

Trade Facilitation: An Assessment of South African Experiences vis-à-vis WTO Disciplines

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Abstract

Despite an array of trade reforms undertaken to integrate the country into the international community, South Africa's performance in international trade has remained dismal, primarily due to its customs procedures and documentation, coupled with resulting high transaction costs. The facilitation of trade and integration into the international community has therefore been a challenging issue for South Africa. Recently, the republic has embarked upon reforming its existing customs regimes, by enacting new legislation that will replace the prevailing Customs and Excise Act 91 of 1964. This article attempts to analyse how far these reforms will adhere to the World Trade Organization's disciplines on trade facilitation that call for harmonization and simplification of customs related rules. The author evaluates the provisions of this new legislation in order to assess whether South Africa is ready to undertake the obligations imposed by the Agreement on Trade Facilitation.

Keywords

World Trade Organization, Agreement on Trade Facilitation, South Africa, Customs Modernization Programme

INTRODUCTION

South Africa has been facing persistent problems in terms of growth and has been unsuccessful at contributing significantly to global exports. Despite a wide array of trade reforms undertaken to integrate the country into the international community, South Africa's performance in international trade has remained dismal, primarily due to its customs procedures and documentation, coupled with resulting high transaction costs. These factors have in turn made businesses less efficient in international markets. While world trade has accelerated rapidly, accounting for economic efficiency and better standards of living among the international community, South Africa does not seem to have gained much from this experience. This can be demonstrated by the fact that, while global exports increased to 6.2 per cent per

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annum in the decade since 1994, South Africa's export performance reduced drastically to 5.6 per cent per annum during this period.¹ In addition, its contribution to world trade in terms of exports has also shrunk from 0.7 per cent to 0.5 per cent since 1994.² Since then, the country's contribution to global exports has been minimal, with a share of merely 0.51 per cent.³

The facilitation of trade and integration into the international community has therefore been a challenging issue for South Africa. The country is currently endeavouring to augment trade facilitation through its Customs Modernization Programme (the CM Programme) that in turn facilitated the enactment of the Customs Control Act, 2014 (CCA),⁴ the Customs Duty Act, 2014 (CDA)⁵ and the Customs and Excise Amendment Act, 2014 (CEAA).⁶ The new acts will subsequently replace the current Customs and Excise Act, 1964 (the 1964 Act)⁷ in order to facilitate streamlined and simplified customs procedures.⁸ Notwithstanding the fact that there has been a surge in trade facilitation measures that are also being implemented through regional trade commitments of which South Africa is a member, the overlapping nature

1 F Flatters and M Stern "Trade and trade policy in South Africa: Recent trends and future prospects" (June 2007, Development Network Africa) at 3, available at: <http://www.dnaeconomics.com/assets/dlas/FILE_063020080109_FILE_101820070217_Trade_and_Trade_Policy_in_South_Africa.pdf> (last assessed 2 April 2015).

2 World Trade Organization "Trade profile: South Africa" (September 2014), available at: <<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=F&Country=ZA>> (last accessed 4 April 2015).

3 Ibid.

4 Act 31 of 2014. This act regulates customs control procedures for imported and exported goods into and from the Republic of South Africa. The act was published in South Africa's *Government Gazette* on 23 July 2014 and will enter into force once it has been proclaimed by the president of South Africa, as provided for in sec 944 of the act.

5 Act 30 of 2014. This act regulates the imposition, assessment and collection of customs duties, and will similarly come into force once it has been proclaimed by the president of South Africa. It was published in the *Government Gazette* on 10 July 2014.

6 Act 32 of 2014. This act amends the Customs and Excise Act, 1964, which regulates the levying of customs and excise duties. It will also come into force once it has been proclaimed by the president of South Africa. It was published in the *Government Gazette* on 23 July 2014.

7 Act 91 of 1964.

8 At the moment, the 1964 Act continues to regulate customs related matters on imported and exported products, such as the levying of duties for customs and excise, and the imposition and administration of taxes; consequently it implements and enforces legislative obligations on traders for this purpose. However, appreciating that this act does not accord with international best practice pertaining to customs procedures, such as that set forth in the Revised Kyoto Convention and by the World Trade Organization, the CM Programme embarks upon replacing the current customs legislation with the three new acts mentioned above. (The International Convention on the Simplification and Harmonization of Customs Procedures, commonly referred to as the Kyoto Convention, came into force in 1974, as a result of the increasing influence of the WTO agreements. It was subsequently revised in 1999. The convention hence came to be known as the Revised Kyoto Convention, which came into force in 2006 and endeavours to increase transparency and predictability in customs administration.)

of these measures and commitments makes it vital that they are addressed at a multilateral level.

In this respect, the World Trade Organization's (WTO)⁹ Agreement on Trade Facilitation (TFA),¹⁰ which was negotiated during the ministerial conference that took place in Bali in 2013, could purportedly have some promising outcomes to offer South Africa in terms of a more sophisticated customs environment. The TFA is currently open for accession and requests members to notify the obligations that they will implement nationally before the agreement comes into force (category A notifications).¹¹ However, developing countries like South Africa also benefit from the special and differential treatment that in turn permits such members to notify provisions that they will only implement after a transitional period (category B notifications).¹² The mandate of the proposed agreement therefore includes facilitating transit between nations by easing customs related rules and procedures. The agreement thus promises tangible effects, in as far as acceptance of its Protocol of Amendment¹³ could potentially ease customs related rules and bring applicable South African laws into line with internationally recognized standards. However, South Africa has not yet notified any category A commitments. The TFA will be of vital interest to South Africa, considering that the cost of trade in the country has been particularly high in comparison to that of its export partners,¹⁴ coupled with its low level of participation in trade in

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- 9 Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) *The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 UNTS 154, (1994) 33 *International Legal Materials* 1144 (Marrakesh Agreement or WTO Agreement). The WTO was established by the Marrakesh Agreement, which consists of a preamble, 16 articles, four annexures and declarations, decisions and understandings. The agreement covers goods, services and intellectual property, with underlying principles of liberalization, commitments to lower customs tariffs and other trade barriers, subject to certain permitted exceptions.
- 10 WTO Agreement on Trade Facilitation, ministerial decision: WT/MIN(13)/36 - WT/L/911 (11 December 2013).
- 11 *Id.*, art 14.1(a).
- 12 *Id.*, art 14.1(b).
- 13 The WTO's General Council adopted the Protocol of Amendment on 27 November 2014, officially inserting the TFA into annex 1A of the WTO Agreement. As a result, the Preparatory Committee for Trade Facilitation is responsible for expediting the entry into force of the TFA and ensuring its efficiency thereafter. For a detailed discussion of the procedure for the Protocol of Acceptance, see WTO "How to accept the Protocol of Amendment to insert the WTO Trade Facilitation Agreement into annex 1A of the WTO Agreement" (14 April 2015), available at: <https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreement_e.htm> (last accessed 20 April 2015). According to WTO rules, the TFA, like any other WTO agreement, will not come into effect until it has been ratified by at least two thirds of members. Subsequently, the agreement will only create binding obligations on the members that have ratified it. To date only five WTO members have accepted the Protocol of Amendment: Hong Kong, China, the United States of America, Singapore and Mauritius.
- 14 South Africa is ranked 61st out of 189 countries with respect to the ease of starting a business in the country, according to the World Bank's 2015 "Doing business" report.

value-added. It is predicted that the TFA will be able to address these issues in order to integrate South African products into global markets.

This article endeavours to assess how far South Africa's CM Programme and customs legislation will eventually fit within TFA obligations once they come into force. South Africa has neither accepted the Protocol of Amendment nor notified any commitment that it is in a position to undertake by the time the TFA comes into force. Hence this article explores the extent to which the country will be ready to embark upon category A notifications, after the operationalization of its new customs legislation. Considering the rapid transformation of the South African customs regime, the author expresses the view that the republic would indubitably be in a position to undertake a host of category A notifications, albeit with the commencement of the new customs legislation. The author would hence propose the obligations that the country should notify as such and would also recommend those that it should notify under category B, obligations it will implement after a transitional period.

WHAT IS TRADE FACILITATION?¹⁵

Trade facilitation has been a vital aspect of international trade, given that the mere reduction of tariffs alone would not achieve the essential objectives of globalization. Hence, when impediments to trade more commonly exist in the form of non-tariff barriers, these impediments are often exacerbated when they come in the form of high transaction costs that occur due to arduous and costly customs procedures or corruption at the border, among others factors. It is in this respect that the significance of addressing these issues has long been understood and hence been included in the work programme of various international organizations and conventions.¹⁶

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The ease of starting a business in South Africa is therefore more difficult in 2015 than it was in 2014 when the country ranked 55th. See World Bank "Doing business 2015: Going beyond efficiency: Economic profile 2015: South Africa" (2015) at 18, available at: <<http://documents.worldbank.org/curated/en/124391468114549588/pdf/921280WP0Box380outh0Africa00Public0.pdf>> (last accessed 10 September 2016).

15 The current discussion draws heavily from the section on "Bali ministerial conference, 2013 and the provisions of the Agreement on Trade Facilitation: An overview" in S Khanderia-Yadav "What the World Trade Organization's Agreement on Trade Facilitation would mean to the emerging economies" (2015) 12/1 *Manchester Journal of International Economic Law* 33 at 44.

16 The concept of trade facilitation owes its origins to the Barcelona Convention and the Statute on the Freedom of Transit, 1921 (7 LNTS 11, 20 April 1921) coupled with the International Convention Relating to the Simplification of Customs Formalities, 1923 (30 LNTS 371, 3 November 1923). The World Customs Organization includes the mandate of trade facilitation via: the International Convention on the Simplification and Harmonization of Customs Procedures, 1974 (commonly referred to as the Kyoto Protocol: OJL 100, 21/04/1975, 1, 18 May 1973, amended 2006); the Resolution of the Customs Co-Operation Council on the Framework of Standards to Secure and

The World Bank opines that there is no standard definition of trade facilitation.¹⁷ The concept has been defined extensively by international organizations in their endeavour to promote fair trade practices¹⁸ and is commonly understood to mean “the simplification and harmonization of international trade procedures”, which in turn involve “the activities, practices and formalities in collecting, presenting and processing data required for the movement

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Facilitate Global Trade (June 2005), available at: <<http://www.wcoomd.org/en/about-us/legal-instruments/~media/18A4FCBBFBED41688CB72D9A510B4FA8.ashx>> (last accessed 2 April 2015); and the Harmonized Community Code Description and Coding System that was established in collaboration with the WTO. In addition, trade facilitation is also a mandate of international organizations, such as the United Nations Conference on Trade and Development, the UN Economic Commission for Europe (UNECE) via the UN Centre for Trade Facilitation and Economic Business (UN/CEFACT), the International Chamber of Commerce, the International Civil Aviation Organization, the International Maritime Organization, the International Organization for Standardization, the Organization for Economic Co-operation and Development (OECD), the World Bank and the WTO General Agreement on Tariffs and Trade (GATT). For a more detailed discussion of trade facilitation as part of the work programme of these conventions and organizations, see generally JG de Matons “Facilitation of transport and trade in Africa” in JG de Matons *A Review of International Legal Instruments: Facilitation of Transport and Trade in Africa* (2nd ed, 2014, International Bank for Reconstruction and Development / World Bank Publications) 13 at 17–20, available at <<https://www.ssatp.org/sites/ssatp/files/legal-instruments-en/Chapters/SSATP-Legal-Review-Chapter-II.pdf>> (last accessed 10 April 2015); T Yasui “Benefits of the Revised Kyoto Convention” (30 October 2014), available at: <http://www.carecprogram.org/uploads/events/2014/CCC-TA-Workshop-AZB/Key-Documents/009_112_213_Benefits-of-the-Revised-Kyoto-Convention.pdf> (last accessed 15 April 2015); and R Ireland “The WCO SAFE framework of standards: Avoiding excess in global supply chain security policy” (2009) 4/11–12 *Global Trade and Customs Journal* 341.

- 17 See also JS Wilson and C Mann et al “Trade facilitation: A development perspective in the Asia Pacific region” (October 2002, APEC Secretariat and World Bank), available at: <<http://siteresources.worldbank.org/INTRADERESESEARCH/Resources/544824-1320091873839/TradeFacilitationInAPEC.pdf>> (last accessed 7 April 2015). These authors opine similarly that there is no common understanding of how “trade facilitation” can be defined.
- 18 See UNECE “National trade facilitation bodies: Recommendation no 4” (2nd ed), adopted by UN/CEFACT, ECE/TRADE/242, Geneva, October 2001, para 15, available at: <http://www.unece.org/fileadmin/DAM/cefact/recommendations/rec04/rec04_ecetrd242e.pdf> (last accessed 10 April 2015); and UN/CEFACT “Recommendation no 4: National trade facilitation bodies CEFACT” (1974, UN, Geneva), which also defined the concept of trade facilitation. The mandate of trade facilitation also sees reflections in the provisions of GATT, 1947. Khanderia-Yadav “What the World Trade Organization’s Agreement”, above at note 15 at 37–41. In particular, GATT, 1947, arts V, VIII and X endeavour to ease customs rules and border related procedures, with the effect of reducing transaction costs between nations and consequently promoting free trade. In this regard, GATT, 1947, art V strives to promote freedom in transit so as to reduce unwarranted delays in international trade. Art XIII underscores the need to reduce fees and other customs related formalities so as to be proportionate to the cost of services rendered. Lastly, art X promotes transparency in international trade so as to increase competitiveness.

of goods in international trade".¹⁹ It is in this context that the concept is most generally understood to incorporate the procedures and controls that seek to regulate the movement of goods across national borders while reducing costs and improving efficiency.²⁰

In general, therefore, trade facilitation includes the simplification of customs rules and procedures in a harmonized manner, so that trade transaction costs (TTCs) are reduced. Portugal-Perez and Wilson defined TTCs as the costs included for the purpose of exportation and importation when the goods reach the final consumer, such as costs related to border issues, transportation, behind-the-border matters and costs essential for complying with the rules of origin.²¹ The absence of simplified customs rules and procedures, high transportation costs and the presence of corruption at borders in turn lead to low international competitiveness and consumer welfare, increasing the cost of the final merchandise.²² Consequently, these factors tend to increase the cost of starting a business in countries where customs rules are complicated and not harmonized with international standards, making the objective of international trade rules defunct. Hence, even while the presence of high tariffs acts as an impediment to free and fair trade, the presence of high trade costs is indeed more detrimental²³ and can most effectively be addressed with the harmonization of rules and standards in this regard.²⁴

19 WTO "WTO: A training package: What is trade facilitation?" (1998).

20 P Hansen and L Annovazzi-Jakab "Facilitating cross border movement of goods: A sustainable approach" in RZ Lawrence, J Blanke, MD Hanouz and J Moavenzadeh *The Global Enabling Trade Report* (2008, World Economic Forum) 67 at 67, available at: <http://www.weforum.org/pdf/GETR08/Chap%201.5_Facilitating%20Cross-Border%20Mvt%20of%20Goods.pdf> (last accessed 25 April 2015).

21 A Portugal-Perez and JS Wilson "Trade costs in Africa: Barriers and opportunities for reform" (2008, The World Bank Development Research Group policy research working paper no 4619) at 4–18, available at: <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Internal-Training/Portugal-Perez_Wilson_Trade_Costs_Africa_paper.pdf> (last accessed 20 April 2015).

22 "Trade facilitation and intra-African trade" at 203, available at: <<http://www.mcli.co.za/mcli-web/downloads/ARIA4/chap6.pdf>> (last accessed 30 April 2015).

23 See generally OECD "Trade costs: What have we learned? A synthesis report" (15 April 2013) (Working Party of the Trade Committee trade policy paper no 150, TAD/TC/WP(2013)3/FINAL), available at: <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2013\)3/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2013)3/FINAL&docLanguage=En)> (last accessed 10 September 2016), which underscores how non-tariff barriers can potentially double the restrictive effects of tariffs for a significant number of goods and services; C Milner "Protection by tariff barriers and international transport costs compared" (Leverhulme Centre for Research in Globalization and Economic Policy research paper no 2002/01), available at: <<http://beta.nottingham.ac.uk/gep/documents/papers/2002/02-01.pdf>> (last accessed 12 April 2015), which, while analysing US exports into the EU, demonstrates that non-tariff barriers in the form of high transaction costs are far more overreaching than tariffs; and P De "Trade, infrastructure and transaction costs: The imperatives for Asian economic co-operation" (2006) 21/4 *Journal of Economic Integration* 708.

24 See generally H Wagner "Costs of legal uncertainty: Is harmonization of law a good solution?" (paper presented at UNCITRAL Modern Law for Global Commerce Congress,

Against this backdrop, the harmonization of procedures that reduce customs barriers and corruption among other things is currently one of the most deliberated topics in international trade.

TRADE FACILITATION AND THE WTO

Trade facilitation has historically been part of the WTO to some extent; see articles V, VIII and X of the General Agreement on Tariffs and Trade (GATT), 1994. Given the limitations of these provisions, a Negotiating Group on Trade Facilitation was formed in 2004 to debate the practicality of a prospective TFA and consequently draw on these provisions in an attempt to provide further clarification in a more comprehensive manner. Hence, the TFA elucidates procedural formalities in order to achieve an improved customs environment and reinforces the significance of improved customs procedures and formalities, which can be better achieved when these are published so as to be public knowledge.

Currently, the mandate of trade facilitation, ie the TFA, is part of annex 1A of the WTO Agreement. Accordingly, the TFA is open for ratification and will enter into force once it has been ratified by two thirds of WTO members. In the meantime, as mentioned above, WTO members have already begun to notify the agreement's "category A notifications", obligations they will be in a position to implement when the TFA comes into force.²⁵

Consequently, the WTO's universal membership, with a blend of countries at different stages of development, makes it a unique forum to address this issue. While the viability of the practicalities of a TFA had been a part of the WTO's mandate since the first ministerial conference in Singapore²⁶ and subsequently as part of the Doha Development Agenda in 2001,²⁷ the WTO was

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Vienna, 9–12 July 2007), available at: <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.532.3794&rep=rep1&type=pdf>> (last accessed 10 September 2016); and FG Pomar "The harmonization of contract law through European rules: A law and economics perspective" (2008) 2 *InDret*, available at: <http://www.indret.com/pdf/535_en.pdf> (last accessed 12 April 2015), which argues that diversity in legal rules increases transaction costs.

25 See WTO "Preparatory Committee on Trade Facilitation: Notifications of category A commitments under the Agreement On Trade Facilitation" (23 March, 2015) WT/PCTF/W/29 for a list of notifications made by members in this regard.

26 WTO Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC: (1997) 36 *International Legal Materials* 218, para 21 (Singapore ministerial conference).

27 WTO Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1: (2002) 41 *International Legal Materials* 746, para 27 (Doha ministerial conference), read along with WTO "The Doha development programme" WT/L/579, 2 August 2005 (also known as the July Package, 2005), which sets out the agenda as follows: "Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the fifth session of the ministerial conference on the basis of a decision to be taken, by explicit consensus, and

unsuccessful in concluding a TFA. Consequently, as part of the Bali ministerial conference in December 2013, the organization's work agenda underscored the necessity "to ensure the expeditious entry into force of the Agreement and prepare for the efficient operation of the Agreement after such entry into force".²⁸

While a host of WTO members have already incorporated measures to facilitate trade, these measures have more or less been unilateral. Some regional attempts have been made to this effect, but problems arise when countries that are a part of such regional initiatives have overlapping memberships. Hence, at some stage multilateral initiatives do assume relevance. The proposal of the Bali ministerial conference to negotiate the modalities on trade facilitation became important in this sense, because it would solve these issues and address the mandate more harmonious and comprehensively. In this respect, the obligations in the TFA would come into force in a phased manner as the Preparatory Committee receives notifications from members regarding the provisions they would be able to implement immediately (category A notifications),²⁹ those they will implement after a transition period (category B notifications), and lastly those they will implement after a transition period coupled with an implementation capacity (category C notifications).³⁰

The proposed benefits of the WTO's TFA³¹

One of the most promising benefits of the TFA is that the world economy would apparently be boosted by \$1 trillion as a result of the simplification and harmonization of customs related rules,³² and consequent reduction of

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that session on modalities of negotiations. In the period until the fifth session, the Council for Trade in Goods shall review and, as appropriate, clarify and improve relevant aspects of arts V, VIII and X of GATT, 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area."

28 TFA, art 13.

29 "Category A notifications" can be found on the WTO website at: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx> (symbol: WT/PCTF/*) (last accessed 4 August 2016). See WTO "Preparatory Committee on Trade Facilitation: Agreement on Trade Facilitation" WT/L/931 (15 July 2014) for the legal review and category A notifications.

30 WTO "Trade Facilitation: WTO members debate future work on trade facilitation as deadlock on protocol remains" (29 September 2014), available at: <www.wto.org/english/news_e/news14_e/fac_29sep14_e.htm> (last accessed 15 April 2015).

31 This section draws on a similar discussion in a paper written by the author; see Khanderia-Yadav "What the World Trade Organization's Agreement", above at note 15 at 48–57.

32 WTO "A trade facilitation deal could give a \$1 trillion boost to world economy: Lamy" (1 February 2013), available at: <www.wto.org/english/news_e/sppl_e/sppl265_e.htm> (last accessed 15 April 2015).

TTCs by 10–15 per cent.³³ Reductions in TTCs could consequently lean towards export diversification in favour of emerging economies, when exporters would be willing to export to countries with the lowest trade costs.³⁴ For this reason, even trivial cutbacks in TTCs by means of trade facilitation measures could contribute two thirds of global welfare in favour of emerging economies.³⁵

Research thus demonstrates that the lack of trade facilitation that causes a delay of even one day in goods leaving the factory, especially in emerging economies, impedes growth in such countries by 1 per cent.³⁶ A study by the Organization for Economic Co-operation and Development (OECD) highlights that potential impacts due to these inefficiencies may thus be in the form of direct³⁷ or indirect³⁸ costs.³⁹ Customs and transit procedures are less developed in emerging economies and this hampers the integration of such countries in global value chains.⁴⁰ Studies underscore on the other hand that implementing trade facilitation measures through national reforms could provide traders with a benefit equivalent to 0.8 per cent of ad valorem duties.⁴¹

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- 33 WTO “Doha Development Agenda: Trade negotiations” (annual report, 2014) at 4, available at: <www.wto.org/english/res_e/booksp_e/anrep_e/anrep14_chap5_e.pdf> (last accessed 12 April 2015).
- 34 HK Nordås, E Pinali and MG Grosso “Logistics and time as a trade barrier” (30 May 2006, OECD Trade Policy working paper no 35: TD/TC/WP(2006)3/FINAL), available at: <[www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/tc/wp\(2006\)3/final](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/tc/wp(2006)3/final)> (last accessed 17 April 2015).
- 35 M Engman “The economic impact of trade facilitation” (12 October, 2005, OECD Trade Policy working paper no 21: TD/TC/WP(2005)12/FINAL), available at: <<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP%282005%2912/FINAL&docLanguage=En>> (last accessed 17 April 2015).
- 36 S Djankov, C Freund and C Pham “Trading on time” (2010) at 4, available at: <<http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Methodology/Supporting-Papers/DB-Methodology-Trading-On-Time.pdf>> (last accessed 5 April 2015).
- 37 Direct costs are those that impact customs fees, payments and port handling changes by virtue of cross border inefficiencies.
- 38 Acceleration of costs caused by inefficiencies in the time taken to complete pre-shipment inspections, processing of shipments or transit is considered an indirect cost.
- 39 OECD “Business benefits of trade facilitation” (2001, Working Party of the Trade Committee: TD/TC/WP(2001)21/FINAL), available at: <<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP%282001%2921/FINAL&docLanguage=En>> (last accessed 17 April 2015). Compare with P Minor and M Tsigas “Impacts of better trade facilitation in developing countries: Analysis with a new GTAP database for the value of time in trade” (2008, Nathan Associates Inc research report) at 3, available at: <<https://www.gtap.agecon.purdue.edu/resources/download/4036.pdf>> (last accessed 17 April 2015).
- 40 World Economic Forum “Enabling trade: Valuing growth opportunities” (2013) at 37, available at: <www3.weforum.org/docs/WEF_SCT_EnablingTrade_Report_2013.pdf> (last accessed 20 April 2015).
- 41 D Hummels and G Schaur “Time as a trade barrier” (2013) 103/7 *American Economic Review* 2935.

Implementing trade facilitation measures would have a greater impact on small and medium sized enterprises in particular and the private sector in general,⁴² given that the former are more susceptible to inefficiencies in customs procedures.⁴³

While these are the predicted outcomes that the TFA endeavours to address, it seems that South Africa is currently not enjoying these benefits fully, given that the reduction of TTCs remains a daunting task for the republic. The World Bank's *Doing Business Report* (2015) demonstrates that South Africa ranks at 100 out of 189 with respect to the ease of doing business with the republic.⁴⁴ Accordingly, international trade with this country becomes arduous given the cost and time taken to import and export to and from the republic.⁴⁵ Trade facilitation thus plays a key feature in improving and sustaining this country's relations with the international community.⁴⁶

South Africa and the World Trade Organization

The election of the democratic government in 1994 and South Africa's consequent inclusion as a member of the WTO in 1995⁴⁷ brought positive changes in the country's attempts to liberalize its domestic trade policy and integrate itself into the global economy.⁴⁸ Furthermore, the country's increased

42 K Joosep "Trade facilitation as a means to improve SME competitiveness and consumer welfare in developing and least-developed countries" (CUTS international briefing paper no 1, 2014) at 5, available at: <<http://www.cuts-geneva.org/pdf/BP-2014-1-Trade%20Facilitation%20SMEs%20and%20Consumers.pdf>> (last accessed 20 April 2015).

43 Id at 4–5.

44 World Bank "Doing business", above at note 14 at 67.

45 Id at 66–69. According to the report, it requires five documents, 16 days and USD 1,830 to export a standard container from South Africa. On the other hand, it requires six documents, 21 days and USD 2,080 to import a similar standard container into South Africa. The report further demonstrates that trade facilitation in terms of the cost of import and export have increased since the previous year (2014), when it cost USD 1,705 to export a standard container from South Africa and USD 1,980 to import a similar container into South Africa.

46 Id at 67. In a related vein, the 2015 report highlights that a mere 10% reduction in these trading costs would enable developing countries to reap greater benefits than the reduction of tariffs would entail.

47 For an understanding of trade policies in South Africa before it joined the WTO, see S Roberts and J Thoburn "Globalization and the South African textiles industry: Impacts on firms and workers" (2004) 16/1 *Journal of International Development* 125; and S Evenett "The impact of economic sanctions in South African exports" (2002) 49/5 *Scottish Journal of Political Economy* 557.

48 For a detailed discussion of South Africa's trade liberalization strategies to ensure compliance with WTO standards, see P Belli, M Finger and A Ballvian "South Africa: A review of trade policies" (1993) (World Bank informal discussion paper on aspects of the South African economy, no 4, the Southern Africa Department, The World Bank), available at: <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/02/03/000009265_3961006075001/Rendered/PDF/multi_page.pdf> (last accessed 19 April 2015); C Harmse and L Rangasamy "The extent of trade liberalization in the 1990s: Revisited" (2003) 71/4 *South African Journal of Economics* 705; Department of Trade and

participation in regional trade agreements provided an impetus to its agenda to liberalize trade, and improve market access and international competitiveness for its products.⁴⁹

Despite the fact that South Africa participated in the WTO negotiations as a developed nation,⁵⁰ with its lack of comparative advantage except in unskilled labour, particularly in agriculture and mining, its firms have been struggling to compete internationally.⁵¹ Significant relaxations in tariffs since the 1990s,⁵² the absence or lack of complementary policies and enhanced coordination have kept South Africa away from mainstream international trade.⁵³ In a similar context, even though South Africa has bound 96.1 per cent of its tariffs (on all products),⁵⁴ as against 18 per

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Industry, Republic of South Africa “A national industrial policy framework”, available at: <http://www.thedti.gov.za/industrial_development/docs/niPF-3aug.pdf> (last accessed 1 April 2015); and F Tregenna and M Kwaramba “An institutional analysis of the International Trade Administration Commission of South Africa” (2014) 7/*S Journal of Economic and Financial Sciences* 641.

- 49 International Trade and Economic Development Division, Department of Trade and Industry, South Africa “A South African trade policy and strategy framework” (May 2010) at xiv, available at: <<http://www.tralac.org/files/2012/12/Trade-Policy-and-Strategy-Framework-2010.pdf>> (last accessed 20 April 2015). South Africa is thus a signatory to a number of regional trade agreements, such as the Southern African Customs Union (SACU), which was signed in 1910 and is the oldest such agreement, and the Southern African Development Community (SADC) signed in 1994 and coupled with the SADC Protocol in 2000, which witnessed a substantial liberalization of trade with 99% of tariffs and 97% of imports from SADC qualifying for duty-free access to South Africa. Moreover, South Africa has also been a party to the Economic Partnership Agreement with the European Union since 2000, the Africa Growth and Opportunity Act with the United States, the SACU-USA Trade, Investment, Development and Corporation Agreement in 2008, the MERCOSUR with SACU in 2009, and most recently the BRICS Agreement with Brazil, Russia, India and China in 2010.
- 50 P Dunne and L Edwards “Trade and poverty in South Africa: Exploring the trade-labour linkages” (2006, South Africa Labour and Development Research Project, University of Cape Town), available at: <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.5192&rep=rep1&type=pdf>> (last accessed 10 September 2016).
- 51 Department of Trade and Industry “A South African trade policy”, above at note 49 at 11.
- 52 See J Lewis “Reform and opportunity: The changing role and patterns of trade in South Africa and SADC” (2001, World Bank, Africa region working paper series 14) at 1.
- 53 This means that, even though South Africa is now a member of the WTO, the mere reduction of tariffs would not be considered sufficient when these reductions have not been complemented by and supplemented at the same time as domestic or national policies that stimulate growth, such as improvements in infrastructure, high competitiveness, increased transparency and reduced corruption.
- 54 WTO “Trade profile: South Africa” (September 2014), available at: <<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=F&Country=ZA>> (last accessed 2 May 2015). On the other hand, South Africa’s tariff-binding rate on manufactured products is 99.37%, according to World Bank indicators; see L Edwards “Has South Africa liberalised its trade?” (2005) 73 *South African Journal of Economics* 754 at 754–56.

cent⁵⁵ by virtue of becoming a member of the WTO during the Uruguay Rounds, the contribution of tariff reductions at the international level towards growth has been rather slow in comparison.

Where do South Africa's endeavours to facilitate trade stand today?

Currently, at the national level, the South African Revenue Service (SARS)⁵⁶ is responsible for the facilitation of trade in the form of customs clearance in the country. SARS is thus endowed with the responsibility of regulating various industrial and trade policies for the purpose of customs and administration. Hence, while customs regulation in a country promotes international trade with that country, the failure to address these concerns at the domestic level would also expose the country to risks of corruption and under-valuation and, needless to say, increase TTCs.

Understanding that tribulations pertaining to documentation related formalities continue to confront the country's endeavours to facilitate trade, South Africa has been embarking on the implementation of its customs management system since 2013, as part of the CM Programme.⁵⁷ The modernization process therefore seeks to provide a legislative basis to its mandate to enhance customs efficiency, which is why the 1964 Act will eventually be replaced by the CCA, the CDA and the CEAA in order to facilitate the implementation of the CM Programme.⁵⁸ This new legislation embarks upon making customs clearance in South Africa easier, replacing manual paper based administration with automated procedures. These acts are largely modelled on the Revised Kyoto Convention⁵⁹ and make South Africa the first African country to come in line with international best practices for customs administration, as set forth in the convention. Of these, the CCA attempts to facilitate trade, with its provisions on, inter alia, efficient release and clearance, expedited shipments and enhanced border co-operation.

The paradigm shift in South Africa's import substitution strategies that has occurred with the introduction of more progressive outward looking policies has to some extent resolved problems pertaining to trade liberalization, but even so has not completely rectified the issue. That said, these

55 Edwards, id at 756.

56 South African Revenue Service Act 37 of 1997, by virtue of which SARS is an autonomous organ with administrative responsibilities.

57 SARS "Customs modernization" available at: <<http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Modernisation.aspx>> (last accessed 2 May 2015); SARS "Customs modernization: Moving into the future", available at: <http://www.saaffkzn.co.za/web/webroot/files/articles/1294/60983_TRADERSPOCKETGUIDEv4.pdf> (last accessed 2 May 2015).

58 The acts are presumed to come into force in 2015 / 2016.

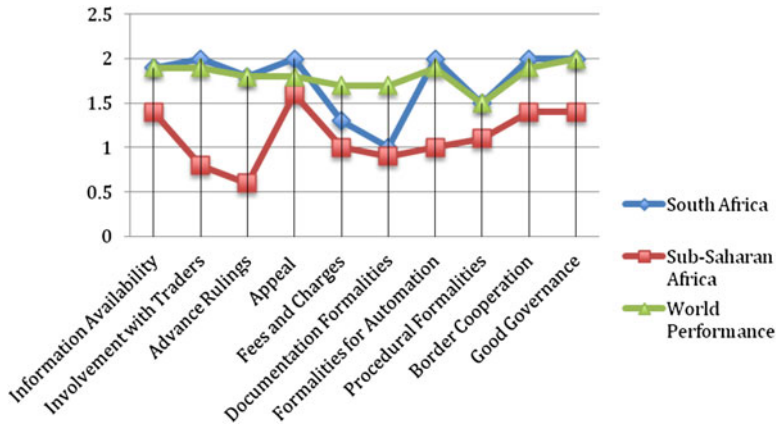
59 Above at note 8.

problems could mostly be traced to the difficulty in performing and sustaining trade relations in the country owing to the high level of transaction costs. Efforts to improve trade facilitation assume immense significance for South Africa in its attempts to integrate into world markets. Hence, even while lacunae in the country's infrastructure operate as a serious impediment to trade relations with other countries in the international community, most of the challenges that South Africa has been facing result from hurdles in administrative procedures that involve lengthy customs procedures, excessive red tape and clearances.⁶⁰

At the same time, research to explore the implementation of trade facilitation measures in South Africa has been rather sporadic. The OECD delineates certain criteria in the form of trade facilitation indicators,⁶¹ with the objective of evaluating the extent to which efforts to facilitate trade have been undertaken at the national level; customs and other related formalities in South Africa are mostly aligned with these. Nevertheless, aspects such as documentation formalities, procedural formalities and fees and charges have remained challenging for South Africa, and South Africa's performance in implementing measures in these areas has been markedly lower in comparison to that in other areas. Its performance (in 2014) in terms of trade facilitation can be represented thus:

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- 60 In a similar context, research demonstrates that facilitation of trade is highly dependent on infrastructure, but at the same time is also dependent on administrative developments, with hurdles in the latter in the form of customs and tax procedures and clearance being even more detrimental to the facilitation of trade. For a detailed discussion of the former, see Global Event of Landlocked Developing Countries and Transit Countries on Trade and Trade Facilitation "Trade, trade facilitation and transit transport issues for landlocked developing countries", available at: <<http://www.unohrrls.org/UserFiles/File/Elle%20Wang%20Uploads/LLDCs%20Publication.pdf>> (last accessed 2 May 2015); and Djankov et al "Trading on time", above at note 36 at 9.
- 61 OECD "OECD trade facilitation indicators: State of implementation" (June 2014), available at: <<http://www.oecd.org/tad/facilitation/TFI-state-implementation-june-2014.pdf>> (last accessed 2 May 2015). Compare with E Moisé, T Orliac and P Minor "Trade facilitation indicators: The impact on trade costs" (2011, OECD Trade Policy working paper no 118), available at: <https://www.wto.org/english/tratop_e/tradfa_e/case_studies_e/oecd_paper_e.pdf> (last accessed 4 May 2015), which identifies a set of 12 variables that rely on the WTO's Draft Consolidated Negotiating Text on Trade Facilitation that also contains 12 parameters of trade facilitation, in 12 articles. Interestingly, these 12 indicators have been re-organized into a set of 16 parameters laid out in the OECD policy paper that analyses the cost of trade facilitation on the developing world. Compare with OECD "Trade facilitation indicators: The potential impact of trade facilitation on developing countries' trade" (2013, OECD Trade Policy paper no 144), available at: <<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP%282012%2924/FINAL&docLanguage=En>> (last accessed 1 May 2015).

Figure 1. Facilitation of trade in South Africa (2014)



This graph analyses the facilitation of trade in South Africa vis-à-vis the OECD indicators.⁶² While the OECD divides “border co-operation” into two separate variables of internal co-operation and external co-operation, the author has for the purpose of this discussion clubbed them into one, and expressed them on the basis of the average of both. As per the analysis, performance has been measured on a scale of 0–2, with 2 being the best performance. World performance indicates the average performance of the countries in the OECD database.

As depicted in [figure 1](#), South Africa’s performance in terms of appeal procedures, automation and border co-operation (including both internal and external co-operation) is modernized in comparison to global performance. At the same time, in terms of parameters that indicate information availability, advance rulings, procedural formalities and good governance, trade facilitation in South Africa is more or less at the same level as in the rest of the world. On the other hand, some of the most significant variables that impact the facilitation of trade to the greatest extent, such as formalities involving documentation and fees, have been the country’s greatest weakness. Simplification of documents, problems relating to harmonization with international standards, the absence of single window systems that would permit the streamlining of documents with the help of single submission points, and the lack of improvements in the area of fees and charges regulating imports and exports remain South Africa’s most contentious issues.

62 Available at: <<http://www.oecd.org/tad/facilitation/south-africa-oecd-trade-facilitation-indicators-april-2014.pdf>> (last accessed 4 August 2016).

Despite a wide array of reforms in South African customs procedures by means of its CM Programme and customs management system discussed above, problems pertaining to complicated documentation formalities and the lack of single window systems have continued. On the other hand, the CM Programme has contributed significantly to the country's endeavour to streamline its customs related processes by means of automated procedures and a reduction in the time required for processing.

With the successful commencement and implementation of the acts that form part of the CM Programme, the country will be able to notify various (if not all) obligations outlined in category A. Accordingly, the next section highlights the proposed⁶³ trade facilitation efforts at the national level in South Africa and indicates the extent to which they would correspond to those set forth in the WTO's TFA.

TRACKING SOUTH AFRICAN TRADE FACILITATION OBJECTIVES IN THE LIGHT OF THE TFA

The discussion in this section is limited to assessing South Africa's trade facilitation mandate in the light of those obligations in the TFA which could be implemented by members at the domestic level when the agreement comes into effect.

In general, obligations listed in category A of the TFA are similar to the OECD indicators⁶⁴ that measure a country's performance in terms of the measures it takes to facilitate trade at the border.⁶⁵ Section I of the TFA contains the commitments set out in category A and extends to articles 1 to 12 of the agreement. These provisions expand the scope and ambit of articles V, VIII and X of GATT, 1947 which also pertain to trade facilitation.

South African trade facilitation provisions on transparency and fairness

The TFA clarifies the mandate of article X of GATT, 1947 that pertains to increasing transparency in international trade. Accordingly, articles 1–5 of the TFA require the publication of information relating to the import and export of goods, customs valuation procedures and rules, duties and related penalties.⁶⁶ The agreement furthermore underscores the need for the prior

63 The author restricts the discussion to the implementation of trade facilitation through the new legislative enactments simply because the current 1964 Act will eventually be replaced by the new legislation. Besides, as mentioned in the introductory remarks, the 1964 Act does not successfully enforce the mandates of contemporary international trade rules (primarily those of the Revised Kyoto Convention and the WTO) in a globalized era.

64 Above at note 62.

65 Ibid.

66 TFA, art 1.1, 1.2, and 1.3, encourages the publication of regulations pertaining to import, export and transit procedures for the convenience of traders. It also recognizes the need to establish enquiry points across the jurisdictions of member states along with such

publication of laws and regulations that govern the movement and clearance of goods,⁶⁷ advance rulings,⁶⁸ and also the classification and origin of goods for the purpose of import and export.⁶⁹ Besides, in order to ensure fairness in international trade, the TFA obligates members to provide a procedure for appeal against administrative decisions of customs authorities.

At the domestic level, the CCA recognizes the significance of trade facilitation and hence addresses the related issues and challenges. For this reason, the South African government encourages predictability and transparency in customs related procedures. In order to achieve the WTO's objective of augmenting transparency⁷⁰ in international trade, customs related procedures involving inter alia importation,⁷¹ exportation,⁷² required documents,⁷³ transit,⁷⁴ duties,⁷⁵ fees, classification, appeals, regional trade agreements involving the facilitation of trade⁷⁶ and administration of tariff quotas are

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provisions in customs unions or other applicable regional agreements for the benefit of traders and businesses.

67 Id, art 2 builds upon art 1.2.

68 Id, art 3.9(a), which defines an advance ruling as "a written decision provided by a Member to an applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to: i) the good's tariff classification, and ii) the origin of the good".

69 Id, art 3, which recognizes the need for advance rulings by underscoring the fact that inconsistent decisions across customs authorities often work to the detriment of traders and indeed foreign investment. Hence, investors and business houses prefer to relocate to nations with predictable rules. Accordingly, art 3.9(b) states that a member must provide advance rulings, among other things, in the manner in which customs duties are calculated along with the exceptions and quotas applicable with regard to such duties.

70 These obligations are mainly set out in art 1.1 of the TFA.

71 CCA, chap 4, part 3, secs 109–15 pertain to the "General principles governing goods under customs procedures" and contain regulations regarding commencement and ending of customs procedures, clearance and release, transfer of ownership and tax related matters.

72 Id, chaps 16 and 17.

73 Documents required to be endorsed for customs purposes are listed on the SARS website, available at: <<http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Documentation.aspx>> (last accessed 10 May 2015).

74 Procedures for transit are set forth in the CCA, chaps 9 and 10 and regulate national and international transit along with excise warehouse transit.

75 South Africa is a signatory to the WCO International Convention on the Harmonised Commodity Description and Coding System and implements the 2012 version of the harmonised classification as well (see *Government Gazette* no 34772). The convention regulates the classification of imported goods with respect to the imposition of duties pertaining to customs, excise, ad valorem, antidumping and countervailing. For a detailed discussion of South Africa's tariff book, see: <<http://www.sars.gov.za/Legal/Primary-Legislation/Pages/Schedules-to-the-Customs-and-Excise-Act.aspx>> (last accessed 18 May 2015).

76 The CCA, chap 41, sec 921 provides for publication of the international agreement(s) to which South Africa is a party.

duly published in the *Government Gazette* for the benefit of other governments and traders.⁷⁷ Information regarding these procedures is also published on a timely basis on the SARS website.⁷⁸ SARS also answers queries on customs related procedures and documents from governments, traders and interested parties, therefore boosting transparency in light of the relevant TFA provisions.⁷⁹

Article 2.1 of the TFA imposes an obligation on members to provide “opportunities coupled with an appropriate time period to traders and other interested parties to comment” on the proposed customs legislation or an amendment to it. In this regard, SARS conducts workshops with stakeholders on a timely basis in order to receive comments from them on the proposed implementation of the acts.⁸⁰ At the same time, with respect to the obligation expressed in the TFA relating to the prior publication of laws relating to customs related procedures to provide traders and interested parties with reasonable time to become acquainted with them,⁸¹ South African legislative enactments pertaining to customs are published in advance on the SARS website. Accordingly, the CCA, the CDA and the CEAA have been published in the *Government Gazette*, even though they are to come into operation at a later date after being proclaimed by the president.⁸²

Moreover, South Africa has modified the existing 1964 Act to incorporate the TFA obligation that members must issue an advance ruling when requested by another member in writing, in order to obtain a decision on the treatment provided to imported good(s) regarding the tariff classification and the Rules of Origin.⁸³ Accordingly, by virtue of the CDA, the

77 Legislative enactments pertaining to customs related rules and procedures are also published on the SARS website, available at: <<http://www.sars.gov.za/Legal/Primary-Legislation/Pages/Acts-administered-by-the-Commissioner.aspx>> (last accessed 10 May 2015).

78 <www.sars.gov.za> (last accessed 4 August 2016).

79 TFA, art 1.1, which mandates the establishment of enquiry points by members at the national level.

80 SARS held workshops in 2014 in order to discuss the comments that were received from stakeholders regarding the draft Customs Control Rules. Accordingly the draft Customs Control Rules were published in phases, for the benefit of stakeholders. The first batch consisted of chaps 1–3 and 10 in June 2014, with a due date of 29 July 2014. The second batch was published on 4 August 2014 with a due date of 26 September 2014, consisting of chaps 11–20 and 24. The third was published on 9 October 2014 with a due date of 14 November 2014 and consisted of chaps 21, 23 and 25–31. The remaining chapters of the CCA were proposed to be published in a fourth phase. The fifth batch would include the CDA rules for comment. For a detailed discussion of the SARS workshops, see: <<http://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Workshops.aspx>> (last accessed 10 September 2016).

81 TFA, art 2.2.

82 See CCA, sec 944, CDA, sec 229 and CEAA, sec 88.

83 Agreement on Rules of Origin (15 April 1994), Marrakesh Agreement, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1868 UNTS 397, (1994) 33 *International Legal Materials* 1143.

concept of advance ruling has been duly incorporated in keeping with international standards and also to bring domestic customs legislation in line with the TFA. Consequently, the CDA provides for advance ruling in the form of advance tariff, advance valuation and advance origin rulings.⁸⁴ Chapter 10 of the act regulates the application of these types of advance rulings,⁸⁵ and determines aspects such as the application,⁸⁶ validity,⁸⁷ binding value,⁸⁸ clearance of goods under the rulings,⁸⁹ amendment⁹⁰ and withdrawal of advanced rulings.⁹¹ The act requires the customs authorities to determine the valuation or re-determination, on the basis of advanced tariff ruling, advanced valuation ruling or advanced origin ruling, as the case may be.⁹² In a related vein, the act also permits a person to self-determine or re-determine the customs tariff, value and / or origin on the basis of the advance ruling.⁹³ Although the provision for advance rulings has been dealt with in the CDA, the relevant provisions are not proposed to come into force in the first phase of the act's commencement.⁹⁴

The CCA also provides a right to a person aggrieved by the decision of a customs authority or SARS official to appeal against the decision;⁹⁵ this is in line with TFA obligations on members to provide the right to administrative appeal.⁹⁶ Consequently, the CCA provides for administrative appeals against decisions by or on behalf of customs authorities or SARS officials,⁹⁷ except when the appeal is against a decision that was subject to alternative dispute resolution or judicial proceedings.⁹⁸ Administrative decisions provided under the CCA provisions are also reasoned⁹⁹ and applicable to border agencies other than customs,¹⁰⁰ and are therefore in line with the TFA

84 CDA, sec 1(1).

85 *Id.*, chap 10, secs 187–98.

86 *Id.*, sec 188.

87 *Id.*, sec 191.

88 *Id.*, sec 192.

89 *Id.*, sec 193.

90 *Id.*, sec 194.

91 *Id.*, sec 195.

92 *Id.*, secs 100(1)–(3), 117(2)(b), 118, 153(2)(a) and 154(3).

93 *Id.*, secs 116(1)(a), 116(3)(b), 152(1)(a) and 152(3)(b).

94 According to the SARS website, only 70% of the CCA and the CDA would be implemented in the first phase (originally proposed for June / July 2015), which would not include, *inter alia*, chap 10 governing advance rulings. See: <<http://www.sars.gov.za/AllDocs/LegalDoclib/Bills/LAPD-LPrep-Bill-2014-08%20-%20Strategic%20Stakeholder%20Meeting%20Implementation%20Customs%20Legislation.pdf>> (last accessed 9 May 2015) at 6.

95 CDA, sec 838.

96 TFA, art 4.

97 CCA, secs 838 and 839.

98 *Id.*, sec 840.

99 *Id.*, sec 845(c).

100 Compare with *id.*, secs 838–45, which are also applicable to SARS officers in addition to customs authorities.

obligations.¹⁰¹ The CDA provides a similar right to administrative appeal¹⁰² to persons aggrieved by duty assessment or reassessment,¹⁰³ tariff, value and origin determination and redetermination with respect to the imposition of customs duties.¹⁰⁴

The TFA also mandates the application of “other measures in order to enhance impartiality, non-discrimination and transparency”.¹⁰⁵ These measures pertain to the application of sanitary and phytosanitary (SPS) measures,¹⁰⁶ detention¹⁰⁷ and test procedures.¹⁰⁸

At the domestic level, South Africa embraces the imposition of SPS measures via the regional economic communities of which it is a member. For instance, South Africa is a member of the Southern African Development Community, whose Protocol on Trade mandates that its members base such measures on international standards and best practices set out in the WTO’s SPS Agreement.¹⁰⁹ In this respect SPS measures are also regulated in the republic through the coordinated efforts of the Department of Agriculture: Forestry and Fisheries, National Phytosanitary Regulatory Services of South Africa, the Department of Agriculture South African Food and Quarantine Inspection Services, and the National Plant Protection Organisation.¹¹⁰

On the other hand, the CCA imbibes upon the TFA’s obligation promptly to inform the importer when goods have been detained by the customs authority or another competent authority.¹¹¹ With respect to the application of test procedures, while the TFA obligates a member either to publish the requisite details of the test laboratory or provide them to the importer, the CCA merely confers on the customs officer the right to inspect goods for carrying out tests or analysing them,¹¹² and for this purpose to take a sample.¹¹³ Hence, the CCA is silent on aspects such as the opportunity to request a second test when the

101 TFA, art 4.5 and 4.6.

102 “Administrative appeal” has the same meaning and scope as that expressed in CCA, part 3 of chap 37.

103 CDA, sec 92.

104 See *id.*, secs 107, 120 and 160.

105 TFA, art 5.

106 *Id.*, art 5.1.

107 *Id.*, art 5.2.

108 *Id.*, art 5.3.

109 SADC “Sanitary and phytosanitary (SPS) annex VIII to the SADC Protocol on Trade” (17 July 2014), available at: <http://www.sadc.int/files/2114/1520/0828/SPS_Annex_to_the_SADC_Protocol_on_Trade_-_Approved_Version_-_17_July_2014_-_English.pdf> (last accessed 30 April 2015).

110 Dept of Agriculture, Forestry and Fisheries “Draft sanitary and phytosanitary strategy” (January 2014), available at: <<http://sansor.org/wp-content/uploads/2012/09/Draft-Strategy-January-2014.pdf>> (last accessed 17 April 2015).

111 CCA, sec 757.

112 *Id.*, sec 722(3)(d).

113 *Id.*, sec 724(2)(a).

result of the first test is adverse,¹¹⁴ and also to consider the results of the former for the purpose of the release and clearance of goods.¹¹⁵

South African trade facilitation provisions on procedural formalities

Articles 6–12 of the TFA regulate issues pertaining to procedural formalities, and clarify and expand upon the scope of articles V and VIII of GATT, 1994.

Article 6 of the TFA pertains to issues regarding fees and charges, other than those that take the form of import and export duties or taxes within the purview of article III of GATT, 1994.¹¹⁶ Such fees and charges can hence only be applied after information about them has been published in accordance with the principles in article 1 of the TFA. Accordingly, information regarding fees and charges, the authority that is responsible for these and also the mode of payment must be published.¹¹⁷ Article 6 also mandates members to regulate the imposition of penalties for a breach of its customs laws and regulations.¹¹⁸ As seen in the graph above, South Africa's performance with respect to the enforcement of provisions on fees and charges is average compared to that of the rest of the world.¹¹⁹ In this respect, the author finds that provisions in this regard are indeed less developed. While the CCA does provide that the SARS commissioner is the authority responsible for regulating the fees applicable to goods stored at licensed premises,¹²⁰ much work remains to be done when it comes to providing transparency in the provisions connected with fees and charges. With respect to the application of penalties, these are regulated by chapters 39 and 40 of the CCA in the form of administrative penalties¹²¹ and penalties for judicial offences.¹²²

Article 7 of the TFA pertains to procedures that are required for customs clearances and draws on similar principles incorporated in the Revised Kyoto Convention. Article 7 of the TFA therefore underscores the following factors that must be considered as pre-requisites for liberalizing trade by means of efficient customs procedures: the ability to permit documentation and other formalities in an electronic manner before the goods arrive at the destination of the importing country, in order to hasten the customs

114 Compare with TFA, art 5.3.1.

115 Compare with id, art. 5.3.2.

116 GATT, 1994, art III pertains to internal taxes. A tax or charge is considered to be "internal" when it is applied within the border of the importing country.

117 TFA, art 6.1.2 and 6.1.3.

118 Id, art 6.3.

119 South Africa's performance in this regard is rated by the OECD as 1.3 on a scale of 0–2, with 2 being the best performance.

120 CCA, sec 585. Goods may be stored on licensed premises in the form of a customs storage warehouse, special storage warehouse, bonded warehouse, manufacturing warehouse or state warehouse. See: <http://www.gov.za/sites/www.gov.za/files/37862_gon582.pdf> (last accessed 2 September 2016) and 1964 Act.

121 CCA, chap 39, secs 874–85.

122 Id, chap 40, secs 886–901.

evaluation process;¹²³ electronic payments in order to ease import and export procedures, thus making international trade more user-friendly for traders;¹²⁴ the incorporation of risk management that regulates random customs checks, thus allowing low risk consignments to clear more quickly;¹²⁵ and the need for post-clearance audits making it mandatory for traders to submit their clearance reports to customs authorities for verification of compliance.¹²⁶

In taking into account the fact that the international movement of goods involves the transport of goods, many of which need to be delivered on an urgent basis or as an utmost priority, article 7 mandates the adoption of procedures taking into account these concerns, especially to accommodate the interests of global value chains which require the speedy delivery of intermediates.¹²⁷

In order to ensure efficient procedures for the clearance and release of goods, the CCA positively embarks upon the mandate of permitting the submission of import documents before the arrival of goods (pre-arrival processing).¹²⁸ It also permits the electronic submission of documents for such processing.¹²⁹ Moreover, electronic payments will also be recognized as a mode for paying duties under the CDA.¹³⁰ At the same time, South Africa duly incorporates risk management procedures into its new customs legislation by means of automation. Therefore, by virtue of its CM Programme, South Africa is now replacing paper based customs applications with electronically submitted documents.¹³¹ The CM Programme therefore makes use of electronic data interchange along with the customs risk engine. In this regard, in keeping with the TFA's requirement to provide for the expedited release of low risk consignments, the CCA duly incorporates this mandate by permitting such goods to move with relatively few restraints while still imposing strict verification on high risk products.¹³²

In order to improve efficiency in trade facilitation measures, the CM Programme duly focuses on conducting post-clearance audits. Accordingly, the annual SARS report for 2013 demonstrates a 59 per cent success rate with respect to risk audits or those incorporating invalid tariffs or valuations,

123 TFA, art 7.2.

124 *Id.*, art 7.1.

125 *Id.*, art 7.4.

126 *Id.*, art 7.5. Khanderia-Yadav "What the World Trade Organization's Agreement", above at note 15 at 46.

127 Revised Kyoto Convention, art 7.8 and 7.9.

128 CCA, art 170.

129 *Id.*, secs 169 and 913.

130 CDA, sec 60. Compare with CDA, sec 706, which recognizes electronic payments as a method that may be used to pay a debt.

131 SARS now incorporates "e@syFile software" for the benefit of importers, exporters and customs brokers who can now upload customs documents with ease. See: <<http://www.sarsefiling.co.za/>> (last accessed 10 May 2015).

132 See CCA, chap 24, secs 518–39, in particular secs 530 and 533.

and a 57 per cent success rate in terms of regulatory audits or those involving customs storage and warehousing.¹³³

South Africa also subscribes to the World Customs Organization's time release study, which studies the average release times taken by countries. In this respect South Africa individually and as a member of SACU undertakes to perform a time release study.¹³⁴ Chapters 24 and 30 of the CCA also make provision for the simplification of procedures that regulate trade facilitation measures for authorized operators.¹³⁵ In a similar context, South African customs authorities also permit the expedited release of goods when persons apply under chapter 24 of the CCA, which provides for and regulates such release.¹³⁶ However, the CCA merely provides for prioritising perishable goods in terms of their inspection; it does not specifically subject such goods to speedy release, as provided for in article 7.9 of the TFA. Further work is therefore needed in this respect.

Article 8 of the TFA endeavours to boost efficiency in procedural formalities in international trade by obligating enhanced co-operation among border agencies for the purpose of customs evaluation. At the domestic level, border agency co-operation in South Africa is regulated by means of chapter 32, part 7 (sections 744–48) of the CCA. Border co-operation is thus augmented by the CM Programme, as a result of which the Border Control Operational Coordinating Committee was established to foster enhanced border control and co-operation. The committee functions in collaboration with various agencies, including the Departments of Home Affairs, Health, Agriculture, Forestry and Fisheries, Transport, Trade and Industry, Public Works and Environmental Affairs, SARS, and the South African Police Service.¹³⁷

Article 12 of the TFA appears in a related context and underlines customs co-operation. As seen in the graph above, South Africa excels in terms of both external and internal co-operation, and its border co-operation is indeed better than the global average.¹³⁸ Customs co-operation thus remains an integral part of South Africa's international relations with other

133 Gilfer "South Africa: Statistic extracts from the SARS annual report" (6 May 2013) (copy on file with the author).

134 Above at note 49. SACU "Quarterly SACU customs bulletin October to December 2011", available at: <<http://www.sacu.int/newsletters/2011/thirdquarter.pdf>> (last accessed 2 May 2015). See also World Customs Organization "WCO trends and patterns report: A capacity building estimate" (issue 3: June 2008) at 29, available at: <http://wcoomdpublishings.org/downloadable/download/sample/sample_id/24/> (last accessed 2 May 2015).

135 CCA, chap 24 pertains to the expedited clearance and release of goods, while chap 30 deals with accreditation. In this regard, sec 1(1) of the CCA defines an accredited person as a person who "is a registered person or licensee [to whom] an accredited client status certificate has been issued in terms of Chapter 30".

136 Compare with TFA, art 7.8.

137 Border Control Operational Coordinating Committee, Republic of South Africa "About us", available at: <<http://www.borders.sars.gov.za/Documents/ABOUT-US-BCOCC.pdf>> (last accessed 2 May 2015).

138 While South Africa's performance is ranked as 2 (being the best performance) in terms

countries with the aim of promoting the exchange of information, in turn debilitating the flow of illicit information.¹³⁹ Consequently, South Africa embarks upon enhancing customs co-operation with countries under the auspices of various regional agreements (in the form of customs mutual assistance agreements) of which it is a member, including with the members of BRICS,¹⁴⁰ Zimbabwe,¹⁴¹ the European Union¹⁴² and Canada¹⁴³ to name a few.

At the same time, article 9 of the TFA underlines the requirement that members regulate the movement of imported goods at the domestic level, in order to facilitate the release and clearance of such goods. Movement of imported goods is facilitated in South Africa by virtue of the obligations set forth in the preamble of the CCA, which in turn entails securing movement of goods into the republic for the purpose of facilitating trade. In this respect, the CCA empowers the SARS commissioner to make rules that would indeed facilitate the movement of such goods within a customs controlled area.¹⁴⁴

The TFA also implements trade facilitation rules that in particular address nuances such as formalities and documentation requirements, the acceptance of copies, the use of international standards, single window, pre-shipment inspections, use of customs brokers, common border procedures, provisions for rejected goods, and the temporary admission of goods and inward and outward processing.¹⁴⁵

While South Africa seems to have addressed some of these issues, the CM Programme is silent on the adoption of single windows. Consequently, where on the one hand the TFA encourages the use of “single window

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of both internal and external border co-operation, world performance averages 1.9 (2 in terms of internal border co-operation but 1.8 in terms of external border co-operation).

- 139 UN Economic Commission for South Africa (UNECA) “Trade facilitation from an African perspective” (2013) at 35–36, available at: <http://www.uneca.org/sites/default/files/PublicationFiles/trade_facilitation_eng.pdf> (last accessed 10 September 2016).
- 140 “BRICS customs agencies to cooperate” (14 March 2013) *SouthAfrica.info*, available at: <http://www.southafrica.info/global/brics/customs-140313.htm#.V9PbBqN_ymx> (last accessed 10 September 2016).
- 141 South Africa and Zimbabwe Customs Mutual Assistance Agreement, signed 8 April 2015. This agreement has not yet been ratified. See “South Africa, Zimbabwe strengthen relations” (9 April 2015) *SouthAfrica.info*, available at: <<http://www.southafrica.info/news/international/south-africa-zimbabwe-090415.htm#.VVMjutoQqko>> (last accessed 2 May 2015).
- 142 Trade, Development and Co-operation Agreement “Council decision 2004/441/EC, OJ L 311, 04.12.1999” (1 January 2004), as amended by a decision of the Council of the European Union on 26 April 2004, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004D0441&from=EN>> (last accessed 2 May 2015).
- 143 South Africa has been a member of the Mutual Legal Assistance Treaty and Customs Mutual Assistance Agreement with Canada since 2001 and 2010 respectively.
- 144 CCA, sec 44.
- 145 TFA, art 10.

systems”¹⁴⁶ on the basis of best practice in countries that are already incorporating this system,¹⁴⁷ South Africa has been largely resistant to this.¹⁴⁸ To this end, the non-adoption by South Africa of single window systems is by and large one of the major impediments to its trade facilitation goals.

With respect to formalities and documentation requirements, although the CCA makes provision for the rapid release and clearance of goods, it does not per se address urgency with respect to perishable goods.¹⁴⁹ However, the country’s customs legislation enacted to implement the CM Programme is based on international standards laid down in the Revised Kyoto Convention, which forms a basis of the former’s “import, export and transit formalities and procedures”,¹⁵⁰

Article 10 of the TFA disapproves of the use of pre-shipment inspections for the purpose of tariff classifications and customs valuation, primarily because they cause undue delays, thus impeding the implementation of the TFA. In general, pre-shipment inspections are regulated by the WTO’s Agreement on Pre-shipment Inspection.¹⁵¹ Pre-shipment inspections are predominantly used by emerging economies; they rely on the services of private companies to inspect prospective imports and provide accurate information on the quality, quantity, price, exchange rate, customs valuation and financial terms, relevant to

146 The single window system, which is encouraged by art 10 of the TFA, aims to simplify procedures in international trade by requiring traders to provide certain information by means of necessary documents that are, where possible, only provided once. This in turn reduces delay in international trade when countries that incorporate and participate in the system are enabled to access information from other partner countries electronically.

147 Countries that currently incorporate the single window include Finland, Germany, Ghana, Republic of Korea, Malaysia, Mauritius Singapore and United States of America. The experiences of these countries may be found on the UNECE database at: <www.unece.org/cefact/single_window/welcome.html> (last accessed 10 May 2015). See Khanderia-Yadav “What the World Trade Organization’s”, above at note 15, footnote 79.

148 On the other hand, a large number of African countries have introduced single windows to facilitate trade. For instance, the Zimbabwe Revenue Authority has progressively implemented these at all major ports. The country is also part of the ASYCUDA system to allow national revenue authorities to access data. Uganda also uses ASYCUDA World, an advanced version of the system, permitting customs declarations from the rest of the world. Other African member nations include Ghana, Kenya, Madagascar, Mauritius, Rwanda, Senegal and Tunisia. Reference may be made to the single window system incorporated by Ghana, Madagascar and Mozambique. South Africa incorporated the mandate of a single window in order to simplify prevalent norms for customs evaluation and has been a continuous example for various other developing and least developed nations. Hence, while Mozambique faced several challenges in terms of infrastructure in order to give effect to the mandate, the country is now able to handle more than 1,500 customs evaluations per day with the incorporation of a single window system. See Khanderia-Yadav id, footnote 80.

149 CCA, chap 24.

150 TFA, art 10.3.

151 1868 UNTS 368.

the goods being imported. Neither the CCA nor the CDA makes pre-shipment inspections a pre-requisite for tariff classification or customs valuation.

With respect to the use of customs brokers,¹⁵² the CCA duly incorporates the TFA requirements, thereby addressing the lacuna of the 1964 Act. Accordingly the CCA permits customs brokers to submit clearance declarations of behalf of a person entitled to submit them, and delineates the measures in its customs procedures with regard to the use of such brokers.¹⁵³ At the same time, sections 633 and 646 of the CCA regulate the licensing of customs brokers.

In addition, South Africa applies common border procedures and documents required for the release and clearance of goods throughout the republic, thus complying with paragraph 7 of article 10 of the TFA. On the other hand, while the CCA authorizes the SARS commissioner to make rules in respect of measures that permit the temporary admission of goods that are required to be re-exported, the act does not mention any such measure. However, South Africa is a member of the Convention on Temporary Admission (also referred to as the Admission Temporaire / Temporary Admission Carnet or ATA Carnet), which permits the temporary duty free admission of goods without the need for them to be declared, provided such goods are re-exported,¹⁵⁴ in turn complying with the TFA obligation. For the purpose of inward and outward processing of goods, the CCA incorporates this obligation in its chapters 18 and 20.

To this end, South African customs legislation does, to some extent, already incorporate the obligations in article 10 of the TFA, but nevertheless requires much improvement, especially in terms of single window systems and the acceptance of copies which are the very crux of trade facilitation reforms in the current era.

Another facet of enhancing trade facilitation via customs related procedures is through freedom of transit, underscored in article 11 of the TFA. This provision entails augmenting this freedom by prohibiting the maintenance of voluntary restraints¹⁵⁵ and fees or charges unrelated to transit.¹⁵⁶ The mandate thus calls for, inter alia, non-discrimination,¹⁵⁷ use of special lanes,¹⁵⁸ transparency¹⁵⁹ and procedural fairness.¹⁶⁰ At the domestic level,

152 See CCA, chap 1, part 1, sec 1 for the definition of customs brokers.

153 The following sections of the CCA govern the use of customs brokers: 165(1)(b), 165(3), 166(2), 167(i), 177(c), 186(3), 189(e), 201(g), 225(b), 248(1)(c), 267(1)(c), 274(d), 302(1)(e), 302(2)(c), 320(b), 340(d), 366(c), 386(c), 413(c), 420(d), 440(c), 459(c), 467(b), 523(h)(i), 542(2)(b), 549(3)(b) and 589(2)(g).

154 SARS "Importation of unaccompanied goods into South Africa" (July 2016), available at: <<http://www.sars.gov.za/AllDocs/OpsDocs/Guides/Customs-G002%20-%20Guide%20on%20Importation%20of%20unaccompanied%20goods%20-%20External%20Guide.pdf>> (last accessed 2 May 2015).

155 TFA, art 11.3.

156 Id, art 11.2.

157 Id, art 11.4.

158 Id, art 11.5.

159 Id, art 11.14.

160 Id, art 11.6–11.13.

transit is regulated in South Africa by virtue of chapter 9 the CCA, which regulates national and international transit, and for this purpose outlines the procedural formalities for clearance. At the same time, the WTO's obligation to ensure freedom of transit is also regulated by means of various international and regional conventions to which South Africa is a party.¹⁶¹ Interestingly, studies have shown that, while on the one hand WTO provisions that pertain to trade facilitation merely underscore the significance of simplifying trade procedures, regional commitments have gone further by additionally addressing aspects such as transport and the quality of infrastructure.¹⁶²

OBSERVATIONS AND CONCLUSION

In light of the analysis of the proposed customs reforms, the author finds that South Africa, under the auspices of its CM Programme, would be in a position to notify an array of provisions that it would be able to implement as category A notifications, provided the new legislation comes into force before the commencement of the TFA.¹⁶³ Implementing the provisions of the new acts would in turn require substantial changes to the country's customs environment and legislation, appreciating that the existing 1964 Act is obsolete and fails to keep pace with modern technological requirements. Nevertheless South Africa has done a commendable job in attempting to bring its customs procedures into line with the WTO's much awaited TFA. Consequently, the author believes that the republic would be able to notify several provisions of the TFA, should the new customs legislation enter into force prior to the commencement of the TFA (see table below).

161 South Africa embraces the freedom of transit through a number of international conventions: the GATT-WTO; Kyoto Convention; Nairobi Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences; Geneva Convention on Harmonization of Frontier Control of Goods; Montego Bay Convention on Landlocked Countries; Almaty Programme of Action; and regional conventions such as those forming the Common Market for Eastern and Southern Africa, SACU and SADC. See UNECA "Trade facilitation", above at note 139 at 32–34 and 61. Compare with R Tama Lisinge "Leveraging WTO negotiations on trade facilitation to operationalize the Almaty Programme of Action" (November 2008, UNECA-African Trade Policy Centre, work in progress no 71), available at: <<http://www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/71.pdf>> (last accessed 10 September 2016).

162 UNECA "Trade facilitation", id at 32 and 34.

163 This is because category A notifications consist of provisions that the respective member undertakes to implement *before* the commencement of the TFA. Given that the CCA, CDA and CEAA will only be implemented after the requisite proclamation by the president, it is understood that none of the provisions under the umbrella of these acts is yet in force.

TFA notifications that South Africa could make

<p>Category A notifications that South Africa could implement prior to the entry into force of the TFA, provided that the new customs legislation is proclaimed before the TFA enters into force</p> <p>Article 1: All provisions</p> <p>Article 2: All provisions</p> <p>Article 4: All provisions</p> <p>Article 5: Paragraphs 1 and 2</p> <p>Article 6: Paragraph 3</p> <p>Article 7: Paragraphs 1, 2, 4, 5, 6, 7 and 8</p> <p>Article 8: All provisions</p> <p>Article 9: All provisions</p> <p>Article 10: Paragraphs 1, 3, 5, 6, 7 and 9</p> <p>Article 11: All provisions</p> <p>Article 12: All provisions</p>	<p>Category B notifications that South Africa could implement after a transition period, by virtue of special and differential treatment offered to developing or least-developed countries</p> <p>Article 3: Even though chap 10 of the CDA makes provisions to regulate advanced rulings (as discussed above), these are not intended to be implemented in the first phase of the act's implementation. Hence, South Africa can only notify article 3 (which pertains to advanced rulings) as a Category B notification.</p> <p>Paragraph 3</p> <p>Paragraphs 1 and 2</p> <p>Paragraphs 3 and 9</p> <p>Paragraphs 2, 4 and 8</p>
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Consequently, South African customs procedures are indeed better placed than the global average in many respects, as also highlighted by the OECD research on trade facilitation indicators in South Africa.¹⁶⁴ The three new acts (the CCA, the CDA and the CEAA) would certainly prove advantageous in facilitating trade in the republic.

164 Above at note 62.