where export prices are highly volatile). They have to increase their competitiveness. They need to focus on moving up the value chain. Without the development of supply side capacity, traders will not be able to take advantage of trade facilitation reforms. There needs to be recognition that there will be winners and losers when trade is facilitated. Therefore, the states will need to instal compensatory policies to ameliorate any potential negative effects that may befall those who might lose out from increased competition following increased trade inflows. Trade facilitation must not be seen as an event, but as a process. The TFA is indeed a useful tool for the SADC states to have in their arsenal, but only if they implement the complementary strategies that are required to make it effective.

Yong-Shik Lee's theory on law and development was also used in the thesis analysis. He had applied the theory to understand the development outcomes in South Korea, South Africa and the United States.<sup>662</sup> This thesis applied the theory generally to the SADC region, and in particular to the Kingdom of Lesotho. This has expanded our academic understanding of the applicability of the theory because the thesis has shown that it is applicable in a wider context and that it assists to explain many of the hindrances to facilitated trade in SADC and in Lesotho. The theory moves us to recommend that, in order for their laws to more effectively impact development, SADC states should establish clear and time-bound implementation targets. They should install monitoring mechanisms to ascertain whether implementation is being carried out in an effective manner. Redress mechanisms should be applied where necessary. In addition, there needs to be the measuring of progress and the dissemination of findings to all stakeholders, (internally within the countries, regionally and globally). The obligation to report would encourage accountability as well as provide opportunity for engagements on assistance, should progress be found to be stalling. Furthermore, reporting allows for good practices to be identified and copied.

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<sup>662</sup> Le Op cit note 94.

Finally, some insights have been gained from the compliance theories. The enmeshment theory elucidates the importance of strong norms and institutions for the successful implementation of reforms. This theory has been found to be relevant in explaining the trade facilitation challenges that persist in SADC. Many of the region's previous regional and multilateral agreements have weak norms. These have failed to, by and large, impose concrete and actionable obligations on members. The failure to install empowered institutions that focus exclusively on monitoring and enforcing trade facilitation commitments is a further critical omission that has led to the inefficacy of the agreements. Therefore, it is recommended that the states consider rectifying these shortcomings. It has been argued that the entry into force of the African Continental Free Trade Agreement and the World Trade Organization's Trade Facilitation Agreement will go a long way towards addressing these weaknesses, as both frameworks are slightly stronger, both normatively and institutionally.

The managerial approach to compliance argues that non-compliance with treaty commitments is not due to intended deviance but that, instead, it is a result of lack of capacity.<sup>663</sup> This was tested to see whether it can, in part, explain non-compliance with trade facilitation agreements in SADC. It was found that indeed this is the case. The instruments that the SADC states participated in pre-the TFA, did not pay sufficient attention to closing gaps in the members' technical and financial capacity. This played a role in the lack of compliance and, therefore, the lack of success of the treaties in alleviating trade facilitation barriers. This leads us to recommend that, alongside prioritising the formal enforcement of measures, the states should similarly concentrate on securing assistance to address their capacity deficits. Reforms to facilitate trade will require finances and this will require appealing for technical assistance in the form of the transfer of finances (for example, for

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<sup>663</sup> Chayes & Chayes Op cit note 118 at 204.

acquiring and improving infrastructure,<sup>664</sup> equipment and systems),<sup>665</sup> training (capacity-building), technology (e.g. ICT), and legal reform. SADC states have individually requested assistance through their submissions of Category C notifications to the WTO. However, it may be worthwhile for them to seek assistance jointly for regional priority areas. If they consolidate their requests, then perhaps donors would be more keen to give support knowing that the impact will be wider.

Although the TFA is an avenue for requesting technical assistance towards trade facilitation, it is emphasised that the SADC countries do not have to only rely on that mechanism. This is because there are many other programmes that have been assisting them hitherto. There are programmes that are run by entities such as the World Bank,<sup>666</sup> the World Customs Organization,<sup>667</sup> the United Nations Office on Drugs and Crime (UNODC),<sup>668</sup> the African Union, the African Development Bank (ADB),<sup>669</sup> the Canadian International Development Agency (CIDA), the Swedish International Development Agency (SIDA), the European Union (EU), the Norwegian Agency for Development Cooperation (NORAD), UKAID,<sup>670</sup> USAID Trade Hubs,<sup>671</sup> China-Africa Co-operation Forum, the United Kingdom's Department for

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<sup>664</sup> Infrastructure upgrades are a big part of what led to reduced delays in Churundu.

<sup>665</sup> Annex I: Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries. A/CONF.202/3. Page 21. And UNECA Op cit note 275.

<sup>666</sup> Through the Trade Facilitation Support Program (TFSP) which has provided assistance to countries such as Botswana, Lesotho, Madagascar, Malawi, eSwatini and Zambia to implement trade facilitation measures.

<sup>667</sup> For example, through the Mercator Programme, available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/wto-atf/mercator-programme/councilwco-mercator-programme.pdf?la=en>, accessed on 1 March 2017.

<sup>668</sup> For instance its Container Control Programme in collaboration with the World Customs Organization. <https://www.unodc.org/unodc/en/drug-trafficking/container-control-programme.html>, accessed 1 March 2017.

<sup>669</sup> It supports trade facilitation measures such as the implementation of one-stop border posts, coordinated border management and customs reform and modernisation. It does much to support trade facilitation through the Africa Trade Fund <https://www.africatrdefund.org/> and United Nations Economic Commission for Africa, African Union, African Development Bank, *Assessing Regional Integration in Africa: Bringing the Continental Free Trade Area About*, 2017. Op cit note 372.

<sup>670</sup> Improving hard and soft trade infrastructure, modernising customs systems, procedures and facilities.

<sup>671</sup> For the delivery of trade-related technical assistance, such as improvements in customs procedures in order to facilitate trade and further regional integration.

International Development (DFID), the United States' Millennium Challenge Corporation (MCC), and the United Nations Conference for Trade and Development (UNCTAD). In addition 'there are a range of project preparation funds operating in Africa providing finance for early stage development of regional projects, such as the NEPAD Infrastructure Project Preparation Fund (IPPF)'.<sup>672</sup> Some of these programmes are more transparent than the TFA's framework for technical assistance and, therefore, may be preferable to it.

It will be important for the states to ensure that assistance is effective. The African Development Bank is a large donor on the continent. It has studied and reported on the factors that enhance the effectiveness of technical assistance.<sup>673</sup>

- Aid effectiveness begins with good research about needs
- Recipients must request concrete and targeted assistance
- Requests for aid should be aligned with national priorities and regional programmes
- Recipient nations need to take ownership of the programmes by ensuring that it's what they need, and what they can commit to.

Therefore, the SADC countries are advised to not only place faith in donor-driven implementation, but to themselves, as far as possible, take responsibility and accountability for addressing their trade facilitation challenges. This is because much has been written about the dangers of donor dependency. SADC is already very donor dependent.<sup>674</sup> Donors can hijack agendas, support only what they will benefit from and impose harsh conditionalities. In addition, donor assistance is not stable or reliable funding,

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<sup>672</sup> Kennedy K Mbekeani *Understanding the Barriers to Regional Trade Integration in Africa* (2013) at 27.

<sup>673</sup> For example, African Development Bank *A Roadmap for Improving Performance on Aid Effectiveness and Promoting Effective Development: Turning Commitments Into Action* available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Rev%20-%20Roadmap%20Aid%20Effectiveness.pdf> accessed 12 July 2019.

<sup>674</sup> According to the African Union 79% of SADC's budget comes from donor funds.

and therefore projects that it supports might not be sustainable. Therefore, the states should seek external funds cautiously, when it becomes strictly necessary. It is recommended that they should focus on collaborating with each other. If they share their resources this could potentially make them stretch a long way. They can also mobilise domestic funding in support of trade facilitation reforms. In order to do this, they will have to address current deficiencies such as weak tax administration; high tax evasion and tax avoidance; corruption and pronounced incidents of illicit financial flows. They should also approach the private sector to partner with governments in trade-facilitating investments by way of public-private partnerships. To do so they would have to convince the private sector of the short, medium and long-term benefits of trade facilitation. The role of domestic resources in funding development was confirmed at the United Nations conference on Financing for Development.<sup>675</sup>

It is recommended that, in implementing reforms, they should begin with less-resource intense interventions. Some trade facilitation hindrances require mainly creativity. Borders can be redesigned to enable smooth and seamless movement from one process/station to another. The redesign should incorporate adequate signage and segregated lanes for commercial and private traffic, as well as parking bays for those vehicles that are still awaiting clearance. The layout should be such that perishable goods and non-perishable goods do not form part of a single traffic flow, and that the policies that apply to their clearance should be sensitive to the priority of clearing perishable products first and speedily. These important improvements do not require vast amounts of funding and, thus, the states may be able to achieve them swiftly. Other non-resource heavy interventions are:

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<sup>675</sup> Addis Ababa, Ethiopia, July 2015.

- Improving transparency and communication channels so that traders are able to know, before-hand, the applicable policies, laws and procedures and, therefore, have time to adequately prepare to comply with them
- Amending policies and laws that are causing unnecessary delays and compounding costs
- Simplifying trade requirements, for example, by reducing the number of documents and the steps in clearance processes<sup>676</sup>
- Making pre-clearance the norm.<sup>677</sup>

In final conclusion, it is encouraging that the TFA came about at a time when there had been significant pessimism about the World Trade Organization and wide speculation of its imminent collapse.<sup>678</sup> Members on both sides of the economic divide had become disillusioned with the WTO's arrangements.<sup>679</sup> Not only was the institution under threat, but the Doha Development Round (DDR) and Trade Facilitation Agreement negotiations themselves were nearly scuppered at several points due to the animosity that existed between

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<sup>676</sup> This may require money for consultancy services to identify where the excesses are, but the governments might be able to conduct that exercise on their own.

<sup>677</sup> The pre-clearance of goods has been a very useful contributor to the alleviation of gridlocks in Lesotho, South Africa and Zimbabwe.

<sup>678</sup> For example, Faizel Ismail cites key criticisms against the WTO, being the asymmetry and imbalanced outcomes that emerged after each ministerial conference, especially since 2008, and that processes became more exclusionary (for example decisions being taken by principal with increasing marginalisation of, in particular, the African Group, ACP and LDCs. Op cit note 604.

<sup>679</sup> See, for example, Jean-Pierre Lehmann, in *The Global Trade Agenda is in a Terrible Mess, Prospects are Grim -- Business Leadership is an Urgent Imperative* (2015), available at <https://www.forbes.com/sites/jplehmann/2015/03/24/the-global-trade-agenda-is-in-a-terrible-mess-prospects-are-grim-business-leadership-is-an-urgent-imperative/#38e097a63838>, accessed on 23 April 2020. Here he alleges that the GATT was a 'First World Trade Organization', and that its agenda was dictated by the interests of the West, to the exclusion of the South and that this caused greater acrimony as rounds progressed. He writes, 'I attended the following ministerial held in Cancun, Mexico, in September 2003. It was clear at the outset that the mood was confrontational, mercantilist and uncompromising: a dialogue of the deaf between North and South'. He continues '[i]n the last dozen years since Cancun, the global trade agenda has become murkier and far more convoluted. The failure to conclude a multilateral trade regime has spawned the huge proliferation of bilateral and regional trade agreements, most of which in fact contribute little to trade, adding layers of opaque complexity, and some of which cause outright trade distortion.' Experts point to examples such as the Trans-Atlantic Trade and Investment Partnership (T-Tip), the Trans Pacific Partnership (TPP), Brexit and US intentions to review their (North Atlantic Free Trade Area) NAFTA membership in support of such views.

members. This led some writers, like Susan Schwab, to write that the DDR could not be resuscitated.<sup>680</sup> Yet, the TFA emerged as the *one* agreement that was rescued out of the Doha round. The TFA would likely not have materialised had members been entirely unconvinced of its importance. This also lends confidence that there are good prospects that it will be successful. Although it may be argued that the TFA is unbalanced, it is not easy to have a global outcome that is completely balanced. It is apparent, from the provisions of the TFA, that there has been a genuine attempt to accommodate the diverse interests and challenges of the WTO members.

The TFA is not a perfect instrument. The SADC countries are encouraged to make the best use of its flexibilities, protections, and opportunities. This will require very careful categorisation by the countries, as well as adequate, effective and sustainable technical assistance and capacity building from development partners. It will take time before the gains of the TFA can be judged. This is because the lesser developed members still have many reforms to put in place. It will also take time for the assistance to come through and for implementation to begin. Therefore, it will be a while before we can concretely argue about the precise value of the agreement. All that we can do now is to speculate, anticipate, hope and advise the SADC countries on how best to chart their way forward in a manner that will allow them to reap the maximum benefits of this new regime. They should continue to pursue greater market access for their products. Improved market access, coupled with more efficient borders, will work best to their advantage. Being granted market access in the face of inefficient borders will render the access nugatory. Market access and trade facilitation should go hand in hand. Trade facilitation may also assist developing countries to trade amongst themselves. This would be of particular benefit to African developing countries because the rates of intra-Africa trade are comparatively lower than other intra-regional trade flows.

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<sup>680</sup> Susan C Schwab 'After Doha: Why the negotiations are doomed and what we should do about it' (2011 ) May/June *Foreign Affairs*,, available at <https://www.foreignaffairs.com/articles/2011-04-09/after-doha>, accessed on 23 April 2020.

In conclusion on this work: this thesis set out to explain the relationship between trade and development, to establish the reasons for the lack of effectiveness of trade facilitation agreements in SADC and to determine the unique advantages of the Trade Facilitation Agreement. The introductory chapter explained that there are different impediments to facilitated trade. This thesis has shown how these impediments manifest in the Southern African Development Community in particular. In addition, the chapter also introduced the concept of trade facilitation and argued that, like trade liberalisation, it is an important component of a country's foreign trade policy because of its potential benefits to development, holistically speaking.

The introduction argued that agreements are important tools for countries to use to effectuate cooperate in facilitating trade. Chapter 4 examined the agreements that SADC countries are bound by and evaluated their strengths and weaknesses. It concluded that the agreements are generally sound, however, compliance and implementation issues prevent them from being more effective. This was the argument that was proposed from the very beginning. The introduction had argued that it is problematic that the agreements are not being effective because it means that they are unable to contribute to developmental efforts. Chapter 4 interrogated the challenges to compliance while chapters 5 and 6 explored challenges to implementation.

The argument was made, in chapter 1, that the World Trade Organization's Trade Facilitation Agreement has unique advantages that give it the potential to assist in the resolution of these compliance and implementation issues. Chapter 7 considered what these features are. It concluded that they are primarily the flexibilities that are availed through the extension of special and differential treatment,<sup>681</sup> the scope for technical assistance, as well as the strength of the institutional arrangements, at the organisational level, as well as at member country level.<sup>682</sup>

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<sup>681</sup> By the freedom to categorise commitments.

<sup>682</sup> Through the Committee on Trade Facilitation and National Committees on Trade Facilitation.

Therefore, this thesis has made three main contributions to the academic literature. First, it has provided academics with an extensive and detailed review of the legal and academic literature on trade facilitation in the Southern African Development Community. Secondly, by way of a focused case study, it has provided a review of the legal frameworks on trade facilitation in Lesotho. This included a detailed exploration of the implementation problems that are experienced by the country in attempts to fulfil the trade facilitation commitments that it has undertaken in regional and international agreements. This is important because it indicates the peculiar circumstances and challenges of, not only a SADC country, but also a land-locked least developed country, which is the type of country that is most likely to experience and to have its economy harmed by trade that is not appropriately facilitated.

Lastly, the thesis has made a contribution to the theory of law and development by applying it in a setting (the SADC region) and to a topic (trade facilitation) where it has, hitherto, not been applied. This thesis has also provided policy makers and trade negotiators with several insightful policy recommendations on developing country perspectives in international negotiations. This includes the need for selectivity in electing to participate, careful consideration of commitments, greater assertiveness in securing their objectives and the importance of flexibilities and technical assistance.

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<sup>683</sup> The reference to years signifies the year of signature.

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<sup>684</sup> The reference to years signifies the year of signature.

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## Annex 1- Lesotho – South Africa Borders

There are thirteen border posts between the Kingdom of Lesotho and the Republic of South Africa. Five are designated as ‘commercial border posts.’ Trade can only be conducted through commercial borders posts. The other border posts can only be used for the movement of persons.

Lesotho Border Post	South Africa Border Post	Opening Hours
Maseru Bridge*	Maseru Bridge	24 hrs
Maputsoe*	Ficksburg Bridge	24 hrs
Caledonspoort*	Caledonspoort	06:00 - 22:00
Qacha's Nek*	Qacha's Nek	06:00 - 22:00
Van Rooyen's Gate*	Van Rooyen's Gate	06:00 - 22:00
Tele Bridge	Tele bridge	06:00 - 22:00
Makhaleng Bridge	Makhaleng Bridge	08:00 - 16:00
Peka Bridge	Peka Bride	08:00 - 16:00
Ramatšeliso	Ramatšeliso	08:00 - 16:00
Sani Pass	Sani Pass	08:00 - 16:00

\* indicates a designated commercial border post.

## Annex 2 – Policies and Laws Regulating Trade in Lesotho

### Policies

National food safety policy (2014).

National industrial policy (2010).

National vision 2020 (2003).

National quality policy.

### Legislation

Agricultural marketing act No. 26 of 1967.

Companies act No. 25 of 2011.

Customs and excise act No. 10 of 1982.

Export and import control act No. 16 of 1984.

Import restrictions (amendment) regulations No. 24 of 2009.

Road traffic act No. 8 of 1981.

Toll gates (amendment) regulations 2018.

Trading enterprise act No. 11 of 1993.

Value added tax act No. 9 of 2001.

## Annex 3 - Goods Subject to Permits or Licensing Requirements in Lesotho<sup>685</sup>

### Goods Requiring Import Permits

Goods subject to licensing	Legislation	Administrator	Scope of application
11. Bees	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Livestock Disease Act</li> </ul>	Ministry of Agriculture and Food Security	All countries
12. Diamonds and other precious stones, cores and samples of precious stones	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Precious Stones Order 1970</li> <li>Precious Stones (Kimberley Process) Regulations 2003 (Legal Notice No. 66 of 2003)</li> <li>Precious Stone (Prescription of Forms and Licence Fees) Regulations 2004 (Legal Notice 64 of 2004)</li> <li>Precious Stones (Diamond Dealer's Licence Grant and Renewals) Regulations 2004 (Legal Notice No. 160 of 2004)</li> </ul>	Ministry of Natural Resources	All countries
13. Clothing (new and used)	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Export and Import Control Act, 1984 (Amended in 1996)</li> </ul>	MTI	Extra-SACU countries only
14. Tyres (new and used)	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Export and Import Control Act - Amendment 1996 (Legal Notice No. 5 of 1996)</li> </ul>	MTI	Extra-SACU countries only
15. Vehicles (new and used)	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Export and Import Control Act - Amendment 1996 (Legal Notice No. 5 of 1996)</li> </ul>	MTI	Extra-SACU countries only
16. Alcoholic beverages (i.e. wines, spirits and beer)	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Liquor Licensing Act 1998 (Act No. 8 of 1998)</li> </ul>	Ministry of Tourism, Environment and Culture	All countries
17. Petroleum fuel	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Fuel and Services Control Regulation for Petroleum Fuel 1999</li> </ul>	Ministry of Natural Resources	Extra-SACU countries only
18. Bank notes, gold securities or foreign currency	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Exchange Control Regulations, 1989 (Legal Notice No. 175 of 1989)</li> </ul>	Central Bank of Lesotho	All countries
19. Medicines, medical devices, drugs and toxic chemicals	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Dangerous Medicines Act 1973</li> </ul>	Ministry of Health and Social Welfare	All countries
20. Explosives	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> <li>Internal Security (Arms and Ammunition) Act 1966</li> </ul>	Ministry of Home affairs	All countries
21. Fire arms and ammunitions	<ul style="list-style-type: none"> <li>Import Restrictions Regulations - Amendment 2009 (Legal Notice No. 175 of 2009)</li> </ul>	Ministry of Home affairs	All countries

Source: World Trade Organization, *Trade Policy Assess*, No. WT/TPR/S324, 2015.<sup>686</sup>

<sup>685</sup> Source: World Bank Group, World Trade Organization Trade Facilitation Agreement Lesotho Validation and Reform Map, Working Draft, May 2016.

<sup>686</sup> MTI = Ministry of Trade and Industry; SACU = Southern African Customs Union.

## Goods Requiring Export Permits

Goods subject to licensing	Legislation	Administrator
Cereals and legumes (wheat, maize, sorghum, barley, oats, peas and beans)	Agricultural Marketing (Cereal and Legume Export) Regulations 1972 (Legal Notice No. 33 of 1972)	Ministry of Agriculture and Food Security
Wool and mohair, hides and skins	Importation and Exportation of Livestock Products Proclamation 1972 (Amendment) Act No. 21 of 1984	Ministry of Agriculture and Food Security
Fish	..	..
Firearms and explosives	Internal Security (Arms and Ammunition) Act 1966 (Act No. 17 of 1973)	Ministry of Police
Drugs and psychotropic substances	Lesotho Dangerous Medicines Act 1973 (Act No. 21 of 1973)	Ministry of Health
Medicines	The Medical, Dental and Pharmacy Order 1970 (Order No. 13 of 1970)	Ministry of Health
Rough diamonds	Precious Stones (Kimberley Process) Regulations 2003, (Legal Notice No. 66 of 2003)  Precious Stones (Prescription of Forms and Licence Fees) Regulations 2004 (Legal Notice No. 64 of 2004)	Ministry of Mining
Hazardous waste or substances	Environment Act 2008 (Act No. 10 of 2008)	Ministry of Tourism, Environment and Culture

Source: World Trade Organization, *Trade Policy Assess*, No. WT/TPR/S324, 2015.

## Annex 4 – List of Fieldwork Respondents

### I. Representatives of Regulatory Institutions<sup>687</sup>

The Ministry of Trade is the principal policy maker in terms of issues related to cross-border trade. The Ministry of Public Works is responsible for state infrastructure. The Ministry of Agriculture approves the import and export of agricultural products and implements sanitary and phytosanitary measures. The Ministry of Health approves the import and export of certain products on account of their health implications. The Lesotho Revenue Authority is responsible for customs collection. The Lesotho Mounted Police Services is responsible for security at the border post.

Respondent Name	Title	Institution
Tseko Nyesemane	Deputy Commissioner Customs	LRA
Motheba Malibeng	Chief Trade development Officer	MTI (NTFC)
Limpho Sopeng	Marketing Manager	LNDB
Hloulha Lelosa	Operations Manager	DTT
Liau Ramokoatsi	Clerk	DoA (Livestock)
Mofokeng Kolo	Assistant Commissioner	Police Services
Bataung Koenene	Head Crops Division	DoAR
Motlatsi Molatela	Senior Researcher	DoAR
Tšepiso Mosasane	Director	Immigration
Seipati Lekoeneha	Manager	Port Health

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<sup>687</sup> One requested anonymity.

## II. Border Officials<sup>688</sup>

Respondent Name	Title	Institution
Tseko Ngatane	Border Manager	LRA
Mohlomong Mothabeng	Inspector	DTT (Weighbridge)
T'seliso Lethunya	Inspector	DoA (Livestock)
Melida Lethola	Inspector	Port Health
Liteboho Mahase	Team Leader	LRA
Inspector Nkhasi	Officer Commanding	Police Services
Marapelang Nyane	Chief Immigration Officer	Immigration
Mamots'abi Lekhabunyane	Inspector	LRA

## III. Traders<sup>689</sup>

Respondent Name	Name of Company	Type of Business
Barbara Saunders	Office National- Manager	Stationary Shop
Mosito 'Noto	Triangle Freight	Clearing Agents
Motjopi Molise	Game Stores	Retail
Nthabiseng Makakole	Unitrans- Depot Manager	Fuel Transport
Mphatsa Molefe	-	Clearing Agent
John Maema	CNA- Manager	Stationary Shop
Mannuku Sekome	Steers - Franchisee	Food
Julia Mahata	Ackermans - Manager	Retail
Rethabile Pule	PicknPay – Finance Manager	Supermarket

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<sup>688</sup> Two requested anonymity.

<sup>689</sup> Five requested anonymity.

#### IV. Other Stakeholders

Respondent Name	Title	Institution
Bocalasa Senooe	Principle Investigation Officer	DCEO
Tšeliso Phafoli	Senior Statistician	BOS
Lieketseng Mokhahlane	Senior Statistician (Transport)	BOS
‘Mamoiloa Raphuthing	Planning and Research Manager	LNDC
Lefa Thamae	Director- Science & Technology	MCST
Tšotetsi Makong	Former Counsellor at the Lesotho Mission and Africa Group Chief Negotiator in the TFA	
Nkopane Monyane	Former Lesotho Ambassador to the WTO	
Yonov Frederic Agah	DDG WTO	

### **Ministry of Trade – Qualitative interviews**

The policies, laws and processes related to cross border trade:

- Do they include the inputs of traders when they are being devised?
- Are they communicated timeously to those to whom they apply, so that they can prepare to comply with them?
- Are they based on international best practice?
- Are they appropriate in number, in coverage, and in what they require from traders?
- Are they current and regularly amended in order to keep pace with global trends in the regulation of trade?
- Are they responsive to the needs of users?
- Are they transparently and consistently applied?
- Do they sufficiently penalise non-compliant behaviour so as to be a deterrent?

### **Ministry of Public Works – Qualitative interviews**

- What is the extent of, and causes of, congestion at the Maseru border?
- What markings and designations have been implemented at the border (e.g. are there designated bays for cargo handling, designated areas for inspections etc)?
- Are there facilities to assist traders and to mitigate the effects of delays at the border, for example, bonded warehouses or cold storage facilities for perishable goods etc?
- Is there the use of technology and mechanisation to speed up processes at the border?

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<sup>690</sup> Other secondary and related questions may emerge during the course of an interview.

## **Border Officials (From Customs, Agriculture and Health) – Qualitative interviews**

- What documents are required for trading (including licenses, certificates etc.)?
- What are the steps involved in border compliance (the methodology of trade)?
- What costs are levied on traders (duties, charges, fees, levies, penalties etc.)?
- What trade restrictions and prohibitions are currently applicable and what is their rationale?
- What inspections are conducted, for what purpose, how are they done, and how long do they take to execute?
- What are the dispute settlement rules and procedures to resolve complaints by traders?
- Questions on staffing
  - Is the quantity of staff adequate to run the border?
  - Is the quality of staff adequate (in terms of training), including the quality of the managerial staff?
  - Are there resources available for training staff (e.g. in the use of new technologies etc)?
  - Is there automation and other tools to assist staff to expedite the discharge of their functions?
  - Are staff sufficiently paid and incentivised to maximize their productivity?
  - What mechanisms exist to encourage co-operation and co-ordination between border authorities and to avoid occurrences such as turf wars and the duplication of efforts (e.g. is there dual recognition of forms and processes? Are documents transferable? Are systems linked? Do the same standards apply? etc.
- What do they believe would make the border more efficient?

- Are they aware of regional and multilateral commitments by the two countries to facilitate trade? Why do they believe these have not been implemented?
- Are they aware of whether the following practices happen at the border post?
  - Collusion between border officials and fraudulent traders
  - Informal fees
  - Forgeries: examples (e.g. double-invoicing etc.)
  - Illicit Trading e.g. smuggling, trade in counterfeit goods, trade in products that breach intellectual property rights, or that breach health and safety standards, drug trafficking, money laundering, or terrorist financing, trans-shipping etc.
  - Tax evasion and tax avoidance
  - Other cross-border crimes?

What causes them, and what mechanisms are there to detect and to address them?

Annex 6 – Questionnaire for Traders

**Respondent:** \_\_\_\_\_

**Contact Details:** \_\_\_\_\_

**Date and Place of Interview:** \_\_\_\_\_

**Section 1. Questions on Bureaucracy**

1. Are the documentation/certification requirements for trade at Maseru Bridge reasonable?

(a) Yes (Explain):

\_\_\_\_\_

(b) No (Explain):

\_\_\_\_\_

2. How many documents do you typically need in order for your import/export to be processed?

(a) Import: \_\_\_\_\_

(b) Export: \_\_\_\_\_

3. List the documents that are typically required of you when you trade:

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

(f) \_\_\_\_\_

(g) \_\_\_\_\_

(h) \_\_\_\_\_

(i) \_\_\_\_\_

(j) \_\_\_\_\_

4. Rate the efficiency of the border clearance procedures at Maseru Bridge.

- (a) Excellent
- (b) Very Good
- (c) Good
- (d) Poor
- (e) Very Poor

5. What are the procedures that apply when you import/export?

**Import:**

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
- (d) \_\_\_\_\_
- (e) \_\_\_\_\_
- (f) \_\_\_\_\_
- (g) \_\_\_\_\_
- (h) \_\_\_\_\_

**Export:**

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
- (d) \_\_\_\_\_
- (e) \_\_\_\_\_
- (f) \_\_\_\_\_
- (g) \_\_\_\_\_
- (h) \_\_\_\_\_

6. How long does it typically take to process your trade?

- (a) Import: \_\_\_\_\_
- (b) Export: \_\_\_\_\_

7. What, in your opinion, should be done to speed up processes at the border post?

(a)

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(b)

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(c)

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8. (i) Are you aware that Lesotho and South Africa have bilateral, regional and international commitments to facilitate trade?

(a) Yes

(b) No

(ii) Do you believe that the commitments are being followed?

(a) Yes (Explain): \_\_\_\_\_

(b) No (Explain): \_\_\_\_\_

## **Section 2: Questions about the Cost of Compliance**

1. Are the fees related to cross-border trade reasonable?

(a) Yes (Explain): \_\_\_\_\_

(b) No (Explain): \_\_\_\_\_

2. What are the fees that you typically have to pay when you trade (before and during trade)?

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

(f) \_\_\_\_\_

(g) \_\_\_\_\_

(h) \_\_\_\_\_

3. How much do you typically pay when you conduct your trade (per transaction)?

M \_\_\_\_\_

4. Are you aware of any penalties that are charged for non-compliance with border procedures/requirements?

(a) Yes

(b) No

5. If YES: which penalties are you aware of?

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

(f) \_\_\_\_\_

6. Are the penalties for non-compliance reasonable?

(a) Yes (Explain): \_\_\_\_\_

(b) No (Explain): \_\_\_\_\_

7. Is there transparency in the manner of the charging of costs and penalties at the border?

(a) Yes (Explain): \_\_\_\_\_

(b) No (Explain): \_\_\_\_\_

8. Do you believe that high fees and penalties contribute to bribery?

(a) Yes (Explain): \_\_\_\_\_

(b) No (Explain): \_\_\_\_\_

9. What, in your opinion, should be done to make the border post cheaper to use?

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

### **Section 3: Questions on Dispute Settlement Mechanisms at the Border**

1. Are you aware of any dispute settlement mechanisms that you can access at the border should you have any dispute related to the conduct of your trade?

(a) Yes

(b) No

2. Are the dispute settlement procedures clear and handled timeously?

(a) Yes

(b) No

3. Are there managers at the border who can intervene to quickly resolve disputes?

(a) Yes

(b) No

4. Are there efficient appeals procedures?

(a) Yes

(b) No

5. Are you aware of whether any of the following practices happen at the border post?

(a) Collusion between border officials and traders in the commission of illegalities

(b) Informal fees being charged

(c) Forgeries (for example double invoicing)

(d) Illicit trading (for example smuggling, trade in counterfeit goods etc)

(e) Tax evasion and tax avoidance

(f) Other cross-border illegalities \_\_\_\_\_

6. What do you believe are the causes of the above illegal practices?

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

7. What mechanisms are you aware of that are being used at the border to detect and address such illegalities?

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

## Annex 7 - List of Preferred Traders

	Name of Company	Sector
1	AfriSam (Lesotho)(Pty)Ltd	Retail
2	Liqhobong Mining Development Co.	Mining
3	Shoprite Lesotho	Retail
4	U-save Supermarkets	Retail
5	OK Bazaars	Retail
6	Lesotho Milling Company	Manufacturing
7	Let'seng Diamond	Mining
8	Maseru Toyota/Pioneer Motors	Retail
9	Maputsoe Toyota (Maputsoe Motors)	Retail
10	China Geo-Engineering Corporation	Construction
11	Action Statistical Investments (PicknPay)	Retail
12	Woolworths Lesotho	Retail
13	Cool Foods (Gentle Giants, Ltd)	Distribution
14	AVANI Lesotho (Pty) Ltd	Tourism

## Annex 8 - Working Shifts at the Maseru Bridge

Institution	Shifts	Number of Employees per shift	Notes
Lesotho Revenue Authority <sup>691</sup>	6:00am – 2:00pm 2:00pm – 10:00pm 10:00pm – 6:00am	For imports: on average, 13 per day shift & 8 per night shift, (because there is generally less traffic at night). The busiest shift is 2:00pm - 10:00pm For exports: 1	Fewer staff on weekends because there is less traffic then. More staff are deployed between Tuesdays & Fridays, because those tend to be the busiest days for trade. More staff can be added as temporary workers during peak times (e.g. Easter and Christmas).
Department of Agriculture	7:00am - 3:00pm 3:00pm - 10:00pm 10:00pm – 7:00am	1	Staff shortage means that inspections can take long and leave the office vacant. In addition, it is not possible to attend training because that would leave the office vacant.
Port Health	7:00am - 5:00pm 5:00pm - 7:00am	1	An employee will be on day duty for three consecutive days, then on night duty for three consecutive nights, then off duty for one day.
Department of Traffic and Transport (weighbridge)	6:00am – 2:00pm 2:00pm- 10:00pm 10:00pm-6:00am	3 per shift	

<sup>691</sup> NB they also serve at the toll gates.

## Annex 9 – Selected Fieldwork Findings

### Select Fieldwork Findings

**Disclaimers:**

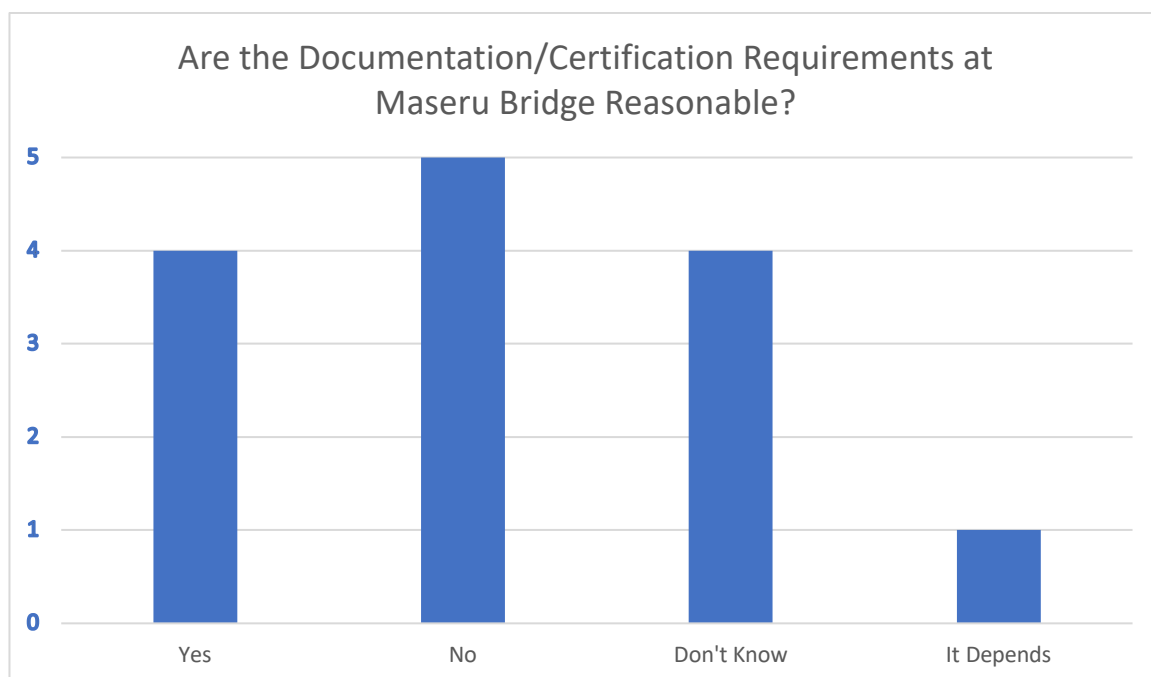
This presents the inputs of traders in Lesotho. The inputs of other trade facilitation stakeholders could not be quantified because there was no commonality in the questions that were posed to them, and, further, all of the questions were open-ended.

Not every question from the traders questionnaire is diagrammatised hereunder. Only the responses to select questions that raise interesting insights are presented.

The charts may not be perfectly accurate because they are based on the subjective perceptions, experiences and recommendations of the traders. The *quality* of the responses, rather than the *quantity* of responses was what was of the essence.

### Section 1: Questions on Bureaucracy

Question 1 sought to discover the perceptions of traders regarding the reasonableness, or otherwise, of the trade documentation/certification requirements at Maseru Bridge. The majority of traders answered that the requirements are unreasonable.



The main reason that was given by those who judged the requirements to be reasonable was that the requirements are not unduly difficult to comply with. The main complaint of those who responded that the requirements are unreasonable was that the requirements change too often and that they

become ever more demanding when they do change. This thesis has argued that a major cause of delays at SADC borders is the plethora of trade requirements. Furthermore, that, when the requirements change often, and without much advance warning to the affected traders, this also leads to increased time and cost of trading. This is because uninformed traders will arrive at borders unprepared for what is expected to process their trade, and, thus, likely non-compliant with the requirements.

4 out of the 14 interviewed traders explained that they don't know whether or not the requirements are reasonable because they employ the services of clearing agents and, therefore, they are not personally familiar with what the requirements are. This is a common trend in Lesotho. In order to escape the frustrations of cross-border trading procedures, many businesses commission clearing agents. Although this may lessen the duration of trade (because the agents become adept at speedily manoeuvring the diverse procedures) this adds to the trading costs for traders. One trader reported having incurred a cost of M15, 000 in one month in clearing agent fees.<sup>692</sup> One clearing agent answered the question as "it depends." The explanation given was that, the requirements are reasonable when intra-SACU trade is involved, but unreasonable when extra-SACU products are in issue.

Questions 2 and 3 in the questionnaire are related. Traders were asked how many documents they are typically required in order to import and / or export, and what the documents are. The point of the question was not to find out what the documents are, *per se*. The point was to discover whether the traders know what the required documents are. This might give an idea of the extent of transparency and communication in the regulation of trade in Lesotho. Chapter 3 of the thesis explained that, where there is a lack of transparency and insufficient strides taken by the authorities to ensure that traders are apprised of the trading requirements, this leads to confusion and

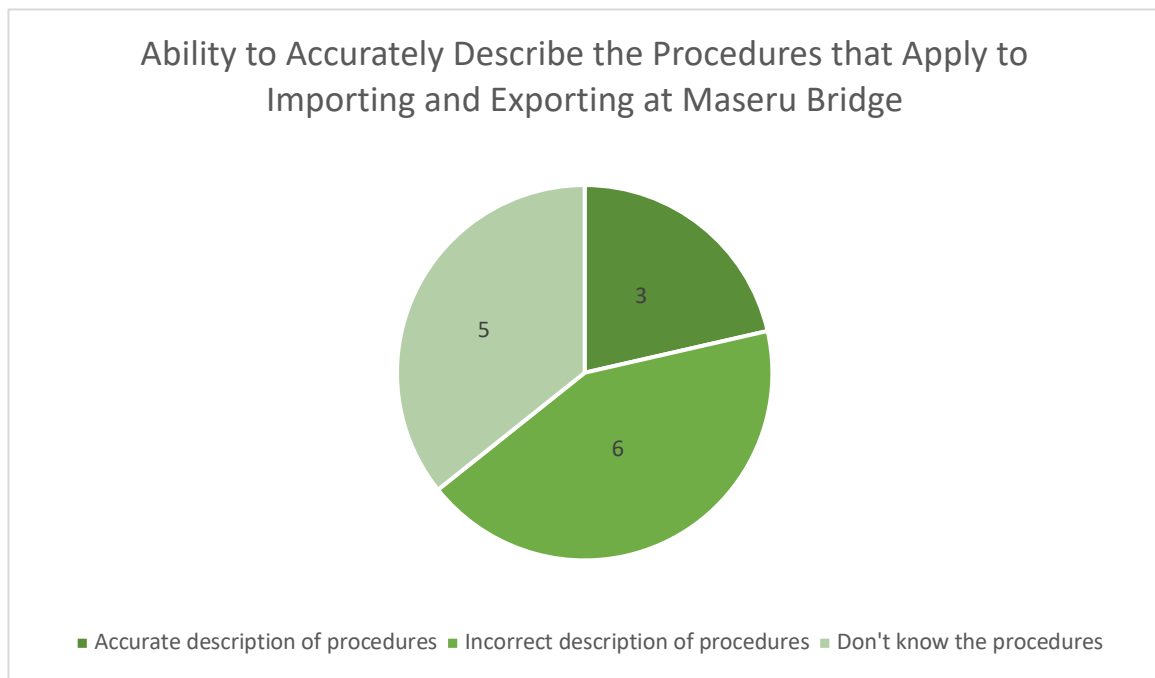
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<sup>692</sup> The Loti is equivalent to the South African Rand. This is approximately USD 925. Rate as at October 31, 2020. <https://www.xe.com/currencyconverter/convert/?Amount=15%2C000&From=ZAR&To=USD>.

lack of preparedness on the part of traders and these become major causes of increasing the time taken to process trade.

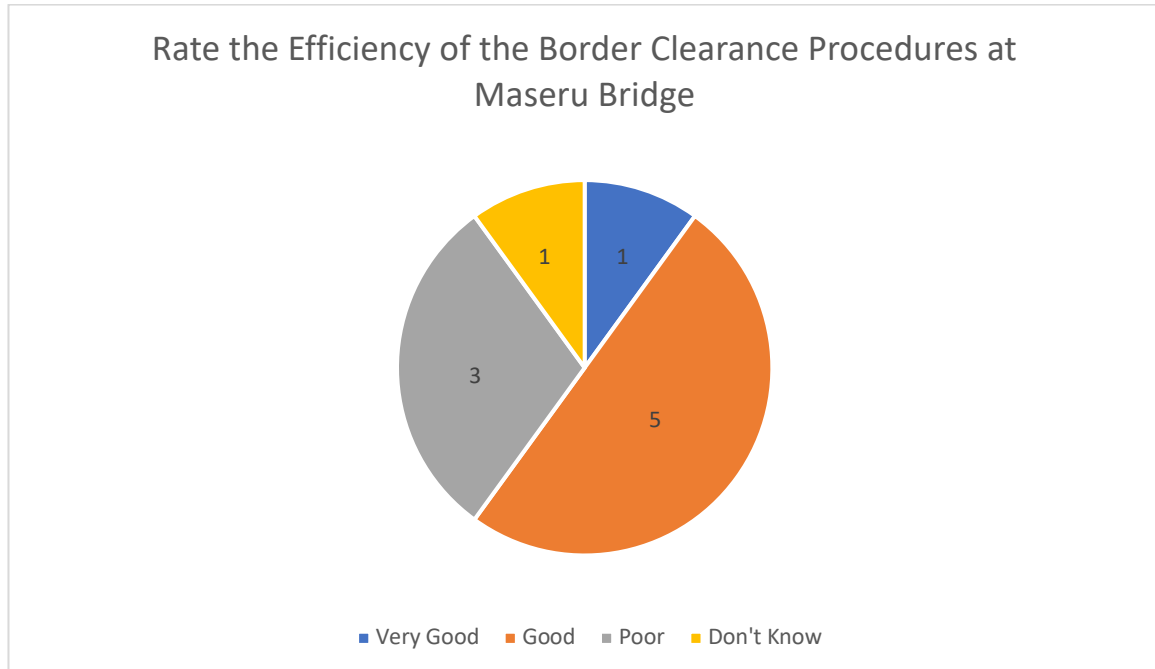
There were inconsistencies in the responses that were given. Traders reported requiring 2, 3, 4 or 9 documents. Six traders (including one clearing agent) admitted to being unsure of what documents are actually required. Some traders mentioned documents that are never requested to process cross-border trade.

Similar confusions were discovered when the traders were asked about their knowledge of trade procedures at Maseru Bridge (Question 5).



Only three of the traders were able to accurately describe the trade procedures at Maseru Bridge. One of these was a clearing agent. Six traders attempted to list the processes, but missed/confused some of the steps. Five traders reported that they don't know what the procedures are because they engage clearing agents who take care of the procedures for them and they have never been personally interested to find out what they entail.

Question 4 required traders to rate the efficiency of the border clearance procedures at Maseru Bridge. The options were: (a) Excellent, (b) Very Good, (c) Good, (d) Poor, (e) Very Poor.



No respondent judged the efficiency of the border procedures as excellent or very poor. The one trader who judged it as “very good” was a clearing agent. Of those who judged it to be good, one was a preferential trader and one was a fuel and gas trader. It would be expected that they would likely give generous ratings because preferential traders are not subjected to the same level of strictness with respect to conforming to the border procedures, as ordinary traders are. Likewise, because fuel carriers convey dangerous items, the processing of their trade is expedited due to the risk of any potential accident that may arise from their delay at such a small, highly populated area. The one trader who was reluctant to give a rating explained that it was because they have a clearing agent that takes care of the procedures, thus they feel they don’t have a basis for judging since they are never involved in the process.

Responses to question 6 (on how long it typically takes to process trade) ranged from:

- 20 - 30 minutes (reported by a clearing agent - who clarified that this depends on whether one's documents are compliant and nothing is queried and also if there is little traffic at the border)
- 1 - 2 hours (reported by a fuel transporter)
- "maximum 2 hours" (reported by a preferential trader)
- 4 hours
- 1 day, if minor inspections are required or if there is a lot of traffic at the border, for example, during the end of the month
- Up to 3 days if thorough physical inspections are undertaken.

The final question in section 1 of the questionnaire aimed to discover whether traders know that Lesotho and South Africa have international commitments to facilitate trade, and whether, in their opinion, based on their experience of trading in Lesotho, the commitments are being implemented, as apparent on the ground in their trading.

	Aware that Lesotho and South Africa have commitments to facilitate trade	Believe that the commitments are being implemented
Yes	8	1
No	2	5
Don't Know	0	2
No Response	4	6

Those who opined that the commitments are being implemented explained that they do see some improvements in efficiency, for example, by the use of the United Nations Conference on Trade and Development's Automated System for Customs Data (ASYCUDA) to process customs declarations. Those who responded that there is no evidence of compliance with the commitments said there have not been any improvements in the efficacy of the processing

of cross border trade. They speculated on possible reasons why this may be so. These were:

- the lack of implementation plans and strategies
- the lack of financial capacity to implement certain reforms, for example, automation.
- implementation is being sabotaged by certain interest groups. The argument was that there is political will at the top but not at the operational level. That border staff have a conflict of interest; they have an interest in the ongoing inefficiency.

Section 2 of the questionnaire focuses on the costs of trading – fees and penalties. The intention behind the questions was, first, to determine whether traders know the applicable trade fees, charges and penalties. One argument that is made in the thesis is that when governments apply numerous charges and penalties this risks increasing, not only the cost of trade, but also the time to trade. This is because of the added complexity of administering the diverse payments. This could, in turn, encourage the commission of unlawful practices, such as bribery and corruption, as traders attempt to evade the added costs and convoluted processes.

## Questions about the Costs of Compliance and Non-Compliance

	Are trade fees reasonable?	Are you aware of the penalties for non-compliance with trade regulations?	Are the costs of penalties reasonable?	Is there transparency in the manner of charging fees and penalties?	Do high fees and penalties contribute to bribery
Yes	3	7	0	1	6
No	2	7	1	2	1
It depends	1	-	-	-	-
Don't know/No opinion	8	-	13 <sup>693</sup>	11	14

The one respondent who reported that the reasonableness “depends” clarified that “it depends on the type of goods being imported.” The fees that are charged for trading in some types of goods are exorbitant, whereas for other categories of goods they are reasonable.

In question 2 traders listed their typical trade costs as being:

- depot costs
- clearing agency fees
- standing time of trucks
- fees for permits
- costs of traders licenses
- tax clearance certificate fees
- Value Added Tax
- toll gate fees
- customs duties
- provisional payments for the temporary importation of goods.

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<sup>693</sup> These respondents reported that they have not been charged any penalties.

Only 50% of the interviewed traders reported being aware of there being penalties for non-compliance. Those that were aware that there are penalties reported knowing about the following infractions as being punishable:

- vehicles being parked on the bridge between the South African side of the border and the Lesotho side
- the overloading of vehicles
- the lodging of false declarations
- the submission of trade expired permits.

They only knew of two penalties that could be imposed for non-compliance: fines and the confiscation of goods. Some traders complained that they have been penalised for minor transgressions, such as inadvertently making errors in their declarations. They felt that border agents should learn to make a distinction between attempted criminality and honest mistakes. They argued that a lot of time is wasted arguing with officials and trying to convince them to pardon the error. As an example, one trader who complained about the implementation of penalties at the Maseru Bridge is an importer of South African newspapers and magazines. Their suppliers require that any items that are not sold within a particular timeframe are to be returned. The trader reported that they had always been returning (exporting) the unpurchased materials without declaring them. They had believed that they only had to declare when they imported the items for sale, but were not aware that they also had to declare them upon export. On one occasion their vehicle was searched by customs officials and the items were found. The trader was informed that it is illegal to not declare returns and they were penalised. The trader felt wronged because they claimed that there was no notice anywhere regarding rules on the declaration of returns. Secondly, they felt that, as a first offence that was conducted in ignorance, the authorities should have given a warning before imposing a penalty.

### Section 3: Questions on Dispute Settlement Mechanisms at the Border

Section 3 asked traders about their knowledge and experience of the efficacy of the dispute settlement procedures at Maseru Bridge. It is a principle of trade facilitation that there be transparent and efficient dispute resolution procedures, including appeal and reveal procedures.

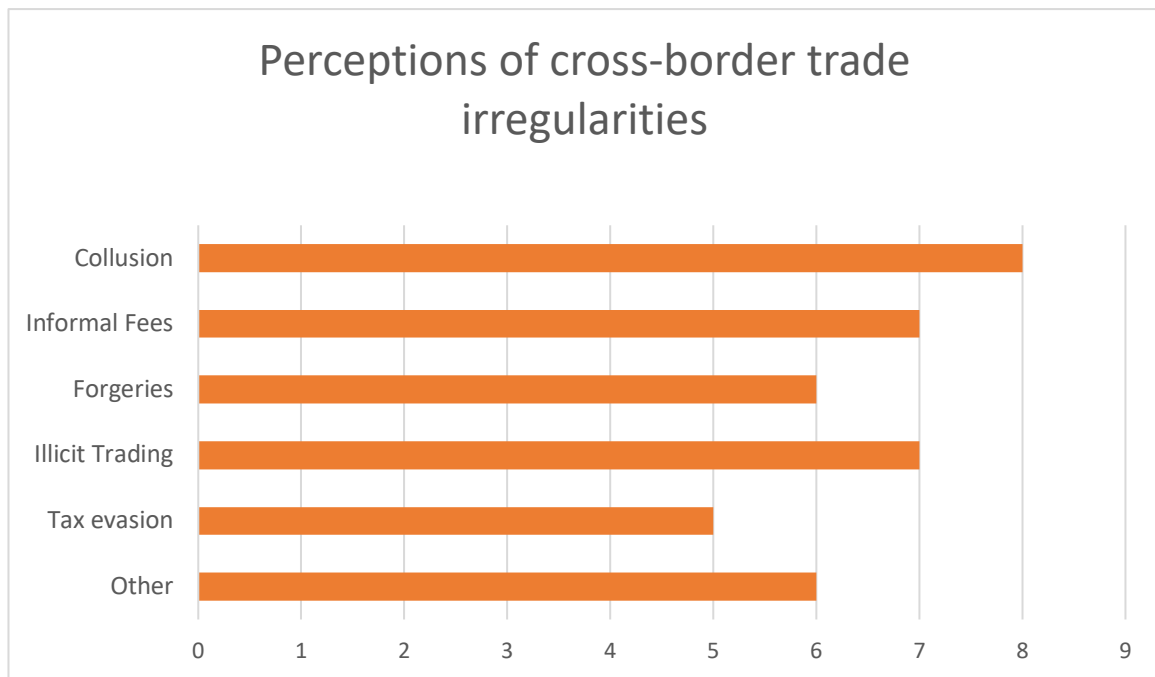
	Awareness of dispute settlement mechanisms at Maseru Bridge	Are the procedures handled timeously?	Are there managers at the border to quickly resolve disputes?
Yes	6	4	5
No	8	2	0
Don't Know	-	2	9
Never Used	-	6	-

The majority of the respondents (57%) were not aware of the dispute settlement channels at Maseru Bridge. Of those who knew about them, 67% judged the procedures as being expeditious. The two who answered that they don't know about the efficacy or otherwise said that:

(1) they always just pay a bribe, so they don't know what the actual procedures for resolving disputes are. Paying a bribe is a quick way of getting around a dispute and

(2) their clearing agent has been involved in resolving disputes with border agents so they do not have personal experience of what is involved.

Finally, the research was interested in discovering traders' perception of cross-border irregularities. Trade facilitation requires that, not only is trade fast and cost-effective but also that it is secure. One element of security is the elimination of cross-border crimes.



Traders suggested that the causes of illegal practices are:

- Traders attempts to avoid the inefficiency of the formal cross-border processes
- The stringency of trade regulations. For example, that traders cannot legally import certain prohibited goods, or goods in desired quantities etc.
- Traders want to increase their profits by evading payments that may arise from legitimate trade
- The poor working conditions of border staff (including salaries) motivates them to request bribes from traders