



Modernisation of customs regulations and practices to combat customs offences in France, South Africa and Cameroon

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DEDICATION

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ABSTRACT

The modernisation of customs regulations and practices involves a process of transformation aimed at boosting the capacity of customs agencies so that they can respond more efficiently to the ever-changing trade environment. In the context of this study, the transformation referred to is changes and adaptations of the institutional, structural, legal, practical, and managerial aspects of revenue collectors' work. Several global changes in international trade prompted the World Customs Organization (WCO), an international customs body, to pilot projects for the modernisation of customs in order to adapt the approach of this administration to the various changes occurring in the field. These changes relate to the increasing volume of world trade, technological advances, the transformation of businesses models and the steady rise in criminal activities and security threats. The modernisation of customs with the WCO's guidance and support entails inviting and empowering member states of the WCO to align their customs regulations and practices with international standards. Customs modernisation became a topic of interest and started gaining worldwide attention when international trade experienced unprecedented changes coupled with technological advances. This has opened debates around issues relating to globalisation, such as the lowering and removal of trade barriers. There is also a necessity to ensure that customs authorities have sufficient strategic control over imported and exported commodities. It has become imperative for all states to improve their competitiveness in customs through the revision of regulations which give rise to burdensome practices and procedures. The removal of cumbersome legislative provisions and practices will ensure an increment of efficiency in customs processes.

Customs modernisation differs in developed, developing or under-developed states. Hence, the approach to customs modernisation differs from one jurisdiction to another. While some states embrace customs modernisation, others are unable, unwilling or merely reluctant to do so. There are different reasons for the variation in states' attitudes towards customs modernisation. These attitudes are reflective of the political and economic realities prevailing in each state. Some states are open to customs modernisation but lack the financial and structural resources necessary to be

able to engage in such modernisation. Others are plagued by corrupt syndicates which employ all the means at their disposal to defend their manipulation of customs authorities.

This study analyses the modernisation of customs regulations and practices in France, South Africa and Cameroon. These jurisdictions have different economic powers, are located in different geo-economic zones, and differ in their capacity to implement customs modernisation. The study examines how the respective states incorporate modernisation into their daily customs operations, as recommended by the WCO, of which they are all member states. The study further analyses the impact of customs modernisation on the fight against customs offences in the three jurisdictions.

Changes in international trade have both positive and negative impacts on customs. The negative impacts include changes in the forms and increases in the frequency of customs offences. Customs offences are breaches or attempted breaches of customs laws. States suffer financial loss, and these illegal activities threaten their security. The benefits that accrue to businesses and the quality of their products are also challenged by these unlawful behaviours. In addition, the health and safety of citizens are imperilled by customs offences such as the illicit import of counterfeit, sub-standard and dangerous goods and substances. Irrespective of their nature, customs offences have negative impacts on society.

To limit and mitigate the adverse effects of customs offences on society and revenue collection, there is a need for strategic customs administrations that embrace technology and modernisation in general. France, South Africa and Cameroon have modernised their customs administrations. While these countries have incorporated the WCO conventions and tools in their respective environments, the impact of the incorporation on customs offences, in general, can be inferred from the simple implementation of these instruments and tools.

KEYWORDS customs modernisation, customs regulations, customs practices, customs offences, combating customs offences in France, combating customs offences in Cameroon, combating customs offences in South Africa.

LIST OF ABBREVIATIONS

AAEC	African Alliance for e-Commerce
AC	Afrique Contemporaine
ACAS	Air Cargo Advance Screening system
ACM	Les Actes Du Club Management
ACM	Automated Cargo Management
ACP	Africa, the Caribbean and the Pacific
ADB Group	African Development Bank Group
AEO	Authorized Economic Operator
ANSM	National Agency for Medicines and Health Products Safety
AOAV	Action on Armed Violence
APEC	Asia-Pacific Economic Cooperation
ASYCUDA	Automated System for Customs Data
ASYPM	ASYCUDA module for performance measurement
ATPN	Afrique-Notes de Politique Commerciale (Africa Trade Policy Notes)
AUSTRAC	Australian Transaction Reports and Analysis Centre
AVI	Attestation of Verification to Import
BCOCC	Border Control Operational Coordinating Committee
CADC	litigation Files Approval Commission
CBC	Customs & Business Challenge
CBCU	Customs Border Control Unit

CCA	Customs Control Act
CCC	CEMAC Customs Code
CCC	EU Community Customs Code
CCDG	Cameroon Customs Directorate General
CCG	Management Control Unit
CCP	UNODC-WCO Container Control Programme
CEMAC	Economic and Monetary Community of Central Africa
CEN	Customs Enforcement Network
CENcomm	Customs Enforcement Network Communication Platform
CEPGL	Economic Community of Great Lake Countries
CET	Common External Tariff
CFA franc	Franc of the Financial Cooperation in Central Africa
CGA	Counterfeit Goods Act
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLIKC	Customs Learning and Knowledge Community
CMP	Customs Modernisation Programme
CNLF	National Anti-Fraud Committee
COMCEC	Standing Committee for Economic and Commercial Cooperation of the Organization of Islamic Cooperation
COPES	Compendium of Customs Operational Practices for Enforcement and Seizures

CRAD	Customs Administration Reform Committee
CRMC	Customs Risk Management Compendium
CPEG	Committee for the Promotion of Ethics and Governance
CTP	Customs Transformation Programme
CRE	Customs Risk Engine
DCPJ	Central Directorate of the Judicial Police
DDA	The Doha Development Round or Doha Development Agenda
DED	Directorate of Customs investigations
DG	Director-General
DGCC	Directorate General of Cameroon Customs
DNRED	National Directorate for Customs Investigations and Intelligence
DPCI	Directorate for Priority Crime Investigation
ECCAS	Economic Community of Central African States
EDF	European Development Fund
EDI	Electronic Data Interchange
EPA	Economic Partnership Agreement
e-RFM	electronic Road Freight Manifest
EU	European Union
FAL	International Maritime Transportation Facilitation Committee
FAO	Food and Agriculture Organization of the United Nations
FATF	Financial Action Task Force

FCC	French Customs Code
GATT	General Agreement on Tariffs and Trade
GCI	Green Customs Initiative
GOLT	Customs' Antiterrorist Operational Group
GOU	Governance Operational Unit
GPS	Global Positioning System
GPT	Generalised Preferential Tariff
GFPTT	The Global Facilitation Partnership for Transportation and Trade
GUCE	Single Window for Foreign Trade Operations
ICC	International Chamber of Commerce
ICCWC	International Consortium on Combatting Wildlife Crime
IDC	Industrial Development Corporation
IDE	Improved Explosives Devices
IDW	International Democracy Watch
IFRC	International Federation of Red Cross and Red Crescent Societies
IMF	International Monetary Fund
IRACM	Institute of Research Against Counterfeit Medicines
ISPM	Public Management Higher Institute
IT	Information Technology
ITAA	International Trade Administration Act
ITAC	International Trade Administration Commission

JIE	Journal of International Economics
LOLF	Loi Organique relative aux Lois de Finances
MC	Management Committee
MCC	Modernised Customs Code
NATO-COE-DAT	North Atlantic Treaty Organization Centre of Excellence Defence against Terrorism
NCCB (ONCC)	National Cocoa and Coffee Board
nCEN	National Customs Enforcement Network
NDFF	National Delegation for the Fight against Fraud
NEDLAC	National Economic Development and Labour Council
NGP	National Governance Programme
NGPSP	National Governance Programme Support Project
OCLCTIC	The Central Office for the fight against crime linked to information technology and communication
OECD	Organisation for Economic Cooperation and Development
OHCHR	United Nations Human Rights Office of the High Commissioner
OLAF	European Anti-Fraud Office
PAD	Autonomous Port of Douala
PAGODE	Procédures Automatisées de Gestion des Opérations de la Douane et du Commerce Extérieur (computerised management procedures for Customs and external trade operations)
PAPMOD	European Union Programme to support the Customs Modernisation Plan

PBLQ	Dutch Institute for Public Administration
PCA	Post-Clearance Audit
PCR	Project Completion Report
PREF-CEMAC	CEMAC Financial and Economic Reform Programme
PRSP	Poverty Reduction Strategy Paper
PVI	Import Verification Programme
RDC	Revue des Douanes Camerounaises (Review of Cameroon Customs)
RILO	Regional Intelligence Liaison Offices
RKC	Revised Kyoto Convention
SACU	Southern African Customs Union
SAFACT	South African Federation Against Copyright Theft
SAMLJ	South African Mercantile Law Journal
SAPS	South African Police Service
SAPSA	South African Police Service Act
SARS	South African Revenue Service
SEBSS	Southeast European and Black Sea Studies
SGS	Société Générale de Surveillance
SNDJ	National Customs Judicial Service
SR1	Single Registration
SWG	Safe Working Group
TBML	Trade-Based Money Laundering

TDA	Transitional Delegated Act
TGI	Tribunal de Grande Instance
TPI	Tribunal de Première Instance
TRACFIN	Intelligence Processing and Action against Illegal Financial Circuits
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TT	Turnover Tax
UCC	Union Customs Code
UDEAC	Central African Customs and Economic Union
UEAC	Central African Economic Union
UMAC	Central African Monetary Union
UNEP	United Nations Environment Program
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCDP	United Nations Committee for Development Policy
UNDP	United Nation Development Programme
UNECE	United Nations Economic Commission for Europe
UPS	United Parcel Service
VAT	Value Added Tax
WB	World Bank
WCJ	World Customs Journal

WCO World Customs Organization

SAFE Framework World Customs Organization SAFE Framework of Standards to
Secure and Facilitate Global Trade

WCOEC World Customs Organization Enforcement Committee

WTO World Trade Organization

WTO TFA World Trade Organization Trade Facilitation Agreement

WTO TFNG World Trade Organization Trade Facilitation Negotiating Group

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CHAPTER 1

INTRODUCTION

1.1 General background

1.1.1 The link between customs modernisation and trade facilitation

The process of importing and exporting goods across borders often confronts several challenges that are referred to as administrative or non-tariff barriers to trade.¹ These barriers have to do with the different formalities (sometimes lengthy and very complex) that such operations require to abide by. They may take the form of regulations that are not always understood, a considerable amount of paperwork, going through different inspection stages or bearing with burdensome customs clearance procedures.² In order to minimise the negative impact of these various procedural challenges on the cross-border movement of goods, trade facilitation has been on the agenda of the makers of trade law for many years now.³ The World Trade Organization (WTO) members consented to the Bali package (2013),⁴ which is the most comprehensive agreement emanating from the Doha round of negotiations.⁵ Its primary objective is to suggest to the WTO members various approaches to making the import, export and transit of goods more practicable and cost-effective by minimising the number and complexity of the related formalities including the related documentation.⁶ To the question why countries take steps to facilitate trade, Hornok and Koren⁷ say it is with the "hope to increase trade volumes without endangering

1 Hornok and Koren 2015 *Journal of International Economics* (JIE) 110; Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

2 Hornok and Koren 2015 *Journal of International Economics* 110.

3 Hornok and Koren 2015 *Journal of International Economics* 110; Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

4 The full name of this agreement is *The World Trade Agreement on Trade Facilitation* (WTO TFA). It was adopted at the WTO's 9th Ministerial Conference in Bali in 2013.

5 The Doha Development Round or Doha Development Agenda (DDA) is the trade-negotiation round seeking to institute consistent reform of the international trading system by introducing tools to lower trade barriers and re-evaluated trade rules. Hornok and Koren 2015 *JIE* 110; United Nations Economic Commission for Europe (UNECE) Date Unknown *WTO Agreement on Trade Facilitation* <https://www.tfig.unece.org> and WTO Date Unknown https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

6 Article 10 of the WTO TFA.

7 Hornok and Koren 2015 *JIE* 110.

government revenues by reducing inefficiencies." This is the context in which customs modernisation was initiated. The transformation occurring in the international trade environment induced heightened awareness as regard the fundamental nature of facilitating trade for boosting economic growth.⁸

Wilson, Mann and Otsuki⁹ consider reforms in the customs industry in general and in the customs regulatory environment¹⁰ in particular as two aspects of trade facilitation which are still in search of a standard and commonly accepted definition. Nevertheless, they suggest that trade facilitation entails port efficiency and customs administration¹¹ as well as a favourable domestic regulatory environment and the services infrastructure that enables the effective use of information technology for e-business.¹² The International Chamber of Commerce (ICC), on the other hand, defines trade facilitation as "improvements in the efficiency of the processes associated with trading in goods across national borders."¹³ The ICC definition is precise and concise. Reform processes to fast-track and sustain economic growth should involve every single structure and infrastructure partaking in trade across borders.

According to the ICC, facilitating trade implies fostering comprehensive and integrated approaches to streamlining and minimising the cost of international trade. It also means making it possible for trade activities to unfold in an adequate, efficient, transparent and predictable manner and, further, drawing from international practices that have made their mark and are so accepted.¹⁴ A similar definition is that given by

8 Staples talks of the importance of trade facilitation with the aim of attracting trade and investment. Staples "Trade Facilitation: Improving the Invisible Infrastructure" 140.

9 Wilson, Catherine and Otsuki 2005 *The World Economy* 841.

10 For these authors, there are four categories of trade facilitation to which attention should be directed, namely: the port infrastructure or port efficiency (which aims at measuring the quality of maritime ports and airports infrastructures); the customs environment (which aims to evaluate direct customs costs as well as the administrative transparency of customs and border crossing); the regulatory environment or the own regulatory environment (where the objective is to evaluate business' approach to regulations); e-business infrastructures or service sector infrastructure (which is designed to measure the effective use and application of information technology for greater efficiency). Wilson, Catherine and Otsuki 2005 *The World Economy* 844.

11 What they call concrete "border" elements.

12 This aspect is referred to by the authors as "inside the border" elements. Wilson, Catherine and Otsuki 2005 *The World Economy* 843-844.

13 ICC 2007 *Discussion Paper* 1.

14 ICC 2007 *Discussion paper* 1.

Staples¹⁵ for whom trade facilitation entails alleviating unnecessary administrative burdens pertaining to the cross-border movement of goods and services. This is where modernisation becomes indispensable as it allows the automation of procedures and levels them up with international practices. In a nutshell, trade facilitation and customs modernisation cannot be dissociated or isolated one from the other. Both of them seek to better international trade. Customs modernisation is part and parcel of trade facilitation as every modernisation step seeks to ease and speed up the movement of goods across borders. Trade facilitation has a broader scope of action than customs inefficiencies and also covers aspects like the costs involved in manufacturing, buying and selling goods and services internationally; transportation costs; the infrastructure utilised in these processes and the quality of the relevant laws and regulations.¹⁶ Governance and human resource development are not to be forgotten. They constitute the roots of the trade transformation process.¹⁷ No step taken, and no laws and regulations adopted, will be of benefit if the underlying issues of corruption in both the public and private sector are not adequately addressed.¹⁸ Customs administrations are called to act and to strive for transparency on all levels, reduce private incentives, and strictly punish non-compliance to established rules and regulations.¹⁹ Human resource development is the indispensable basis for a better implementation of trade facilitation measures.²⁰ Untrained or poorly trained human resources are a major regressive factor in the implementation of customs reform initiatives and the consequent trade facilitation.²¹

Staples²² further views trade facilitation as that process leading to the reduction of transaction costs associated with the enforcement, regulation, and administration of trade policies. Because trade facilitation as a whole is a technical and inclusive

15 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 140.

16 Amadi *Customs reform as a means to enhancing trade facilitation* 11.

17 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

18 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

19 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

20 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

21 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

22 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 140.

process,²³ it has been taxed as the “plumbing” of international trade.²⁴ Trade facilitation according to this author does not, however, mean loosening up on efforts to boost trade compliance.²⁵ In a further attempt to breaking down the concept of trade facilitation, Staples,²⁶ sees it as a process that primarily deals with the standardisation, streamlining and modernisation of customs techniques and procedures.²⁷ In more apt words, modernised and streamlined customs processes are the very essence of trade facilitation. There is, therefore, no trade facilitation without customs reform or modernisation. This assertion reinforces the idea that trade facilitation and customs modernisation are interrelated. The best chart correctly explaining the link between trade facilitation and customs modernisation is that trade facilitation is grounded on trade reform as a whole, and on customs reform in particular.²⁸ Customs modernisation thus appears as a critical and significant step in the overall trade facilitation goal.

As diverse as they are, the aspects affected by both trade facilitation and customs modernisation are represented in the following diagram, which bears the title of “An extended trade efficiency model”²⁹ but which adequately represents the domains that are affected by the processes seeking to sustain the growth of world trade.

23 As it involves every single aspect that intervenes in the import and export of goods across borders.

24 Staples “Trade Facilitation: Improving the Invisible Infrastructure” 140.

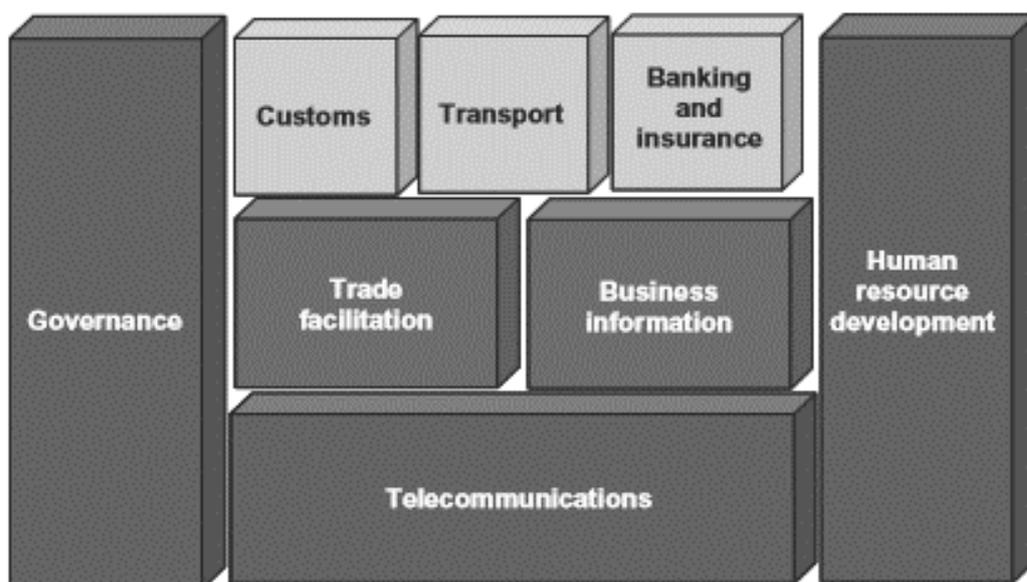
25 Staples “Trade Facilitation: Improving the Invisible Infrastructure” 140.

26 Staples “Trade Facilitation: Improving the Invisible Infrastructure” 144.

27 Staples “Trade Facilitation: Improving the Invisible Infrastructure” 145.

28 Staples “Trade Facilitation: Improving the Invisible Infrastructure” 144.

29 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.



In 1999 the ICC invited trade and finance heads to acknowledge that the modernisation of the customs administrations of individual countries and their trading partners was crucial for economic development.³⁰ The invitation directed attention to the vital role to be played by the government and its representatives in the modernisation of customs administrations. Governance as a crucial element in the customs modernisation process will be discussed further in Chapter 2.

Within the borders of a country, the modernisation of the customs administration enables growth and investment, while the modernisation of the customs administrations of trading partners is central to the fulfilment of negotiated trade benefits.³¹ Once a country has engaged in the process of modernising its customs administration, it should urge its various trading partners to do likewise if they are not already doing so, so that the trade concessions entered into among them can benefit all of them.³²

The World Customs Organization (hereafter WCO) concisely sums up the link between

30 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization*
<https://www.iccwbo.org>.
 31 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization*
<https://www.iccwbo.org>.
 32 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization*
<https://www.iccwbo.org>.

trade facilitation and customs in the following terms:

In international trade Customs plays a critical role not only in providing expedited clearing processes but also in implementing effective controls that secure revenue, ensure compliance with national laws, and ensure security and protection of society. *The efficiency and effectiveness of Customs procedures* has a significant influence on the economic competitiveness of nations and in the growth of *international trade and the development of the global marketplace* [emphasis added].³³

The two concepts are thus interconnected and mutually accommodating. Attempting to strike a proper balance between trade facilitation and the compliance with statutory prerequisites has been one of the significant action fields in the WCO's agenda since its establishment.³⁴ In acting to address customs inefficiencies, the WCO plays a participative role in the trade facilitation agenda, but the WTO undertakes the primary efforts in the field.³⁵ The WCO's object is to enable its member customs administrations to operate in an environment where trade is facilitated, and customs control is effective.³⁶ Increasing the efficiency of customs procedures has therefore been at the centre of trade facilitation discussions because it intervenes at various stages of the process of importing and exporting of goods across borders.³⁷ The improved procedures would need to ensure both speed and efficiency while clearing goods for an ever-increasing volume of transactions.³⁸

As customs systems have now been situated in their proper place in international trade, it is now vital to understand customs specificities.

1.1.2 The context of the research – definitions

"Customs administrations are key government agencies established to apply international, regional and national policies and laws to goods crossing borders."³⁹ The efficiency of these administrations is considered essential to economic growth and social protection.⁴⁰ Protecting society as an aspect of the function of customs

33 WCO Date Unknown *Overview* <https://www.wcoomd.org>.

34 WCO Date Unknown *Overview* <https://www.wcoomd.org>.

35 Duval 2007 *Trade Facilitation* <https://www.econstor.eu>.

36 WCO Date Unknown *Overview* <https://www.wcoomd.org>.

37 Amadi *Customs reform as a means to enhancing trade facilitation* 14.

38 WCO Date Unknown *Cross-border e-Commerce* <https://www.wcoomd.org>.

39 WCO 2010 *Support for Customs Reform* <https://www.wcoomd.org>.

40 WCO 2010 *Support for Customs Reform* <https://www.wcoomd.org>.

administration is that on which this thesis focuses. The world has become a global market characterised by an ongoing and increasing flow of goods, people, capital, information and technology,⁴¹ it is crucial that customs administrations adequately transform (their structures, their approaches and their rules) in order to enhance their provision of services. This is where the concept of modernisation comes in.

Depending on the circumstances, “customs” may be defined as designating either (i) the government department that collects taxes on goods bought and sold and on goods brought into the country, and controls what is brought in; or (ii) the place at a port or an airport where the goods you bring into the country are checked; and (iii) the taxes that must be paid to the government when goods are brought in from other countries.⁴² These definitions have some shortcomings especially as three of them refer only to importation. Export or transit operations seem not to exist in these definitions. The WCO definition is more inclusive. It defines customs as:

The Government Service which is responsible for the administration of Customs law and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.⁴³

The WCO notes that the term is also used to refer to any part of the Customs Service or its offices. It further points out that the word “customs” may also be used to describe officials involved with customs, duties and taxes or the control of goods, or any other aspect of customs.⁴⁴ This definition of customs best meets the objectives of this research, which regards customs as the government service that enforces customs law and administers other law in respect of goods and people⁴⁵ moving across borders.

From a customs perspective, modernisation is perceived as:

a broad strategy and goal to improve the effectiveness, efficiency, transparency, and

41 WCO 2010 *Support for Customs Reform* <https://www.wcoomd.org>.

42 Hornby *et al Oxford Advanced Learner's Dictionary* 361.

43 General Annex, Chapter 2 of the *International Convention on the Simplification and Harmonization of Customs Procedures* (as amended) (1999) otherwise and hereafter called the Revised Kyoto Convention.

44 WCO *Glossary of International Customs Terms* 8.

45 The movement of people is usually handled by a distinct immigration service; however, customs being tasked with primarily focusing on the movement of goods. Keen “The Future of fiscal frontiers” 2; WCO 2007 *WCO News* 13 (hereafter the WCO SPECIAL REPORT).

predictability of an administration's operations so that it can better meet the demands of modern times.⁴⁶

It is, in other words,

the comprehensive streamlining of processes, formalities, procedures and documents handled by Customs, supported by an improved legal and regulatory framework, the optimal application of IT solutions, and the implementation of an improved human resource management policy.⁴⁷

Customs modernisation thus means empowering customs so that the system can keep abreast with societal changes. It also means aligning customs practices and the legal framework with international standards that have proven successful, to make them more efficient and more effective for more competitiveness.⁴⁸ Modernisation as a whole is an inclusive, complex and multi-dimensional concept.⁴⁹ It is a process of socio-cultural transformation.⁵⁰ Engaging in such a process means the transformation of values, norms, institutions and structures.⁵¹ Countries keen on the idea of customs modernisation have developed programmes with the aim of introducing the projected reform of the administration and its border services.⁵² The United Nations Conference on Trade and Development (UNCTAD)⁵³ views a customs modernisation project as one that seeks:

To reform and modernize the Customs Administrations, aligning the legal framework, their organization and procedures to international standards and best practice, and ensuring their expected role in a modern market economy.

The above definition reflects the underlying component of a customs modernisation plan or project.

Customs offences, on the other hand, are defined as any breach or attempted breach

46 WCO 2007 *Special Report* 13.

47 The Global Facilitation partnership for Transportation and Trade Date Unknown *Cutoms modernisation* <http://www.gfptt.org> (hereafter the GFPTT).

48 De Wulf and Sokol (eds) *Customs Modernization Handbook* (hereafter the Modernisation Handbook).

49 Msheshwari 2016 *The Concept of Modernization* <https://www.vkmaheshwari.com>.

50 Msheshwari 2016 *The Concept of Modernization* <https://www.vkmaheshwari.com>.

51 Msheshwari 2016 *The Concept of Modernization* <https://www.vkmaheshwari.com>.

52 WCO Date Unknown *Single Window* <https://www.wcoomd.org>.

53 The UNCTAD is a permanent intergovernmental body within the United Nations that deals with economic and sustainable development issues and more specifically those relating to trade, finance, investment and technology. UNCTAD 2017 *UNCTAD at a Glance* <https://unctad.org>.

of Customs law.⁵⁴ Customs law, in turn, is perceived in the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (hereafter the Nairobi Convention)⁵⁵ as “all the statutory or regulatory provisions enforced or administered by the Customs administrations concerning the importation, exportation or transit of goods.” It is clear from the above that any activity, carried out with the aim of defeating customs law bears the character of an offence under the said law.

The following paragraphs aim at contextualising these concepts and establishing how they relate to each other.

1.1.3 Customs' general role and importance

The role of Customs is to control the movement of goods and thereby secure the state's interests and safeguard revenue collection. The key aims have been to ensure compliance with state policies and laws applicable to the cross-border movement of goods, to combat smuggling, and to secure borders, whilst ensuring the facilitation of legitimate trade.⁵⁶

Customs thus has a number of roles to play in the service of society, namely controlling, enforcing and administering customs law and other law with the aim of safeguarding state revenue and security, preventing and repressing various offences, and enabling a smooth flow of law-abiding goods. This conclusion is reflected in these words of the WCO:

The common globally accepted mission of Customs is to develop and implement an integrated set of policies and procedures that ensure increased safety and security, as well as effective trade facilitation and revenue collection.⁵⁷

The importance of customs varies from one continent/country to the next, and this difference is often shaped by or depends on the level of development of the country.⁵⁸ It is commonly accepted that the customs system is of a crucial importance in

54 Article 1(b) of the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (1977).

55 Article 1(a) of the *Nairobi Convention*, 1977.

56 WCO 2008 *Customs in the 21st Century* II/5.

57 WCO 2008 *Customs in the 21st Century* II/5; WCO 2008 <http://www.wcoomd.org>; UNCTAD Trust Fund for Trade Facilitation Negotiations 2011, *Technical Note* No. 3, 2; Ferreira, Engelschalk and Mayville “The challenge of combating corruption” 369.

58 Buyonge and Worquea *Best practices report* 1.

developing countries, as it constitutes the primary source of revenue for the state, while in developed countries, beyond collecting duties on goods, a significant emphasis is rather placed on non-financial aspects such as strengthening control measures related to combatting terrorism and drugs trafficking, for instance.⁵⁹ In addition, the customs system also has to perform various other complementary roles.⁶⁰ It is worth noting, however, that the focus is progressively changing in Africa, given the challenges posed by the growth in international trade.⁶¹

Despite the different levels of importance ascribed to customs systems in different parts of the world, a customs system is very often viewed as “a major budget contributor, and sometimes the most important source of revenue for a country.”⁶² A customs system is furthermore said to hold a critical observation position as its stand at the centre of trade, the economy, fiscal and budget issues, crime prevention, transport and environmental issues.⁶³ It is in this respect that the WCO characterises it as “a central part of the globalization process and a catalyst for the competitiveness of countries...”⁶⁴

This way of presenting customs systems strengthens the idea that they play a crucial role in shaping, strengthening and sustaining countries’ economy and security. If a customs administration does not function effectively and efficiently in order to ensure the ease and safety of the trading platform, this becomes a problem for the individual country itself and for other countries trading with it. In this respect, the WCO acknowledges that “the lack of effective controls presents risks to any economy and society and can undermine gains that have been made.”⁶⁵

59 WCO 2007 *SPECIAL REPORT* 14; Keen “The Future of fiscal frontiers” 2; Widdowson 2007 *WCJ* 31; Ireland 2009 *WCO Research Paper No 3*, 2; The African Development Bank Group 2012 *There is Strong Commitment to Customs Modernization in Africa* <http://www.afdb.org>; see further Buyonge *World Customs Journal* (hereafter *WCJ*) 55; WCO 2009 *The WCO Capacity Building Development Compendium 2-1*.

60 WCO 2007 *SPECIAL REPORT* 14.

61 Buyonge *WCJ* 57.

62 The World Bank 2011 *The Role of Customs* <http://www.worldbank.org>.

63 The World Bank 2011 *The Role of Customs* <http://www.worldbank.org>; WCO 2009 *The WCO Capacity Building Development Compendium 2-1*.

64 WCO 2010 *Support for Customs Reform* <http://www.wcoomd.org>

65 WCO 2010 *Support for Customs Reform* <http://www.wcoomd.org>; see further Gordhan 2007 *WCJ* 49; Foreword of the *Customs Modernization Handbook* IX.

Therefore, a customs administration, like any other enforcement state agency, must be “service-oriented” and work in a way that will satisfy states, societies and business organisations’ expectations, says the WCO. One way of doing so is to modernise or reform the techniques, processes, procedures and legal instruments governing the field.

1.1.4 Customs administrations’ specific role in the fight against customs offences

The functions of customs enforcement broadly speaking entail protecting society and fighting transnational organised crime, using adequate risk management principles.⁶⁶ Risk management in customs entails submitting documents online prior to the goods arriving. This enables the customs administration to determine in advance what merchandise bears the most risk, and thus to focus its attention and resources on that merchandise while enabling a smooth flow of less dangerous cargoes where minimum control is exercised.⁶⁷ This means taking proactive steps to mitigate risks that may ensue from trading across borders.

Customs administrations have functions beyond their principal or primary known responsibilities of collecting duties and taxes at the border. They are also expected, on their own or in collaboration with other enforcement agencies at the border and beyond, to curb crime in its diverse forms. It is in this respect that the World Bank (WB) suggests that customs administrations have three leading roles, namely: (i) to assess and collect revenue based on the characteristics of the goods; (ii) *to protect the country and the society by preventing smuggling* [emphasis added]; and (iii) to ensure that national legislation is applied to imported goods.⁶⁸ The WB also describes the role of customs administrations in fighting crime as follows:

Customs administrations are expected to ... provide supply chain security, prevent the importation of prohibited or unsafe imports (for example, illegal weapons or out-of-date medicines), and combat the trade of narcotics through the implementation

66 De Wulf “Strategy for Customs Modernization” 6.

67 Standard 3.25 of the General Annex to the RKC; see also Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 17.

68 The World Bank 2011 *The Role of Customs* <http://www.worldbank.org>.

of laws and regulations that are in line with WTO commitments...⁶⁹

Collins⁷⁰ similarly believes that customs agencies should be more involved in the fight against cross-border crime than any other enforcement agency because (i) illegal commodities need to cross an international border to be sold at a profit; and (ii) the means of transport used for legitimate trade are similarly used for illegal transactions. The enforcement mandate of customs administrations has thus been taken to another level and has been diversified and extended in the 21st Century to key targets such as facilitating legitimate trade, protecting society (citizens and their environment) and curbing transnational crime in its diversity.⁷¹ The projection of the mandate of customs administrations in the 21st Century is that it is evolving and will result in considerable changes in the way they handle their business.⁷²

The mandate of customs agencies to act against illegal activities affecting the interest of trade and the security of nations worldwide having been touched upon, it is now necessary to understand the factors driving the modernisation of customs administrations.

1.1.5 The reasons for the modernisation of customs

The changing environment in which customs agencies operate nowadays has placed heavier burdens on them than those they were used to.⁷³ World trade growth has rendered their task both more important and more complex.⁷⁴ The international trade

69 Keen similarly describes the task of customs agencies in fighting customs offences as protecting society against terrorist activities; enforcing quantitative restrictions on the movement of some commodities; detecting and seizing prohibited goods; enforcing sanitary and phytosanitary restrictions and rules relating to endangered species and intellectual property rights; implementing exchange restrictions; and monitoring cash flows across borders that may be suggestive of money laundering. Keen "The Future of fiscal frontiers" 2; De Wulf "Strategy for Customs Modernization" 5; see further The World Bank 2011 *The Role of Customs* <http://www.worldbank.org>.

70 Gordhan *WCJ* 51; see also Collins "Cross border crime and Customs".

71 Widdowson 2007 *WCJ* 32; European Union Commission 2007 "Standardised framework for risk management" 3; Alohan 2015 *Tackling 21st Century customs challenges* <http://www.leadership.ng>; African Development Bank Group 2012 <http://www.afdb.org>; also see the United Nations Programme of Action Implementation Support System 2014 <http://www.poa-iss.org/RegionalOrganizations/24.aspx>; The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>.

72 The World Bank 2011 *The Role of Customs* <http://www.worldbank.org>.

73 Widdowson 2007 *WCJ* 32; WCO 2010 *Support for Customs Reform* <http://www.wcoomd.org>.

74 Keen "The Future of fiscal frontiers" 3.

environment is growing in complexity, with changes taking place at all sphere of operation.⁷⁵ The way in which goods are carried and traded, the speed at which transactions are concluded, and the ever-increasing volume of goods and people moving across borders, coupled with businesses' high expectations have required of customs officers more "service-oriented" interventions.⁷⁶ Widdowson⁷⁷ refers to this type of approach as moving from the concept of intervention for the sake of intervention to intervention by exception. This means exercising control strategically in a way that will not hinder legitimate trade, but that will, on the other hand, be very strict on illegal transactions. This approach has to be based on the legitimate identification of risks.⁷⁸ This entails enhancing customs capacities and striving for efficiency, to the benefit of all interested parties.⁷⁹ Customs administrations are thus required to strategically respond to the "continuing and rapid changes in the pattern, extent, and nature of international trade."⁸⁰ The magnitude of trade flows is huge, and customs administrations thus need to be adequately prepared to handle them.⁸¹ Both the environment in which the work is done and the way in which such work is carried out need ongoing transformation.⁸² Responsibilities in respect of the international movement of goods have expanded and will continue to expand from the traditional collection of duties and taxes on international trade to boost state revenues, to the carrying out of controls and other activities that serve a broader set of governmental objectives.⁸³

The fast-changing and very demanding nature of this environment has prompted many states individually or collectively (with the support and guidance of the WCO as well as that of the WTO, the World Bank and the International Monetary Fund (IMF),

75 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 139.

76 Mikuriya "Legal framework for customs operations" 51; Gordhan 2007 *WCJ* 51; The WCO *Customs Risk Management Compendium* 3 hereafter the WCO CRMC; Keen "The Future of fiscal frontiers" 15; European Union Commission 2007 "Standardised framework for risk management" 2; also see the WCO 2010 *Support for Customs Reform* <http://www.wcoomd.org> and Staples "Trade Facilitation: Improving the Invisible Infrastructure" 139.

77 Widdowson 2007 *WCJ* 32.

78 Widdowson 2007 *WCJ* 32.

79 Levendal *A case study of the customs administrative penalty* 1.

80 Keen "The Future of fiscal frontiers" 1.

81 Keen "The Future of fiscal frontiers" 3.

82 Keen "The Future of fiscal frontiers" 15; Foreword of the *Customs Modernization Handbook* IX.

83 WCO 2008 *Customs in the 21st Century* II/5.

among other organisations) to take steps to modernise customs practices in order to keep them aligned with the changing trade environment.⁸⁴ The main idea behind such modernisation is to ensure that every customs system remains alert and responsive to developments in international trade in the fields of technology, law and the economy so as to facilitate and secure trade worldwide.⁸⁵

An inefficient or traditional customs administration will not enable governments to meet their revenue targets, nor satisfy their will to facilitate trade and their desire to protect society from the influx of dangerous commodities that are smuggled or illegally traded across borders.⁸⁶ Where government policies are made up of burdensome trade and customs regulations serviced by poorly equipped customs administrations, this is detrimental to economic growth.⁸⁷

The modernisation of customs simply comes down to building customs systems that are proactive regarding the challenges brought about by globalisation, in order to adequately meet the expectations of all stakeholders.⁸⁸ In the words of the WCO, modernising customs finds its justification and is necessary because it makes it possible for customs administrations to meet better their countries' individual needs as well as those of the international community concerning revenue collection, trade facilitation and the fight against customs-offending behaviours that are perpetrated across borders.⁸⁹ The need for modernisation thus arises as a direct consequence of a very complex and varied customs mandate that is modified by new developments that happen every day, as the quantum of world trade reaches new heights.⁹⁰ The process requires strategic planning, the consistent use of technical assistance and, most importantly, strong political commitment.⁹¹

From what has been said above, it may be concluded that there is no doubt that

84 The WCO *CRMC* 3.

85 The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>.

86 WCO 2007 *SPECIAL REPORT* 16; WCO 2009 *The WCO Capacity Building Development Compendium 2-I*; Keen suggests for instance that inefficient customs operations bear very heavy economic costs for the administration involved. Keen "The Future of fiscal frontiers" 14.

87 Clarke 2005 *World Bank Policy Research Working Paper* 3.

88 WCO 2010 *Support for Customs Reform* <http://www.wcoomd.org>.

89 WCO 2007 *SPECIAL REPORT* 16.

90 WCO 2009 *The WCO Capacity Building Development Compendium 2-I*.

91 Keen "The Future of fiscal frontiers" 16.

customs agencies have a central role to play in fighting criminal activities that take advantage of trade development. However, the bigger picture portrays customs modernisation as a way of technically empowering a customs administration (its material and human resources as well as its approach) in order that it may better meet its economic goals. New developments in trade are often accompanied by new developments in illegal activities, which must be met by new developments in the regulation and implementation of customs administration. Associated with the general technical nature of customs modernisation, the modernisation of the legal framework would contribute to a powerful customs administration able to provide better services. Up-to-date, incisive pieces of legislation are crucial tools for use in fulfilling the goals of a nation. As pointed out by Amadi,⁹² "open global trade regimes will only foster trade integration when there are complementary policies in place." Reforming policies and strengthening legal instruments are indubitably ways of easing the trade.⁹³

This thesis is an attempt to justify, or better, to explain how customs modernisation is not only a technical process but also one that has a legal dimension. As the research is being performed from a legal perspective, it is important to draw the line between modernisation as a general concept and modernisation in the customs context, and further to understand how modernisation in the latter context also involves improving the relevant regulatory framework.

Customs administrations' modernisation steps are generally seen as a constitutive part of trade facilitation.⁹⁴ However, Keen⁹⁵ considers the customs administration itself as a hindrance to the development of trade. Keen⁹⁶ further believes that the whole point of modernising customs is to lessen the burden laid on trade by customs administrations. It is also his view that developing countries need the "wholesale modernisation of customs administration", suggesting that a thorough transformation of the approach to customs is indispensable for the said countries.⁹⁷ One might concur and add that modernisation is an essential process, in both developing and developed

92 Amadi *Customs reform as a means to enhancing trade facilitation* 8.

93 Wilson, Catherine and Otsuki 2005 *The World Economy* 870.

94 See generally 1.1.1 above.

95 Keen "The Future of fiscal frontiers" 13.

96 Keen "The Future of fiscal frontiers" 13.

97 Keen "The Future of fiscal frontiers" 14.

countries. The only difference between these contexts may reside in the extent of modernisation needed coupled with a territory's ability to actually accommodate such a process and sustain it.

Oliver⁹⁸ believes that the modernisation of the customs administration is crucial because better cooperation leads to better control, better systems equal less corruption, and better facilitation requires more resources for better security and compliance. Moreover, the modernisation of customs administration would have the advantage of attracting foreign direct investment.⁹⁹ As the ICC's Committee on Customs and Trade Regulations puts it, "business-friendly policies" are what investors are progressively looking out for in locating future territories to invest in.¹⁰⁰ That is why countries that do not align themselves with "world-class standards" are unlikely to receive investment in their territories, as investors consider customs inefficiencies as very costly to their businesses.¹⁰¹ Beyond the foreign investment attraction dimension, the need for modernising customs regulations and practices, regardless of a territory's capabilities and reality, stems directly from the development of trade as a whole.¹⁰² Since modernisation is a broad concept, there is now a need to establish how it fits into the legal context.

1.1.6 Customs modernisation as a concept with a legal dimension

Several schools of thought¹⁰³ scrutinise the broad concept of modernisation (what it entails, how and when it comes about and/or ends, what its implications are within and for society, what specific concepts are used to characterise it and so forth). A full discussion of those approaches is beyond the scope of this thesis as one needs only a general definition of modernisation in the context of customs to be able to see how

98 Oliver Date Unknown *Simpler procedures for world trade growth* <https://slideplayer.com>.

99 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization* <https://www.iccwbo.org>.

100 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization* <https://www.iccwbo.org>.

101 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization* <https://www.iccwbo.org>.

102 The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>; see also generally 1.1.5 above.

103 Charlton and Andras *The Modernization Imperative* 3-6; Margetts "Modernization Dreams and Public Policy Reform" 25-27.

law and regulation are involved.

Margetts¹⁰⁴ quotes a definition of modernisation by Huntington to the effect that it is a “multifaceted process involving changes in all areas of human thought and activity”. This means that law and regulations cannot be excluded from the whole modernisation process. It is undeniably part and parcel of the said process.

Legal systems or legal improvement cannot be isolated from political, social and economic development.¹⁰⁵ According to Friedman,¹⁰⁶ no systematic social change can take place without similar changes being reflected somehow in the law. She emphasises the crucial role played or to be played by legal institutions in setting off, monitoring or following up on changes occurring in society. Drastic political and economic changes also call for drastic changes in existing laws.¹⁰⁷ The law in these cases has to be seen as a way to fully implement and support the transformed or transforming society.¹⁰⁸

With specific reference to customs, Keen¹⁰⁹ identifies four areas that require transformation: coherent trade policies and clear supporting legislation need to be established;¹¹⁰ modern and simple procedures are to be adopted;¹¹¹ there needs to be a focused change that ensures substantial reliance on self-assessment by taxpayers backed by a shift from physical to post-release controls, and the state needs to make available incentives and organisational structures that are favourable to integrity and effectiveness in customs administration.

104 Margetts “Modernization Dreams and Public Policy Reform” 25.

105 Friedman 1969 *Law & Society Review* 29.

106 Friedman 1969 *Law & Society Review* 29.

107 This entails the alteration or even the replacement of existing laws. Friedman 1969 *Law & Society Review* 37.

108 Parsons shares the view that the development of general legal systems is a key factor in social transformation. Parsons 1964 *American Sociological Review* 351; Friedman 1969 *Law & Society Review* 37.

109 Keen “The Future of fiscal frontiers” 15-16.

110 Here the author refers to well-designed policy measures that are simple and incorporated in clear legislation and that further provide a thorough description of the policy and the way it should be implemented.

111 A customs system must be appropriately designed and simple in nature. It must balance the different interests served so as not to privilege any one of these to the detriment of the others.

Improving legal and regulatory frameworks entails but is not limited to reviewing out-of-date laws and regulations that are confusing and sometimes contradictory, removing all duplication between existing law and regulations, ensuring that legal frameworks are consistent, easy to understand, flexible and simple to use, and enacting legal frameworks that incorporate the provisions of relevant international conventions and enable a strategic approach to issues.¹¹² In context, this means reviewing, amending or developing customs legal instruments that are compatible with the projected or ongoing changes (as the case may be) within the administration,¹¹³ that clearly set out the competency of customs authorities, that advocate transparency and predictability, that make provision for modern and simplified techniques for processing goods, that promote cooperation with other customs administrations as well as with other government enforcement agencies, that strengthen customs partnerships with core stakeholders, that place a significant accent on integrity, that provide for sufficiently deterrent penalties that nevertheless are proportionate to the offence committed, that are readily accessible to the public and - most importantly - meet international standards, and finally that clearly provide for time-effective and straightforward dispute settlement procedures.¹¹⁴

Such a framework should be consistent not only with itself but also with other related legislation that intervenes in the import and export processing of goods and other services.¹¹⁵ It is in this vein that Keen ¹¹⁶ points out that “badly conceived or complex policies, lacking a coherent rationale and often characterised by considerable arbitrariness, are by their very nature often hard to administer.” Legislative and regulatory reform constitutes a crucial element for improving the entire business sphere within which customs agencies intervene.¹¹⁷ It is a fact that out of date

112 Galanter “The modernization of law” 154; Law Commission 2015 *Modernising the legal framework* <http://www.lawcom.gov.uk>; Mikuriya “Legal framework for customs operations” 60-61.

113 UNCTAD Trust Fund for Trade Facilitation Negotiations 2011, *Technical Note* No. 3, 2; Mikuriya “Legal framework for customs operations” 57-58.

114 Preamble of the RKC; Standards 1.2-1.3, 3.39, 6.3-6.9, 7.1, 7.4, 9.1, 10.1 and transitional standard 3.4 of the General Annex to the RKC; Mikuriya “Legal framework for customs operations” 53.

115 Preamble of the RKC; Mikuriya “Legal framework for customs operations” 53.

116 Keen “The Future of fiscal frontiers” 15.

117 Buyonge and Worquea *Best practices report* 1.

customs law limits social and economic progress by acting as a barrier to trade.¹¹⁸ Changes that occur in society have an undeniable impact on the law and so require its improvement.¹¹⁹ The legal framework governing customs nowadays must, therefore, reflect, incorporate and give the full legal basis for the implementation of modern customs procedures.¹²⁰ In other words, laws and practices governing customs activities should be adequate for the modern trading environment. "Adequacy" in this context refers to the ability of the laws and relevant practices to incorporate modern principles applicable to the international trading environment. It further implies the incorporation of steps that advocate for and enable a proactive approach to the changes in the international trading environment. It also refers to the appropriateness and ability of the current body of legal rules to efficiently address the problems stemming from the administration's day-to-day business. Beyond the need for incorporating such a body of rules in the legal regime, its implementation on a sustainable and ongoing basis is imperative. This, of course, must be done while considering the specific environment in which such body of rules is implemented, in order for the implementing administration and the country as a whole to draw the expected benefits. One such benefits include tackling customs fraud more efficiently.¹²¹

This thesis is concerned not only with the modernisation of laws and regulations governing customs but also considers the modernisation of customs practices that contribute to the fight against customs offences. The practical aspect finds justification in the very nature of customs work. There are practical aspects of this administration's work that at first glance would not qualify as legal measures, but that seems more clearly legal on closer analysis. A simple example that illustrates this statement has to do with the customs networks established among the member states of the WCO to facilitate cooperation among them in their enforcement tasks. Very often initiated by

118 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization* <https://www.iccwbo.org>; Nigeria Customs Service 2012 *Customs Reform and Modernisation in Nigeria* 157.

119 Hee 2003 *Bond Law Review* 286.

120 Nigeria Customs Service 2012 *Customs Reform and Modernisation in Nigeria* 157.

121 Keen for instance refers to the institution of post-release verification and audits as modern techniques that can assist in effectively countering undervaluation and other fraud that lead to the serious revenue losses. Keen "The Future of fiscal frontiers" 9.

the WCO and adopted by its member states, there may not be an express legal instrument governing these practices, but beyond their apparent “technical nature” they work well in enabling customs administrations all over the world to curb crime. Furthermore, using advanced technology to process customs operations and manage risk in such an environment also has a legal dimension in the sense that it enables the easy detection of criminal activities and provides greater transparency while advancing the purposes of trade.¹²² An automated customs system, in addition to enabling smoother, cost-effective and time-saving operations, is conducive to legal certainty and stands as a deterrent to illegal transactions.¹²³ Modernisation of this kind leads in the short term to a reduction in the incidence of fraud in response to the uniform application of laws and regulations.¹²⁴ The question arises as to how the WCO presents the process of modernisation to its members as the driving force of customs modernisation around the world?

1.1.7 Customs modernisation under the WCO's guidance: a duty, a constraint or a choice?

It is important to note that the WCO's role is to govern various frameworks and conventions that facilitate and secure international trade.¹²⁵ It has developed a number of working standards that provide a significant framework for the operation of customs agencies in its member states.¹²⁶ Aware that change is constant in the trade environment, the WCO has endeavoured into the modernisation of these standards for better customs practices in its member states. Some countries take the initiative to modernise on their own and are supported in these steps by the WCO and its partners, and others are enticed by the WCO to launch the process.¹²⁷ Member states of the WCO are thus regularly presented with several ways in which to better their service delivery, and those that agree to these ways are aided both financially

122 Ntabazi *Combating corruption in customs* 47.

123 UNCTAD Trust Fund for Trade Facilitation Negotiations 2011, *Technical Note* No. 3, 1.

124 UNCTAD Trust Fund for Trade Facilitation Negotiations 2011, *Technical Note* No. 3, 1.

125 Sutter 2015 *Livingston Global Perspectives Quarterly Newsletter* 14.

126 Sutter 2015 *Livingston Global Perspectives Quarterly Newsletter* 14.

127 De Wulf and Sokol (eds) *Customs Modernization Handbook* XVII.

and technically by the organisation and its partners as they proceed.¹²⁸

Modernisation is said to have gained extensive ground "by conquest, colonisation, trade and emulation."¹²⁹ It is commonly accepted that the process of modernisation goes beyond the will of individual politicians or states. Governments that are reluctant to engage in the said process, whatever their motive, are sooner or later faced with reality.¹³⁰ The end result is generally that a country that chooses not to take the step finds itself somehow dominated by those countries that are modernising or have modernised.¹³¹ According to Mikuriya,¹³² reform is a core component of any organizational life. No customs administration will remain indifferent to all changes that occur in the trade industry.¹³³ While acknowledging that modernisation as a whole is not perfect but carries a number of disadvantages (unexpected consequences, for instance), Charlton and Andras¹³⁴ nevertheless see it as something that is not only inevitable but is also desirable. Transitioning from a traditional society to a modern or modernising one has thus become inevitable.¹³⁵ The pressure to change may arise from the fact that other societies are taking steps to modernise, and standing out alone against this trend might affect the state's competitiveness.¹³⁶ Competitiveness is measured in terms of various factors such as quality, the ability to innovate and deliver on time, and the capacity to adjust to changing market conditions.¹³⁷ To this end, modernisation is perceived as a necessity in today's fast transforming trade environment.¹³⁸ This thesis focuses specifically on France, South Africa and Cameroon. The reasons for this choice are given below.

1.1.8 The purpose of referencing France, South Africa and Cameroon in this thesis

France, South Africa and Cameroon are all members of the WCO. For this reason, the

128 Foreword of the *Customs Modernization Handbook* IX.

129 Anonymous Date Unknown <http://www.imprint.co.uk>.

130 Charlton and Andras *The Modernization Imperative* 19.

131 Charlton and Andras *The Modernization Imperative* 19.

132 Mikuriya "Foreword" XI.

133 Mikuriya "Foreword" XI.

134 Charlton and Andras *The Modernization Imperative* 22.

135 Charlton and Andras *The Modernization Imperative* 22.

136 Charlton and Andras *The Modernization Imperative* 24.

137 United Nations Conference on Trade and Development (UNCTAD) 2001 *TD/B/COM.1/EM.17/3* (Point 4) 4.

138 Neggers 2013 "WCO SAFE Standards".

countries run their respective customs businesses in line with the WCO's tools and guidelines, at least, to a considerable extent. Customs modernisation is a process advocating for efficiency and effectivity within the customs administrations of the WCO's member states, and a process bringing together all factors intervening in the international trade of goods. It is, therefore, the aim of this thesis to look at how different legal systems accommodate the principles on which customs modernisation rest.

The choice of Cameroon and France for the purpose of this study is further motivated by the historical link between these two countries. The history of the link between Cameroon and France goes back to the colonial era, as France is one of the colonial powers that ruled Cameroon (from 1916 to 1960, with Britain).¹³⁹ This joint "administration" or system of international supervision¹⁴⁰ was decided upon after the First World War in 1919 under the League of Nations' mandates.¹⁴¹ This followed the renouncement by Germany of its sovereignty over all its African colonies in the *Treaty of Versailles* (1919).¹⁴² The two countries thus share historical, linguistic and cultural ties,¹⁴³ the colonial history has set the stage for close ties between the two countries.¹⁴⁴ The ties are for most people exploitative for France and thus detrimental to Cameroon, but this aspect is beyond the scope of this study. It is suggested¹⁴⁵ that "Cameroon is France's largest recipient of foreign assistance and one of its biggest trading partners [the fifth largest] in sub-Saharan Africa, with French companies

139 Deltombe, Domergue and Tatsitsa *La Guerre du Cameroun* 24; Country Watch Incorporated 2010 *Cameroon Country Review* 8; History World Date Unknown *History of Cameroon* <https://www.historyworld.net>.

140 Kamga *Emergency Regimes in contemporary democracies* 31.

141 Note is to be taken of the fact that the joint administration of Cameroon by France and Britain had already started before the official confirmation was made in 1922 by the granting of the League of Nations Mandates. Ardener 1962 *The World Today* 341, 344; The Commonwealth 2018 *Cameroon: History* <https://www.thecommonwealth.org>; Anonymous 2017 *Cameroon has a complex relationship with France* <https://www.letterstoetoudi.wordpress.com>; Kamga *Emergency Regimes in Contemporary Democracies* 31.

142 History World Date Unknown *History of Cameroon* <https://www.historyworld.net>; Kamga *Emergency Regimes in Contemporary Democracies* 31.

143 Anonymous 2017 *Cameroon has a complex relationship with France* <https://www.letterstoetoudi.wordpress.com>.

144 Kamga 2011 *Dynamiques Internationales* 2; Anonymous 2017 *Cameroon has a complex relationship with France* <https://www.letterstoetoudi.wordpress.com>.

145 Anonymous 2017 *Cameroon has a complex relationship with France* <https://www.letterstoetoudi.wordpress.com>.

maintaining a strong presence in the Cameroonian economy." France, on the other hand, is Cameroon's number one trading partner.¹⁴⁶ It is the view of Deltombe, Domergue and Tatsitsa,¹⁴⁷ that France still has a grip on Cameroon, which view is partially justified by the historical background that brought them close. It is further estimated¹⁴⁸ that in Cameroon "about 100 subsidiaries and 200 businesses are owned by French nationals." It has become imperative for mutual trading partners to assure each other that they will improve the quality of their customs services to ensure that none of their shortcomings affects their trading relationships negatively.¹⁴⁹ It is thus necessary to look at the question of customs modernisation from the perspective of countries that have a significant number of ongoing trading relations. Each trading partner is "compelled" to accommodate modernisation to keep trade deals running and mutually beneficial.¹⁵⁰ Besides this, Cameroon has received support from the European Union through what is called the European Union Programme to Support the Customs Modernisation Plan (PAPMOD).¹⁵¹ This partnership makes it imperative for Cameroon to strive for efficiency in its customs dealings in order to meet the expectations of the EU that prompted the provision of the said support.

As for South Africa, beyond being the country where the study is being carried out, the country is fully involved in the modernisation of customs laws, regulations and practices; which fact makes it a very relevant part of this study. Through the study of the different regimes, a lot can be learned of what is to be gained by the modernisation of customs and the combatting of customs offences through such modernisation. Cameroon, in particular, is also fraught with corruption, and the experiences in that country can serve as pointers of how customs modernisation could assist in combatting customs offences in South Africa. Furthermore, the majority of documents

146 Anonymous 2017 *Cameroon has a complex relationship with France* <https://www.letterstoetoudi.wordpress.com>.

147 Deltombe, Domergue and Tatsitsa *La Guerre du Cameroun* 24, 26, 28.

148 Another source estimates that there are 200 French companies and 160 subsidiaries in Cameroon. France Diplomatie 2017 *France and Cameroon* <https://www.diplomatie.gouv.fr>; Anonymous 2017 *Cameroon has a complex relationship with France* <https://www.letterstoetoudi.wordpress.com>.

149 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization* <https://www.iccwbo.org>.

150 ICC Committee on Customs and Trade Regulations 1999 *Trade Liberalization* <https://www.iccwbo.org>.

151 Discussed in 6.2.2.2.2 below.

in France and Cameroon are written in French. Access to valuable information would normally appear difficult with the language standing as a barrier to such access. This thesis adds something new to the body of knowledge in South Africa by presenting it with different approaches to customs modernisation in France and Cameroon. It thus provides better insight and makes knowledge about what is happening in those jurisdictions more accessible. South Africa can learn from how these two territories practically implement modernisation under related circumstances.

Another factor leading to the involvement of these three countries in the study is their respective membership to different customs groupings.¹⁵² This element helps in ascertaining how individual countries accommodate customs modernisation as part of a union or a community. The context of this research is further detailed below.

1.2 Contextualising the research

This research project intends to seek legal answers to questions asked in a domain more often considered from an economic perspective, and as such, it differs considerably from other research. Customs modernisation entails the development of administrations that are well equipped, well prepared and legally grounded in order that they may address every issue that confronts them appropriately and purposefully. Has this idea of the modernisation of customs agencies been given full effect in France, South Africa and Cameroon?

1.2.1 Research question

With specific reference to combatting customs offences, how has the modernisation of customs regulation and practices as proposed by the WCO and progressively adopted by the French, South African, and Cameroonian customs administrations helped, and how can it help in future, in adequately addressing and strengthening the fight against customs-related offences in these territories?

¹⁵² France in the EU Customs Union; South Africa In the Southern African Customs Union; and Cameroon in the Economic and Monetary Community of Central Africa (CEMAC).

1.2.2 Research objectives

As a strategic enforcement agency, and no matter the degree of importance given to this administration in a specific country or continent, a customs administration has a vital role to play in the development of the trade and security of a country. It has to ensure that everything that is imported to and exported from a territory is adequately accounted for and to provide for a safe and secure society by preventing the movement of illicit, counterfeit commodities and the abuse of the customs system. We live in a world that continually imposes changes in the way things are run. Globalisation calls for strategic and more adaptive regulatory, technical and practical systems. In this respect, the objectives of this study are:

- To scrutinise the concept of customs modernisation as presented, supported and piloted by the WCO in its initiatives and tools.
- To give a brief overview of some acts and omissions that amount to or qualify as customs offences from an international perspective.
- To give a critical analysis of how France, as a member state of the European Union, applies customs modernisation principles and how such application impacts the country's efforts to do away with customs offences.
- To critically ascertain and analyse how customs modernisation, in general, is integrated into the South African context and how such integration impacts the fight against customs offences.
- To provide a critical analysis of how Cameroon utilises customs modernisation tools in its environment to address the ever-emerging threats posed by customs offences.
- To draw lessons from the respective countries' approaches for the respective countries' improvement where need be.
- To make recommendations for even greater efficiency in the respective countries under study.

1.3 Assumptions and hypothesis

1.3.1 Assumptions

Be it for laws and regulations, or practical steps; the following assumptions can be made from the concept of modernisation of customs in general:

- The modernisation of customs is not a “one size fits all” concept.
- Globalisation has provided ways for offenders to extend their networks, consequently causing states innumerable losses every year, endangering human health, and unfairly attacking legitimate businesses.
- New approaches are required to adequately handle the challenges posed by globalisation and more specifically, the development of trade.
- The modernisation of customs laws and regulations, as well as the customs practices, is imperative for customs administrations in the 21st Century.
- The selected countries have their particularities that are partially determined by their geographical location and by their level of development, and their approach to combatting customs offences may, therefore, differ considerably from a practical, technical and regulatory perspective.

1.3.2 Hypothesis

Attempts to modernise the customs systems of the three countries are being made at different levels and in different ways. If modernity, efficiency, cost-effectiveness and adaptability are the key aspects that should govern every customs administration in the 21st century, these are the qualities every customs system should possess to ensure revenue collection for the state, to be armed against any activity directed at circumventing such collection, and to protect society against the dangers to which smuggled, prohibited and unhealthy goods may expose them. Finding the right balance between control and efficiency is not easily manageable, and a thorough enquiry may provide insight into the different countries in the sense that some approaches by one of the countries might serve the others and enable them to approach the matter differently and more efficiently.

1.4 Research methodology

A broad but limited legal comparative method will be used in the performance of this research. However, considering the nature of the principles governing the field studied which are widely diverse from one territory to the other though resting on the same principles, the comparison will be done according to the respective responses of each territory and will not use the standard comparative principles academically required. As the approach to modernisation may differ considerably from one country to the other and also amongst the chosen countries, an elaboration of the different characteristics of a modern legal framework as drawn from the WCO's instruments and initiatives will be the starting point. This will be followed by a review of the different types of customs offences and a delineation of what constitutes a customs offence for the purpose of this research. Next, there will be a critical review of the relevant French, South African, and Cameroonian legal framework and standard practices, case studies, textbooks, journal articles and electronic material that address customs modernisation in general and how it impacts the fight against customs offences. All these steps will provide insight so that we can reach a critical balance between the different approaches and the legal framework. This would facilitate a process of identifying gaps and providing recommendations for the improvement of the different approaches to achieve more efficiency. This thesis, however, has some limitations that have to be pointed out.

1.5 Limitations of this thesis

It is important to note, however, that this field of research has the "disadvantage" of not being supported by a well-established body of literature, especially literature that deals with the field of enquiry from a legal perspective. The WCO literature on the modernisation of customs is without a doubt extensive and exceptional, but it is limited, first because most of it deals with "capacity building" i.e. it is of a technical nature, and the legal implications thereof usually have to be inferred. Secondly, only a few writers have followed in this organisation's footsteps, especially regarding the legal aspects and implications of the modernisation of customs. Moreover, there is barely a handful of research that focus on customs offences in general. Corruption in customs is well documented, but the other offences in the field are not given the

necessary attention. These factors, therefore, limit the weight and quality of the resources used in the writing of this thesis.

More so, this study is a theoretical analysis of a body of legal instruments with a limited practical dimension thereof. This means that a thorough investigation of the overall practical implementation and impact of the said instruments was not covered by this study. The approach could have been different had the study also focused on, for instance, interviewing stakeholders about the impact or the suitability of the application of customs modernisation efforts. That is why the analysis of the different modernisation measures is only weighed against the backdrop of international standards set by the WCO. It is therefore limited to: "this is what should be done", "this is how it should be done" and "if done this way, this is what to expect as a result". The study is carried out within this context.

1.6 The originality of this thesis

This paper seeks to "bring to light" the legal and sometimes hidden or not emphasised enough dimension of the process of customs modernisation, which is often seen merely as a technical or capacity building process, only serving the economic interest of trade. This thesis draws the specific implications of customs modernisation on the fight against customs offences in three countries from the comprehensive range of instruments and tools devised by the WCO, thereby placing a strong emphasis on the legal dimension of this process. Furthermore, previous studies have mainly focused on the modernisation of customs as a trade facilitation process, and the impact of this process on the control role of customs and consequently on the fight against customs offences have not been given the required attention. There is a minimal number of authors that have followed in the WCO's footsteps, especially with regards to defining customs offences and characterising them. This study sets the position of customs modernisation as presented by the WCO and its implementation in the respective countries chosen. Few studies have taken this route in the past.

Furthermore, this thesis proposes to define customs modernisation as a broad legal and practical approach that seeks to address customs administrations' inefficiencies and shortcomings with the view of upgrading and aligning their capacities with new

development in the trade environment, sustaining them going forward, with efficiency as the ultimate goal. This is the original definition proposed by this thesis and drawn from the respective definitions proposed by different organisations and presented in this Chapter. The outline of the thesis follows below.

1.7 Structure of the study

The introductory Chapter of this study (Chapter 1) describes the importance of customs systems and the why and the how of customs modernisation. It establishes the link between trade facilitation and customs modernisation. It further provides an exposition of the link between customs, modernisation and the fight against customs offences.

Chapter 2 scrutinises the characteristics of a modern customs legal framework and customs practices in general as presented in the WCO's instruments and initiatives, especially those that impact the fight against customs offences.

In the knowledge that customs and customs-related offences are particularly vast and varied areas of concern, that not all of them fall within the scope of this study, and further that not all of them can be covered here for brevity's sake, an international perspective on customs-related offences will constitute the content of Chapter 3.

Mindful of the fact that customs modernisation is not a "one size fits all" concept in that it is differently perceived and applied by each administration depending on its level of development, its ability to accommodate it, and its needs at a specific point in time, Chapters 4, 5 and 6 are respectively expositions of the integration systems in France, South Africa and Cameroon.¹⁵³ As all of them are members of the WCO, it is necessary for these Chapters to scrutinise the regulatory and practical aspects each country has put in place in an attempt to modernise its system and to investigate how such steps have contributed or are currently contributing to strengthening the fight against customs-related offences.

¹⁵³ According to De Wulf and Sokol, each customs administration has to tailor its modernisation efforts according to its national objectives, its implementation capacities, and the resources at its disposal. Nevertheless, each single approach has to take into account core principles that underlie a modern customs administration. De Wulf and Sokol (eds) *Customs Modernization Handbook* XVII.

Chapter 7 will be a comparative analysis of the different approaches to customs modernisation in the chosen countries with a view to drawing some useful lessons from the comparison, after which, recommendations will be made.

CHAPTER 2

THE FOUNDING PRINCIPLES OF CUSTOMS MODERNISATION BY THE WCO THAT IMPACT THE FIGHT AGAINST CUSTOMS OFFENCES

2.1 Introduction

The present Chapter aims to scrutinise the specific aspects relating to customs modernisation (besides those associated with operational efforts in Chapter 3 below) that affect or impact on the legal sphere of customs work. A range of legal instruments and **guiding principles** developed by the WCO within the context of modernisation and placed at the disposal of its member states for adoption and application. This Chapter, therefore, seeks to discuss some of the initiatives undertaken and legal instruments developed by the WCO to help its member administrations to operate in a modern context efficiently and effectively. This will be done by drawing on the general principles that underlie all of these instruments and steps. This Chapter offers some background as to what steps are considered fundamental in the customs modernisation process and which of those steps specifically address the need for modernisation to curb customs fraud more efficiently.

The WCO's activities and mandate set it as the most active organisation in matters of trade facilitation besides the works performed by the WTO and other organisations.¹ The WCO coordinates efforts to develop global customs standards suitable for all countries around the world.² As an intergovernmental organisation, the WCO has built itself a reputation throughout the years, is recognised as the global centre of customs expertise, and as such plays a primary role in the development and promotion of modern customs rules and procedures.³ The aims of the WCO as provided for in Article III of the *Convention Establishing a Customs Co-operation Council* (1950)⁴ include

1 See 1.1.5 above and the description that leads to footnote 12 in the current heading 2.1 with reference to the other organisations involved in the modernisation process. Staples "Trade Facilitation: Improving the Invisible Infrastructure" 141.

2 HM Revenue & Customs 2016 *Customs Vision for 2020*, 6.

3 WCO 2016 *ASYCUDA Newsletter* 12.

4 Customs Co-operation Council being the former name of the WCO. The Convention came into being in 1952. This name was changed in 1994 to World Customs Organization because this new appellation better reflected the worldwide character of the organisation. Sutter 2015 *Livingston*

thoroughly studying customs systems with the aim of making available to its members practical tools to help them reach the highest level of harmony, uniformity and simplicity; preparing draft Conventions and their amendments and recommending them for adoption by interested governments; and making recommendations to ensure uniformity in the interpretation and application of its own provisions. Another aspect of this organization's work revolves around research (undertaken for a better understanding of the transforming trade environment) to operational efforts organised under different programmes, some dealing with specific customs offences.⁵ The WCO strategies also involve proposing standards, the recommendation of practices, and the development of customs networks to facilitate and enhance cooperation among different role-players worldwide.⁶ All these steps enable the organisation to boost the capacities of customs administrations by enabling them to enforce trade policies, protect society and collect fiscal revenue, with the further aim of building robust economic systems and thus promoting social development.⁷ The organisation's activities in carrying out its mission are thus of varying nature, but they all are directed at the simplification, standardisation and efficiency of customs practices amongst its member states.⁸

In an attempt to fulfil these aims the organisation has developed under its customs modernisation programme a number of tools aimed at empowering its member states (individually or collectively) to efficiently provide the relevant services. These tools have a direct impact on the fight against customs offences in their diverse forms.⁹ The organisation hopes through the promotion of these tools to build well-capacitated customs administrations that are sensitive to the changing trade environment and that

Global Perspectives Quarterly Newsletter 14; see also Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>; WCO Date Unknown *Overview* <https://www.wcoomd.org>.

5 See Strategic Goal 7 of the WCO Goals which is focuses on research and analysis. WCO Date Unknown *WCO Goals* <http://www.wcoomd.org/en/about-us/what-is-the-wco/goals.aspx>; see further WCO Date Unknown *WCO in Brief* <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx>.

6 Mikuriya 2012 *WCO News* 11.

7 Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

8 WCO Date Unknown *Overview* <https://www.wcoomd.org>.

9 Gordhan 2007 *WCJ* 52.

make use of modern and uniform legal frameworks, techniques and approaches.¹⁰ Through taking all of these steps, the organisation provides ongoing support to its members.¹¹ The support is usually provided with the participation and active contribution of organisations such as the WTO, the WB and the IMF; the United Nations Conference on Trade and Development (Asycuda Program); regional development banks, and other organisations¹² such as financial institutions and bilateral donors.¹³

Mostly built on the idea that “asymmetrical customs regimes create uncertainty and, therefore, costs for international traders”,¹⁴ the tools devised by the WCO in the context of modernisation are numerous and often meant for a specific aspect of customs work. They are usually shaped in a way that would be compatible with and play a complementary role to the Revised Kyoto Convention (RKC), which is considered to be the main founding legal instrument dealing with customs modernisation.¹⁵ The WCO’s efforts to enhance capacity in every aspect of customs work are made on an ongoing basis. Every single one of these detailed provisions has legal implications of one sort or another. Beyond the efficiencies sought, all of them are aimed at addressing malpractice, poor compliance and non-compliance. This shows the importance of modernising laws and practices simultaneously.

It is in this respect that Mikuriya¹⁶ states that all customs systems and operations must be sustained by strong and robust legislation and regulation. Customs operations require effective and robust legal frameworks that govern their activities.¹⁷ Such frameworks have the power to transform the business environment of the countries to which they apply into a transparent, predictable and efficient environment which enhance the competitiveness of the country and attract potential investors.¹⁸ In the

10 This is among its founding principles as described by Sutter in Sutter 2015 *Livingston Global Perspectives Quarterly Newsletter* 14.

11 WCO 2012 *WCO News* 16.

12 Foreword of the *Customs Modernization Handbook* IX.

13 Foreword of the *Customs Modernization Handbook* IX.

14 Staples “Trade Facilitation: Improving the Invisible Infrastructure” 140.

15 Mikuriya “Legal framework for customs operations” 51-52.

16 Mikuriya “Legal framework for customs operations” 51.

17 Mikuriya “Legal framework for customs operations” 51.

18 Mikuriya “Legal framework for customs operations” 51.

context of customs modernisation, a legal framework is required to take into consideration internationally accepted standards.¹⁹ This requirement proceeds from the fact that customs activities encompass dealing with international trade operations, and no country can act in isolation in an attempt to engage in legal reforms or transform its system as a whole.²⁰ As the responsibilities of customs administrations increase daily with the trade environment going through a massive transformation, modernising customs laws and regulations as well as the entire legal system has become inevitable and is actually the way for these administrations to go if they are to cope with the new trade environment.²¹ Obsolete customs laws and regulations are said to carry a multitude of disadvantages for a country. Amongst others, they hamper social and economic development by standing as significant non-tariff barriers; they hamper effective revenue collection; they discourage foreign investment and can pose a threat to a state's or a society's security.²² Because international trade supply chains remain exposed to possible terrorist attacks and the like, which could bring international trade to a standstill and so create a multidimensional and international economic crisis, it is crucial to take action.²³ The legal framework that governs customs modernisation and the underlying founding principles are described below.

2.2 The legal framework for modern customs administration

Before considering the different aspects that should govern all modern customs administration and the laws governing them, it is crucial to present the most important instrument developed by the WCO, namely the *International Convention on the Simplification and Harmonization of Customs Procedures*.²⁴ This instrument is often referred to as the "blueprint"²⁵ of a modern customs administration.

19 Mikuriya "Legal framework for customs operations" 51.

20 Mikuriya "Legal framework for customs operations" 51.

21 Mikuriya "Legal framework for customs operations" 51.

22 Mikuriya "Legal framework for customs operations" 52.

23 Weerth 2016 *Customs Scientific Journal* 38.

24 1973 (as amended).

25 Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

2.2.1 *International Convention on the Simplification and Harmonization of Customs Procedures (1973) (as amended)*

As the first of the broad and varied range of initiatives developed under customs modernisation, in 1999 the WCO reviewed the *International Convention on the Simplification and Harmonization of Customs Procedures (1973)* (the Kyoto Convention) and developed the Revised Kyoto Convention (hereafter the RKC), which entered into force in February 2006. The Kyoto Convention was revised to ensure it kept abreast with new developments in the customs domain, and most importantly, to ensure it could meet the expectations of governments and the exigencies imposed on customs administrations by a fast transforming international trade platform.²⁶ The Convention overall reflects the WCO's effort to promote and sustain an international trading environment with less burdensome procedures while not compromising on appropriate levels of regulatory controls.²⁷

Its provisions not only reflect the economically and technologically transformed trading environment but also reflect member states' practices that have proven successful over the years.²⁸ The revision and adaptation process took about four years and was completed in June 1999.²⁹ The Convention entered into force in February 2006. In sum, it contains 600 Standards, Recommendations and Practices. As the key instrument for modern customs practices and framework, it receives further and ongoing updates through the many projects of modernisation undertaken by the WCO.³⁰

The RKC is defined as an international agreement that provides a set of comprehensive customs procedures to facilitate legitimate international trade while ensuring that customs control supplies the optimal protection of customs revenue and society.³¹

26 WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

27 Widdowson 2007 *World Customs Journal* 33-34.

28 Mikuriya "Legal framework for customs operations" 52.

29 WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>; Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

30 Most of the organisation's initiatives for customs modernisation make use of and refer to the principles developed therein.

31 Yasui 2010 *WCO Research Paper No 6*, 3.

Staples³² sees the RKC as the most comprehensive existing legal instrument advocating for trade facilitation. The Convention is made up of the main body of the text (twenty articles in total), a General Annex (divided into ten Chapters each dealing with a specific aspect of customs work, transactions and procedures), and several Specific Annexes (Annexes A-K). Parties adhering to it are bound by the body of the Convention and the General Annex.³³ They are, however, free to choose what Specific Annex(es) or Chapter(s) they want to incorporate in their law.³⁴ It is the WCO's view that this freedom of choice allows each contracting party to carefully consider the specificities proper to its own administration and system before making a choice.³⁵

The Convention establishes a Management Committee (MC) tasked with helping contracting parties in the interpretation and implementation of the Convention, and with managing the review and amendment processes proposed in the Convention.³⁶ The MC thus stands as the voice of all participating members to the Convention as it gives them an opportunity to participate in the development and administration of the Convention.³⁷ To keep the Convention abreast of new developments and challenges occurring in the trade environment in general and in the customs environment in particular, and so ensure that it remains topical, the MC, which should meet at least once a year,³⁸ is expected to review and update the Guidelines³⁹ and to recommend amendments to the Convention (the body and the General Annex) or the incorporation of new Specific Annexes and Chapters to Specific Annexes.⁴⁰ The Committee is thus mandated with ensuring that the RKC remains a dynamic and living instrument.⁴¹

The Convention sets out effective controls and mechanisms to facilitate legitimate

32 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 141.

33 Mikuriya "Legal framework for customs operations" 55, 57; The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

34 The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

35 The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

36 Article 6 (1) of the RKC; Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

37 The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

38 According to Article 6 (7) of the RKC.

39 Article 6 (5) (d) of the RKC.

40 Article 6 (5) (a) (i) (ii) (iii) of the RKC.

41 Yasui 2010 WCO Research Paper No 6, 3.

trade as the “blueprint” of a modern customs administration.⁴² In other words, the Convention suggests principles that promote trade facilitation without compromising the statutory functions of customs (i.e. those of control and revenue collection).⁴³ Amongst others, the key principles which underpin the RKC are the simplification and standardisation of goods declarations and supporting documents, pre-arrival information, the maximum use of information technology, risk management, audit-based controls (post-clearance audit), transparency and predictability, coordinated intervention and maximum cooperation.⁴⁴ To generalise, it is an instrument that views the simplification and harmonisation of customs procedures and practices as the way forward.⁴⁵ Mikuriya⁴⁶ states in this regard that a modern, efficient and well-functioning customs administration is one whose processes and procedures are based on the global standards set out in the RKC. The RKC aims to “standardize customs policies and procedures” all around the world.⁴⁷ In more apt words, it is a compilation of successful practices drawn from WCO's members' national legislation worldwide.⁴⁸ Overall, the RKC demonstrates that trade facilitation and strict control can find a common ground of operation and can cohabit without any loss for the administration of customs and the entities it represents.⁴⁹ The design of the Convention proceeds from the desire to enable customs agencies worldwide to provide their services in a more efficient and effective way.⁵⁰ With the hope of broadening the adherence to the RKC and ensuring that its provisions are binding on signatory parties, there have been

42 Mikuriya “Legal framework for customs operations” 52; Widdowson 2007 *WCJ* 33-34; Anonymous 2015 “Draft Guide to Best Practices and Procedures in a Modern Customs Administration”; The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>; Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

43 Widdowson 2007 *WCJ* 34; Yasui 2010 *WCO Research Paper No 6, 2*; The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>; Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

44 Preamble to the RKC; Widdowson 2007 *WCJ* 34; De Matons Facilitation of transport and trade in Sub-Saharan Africa 30; Piraux 2009 *An Introduction to the World Customs Organization* <http://www.wto.org>; Yasui 2010 *WCO Research Paper No 6, 2*; The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

45 Preamble to the RKC; The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

46 The African Development Bank Group 2012 *There is Strong Commitment to Customs Modernization in Africa* <http://www.afdb.org>.

47 Mikuriya “Legal framework for customs operations” 52.

48 Mikuriya “Legal framework for customs operations” 52.

49 The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

50 The WCO Date Unknown *The Revised Kyoto Convention* <http://www.wcoomd.org>.

suggestions that the WTO should incorporate the said convention in its structure or at least the principles laid down in it.⁵¹ This step is said to likely sustain a wider use of the instrument and its governing principles to the benefit of all. This is rightly so as the wider the use of the instrument and the application of its founding principles, the more efficient world customs administrations will become. This will undeniably create more stumbling blocks for customs offenders. The RKC dedicates one of its Annexures to approaches to fight customs offences more efficiently.

2.2.1.1 The Revised Kyoto Convention and the fight against customs offences

The RKC in its Annexure H, deals explicitly with customs offences and sets out important standards⁵² and recommended practices⁵³ that are meant to facilitate each member state's adoption and adaptation of the new approach to customs dealings in its own environment.⁵⁴ Member states are, for instance, required to define customs offences in their national legislation, to set out the conditions under which these offences can be investigated, and to establish dispute settlement processes and further, prescribe the applicable penalties for each and every category of customs offence.⁵⁵ Furthermore, each member state is urged to explicitly and clearly define the conditions under which customs officials are to carry out their control duties, be they on goods, on people and premises, or on accessing computerised databases, and how to secure evidence in this regard.⁵⁶ They are also called to set out the particulars of different customs offences (i.e. the characteristics of each offence) and the relevant procedure to follow once each of them is discovered.⁵⁷

In adopting the RKC, each and every state commits not only to accordingly adjust its legal framework and the consequent customs procedures and practices that will lead

51 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 141, 143.

52 Article 1 of the RKC defines a standard as being a provision whose implementation is acknowledged as crucial for the realisation of the harmonisation and simplification of customs procedures and practices.

53 A Recommended Practice is, according to article 1 of the RKC, a provision the broadest application of which is desired, deriving from a Specific Annex, which is acknowledged as a pathway towards attaining the harmonisation and the simplification of customs procedures and practices.

54 Mikuriya "Legal framework for customs operations" 52.

55 Standards 2 and 22 of Specific Annex H to the RKC.

56 Standard 5 of Specific Annex H to the RKC.

57 Standard 9 and Recommended practice 10 of Specific Annex H to the RKC.

to a simplified and harmonised customs system, but also to “conform” within well prescribed time frames to the Standards, Transitional Standards and Recommended Practices provided in the Annexures to the Convention.⁵⁸ Though the Recommendations and Standards, as their names imply, have by nature no legal binding force,⁵⁹ they have the advantage of providing member countries with guiding principles that can be moulded to their respective realities on the ground, and so enable them to reach higher levels of harmonisation and uniformity in their customs proceedings for the benefit of all stakeholders.⁶⁰ Generally reflecting approaches that have been tested and proved successful in other member states, the Recommendations and Standards are often regarded as possessing a “great moral force” in practice, and states are often expected to do their best to implement (adapt) these proposals in their respective territories.⁶¹ Adopting and implementing the modernisation principles as presented in the RKC are said to hold a multitude of benefits for the signatory state, which benefits are enumerated below.

2.2.1.2 The benefits attached to the adoption of the RKC

According to Mikuriya,⁶² a proper implementation or incorporation of the provisions deriving from the RKC would facilitate adherence to and compliance with trade and border procedures as well as adherence to the WTO’s rules. In other words, the incorporation of the Convention in national legislation and its proper implementation could assist significantly in rolling out the customs-related principles devised by the WTO.⁶³ Becoming a member of the RKC is said to hold a multitude of other benefits, both in terms of accessing it and implementing it.

58 The provisions of the Specific Annexures to the RKC are binding on a state only if the state has openly adhered to one or more of such Annexures and any of the Chapters thereto. The General Annex, however, is binding on all contracting states. Article 2, 5, 8 (3), 9 (2), 12 (1) and 13 (1,2,3) of the RKC.

59 United Nations Economic Commission for Europe (UNECE) 2012 *Trade Facilitation Implementation* <http://www.tfig.unece.org>.

60 Mikuriya “Legal framework for customs operations” 52; United Nations Economic Commission for Europe (UNECE) 2012 *Trade Facilitation Implementation Guide* <http://www.tfig.unece.org>.

61 Organisation for Economic Cooperation and Development (OECD) Date Unknown *OECD Legal Instruments* <http://www.oecd.org>.

62 Mikuriya “Legal framework for customs operations” 54.

63 Mikuriya “Legal framework for customs operations” 54.

Regarding the benefits associated with acceding to the Convention, it is said to produce a positive “announcement effect” by sending out a message to the trading community that the government concerned promotes and maintains efficient and modern customs practices in line with international standards and strikes a proper balance between enforcement and control.⁶⁴ Ratifying the RKC also gives a country a prominent role in the shaping of future standards through its active participation in the MC. Unlike non-members and other entities that participate in the MC’s meetings as observers, contracting parties participate in all processes, including suggesting amendments to the Convention and its guidelines.⁶⁵ Because the RKC is considered a reference tool within the WTO’s Trade Facilitation Negotiating Group (TFNG), it gives member countries prominent roles in the negotiation of trade agreements, as the two should be closely aligned.⁶⁶ Acceding to the RKC furthermore gives the administration concerned a chance to receive capacity-building initiatives offered by the WCO and its partners.⁶⁷

As for the benefits relating to the implementation of the RKC, they include economic benefits which are the faster release of goods and lower trade costs, increased revenue collection, more foreign direct investment and economic competitiveness.⁶⁸ Non-economic benefits deriving from such implementation are the promotion of the protection of security, society and human health, and the facilitation of the inbound and outbound flow of goods and people in instances of natural disasters and other emergencies situations.⁶⁹ Moreover, implementing the RKC constitutes a basis for implementing other instruments and tools included in the customs modernisation programme under the WCO’s guidance and support.⁷⁰ The scrapping of different customs procedures and practices worldwide and the consistent implementation of the RKC provisions would enable customs transactions and procedures to run smoothly and therefore enable international businesses to meet their customs obligations more

64 Yasui 2010 *WCO Research Paper No 6*, 3.

65 Yasui 2010 *WCO Research Paper No 6*, 3.

66 Yasui 2010 *WCO Research Paper No 6*, 3.

67 Yasui 2010 *WCO Research Paper No 6*, 4.

68 Yasui 2010 *WCO Research Paper No 6*, 4-5.

69 Yasui 2010 *WCO Research Paper No 6*, 6.

70 Yasui 2010 *WCO Research Paper No 6*, 6.

easily.⁷¹

Overall, the approaches promoted in the RKC have a direct impact on the fight against customs offences. Disparities in rules applied in customs processes from one side of the border to the other do not enable collective and fast action in dealing with customs offences. Just as the uniformity of processes would boost the administration's revenue collection and the businesses of traders, so it would also create a healthy business climate and build trust on both sides of a border. The use of efficient automated tools would limit the spread of customs offences, enhance trust between traders and the administration, and enable better compliance rates. Furthermore, developing an accountable system of human resources management would curb the commission of offences (notably, acts of corruption) from within the administration. If the relevant laws and regulations were to keep pace with all the changes happening in the business of trading across borders and their implementation was strictly monitored, this would give the administration a strong foundation on which to build and send out a strong message to potential investors.

The RKC is the reference in terms of the WCO's frameworks dealing with customs modernisation, but the organisation has furthered its modernisation goals by developing various other instruments that complement one another and attempt to provide much-needed efficiency tools in the various aspects of customs work. In the following paragraphs, we distil the founding principles from these instruments and initiatives, especially from those that impact the fight against customs offences.

The RKC has a total of 114 contracting parties (as of June 2018). France became a member on the 22nd of July, 2004; South Africa has been a member since the 18th of May, 2004, and Cameroon acceded to it on the 18th of November, 2014.⁷² Below follows an exposition of the founding principles of customs modernisation derived from the WCO's instruments. These principles affect the fight against customs offences.

71 Mikuriya "Legal framework for customs operations" 54.

72 The instrument of the country's accession to the RKC was deposited on the 18th of November 2014, but the Convention was to enter into force for Cameroon on 18 February 2015.

2.2.2 The founding principles of customs modernisation that impact on the fight against customs offences

As can be gathered from the founding RKC and the instruments that are hereunder scrutinised, customs modernisation entails purpose-driven approaches like risk management and post-clearance audit, promoting local and international partnerships and cooperation, promoting transparency, predictability and good governance, enabling the automation of processes and placing a particular accent on enforcement (acting against all derivative offences). An efficient customs administration is one that is flexible in its rules and capable of providing timeous responses to governments' needs.⁷³ Streamlined procedures and processes, or merely the introduction of sophisticated technology are, however unable to ensure the success of customs actions and missions on its own.⁷⁴ Such efforts must be combined or met with other elements such as the customs operational procedures, its structural as well as managerial systems; its supervisory capacity, its internal control; its human and financial resources constituency; and most importantly, its legal foundation.⁷⁵ These foundational principles of customs modernisation are contained in different instruments and initiatives developed by the WCO.

2.2.2.1 Risk management and post-clearance audit

Risk management and audit-based control walk hand in hand as techniques used in a modern customs environment to balance time and cost in customs dealings.⁷⁶ While the first promotes predictably and enables a proper allocation of resources to the areas most needed, the second is rooted in the healthy business climate that can derive from meeting traders halfway and thus ensuring that those who abide by the law are offered better facilities. These two approaches are further detailed below.

73 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 147.

74 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 147; see further Ellanti and Canham 2012 *WCO News* 14.

75 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 147; see also Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 17.

76 Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 17.

2.2.2.1.1 The WCO Risk Management Compendium

Given the importance and weight of international trade transactions on the world economy, the WCO Risk Management Compendium suggests the adoption of "a more structured and systematic way" of dealing with risks.⁷⁷ Managing risk in today's context is one of the most important marks of a modern customs administration, according to the WCO.⁷⁸ The Compendium is the WCO's way of attempting to develop a flexible international strategy that can be used by its member states to deal appropriately and more adequately with potential risks in the supply chain.⁷⁹ This entails framing risk management processes or programmes⁸⁰ and evaluating and acting on the information gathered⁸¹ for more strategic customs intervention.⁸²

Basically, managing risk in customs means using specific techniques that enable the administration to establish which areas are more vulnerable to risk and ensuring that the necessary resources are allocated to manage such risks at the required levels.⁸³ This implies that compliant traders' transactions are facilitated by them having access to fast, more efficient and automated procedures and facilities.⁸⁴ The Compendium is built on five objectives: it provides definitions for some fundamental terms relating to risk management; it describes what managing risks in customs entails; it presents the key and indispensable aspects for managing risk in an organisation and also a methodology for doing so; it makes available practical techniques and tools for managing risk; and lastly it uses some members' experience in risk management in the form of case studies to convey a better understanding of the issues.⁸⁵

The Risk Management Compendium is rooted in the developmental features that affect

77 WCO Date Unknown *WCO Customs Risk Management Compendium*; Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 17.

78 Foreword of the *WCO Customs Risk Management Compendium V*; WCO Date Unknown *WCO Customs Risk Management Compendium*.

79 WCO Date Unknown *WCO Customs Risk Management Compendium*.

80 Volume 1 of the *Compendium*.

81 Volume 2 of the *Compendium*.

82 WCO Date Unknown *WCO Customs Risk Management Compendium*.

83 WCO *WCO Customs Risk Management Compendium VIII* and Staples "Trade Facilitation: Improving the Invisible Infrastructure" 140.

84 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 140.

85 Foreword of the *WCO Customs Risk Management Compendium V*; WCO *WCO Customs Risk Management Compendium VIII*.

trade worldwide, which features require the adoption of new approaches that will help in building a more stable trade environment where benefits are freely reaped, and a positive societal impact becomes tangible.⁸⁶ Standards 6.3 to 6.5 of the General Annex to the RKC expressly invite customs administrations, in their efforts to modernise their customs laws and regulations, to make provision for risk management techniques and processes and establish within their services a “compliance measurement strategy” which will act as a support system to the risk management approach. Managing risks in customs is the first step to take in enforcing audit-based control discussed hereunder.

2.2.2.1.2 Guidelines for Post-Clearance Audit

Audit-based control or post-clearance audit (PCA) is an approach that the WCO has encouraged its member states to adopt.⁸⁷ In the context of customs modernisation, it has the advantage of enabling the smoother provision of services and thus more efficient results. In essence, auditing a business after clearance entails scrutinising the business by thoroughly checking its commercial systems, its sales contracts, its financial and non-financial status, its stock and its other belongings with a view to evaluating and improving its level of compliance with the rules.⁸⁸ The PCA process helps a customs agency to verify how well a company has complied with existing customs laws and regulations in a determined period of time.⁸⁹ The PCA is set out in two volumes. While the first is open to the public and aims at helping customs authorities to shape their own PCA programmes, the second is accessible only by the customs administrations of the WCO, and endeavours to help them run their PCA by providing practical guidelines and checklists for officials conducting the audit.⁹⁰

The Guidelines for Post-Clearance Audit (hereafter the Guidelines) proceed from the assumption that, though still playing a vital role at the border in a modern trade environment, delays in clearance processes would generally affect the celerity of the

86 Foreword of the *WCO Customs Risk Management Compendium V*.

87 Standard 6.6 of the General Annex to the RKC.

88 *WCO Guidelines for Post-Clearance Audit Volume 1*, 4.

89 WCO Date Unknown *Compliance & Enforcement Package brochure 9*.

90 *WCO Guidelines for Post-Clearance Audit Volume 1*, 5.

services provided, to the detriment of both the customs administration and the trading community.⁹¹ The Guidelines thus suggest a way to save time and resources, subject of course, to having to deal with cases of suspected fraud, to exercise more precise controls only after importation while nevertheless carrying out targeted inspections at the border.⁹² This approach of striking the proper balance between risk management and post-clearance is said to carry benefits such as enabling customs authorities to use their resources in a more effective manner and to build up partnerships with the trading community, which in turn improve the level of compliance and make trade transactions less complicated and more accessible.⁹³ The Guidelines reflect modern customs techniques developed from the WCO member countries' experience, thus making them more adaptable to various environments.⁹⁴ There is no doubt that enforcing PCA is an efficient way of curbing customs offences in the sense that customs can thoroughly investigate how well businesses comply with related laws and regulations. This step indubitably takes enforcement to new heights. The second founding principle of customs modernisation calls for a stronger and more meaningful partnership between all customs stakeholders.

2.2.2.2 An accent on cooperation and partnership

In an attempt to create an atmosphere of mutual understanding for purposeful intervention both with the trading community and with other customs administrations around the world, the WCO promotes partnership and cooperation. This approach is justified by both the increasing volume of trade and the escalation in trans-border organised crime, says the WCO.⁹⁵ To this end, the WCO states that in matters relating to customs, cooperation (customs-to-customs, customs-to-legitimate business, as well as customs-to-other law enforcement authorities) is the prerequisite for proper law enforcement.⁹⁶

91 WCO *Guidelines for Post-Clearance Audit Volume 1*, 4.

92 WCO *Guidelines for Post-Clearance Audit Volume 1*, 4.

93 WCO *Guidelines for Post-Clearance Audit Volume 1*, 4.

94 WCO Date Unknown *Guidelines for Post-Clearance Audit* <http://www.wcoomd.org>.

95 WCO Date Unknown *Mutual Administrative Assistance Instruments* <http://www.wcoomd.org>.

96 WCO Date Unknown *Mutual Administrative Assistance Instruments* <http://www.wcoomd.org>.

2.2.2.2.1 The partnership approach with authorised persons and entities

Strengthening cooperation between customs administrations as well as between customs administrations and business and customs administrations and other government agencies by developing meaningful and mutually beneficial partnerships is a vital aspect of the 21st-century WCO strategy.⁹⁷ It is in line with this partnership approach that the concept of an Authorized Economic Operator (AEO) was introduced.

As presented in the 2007 version⁹⁸ of the SAFE Framework of Standards, the AEO first stands as an exhortation made by the WCO to its member states that they consider an “inclusive management technique”. This technique makes it possible for the private sector to play a crucial part in the security and facilitation of legitimate global trade.⁹⁹ The concept is the development of Pillar 2 of the SAFE Framework of Standards, which rests on the notion of customs-to-business partnerships. An Authorized Economic Operator is one that not only meets various criteria laid down by a customs agency but most importantly that has a traceable record of compliance with different customs requirements as well as a satisfactory system to file and handle its records.¹⁰⁰

Basically, an AEO is:

A party involved in the international movement of goods in whatever function that has been approved by or on behalf of a national Customs administration as complying with WCO or equivalent supply chain security standards.¹⁰¹

As can be seen in the above definition, the facility is open to economic operators¹⁰² that show a satisfactory level of compliance in their dealings with customs and that through their personal approaches to business render the control work of customs much more manageable.¹⁰³ In other words, it is open to traders that meet certain

97 WCO 2008 *Customs in the 21st Century* Point 13 (d); Kennard 2012 *WCO News* 49.

98 There is a 2018 version which is the latest.

99 Weerth 2016 *Customs Scientific Journal* 41.

100 Transitional Standard 3.32 of the General Annex to the RKC; 2007 version of the SAFE Framework of Standards.

101 2007 version of the SAFE Framework of Standards.

102 Economic operators here comprise manufacturers, importers, exporters, brokers, carriers, consolidators, intermediaries, ports, airports, terminal operators, integrated operators, warehouses and distributors. See the 2007 version of the SAFE Framework of Standards.

103 2007 version of the SAFE Framework of Standards.

security standards.¹⁰⁴ The AEO should also be financially able to fulfil its commitments *vis-à-vis* the conditions attached to the specific type of business it conducts.¹⁰⁵ The customs administration has the responsibility to establish strong cooperation links with the AEO and regularly involve it in matters that concern and affect it.¹⁰⁶

In exchange for abiding by customs rules the AEO receives different types of benefits, ranging for instance from the release of its goods upon the production of the minimum information necessary for the identification of the goods and the completion of the process only later, to the possibility of its using the same goods declarations within a well-defined period of time for all import and export transactions done by the same AEO.¹⁰⁷ The right to the said benefits derives from the last of the four core elements on which the SAFE Framework of Standards is based. The Framework requires that such benefits be meaningful, measurable and reportable to the extent possible.¹⁰⁸ The Framework sets out these benefits in different categories and places them at the disposal of customs administrations to adapt to their respective operating environment. The first category refers to measures to speed up cargo release, cutting down on transit time and the dropping of storage costs.¹⁰⁹ The second category has to do with enabling AEO participants to access information of value.¹¹⁰ The third one deals with providing for special procedures that relate to the period of trade disruption or elevated threat level.¹¹¹ The last category looks into giving the designated AEO priority of participation in any new cargo processing programs.¹¹² Cooperation between customs agencies and between customs agencies and other enforcement bodies is likewise vital for better enforcement.

2.2.2.2.2 Cooperation with other customs administrations and enforcement agencies

Cooperation with both the customs administrations of other countries and other

104 Weerth 2016 *Customs Scientific Journal* 41.

105 2007 version of the SAFE Framework of Standards.

106 2007 version of the SAFE Framework of Standards.

107 Transitional Standard 3.32 of the General Annex to the RKC.

108 Annex III of the 2007 version of the SAFE Framework of Standards III/14.

109 Annex III of the 2007 version of the SAFE Framework of Standards III/14.

110 Annex III of the 2007 version of the SAFE Framework of Standards III/14.

111 Annex III of the 2007 version of the SAFE Framework of Standards III/14.

112 Annex III of the 2007 version of the SAFE Framework of Standards III/14.

enforcement agencies in a country has been set as an efficient way to exercise customs control,¹¹³ thus preventing a number of offences from being committed and efficiently tackling those that have been or are being committed.¹¹⁴ There are two specific WCO Conventions that have as their common denominator mutual administrative assistance, and that speak volumes on the emphasis the organisation places on cooperation in customs matters for better enforcement. The WCO has also developed the *Compendium of Customs Operational Practices for Enforcement and Seizures* (COPES). The principles governing the instruments mentioned above are distilled hereunder.

2.2.2.2.1 The International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (1977) (the Nairobi Convention)

Adopted in 1977, the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (hereafter the Nairobi Convention) came into operation in 1980. The Convention reiterates the importance of co-operation as an effective tool to bar the road to customs offences that affect all administrations worldwide.¹¹⁵ It sets out the conditions and requirements upon which assistance may be required, granted or denied; how requests should be made;¹¹⁶ how the information transmitted in these processes should be used;¹¹⁷ and how disputes can be settled among the state parties regarding the interpretation and application of the Convention.¹¹⁸ Co-operating (by giving and receiving assistance) can in principle occur only within the limits of an administration's capabilities.¹¹⁹ This means that if a country is requested by another to assist in a particular matter, the country being so requested can provide its assistance only within the limits of what its capabilities allow. For instance, the Convention makes it clear that providing and receiving assistance does not, in any case, encompass matters

113 Customs control is defined in the General Annex to the RKC as "measures applied by the customs to ensure compliance with customs law".

114 Standards 6.7 and 6.8 of the General Annex to the RKC.

115 Preamble of the Nairobi Convention.

116 Article 7 of the Nairobi Convention.

117 Article 5 of the Nairobi Convention.

118 Article 14 of the Nairobi Convention.

119 Article 2(2) of the Nairobi Convention.

relating to the arrest of persons or the recovery of duties, taxes, charges, fines or any other monies for the benefit of another member country.

Regarding the arrest of persons, for instance, the restrictive nature of the matters covered by the Convention may be problematic and seem to make a nonsense of the use of the word “repressive” in its title. The electronic age in which we live makes it possible to perpetrate an offence from any part of the world, and the effect of the perpetration may likewise be felt worldwide. So what would be the point of assisting a customs administration in the “investigation” of customs offences in another territory if when the need arises, there is no possibility of further assisting in the arrest, sentencing and potential extradition of a perpetrator? Assisting in the investigation by only providing information (which is valuable, of course) but taking no further step forward does not advance the purpose of the Convention, neither does it add to the modernisation effort that seeks to curb crime more efficiently. Although the said aspects may be dealt with under other types of cooperative efforts and laws, this does not, however, mean that the WCO must not to the least, make mention of it.

The Convention has eleven Annexures. A country is bound by an Annex only if it has acceded to it, and that Annex becomes an integral part of the Convention regarding that specific country.¹²⁰ The Commentary to the Convention states that it rests on the principle of “reciprocity”, meaning that one country can render assistance to another only in so far as both of them have assented to the same Annex.¹²¹

In terms of the Nairobi Convention, there are a number of activities that would amount to offences under customs law, and that can form the subject matter of cooperation. The Convention does not give an express list of these offences, but a few conducts are identified from its provisions, namely smuggling¹²² and fraud arising from forgery, falsification and counterfeiting.¹²³ False declarations regarding the quantity, quality and origin of goods also fall under the ambit of other customs fraud.

Annex X, for instance, deals with mutual administrative assistance in activities relating

120 Article 10 of the Nairobi Convention.

121 Commentary to the Nairobi Convention 53.

122 Defined in article 1(d).

123 Annex IX to the Nairobi Convention.

to the smuggling of narcotic drugs and psychotropic substances, while Annex XI deals with the offering of assistance in addressing the smuggling of works of art, antiques and other cultural properties. The Commentary to this Convention notes that the Annexures dealing with specific aspects of smuggling were introduced into the Convention to meet the expectations of contracting members who had expressed serious concerns regarding smuggling in the specific domain addressed.¹²⁴ As defined for the purposes of the Nairobi Convention, smuggling is said to encompass not only situations where goods are wholly concealed in order to evade customs controls but also instances where goods are not concealed but are not adequately declared to the customs administration.¹²⁵ It is also said to involve all modes of transport, including the post.¹²⁶

The Convention acknowledges that these offences negatively affect a state's economic, social and fiscal interests and are also detrimental to the interests of trade.¹²⁷ France¹²⁸ and South Africa¹²⁹ are signatories to the Nairobi Convention. While France has adhered to the Convention and to three of its Annexures (I, IX and X), South Africa has adhered to it with four Annexures (I, II, III and VI).¹³⁰ Cameroon is not mentioned in the list of countries that have signed or ratified this Convention. However, the Cameroon Customs Directorate refers to this instrument as one of the many WCO instruments on which the country relies to run its customs business.¹³¹ A total of 53 states have acceded to this Convention.¹³² The other WCO instrument that advocates cooperation between customs and beyond customs is the *International Convention on Mutual Administrative Assistance in Customs Matters* (2003) (Johannesburg Convention), which is detailed below.

124 Commentary to the Nairobi Convention 52.

125 Commentary to the Nairobi Convention 55.

126 Commentary to the Nairobi Convention 55.

127 Preamble of the Nairobi Convention.

128 Since 12 April 2001.

129 From 10th August 1993.

130 WCO General Secretariat 2012 *EG0019E1a*.

131 See generally 6.2.1.1.2 below.

132 WCO General Secretariat 2012 *EG0019E1a*.

2.2.2.2.2 The International Convention on Mutual Administrative Assistance in Customs Matters (2003) (Johannesburg Convention)

The *International Convention on Mutual Administrative Assistance in Customs Matters*¹³³ goes a step further than the *Nairobi Convention* to encompass mutual administrative assistance regarding the application of Customs law, and the prevention, investigation and combatting of customs offences.¹³⁴ It also urges its member states to strive for the security of the international trade supply chain.¹³⁵ The Johannesburg Convention is also more detailed than the Nairobi Convention and places a stronger emphasis on the importance of co-operation as an efficient way to combat customs offences. One of the founding principles of the Johannesburg Convention is ensuring that the right balance is achieved between compliance and facilitation in order to meet governments' high expectations for the protection of society and the collection of revenues.¹³⁶ The Johannesburg Convention drafters acknowledge that the Nairobi Convention has laid the foundation of a clear framework regarding mutual administrative assistance in customs matters.¹³⁷ It prescribes processes more or less similar to those set out in the Nairobi Convention, but it is more detailed, and its scope of application is broader than that of the latter.¹³⁸ The Johannesburg Convention was adopted by the Council of the WCO on 27 June 2003 in Brussels, Belgium.¹³⁹ The Convention is one of the leading international agreements of the WCO and is aimed at providing a legal and binding framework for mutual cooperation between customs administrations.

One critical article of the Johannesburg Convention worth emphasising is article 6,

133 Johannesburg Convention.

134 Weerth adds that the Johannesburg Convention seeks to enable the proper application of customs law and to ensure the security of the international trade supply chain. Weerth 2016 *Customs Scientific Journal* 38.

135 Article 2(1) of the Johannesburg Convention; Weerth 2016 *Customs Scientific Journal* 38.

136 Preamble of the Johannesburg Convention.

137 Preamble of the Johannesburg Convention.

138 Weerth is of the view that the Nairobi Convention has a more restricted scope to the extent that it focuses only on cooperation to combat drug smuggling and smuggling in general. He also considers that despite being well rooted in assisting customs administrations to cooperate with one another, the Nairobi Convention lacks international backing, the reason being that only 52 states out of all the WCO's members are making use of some of its eleven annexures. Weerth 2016 *Customs Scientific Journal* 36, 37, 40.

139 Explanatory Memorandum of the *Convention on Mutual Administrative Assistance in Customs Matters* <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2006/060531customs.htm>.

which relates to the sharing of information about customs offences. The Convention provides that information on planned, ongoing, or completed activities can be shared on request or on a country's own initiative with its counterpart contracting state if there is reasonable evidence pointing to the fact that a customs offence has been committed or is likely to be committed. The emphasis is placed on this specific article, because it calls for the vigilance of the parties concerned not only in their own interest but also in the interests of other customs administrations around the world, as long as there is a factor connecting them to one another.

Unlike the Nairobi Convention, the Johannesburg Convention explores the possibility that contracting states may co-operate for the purpose of recovering customs claims.¹⁴⁰ It defines such a customs claim as being "any amount of Customs duties that cannot be collected in one of the Contracting Parties". This leads to the conclusion that the subject matter of the Johannesburg Convention is more extensive than that of the Nairobi Convention, which fact should motivate states to adopt it. Weerth¹⁴¹ argues that despite the existence of other instruments and tools designed by the WCO and other organisations, notably the Nairobi Convention, that govern mutual administrative assistance in customs matters, the adoption of the Johannesburg Convention would "make things better, clearer and modern". In other words, the Johannesburg Convention best responds, according to Weerth,¹⁴² to the needs of the modern trade environment in matters of extensive mutual administrative assistance and the dissemination of information. The author further considers this Convention as the Nairobi Convention's "modern successor".¹⁴³ The factors standing on the way of the Convention's being enacted are administrative difficulties and the reluctance of governments, which dashes the hope of making supply chains more secure.¹⁴⁴ This Convention should be prioritised as it caters for cooperation in combatting terrorism, illicit trade in prohibited goods, money laundering and smuggling, and proposes a risk

140 Article 14 (1) of the Johannesburg Convention.

141 Weerth 2016 *Customs Scientific Journal* 44.

142 Weerth 2016 *Customs Scientific Journal* 44.

143 Weerth 2016 *Customs Scientific Journal* 44.

144 Weerth 2016 *Customs Scientific Journal* 44.

analysis strategy.¹⁴⁵ It is an effective tool for customs co-operation in the 21st century.¹⁴⁶

The *Johannesburg Convention* has not yet come into force. Article 51 (1) of this Convention reads:

This Convention shall enter into force three months after five of the entities referred to in paragraphs 1 and 3 of Article 46 thereof have signed the Convention without reservation of ratification or have deposited their instrument of ratification or accession.

The requirements laid out in this article of the Convention for its coming into being have not been met yet. The Convention has thus far been signed by ten countries, and only three out of the ten have actually ratified it.¹⁴⁷ So, basically, only two more ratifications are needed for the Convention to enter into force. It is important to emphasise, as pointed out by Weerth,¹⁴⁸ that the Johannesburg Convention's main aim is to stand as a binding and enabling legal instrument for mutual legal assistance in customs dealings, and further, to assist the interested administrations in obtaining information not accessible in their own territories for a proper application of customs law.¹⁴⁹ As such, it enables efficient and swift handling of data that is key to international competitiveness and more specifically, to the security of international supply chains.¹⁵⁰ Weerth¹⁵¹ also argues that although mutual administrative assistance in customs matters is operating well under several other tools (notably the Nairobi Convention), these tools do not all have a legal background and therefore are somehow limited. He advocates for the adoption of the Johannesburg Convention for the reason that this Convention puts a particular accent on data exchange between modern customs administrations and the flow of data between businesses and customs administrations.¹⁵² The Johannesburg Convention, according to this author,

145 Weerth 2016 *Customs Scientific Journal* 44.

146 Weerth 2016 *Customs Scientific Journal* 41.

147 The three countries to have ratified the Convention are South Africa, Albania and India. Weerth 2016 *Customs Scientific Journal* 36.

148 Weerth 2016 *Customs Scientific Journal* 38.

149 Weerth 2016 *Customs Scientific Journal* 38.

150 Weerth 2016 *Customs Scientific Journal* 39.

151 Weerth 2016 *Customs Scientific Journal* 38.

152 Weerth 2016 *Customs Scientific Journal* 40.

will lead to better-regulated cooperation.¹⁵³ The broad adoption of the Johannesburg Convention would result in better control of cross-border trade under the new data-exchange models.¹⁵⁴ This would have the effect of combatting customs offences in real-time and thus meeting the challenges posed by cross-border offences.

The WCO presents the Johannesburg Convention as highly beneficial to the customs administrations that adopt it, as it will enable them to:

Legally exchange information, including personal data, and assistance directly with the partner of choice, which is not possible under the current Nairobi Convention;
exchange information on consignments in advance of their arrival at destination in order to secure the international trade supply chain;
have available a WCO instrument on mutual administrative assistance in Customs matters under which it is possible to enter reservations in respect of all provisions which do not constitute basic principles of the Convention, an option that does not exist under the Nairobi Convention;
extend mutual administrative assistance to cover many aspects of Customs work in a complementary fashion to the principles of mutual legal assistance accepted by most Members in the United Nations' Palermo Convention;
provide a legal status to the Customs Enforcement Network, which is the WCO's central data base on Customs offences; and
have an instrument to supplement bilateral agreements dealing appropriately with topical issues relating to the protection of society and the collection of revenue.¹⁵⁵

It appears from the list of these benefits that the Johannesburg Convention actually responds to the standard of handling information that is needed for the modernising and fast-changing trade environment, and its ratification is highly recommended for these reasons. Effectively and efficiently fighting customs offences in their variety requires enhanced national and international cooperation.¹⁵⁶ This is what the Johannesburg Convention promotes. The Convention was adopted in 2003 and, given the subsequent developments in the field, it may appear as if by the time the quota for ratification is met and the Convention comes into force, its underlying principles might no longer be relevant. This is not so. It is essential to note that the principles contained in the WCO's instruments (Conventions) are used as the basis for the organisation's activities and that of its members. These foundations are complemented by up-to-date steps and tools that take into consideration every single development

153 Weerth 2016 *Customs Scientific Journal* 43.

154 Weerth 2016 *Customs Scientific Journal* 41.

155 WCO 2012 *Benefits of the Johannesburg Convention* <http://www.wcoomd.org>.

156 Weerth 2016 *Customs Scientific Journal* 44.

surrounding the work of customs. Furthermore, there is usually established bodies that work on updating the principles contained in Conventions according to the changes in society. In this regard, there should, therefore, be no concern regarding the relevance of the WCO's instruments governing customs modernisation that are not yet in force. Furthermore, it complements and is complemented by several other trade facilitation initiatives piloted by the WCO/WTO, especially the SAFE Framework of Standards and the concepts such as Integrated Border Management and Coordinated Border Management.¹⁵⁷ The third instrument advocating cooperation is the *Compendium of Customs Operational Practices for Enforcement and Seizures* (COPES), which is more inclined to the operational and practical dimension of enforcement. This instrument is revisited below.

2.2.2.2.3 Compendium of Customs Operational Practices for Enforcement and Seizures (COPES)

Jointly developed by specific customs administrations with the help of the WCO Secretariat, the main aim of the *Compendium of Customs Operational Practices for Enforcement and Seizures* (COPES) is to better understand, through knowledge sharing, the way customs administrations exercise their powers in seizing, penalising and detaining goods or people in instances of fraud (non-compliance).¹⁵⁸ In other words, COPES was developed to present useful, practical examples of practice and to highlight the different obstacles to proper enforcement with particular stress being laid on procedures dealing with seizures that may require the involvement of different customs administrations.¹⁵⁹ Overall, the Compendium's primary purpose is to enhance enforcement and seizure practices.¹⁶⁰ Through its detailed processes, COPES seeks to urge WCO members to examine their current positions and take steps to enhance the capabilities of their systems with particular reference to their respective legal frameworks and the operational aspects that underlie their proceedings and

¹⁵⁷ Weerth 2016 *Customs Scientific Journal* 40.

¹⁵⁸ WCO Date Unknown *COPES* <http://www.wcoomd.org>.

¹⁵⁹ WCO Date Unknown *COPES* <http://www.wcoomd.org>.

¹⁶⁰ WCO Date Unknown *COPES* <http://www.wcoomd.org>.

practices.¹⁶¹ Due to the delicate¹⁶² nature of the information in the Compendium, access to its content is granted to WCO member administrations only.¹⁶³ With a view of complementing the Compendium, the WCO Secretariat has rolled out an interactive COPES training course for field officers with the objective:

to raise awareness among field officers of the essential role played by the procedures for seizing goods and collecting evidence, to support effective and efficient border security practices.¹⁶⁴

All these steps enhance customs officers' capacities and this can only lead to bettering customs enforcement activities. Besides cooperation at all possible levels to enable better control over the different aspects of customs work, the automation of customs systems has become imperative in today's trading environment. The maximum use of information technology is, therefore, one of the cornerstones of customs modernisation as a whole.

2.2.2.3 Maximum use of Information Technology

Information sharing on its own is considered a significant part of the overall cooperation endeavour.¹⁶⁵ In the same way, the international sharing of information is also viewed as an essential component of effective risk management and as such, should be governed by explicit legal provisions.¹⁶⁶ Information and intelligence (receiving, disseminating, storing, analysing, and retrieving) are said to be the lifeblood of law enforcement.¹⁶⁷ Information technology as a tool to strengthen the work of customs in general and specifically to curb crime is foregrounded by standards 6.9, 7.1 and 7.4 of the General Annex to the RKC. This has enabled the enhancement and better use of available sources of information as well as the development of new

161 WCO Date Unknown *COPES* <http://www.wcoomd.org>.

162 Usually, when access to an instrument is restricted to customs agencies and their officials, this means that the nature of the information contained therein is such that if it were open to the public, it might adversely be used by evil-minded people to contravene customs rules and practices. WCO *COPES* Date Unknown <https://www.wcoomd.org>.

163 WCO Date Unknown *COPES* <http://www.wcoomd.org>.

164 WCO Date Unknown *COPES* <http://www.wcoomd.org>.

165 WCO Date Unknown *Mutual Administrative Assistance Instruments* <http://www.wcoomd.org>.

166 Weerth 2016 *Customs Scientific Journal* 38.

167 Brown *Criminal Investigation* 64; WCO 2012 *nCEN-Bridging the gap through technology* <https://slideplayer.com/slide/6326847/>; United Nations Office on Drugs and Crime 2016 *Law enforcement* <http://www.unodc.org>.

ways of passing such information from one entity to another. Real-time cooperation between different customs administrations through the advanced electronic transmission of customs data is a crucial element in making it possible for customs administrations to adequately manage risks that may derive from international trade transactions.¹⁶⁸

In this regard, the most relevant communication tools (or networks) that strengthen the enforcement of customs laws and regulations are the Customs Enforcement Network (CEN) and the Regional Intelligence Liaison Offices (RILO).

2.2.2.3.1 Customs Enforcement Network suite (CEN)

Technology and innovation are two crucial elements in the WCO's agenda of promoting more excellent connectivity and more coordinated and harmonious interaction between world customs administrations.¹⁶⁹ The Customs Enforcement Network (CEN) database started operating in 2000. It is a 24/7 network enabling customs officers worldwide to interchange information regarding customs offences and to share intelligence timeously and securely.¹⁷⁰ It is a platform where invaluable information regarding customs enforcement is made available.¹⁷¹ In 2011 the CEN application was updated, and it now contains a database of seizures regarding customs offences as well as pictures of seized goods. This means that information relating to seizures that have been made and the characteristics of customs offences accompanied by pictures for more clarity can be found in the database. This eases customs work to a considerable extent.¹⁷² The CEN webpage provides various enforcement-related publications, amongst which are warnings, analytical reports and instructive periodicals. It is an investigative instrument or rather, in the words of the WCO, "a global data and information-gathering, analysis and communication system for intelligence purposes."¹⁷³ Its analytical nature allows WCO member states to mine

168 Weerth 2016 *Customs Scientific Journal* 38.

169 WCO Date unknown *CEN Suite* <http://www.wcoomd.org>.

170 CEN Date unknown <http://www.195.99.88.100/CEN> or CEN Date unknown *Customs Enforcement Network (CEN)* <http://www.projectren.org>.

171 CEN 2012 <http://www.wcoomd.org>.

172 CEN 2012 <http://www.wcoomd.org>.

173 WCO Date Unknown *CEN Brochure* <http://www.wcoomd.org>.

data for a better definition of strategies, for the preparation of risks indicators and for spotting trends.¹⁷⁴ In developing this tool, the WCO took into account today's digital era and concluded that an efficient and fast way of making information flow between countries, agencies and the front-line staff was indispensable for effective border control and to curb a multitude of customs offences (disruption of illicit trade).¹⁷⁵ According to the WCO, "Intelligence is a vital element of enforcement, and the CEN application enables all WCO Members to access a critical mass of information which forms the basis of intelligence."¹⁷⁶

The CEN encompasses several other applications such as the National Customs Enforcement Network (nCEN) and the Customs Enforcement Network Communication Platform (CENcomm).

The nCEN is a system devised to empower customs administrations with the ability to collect and store law-enforcement information within the boundaries of each state but with the possibility of exchanging such information regionally and internationally. The national platform makes available information regarding seizures, offences, suspected persons and suspicious business entities. As the WCO rightly points out,

...in a global economy based on information computerisation, the nCEN enables customs administrations to take large steps on the path to good governance, trade facilitation, *stricter law enforcement* and ultimately sustainable development and economic growth.¹⁷⁷

The WCO administers the CEN, whereas the nCEN is administered within each country's national boundaries.¹⁷⁸

Regarding CENcomm, it was designed by the WCO Secretariat and aims to secure a messaging system of a particular nature that is meant to help member states (through their officers) improve and strengthen their fight against illicit trade. It is a "closed user group of officers' platform" where communication flows instantaneously through

174 WCO Date Unknown *Customs Enforcement Network (CEN)* <http://www.wcoomd.org>.

175 WCO Date unknown *CEN Suite* <http://www.wcoomd.org>.

176 WCO Date Unknown *Customs Enforcement Network (CEN)* <http://www.wcoomd.org>; WCO and UNEP Date Unknown *Customs Enforcement Network* <http://www.projectren.org/files/factsheet/CEN.pdf>.

177 WCO Date Unknown *Customs Enforcement Network (CEN)* <http://www.wcoomd.org>.

178 WCO CEN Team Date Unknown "WCO Customs Enforcement Network Applications" 3.

encrypted channels, covering an operation or a project. The network enables the use and exchange of information within reasonable times and in a secure way. This particular platform was established, bearing in mind that the timeous and secure dissemination of information for border enforcement operations is crucial to a customs administration wishing to meet the challenges of today's fast transforming digital era. Available 24/7 in different languages,¹⁷⁹ the CENcomm is the future when it comes to global communication for law enforcement officers, says the WCO.¹⁸⁰

The CEN electronic system brings together all customs administrations via the WCO's network of global Regional Intelligence Liaison Offices (RILO).

2.2.2.3.2 Regional Intelligence Liaison Offices (RILO)

The Regional Intelligence Liaison Offices (RILO) are part of the WCO's Intelligence and Risk Management Programme. The WCO has established RILO offices in its six regions, and Cameroon is the host of the RILO for Central Africa. Kenya hosts the RILO for Eastern and Southern Africa.¹⁸¹ The RILO network has eleven liaison offices worldwide. The aim of the RILO system is said to be to boost the capabilities of global information and intelligence exchange, as well as to ensure interaction between different customs administrations that bear the responsibility for curbing trade-related cross-border crime.¹⁸² Thus, co-operating to fight customs offences is one of the main objectives of the mechanism.¹⁸³ Its main functions, beyond aiding WCO members with all requests dealing with intelligence ("create, make available and manage the exchange of intelligence"), are to provide administrative assistance, carry out liaison works for law collaboration, devise and coordinate the implementation of specific intelligence analysis projects and regional intelligence-led operations, ensure the promotion and maintenance of CEN, and provide technical assistance to the

179 WCO Date Unknown *CEN Suite Brochure* <http://www.wcoomd.org>.

180 WCO Date Unknown *CEN Suite Brochure* <http://www.wcoomd.org>.

181 Mention is made of these offices because Cameroon is part of this study and South Africa is part of the Southern Africa Community Union. The placement of an office in one country and not in another within a community is a choice made by the WCO which is certainly motivated only by the need to be closer to its member states without any preference of one country to the detriment of another.

182 WCO Date Unknown *RILO* <http://www.wcoomd.org>.

183 WCO Date Unknown *RILO* <http://www.wcoomd.org>.

members.¹⁸⁴ The mechanism operates nationally, regionally and internationally in a collaborative and well-coordinated manner.¹⁸⁵ Besides the automation of customs processes and procedures, the WCO also emphasises the practice of transparency, predictability and good governance in customs structures and administrations.

2.2.2.4 Promoting transparency, predictability and good governance.

The concepts of transparency and predictability in customs refer to the appropriateness of an administration's processes and strategy to be readily available to the public and to be consistent and uniform in the application of the law. Transparency occurs through placing at the disposal of any interested party, in time and free of charge (or at a reasonable cost as the case may be), information pertaining to laws, regulations, judicial decisions and administrative rulings, as well as running independent audit.¹⁸⁶ Predictability, on the other hand, requires that laws and procedures be consistent with one another and sufficiently precise to ensure that no abuse or misinterpretation can be achieved, and discretionary interventions can be limited or just avoided.¹⁸⁷ Thus, modern laws governing customs should, on the one hand, be readily accessible to any person having an interest in them and on the other hand their regulation, as well as the policies related to them, should be aligned with one another in a way that leaves little or no leeway for officers to act in a discretionary manner. According to Helble, Shepherd and Wilson,¹⁸⁸ predictability and simplification are components of transparency. In their view, predictability reduces uncertainty and consequently, the costs to business, while simplification greatly assists importers and exporters in the identification, evaluation of and compliance with existing laws and regulations.¹⁸⁹ Besides the need for predictability and transparency, governance, in particular, good governance, is crucial in today's customs environment.

184 Jang "RILO's Activities"; WCO Date Unknown *RILO* <http://www.wcoomd.org>.

185 WCO Date Unknown *RILO* <http://www.wcoomd.org>.

186 Mikuriya "Legal framework for customs operations" 53, 56, 64-65; *Asia-Pacific Economic Cooperation (APEC) Principles on Trade Facilitation* 2001.

187 Mikuriya "Legal framework for customs operations" 60, 61, 64-65; *APEC Principles on Trade Facilitation* 2001.

188 Helble, Shepherd and Wilson "Transparency & Trade Facilitation in the Asia Pacific" ii.

189 Helble, Shepherd and Wilson "Transparency & Trade Facilitation in the Asia Pacific" ii, 9, 13.

Governance¹⁹⁰ is to be singled out from good governance. Good governance is an outcome of operating in a transparent and predictable system.¹⁹¹ Transparency, responsibility, accountability, participation and responsiveness to people's needs are the key elements characterising good governance.¹⁹² According to the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP),¹⁹³ good governance implies a participatory system of governance, that is consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and most importantly, one that follows the rule of law.¹⁹⁴ For lack of a universally accepted definition of the concept of good governance, it is however often recognised that the term entails but is not limited to full respect of human rights, the rule of law, active participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.¹⁹⁵ Nevertheless, there is consensus on the fact that good governance points to political and institutional processes and outcomes that are considered crucial for meeting development targets.¹⁹⁶ Customs administrations are therefore a major role player in the achievement of a country's development goals so long as they partake in good governance initiatives within their field of work and ensure corruption, which is their central challenging element, is rooted out to the core. The WCO has undertaken several pieces of work to help its members counter all

190 Governance is defined as "the process of decision-making and the process by which decisions are implemented (or not implemented)." United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) Date Unknown *What is Good Governance?* <https://www.unescap.org/sites/default/files/good-governance.pdf>.

191 Johnston Date Unknown *Good Governance* <http://unpan1.un.org>.

192 United Nations Human Rights Office of the High Commissioner (OHCHR) 2018 *Good Governance and Human Rights* <https://www.ohchr.org>.

193 United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) Date Unknown *What is Good Governance?* <https://www.unescap.org/sites/default/files/good-governance.pdf>.

194 See also in this regard the analysis of this concept in De La Harpe, Rijken and Roos 2008 *Potchefstroom Electronic Law Journal* 6-7.

195 OHCHR 2018 *Good Governance and Human Rights* <https://www.ohchr.org>.

196 OHCHR 2018 *Good Governance and Human Rights* <https://www.ohchr.org>; see further Srivastava, who summarises good governance as "the function of installation of positive virtues of administration and elimination of vices of dysfunctionalities." Srivastava 2009 *Good Governance* file:///C:/Users/nwuuser/Downloads/SSRN-id1528449.pdf.

behaviours that affect integrity in this field of work. The *Revised Arusha Declaration*,¹⁹⁷ for instance, deals with ways to combat and root corruption out of this particular field of work. Another way suggested by the WCO to deal with customs more efficiently is to institute less burdensome and more time-effective disputes settlement processes.

2.2.2.5 Enabling smooth and time-effective dispute settlement processes

Smooth, timely and cost-effective dispute settlement processes in any system enable a healthy business climate where on the one hand the administration lessens its burden by dealing speedily with all disputes arising from its provision of services, and on the other hand businesses have the opportunity to run their affairs more comprehensively and reap the benefits of it to their satisfaction.¹⁹⁸ Basically, such processes save time and costs both to the administration and to the trading community.¹⁹⁹ This will give the administration a positive image both nationally and internationally, which in turn may attract foreign investment and new businesses. For such a system to be effective, there is the apparent need for a strong (both in number and in knowledge) human resource capacity. The number and knowledge of this human resource are crucial, considering the volumes of growing trade and the disputes arising therefrom.

The entire Chapter 10 of the Annex General to the RKC is dedicated to the appeal process in customs matters. A person affected in any way by the decisions of a customs administration should be given the right to challenge such decisions. Such an appeal process within these lines has to meet three specific standards. First, the legislation governing the administration of customs should enable an initial appeal to the customs authority itself.²⁰⁰ If the dispute is not solved at that level, an alternative appeal to an authority independent of the customs administration should follow.²⁰¹ Should this second step also fail to resolve the issue, the appellant should be allowed

197 On *Integrity in Customs* (2003).

198 Mikuriya "Legal framework for customs operations" 61.

199 Mikuriya "Legal framework for customs operations" 61.

200 Standard 10.4 of the General Annex to the RKC.

201 Standard 10.5 of the General Annex to the RKC.

in the final instance to seize a judicial authority.²⁰² Modernising the customs legal framework in this context would be conducive to enabling transparent and predictable administration through the use of independent audits and timely and cost-effective appeal processes.²⁰³ When all the parties involved in customs transactions are well acquainted with their right to challenge customs decisions and the relevant procedures to follow, there is no doubt that customs administrations will be transparent environments where the possibilities of abuse would be considerably reduced. This is why every customs administration needs to be rooted in a system of accountability and proper human resource management. The WCO has, besides defining the founding principles of customs modernisation as presented in its instruments, also developed some instruments that incorporate all such founding principles. The instruments are mostly meant to guide its member states in their modernisation efforts. This set of instruments are referred to as the all-in-one WCO tools advocating customs modernisation.

2.2.3 The all-in-one WCO tools advocating customs modernisation

Some tools and instruments devised under the WCO modernisation programme are all-encompassing; i.e., they incorporate all the aspects referred to above without prioritising any but aim to help member states modernise their laws and regulations as well as their operating systems. Amongst those, are the *WCO Framework of Standards to Secure and Facilitate Global Trade* (SAFE Framework) and the WCO's Columbus programme.

2.2.3.1 The WCO Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework)

The WCO Framework of Standards to Secure and Facilitate Global Trade²⁰⁴ was adopted in June 2005 at the WCO Council Sessions in Brussels.²⁰⁵ The WCO updates and improves the Framework at defined intervals, taking into account changes that

202 Standard 10.6 of the General Annex to the RKC.

203 Mikuriya "Legal framework for customs operations" 53, 64.

204 Otherwise termed as the SAFE Framework of Standards or SAFE FoS.

205 Foreword of the 2015 edition of the SAFE Framework of Standards; Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wco.org>.

occur along the way.²⁰⁶ It was devised to both secure and facilitate world trade, thereby ensuring that all the possible economic, financial and social benefits flowing from it could be realised.²⁰⁷ The SAFE Framework recognises that the strategic position of customs agencies could enable them to provide increased security to the global supply chain, amongst other services.²⁰⁸ The Framework was thus purposed to “act as a deterrent to international terrorism, secure revenue collection and promote trade facilitation worldwide.”²⁰⁹ In the same vein, the Framework is expected to help member countries of the WCO to ameliorate and modernise customs operations in their respective environments.²¹⁰ It was developed within the bounds of the principles contained in the RKC.²¹¹ The support provided by the Framework is twofold and rests on the economic and social protection of international trade.²¹² It acknowledges further that a modern customs administration is one that uses automated systems for risk management.²¹³ It also sees capacity building and improved legal frameworks as crucial elements in building a progressive and adaptive customs administration.²¹⁴

Furthermore, the SAFE Framework endeavours to assist customs administrations that adopt its proposed standards with capacity building initiatives.²¹⁵ Among others, and with reference to security, i.e. protecting society and the economy against the threats posed by globalisation, the Framework aims to:

Establish standards that offer supply chain security to uphold certainty and predictability.

Work toward integrated supply chain management for different modes of transport.

Build customs administrations that effectively and efficiently meet the challenges and opportunities of the 21st Century.

Strengthen co-operation between different customs administrations with a view to

206 So far, there have been five versions of the Framework, published in 2005, 2007, 2012, 2015 and 2018. The latest version i.e. the 2018 version was not used in this study. Each version published subsequent to the original version of 2005 brings in a new aspect. Foreword of the 2015 edition of the SAFE Framework of Standards.

207 Preamble of the 2007 edition of the SAFE Framework of Standards.

208 Foreword of the SAFE Framework of Standards.

209 WCO SAFE Package 2015 <http://www.wcoomd.org>; Anonymous Date Unknown “SHORT LIST” QUESTIONS 1 and 2; Neggers 2013 “WCO SAFE Standards”.

210 2015 version of the SAFE Framework of Standards 4; Neggers 2013 “WCO SAFE Standards”.

211 Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

212 2015 version of the SAFE Framework of Standards 4.

213 WCO SAFE Framework of Standards 6.

214 WCO SAFE Framework of Standards 7.

215 WCO SAFE Framework of Standards 7.

boosting their ability to detect high-risk consignments.
Encourage customs and business co-operation.
Promote the harmonious movement of goods through secure international trade supply chains.²¹⁶
Encourage co-operation between customs and other government agencies that deal with international trade and security.²¹⁷

The Framework rests on four essential elements: (i) it harmonises the advance electronic cargo information requirements; (ii) it urges member countries to use a comprehensive risk management technique to address security threats; (iii) it promotes the use of modern technology, preferably non-intrusive detection equipment such as large-scale x-ray machines and radiation detectors for the inspection of high-risk consignments; and lastly (iv) it encourages the provision of benefits for businesses complying with proposed minimal supply chain security standards and best practices.²¹⁸

Drawing on these four elements, the Framework consisted until 2015 of two pillars, namely customs-to-customs collaboration and customs-to-business partnerships. The 2015 version adds a third pillar that promotes customs-to-other government agencies co-operation. The three pillars have to do with a range of standards brought together to ensure ease of understanding and speedy international enforcement among all role players.²¹⁹ Connecting different entities, as promoted by the Framework, enables the timeous dissemination of information for the effective management of risks, and this, in turn, limits the risks to which the activities in this sector may be exposed.²²⁰ Not legally binding, for the countries eager to follow it, the SAFE Framework constitutes a point of reference for a thorough transformation of customs legislation and administration as a whole.²²¹

216 The first six objectives are found in the 2007 version of the SAFE Framework of Standards 7; also see Piraux 2009 *An Introduction to the World Customs Organization* <https://www.wto.org>.

217 This last objective is newly added and is found in the 2015 version of the SAFE Framework of Standards.

218 2007 version of the SAFE Framework of Standards 7.

219 2007 version of the SAFE Framework of Standards 8.

220 2012 version of the SAFE Framework of Standards 5.

221 Aigner 2010 *WCJ* 47; Neggers 2013 "WCO SAFE Standards"; Hermann 2016 *the Implementation of the SAFE Framework of Standards* <http://www.wcu-customs.de>; Schulte 2013 *The WCO's SAFE Framework* <http://www.ifrc.org>; Dutch Institute for Public Administration (PBLQ) International Date Unknown <http://www.pblq.nl>.

Neggers²²² sees the Framework as:

a comprehensive instrument that covers all areas of Customs controls and can help to incorporate modern Customs principles and relies on an efficient supply chain made up of a combination of private and public sector players and interests.

In 2007, the WCO established a SAFE Working Group (SWG) that is mandated to maintain and further develop the SAFE Framework of Standards.²²³ Approved by the Policy Commission in December 2014 and confirmed by the Council in June 2015, the SWG replaced the High-Level Strategic Group.²²⁴ This body deals both with policies issues and with technical amendments related to the SAFE Framework.²²⁵ With regard to policies, it works under the guidance of and is accountable to the Policy Commission.²²⁶ As for technical amendments, it is supervised and reports to the Permanent Technical Committee.²²⁷ The SWG also has an advisory capacity through which it informs the bodies to which it reports and the Secretary-General on progress and every other issue having to do with the implementation, maintenance and amendment to the SAFE Framework and the unfolding of all following programmes, such as the Columbus Programme.²²⁸

As of 1st October 2015, 169 of the WCO's 180 members had expressed the will to implement the Framework by signing the letter of intent. The letter was signed by South Africa, Cameroon and the European Union as an organisation for its 28 members in June 2005. The number of countries intending to apply (or currently applying) the SAFE FoS is given as an indicator that the instrument and its founding principles have been widely accepted and are being implemented.²²⁹ The WCO's Columbus Programme has equally greatly impacted in the overall effort of customs modernisation piloted by the latter organisation.

222 Neggers 2013 "WCO SAFE Standards".

223 WCO Date Unknown *SAFE Working Group* <http://www.wcoomd.org>.

224 WCO Date Unknown *SAFE Working Group* <http://www.wcoomd.org>.

225 WCO Date Unknown *SAFE Working Group* <http://www.wcoomd.org>.

226 WCO Date Unknown *SAFE Working Group* <http://www.wcoomd.org>.

227 WCO Date Unknown *SAFE Working Group* <http://www.wcoomd.org>.

228 WCO Date Unknown *SAFE Working Group* <http://www.wcoomd.org>.

229 WCO 2012 *Trade Facilitation Implementation Guide* <http://www.tfig.unece.org>; Anonymous Date Unknown "SHORT LIST" QUESTIONS 6.

2.2.3.2 The WCO's Columbus Programme: Aid for Safe Trade

The WCO's *Columbus Programme: Aid for Safe Trade*, which is simply referred to as the Columbus Programme, is said to be the largest and most comprehensive of the WCO's capacity-building initiatives.²³⁰ It is primarily meant to help WCO members to fully implement the SAFE Framework and other of the WCO's legal instruments and tools, such as the RKC, and identified best practices in the customs field.²³¹

The programme is split into three phases, the first being needs assessment,²³² the second being planning and implementation²³³ considering existing needs, and the third being the monitoring of progress and evaluation of outcomes.²³⁴ This programme draws from the fact that in order to achieve sustainability, capacity-building initiatives should be based on the accurate assessment of needs from a developmental and technical perspective.²³⁵ It also acknowledges that projects undertaken under capacity building need to be appropriately contextualised and offered in an appropriate sequence.²³⁶ The Columbus Programme, in essence, aims at producing "a comprehensive and accurate diagnosis of a customs administration's capacity."²³⁷ These preliminary steps are crucial for fundamental and sustainable customs reform.²³⁸

This large-scale programme also has, amongst other objectives, the promotion of

230 WCO Date Unknown *Columbus Programme: Aid for Safe Trade* <http://www.wcoomd.org>; Anonymous Date Unknown "SHORT LIST" QUESTIONS 5.

231 Anonymous Date Unknown "SHORT LIST" QUESTIONS 3 and 5.

232 This first phase ended in July 2007. It consisted of sending diagnostic missions to more than 100 countries to evaluate their current capacity and their shortcomings with regard to 7 identified aspects, namely strategic management, human and financial resources, legal frameworks, customs proceedings, information technology, external cooperation, and governance. The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>.

233 Considered the most important and longest, this second phase was conducted in more than 25 countries and entailed providing support to address existing shortcomings according to the recommendations made in the diagnostic findings, such as action planning, change management and training. The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>.

234 WCO 2007 *Special Report* 16; The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>; Anonymous Date Unknown "SHORT LIST" QUESTIONS 6.

235 WCO 2009 *The WCO Capacity Building Development Compendium* I-3.

236 WCO 2009 *The WCO Capacity Building Development Compendium* I-3.

237 WCO 2009 *The WCO Capacity Building Development Compendium* I-3; Staples "Trade Facilitation: Improving the Invisible Infrastructure" 141.

238 Staples "Trade Facilitation: Improving the Invisible Infrastructure" 145.

sustainable customs modernisation.²³⁹ After the completion of the assessment phase, recommendations are made regarding the gaps identified. These findings and recommendations are conveyed to the administrations assessed, and it is up to them to engage, of course with the help of donors and considering the reality on the ground, in programmes to boost their capacities. They may decide to follow or ignore the recommendations made.²⁴⁰ The choice is theirs. Finding and responding to the weaknesses of an administration helps it build capacity that further enables it to respond effectively to the emerging trends in crime and the threats surrounding the trade environment.

2.3 Summary

The aim of this Chapter was to scrutinise the WCO instruments and initiatives developed within the context of customs modernisation in order to identify those that specifically relate to the fight against customs offences. It is important to note that the WCO work in the context of customs modernisation is as vast as the modernisation process itself. It was important to carry out an analysis that provides a basis for understanding how the measures contained in those instruments aid the purpose for which they were devised, namely bettering customs services and curbing customs offences more effectively. The discussion focused on identifying and analysing the founding principles of customs modernisation that stem from the WCO's instruments and initiatives. It appears that these founding principles, as varied as they are, all play a crucial role in the fight against customs offences.

This Chapter finds that the variety of ways in which the WCO provides support and guidance to its member countries as they modernise their regulations and consequently their operating systems is commendable in the sense that these efforts contribute to empowering customs agencies so that they can deliver their services in a better way to the benefit of all and to the detriment of those perpetrating fraud in the domain. That is the main mandate of the WCO initiatives. The positive response of the member states who access those instruments and follow the different initiatives

239 The GFPTT Date Unknown *Cutoms modernisation* <http://www.gfptt.org>.

240 WCO 2009 *The WCO Capacity Building Development Compendium* I-3.

is already proof that customs fraud perpetrators are affected. Sophisticated techniques and strategic responses enable better enforcement and this impacts networks of fraud perpetrators.

The RKC specifically, has over the years been referred to as the most crucial legal instrument providing the basis for an efficient, predictable and responsive customs administration operating in a continually transforming trade environment.²⁴¹ The General Annex to this *Convention* is particularly edifying in terms of its identification of the core principles that should be considered by each customs administration in reviewing or developing laws and regulations that govern its activities as a strategic enforcement agency. Including, incorporating or simply taking these principles as the basis for all development in the administration and its governing legal framework would make it possible for the customs agency to achieve its goals and meet its targets, especially with regard to curbing customs offences in their diversity.

The whole idea behind approaching customs work from a different or modern angle is to ensure that the fast-developing international trade environment does not hinder the smooth running of activities in this sector and the call to be responsive applies to all customs administrations regardless of their geographical location or economic power. Adhering²⁴² to new ways of responding to the changes would ensure that facilitation and control can cohabit with great ease. Although capacities to implement the new approach differ from one country to the next, the fact remains that all countries are now morally compelled to accommodate at least basic customs modernisation if they want to compete in the international market. No country can isolate or exclude itself from this process. The application of the founding principles of customs modernisation not only boosts customs capacities in a territory, but it also sets the implementing administration on a level path at the international level.

That is why the laws and regulations that govern customs must be adequate and able to respond to the demands of time. They should be simple, clear and consistent in their content, well-known to all interested parties, and reflective of the international

241 See discussion in 2.2.1 above.

242 And fully implementing.

standards developed in various initiatives and instruments as presented in this Chapter. They should also allow for the use of risk management techniques; promote the maximum use of information technology, advocate cooperation at all possible levels, promote transparency and predictability, and enable a smooth, timely and cost-effective dispute resolution system. A particular accent should also be placed on governance (good governance), which stands as the beginning and the end of all customs modernisation efforts. These are the founding principles of customs modernisation that, if thoroughly incorporated, have an undeniable effect on the fight against customs offences.

Risk management enables the administration to deal with risks associated with its business through advance information submission. The post-clearance audit is a follow-up approach that helps the administration ensure that its traders operate in compliance with the existing laws and regulations. Cooperation and partnership assist in building a healthy business climate where the customs administrations and other enforcement bodies work with each other to ensure better compliance and customs administrations and businesses build strong partnerships that facilitate their dealings with each other and further enable greater compliance to rules and regulations. The maximum use of information technology in customs dealings not only speeds up processes and procedures, but it also facilitates the dissemination of information and consequently the fast and easy detection of customs offences. That is why information and intelligence form the lifeblood of law enforcement.²⁴³ All the above principles in their varied ways contribute to the promotion of transparency, predictability and good governance in the overall customs business as everyone in the value chain is accountable to some extent and is therefore compelled to act in ways that advance the goals of the administration. Last but not least, customs modernisation also seeks to institute a culture of smooth, time and cost-effective dispute settlement processes which enable the administration to handle disputes more strategically by saving itself and businesses both time and money.

In urging its member states to modernise their customs administrations and the

²⁴³ See discussion in 2.2.2.3 above.

related legal frameworks, the WCO has devised helpful guidelines for improving capacities; involving different law enforcement authorities in different initiatives; providing infrastructures for better enforcement where needed; conducting research in various domains; providing platforms for dialogue, training and the sharing of information of various kinds among front-line officers and amongst administrations; and so on. The founding values informing the work of the WCO strengthen the idea that customs offences are of a serious nature, and consequently, the battle against them needs to be waged on an ongoing basis. It is clear from what has been discussed above that any customs modernisation efforts should be rooted in appropriate laws and regulations reflective of the values, principles and international standards that inform the practices of truly effective customs agencies worldwide.

The challenge remains, however, one of universal adherence and implementation of the standards set by the WCO and its allies. It is evident that the international standards set through these instruments and steps hardly reflect every party's (member's) reality on the ground, which render such adherence and implementation sometimes tricky. However, aware of such differences, the WCO always suggests its members should adjust its instruments and initiatives to their respective operating environments at least, to the extent their capabilities and territorial realities allow, but the underlying principles remain the same. It is therefore advisable that each state fully embraces the said proposals. This can only advance the purposes of international trade in today's fast transforming environment. As the founding principles that should underlie every customs modernisation effort to combat customs offences have been identified, it is crucial to delve into the specificities that characterise a number of customs offences to see how the WCO approaches them.

CHAPTER 3

AN INTERNATIONAL PERSPECTIVE ON CUSTOMS-RELATED OFFENCES

3.1 Introduction

This Chapter aims at giving a brief overview of customs offences from an international perspective and to unveil the different approaches the WCO uses to strategically fight these offences besides the instruments and approaches it promotes as discussed in Chapter 2.

International trade has shown unprecedented growth, thanks to globalisation. This growth has benefited not only the trading community but also customs offenders. New ways to avoid restrictions, prohibitions and the like laid down by customs laws and other laws have also developed in this period. This has enabled those who wish to offend against the law in this context to benefit unduly from the many opportunities offered by trade across borders. The nature of customs work is such that abuses can be perpetrated at any stage of the import-export-transit process, either by insiders (customs officers) or outsiders (people dealing with customs) and for a multitude of reasons. That is why customs offences vary in nature, number and sizes. Globalisation has broadened the field of operation of customs offenders and thus extended their global reach.

While some offences deprive the customs administration of its capacity to collect duties/taxes on goods, others have a negative impact on the environment, the safety and health of communities, and the security of states. Yet other customs offences attack legitimate businesses by trading in the same line as they do, with under-standard products.¹

The WCO Compliance and Enforcement Working Body, which comprises several sub-working groups, amongst which is the Working Group on Commercial Fraud, has a

1 This is the categorisation made by the WCO's Compliance and Enforcement Working Body in the document entitled *Compliance & Enforcement Package brochure*. The constituent of the different categories are discussed in para 3.2.1; 3.2.2; 3.2.3; 3.2.4 and 3.2.5 below.

mandate that involves but is not limited to curbing customs offences.² Simply put, after it had been approved by the WCO Policy Commission, the WCO Working Group on Commercial Fraud developed different programmes, each of which deals with a particular aspect of customs work vulnerable to attack.³ The risk areas in question are revenue, security, intellectual property, health and safety, drugs and precursors, and the environment.⁴ Beyond these identified and certain risks areas, the Working Group urged customs to look out for emerging risks that may encompass different aspects of the abovementioned risks areas.⁵ One example of such emerging risks is money laundering.⁶ Categorising the different risk areas makes it possible to approach customs offences from a more strategic angle. Considering the diversity of customs offences, it also helps to avoid confusion and facilitates understanding as to how they come about and what the specific features attached to each one of them are. The first part of this Chapter consists of an overview of the different groupings of customs offences per risk areas as done by the WCO Working Group on Commercial Fraud. The second part is dedicated to the tools and operational responses to these different groups of identified risks.

3.2 The categorisation of customs offences per areas affected: The perspective of the WCO Working Group on Commercial Fraud

As indicated in the above introduction (3.1), the WCO's Working Group on Commercial Fraud has grouped customs offences according to the different stages of customs work at which they unfold and also based on the specificities surrounding each one of them. Revenue, security, intellectual property rights (IPR), health and safety, drugs and precursors, and the environment are the areas so grouped, and each area pertains to specific types of offences.⁷

2 WCO Date Unknown *Compliance and Enforcement Sub-Directorate*
<http://www.wcoomd.org/en/about-us/wco-secretariat/the-directorates/compliance-and-facilitation/enforcement.aspx>.

3 WCO Date Unknown *Compliance & Enforcement Package brochure 8.*

4 WCO Date Unknown *Compliance & Enforcement Package brochure 8.*

5 WCO Date Unknown *Compliance & Enforcement Package brochure 8.*

6 WCO Date Unknown *Compliance & Enforcement package brochure 8.*

7 WCO Date Unknown *Compliance & Enforcement Package brochure 8.*

3.2.1 Revenue collection offences

Collecting duties on goods that enter or leave a territory is what defines customs in most cases.⁸ Depending on the nature of the goods, the rate of duty varies. In that respect, some commodities attract higher duty rates than others. In order to avoid paying the right duty or to unduly benefit from some advantage attached to specific commodities, or to perpetrate a number of other unlawful activities, people have different ways of deceiving the customs administration.⁹ This identified risk area thus encompasses a number of unlawful activities with most of them falling under the scope of what is termed commercial fraud. It is essential to put the concept of commercial fraud in context by first defining it before engaging into the specific activities that are covered by it. Corruption, bribery, and extortion, as well as false invoicing and fraudulent insurance claims, are a few of the many forms of criminality to which the revenue collection area can be exposed.¹⁰

3.2.1.1 Defining commercial fraud

The approach to commercial fraud by both the United Nations Commission on International Trade Law (UNCITRAL) and the WCO will be discussed hereunder.

3.2.1.1.1 The approach of the United Nations Commission on International Trade Law (UNCITRAL) to commercial fraud

Privy to the harmful impact commercial fraud has on international commerce, and how badly it affects legitimate commercial institutions, the United Nations Commission on International Trade Law (UNCITRAL) undertook a research project on commercial fraud.¹¹ The aim of the research project was to provide assistance to all interested parties in their efforts to prevent commercial fraud.¹² The UNCITRAL did so by drafting a document that could be used by a wide and varied audience. This is so not only because it is easily understandable, but also because it contains invaluable information

8 See definitional background to this study at para 1.1.2.

9 Swaziland Revenue Authority Date Unknown *Impact of Fraud on Revenue Collection* <https://acfesa.co.za/resources/Documents/Presentation%20at%20ACFE%20Launch%20-%20Daniel%20Dlamini%20-%20SRA.pdf>.

10 Connell Associates Date Unknown *Fraud* <https://www.connellassociates.co.uk/fraud.html>.

11 UNCITRAL 2013 *Recognizing and Preventing Commercial Fraud* <http://www.uncitral.org>.

12 UNCITRAL 2013 *Recognizing and Preventing Commercial Fraud* <http://www.uncitral.org>.

that can enlighten the thoughts and actions of all involved in the fight against commercial fraud.

The project resulted in the establishment of twenty-three identifying features that should help customs officers to recognise commercial fraud. As pointed out by UNCITRAL, the project does not stand as a law or a thorough and open-ended study of commercial fraud, but should instead be viewed as “instructive materials” containing guidelines that could help to combat commercial fraud.¹³ In the light of the extent of the problem, UNCITRAL believes that the term commercial fraud need not be given a straightforward definition, first of all, because that would not be in line with the purposes for which the specific research was undertaken, and second because such a definition would be restrictive and could, contrary to its purpose, limit the broad use of the research material.¹⁴ Instead of a definition, the organisation chose to provide an outline of the main characteristics or aspects that can help to easily identify commercial fraud. These are:

There is an element of deceit or of providing inaccurate, incomplete or misleading information;

Reliance on the deceit or the information provided or omitted induces the target of the fraud to part with some valuable thing that belongs to the target or to surrender a legal right;

There is a serious economic dimension scale to the fraud;

The fraud uses or misuses and compromises or distorts commercial systems and their legitimate instruments, potentially creating an international impact; and

There is a resultant loss of value.

This implies that for commercial fraud to be established, there are specific features that should be present, namely: there must be fraudulent acts or omissions, intentionally perpetrated by an individual(s) on which the target(s) relies to enable a transaction. The act or omission must have a broader impact than can be ascertained at first sight and its purpose must be to circumvent laws or systems in place, and it must eventually lead to a loss of value on the one side and undeserved gain on the

13 UNCITRAL 2013 *Recognizing and Preventing Commercial Fraud* <http://www.uncitral.org>.

14 UNCITRAL 2013 *Recognizing and Preventing Commercial Fraud* <http://www.uncitral.org>.

other.

Unlike the UNCITRAL, the WCO provides a full definition of the concept of commercial fraud.

3.2.1.1.2 The WCO's approach to commercial fraud

The WCO Working Group on Commercial Fraud¹⁵ defines commercial fraud as:

Any offence against statutory or regulatory provisions which Customs are responsible for enforcing, committed in order to:

- Evade, or attempt to evade, payment of duties, levies, taxes on movements of commercial goods; and/or
- Evade, or attempt to evade, any prohibitions, restrictions or requirements applicable to commercial goods; and/or
- Receive, or attempt to receive, any repayments, subsidies or other disbursements to which there is no proper entitlement nor transaction; and/or
- Obtain, or attempt to obtain, illicit commercial advantage injurious to the principle and practice of legitimate business competition; and/or
- Exploit, or attempt to exploit commerce for the purpose of transferring the proceeds of crime.

Whether commercial fraud is described through the identification of its characteristic features as done by the UNCITRAL or fully defined as done by the WCO, it can be seen here that for commercial fraud to be established, there needs to be an intent to deceive. This must be with a view to obtaining undue advantages to the customs administration's or the business community's detriment. Fraud aims to circumvent the laws and regulations governing commercial activities. The WCO emphasises that commercial fraud is often not an isolated act or a stand-alone scheme.¹⁶ This means that most schemes in that sector are usually a starting point for more schemes. One example of a scheme leading to another is the use of trade as a channel to enable the flow of ill-acquired funds that are then used for other illegal activities such as financing

15 The definition was consented to by the Working Group at the 11th Enforcement Committee (Doc.36.540), has received the approval of the Enforcement Committee, and has been adopted by the Council. WCO Date Unknown *Working Group on Commercial Fraud* <http://www.wcoomd.com>; WCOEC 2010 *Commercial Fraud Typologies Summary* 6 (fn 1).

16 WCOEC 2010 *Commercial Fraud Typologies Summary* 6.

terrorism.¹⁷ Despite the different forms they take and the variation in their motives, acts of commercial fraud, or omissions, are generally related.¹⁸ It is also suggested that though the reasons for committing commercial fraud offences may abound, the usual purpose of such activity is to draw financial benefits.¹⁹ Evading or attempting to evade duties, for instance by smuggling highly taxed goods like tobacco, alcohol or motor spirits, impacts profoundly on the state's ability to secure the duties due to it by the trader or its agent. Cigarettes are considered one of the world's most taxed and smuggled merchandise, and for this reason, they have become a sizeable source of revenue for customs offenders.²⁰ The negative impact of commercial fraud schemes on revenue collection is indisputable.²¹

The WCO differentiates among five categories of commercial fraud, namely: the evasion of duty and tax payable; the evasion of import and export prohibition, or relevant restrictions or requirements; illegal receipt or repayment, subsidy and/or disbursement; obtaining illegal commercial advantage; and lastly, concealing the transfer of the proceeds of crime using import and export transactions. These offences are further discussed below.

3.2.1.1.2.1 Evasion of duty/tax payment

There are several illegal behaviours falling under the scope of customs duty and tax evasion. These are under- or over-valuation, misdescription, smuggling and the unauthorised release of goods under customs control, the falsification of origin, false declaration regarding the quality and quantity of goods, and off-record transactions and end-use.²² Tax evasion is simply defined as an illegal act that reduces a government's revenues.²³

Under-valuation consists of making a false declaration by declaring a value inferior to

17 This is referred to as trade-based money laundering. WCOEC 2010 *Commercial Fraud Typologies Summary* 6.
18 WCOEC 2010 *Commercial Fraud Typologies Summary* 6.
19 WCOEC 2010 *Commercial Fraud Typologies Summary* 8.
20 Melzer "Cigarette smuggling" 49-51.
21 WCOEC 2010 *Commercial Fraud Typologies Summary* 6.
22 WCOEC 2010 *Commercial Fraud Typologies Summary* 8-17.
23 Gibson and Schauer "Tax Evasion" 393-395.

that of the real transaction value.²⁴ This type of commercial fraud is generally perpetrated in order to pay less duty or excise taxes and/or circumvent import restrictions.²⁵ The general characteristics are under-invoicing,²⁶ price/value alteration²⁷ and split invoicing.²⁸ The under-valuation of imports is viewed as a form of smuggling, despite its not featuring all the elements of physical concealment often associated with the term smuggling.²⁹ According to Keen,³⁰ underpaying duties that are by law due to the administration bears the characteristics of smuggling. This stance is justifiable to the extent that giving a value inferior to the actual value of goods in order to evade duties or part of them renders the part of goods not accounted for smuggled goods.

Unlike under-valuation, over-valuation consists of making a false declaration assigning to a transaction a value higher than its real or actual value.³¹ This aspect of commercial fraud can be perpetrated for several reasons, among which are obtaining higher export refunds and higher duty compensation, evading exchange controls, circumventing internal taxes, eluding anti-dumping duties; or simply perpetrating money laundering fraud.³² Works of arts and rare manufactured pieces are cited as being very much exposed to over- or under-valuation schemes.³³

In the case of misdescription, the information made available during the clearance process is false.³⁴ This offence may be perpetrated for the total or partial evasion of import duties, or import and export levies. It also aims to avoid prohibitions, quota or

24 IDC *Fridge Research Project 7*.

25 European Commission *Good Practice Guide 67*; WCOEC 2010 *Commercial Fraud Typologies Summary 8*; IDC *Fridge Research Project 7*.

26 For instance, the weight, quantity or value of goods are incorrectly declared, and invoices do not match the bill of lading. IDC *Fridge Research Project 8*.

27 This can be done through the inflation of insurance, freight and management costs. IDC *Fridge Research Project 8*.

28 This aspect entails dividing the value of one invoice into several invoices that enable the perpetrator to declare lower values and thus, to avoid paying full duties and VAT. IDC *Fridge Research Project 8*.

29 Keen "The Future of fiscal frontiers" 7-8.

30 Keen "The Future of fiscal frontiers" 7.

31 WCOEC 2010 *Commercial Fraud Typologies Summary 10*.

32 European Commission *Good Practice Guide 67*; WCOEC 2010 *Commercial Fraud Typologies Summary 10*.

33 European Commission *Good Practice Guide 67*.

34 WCOEC 2010 *Commercial Fraud Typologies Summary 10*.

origin restrictions.³⁵ Misdescription can be perpetrated at the point of importation or exportation, or when goods are brought into free circulation.³⁶ It often happens with reference to the classification of goods and may involve giving goods a description that will lead to their classification under a tariff heading from which the declarant will draw profit.³⁷ The scheme is also referred to as misclassification or mislabelling.³⁸

Smuggling and the unauthorised release of goods under customs control comprise fraudulent activities such as removing goods from customs warehouses without authorisation.³⁹ Smuggling is an offence consisting of the movement of goods across a customs frontier in any clandestine manner, thus eluding customs control.⁴⁰ Acts of smuggling specifically relate to the evasion of control regarding high-duty commodities, goods normally prohibited and restricted, endangered species and copyright.⁴¹ In some instances, possessing and moving goods within the customs territory in violation of customs legislation may also be viewed as smuggling.⁴² In some countries, enabling the movement of goods clandestinely over borders does not constitute an essential element of smuggling, and in some other countries, the act must be intentional to be viewed as such.⁴³

Smuggling can have irreversible consequences when customs administrations are unable to detect it through their control systems.⁴⁴ This is justified by its link to a chain of other criminal activities like money laundering, tax and duty evasion.⁴⁵ Integrity among customs officials is cited as one of those factors that can help to easily address the problem of smuggling.⁴⁶ Failing to declare (non-declaration) a product at a port of

35 European Commission *Good Practice Guide* 68.

36 An example of bringing goods into free circulation is removing them from warehousing.

37 European Commission *Good Practice Guide* 68; WCOEC 2010 *Commercial Fraud Typologies Summary* 10.

38 WCOEC 2010 *Commercial Fraud Typologies Summary* 10.

39 WCOEC 2010 *Commercial Fraud Typologies Summary* 10.

40 Article 1 (d) of the *Nairobi Convention*; WCO *Glossary of International Customs Terms* 32; WCOEC 2010 *Commercial Fraud Typologies Summary* 12; CECOJI 2011 "Study on preventing and fighting illicit trafficking" 140.

41 European Commission *Good Practice Guide* 3.

42 WCO *Glossary of International Customs Terms* 32.

43 WCO *Glossary of International Customs Terms* 32.

44 Buehn and Farzanegan 2012 *Applied Economics* 4.

45 Buehn and Farzanegan 2012 *Applied Economics* 4.

46 WCOEC 2010 *Commercial Fraud Typologies Summary* 13.

entry is also a form of smuggling.⁴⁷ The same goes for the under-valuation of imports.⁴⁸ The nature of this specific customs fraud is such that customs alone are powerless to curb it. Thus, effectively responding to smuggling involves close cooperation with other government agencies such as the border patrol and/or coast guard, which cooperation must be based on clear memoranda of understanding.⁴⁹ Buehn and Farzanegan,⁵⁰ suggest that sound institutions are able to limit the profits that could derive from smuggling activities. Sound institutions could be inferred as those institutions that have modernised (strategised) in order to tackle the issue more efficiently. Smart,⁵¹ for instance, argues that trade liberalization has considerably reduced the opportunities to engage in smuggling activities. Various forms and appellations of smuggling include the unauthorised discharge of goods that are in transit, the untrue termination of customs transit, and substituting goods that are under a temporary importation procedure. Smuggling may also take the form of in-bond diversion and the smuggling of counterfeit goods, as well as the smuggling of disassembled used cars.⁵²

Origin/preference fraud relates to any attempt to willfully breach or abuse existing rules of origin and/or customs documentary requirements provided by bilateral or multilateral agreements applying to specific countries in order to unlawfully benefit from preferential rates.⁵³ Concealing the real origin of goods may be achieved by shipping goods through third countries.⁵⁴

Fraudsters may engage in furnishing false information to customs' authorities regarding the physical characteristics, nature, size, volume, quantity or measure of goods being declared.⁵⁵ This is referred to as false declaration (or mis-declaration),⁵⁶

47 IDC *Fridge Research Project 7*; CECOJI 2011 "Study on preventing and fighting illicit trafficking" 140.

48 Keen "The Future of fiscal frontiers" 7.

49 Keen "The Future of fiscal frontiers" 9.

50 Buehn and Farzanegan 2012 *Applied Economics* 4.

51 Smart 2015 *Auac* 51.

52 WCOEC 2010 *Commercial Fraud Typologies Summary* 13-14.

53 European Commission *Good Practice Guide 3*; WCOEC 2010 *Commercial Fraud Typologies Summary* 14; IDC *Fridge Research Project 7*.

54 WCOEC 2010 *Commercial Fraud Typologies Summary* 15.

55 WCOEC 2010 *Commercial Fraud Typologies Summary* 15.

56 IDC *Fridge Research Project 7*.

and the aim in this instance is to draw undue advantage or pecuniary benefits. Furthermore, it can simply be perpetrated to circumvent existing restrictions and prohibitions.⁵⁷ It may relate to the tariff code, to the end-destination, or to the origin of the goods, and may also seek to abuse regional trade agreements with reference to the origin of the goods.⁵⁸

When a transaction subject to tax or duty is not accounted for by a tax or customs authority when it should be, there is an off-record transaction.⁵⁹ Fraudulent activities that may occur here are those having to do with internal taxes and duties like sales tax, value-added tax (VAT), and excise duties imposed on hydrocarbon oils, tobacco, alcoholic beverages and the like.⁶⁰ The WCO notes that smuggling is not included in the set of off-record transactions, but that smuggled goods might well qualify as being part of an off-record transaction when such goods are traded after being smuggled.⁶¹

End-use fraud (or the mis-declaration of an end destination)⁶² entails diverting goods from an authorised end-use with the aim of unduly benefiting from zero or a lower rate of duty.⁶³ Otherwise termed as the false declaration of a destination or removal-in-bond/removal-in-transit fraud, this scheme entails evading restrictions applicable to the exportation of goods to specific destinations or diverting goods purportedly under transit for home use.⁶⁴ National law may provide for zero or a lower rate of duty on certain goods imported for a stated end-use.⁶⁵ End-use certificates from the relevant authorities are normally required for supporting documents to an end-use declaration.⁶⁶ This scheme also includes diversion/acquittal fraud, whereby documents to the effect that the goods in question have been exported (ghost export) are provided.⁶⁷ This consequently induces VAT fraud, where a VAT claim is submitted

57 WCOEC 2010 *Commercial Fraud Typologies Summary* 15.

58 IDC *Fridge Research Project 7*; also see French *Cour des Comptes* "L'Action de la Douane" 19-20.

59 WCOEC 2010 *Commercial Fraud Typologies Summary* 15.

60 WCOEC 2010 *Commercial Fraud Typologies Summary* 15.

61 WCOEC 2010 *Commercial Fraud Typologies Summary* 15.

62 IDC *Fridge Research Project 7*.

63 Anonymous Date Unknown *Syllabus: commercial fraud analysis*.

64 European Commission *Good Practice Guide* 79; IDC *Fridge Research Project 7*.

65 WCOEC 2010 *Commercial Fraud Typologies Summary* 16.

66 WCOEC 2010 *Commercial Fraud Typologies Summary* 16; Anonymous Date Unknown *Syllabus: commercial fraud analysis*.

67 IDC *Fridge Research Project 7*.

regarding the purported export.⁶⁸ The common characteristics also include non-compliance with import-export pre-conditions, using imported goods for purposes different from the specified ones, and hiding behind a ghost company to abuse VAT exemption status, to name but few.⁶⁹

3.2.1.1.2.2 Avoidance of prohibition, restriction or requirements for import and/or export

As its name implies, this category of commercial fraud activities entails among others the circumvention of regulations relating to import/export licences, the alteration of the physical appearance of the goods during transshipment either by giving them a new package or a new label or simply by re-boxing them.⁷⁰ Smuggling and the unauthorised release of goods under customs control, misdescription, the falsification of origin, the falsification of trade licences, and the violation of consumer protection requirements are the main characteristics of this category of fraud.⁷¹ The accent will hereunder be placed on those aspects that have not yet been discussed above.

The WCO emphasises that smuggling will flourish in an environment where there is a disparity between the demand and supply as regarding the prerequisites for a specific set of goods; or where there are other economic considerations that render such an environment appealing to the scheme.⁷² Customs processes usually involve the temporary admission of certain goods, especially those in transit, and fraud occurring here can take either the form of temporary admission fraud or the unauthorised release of goods under the control of customs.⁷³ Fraudulent behaviours in this respect are carried out with a view to evading the duties or taxes due on the specific goods so temporarily admitted and also to avoid facing several requirements laid down by national law.⁷⁴

Though already defined above, misdescription has other specificities in the present

68 IDC *Fridge Research Project 7*.

69 WCOEC 2010 *Commercial Fraud Typologies Summary* 16.

70 WCOEC 2010 *Commercial Fraud Typologies Summary* 18.

71 WCOEC 2010 *Commercial Fraud Typologies Summary* 18.

72 WCOEC 2010 *Commercial Fraud Typologies Summary* 18.

73 WCOEC 2010 *Commercial Fraud Typologies Summary* 18.

74 WCOEC 2010 *Commercial Fraud Typologies Summary* 18.

context. It may also involve the misdescription of imported goods, a false declaration with regard to the exporter's name, the reselling of prohibited goods without authorisation, or simply altering serial numbers.⁷⁵

Falsifying trade licences means deceiving the authority by presenting to them false documents instead of the genuine licences that are occasionally required. The licences are sometimes required due to conditions or restrictions being laid down for the import or export of certain goods.⁷⁶ Goods that usually require a licence to be imported or exported include military equipment and pharmaceutical products, to mention but a few.⁷⁷

Violating consumer protection requirements means derogating from the prescribed conditions that are set to ensure "minimum safety standards" for consumers. These conditions are often set out in national law, applied by specific government branches or agencies, and administered at national borders by customs.⁷⁸ Set conditions or rules under this specific aspect are generally prescribed regarding foodstuff, medicines, cosmetics, toys for babies, and the like that may have irreversible consequences on consumers' health and safety. Examples of goods that may endanger consumers' health and safety are substandard goods and contaminated or counterfeit products.⁷⁹

3.2.1.1.2.3 Illegal receipt of repayment, subsidy and/or disbursement

Drawback fraud appears as the main scheme perpetrated with the aim of unduly benefitting from repayment, subsidy and/or disbursement. Drawback is defined as the amount of import duties and taxes repaid under the drawback procedure.⁸⁰ Within the customs context, a drawback procedure is one which, upon the exportation of goods, provides for a total or partial repayment to be made regarding the import duties and taxes levied on the goods, or on materials contained in them or consumed in their

75 WCOEC 2010 *Commercial Fraud Typologies Summary* 18-19.

76 European Commission *Good Practice Guide* 79.

77 Anonymous Date Unknown *Syllabus: commercial fraud analysis*.

78 WCOEC 2010 *Commercial Fraud Typologies Summary* 20; Anonymous Date Unknown *Syllabus: commercial fraud analysis*.

79 WCOEC 2010 *Commercial Fraud Typologies Summary* 20.

80 Specific Annex F to the Revised Kyoto Convention.

production.⁸¹ In essence, drawback fraud means “the abuse of the relief which provides for the repayment of Customs/excise duties paid on goods that have not been and will not be consumed in the national Customs territory.”⁸² The characteristics of the scheme are numerous but usually include swopping commodities, inaccuracy in the declaration of quantity (the overvaluation of exported goods), fictional export (for instance, through forging customs stamps), and the fraudulent alteration of a currency code.⁸³ With regard to swopping commodities, a legitimate commodity that is not the commodity on which drawback has been claimed may be exported or an item having little or no value at all may be exported in the stead of the product on which drawback has been claimed.⁸⁴

3.2.1.1.2.4 Obtaining an illegal commercial advantage

Obtaining illegal commercial advantage entails the falsification of origin, the abuse of inward/outward processing relief, and the falsification or abuse of an import/export licence. The falsification of origin and misdescription are termed as trade description fraud.⁸⁵ These fraudulent schemes are carried out with the aim of easing the importation of substandard goods in order to draw an undue profit when competing with other products⁸⁶ on the domestic market. Territories having no quality control, no or little regard to safety measures and that do not dispose of consumer standards are very attractive to this type of scheme.⁸⁷ A well-known example of the falsification of origin is re-labelling, which consists of replacing an original label (the label from the real manufacturer) with a fake one (a fake manufacturer), making the product appear as if it was manufactured in the country of the fake manufacturer and so misleading consumers as to the real origin of the products and thus further drawing unfair

81 Specific Annex F to the Revised Kyoto Convention.

82 Anonymous Date Unknown *Syllabus: commercial fraud analysis*.

83 WCOEC 2010 *Commercial Fraud Typologies Summary* 21-22.

84 WCOEC 2010 *Commercial Fraud Typologies Summary* 21; IDC *Fridge Research Project* 7.

85 Trade description fraud is defined as the infringement of technical requirements/specifications applied to goods by national legislation to guarantee minimum quality standards of goods, and reported to Customs at national borders for implementation. Anonymous Date Unknown *Syllabus for commercial fraud analysis*.

86 The unfair practice generally targets and works to the detriment of home-produced goods. WCOEC 2010 *Commercial Fraud Typologies Summary* 23.

87 WCOEC 2010 *Commercial Fraud Typology Summary* 23.

advantages.⁸⁸

Inward/outward⁸⁹ processing relief fraud consists of abusing inward/outward processing procedures.⁹⁰ The purpose of abusing these procedures varies but is generally to evade import duties and taxes, to evade the existing prohibitions and restrictions provided in national law, to divert imported products and dispatch them in the local market, to derive undeserved market benefits under the specific procedures, and also to circumvent quota restrictions.⁹¹

Import/export licences are sometimes required because restrictions or conditions have been imposed on the importation or exportation of some specific goods.⁹² The type of goods, their destination or origin, their quantity or their end-use are considerations that usually dictate whether such a licence is required or not.⁹³ Falsifying or abusing import/export licences can be perpetrated through counterfeiting licences, providing false information in order to acquire licences, and the alteration of authentic licences.⁹⁴

3.2.1.1.2.5 Laundering the proceeds of crime using trade transactions: "Trade-based money laundering"

The term trade-based money laundering (TBML) designates the process of legitimising ill-acquired funds by concealing them in the form of the payment for an international trade transaction.⁹⁵ Another succinct definition is offered by the Financial Action Task Force (FATF),⁹⁶ which sees it as "the process of disguising the proceeds of crime and

88 WCOEC 2010 *Commercial Fraud Typology Summary* 23.

89 "Inward processing" is defined as the Customs procedure enabling specific goods imported into a territory to be conditionally exempted from import duties and taxes, on the basis that the said goods are meant for manufacturing, processing or repair and subsequent exportation. "Outward processing" on the other hand means the Customs procedure enabling goods in free circulation in a Customs territory to be provisionally exported for the purpose of manufacturing, processing or repair abroad and re-imported afterward totally or partially exempted from import duties and taxes. Specific Annex F to the Revised Kyoto Convention.

90 WCO 2010 *Commercial Fraud Typology Summary* 23; Anonymous Date Unknown *Syllabus for commercial fraud analysis*.

91 WCO 2010 *Commercial Fraud Typology Summary* 23; Anonymous Date Unknown *Syllabus for commercial fraud analysis*.

92 WCOEC 2010 *Commercial Fraud Typologies Summary* 23.

93 WCOEC 2010 *Commercial Fraud Typologies Summary* 23.

94 WCOEC 2010 *Commercial Fraud Typologies Summary* 23.

95 WCOEC 2010 *Commercial Fraud Typologies Summary* 24; WCO 2012 *Illicit Trade Report* 34.

96 The FATF is a policy-making body dealing specifically with ways to combat money laundering and the financing of terrorist activities. In other words, the FATF is an intergovernmental body in

moving value through the use of trade transactions in an attempt to legitimise their illicit origin."⁹⁷ No real legitimate transaction of goods or services needs to be done for the scheme to take place.⁹⁸ Money laundering in this context not only takes advantage of the international trade system but also exploits financial systems.⁹⁹ It is suggested that high-value goods such as gold, other precious metals and gemstones are very often used for such transactions. This is due to several factors, amongst which are their worth, the ease with which they can be transported, the ease with which their forms can be modified, and the fact that they are universally accepted as an exchange medium.¹⁰⁰ The commodities can serve either as a source of illicit value to be laundered or simply as the actual laundering channel through normal buying and selling transactions.¹⁰¹

TBML can be committed in a variety of ways, namely misrepresenting price (this is done by the over- or under-invoicing of the merchandise or the services), invented invoicing, diverse invoicing, and inadequate description or faking the quantity or quality of the goods or services transacted.¹⁰² Other ways are shipping merchandise or services with the aim of transferring funds from one criminal group to another, disguising money laundered under the umbrella of international consultancy fees, or bogus shipments where goods or services are never dispatched, but the relevant paperwork is handed to the authorities.¹⁰³ The scenario in this specific instance is made worse as on the one hand the funds in question are made from illegal

charge of defining legal, regulatory and operational measures and strategies to root out money laundering, terrorist financing and all other related offences. FATF 2018 *Who we are* <http://www.fatf-gafi.org/about/whoweare/>; Southworth "Financial Action Task Force" 143-145.

97 FATF 2006 *Trade Based Money Laundering* 3.

98 Australian Transaction Reports and Analysis Centre (AUSTRAC) 2013 *Typologies and Case Studies Report* 16.

99 FATF 2006 *Trade Based Money Laundering* 3; AUSTRAC 2013 *Typologies and Case Studies Report* 16.

100 FATF 1997-1998 *Report on Money Laundering Typologies*; WCOEC 2010 *Commercial Fraud Typologies Summary* 24.

101 FATF 1997-1998 *Report on Money Laundering Typologies*; WCOEC 2010 *Commercial Fraud Typologies Summary* 24.

102 WCOEC 2010 *Commercial Fraud Typologies Summary* 24.

103 These techniques are considered by the FATF as basic TBML techniques. That means there are more complex ways in which this scheme is perpetrated. But these complex techniques need not be mentioned here as the study is only about giving an overview of the different customs offences. FATF 2006 *Trade Based Money Laundering* 4; AUSTRAC 2013 *Typologies and Case Studies Report* 16; WCO 2012 *Illicit Trade Report* 34-35.

activities,¹⁰⁴ and on the other hand, some of the above-mentioned characteristics can lead to the commission of other offences such as not paying duties or taxes or smuggling dangerous goods.¹⁰⁵ Customs are to play an active role in dismantling these networks because of their strategic location at borders, their legal mandate,¹⁰⁶ their knowledge and experience of international trade.¹⁰⁷ The second grouping of customs offences by the WCO Working Group on Commercial Fraud is called offences against security. These offences are discussed hereunder.

3.2.2 Offences against security

The strategic position of customs at borders grants them a critical role regarding government efforts to restrain the importation or exportation of dangerous, restricted and prohibited commodities.¹⁰⁸ Ensuring that everything that goes into or out of a territory complies with the law and regulations appears not to be an easy task.¹⁰⁹ Having this in mind, the WCO developed a Security Programme with the aim of empowering all customs administrations by enhancing their capabilities to adequately handle security issues at the national as well as at the international level.¹¹⁰ Security concerns within the customs environment relate to fighting terrorism, the proliferation of weapons and other materials of mass destruction, the trafficking of small arms and light weapons, explosives, and the illicit diversion of dual-use goods.¹¹¹

Customs activities with regard to these different aspects of security are mostly directed at protecting states and their citizens against the many and undesirable consequences

104 FATF 2006 *Trade Based Money Laundering 3*; The World Bank Date Unknown *Money Laundering and Terrorist Financing* <http://www1.worldbank.org>.

105 AUSTRAC 2013 *Typologies and Case Studies Report 16*.

106 Customs' legal mandate stem directly from the definition of this administration and entails seeing that national customs law and regulations and other law and regulations are properly enforced regarding the collection of duties and taxes and the overall movement of goods and people across borders. General Annex, Chapter 2 of the Revised Kyoto Convention.

107 WCO Date Unknown *Compliance & Enforcement Package Brochure 8*.

108 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

109 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

110 At the international level, the Security Programme consists of facilitating co-operation between different Customs administrations so as to adopt a global approach to some specific responses to the different threats against security. WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

111 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

that may ensue if these activities are not adequately or appropriately countered through the enforcement of the law.¹¹² According to the WCO, these illegal activities not only place at risk the security and safety of people but also affect the economic development, the political stability and the social cohesion of countries worldwide.¹¹³ Efficiently addressing security concerns from the WCO's point of view requires intervention in well-identified areas which consist of: policy setting and foresight, offering support and best practices regarding customs control measures, instituting and supporting all law enforcement programmes and the related operations, promoting international co-operation, enabling and encouraging the maximum use of technology, and lastly, providing technical support and capacity-building.¹¹⁴

As part of its operational efforts, the Security Programme has other sub-programmes that deal with specific domains such as explosive precursor chemicals, small arms and light weapons.¹¹⁵ The WCO aims in this regard to building an ongoing partnership with the United Nations and other organisations that provide good guidance regarding these security-related issues.¹¹⁶ Offences against intellectual property rights, health and safety is equally an area at risk emphasised by the WCO.

3.2.3 Offences against Intellectual Property Rights (IPR)/Health and Safety

Customs enforcement as regards intellectual property rights as well as health and safety deals with restraining the spread of fake or counterfeit pharmaceutical products, other types of counterfeit and pirated goods, products of substandard quality such as tainted foodstuff, and vehicle and aircraft spare parts.¹¹⁷ The French Customs administration defines counterfeiting as “the violation of an intellectual property right”.¹¹⁸ The counterfeiting of goods, in essence, entails a number of actions directed at duplicating copyrighted or patented merchandise in contravention of Intellectual

112 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

113 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

114 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

115 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>; WCO 2013 *Second Global Canine Forum* <http://www.wcoomd.org>.

116 WCO Date Unknown *Security Programme* <http://www.wcoomd.org>.

117 WCO Date Unknown *Compliance & Enforcement Package Brochure* 8.

118 French Customs 2016 *Infractions douanières en matière de contrefaçon* <http://www.douane.gouv.fr>.

Property Rights (IPRs) and making it available to consumers who may be or may not be aware of their counterfeit nature.¹¹⁹ Like most if not all other customs offences, the driving force behind counterfeiting is financial gain.¹²⁰

Counterfeiting and piracy impact heavily on the global economy and expose the public to serious health and safety risks.¹²¹ This fact is undeniable, as the WCO points out, that most counterfeit products are those used on a daily basis by ordinary people.¹²² Pirated and counterfeit goods have a multiplicity of negative impacts as they not only endanger consumers' health and safety but they also deprive the government of substantial sums that should be levied on import/export transactions, and adversely, they affect legitimate trade and businesses.¹²³ According to the European Commission,¹²⁴ trade in counterfeit and pirated goods not only deprives rights owners of legitimate profits but also discourages innovation and creativity, which in turn results in job losses. Furthermore, the European Commission is of the view that such activities could also constitute the funding basis for organised criminal activities which impact on society are also scary.¹²⁵ Fake medicines, for instance, are perilous because they will not only fail to provide the cure expected but will harm and in some instance, constitute a cause of death.¹²⁶ Customs intervention in this identified risk area serve a threefold objective namely preventing unfair competition and ensuring equal market access to participating actors; protecting states' revenues; and protecting citizens from the harm to which these illegal behaviours expose them.¹²⁷

It is the WCO's view that trafficking in counterfeit medications is likely to be lucrative and will easily spread in territories:

119 Caneppele "Counterfeit Goods" 77-80.

120 Caneppele "Counterfeit Goods" 77-80.

121 WCO Date Unknown *Compliance & Enforcement Package Brochure* 8, WCO Date Unknown *IPR, Health and Safety Programme* <http://www.wcoomd.org>.

122 WCO 2013 *Illicit Trade Report* 71.

123 The WCO points out that brand owners' images and profits suffer heavily from IPR violations. WCO 2010 *Customs and IPR Report* 6.

124 European Commission 2014 *The EU customs union* 8.

125 European Commission 2014 *The EU customs union* 8.

126 United Nations Office on Drugs and Crime (UNODC) 2015 *Trafficking in falsified medical products* <https://www.unodc.org>.

127 WCO 2009 *Customs and IPR Report* 2.

where legislatures are unable, or unwilling to cope with the situation, where legal assistance is non-existent, where the population is not well informed, where medications are in short supply, where supply chains are complex, where regulatory and inspection resources are lacking, and where corruption is rife, etc.¹²⁸

In other words, these activities will flourish in territories where law and regulations, as well as enforcement activities, are not harmonious,¹²⁹ where there is little or no real knowledge of the issue, and populations are consequently not aware of the damaging effect of counterfeit products. It may also be so where trade transactions are operated in a complex supply chain environment and in administrations with little or no adequate resources to handle them. This is the question customs modernisation seeks to answer. Drugs and precursors are another risk area that the WCO has been working on.

3.2.4 Drugs and precursors enforcement programme

Within the WCO working structures, the drugs and precursors' enforcement programme aims at circumventing the illegal cultivation, manufacturing, distribution and trade of health-threatening substances.¹³⁰ Considering its strategic involvement in dealing with this type of issue, customs is expected in this regard to make use of innovative control measures and be involved in national and international operations and initiatives directed at helping it to fulfil its obligations.¹³¹ The WCO believes that not only is drug trafficking negatively impacting on the health and safety of nations (by exposing their citizens to narcotics), but it also has an undeniable influence on these states' security and economic development.¹³² This belief draws from the fact that this type of illegal activity is indubitably linked to other illegal activities and the proceeds of such activities are often used to fulfil other unlawful purposes of organised criminal groups and terrorists.¹³³

128 WCO *Press Release* Paris, 22 September 2014; the WCO Date Unknown *IPR, Health and Safety Programme* <http://www.wcoomd.org>.

129 The term generally used is "harmonisation."

130 WCO Date Unknown *Compliance & Enforcement Package brochure 8*; UNODC 2015 *Trafficking in falsified medical products* <https://www.unodc.org>.

131 WCO Date Unknown *Compliance & Enforcement Package brochure 8*.

132 *Declaration of the Customs Co-operation Council on the illicit Traffic in Drugs* (June 2003), otherwise referred to as the Brussels Declaration.

133 WCO 2015 *Drugs and Precursors Programme* <http://www.wcoomd.org>.

Drug trafficking constitutes a real challenge to customs and all the agencies involved in curbing it. It is common cause that the *modus operandi* in drug trafficking changes considerably over the years. The networks seem to be expanding, while the distributing channels are constantly changed, and even the qualities of the illegal substances are varying as time goes on.¹³⁴ The WCO's involvement at this level is palpable as it provides reports, on an annual basis about the trends and patterns of drug-related activities.¹³⁵ This extensively assists in tackling the problem as better knowledge is key to better enforcement.

The WCO's activities here are shared among five sub-programmes, namely the United Nations Office on Drugs and Crime (UNODC)–WCO Container Control Programme (CCP); the Project Aircop; the Global Forum on Combatting Illicit Drug Trafficking and Related Threats; the Global Canine Fora; and lastly, operational activities.¹³⁶ It is important to note that the WCO has been working very closely with a number of other law enforcement agencies and has ongoing partnerships with most of them.¹³⁷

3.2.4.1 UNODC-WCO Container Control Programme

The heavy workload of port officers, the rapidity with which drug traffickers and other smugglers devise their schemes and ensure that they go undiscovered, the complexity of the seaport environment, the inadequacy of existing resources to tackle evolving problems, the lack of trust between agencies expected to work together, and the rigidity of the processes and procedures in this environment are among the many factors that led to the establishment of a partnership between the UNODC and the WCO.¹³⁸ According to the two organisations, all these factors affecting the safety of the international trade supply chain also ruin the hope of making sustainable

134 WCO 2015 *Drugs and Precursors Programme* <http://www.wcoomd.org>.

135 This report is known as the *WCO Illicit Trade Report*.

136 WCO 2015 *Drugs and Precursors Programme* <http://www.wcoomd.org>.

137 These enforcement agencies and partners with which the WCO has been teaming up are the Central Asian Regional Information and Coordination Centre for Combating Trafficking of Narcotic Drugs, Psychotropic Substances and their Precursors (CARICC), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), INTERPOL, International Narcotics Control Board (INCB), the Southeast European Law Enforcement Centre (SELEC) and the United Nations Office on Drugs and Crime just to mention a few.

138 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

development a reality.¹³⁹ As its name implies, the UNODC-WCO CCP primarily aims to provide governments with necessary assistance in their efforts to shape efficient and effective container spotting and control to stop the circulation of drugs across borders, as well as other illicit activities having a cross-border effect.¹⁴⁰ This modern way of approaching container control at various ports saw the constitution of inter-agency Port Control Units (PCUs), which are working forces comprising risk analysts and physical inspection teams from various law enforcement groups. These officers are trained and provided with the necessary equipment within the purposes of the CCP so that they can join hands in their targeting processes for the better scrutiny of high-risk containers (using risk analysis and other efficient targeting approaches) while at the same time not disturbing the smooth running of legitimate trade.¹⁴¹

Receiving financial support from wilful donors made it possible for the two organisations to continually be there in terms of the training and mentoring of the established PCUs.¹⁴² Their support aims at producing skilful officers working in "qualified and sustainable structures", and that understand and are adequately prepared to deal with matters relating for instance to risk profiling, the transmission of intelligence for targeting purposes, and any other control steps.¹⁴³ In launching and supporting this initiative, the two organisations are happy to lend their help to the international law enforcement community in their attempt to curb the international trafficking in illicit commodities and so to play a role in trade facilitation efforts.¹⁴⁴

The second sub-project under the drugs and precursors programme is Project Aircop.

3.2.4.2 Project Aircop

The illegal nature of drug trafficking makes the people involved in such activities very proactive in devising new ways of expanding their market and continually growing their profits. Aware that new trafficking routes from South America to Europe through

139 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

140 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

141 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

142 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

143 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

144 WCO Date Unknown *The UNODC-WCO Container Control Programme* <http://www.wcoomd.org>.

West Africa had been opened, the WCO conducted Operation Cocair in 2008.¹⁴⁵ It appeared from the analysis of this operation and others that had been conducted that there was an urgent need to develop capacity building regarding the airport services of the countries involved in the operation, to provide opportunities to train their officers, to place at their disposal adequate facilities, and to equip them with appropriate, efficient and modern detection instruments.¹⁴⁶ Conducting the operation also made the WCO aware that a strong coordination system against drugs trafficking needed to be developed.

The project Aircop was subsequently introduced in 2010 with the aim of dealing with the needs identified.¹⁴⁷ The primary objective of the project was to tackle the illegal trafficking of cocaine by air that journeyed from South America, through Africa with Europe as the destination.¹⁴⁸ It was also the aim of this project to fight airport crime as a whole.¹⁴⁹ The project was supported in different ways by several organisations that have the common desire to stop drug trafficking. Funded by the European Commission and Canada, it was supervised by the UNODC and executed by the WCO and INTERPOL, which teamed up with the WCO members and other enforcement agencies.¹⁵⁰ The focus was directed at West and Central African airports. In this regard, and as a first step in the operation, Joint Air Interdiction Task Force (JAITF) units were formed. They were made up of forces from customs, police, the gendarmerie¹⁵¹ and other law enforcement organisations.¹⁵² The JAITF seeks to

145 Operation COCAIR as a whole placed African Customs services at the forefront. Fifteen customs administrations from West and central Africa were involved. Brazil was also involved. The primary purpose of operation COCAIR was to tighten anti-drug trafficking approaches in twenty-two international airports with a view to stopping consignments of cocaine and other dangerous drugs *en route* for Europe. The key aspects of the training given under operation COCAIR were product recognition, risk management, selection, targeting, sharing information and intelligence and police investigation. The administrations involved had seven (7) days (length of the operation) to practically expose the training given them. WCO *Press Release* Brussels, Belgium, December 2008.

146 WCO 2013 *Illicit Trade Report* 37.

147 WCO 2013 *Illicit Trade Report* 36.

148 WCO 2013 *Illicit Trade Report* 36.

149 WCO 2013 *Illicit Trade Report* 36.

150 WCO 2013 *Illicit Trade Report* 36.

151 The *Gendarmerie* is a national law enforcement body under the Ministry of Defence.

152 WCO 2013 *Illicit Trade Report* 36.

counter international illicit drug trafficking by air passengers.¹⁵³

Under this project, three Operations Cocair¹⁵⁴ were carried out in order to assess JAITFs' abilities to adequately deal with matters for which they were established. Besides using the WCO CENcomm to facilitate communication among all involved actors, whether close or far,¹⁵⁵ INTERPOL's I-24/7 database¹⁵⁶ was also used for communication purposes between the airports involved, and for the consultation of the criminal records of air passengers. This made the JAITF's risk management work easier.¹⁵⁷ Dogs and handler programmes are the third element under the drugs and precursors enforcement programme. This is discussed below.

3.2.4.3 Dogs and handler programmes

Originally initiated to boost customs capacities in curbing drug trafficking, dogs and handler programmes are now being used for a broader purpose and include areas such as uncovering weapons and explosives, as well as fighting trafficking in currency, counterfeit products and CITES goods.¹⁵⁸ Dogs and handler teams constitute a prominent component of global risk management programmes run by customs services as they help to fight illicit trade in its various aspects and thus contribute to the protection of society.¹⁵⁹ The WCO considers human resources and training, or better, a "professional, knowledge-based service culture" as the cornerstone of customs modernisation.¹⁶⁰ As the WCO Secretary General puts it, in the progressive

153 Interpol and WCO *Customs – Police Cooperation Handbook* 14.

154 The aim of all COCAIR Operations have been to test the capabilities of JAITFs on the field with regard to the purpose of their establishment. Interpol and WCO *Customs – Police Cooperation Handbook* 14.

155 WCO 2013 *Illicit Trade Report* 37.

156 INTERPOL's I-24/7 is a global police communication platform devised by INTERPOL to bring together law enforcement and officers in every single one of their member countries. It is a platform that enables those authorised to exchange sensitive and vital information with all other interested parties worldwide. It is also a network available to investigators to access a database of criminal records. INTERPOL 2015 *Data Exchange* <http://www.interpol.int>; WCO 2013 *Illicit Trade Report* 37.

157 WCO 2013 *Illicit Trade Report* 37.

158 WCO 2011 *WCO news* 45.

159 WCO 2011 *WCO news* 45.

160 This vision of customs in the 21st century was reiterated by the WCO Secretary General at its opening speech marking the 2011 international Customs Day celebrated on 26 January 2011 under the theme "Knowledge, a catalyst for customs excellence". The forum took place simultaneously with the 2011 International Customs Day. WCO 2011 *WCO news* 45.

environment in which we live, "knowledge is a critical resource".¹⁶¹

It is in this respect that the first Global Canine Forum was organised by the WCO from 25 to 27 January 2011 as a platform for sharing best practices and experiences, spotting challenges associated with the setting up of new canine centres, and devising strategies to deal with the challenges among the participating administrations and organisations that have or are yet to establish dog and handler training centres. Activities such as workshops¹⁶² and canine demonstrations were among those undertaken during the three-day forum.¹⁶³ This forum prompted the creation of a global network of canine experts that makes use of the WCO CENcomm "Global Canine Forum", and that has been adapted to meet the needs of this specific forum.¹⁶⁴ The second Global Canine Forum, which took place in Moscow¹⁶⁵ from 28 to 30 May 2013 saw the participation of officials in charge of dog training and dog handlers from twenty-eight countries around the world.¹⁶⁶ The third one was held in Argentina in June 2015 and focused mostly on enabling more than 90 experts from 28 countries to showcase the latest best practices and their respective experience in relation to detector dog and handler training.¹⁶⁷

These initiatives have contributed to strengthening customs capacities in their fight against all offences in the domain, and have also helped them to address the issue from a more technical and purposeful angle. The last risk area identified by the WCO

161 Speech by Kunio Mikuriya, Secretary General, *World Customs Organization at the International Customs Day 2011* available at <http://www.wcoomd.org>.

162 Issues relating to dog selection and their breeding, the training to be given to dogs and handlers, the training centres, the administration of dog and handler teams as well as the environment where they operate were the topics discussed during these workshops.

163 There were also discussions around the ten exhibition stands managed by WCO members. The said stands offered an opportunity for some partakers to make known their dog training centres and promote their work in this regard by way of videos. While some dog and handler teams demonstrated on narcotics detection (Belgium, Denmark and Hungary), others focused on the detection of weapons and explosives (France), banknotes (Argentina, Denmark and Italy), and CITES goods (Germany). These teams were awarded certificates and commemorative medals at the end of the forum by the WCO Secretary General Kunio Mikuriya. See the WCO 2011 *WCO news* 46.

164 WCO 2011 *WCO news* 45.

165 In the Russian federation.

166 WCO 2013 *Second Global Canine Forum* <http://www.wcoomd.org>.

167 WCO 2015 *Third Global Canine Forum* <http://www.wcoomd.org>.

Working Group on Commercial Fraud is offences against the environment.

3.2.5 *Offences against the environment*

The environment is the fifth risk area identified by the WCO Working Group on Commercial Fraud. The WCO Environmental Programme was launched in 2012. The then UN Secretary-General Ban Ki-Moon¹⁶⁸ reiterated the importance of protecting the environment in his official message at the first World Wildlife Day in these terms:

People and cultures have relied for millennia on nature's rich diversity of wild plants and animals for food, clothing, medicine and spiritual sustenance. Wildlife is integral to our future through its essential role in science, technology and recreation. It is intrinsic to our continued heritage and sustainable development.

Wildlife and forest crime is from a general viewpoint defined as the "illegal exploitation of the world's wild flora and fauna".¹⁶⁹ The WCO believes that the illegal cross-border trafficking of endangered species, hazardous and toxic waste, ozone-depleting substances and illicit trade in timber to mention but a few, constitute a real threat to sustainable development and ecological balance.¹⁷⁰

A number of Multilateral Environmental Agreements (MEAs) have been concluded among different interested parties worldwide.¹⁷¹ The WCO works closely with and is always ready to collaborate with organisations working against environmental crime.¹⁷² In this regard, the WCO Secretary-General stated that

Marking World Wildlife Day 2015 gives the WCO the opportunity to underscore the key role played by customs in combatting cross-border wildlife crime, and to recall the WCO's commitment to strengthening collaboration and information sharing to

168 His mandate as Secretary General of the UN ran from 2007-2016. Ban Ki-Moon 2014 *Speech by United Nations Secretary-General Mr. Ban Ki-moon* <http://wildlifeday.org>.

169 UNODC 2015 *Trafficking in falsified medical products* <http://www.unodc.org>.

170 WCO *Compliance & Enforcement Package brochure* 8.

171 These are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973); the Montreal Protocol on Substances that Deplete the Ozone Layer (ODS); the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (1989); the Stockholm Convention on Persistent Organic Pollutants (POPs) (2001); the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000).

172 WCO Date Unknown *Environment Programme* <http://www.wcoomd.org>.

ensure a more efficient law enforcement response to the illegal wildlife trade.¹⁷³

The importance of cooperation was further acknowledged at the World Wildlife Day, 2014 by the Duke of Cambridge, Prince William, who believes that efficiently fighting wildlife crime can be achieved only through "a concerted global response as vigorous and forceful as the trade itself."¹⁷⁴ Fighting environmental crime forms an important part of the WCO's agenda. It partnered with the Green Customs Initiative (GCI)¹⁷⁵ from 2001 and in 2008, its Council embraced the *Recommendation concerning Actions against Cross-Border Environmental Offences*, which text provides customs administrations with guidelines on the steps to be taken to improve capacities in this particular area.¹⁷⁶ In addition to this, the WCO is among the organisations¹⁷⁷ that founded the International Consortium on Combatting Wildlife Crime (ICWC), which is meant to provide support to national, sub-regional and regional wildlife law enforcement agencies and networks.¹⁷⁸ In the words of the WCO Secretary General, it (the ICWC) aims at combatting wildlife crime using enhanced cooperation.¹⁷⁹ As a communication tool among different customs administrations, relevant national authorities, international organisations and the related regional networks, the WCO devised ENVIRONET in 2009. It has also developed an e-learning facility that provides courses on environmental crime, among others. It is named CLIKC, which stands for Customs Learning and Knowledge Community. It more precisely offers to the customs community "a single entry point for WCO training activities and a collaborative portal

173 WCO Secretary General *Press Release* 3 March 2015.

174 WCO 2014 Global Customs community marks first World Wildlife Day <http://www.wcoomd.org>.

175 "Green Customs Initiative – Customs Protecting the Environment" is a cooperation tool regrouping a number of international organisations working toward eliminating the trade in commodities that are environmentally sensitive and smoothing the legal trade of such commodities. The overall aim of the GCI is to boost customs and other enforcement agencies' capacity to watch and uncover illicit trade in environmentally-sensitive commodities, and also to enable and control the legal trade of the said commodities. The United Nations Environmental Programme (UNEP) intends meeting its goals by raising awareness on the existing international agreements and providing assistance and tools for enforcement agencies. Green Customs also aims to play a complementary role and enhance already existing customs training work achieved through the existing agreements. UNEP Date Unknown *Green Customs Initiative* <http://www.greencustoms.org>.

176 WCO Date Unknown *Environment Programme* <http://www.wcoomd.org>.

177 The other organisations that have contributed to the founding of the International Consortium on Combating Wildlife Crime are the CITES Secretariat, the International Police Organization (INTERPOL), the United Nations Office on Drugs and Crime (UNODC) and the World Bank. WCO Date Unknown *Environment Programme* <http://www.wcoomd.org>.

178 WCO Date Unknown *Environment Programme* <http://www.wcoomd.org>.

179 WCO Secretary General address at the first World Wildlife Day 2014 <http://www.wcoomd.org>.

to share and foster Customs knowledge."¹⁸⁰

The World Wildlife Day is celebrated on the 3rd March every year, the day on which the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) was adopted. It was so proclaimed by the UN General Assembly on 20 December 2013 and was first celebrated worldwide in 2014. The theme for 2015 was "Wildlife crime is serious, let's get serious about wildlife crime." In seeking new and comprehensive solutions to wildlife crime, and being aware of the challenges this type of criminal activity presents in various regions of the world, the 2015 theme was to be complemented by the sub-themes "Wildlife and sustainable tourism" and "The role of local communities in conservation." Beyond giving an opportunity to celebrate and so give more value to wild fauna and flora and also raise public awareness of the value of preserving wildlife, the CITES Secretary-General¹⁸¹ noted that this annual celebration was a reminder that the problem is ever-present and as such, fighting it thoroughly requires stricter and more strategic approaches.¹⁸² It was his view that wildlife crime has "wide-ranging economic, environmental and social impacts."¹⁸³ Besides the five risk areas discussed above, there is the scourge of corruption that is intentionally separated from the above for a number of reasons explained under 3.2.6 below.

3.2.6 Corruption in customs

Corruption is evaluated on its own, apart from other identified risk areas, in that it is related to all aspects of the other offences. This means that corruption presents a threat to revenue collection, to security, to the health and safety of populations, to the owners of property rights and to the environment. Corrupt administration or corrupt customs officers will fail in their control duties, which will open the borders of their territories to all the offences that the administration has the duty to prevent and combat.¹⁸⁴ Furthermore, this topic has received a lot of attention from academics,

180 WCO Date Unknown *Customs Learning and Knowledge Community* <http://clikc.wcoomd.org>.

181 Scanlon JE.

182 The WCO *Press Release* 3 March 2014.

183 The WCO *Press Release* 3 March 2014.

184 WCO 2015 *WCO Integrity Newsletter* 2.

governments and international organisations by reason of its impact on society.¹⁸⁵

3.2.6.1 Background

There are few public agencies in which the classic pre conditions for institutional corruption are so conveniently presented as in a Customs administration. The potent mixture of administrative monopoly coupled with the exercise of wide discretion, particularly in a work environment that may lack proper systems of control and accountability, can easily lead to corruption. A Customs administration infected with corruption is going to be seriously dysfunctional and the impact of the corruption will be felt throughout the society.¹⁸⁶

These words of Shaver, a former secretary-general of the WCO,¹⁸⁷ aptly provide a background as to the reasons why so many customs administrations are vulnerable to corruption and why there is a pressing need in each of them to seriously address the issue. Indeed the nature of customs work is the very thing that breeds corruption.¹⁸⁸

Corruption is a plague that severely affects all nations,¹⁸⁹ every sphere of government, and every type of human behaviour.¹⁹⁰ It hinders the proper development of international trade and the enjoyment of all the benefits that may derive from it.¹⁹¹ An act of corruption in customs is hardly ever an isolated act. As pointed out by Shaver,¹⁹² it is usually the consequence of “a wider malaise within society”.

A comprehensive and broad definition of corruption is that provided by the World

185 WCO 2015 *WCO Integrity Newsletter* 2.

186 Shaver “Defeating corruption in the International trade Environment: A global vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>; also see Ferreira, Engelschalk and Mayville “The challenge of combating corruption” 367. These authors point out that corruption in customs adversely affects trade relations and limits foreign investment to a considerable extent.

187 Between 1994-1998.

188 McLinden and Durrani 2013 *World Customs Journal* 4; Walsh “Practical Measures to Promote Integrity” 154.

189 Poor or rich, private and public sector, developing countries or countries in transition. See Klitgaard 1998 *Finance and Development* 3.

190 WCO “Global Transparency: Fighting corruption for a sustainable future”; also see The World Bank Group 1997 *Helping Countries Combat Corruption* <http://www1.worldbank.org>; Nye 1967 *American Political Science Review* 419; Klitgaard 1998 *Finance and Development* 3; Das-Gupta, Engelschalk and Mayville 1999 *PREMnotes* 1.

191 WCO “Global Transparency: Fighting corruption for a sustainable future”; see further Shaver “Defeating Corruption in the International Trade Environment: A Global Vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.

192 Shaver “Defeating corruption in the International trade Environment: A global vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.

Bank, which sums up corruption as “the abuse of public office for private gain”.¹⁹³ In providing this definition, the organisation was conscious that it is not an original definition but believed that it was concise and broad enough to reflect various forms of corruption. Transparency International¹⁹⁴ sees corruption as “the abuse of entrusted power for private gain”. This definition appears broader than that of the World Bank in that it does not limit corruption to “public office” but rather encompasses actions that may happen elsewhere, including in the private sector. The term “entrusted power” here makes the difference. Because the private sector is part of the problem and consequently should be part of the solution, it cannot be left out in defining the problem.¹⁹⁵ Plouffe¹⁹⁶ finds that corruption can be identified and is usually so identified in crimes that are perpetrated through “the violation of a trust or a fiduciary relationship.” These crimes, according to the latter author, are embezzlement, bribery, extortion, insider trading, malfeasance or the abuse of office, amongst others.¹⁹⁷

The Asian Development Bank’s definition of corruption is similar to that of Transparency International, as it succinctly defines corruption as the “abuse of public or private office for personal gain”.¹⁹⁸ In more details, the Bank refers to corruption as “any behaviour in which people in the public or private sectors improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing their position”.¹⁹⁹

While acknowledging the narrowness of its definition, Nye²⁰⁰ sees corruption as a:

193 The World Bank Group 1997 *Helping Countries Combat Corruption* <http://www1.worldbank.org>.
 194 Created in 1993, based in Berlin (Germany) and now present in more than 100 countries worldwide, Transparency International is a non-profit organisation aiming at building “a world in which government, business, ccivil society and the daily lives of people are free of corruption”. See Transparency International 2015 *what is corruption?* <https://www.transparency.org/what-is-corruption>.
 195 Klitgaard 1998 *Finance & Development* 5.
 196 Plouffe “Corruption” 345.
 197 Plouffe “Corruption” 345.
 198 Asian Development Bank 1998 *Anticorruption Policy* <https://www.adb.org/documents/anticorruption-policy>.
 199 Asian Development Bank 1998 *Anticorruption Policy* <https://www.adb.org/documents/anticorruption-policy>.
 200 Nye 1967 *American Political Science Review* 419.

behavio[u]r which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.

In the same vein, Klitgaard²⁰¹ describes the plague of corruption as “the misuse of office for unofficial ends.”

As can be seen above, there are several definitions of corruption,²⁰² most of them generally aimed to fit a particular domain.²⁰³ These many definitions, as readily acknowledged by their various authors, still do not provide a well-rounded or a universally accepted definition of the term.²⁰⁴ Be it in customs or in another administration, corruption remains a dangerous scourge that not only impedes development but undermines any effort made in this regard. It is in this vein that the UN secretary-general describes corruption as:

an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.²⁰⁵

Corruption takes various shapes in different circumstances and in the context of customs as well.

3.2.6.2 Different forms of corruption

Depending on the sum of money lost and the particular sphere within which it occurs, Transparency International distinguishes between grand,²⁰⁶ petty²⁰⁷ and political²⁰⁸

201 Klitgaard 1998 *Finance and Development* 4.

202 The OECD believes that there are as many definitions as the various manifestations of the issue of corruption. See OECD *OECD Glossaries: Corruption-A Glossary of International Criminal Standards in Criminal Law* 22; Klitgaard 1998 *Finance & Development* 4.

203 OECD *OECD Glossaries: Corruption - A Glossary of International Criminal Standards in Criminal Law* 22.

204 Von Alemann 2004 *Crime, Law & Social Change* 25; see further the OECD *OECD Glossaries: Corruption - A Glossary of International Criminal Standards in Criminal Law* 22.

205 Foreword to the *United Nations Convention against Corruption* (2004) (UNCAC).

206 Acts that are committed at a high level of government that affect policies or the central functioning of the state, so making it possible for leaders to draw benefits to the detriment/at the expense of the public property.

207 Petty corruption has to do with routine abuse of entrusted power by either low or mid-level public officials in their daily dealing with ordinary citizens, who seek to access basic services at different state's agencies.

208 Political corruption consists of influencing policies, institutions and rules of procedure in the distribution of resources and financing by political decision makers, who use their position to

corruption.

With specific reference to customs, however, Hors²⁰⁹ presents three types of corruption, namely: routine corruption,²¹⁰ fraudulent corruption,²¹¹ and lastly, criminal corruption.²¹² Corruption in the context of customs is fuelled by various factors, which factors are discussed hereunder.

3.2.6.3 Factors increasing the problem of corruption in customs

According to Transparency International,

corruption thrives where temptation meets permissiveness, where institutional checks on power are missing, where decision making is opaque, where civil society is disempowered.²¹³

The vulnerability of the customs administration is said to derive from opportunities that place officials in a discretionary decision-making position and for which monitoring and accountability or post-clearance control systems are non-existent or dysfunctional.²¹⁴ Being in direct contact with different stakeholders of the trading community also exposes the administration officials to corruption, as these operators have a lot to gain by engaging in corruption.²¹⁵ Other identified factors include high tariffs,²¹⁶ multiple and complicated regulatory frameworks,²¹⁷ as traders will try in these instances to reduce the amount they would normally be bound to pay and so enable the fast processing of their transactions. The low salaries earned by officials

sustain their power, status and wealth.

209 Hors 2001 *OECD Working Paper No 175*, 15.

210 Where private operators pay bribes to obtain a normal or hastened completion of customs operations.

211 Where operators try to pay less tax than is due or no tax at all, by not properly accomplishing the customs clearance process. They pay bribes to blind customs officers to their actions or to buy their active co-operation.

212 Where operators pay bribes to customs officers so that they will permit totally illegal, lucrative operations such as drug trafficking or the abuse of an export of promotion scheme, etc.

213 Transparency International 2015 <https://www.transparency.org/what-is-corruption>.

214 McLinden "Integrity in Customs" 70; also see McLinden and Durrani 2013 *World Customs Journal* 3; Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 368, 373; Walsh "Practical measures to promote integrity" 154.

215 McLinden and Durrani 2013 *World Customs Journal* 3; Ntabazi *Combating corruption in customs* 47-48; Walsh "Practical measures to promote integrity" 154.

216 Walsh "Practical measures to promote integrity" 155.

217 Michael 2009 *Should the World Customs Organisation Develop a Hard Law* <https://works.bepress.com/>; see further Ntabazi *Combating corruption in customs* 30.

are also referred to as among the reasons why they indulge in corrupt practices.²¹⁸ Though it is voluminous, the literature on corruption is said²¹⁹ mostly to report on corruption rather than to solve the issue at hand.²²⁰

One of the most popular formulae for defining corruption is that proposed by Klitgaard. The formula is the following $C=M+D-A$, standing for Corruption *equals* Monopoly *plus* Discretion *minus* Accountability.²²¹ This entails that in an environment where people enjoy the monopoly over a good or a service, and have discretionary powers in deciding to whom and how to provide their services, and are further not accountable in any way, corruption will flourish. In another and more detailed figure, he explains that when the bribes abound both in number and value, the possibilities of being noticed or discovered very tiny, and the sanctions that may be imposed if eventually caught almost insignificant, this state of fact will prompt many officials to freely engage in corrupt practices.²²²

Klitgaard²²³ points out that the problem may constantly be present because there is no will or appropriate local capacity to deal with it. He invokes in this regard the non-existence of well-designed strategies and structures to appropriately handle the issue from the roots.²²⁴ While some local capacities may be affected and restricted by a lack of financial means, others do not have the necessary knowledge (the know-how) and the ability to deal with it, and some others are lagging behind when it comes to taking action, i.e. devising comprehensive strategies against corruption.²²⁵

An essential aspect that has been mentioned is that very often, corruption in customs occurs within well-organised networks where the benefits derived are shared with

218 McLinden "Integrity in Customs" 70; see further McLinden and Durrani 2013 *World Customs Journal* 3; Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 368.

219 Zake 2011 *IMF Working Paper WP/11/184*, 16.

220 McLinden "Integrity in Customs" 70.

221 Klitgaard 1998 *Finance and Development* 4.

222 Klitgaard 1998 *Finance and Development* 4.

223 Klitgaard 1998 *Finance & Development* 3 and 5.

224 Klitgaard 1998 *Finance & Development* 5.

225 Klitgaard 1998 *Finance & Development* 3; Ferreira, Engelschalk and Mayville in the same vein describe the external framework of the operating environment as well as the weaknesses in the organisation itself and its procedures as factors that can generate corrupt practices. Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 373.

colleagues and hierarchic superiors, thus rendering addressing the problem very difficult.²²⁶ In these instances, the practice becomes like a norm, and the effects thereof are crippling.²²⁷ This adds to the cost of doing business, at the expense of traders who end up indulging in these practices without even tagging them as corrupt.²²⁸ It is in this regard that Keen²²⁹ says that corruption in customs is so common that it is almost institutionalised and considered as a fitting part of the business of trade. This state of affairs, according to this author, has prompted some governments to take away from the hand of local officials the management of customs administrations and hand it over to private inspections companies.²³⁰ He points out, however, that this step did not, in any case wholly erase corruption and had the disadvantage of placing the domestic customs administration in an unpredictable and quite uncertain future.²³¹

In accord with this point of view, the solution certainly does not lie in preventing the customs officials from running the business of the country, but in providing an environment that gives them the sense that because they are both privileged and honoured to be there, they should do their job to the best of their abilities. They should go to work knowing that they are valued, and as such that a lot is expected of them in terms of integrity.²³² Keen²³³ moreover emphasises that the relations linking customs to businesses and vice-versa are conflictual from both perspectives, as a result of which morale is low and suspicion is high. This author is of the view that corruption is a burden to all society, and considering the number of benefits that can be derived from participating in such activities, its undesirable effects can be alleviated but never completely stamped out.²³⁴ Corruption in customs can lead to a chain of negative impact considering the strategic position of this administration and the role

226 McLinden "Integrity in Customs" 71; Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 372.

227 Klitgaard 1998 *Finance & Development* 4.

228 Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 368.

229 Keen "The future of fiscal frontiers" 15.

230 Keen "The future of fiscal frontiers" 15.

231 Keen "The future of fiscal frontiers" 15.

232 This is largely a summary of the solutions proposed hereunder by different authors.

233 Keen "The future of fiscal frontiers" 15.

234 Keen "The future of fiscal frontiers" 16.

it is supposed to play in curbing fraud in general. The said impact are reemphasised below.

3.2.6.4 Impact of corruption in customs

Corruption in customs can discourage foreign investment,²³⁵ endanger international trade when little or no control at all is exercised over dangerous commodities such as weapons of mass destruction, build more fear of government institutions, and affect citizens in many ways.²³⁶ Customs worldwide is generally considered as one of the most corrupt state enforcement agencies.²³⁷ Corruption in this particular administration (as of course in any other administration) carries hefty consequences in that the administration is a strategic one that is called to collect the state's revenue, facilitate trade, prevent crime,²³⁸ implement the state's obligations regarding international trade, and so on.²³⁹ In a nutshell, customs administrations are expected to uphold and enforce the states' policies regarding goods and people coming in and leaving the national territory.²⁴⁰ Failing to do so has dire consequences for the state concerned. There have been diverse suggestions as regards the best approaches to enabling a corruption-free customs environment. These suggestions are reviewed below.

3.2.6.5 Grooming corruption-free customs administrations

The WCO suggests that developing sustainable solutions starts with acknowledging that there is indeed a problem, and then all stakeholders must come together as one, agreeing to partner with one another for more effective results.²⁴¹ It also

235 Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 367.

236 Shaver "Defeating corruption in the International trade Environment: A global vision" available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.; Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 372.

237 McLinden "Integrity in Customs" 67; also see McLinden and Durrani 2013 *World Customs Journal* 4; Keen "The Future of fiscal frontiers" 15; Michael 2009 *Should the World Customs Organisation Develop a Hard Law* <https://works.bepress.com/>.

238 Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 370.

239 McLinden "Integrity in Customs" 67.

240 McLinden "Integrity in Customs" 67, 68; also see WCO "Global Transparency: Fighting corruption for a sustainable future"; Gill *Customs: Developing an Integrated Anti-Corruption Strategy* 129 available at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/1740479-1150402582357/2661829-1150402603429/03phase02b.pdf>.

241 WCO "Global Transparency: Fighting corruption for a sustainable future".

acknowledges the crucial role political will is to play in providing sound responses to the ever-present problem and so points out the need for "clear and concise" legal frameworks, the automation and simplification of customs processes, building an accountable administration, increasing officials' wages, providing officials with pension entitlements, and providing incentives for compliant companies or individual agents or customs officials, to mention but a few recommendations.²⁴² Without neglecting the role groups such as brokers may play in fighting corruption, it is suggested that these agents should be continuously urged to familiarise themselves with the existing regulations and should be made aware of their underlying principles.²⁴³ This entails building trustworthy partnerships with the private sector, including business associations and associations of customs brokers.²⁴⁴ This is one essence of customs modernisation.

According to Das-Gupta, Engelschalk and Mayville,²⁴⁵ an efficient anti-corruption strategy begins with addressing the motives and opportunities that prompt the role players to engage in corrupt practices. Addressing the motives requires pinpointing the weaknesses surrounding human resource policies and management as a whole.²⁴⁶ Addressing opportunities, on the other hand, calls amongst other things for tax reform or simplification (i.e. lowering tax rates, widening the tax base and removing special exemptions), expressly and clearly defining the role players' responsibilities and the procedures underlying their work, enabling internal and external audit checks, and computerising procedures for more transparency.²⁴⁷ This is once again, a solution customs modernisation seeks to provide. Transparency can be a reality only in an environment where there is a concise, simple, readily available and accessible legal and regulatory framework.²⁴⁸ Another way of limiting opportunities is by establishing a transparent and efficient administrative and judicial dispute settlement system run

242 WCO "Global Transparency: Fighting corruption for a sustainable future"; Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 377.

243 WCO "Global Transparency: Fighting corruption for a sustainable future"; Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 378.

244 Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 378.

245 Das-Gupta, Engelschalk and Mayville 1999 *PREMnotes* 1.

246 Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 375.

247 Das-Gupta, Engelschalk and Mayville 1999 *PREMnotes* 2.

248 Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 377.

by an independent body.²⁴⁹

Contrary to common belief, Klitgaard believes that the real problem is not enacting new laws, exercising more controls, and bringing about an ethical revolution or a change of mentality.²⁵⁰ These things, he submits, would prove insufficient unless there are systems in which ethical behaviour is to be expected.²⁵¹ So it is all about fixing the shortcomings of the system before thinking of enacting new laws and instigating new ways of control and moral disciplines. This approach is understandable, but one has to ask how the whole system can be fixed if there is no prior or simultaneous regulatory and structural reform that both strengthens the idea that offending behaviours will not go unpunished and reminds the officials time and again that they are the servants of the people and are called to strive for them on a daily basis? Addressing these issues is undeniably part and parcel of fixing the system. Perhaps, though, what Klitgaard refers to is the bureaucratic system or environment in which customs operates. If this is indeed what he means, then for changes to have a palpable effect, the state must review its whole structure, the power and influence it has over this government institution, and the way the latter is attached to the government.

Thus, efficiently uprooting corruption depends mostly on political leadership, says Klitgaard.²⁵² While acknowledging that the political will²⁵³ is lacking in many cases, he believes, however, that "leaders must see that it is possible to make systematic improvements without committing political suicide."²⁵⁴ He suggests that there should be more willingness to seek advice and assistance in order to draw lessons from successful anti-corruption strategies implemented elsewhere so that leaders can develop their own systematic approach to the problem.²⁵⁵

He also thinks national leaders should understand that combatting corruption is a long-

249 Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 377; Das-Gupta, Engelschalk and Mayville 1999 *PREMnotes* 2.

250 Klitgaard 1998 *Finance & Development* 4.

251 Klitgaard 1998 *Finance & Development* 4.

252 Klitgaard 1998 *Finance & Development* 5.

253 The *Revised Arusha Declaration* talks of "firm political will" in order to ensure a corruption-free customs environment.

254 Klitgaard 1998 *Finance & Development* 5.

255 Klitgaard 1998 *Finance & Development* 5.

term process and that they must consequently advance one step at a time.²⁵⁶ He suggests they should start with services where the problem is most present. He submits that international cooperation could instil both the will to curb corruption and the ability to do so effectively.²⁵⁷

These are only some aspects of Klitgaard's formula for combatting corruption. It may be worth mentioning that this formula has been widely used by different administrations in building anti-corruption strategies and tools. It was also highly regarded when the WCO's *Revised Arusha Declaration on Integrity in Customs* (2003)²⁵⁸ and many other of the administration's tools relating to customs integrity were developed.²⁵⁹

Other tools developed to promote integrity in customs are the *Revised Integrity Development Guide*,²⁶⁰ the *Model Code of Ethics and Conduct*,²⁶¹ the *Compendium of Integrity Best Practices* (which is updated periodically), the *Maputo Declaration*,²⁶² the *Almaty Integrity Resolution*,²⁶³ the *Nairobi Resolution on Integrity*,²⁶⁴ the Integrity e-

256 This view is shared by Ferreira, Engelschalk and Mayville, who add that the chosen tactic needs to be adjustable so that it can be progressively changed with development in the field. Ferreira, Engelschalk and Mayville "The Challenge of Combating Corruption" 384, 385.

257 Klitgaard 1998 *Finance & Development* 5.

258 This was drafted in the context of the belief that effectively uprooting corruption requires a comprehensive national effort. The Revised Arusha Declaration provides guidelines as to aspects that should be prioritised when devising approaches against the plague. The ten factors identified are: leadership and commitment, the regulatory framework, transparency, automation, reform and modernisation, audit and investigation, a code of conduct, human resource management, moral and organisational culture, and lastly, the relationship with the private sector.

259 McLinden "Integrity in Customs" 71.

260 Drawing considerably from the Revised Arusha Declaration, the Integrity Development Guide (as revised in June 2014) is "a practical framework to examine the management, administrative and integrity strategies currently in place and to identify opportunities for further improvement." It was made available to member administrations by the WCO.

261 This Code provides as guidelines a comprehensive list of minimum standards of behaviour for which customs employees must strive.

262 At the international conference on "Integrity in Customs: The African Response" that took place in Maputo (Mozambique) between the 20 and 22 March 2002, the Maputo Declaration was adopted to reiterate participating customs administrations' commitment to the principles set out in the WCO Arusha Convention (1993).

263 This Resolution was adopted at the Sub-Regional Integrity Conference with the theme "Strategic methods of improving integrity in Customs" hosted by the Republic of Kazakhstan (in Almaty, to be precise) from 17-19 January 2007, as a commitment by the participating nations to engaging in the fight against corruption following the WCO *Revised Arusha Declaration on Integrity in Customs* (2003).

264 This Resolution was taken as an effort by the participating customs administrations to re-commit to the WCO Revised Arusha Declaration on Integrity in Customs (2003) and the Maputo Declaration

learning Module,²⁶⁵ and the *Integrity Newsletter*.²⁶⁶ The WCO has also set up an integrity working group.

Another proposed approach is that of Shaver,²⁶⁷ who in 1997 already foresaw the establishment of “a well-organized and determined Customs Reform and Modernization Programme” as a consistent part of the solution to efficiently fight corruption. Most of the solutions proposed to date to handle corruption in customs identify a partnership with the private sector as the key to reaching complete integrity in customs.²⁶⁸

Shaver²⁶⁹ believes that political leaders, as well as all belonging to the international trading community, are the two sectors with which customs can work in order to achieve a certain level of integrity in the administration. National political leaders can help by setting themselves as examples and placing a particular accent on rewarding integrity in all government agencies, initiating, supporting, funding and following up on the modernisation programmes of their respective customs administrations, and ensuring that customs employees get a rewarding remuneration that can enable them to live a “dignified lifestyle.”²⁷⁰ Shaver²⁷¹ also believes that like importers, exporters, airlines, shipping companies, port and airport authorities, trade consultants, everyone having an interest in international trade must join the fight either on their own or in

(2002). This was as a result of the High-Level Workshop on Integrity in the Eastern and Southern Africa Region held in Nairobi (Kenya) from 20-23 February 2007.

265 This online training of about three hours has as objectives to “familiarise” all parties having an interest in fighting corruption with the organisation’s integrity tools and to promote their use among them.

266 The newsletter is a platform made available by the WCO to its members to promote the measures they use to combat corruption and engage in discussions and contributions on integrity matters among them. Endorsed by the Integrity Sub-committee (ISC) at its 9th session, the newsletter is published periodically (three or four times a year depending on the number and size of members’ contributions).

267 Shaver “Defeating corruption in the International trade Environment: A global vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.

268 WCO “Global Transparency: Fighting corruption for a sustainable future”.

269 Shaver “Defeating corruption in the International trade Environment: A global vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.

270 Shaver “Defeating corruption in the International trade Environment: A global vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.

271 Shaver “Defeating corruption in the International trade Environment: A global vision” available at <http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/shaver.html>.

collaboration with other participants, both regionally and internationally.

Ferreira, Engelschalk and Mayville²⁷² nevertheless emphasise that all instances of corruption at the border cannot always be attributed to the customs administration. They are of the view that many other government control agencies partake in corrupt practices, but the blame is put on customs due to their very active and vital role at borders. Furthermore, they suggest that a successful anti-corruption strategy should involve each and every administration operating at borders.²⁷³ Partnership and cooperation are thus the modernisation tools that should be prioritised in approaching corruption in this sector of activities. The WCO goes beyond identifying risk areas by recommending practical measures to deal with customs offences. This is explained below.

3.3 Tools and operational responses to the various risk areas

All of the tools proposed by the WCO to empower the customs administration of its member states can be summed up in two imperatives: strengthen the capacities of customs administrations and enable cooperation at all possible levels.

Chapter Two of this thesis presents different tools devised by the WCO in support of its members' customs modernisation programmes. Though various in nature, they all seek to enable customs administrations worldwide to approach their task in a systematic manner. Beyond collecting revenues that are crucial for the proper functioning of governments as a whole, enabling a crime-free trade environment is at the heart of all customs modernisation efforts.²⁷⁴ Thus, apart from enacting international conventions, carrying out capacity building projects, providing members with guiding principles on best approaches and successful strategies gathered from some members' experiences, and urging member states to join forces by building cooperation networks or strengthening existing ones with other customs administrations and the private sector, and encouraging the maximum use of information technology, the WCO also supports member states through its operational

272 Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 370.

273 Ferreira, Engelschalk and Mayville "The challenge of combating corruption" 370.

274 Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 16.

efforts.²⁷⁵ These put into practice all the instruments and approaches derived from the various tools proposed by the WCO and constitute the best ways to experiment and test them. So, under the different risk areas identified in the first part of this Chapter, the WCO engaged in different operational activities that are selectively presented hereunder. The general aim of these exercises was to find better and more efficient ways of eradicating these offences from import and export activities.²⁷⁶ In this respect, the WCO had this to say:

Operations are designed to disrupt illicit trade and to detect, arrest and prosecute offenders. The WCO provides technical and capacity building assistance to members, enabling them to strengthen their national enforcement programmes and increase their contributions to regional and international operations targeted at destabilising transnational organised crime groups, smugglers and terrorist organisations.²⁷⁷

These operations have had far-reaching consequences as they have enabled customs authorities to meet their obligations both towards national government and towards the international community with regard to crime prevention, reduction and eradication. These operational efforts are discussed below based on the risk areas under which they fall.

3.3.1 Programme Global Shield under the security risk area

Aware of the increased use by terrorists²⁷⁸ of improved explosives devices (IEDs) outside conflict zones, three world organisations, the WCO, the INTERPOL and the UNODC came together to launch the first-ever multilateral law enforcement operation in this domain, namely Programme Global Shield. Launched in November 2010 and conducted for six months, the main aim of this initiative was, through an adequate monitoring system, to stop the smuggling and illegal diversion of precursor chemicals that could serve to produce IEDs.²⁷⁹

The North Atlantic Treaty Organization's (NATO) Centre of Excellence Defence against

275 WCO Date Unknown *Overview* <http://www.wcoomd.org/en/about-us/wco-regional-bodies/rilo/overview.aspx>.

276 WCO Date Unknown *Compliance & Enforcement Package brochure* 13.

277 WCO Date Unknown *Compliance & Enforcement Package brochure* 13.

278 Prompted by the availability and the low cost of the precursor chemicals used for their making.

279 WCO 2013 *Programme Global Shield* <http://www.wcoomd.org>.

Terrorism (COE-DAT) reports that four thousand people lost their lives as a result of 2991 IED attacks that occurred around the world in 2012.²⁸⁰ The WCO notes that the issue of dangerous precursor chemical has received proper attention through the project and is now being addressed with the utmost seriousness. As a direct result of the project, more than hundred nations are now working together regarding some fourteen precursor chemicals most used to manufacture IEDs.²⁸¹ Through this programme, the WCO stresses the importance of being very strict and of aggressively hunting those involved in diverting and trafficking these chemicals.²⁸² Other objectives of this programme were to promote cooperation between customs and police administrations in order to enhance the fight against the illegal diversion of precursor chemicals; to raise global awareness regarding the growth of the threat and build partnerships with private industries with a view to developing best practice programmes.²⁸³ The programme further aimed to equip customs officers with the necessary technical knowledge in dealing with precursor chemicals; communicate the seizure of illicit shipments to all participating in the project and facilitate investigations and other enforcement efforts against illicit shipments.²⁸⁴ It also sought to spot and share best practices in the domain; gain momentum by closely watching legitimate shipments and consequently broadening understanding of the patterns, diversity and size of illicit international trade in the specific field; and lastly, use the risk management approach to ease the legitimate trade in precursor chemicals.²⁸⁵

The WCO believes that the project was “doubly successful” as it led to several seizures

280 WCO 2013 *Programme Global Shield* <http://www.wcoomd.org>.

281 U.S Immigration and Customs Enforcement 2018 *Program Global Shield* <https://www.ice.gov/global-shield>.

282 WCO Date Unknown *Programme Global Shield* <https://www.eiseverywhere.com>.

283 WCO Date Unknown *Improvised Explosive Devices (IEDs) Programme* <http://www.wcoomd.org>; AOAV 2016 *Programme Global Shield* <https://aoav.org.uk/2016/programme-global-shield/>; U.S Immigration and Customs Enforcement 2018 *Program Global Shield* <https://www.ice.gov/global-shield>.

284 WCO Date Unknown *Improvised Explosive Devices (IEDs) Programme* <http://www.wcoomd.org>; AOAV 2016 *Programme Global Shield* <https://aoav.org.uk/2016/programme-global-shield/>; U.S Immigration and Customs Enforcement 2018 *Program Global Shield* <https://www.ice.gov/global-shield>.

285 WCO Date Unknown *Improvised Explosive Devices (IEDs) Programme* <http://www.wcoomd.org>; AOAV 2016 *Programme Global Shield* <https://aoav.org.uk/2016/programme-global-shield/>; U.S Immigration and Customs Enforcement 2018 *Program Global Shield* <https://www.ice.gov/global-shield>.

of precursor chemicals, and the participating states reported some arrests. By April 2013 reports showed sixty-two seizures of IEDs, explosives and precursors, over one hundred and ninety-four metric tons of solid precursors and thirty-four thousand litres of fluid chemicals; and fifty-six arrests had been made.²⁸⁶ The success of the project prompted the WCO to approve a proposal to turn the project into a long-term one, so enabling extensive co-operative efforts between customs and the police administrations of the countries involved.²⁸⁷ Operation Biyela was specifically selected for the Intellectual Property Rights (IPR)/Health and Safety risk area.

3.3.2 How the WCO approaches the Intellectual Property Rights (IPR)/Health and Safety risk area

It is important to emphasise that the WCO places a particular accent on cooperation in an attempt to address the Intellectual Property Rights (IPR)/Health and Safety risk area. It suggests that winning the battle against counterfeiting begins with joint, global efforts entailing for the most critical capacity building initiatives.²⁸⁸ This means that as an organisation, it must be at the centre of its members' and other organisations' efforts and coordinate them as often as necessary.²⁸⁹ This also entails partnering with the private sector, as customs alone cannot win the battle.²⁹⁰ The WCO focuses most of its efforts in this field on co-operation with rights holders with the view to raising awareness and enhancing customs' capacity to identify and stop the circulation of counterfeit products through risk-based techniques.²⁹¹ An online anti-counterfeiting

286 WCO 2013 *Programme Global Shield* <http://www.wcoomd.org>.

287 WCO 2013 *Programme Global Shield* <http://www.wcoomd.org>; AOAV 2016 *Programme Global Shield* <https://aoav.org.uk/2016/programme-global-shield/>.

288 These capacity-building initiatives usually take the form of legislative/operational training seminars for different customs administrations and for organisations working alongside the WCO.

289 The WCO hosts biannual Counterfeiting and Piracy Group (CAP) meetings where customs and law enforcement agencies have an opportunity to share their experiences, best practices and invaluable information that may help in curbing counterfeiting and piracy. Furthermore, the WCO has developed an Internet-based e-learning module that makes it possible for customs officers to empower themselves by obtaining concrete knowledge regarding IPR enforcement at the border. WCO 2013 *Illicit Trade Report* 69.

290 The Rights Holders Consultative Group meets two times a year with the WCO member administrations for exchanges of best practices and opinions with the private sector. WCO 2013 *Illicit Trade Report* 69; International Trademark Association 2014 *INTA Bulletin* 4; WCO 2010 *Customs and IPR Report* 7.

291 WCO Date Unknown *IPR, Health and Safety Programme* <http://www.wcoomd.org>; WCO 2010 *Customs and IPR Report* 11.

application was devised by the WCO in 2010 and used by customs and the private sector to exchange information.²⁹²

The application is named Interface Public Members (IPM). Among other things, the IPM application was designed to help customs officers to easily differentiate between counterfeit and original products, and so to learn more about smuggling tendencies.²⁹³ The increasing number of subscribing countries to this application, according to the WCO, shows “its stronger international visibility” and also states’ willingness to put an end to counterfeiting activities.²⁹⁴ In April 2014, in partnership with the Federal Customs Authority of the United Arab Emirates (FCA), the WCO officially launched the mobile version of the IPM application, “IPM Mobile”, which is also said to have stirred interest from members as it contains features enabling customs officers among others, to alert others or be alerted to suspicious shipments, or liaise directly with rights holders and upload photos of the suspicious products.²⁹⁵

The WCO also possesses a repository²⁹⁶ which is made up of information collected from its members’ law and regulations pertaining to counterfeiting and copyright procedures.²⁹⁷ The Repository is to be assumed to provide the best ways for customs enforcement of Trade-related Aspect of Intellectual Property Rights (TRIPS) but is a simple guideline tool for implementing the WTO Agreement on TRIPS that makes available information on other customs administration experiences.²⁹⁸ It may be used as a vital tool for capacity building in this field.²⁹⁹ A typical operational project carried out to address this dangerous aspect is Operation Biyela.

3.3.2.1 Operation Biyela

In partnership with the Institute of Research Against Counterfeit Medicines (IRACM)

292 WCO Date Unknown *IPR, Health and Safety Programme* <http://www.wcoomd.org>.

293 WCO 2013 *Illicit Trade Report 70*.

294 WCO 2013 *Illicit Trade Report 72*.

295 WCO 2014 WCO and FCA launch IPM Mobile <http://www.wcoomd.org>; WCO 2013 *Illicit Trade Report 72*.

296 Information Repository of Legislation on Border Measures for Counterfeiting and Piracy.

297 WCO Date Unknown *Information Repository* <http://www.wcoomd.org>.

298 WCO Date Unknown *Information Repository* <http://www.wcoomd.org>.

299 WCO Date Unknown *Information Repository* <http://www.wcoomd.org>.

and experts of the related industrial sectors, the WCO organised Operation Biyela.³⁰⁰ The Operation's objective was boosting enforcement methods and best practices by joining efforts against counterfeiting and piracy.³⁰¹ Conducted with the participation of twenty-three African states,³⁰² this joint enforcement operation targeted counterfeit medicines and other unsafe goods with the primary objective of putting an end to the circulation of products threatening consumers' health and safety.³⁰³ Deriving from the Zulu word "encirclement", Operation Biyela was divided into two phases.

The first phase was more of an advanced training session that consisted of a three-day workshop in Lomé (Togo).³⁰⁴ Officers from the participating countries' administrations received consistent technical training³⁰⁵ on the features and characteristics of the products most often counterfeited or likely to be counterfeited, and also on targeting techniques.³⁰⁶ The real Operation itself started with phase two, which was conducted at participating countries' main seaports for ten days in April 2013. Those involved were the officers trained in phase one, working with the WCO intellectual property rights-accredited experts allocated to them.³⁰⁷ The Operation saw the interception of 1,135,302,883 samples of illicit products in 145 containers, with pharmaceutical products accounting for about forty-nine per cent of the products, followed by electronic appliances claiming forty per cent of the goods seized.³⁰⁸ Eleven per cent of the seized goods were attributed to fourteen categories of goods. The frightening results of the Operation prompted the WCO secretary-general, Mikuriya,³⁰⁹ to state that the Operation emphasised once again the crucial role to be played by

300 WCO *Press Release* Paris, 13 June 2013.

301 WCO 2013 *Illicit Trade Report* 70.

302 Customs administrations of the following countries took part in the operation: Algeria, Angola, Benin, Cameroon, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Madagascar, Morocco, Mauritius, Mozambique, Namibia, Nigeria, Republic of Congo, Senegal, South Africa, Tanzania and Togo.

303 WCO 2013 *Illicit Trade Report* 70.

304 The WCO refers to this first phase as a pre-Operation. WCO 2013 *Illicit Trade Report* 70.

305 This was achieved through the help of IPM, which enables the fast detection of counterfeit items by providing critical information on different branded goods made available by the licensees with photos, technical descriptions, packaging features, and contact people for the different brands. It is open for accession by customs officers 24 hours a day.

306 WCO 2013 *Illicit Trade Report* 70.

307 WCO 2013 *Illicit Trade Report* 70.

308 WCO 2013 *Illicit Trade Report* 70.

309 Kunio Mikuriya.

customs in providing protection to consumers, and that beyond the aim of intercepting counterfeit goods, it had enabled the collection of invaluable information with regard to the circulation of these products, thus enabling customs to tighten their control techniques.³¹⁰

It was also observed that the most common ways of smuggling counterfeit products are of placing them deep in a container, hiding them behind legitimate goods, transporting them by way of false import/export declarations, or sending them in parts and assembling them locally.³¹¹ The Customs and IPR Report 2010 adds that goods may sometimes be concealed inside mail, i.e. postal or express packages, or declared to customs without any concealment whatsoever, mixed with authentic products in such a way that they cannot, at first sight, be distinguished.³¹²

The Operation's other main objectives were among others to uncover new fraud techniques with a view to developing more adequate tools to fight them; to equip customs officers with the technical knowledge required for risk analysis and targeting; to promote the use of the IPM system by customs officers in concrete situations; to characterise the different types of counterfeit products and assess their potential dangers; and to bring together all interested parties, particularly licensees and regulatory agencies, so that they are able to promptly support and collaborate with customs.³¹³

The WCO secretary-general recommends cooperation as the most appropriate response to this scourge. His formula is the following: strengthened cooperation should focus mostly on information sharing nationally, and among customs officers, other regulatory departments, and public health officials, as well as internationally between customs authorities.³¹⁴

310 *Press Release* Paris, 22 September 2014.

311 WCO 2013 *Illicit Trade Report* 70.

312 WCO 2010 *Customs and IPR Report* 11.

313 IRACM 2013 *Operation Biyela* <http://www.iracm.com>.

314 It is also important to reemphasise that inter-agency cooperation involving the police and other enforcement agencies should form a substantial part of the cooperation. Furthermore, bringing together brand holders, supply chain logistics providers and all other agencies that have a say in IPR enforcement is crucial to uprooting IPR infringements. *Press Release* Paris, 22 September

The WCO and IRACM are aware that it is difficult to define with certainty the extent of the problem, but suggest that working together for three years has helped them to expose a substantial part of the problem and has provided a “partial picture” of the different facades under which these illegal activities are being conducted in Africa.³¹⁵ They further acknowledge that the problem of trafficking in counterfeit medicines is growing unabated.³¹⁶ The WCO argues that though much has been done so far, the battle is far from over, as international trafficking groups are quick and almost always ready to adapt to new market conditions and opportunities.³¹⁷ Leroy,³¹⁸ then IRACM director, while acknowledging the importance of these types of operations, and that customs administrations are “the first line of defence” against the dissemination of counterfeit medications, stresses the part to be played by other spheres of government, notably the judiciary and the legislature.³¹⁹ According to him, it is high time that everyone who has a role to play (nationally and internationally) gets involved and takes a stand. As a further step in the fight against this practice, the IRACM is in the process of drafting model laws that will assist affected states to track supply chains, try traffickers, and seize their belongings for better enforcement results.³²⁰

This type of undertaking is of crucial importance in the WCO's attempts to stop abuses in the Intellectual Property Rights (IPR)/Health and Safety risk area. The importance lies in the fact that these activities prioritise the fight against goods that may affect people's health or safety.³²¹ Under the drugs and precursors programme, attention is directed at Operation “Sky-NET”.

3.3.3 Operational activities carried out under the drugs and precursors programme

Several operations have been conducted to stop the circulation of drugs across borders and equip customs services with the necessary instruments to detect and handle cases

2014; WCO 2010 *Customs and IPR Report 7*.

315 *Press Release* Paris, 22 September 2014.

316 *Press Release* Paris, 22 September 2014.

317 WCO 2009 *Customs and IPR Report 2*.

318 Bernard Leroy.

319 WCO *Press Release* Paris, 22 September 2014.

320 WCO *Press Release* Paris, 22 September 2014.

321 WCO 2013 *Illicit Trade Report 70*.

dealing with drug trafficking. But for brevity's sake, only operation "SKY-NET" will be presented hereunder.

3.3.3.1 Operation "SKY-NET"

In the knowledge that postal channels were being misused more and more frequently by criminals to satisfy their criminal purposes, Operation "SKY-NET"³²² was conducted by the WCO between September 10 and October 28, 2012 in cooperation with China customs. Sixty-eight of the WCO member administrations and five of its RILO offices took part in the operation, and the WCO also received support from INTERPOL.³²³ The WCO secretary-general saw this operation as one that emphasised the gravity of the problem and so encouraged partnership between customs, postal services and all other relevant partners.

The operation was conducted with a view to evaluating or weighing up the extent of the problem. In essence, it was an attempt to appreciate the nature of the trafficking in drugs and precursor chemicals through postal services;³²⁴ to gather intelligence that could help the officials to understand all the factors pertaining to this abuse of the postal service. This was done in the belief that gathering and scrutinising the information collected would help the enforcement authorities to respond to the problem from a more appropriately orientated perspective, considering the complexity of the postal environment, with so many parties being involved and little information being available to pinpoint potentially illicit items, such as incorrect delivery address, or bogus consignors or consignees.³²⁵ This absence of information to help customs carry out their risk analysis prompted the Universal Postal Union (UPU)³²⁶ to endeavour to provide the legal basis that would enable postal services to make available advanced electronic data available to customs.³²⁷ This step, according to the WCO, would definitely help customs in its daily endeavours, and would also lead to a

322 WCO *Press Release* 20 November 2012.

323 WCO *Press Release* 20 November 2012.

324 WCO *Press Release* 20 November 2012.

325 WCO *Press Release* 20 November 2012.

326 Established in 1874 and considered the second oldest international organization in the world, the UPU is the most known platform for international cooperation involving role players in the postal sector. UPU Date Unknown *The UPU* <http://www.upu.int/en/the-upu/the-upu.html>.

327 WCO *Press Release* 20 November 2012.

more secure trading environment. The protection of the environment is of vital importance and among the operational efforts organised under this programme, Operation Demeter and Operation COBRA have been selected for discussion.

3.3.4 Operations targeting offences that negatively impact on the environment

Some of the operations carried out under this risk area were Operation Demeter, Operation COBRA and Operation Amazonas. Only Operation Demeter and Operation COBRA are described below.

3.3.4.1 Operation Demeter

Operation Demeter was a joint customs effort to address the illegal Transboundary Movement of Waste between Europe, Asia/Pacific and Africa. It took place between 23 March and 11 May 2009 (over fifty days) and involved the customs administrations of sixty-five countries. The operation was undertaken on the understanding that hazardous waste poisons soil and water generally for an extended period of time, thus placing at risk people's health and the environment, and its effects are sometimes simply irreparable.³²⁸ Trade in these wastes is progressively gaining momentum and constitutes a real concern.³²⁹ In this regard, the WCO has an *Action Plan for Combating Cross-Border Environmental Offences*, which was adopted in 2008. The WCO *Action Plan* urges customs to consider environmental offences as an essential part of their agenda, actively to join in operations that aim at curbing such offences and to provide and receive advice from one another regarding the traffic of these wastes.³³⁰

The WCO dedicated the year 2009 to environmental issues under the theme "Customs and the environment: Protecting our natural heritage." Several aspects were part of the operation, namely intensified controls, scrutinising, information transmission, feedback and seizure using the WCO's own communication tools.³³¹ The Operation targeted sixteen types of waste that are very often traded and trafficked. The WCO secretariat prepared in this respect a set of risk indicators or characteristics that were

328 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

329 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

330 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

331 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

positioned within national risk assessment systems, besides national and local indicators and characteristics. The participating administrations had to intensify their risk assessment and profiling, and their cooperative efforts in terms of notifying each other about suspicious shipments for concrete results. One aspect worth mentioning that contributed to the operation's success was the support provided to the participating customs administrations by their respective national environmental agencies, police forces, the Secretariat of the *Basel Convention*,³³² the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL), and all the seven WCO RILO offices.³³³

The success of the operation is amongst other factors attributable to the number of countries that joined in the effort (i.e. sixty-five),³³⁴ the scale of the deployments and the amount of information exchanged (the WCO CENcomm application is here applauded as a communication tool).³³⁵ The main recommendation made at the end of this operation was that more of such concerted efforts needed to be undertaken in order to emphasise that the threat against the environment was ever-present.³³⁶ The promise has been kept all these years, and the latest undertaking goes back to November 2018.³³⁷ Furthermore, the Operation revealed that the lack of relevant legislation and the inconsistencies in the existing legislation in different countries are a serious barrier to the efforts to fight environmental crime.³³⁸ Save for revenue collection, the Operation's report emphasised that these factors made it difficult for customs to properly scrutinise waste shipments at borders. The operation also revealed the failure by some participating administrations to fully use the communication tools made available to them, and suggested that efforts in this regard would ease data collection and treatment as well as the formulation of risk

332 The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* adopted on the 22nd of March 1989 by the Conference of Plenipotentiaries in Basel, Switzerland. This was in response to public concern following the discovery, in the 1980s, in Africa and other parts of the developing world of deposits of toxic wastes imported from abroad.

333 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

334 In 2018, this enforcement operation saw the participation of 75 customs administrations around the world. See WCO 2018 *Illegal trade in waste* <http://www.wcoomd.org>.

335 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

336 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

337 WCO 2018 *Illegal trade in waste* <http://www.wcoomd.org>.

338 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

indicators.³³⁹ The importance of using the WCO RILO networks by countries all around the globe was another aspect that the operation noted. In a nutshell, the WCO suggests that a successful fight against environmental crime can come about only through “concerted action on all fronts”.³⁴⁰

Further operations codenamed Demeter were launched. The initiation of these other operations followed increasing concerns relating to the fact that the cross-border circulation of hazardous waste often occurs in contravention of international and national regulatory instruments, and this presents a serious danger to the environment and the public health of the nations.³⁴¹ Developing countries are here identified as being more vulnerable. The cross-border movement and disposal of hazardous waste are regulated by the Basel Convention. This Convention subjects the import or export of these wastes to the pre-consent of the importing country.³⁴² No country is allowed to export without such prior consent, and a country has the right to demand the immediate exportation of such waste or that it be adequately disposed of in accordance with the provisions of the Basel Convention. The executive secretary of the Basel Convention, Willis,³⁴³ reiterated at the end of Operation Demeter III how crucial the active participation and involvement of customs is in addressing the issue of hazardous waste circulation.³⁴⁴ Operation COBRA hereunder discussed also sought to provide insight to customs officers on how to best protect the environment.

3.3.4.2 Operation COBRA

Operation COBRA was suggested by China’s National Interagency CITES Enforcement Coordination Group (NICE-CG) and the Association of South-East Asia Nations Wildlife Enforcement Networks (ASEAN-WEN) in 2012. It was then organised by China, South Africa and the United States in full cooperation with the organisations that proposed it and many others, amongst which were the Lusaka Agreement Task Force (LATF)

339 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

340 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

341 WCO 2010 *OPERATION DEMETER* <http://www.wcoomd.org>.

342 Articles 4 and 6 of the Basel Convention.

343 Willis J.

344 WCO *Press Release* Brussels, 20 January 2014.

and the South Asia Wildlife Enforcement Network (SAWEN). The operation benefitted from the assistance of the WCO, the CITES Secretariat and INTERPOL.³⁴⁵ Thus, it was a joint initiative by Asia, Africa and the United States to dismantle wildlife crime syndicates.³⁴⁶ The operation was conducted within the period of a month (from January 6 to February 5, 2013) and was directed at endangered species such as big cats, elephants, rhinos, pangolins and great apes.³⁴⁷ The initiative was praised for its international character and for its ability to facilitate cooperation among a range of departure, transit and destination of consumer countries where the seizures of specimens and arrests of suspects were made. It also contributed significantly to the promotion of specialised investigations techniques such as controlled deliveries.³⁴⁸ One major issue setting this operation apart from the others is the fact that it placed more emphasis on the quality of the investigations than on the number of seizures.³⁴⁹ As in the other operations, cooperation was again viewed as the best approach to find durable solutions to wildlife crime.³⁵⁰ It is in this respect that Grace³⁵¹ states that “only as global partners can we protect the world’s wildlife.” Hundreds of arrests leading to the seizure of various wildlife specimens were the results of this operation. Its success prompted Scanlon³⁵² to say that the operation deserves to be awarded the CITES Secretary-General’s Certificate of Commendation.³⁵³

345 The countries that were involved in this operation are the following: Botswana, Cambodia, Cameroon, China, the Democratic Republic of the Congo, Gabon, India, Indonesia, Kenya, Laos, Malaysia, Mozambique, Nepal, the Republic of Congo, Singapore, South Africa, Tanzania, Thailand, Uganda, the United States, Vietnam and Zambia. The funds that were used throughout the operation were provided by the United States Fish and Wildlife Service, the African Elephant Conservation Fund, the Royal Thai Police, the China Wildlife Conservation Association, and the FREELAND Foundations, and contributions were made by various participating countries.

346 WCO *Press Release* Brussels, 19 February 2013.

347 WCO *Press Release* Brussels, 19 February 2013.

348 WCO *Press Release* Brussels, 19 February 2013.

349 Wang Ziming (Director of the Law Enforcement and Training at the CITES Management Authority of China) *Press Release* 19th February 2013, Brussels “Asia and Africa join hands to crack down on wildlife crime syndicates”.

350 WCO *Press Release* Brussels, 19 February 2013.

351 Grace E; Deputy Chief of the United States Fish and Wildlife Service’s Office of Law Enforcement.

352 Scanlon JE; Secretary General of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

353 The CITES Conference of the Parties held in 2002, amongst other issues called upon these parties and the CITES Secretariat in their attempt to stop wildlife crime to spot and award to outstanding enforcement agencies a certificate for their steps in this regard and in a formal way. That is how the Secretariat developed the idea of the Certificate of Commendation, which certificate is offered at the discretion of the CITES Secretary General. In order to be considered for the Certificate, the

Wildlife criminals were also targeted by Operation COBRA II, which furthered the aims of Operation COBRA I and saw the arrest of more than four hundred criminals operating as wildlife trafficking kingpins in Asia and Africa, and many investigations are still being carried out in different countries. It is suggested that it is the cooperative spirit and the way different cases were handled that made this operation successful.³⁵⁴ Like other operations, a training phase preceded the operational phase. The two-day training workshop was provided by the International Consortium on Combating Wildlife Crime (ICWC), which comprised the CITES Secretariat, INTERPOL, the UNODC, the World Bank and the WCO.³⁵⁵

3.4 Summary

The purpose of this Chapter was to give a general overview of the most common international trends related to customs offences and to investigate the different approaches of the WCO in fighting them more efficiently. These approaches are complementary to the legal instruments that were discussed in Chapter 2 above that constitute the basis for all interactions between stakeholders.

The WCO's attempts to assist its member countries in fighting customs offences are laudable. Identifying the different areas at risk,³⁵⁶ providing the characteristics of customs offences, and conducting programmes relating to each aspect are

parties must report to the CITES Secretariat with the full details important cases of illicit trade and also, and as far as possible, cases of convicted illicit traders and repeated offenders. Once the Secretariat has access to this information whether it was reported or learnt about independently due to its outstanding character, the secretariat scrutinises it in order to see if it could qualify as a successful practice, and as such could be applied by other enforcement groups, or simply whether the steps as they stand have contributed to advancing the objectives of the Convention i.e. curbing illicit trade in wildlife in an innovative way. As of this date (28/04/2015), South Africa is the latest country to have received the award. The South African Police Service (SAPS), the National Prosecuting Authority (NPA) and Ezemvelo KwaZulu-Natal wildlife received the award for their concerted effort during Operation Whisper (carried out undercover), which resulted in the arrest of members of wildlife crime syndicates that regularly partook in rhinoceros poaching and illicit horn trading. CITES 2015 *The Secretary-General's certificates of commendation* <http://www.cites.org>.

354 One example of such cooperation which might be thought to justify this statement is that China and Kenya worked very closely together in the arrest and deportation of an identified wildlife smuggler from Kenya to China for prosecution.

355 The training also received the support of the Lusaka Agreement Task Force (LATF), the ASEAN-WEN and the SAWEN.

356 Through its Working Group on Commercial Fraud.

constructive steps towards efficiently combatting customs offences. No war can be waged successfully on unknown offences. Better enforcement can only be achieved through the knowledge of all characteristics, causes and consequences surrounding these offences. Knowledge, therefore, is indeed a key element for better enforcement.³⁵⁷ This has to be combined with efficient practices and a totally transformed and modernised environment.

The impact of these offences is felt not only to the extent that they deprive states of revenues due to them on imported and exported goods and services.³⁵⁸ They also affect different aspects of society such as security,³⁵⁹ intellectual property rights, health and safety,³⁶⁰ and the environment.³⁶¹ The WCO Working Group on Commercial Fraud has also developed a drug and precursors enforcement programme for matters connected with drugs' dealings.³⁶² The many fields at risk testify to the importance of always being on the lookout. That is what the WCO does by actually not limiting itself to identifying risk areas, but by getting involved by organising multi-agency and multi-dimensional projects.³⁶³

More precisely, the WCO's operational undertakings demonstrate that fighting customs offences should be an ever ongoing process that focuses on understanding how the offences come about, what strategies work well as the environment experiences changes and so on. Operations are often preceded by training sessions, after which offence detecting materials are distributed to the customs administrations involved. The skills of their officers are enhanced through these processes, and modern equipment is made available for greater efficiency. When the results of the operations are made available (whether provisional or final), further strategic enforcement measures are devised to ensure that the efforts put into operations are not wasted, and that the administrations involved remain alert and ready to combat the various

357 Speech by Kunio Mikuriya, Secretary General, World Customs Organization at the International Customs Day 2011 available at <http://www.wcoomd.org>.

358 See generally 3.2.1 for what the WCO Working Group on Commercial Fraud calls Revenue collection offence.

359 See generally 3.2.2 above.

360 See generally 3.2.3 above.

361 See generally 3.2.5 above.

362 See generally 3.2.4 above.

363 See generally 3.3 above and the subsequent sub-headings.

offences for which the operations are often organised.

Beyond the quantity of illicit commodities seized and the number of offenders brought to book, one significant aspect is that through these operations, the WCO promotes inter-agency cooperation both locally and internationally. The cooperative environment so created often if not always remains unshaken and therefore facilitates responses against various customs offences and also builds the basis for future operations. Building sustainable cooperation among customs administrations, police forces and all other law enforcement agencies at national, regional and international levels is one of the primary aims of these operations. The routine recourse to the expertise and logistical resources devised by the WCO and its allies testifies to this effect. The WCO aims at presenting its efforts as a starting point for each and every customs administration in order for them to fit these proposals into their respective environments that are often very different. From the different characteristics attached to each offence and the tools provided, the customs administrations of the member countries of the WCO are able to broaden their understanding of the existing problems and so to enact laws and streamline their processes accordingly for more modern and responsive administrations. It is important to remember that all "identification and action" work done and carried out by the WCO as analysed in this Chapter are best practice solutions to the problem of customs fraud. The countries involved should sustain these efforts by being proactive and taking the initiatives to greater heights after the training and operations. The current Chapter and the previous one (Chapter 2 above) reflect the legal and practical aspects governing the WCO's approach against customs offences within the context of customs modernisation. The next three Chapters reflect the legal and practical framework of France, South Africa and Cameroon to combat customs offences in the process of customs modernisation.

CHAPTER 4

CUSTOMS MODERNISATION AND ITS IMPACT ON CUSTOMS OFFENCES IN FRANCE

4.1 Introduction and historical background

The aim of this Chapter is to scrutinise the modernisation of customs laws and regulations in France as well as the practical aspects thereof, with the view to ascertain how these steps have helped the country in its fight against customs offences.

The year 1968 saw the birth of the European Customs Union that was aimed at establishing a common market within the European Economic Community.¹ This led to the elimination of customs duties on trade within the community for the members and the establishment of a common customs tariff for the customs union's trade dealings with other countries in the world.² Basically, a customs union entails that the members of the union use common rules regarding goods imported into their territory from third countries and apply the free movement (no tariffs) of goods within the union.³ The European Union (EU) customs union was one of the first achievements of the European Union.⁴ The EU is, in essence, a customs union made up of 28 countries which form a single territory for customs purposes.⁵ Practically speaking, the customs union is run by 28 national customs services operating as one single body.⁶ The EU customs union is said to be to the European Union (EU) member states what the skin is to the body.⁷ The customs union has enabled both economic integration and growth in Europe.⁸ By 1993, all customs controls at internal borders had been eliminated.⁹ The free movement of goods thus became a reality, and for the first time, the member

1 European Commission 2014 *The EU customs union* <https://www.europa.eu>; European Commission Date Unknown *The Union Customs Code (UCC) – Introduction* <https://ec.europa.eu>.

2 European Commission 2014 *The EU customs union* <https://www.europa.eu>.

3 European Commission 2014 *The EU customs union* <https://www.europa.eu>.

4 Sciberras 2015 *The Malta Independent* 1; European Commission 2014 *The EU customs union* <https://www.europa.eu>.

5 European Commission Date Unknown *EU Customs Union* <http://trade.ec.europa.eu>.

6 European Commission 2016 *EU Customs Union-unique in the world* <https://ec.europa.eu>.

7 European Commission 2014 *The EU customs union* <https://www.europa.eu>.

8 Sciberras 2015 *The Malta Independent* 1.

9 European Commission 2014 *The EU customs union* <https://www.europa.eu>.

states of the EU started applying uniform customs legislation that had direct implications on the national territory of each state.¹⁰

In 1992, all European customs legislation was therefore consolidated to a single piece of legislation, namely the Community Customs Code (CCC).¹¹ This enabled collective enforcement of the same piece of legislation but within the EU states' respective systems.¹² In other words, the EU common customs legislation makes provision for the common EU market, and each EU state adapts this to its particular internal system. As trade flow increased over the years, the Union's market expanded, technological advancement occurred, and electronic trade developed at an unimaginable pace. Thus the need arose for greater emphasis to be placed on the safety and security dimension of trade in general. This led to the EU members once again coming together to draft what was known as the Modernised Customs Code (MCC). When this instrument failed to satisfy the various urgent needs for which it had been drafted, the EU member states agreed to replace it with the Union Customs Code (UCC). The UCC is the current common EU instrument. It could fittingly be referred to as a modern framework for customs and trade.¹³ It is said to be the ultimate act that completed the transition to a paperless and fully electronic and interoperable environment founded on essential values such as simplicity, service and speed.¹⁴

The French customs administration works under the Directorate General of Customs and Indirect taxes, which is part of the Ministry of Budget, Public Accounts and Civil Service.¹⁵

Amongst the various tasks assigned to the French customs, two stand out and are extracted from *Decree No 2007-1664 of 26 November 2007 relating to the General*

10 European Commission 2018 *History of the EU Customs Union* <https://ec.europa.eu>.

11 European Commission Date Unknown *The Union Customs Code (UCC) – Introduction* <https://ec.europa.eu>.

12 European Commission Date Unknown *The Union Customs Code (UCC) – Introduction* <https://ec.europa.eu>.

13 European Commission Date Unknown *The Union Customs Code (UCC) – Introduction* <https://ec.europa.eu>.

14 European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

15 Europol 2018 *France* <https://www.europol.europa.eu>.

Directorate of Customs and Excise.¹⁶ Article 2 (1) and (5) of the said *Decree* reads:

(1) It contributes to the development of projects of laws and regulations concerning customs, tax and indirect taxes as well as instructions for their application. It ensures their implementation and monitors their application.

(5) It develops policies of control and fight against customs fraud and indirect contributions and follows litigation in the areas of its competence. As such, it ensures the representation of the State before the national courts. In addition, it ensures the implementation of laws and regulations for which specific authorisations are granted.

These two paragraphs clearly reiterate the general role of customs for the purpose of this study: participating in the elaboration of related laws and regulation, seeing that such laws and regulation are fully implemented, elaborating policies aimed at curbing fraud and litigating accordingly within its domain of competence. Among the broad range of tasks assumed by customs, those mentioned above are the focal duties on which this study rests.

The EU is not only presented as the world's largest trading block, but its Customs Union is viewed as a heavyweight when it comes to international trade.¹⁷ To maintain its rank in the world trade environment, the EU had to adapt its rules and procedures to all changes occurring in the field.¹⁸ The EU's general modernisation efforts officially started in 2003.¹⁹ This starting point saw the regulation of customs intervention regarding goods that disregarded intellectual property rights.²⁰ France being a member of the EU, its modernisation has been ongoing for many years, and the administration modernises its resources, organisation, legal framework and monitoring techniques on a regular basis in order to upgrade its capacity and remain up to date with the growth in trade volumes and the consequent exploitative fraud practices.²¹ French customs

16 Hereafter *Decree* No 2007-1664 of 26 November 2007.

17 Sciberras 2015 *The Malta Independent* 1; European Commission 2014 *The EU customs union* <https://www.europa.eu>.

18 Sciberras 2015 *The Malta Independent* 1.

19 Sciberras 2015 *The Malta Independent* 1; European Commission *Douanes* 11 available at file:///C:/Users/nwuuser/Downloads/customs_fr.pdf.

20 Sciberras 2015 *The Malta Independent* 1.

21 Thillier 2010 *Gestion & Finances Publiques* 123; French Customs 2015 *Douanes Magazine* 3; French Customs 2011 *A Brief Introduction to French Customs* <https://www.douane.gouv.fr>; French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>; French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

modernisation is part of a broader programme to modernise public policy, which requires all spheres of government to rethink their mission in the sense of improving efficiency and reducing public expenditure.²²

The then Director-General of French Customs and Excise²³ saw the administration as one that has undergone a radical transformation over the years, which transformation makes it a "proactive, reactive and inventive" administration that adequately serves the state's, businesses' and citizens' interests.²⁴ She recognised that, while generating economic growth, globalisation simultaneously generates new risks that require new control methods based on "a better understanding of flows, risk analysis and targeting", and the like.²⁵ This targeting approach enables a better and more efficient orientation of services.²⁶ Changes in the way international trade has developed place a burden upon the administration to adapt its ways to the new environment.²⁷ In this respect, modernisation becomes a duty for the administration, which has to satisfy the expectations of the state, businesses, citizens and society as a whole.²⁸ In this vein, Thillier²⁹ states that as a public service, French customs has a mission of support to the economy. The support referred to comes down to adjusting and adapting all aspects of the service to the changing trade environment for more efficiency and effectiveness.

Being aware of the diversity, complexity and worldwide nature of fraud and trafficking, the French *Cour des Comptes* (audit court)³⁰ acknowledges that controlling these

22 Thillier 2010 *Gestion & Finances Publiques* 123.

23 Crocquevillle.

24 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>; see further IDC *Fridge Research Project* 12, where it is stated that the French customs administration has substantial infrastructure and equipment that adequately serves in handling its work in this domain.

25 Also see in this regard Hauts-de-France Interregional Directorate of Customs 2017 *Cahiers d'Administration* 4.

26 Hauts-de-France Interregional Directorate of Customs 2017 *Cahiers d'Administration* 4.

27 Thillier 2010 *Gestion & Finances Publiques* 123.

28 Thillier 2010 *Gestion & Finances Publiques* 123.

29 Thillier 2010 *Gestion & Finances Publiques* 123.

30 The French *Cour des Comptes* is an independent court located equidistantly between Parliament and the Government, both of which it assists in accordance with Article 47-2 of the French Constitution. The main task of the *Cour des Comptes* is to ensure the proper use of public funds and to inform citizens accordingly. Article 47-2 of *French Constitution* of 1958, which sets out this body's mandate, reads: "The Cour des Comptes shall assist Parliament in monitoring Government action. It shall assist Parliament and the Government in monitoring the implementation of Finance

illegal activities no longer involves only the physical interruption of goods but also and most importantly includes identifying the techniques of fraud, dismantling networks and criminal organisations, applying and enforcing the penalties provided by the law, and lastly, acting preventatively by addressing the different shortcomings in the relevant circuits.³¹ This is the very essence of customs modernisation. Fighting fraud in the trade environment is recognised as a fundamental mission of customs, according to the *Cour des Comptes*.³² It is in this regard that the constitutional council³³ reiterated that customs works toward preventing harm to public order and combatting tax evasion.³⁴

To this end, the power of French customs has been progressively extended over the years to ensure that the administration has the necessary legal and technical resources at its disposal in its various dealings.³⁵ The nature of the frauds and offences perpetrated suggests the need for a strengthened and ongoing cooperative approach involving other state departments.³⁶ It is in the context of these threats that the French legislature has given extended powers to its customs administration. Most of these powers derive from the French Customs Code and are amended on a continual basis.³⁷ National laws give extensive powers to customs, but these powers are sometimes limited by the fact that the national force has to act in line with EU policies.³⁸

The *Cour des Comptes* acknowledges that the rules that customs is tasked to enforce are very complex and that the corresponding infractions are very broad.³⁹ This

Acts and Social Security Financing Acts, as well in assessing public policies. By means of its public reports, it shall contribute to informing citizens. The accounts of public administrations shall be lawful and faithful. They shall provide a true and fair view of the result of the management, assets and financial situation of the said public administrations." French Budget Directorate *Guide de la performance* 8.

31 French *Cour des Comptes* "L'Action de la Douane" 7.

32 French *Cour des Comptes* "L'Action de la Douane" 7.

33 The French Constitutional Council is the highest constitutional authority established by the 1958 *Constitution*.

34 *Constitutional Council Decision* N° 2001-457 DC of 27 December 2001, *Amending Budget Law for 2001*, JORF, 29 December 2011.

35 French *Cour des Comptes* "L'Action de la Douane" 7.

36 French *Cour des Comptes* "L'Action de la Douane" 10.

37 French *Cour des Comptes* "L'Action de la Douane" 27.

38 French *Cour des Comptes* "L'Action de la Douane" 31.

39 French *Cour des Comptes* "L'Action de la Douane" 17.

diversification and development of commercial crime are related to the development of trade worldwide, the development of means of transport, and the ease with which funds flow from one point to another.⁴⁰ The *Cour des Comptes* believes that the French territory is most vulnerable to fraud and trafficking because of its geographic location and its position in the goods conduit within the EU.⁴¹

The development of international trade and globalisation have significantly contributed to the broadening and diversification of activities linked to organised criminality.⁴² The *Cour des Comptes*⁴³ notes further in this regard three factors that have given rise to the current state of affairs, namely the development of new channels of trafficking with the internet,⁴⁴ the increasing value of the financial dimension of trafficking (including transfers, laundering and the recycling of the money derived from trafficking)⁴⁵ and lastly, the restructuring of criminal networks.⁴⁶

French customs recognises that its mission is twofold; namely, to facilitate trade and make it more secure.⁴⁷ Privy to the challenges posed by globalisation and the development of trade,⁴⁸ and in an effort to find the right balance between the two aspects of its mission, the administration has developed a number of modern practices

40 French *Cour des Comptes* "L'Action de la Douane" 17.

41 French *Cour des Comptes* "L'Action de la Douane" 17; 20.

42 French *Cour des Comptes* "L'Action de la Douane" 25.

43 French *Cour des Comptes* "L'Action de la Douane" 25.

44 While electronic commerce has made international trade easy, it has also facilitated communication for the smooth distribution of illicit commodities and finance. People abusing the internet enjoy all the benefits it has to offer, including anonymity, extraterritoriality, and the lack of harmonisation of the laws on cybercrime across the globe etc. The internet can be used to disturb customs security system in a way that will enable the perpetration of another full range of offences through security circumvention. French *Cour des Comptes* "L'Action de la Douane" 25.

45 In the pursuit of illegal activities, criminals seek to fund their activities, secure the funds they get from them, and hide their origin. They take recourse to financial institutions with the aim of securing their money and laundering it so that its origin cannot be traced. French *Cour des Comptes* "L'Action de la Douane" 26.

46 The French *Cour des Comptes* notes that criminal groups tend nowadays to become "generalists" in the sense that they are no longer specialists in different dimension of crime (sectors), but act generally as possibilities open up. The most alarming factor here is the development of partnerships between terrorists and these offenders, whereby the former use the latter to source firearms, explosives and fake documents. French *Cour des Comptes* "L'Action de la Douane" 27.

47 French Customs 2011 *A Brief Introduction to French Customs* <https://www.douane.gouv.fr>; French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>; Thillier 2010 *Gestion & Finances Publiques* 123.

48 Sciberras 2015 *The Malta Independent* 1.

and techniques to facilitate the understanding and management of trade flows and to ensure the safety of the international trade platform.⁴⁹ Hence, the modernisation of French customs is manifested by the acquisition and implementation of these various tools.⁵⁰ These tools or steps can either be of a legal or practical nature and they are scrutinised below as the main two parts of this Chapter.

4.2 Legal and practical aspects of French customs modernisation

Customs modernisation in France, as in any other country, is a broad concept that encompasses a very diverse range of changes, both from a legal and a practical viewpoint.

4.2.1 The legal framework governing French customs modernisation

Numerous steps have been taken by France, on its own or as part of the EU's Customs Union, to modernise its customs laws and regulation. These steps are based on international, union and national sources of law. They are discussed below.

4.2.1.1 International legal sources governing French customs

This involves the incorporation of international treaties, especially those by the WCO, into French domestic customs operations. Examples of such are the Nairobi Convention and the RKC.

4.2.1.1.1 International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences [1977] incorporated into the French legal order

It took the French government some years to decide to adhere to the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (1977) (hereafter the Nairobi Convention).⁵¹ Thus, the law authorising French accession to the Nairobi Convention is the *Accession Authorisation Law* No 2001-84 of 30 January 2001.⁵² The Decree officialising the

49 French *Cour des Comptes* "L'Action de la Douane" 86.

50 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>.

51 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/I99-186/I99-186.html>.

52 *Annuaire Français de Droit International* (French Directory of International Law XLVII-2001).

adoption of the Convention is *Decree* No 2001-546 of 20 June 2001 relating to the publication of the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (all eleven Annexes), done in Nairobi on 9 June 1977.⁵³ Despite the Convention's being very flexible in its provisions, France believed that adopting it as it was then, with its stance on personal data, would have been in contradiction of its legislation on the protection of personal data.

It was only after countries were allowed through an amendment of the Convention⁵⁴ to make reservations regarding aspects of the Convention inappropriate in their particular contexts that France became a party to the said Convention. The country's adherence to this international instrument was based on the assumption that as fraud had become international, borders should not be considered a hindrance to customs administrations that strive to curb all types of customs offences. Because fraud affects different domains of society and has an international character, the best way to deal with it is to operate on an international level by building secure cooperation networks with other countries and entities.⁵⁵ The principles of cooperation with other countries around the world laid down by the Convention were thus amongst the determining factors that prompted the country to adhere to the Convention.⁵⁶ The country hoped that such accession would enable it to further develop its cooperation with its partners.⁵⁷

France has acceded to only three out of the eleven Annexes provided by the Convention. Those are Annexes I, IX and X.⁵⁸ While Annex X is said to have been selected because, like the French customs administration itself, it places great emphasis on cooperation in action against the smuggling of narcotic drugs and

53 *Annuaire Français de Droit International* (French Directory of International Law XLVII-2001).

54 The second amendment to the Nairobi Convention entered into force on 7 October 1995 and it amended its original stance on reservation in article 18. More specifically, before the said amendment, the signatories were not allowed to make reservations, as the drafters of the Convention considered it already flexible enough. The amendment authorised countries to adhere to the Convention with the possibility of making reservations.

55 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

56 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

57 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

58 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

psychotropic substances,⁵⁹ Annexes I and IX are said to have been chosen because both of them focus on information and knowledge sharing, which is the key to preventing, investigating and punishing customs offences.⁶⁰ France accepted these three Annexes because most of the standards set in them are similar to those set in previous agreements to which the country subscribed. Annex X, for instance, stands as an addition not only to existing national provisions but also to international Conventions on narcotics and psychotropic substances.⁶¹ The Decree affirming the adherence of French customs to the Nairobi Convention recognises the eleven Annexes, although it is said that the country has adopted only three of them. This is confusing, as it is uncertain whether the country has agreed to the eleven Annexes or only three of them. But on behalf of the French Commission of Foreign Affairs, Sicre⁶² reiterates that the country has adhered to the Convention and three of its Annexes.

The selection of some Annexes over others is due to the fact that the non-adopted Annexes probably include measures to which the specific country does not agree. In this specific instance, Brana⁶³ argues that France limited itself to three Annexes simply because it did not want to be bound multilaterally to partners it did not choose. It means that the country limited its selection to Annexes through which it can cooperate and for which it is ready. Increasing the number of Annexes would mean being bound to much more principles towards the other states that would agree to those Annexes as well. The fact that each country has the choice to adopt certain Annexes and not others, has the disadvantage of limiting the extent of cooperation amongst signatory members. Nevertheless, and as suggested by Brana,⁶⁴ this also helps to avoid conflicts of law as each party contracting with the other is aware from the onset of what

59 According to Rouvière, cooperation is indispensable in a world marked by the complexity of trade and financial networks and as well as the development of international exchanges, which have all played a role in the rising and ever-growing range of customs offences. The Commission strongly believes that any efficient action against customs offences must rely on international cooperation with other states and entities. Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

60 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

61 *Single Convention on Narcotic Drugs* of 1954 as amended by the 1972 *Protocol and the Convention on Psychotropic Substances* of 1971. Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

62 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr/12/rapports/r1341.asp>.

63 Brana 2000 *Rapport No 2760* <http://www.assemblee-nationale.fr/11/pdf/rapports/r2760.pdf>.

64 Brana 2000 *Rapport No 2760* <http://www.assemblee-nationale.fr/11/pdf/rapports/r2760.pdf>.

Annex(es) the other party has adopted. It could, therefore, be said that, enabling countries to decide on their choice of Annexes indeed constitutes a stumbling block to extensive cooperation, but it also enables predictability in international customs dealings.⁶⁵

The accession to the Convention thus added to and strengthened the existing cooperation efforts already in place in the country.⁶⁶ The importance of the Convention, according to the Rouvière,⁶⁷ and on behalf of the French Commission of Foreign Affairs, lies on the one hand in the fact that it helps to fight fraudulent international traffic more efficiently, and on the other hand, it urges parties to strengthen their cooperation with one another. Such cooperation benefits from the legal certainty created by the Convention says Rouvière. At the time when the Convention was recommended for adoption, many benefits were hoped to be drawn:

With reference to employment, the protection of the national and European economy and therefore, the preservation of employment.

In terms of general interest, greater efficiency in the fight against fraud, which would in turn:

Ensure better revenue collection for the state and for the European Union;

Protect the safety and health of French and European citizens (the fight against drugs, trafficking in arms and explosives, cigarettes, harmful waste, radioactive materials etc.);

Enable the protection of French and European businesses against threats related to international trade (unfair competition, counterfeits etc.);

Ensure better protection of the environment (protection of threatened species of fauna and flora; prevention of trafficking in hazardous waste etc.);

Protect the cultural heritage (combatting fraudulent trafficking in works of art in particular).

In regard to financial matters, ensuring increased tax revenue collection by the state and the European Union.

...

As for the complexity of the legal system, French customs hoped that the adoption

65 De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 25.

66 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

67 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

of the Convention would complete and strengthen the existing legal framework, which already included a range of other bilateral and multilateral agreements.⁶⁸

Overall, and as discussed in Chapter 2 above,⁶⁹ this Convention reemphasises the importance of co-operative action in customs dealings in general and in the fight against customs offences in particular. The RKC has also been incorporated into the French legal order.

4.2.1.1.2 The Revised Kyoto Convention as part of the French customs legal framework

France acceded to the Revised Kyoto Convention (RKC) on 22 July 2004. Such accession was approved by *Law No 2004-492 of 7 June 2004 authorising the accession of France to the Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures (all three Annexes)*. French adherence to this instrument proceeds from the founding principles that led to the WCO's proposing that the Convention be amended. The Convention in its original form, namely the Kyoto Convention, was no longer adequate for international trade as there was a need to draft an instrument that took into account the growth and increasing volume of international exchanges. Furthermore, the Convention needed to consider and reflect the technological transformation of society. It also needed to emphasise the active role customs plays in the development of international exchanges and worldwide trade, as well as the evolution of customs and clearance procedures, for instance.⁷⁰ France saw in the rewritten Convention, as a modern, revised text, two fundamental principles: the emphasis placed on technology and technicality; and the establishment of a committee tasked with the management of the Convention.⁷¹ Beyond overseeing every process and action related to the Convention, the said Committee stands as a conciliator or arbitrator of disputes that the parties are unable to solve amongst themselves.⁷²

68 Rouvière 2000 *Rapport No 186* <https://www.senat.fr/rap/199-186/199-186.html>.

69 Precisely at 2.2.2.2.2.1.

70 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

71 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

72 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

For the French government, the revised Convention was likely to facilitate exchanges through its legal provisions, which set out simple but effective procedures that are to be carried out in harmony with other systems, and that provide maximum facilities for goods and travellers through the use of different tools.⁷³ The French Commission of Foreign Affairs, through its representative, noted at the time, that the adoption of the revised Convention would not have any negative impacts (in terms of requiring changes to already existing rules) on the country's legal framework. This view was based on the fact that most of the Convention's provisions had equivalents that were already being applied in France, in the national *Customs Code* as well as in the EU *Customs Code*.⁷⁴ The Commission strongly believed that once adopted and applied on a worldwide scale, the RKC would give international trade the predictability and efficiency that modern-day trade transactions require.⁷⁵ According to the commission, the adoption of the revised Convention was also a way for France to fulfil its duties at the European Union level.⁷⁶ The core customs modernisation principles reflected in the RKC were discussed in Chapter 2 above.⁷⁷

Besides these international instruments to which France has acceded and which have been made French law, its customs operations are primarily influenced by EU Customs legislation.

4.2.1.2 The EU-based framework as a source of modern French customs law

The EU Customs Union's 28 member states share a standard piece of legislation for customs purposes, namely the *Union Customs Code*.

73 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

74 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

75 Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

76 The duties in question are not enumerated in the report. Sicre 2004 *Rapport No 1341* <http://www.assemblee-nationale.fr>.

77 They revolve around enabling a sound and efficient culture of risk management, placing a particular accent on co-operation and partnership at all possible levels; automating procedures; enabling or working towards a transparent, and predictable environment where good governance is a priority and finally; ensure that the dispute settlement system is one that is smooth and time effective.

4.2.1.2.1 Further modernisation through harmonisation: the newly enacted EU Customs Code (the Union Customs Code (UCC))

The customs regimes of the EU member states were first brought together in the Community Customs Code (CCC).⁷⁸ The process for the revision of the CCC was launched in the late 2000s.⁷⁹ Thus, in furthering its modernisation purpose, the union orchestrated a significant overhaul of the CCC and moved from it to the Modernized Customs Code (MCC).⁸⁰ The MCC sought to incorporate more modern practices such as electronic commerce in line with new international obligations and to enable a simple and paperless environment for customs and trade.⁸¹ It failed in this mission.⁸² This led to the decision⁸³ to adopt the *Union Customs Code* (UCC) in order to advance the Union's modernisation purposes.⁸⁴ The latter code was enacted on 30 October 2013, but most of its substantive provisions became applicable only on 1 May 2016.⁸⁵ In the EU's terms, the UCC is a recast of the MCC.⁸⁶ The UCC is part of the modernisation of the Union's customs and serves as the new framework regulation on the rules and procedures for customs throughout the EU.⁸⁷ This very recent piece of

78 In *Council Regulation* (EEC), No. 2913/92 of 12 October 1992 establishing the Community Customs Code. European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

79 European Commission 2013 *Proposal for a DIRECTIVE* 4.

80 Under *Regulation (EC)* No 450/2008 of the European Parliament and of the Council of 23 April 2008 *laying down the Community Customs Code (Modernised Customs Code)*. European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

81 Levendal *A case study of the customs administrative penalty* 25; Deloitte 2014 *In 2016 the European Union will have a new Customs Code* 2.

82 Deloitte 2014 *In 2016 the European Union will have a new Customs Code* 2.

83 The decision to do so was made in 2012. Levendal *A case study of the customs administrative penalty* 25.

84 On 9th October 2013 as *Regulation (EU)* No 952/2013 of the European Parliament and of the Council. European Commission 2017 *Electronic customs* <https://ec.europa.eu>; European Commission 2013 *Proposal for a DIRECTIVE* 4.

85 French Customs 2015 *Douane Magazine* 7; French Customs *Customs Clearance in France* 5; European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

86 European Commission 2017 *Electronic customs* <https://ec.europa.eu>; European Commission 2013 *Proposal for a DIRECTIVE* 4.

87 Certain provisions of the UCC will be operational only when the required IT system is either deployed or upgraded. The European Commission has in this respect created a Regulation that lays down provisions for a transitional period between May 1st, 2016 and December 31st 2020, during which these electronic customs enhancements would be finalised. A number of transitional phases will follow until full implementation is complete in 2020. These measures are contained in the *Transitional Delegated Act* (TDA). Once again, the reason behind the transitional measures is that the IT systems that need to support the UCC are not yet fully operational. UPS 2016 *Union customs Code* <https://www.ups.com>; Descartes Date Unknown *EU Union Customs Code (UCC)* <https://www.descartes.com>; Compass Customs 2017 *The Union Customs Code*

legislation proceeds from the following principles:

(15) The facilitation of legitimate trade and the fight against fraud require simple, rapid and standard customs procedures and processes. It is therefore appropriate, in line with the Commission Communication of 24 July 2003 entitled "A simple and paperless environment for customs and trade", to simplify customs legislation, to allow the use of modern tools and technology and to promote further the uniform application of customs legislation and modernised approaches to customs control, thus helping to ensure the basis for efficient and simple clearance procedures. Customs procedures should be merged or aligned and the number of procedures reduced to those that are economically justified, with a view to increasing the competitiveness of business

(16) The completion of the internal market, the reduction of barriers to international trade and investment and the reinforced need to ensure security and safety at the external borders of the Union have transformed the role of customs authorities giving them a leading role within the supply chain and, in their monitoring and management of international trade, making them a catalyst to the competitiveness of countries and companies. The customs legislation should therefore reflect the new economic reality and the new role and mission of customs authorities.

(17) The use of information and communication technologies, as laid down in *Decision No 70/2008/EC* of the European Parliament and of the Council of 15 January 2008 on a paperless environment for customs and trade (10), is a key element in ensuring trade facilitation and, at the same time, the effectiveness of customs controls, thus reducing costs for business and risk for society. It is therefore necessary to establish in the Code the legal framework within which that Decision can be implemented, in particular the legal principle that all customs and trade transactions are to be handled electronically and that information and communication systems for customs operations are to offer, in each Member State, the same facilities to economic operators..⁸⁸

It is clear from the above text that the UCC incorporates principles that ensure less burdensome procedures for more tangible results at all levels. In other words, the purpose of its simple, rapid and standard customs procedures and processes is to make it possible to draw all the benefits international trade has to offer and to put in place procedures and rules that help facilitate legitimate trade and address fraud.⁸⁹ The UCC sought to align the EU's rules with global developments and drew inspiration from the WCO SAFE Framework of Standards that, beyond every other principle of

<https://www.compasscustoms.eu>; Levendal *A case study of the customs administrative penalty* 25.

88 *Regulation (EU) No 952/2013* of the European Parliament and of the Council of 9 October 2013 *laying down the Union Customs Code*.

89 Descartes Date Unknown *EU Union Customs Code (UCC)* <https://www.descartes.com>.

international security, advocates the provision of the Authorised Economic Operator (AEO) status.⁹⁰ Otherwise, the UCC is also founded on the principle of enabling a "Single Window" for the clearance of goods, where the customs administration and other state agencies come together at one point (in one electronic system) to operate all the necessary controls on goods, thereby avoiding multiple and time-consuming checks and this equally limits the occurrence of fraud.⁹¹ In the words of Sciberras,⁹² the UCC aims at "creating a modernised, simpler and integrated EU customs system which supports cross-border trade and provides more EU-wide cooperation."

The UCC and the related delegated and implementing acts aim more succinctly to: streamline customs legislation and procedures throughout the EU Member States; offer greater legal certainty and uniformity to businesses; increase clarity for customs officials; simplify customs rules and procedures and facilitate more efficient customs transactions in line with modern-day needs; complete the shift by customs to a paperless and fully electronic environment; and reinforce swifter customs procedures for compliant and trustworthy economic operators (through the AEO).⁹³

In its *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the Union legal framework for customs infringements and sanctions* (hereafter the Proposal for a DIRECTIVE), the European Commission sums up the purpose of the UCC as being the adaptation of customs legislation to the electronic age within the customs and trade environment; the advancement of the harmonisation and uniform application of customs legislation; and the provision to the Union's economic operators of adequate tools to easily develop and adapt their business to a global business environment.⁹⁴

90 Which invites customs to partner with economic operators for mutually beneficial transactions. Sciberras 2015 *The Malta Independent* 1; French Customs 2016 *General Presentation of the Union Customs Code* <http://www.douane.gouv.fr>; See further French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

91 Anonymous Date unknown *Union Customs Code* <http://www.edouane.com>.

92 Sciberras 2015 *The Malta Independent* 1.

93 Sciberras 2015 *The Malta Independent* 1; EU Date Unknown *The Union Customs Code (UCC)* <https://ec.europa.eu>; UPS 2016 *Union customs Code* <https://www.ups.com>; See also French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

94 European Commission 2013 *Proposal for a DIRECTIVE* 4.

The UCC is a full package made up of the UCC itself; the UCC *Delegated Act*,⁹⁵ the UCC *Implementing Act*,⁹⁶ the UCC *Transitional Delegated Act*⁹⁷ and the UCC Work Programme.⁹⁸ Because this thesis focuses on the impact of customs modernisation in France on customs offences, it is crucial to look into how these offences are dealt with at the EU's level.

4.2.1.2.2 The Process of harmonising customs offences and penalties in the EU

Although the EU customs legislation is consolidated in a single instrument, the enforcement of customs offences is country-specific or has been until recently.⁹⁹ This means that the other aspects of customs have a “common law” applied to them but for matters relating to customs infringement and the resulting penalties, each of the member states of the EU has its specific legal framework. Despite the fact that several participating countries have confirmed that their legal frameworks in respect of infringements and sanctions cohere well with the principles of effectivity, proportionality and dissuasion as prescribed by the former Article 21 of the *Modern Customs Code*,¹⁰⁰ the impact of the disparity in applicable laws is that it undermines other principles of harmonisation and the efforts made by the Union to function as a single entity.¹⁰¹ Beyond posing a challenge to the effective management of the

95 Adopted on 28 July 2015 as *Commission Delegated Regulation* No. 2015/2446 which supplements certain non-essential elements of the UCC. European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

96 Adopted on the 24th of November 2015 as *Commission Implementing Regulation* No. 2015/2447 which intends to ensure the existence of uniform conditions for the implementation of the UCC and the harmonised application of procedures by all member states. European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

97 Adopted on the 17th of December 2015 as *Commission Delegated Regulation* No. 2016/341 which establishes transitional rules for operators and customs authorities pending the upgrading or the development of the relevant IT systems to create a fully electronic customs environment. European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

98 Adopted on the 11th April 2016 as *Commission Implementing Decision* No. 2016/578 which relates to the development and deployment of the electronic systems provided for in the UCC and is closely linked to the UCC Transitional Delegated Act. European Commission 2017 *Electronic customs* <https://ec.europa.eu>.

99 Executive Summary of Annex 1-B of the *Impact Assessment Report 2013*; Annex 4A of the *Impact Assessment Report 2013*; European Commission 2013 *Proposal for a DIRECTIVE 2*; Deloitte 2014 *Customs Flash 1*.

100 This unprecedented inclusion in the MCC is relayed in article 42 of the UCC and concerns customs administrative penalties. European Commission 2013 *Proposal for a DIRECTIVE 4*.

101 Executive Summary of Annex 1-B of the *Impact Assessment Report 2013*; Point 1.3 of Annex 1-B of the *Impact Assessment Report 2013*; European Commission 2013 *Proposal for a DIRECTIVE 4*.

customs union, this state of affairs in respect of economic operators, for instance, has a negative impact on the level playing necessary to the Internal Market.¹⁰² The direct impact is that it provides an advantage to those who infringe the law in a state party that has less strict legislation for customs sanctions.¹⁰³ Consequently, what constitutes a criminal offence in one member state may not even be regarded as an offence in another member state, and this becomes problematic.¹⁰⁴ The harmonised customs legislation should, therefore, be strengthened by the development of similarly standard rules for enforcement.¹⁰⁵

To remedy the situation and evaluate the possibility of harmonising customs infringements and sanctions (both administrative and criminal) within the Union, in 2013, the European Commission established a Project Group to look into the matter.¹⁰⁶ The said Group drafted a Staff Working Document, *Impact Assessment*.¹⁰⁷ The latter document presents the series of questions that were to be put to EU member states regarding core aspects of their respective customs infringements and penalties provisions, in order to assess the specificities of each and see where differences lie and how they can be approached for the common interest of the member states.¹⁰⁸ More succinctly, the purpose of the consultation was to assess and quantify the size of the unequal treatment of offences within the Union, as the Commission wished to find out if it was feasible to develop a common piece of legislation dealing with customs infringement and sanctions.¹⁰⁹

With the aim of dealing harmoniously with the breaching of customs legislation and

102 European Commission 2013 *Proposal for a DIRECTIVE 4*.

103 A further example is the process of obtaining the advantageous status of Authorised Economic Operator (AEO). Usually granted to law-abiding operators and those that do not have any record of serious infringements, an inconsistent application of laws regarding customs offences will negatively impact the access and granting of customs simplification and facilitation or the very process of obtaining the AEO status. European Commission 2013 *Proposal for a DIRECTIVE 4*.

104 Annex 4A of the *Impact Assessment Report 2013*.

105 European Commission 2013 *Proposal for a DIRECTIVE 4*, 9.

106 Paragraph 5, Executive Summary of Annex 1-B of the *Impact Assessment Report 2013*; European Commission 2013 *Proposal for a DIRECTIVE 2*

107 Brussels, 13.12.2013 SWD (2013) 514 final.

108 Point 1 of Annex 1-A of the *Impact Assessment Report 2013*.

109 Annex 4A of the *Impact Assessment Report 2013*.

so enabling a level playing field for economic operators,¹¹⁰ at the end of the assessment by the Project Group, the European Commission came up with a proposal for a new Directive (2013/0432 (COD)). The Proposal:

[s]ets a common legal framework for the treatment of customs infringements and sanctions, bridging the gap between different legal regimes through a common platform of rules and thus contributing to an equal treatment between economic operators in the EU, as well as the effective protection of the Union's financial interests and law enforcement in the field of customs.¹¹¹

More aptly, the proposal

includes a common list of different infringements (strict liability, committed with negligence and committed with intent) breaching the rules of the Union Customs Code and as such encompasses all possible situations that persons may face in that respect when dealing with customs authorities. The proposal considers as infringement not only the complete performance of the behaviours listed in the proposal but also its intentional attempt.

In parallel to those conducts, this proposal also establishes a common scale of effective proportionate and dissuasive sanctions linked to the infringements and relevant circumstances that should be taken into account by the competent authorities from Member States when determining the type and level of sanctions for customs infringements which contribute to the adaptation of the sanction to the specific situation. The combination of the scale of the sanctions along with the relevant circumstances permits to establish several levels of severity in order to respect the principle of proportionality of the sanctions. Moreover, the proposal defines certain cases where a behaviour falling in the categories defined as strict liability infringements by this proposal shall not be considered as such when they are due to an error on the part of the competent customs authorities.¹¹²

So, member states of the EU have to ensure that the provisions of the proposal are satisfactorily transposed into their respective legal orders.¹¹³ With the IT culture promoted in the UCC, cooperation will make it possible for a decision taken in one country to be easily enforced in any of the other countries.¹¹⁴ The Proposal is made up of twenty-one articles in all. It should be noted that the Proposal introduces a uniform non-criminal system, thus making it possible for each member state to handle criminal prosecution according to its criminal law regime.¹¹⁵ This approach gives individual countries the power to decide on criminal sanctions which is fundamental

110 Deloitte 2014 *Customs Flash* 1.

111 European Commission 2013 *Proposal for a DIRECTIVE* 2.

112 European Commission 2013 *Proposal for a DIRECTIVE* 7, 8.

113 European Commission 2013 *Proposal for a DIRECTIVE* 8.

114 European Commission 2013 *Proposal for a DIRECTIVE* 9.

115 Levendal *A case study of the customs administrative penalty* 27.

for the exercise of sovereignty. France also has a national framework for its customs activities which is dealt with hereunder.

4.2.1.3 National sources of French customs law

The French *Customs Code* is considered the most important piece of legislation governing French national customs, for the purpose of this study.

4.2.1.3.1 The French Customs Code

The French *Customs Code* (hereafter FCC) is the national piece of legislation that regulates import and export transactions in France and beyond. The Code extensively regulates the actions of the customs administration with its interlocutors. Only a few aspects of the FCC are evaluated below, especially those that bear the features of the founding principles of customs modernisation as discussed in Chapter 2 above.

4.2.1.3.1.1 Categorising customs offences according to the FCC

In France, customs offences fall into either of two categories. The first category is customs contraventions (five classes), and the second category is customs offences (three classes).¹¹⁶ Contraventions attract less severe fines than offences, and offences can warrant a jail sentence. A table (represented in Annexure 1 below) would best describe the two categories and highlight what differentiates the one from the other.¹¹⁷ In this table, it can be seen that not all customs infringement can be qualified as an offence in the French context. The RKC suggests that identifying customs offences and providing deterring penalties and the procedure to follow upon discovery, are important steps to the overall process of limiting the impact of these offences on society.¹¹⁸ Still, in line with the requirements prescribed in the RKC, the FCC grants customs officers extensive powers to limit the commission of customs offences in its territory. This aspect meets the prescription on Standard 5 and subsequent Standards

116 Articles 408-409 of the FCC.

117 The categorisation is almost word for word similar to that done in the CEMAC *Customs Code*. This reinforces the idea that the colonial inheritance is still very palpable in Francophone African systems in general and in Cameroon in particular. See generally 6.2.1.2.1 and specifically 6.2.1.2.1.1 below.

118 See generally Specific Annex H to the RKC which was discussed in details at 2.2.1.1 above and more precisely Standards 2, 9, 22 and Recommended Practice 10 Just to mention a few.

of Specific Annex H to the RKC. This reinforces the idea that France runs its customs business in line with the WCO's principles and approaches.

4.2.1.3.1.2 Prerogatives and powers of customs officers that impact on combatting customs offences

The French customs administration has the power to exercise all types of control to prevent infringements of the laws and regulations that apply in the customs territory and to prosecute infringements of these same laws and regulations committed in the customs territory. To enable the administration to effectively fulfil this mission, a number of prerogatives and powers are provided to customs officers by the FCC. The officers have the right to inspect goods and means of transport as well as people.¹¹⁹ They have the right of access to premises and places for professional use and may make home visits.¹²⁰ Article 64 of the FCC states that they may visit any place, even if it is a private place, and seize documents and assets/goods that may have a direct or indirect link to the suspected offences. They must, however, be accompanied in these visits by a judicial police officer. Apart from cases where the officers need to act urgently to uncover offences or stop their perpetration, any such visit must be authorised by a competent high court judge. Access to premises includes the premises of postal service providers and express freight companies, in the presence of the controlled operator or his representative. Even though customs authorities can visit postal services and express freight companies beyond their regular operational hours, which are from 8:00 a.m. to 8:00 p.m., when sorting, transporting, handling or storing is in progress, the principle of the secrecy of the correspondence prevails, so letters and parcels may not be tampered with in any circumstance.¹²¹

The powers of customs officers in enforcing customs laws and regulations extend to the possibility of temporarily detaining persons who are suspected of partaking in an offence in any capacity.¹²² Customs officers may arrest and detain a person, however,

119 Article 60 of the FCC.

120 Article 63 of the FCC.

121 Article 66 of the FCC.

122 Article 67 ter of the FCC.

only when the person is caught in action committing customs offences punishable by imprisonment, and where such arrest and detention is required for the customs investigation.¹²³ Cooperation is another aspect of modernisation that stands out from the FCC.

4.2.1.3.1.3 Working in conjunction with customs agencies of other countries and with other national state agencies

Cooperation for the purpose of efficiently curbing customs offences is an approach that has been promoted by the WCO through its instruments. The French customs administration is authorised by the FCC to assist the qualified authorities of foreign countries by providing them with all the information, certificates, minutes and any other documentation that may help the requesting state to establish a breach of customs laws and regulations applicable at the entry or exit of its territory.¹²⁴ Such assistance may be of any sort but must be based on the principle of reciprocity. That means that the country requesting the assistance must be able to provide such assistance in return. On the other hand, there is a need for cooperation between customs authorities and the other bodies of the same state. The French *Cour des Comptes* sees customs cooperation with other government agencies as a crucial tool in fighting fraud and traffics. It also makes it clear that the efficiency of customs actions in fighting fraud and traffics depends mostly on the type of relationship the administration entertains with other state departments.¹²⁵ About sharing information with the parties concerned, several obstacles affect the smooth running of such services. These are the different ways of configuring the respective information systems, the difficulties any one government agency has in accessing the database of any other government agency, and the late or delayed transmission of the required information.¹²⁶

Beyond the national sphere of each state, the EU recommends to its member states

123 Article 323-1 of the FCC.

124 Article 65 (6) of the FCC.

125 French *Cour des Comptes* "L'Action de la Douane" 91.

126 French *Cour des Comptes* "L'Action de la Douane" 93.

that they enter into agreements with other nations or other trading blocs because this type of cooperation enables the harmonisation and simplification of customs procedures for all stakeholders.¹²⁷ The EU also believes that this type of agreement strengthens national and international efforts to protect intellectual property rights and generally curb fraud.¹²⁸ The French customs' capacity to be part of any such agreement proceeds from article 2 (6) and (7) of *Decree* No 2007-1664 of 26 November 2007. Post-clearance control in the FCC does not bear all the specificities of post-clearance audit as proposed by the WCO, but it does help the French customs administration to achieve better control and to detect non-compliance.

4.2.1.3.1.4 Post-clearance control

In France, customs control is carried out either during import or export clearance or after clearance within well-defined deadlines.¹²⁹ When carried out after clearance, it is called post-clearance control (*contrôle a posteriori*) and can be done at businesses sites, at the residence of the owner of the goods or that of his or her representative, or at the place of any person having any direct or indirect professional link to the operations in question.¹³⁰ The purpose of this operation is for customs to ensure that the information provided during clearance is indeed truthful. This is indeed an effective way of uncovering and punishing fraud and non-compliance. For a thorough verification, customs agents are allowed to access all documentation (article 65 of the FCC), to access professional premises (article 63 ter of the FCC) and to carry out any such control that may be necessary on any infrastructure. These controls should, however, be conducted without any violation and within the limits of what is legally permissible.¹³¹ Customs agents may require an expert to assist them during such control.¹³² The expert conducts his/her duties under the watch of customs agents and provides them with a report at the end of their task. At the end of the post-clearance control, if the agents have enough reasons to suspect the commission of an offence or its attempt, they may decide to conduct a free audit (*Audition Libre*) in accordance

127 European Commission *Douanes 7* file:///C:/Users/nwuuser/Downloads/customs_fr.pdf.

128 European Commission *Douanes 7* file:///C:/Users/nwuuser/Downloads/customs_fr.pdf.

129 French Customs 2015 *Charter of customs controls* <http://www.douane.gouv.fr>.

130 Article 48 of the UCC.

131 French Customs 2015 *Charter of customs controls* <http://www.douane.gouv.fr>.

132 Article 67 quinquies A of the FCC.

with Article 67F of the FCC and following the procedure laid down in the article 61-1 of the *Criminal Procedure Code*. The aspects discussed above contribute greatly to the achievement of French customs' goals of efficiency in a progressive customs environment. Because the celerity of the customs dispute system also contributes to achieving greater enforcement in today's customs dealings, it is important to look at what the FCC has to say about settling customs disputes. It is also crucial to remember that the establishing of dispute settlement processes respond to the suggestions made by the WCO in the RKC.¹³³

4.2.1.3.1.5 Customs litigation under the FCC provisions

Customs litigation refers to all the steps involved in the process of resolving disputes resulting from the enforcement of customs laws and regulations. Customs litigation in the context of customs modernisation contributes significantly to preventing the perpetration of customs offences. The celerity of dispute settlement is an aspect that promotes transparency.¹³⁴ For a dispute to be brought before a court of law, it has to have failed to find a solution within the customs administration itself through what is called the administrative appeal or administrative settlement of disputes. It is only once such a process fails that the courts come into play. The process of solving customs disputes in the French customs' environment is very much similar to that of Cameroon.¹³⁵ The various steps are discussed below.

4.2.1.3.1.5.1 Administrative settlement of disputes under the FCC

In its Article 350, the FCC gives customs officers the capacity to settle (*la transaction*) with offenders with a view of enforcing customs tax penalties and the jail sentences deriving from them.¹³⁶ The settlement (*la transaction*) is simply a procedure allowing customs officers and customs laws offenders to reach a mutually beneficial solution to a customs dispute. This arrangement places on the offender a duty to do something, for instance, pay a settlement fine against the administration renouncing to its right

133 See specifically Standard 2, 19, 22 and 27 of Specific Annex H to the RKC.

134 Mikuriya "Legal framework for customs operations" 61.

135 Which is discussed at 6.2.1.2.1.3 and the sub-sequent headings below.

136 See also French *Cour des Comptes* "L'Action de la Douane" 102.

to take the matter to court.¹³⁷ This process saves time and money to both parties and is ideal for solving minor disputes, thereby giving sufficient time to the administration to focus on more serious offences.¹³⁸ The list of authorities allowed to settle in matters of customs infringements is given in *Decree* No 78-1297 of 28 December 1978. Besides the other authorities that all form part of the customs decentralised offices, the Customs DG and the Customs Minister can also settle in matters involving foreign jurisdictions and very high amounts of duties eluded or benefits unduly perceived. In such circumstances, the decision to settle must be submitted to the Exchange, Customs and Tax Litigation Committee (CCFDC) for its opinion.¹³⁹ However, the latter's opinion is purely consultative and does not, in any case, bind the administration.¹⁴⁰ When the administrative process fails to provide a solution to a dispute, the court can be involved thereafter.

4.2.1.3.1.5.2 Legal proceedings in French customs matters

Prosecution and recovery usually precede the actual court procedure in customs matters. All customs offences and contraventions may be prosecuted and proven by all means of law.¹⁴¹ The action for the enforcement of sentences is exercised by the public prosecutor (*le ministère public*). Regarding the application of fiscal sanctions, the action is exercised by the customs administration; the public prosecutor can exercise this power only incidentally.¹⁴² In the instance that the perpetrator of a customs offence dies before a final judgment or a settlement (*la transaction*) is pronounced or reached, the customs administration is mandated to proceed against the latter's estate, the action aiming at the pronouncement by the president of the High Court of an order for the confiscation of objects liable to this penalty or, if they cannot be seized, the payment of a sum equal to the value of the said objects and calculated on the basis of the internal market price at the time when the fraud was

137 French Customs 2015 *Charter of customs control* <http://www.douane.gouv.fr>.

138 French Customs 2015 *Charter of customs control* <http://www.douane.gouv.fr>.

139 Article 460 of the FCC.

140 French Customs 2015 *Charter of customs control* <http://www.douane.gouv.fr>.

141 Article 342 of the FCC.

142 Article 343 of the FCC.

committed.¹⁴³

In France, the mandate to settle disputes the judicial way is shared between customs and the prosecuting authority. Three ways of responding to customs offences are available in the French system, namely bringing the offender before a prosecutor, engaging in direct proceedings (direct summons) or lastly, through the act of the tax authority.¹⁴⁴ When caught red-handed, customs offenders can be directly presented by customs officers to the prosecutor's office to be tried, following the procedure set for direct appearance.¹⁴⁵ As for direct prosecution/direct summons, the accused is summoned by the administration to present himself or herself directly¹⁴⁶ before the criminal court or the police court to face charges regarding any customs offence.¹⁴⁷ With reference to the initiation of proceedings by the act of the tax authority, where the proof of an infringement is not sufficiently established or where further investigation is needed, in particular in other States, customs may, while seizing the the prosecution by the initiating act of tax authority, request the opening of a judicial inquiry.¹⁴⁸

The French customs administration, like any other independent state agency, may take action within limits defined by its *Customs Code* without having to involve the judicial authority.¹⁴⁹ However, this authority is said to be problematic in so far as it may undermine the authority of the judiciary in one way or another.¹⁵⁰ One aspect of such risk is the fact in acting on its own; the customs administration may unwittingly interfere with ongoing legal proceedings.¹⁵¹ The consequences may, therefore, be severe when the customs administration's actions relate to specific individuals that are

143 Article 344 of the FCC.

144 French *Cour des Comptes* "L'Action de la Douane" 102; French Customs 2016 *Infractions douanières en matière de contrefaçon* <http://www.douane.gouv.fr>.

145 French *Cour des Comptes* "L'Action de la Douane" 102; French Customs 2016 *Infractions douanières en matière de contrefaçon* <http://www.douane.gouv.fr>.

146 That is without any prior judicial enquiry or investigation.

147 French *Cour des Comptes* "L'Action de la Douane" 102; French Customs 2016 *Infractions douanières en matière de contrefaçon* <http://www.douane.gouv.fr>.

148 French *Cour des Comptes* "L'Action de la Douane" 102; French Customs 2016 *Infractions douanières en matière de contrefaçon* <http://www.douane.gouv.fr>.

149 French *Cour des Comptes* "L'Action de la Douane" 102.

150 French *Cour des Comptes* "L'Action de la Douane" 103.

151 French *Cour des Comptes* "L'Action de la Douane" 103.

a danger to public order.¹⁵² Usually, matters relating to narcotics and counterfeiting are tried before the judicial authority.¹⁵³ In this respect, eight specialised inter-regional jurisdictions are dealing with organised crime (narcotics being at the top of the list).¹⁵⁴ The existence of these jurisdictions facilitates dialogue with territorial customs services.¹⁵⁵ In order to further facilitate communication between customs and the judiciary and thus avoid any instance where the actions of one of these administrations affect the actions of the other, a common *Circular* was signed between the Director of Criminal Affairs and Pardons and the Customs DG on 6 May 2009.¹⁵⁶ This circular not only defines the boundaries within which each of the bodies can operate¹⁵⁷ but also sets the threshold under which customs can proceed to the settlement of disputes and the threshold beyond which customs must allow the judicial authority to step in.¹⁵⁸

There are instances where the problem does not lie in the lack of communication, but rather in the delayed transmission of information, which still affects the other administration's work.¹⁵⁹ Unlike the police or the *gendarmerie*,¹⁶⁰ customs has essential administrative powers assigned to it that do not place it under any obligation to transmit its files to the judicial authority at an early stage.¹⁶¹ Customs has extensive administrative powers that enable it to engage in its own investigations and even deprive individual suspects of their freedom.¹⁶² It is said that customs prefers proceeding that way because it thinks that involving the court in every single matter prevents the administration from fully enjoying the resources made available to it by the *Customs Code*.¹⁶³ Another reason why customs acts on its own is that the procedural requirements related to the identification of the parties and of the circumstances each specific case may, in some instances, affect the confidentiality

152 French *Cour des Comptes* "L'Action de la Douane" 103.

153 French *Cour des Comptes* "L'Action de la Douane" 103.

154 French *Cour des Comptes* "L'Action de la Douane" 103.

155 French *Cour des Comptes* "L'Action de la Douane" 103.

156 French *Cour des Comptes* "L'Action de la Douane" 102.

157 Scope of their respective duties.

158 French *Cour des Comptes* "L'Action de la Douane" 102.

159 French *Cour des Comptes* "L'Action de la Douane" 103.

160 The *Gendarmerie* in French speaking countries is an enforcement body operating under the Ministry of Defence.

161 French *Cour des Comptes* "L'Action de la Douane" 103.

162 French *Cour des Comptes* "L'Action de la Douane" 103.

163 French *Cour des Comptes* "L'Action de la Douane" 103.

which the administration needs to extend to its human sources.¹⁶⁴ While not dismissing the argument that the requirement of such co-operation may limit the ability of the customs administration to act independently, the Chancellery believes that the customs administration needs to find a compromise between its capacity to act independently and the requirements laid down by the judiciary, in the same way as the police services do.¹⁶⁵

The Chancellery wishes to see the judicial authority being more involved in customs matters than previously, hoping that such closer involvement would eradicate the risks to which the lack of cooperation exposes the different administrations.¹⁶⁶ Furthermore, it is the Chancellery's view that the judicial authority can contribute constructively to developing an effective strategy for the investigation of customs offences.¹⁶⁷ This view is not shared by the customs administration and its partners, however. They believe that while being asked not to intervene so that they will not interfere with the ongoing investigation(s), offences are in the meantime being perpetrated. Furthermore, giving a fine or amicably settling customs disputes (*via la transaction*) boosts the State's funds, which a judicial investigation or inquiry cannot do.¹⁶⁸ This implies that there must be a shift in the way customs carries out its duties as all entities having a role to play in this industry have to balance their interest in order to accommodate each other for better enforcement. The courts' jurisdiction in customs matters in the French environment is discussed in more detail below, followed by the different ways in which customs offences cease to be prosecutable.

4.2.1.3.1.5.2.1 Courts' jurisdiction/competence in customs matters

The French court's ability to deal with customs disputes rests on two requirements, namely the subject-matter jurisdiction (*ratione materiae*) or the territorial competence (*ratione loci*).

164 French *Cour des Comptes* "L'Action de la Douane" 103.

165 French *Cour des Comptes* "L'Action de la Douane" 104.

166 French *Cour des Comptes* "L'Action de la Douane" 104.

167 French *Cour des Comptes* "L'Action de la Douane" 104.

168 French *Cour des Comptes* "L'Action de la Douane" 104.

As regards to the competence *ratione materiae* (subject-matter jurisdiction), the *tribunaux de police* (police courts) are competent to hear customs matters of the nature of contravention and all other customs enquiries raised by way of exception.¹⁶⁹ The *tribunaux correctionnels* (criminal courts) are competent to hear all customs offences and all other customs matters raised by way of exception. They are also competent to hear issues relating to customs contraventions that are somehow connected to a customs offence or a common-law offence.¹⁷⁰ The *tribunaux de grande instance* (high courts) deal with disputes relating to the payment, guarantee or repayment of claims of any kind recovered by the customs administration and all other customs matters falling outside the competence of *jurisdictions repressives* (criminal courts).¹⁷¹

As for the competence *ratione loci* (territorial competence), when a seizure report establishes customs offences, the matter is brought before the court nearest to the district where the offence was discovered. Issues relating to claims, to requests made in connection with the prescription, and those relating to deposits are instead within the competence of the *tribunal de grande instance* nearest to the customs office, the specialised service or the regional customs directorate where the claim was established.¹⁷² As for every other matter outside those mentioned above, the ordinary rules of jurisdiction in force in the territory in question are applicable.

4.2.1.3.1.5.2.2 Methods of extinction of the rights of prosecution and punishment in customs matters

The first step leading to the extinction of the customs administration's right of prosecution is through a settlement (*la transaction*).¹⁷³ Before resorting to such an amicable settlement, the customs administration must ensure that a few conditions are met, namely that there is no pending case against the person in question, or if there is a case, that it has not reached a certain level of settlement. Another way in

169 Article 356 of the FCC.

170 Article 357 of the FCC.

171 Article 357 *bis* of the FCC.

172 Article 358 of the FCC.

173 Article 350 of the FCC.

which a customs administration's right to prosecute customs offences and contraventions can come to an end is through prescription. For customs offences specifically, the period of the prescription lasts for as long as and runs under the same conditions as a public action in common law offences.¹⁷⁴ More precisely, and as from 2017,¹⁷⁵ customs offences prescription now runs for six years while the prescription period for action against contraventions remains for three years. This has the advantage of giving the administration enough time to bring the offenders to book regardless of when the cause of action arose. As trade grows and consequent development takes place, the French customs administration strives to keep abreast of these changes by adjusting its *Customs Code* accordingly and on an ongoing basis.

4.2.1.3.2 Continual adjustment of the French Customs Code to the demands of time

One way of keeping in step with the pace at which international trade develops and responding to the challenges that come with it is to adjust and adapt existing legal instruments with the aim of making them more responsive to the demands of time. This continual and ongoing adaptation provides customs authorities with the tools to carry out their duties.¹⁷⁶ Judging from what appears on the French customs administration's website, the French *Customs Code* (FCC) is reviewed and updated twice a year.¹⁷⁷ The current version of the FCC was consolidated on 1 January 2018.

The legal basis of French customs laws having been scrutinised, it is now possible to look into the practical steps the administration has taken that contribute to its modernisation plan and to the fight against customs offences.

4.2.2 *Practical aspects of the French customs modernisation*

Like the legal aspects, several practical steps have been taken by French customs to improve its services in the context of a changing and fast developing trade environment and to help in the fight against customs offences. These practical steps

174 Article 351 of the FCC.

175 Law no 2017 – 242 of 27 February 2017 on the reform of the limitation period in criminal matters amending article 351 of the *Customs Code* which deals with the time limit for action by the customs administration to punish customs offences and contraventions.

176 French *Cour des Comptes* "L'Action de la Douane" 104.

177 French Customs 2016 <http://www.legifrance.gouv.fr>.

are various and are presented in their diversity under the umbrella of the founding principles discussed in Chapter 2 above. It is important to point out that the principles of risk management and maximum use of information technology are complementary because risk management is mainly conducted through automated systems. Automation is, therefore, a preliminary step for carrying out risk management. This means that an aspect discussed under 4.2.2.1 might well fit under 4.2.2.3 and this would mean that the step in question bears the features of both risk management and automation.

4.2.2.1 Risk management and post-clearance audit

The Import Control System is the EU centralised declaration system that also serves as a risk management tool in the union's customs dealings. As for the post-clearance audit approach, it bears the name of post-clearance control and was discussed in details at 4.2.1.3.1.4 above. Only the Import Control System is revisited below.

4.2.2.1.1 The Import Control System

Mainly developed to facilitate the understanding of trade flows, the Import Control System (ICS) is the foundation of European customs security.¹⁷⁸ The ICS was first introduced in 2011, as an attempt to boost the safety and security measures regarding air and maritime freight in order to counter risks of terrorist attacks.¹⁷⁹ With this system and for goods being shipped from non EU countries into the EU countries, an Entry Summary Declaration (ENS) comprising security and safety data must be made available online by the carrier to the first customs office in the European Union that the goods cross.¹⁸⁰ Upon this submission, a risk analysis is conducted to ascertain

178 SCB Trading Portal Date Unknown *European Union Import Control System – ICS* <https://www.scbtrade.com>; French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>; Conex 2015 *ICS – Import Control System* <http://www.conex.net/en-FR/import-control-system.html>; French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

179 French Customs 2015 *French Customs 2015 Results* <http://www.douane.gouv.fr>.

180 SCB Trading Portal Date Unknown *European Union Import Control System – ICS* <https://www.scbtrade.com>; French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>; Conex 2015 *ICS – Import Control System* <http://www.conex.net/en-FR/import-control-system.html>.

whether the goods should proceed or be stopped.¹⁸¹ Filing an ENS has now become compulsory for all goods being shipped to France since 2015.¹⁸² This is a way of managing risks, and it has been implemented within the line of suggestions made by the WCO SAFE Framework of Standards.¹⁸³ France like the WCO, places a significant emphasis on cooperation as is discussed hereunder.

4.2.2.2 An accent on cooperation and partnership

France approach to cooperation both with customs and other government enforcement agencies was discussed at 4.2.1.3.1.3 above. As regards the concept of Authorised Economic Operator (AEO) which is a core value in the SAFE Framework of Standards to Secure and Facilitate Global Trade, and which makes it possible for customs to build sustainable partnerships with legitimate businesses or economic operators, it is one of the many innovations brought forth by the UCC. The following paragraphs are supplementary to the discussions at 4.2.1.2.1 and 4.2.1.3.1.3 above.

4.2.2.2.1 Customs experts "Tour de France"

Customs experts "Tour de France" was initiated by the French customs in September 2013.¹⁸⁴ The campaign bore as its motto "overseas success".¹⁸⁵ The primary aim of this national approach is keeping private companies always up to date (through workshops, round table and personal interviews) with customs procedures that can be beneficial to them in terms of cost-effectiveness, saving time and simplified formalities.¹⁸⁶ Beyond this issue and with more relevance to this thesis, this initiative also seeks to inform the companies concerned about the opportunities offered to them by existing customs laws and regulations as well as any development that has occurred

181 SCB Trading Portal Date Unknown *European Union Import Control System – ICS* <https://www.scbtrade.com>; French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>; Conex 2015 *ICS – Import Control System* <http://www.conex.net/en-FR/import-control-system.html>.

182 French Customs 2015 *French Customs 2015 Results* <http://www.douane.gouv.fr>.

183 SCB Trading Portal Date Unknown *European Union Import Control System – ICS* <https://www.scbtrade.com>.

184 French Customs *Customs clearance in France* 13.

185 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

186 French Customs *Customs clearance in France* 13; Eckert 2015 *Douane Magazine* 5.

in international trade provisions.¹⁸⁷ These two steps¹⁸⁸ form part of an overall forty-measures target set by French Customs to support business within its territory and beyond, to be reached by 2018.¹⁸⁹ This is thus a specific mission on which French customs has been working and which purports to ease these stakeholders' understanding of the *Union Customs Code*, which had then not yet become operational.¹⁹⁰ This is a support initiative by French customs to boost businesses competitiveness abroad.¹⁹¹ In regard to business, one of the founding goals of modernisation is to build strong and growing partnerships with businesses, taking into account three vital factors, namely their reliability, their ability to provide the administration with accurate information, and their capacity to keep track of their trading.¹⁹² These partnerships have the advantage of enabling customs to focus its resources where they are most needed, and thus to provide substantial protection both on the local and the European levels.¹⁹³ Corruption, other financial and tax offences matters are handled by a Central Office that works in close collaboration with other government bodies as discussed in the following paragraph.

4.2.2.2.2 Central office to fight against corruption, financial and tax offences

The Central office to fight against corruption, financial and tax offences derives from the recently adopted French legislation on economic crime, namely *LAW* No. 2013-1117 of 6 December 2013 *on the fight against tax fraud and large-scale economic and financial crime*. This law was preceded by *Decree* No. 2013-960 of 25 October 2013 *establishing a central office for the fight against corruption and financial and tax offences*. The office serves as the central contact point in France for all acts of international cooperation with organisations and states, relating to corruption, tax and

187 French Customs *Customs clearance in France* 13.

188 Measure 27 seeks to "Present the opportunities of the Union Customs Code (UCC) during the Customs experts' "Tour de France"" while Measure 28 aims to "Counsel Businesses in terms of customs regulations".

189 French Customs *Customs clearance in France* 13-14.

190 Eckert *Douane Magazine* 5.

191 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

192 The French Customs administration has devised 40 concrete measures to support businesses and everything about the AOE status in France is found in the said document. French Customs *Customs clearance in France* 1-20.

193 French Customs *Customs clearance in France* 1-20.

financial crimes.¹⁹⁴ Within the borders of France, it centralises, analyses, exploits and transmits its findings to a range of government departments that are directly or indirectly affected by its work.¹⁹⁵ Having ratified the *OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* on 31 July 2000, the working group tasked with monitoring the members' application of the Convention pointed out to France in 2012 that their anti-corruption efforts were not strong enough, and that they were not complying with the provisions of the Convention.¹⁹⁶ Note is to be taken that the *Convention* is a set of legally binding standards to criminalise the bribery of foreign public officials in international business transactions and that it focuses mainly on the "supply-side" of bribery.¹⁹⁷

In response, France undertook to reform its anti-corruption laws, but the above-mentioned working group still found such steps insufficient and advised the country to take its efforts even further in order to meet the standard set by the *Convention*.¹⁹⁸ The European Commission also noted the insufficiency of France's efforts in one of its reports.¹⁹⁹ The new legislation thus emanates from the criticism mentioned above. It increases investigators' powers by enabling them to carry out a multitude of acts during investigations and provides very severe sentences.²⁰⁰ The piece of legislation is also innovative in that it creates a new Prosecutor's Office that specialises in criminal proceedings relating to financial crime matters only and bears the name *Procureur de la République Financier* "Financial Public Prosecutor".²⁰¹ Established on 27 October 2014 the Office was provided with efficient and adequate material to carry out its mission.²⁰² The staff of this particular office consists of police officers and members of the General Directorate of Public Finances.²⁰³ The diversification in the constitution of

194 Article 8 of *Decree* No. 2013-960 of 25th October 2013.

195 These bodies are the national police, units of the National *Gendarmerie*, the services of the Directorate General of Customs and Excise, the General Directorate of Public Finance and the Directorate General for Competition, Consumer Affairs, Fraud Control and Judicial Authorities. Article 5 of *Decree* No. 2013-960 of 25th October 2013.

196 Kowalski 2014 *The French fight against tax fraud* <http://www.elexica.com>.

197 OECD 2016 <http://www.oecd.org>.

198 Kowalski 2014 *The French fight against tax fraud* <http://www.elexica.com>.

199 Kowalski 2014 *The French fight against tax fraud* <http://www.elexica.com>.

200 WCO 2015 *Integrity Newsletter* 15.

201 Article 65 of *Law* No. 2013-1117 of 6 December 2013.

202 Kowalski 2014 *The French fight against tax fraud* <http://www.elexica.com>.

203 Kowalski 2014 *The French fight against tax fraud* <http://www.elexica.com>.

the staff is undoubtedly a deliberate strategy followed by the administration to facilitate communication between the agencies involved, in order to achieve better results in the prevention and detection of economic crime. In the process of modernising customs regulations and practices, automation is crucial.

4.2.2.3 Maximum use of Information Technology

Information technology is at the centre of all customs modernisation efforts. A few aspects of the French customs steps in this regard are discussed below. It is important to emphasise once again that automation is a prerequisite to risk management and some initiatives fall both under the risk management principle and the automation of procedures. For instance, the Import Control System as discussed at 4.2.2.1.1 above and the Single Window (*Guichet unique*) are both used in France (EU) to facilitate customs declarations submissions and trade in general while also assisting in managing risks.

4.2.2.3.1 Datamining

French customs' strategic inspection approach draws from a varied range of tools, all forming part of a sophisticated information system.²⁰⁴ These tools relate on the one hand to the software set for online customs declarations (DELTA),²⁰⁵ an automated targetting and risk management platform (RMS), and on the other hand to an inspection database that serves customs nationally (BANACO).²⁰⁶ All these are intelligence and analysis tools which are said²⁰⁷ to be ground-breaking methods that assist in gathering and analysing valuable information that, in turn, help in the fight against customs offences. The main purpose of datamining is to sift through large amounts of data to detect fraudulent patterns that may have gone unnoticed by other risk analysis instruments.²⁰⁸ In a nutshell, datamining is a way of improving and

204 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

205 DELTA or DELT@ is basically a teleservice. French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>; Banco Santander 2019 *Import customs procedures in France* <https://en.portal.santandertrade.com>; French Customs 2019 *Les sources d'information de la douane* <http://www.douane.gouv.fr>.

206 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

207 French Customs 2015 *French Customs 2015 Results* <http://www.douane.gouv.fr>.

208 French Customs 2015 *French Customs 2015 Results* <http://www.douane.gouv.fr>.

optimising the overall French risk analysis toolset.²⁰⁹ The acknowledgement that some risks may go unnoticed when using certain risk management tools, points to the fact that customs modernisation, for which risk management is a founding principle, is not after all without shortcomings. Nevertheless, this process is still credited for the fact that it has raised the standard of customs administrations at all levels all over the world. French customs deals with intelligence and consequent analysis in different ways. Besides the datamining dimension discussed in here, the other aspect of intelligence and analysis is evaluated below.

4.2.2.3.2 Further development of Intelligence and analysis

With a view to keeping up to date with ever-changing threats²¹⁰ and in an attempt to modify its stance from a legal, regulatory and technological viewpoint, French customs has broadened its intelligence activities.²¹¹ It draws on a network of specialists and analysts in several domains and has also established an inter-departmental unit that has the duty of carrying out strategic analysis by detecting emerging threats and consequently adjusting customs' responses thereto.²¹² It is important to remember that France has different intelligence bodies attached to different ministries.²¹³ A significant feature of the intelligence and analysis tool is that its experts proceed by comparison and closely monitor other countries' policies and best practices with the view of enhancing theirs.²¹⁴ This approach once again serves well the interest of a modernising customs administration by allowing it to keep abreast with changes surrounding its work and this, has an undeniable impact on customs offences. The efforts to combat customs offences are not limited to France's boundaries, some of them are carried out at the European Union's level. One example is the European Anti-Fraud Office which also attests to the automation of French customs procedures.

209 French Customs 2015 *French Customs 2015 Results* <http://www.douane.gouv.fr>.

210 Considering all terrorist attacks that have been perpetrated in Europe in general in the past years and in France in particular.

211 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

212 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

213 Vernile 2018 *The evolution of intelligence services around Europe* <http://mediterraneanaffairs.com>.

214 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

4.2.2.3.3 European Anti-Fraud Office (OLAF)

The National Anti-Fraud Office (OLAF) sustains EU operations by providing strategic analysis and a secured information technology platform for the real-time exchange of intelligence, and also by deploying investigators and forensic experts. OLAF is a specialised office within the EU tasked with curbing fraud and most importantly, with protecting the financial interests of the Union.²¹⁵ OLAF is tasked with the mandate to strengthen the fight against a range of offences which vary between embezzlement, fraudulent claims, misbehaviours in public procurement procedures and customs fraud.²¹⁶ With specific reference to offences perpetrated online, the Central Directorate of the Judicial Police has established a Central Office.

4.2.2.3.4 The Central Office for the fight against crime linked to information technology and communication (OCLCTIC) of the Central Directorate of the Judicial Police (DCPJ)

The Central Office for the fight against crime linked to information technology and communication (OCLCTIC), which is located in the Central Directorate of Judicial Police (DCPJ), is a national structure that has a comprehensive mandate and which has interdepartmental and operational focus.²¹⁷ It deals with judicial matters on the violations associated with the automation of procedures, and thus with every type of fraud and crime that occurs through the online processing of documents, payment transactions and the like.²¹⁸ It also works towards ensuring that the information systems of government departments and economically or technically vulnerable companies are shielded from such violations.²¹⁹ This working force operates from information generated and gathered by different sources and has different ways of

215 French *Cour des Comptes* "L'Action de la Douane" 32; European Commission 2019 *OLAF* https://ec.europa.eu/anti-fraud/home_en.

216 European Commission 2019 *OLAF* https://ec.europa.eu/anti-fraud/home_en.

217 French *Cour des Comptes* "L'action de la douane" 114; French National Police 2011 *Sous-direction de lutte contre la cybercriminalité* <https://www.police-nationale.interieur.gouv.fr>.

218 French *Cour des Comptes* "L'action de la douane" 114; French National Police 2011 *Sous-direction de lutte contre la cybercriminalité* <https://www.police-nationale.interieur.gouv.fr>.

219 French *Cour des Comptes* "L'action de la douane" 114; French National Police 2011 *Sous-direction de lutte contre la cybercriminalité* <https://www.police-nationale.interieur.gouv.fr>.

approaching its task.²²⁰ The OCLCTIC has managed to establish a network of cybercrime investigators within the national police.²²¹ Since 2009 it has also handled the harmonisation, analysis, overlap and orientation of the reports platform (PHAROS) which enables internet users to report any behaviour suspected of violating the *Criminal Code*.²²² The national telephone platform for the information and prevention of scams on the internet, called "info-scams", is also managed by this unit.²²³ Steps enabling transparency, predictability and good governance are also palpable in the French customs modernisation efforts.

4.2.2.4 Promoting transparency, predictability and good governance

Hereunder are a few aspects that reveal how French customs promotes transparency, predictability and good governance in its territory.

4.2.2.4.1 Measuring performance in the French customs context

The French customs administration introduced as part of its modernisation steps the performance measurement system, which focuses on results, service provided and performance.²²⁴ The new approach was introduced in 2003.²²⁵ However, the new culture (results-based) became a reality as from 2006 when the *Constitutional Bylaw on Budget Acts*²²⁶ became effective, which Bylaw, beyond every other consideration, brings forth management by objectives and performance indicators.²²⁷ The LOLF stands as a tool used to enable a proper balance between the freedom and the responsibility of the manager who is to ensure that the set goals or objectives are

220 French *Cour des Comptes* "L'action de la douane" 114.

221 French *Cour des Comptes* "L'action de la douane" 114; French National Police 2011 *Sous-direction de lutte contre la cybercriminalité* <https://www.police-nationale.interieur.gouv.fr>.

222 French *Cour des Comptes* "L'action de la douane" 114; French National Police 2011 *Sous-direction de lutte contre la cybercriminalité* <https://www.police-nationale.interieur.gouv.fr>.

223 French *Cour des Comptes* "L'action de la douane" 114-115.

224 Pascual "Measuring Performance" 59; French Customs 2014 *Performance et gestion publiques* <https://www.performance-publique.budget.gouv.fr>.

225 This is according to Pascual. However, the French Customs talks of 2001 as the year when the *Constitutional Bylaw on Budget Acts* was enacted and 2003 is when the Budgetary Reform Directorate at the Ministry for the Budget was created. French Ministry of Economy and Finance *Guide to the Constitutional Bylaw 7*; see further French Ministry of the Economy and Finance *Guide Pratique de la LOLF 9*.

226 Its original name is Loi Organique relative aux *Lois de Finances* (LOLF).

227 Pascual "Measuring Performance" 59; French Ministry of Economy and Finance *Guide to the Constitutional Bylaw 5*.

achieved and this, within the timeframe and the budget package assigned to its administration.²²⁸ It is a general approach used in all French government administrations, which aims at ensuring that public funds are adequately spent and that policies are effective.²²⁹ In a nutshell, performance measurement within the French territory is a management tool used to monitor the actions of all government agencies.²³⁰

In France, the state budget takes the form of vital missions.²³¹ The missions in question comprise the major state policies and are apportioned into programs.²³² In this respect, Program 302 entitled "Securing and facilitating trade" is the one where customs and its work fall.²³³ The French Customs Director-General bears the responsibility of bringing up a strategy and setting out objectives under the program and ensuring that these run smoothly in practice and he or she is further responsible for reporting on performance before the parliament.²³⁴ Each annual performance project is subdivided into strategic objectives,²³⁵ operational objectives and performance indicators²³⁶ as well as targets.²³⁷ Five²³⁸ objectives were at the time used

228 Pascual "Measuring Performance" 60; French Ministry of Economy and Finance *Guide to the Constitutional Bylaw* 12, 15-16, 20.

229 Pascual "Measuring Performance" 59.

230 Pascual "Measuring Performance" 59.

231 French Customs "la mesure de la performance"; French Customs 2017 *Stratégie, objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

232 Pascual "Measuring Performance" 60; "; French Customs 2017 *Stratégie, objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

233 Pascual "Measuring Performance" 60; French Customs "la mesure de la performance".

234 Pascual "Measuring Performance" 60; French Customs "la mesure de la performance"; French Customs 2017 *Stratégie, objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

235 This includes sustaining the economy, act and protect, be a modern tax administration and be attentive to the staffing needs.

236 Operational objectives and indicators are set to sustain the realisation of strategic objectives and they revolve around three components of performance namely the socio-economic effectiveness of customs activities; the quality of the services and lastly, the general efficiency. The three components target specific group of customs interlocutors who are respectively in this case citizens, general users and tax payers. The targets on the other hand, are made up of the amount of money collected or spent, the time spent in performing this or that activity; and finally, the number of seizures made as the case may be. French Budget Directorate *Guide de la performance* 25; French Ministry of the Economy, Finance and Industry 2005 *Budget reform* <https://www.performance-publique.budget.gouv.fr>.

237 French Customs "la mesure de la performance".

238 While Pascual refers to five objectives, the French Customs administration itself rather talks of four objectives and makes no reference to objective 3 namely ensuring the constant presence of officers in the field. It is obvious that as time goes by, the administration adapts its objectives to its actual

to measure performance in the French customs context. These are strengthening the fight against fraud and large-scale trafficking; speed up customs clearance; ensure the constant presence of officers in the field; target customs inspections more effectively and lastly; to keep customs management costs under control.²³⁹ In order to monitor the progress in attaining these objectives, specific indicators are defined by the administration which are matched to quantified targets.²⁴⁰ Drafting the framework for Program 302 is done from the national to the local level through a three stages dialogue between the DG of customs and the Finance Ministry's Budget Directorate;²⁴¹ the DG of customs and members of parliament²⁴² as well as between the DG and the interregional customs directors;²⁴³ and finally, at the local level.²⁴⁴

In essence, the interregional directors are presented with the national project outline from which they can devise their budget and local performance plan and which also makes proposals regarding targets.²⁴⁵ The interregional directors may reject or embrace the proposed targets. Several dialogue platform (meetings) are consequently organised to iron out divergences and to find a common ground of operation regarding all questions around the plan. It is upon these processes that the draft budget and performance plan are adopted. This shows that the administration adopts an inclusive management approach which requires role players at different levels to be aware and

needs. Another (most recent) document by the French Customs administration makes reference only to three objectives. The administration is of the view that having few objectives helps it keep its purposes concise and relatable and to avoid the scattering of its efforts and means in broad and confusing objectives. This conciseness ensures better visibility. See French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr> and also French Customs 2017 *Stratégie, objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

239 Pascual "Measuring Performance" 61; see further French Customs "la mesure de la performance".

240 Pascual "Measuring Performance" 61.

241 Here the customs administration places before the Ministry its annual performance plan that comprises its objectives, indicators, targets and the projected budget as well as the capacity required in terms of personnel. Pascual "Measuring Performance" 62

242 Upon the Ministry's validation of the plan placed before it, the indicated plan is inserted in the government's budget act which in turn is placed before parliament for approval/adoption. Pascual "Measuring Performance" 62

243 The dialogue between the DG and its interregional customs directors intervenes between the time the plan is presented to the Ministry for validation and consequently to parliament for adoption. This is called the management dialogue. Pascual "Measuring Performance" 62, 64.

244 This is the third phase of dialogue where meetings are held at the interregional levels to monitor how the projected performance indicators and targets unfold, how efficient they are and where possible, enable amendments for more efficiency.

245 Pascual "Measuring Performance" 64.

hands-on as transformation occurs.²⁴⁶ According to the administration,²⁴⁷ the measurement culture serves to institute management dialogue;²⁴⁸ to measure the performance of local services; to compare the performance of the various directorates and lastly, to achieve management control. This approach overall guides the actions of the administration towards the standard it wishes to attain.

As time went by, the performance measurement process that used to be found only in annual performance plans developed and took different shapes. The first is the multiannual performance contract.²⁴⁹ The latter somewhat addresses the shortcomings of annual performance plans that are considered too general to address every issue faced by customs. It focuses more on customs officers and involves the latter as well as heads of service in decision making, and this makes it possible to consider a broader range of sectors where customs intervenes and to define strategy proper to each one of them and performance indicators that befit them.²⁵⁰

The second shape taken by the performance process is employee participation through which the French customs administration introduces a collective employee participation plan. Under this aspect, "the number of targets met determines the amount of the employee participation bonus".²⁵¹ All customs officers, regardless of their role, rank and grade, receive the same bonus which cannot exceed the amount of €150 a year. This national and collective approach has the advantage of not favouring one officer to the detriment of another, and this is an approach to encourage as it gives to each one of them a sense of belonging and in turn, advances the purposes of the administration.

The third form that performance measurement has taken is the exemplary administration plan. It is an approach through which all government agencies are

246 French Ministry of the Economy and Finance *Guide Pratique de la LOLF* 59; French Customs "la mesure de la performance"; French Customs 2017 *Stratégie, objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

247 French Customs "la mesure de la performance".

248 Between the central administration and the regional directorates.

249 French Customs "la mesure de la performance".

250 Pascual "Measuring Performance" 65; French Customs "la mesure de la performance".

251 Pascual "Measuring Performance" 65.

invited to run their respective businesses in a sustainable manner.²⁵² It is in this regard that the Ministry of the Environment came up with fourteen indicators that all revolve around an administration's operating systems, its expenses, its infrastructural capacity, usage and efficiency as well as its compliance to specific set national standards. Through this scheme, all administrations have to pay a certain amount of money into an interministerial fund at the beginning of the year, which funds are distributed at the end of the year amongst those of the administrations that have managed to reach the expected results by attaining at least eleven of the fourteen targets predefined.²⁵³ This approach challenges the different administrations and enables them to operate in an environment where the actions of the one are understood by the other, and this is commendable within the context of (customs) modernisation and good governance that should be the direct consequences thereof. And this contributes to advancing not only customs objectives but that of the state as a whole.

Generally speaking, beyond every other characteristic²⁵⁴ that indicators should have, France has developed its theory that should govern the setting of indicators for performance measurement purposes. These are, indicators must be automated;²⁵⁵ the formula for evaluating them are made public and discussed in defined intervals with interested parties;²⁵⁶ their results can be viewed at all hierarchical levels;²⁵⁷ and they are applied to customs services and not to customs officers individually.²⁵⁸ These aspects enable the administration to set out indicators that help it grow. Indicators

252 Pascual "Measuring Performance" 66.

253 Pascual "Measuring Performance" 66.

254 Relevance, usefulness and meaningfulness, robustness, reliability and verifiable. Pascual "Measuring Performance" 66-67; Galdemar, Gilles and Simon 2012 *Cahier de Recherche* 33; French Customs 2017 *Stratégie, objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

255 This facilitate the evaluation of their efficiency.

256 Involving all interested parties in the development of indicators makes it possible for the administration to achieve better results.

257 This enables transparency even though this is not the objective sought by the administration.

258 Because indicators are developed at interregional director level or at lower levels, these cannot be limited to individual customs officers but to customs services as a body. This stance proceeds from the premise that individual interests may not align with collective interest. And in focusing on achieving individual goals, customs officers may not give the necessary attention to the common vision of the administration which revolves around working together for better results. Pascual "Measuring Performance" 67-68.

could be defined as pointers that the administration sets based on the ranges of services it provides, with which it evaluates the efficiency and effectiveness of its processes, procedures or policies for a determined period, with the further view of improving itself for more significant achievements.²⁵⁹ The introduction of this system into the French customs dealings was done at different stages. While the first set of indicators introduced focused on measuring customs activities and results,²⁶⁰ the second set²⁶¹ looked at the effectiveness and the qualitative dimension of customs services.²⁶² Two years later, that is from 2007, the third set of indicators was devised that weighed the impact of the customs administration's activities both on the economy and society as a whole.²⁶³ The latter set of indicators is used to enhance internal management.²⁶⁴

To ensure that the system of indicators is appropriately monitored and consequently best suited to the needs of the growing and changing customs environment, the French customs has established as from 2003 what is called the Management Control Unit (CCG)²⁶⁵ within its General Directorate. The CCG is tasked with calculating and making public the outcome of most indicators.²⁶⁶ It is referred to as the French customs administration's "numbers bureau" in charge of calculating or validating the statistics contained in the activity report of the administration.²⁶⁷ It is thus a statistics service that ensures the accuracy of the data released.²⁶⁸ There is also an inter-ministerial body²⁶⁹ that conducts audits since 2009 for the overall performance measurement steps and this assists to appreciate the adequacy and relevance of objectives and their assigned indicators.²⁷⁰

259 Pascual "Measuring Performance" 69.

260 A purely quantitative approach.

261 In place as from 2005.

262 Pascual "Measuring Performance" 69-70.

263 Pascual "Measuring Performance" 73.

264 Pascual "Measuring Performance" 74.

265 Cellule de contrôle de gestion.

266 Pascual "Measuring Performance" 75.

267 Pascual "Measuring Performance" 75.

268 Pascual "Measuring Performance" 76.

269 The committee's original name is *Comité interministériel d'audit des programmes* (CIAP) or Interministerial audit committee of programs.

270 Galdemar, Gilles and Simon 2012 *Cahier de Recherche* 33.

The French customs administration acknowledges that effectively combating fraud revolves around strengthening cooperation at all possible levels with other relevant administrations and services.²⁷¹ With the view of emphasising the importance of such cooperative approaches and boosting them, the administration has incorporated this aspect of its work in its system of indicators.²⁷² This enables it to work hand in hand with these administrations and services and to tackle fraud more effectively. This also helps to identify what techniques of cooperation work and what does not work and to address the shortcomings accordingly.²⁷³ Through the said indicators, the administration prioritises collaborative work and information exchange over seizure in general.²⁷⁴ This approach builds and strengthens capacity.

Overall, performance measurement in the French customs environment is an approach to enable and sustain management dialogue and a strategy for managing customs services.²⁷⁵ Pascual²⁷⁶ points out however, that indicators fail at two levels. It is this author's view that indicators help to set objectives but do not provide guidance on how to achieve them.²⁷⁷ Secondly, they only do what their name implies i.e. indicate rather than making decisions. Although this stance is correct,²⁷⁸ the fact remains however that the new culture of performance measurement through the use of indicators enables all stakeholders to understand their operating environment better and this, brings purpose and growth within the administration and in the country as a whole. As diverse and broad as the system of indicators may be, it is an approach

271 French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

272 Pascual "Measuring Performance" 72.

273 One such cooperative efforts is built through the institution in recent years of the Automated License Plates Readers (LAPI) that is an interministerial program bringing together customs, the police and the national *gendarmerie*. The LAPI acts as a risk management tool as it helps to identify vehicles to control thoroughly and those to be afforded free circulation. French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

274 Pascual "Measuring Performance" 73; French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

275 French Customs "la mesure de la performance".

276 Pascual "Measuring Performance" 80.

277 This view is shared by the French Customs administration, however, the latter also acknowledges that the measurement approach provides objective and reliable data; it helps the decision makers to identify the loopholes of the system; it enables them to allocate resources (human and material) where most needed and lastly, it helps identify best service providers and best practices for the overall growth of the administration. French Customs "la mesure de la performance".

278 See also in this regard Galdemar, Gilles and Simon 2012 *Cahier de Recherche* 30-32.

compatible with the founding principles of customs modernisation and which has helped the French customs administration achieve greater efficiency and effectiveness at all levels including fraud reduction. Pascual²⁷⁹ is further of the view that while the measurement approach is in use at different levels of public management in France, issues of transparency or corruption are not considered relevant in the country. The extent to which this stance is true is still to be verified. Suffice is to say that the Central office to fight against corruption, financial and tax offences hereunder discussed²⁸⁰ would not include corruption if such unlawful behaviour was of no importance or no relevance in the country in general. The human resource dimension is also highly valued in the French customs modernisation plan as there is a particular accent on grooming skilled customs officers as demonstrated in the following paragraph.

4.2.2.4.2 French customs' efforts to provide its staff with quality working conditions

French customs has engaged in a broad set of activities that aim to empower its workforce by placing at its disposal a conducive work environment. This aspect of its modernisation programme proceeds from the belief that the administration's strength lies not only in its material resources but also in its human resources.²⁸¹ The administration believes that providing its staff with "customised support" is indispensable, for they need to operate in an environment that they not only understand but that they have also mastered.²⁸² Considering the fast transforming environment in which they operate, the administration seeks to understand and takes into account the individual circumstances of every member staff through interviews, and this is done in the hope of adequately positioning staff skills within the administration.²⁸³ It is in this context that the administration in 2014 inaugurated a *Consultancy, Professional Mobility and Careers Unit*²⁸⁴ which stands as a career

279 Pascual "Measuring Performance" 66.

280 At 4.2.2.4.3.

281 In this regard, the administration uses this statement as a motto "PEOPLE–THE KEY TO THE SUCCESS OF EVERY PROJECT". French Customs 2015 *French Customs 2015 Results* <http://www.douane.gouv.fr>.

282 It is in the regard that while drafting the *French Customs Strategic Plan 2018*, measure twenty-three and twenty-four concerned ways to develop the career of customs agents.

283 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

284 Its original name is *La Cellule conseil, mobilité, et parcours professionnels*. This Unit is mentioned

development platform. The Unit interviews members of staff, advises them and places them suitably. In essence, through this platform and its processes, their career path is properly delineated, and the aspects where training is still needed are identified and addressed.²⁸⁵

A significant aspect of this support scheme is that the interviews enable the administration to conduct a thorough analysis of the employees' skills, through which they address the best match between profiles and positions.²⁸⁶ There is no doubt that such an approach has a deep impact on the administration work as a whole. Because employees are placed in the sector where their skills best fit, this creates a work environment with skilful employees that are posted according to their competences. This, in turn, provides staff with plausible working conditions and this can only work out for the administration's good in the sense that corrupt practices will be reduced since employees will in most cases be happy where they are. This is, therefore, a laudable approach.

Furthermore, the administration puts much effort into providing vocational training for its staff and has also developed an e-learning platform where staff can take courses at their own pace.²⁸⁷ The main aim behind such vocational training is to sharpen staff skills so that they can easily deal with the different aspects of their daily work which are forever transforming.²⁸⁸ This contributes greatly to fighting customs offences as better enforcement can only be achieved through better knowledge, efficient and valued workforce. French customs also devises strategic plans that run for a number of years and that aim at planning and gaining better insight (predictability) into its environment for the way forward. The one evaluated hereunder is the 2018 French Customs Strategic Plan.

as one of the twenty seventh (it is precisely the twenty fourth measure) measures included in the Customs 2018 French Customs Strategic Plan.

285 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

286 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

287 See Measure twenty-three and twenty four of the 2018 French Customs strategic plan.

288 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

4.2.2.4.3 French customs Strategic Plan 2018

As part of the French customs' modernisation plan, the Strategic Plan, drawn up toward the end of 2012, for the year 2018 provides the administration with a five-year plan and expected targets with major key areas to focus on, such as boosting anti-smuggling actions and enhancing control capacities and risk analysis tools.²⁸⁹ The strategic plan, therefore, provides guidelines for French customs and aims at providing this administration with greater visibility in managing its relationship with its partners and staff.²⁹⁰ It is French customs' way of playing its part in a broader government streamlining and modernisation effort.²⁹¹ According to the French Director-General of Customs and Excise on duty when the strategic plan was adopted,²⁹² French customs' daily endeavours are meant to establish the administration as an organisation of reference that efficiently and effectively prepares itself and is ready for the challenges that lie ahead.²⁹³ In her words, the strategic plan is a roadmap for the further modernisation of the work and more strategic and visionary planning of the administration's future.²⁹⁴ The challenging goals that the administration has set for itself in the Strategic Plan still have to be duly rolled out in order to meet the expectations that surrounded their drafting.²⁹⁵ This implies defining new tools, working methods and conditions, and ensuring that vocational training is a consistent part of the process in order to sharpen staff skills and so build more rewarding careers for them, that can only be to the benefit of the administration.²⁹⁶ Hence, the Strategic Plan reiterates its *raison d'être* in the following words:

Customs controls international trade and supports the country's economic competitiveness in an ever-changing and fiercely competitive environment. It has to

289 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

290 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

291 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

292 Hélène Crocquevieille.

293 French *Cour des Comptes* "L'action de la douane" 56; French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

294 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

295 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

296 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>.

anticipate change and constantly adjust its tools and working methods to maintain its high quality of service.²⁹⁷

The Strategic Plan places a particular accent on more excellent professionalism in managing risk, inspections, and efforts to fight fraud consistently (smuggling and organised crime).²⁹⁸ It takes into account “changes in international trade with continuing growth in trading, as well as new forms of trade and the emergence of underlying risks.”²⁹⁹ This plan is a true reflection of the steps of an adaptive customs administration. This adaptive capacity should characterise each and every customs administration around the world. This approach enables predictability as the administration is well prepared to deal with future changes and challenges. The fifth founding principle of the customs modernisation process is hereunder discussed.

4.2.2.5 Enabling smooth and time-effective dispute settlement processes

Dispute settlement as a founding principle of the modernisation of customs was discussed in 4.2.1.3.1.5 above. Besides the practical efforts enumerated above that could be associated with a specific founding principle, the following paragraph groups other customs modernisation efforts that still impact the fight against customs offences.

4.2.2.6 Other general practical customs modernisation efforts that contribute to the fight against customs offences

There are other practical efforts that are of a general nature but still assist the French customs administration in its modernisation efforts to combat customs offences efficiently.

4.2.2.6.1 France’s efforts against financial fraud and tax evasion

Financial fraud is considered one of the most dangerous customs offences, as it may

297 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>

298 French Customs 2014 *Customs 2018 French Customs Strategic Plan* <http://www.douane.budget.gouv.fr>; French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>.

299 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

be linked to other forms of criminal activity such as terrorism. In this regard, the French customs is vested with the power to embargo cash, securities and assets that are being moved across French borders and that are linked in any way to illegal activities, efforts to evade tax, money laundering and the like.³⁰⁰ People travelling across French borders are to declare to customs when they have in their possession an amount of money equal to or greater than €10 000.³⁰¹ The National Directorate for Customs Investigations and Intelligence (DNRED) has established within its services a group of financial intelligence experts that render technical and analytical support when financial investigations are being carried out.³⁰² In 2013 another unit that contributes to the French customs' efforts against financial crime was set up. It bears the name Illegal Financial Channels Unit.³⁰³ This operational unit is in constant collaboration with the National Customs Judicial Service (SNDJ) and the French Financial Intelligence Unit, namely TRACFIN.³⁰⁴ About funds that may be used by terrorists to fund their criminal activities, there is a specialised unit, namely the Customs' Antiterrorist Operational Group (GOLT), whose task is to analyse and process intelligence on funds that are so suspected.³⁰⁵ Another body with a different capacity in the fight against customs offences is the National Customs Judicial Service, which deals with economic and financial crimes.

4.2.2.6.2 The National Customs Judicial Service (SNDJ)

Created in 2002, the National Customs Judicial Service (SNDJ) is vested with the powers of criminal investigation police officers or *gendarmes*, is governed by a judge, and comprises a team of "Judicial Customs Officers".³⁰⁶ It specialises in the fight against economic and financial crime.³⁰⁷ Its agents focus on investigating major

300 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>.

301 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>.

302 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>.

303 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>.

304 Lévy 2008 *Presses de Sciences Po* 576; French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>; AMF 2015 *Prevention of Money Laitdering* <https://www.amf-france.org>.

305 French Customs 2013 *Customs 2013 Results* <https://www.douane.gouv.fr>

306 French Customs 2011 *A Brief Introduction to French Customs* <http://www.douane.gouv.fr>; Ooreka Droit 2019 *Douane judiciaire* <https://justice.ooreka.fr>.

307 French *Cour des Comptes* "L'action de la douane" 57; Ooreka Droit 2019 *Douane judiciaire* <https://justice.ooreka.fr>.

traffics and criminal organisations.³⁰⁸ The service operates in areas expressly defined by law.³⁰⁹ The powers of this body derive from *Law No 99-515 of 23 June 1999*³¹⁰ *reinforcing the efficiency of criminal procedure*, and which consequently created article 28-1 of the *Criminal Procedure Code*. The latter enables some customs agents to perform judicial investigations but only when required to do so by the (public) prosecutor or an investigating judge.³¹¹ They are called customs judicial officers, and their powers are equal or similar to those held by judicial police officers, national police and the national gendarmerie, but within well-defined areas set by law.³¹² They undertake their function under the direction of the prosecutor, under the surveillance of the Attorney General, and under the control of the investigating chamber of the headquarters of their functions under the conditions provided by articles 224 to 230 of the *Criminal Procedure Code* (CPC).³¹³ Their investigations are undertaken following the provisions of the CPC and not those of the *Customs Code*.³¹⁴ They are competent to investigate not only offences deriving from the *Customs Code* but can also investigate a full range of other offences.³¹⁵ It is noted in this regard that this body is particularly equipped to curb financial frauds.³¹⁶ This is so because it can use the provisions of the CPC in matters related to money laundering³¹⁷ as well as VAT avoidance and the protection of the EU financial interests.³¹⁸ Its scope of work includes more generally developing provisions aimed at fighting organised crime and delinquency.³¹⁹ It does not deal with matters relating to drug trafficking except when expressly required by the prosecutor or the investigating judge to form part of a team made up of officers from other competent bodies.³²⁰ In such circumstances, they can only carry out their duties following the provisions of the CPC and not under both the

308 French *Cour des Comptes* "L'action de la douane" 57.

309 French Customs 2011 *A Brief Introduction to French Customs* <http://www.douane.gouv.fr>.

310 Otherwise called *Loi Perben*. Ooreka Droit 2019 *Douane judiciaire* <https://justice.ooreka.fr>.

311 French *Cour des Comptes* "L'action de la douane" 29; Ooreka Droit 2019 *Douane judiciaire* <https://justice.ooreka.fr>.

312 French *Cour des Comptes* "L'action de la douane" 56, 57.

313 French *Cour des Comptes* "L'action de la douane" 29.

314 French *Cour des Comptes* "L'action de la douane" 29.

315 French *Cour des Comptes* "L'action de la douane" 57.

316 Art 324 (1-9) of the French *Criminal Procedure Code*.

317 Art 324 (1-9) of the French *Criminal Procedure Code*.

318 Art 324 (1-9) of the French *Criminal Procedure Code*.

319 Art 706 (73-74) of the French *Criminal Procedure Code*.

320 Art 222-34 to 222-40 of the French *Criminal Procedure Code*.

latter and the *Customs Code* or even the Book of Tax Procedures.³²¹ This restriction has the aim of preventing the accumulation of powers or duties by customs officers, says the French *Cour des Comptes*.³²² This also ensures proper coordination between the administrative and judiciary aspects of the French customs work, which is a crucial element for better enforcement.³²³ This shows the modern character of the piece of legislation to the extent that the general and specific powers of customs officers are well defined regarding different aspects of their work. While this helps to avoid confusion as to who does what and to what extent, it also brings about a clear and easily understandable piece of legislation. The National Directorate for Customs Investigations and Intelligence is the next body that is discussed.

4.2.2.6.3 The National Directorate for Customs Investigations and Intelligence (DNRED)

The National Directorate for Customs Investigations and Intelligence (DNRED) is tasked with curbing the most threatening types of fraud and major traffics.³²⁴ The DNRED is divided into three areas taking the form of directorates, namely the Directorate of Customs Investigations (DED),³²⁵ the Directorate of Customs Intelligence (Information)³²⁶ and finally the Directorate of Customs Operational Intervention.³²⁷ The French customs administration carries out administrative

321 French *Cour des Comptes* "L'action de la douane" 30.

322 French *Cour des Comptes* "L'action de la douane" 30.

323 French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>; Feuerstein 2018 *La discrète montée en puissance de la douane judiciaire* <https://www.lesechos.fr>.

324 French customs 2011 *A Brief Introduction to French Customs* <http://www.douane.gouv.fr>; French *Cour des Comptes* "L'action de la douane" 56.

325 The DED stands as the main administrative investigating service tasked with spotting criminal networks both on the national and international scale and also aims to dismantle criminal organisations. This Directorate has four divisions, all characterising different types of fraud (customs and commercial fraud, foodstuffs, tax fraud and financial flow). French *Cour des Comptes* "L'action de la douane" 56.

326 This body is made up of specialised analysts providing short-, medium- and long-term analyses regarding past, current and future trends in respect of different aspects of fraud. French *Cour des Comptes* "L'action de la douane" 56.

327 This third body seeks to take every necessary operational step to stop trafficking. Its primary tasks involve fighting major traffics relating to narcotics, cigarettes, counterfeiting and firearms. French *Cour des Comptes* "L'action de la douane" 56; French Customs 2011 *A Brief Introduction to French Customs* <http://www.douane.gouv.fr>.

inspections and does not have the power to institute criminal investigations.³²⁸ However, as a unit of the police force, the DNRED possesses such power and can institute criminal proceedings even though its power to do so is limited to matters concerning customs duties, taxes and counterfeiting.³²⁹

The Cyberdouane is to be found in this department. It is a body responsible for collecting and evaluating intelligence in order to counter all types of customs offences perpetrated online.³³⁰ It was created in 2009 and has the specific duties of compiling information, identifying illicit transactions carried out online, and transmitting the said information to a competent law enforcement authority that will carry out investigations through targeted customs control or a thorough investigation.³³¹ The other bodies whose scope of intervention is relevant to this study is the National Anti-Fraud Committee (CNLF).

4.2.2.6.4 National Anti-Fraud Committee (CNLF)

The National Anti-Fraud Committee (CNLF) was established by *Decree* No 2008-371 of 18 April 2008. The Committee annually drafts a plan of action against tax and social fraud that is not handled by customs.³³² This body forms part of the Ministry of Economy and Finances.³³³ Suffice is to say that its actions greatly assist in the overall fight against customs fraud and that is why this body is mentioned here. Unlike other bodies that specialise in specific aspects of the fight against customs offences, Intelligence Processing and Action against Illegal Financial Circuits on its part operates in more than one domain. The distinguishing features of this body are presented below.

328 Vervaele and Klip "Comparative Law" 254.

329 Vervaele and Klip "Comparative Law" 254.

330 French Customs 2011 *A Brief Introduction to French Customs* <http://www.douane.gouv.fr>; French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

331 French *Cour des Comptes* "L'action de la douane" 103-114.

332 French *Cour des Comptes* "L'Action de la Douane" 91.

333 French *Cour des Comptes* "L'Action de la Douane" 91.

4.2.2.6.5 Intelligence Processing and Action against Illegal Financial Circuits (TRACFIN)

Although Intelligence Processing and Action Against Illegal Financial Circuits (TRACFIN)³³⁴ has its origins in customs and almost half of its staff consists of customs officers, it is not a customs service, neither by its link to customs nor by its mission or its methods.³³⁵ TRACFIN is made up of customs and tax agents.³³⁶ Its mandate derives from article 5 of *Law* No 90-614 of 12 July 1990.³³⁷ It is an institution of the French Ministry of Finance.³³⁸ Its primary task is to fight tax, customs and social fraud, money laundering and the financing of terrorism.³³⁹ It also specialises in the fight against breaches of probity.³⁴⁰ All these offences are core to customs and such a body definitely has the ability to help customs administrations to fight the offences more effectively. This is one of the aims of customs modernisation. It advocates for capacity building³⁴¹ to handle customs offences in their diversity. With the aim of protecting intellectual property rights and the health and safety of its citizens, France has established a National Agency for Medicines and Health Products Safety, which is discussed below.

4.2.2.6.6 National Agency for Medicines and Health Products Safety (ANSM)

Bearing in mind that France is considered an ideal location or platform within the EU for the distribution of fake and counterfeit medicines mainly originating from Asia and usually re-exported to Africa, the cooperation between customs and the National Agency for Medicines and Health Products Safety (ANSM) is said not to be as strong as it should.³⁴² That is why in recent years, one of ANSM's aims has been to strengthen its relationship with all stakeholders and making sure the latter are fully

334 *Traitement du Renseignement et Action contre les Circuits FINANCIERS clandestins.*

335 French *Cour des Comptes* "L'Action de la Douane" 96.

336 Lévy 2008 *Presses de Sciences Po* 579.

337 Relating to the fight against the laundering of proceeds from drug trafficking. Lévy 2008 *Presses de Sciences Po* 579.

338 Lévy 2008 *Presses de Sciences Po* 576; French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

339 French *Cour des Comptes* "L'Action de la Douane" 96.

340 Roche & Cie 2017 *The Tracfin report 2017* <https://www.cabinet-roche.com>.

341 Specialised bodies.

342 French *Cour des Comptes* "L'Action de la Douane" 100.

involved in its activities and steps.³⁴³ ANSM focuses more on falsified or fake products than on counterfeit products.³⁴⁴ The most common characteristics associated with falsified products are under-dosage, non-conforming packaging and presentation, and the lack of products notice in French.³⁴⁵ This state body's main goal is to ensure compliance with the regulatory requirements.³⁴⁶ In a nutshell, it seeks to bring together fast access to innovative developments while continuously adjusting health products' risks/benefits ratio to match therapeutic progress for the benefit of the end-users that are patients.³⁴⁷ Its work basically rests on ensuring the safety of health products.³⁴⁸

The French customs efforts against counterfeit goods are mostly rooted in legislative reform. A nationwide, unprecedented action to destroy such goods took place on 11 June 2013 with a view to raising awareness of the irreversible damage that counterfeit products cause not only to the economy but also to health and safety.³⁴⁹ That was the first-ever National Counterfeit Destruction Day. Many regulatory efforts have been made since then, and some legal projects have already been adopted. *Regulation* (EU) No 608/2013 of 12 June 2013 *relating to the customs enforcement of intellectual property rights* replaced *Council Regulation* (EC) No 1383/2003 and came into being on 1 January 2014. This has been a process of evolution at the EU's level. It increases the powers of customs authorities, enables an easier application process and simplifies the procedure for the destruction of counterfeit goods.³⁵⁰ The regulation furthermore enables broader cooperation between customs and rights holders with regards to the dispatching of information.³⁵¹ In 2013 a very comprehensive Act against counterfeiting was drafted and was in the process of being adopted. The Act would constitute the

343 ANSM *Summary Activity Report* 9.

344 The French *Cour des Comptes* differentiates between falsification (which involves acts such as the alteration of the product specificities and the denaturation of the information on the product) and counterfeiting (which may involve amongst other things an authentic imitation of the counterfeited product). French *Cour des Comptes* "L'Action de la Douane" 100.

345 French *Cour des Comptes* "L'Action de la Douane" 100-101.

346 French *Cour des Comptes* "L'Action de la Douane" 101; ANSM *Summary Activity Report* 2.

347 ANSM *Summary Activity Report* 6.

348 ANSM *Summary Activity Report* 8.

349 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

350 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

351 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

perfect legal basis upon which to address all counterfeit activities through its modernised and simplified provisions and alignment of French domestic law with EU law.³⁵² The environmental aspect of customs work is not neglected in France as there is also a strategy in place to fight sea pollution.

4.2.2.6.7 French customs' approach against sea polluters

Fighting maritime pollution is a priority for French customs. The administration has boosted its airborne resources by acquiring equipment that is used to monitor activities at sea. These resources comprise, amongst others, two aircraft equipped with "POLMAR" ocean pollution detection systems, which ensures rigorous scrutiny of France's coastlines.³⁵³ The administration strongly believes that its constant presence at sea and the use of the newly acquired and more efficient tools and materials combined with the substantial fines that are applied by courts are significant factors that will deter any potential sea polluter.³⁵⁴ Since proper control over postal services contributes massively to the overall fight against customs offences, the French customs administration has therefore strengthened the security of express shipments and postal traffic as part of its modernisation efforts.

4.2.2.6.8 Security of express shipments and postal traffic strengthened

Postal services are usually abused by law offenders to facilitate their dealings across the globe.³⁵⁵ French Customs has been working hard to introduce the Air Cargo Advance Screening system (ACAS) in its territory following the United States customs authorities' example.³⁵⁶ This tool aims to properly scrutinise express shipments and regular mail to ensure the safety of that entire platform.³⁵⁷ Modernisation also advocates copying good examples. By transposing the United States' example into its

352 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

353 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

354 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

355 Gardner 2018 *TECHNOLOGY 98 Years of Mail Fraud* <https://www.theatlantic.com/technology/archive/2018/05/98-years-of-mail-fraud/559661/>.

356 Cargo Information Network France 2012 *ACAS: Qu'est ce que c'est?* <http://cin-fr>; French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

357 Cargo Information Network France 2012 *ACAS: Qu'est ce que c'est?* <http://cin-fr>; French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

system of control, France has shown that it is truly committed to strengthening its capacities at all levels for the overall efficiency of customs services. Within the same vein, the French customs also initiated the amendment of the *Universal Postal Union Convention* to include concepts such as prior electronic data transmission and risk management.³⁵⁸

4.3 Summary

It is difficult to draw a definitive line between what constitutes a legal or practical aspect of the French customs modernisation efforts. The difficulty arises from the fact that some initiatives, though practical, have as their main aim to fulfil a particular legal goal. Nevertheless, the above distinction is merely symbolic, and the most important thing is that these steps all seek to enhance customs' capacity in order for it to better respond to the changes occurring in the cross border movement of goods and tactically tackle fraudulent practices beyond every other goal.

The aim of this Chapter was to assess how France has been accommodating the call for customs modernisation launched by the WCO and how its efforts from a legal and practical viewpoint have been helping it to efficiently curb customs offences.

In its report on the customs administration's response to fraud and smuggling, the *Cour des Comptes*³⁵⁹ concludes that French customs has a very great adaptive capacity that enables it to keep up to date with new developments in fraudulent practices. However, this adaptive capacity remains insufficient with regard to its objectives, its means, its organisation and its methods, says the *Cour des Comptes*.³⁶⁰ It finds that customs cannot do everything. It suggests that the administration, in the midst of its various attributions, must clearly set out its priorities; otherwise, it is missing the point.³⁶¹ It ought also to thoroughly consider the allocation of its resources and the sharing of its tasks with other state services. Moreover, the *Cour des Comptes* finds that although well-equipped and strengthened over the years from a legal and

358 French Customs 2013 *French Customs 2013 Results* <https://www.douane.gouv.fr>.

359 French *Cour des Comptes* "L'Action de la Douane" 117.

360 French *Cour des Comptes* "L'Action de la Douane" 117.

361 French *Cour des Comptes* "L'Action de la Douane" 117.

practical viewpoint for its mission of curbing customs offences as a whole, several factors including European rules³⁶² tend to limit the administration's capacity to control the fight against these offences.³⁶³ This is true of every country that acknowledges the legal role of international and regional instruments. This is a reality in the EU as well, where the community's rules supersede national rules and benefit from the principle of direct applicability or direct effect into national legal systems.³⁶⁴ One specific aspect mentioned about the previous statement is the fact that the rules of control of some other EU countries are less strict than French rules. Due to this leniency,³⁶⁵ goods destined for France may not have been subjected to proper control. This fact exposes the French territory to various customs offences that the administration fights so hard to restrain. In other words, the inharmonious customs laws of the EU member states were a stumbling block to efficiency and effectivity. One can add that there seems to be an unending list of bodies and units that help in the general administration's efforts to curb fraud and make its procedures and processes more efficient. These bodies and their scope of operation are confusing and overlapping to some extent. Nevertheless, the diversity and variety of these efforts can be justified by the nature of international trade, but most importantly, by the administration's desire to have an appropriate response to every single challenge to which the ever-developing trade environment exposes it. The *Union Customs Code* that was enacted recently will undoubtedly iron out a number of issues including the ones mentioned by the French *Cour des Comptes* above. It considers the founding principles of the Code, which are perfectly in line with the WCO's general founding principles for customs modernisation.³⁶⁶

Customs modernisation, whether regulatory or in practice, is palpable in France both from the union's standpoint and nationally. Through the use of the tools described above that are founded on the WCO's proposals and on sound and updated pieces of legislation, the administration has kept up to date with every single aspect of

362 Rules that are not always harmonised.

363 French *Cour des Comptes* "L'Action de la Douane" 32.

364 See the discussion in this regard concerning Cameroon at sub-heading 6.2.1.2.1; and further see De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 6; French *Cour des Comptes* "L'Action de la Douane" 32.

365 That is justified by different factors such as striving to attract more business in one's territory.

366 As discussed in Chapter 2 above.

modernisation and believes that such steps have so far only strengthened it and have adequately served the ideals for which it stands and strives amongst which the fight against customs offences.

In conclusion, France has responded positively to the call for customs modernisation, as made by the WCO, not only as an individual country but as part of the EU customs union. It has incorporated several of the WCO's instruments in its legal system, thereby adopting the customs modernisation standards and founding principles promoted by the organisation which are critical in today's trading sphere and which help, without any doubt, to efficiently curb customs offences. The various steps into which the French customs have been involved attest to the responsiveness of this administration and France as a whole to the developing and growing international trade platform. This stance is equally recognised by the WTO³⁶⁷ whose recent report suggests that France has a 100% rate of implementation commitment with regards to the principles contained in the *WTO Trade Facilitation Agreement*.³⁶⁸ These principles are supplementary to the WCO's customs modernisation founding principles drawn from its instruments and initiatives. They altogether contribute to better customs capacities for the growth of international trade and the consequent downfall of customs offences. The South African position with respect to the modernisation of customs regulations and practices to combat customs offences is scrutinised in the next Chapter.

367 WTO TFA Database 2019 *France Rate of implementation commitments*
<https://www.tfadatabase.org/members/france>.

368 See respectively the discussions under 5.2.1.1.1 and 6.2.1.1.1.2 hereunder on the WTO TFA.

CHAPTER 5

CUSTOMS MODERNISATION AND ITS IMPACT ON CUSTOMS OFFENCES IN SOUTH AFRICA

5.1 Introduction and historical background

This Chapter aims to critically scrutinise the efforts made by the South African customs administration to modernise itself. Modernisation is a broad and all-encompassing concept that does not limit itself to a specific aspect of customs work but seeks to do everything possible to improve the way the administration renders its services.¹ In contributing to bettering such services, modernisation efforts also strengthen the administration's capacities and empower it to strategically and efficiently fulfil one of its core duties, which is to curb customs offences. This mission may not always be visible at first glance in the initiatives taken under the modernisation programme, but one must bear in mind that there is unlikely to be a single initiative taken as part of this process that is not meant to empower the administration. A well-capacitated administration would be able to detect offences more easily at different levels of customs operations, and this seems at the end of the day to be the ultimate goal.

The complexity and time-consuming nature of South African customs administration formalities and its inefficiencies² have been targeted as factors hindering sustainable development and economic growth in the sense that they restrict access to regional and world markets.³ Customs modernisation, for South Africa, is perceived as the way to attain and sustain economic growth.⁴

The modernisation of customs in South Africa was introduced following the South African Revenue Service's (SARS) previous tax modernisation initiative that had resulted in the improvement of the administration's internal efficiency, the

1 SARS 2010 *Customs Modernisation* 3.

2 Which are considered non-tariff barriers to trade.

3 Khanderia 2016 *Journal of African Law* 441-442; Amadi *Customs reform as a means to enhancing trade facilitation* 3.

4 Amadi *Customs reform as a means to enhancing trade facilitation* 4.

enhancement of the services it offered, and the enlargement of its tax base.⁵

Before the initiation of the Customs Modernisation Programme, the SARS customs had passed through several other initiatives that bore different labels. Towards the end of the year 1995, a transformation process was initiated that endeavoured to detach Customs and Excise and Inland Revenue from the Department of Finance. The detachment took effect from 1 April 1996 when SARS was formed and started operating as an independent government department. On 1 October 1997, it acquired its full autonomy and was thus established as a National Public Body.⁶ On 11 September 1998 the Customs Transformation Programme (CTP) was initiated, through which several objectives were to be achieved, namely: boosting revenue collection; improving risk analysis to discourage illegal trade in its diversity; protecting the public against harmful commodities with a particular accent on drug trafficking; ensuring that the country meets its international obligations in terms of trade agreements; and lastly, sharpening control measures at borders as well as importations via couriers, the post and rail.⁷ The results of this first phase of transformation have not been made available.

The second phase of transformation was termed the Siyakha Transformation Programme. It took over from the CTP. This programme endeavoured to drastically transform end-to-end processes for cargoes operations support and post-clearance inspections while establishing a new anti-smuggling capability.⁸ The key aspect of this programme was shifting the focus from a purely administrative environment to an enforcement one.⁹ Staff were trained accordingly, and the programme was spread to all branches in September 2001.¹⁰

Five years later, i.e. in March 2006, the administration opted for something that would make its work more worthwhile. That is how the Operations Management Systems

5 SARS 2010 *Customs Modernisation* 3.

6 SARS 2008 *Border Security Crime Trends* 8.

7 SARS 2008 *Border Security Crime Trends* 8-9.

8 SARS 2008 *Border Security Crime Trends* 9.

9 SARS 2008 *Border Security Crime Trends* 9

10 SARS 2008 *Border Security Crime Trends* 9.

came about. It organised employees according to their geographic locations and around the administration's different products, which are tax, customs and service.¹¹ This enabled a redesigning of the administration's structures and working procedures, leading to more focused and less burdensome processes, the provision of more efficient service, and uniformity and harmonisation in the application of the law.¹²

Prior to, during and after the said period, the administration undertook several projects all of which aimed at its empowerment and a mutual understanding with the other administrations having a role in fighting illegal activities across borders. One of these projects was project PRISMA, which was implemented with the help of the government of the United Kingdom and aimed at transferring skills, knowledge, and experience to the South African customs administration in the context of its fight against illicit trade and also to empower the administration to easily detect and counter under-valuation through adopting a new approach.¹³ The administration also thought of reducing the number of international ports of entry as a way of countering illicit trade. As such, the number of recognised points of access to the Republic for commercial goods diminished from ninety-six to thirty-six (land, airport and seaports combined).¹⁴ Regarding the land ports (seventeen in total), the reduction made it possible for SARS to work closely with the other SACU countries for stricter physical control over exports to the latter countries, which considerably reduced fraudulent VAT refund claims.¹⁵ Enforcement activities were similarly enhanced at various levels, some through joint administration units¹⁶ and some more concretely through the establishment of the Customs Compliance Task Unit to address non-compliance and corruption in the

11 SARS 2008 *Border Security Crime Trends* 9.

12 SARS 2008 *Border Security Crime Trends* 10.

13 SARS 2008 *Border Security Crime Trends* 17.

14 SARS 2008 *Border Security Crime Trends* 17.

15 SARS 2008 *Border Security Crime Trends* 17.

16 Examples of such units are the joint SARS/SAPS Drug unit trained by the United Nations Drug Control Programme and the WCO; the joint Mobile Border Police and Customs Team, which worked on the different features of cross-border crime under the South African government's collective approach initiative as well as the SARS all-inclusive operational divisions, the South African Police Service and the National Directorate of Public Prosecutions. The latter joint unit was working on SARS' project to counter cross-border crime with a particular accent being laid on internal and external features.

administration.¹⁷

When the World Customs Day was celebrated on 26 January 2006, the SARS commissioner unveiled the administration's plan to run a Customs Modernisation Programme (CMP), which programme would encompass several dimensions.¹⁸ This led in 2007 to the establishment of the Customs Border Control Unit (CBCU) as a proactive response to the fast-transforming trade environment which was presenting new benefits and threats to the administration, which needed to be strategically approached in order to create an environment of more compliant clients who would participate and help the administration to meet its targets.¹⁹ Through the use of intelligence operations and enhanced risk management techniques, the Unit was expected to conduct focused customs enforcement operations at the frontline, promote its own visibility and build up a disciplined and well-behaved customs administration.²⁰

In order to emphasise that customs modernisation is a reality in South Africa and that visible changes were happening on an ongoing basis, Van Den Berg²¹ stated that the programme is not just policy jargon nor a popular "buzz" expression used by SARS to increase its fame.

Officially launched in October 2009,²² the modernisation of customs in South Africa aimed at addressing various (critical) issues that were impeding the proper functioning of this administration.²³ The first step toward fulfilling this goal of modernisation was the introduction of Electronic Data Interchange (EDI), which enabled the submission

17 SARS 2008 *Border Security Crime Trends* 20.

18 Among the different aspects included in the CMP were the establishment of a policy unit as well as a customs border control unit comprising detector dog units and purposely marked vehicles. It is scarcely necessary to refer to the unfailing help that detector dog units provide to the SARS by boosting the latter's ability to detect narcotics, other counterfeit and dangerous commodities such as explosives, and the protected species that are poached all around the world and smuggled here and there. SARS 2008 *Border Security Crime Trends* 20-21.

19 SARS 2008 *Border Security Crime Trends* 20.

20 SARS 2008 *Border Security Crime Trends* 20.

21 Van Den Berg 2013 *What Ever Happened to the Customs & Excise Re-write Project?* <http://www.thesait.org.za>.

22 Magashula 2013 <http://www.govza.gcis.gov.za>; SARS 2010 *Customs Modernisation 3*; SARS 2014 *Customs Modernisation* <http://www.sars.gov.za>.

23 SARS 2014 *Customs Modernisation* <http://www.sars.gov.za>.

of goods' declarations electronically.²⁴ A few of the factors that had prevented the administration from fulfilling its tasks efficiently had included inadequate inspection and control facilities; limited investigation capacity; ineffective information sharing and coordination among the enforcement agencies concerned; public unawareness of the existing anti-corruption hotline; an insufficient number of staff at entry ports compared with the volume of the transactions to be treated;²⁵ lengthy checks significantly affecting traders; inexperienced or insufficiently trained customs officials that did not have the required knowledge regarding the specifics of products and the different sectors involved; the inadequacy of the law (for instance several provisions of the *Customs and Excise Act*²⁶ were being tagged as no longer relevant to the demands of a modern society);²⁷ and a certain inconsistency in the application of the customs regulatory provisions.²⁸

The SARS sees modernising customs processes and procedures as a way of reducing and better controlling the disruptive impact of customs on legitimate trade and tourism.²⁹ This large-scale programme seeks to make a positive impact on every single area of customs work, namely people, policy, technology and processes.³⁰ The South African programme focuses on the following key areas: systems, policies, processes and people.³¹ These areas are being transformed so that the South African Customs administration can be seen to be a world-class customs agency which sustainably contributes to a stable, healthy and prosperous country, region and world.³² Achieving the highest degree of professionalism is one of the missions of the SARS in carrying

24 SARS 2010 *Customs Modernisation* 3.

25 SARS 2014 *Customs Modernisation* <http://www.sars.gov.za>.

26 Act 91 of 1964

27 It was suggested by the IDC Research Project that section 4 (which related to the General duties and powers of officers) of the Customs and Excise Act was perceived as hindering intelligence sharing to a considerable extent. Cooperation and information sharing are now considered to be key elements of better enforcement procedure in a progressive and forward-looking customs administration. IDC *Fridge Research Project* 13.

28 IDC *Fridge Research Project* 4, 5, 6, 8, 13, 14; Khanderia 2016 *Journal of African Law* 453, 454; SARS 2014 *Customs Modernisation* <http://www.sars.gov.za>.

29 SARS Date Unknown <http://www.gov.za>; Poverello Date Unknown *Customs Modernisation* <http://www.mpoverello.com>.

30 SARS 2010 *Customs Modernisation* 3.

31 SARS 2014 *Customs Modernisation* <http://www.sars.gov.za>.

32 SARS 2010 *Trader pocket Guide* 3; SARS 2013 *Customs External Guide* 5; SARS 2015 *New customs legislation update* <http://www.sars.gov.za>; SARS 2016 *About Customs* <http://www.sars.gov.za>.

out its duties.³³ The twofold role of South African customs like that of any other customs administration, is to smooth the ground for legitimate trade and to ensure that the economy and society are properly sheltered from illegal and unfair trade practices.³⁴ This role derives directly from the SARS's mandate as a tax and customs administration.³⁵ SARS customs plays a major role in helping the country to meet its international obligations and present itself as a worthy trading partner.³⁶

Modernising customs includes but is not limited to the use of a modern, electronic and integrated technology platform combined with a restructuring of processes for the benefit of the SARS and also of traders.³⁷ In a nutshell, it entails moving away from a complex, partially paper-based and labour-intensive environment to one reflecting characteristics such as simplicity, automation and cost-efficiency.³⁸ In the administration's words, it has endeavoured to "dematerialise" paper in all its transactions.³⁹ By engaging in the modernisation programme, the administration seeks to use technology to its advantage by applying it to its processes and procedures, and so to ensure that all stakeholders play their role. At the same time, the administration will continue to investigate and discourage non-compliance.⁴⁰

The deep motivation for engaging in the modernisation programme, beyond automation and every other structural change within the administration, is said to be improving the relationship between the SARS and its clients, which would lead to better compliance with existing tax and customs legislation.⁴¹ This motivation is founded on the administration's being open to the demands of its clients, and the belief that the client will, in response abide by customs laws and regulations. The essence of the South African model of modernisation can be encapsulated in two

33 SARS 2013 *Customs External Guide* 5.

34 SARS 2008 *Border Security Crime Trends* 4-5.

35 Part 1 of the *South African Revenue Service Act* 34 of 1997.

36 SARS 2008 *Border Security Crime Trends* 5.

37 SARS 2010 *Customs Modernisation* 3.

38 SARS 2010 *Trader pocket Guide* 3; Poverello Date Unknown *Customs Modernisation* <http://www.mpoverello.com>.

39 SARS 2014 *Customs Modernisation* 5.

40 Magashula 2011 "The role of customs" 4.

41 Magashula 2010 *Address by Commissioner of the South African Revenue Service* <http://www.gov.za>.

fundamental terms, namely service⁴² and enforcement.⁴³ The administration hopes that its endeavour in these two areas will result in greater compliance from both taxpayers and traders.⁴⁴ This involves allocating resources where the need is most pressing in order to ensure the delivery of service for the compliant and enforcement for the non-compliant.⁴⁵ In 2011, Magashula⁴⁶ pointed out that despite the progress made in automating the complete system, a considerable number of customs processes were still paper-based, which fact not only slowed the pace of service delivery but also posed a problem in carrying out a successful and adequate risk assessment on goods. Furthermore, he emphasised that one of the biggest challenges facing the customs administration was “the complexity of international and domestic trade rules and the large number of different technology platforms in use not only internationally but within South Africa”.⁴⁷ It is his view that a paper-based or manual system fails in terms of efficiency and also exposes the administration to fraud and corruption.⁴⁸ This viewpoint was expressed six years ago. Things have changed considerably since then, and paper-based transactions are almost non-existent in customs processes in South Africa these days.

Prior to the CMP's being launched, studies had already shown that the administration needed a radical change in its focus and the way it carried out its mandate if it

42 Based on WCO instruments such as the RKC and the SAFE Framework of Standards, this means providing greater trade facilitation benefits to complying clients or those working with the administration and helping it to achieve its set goals. Among other benefits are faster processing times, intervention only if necessary, and reliance on audit-based control. Magashula 2010 *Address by Commissioner of the South African Revenue Service* <http://www.gov.za>.

43 Magashula talks about “credible enforcement and punishment” for those traders and taxpayers who choose not to comply with existing laws and regulations. This means ensuring that no customs law breaker gets away with an illegal act and further ensuring that the system is as deterrent in its rules as possible and that offences are easily detectable and severely punished. Magashula 2010 *Address by Commissioner of the South African Revenue Service* <http://www.gov.za>.

44 Magashula 2010 *Address by Commissioner of the South African Revenue Service* <http://www.gov.za>

45 SARS 2010 *Customs Modernisation* 3.

46 Magashula 2011 “The role of customs” 3.

47 To a certain extent this statement indicates a points of weakness in modernisation, as multiple platforms are developed, and this may appear to be very confusing. Magashula 2011 “The role of customs” 3; See further SARS 2008 *Border Security Crime Trends* 6.

48 He illustrates his argument with only a few specifics, such as the ease with which paper-based documents can be forged, how customs stamps can be stolen or wrongly used, and the precarious nature of paper, which can easily be mislaid or misfiled to cover the tracks of an illicit act. Magashula 2011 “The role of customs” 3.

expected to appropriately and efficiently address new challenges.⁴⁹

The SARS thus engaged in a review of the whole customs system, bearing in mind that accommodating trade facilitation on the one hand and protecting the country's economy and consumer on the other could be performed effectively only through "sophisticated risk assessment tools" entailing different levels of control regarding high and low risk goods or consignments, and that this would have to rely on an accurate and easily accessible electronic information system.⁵⁰ More resources would be used to process risky transactions, and less risky ones would be allowed to move through swiftly, with little or no intervention.⁵¹ Automating processes basically constitutes the central aspect of the South African CMP.⁵²

As part of the re-engineering process, the SARS has also endeavoured to keep the media and the public updated regarding its activities and operations directed at strengthening the fight against smuggling activities, fraud and any abuse of the tax system. It has thus created a website where it reports its activities regarding tax and customs-related offences on a monthly basis.⁵³ Intervening against smugglers for SARS goes beyond the use of the latest technology to include dog detection units working at different airports and at some land borders.⁵⁴

Because the role of customs is to ensure compliance with customs-related laws and regulations⁵⁵ and such laws and regulations have to keep pace with the transformation occurring in society, new legislation was required in South Africa. The current Chapter has two parts. On the one hand, the legal components and on the other hand, the practical aspects of the South African CMP that affect the fight against customs

49 SARS 2008 *Border Security Crime Trends* 7.

50 SARS 2008 *Border Security Crime Trends* 8; SARS 2016 *About Customs* <https://www.sars.gov.za>; Magashula 2010 "The role of customs" 4; Magashula 2011 *Address by the Commissioner, presenting the SARS annual report* <http://www.polity.org.za>.

51 SARS 2008 *Border Security Crime Trends* 8.

52 SARS 2012 *Customs Connect* 4; Magashula 2013 <http://www.govza.gcis.gov.za>.

53 As such, it is submitted that the modernisation of customs in South Africa has led to several criminal actions (149 in total for the 2010 financial year) and civil actions (8 in total, dealing with clothing and textiles) being taken against different types of alleged smugglers. Fifty-six cases were taken to court and convictions followed. Magashula 2011 "The role of customs" 6; SARS 2014 *Customs Modernisation* <http://www.sars.gov.za>.

54 Magashula 2011 "The role of customs" 8.

55 SARS 2013 *Customs External Guide* 11.

offences are evaluated. The practical aspects are scrutinised against the background of the founding principles of customs modernisation as identified in Chapter 2 above.

5.2 Legal and practical aspects of the South African customs modernisation programme

The legal aspects of the South African customs modernisation steps will be evaluated before the practical aspects.

5.2.1 The legal framework governing South African customs (modernisation)

The legal framework governing the South African CMP is made up of international, regional and national instruments. The South African stance regarding international and regional agreements in customs matters will precede the evaluation of national legal instruments.

5.2.1.1 International sources of law governing South African customs activities

South Africa has consented to a number of international instruments that make these instruments a source of its overall customs legal framework. These instruments are mostly derived from the country's membership to both the WCO and the WTO.

5.2.1.1.1 The WCO and WTO's instruments as part of the South African customs' legal framework

The *Constitution of the Republic of South Africa*,⁵⁶ underscores that international law (of different nature) is part of the South African framework as long as due process is followed. While some agreements require certain procedures before becoming part of the country's framework, others are directly integrated into the system by virtue of their nature.⁵⁷ This stance with regard to international law prompted Ferreira and Ferreira-Snyman⁵⁸ to say that South Africa is a blended system that accommodates a monist approach in relation to customary international law, and a dualist approach as

56 1996 in its Chapter 14, Sections 231-233.

57 See respectively Sections 231 and 232 of the *Constitution of the Republic of South Africa*, 1996.

58 Ferreira and Ferreira-Snyman 2014 *Potchefstroom Electronic Law Journal* 1473.

roots in the trade. Nevertheless, all these instruments are complementary. Judging from the recently enacted customs legislation in South Africa,⁶⁷ it is evident that the administration has set the standard high by incorporating⁶⁸ the principles included in the WTO TFA. This enabled South Africa to experience a tremendous shift in its international trade deals which were very cumbersome and poorly competitive before and which are now more accessible.⁶⁹ Under the WTO TFA, there are different stages for the implementation of different steps, and these are known as notifications. Basically,

Developing and LDC⁷⁰ Members can request more time and capacity building support to implement the Agreement. To benefit from these flexibilities, they must designate all measures into categories A, B and/or C which have the following implementation timings:

CATEGORY A = developing Members will implement the measure by 22/02/2017 and LDCs by 22/02/2018

CATEGORY B = Members will need additional time to implement the measure

CATEGORY C = Members will need additional time and capacity building support to implement the measure⁷¹

For category A, South Africa has so far a percentage of 90.3% implementation, for category B, 9.7% and 0% for category C. This means that South Africa is fully involved in the transformation of its trading environment, and this is visible from its various customs/trade modernisation steps and its updated customs framework. Note should be taken of the instrument's call for the implementation of the Single Window System for the easy and fast processing of customs documents. South Africa noted this under category B and is set to see the light by November 2022 and to be fully operational by February 2038.⁷² These statistics are quite promising and indeed set South African customs procedures on a global scale. Khanderia,⁷³ in this regard, states that the South African customs procedures are in their current state "better placed than the global

67 See generally 5.2.1.3 below and the subsequent sub-headings.

68 Even before the WTO TFA came into force.

69 Khanderia 2016 *Journal of African Law* 450,466.

70 LDC stands for Least Developed Countries.

71 WTO TFA Database 2019 *Implementation notifications (Categories A, B, C)* <https://www.tfadatabase.org/notifications/implementation>.

72 WTO TFA Database *Notification Status G/TFA/N/ZAF/1/Add.1* available at <https://www.tfadatabase.org/members/south-africa>.

73 Khanderia 2016 *Journal of African Law* 467.

average in many respects.” At the regional level, South Africa also has obligations based on its accession to a few instruments. However, only the Annex (E) to the *SACU's Agreement on Mutual Administrative Assistance* is scrutinised below.

5.2.1.2 Community-based legal sources of South African customs (modernisation)

For brevity's sake, only the Annex (E) of the SACU's *Agreement on Mutual Administrative Assistance* is considered hereunder.

5.2.1.2.1 Annex (E) of the SACU's Agreement on Mutual Administrative Assistance

Annex E to the SACU Agreement on Mutual Administrative Assistance was adopted in 2011 but only came into force in 2017. South Africa adopted and ratified the instrument, respectively, in 2011 and 2015.⁷⁴ This Annex urges member states to ensure a proper and strict observance of the customs law applicable in their respective territories, to prevent, investigate and curb customs offences, to develop an environment of cooperation that can contribute to the simplification and harmonisation of their respective customs procedures, and more importantly, to ensure that the international trade supply chain is safe.⁷⁵ The Annex extensively and consistently deals with all aspects of cooperation, varying from information exchange, the exchange of experts for knowledge sharing and the possibility of customs officials appearing as witnesses in matters in the requesting state's territory. The Annex also makes provision for the monitoring of individuals or activities pertaining to a specific case in a requested state through the requesting state's help as well as for ways through which information can be obtained and exchanged and how strictly such information should be treated and used. It further contemplates how different administrations can team up with other member states' customs administrations for greater efficiency; and how in a case of emergency an authorisation need not be obtained for carrying out enforcement activities on the territory of another state, though such authorisation must follow as soon as is practicable. Cooperation under this Annex does not cover cooperation to collect duties, taxes and any other charges incurred in and due to the

74 SACU 2017 *Status of Agreements* <http://sacu.int>.

75 Article 2 (1) of Annex to the *SACU Agreement on Mutual Administrative Assistance* (hereafter SACU's Annex).

requesting State in the territory of the requested state.⁷⁶ Contracting parties are free under the current Annex to exchange information relying on the SAFE Framework of Standards to Secure and Facilitate Global Trade.⁷⁷ When on its own initiative a member state considers that it has information that could prevent the economy, public health, public security or any vital interest of any of the member states from being affected, the said state ought to disclose such information to the endangered state without any delay.⁷⁸ Such disclosure is also required on request or by an administration's own will for information and/or supporting documentary evidence that might help either state to apply and enforce customs law properly, and that can also help in preventing, investigating or generally combatting customs offences and so enabling a safer supply chain for international trade.⁷⁹ The broadness of this requirement, which enables a timely sharing of information with partner administrations whenever deemed necessary, is a paramount quality as it enables the strict and effective enforcement of customs laws and regulations to the benefit of all states. Such a cooperative environment also encompasses a technical dimension to the extent that there can be an exchange of knowledge and experts among different administrations for a better understanding of the strategies and respective approaches of the administrations concerned, and for empowering one another through specific training, as the case may be.⁸⁰

After this general overview of the international and main regional instruments to which South Africa has adhered and which form part of its customs (modernisation) framework, it is now important to look at the country's national and recently enacted framework.

5.2.1.3 The national legal framework governing the South African Customs modernisation programme

Because customs law includes both those legal instruments enforced by the administration and those administered by it, a distinction will be made between

76 Article 2 (2) of the SACU's Annex.

77 Article 2 (5) of the SACU's Annex.

78 Article 3 (7) of the SACU's Annex.

79 Article 4 (1) and Article 5 of the SACU's Annex.

80 Article 10 of the SACU's Annex.

specific customs instruments and those incidental to customs work.

5.2.1.3.1 The express legislative framework governing customs in South Africa

Such express legal instruments are those that expressly regulate the work of customs. Before presenting the current legislative framework governing customs in South Africa,⁸¹ it is essential to first look at the previous legislation which is being replaced namely the *Customs and Excise Act 91 of 1964*. This will make it possible to understand the current position better. The assessment of the new framework will help to understand how well the country is lifting its standards to compete better in the international trade platform and how this is affecting and will continue to affect the fight against customs offences.

5.2.1.3.1.1 Customs and Excise Act 91 of 1964

The *Customs and Excise Act 91 of 1964* is said to have been drafted for South African customs at a stage when control was prioritised.⁸² That is to say that every transaction was scrutinised from the beginning of the customs process to its end. This required a lot of time and resources and was a prolonged process. The Act underwent several amendments throughout the years aimed at adjusting it to the different developments occurring, but it still could not adequately address the needs of the administration, as its original structure was always preserved. It was more adequate to respond to the needs of the 1960s than to the new and changing environment.⁸³

Consequently, the Act was judged to be structurally unfit to govern the modern system envisaged by the SARS.⁸⁴ Succinctly, as it stood, it had “not kept pace with the

81 Which framework (different Acts) was published in 2014 but is yet to come into force as this will only happen when the President of the Republic has published it as the new legal framework governing customs. See in this regard SARS 2019 *New Customs Legislation Update* <https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx>; see further Khanderia 2016 *Journal of African Law* 466; South African Government 2019 *Customs Control Act 31 of 2014* <https://www.gov.za/documents/customs-control-act>.

82 SARS Date Unknown <http://www.gov.za>.

83 Preamble of the *Customs Control Act 31 of 2014*; SARS Date Unknown <http://www.gov.za>; Poverello Date Unknown *Customs Modernisation* <http://www.mpoverello.com>.

84 Preamble of the *Customs Control Act 31 of 2014*; IDC *Fridge Research Project 14*; SARS 2015 *Questions & Answers – New customs legislation* <http://www.gov.za>.

changing focus of customs work” as well as the technological advancement that was dictating new ways of conducting trade transaction.⁸⁵ It could not adequately respond to new risks⁸⁶ and was seen as not being business-friendly.⁸⁷ Restructuring the customs (and excise) legislative framework meant drafting it while taking into consideration instruments such as the Revised Kyoto Convention⁸⁸ to which the country had acceded in 2004, and several other international instruments⁸⁹ but most importantly, building up a system that draws from and rests on a “sound, clear and logical legislative framework”.⁹⁰ The need had arisen to draft more constitutionally compliant, easier to read legislation based on international standards.⁹¹

The administration also hoped that the new legislation would provide a legal framework that was much easier to understand and use, with the view of instituting a high degree of certainty in its operation for all stakeholders.⁹² Furthermore, such steps sought to situate South African customs practices in the context of generally accepted international customs and trade best practices.⁹³ The legislature acknowledges in the preamble of the *Customs Control Act* 31 of 2014 that the mere amendment of the previous legislation (namely the *Customs and Excise Act* 91 of 1964) would not have enabled the administration and the country to reach its targets in respect of the modernisation and transformation of the laws governing customs and the simplification of customs procedures and formalities. A new legislative framework needed to be drafted, that could further the administration's modernisation purposes

85 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.gov.za>.

86 The risks in question are those associated with ill behaviours that take advantage of inefficient customs systems deprived of adequate and automated strategies and capacities to detect and efficiently address these behaviours in an international trade environment that is growing unexpectedly. Other risks involved include the inability of a country to attract investment which may be detrimental to its economy by the simple fact that it does not adapt to changes.

87 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.gov.za>.

88 SARS 2010 *Trader Pocket Guide* 8; SARS 2010 *Trader Pocket Guide* 3; Khanderia 2016 *Journal of African Law* 452 and 464; SARS 2015 *New customs legislation update* <http://www.sars.gov.za>; Van Den Berg 2013 <http://www.thesait.org.za>; SARS 2019 *New Customs Legislation Update* <https://www.gov.za/documents/customs-control-act>.

89 Preamble of the *Customs Control Act* 31 of 2014; SARS 2015 *New customs legislation update* <http://www.sars.gov.za>.

90 SARS 2015 *New customs legislation update* <http://www.gov.za>.

91 Levendal *A case study of the customs administrative penalty* 20.

92 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.gov.za>.

93 Poverello Date Unknown *Customs Modernisation* <http://www.mpoverello.com>.

in an open and democratic society.⁹⁴ The administration thought a new legislative framework would make it possible to achieve the right balance between the different interests at stake in international trade, namely effective customs control, the safe movement of goods and people across the Republic's borders, and the facilitation of trade and tourism.⁹⁵ The new legislative framework was viewed as being able to serve as a platform for the smooth and comprehensive implementation of the various other laws that are directly but implicitly connected to the work of customs.⁹⁶ From this perspective, it is clear that it was crucial to modernise the legislative instruments expressly governing customs. Once this was achieved, the direct consequence was that all other laws belonging to other government bodies dealing with trade but that to some extent have an impact in customs, would now have to take cognisance of the new customs legislation and be modernised as well, with a view to copying the example and aligning their provisions and practices with the standard set in the customs legal instruments. This would, therefore, mean the generation of a wholly transformed legal environment for customs.

The furtherance of the SARS's CMP saw a new legislative era that unfolded on the *Customs Control Act 31 of 2014*⁹⁷ and the *Customs and Excise Amendment Act 32 of 2014*⁹⁸ being passed on 23rd July 2014. Prior to that, the *Customs Duty Act 30 of 2014* had been passed on 10 July 2014.⁹⁹ These legislative steps were taken to enable South Africa to meet and support international legislative requirements and obligations, to ensure that its system as a whole was keeping pace with global trade transformation and that its procedures were efficient, predictable and transparent.¹⁰⁰ Each of these "modern pieces of legislation", as the SARS calls them, covers specific aspects of the customs work. These are scrutinised below.

94 Preamble of the *Customs Control Act 31 of 2014*.

95 Preamble of the *Customs Control Act 31 of 2014*.

96 Preamble of the *Customs Control Act 31 of 2014*; see further section 8 of the same Act.

97 Government *Gazette No. 37862* of 2014.

98 Government *Gazette No. 37863* of 2014.

99 Government *Gazette No. 37821* of 2014.

100 SARS 2015 *New customs legislation update* <http://www.sars.gov.za>; Levendal *A case study of the customs administrative penalty* 20.

5.2.1.3.1.2 Customs Control Act 31 of 2014

The *Customs Control Act* 31 of 2014 (hereafter CCA) provides a broad range of measures that will arm a very proactive administration aware of the ever-changing environment against every single threat that may come its way if it is followed correctly and with full integrity. Section 3 of the CCA describes the aim of the Act as being to provide systems and procedures for the customs checking of all goods and persons moving across the Republic's borders; for collecting tax more effectively on imported and exported goods; and finally, for easing the implementation of the *Tax Levying Acts* and other legislation applying to such goods or persons.

Beyond every other provision, the Act promotes a simplification of procedures by providing in three ways for the expedited clearance and release of goods meant for home use or any other permissible customs procedure: the clearance and release of goods can be done even if the information submitted is incomplete and the clearance information is provisional; the release of goods subject to clearance can also be done with clearance only following at a later stage in the process; and lastly, the clearance and release of goods can be done following elementary clearance requirements.¹⁰¹ Such procedures accord with the principles underpinning the Revised Kyoto Convention, in accordance with which this Act was drafted.¹⁰²

The most noticeable aspect (and one that is very relevant to this study) is the extensive enforcement powers accorded to customs officers in the exercise of their duties against any act or omission infringing the provisions of the Act and other related Acts.¹⁰³ Hereunder is a more detailed presentation of some essential aspects of the Act relevant to this study. It is important to highlight that these different aspects specifically address the concerns of the WCO with its different instruments and initiatives, more specifically those contained in the RKC.¹⁰⁴ Concerns here refer to the

101 Section 518 (a) (b) and (c) of the CCA.

102 See Preamble of the CCA where it is indicated that the then Customs legislation had not kept pace with technological advances and did not incorporate the standards set both in the Revised Kyoto Convention and other international instruments to which South Africa was a party.

103 Section 11 of the CCA.

104 See Specific Annex H of the said RKC.

aspects pointed out by the WCO that should be given particular attention in a modernising customs environment.

5.2.1.3.1.2.1 Characterising customs offences under the CCA

The CCA distinguishes between prosecutable and non-prosecutable breaches.¹⁰⁵ While a non-prosecutable breach is defined as one which does not constitute an offence in terms of the Act, a prosecutable breach is one that constitutes an offence under the Act. The Act also differentiates between two categories of offences. Those that fall into Category 1¹⁰⁶ comprise offences such as corruption, false statements and documentation, diverting for home use goods imported into the Republic for transit purposes, concealing or dealing in diverted goods, smuggling and misrepresentation.¹⁰⁷ Category 2 comprises offences such as obstructing a customs officer from performing his duties and misrepresenting oneself as a customs officer.¹⁰⁸

Penalties are also provided for the different categories of offences.¹⁰⁹ The difference between the two categories of offences is that the penalties in Category 1 are more severe than those in Category 2, and the prescribed fines are similarly higher in the former than the latter category. A non-prosecutable breach calls for the imposition of a fixed amount penalty while a prosecutable breach imposes on the offender a prosecution avoidance penalty, failing which criminal proceedings are instituted.¹¹⁰ Further to this aspect, the CCA gives broad enforcement powers to customs officers in order to facilitate law enforcement.¹¹¹

5.2.1.3.1.2.2 General enforcement powers accorded to customs officers

The enforcement functions of customs officers are to be performed in accordance with

105 Characterising customs offences to facilitate understanding as to how they come about and how they should be dealt with is specifically dealt with in Standard 2, 9 and 22 of Specific Annex H to the RKC and also in Recommended practice 10 of the same Annex. See discussion in 2.2.1.1 above; see also Section 875 of the Act.

106 Section 887.

107 Emanating from Sections 887(1)(e), 887 (1)(a-d), 887 (1)(k-m) and 735 (e)(ii) respectively.

108 Section 888 (a-f).

109 Sections 890 and 892.

110 Section 875 (a) and (b) of the CCA.

111 See generally Annex H to the RKC specifically its Standard 5.

any instructions that may be given by the Commissioner and within limits and following any procedure that may be prescribed by rule or determined by the Commissioner.¹¹² Such enforcement may be performed, except where the CCA states otherwise, at any time and place without a warrant or previous notice, but subject to the limitations prescribed by rule or given by the Commissioner.¹¹³

The Act recognises that customs officers have “unqualified” access to and may perform at any time any enforcement function at any area, premises or facility.¹¹⁴ Such an officer may within the enforcement of such a mandate require the help or assistance of interpreters, technicians, workers, police officers or any other persons whose participation in the operation might be necessary.¹¹⁵ Not only people can be used in helping customs officers, but they can also make use of any other aids including dogs, chemical substances, imaging equipment, or any other mechanical or electronic devices, but within the boundaries of laws governing the use of such aids.¹¹⁶ This is the essence of customs modernisation; i.e., making use of more efficient resources to accomplish more satisfactorily the tasks assigned to this public body.

Freedom of access and search is accorded to customs officers operating outside a customs controlled area,¹¹⁷ but this is subject to a number of conditions laid down in subsection 3 of Section 709 of the CCA. The conditions include amongst others the consent of the person in charge, the (business and public) nature of the area, premises or facility, the reasonable belief that there may be found at that place goods, documents, and information of crucial value to customs and subject to customs control, or persons possessing valuable information for the same purpose.¹¹⁸ As emphasised by the CCA,¹¹⁹ beyond the conditions enumerated above, such warrantless enforcement conducted outside a customs controlled area must be based on the reasonable grounds that if it were applied for, a warrant would have been

112 Section 12 (1) (a)(b) of the CCA.

113 Section 12 (2) of the CCA.

114 Section 709 (1) (a) (b) of the CCA.

115 Section 12 (3) (a) of the CCA.

116 Section 12 (3) (b) of the CCA.

117 Section 709 (2) (a) (b). The term “outside a customs controlled area” is not defined in the CCA.

118 Section 709 (3) of the CCA.

119 Section 709 (4) of the CCA.

granted and that the delay caused by applying for a warrant might defeat the purpose of the access. The customs officer may have recourse to force, but only to the extent necessary if on demand by the person in charge of the area or premises he has identified himself by means of an identity card, has produced the warrant authorising such access or in the absence of a warrant, has explained the purpose of the access, and the reasons why no warrant is available, but was not subsequently granted access¹²⁰

There is an extensive jurisprudence of cases dealing with the limitations to the right to privacy¹²¹ enshrined in the Constitution.¹²² All of these cases aim at ensuring that in carrying out their duties, state officials do not abuse their powers and act only within constitutionally justifiable limits. In other words, the case law in question draws a line between what is permissible and what is not when it comes to enforcing the law vis-à-vis society and its citizens.¹²³

So, in carrying out searches, the principle set in *Gartner* must always be kept in mind, namely:

A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the State must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation.¹²⁴

120 Section 710 of the CCA

121 *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67; *Mistry v Interim National Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 25; *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC); *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC); *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC).

122 Section 14 of the Constitution of the Republic of South Africa, 1996.

123 In *Magajane*, at para 65, it was held that "[T]he importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation."

124 *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at Para 69.

This is important to the extent that:

A warrantless search procedure implies the absence of a warrant providing guidance as to the time, place and scope of a search and it is therefore desirable that the statutory provision authorising a warrantless search procedure be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, which the warrant requirement would otherwise do.¹²⁵

It is clear from this case law that warrantless searches and seizures are permissible, but they should never become the rule, no matter the domain involved.¹²⁶ Furthermore, warrantless searches should never be a synonym of arbitrariness and laws regulating them should put a strong emphasis on the boundaries not to cross.

In performing searches or any other enforcement functions,¹²⁷ the customs officer also has unqualified access to vessels, aircrafts, trains, railways carriages and vehicles, whether inside or outside a controlled customs area, whether with or without a warrant (subject to a few conditions as prescribed by Section 711 (3) and (4), and conditional on the consent of the person in control of the vessel, aircraft, train, railway carriage or vehicle, and subject to the reasonableness of such an action in the circumstances), as the case may be.¹²⁸ These broad enforcement powers include the ability to order or forcefully urge the on-board operator of a vessel or vehicle to halt, or of an aircraft to land.¹²⁹

People entering or leaving the Republic, including crew members, and their luggage may also be subjected to customs control with or without a warrant, and may be requested by a customs officer to produce any document or goods in their

125 Para 23 in *Minister of Police and Others v Kunjana* [2016] ZACC 21.

126 Gaertner at para 69; *Minister of Police and Others v Kunjana* [2016] ZACC 21 at para 27.

127 The enforcement function may relate to the suspicion that in such a vessel, aircraft, train, railway carriage or vehicle will be found goods that are or which the customs officer has reasonable grounds to suspect are being subject to customs control, goods in respect of which a breach of the current Act or a *Tax Levying Act* is being or has been committed, goods that have been utilised or are being utilised for an activity constituting a breach of the above mentioned two Acts, or goods that are prohibited, restricted, or sectorally controlled, or counterfeit goods or documents relating to such goods or any person having helpful information regarding such goods or any activity carried out in breach of the provisions of the Act or a *Tax Levying Act*. Other grounds may include suspicions that the vessel, aircraft, train, railway carriage or vehicle has been specifically constructed, adapted, altered or fitted in any manner with the aim of concealing goods. See Section 711 (3) of the CCA.

128 Section 711 (1) (2) (3) (4) and (5) of the CCA.

129 Section 711 (5) of the CCA.

possession.¹³⁰

The documents or goods may be requested simply because they are subject to customs control or are suspected to have been transported or manufactured in breach of the provisions of the CCA or a *Tax Levying Act*, or might have been part of any activity carried out in breach of the said Acts.¹³¹ If such persons do not cooperate, the customs officer is authorised by law to have recourse to force, but only to the extent necessary.¹³² Depending on each specific case, the persons so stopped can be searched either on account of their refusal to comply with the customs officer's interpellation or randomly as part of a customs control check.¹³³ A child¹³⁴ may similarly be searched if there are reasons to believe that he or she may be used or involved in acts contravening customs laws and regulation. However, a child can be searched only in the presence of that child's parent or guardian or a person responsible for the child while travelling, as the case may be.¹³⁵

Different types of searches can be conducted varying from frisk searches to external bodily searches.¹³⁶ The overall purpose of such searches is to detect any concealed weapon or dangerous object that might be used to inflict bodily injury, prohibited goods or goods requiring strict customs scrutiny, and so on.¹³⁷ For greater efficiency in undertaking searches, the customs officer, who must be adequately trained in this regard, is allowed by law to make use of any mechanical, electrical, imaging or electronic equipment, sniffer dogs or any other animal trained for a specific detection purpose.¹³⁸ These are the tools that contribute to the efficient performance of the duties of a modern customs administration. A person is guilty of an offence if that person does anything that prevents the scanning equipment or any mechanical or electronic, imaging or electronic appliance from fulfilling the purpose for which it is

130 Section 716 of the CCA.

131 Section 716 (3) of the CCA.

132 Section 716 (5) of the CCA.

133 Section 717 (1) and (2) of the CCA.

134 The Act considers a child to be a person under the age of 18. See Section 717 (5) of the CCA.

135 Section 717 (3) of the CCA.

136 Sections 718, 719 and 720 of the CCA.

137 Section 718 (1) of the CCA.

138 Section 719 (2) and (3) of the CCA.

used - that is, producing an indication of the true nature or characteristics of goods in packages or containers, on or in a person's body.¹³⁹

In carrying out its duties, if a customs authority for one reason or the other is aware that releasing goods after they have been cleared for home consumption or any other customs procedure might affect or breach in any way the provisions of the current *Act*, the *Tax Levying Act* or any other Act dealing with goods, the authority must refuse the release of such goods.¹⁴⁰ The power to prevent the release of goods may also be exercised when necessary to prevent the abuse of any systems and procedures of the current *Act* or the *Tax Levying Act*, and to give effect to existing national legislation or policy relating to international trade, the protection of public health, the protection of the environment, or public safety.¹⁴¹ The SARS officials are also expected, under the CCA, to reinforce cooperation with other customs administrations around the world as this helps in tackling fraud more efficiently. Cooperation is, as pointed out by the WCO, an efficient weapon in the enforcement of customs law. The organisation has placed enough emphasis on this aspect as can be seen from its various instruments discussed in Chapter 2 above.¹⁴² This aspect is detailed below.

5.2.1.3.1.2.3 Working in conjunction with other countries

If authorised by the national executive, the Commissioner may freely enter into an agreement with the customs administrations of other countries for the purpose of customs co-operation, including information exchange, facilitating the customs processing (import and export) of goods,¹⁴³ and exchanging experts in the

139 Section 752 (1) (c) of the CCA.

140 Section 99 (1) (a) (b) (c) of the CCA.

141 Section 100 (1) (a) (b) (c) of the CCA.

142 See specifically Standards 6.7 and 6.8 of the General Annex to the RKC; see the Nairobi Convention discussed at 2.2.2.2.2.1 above and the Johannesburg Convention discussed at 2.2.2.2.2.2 above.

143 Section 16 (1) (b) reads:

"16. (1) The Commissioner may, if authorised by the national executive, enter into an agreement with the customs administration of another country—
(b) to facilitate the customs processing of goods—
(i) exported to the Republic from that country; and
(ii) exported from the Republic to that country; and...". There seems to be a slight mistake in (i) where "exported" is used instead of "imported". It is true that those goods are exported from the country indeed and when they enter the Republic, they are imported goods. For simplicity's sake, it would have been better to use the term "imported" in (i), which would then read "imported to

enforcement of the customs laws of that country and those of the Republic.¹⁴⁴ Cooperation is not only essential in today's fast transforming trade environment, it has become compulsory as it is the only way an administration can strengthen its efforts against customs offences that know no definite shape and that are perpetrated beyond borders. The WCO has always emphasised the importance of building such strong links with other customs administrations and this forms part of its founding principles as discussed at 2.2.2.2 in Chapter 2 above. In a nutshell, cooperation gives better visibility as to how to deal with customs offences that undermine borders and affect more than one state at a time. Ensuring that all networks used by fraudsters to perpetrate customs fraud are monitored by customs from one end to the other has also been emphasised in the CCA through its provisions about international postal articles discussed below.

5.2.1.3.1.2.4 Dealing with international postal articles

Customs authorities also have a crucial role to play regarding international postal articles. When these articles are presented to them, they are required to categorise them according to their specific nature. This means categorising them as those that must be cleared in terms of regular clearance procedures, those that are taxable and those that are not, those that contain prohibited, restricted or sectorally controlled goods, and so on.¹⁴⁵ Furthermore, the customs authority must perform all actions relating to these categories as may be required by law. These include, amongst others, notifying importers or exporters of such postal articles and the related procedure, releasing cleared non-taxable items, and dealing accordingly with those belonging to the category of prohibited, restricted or sectorally controlled goods.¹⁴⁶ The enforcement functions of the customs authority are fully extended in this context as the officer has the right, subject to his doing so on reasonable and necessary grounds, for any enforcement purposes, to open an international postal article in order to

the Republic from that country." The same amendment should apply to 16 (c) (i). Though the word "exported" makes sense as used in these specific Sections, it leads to confusion.

144 Section 16 (1) (c) and (2) of the CCA.

145 Section 498 (1) (a) of the CCA.

146 Section 498 (1) (b) (c) (d) (e) (f) (g) of the CCA.

retrieve the invoice or the information regarding the consignment, to compare the content of the postal article and the specific characteristics given on the postal declaration, to assess whether such an article is subject to any import or export tax, and most importantly to ascertain whether such an article is prohibited, restricted or sectorally controlled goods.¹⁴⁷ This expands the enforcement power of a customs officer to a considerable extent, as he can access the content of postal articles if he judges their opening to be necessary. However, such enforcement powers are restricted in Section 507 of the CCA, which reads:

507. (1) No customs officer may—
(a) open any international postal article that weighs 30 grams or less, unless the customs officer on reasonable grounds suspects that the postal article contains prohibited, restricted or sectorally controlled goods;
(b) read, copy or make an extract from any personal or private communication found in any international postal article opened in terms of Section 506 if reading, copying or making an extract from that communication is not necessary for the enforcement of this Act or a tax levying Act; or
(c) disclose any personal or private communication found in any international postal article opened in terms of Section 506 otherwise than for a purpose permitted in terms of Part 5 of Chapter 1.
(2)...

So in carrying out his enforcement function, the customs officer may not interfere with any postal article if such interference is not reasonably necessary in the circumstances. Even so, such action requires that the officer duly notifies the addressee by affixing on the postal article a note informing the addressee of the action undertaken by him.¹⁴⁸ This act of informing the addressee that the item was opened and inspected by customs can be omitted, however, if such notification may obstruct the investigation of serious crime.¹⁴⁹ This means, in other words, that if the customs officer judges that by notifying the addressee that the postal article was opened this might obstruct the investigation of a serious crime he may refrain from giving such notification. This reinforces the idea that indeed officers must perform their duty in a way that meets all the stakeholders' expectations. The customs authority also has the right to seize and confiscate an international postal article if the said article or its

147 Section 506 (a) (b) (c) (d) and (e) of the CCA.

148 Section 508 (1) of the CCA.

149 Section 508 (3) of the CCA.

contents is found not to match the clearance declaration submitted for the article in question or the postal declaration accompanying it.¹⁵⁰ The Act makes it possible for the Commissioner to enter into any such agreement as may be reasonably necessary for a better understanding of and strengthened cooperation with the South African Post Office.¹⁵¹ The need for efficiency and effectiveness in the delivery of the services provided by the two administrations should motivate any such agreement, and this can only be beneficial for the country. With a view to facilitating the implementation of this particular Chapter of the Act, rules can be made and might relate amongst others to measures aimed at curbing tax evasion regarding goods sent by post and the detection of prohibited, restricted and sectorally controlled goods sent through the same channel.¹⁵² This reinforces the idea that in the process of implementing the Act, if somehow there is a need to develop rules for more efficiency, the Commissioner is free to do so, so long as the rules serve to advance the purpose of the Act and those of the administration as a whole. Considering all procedural steps that the fight against customs offences requires, the CCA gives customs officers extensive investigative powers, which powers enable them to access places and information easily, thus facilitating law enforcement. This, once again, is in line with Standard 5 and the subsequent standards of Specific Annex H to the RKC.

5.2.1.3.1.2.5 Investigative powers of customs officers

The customs authority is vested with the power to question a person regarding any area, premises, facility, vessel, aircraft, train, railway carriage or vehicle to which the officer has access or in respect of any goods, documents or persons in, on or at such premises, no matter their capacity as regard such a place, instrument of transport, goods or documents or any act or omission in breach of or apparent breach of the current Act or any associated Act.¹⁵³ In the event that the person so interrogated is reluctant to answer questions put to him/her or to make available the goods or documents requested, the customs officer might serve on that person a notice to

150 Section 509 (1) (a) (b) of the CCA.

151 Section 510 of the CCA.

152 Section 511 (b) of the CCA.

153 Section 729 of the CCA.

appear before the authority at a time and place specified in the notice to answer the questions or produce what is requested of him/her as specified in the notice.¹⁵⁴ The person may similarly be required through the notice to answer questions under oath or affirmation.¹⁵⁵ Customs officers similarly have the power to arrest when the need arises. This aspect is detailed in the following paragraph.

5.2.1.3.1.2.6 Powers to arrest vested in customs officers

The power to arrest is not a power vested in every customs officer. To be able to perform such an action in fulfilling his duty, the customs officer must have such special status granted him by the Commissioner and must accordingly possess a certificate and an identification card proving that he has such power in enforcing the *Customs Control Act* or a *Tax Levying Act*.¹⁵⁶ The power to arrest accorded to customs officers may be carried out with or without a warrant.¹⁵⁷ Depending on every circumstance, and to the extent it is reasonably necessary, force may be used to arrest a person who resists, flees or tries to flee.¹⁵⁸ The circumstances justifying an arrest without a warrant derive from Section 735 of the Act. It includes the illicit acts of persons in control of a non-complying vessel, aircraft, train, railway carriage or vehicle operators, having or being suspected of having entered, left or tried to enter or leave the Republic otherwise than through a place of entry or of exit. It also includes a person having imported or being suspected of having imported or of attempting to import or export goods into and from the Republic in contravention of the Act, as well as a person importing into or exporting from the Republic or on reasonable grounds being suspected of so doing or being found in possession of prohibited, restricted or sectorally controlled goods in violation of the Act and related legislation. Persons guilty of these actions can be arrested without a warrant. Another category exposed to the possibility of arrest without warrant is a person diverting or being reasonably suspected of having diverted goods in transit for home use and also one who is a suspected or confirmed smuggler. A person having escaped custody; one who

154 Section 730 of the CCA.

155 Section 730 (2) (b) of the CCA.

156 Section 733 (a)(b) of the CCA.

157 Section 734 of the CCA.

158 Section 739 (2) of the CCA.

impersonates a customs officer and one who prevents a customs officer from the proper performance of his duty can also be subject to an arrest without warrant. Arresting under the authority of a warrant is dealt with in Section 736 of the Act. In Section 737, the Act releases customs officers, as well as any other officers of another workforce, assisting in the carrying out of such arresting duty and detention of any liability in a case of wrongful arrest. This exemption applies to the customs officers and their colleagues from other enforcement departments who perform an arrest and are so authorised by a warrant and reasonably believe that the person they are arresting and in some instances detaining, is indeed the person designated in the warrant.¹⁵⁹ This position should be read in line with the findings in *Minister of Safety and Security v Kruger*¹⁶⁰ regarding section 46 (1) of the *Criminal Procedure Act*.¹⁶¹ The section in question also exempts the officers who perform a wrongful arrest from liability when they reasonably believed to be arresting the right person. The court stated in that case that:

...A police officer - or anyone else for that matter – who deprives a person of his or her liberty without legal justification commits a delict, and is ordinary liable for the damage that is caused by the delictual act. The section does not purport to render the act lawful. In its terms it does no more than to relieve the police officer of the consequences of the delictual act. The act remains unlawful and, in accordance with ordinary principles, the employer is vicariously liable for its consequences.¹⁶²

The position is therefore that the officers in these circumstances have only a limited protection from the law.

Suspects arrested by customs officers or the people assisting them are to be brought to a police station, or any other place stated explicitly in the warrant of arrest, and any further action against them should be in accordance with the procedure prescribed in Section 50 of the *Criminal Procedure Act*.¹⁶³ Certain customs officers may be permitted by the Commissioner after adequate training to carry an official SARS

159 Section 737 (1) and (2) of the CCA.

160 (183/10) [2011] ZASCA 7 (8 MARCH 2011).

161 51 OF 1977.

162 *Minister of Safety and Security v Kruger* (183/10) [2011] ZASCA 7 (8 MARCH 2011)) at para 17; See *Ndlovu v Minister of Police* (Unreported) GP case no 2014/15210, 9 September 2016 at para 11.

163 Section 740 of the CCA.

firearm, but it may be used only as a last resort and in exceptional circumstances.¹⁶⁴

As regards border control, a customs officer may assist in patrolling the republic's borders and also in curbing cross-border crime related to imported or exported goods.¹⁶⁵ The Commissioner has the responsibility, when the work so requires, to acquire equipment that can improve the administration's response to rising crime.¹⁶⁶ Such equipment may include patrol boats, aircraft and vehicles, for instance, as well as the weapons and ammunition needed to equip them.¹⁶⁷ When duty so requires, these can be used in pursuing a vessel at sea and forcing it to stop, subject to obtaining the Commissioner's authorisation, by firing a shot if the vessel is reluctant to stop despite the patrol boat's bearing the customs ensign or flag.¹⁶⁸ The right to hot pursuit at sea can be exercised either on behalf of the Republic or on behalf of a foreign state, following article 111 of the *United Nations Convention of the Law of the Sea*, and the consequent seizure of the vessel and arrest of the persons on board may follow.¹⁶⁹ At 3.2.3 in Chapter 3 above, one risk area identified by the WCO Working Group on Commercial Fraud was offences against intellectual property rights, health and safety. This aspect of the WCO's approach broadly seeks to protect right owners from the unlawful competition that has various and extended negative consequences not only for the latter, but also for the state's economy and its citizens' health and safety. That is why the fight against counterfeit goods is taken very seriously in South Africa. The following paragraph attests to that.

5.2.1.3.1.2.7 Dealing with counterfeit goods

Counterfeit goods constitute a significant threat to the whole trade environment. By inserting this aspect of trade in the CCA, the legislature hopes to reemphasize customs' role in combatting the trade in counterfeit commodities, whether imported to or exported from the Republic.¹⁷⁰ The Act provides that in the event of its provisions

164 Sections 741 and 742 of the CCA

165 Section 744 (1) of the CCA.

166 Section 745 of the CCA.

167 Section 745 (a) and (b) of the CCA.

168 Section 746 (1) and (2) of the CCA.

169 Section 747 (1) and (2) of the CCA.

170 Section 804 (1) of the CCA.

conflicting with the *Counterfeit Goods Act* (CGA), the provisions of the former prevail.¹⁷¹ The point is thus made that in a situation where the provisions of the CCA and the CGA are conflicting, and although the CGA belongs to a distinct domain, the CCA takes precedence, most probably because of its new nature.

People lawfully detaining specific goods in terms of an application granted by the customs authority¹⁷² must notify the customs authority within a period of ten calendar days following the detention of the goods whether they intend to take the matter to court for a finding to the effect that the goods in question are counterfeit goods traded in violation of an existing intellectual property right.¹⁷³ This notice, which must also to the extent possible be addressed to any affected party must, in case the rights holder is taking the matter to court, cause the goods to be removed to a counterfeit goods depot, as prescribed by Section 815 of the CCA.¹⁷⁴ If notice is given to the customs officer to the effect that the rights holder has no intention of applying to a court regarding the detained goods, the detention of the goods must immediately be terminated by the customs authority.¹⁷⁵ A right holder will benefit from taking the matter to court, as the court may find that the goods are counterfeit goods and accordingly, among other directions, order the accused party to provide the right holder with information about the origin (the source) of the goods detained, the identity of the people involved or allegedly involved in importing, exporting, manufacturing, producing and supplying the said goods, as well as the different distributing networks.¹⁷⁶ The information obtained would be of vital value to the rights holder, who would be able to protect its brand by exposing the counterfeit network, and would also be of value to consumers, who would in this manner be prevented from being misled by such goods. This whole process of right holders protecting their brand comes down to co-operating with the customs authority with the aim of preventing the commission of customs offences, such as dealing in counterfeit goods,

171 Section 804 (3) of the CCA.

172 Sections 806 and 810 of the CCA.

173 Section 814 (1) of the CCA.

174 Section 814 (2)(3) (a) of the CCA.

175 Section 814 (3) (b) of the CCA.

176 Section 817 (1) (b) of the CCA.

which have a disastrous effect not only on the right holders but also on consumers. Of course, when the application is brought before a court there is always the risk that the court may rule that the goods detained are not counterfeit goods, in which case the right holder may be directed to pay damages to the affected party,¹⁷⁷ but right holders should be aware of the specifics of their products and should not hesitate to have recourse to courts in an attempt to protect their rights. This is indeed the best way to shield their brands from unauthorised uses. The following paragraph presents the component of the CCA with regard to preventing corruption in the daily activities of customs.

5.2.1.3.1.2.8 The zero-tolerance policy against corruption in customs

SARS has established a joint Anti-Corruption, Security and Customs forum, which has, in turn, led to the development and implementation of joint strategies to stop corrupt practices within the customs administration.¹⁷⁸ The administration hopes to maintain integrity in the performance of its services so that it can continue to be regarded as a world-class tax and customs administration.¹⁷⁹ In carrying out their enforcement functions, customs officials are forbidden to demand or receive anything other than from or through their employer, any reward for performing or refraining from performing their function. They are also forbidden to do anything or promise to do anything or agree to anything or to permit the doing of anything that is in breach of the present Act and the *Tax Levying Act*.¹⁸⁰ Persons issuing invoices in trade transactions are equally urged to carry out their task carefully and in all honesty.

5.2.1.3.1.2.9 The responsibility of persons issuing an invoice in trade transactions

Beyond the other varied responsibilities to which people involved in the clearance and delivery of goods may be submitted, persons issuing an invoice concerning traded goods have a very onerous one. These persons must ensure that the documents they submit contain truthful statements and are not in any way prejudicial to the customs administration and the purposes for which they are so submitted in any way. Section

177 Section 818 (a) of the CCA.

178 Magashula 2011 "The role of customs" 8.

179 SARS *SARS Compliance Programme 2012/13 – 2016/17*, 5.

180 Section 26 (2) (a) (b) (c) of the CCA.

186 (5) and (6) of the CCA draws the attention of those who issue documents to the fact that they will be held responsible if any document they present to the customs administration or issue for the customs transaction, as the case may be: contains a false statement or incorrect information to their knowledge; bears or fails to bear information with the aim to mislead; omits to provide information or provides incorrect information in order to unduly benefit from lower tax rates or rebate, refund, drawback or any other entitlement. As noted in subsection (7) of the same Section 186 of the CCA, these are category 1 offences, which means that they attract more significant fines and longer jail sentences.¹⁸¹ These officers are therefore called to extreme vigilance. It is no secret that if not monitored correctly, transit operations can have a multitude of negative impact (through dumping and diversion) on a country's economy and that of its neighbours without neglecting the impact it may have on citizens' health. Taking these concerns into consideration, this procedure has been regulated by the CCA.

5.2.1.3.1.2.10 National and international transit operations under the CCA

The CCA distinguishes between national and international transit, but considering the nature of the present research, only aspects relating to international transit will be examined here. However, it may be noted that in terms of the CCA national transit is a customs procedure that enables goods to be transported in the Republic from one customs controlled area to another such area not served by the same customs office.¹⁸² Goods are subject to the international transit procedure when they are cleared as such.¹⁸³ During the transit process, it is prohibited to redirect goods to another destination without the prior written permission of the customs authority.¹⁸⁴ In order to secure the goods that are declared as being in transit, there is a set standard of technicality that vehicles and containers carrying such goods must meet in order to proceed uninterrupted.¹⁸⁵ The Act refers to these requirements without

181 See Section 887 of the CCA.

182 Section 194 (1) of the CCA.

183 Section 196 (1) (a) of the CCA.

184 Section 208 of the CCA.

185 Section 210 (1) of the CCA.

naming them. Vehicles or containers failing to comply with these requirements run the risk of seeing the release of their goods withheld by the customs authority.¹⁸⁶ The carrier who carried out the transit operation or the person clearing the goods for transit must submit to the customs authority, provided such authority requires this, proof that the transit operation has been completed.¹⁸⁷ Does it perhaps mean that if the customs authority makes no such request of proof the people so mentioned need not provide it to the administration? It may be wiser to set the provision of proof as an essential step to be fulfilled by the people concerned. Considering the delicate nature of transit operations and more specifically of international transit operations, the submission of proof upon completion of the process should be compulsory, irrespective of whether the customs authority requests such proof or not. All participants in transit operations must be aware that they must submit without delay proof of completion of the transaction. If for one reason or the other goods cleared for international transit are not finally exported within the timeframe provided, the responsibility lies with the person who is clearing such goods to notify without delay the customs authority of the failure to export the goods in transit, and the reasons for the failure.¹⁸⁸ The customs authority will then, depending on the nature of the justification provided and the factual situation, take an appropriate action, that varies from securing the goods or requiring them to be secured in a specific manner or withdrawing the release given in respect of the goods in question and issuing a direction in this regard.¹⁸⁹ As customs disputes are a direct consequence of customs administrations' efforts to combat customs offences, the next paragraphs are dedicated to the different stages of this process within the context of the new legal framework.

5.2.1.3.1.2.11 Resolving customs disputes following the CCA provisions

The CCA offers four ways of settling disputes arising from its implementation, enforcement or interpretation and that of the *Customs Duty Act* or the *Excise Duty*

¹⁸⁶ Section 210 (2) of the CCA.

¹⁸⁷ Section 216 (1) (a) and (b) of the CCA; Section 217 (3) (a) similarly reads: "A person who cleared goods for international transit must *on request* by the customs authority provide proof to the customs authority that the goods were exported as may be prescribed by rule."

¹⁸⁸ Section 217 (2) (a) of the CCA.

¹⁸⁹ Section 217 (2) (b) of the CCA.

Act.¹⁹⁰ The different contexts to solve customs disputes are presented below.

5.2.1.3.1.2.11.1 Internal review/Internal resolution of decisions and settlement

According to the CCA, the *Customs Duty Act*, and the *Excise Duty Act*, the decision-makers are the Commissioner and a customs officer or a SARS official who is not a customs officer.¹⁹¹ These decision-makers may internally review decisions made by themselves or by either of them on their own initiative or on the initiative of the supervisor of the customs officer or SARS official who took the decision, or solely on written request by an aggrieved party.¹⁹² This can be done by confirming, altering or repealing such a decision to the extent possible and necessary and taking into consideration any right that might have evolved or have been affected by the prior making of the decision.¹⁹³ Moreover, the reconsideration may happen either before or after the person to whom the decision relates has been made aware of the decision.¹⁹⁴ There are a few instances, however, when those decisions may not undergo any form or amendment or be repealed: a decision on or in the course of an administrative appeal; a decision which is the subject of such appeal or the subject of alternative dispute resolution proceedings or of judicial proceedings; and a decision which is part of a settlement, which has already been communicated to the person affected by it, and is administered by specific provisions of the current Act and the other related Acts referring to the reconsideration, repeal, withdrawal, suspension, amendment or correction of decisions.¹⁹⁵

Besides the internal review of decisions, the CCA makes provision for the settlement of disputes arising from its implementation and the other related Acts between the Commissioner and other parties. To settle means to reach an agreement regarding a dispute, in whole or in part, between the Commissioner and another person by compromising the disputed matter.¹⁹⁶ The Act gives different circumstances when it is

190 *Customs Duty Act* 30 of 2014 and the *Excise Duty Act* 91 of 1964.

191 Section 824 of the CCA.

192 Section 826 (a) of the CCA.

193 Section 831 of the CCA; Section 832 (b) of the CCA.

194 Section 835 (1) of the CCA.

195 Section 835 (2) (a) (b) (c) and (d) of the CCA.

196 Section 824 of the CCA.

appropriate or not to settle¹⁹⁷ and designates the Commissioner and any SARS official to whom the latter delegates powers to that effect as the only people able to settle customs disputes.¹⁹⁸ A settlement would be inappropriate if it defies the purpose of this Act and the related Acts and does not serve well the interest of the state. In all respects, settlements should be fair and equitable to either of the parties.¹⁹⁹ The Commissioner is bound by the settlement provided there was complete disclosure of any material fact known to the other party at the time of the settlement, and there was no fraud or misrepresentation of any sort on its part.²⁰⁰ The same process of settlement is found in the *Tax Administration Act*,²⁰¹ and the two Acts are complementary. In the instance where the internal review of decisions and/or settlement of disputes fails, the next door opened is for administrative appeals.

5.2.1.3.1.2.11.2 Administrative appeals

As its name implies, the administrative settlement of disputes opens administrative recourse to persons aggrieved by decisions of customs officers or SARS officials, as well as decisions taken by customs officers or SARS officials in lieu of the Commissioner.²⁰² The appeal can be filed either with the Commissioner or with the official in charge of the Customs Office where the decision-maker is stationed.²⁰³ No appeal may be lodged if the decision is the subject of an alternative dispute resolution or the subject of judicial proceedings.²⁰⁴ The appeal must be submitted electronically, or to the SARS office which communicated the decision to the appellant within thirty working days from the date the appellant became aware of the decision, or if the person has made a written request for the reasons for the decision, within thirty working days from the date the reasons were given to that person.²⁰⁵ An appeal has to be decided within sixty calendar days of the date on which it was electronically

197 Sections 853 and 854 of the CCA.

198 Section 855 of the CCA.

199 Section 854 (2) of the CCA.

200 Section 857 (3) of the CCA; see also Section 148 (2) of the *Tax Administration Act* 28 of 2011.

201 Act 28 of 2011 in its part F, Chapter 9 (Sections 142-150).

202 Section 838 of the CCA.

203 Section 839 (1) (a) and (b).

204 Section 840 (a) and (b) of the CCA.

205 Section 841 (1) (b) and (2) (a) of the CCA.

submitted or received by the SARS office that made the decision.²⁰⁶ In the event of the application being incomplete, the decision must be made within sixty calendar days of the date on which the application was completed.²⁰⁷

Depending on the circumstances of each case, the Commissioner is at liberty to extend the deadlines so given by no more than thirty calendar days.²⁰⁸ The appeal must be deemed to have been upheld if, within the period provided, with or without extension, as the case may be, no decision is forthcoming.²⁰⁹ The appellant must, without delay, be notified as soon as the appeal is decided.²¹⁰ The Commissioner has the power by rule to establish appeal committees that may consider appeals against decisions of customs officers and SARS officials; and that are either to decide the appeals themselves or make recommendations to the Commissioner on the decision of such appeals.²¹¹ The powers and duties of such a committee can similarly be defined by the Commissioner, who further has the power to establish special appeal committees for different areas or one or more appeal committees for each SARS office.²¹² The Committee can be constituted either solely of SARS officials or of both SARS officials and other officials.²¹³ It is worth noting that a committee composed of both members of the SARS and other officials will seemingly be a more independent committee than a committee consisting solely of SARS officials. There are three ways in which an appeal ends: if before a decision is taken regarding the appeal, the aggrieved person starts legal proceedings regarding that very decision; or if the person becomes a party to a settlement that still relates to the decision; or if the person withdraws the appeal.²¹⁴ The CCA also caters for alternative dispute resolution.

206 Section 842 (1) (a) of the CCA.

207 Section 842 (1) (b) of the CCA.

208 Section 842 (2) of the CCA.

209 Section 842 (3) of the CCA.

210 Section 842 (4) of the CCA.

211 Section 843 (1) (a) of the CCA.

212 Section 843 (1) (b) and (2) of the CCA.

213 Section 843 (3) of the CCA.

214 Section 844 (a) (b) and (c) of the CCA.

5.2.1.3.1.2.11.3 Alternative dispute resolution

The CCA also makes provision for an alternative dispute resolution process.²¹⁵ According to Section 847 of the CCA, a person affected by a decision made in terms of this Act or the other related Acts by the Commissioner, a customs officer or a SARS official (either in their own capacities or the latter two having decided on behalf of the Commissioner), wishing to have the matter resolved by alternative dispute resolution procedures, may in writing apply to the Commissioner in order for the matter to be so resolved.²¹⁶ Having recourse to an alternative dispute resolution at this stage seems like a deliberate choice that the affected party can make at any moment, but this is not the case, as Section 848 refers to the specific circumstances in which the Commissioner may grant the application. The section specifies that such an application may be granted only if the applicant was unsuccessful in an administrative appeal as described in the preceding paragraph, the said decision is appropriate for alternative dispute resolution, and the decision is not part to any judicial proceedings or pending judicial proceedings.²¹⁷ The conditions in which the application may be rejected include, beyond what may derive from Section 848 (1), the fact that solving the dispute via alternative dispute resolution procedures may not be in the interest of the state.²¹⁸ It appears that the right of the aggrieved party to have its dispute resolved by an alternative system is almost non-existent. The Commissioner seems to be implicitly given the discretionary power (despite the conditions the decision has to satisfy) to decide what goes to alternative dispute resolution and what does not go. It might be appropriate to ask why one would make such application when, subject of course to the conditions given by the legislature, one has no influence over the fate of the application! The procedures related to alternative dispute resolution can be made by regulation, after proper consultation with the Cabinet member responsible for the administration of justice, by the Minister.²¹⁹ The Minister can similarly by regulation prescribe what decisions are to be dealt with through alternative dispute

215 See Part 4, Chapter 37 of the CCA.

216 Also see Section 846 of the CCA.

217 Section 848 (1) of the CCA.

218 Section 848 (2) (b) (ii) of the CCA.

219 Section 850 (a) of the CCA.

resolution and those that are not.²²⁰ All the above processes may fail to solve the issue (s) at hand. This the point where the courts can become involved.

5.2.1.3.1.2.11.4 Court's competence in customs matters

Judicial proceedings are referred to as a last resort in the context of customs dispute resolution.²²¹ A magistrate's court is competent to hear and decide any civil or criminal matter brought before it against a person for an offence in terms of the CCA and to impose the related penalty or ensure the full payment of monies due to the customs administration, this in terms of the *Magistrates' Courts Act*.²²²

Besides these four ways of solving disputes,²²³ the administration offers an opportunity to those who have benefitted from an erroneous determination to disclose it themselves in order to avoid prosecution.

5.2.1.3.1.2.12 Voluntary Disclosure Relief

Voluntary Disclosure Relief aims at offering to persons benefitting from faulty duty determinations the possibility to avoid prosecution or the imposition of administrative penalties by willfully disclosing such duty determinations so that no action can be taken against them.²²⁴ The similarities between the CCA's procedure and that of the *Tax Administration Act* (the Voluntary Disclosure Relief procedure) demonstrate the harmonious character of rules in customs matters in South Africa, which is one goal modernisation seeks to achieve. A faulty duty determination is defined in Section 863 of the CCA as:

an incorrect customs or excise duty assessment or re-assessment in respect of goods due to the submission of inaccurate or incomplete, or non-submission, of information to the customs authority which resulted in—
(a) no duty or an incorrect amount of duty being paid or recovered on the goods;
(b) no interest on duty or an incorrect amount of interest on duty being paid or recovered; or

220 Section 850 (b) of the CCA.

221 Section 827 of the CCA.

222 Act 32 of 1944. See Article 899 of the CCA.

223 Namely the internal review/Internal resolution of decisions and settlement; administrative appeals; alternative dispute resolution and the involvement of courts.

224 Section 864 of the CCA; the *Tax Administration Act* equally makes provision for the Voluntary Disclosure Relief procedure which is found in Part B of Chapter 16 (Sections 225-233) of the said Act.

(c) an incorrect refund or drawback being made by the Commissioner.

The disclosure, made by way of an application, has to satisfy a certain number of conditions in order to be accepted. The application can be granted only if the disclosure is done voluntarily, consists of a faulty duty determination, is full and complete in all material respects, relates to the potential imposition of an administrative penalty or the institution of criminal proceedings, and will not lead to the Commissioners having to pay a refund or drawback or additional refund or drawback.²²⁵ The relief must be sought as soon as that person knows or suspects that a faulty duty determination has been made and that he or she is unduly benefitting or has unduly benefitted from it.²²⁶ The CCA confines the possibility of making such an application to within three years of the date of the faulty duty determination relating to the application.²²⁷ The relief becomes unavailable if the person in question has become aware of: a pending customs audit or investigations being carried out regarding his or her affairs, or a customs audit or investigation of their affairs that has commenced and is still ongoing.²²⁸ Such an applicant is deemed to be aware of any such action if any of the following persons were aware of the ongoing proceedings: the person's representative, in the case of an applicant which is a company, an officer, shareholder or member of the applicant; a partner in partnership with the applicant; a trustee or beneficiary of the applicant in the case where the applicant is a trust; and lastly a person acting for or on behalf of or as an agent or fiduciary of the applicant.²²⁹

The applicant has to ensure that its application for voluntary disclosure does not contain any false or misleading information and must see that he or she did not omit to disclose any information crucial to the consideration of the application. If he or she fails in this regard, this is enough reason for the authority to cancel or annul any agreement entered into with the person and even to institute criminal proceedings and impose an administrative penalty.²³⁰ The most relevant aspects of the CCA to this

225 Section 866 of the CCA.

226 Section 865 (1) of the CCA.

227 Section 865 (5) of the CCA.

228 Section 865 (2) (a) and (b) of the CCA.

229 Section 865 (3) of the CCA.

230 Section 870 (1) of the CCA.

study that play a crucial role in the fight against customs offences have been discussed. It is now important to look at the second piece of legislation enacted by the administration namely the *Excise Duty Act* 91 of 1964, to assess its bearing on the current study.

5.2.1.3.1.3 From the Customs and Excise Act 91 of 1964 to the Excise Duty Act, through the Customs and Excise Amendment Act 32 of 2014

When the process of drafting new laws governing customs in SA was ongoing, the *Customs and Excise Act* 91 of 1964 also underwent several amendments for different reasons. The *Customs and Excise Amendment Act* 32 of 2014 was introduced as the Act amending the old *Customs and Excise Act* 91 of 1964. In essence, the purpose of this former Act was to amend the *Customs and Excise Act* of 1964 by the deletion of a certain number of provisions in such a way that the only remaining provisions would be those regulating excise duties. Because the *Customs Control Act* described in 5.2.1.1.2 above chiefly regulates customs control measures, there was no need to repeat these measures in the *Customs and Excise Act* of 1964. After the deletion, the *Customs and Excise Act* 91 of 1964 was given the name of the *Excise Duty Act* 91 of 1964. In short, the *Excise Duty Act* 91 of 1964 is what remains of the 1964 *Customs and Excise Act* which amendment was made through the *Customs and Excise Amendment Act* 32 of 2014.²³¹ The new Act focuses on excise duties and will also cater for matters incidental thereto. This Act does not have much bearing in the present study, and for that reason, its provisions need not be analysed. The third piece of legislation specifically dealing with customs is examined below.

5.2.1.3.1.4 Customs Duty Act 30 of 2014

Like the *Customs Control Act*, the *Customs Duty Act* 30 of 2014 provides a range of offences and penalties that may result as a consequence of not complying with the processes of imposing, assessing, paying and collecting duties on goods coming into or leaving the territory of the Republic. Depending on whether the offence in question qualifies as a prosecutable or non-prosecutable one, there are administrative penalties

²³¹ Levendal *A case study of the customs administrative penalty* 20.

such as a fixed amount penalty, a fixed percentage penalty or a prosecution avoidance penalty for the breach of the provisions of this Act.²³² The authority may otherwise simply lay charges for the institution of criminal proceedings for the breach.²³³ These offences, too, are divided into Category 1 and Category 2 offences, with similar penalties and fines prescribed as in the CCA. It is noteworthy that an offence listed in Category 2 will nevertheless be punishable as an offence under Category 1 (i.e. it will be more severely reprimanded) if there is proof to the effect that the act was carried out to avoid paying duty.²³⁴ Besides the express legal framework governing customs dealings in South Africa, there are other pieces of legislation proper to specific enforcement bodies. That is discussed below as they interact with and affect the work of customs.

5.2.1.3.2 Other legislative instruments directly influencing the work of customs

These instruments are those that belong to a specific government department or institution but by reason of their inseparable link to customs are thus considered directly linked with or incidental to the work of customs. The instruments in question are the *International Trade Administration Act* 71 of 2002; the *Counterfeit Goods Act* 37 of 1997 and the *South African Police Services Act* 68 of 1995 respectively evaluated below.

5.2.1.3.2.1 International Trade Administration Act 71 of 2002

The primary purpose of the *International Trade Administration Act* (ITAA) is the institution of the International Trade Administration Commission (ITAC), its duties and its procedures. The ITAC scope of work is vast but ranges between carrying out any duty as assigned by the Minister; carry out any function arising from an obligation of the Republic in terms of trade agreement; the issuance of permits and certificates; monitoring trade and other matters; information sharing with SACU institutions and member states; public information and reporting to mention but few.²³⁵ The Act also

232 Section 199 of the Act.

233 Section 200(c) (ii) of the Act.

234 Section 217(2) of the Act.

235 See Sections 15-22 of the ITAA.

regulates certain matters relating to the import and export of goods and the amendment of customs duties and matters thereto connected within the Southern African Customs Union (SACU).²³⁶ Article 2 of the ITAA reads:

The object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the Common Customs Area by establishing an efficient and effective system for the administration of international trade subject to this Act and the SACU agreement.

There is no doubt that economic growth and development can flourish and be well rooted only in a fraud-free environment. This characterises the ITAC as a body that can work hand in hand with the South African customs administration to fulfil one of the latter's core goals, namely combatting crime within the trade environment.

5.2.1.3.2.2 Counterfeit Goods Act 37 of 1997

Counterfeit goods are defined by the *Counterfeit Goods Act 37 of 1997 (CGA)*²³⁷ as goods that are the result of counterfeiting and includes any means used for purposes of counterfeiting. The words "any means" used in the definition, combined with the first part of the said definition, broadly includes any act that contributes to the making and distributing of goods of such a nature. This reinforces the idea that indeed, any type of activity that somehow links a person to the manufacturing, storing or selling of counterfeit goods is an offence under the present Act. As stated in its preamble, the simple possession of counterfeited goods (in certain circumstances) constitutes an offence. As article 2 (2) of the CGA emphasises, the acts or omissions of a person or people with regard to counterfeit goods become offensive only when such a person or people "perform(s) or engage(s)" in any process prohibited by subsection 2 (1) of the present Act by the simple fact that at the time of their involvement with the goods, they knew or had reason to suspect that the goods on which they were acting were counterfeit. Furthermore, such a person must have failed to take all possible reasonable steps to prevent such a process from taking place or avoid being part of it. In other words, and as described in the Act, to be convicted of such an offence,

²³⁶ Preamble of the ITAA.

²³⁷ In its Section 1 (v).

one must be a dealer in counterfeit goods.²³⁸

Such a person is liable to a fine in respect of each article or item involved in the scheme of counterfeiting, the fine not exceeding R5000 per article or item, or imprisonment for a period no longer than three years, or both a fine and imprisonment in respect of a first conviction.²³⁹ When it is a second or subsequent conviction, the amount of the penalty rises to R10000 per article or item and the imprisonment is for a period not exceeding five years (or both such a fine and imprisonment).²⁴⁰ In either case, the Minister may, whenever he judges necessary, by notice in the Government Gazette increase the amount of the fine.²⁴¹ Such notice must, however, be considered and approved by the National Assembly.²⁴² The Act emphasises that in the process of imposing these sanctions against persons convicted of counterfeiting, a court should take into consideration what risk the goods in question pose to human or animal life, health or safety, or danger to property, and what risk may ensue from such goods being present or used in the specific environment concerned.²⁴³ Such consideration, depending on their harmful or less harmful nature, will most probably constitute an aggravating or mitigating factor in the imposition of sanctions, which gives broad power to the court to strictly sanction people involved in such activities. And this power will definitely work in favour of the administration in deterring future offenders.

The purpose of the *Counterfeit Goods Act* as reflected in its preamble is to introduce measures that will help eradicate the trade in counterfeit goods as well as protect owners of trademarks, copyright and certain marks covered by the *Merchandise Marks Act* 17 of 1941. The CGA also aims at blocking every distribution channel of counterfeit goods. Acts condemned under the present Act are the possession, manufacturing, production, sale, hiring, bartering or exchanging, exhibiting in public for trading purposes and lastly, distributing of counterfeit goods.²⁴⁴ This Act further seeks to align

238 See the title preceding article 2 of the CGA.

239 Article 19 (1) (a) of the CGA.

240 Article 19 (1) (b) of the CGA.

241 Article 19 (4) (a) of the CGA.

242 Article 19 (4) (b) of the CGA.

243 Article 19 (3) of the CGA.

244 Article 2 of the CGA.

South African practices with some of the provisions of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), to which the country has adhered.²⁴⁵

In order to ensure that customs helps them to protect their rights, intellectual property rights holders must apply to the Commissioner for Customs and Excise to enable the customs administration to seize and detain goods when they are detected.²⁴⁶ The Act emphasises that such intervention by the customs administration can be possible only so long as the “intellectual property right subsists”.²⁴⁷

Failing to comply with a request by an inspector acting under the Act; obstructing such an inspector in the fulfilment of his or her duty; without authorisation breaking seals and removing goods, documents or any item detained or stored at a counterfeit depot by an inspector; refusing to provide information or explanation when requested to do so; or providing information that is to his knowledge false at the request of an inspector are all considered miscellaneous offences in terms of the CGA.²⁴⁸ These offences are considered less serious and thus receive as punishment a fine or imprisonment for a period not exceeding six months.²⁴⁹ They are otherwise referred to as minor offences as opposed to the main ones mentioned earlier.²⁵⁰ The Act gives vast enforcement powers to authorities to search, seize and detain counterfeit products as well as to follow up matters in the court. It is in this respect that Dean²⁵¹ sees it as providing a “streamlined procedure” that enables a broader approach to curb all sort of attacks directed at copyright owners and their products. The current Act works hand in hand with the *Merchandise Marks Act* 17 of 1941, which deals with the marking of merchandise and the coverings with which such merchandise is sold.²⁵² Due to the fact that these two Acts complement each other to a considerable extent,²⁵³

245 Dean 1998 *South African Mercantile Law Journal* (SAMLJ) 33.

246 Article 15 (1) of the CGA.

247 Article 15 (1) (b) of the CGA.

248 Article 18 of the CGA.

249 Article 19 (2) of the CGA.

250 Dean 1998 *SAMLJ* 46.

251 Dean 1998 *SAMLJ* 56.

252 Preamble of the *Merchandise Marks Act* 17 of 1941.

253 Dean 1998 *SAMLJ* 33.

the *Merchandise Marks Act* will not be examined here.

5.2.1.3.2.3 South African Police Services Act 68 of 1995

Organised crime activities, according to the *South African Police Service Act 68 of 1995* (SAPSA), are activities perpetrated by a person, group of persons or syndicate in an organised fashion or in any way that could end in the person, group of persons or syndicate making substantial financial benefits.²⁵⁴ It might also be criminal conduct perpetrated by a person or persons in a position of authority.²⁵⁵ Among other things, the said criminal activities might pertain to the revenue or expenditure of the national government,²⁵⁶ the national economy,²⁵⁷ unwrought precious metals or unpolished diamonds,²⁵⁸ hunting, importing, exporting, possessing, buying and selling endangered species or any products thereof,²⁵⁹ and may occur in more than one province or outside the borders of the Republic provided the same perpetrator(s) perform the activities.²⁶⁰ In Chapter 6A, the SAPSA establishes the Directorate for Priority Crime Investigation (hereafter the DPCI or simply the Directorate). By so establishing the Directorate, the legislature hopes to emphasise how important that body is in the prevention, combatting and investigation of national priorities offences,²⁶¹ in particular, *serious organised crime, serious commercial crime and serious corruption*.²⁶² Beyond implementing where appropriate a multi-disciplinary approach and an integrated methodology entailing the co-operation of all relevant government departments and institutions, the DPCI must be an independent body and must be equipped with the necessary resources (human and financial) to carry out its duties.²⁶³ Concretely, the Directorate is tasked to prevent, combat and investigate national priority offences, selected offences not limited to offences referred to in

254 Section 16 (1) (2) (i) (ii) of the SAPSA.

255 Section 16 (2) (b) (i) of the SAPSA.

256 Section 16 (2) (b) (ii) of the SAPSA.

257 Section 16 (2) (b) (iii) of the SAPSA.

258 Section 16 (2) (d) of the SAPSA.

259 Section 16 (2) (e) of the SAPSA.

260 Section 16 (2) (f) of the SAPSA.

261 Defined in Section 17A of the SAPSA as "organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof..."

262 Section 17B (a) of the SAPSA.

263 Section 17B (b) (i) (ii) (iii) of the SAPSA.

Chapter 2 and Section 34 of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004, and lastly, any other offence or category of offences from time to time referred to it by the National Commissioner of the SAPS.²⁶⁴

When requested to help the Directorate achieve its purposes, other government departments or institutions must take reasonable steps to provide the requested assistance.²⁶⁵ This includes the secondment of personnel from any other government department or institution such as personnel of the SARS or the Department of Home Affairs.²⁶⁶ In the context of this thesis, in practice, the SARS often requires the assistance of these other departments to fulfil its task of combatting customs offences. Either way, whether it is the Directorate through its Head or the SARS that requests help from the other organisations or institutions, co-operation among the various arms of government is emphasised as an efficient way to combat crime in its various form. The SAPSA also establishes an Operational Committee which is mostly comprised of the heads of different government departments and institutions that work closely with the SAPS. It meets at least four times a year and is chaired by the National Head of the Directorate.²⁶⁷ Among the heads is the Commissioner of the SARS.²⁶⁸

An essential part of the modernisation efforts that help to curb customs offences is the development of practical tools used in discharging customs responsibilities, as described below.

5.2.2 Practical aspects of the South African Customs Modernisation Programme aiming at combatting customs offences

Practically approaching customs modernisation often, although not always, is a way of putting into practice what is contained into legal instruments. There are various tools other than palpable legislation and regulations through which SARS aims to curb fraud in the customs environment. The variety of these approaches speaks volumes about the administration's willingness and commitment to ensure that its customs

264 Section 17D (1) (a) (aA) (b) of the SAPSA.

265 Section 17F (1) of the SAPSA.

266 Section 17F (3) of the SAPSA.

267 Section 17 J (1) (a) (i) and Section 17 J (2) (D) of the SAPSA.

268 Section 17 J (1) (a) (v) of the SAPSA.

administration is effective in every respect in the ever-changing environment in which it operates. A number of these tools most relevant to this study are evaluated under the founding principles identified in Chapter 2. Once again, some aspects have already emerged from the scrutiny done on the legal instruments in the first part of the Chapter.

5.2.2.1 Risk management and post-clearance audit

Managing risk in the South African customs modernisation context is mainly achieved through the Customs Risk Engine and the 24-hours advanced cargo loading notice for containerised cargo. Other approaches bearing both the features of automation and risk management are discussed under the principle that advocates for the maximum use of information technology at 5.2.2.3 below.

As for the post-clearance audit, the approach in the South African context of customs modernisation that bears such features is the SARS's compliance programme. But because this approach also incorporates aspects related to the partnership with relevant stakeholders, its details are rather given under 5.2.2.2 below. The SARS asserts that it is still building a proper post-clearance audit culture.

5.2.2.1.1 The Customs Risk Engine

The Customs Risk Engine (CRE) together with the use of electronic systems, has considerably eased the administration's work on different operations.²⁶⁹ It is the primary tool used in South Africa to fight illegal trade, and it is submitted that it has the specificity of focusing on high-risk consignments with the capacity of "driving better operational efficiency and output".²⁷⁰ It is precisely what the WCO refers to as an automated risk management system in the customs environment. This tool has enabled the SARS to transform itself from being a gatekeeper to being a risk manager.²⁷¹ It is Magashula's²⁷² view that using this engine helps significantly in

269 Magashula 2011 "The role of customs" 4; Magashula 2013 <http://www.govza.gcis.gov.za>.

270 Magashula 2011 "The role of customs" 4; Magashula 2011 <http://www.polity.org.za>.

271 Magashula 2011 *Address by the Commissioner, presenting the SARS annual report* <http://www.polity.org.za>.

272 Magashula 2011 "The role of customs" 4.

controlling declarations, thereby enabling a better sharing of resources and boosting the administration's capabilities in performing its task of facilitating legitimate trade and seeing that non-complying traders are called to order.²⁷³ Managing risk in today's fast transforming trade environment is the ultimate approach through which a customs administration can achieve a balance between control and efficiency. A further practical tool that enhances the SARS's modernisation efforts to fight customs offences is the 24-hours advanced cargo loading notice for containerised cargo. It responds to both the principle of risk management and the maximum use of information technology to streamline customs operations.

5.2.2.1.2 The 24-hours advanced cargo loading notice for containerised cargo

Introduced into the South African environment in order to satisfy one of the requirements of the SAFE Framework of Standards, the 24-hours advanced loading notice rule makes it possible to identify possible risks to the supply chain, prior to the container's being loaded at the foreign seaport.²⁷⁴ If it is established that the said cargo poses a threat, it will be prevented from entering a South African port or, depending on the level of the risk, the necessary steps will be taken before such entry.²⁷⁵ By doing this, the administration not only prepares itself for what is coming its way, it also saves itself time by allocating in advance the resources to deal with dangerous cargoes. This allows a smooth flow of less threatening cargoes. This can only lead to a healthier trading environment where risks are detected automatically and evaluated long before the goods arrive. In its overall customs modernisation steps, the administration abides by the call to build and strengthen cooperation and partnership with relevant entities as discussed below.

5.2.2.2 An accent on cooperation and partnership

In an attempt to respond to this call for cooperation, the SARS has entered into a few steps amongst which the "preferred trader" initiative/programme and the compliance programme. It has also partnered with the National Economic Development and

273 SARS *Compliance Programme 2012/13 – 2016/17*, 3; Magashula 2011 "The role of customs" 4-5.

274 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

275 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

Labour Council (NEDLAC) with the aim of having better visibility of the activities of the textile industry and that of other importers of which the activities are prone to fraudulent practices. The one partnership with the South African Federation Against Copyright Theft (SAFACT) is also of interest to this thesis. The details of these cooperative efforts are briefly given below.

5.2.2.2.1 "Preferred trader" initiative/programme

In an attempt to further urge voluntary compliance with customs laws and regulations, the SARS has introduced in its overall customs efforts what is called the "Preferred trader" initiative/programme. The main objectives of the preferred trader initiative are to enhance trade facilitation and the economic protection of key industries, urge voluntary compliance, and boost the SARS' efficiency.²⁷⁶ It is the administration's way of partnering with the business sector for a better mutual understanding with the further view of improving the quality of services and drawing maximum benefits from trade activities.²⁷⁷ The initiative is part of the revised Accreditation approach in the SARS, which entails restructuring the administration's Accreditation Programme with the aim of offering more significant benefits to clients that show a consistent level of compliance with customs requirements and set rules, thus enhancing trade facilitation and border security.²⁷⁸ The new rules for Accreditation were made public on 1 August 2011 in the hope that the first set of clients meeting the expectations of SARS would receive formal status, and would receive the promised benefits in early 2012.²⁷⁹ This programme is a first step towards building a South African Authorised Economic Operator (AEO), which is recommended by the WCO in the SAFE Framework of Standards to which South Africa has adhered.²⁸⁰ The AEO is one of the main tools proposed by the SAFE Framework to facilitate the fight against terrorism.²⁸¹ A vital

276 SARS 2010 *Trader Pocket Guide* 6.

277 SARS 2010 *Trader Pocket Guide* 6-7; Magashula 2011 "The role of customs" 5.

278 SARS 2011 *Customs Connect* 3, 8; SARS 2012 *Customs Connect* 11; see further Section 682 (1) and (2) of the CCA for a more comprehensive description of the different benefits linked to the obtaining of the accredited client status certificates.

279 SARS 2011 *Customs Connect* 8.

280 SARS 2011 *Customs Connect* 3; also see sub-heading 2.2.2.2.1 in Chapter 2 for more information on the concept of AEO.

281 SARS 2012 *Customs Connect* 11.

component of the programme is the Preferred Trader Audit teams, which operate in all of the main administrative centres and help the administration to fulfil its objectives under this programme.²⁸² One way of selecting clients that qualify for the Accreditation is by launching a test of customs knowledge, which is to be taken by all Preferred Trader clients' representatives that seek to be accredited. After having undergone the test, qualifying clients will be considered for official Accreditation by the National Accreditation Review Board.²⁸³ The process of acquiring the accredited client status certificate, its requirements and the conditions attached to it are fully regulated by Chapter 30 of the *Customs Control Act* 31 of 2014. The status remains valid for a period of three years renewable, and this period may be shortened if, for one reason or another, the accredited client status certificate is withdrawn or suspended or has lapsed.²⁸⁴

Among the many reasons that may justify a premature ending of the accredited client status certificate (through withdrawal or suspension), there is the fact that the certificate holder acquired it under false pretences; he is no longer in compliance with the criteria to which the certificate is subjected, or he has in a material respect breached any of the conditions attached to the certificate. Other factors may be that the certificate holder has failed to pay any tax due by him in due course; he or one of his employees in a managerial position, or if the holder is a juristic entity, a director, administrator or trustee of the juristic entity without any participation whatsoever of the certificate's holder has in a material respect breached the provisions of the CCA or a *Tax Levying Act*. The withdrawal of the certificate or the suspension of its use may also happen if its holder has been convicted of an offence under any of the acts mentioned above or he or she has been convicted of an offence of fraud or dishonesty.²⁸⁵ Drawing businesses closer, creating a platform conducive to dialogue and providing facilities for the most compliant business owners is a strategic approach that generates a multitude of benefits for both the customs administration and businesses. There is an overall effect that such deals have, namely that traders will

282 SARS 2011 *Customs Connect* 8.

283 SARS 2012 *Customs Connect* 11.

284 Section 675 (1) (2) and (3) of the CCA.

285 Section 679 (1) (2) and (3) of the CCA.

refrain from committing any type of customs offence, and this, in turn, will mean more revenue for the state. Furthermore, traders' transactions will be facilitated, and this also means more benefits for them. This approach is therefore mutually beneficial.²⁸⁶ This approach finds justification in the partnership with authorised persons and entities that the WCO advocates and which was discussed at 2.2.2.2.1 in Chapter 2. More specifically, and although referring to the “preferred trader” initiative at the regional (SACU's) level, Chopra and Nxumalo²⁸⁷ specifically point out the following advantages for economic and social protection that derive from this initiative:

Reduction of smuggling and enhancement in the fight against organised crime; reduction of undervaluation –increasing the collection of customs duties; reduction of corruption; improvement of ‘Risk analysis’ and ‘Risk Profiling’ on the pre-arrival data; and improvement of overall organisational capacity...

Whether carried out at the regional or national level, these enumerated advantages remain true for any “preferred trader” initiative²⁸⁸ and for the partnership with stakeholders that further the aims of customs modernisation as presented by the WCO. With the aim of enhancing customs stakeholders' compliance with existing legislation, the SARS has instituted a compliance programme. The particularities are given below.

5.2.2.2.2 SARS's Compliance Programme

In order to create a work environment where all parties play their role in the manner expected of them, especially in terms of complying with the existing legislation, SARS has initiated a compliance programme within its administration. This programme is rooted in the practices most common to tax and customs administrations in the world

286 See the introductory part of this Chapter (para 13) where the administration sees partnership with the private sector as fundamental in the efficiency goal sought by it.

287 Chopra and Nxumalo “Regional IT Connectivity” 17.

288 The founding principles remain the same. The only difference is the fact that when carried out at the regional level, different states are involved, and this involvement comes with broader advantages for the whole regional group as compared to individual national advantages. The named advantages are said to revolve around regional integration and “Promote/improve cross border communication and cooperation; promote the concept of One Stop Border Post (OSBP) and co-ordinated border management; encourage government agencies to work together; provide sustainability in administrative cooperation; reduce security risks in the Region.” See in this regard Chopra and Nxumalo “Regional IT Connectivity” 17.

today and rests on voluntary adherence to the rules by everyone involved.²⁸⁹ The administration reckons that in order for stakeholders to fully play their part, first, they need to know what is expected of them, second they must have the ability to do what is expected of them, and third, they must have the right motivation to do so.²⁹⁰ This approach, which could be described as the “what”, “how” and “why” of complying with the existing laws and regulations, is at the centre of the administration’s tactic to urge partakers to comply. This approach also seeks to address and understand what motivates those role players who are reluctant to abide by the rules in order for the administration to be able to respond to them more strategically.²⁹¹ Education and communication through various means are critical in this approach, says the administration.²⁹²

Once the information is relayed, the second step is to provide a platform conducive for the fulfilment of obligations. This entails providing taxpayers and traders with an environment that allows them to quickly, easily, conveniently and cost-effectively play their part.²⁹³ This is a critical phase of the whole modernisation programme that has to make the maximum use of technology to facilitate customs and tax work and processes to the benefit of all. An example of such an automated platform is the e-filing tool provided by the SARS.²⁹⁴

Last but not least, taxpayers and traders need to know and understand why they have to comply with the laws governing their activities.²⁹⁵ No society can function without traders abiding by the rules that govern their activities, and without tax, the state cannot function. The programme is furthermore a tool through which the administration seeks to warn those who offend against the law of the strictness and severity of the penalties that will befall them when they are caught.²⁹⁶ The administration understands that this is not a once-off process but a continuous one

289 SARS *Compliance Programme 2012/13 – 2016/17*, 4.

290 SARS *Compliance Programme 2012/13 – 2016/17*, 4.

291 SARS *Compliance Programme 2012/13 – 2016/17*, 7.

292 SARS *Compliance Programme 2012/13 – 2016/17*, 4.

293 SARS *Compliance Programme 2012/13 – 2016/17*, 4.

294 SARS *Compliance Programme 2012/13 – 2016/17*, 4.

295 SARS *Compliance Programme 2012/13 – 2016/17*, 5.

296 SARS *Compliance Programme 2012/13 – 2016/17*, 5.

that needs to be ever ongoing so that beyond the sustainable level of wilful compliance that can be created, the administration is also able to provide its clients with an environment progressively conducive to the fulfilment of their part of the bargain.²⁹⁷ It is the SARS's view that this programme has enabled it to deepen its understanding of the problems surrounding compliance and help it on a daily basis to adjust its response accordingly, thus reinforcing efficiency.²⁹⁸ It is also its way of providing a platform of communication between itself and the targeted key stakeholders, empowering the latter with essential guides and interpretation notes.²⁹⁹ From the moment it was launched (i.e. 2012/2013), the administration had a five-year plan for the complete execution of this project. Among the areas prioritised (seven in total) were large business³⁰⁰ and transfer pricing,³⁰¹ illicit cigarettes,³⁰² the undervaluation of imports in the clothing and textile industry,³⁰³ tax practitioners and trade

297 SARS *Compliance Programme 2012/13 – 2016/17*, 5.

298 SARS *Compliance Programme 2012/13 – 2016/17*, 7, 8.

299 SARS *Compliance Programme 2012/13 – 2016/17*, 8.

300 The administration believes that some big corporates tend to exploit certain area of the law, and this has brought about challenges regarding structured finance schemes and foreign tax credit schemes. SARS *Compliance Programme 2012/13 – 2016/17*, 13.

301 The administration's actions here aim at countering unacceptable transfer pricing because of the important role multinationals play in world trade. SARS *Compliance Programme 2012/13 – 2016/17*, 12.

302 Cigarettes are harmful to human health by nature. This state of affairs is worsened when the cigarettes in question are counterfeit. Trading in these commodities is both detrimental to human health and to the fiscus. Among other activities, the SARS hopes to closely collaborate with tobacco industry experts to frame a set of targeted risk criteria that can help in differentiating licit from illicit cigarettes and improve the quality of retail cigarettes inspections. SARS also hopes to review the related legislation in such a way as to lead to a strict application of punitive measures and to organised campaigns by the industry aimed at educating consumers about the negative impact illicit cigarettes have on both their health and the economy. SARS *Compliance Programme 2012/13 – 2016/17*, 7, 15.

303 The most common features of schemes in this sector are the undervaluation of imports, and the misclassification of the country of origin and the tariff heading. The administration's main worries here relate to protecting the local economy and local employment against unfair practices that threaten local industry and leave it uncompetitive. Work to boost compliance in this area thus involves but is not limited to providing advice on regulation and strategic policy issues when dealing with customs fraud. It also includes introducing a reference pricing database as a mean of enabling the identification of the undervaluation of imports for specific commodities as well as augmenting the number of inspections at border posts. Modernisation would provide an appropriate platform for effectively assessing risk through such tools as participating with other government department in a seamless transition to an integrated border management model, progressively moving towards non-intrusive inspection capability, and the pursuance of a common customs working philosophy across Africa, to mention but a few moves that could be made. SARS *Compliance Programme 2012/13 – 2016/17*, 16.

intermediaries.³⁰⁴

The administration reiterates that placing specific emphasis on these seven areas should not be thought to imply that other areas have been left behind, but just that they are specific aspects of a broader project.³⁰⁵ Efficiently detecting and deterring non-compliance, in the administration's words, passes through verifications, audits and investigations.³⁰⁶ So the target here is to stir in stakeholders the desire to comply with laws without any constraint and to be aware that every misplaced act or omission will be severely sanctioned. The administration suggests two ways in which stakeholders can help in fighting illegal behaviour in the tax and customs sectors. Firstly, the administration asks stakeholders never to participate in or condone these fraudulent behaviours. Secondly, stakeholders should speak up about anything that may be happening around them in contravention of the law.³⁰⁷ The administration hopes through this programme to develop and firmly establish a culture of tax and customs compliance within which it can work hand in hand with stakeholders by placing at their disposal everything that can help them to comply easily, and so creating a convivial and collaborative environment for taxpayers and traders so that it, the administration itself, can meet its goals as a state enforcement agency.³⁰⁸ For instance, the SARS considers purchasing counterfeit goods to be a form of stealing.³⁰⁹ This shows how bold the administration is in its approach and surely sends out a strong message to anyone not ready to collaborate or abide by the rules. In short, the Programme makes plain to taxpayers and traders the reasons why they have to pay taxes, why there is a need for them to comply with laws and regulation, and that illicit trade has a wider impact than one could ever imagine.³¹⁰ SARS has also thought it crucial to partner with specific industry representatives like the National Economic

304 SARS hopes here through its compliance programme to ensure that tax practitioners and trade intermediaries are persons of good repute regarding personal tax compliance and ensuring that administrative penalties are adequately imposed. SARS *Compliance Programme 2012/13 – 2016/17*, 17.

305 SARS *Compliance Programme 2012/13 – 2016/17*, 9.

306 SARS *Compliance Programme 2012/13 – 2016/17*, 9.

307 SARS *Compliance Programme 2012/13 – 2016/17*, 20.

308 SARS *Compliance Programme 2012/13 – 2016/17*, 20.

309 SARS *Compliance Programme 2012/13 – 2016/17*, 20.

310 SARS *Compliance Programme 2012/13 – 2016/17*, 4.

Development and Labour Council (NEDLAC).

5.2.2.2.3 Cooperation with the textile industry through the National Economic Development and Labour Council (NEDLAC)

The purpose of SARS' increased cooperation with the textile industry and other importers of products through the National Economic Development and Labour Council (NEDLAC) is to address the problem of undervalued imports.³¹¹ The initiative endeavours to look into data collected over the years in order to ensure that prices in the valuation database are up to date and that there is no leeway for fraud.³¹² In the same vein, the SARS has been working closely with the South African Federation Against Copyright Theft (SAFACT), and this is briefly discussed in the following paragraph.

5.2.2.2.4 SARS partnership with the South African Federation Against Copyright Theft (SAFACT)

The main aim that prompted the partnership between the SARS and the South African Federation Against Copyright Theft (SAFACT) was to raise awareness regarding the harmful consequences that befall the state, rights holders and the consumers themselves when the latter buy or consume counterfeited products.³¹³ This is in furtherance of the administration's legislative efforts as discussed in 5.2.1.3.1.2.7 above. Crucial to all customs modernisation steps is the use of information technology. The South African position in this regard is discussed in the following lines.

5.2.2.3 Maximum use of Information Technology

The SARS is well acquainted with the use of information technology at this stage of its Customs Modernisation Programme as can be ascertained from the paragraphs below.

311 Magashula 2011 *Address by the Commissioner, presenting the SARS annual report* <http://www.polity.org.za>.

312 Magashula 2011 *Address by the Commissioner, presenting the SARS annual report* <http://www.polity.org.za>.

313 Magashula 2011 "The role of customs" 9.

5.2.2.3.1 Regional IT connectivity

At the regional level, the SARS is also working toward the full establishment of a harmonious online data system for import/export transactions. This is to be achieved through the Regional IT connectivity. The activities in this regard are unfolded with the aim of meeting or satisfying the standard set by the SAFE Framework of Standards.³¹⁴ The SARS is working closely with its neighbouring trading partner countries to enable the online exchange of import/export data, which in turn will help to test the potential for import/export data matching.³¹⁵ The underlying objective of the IT Connectivity in SACU is:

To establish real time connectivity of SACU Member States Customs Administrations' IT systems to enable regional integration and trade facilitation.³¹⁶

The Regional IT Connectivity is the result of the WCO-SACU Connect Project. It involves a number of steps that all seek to improve customs capacities and integration at the regional level.³¹⁷ This factor makes the SACU's Regional IT Connectivity a framework for efficient customs practices within and beyond the regional boundaries.³¹⁸ It is within these lines that SACU adopted in 2015 the WCO Globally Networked Customs approach to guide its steps into the IT Connectivity development in the region.³¹⁹ This tool may also serve as the basis for bilateral cooperation between a member state of SACU and a member state of SADC and the Common Market for Eastern and Southern Africa (COMESA).³²⁰ There is clear evidence³²¹ that SACU's IT Connectivity is already functional, although not yet to its fully expected potential. It is sufficient to say that members of the same community coming together and working on a project of this scale is in itself a deterrent to the commission of customs offences and a way of enabling greater compliance beyond national borders. The single registration is also an automated way used in the modernising South African customs

314 Chopra and Nxumalo "Regional IT Connectivity" 1.

315 SARS 2011 *Customs Connect* 3.

316 Chopra and Nxumalo "Regional IT Connectivity" 5.

317 Chopra and Nxumalo "Regional IT Connectivity" 4.

318 Chopra and Nxumalo "Regional IT Connectivity" 8.

319 Chopra and Nxumalo "Regional IT Connectivity" 6.

320 Chopra and Nxumalo "Regional IT Connectivity" 6.

321 Based on the reading of the presentation by Chopra and Nxumalo. Chopra and Nxumalo "Regional IT Connectivity" 1-22.

environment and the details of that approach are given below.

5.2.2.3.2 Single registration

The single registration process allows the use of the new Single Registration (SR1) form that enables new applicants to apply once for various customs and excise transactions.³²² This does not, however, mean that all transactions will be processed under the same reference number, but that each product is processed separately so that its compliance with the relevant Acts and rules is readily ascertainable.³²³ Beyond helping to avoid duplications in order to enhance efficiencies and thus ensuring strategic management of risks through a single consolidated view of the client account, its transactions and business relationships with accountants and public officers, the new SR1 is said to protect clients and the state against fraud.³²⁴ This aspect of the Modernisation Programme implies that there will be improved compliance by clients and the management of risk will be made easier so that illegal activities such as theft, fraud and corruption can be combatted more effectively. At 2.2.2.2 in Chapter 2 above, cooperation with other customs administrations and enforcement agencies was discussed as a component of the cooperation and partnership approach which is one principle on which the WCO's overall customs modernisation is founded. The SARS's e@syScan Software presented below combines the features of maximum use of information technology (see 2.2.2.3 above) and risk management (see 2.2.2.1 above) promoted by the WCO.

5.2.2.3.3 SARS's e@syScan Software

The e@syScan Software³²⁵ was introduced as part of the second phase of the SARS Customs Modernisation Programme.³²⁶ A prior testing phase was launched and involved service providers and customs in order for the latter to acquaint themselves with the new approach and integrate it into their trade system.³²⁷ This software makes

322 SARS 2011 *Customs Connect* 11.

323 SARS 2011 *Customs Connect* 12.

324 SARS 2011 *Customs Connect* 11.

325 Also referred to as e@syFile software. Khanderia 2016 *Journal of African Law* 461.

326 SARS 2010 *Customs Modernisation* 5.

327 SARS 2010 *Customs Modernisation* 5.

it possible for a customs broker or trader to easily upload backup documents (shipping documents) as required by customs.³²⁸ This facility is used when such a client has received through EDI a customs status response message with the code "13", to the effect that such a declarant ought to upload backup documents that will enable customs to conduct a desk audit.³²⁹ While making customs work less burdensome, this approach also enables customs officers to keep an eye on every transaction and to detect non-compliance easily. Streamlined processes of a similar nature are further palpable in what the SARS calls the Automated Cargo Management system that focuses on sea, air and road.

5.2.2.3.4 Automated Cargo Management system for sea, air and road

The Automated Cargo Management (ACM)³³⁰ system replaced the SARS's Manifest Acquittal System and was first introduced for sea and air cargo reporters.³³¹ In August 2011, and within the same system, the SARS extended the programme to include land border posts. This bore the name of electronic Road Freight Manifest (e-RFM).³³² The new ACM plays a central role in enabling the administration to evaluate the risk associated with a particular consignment, as it allows advanced information, declaration information and movement data to be matched for such a purpose.³³³ As a further way of fulfilling its obligations towards the international trade community and more specifically responding to the call for cooperation (discussed in 2.2.2.2 above) launched by the WCO through its various instruments and initiatives, the SARS established a network for customs-to-customs data exchange.

5.2.2.3.5 Customs to customs data exchange under the WCO's SAFE Framework of Standards

Having agreed to use the WCO SAFE Framework of Standards as a tool in its modernisation programme, the SARS views customs-to-customs cooperation, one of

328 SARS 2010 *Trader Pocket Guide* 5.

329 SARS 2010 *Customs Modernisation* 5.

330 SARS 2011 *Customs Connect* 2.

331 SARS 2011 *Customs Connect* 4; SARS 2010 *Customs Modernisation* 14.

332 SARS 2012 *Customs Connect* 5.

333 SARS 2010 *Customs Modernisation* 14.

the three pillars of the Framework, as the way forward, in the sense that no country can achieve efficiency and effectiveness in customs while on its own.³³⁴ Co-operation with the customs administrations of other countries here becomes imperative for the fulfilment of customs administrations' common and dual goals of speed and security.³³⁵ This initiative is based on the motto "your export is my import" to show that no-one is spared and all are called to work in close collaboration.³³⁶ The specific objectives attached to the South African customs administration customs-to-customs data exchange are: to assimilate and conquer the different obstacles to data exchange; to enable timely risk detection; to reduce the regulatory burden on the industry; and lastly to facilitate the elimination of paper between the SACU's states.³³⁷ At the time it was launched, the programme was expected to top-up supply chain security, intensify trade facilitation, and enhance end-to-end visibility.³³⁸ In addition, this new way of approaching customs was to help uncover cases of under- or non-declaration.³³⁹ The above enumeration demonstrates that customs modernisation in South Africa is indeed playing a positive role in the overall fight against customs offences, and this is the achieved and continuous aim sought by the piloting organisation (ECO) for its member states. Transit operations as discussed earlier on (at 5.2.1.3.1.2.10 above),³⁴⁰ are also monitored practically and this is discussed below.

5.2.2.3.6 From the manifest/transport document to clearance declaration for transit operations

The manifest/transport document requirement is a policy that was previously used. It was based on a process that did not enable the SARS to have total control over goods moving across borders. This derived from the fact that a manifest only gives a general overview of the cargo on board a vessel without any specification regarding the goods, leaving the administration unable to assess the risks attached to the consignment, as

334 Magashula 2011 "The role of customs" 10.

335 Magashula 2011 "The role of customs" 10.

336 SARS 2012 *Customs Connect* 13-14.

337 Magashula 2011 "The role of customs" 10.

338 Magashula 2011 "The role of customs" 10; SARS 2012 *Customs Connect* 14.

339 Magashula 2011 "The role of customs" 10.

340 As a constitutive part of the CCA's provisions.

such a manifest does not contain the tariff value and origin information critical to the assessment of risk.³⁴¹ The document contains information given to the carrier by a person in a foreign jurisdiction, which limits the ability of the SARS to ascertain the accuracy of such information, which limitation is exacerbated by the general character of the said information.³⁴² To remedy this problem, the SARS has introduced the clearance declaration which, unlike the manifest document, is presented to the administration by a registered person or licensee or a registered agent in the Republic. It contains information relating to the tariff, value and origin of goods that is indispensable in conducting a risk assessment.³⁴³ Submitted electronically, the clearance declaration is timeously scrutinised with the SARS Risk Engine, and through this, the administration is sure of what type of cargo is transiting through its territory.³⁴⁴ The person submitting the document also attests to the correctness of the information contained therein, thus making himself liable if the declaration turns out to be false.³⁴⁵ Transit operations have to be monitored closely in every territory. A weak system of control for transit operations exposes the country in question to many risks one of which is becoming a dumping site for counterfeit and dangerous goods.³⁴⁶ The customs administration is supposed to prevent this. Transparency, predictability and good governance are also promoted in the overall South African customs modernisation efforts.

5.2.2.4 Promoting transparency, predictability and good governance

The main aspects of the promotion of transparency, predictability and good governance in the South African context were discussed in the first part of this Chapter specifically under 5.2.1.3.1.2.8 and 5.2.1.3.1.2.9 above. The predictability element is mostly palpable in the availability of laws and regulations as can be seen from the first part of this Chapter. Hereunder only the re-engineered inspection system is evaluated.

341 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

342 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

343 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

344 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

345 SARS 2015 *Questions & Answers – New customs legislation* <http://www.sars.co.za>.

346 Without mentioning the loss in revenue collection for the countries involved in such operations.

5.2.2.4.1 Re-engineering of the inspection system

The South African Customs Modernisation programme has enabled a more relaxed and fundamental inspection process that considerably reduces the opportunities for corruption.³⁴⁷ The new system of inspection deprives customs inspectors of the right to choose what cases to work on.³⁴⁸ Instead, and in compliance with the SARS' ongoing tax reforms, customs makes use of the "get next item" concept, which enables a random allocation of the risk-engine-identified cases amongst inspectors.³⁴⁹ Cases are allocated considering inspectors' availability or geographical position, as well as the risk priority attached to them.³⁵⁰ The efficiency of the practice resides in the fact that there is no collusion between the client and the customs officer or inspector, which absence limits the opportunities to engage in corrupt practices.³⁵¹ In essence, as long as the trader is clueless of "who" is scrutinising his consignment, he will not try to bribe his way out of the process. The contact between customs officers and traders or their representatives has been identified as one of the main factors that fuel the practice of corruption in the sector.³⁵² Limiting the contact between the said parties in customs operations has been identified as a possible solution to the scourge of corruption. The SARS approach not only limits the contact between the parties, but also leaves them (especially the client) in the dark regarding where or by whom their declaration is being handled. This approach is indeed a corruption killer as the client will, in most instances, refrain from making any move whatsoever towards unknown and unfamiliar customs agents. The fifth founding principle as incorporated into the SARS's CMP is detailed below.

5.2.2.5 Enabling smooth and time-effective dispute settlement processes

The dispute settlement process in the South African customs environment is discussed at 5.2.1.3.1.2.11 above and the subsequent paragraphs. The following section is made

347 Magashula 2011 "The role of customs" 5.

348 Magashula 2011 *Address by the Commissioner, presenting the SARS annual report* <http://www.polity.org.za>.

349 SARS 2010 *Customs Modernisation 7*; Magashula 2011 "The role of customs" 5; Magashula 2011 *Address by the Commissioner, presenting the SARS annual report* <http://www.polity.org.za>.

350 SARS 2010 *Customs Modernisation 7*.

351 SARS 2010 *Customs Modernisation 7*.

352 See discussion on corruption in Chapter 3 (specifically sub-heading 3.2.6.3) above.

up of another initiative undertaken by the SARS which is relevant to this study.

5.2.2.6 Other general practical customs modernisation efforts that contribute to the fight against customs offences

Besides the practical steps that fit under specific principles of customs modernisation, there is another effort that still assists in the fight against customs offences, but which could not be associated with a specific principle. It is the Border Control Operational Coordinating Committee which is presented below.

5.2.2.6.1 The Border Control Operational Coordinating Committee

Founded in 2001, the Border Control Operational Coordinating Committee (BCOCC) is the committee representing the most active border control government departments. It is tasked with strategically and harmoniously managing the South African border space.³⁵³ The said government institutions are the Department of Home Affairs, National Intelligence, Transport, the South African Police Service (SAPS), Public Works, Agriculture, Health, Defence, and also the SARS.³⁵⁴ The BCOCC was given the mandate to approach the South African border environment with a more strategic form of management, as it was perceived to be “an affiliated structure of justice, crime prevention and security cluster.”³⁵⁵ In 2007 the SARS was identified through a Cabinet decision as the lead agency at all SA borders points, which position gave it the Chair of the BCOCC.³⁵⁶ According to the IDC Research Project,³⁵⁷ though based on sound principles, the BCOCC did not function effectively insofar as implementation was concerned.³⁵⁸ The same IDC Research Project concluded that initiatives to curb customs fraud in South Africa abound in number but are poorly integrated, have limited budgets and capacity, and are unable to follow up on processes due to their limited efficiency.³⁵⁹ This conclusion having been made in 2010, there is very little information available that can point to the fact that this Committee is fully functional

353 SARS 2016 *About Customs* <http://www.sars.gov.za>; IDC *Fridge Research Project* 28.

354 SARS 2008 *Border Security Crime Trends* 25; South African Borders 2014 *Welcome to South African Borders* <http://www.borders.sars.gov.za>.

355 South African Borders 2014 *Welcome to South African Borders* <http://www.borders.sars.gov.za>.

356 SARS 2008 *Border Security Crime Trends* 25.

357 2010.

358 IDC *Fridge Research Project* 3.

359 IDC *Fridge Research Project* 3.

eight years later (i.e. in 2018) or that considerable progress has been made to remedy these shortcomings.

Nevertheless, modernisation has enabled border agencies to progressively move towards full integration of the technology platform now indispensable for their work, and thus, they have access to information that renders their work more accessible. The availability of such information is beneficial to SARS for better risk-weighting, securing the borders and improving trade facilitation and compliance with the existing legislation.³⁶⁰ Furthermore, the shortcomings pointed out in the IDC Research Project are essentially what customs modernisation seeks to remedy. South Africa being fully involved in the process for a number of years now, it can be assumed that these problems have been addressed accordingly.

5.3 Summary

In the early stages of the development of the South African Customs Modernisation Programme, Magashula,³⁶¹ then Commissioner of the SARS, pointed out that a proper balance was already being achieved between the cross-border processing of legitimate goods and the detection of illegal commodities. Eight years later (i.e. in 2019), does the statement still hold? Or better, can it be said that this vision has fully matured throughout the development of the modernisation programme and that South African customs practices have evolved and are up to speed with international standards, and that the country is now well able to balance its various mandates? There is no doubt that tremendous efforts have been made, and this is visible throughout the customs administration's undertakings under its CMP. It can be said that the SARS is genuinely working hard to make the South African customs administration an organisation of reference, both by its regulations and practices. This is a milestone, considering that South African customs/trade procedures and requirements were previously known to be very cumbersome and demanding. This increased the cost of doing business with South Africa, thereby limiting its competitiveness internationally.³⁶²

360 SARS 2016 *About Customs* <http://www.sars.gov.za>.

361 Oupa Magashula.

362 Khanderia 2016 *Journal of African Law* 442.

This Chapter sought to assess the extent to which customs modernisation as presented by the WCO is a reality in South Africa and to ascertain the impact such a process has been having on the fight against customs offences. It was found that the system has undergone thorough changes and the new pieces of legislation, beyond attesting to that, also reflect the administration's will to include all aspects, so that it can better offer its services. It was also found that the new legal framework, which is yet to come into effect, is founded on the major principles of customs modernisation as advocated by the WCO (and the WTO) and as reflected in its various instruments and initiatives.³⁶³ In the meantime, there is a thorough transformation of the system under the overall CMP and this has taken the standard of the country's customs/trade practices to a whole new level.³⁶⁴ In other words, while awaiting the final publication of the newly enacted framework by the President of the Republic,³⁶⁵ background work is being carried out, preparing the South African system for the new approaches contained in the legislation. This is what customs modernisation is all about, transforming customs systems to the core for better services and enforcement.³⁶⁶

In a nutshell, the South African customs system at present reflects and incorporates the founding principles advocated by the WCO (and WTO)³⁶⁷ and this is enough to say that their diligent implementation will make it possible for the administration to meet its targets³⁶⁸ and more specifically, to limit fraudulent practices in its operations. The administration itself attests to the positive impact new rules and practices already being unfolded under its CMP, have had on the fight against customs offences in its environment.³⁶⁹

Besides the legislative instruments proper to customs in South Africa, other pieces of legislation contribute in one way or another to the fulfilment of the objectives of the

363 As discussed in Chapter 2 above.

364 Khanderia 2016 *Journal of African Law* 442.

365 See discussion in 5.2.1.3 above.

366 Khanderia 2016 *Journal of African Law* 446.

367 As pointed out by SARS at SARS 2019 *New Customs Legislation Update* <https://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/New-Customs-Legislation-update.aspx>.

368 Both Nationally and internationally.

369 See generally 5.2.1.3.1.1 above about the many reasons that led to the adoption of new legislation to the detriment of the former *Customs and Excise Act* 91 of 1964.

customs administration, though they are proper to other government departments. While the current legal framework complies with global standards and has kept pace with global development in trade, one can only hope that full implementation of the legal instruments will not detract from their “bold” character. It would be a total waste to have gone through all this trouble to develop laws and regulations as well as practical tools that reflect international standards and not to ensure that they are adequately implemented for the purposes for which they were formulated. The new sophisticated approaches are fundamental³⁷⁰ to barring the road to customs offences as they are founded on responsive techniques that monitor customs offences development at every stage of the customs process. These approaches can root out the said offences efficiently.

South Africa's progress so far is also highlighted by the WTO TFA Database. According to the said database,³⁷¹ South Africa has reached 90.3% rate of implementation commitments with regard to Category A Notifications of the WTO TFA. This involves a number of modern measures that signatories countries undertook to implement before the WTO TFA came into force on February 2017. The remainder of percentage, i.e. 9.7, is assigned to Category B Notifications. These are measures for which signatories states need time to fully implement. The Single Window for the easy, central and electronic submission of customs documents is within the 9.7% of the South African Category B Notifications and it is set to become fully operational as from 2022 towards 2038. This points to the fact that, although well involved in the process of customs modernisation as a whole, there are few specific elements that are crucial for customs dealings that the administration still has to fully put into motion. This will surely not be a problem considering where the administration already finds itself in terms of modernisation efforts. The Single Window approach being very determinant in the overall customs modernisation process, and the country projecting to unfold it in a few years to come, this shows that the ground is being prepared. This once again, is one aspect that customs modernisation seeks to address, namely, that there should not be a blind copy of the suggested approaches. Each country must implement the

370 If implemented accordingly.

371 WTO TFA Database 2019 *Implementation Notifications (ABC)*
<https://www.tfadatabase.org/notifications>.

customs modernisation principles taking into account the specificities attached to its environment and this after having weighed the advantages and disadvantages or best after evaluating the feasibility of any such step before fully getting involved.³⁷²

One outstanding aspect worth mentioning of the *Customs Control Act* and the *Customs Duties Act* is the available penalties for actions or omissions directed at circumventing their provisions. The regulation of these offences points to the administration's commitment to fighting them in their various forms, and the sanctions will definitely constitute a deterrent to many potential offenders. Though the range of offences is extensive, this Chapter has focused mainly on different aspects of the modernisation programme that have to do with smuggling (which includes and relates to a number of other illegal activities), corruption, misrepresentation (in the sense of false statement), the submission or production of false documentation with the intention to mislead, and duty evasion (one aspect being diversion). If one looks at the definition of customs offences, it encompasses a seemingly limitless range of offences that cannot be covered by this study, as they belong to other specific fields of law. The practical aspects of the South African Customs Modernisation Programme are similarly invaluable. Though they are less documented in their various aspects and sometimes confusing and contradictory, each fulfils a role in the transformation and bettering of the customs administration work in general and for this reason, assist significantly in addressing customs offences more effectively in a global trading environment that is continuously developing. Like South Africa, Cameroon is also well involved in the modernisation of customs, even though its progress is not on the level of the former.

372 De Wulf and Sokol (eds) *Customs Modernization Handbook* XVII.

CHAPTER 6

CUSTOMS MODERNISATION AND ITS IMPACT ON CUSTOMS OFFENCES IN CAMEROON

6.1 Introduction and historical background

This Chapter aims to investigate the legal framework governing Cameroon customs modernisation programme in order to ascertain how this framework and its implementation impacts on combatting customs offences, and further to scrutinise the practical aspects of the said programme that assist in tackling customs offences. These primordial enquiries will help determine how well this particular administration responds to the WCO general call for modernisation.

Bordered by both West and Central African states, Cameroon is said to be located in the “armpit” of tropical Africa.¹ More specifically, Cameroon shares borders with Nigeria to the west and northwest, with Chad to the northeast, and with the Central African Republic, Congo, Gabon, and Equatorial Guinea to the east and south.² Cameroon has a bi-jural legal system with English Common Law and French civil law being in practice.³ Its French and English languages (the two official languages)⁴ inherited from France and Britain, which colonised it, make it difficult to locate Cameroon in one specific cultural region. The difficulty arises from the fact that several Central African states are French-speaking while West African states are English speaking.⁵ From an Anglophone’s point of view, Cameroon would be located in West Africa, while from a Francophone’s point of view it would belong to Central Africa.⁶ Either way, Cameroon is most generally referred to as a Central African state rather than a West African state.⁷ It belongs to the Economic and Monetary Community of

1 Afuma and Thatcher *The Python Trail* 221.

2 Political Risk Yearbook 2017 *Cameroon Country Report* 15.

3 Cameroon Country Monitor 2018 *Country Reports - Cameroon 2*.

4 While 80% of the population speaks French, the remaining 20% speaks English. Note is further to be taken that more than two hundred other local languages are spoken in the country. Afuma and Thatcher *The Python Trail 2*, 221.

5 Afuma and Thatcher *The Python Trail* 221.

6 Afuma and Thatcher *The Python Trail* 221.

7 Leke *The History and Structure of CEMAC* 67, 74; United Nations 1999 *Report of the Republic of Cameroon on Governance*

Central Africa (CEMAC),⁸ which was founded in 1999,⁹ along with Gabon, Central African Republic (CAR), Chad, the Republic of Congo and Equatorial Guinea.¹⁰

CEMAC replaced the Central African Customs and Economic Union (UDEAC),¹¹ which was established by the *Brazzaville Treaty* in December 1964, which became effective in 1966.¹² Although the UDEAC treaty was revised in 1975, this did not save the Union. UDEAC's failure to fulfil the objectives of its establishment led to its members agreeing to the creation of CEMAC, which was to replace and strengthen the customs union.¹³

<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan003139.pdf>.

- 8 CEMAC is the acronym drawn from Communauté Economique et Monétaire de l'Afrique Centrale. There are different translations of this into English. Some translate it as the Economic and Monetary Community of Central Africa; and others as the Central African Economic and Monetary Community. WTO 2007 *Trade Policy Review* (WT/TPR/S/187/Rev.1) viii; International Monetary Fund Date Unknown <https://www.imf.org>; Anonymous Date Unknown <https://www.housingfinanceafrica.org>; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.
- 9 CEMAC was originally instituted in 1994. It became operational only in 1999, once all its six member states had ratified the Treaty instituting it (*Treaty of 16 March 1994 instituting the Central African Economic and Monetary Community* (CEMAC)). Some authors state that CEMAC became operational in 1998 (6 February 1998) and not in 1999, as stated above. De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 107, 114; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.
- 10 Equatorial Guinea joined the 1964 Central African Customs and Economic Union (UDEAC) only in 1983. There is another regional economic community in Central Africa, which is not to be confounded with CEMAC, namely the Economic Community of Central African States (ECCAS). In addition to the countries mentioned above, its membership includes Angola, Burundi, the Democratic Republic of the Congo, and São Tomé and Príncipe, which countries in turn, (with the addition of Rwanda, which is not a member of ECCAS) make the Economic Community of Great Lake Countries (CEPGL). ECCAS was established by the Treaty of Libreville, concluded on October 19, 1983. De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 107, 108; Leke *The History and Structure of CEMAC* 76; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>; ECCAS 2014 *Présentation de la CEEAC* (ECCAS presentation) <https://www.ceeac-eccas.org>.
- 11 UDEAC is sometimes translated as Customs and Economic Union of Central Africa. De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 107; Leke *The History and Structure of CEMAC* 75.
- 12 The UDEAC objectives were amongst others the establishment of "an integrated market and the coordination of the different member states' development programmes." Weissberg & Weissberg 1996-1998 *A Guide for Business in Cameroon 2*; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.
- 13 The factors that led to the failure of UDEAC are amongst others said to be that its operational system was quite inefficient, that the member states lacked full commitment and often failed to pay their contributions for the running of the community's projects, and that the economic crisis of the 1980's only worsened the situation. Their financial difficulties diminished the countries' interest in playing their part and showing support for the fulfilment of the organisation's objectives. These factors led progressively to the Union becoming "slow" and almost "inactive". Leke *The History and Structure of CEMAC* 76; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.

CEMAC thus proceeds from the *N'Djamena Treaty* of March 1994.¹⁴ CEMAC officially came into existence after the ratification and adoption of an action plan under what was called the *Malabo Declaration*.¹⁵ CEMAC's aims¹⁶ to promote peace and the harmonious development of its member states, and also to boost economic integration for those countries that use the same currency, namely the CFA franc.¹⁷

CEMAC became a free trade zone toward the end of the year 2000.¹⁸ It has as its principal aim boosting the process of sub-regional integration within the framework of economic and monetary union through common political, financial, legal and economic structures and policies.¹⁹ Moreover, CEMAC aims at promoting trade and instituting a real common market among its member countries, whereas UDEAC its predecessor aimed at enhancing cooperation between member states.²⁰ CEMAC has more institutions than UDEAC had.²¹

The 1994 treaty establishing CEMAC established two important bodies in the sub-region, namely the Central African Economic Union (UEAC) and the Central African Monetary Union (UMAC). While the latter deals with the community's financial integration matters, the former is expected to enable the establishment of a common market, to reinforce the competitiveness of economic and financial activities within the union, to coordinate economic policies and to build firm foundations for the economic union.²² These objectives were to be carried out through a two-part plan to be

14 De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 107.

15 Leke *The History and Structure of CEMAC* 77.

16 According to Article 2 of its *Revised Constitutive Treaty* (initially signed on March 16, 1994).

17 This acronym derives from the "Franc of the Financial Cooperation in Central Africa". It is otherwise abbreviated as fcfa. Leke *The History and Structure of CEMAC* 76-77; Weissberg & Weissberg 1996-1998 *A Guide for Business in Cameroon* 2.

18 Other articles refer instead to 1998 as the year when trading within the community's borders became duty free. Anonymous *Africa Housing Finance Yearbook* 189; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.

19 Bongyu 2009 *Journal of Asian and African Studies* 389; Anonymous *Africa Housing Finance Yearbook* 189.

20 Leke *The History and Structure of CEMAC* 73; De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 114.

21 De Matons *Facilitation of transport and trade in Sub-Saharan Africa* 114.

22 See article 2 of the *Convention Governing the UEAC*; International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.

completed by 2015.²³ Thus far, the community seems to be lagging behind its projections.²⁴

The Community has produced a tax and customs reform paper, namely the UDEAC Tax and Customs Regional Reform Programme, which aims at correcting the weaknesses of previous sub-regional laws that were complex and not really conducive to sub-regional integration. The reform, according to the paper, seeks to correct the weaknesses of the old sub-regional system and to modernise the system as a whole. The common external tariff (CET),²⁵ the generalised preferential tariff (GPT)²⁶ and the turnover tax (TT)²⁷ are the constituents of the new UDEAC-CEMAC tax-customs system. The Regional Reform Programme was set to start by 1 January 1994 at the latest, or when so justified by 1 January 1995.²⁸

CEMAC also has a Financial and Economic Reform Programme (PREF-CEMAC) that was put in place in 2016 and aims at the implementation of rapid, vigorous and coordinated actions, both at national and sub-regional level, for the stabilisation of the macroeconomic framework and a profound structural transformation of the sub-regional economies, in order to increase their resilience and place them on the path of emergence.²⁹ Reinforcing the customs union is part of the PREF-CEMAC agenda, as expressed in its specific objective 24.

Cameroon has been a member of the WCO since April 1965. It has ratified some of the legal instruments released by this organisation. In the same vein, the country is

23 Article 3 of the Convention Governing the UEAC.

24 International Democracy Watch 2012 *Central African Economic and Monetary Community* <https://www.internationaldemocracywatch.org>.

25 Exempted from Turnover Tax during import and of complementary tax, the Common External Tariff comprises four rates for four categories of goods.

26 The GPT applies to goods originating from UDEAC during their import into another member country. Its rate, initially fixed at 20% of the Common External Tariff applicable to the designated products, was brought down to 10% in 1996, and the tax was to be totally eradicated by January 1998.

27 This tax replaces all indirect tax that applies to the goods delivery, services and to import.

28 Article 1 of *Act No 8/93-UDEAC-556-CD-SE1* Setting up the implementation date of the Tax and Customs regional reform programme.

29 Preface to the *CEMAC Financial and Economic Reform Programme* (PREF-CEMAC).

partaking in the modernisation of customs piloted by the Organisation.³⁰

Many are the challenges that Cameroon customs administration faced in the past, and which led it to enter into a modernisation and reform program.³¹ Three years after the reform of the Cameroon customs administration was first contemplated, a committee was set up to make the reform a reality.³² The following year, that is, in 2002, the Cameroon government proceeded to the creation of Technical Commissions within the CRAD Committee; and the designation of members of the Commissions, in an attempt to ensure that the private sector was involved in the projected reform process.³³ Four Technical Commissions were thus established to study in-depth the measures contained in the reform plan.³⁴ Technical Commission number one was to be in charge of issues relating to the organisation (the institutional dimension) and procedures, to training and information.³⁵ Technical Commission number two was tasked with issues relating to the audit and securing of the PAGODE system,³⁶ the extension of PAGODE to the other structures of customs, the automation of customs procedures and the monitoring of the clearance chain.³⁷ Technical Commission number three was to deal with issues of security, fraud and smuggling.³⁸ Technical Commission number four

30 Likeng, Djeuwo and Bilangna *Gazing into the Mirror Vol I and II*, vii.

31 Likeng *Cameroon Customs The Time of Change Vol I*, 29-32 (Douanes Camerounaises Le Temps des Mutations).

32 The committee was established in terms of *Decision* No 035/CF/MINEFI/ of 14/09/1999 modified and supplemented by *Decision* No 02658/MINEFI of 19/07/2001, and bore the name Customs Administration Reform Committee (CRAD). Cameroon Customs Directorate General (hereafter CCDG) (Technical Commission No 1) 2002 *Cameroon customs reform-Tome I*, 3.

33 This was done in *Decisions* No 00288/MINEFI/CAB and No 00292/MINEFI/CAB of 24 January 2002. CCDG 2002 *General Report Cameroon Customs Reform 7*; CCDG (Technical Commission No 1) 2002 *Cameroon customs reform-Tome I*, 3.

34 CCDG (Technical Commission No 4) 2002 *Cameroon customs reform-Tome IV*, 3.

35 CCDG (Technical Commission No 1) 2002 *Cameroon customs reform-Tome I*, 3; Ndiefouo *Cameroon Customs in the Era of Trade Facilitation 20* (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux).

36 PAGODE: Procédures Automatisées de Gestion des Opérations de la Douane et du Commerce Extérieur (computerized management procedures for Customs and external trade operations).

37 Other sources simply refer to Technical Commission number two as the one tasked with "services and IT systems". The work of the Technical Commission number 2 extended as time went by to the migration from the PAGODE system to the adoption of the ASYCUDA system. CCDG (Technical Commission No 2) 2002 *Cameroon customs reform-Tome II 3*; Ndiefouo *Cameroon Customs in the Era of Trade Facilitation 20* (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux).

38 Ndiefouo *Cameroon Customs in the Era of Trade Facilitation 20* (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux).

worked on auditing the working conditions and the then infrastructures of the customs administration and to make proposals that would help remedy the existing shortcomings.³⁹ Each Technical Commission was to focus on a specific aspect of the customs work so that the reform could be planned and achieved more efficiently.⁴⁰ At the end of their work, each of the Commissions compiled a report that made recommendations to the government on customs reforms, and these recommendations are what shaped the actions of the administration into its overall modernisation process.⁴¹

The main stages of this reform programme were undertaken in 1996,⁴² 1999,⁴³ 2003,⁴⁴ 2006,⁴⁵ and 2008.⁴⁶ 1989,⁴⁷ 1994, 1999 and 2007⁴⁸ are mentioned as the four dates when the administration underwent consistent and palpable reforms.⁴⁹ The inconsistencies in the dates or their variety do not matter. What matters is that the quest for greater efficiency did not start on a specific date. Modernisation did not happen all at once but in different stages. The changes made may not always have borne the name of modernisation or reform, but they all were meant to improve

39 CCDG (Technical Commission No 4) 2002 *Cameroon customs reform-Tome IV*, 3; Ndiefouo *Cameroon Customs in the Era of Trade Facilitation* 20 (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux).

40 Ndiefouo *Cameroon Customs in the Era of Trade Facilitation* 20 (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux).

41 Ndiefouo *Cameroon Customs in the Era of Trade Facilitation* 21 (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux).

42 Adoption of a modernisation and rehabilitation plan for the customs administration. Likeng *Cameroon Customs the Time of Change Vol I*, 32 (Douanes Camerounaises Le Temps des Mutations); CCDG 2002 *General Report Summary Customs Reform in Cameroon* 6.

43 The government established a customs administration reform committee (CRAD). Likeng *Cameroon Customs The Time of Change Vol I*, 32 (Douanes Camerounaises Le Temps des Mutations).

44 Finalisation and adoption of the General Report of the Reforms and Modernisation Committee of the Customs Administration (CRAD) through a strategic plan incorporating 8 objectives and 173 measures. This is the report on which the whole modernisation programme rests. Bilangna 2009 *Afrique Contemporaine* 103; Likeng *Cameroon Customs The Time of Change Vol I*, 32 (Douanes Camerounaises Le Temps des Mutations).

45 Diagnostic mission of the World Customs Organization to Cameroon customs under phase 1 of the COLUMBUS program. Likeng *Cameroon Customs The Time of Change Vol I*, 32 (Douanes Camerounaises Le Temps des Mutations).

46 Phase 2 of the COLUMBUS programme was dedicated to the planning of actions. Likeng *Cameroon Customs The Time of Change Vol I*, 32 (Douanes Camerounaises Le Temps des Mutations).

47 Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

48 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 55, 57.

49 Nguini 2011 *Customs & Business Challenge* 24.

customs performance. Nevertheless, 1999 appears to be the date most commonly referred to as that on which the Cameroon customs administration started its reform process.⁵⁰

The modernisation of customs administration in Cameroon was initiated by the Head of State and is piloted by the Customs Directorate General under the guidance of the ministry of finance.⁵¹ It was primarily introduced to combat corruption, which was rampant in the administration.⁵² This particular administration had a horrible reputation. The general impression was that corruption, malpractices and fraud were common in the agency.⁵³ To restore its image and reputation among both citizens and the government as well as among the international trading community, and thus to ensure better performance, modernisation appeared to be a pressing need.⁵⁴

The modernisation of Cameroon customs encompasses reforming institutions and procedures as well as intervening in the retraining of human resources.⁵⁵ It entails simplifying procedures, streamlining customs control and reforming the services offered and the IT systems.⁵⁶ The objective of the modernisation programme is to progressively set Cameroon customs within the global environment as a modern administration open to its context and well aware of its economic mission in service of development, which mission entails trade facilitation and partnership with the private sector.⁵⁷ The modernisation programme thus seeks to bring about technical as well as “cultural” changes.⁵⁸

50 CCDG 2002 *General Summary Report Cameroon Customs Reform 6*; Ndiefouo *Cameroon Customs in the Era of Trade Facilitation* 19 (La douane Camerounaise à l'ère de la facilitation des échanges commerciaux); International Business Publications *Cameroon Investment Trade Laws* 84.

51 Likeng *Cameroon Customs The Time of Change Vol I*, 50, 55-56 and *Vol II*, 86 (Douanes Camerounaises Le Temps des Mutations).

52 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 7* (Appui à la mise en oeuvre du plan de modernisation); Bilangna 2009 *Afrique contemporaine* 103.

53 Ajang 2011 *Customs & Business Challenge* 23.

54 CCDG 2002 *General Summary Report Cameroon Customs Reform 37*.

55 Likeng *Cameroon Customs The Time of Change Vol I*, 50 (Douanes Camerounaises Le Temps des Mutations).

56 Bilangna 2009 *Afrique Contemporaine* 103.

57 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 4* (Appui à la mise en oeuvre du plan de modernisation).

58 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 4* (Appui à la mise en oeuvre du plan de modernisation).

Among the key aspects of the modernisation of the customs administration, Cameroon customs undertook to define and put in place a renovated control chain through the use of modern tools for control such as audit, scanner, risk management and targeting.⁵⁹ It is submitted that one crucial element that distinguishes the Cameroon customs modernisation programme from other administrations is the introduction of performance contracts (discussed at 6.2.2.4.3 hereunder). Performance contracts are a very significant aspect of a broader plan of modernisation and reform of the whole customs administration. They seek to instil change in three different areas in the administration by reducing the clearance time of goods, increasing the collection of customs revenues, and reducing bad practices in general and corruption in particular.⁶⁰ Performance contracts have as their principal objective curbing all types of customs fraud, and specifically corruption, but they also aim at making clearance processes less burdensome - i.e., faster and more efficient.⁶¹ In her opening speech at the third edition of the Club Management,⁶² the then Cameroon customs Director General (hereafter the DG) identified customs modernisation as the administration's response to the many challenges it faced, among which were strengthening security in order to protect citizens, consumers and legitimate trade with regard to goods traded on the territory or in transit thereof.⁶³ The first part of this Chapter is consecrated to the evaluation of the legal framework governing the Cameroon customs modernisation programme while the second part scrutinises the relevant practical steps.

6.2 Legal and practical aspects of Cameroon customs modernisation programme

The legal aspects will precede the practical aspects of customs modernisation in Cameroon that impact the fight against customs offences.

59 Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

60 Cantens *et al* 2011 *Afrique-Notes de Politique Commerciale Note #13*, 2.

61 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 5.

62 The "Club Management" is a creation of the Public Management Higher Institute (ISPM), a professional training institute that aims to offer to managers in general a platform to share with men of science and the public at large their experiences in terms of their successes and challenges.

63 Likeng 2011 *Les Actes du Club Management* 11.

6.2.1 *The legal framework governing Cameroon customs (modernisation)*

Customs law in Cameroon is built on various international, community-based and national sources.⁶⁴

6.2.1.1 International sources of law governing Cameroon customs

When reference is made to the bodies piloting international trade, two leading organisations come to mind, namely the World Trade Organization (WTO) and the WCO.⁶⁵ The WCO is an administrator and the only international organisation dealing exclusively with international customs and border control matters.⁶⁶ It acts as a negotiator that deals with the global rules of trade between nations.⁶⁷ Its primary function is to ensure that trade flows as smoothly, predictably and freely as possible.⁶⁸ The WTO, on the other hand, acts as a regulator. It was set up in 1995 in order to put in place a permanent organisation for implementing international trade agreements and to establish a dispute settlement body.⁶⁹ The WTO stands as a body that can be used by its member states as a forum for negotiating trade agreements and as a platform to settle disputes amongst themselves.⁷⁰ Even though the WTO's agreements are thought to have established a legal framework generally relating to international trade activities that impact Cameroon customs, the fact remains that legal and technical issues of the national customs system are mainly governed by the WCO.⁷¹

6.2.1.1.1 The WTO and Cameroon customs

The WTO, through its instruments, plays a decisive role in the shaping of customs

64 CCDG *Guide de l'utilisateur en douanes* 10 (Customs user's guide).

65 Sutter 2015 *Livingston Global Perspectives Quarterly Newsletter* 13; CCDG *Guide de l'utilisateur en douanes* 10 (Customs user's guide).

66 Anonymous 2013 *What is the difference between the WTO and the WCO?* <http://import-export-training.blogspot.com/2013/05/what-is-difference-between-wto-and-wco.html>.

67 Sutter 2015 *Livingston Global Perspectives Quarterly Newsletter* 13; WTO 2018 *What is the WTO?* https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

68 WTO 2018 *What is the WTO?* https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

69 Anonymous 2013 *What is the difference between the WTO and the WCO?* <http://import-export-training.blogspot.com/2013/05/what-is-difference-between-wto-and-wco.html>.

70 WTO 2018 *What is the WTO?* https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

71 CCDG *Guide de l'utilisateur en douanes* 10 (Customs user's guide).

rules in general. Its Trade Facilitation Agreement is discussed below.

6.2.1.1.1.1 From the General Agreement on Tariffs and Trade (GATT) rules to the WTO agreements

Cameroon has been a member of the WTO since its creation, and all WTO standards relating to customs have therefore been integrated into the country's legal order.⁷² It is in this respect that the Final Act of the *Uruguay Round Agreement* signed in Marrakech (Marrakech Declaration of 15 April 1995) is applicable in Cameroon under international customs law (as an international source for customs law).⁷³ This Declaration covers a series of agreements.⁷⁴ Beyond these, some of the 1994 GATT guiding principles are implemented in Cameroon, notably the GATT most favoured nation clause⁷⁵ and the national treatment principle⁷⁶ (both emanating from article II of GATT 1994).⁷⁷ Beyond these instruments, which need not be discussed here in more detail, Cameroon recently "adhered" to the *World Trade Organization Trade Facilitation Agreement*, a step which will impact significantly on combatting customs offences, considering its basic principles.

6.2.1.1.1.2 World Trade Organization Trade Facilitation Agreement ⁷⁸

Adopted in 2013, the *World Trade Organization Trade Facilitation Agreement*⁷⁹ (WTO

72 CCDG *Guide de l'usager en douanes* 11 (Customs user's guide).

73 CCDG *Guide de l'usager en douanes* 11 (Customs users' guide).

74 They are the *Agreement on Customs Valuation* (article VII of GATT 1994); *Agreement on trade in goods*; *Anti-Dumping Agreement*; *Agreement on trade in services*; *Agreement on Subsidies and Countervailing Measures*; *Agreement on trade-related aspects of intellectual property rights*; *Understanding on rules and procedures governing the settlement of disputes*; the *Agreement in Agriculture*; *Trade policy review mechanism*; the *Agreement on the application of sanitary and phytosanitary measures*; *Agreement on textile and clothes*; *Agreement on trade-related investment measures*; *Agreement on Trade in Civil Aircraft*; *International Bovine Meat agreement*; *Agreement on Government Procurement*; *International Dairy Agreement*. CCDG *Guide de l'usager en douanes* 10 (Customs user's guide).

75 This clause compels all members of the WTO that concede a trade advantage to one country, to extend it to all the other member countries of the organization.

76 This principle requires from member states of the WTO, an equal treatment on national goods and the similar imported goods once these have been admitted on a market.

77 CCDG *Guide de l'usager en douanes* 11 (Customs user's guide).

78 France, South Africa and Cameroon have ratified the *World Trade Organization Trade Facilitation Agreement* respectively on 05/10/2015; 30/11/2017 and 30/11/2018. See WTO 2019 *Trade Facilitation Agreement Facility* <https://www.tfacility.org/ratifications>.

79 Its French title is "l'Accord de l'OMC sur la facilitation des échanges commerciaux".

TFA) came into being in February 2017 upon its ratification by two-thirds of the WTO members.⁸⁰ It is the product of lengthy negotiations that led to its legal review by July 2014. The Protocol of Amendment was consented to by WTO members on November 2014, which Protocol inserted the new WTO TFA into the legal framework of the organisation.⁸¹

This instrument is founded on the principles that facilitating the movement, release and clearance of goods across borders⁸² through the simplification, modernisation and harmonisation of trade processes⁸³ as well as close cooperation in customs compliance issues and capacity building are keys to sustainable global trade.⁸⁴ Besides the instruments enacted by the WCO to which Cameroon has adhered or from which it draws inspiration, and that have been made law or practice in its territory, it has also adhered to the WTO TFA, which has a direct impact on customs modernisation. By adhering to the WTO TFA, Cameroon hopes it will bring more transparency as well as better access to customs documents, laws, regulations and procedures.⁸⁵ It will make available information that is needed by companies in order to start the trade exchange.⁸⁶ This new treaty, especially its element on trade facilitation, is expected to eliminate paper-based procedures and bureaucratic delays for goods sent all over the world.⁸⁷ By consenting to this agreement, the signatory states or entities commit to reforming their customs practices, to ensuring more efficient goods processing at

80 WTO Date Unknown *Trade facilitation*
https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

81 WTO Date Unknown *Trade facilitation — Cutting “red tape” at the border*
https://www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm.

82 WTO 2017 *WTO’s Trade Facilitation Agreement enters into force*
https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm.

83 WTO Date Unknown *Trade facilitation*
https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

84 WTO 2017 *Agreement on Trade Facilitation* https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm; United Nations Committee for Development Policy (UNCDP) Date Unknown *WTO Trade Facilitation Agreement (TFA) Now in Force* <https://www.un.org/ldcportal/wto-trade-facilitation-agreement-tfa-now-in-force/>.

85 Likeng *Cameroon Customs The Time of Change Vol II, 77* (Douanes Camerounaises Le temps des mutations).

86 Likeng *Cameroon Customs The Time of Change Vol II, 77* (Douanes Camerounaises Le temps des Mutations).

87 Likeng *Cameroon Customs The Time of Change Vol II, 77* (Douanes Camerounaises Le temps des Mutations).

their borders, and to providing access to accelerated dispatch channels.⁸⁸ The WTO TFA has further requirements that signatory states should abide by, namely that they should lighten documentary requirements, ensure the processing of documents before the goods arrive, make use of electronic means of payment, and allow priority treatment for perishable goods.⁸⁹ These trade facilitation steps, it is suggested, are going to further reduce trading costs for small exporting companies.⁹⁰ Like any other modernisation instrument that sets out best practices for greater efficiency, this instrument in itself stands as a barrier to customs offences. Because modern customs practices call for modern infrastructure that aids in curbing fraud, the country has an interest adopting the principles set out in this instrument into its daily customs practices, as this will strengthen the customs modernisation efforts it has undertaken thus far. For many years the WTO and the WCO have been cooperating in several aspects of international trade, notably those aspects relating to access to markets, agreements relating to information technology, customs valuation,⁹¹ rules of origin and trade facilitation, to mention but a few.⁹²

Although implementing to a considerable extent the provisions of the WTO TFA which it ratified in November 2018, Cameroon is ranked low as a country implementing trade facilitation measures according to the WTO data.⁹³ One may assume that the low ranking is justified by only recent accession of the administration to the instrument. However, the modernisation programme has been ongoing in the country for more than a decade now, it should have already prepared the ground for the effortless

88 Likeng *Cameroon Customs The Time of Change Vol II*, 77 (Douanes Camerounaises Le Temps des Mutations).

89 Likeng *Cameroon Customs The Time of Change Vol II*, 77 (Douanes Camerounaises Le Temps des Mutations).

90 Likeng *Cameroon Customs The Time of Change Vol II*, 77 (Douanes Camerounaises Le Temps des Mutations).

91 The decision to apply the *WTO Valuation Agreement* took effect in Cameroon as from 1 July 2001. It was transposed into the national legal framework by *Law No 2001/008* of 30 June 2001 and completed by the *Ministerial Instruction No 0246/MINEFI/DD* of 30 June 2001. The full name of the *WTO Valuation Agreement is Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) 1994*. WCO *WTO Valuation Agreement 1994* <http://www.wcoomd.org>; Belinga "Regional forum of the OECD on trade facilitation" 22.

92 CCDG *Guide de l'usager en douanes* 11 (Customs users' guide); WCO 2014 *WTO Trade Facilitation Agreement* <https://www.wcoomd.org> or <https://www.eiseverywhere.com>.

93 WTO TFA Database 2019 *Cameroon Notification Status* <https://www.tfadatabase.org/members/cameroon>.

blending in of the WTO TFA into the system like it has been the case in South Africa. The extent to which the WCO's instruments form part of Cameroon's customs legal framework are scrutinised below.

6.2.1.1.2 WCO instruments adhered to by Cameroon customs and those from which it draws inspiration

Cameroon adhered to the WCO when it was still the Customs Cooperation Council in 1965.⁹⁴ Under the aegis of the WCO, several instruments have been developed to which Cameroon has formally adhered or from which it merely draws inspiration to run its day-to-day customs business.⁹⁵ The instruments cover various spheres involved in the international movement of goods across borders. The highlight for this thesis rests on the *International Convention on the Simplification and Harmonization of Customs Procedures (as amended)* 1999; the *Revised Arusha Declaration : Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in Customs*;⁹⁶ the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (Nairobi, 1977); and the *International Convention on Mutual Administrative Assistance in Customs Matters* (Brussels, 27 June 2003) (Johannesburg Convention). These are specific instruments discussed in Chapter 2 above, which have been highly recommended by the WCO to its member states that strive for efficiency and modern customs practices. As a member of CEMAC, Cameroon is obligated by legal rules at the community level. The details thereof are provided below.

6.2.1.2 Community-based legal sources of Cameroon customs (modernisation)

As a member of CEMAC Cameroon submits to the application of the *CEMAC Customs*

94 CCDG *Guide de l'utilisateur en douanes* 11 (Customs users' guide); WCO 2018 *List of the 178 WCO members* <https://www.wcoomd.org>.

95 It is important to highlight the words "draws inspiration". This expression points to the fact that the country may not have adhered to all the instruments developed by the organisation but still makes use of them somehow. At least that is the impression given by the use of these words by the Cameroon Customs Directorate General. This proves true when for instance the country has not adopted the *Johannesburg Convention* but mentions this Convention as one of the instruments from which the administration draws inspiration. CCDG *Guide de l'utilisateur en douanes* 12 (Customs user's guide).

96 Done at Arusha, Tanzania, on the 7th day of July 1993 (81st/82nd Council Sessions) and revised in June 2003 (101st/102nd Council Sessions).

Code and the various acts taken by the Community's bodies. Furthermore, economic integration in Central Africa rests on a Common External Tariff (CET) adopted within the Customs Union.

6.2.1.2.1 CEMAC Customs Code

The member countries of CEMAC make use of a common code for customs-related issues, namely the *CEMAC Customs Code* (hereafter the CCC), which was initially enacted by *Act* No 08/65-UDEAC-37 of 14 December 1965.⁹⁷ Subsequent amendments were made after that, and the most recent goes back to 2010.⁹⁸ In the hierarchy of legal norms, the CCC is superior to national legal frameworks.⁹⁹

The Community law stands out in the sense that it has direct application in the domestic order of the CEMAC member states.¹⁰⁰ In this respect, all the community's laws enjoy direct application.¹⁰¹ This is sometimes called the principle of direct applicability or direct effect.¹⁰² This means that:

Community regulations are integrated as they are passed into the national legal order without the need of any national measures of transposition or reception. Once these community laws are passed by the competent authority, they are applied immediately and without any contestations by the national authority.¹⁰³

CEMAC countries, therefore, apply legal monism, and as such, the treaty instituting CEMAC is superior to all national laws.¹⁰⁴ The direct implication is the subordination of the national law-making bodies to that of the community.¹⁰⁵ This further means that the community's laws have a "supra-constitutional" value and that the provisions of

97 It was then called *UDEAC's Customs Code*. It was later revised by *Regulation* No 05/01-UEAC-097-CM-06 of 3rd August 2001. It became the *CEMAC Customs Code* when CEMAC took over UDEAC. CCDG *Guide de l'utilisateur en douanes* 10 (Customs user's guide). Anonymous Data unknown <http://www.logistiqueconseil.org>.

98 *Regulation* No 08/10 UEAC 205 CM 21 of 28 October 2010.

99 CCDG *Guide de l'utilisateur en douanes* 13 (Customs user's guide).

100 CCDG *Guide de l'utilisateur en douanes* 13 (Customs user's guide).

101 CCDG *Guide de l'utilisateur en douanes* 13 (Customs user's guide).

102 CCDG *Guide de l'utilisateur en douanes* 13 (Customs user's guide); Bongyu 2009 *Journal of Asian and African Studies* 393.

103 See Article 21 of the *Additive to the CEMAC treaty relating to the legal and institutional system of the community* of 5 July 1996; Bongyu 2009 *Journal of Asian and African Studies* 393; CCDG 2010 *Guide de l'utilisateur en douanes* 13 (Customs user's guide).

104 Bongyu 2009 *Journal of Asian and African Studies* 391.

105 Bongyu 2009 *Journal of Asian and African Studies* 391.

the CEMAC treaty would override any national laws.¹⁰⁶ This state of affairs prompted Bongyu¹⁰⁷ to argue that the progressive application of CEMAC community laws has led to a decline in the sovereignty of member states. Although giving such supremacy to the community's legal instruments facilitates regional integration and serves both the interest of the community and trade in general, there should be a balance between such rules so that the state laws will still have a certain degree of influence. The instruments are devised to take into consideration specific national realities and cannot, therefore, simply and always bow to the community's rules. It is important to note, however, that recommendations and opinions have no binding force on member states.¹⁰⁸

The CCC is built on twelve titles, namely the General principles of the Customs regime; the Functioning and organisation of the customs service; Goods going through customs; Warehouses and clearance areas; Clearance operations; Customs suspensive and economic procedures; Customs bonded warehouses; Preferred operations; Movement and the holding of goods within the customs territory; Navigation; Diverse taxes charged by customs; and lastly Litigation.¹⁰⁹ Several aspects of this code will be scrutinised hereunder. Most of these involve the categorisation of customs offences by the CCC, aspects dealing with the customs officers investigative and enforcement powers to detect and prosecute customs offences, the smoothness of customs litigation processes, the deterrent nature of the penalties applied to customs offences, and the like. All these aspects incorporate the WCO's founding principles of customs modernisation in one way or the other.

6.2.1.2.1.1 Categorising customs offences according to the CCC

The CCC differentiates between two categories of customs offences, namely contraventions (divided into five classes) and offences (divided into three classes).¹¹⁰

The burden of proof in customs litigation rests on the defender, who has to prove the

106 Bongyu 2009 *Journal of Asian and African Studies* 392.

107 Bongyu 2009 *Journal of Asian and African Studies* 390.

108 CCDG *Guide de l'usager en douanes* 13 (Customs user's guide).

109 CCDG *Guide de l'usager en douanes* 13 (Customs user's guide).

110 Article 395 of the CCC.

applicant wrong.¹¹¹ Smuggling, for instance, belonging to the category of offences, is regulated by articles 403, 404 and 405 of the CCC. First-class offences, which is made of acts of smuggling highly taxed goods or the importation or exportation without declaration of prohibited goods, for instance, may lead to fines of up to double the value of the goods smuggled, and a jail sentence of one to thirty days with other complementary sanctions such as the confiscation of the goods, the means of transport, and the things used to hide such goods.¹¹² When the offence of smuggling is perpetrated by a syndicate of from three to six individuals, in addition to having to pay a fine of twice the value of the goods in question, the persons involved are subject to a three months to one year jail sentence.¹¹³ The most severe of these fines and sentences come from the third class of offences, which includes offences such as smuggling (involving between three and six people), counterfeiting, and smuggling fishery products through national waters. The fine for this category is four times the value of the goods seized, a jail sentence of six months to three years is imposed, and the goods are confiscated, as are the means used to transport them and the things used to conceal the act of fraud.¹¹⁴ Annexure 2 below represents the standard categorisation of customs offences as presented by the CCC.

The clear difference between contraventions and offences is that the former do not call for a jail sentence but solely for fines and seizures, the amount of which may vary from 50 000 FCFA up to three times the value of the goods in dispute.¹¹⁵ The CCC gives broad prerogatives and powers to customs officers in an attempt to achieving better enforcement.

6.2.1.2.1.2 Prerogatives and powers of customs officers that impact on the fight against customs offences

Many powers and prerogatives are assigned to customs officers to ensure that they enforce customs laws and regulations in ways that deter the commission of customs

111 See article 352 of the CCC regarding the proof of non-contravention; Koah *The Approved Customs Agent Responsibility* (La responsabilité du commisssionnaire en douane agréé).

112 Article 403 of the CCC.

113 Article 404 of the CCC.

114 Article 405 of the CCC.

115 Article 397, 399, 400, 401 and 402 of the CCC.

offences. Customs officers' general enforcement powers include but are not restricted to working in conjunction with other countries, participating in a specific way in the movement of international postal articles, ensuring that they leave no room for corrupt practices, proceeding to the arrest of customs law offenders, and also conducting post-clearance checks as the case may be.¹¹⁶

Customs officers have broad general enforcement powers. All ranks of customs officers take an oath before the commencement of their duties.¹¹⁷ They are required, at all times, to have their employment commissions¹¹⁸ with them and to display them if required when carrying out their duties. Customs officers and those that have worked with them in any capacity are bound by professional secrecy under the conditions and sanctions provided by the Cameroon *Criminal Code*.¹¹⁹

Customs officers are under the special protection of the law. For this reason, no one should abuse, mistreat or disturb them in the performance of their duties or oppose such performance.¹²⁰ Both civilian and military forces are to lend support to customs officers whenever requested to do so in the performance of the latter's duties.¹²¹ Opposing customs officers in their work, refusing to allow them to perform searches or to physically inspect goods, or refusing to place at their disposal requested documents constitute infringements of customs law.¹²² According to article 65 (1) (2) of the CCC, customs officers are entitled to carry guns and to use them should the necessity arise. This includes using them to defend themselves against violent acts directed at them, to stop non-cooperating vehicles, to stop means of transport¹²³ and people, as well as dogs and other animals that cannot be neutralised alive and that are used to perpetrate fraud or are unlawfully imported or exported or that are

116 See generally articles 68, 75 and 77 of the CCC; see further CCDG *Guide de l'usager en douanes* 61 (Customs user's guide).

117 Article 63 (1) of the CCC.

118 This is the document that attests to their having taken the oath. See articles 63 (2) and 64 of the CCC.

119 Article 69 of the CCC.

120 Article 62 (1) of the CCC.

121 Article 62 (2) of the CCC.

122 CCDG *Guide de l'usager en douanes* 22 (Customs user's guide).

123 This is often the situation where a vehicle refuses to stop despite several commands to do so being given by customs officers.

wandering on the customs territory. A few of these prerogatives and powers are revisited below.

6.2.1.2.1.2.1 Conducting searches and seizures

To uncover acts of fraud, customs officers are allowed to operate house searches, and they should be accompanied in these tasks by either a municipal officer, a police officer or a representative of the regional or local authority.¹²⁴ House searches are special steps that are particularly regulated. Private spaces are usually considered inviolable.¹²⁵ For this reason, the *Cameroon Criminal Code* in its article 299 forbids anyone from stepping foot in a citizen's house without being legally authorised or without following the proper procedure prescribed by the law. These accompanied house visits cannot in principle be performed at night, but this rule is overridden if it appears that goods that have been monitored without interruption were taken into a house or any other building even outside the operational area.¹²⁶ In this case, the customs officer can act at night and does not need to be accompanied. If the officer(s) meet(s) resistance as to the opening of doors, they can force their way into the building but within limits prescribed by law.¹²⁷ Customs officers equally have the right to visit goods,¹²⁸ means of transport¹²⁹ and people¹³⁰ in the implementation of the CCC and in their attempt to uncover fraud.¹³¹ They further have the right to access documents that may assist in their enforcement activities. Once again, and as pointed out in the previous Chapters, extending the powers of customs officers for better

124 Article 75 (1) of the CCC.

125 CCDG *Guide de l'usager en douanes* 67 (Customs user's guide).

126 Article 75 (2) (3) of the CCC.

127 The CEMAC Code requires customs officers to be accompanied in these instances by either a municipal officer, a police officer, or a representative of the regional or local entity. Article 75 (4) of the CCC.

128 This step is a verification step that seeks to compare the veracity of goods declaration data with the actual goods, to ensure they match. Articles 79-94 as well as 106-109 of the CCC regulate goods visits based on their means of transport, warehouse and clearance areas, or export operations.

129 Visiting means of transport extends to warships found in ports and bays. Article 73 of the CCC; CCDG *Guide de l'usager en douanes* 66 (Customs user's guide).

130 Visiting people in this context means searching them. Usually a simple or normal body search will be enough, but if suspicions arise that a person might be carrying dangerous drugs in his/her system, a search *in corpore* is executed. CCDG *Guide de l'usager en douanes* 67 (Customs user's guide).

131 Article 70 (1) of the CCC.

enforcement of their duty is a requirement laid down in Standard 5 of Specific Annex H to the RKC.

6.2.1.2.1.2.2 Accessing documents

Customs agents (inspectors, controllers, officers) are empowered to request any papers or documents relating to operations within the scope of their work from any natural or legal person, directly or indirectly, regarding regular or irregular operations within the competence of customs. This is otherwise called the right of communication and of documents seizure.¹³² The documentation request can be made at the premises of railway stations, of road transport companies, of air navigation companies, of customs brokers or freight forwarders, of banks, and generally at the premises of any natural or legal person directly or indirectly involved in regular or irregular operations within the competence of customs.¹³³ This right of communication concerns all documents without any exception and no one can use professional secrecy as a ground for not providing the documents requested.¹³⁴ In addition to the agents that can request documents as mentioned above, office managers and customs collectors are authorised to proceed with seizing documents that can help in the performance of their duties.¹³⁵

Documents seizure can precede goods and merchandise seizure and vice-versa when customs officers find that there has been an offence against customs law. The seizure is operated on infringing goods and means of transport.¹³⁶ It can also be done in the form of money (value) to guarantee the payment of fines and penalties that eventually incur. Specific types of seizure are described, such as home-based seizure, seizure on ships and boats, and seizure outside customs zones.¹³⁷ Customs agents can also conduct investigations and inquiries to obtain information and confessions. These rights are found in articles 308 (1) and 310 (2) of the CCC. Customs agents also have

132 Article 76 of the CCC.

133 CCDG *Guide de l'utilisateur en douanes* 67-68 (Customs user's guide).

134 CCDG *Guide de l'utilisateur en douanes* 68 (Customs user's guide).

135 CCDG *Guide de l'utilisateur en douanes* 68 (Customs user's guide).

136 The seizure procedures are described in articles 298-307 of the CCC; CCDG *Guide de l'utilisateur en douanes* 68 (Customs user's guide).

137 Articles 304, 305 and 306 of the CCC.

the right to verify the identity of people coming in and leaving the customs territory or that move within the customs' zones.¹³⁸ With the view of giving effect to the founding principle of cooperation in the customs modernisation process, the CCC vests in customs the power to build strong cooperation networks with other customs administrations around the world.

6.2.1.2.1.2.3 Teaming up with other customs administrations for better enforcement

Because better enforcement of customs laws and regulations cannot take place in isolation, customs officers are called upon to cooperate with the customs administrations of other countries and with other agencies working with them. Working in conjunction with other countries is based on the principle of reciprocity. Thus, CEMAC countries can only exchange information with countries that are themselves able to provide such assistance in return.¹³⁹ It is common cause that international postal services, because of their speed and other facilities they offer, are often abused by law offenders for their fishy transactions. Bearing this in mind, the drafters of the CCC dedicated a specific aspect of the Code to how to handle these articles in ways that can facilitate the detection of offences.

6.2.1.2.1.2.4 Dealing with international postal articles

The interest of the customs administration in the work of postal services comes from the general belief that the latter services are often used to perpetrate fraud across borders. The CCC empowers customs officers by giving them open access to post offices and the mandate to perform searches in fulfilment of their missions.¹⁴⁰ Customs officers are authorised to access all parts of post offices in the presence of postal agents, including the sorting hall, which deals directly with external mails, to search sealed or unsealed mail, irrespective of whether it comes from inside or outside the country (excluding those meant for transit) that contain or seem to contain prohibited or restricted goods.¹⁴¹ The postal authorities are to cooperate fully with the customs

138 Article 78 of the CCC.

139 Article 75 (4) of the CCC.

140 Article 77 of the CCC.

141 Article 77 (1) of the CCC.

authorities by submitting to them mail marked with import prohibition, on which duties and taxes must be paid, or which is subject to restrictions or some formalities at the point of entry over the border.¹⁴² The same goes for export mails bearing the same features. Despite the assignment of such broad powers to customs officers, the secrecy of correspondence cannot be violated.¹⁴³ Issues of corruption in customs dealings are usually treated with the utmost importance given the chain of negative effects the commission of such offence can generate. That is why Cameroon, as part of CEMAC, has subscribed to a zero-tolerance policy against corruption in customs operations.

6.2.1.2.1.2.5 The zero-tolerance policy against corruption

Issues of integrity in customs are a common concern for every customs administration in the world, and much more for Cameroon. The zero-tolerance policy against corruption is, therefore, a motto for which every customs administration in the world strives. This is the reason the WCO proposes strategies for promoting transparency, predictability and good governance in customs.¹⁴⁴ The CCC¹⁴⁵ makes it clear that acts of corruption are punishable by sanctions provided in the *Criminal Code*.¹⁴⁶ This Code subjects those found guilty of corruption to five to ten years imprisonment and a fine of 200 000 to 2 000 000 FCFA.¹⁴⁷ These jail sentence and fines are reduced by half (one to five years imprisonment and 100 000 to 1 000 000 FCFA)¹⁴⁸ if the corrupt activity does not form part of the agent's work description, but his position was simply used to facilitate the act in question. Customs officers are strictly forbidden to partake in corrupt activities, whether directly or indirectly, and those that fail to abide by this rule are subjected to criminal sanctions.¹⁴⁹ The Code also condemns any interest in the act of corruption, i.e. the circumstances where a civil servant or any state worker directly or indirectly partakes in activities that lead to their unduly benefiting in a

142 Article 77 (2) of the CCC.

143 Article 77 (4) of the CCC.

144 This is the fourth founding principle of customs modernisation as discussed at 2.2.2.4 above.

145 Article 68 (2) of the CCC.

146 Corruption is therefore regulated by *Law No 2016/007* of 12 July 2016, which institutes the *Criminal Code*.

147 Approximately USD 348-3481.

148 Approximately USD 174-1740.

149 CCDG *Guide de l'usager en douanes 22* (Customs user's guide).

matter under their control or supervision. One way in which corruption occurs in customs is through the bribing of customs officers, perhaps to speed up customs or to persuade the officer to overlook some requirement. These acts could result in prejudice to citizens' health, the collection of customs revenue, the performance of legitimate businesses, and the trade environment as a whole. Customs officers are also vested with the capacity to arrest those who break the law pertaining to customs.

The powers to arrest vested in customs officers enables them to engage in the fight against customs offences fully. When a perpetrator is caught red-handed, the customs agent has the power to arrest the accused and to bring him/her before the public prosecutor (*le ministère public*).¹⁵⁰ The extent of customs agents' prerogatives is quite broad, which is a way of ensuring that they can uncover fraud in its diverse forms and so perform their duties of verification and control. Customs agents' enforcement prerogatives and powers also entail carrying out post-clearance verification.

6.2.1.2.1.2.6 Post-clearance verification

Post-clearance verification or post-clearance checks is of crucial importance in the process of curbing customs offences. Control is often considered to be the step preceding customs litigation.¹⁵¹ Post-clearance checks are the different types of verification procedures that are carried out by the customs administration into economic operators or their representatives' businesses upon the removal of goods in order to ensure that all the information provided by the latter during the clearance process are correct and no offence has been committed against customs law.¹⁵² This procedure also has the purpose of ensuring that the administration did not make any mistakes during the clearance processes, and if it did, these procedures allow it to correct its error(s).¹⁵³ These controls are opposed to first-line control (and are called second-line control), which occurs during clearance and is carried out by customs structures different from customs offices.¹⁵⁴ These controls are of two kinds, namely deferred control the post-clearance verification, and are based on Article 76 of the

150 This is the content of article 298 (4) of the CCC.

151 Anonymous Date Unknown *Contrôles Douaniers* <http://logistiks.over-blog.com>.

152 CCDG *Guide de l'utilisateur en douanes* 61 (Customs user's guide).

153 CCDG *Guide de l'utilisateur en douanes* 61 (Customs user's guide).

154 CCDG *Guide de l'utilisateur en douanes* 61 (Customs user's guide).

CCC and *Circular* N° 010/MINFI/DGD of 17 September 2008. By *Decision* N° 1056/CF/MINEFI of 29 August 2005, the Ministry of Finance instituted a unique control unit, namely the tax customs mixed unit, which is directly attached to the Ministry of Finance Secretariat General and was initially in charge of controls relating to VAT. The scope of their work has expanded over time.¹⁵⁵

Deferred control was instituted to compare the information on the declaration with that on the documents accompanying the goods. It is preceded by immediate control.¹⁵⁶ It is a recent practice carried out as soon as goods are released and that seeks to ensure there is no mistake and that the administration has not lost any money because of the existence of discrepancies in the documents presented.¹⁵⁷ This work is done by a structure (the monitoring brigade) placed directly under the authority of customs area managers.¹⁵⁸

Post-clearance verifications, on the other hand, are investigations carried out at a later stage in the accounting entries and accounting records (documents) of external trade operators and at the sites of their businesses, within limits prescribed by law.¹⁵⁹ These verifications have to be authorised by the customs DG. Decisions relating to the make-up of the team, its objectives and the conditions under which the investigation is to be carried out are assigned to the competent head of the division.¹⁶⁰

Otherwise called “surveillance services”, the performance of these mandates ensures the regularity of goods detention and circulation in the customs territory.¹⁶¹ It helps the administration in the search for and exploitation of information¹⁶² and contributes significantly to the protection of the national economic environment both in time and in space.¹⁶³

155 Anonymous Date Unknown *Contrôles Douaniers* <http://logistiks.over-blog.com>.

156 Immediate control is done while goods are still under customs care and relates either to the goods declaration or the accompanying documents thereof. It is performed by customs officers as first-line control. Anonymous Date Unknown *Contrôles Douaniers* <http://logistiks.over-blog.com>.

157 CCDG *Guide de l'usager en douanes* 61 (Customs user's guide).

158 CCDG *Guide de l'usager en douanes* 62 (Customs user's guide).

159 CCDG *Guide de l'usager en douanes* 61-62 (Customs user's guide).

160 CCDG *Guide de l'usager en douanes* 62 (Customs user's guide).

161 CCDG *Guide de l'usager en douanes* 16 (Customs user's guide).

162 CCDG *Guide de l'usager en douanes* 16 (Customs user's guide).

163 CCDG *Guide de l'usager en douanes* 16 (Customs user's guide).

When customs agents exercise their various prerogatives and rights, they are bound to uncover various acts of fraud. Depending on their level of gravity, these may or may not call for litigation.

6.2.1.2.1.3 Customs litigation under the CCC provisions

Customs litigation is made a part of this thesis because the way in which a customs administration handles disputes with its interlocutors is a vital aspect that can contribute to its achieving its goals of efficiently dealing with customs offences. The speed with which action is taken, the fairness of the action, the severity of sanctions, the expertise of those tasked with handling these disputes and the effective implementation of the applicable sanctions bear reference. Courts and administrative tribunals are competent to hear customs disputes initiated by either the customs administration or the taxpayer.¹⁶⁴ In principle, courts have core competence in customs matters. However, administrative tribunals are competent when the action of the customs administration or its administrative competence is questioned. For instance, in issues relating to the species, origin, value, quantity or weight of goods, administrative redress is a prerequisite to the commencement of legal proceedings.¹⁶⁵

6.2.1.2.1.3.1 Defining customs litigation

Customs litigation is the set of rules relating to the initiation, conduct and conclusion of disputes emanating from the application of customs laws.¹⁶⁶ Koah¹⁶⁷ looks at customs litigation from three different angles, namely from the organic, formal and material perspectives. According to this author, the organic viewpoint takes into account all the organs of the customs administration that can resolve customs disputes, such as customs agents, appeal committees, and sometimes even common law jurisdictions.¹⁶⁸ The formal viewpoint takes into account all disputes which may

164 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide).

165 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide).

166 CCDG *Guide de l'usager en douanes* 65 (Customs user's guide).

167 Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

168 Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

give rise to contention before the courts about the functioning of the customs service, which does not imply that they give rise to trials.¹⁶⁹ And the material perspective has to do with the legal regime applicable to the entire dispute relating to a customs offence.¹⁷⁰

This above author believes that this way of defining customs litigation implies that customs users are not all submitted to the same legal regime or procedures when it comes to dispute resolution.¹⁷¹ It may be inferred then that the type of user, the basis of the dispute and the importance thereof, as well as the way the offence is discovered, are factors that may give rise to users being treated differently or being subjected to different procedures. This approach once again demonstrates the diverse nature of customs work and is supported to the extent it allows different users to be treated according to different standards in resolving customs disputes so long as this difference of treatment serves to advance the administration's goals.

6.2.1.2.1.3.2 Background on customs litigation in Cameroon

Customs litigation can be initiated before, during or after the clearance of goods.¹⁷² Any substantial failure to comply with the administration's laws can cause litigation procedure to be started. Such failures are among others the failure to produce the documents required for the importation, exportation and transit of goods or the declaration documents relating to the merchandise, or providing a false declaration regarding the quantity, quality, species, worth, destination or origin of goods.¹⁷³ The authorities tasked with finding and following up these offences are customs agents.¹⁷⁴ Besides these agents, agents from other administrations¹⁷⁵ can proceed to the seizure

169 Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

170 Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

171 Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

172 Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

173 Article 401 of the CCC; Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commisssionnaire en douane agréé).

174 Article 298 (1)(a) and 299 (2) of the CCC.

175 Koah refers to administrations such as the *gendarmérie*, police agents, tax agents, water and

of fraudulent goods and detention made by these administrations can be admitted by the customs' services of the place where the goods have been seized and deposited.¹⁷⁶ Goods and means of transport seized have to be kept in the customs office closest to the place where the seizure occurred or in another locality or under the custody of another person if the first option is not achievable.¹⁷⁷ CEMAC law is clear on the fact that the person found in possession of fraudulent goods is considered as the person responsible for the fraud.¹⁷⁸ This is the principle. However, public transporters and their attendants, for instance, will not be considered as customs offenders so long as they provide the customs administration with sufficient information that can help them trace the real perpetrators of the fraud.¹⁷⁹

Concerning offences, accomplices are punished with the same punishment that befalls the principal fraud perpetrators.¹⁸⁰ In this regard, the provisions of the *Criminal Code* applicable to accomplices apply equally to accomplices in customs matters.¹⁸¹ For this reason, those that are interested¹⁸² in any way, no matter the extent of their interest, in offences of smuggling or import and export without declaration, for instance, will be punished in the same way as the principal authors of the fraud are punished, and may also face a jail sentence, as the case may be.¹⁸³ Furthermore, an attempt to commit an offence in customs is considered in itself as an offence.¹⁸⁴ Customs officers have to write minutes in this regard containing information about the circumstances,

forestry agents, civil administrators and kings of villages. Koah *The Approved Customs Agent's Responsibility* (La responsabilité du commissionnaire en douane agréé).

176 Article 298 (1) (b) and (3) of the CCC.

177 Article 299 of the CCC.

178 Article 380 (1) of the CCC.

179 Article 380 (2) of the CCC.

180 Article 386 of the CCC.

181 Article 386 of the CCC.

182 Interested persons, according to the CCC, are entrepreneurs, company members, insurance companies, insurers, donors, owners of goods, and in general those that have a direct interest in the fraud. Those that cooperate in any way in a number of acts carried out by a certain number of individuals acting together, following a plan to defraud and seeking to attain a common goal are also considered interested persons. Those that try to hide the acts of fraudsters and try to ensure that the latter go unpunished are also involved, as are those who bring or keep goods deriving from an offence of smuggling, even outside a certain area, or those that import goods without declaration. Those that buy or keep a quantity of goods greater than they could need for family use are also implicated. The law protects those that act out of necessity or make an undeniable error, however. Articles 387 (2) and 388 of the CCC.

183 Article 387 (1) of the CCC.

184 Article 396 of the CCC.

reasons, and nature of the seizure.¹⁸⁵ Minutes recording the seizure for customs offences are submitted to the competent public prosecutor (*le ministère public*) or the magistrate, and in instances where arrest have been made, the accused are prosecuted before the magistrate.¹⁸⁶ The enforcement of sentences is the responsibility of the court, and the customs administration itself exercises the application of tax penalties. All possible legal means may be used to prove and prosecute customs offences.¹⁸⁷ The customs administration is entitled to claim from the estate of a deceased customs offender when the person passed away before a final judgment could be pronounced or an agreement could be reached.¹⁸⁸ The prior action in such circumstances is usually to apply to the court for the confiscation of the goods that are the subject matter of the fraud if they still exist. If they do not, the administration has no recourse but to apply for the value of such goods.¹⁸⁹

There are several forms customs disputes can take. They can be settled through the administration itself or through the court.

6.2.1.2.1.3.3 Administrative appeal (settlement) of customs disputes

The decisions of the customs administration are appealable by importers. There are three ways of exercising the right to appeal.

A hierarchical appeal is one where an aggrieved party appeals to the line manager of the customs agent who found out about an alleged offence against customs laws and regulations.¹⁹⁰ This person has two weeks from the date of the signature of the minute/report to appeal the decision.¹⁹¹ Once this deadline elapses, the appeal is inadmissible.

The Appeal Committee is a joint organ instituted by the *Ministerial Decision* No 071/CF/MINEFI/DD of 30 December 1999 to deal with customs issues relating to the

185 Articles 299 (2) (3) and 300 of the CCC.

186 Article 307 of the CCC.

187 Article 317 of the CCC.

188 Article 319 of the CCC.

189 Article 319 of the CCC.

190 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide).

191 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide).

species, the origin, the value, the quantity and the weight of goods.¹⁹² The appeal committee can be seized only once all the statutory means of redress to entities in charge of processing declarations have been exhausted.¹⁹³ The heads of the units in this preliminary process have three days in which to give an opinion. Only approved customs brokers or their principals are fit to submit cases to the appeal committee.¹⁹⁴ The agent that submits the application must be present when the case is decided. Exceptionally, the agent or its principal may be represented in the committee's sessions, if a due mandate is given to the representative.¹⁹⁵ The committee meets at least once a month. Its decisions are taken on common accord after a debate or by default. Whether by common accord or by default, all such decisions are equally enforceable.¹⁹⁶

The Council of Ministers of the Economic Union of Central Africa (UEAC) intervenes as a last resort when the other administrative steps have not provided a satisfactory solution for all parties. The CCC¹⁹⁷ authorises a party that is not satisfied with the appeal committee's decision to proceed to seize the Council of Ministers of the UEAC within two weeks of the former's decision. Courts intervene only when all the above remedies have not solved the problem at hand.

6.2.1.2.1.3.4 Courts' proceedings in Cameroon customs matters

Courts' capacity or competence to decide a matter rests on different requirements that are either considered individually or in combination. It must have competence over the material issue presented to it (competence *ratione materiae* i.e. what?), over the parties concerned (competence *ratione personae* i.e. who?), over the specific place concerned (competence *ratione loci* i.e. where?), and finally over the time when the event invoked took place (competence *ratione temporis* i.e. when?).¹⁹⁸ The court's

192 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide); International Business Publications *Cameroon Investment Trade Laws* 86.

193 International Business Publications *Cameroon Investment Trade Laws* 86.

194 International Business Publications *Cameroon Investment Trade Laws* 86.

195 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide).

196 CCDG *Guide de l'usager en douanes* 76 (Customs user's guide).

197 Article 130 (5) and (6) of the CCC.

198 Viljoen *International Human Rights Law in Africa* 35.

jurisdiction in customs matters in the specific context of Cameroon is based either on subject-matter jurisdiction (*ratione materiae*) or territorial competence (*ratione loci*).

The competence *ratione materiae* of courts varies depending on whether the matter is before a court or an administrative tribunal. The CCC¹⁹⁹ provides that courts are apt to hear customs matters that are either of a criminal or civil nature.²⁰⁰ Criminal courts²⁰¹ have broad jurisdiction over customs litigation as provided in article 335 of the CCC. This includes police tribunals²⁰² (essentially the court of the first instance (*TPI*)²⁰³ or lower court) that have jurisdiction over customs offences falling under contraventions and all other customs issue raised by way of exception.²⁰⁴ The second category of courts having jurisdiction is correctional courts²⁰⁵ (high courts or *TGI*)²⁰⁶ that hear customs offences qualified as offences and punishable under article 403 of the CCC, and all other customs issues raised by way exception. As regarding civil courts,²⁰⁷ lower courts (*tribunaux d'instance*) or districts courts have jurisdiction in customs over matters relating to the payment or reimbursement of customs duties, constraints opposition, and other customs matters not falling under the competence of other repressive courts.²⁰⁸

In conformity with administrative law rules, administrative jurisdiction competence in customs matters is limited to the control of the customs administration responsibility in the provision of its services; to litigation concerning the state's responsibility for customs agents in the fulfilment of their duties, provided the acts they perform are not detachable from their functions; and lastly, to disputes arising from the action of the customs service when it intervenes in a domain outside its tax mission.²⁰⁹ Jurisdiction is also often founded on the place where an issue occurred. This is the

199 Articles 334, 335 and 336 of the CCC.

200 Also see CCDG *Guide de l'usager en douanes* 77 (Customs user's guide).

201 *Tribunaux Repressifs*.

202 *Tribunaux de police*.

203 TPI stands for *Tribunal de Première Instance*.

204 Article 334 of the CCC.

205 *Tribunaux Correctionnels*.

206 TGI stands for *Tribunal de Grande Instance*.

207 As provided for by article 336 of the CCC.

208 Also see CCDG *Guide de l'usager en douanes* 77 (Customs user's guide).

209 Also see CCDG *Guide de l'usager en douanes* 78 (Customs user's guide).

competence *ratione loci*.

Almost similar to common law rules, rules on territorial jurisdiction in customs matters are laid down in article 337 of the CCC. In matters of criminal nature, the courts' jurisdiction will depend on whether the offence was discovered by a seizure report or not. In the first instance, article 337 of the CCC provides that disputes resulting from customs offences found or established by a seizure report are dealt with in a court whose jurisdiction is nearest the customs office in the area where the offence was found. On the other hand, i.e. when the offence was not discovered by a seizure report, the court's jurisdiction depends on the type of offence involved. In the case of a contravention, the competent court is the police court where the offence was committed or discovered or the one located in the area where the defendant resides. In matters of offences, the criminal court of the place where the offence was committed, or that of the defendant's residence or the place of the latter's arrest (even when the arrest was made for reasons other than customs issues) has jurisdiction. When a person refuses for instance to provide the documents requested by the customs agent, however, the court having jurisdiction is not the one where the request for the documents was made, but the one where the material element of the offence was discovered or perpetrated. This is an exception in terms of territorial competence. Documents are to be presented upon request (be it oral or in writing) and a failure to abide by such request is punishable under article 399 of the CCC.

In non-criminal matters, two instances are to be distinguished. According to the common law rules of civil procedure, the court having jurisdiction is that of the defendant's residence. However, an exception exists to this principle. In matters of opposition to constraints, the lower court in whose jurisdiction the relevant customs office is situated has jurisdiction.²¹⁰

6.2.1.2.1.3.4.1 Methods of extinction of the rights of prosecution and punishment in customs matters

According to the CCC, there are two ways in which the rights of prosecution and

²¹⁰ See article 337 (2) of the CCC.

punishment of customs offences can come to an end. It may happen through the settlement (*la transaction*)²¹¹ or the prescription of such rights. However, other grounds for extinction are provided by the doctrine.²¹² The settlement (*la transaction*) can be defined as a private contract, of a civil nature, concluded between the customs administration and a liable person and which seeks to put an end to a customs dispute.²¹³ To settle is to compromise, to negotiate or to conciliate without involving courts. It is considered a quick and safe way of settling customs disputes. On the one hand, it helps the taxpayer to avoid lengthy court proceedings and the risk of having to pay legal fines as prescribed by the CCC,²¹⁴ and on the other hand, it is a speedy way the administration uses to efficiently deal with disputes where the offence seems not to be serious and therefore needs to be got out of the way expeditiously.²¹⁵ The settlement (*la transaction*) can intervene before or after a final judgement, and in the latter instance, corporal punishment remains enforceable.²¹⁶ The customs administration and its interlocutors²¹⁷ are the only people able in principle to settle.²¹⁸ When the customs offence in question is or seems to be prejudicial to more than one state, the power to settle is exercised by the council of the Ministers of UEAC²¹⁹ or the CEMAC commission chair.²²⁰ When the offence affects only one state, the Minister of the concerned state²²¹ and the customs Director General²²² are the authorities vested

211 Articles 327 and 328 of the CCC.

212 CCDG *Guide de l'usager en douanes* 79 (Customs user's guide).

213 CCDG *Guide de l'usager en douanes* 79 (Customs user's guide).

214 CCDG *Guide de l'usager en douanes* 79 (Customs user's guide).

215 CCDG *Guide de l'usager en douanes* 79 (Customs user's guide).

216 Article 327 (2) (3) of the CCC.

217 These interlocutors are the persons, either natural or legal, responsible for the fraud. The only persons unable to settle are those who are incapacitated (non-emancipated minors and incapable adults), fraud and smuggling specialists, and recidivists.

218 CCDG *Guide de l'usager en douanes* 79 (Customs user's guide).

219 Especially if the duties evaded or compromised involve a sum of money greater than 250 000 000 fcfa (about 424,751 USD), or if no duties have been compromised greater than 500 000 000 fcfa (about 849,503 USD).

220 The CEMAC commission chair intervenes in settlements when the dispute at hand relates to amounts inferior to those for which the Ministers of UEAC intervene, as when the offence was committed by one or more travellers and did not give rise to prosecution. Note should be taken that while the CCC refers to the CEMAC Executive Secretary, Cameroon customs talks instead of the CEMAC Commission Chair.

221 When the dispute over duties evaded or compromised involves amounts greater than 50 000 000 fcfa (about 84,950) or if no duties have been compromised greater than 300 000 000 fcfa (about 509,701 USD).

222 The customs Director General is called into the settlement when the amount in dispute is beneath the value for which the Minister intervenes.

with the power to settle.²²³

As for prescription as a method of extinction of the rights of prosecution and punishment, no action against or for the administration is receivable three years after the action should have been taken. As such, no one can claim the restitution of duties and goods three years after the payment of duties and the deposit of goods took place.²²⁴ Similarly, the customs administration cannot make any payment demand whatsoever of customs duties three years after such duties should have been paid.²²⁵ However, the prescription period is extended to thirty years when, for instance, by a fraudulent act of the person liable, the administration was not aware of the subject matter of its rights and therefore did not act in that respect.²²⁶ The prescription period is also taken to thirty years in instances where, before the standard three years prescription period expires, the constraint was awarded and served, an application filed in court, condemnation was pronounced, or a promise made and the like.²²⁷

The doctrine prescribes other ways in which actions against customs offences can be terminated. They are death, acquiescence and amnesty.²²⁸ Upon the death of a fraud perpetrator, both the public action and the tax action are extinguished, but they remain towards the accomplice and co-accused. If the customs administration acquiesces during court proceedings, this puts an end to the tax action, but the public action will continue. Amnesty makes it possible to erase convictions and leads to the remission of all sentences.²²⁹ No money in terms of fines paid into the public treasury

223 Note should be taken here of the litigation Files Approval Commission (CADC). This is a recently established structure within the Directorate General of Cameroon customs that has as its principal purpose sitting as a final adjudication committee on disputed files recorded by the Directorates of different operational units. The Commission was instituted by *Memorandum* No 015/MINFI/DD of 10 July 2002. The Commission is supervised by the DG of Cameroon customs and finds justification regarding its establishment in the fact that it is law to close a case that has been solved through settlement only after a decision has been taken by either the DG of customs or the Ministry of Finances.

224 Article 330 of the CCC.

225 Article 332 of the CCC.

226 Article 333 (2) of the CCC.

227 Article 333 (1) of the CCC.

228 CCDG *Guide de l'utilisateur en douanes* 81 (Customs user's guide).

229 CCDG *Guide de l'utilisateur en douanes* 81 (Customs user's guide).

by people already condemned will be refunded, despite the amnesty.²³⁰

Besides the CCC, CEMAC countries also have another common piece of legislation which is the Common External Tariff (CET).

6.2.1.2.2 Common External Tariff (CET)

CEMAC countries also share another piece of legislation, the Common External Tariff.²³¹ CEMAC economic integration rests on this Common External Tariff (CET).²³² Attempts to establish a CET were made as early as in 1970.²³³ The CET of CEMAC customs is established by *Act* No 7/93- UDEAC-556-CD-SEI of 21 June 1993, which revises the CET and establishes the procedures for the application of the Generalised Preferential Tariff (GPT).²³⁴ The CET is applied to imports from third countries and aligns itself to the harmonised system drawn from the *International Convention on the Harmonized Commodity Description and Coding System*.²³⁵ In other words, the CET is the common tax system enforced on goods originating from countries outside CEMAC and destined for the CEMAC internal market.²³⁶ Regarding the tariff plan, the goal is to promote a common market through common tariff protection regarding third countries' goods, and this is what the CET seeks to achieve.²³⁷ It faces a major challenge that relates to its implementation. In actual fact, the CET has yet to be transcribed into the customs information systems (ASYCUDA) of the CEMAC member countries,²³⁸ and this fact limits the ability of the CEMAC Commission to access the amount of information that would enable it to monitor the proper application of the

230 CCDG *Guide de l'utilisateur en douanes* 84 (Customs user's guide).

231 International Business Publications *Cameroon Investment Trade Laws* 83.

232 CCDG *Guide de l'utilisateur en douanes* 12 (Customs user's guide).

233 When CEMAC was still UDEAC. WTO 2013 *Trade Policy Review WT/TPR/S/285* 35.

234 It was adopted by *Act* No 16/96-UDEAC-556-CD-57 of 1 July 1996, which adopted the Common External Tariff, and is complemented by the *Additional Act* No 03/00-CEMAC-046-CM-05 of 14 December 2000 and all subsequent amendments. It comprises customs law and the Community integration tax instituted respectively by *Act* No 7/94-UDEAC-CD of 19 December 1994 and *Regulation* No 07/01-CEMAC-046-CM-7 of 5 December 2001. The Additional Act in question establishes an autonomous financing mechanism for the CEMAC. CEMAC Commission 2009 *Customs Tariff* 8; CCDG *Guide de l'utilisateur en douanes* 13 (Customs user's guide).

235 CCDG *Guide de l'utilisateur en douanes* 13 (Customs user's guide).

236 CEMAC *CEMAC Economic and Financial Reforms Programme* 71.

237 CCDG "Customs contribution" 2 (Contribution Douanière à L'attractivité de L'environnement Economique du Cameroun).

238 CEMAC *CEMAC Economic and Financial Reforms Programme* 71.

CET in different countries.²³⁹ Furthermore, CEMAC members are allowed by law, and because the customs exemptions are not harmonised, to deviate from the CET when they apply customs exemptions to individual importers.²⁴⁰ Harmonising the categorisation of these customs exemptions has been set as the first step towards finding a durable solution to the problem of disparities that exist in different member states.²⁴¹ This would enable the CEMAC Commission to better monitor and understand the different practices in the member states and arrive at a better structure of the CET.²⁴²

Various other acts have been adopted by the CEMAC Community's bodies, which intervene in the Community's customs dealings but are not of interest to this thesis. At the national level, a few legal sources are also available.

6.2.1.3 National sources of Cameroon customs law

The Budget Law of the Republic and the related regulations are the leading national sources of customs law.²⁴³

6.2.1.3.1 Budget Law and Ordinances

The tax and customs provisions applicable to import and export operations by companies and individuals are included in the *Budget Law*²⁴⁴ of the Republic.²⁴⁵ The Budget Law is essentially that piece of legislation enacted on an annual basis that determines the revenue and expenditure of the State, lays down the conditions of budgetary and financial balance and also establishes the State budget.²⁴⁶ This piece of legislation further lays down the legal framework for customs intervention for the implementation of the provisions repeated in the *CEMAC Customs Code*.²⁴⁷ The

239 CEMAC *CEMAC Economic and Financial Reforms Programme* 71.

240 CEMAC *CEMAC Economic and Financial Reforms Programme* 71.

241 CEMAC *CEMAC Economic and Financial Reforms Programme* 71.

242 CEMAC *CEMAC Economic and Financial Reforms Programme* 71.

243 CCDG *Guide de l'utilisateur en douanes* 14 (Customs user's guide).

244 Its original name in French is *Loi de Finances* and otherwise translated as Finance Law.

245 CCDG *Guide de l'utilisateur en douanes* 14 (Customs user's guide).

246 See section 1 of *Law No 2018/022 of 11 Dec 2018 relating to the Finance Law of the Republic of Cameroon for the 2019 Financial Year*.

247 See Part 2, Chapter 1, Section five to Section twenty-seven of *Law No 2018/022 of 11 Dec 2018 relating to the Finance Law of the Republic of Cameroon for the 2019 Financial Year*.

parliament may also authorise the President of the Republic, through an ordinance, to effect changes to customs legislation.²⁴⁸ The *National Customs Tariff* also constitutes a prominent source of customs law in the country.²⁴⁹

6.2.1.3.2 Regulatory measures

In accordance with the CCC, the Budget Law of the Republic and the National Customs Tariff provisions, competent authorities are called upon to take regulatory measures as part of their respective competencies from time to time.²⁵⁰ The framework agreements, the specifications, as well as the headquarters agreements, concluded between the state of Cameroon and some bodies also contain stipulations that impact on the application of customs law.²⁵¹ Beyond these different legal foundations on which Cameroon customs (modernisation) law rests, various practical aspects complement the legal framework and add value to the overall modernisation programme of the customs administration and one of its primary aim which is to curb customs offending behaviours efficiently.

The second part of this Chapter is dedicated to the scrutiny of the practical aspects of Cameroon customs modernisation programme that are relevant to this thesis.

6.2.2 Practical aspects of the Cameroon customs modernisation programme

The Cameroon customs modernisation programme is as diverse in its aspects as the work of customs itself. Countless initiatives are taken under this programme, and though they are characterised as belonging to a specific line of modernisation, some initiatives are found to belong to more than one line. Initiatives taken under the modernisation programme do not always proceed from a law or a specific regulation. Some initiatives are introduced into the system based merely on their efficiency in boosting the performance of customs administrations, and since they help to curb customs offences, they are mentioned here. There are various ways in which Cameroon customs unfolded its modernisation programme, but suffice it to say that

248 CCDG *Guide de l'usager en douanes* 14 (Customs user's guide).

249 CCDG *Guide de l'usager en douanes* 14 (Customs user's guide).

250 CCDG *Guide de l'usager en douanes* 14 (Customs user's guide).

251 CCDG *Guide de l'usager en douanes* 14 (Customs user's guide).

performance measurement or monitoring the execution of services is at the heart of this modernisation programme. The other aspects derive from this central point and complement it, as it impacts on a lot of other domains of the administration's work, like ethics and governance. The automation of procedures also constitutes a crucial element in the administration's modernisation programme. The partnership and cooperation approach promoted by the WCO is also considered to be very important by the administration and has been identified as one of the founding principles of its modernisation programme. Enabling a smooth and time-effective dispute settlement system also forms part of the administration's modernisation programme. All these various aspects, that are in line with the founding principles of customs modernisation as discussed in Chapter 2, demonstrate that Cameroon strives to be among the best in the world. These efforts are therefore classified below according to the said founding principles. It is important to bear in mind that some aspects have already been highlighted in the legal instruments scrutinised in the first part of this Chapter.

6.2.2.1 Risk management and post-clearance audit: Cameroon makes use of the scanner combined with electronic risk management

The use of the scanner in customs clearance processes is the result of an exhaustive dialogue between the *Société Générale de Surveillance* (SGS), now the SGS SA, the Autonomous Port of Douala (PAD), and the private sector.²⁵² The scanner device does away with the need for a physical inspection of goods and enables a purposeful use of resources.²⁵³ It accelerates exit procedures as it takes only an average of eight minutes, as against hours of physical inspection.²⁵⁴ To maximise the benefits of the scanner device, it was associated with risk management techniques available through the SGS Profiler software. All information gathered on the SGS Profiler as well as that relating to the Attestation of Verification to Import (AVI) is transmitted to the Risk Management Unit of the customs administration, which uses it to conduct targeted control.²⁵⁵ The control seeks to detect high-risk cargos and that of less concern. During

252 Belinga "Regional forum of the OECD on trade facilitation" 19.

253 Belinga "Regional forum of the OECD on trade facilitation" 19.

254 Belinga "Regional forum of the OECD on trade facilitation" 19.

255 Belinga "Regional forum of the OECD on trade facilitation" 20.

the process, it uploads the information into the ASYCUDA system in order to ascertain the type of intervention required.²⁵⁶ The AVI delivered by the SGS will make it possible to evaluate the level of risk of an operation and therefore, the level of intervention needed.²⁵⁷ This process guarantees predictability and is, therefore, a better approach to curbing customs fraud. The intervention levels are rated Low, Middle and High. The general and main characteristics of Risk Management as a founding principle of customs modernisation were discussed at 2.2.2.1 in Chapter 2 above. So were the characteristics of post-clearance audit.

The Cameroon style of post-clearance audit which is rather labelled post-clearance verification was discussed in details at 6.2.1.2.1.2.6 above. Building productive links and partnership in customs dealings is also fully applied in the Cameroon customs environment.

6.2.2.2 An accent on cooperation and partnership

Cameroon customs has extensive working relationships with diverse entities as detailed in the following lines.

6.2.2.2.1 The will to institute productive dialogue through the partnership with economic operators

The will to institute productive dialogue through the partnership with economic operators has emerged as a crucial component for enforcing customs laws in recent years. Having the business community work jointly with customs is vital for ensuring that they are aware of what is expected of them and vice-versa. The Cameroon customs partnership with the business community is labelled the customs-business forum.

Building a sustainable partnership with the business industry and all the role players in the private sector is seen as crucial for the success of every step of the reform, especially with regard to limiting business' involvement in fraudulent activities.²⁵⁸ This

256 Belinga "Regional forum of the OECD on trade facilitation" 20.

257 Belinga "Regional forum of the OECD on trade facilitation" 20.

258 Likeng *Cameroon Customs The Time of Change Vol I*, 11 (Douanes Camerounaises Le Temps des

led to the establishment in March 2009 of the customs-business forum, a platform for dialogue, exchange and consultation between the administration and the business sector.²⁵⁹ The Customs-business forum is a platform where business and the customs administration debate questions of common interest with the aim of contributing to the reinforcement of business competitiveness through the adaptation of customs facilities to the specific needs of businesses.²⁶⁰ On the other hand, it is the place where the customs administration also reiterates the importance of abiding by the law for the companies in question.²⁶¹ The platform identifies and highlights synergies between the administration and the private sector.²⁶²

This approach is said to be beneficial to both parties. On the one hand, the private sector is more thoroughly acquainted with the customs administration's expectations regarding the laws and regulations administered or enforced by it, while on the other hand, the customs administration becomes more open to the demands of the companies in relation to trade facilitation, the reduction of costs and time in the processing of their business transactions, and the transparency of these transactions.²⁶³ In other words, the forum provides both parties with a better understanding of each other's way of operating and thus makes for a healthier business climate.²⁶⁴ Participating or contributing to the competitiveness of these companies not only works to the latter's advantage but also makes it possible for the customs administration to evolve and to meet its goals as a service provider.²⁶⁵ The primary goal in building this strong bond with companies is to find the right balance

Mutations).

259 Likeng *Cameroon Customs The Time of Change Vol I*, 11 (Douanes Camerounaises Le Temps des Mutations); Cameroon Ministry of Finance 2014 *Reform and modernisation of customs* <http://www.minfi.gov.cm>.

260 Likeng *Cameroon Customs The Time of Change Vol II*, 91-92 (Douanes Camerounaises Le Temps des Mutations).

261 Likeng *Cameroon Customs The Time of Change Vol II*, 91 (Douanes Camerounaises Le Temps des Mutations).

262 Cameroon Ministry of Finance 2014 *Reform and modernisation of customs* <http://www.minfi.gov.cm>.

263 Likeng *Cameroon Customs The Time of Change Vol I*, 11 (Douanes Camerounaises Le Temps des Mutations).

264 Likeng *Cameroon Customs The Time of Change Vol I*, 59 (Douanes Camerounaises Le Temps des Mutations).

265 Likeng *Cameroon Customs The Time of Change Vol I*, 12, 59 (Douanes Camerounaises Le temps des Mutations).

between the facilitation of customs operations and the collection of revenues for a win-win partnership.

Furthermore, by reducing the time spent on processing goods declarations, the administration has made it possible for economic operators to make significant profits that benefit not only the companies but also the consumers of imported goods.²⁶⁶ The innovations arising from this partnership include the prepayment of duties on ASYCUDA, the availability of information regarding payable duties, and the like.²⁶⁷ The Customs-business partnership was extended in 2011 with the institution of operators' contracts, as described in 6.2.2.4.3.2 above.²⁶⁸

As a way of taking this partnership to even greater heights, the Cameroon customs administration thought it necessary to develop a concept that would enable it to further fulfil its commitments towards its many partners. That is how the concept of a Partners' Evening came about. It is an evening dedicated to honouring those customs partners that stood out during a budgetary year by behaving as the administration expected and by helping the latter with the maximum collection of revenues and the protection of society against fraud.²⁶⁹

Beyond the above partnerships that facilitate mutual understanding with respect to the expectations vis-à-vis both the administration and its interlocutors, Cameroon has built other partnerships of varying dimensions and impact. One such takes the form of a reciprocal trade liberalisation agreement that has substantial economic implications for the customs administration. The latter type of partnerships appears more like funding partnerships through which the country obtains financial support for its modernisation efforts. These are for the most relevant: the European Union Programme to support the Customs Modernisation Plan (PAPMOD) and the Economic

266 Likeng *Cameroon Customs The Time of Change Vol I*, 62-63 (Douanes Camerounaises Le Temps des Mutations).

267 CCDG "Customs contribution" 6 (Contribution Douanière A L'attractivité De L'environnement Economique Du Cameroun).

268 Likeng *Cameroon Customs The Time of Change Vol I*, 62 (Douanes Camerounaises Le Temps des Mutations).

269 Likeng *Cameroon Customs The Time of Change Vol II*, 22, 91 (Douanes Camerounaises Le temps des Mutations); CCDG "Customs contribution" 7 (Contribution Douanière A L'attractivité De L'environnement Economique Du Cameroun).

Partnership Agreement, with the EU. These are discussed hereunder.

6.2.2.2.2 The European Union Programme to support the Customs Modernisation Plan (PAPMOD)

The EU adopted the 2009 Annual Action Programme for the Republic of Cameroon and endeavoured to support its customs modernisation plan under what is called the Programme to support the Customs Modernisation Plan (PAPMOD).²⁷⁰ Theoretically in execution since December 2009, it was supposed to run until September 2014 under the Tenth European Development Fund (EDF) funding cooperation between Cameroon and the EU.²⁷¹ Some factors (in particular the lengthy and burdensome procedures) within the administration delayed the timely execution of the said programme, leading to thirteen months of inactivity.²⁷² The project was finally relaunched later than expected and then covered the period 2010-2015.²⁷³ Thus, through the PAPMOD, the EU actively supported the unfolding of the plan to modernise Cameroon customs from 2010 to 2015.²⁷⁴ The four constituents of the programme, or rather the aspects that were to be focused upon during this programme, were support for computerisation,²⁷⁵ professional training, support for governance, and lastly the acquisition of modern equipment.²⁷⁶ The PAPMOD aimed at contributing to strengthening Cameroon's economic competitiveness by working on elements relating to the customs regime and

270 PAPMOD is the acronym for *Projet D'Appui à la Mise en Oeuvre du Plan de Modernisation des Douanes*.

271 Bala 2013 *Les douanes se projettent sur la modernisation* (Customs goes all the way into modernisation) <https://www.ct2015.cameroon-tribune.cm>.

272 Bala 2013 *Les douanes se projettent sur la modernisation* (Customs goes all the way into modernisation) <https://www.ct2015.cameroon-tribune.cm>.

273 Ngouem 2015 *Les Douanes à l'Épreuve des Risques (Customs at the school of risk)* <https://www.camerounweb.com>; Cameroon customs Date Unknown *Partenariat Douanes/Union Européenne* (Customs/European Union Partnership: we evaluate PAPMOD) <http://www.douanes.cm/douane/index.php/fr/actualite/174>.

274 Cameroon customs Date Unknown *Partenariat Douanes/Union Européenne* (Customs/European Union Partnership: we evaluate PAPMOD) <http://www.douanes.cm/douane/index.php/fr/actualite/174>.

275 This element meant moving from ASYCUDA ++ to ASYCUDA World and further extending the new ASYCUDA World system to all customs offices countrywide. 237 Online 2014 *Cameroun-Procédures douanières* (Cameroon-customs procedures: another version of ASYCUDA is coming) <https://www.237online.com>.

276 Cameroon customs Date Unknown *Partenariat Douanes/Union Européenne* (Customs/European Union Partnership: we evaluate PAPMOD) <http://www.douanes.cm/douane/index.php/fr/actualite/174>.

the facilitation of the Economic Partnership Agreement signed with Cameroon in January 2009 and ratified in July 2014.²⁷⁷ This means supporting the customs administration in its desire to reach higher governance standards, to be transparent and to perform like a modern administration open to its environment and well aware of its economic mission.²⁷⁸ The PAPMOD is said to have propelled Cameroon customs administration to the level of competitiveness it sought. The same cannot be said of the Economic Partnership Agreement with the EU which has been heavily criticised. This matter is discussed below.

6.2.2.2.3 Economic Partnership Agreement with the EU and implications for the Cameroon customs administration

The EU has initiated negotiations with regard to Economic Partnership Agreements (EPA) with 76 of its former African colonies in Africa, the Caribbean and the Pacific (ACP.)²⁷⁹ Essentially, EPA is free trade agreements that seek to liberalise trade between the EU and the ACP reciprocally.²⁸⁰ However, the EU presented its desire to conclude EPA with these countries in the form of a threat by laying out the adverse consequences that would befall the countries that refused to ratify it. Mainly, the EU had made it plain that it would deprive them of the benefits of duty-free and quota-free access to EU markets by a specified date, namely 1 October 2014.²⁸¹

The EU is Cameroon's most prominent trade partner. The EPA with the EU is a trade liberalisation agreement under which Cameroon's exports enjoy duty-free access to the EU market in exchange for the removal of customs duties on selected imports originating from the EU.²⁸² The two parties agreed to an EPA in December 2007. A few years later, i.e. in June 2013, the EPA was approved by the European Parliament

277 The original French appellation is *Accord de Partenariat Economic* (APE). Cameroon Customs Date Unknown *Partenariat Douanes/Union Européenne* (Customs/European Union Partnership: we evaluate PAPMOD) <http://www.douanes.cm/douane/index.php/fr/actualite/174>.

278 237 Online 2014 *Cameroun-Procédures douanières* (Cameroon-customs procedures: another version of Sydonia is coming) <https://www.237online.com>.

279 South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 4.

280 South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 4.

281 South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 4.

282 European Commission 2017 *Factsheet on the Economic Partnership Agreement* <http://trade.ec.europa.eu>; Anonymous 2015 *Cameroon vis-a-vis the Economic Partnership Agreement* <http://www.fes-kamerun.org>.

and later ratified by Cameroon in July 2014.²⁸³ The EPA became enforceable as of August 2016. It was negotiated in order to avoid the disruption of the country's exports to the EU upon the expiry of the Cotonou Agreement in December 2007.²⁸⁴ The CEMAC member countries believed that such an agreement would be detrimental to Cameroon and the community as a whole. In other words, they believed it to be unfair, unbalanced, and beneficial to the EU only.²⁸⁵ That is why they refused to follow Cameroon's lead in ratifying the said agreement.

Many predicted long before Cameroon took the step to ratify the EPA that the step would be highly detrimental to regional integration efforts in Central Africa and a way of defying regional solidarity and compliance with the Abuja Treaty and African interests in general.²⁸⁶ This step taken by Cameroon has indeed had far-reaching consequences on sub-regional trade, in particular, considering that the Common External Tariff is still being resolved and complete harmonisation is still being sought.²⁸⁷ The EU believes this agreement to be mutually beneficial, as countries that take up the deal are allowed to export to the EU without tariffs or maximum quotas based on the WTO rules.²⁸⁸ Furthermore, it considers this agreement not only to be a trade agreement but a development agreement, as pointed out by its head of delegation to Cameroon.²⁸⁹ One of the main aims of the EPA was to encourage ACP countries to enter the deal with the EU in regional groupings instead of doing so individually.²⁹⁰ That is why the European Commission considers the agreement with Cameroon as a stepping stone towards reaching a full sub-regional agreement.²⁹¹

283 European Commission 2017 *Factsheet on the Economic Partnership Agreement* <http://trade.ec.europa.eu>.

284 Bilal and Stevens (eds) 2009 *The Interim Economic Partnership Agreement 1*; South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 4; European Commission 2017 *Factsheet on the Economic Partnership Agreement* <http://trade.ec.europa.eu>; European External Action Service 2018 *Trade* <https://eeas.europa.eu/>.

285 Kindzeka 2016 *New EU Trade Deal Stirs Controversy in Cameroon* <https://www.voanews.com>.

286 South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 4-5.

287 South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 12.

288 Kindzeka 2016 *New EU Trade Deal Stirs Controversy in Cameroon* <https://www.voanews.com>.

289 Françoise Collet.

290 Deutsche Welle 2016 *Cameroon ratifies EU trade deal* <https://www.dw.com>.

291 European Commission 2017 *Factsheet on the Economic Partnership Agreement* <http://trade.ec.europa.eu>.

Many²⁹² have voiced their disapproval of the agreement in question and have suggested it is one of those things that show how much power the European Union (or France, in this case) still has in Cameroon, and how much control it still seeks to have.²⁹³ These critics believe that the EPA seeks to submit the economies it has invited to contract with the EU to the needs of European capital.²⁹⁴ Some believe that French companies, which are well established in Cameroon and in considerable numbers, are those who stand to benefit from this bilateral EPA.²⁹⁵ Others consider it to be a means for the current President to remain in power as if he had not signed the agreement the EU leaders would no longer support him and his regime.²⁹⁶ A general concern was that Cameroon relies heavily on customs as a source of government revenue, and not collecting duties from EU's goods would amount to committing economic suicide.²⁹⁷ African countries had until October 2014 to express their willingness to be part of the deal, but they managed to obtain an extension of the deadline to August 1, 2016.²⁹⁸ And it is certain that despite the deadline having expired, any of the countries presented with the offer would still be able to negotiate and become part of the EPA. Although most of these opinions are legitimate,²⁹⁹ one thing remains: There is no way a country would sign up for such a deal if it would not benefit from it. Furthermore, and although it still constitutes a disguised gift for many, there is a lot that Cameroon gets from the EU through the PAPMOD (discussed at 6.2.2.2.2 above) programme, and no one can deny that this specific programme has tremendously contributed to the overall modernisation steps of the Cameroon customs administration.

The impact of EPA for this study rests on what risks such adherence represents for

292 Kindzeka 2016 *New EU Trade Deal Stirs Controversy in Cameroon* <https://www.voanews.com>;
Sama 2016 *French Companies are the main beneficiaries of the Economic Partnership Agreement* <http://www.cameroonintelligencereport.com>.

293 Kindzeka 2016 *New EU Trade Deal Stirs Controversy in Cameroon* <https://www.voanews.com>.

294 Deutsche Welle 2016 *Cameroon ratifies EU trade deal* <https://www.dw.com>.

295 Sama 2016 *French Companies are the main beneficiaries of the Economic Partnership Agreement* <http://www.cameroonintelligencereport.com>.

296 Kindzeka 2016 *New EU Trade Deal Stirs Controversy in Cameroon* <https://www.voanews.com>.

297 South Centre estimated the losses of revenue in the following terms: "Cameroon is expected to lose around 2% of government revenue directly upon implementation of the EPA. This is set to increase to around 5% at the end of the EPA implementation period." South Centre 2013 *Analytical Note SC/TDP/AN/EPA/33*, 11.

298 Deutsche Welle 2016 *Cameroon ratifies EU trade deal* <https://www.dw.com>.

299 If one simply looks at the number of trading transactions ongoing between France and Cameroon.

the country. Some critics have said that if strict surveillance is not exercised over imported goods, businesses will use the partnership as a way to commit fraud by channelling their goods through Europe in order to enjoy tax exemption in the country.³⁰⁰ Such concerns are to be taken seriously by the administration because this would invite “disaster” if, beyond the revenues lost from EU goods entering the country’s territory for free, the customs had to bear with more businesses fraudulently making use of such facilities. The modernisation described above should be used to its full capacity to ensure that such risks are effectively countered.

Beyond the partnership approach, the administration has included information technology in its plans, which is a crucial element in the whole modernisation programme, by having as its target the complete automation of procedures which not only facilitates trade but also detects and curbs fraud more effectively.

6.2.2.3 Maximum use of Information Technology

The maximum use of information technology is promoted by the WCO as can be seen at 2.2.2.3 in Chapter 2. The Cameroon customs administration moved from the PAGODE to the ASYCUDA computer system. It later on introduced Nexus+ Cameroon Customs GPS for transit operations and much later, the Single Window for Foreign Trade Operations (GUCE) for the most relevant. It also instituted the use of scanners in risk management for more efficiency (see 6.2.2.1 above) which approach works hand in hand with the ones detailed below.

6.2.2.3.1 From the PAGODE to the ASYCUDA computer system and its derivatives

The reform started with the introduction of the PAGODE system (a semi-computerised customs operations management system established in 1984).³⁰¹ The acronym stands for *Procédures Automatisées de Gestion des Opérations de la Douane et du Commerce*

300 Cameroon Concord 2017 *Cameroon: Economic Partnership Agreement with EU* <http://cameroon-concord.com>.

301 Tchouawou, Rabaey and Sala *Support for the Implementation of the Modernisation Plan 12* (Appui à la mise en oeuvre du plan de modernisation); CCDG (Technical Commission No 2) 2002 *Cameroon customs reform-Tome II*, 43; Anonymous 2009 *Nexus Cameroon Customs GPS* <http://www.cameroun-ecotourisme.blogspot.com>.

Extérieure.³⁰² This was later (from 2002) progressively replaced³⁰³ by ASYCUDA++.³⁰⁴ 2002 thus marks the year when the Government decided to migrate from PAGODE to ASYCUDA++³⁰⁵ and to this effect, it signed a project document with the UNCTAD later in January 2003.³⁰⁶

Migrating from PAGODE to ASYCUDA was done under various items of regulation, including *Letter* No 02/00443/MINFI/CAB of 19 November 2002, in which the Ministry of Finance formally chose to adopt the solution that suggested the replacement of the PAGODE system with the ASYCUDA application;³⁰⁷ *Letter* No 02/MINEFI/CAB of December 2002 relating to the agreement in principle of the Cameroonian government for the replacement of the PAGODE application with ASYCUDA application; the *Convention* No CMR/OT/2CR signed on February 03, 2003 between the Cameroonian government and the UNCTAD for the setting up of the ASYCUDA ++ system; and lastly, the Minutes validating the specifications of the transition from the PAGODE

302 Computerised management procedures for customs and external trade operations.

303 Likeng *Cameroon Customs The Time of Change Vol I*, 32 (Douanes Camerounaises Le Temps des Mutations).

304 ASYCUDA is an automated customs clearance system to facilitate operations such as following up on each consignment processed and evaluating important criteria indispensable for shaping the basis for a progressive administration. ASYCUDA software is placed at the disposal of developing countries free of charge, and installed at the request of the latter with the support of UNCTAD experts but at the cost of the requesting state. ASYCUDA is the English acronym. The French acronym is SYDONIA which stands for *Système Douanier Automatisé*. ASYCUDA has metamorphosed over the years. Its first version was established in 1981 in only three countries (ASYCUDA); the second version came about in 1984 and was in use in several countries (ASYCUDA); the third version was released in 1994 and has been in use around the world (ASYCUDA ++); the most recent version (version 4) of the system dates back to 2004 (ASYCUDAWORLD) and is progressively being used to replace ASYCUDA ++. ASYCUDA overall provides the core software and related expertise to enable a well-capacitated environment for the management of customs operations. It covers the full clearance process. This system is said to bear a multitude of advantages, amongst which the most relevant are cargo control, risk management and container security initiatives as well as the uniform application of customs law. As the system is upgraded from time to time, the countries making use of it are free to upgrade at their own pace, taking into account their financial and technical abilities to accommodate the settings of a new version. Montagnat-Rentier and Parent *IMF Working Paper WP/12/259* 20, 21; World Trade Organization *Trade Policy Review WT/TPR/S/187*, 31; Cantens, Raballand and Bilangna 2010 *WCJ* 55, 56, 57, 73; UNCTAD Date Unknown *ASYCUDA* <https://unstats.un.org>; David 2013 *ASYCUDA-A recommended IT system for customs* <https://www.asycuda.org>.

305 Cantens 2007 *Afrique Contemporaine* 289.

306 CCDG 2002 *General Report Summary Cameroon Customs Reform* 105; UNCTAD 2008 *ASYCUDA World Report* 15.

307 CCDG 2002 *General Report Summary Cameroon Customs Reform* 104.

system to the ASYCUDA system.³⁰⁸

ASYCUDA++ officially replaced the national system PAGODE in 2007.³⁰⁹ The ASYCUDA++ is vested with essential additional functionalities including trader input and the electronic presentation of declarations by customs brokers, risk management and transit follow-up that render it suitable for various needs.³¹⁰ In other words, it is an entirely automated clearance system dealing with all customs operations.³¹¹ This automated customs clearance system amongst other main objectives was expected to help curb customs fraud, smuggling and counterfeiting. To this end, a National Committee conducting operations against these offences was established and has been working since 2005.³¹²

Though thoroughly incorporated into the Cameroon customs system, some weaknesses have been identified in respect of the ASYCUDA++ application, namely that it is not being used to its full potential due to the lack of constant training required blamed on the weak turn-over of personnel to train, combined with the approval given by the hierarchy that old systems could still be used.³¹³ This state of affairs is further aggravated by the weak IT support available and the lack of any follow-up evaluation.³¹⁴

ASYCUDA World is said³¹⁵ to be more open to the world than ASYCUDA++ and also

308 The Minutes validating the specifications of the transition from the PAGODE system to the ASYCUDA system are a translation from the original French version "*Proces-verbal de validation du cahier des charges du passage du système PAGODE au système ASYCUDA*". CCDG 2002 (Technical Commission No 2) *Cameroon Customs Reform Tome II*, 62.

309 Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 21; Cantens 2007 *Afrique Contemporaine* 290; CCDG (Technical Commission No 2) 2002 *Cameroon customs reform-Tome II*, 21; Bilangna 2009 *Afrique Contemporaine* 104.

310 Montagnat-Rentier and Parent *IMF Working Paper WP/12/259*, 21.

311 Cameroon Ministry of Finance 2014 *Reform and modernisation of customs* <https://www.minfi.gov.cm>.

312 *Decree No. 2005/0528/PM of 15 February 2005 Establishing the Organisation and Functioning of an Ad Hoc Committee for the Coordination of Operations to Fight Fraud, Smuggling and Counterfeiting*.

313 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 45* (Appui à la mise en oeuvre du plan de modernisation).

314 Tchouawou, Rabaey and Sala *Support for the Implementation of the Modernisation Plan 45* (Appui à la mise en oeuvre du plan de modernisation).

315 237 Online 2014 *Cameroon-Procédures douanières* (Cameroon-customs procedures: another version of Sydonia is coming.) <https://www.237online.com>.

amendable, unlike the latter. The former offers more opportunities, more modules, and is easily accessible and thus more modern.³¹⁶ ASYCUDA ++ required passing through an access supplier in order for the user to gain access, which is no longer the case with ASYCUDA World, where all you need for access is an internet connection.³¹⁷ The new platform also enables information sharing, which was not possible with ASYCUDA ++.³¹⁸ Automating procedures has the undeniable advantage of making it possible to easily track and follow up on activities, which process impacts positively on curbing fraud. It is in this context that Nexus+ Cameroon GPS was launched.

6.2.2.3.2 Securing Transit operation through Nexus+ Cameroon Customs GPS

Facilitating and securing transit operations are crucial elements of the overall customs modernisation plan of Cameroon. To this effect, the World Bank made available a consistent financial package to the Cameroon customs, aiming at sustaining its modernisation efforts in the transit sector.³¹⁹ Part of this funding was to be used to fight fraud in transit operations by developing a risk management tool on customs clearance and transit, which tool would, in turn, sustain the monitoring of the execution of services or the performance measurement policy of the Cameroon customs service.³²⁰

The WCO suggests several ways in which transit operations can be made more effective. These are effective information sharing,³²¹ a guarantee system,³²² the simplification of customs formalities,³²³ risk management,³²⁴ customs seals and other

316 237 Online 2014 *Cameroun-Procédures douanières* (Cameroon-customs procedures: another version of Sydonia is coming.) <https://www.237online.com>.

317 237 Online 2014 *Cameroun-Procédures douanières* (Cameroon-customs procedures: another version of Sydonia is coming) <https://www.237online.com>.

318 237 Online 2014 *Cameroun-Procédures douanières* (Cameroon-customs procedures: another version of Sydonia is coming) <https://www.237online.com>.

319 Bilangna 2009 *Afrique Contemporaine* 104.

320 Likeng, Cantens and Bilangna *Gazing into the Mirror I*, 29.

321 Between the initial customs office where the transit declaration is lodged and all the other offices appearing on the transit road.

322 The guarantee approach suggests that the customs duties and taxies which are at stake during a transit process will be covered at all times until the goods reach the customs office of destination.

323 This implies the use of electronic systems for the submission of transport documents to avoid burdensome transit procedures.

324 In this regard, high-risk goods will be strictly controlled while low-risk good will be given less attention for a more purposeful use of resources.

security measures,³²⁵ border infrastructure,³²⁶ coordinated border management³²⁷ and performance measurement.³²⁸ It is important to note that Cameroon is a strategic transit territory within the Central African sub-region.³²⁹ Within the Central African Sub-region, the Central African Republic and Chad are the two major landlocked territories and thus have no direct access to the sea.³³⁰ This makes Cameroon their principal entry port.³³¹

Cameroon started to reform transit operations in 2008 with efficiency in mind.³³² This led to the reinforcement of the regulatory framework and the launching of Nexus+ Cameroon Customs GPS.³³³ This was a revolutionary step for the transit Douala-N'Djamena-Kousseri and Douala-Bangui.³³⁴ The said reform was prompted by the WCO tools and standards, namely Chapter One of the Specific Annex E to the RKC relating to Customs Transit; the *WCO Handbook on Customs Transit*; and the *WCO Risk Management Compendium*.³³⁵ The WCO technically participated in the design and implementation of the reform plan through its Columbus Programme. The Columbus Programme consists of three phases.³³⁶ Phase One, which is needs assessment, made it possible to single out transit as an aspect of customs work in need of reform.³³⁷

325 Affixing seals and fastenings to the goods and/or the transport unit is the way customs administrations usually secure goods in transit. Recent trends have seen the introduction of electronic seals or tracking devices that allow a real-time follow-up of goods in transit.

326 This aspect requires the improvement of border infrastructure to avoid congestion. An example of such infrastructure is making use of separate transit lanes for various categories of cargo in transit.

327 The involvement of various government agencies in the movement of goods across borders requires cooperation and coordination, which is made easy through having a one-stop border post.

328 Performance measurement here enables an evaluation of the practices used in transit operations and the identification of the shortcomings in the system in place. *WCO Transit Handbook* 16-17.

329 Charlier and NCho-Oguie *Sustaining Reforms for Inclusive Growth in Cameroon* 117; Belinga "Regional forum of the OECD on trade facilitation" 24; Cabanius 2003 *UNCTAD/LDC/2003/1*, 5.

330 Cabanius 2003 *UNCTAD/LDC/2003/1*, 4; Ekomo "The Atlantic Coast of Cameroon" 7; Bilangna 2009 *Afrique Contemporaine* 102.

331 Charlier and NCho-Oguie *Sustaining Reforms for Inclusive Growth in Cameroon* 117.

332 Sanama "L'expérience Camerounaise du transit"4 (Cameroon's experience of transit).

333 Sanama "L'expérience Camerounaise du transit"4 (Cameroon's experience of transit).

334 Douala is the economic city of Cameroon, N'Djamena is the capital and largest city of Chad, Kousseri is in the Far North region of Cameroon just opposite N'Djamena, and Bangui is the capital and largest city of the Central African Republic. Sanama "L'expérience Camerounaise du transit" 4 (Cameroon's experience of transit).

335 Sanama "L'expérience Camerounaise du transit"5 (Cameroon's experience of transit).

336 WCO 2009 *The WCO Capacity Building Development Compendium* I-3.

337 WCO 2009 *The WCO Capacity Building Development Compendium* I-3; Sanama "L'expérience Camerounaise du transit"5 (Cameroon's experience of transit).

Phase Two, consisting of the planning and implementation aspect of the reform programme, made it possible for the Cameroon customs strategic plan to be unfolded with WCO support.³³⁸ When the reference paper used in this thesis was written, the results of Phase Three, which is the monitoring or evaluation of outcomes phase, were still awaited.³³⁹

On a sub-regional level, Cameroon has signed two bilateral conventions relating to transit, namely the *Bilateral Convention Cameroon/Chad* (13 April 1999) *on road transit* and the *Bilateral Convention Cameroon/Central African Republic* (22 December 1999) still *on road transit*.³⁴⁰ These *Conventions* attest to the importance of Cameroon as a transit territory and seek to ensure that operations passing through the country are safe, reliable and competitive to the satisfaction of all stakeholder.³⁴¹ Considering the context of this thesis, there was a recommendation for the revision of these Conventions in order that they would operate under a harmonised set of policies and standard procedures and be more responsive to the challenges faced.³⁴² The extent to which such recommendation was taken into consideration could not be ascertained.

The GPS programme is governed, by three regulations that apply by context, namely the *Ministerial Instruction* No. 170/MINFI/DGD of 19 March 2009 *Establishing a GPS Tracking System for Goods in Transit under Customs*; the *Memorandum* No. 113/MINFI/DGD of 1st June 2009 *Organising the Implementation of the GPS Tracking System for Goods under Customs in Circulation Established by Ministerial Instruction* No. 170/MINFI/ DGD of 19 March 2009; and lastly, the *Memorandum* No. 146/MINFI/DGD of 31 July 2009 *Organising the Processing and Internal Monitoring of Transit Cargos under GPS*.³⁴³

338 WCO 2009 *The WCO Capacity Building Development Compendium* I-3; Sanama "L'expérience Camerounaise du transit" 5 (Cameroon's experience of transit).

339 WCO 2009 *The WCO Capacity Building Development Compendium* I-3; Sanama "L'expérience Camerounaise du transit" 5 (Cameroon's experience of transit).

340 Cabanius 2003 *UNCTAD/LDC/2003/7*, 6; Nguene "L'expérience du Cameroun dans la Mise en Œuvre de la Facilitation des Echanges" 8 (Cameroon's Experience in the implementation of trade facilitation).

341 Cabanius 2003 *UNCTAD/LDC/2003/7*, 6.

342 Cabanius 2003 *UNCTAD/LDC/2003/7*, 7.

343 Cameroon Customs 2014 *Nexus* + <http://www.douanes.cm>; Sanama "L'expérience Camerounaise du transit" 15 (L'expérience Camerounaise du transit).

In essence, Nexus + Cameroon Customs GPS was officially launched on the 4th of August 2009 in Yaoundé.³⁴⁴ It is a Global Positioning System tracking and monitoring cargos that transit through Cameroon and are bound to Chad and the Central African Republic (CAR).³⁴⁵ It is, more precisely:

an enhanced system for processing and managing transit operations, incorporating real-time, GPS monitoring of transit cargo movements within the well-established ASYCUDA customs application.³⁴⁶

Initially termed "Nexus Cameroon Customs", and later "Nexus+ Cameroon Customs GPS", the GPS system is an improved version of the computerised system (ASYCUDA) which was introduced in the system in 2007 to strengthen the administration's commitment to fighting corruption, fraud and all sorts of malpractices.³⁴⁷

It provides real-time follow-up and proper determination of the geographical position of goods that have been declared in transit on the national territory and helps to ensure that such declared cargos do leave the national territory.³⁴⁸ It is used in combination with a card for location and positioning purposes.³⁴⁹ Before receiving the GPS, all authorised customs agents have to make a one-off deposit.³⁵⁰ The deposit is returned once the authorities attest to the fact that the goods did leave the national territory.³⁵¹ After that, they only have to pay a very meagre amount to obtain a GPS every time they travel.³⁵² The GPS devices are distributed at the port of Douala, and

344 Anonymous 2009 *La douane camerounaise expérimente le GPS* <http://www.balancingact-africa.com>.

345 Likeng *Cameroon Customs The Time of Change Vol I*, 34 (Douanes Camerounaises Le Temps des Mutations).

346 WCO 2009 *WCO News 29*; Likeng *Cameroon Customs The Time of Change Vol I*, 34 (Douanes Camerounaises Le Temps des Mutations); Anonymous 2009 *Nexus Cameroon Customs GPS* <http://www.cameroon-ecotourisme.blogpost.com>.

347 Ajang 2011 *Customs & Business Challenge 23*.

348 Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>; Anonymous 2009 *La douane camerounaise expérimente le GPS* <http://balancingact-africa.com>.

349 Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>.

350 Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>.

351 Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>.

352 As from July 2012, the GPS deposit was reduced by 50% (i.e. CFA Francs 10 000) and was accompanied by an insurance certificate delivered by the office in charge of Nexus +. See *Memorandum* No 096/MINFI/DGD of 26 June 2012 determining the new rate of GPS deposit (Note de Service fixant le nouveau tarif de la prime de garantie GPS); Anonymous 2009 *La douane camerounaise expérimente le GPS* <http://www.balancingact-africa.com>; Kaptchouang 2009 *Douanes: Le directeur général prend le pouls du GPS dans le Grand Nord* <http://www.entrepreneurnewsonline.com>.

from that moment there is a "top departure", and the device follows trucks and cargos through corridors and checkpoints the driver is bound to pass through. Each of the controls should not exceed 20 minutes.³⁵³ The GPS device is removed and the deposit repaid upon arrival at the border.³⁵⁴

The system was introduced to remedy the shortcomings that surrounded transit operations such as the illegal diversion of goods in transit to local markets by some importers, sometimes assisted by corrupt customs officials, leading to serious losses that had to be borne by all states involved in the operation.³⁵⁵ Other issues to be addressed consisted of reducing delivery times and maximising the benefits for all participants and having a clear account of goods distributed.³⁵⁶ The new approach endeavours to ensure the proper balance between supply chain security and trade facilitation in the long run, while looking after the legitimate interest of all role-players involved, and more effectively protecting the national economic space.³⁵⁷ Thus, the overall purposes of the GPS system are to reduce the time of forwarding goods in transit, to curb fraudulent practices related to transit operations, to facilitate trade with neighbouring countries, to secure customs revenue for states involved, to reduce the cost of global transit operations, to generate accurate statistics about transit operations to neighbouring countries, and to protect the national economic space against illegal spill of counterfeit goods.³⁵⁸ To that effect, a massive deadline cut is visible on all the corridors. The general average time in 2013 was about six days against two to three months before the institution of the GPS system.³⁵⁹ When NEXUS+ was launched, the regulatory deadline was twenty to fourteen days,³⁶⁰ which

353 Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>.

354 Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>.

355 Sanama "L'expérience Camerounaise du transit" 16 (Cameroon's experience of transit).

356 Sanama "L'expérience Camerounaise du transit" 15 (Cameroon's experience of transit).

357 WCO 2009 *WCO News* 28; Likeng *Cameroon Customs The Time of Change Vol I*, 56 (Douanes Camerounaises Le Temps Des Mutations); Biwolé 2009 *Douanes Camrounaises* <http://www.kongossa.fr>; Anonymous 2009 <http://www.aeud.fr>; Africa Press 2009 <http://www.africapress.over-blog.com>.

358 CCDG 2012 *Annual Report* 17; Sanama "L'expérience Camerounaise du transit" 17 (Cameroon's experience of transit).

359 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations); Likeng 2014 *Cameroon Customs The Time of Change Vol II*, 95 (Douanes Camerounaises Le temps des Mutations).

360 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des

was reduced to about ten days in 2013.³⁶¹ Similar progress is evident in the processing time of goods in transit. Furthermore, the payment of the deposit is now possible within a maximum period of forty-eight hours on request by an approved customs agent after the border has been crossed, as against thirty days and sometimes more in previous years, and when contestation arose.³⁶² The position as from 2017 has not been ascertained.

Nexus+ Cameroon Customs GPS has two main features, namely a physical mechanism and an information system. The first enables the uninterrupted physical monitoring of transit operations from point to point, while the second serves as a collection, structuring, storing and distribution centre for data and information related to transit operations.³⁶³

Used in combination with the Internet, it keeps all interested parties abreast of the progress of the voyage.³⁶⁴ One significant advantage of the system, according to customs, is that it enables the security apparatus to react when an incident occurs during the journey.³⁶⁵

Nexus Cameroon Customs GPS is viewed by the WCO as a good way of meeting stakeholders' demands and at the same time properly balancing supply chain security and trade facilitation in the long run.³⁶⁶ Beyond the will to avoid states' losses due to unscrupulous importers, the then DG of Cameroon customs,³⁶⁷ believed that the launch of the GPS would provide local producers and legal importers with peace of mind regarding the unfair competition to which fraudulently imported goods exposed them.³⁶⁸ A specific Unit manages the GPS system within the computer division of the

Mutations).

361 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations).

362 Sanama "L'expérience Camerounaise du transit" 18 (Cameroon's experience of transit).

363 WCO 2009 *WCO News* 28.

364 Anonymous 2009 *La douane camerounaise expérimente le GPS* <http://balancingact-africa.com>.

365 Enumerated incidents include car breakdowns, accidents, highjacking and carriers' misbehaviour. Anonymous 2009 *La douane camerounaise expérimente le GPS* <http://balancingact-africa.com>.

366 WCO 2009 *WCO News* 28.

367 Minette Libom Likeng.

368 Likeng 2009 *Le GPS déboussole les contrevenants* <http://www.aeud.fr>.

Directorate General of Customs.³⁶⁹ Named "nexus+ Unit", the Unit has supervisory power over the activities of Nexus+ Cameroon Customs GPS.³⁷⁰ The Unit was created by *Service Memorandum* No. 163/MINFI/DGD of 23 October 2012, when the GPS system underwent thorough reforms.³⁷¹

The then DG of Cameroon Customs further observed, three months after the GPS launch, that out of 5218 trips processed under the new system, 4140 reached their final destination, amounting to 79,34%, which was a huge progress compared with previous statistics. 1078 trips were still ongoing at the time she made the observation.³⁷² For the rest, she explained that during that short period, many incidents were dealt with. Two cases of illegal diversion were spotted, and two other attempts prevented.³⁷³

She considered the tracking system to be a "miracle solution" to all the problems generated by transit operations in the sub-region for many years, and one that would deter fraudulent behaviours due to tangible proof being made available by the system.³⁷⁴ In the same vein, she argued that beyond reducing costs and time to the advantage of all involved in such transactions, the tracking system has significantly helped to restrain the practice of fraud and delays in transit operations.³⁷⁵ A crucial aspect worth mentioning is that in practice, Nexus + GPS deals not only with cargos fitted with a GPS device but also handles cargos that leave Douala port by rail, and those vehicles not having a GPS device at all.³⁷⁶

6.2.2.3.2.1 The criticism raised about the GPS programme

A few problems have been aired regarding the use of the GPS. At a recent meeting of the Standing Committee for Economic and Commercial Cooperation of the

369 CCDG 2012 *Annual Report* 17.

370 CCDG 2012 *Annual Report* 17.

371 CCDG 2012 *Annual Report* 17.

372 Likeng 2009 *Le GPS déboussole les contrevenants* <http://www.aeud.fr>.

373 Likeng 2009 *Le GPS déboussole les contrevenants* <http://www.aeud.fr>.

374 Likeng 2009 *Le GPS déboussole les contrevenants* <http://www.aeud.fr>.

375 Likeng 2011 *Les Actes du Club Management* 12; Likeng *Cameroon Customs The Time of Change Vol I*, 34 and 116 (Douanes Camerounaises Le Temps des Mutations) and *Vol II*, 95.

376 Essomba 2013 *Revue des Douanes Camerounaises* 19.

Organization of Islamic Cooperation (COMCEC), the representative of Cameroon Customs,³⁷⁷ pointed out that one main weakness of the GPS system is that the devices are placed on vehicles but not on the containers.³⁷⁸ The problem with the process, he said, arises from the fact that in some cases, and without this being detected by customs officers, goods may be replaced in transit.³⁷⁹ He mentioned specific cases in which petroleum products had been replaced with water during transit.³⁸⁰

While some believe that the common phenomenon of high-jacking in the Adamawa region of Cameroon is a matter that the GPS cannot control because customs officials cannot be sent there anyhow, others emphasise that the bad state of the roads and the trucks themselves are other factors that diminish the usefulness of the GPS, as follow-up is too difficult.³⁸¹ Other critics point out that the administration does not possess enough GPS devices for every single operation, which fact causes considerable delays, because the rotation system is quite slow and even the company tasked with bringing back the devices is also very slow.³⁸² Besides, the process of obtaining a GPS device is lengthy and time-consuming.³⁸³ According to the transporters, these factors negatively affect their daily activities.³⁸⁴ Recent years have seen the rise of terrorist activities by the Islamist group Boko Haram in the Far North region of Cameroon, leading to the closing of some transit roads and the inactivity of some other exit point.³⁸⁵ This has led to a drop in the quantum of transit operations to Chad and political instability in the Central African Republic.³⁸⁶ The deterioration of transport infrastructure is another difficulty facing the system that may interfere with the smooth running of the GPS tracking system.³⁸⁷

However, Cameroon customs officials, though acknowledging that the system still has

377 George Dobgima Taka.

378 COMCEC Coordination Office "Facilitating Intra-OIC Trade" 19.

379 COMCEC Coordination Office "Facilitating Intra-OIC Trade" 19.

380 COMCEC Coordination Office "Facilitating Intra-OIC Trade" 19.

381 Biwolé 2009 *Douanes Camerounaises* <http://www.kongossa.fr>.

382 Likeng 2009 *Le GPS déboussole les contrevenants* <http://www.aeud.fr>; Biwolé 2009 *Douanes Camerounaises* <http://www.kongossa.fr>

383 Biwolé 2009 *Douanes Camerounaises* <http://www.kongossa.fr>.

384 Biwolé 2009 *Douanes Camerounaises* <http://www.kongossa.fr>.

385 Sanama "L'expérience Camerounaise du transit" 19 (Cameroon's experience of transit).

386 Sanama "L'expérience Camerounaise du transit" 19 (Cameroon's experience of transit).

387 Sanama "L'expérience Camerounaise du transit" 19 (Cameroon's experience of transit).

some defects, see the measure as a promising one and believe that some of these criticisms are baseless and just an attempt by evil-minded officials and transporters to discredit the new tracking system, which exposes their fraudulent practices.³⁸⁸ According to Likeng,³⁸⁹ the GPS devices were prepared, taking into account the known level of activities and that the system was also based on the rotation scheme, which considered different itineraries. She also observed that the reform has met with resistance from some customs officials, and this hinders the optimal use and enjoyment of the new tracking and monitoring system.³⁹⁰

Another way of tracking down fraud that the administration uses is a scanner in conjunction with risk management techniques.

The most significant part of the automation of customs procedures has been achieved through the shift from physical intervention units to the integration of the electronic mode, and more specifically through the use of the Single Window for External Trade (GUCE).

6.2.2.3.3 Dematerialising and facilitating procedures through the Single Window for Commercial Operations (GUCE)

The Single Window for Commercial Operations (GUCE), also referred to as the one-stop-shop for foreign/external trade transactions is the leading platform set for handling the processing of external trade transactions in which Cameroon is involved.

With the aim of making the Douala Port a competitive port and one of relevance to the Gulf of Guinea, a project was set up in February 2013 that sought the dematerialisation of external trade procedures.³⁹¹ Before this phase, a committee was set up to work on this project in 2012.³⁹² The dematerialisation aims at facilitating and

388 Biwolé 2009 *Douanes Camerounaises* <http://www.kongossa.fr>.

389 Likeng 2009 *Le GPS déboussole les contrevenants* <http://www.aeud.fr>.

390 Sanama "L'expérience Camerounaise du transit" 19 (Cameroon's experience of transit); Biwolé 2009 *Douanes Camerounaises* <http://www.kongossa.fr>.

391 Likeng *Cameroon Customs The Time of Change Vol II*, 82 (Douanes Camerounaises Le Temps des Mutations).

392 Nguene "L'expérience du Cameroun dans la Mise en Œuvre de la Facilitation des Echanges" 8 (Cameroon's Experience in the implementation of trade facilitation).

minimising the time and costs spent on processing goods at the port.³⁹³ More specifically, it entails taking steps to ameliorate the economic space and the attractiveness of the port of Douala; securing the information technology system; placing all customs clearance applications within the same platform; taking concrete steps for the minimisation of the time and cost spent on processing goods; speeding up the goods clearance formalities in order to increase the volume of both customs revenue and business; and lastly, reinforcing ethics and good governance.³⁹⁴ Several other initiatives in the context of reform have been undertaken towards the dematerialisation of external trade procedures.³⁹⁵ They include but are not limited to using Nexus+ Cameroon Customs GPS for transit operations (developed above at 6.2.2.4.2) the purpose being to secure transit operations. The one-stop-shop for foreign/external trade transactions (GUCE) is, in essence, dematerialisation materialised.

Various appellations are used to refer to the acronym GUCE. The single window for foreign trade, the one-stop-shop for external trade transactions, and the single window for commercial operations are the most common.

The African Alliance for e-commerce³⁹⁶ defines the single window for trade as:

a national or regional system mainly built on a computer platform initiated by a Government or an *ad hoc* entity to facilitate the performance of import, export or transit-related formalities, by offering a single point of submission of standardised data and documents in a bid to fulfil official requirements and facilitate logistics.

The WCO has a similar definition³⁹⁷ but with the difference that it accommodates practices where the agencies are found in one single location and are not necessarily

393 Likeng *Cameroon Customs The Time of Change_Vol II*, 83 (Douanes Camerounaises Le Temps des Mutations).

394 Likeng *Cameroon Customs The Time of Change Vol II*, 83 (Douanes Camerounaises Le Temps des Mutations).

395 Likeng *Cameroon Customs The Time of Change Vol II*, 83 (Douanes Camerounaises Le Temps des Mutations).

396 African Alliance for e-commerce (AACE) 2013 "Guidelines for Single Window Implementation in Africa" 16.

397 It broadly defines the single window as "a facility that allows parties involved in trade and transport to lodge standardised information and documents with a single-entry point to fulfill all import, export, and transit related-related regulatory requirements." WCO Date Unknown *Single Window Information Store* <https://www.wcoomd.org>.

operating with an information system readily available, or are operating both physically and online for all these submissions and formalities.

The aim of the single window for processing trade transactions was to cut transit time and enhance transparency in the whole customs clearance process.³⁹⁸ It is a trade facilitative measure.³⁹⁹ Beyond that, it is a paradigm of governance in the sense that it requires transformative government structures that move away from their traditional practices, arrange themselves in ways that best meet citizens' and businesses' needs, and that are always abreast of new development.⁴⁰⁰ Hence, the regulatory environment of international trade has to be accordingly adjusted.⁴⁰¹ It has become imperative for governments to provide a trade environment where modern logistics practices are utilised, and that support predictable processes in the overall supply chain.⁴⁰² The WCO acknowledges that the single window interface on its own does not guarantee fast and predictable clearance.⁴⁰³ This needs to be achieved through a broader customs modernisation programme that includes other reforms such as investment in human resources and the automation of procedures.⁴⁰⁴ The GUCE brings together in a single space all stakeholders engaged in external trade operations.⁴⁰⁵

Established on July 7, 1999 by the will of the state, with the assistance of the economic

398 Charlier and NCho-Oguie *Sustaining Reforms for Inclusive Growth in Cameroon* 121.

399 WCO Date Unknown *Single Window Information Store* <https://www.wcoomd.org>.

400 WCO Date Unknown *Building a Single Window Environment* Vol I, Part I <http://www.wcoomd.org>.

401 The legal framework governing the implementation of GUCE in Cameroon is made up of the *Law No 2010/021 of 21 December 2010 on Electronic Commerce*; *Law No 2010/012 of 21 December 2010 on Cybersecurity and Cybercrime*; *Law No 2010/013 of 21 December 2010 on Electronic Communications*; *Decree establishing the conditions for the use of the "e-GUCE" platform for Foreign Trade Operations* (22nd February 2014); *The Ministerial Instruction on Maritime Manifest* (2013); *Memorandum of Understanding between the Ministry of Finance and Banks for the Electronic Payment of Customs Duties and Taxes* (2012); and the *Law on Foreign Trade Operations* (2016). Faouzi 2017 *The single form for foreign trade operators-GUCE GIE – Cameroon* <https://www.slideshare.net>; Cameroon Ministry of Posts and telecommunications 2017 <https://www.minpostel.gov.cm/index.php/en/les-textes/telecoms-tic/lois-telecoms-tic>; and WCO Date Unknown *Building a Single Window Environment* Vol I, Part I <http://www.wcoomd.org>.

402 WCO Date Unknown *Single Window as part of customs modernization* Part III Vol I <http://www.wcoomd.org>.

403 WCO Date Unknown *Single Window as part of customs modernization* Part III Vol I <http://www.wcoomd.org>.

404 WCO Date Unknown *Single Window as part of customs modernization* Part III Vol I <http://www.wcoomd.org>.

405 Charlier and NCho-Oguie *Sustaining Reforms for Inclusive Growth in Cameroon* 121; Investir en zone Franc Date Unknown *Guide for Exporting to Cameroon* <http://www.izf.net>.

operators and the support of funders, the GUCE is an Economic Interest Group governed by three bodies, namely the General Assembly, the Board of Directors and the Directorate General.⁴⁰⁶ The GUCE has been operating since August 25, 2000.⁴⁰⁷ This platform brings together different entities involved in international trade that are virtually or physically present on the GUCE site, namely the Autonomous Douala Port, customs, banks, the *Société Générale de Surveillance* (SGS), the National Cocoa and Coffee Board (NCCB) known as ONCC, the phytosanitary services and the foreign exchange division.⁴⁰⁸ In January 2016 the physical GUCE⁴⁰⁹ system was digitalised, enabling the collection of more revenue for the state and time-effective clearance transactions.⁴¹⁰ The full digitalisation of all the procedures contained in this system and their extension nationwide were to follow progressively through the year.⁴¹¹ Because of the irreversible impact of crime such as terrorism on human life and on the economy in general, it has become crucial to develop regulatory policies on cross-border trade, and Single Window forms part of such a regulatory framework, as it ensures a certain level of security to trade by its processes.⁴¹² The GUCE impacts on procedures as it reduces the number of fake documents that can be submitted. It also reduces the amount of paper used in the processes, and thus limits the number of errors that may occur due to human agency. It also generates reliable statistics and makes it possible to trace operations. Finally, it enables greater transparency in

406 CCDG 2002 *General Report Summary Customs Reform in Cameroon* 28; CCDG *Guide de l'usager en douanes* 19 (Customs user's guide); GUCE Cameroon 2016 *Presentation* <http://www.guichetunique.cm/en>.

407 Other sources say the GUCE was brought on stream in December 2000. See in this regard Charlier and NCho-Oguie *Sustaining Reforms for Inclusive Growth in Cameroon* 121; CCDG *Guide de l'usager en douanes* 19 (Customs user's guide); International Business Publications *Cameroon Investment Trade Laws* 85; CCDG 2002 *General Report Summary Customs Reform in Cameroon* 28; AAEC 2014 *Cameroon Peer Review Country Report* <https://www.slideshare.net>.

408 CCDG 2002 *General Report Summary Customs Reform in Cameroon* 29; Charlier and NCho-Oguie *Sustaining Reforms for Inclusive Growth in Cameroon* 121; CCDG *Guide de l'usager en douanes* 19 (Customs user's guide).

409 This means that all role-players intervening in the clearance process are found in one single location. Business in Cameroon 2016 *Cameroon launches full digitisation of external trade operations* <https://www.businessincameroon.com>.

410 Business in Cameroon 2016 *Cameroon launches full digitisation of external trade operations* <https://www.businessincameroon.com>.

411 Business in Cameroon 2016 *Cameroon launches full digitisation of external trade operations* <https://www.businessincameroon.com>.

412 WCO Date Unknown *Single Window as part of customs modernization* Part III Vol I <http://www.wcoomd.org>.

matters relating to customs revenue.⁴¹³ However, some characteristics of the GUCE are less favourable. Its roll-out faces some challenges, amongst which are network connectivity, breaks in the supply of energy in some areas where it is deployed, the difficulty in cohabitating with existing systems,⁴¹⁴ and people's tendency to resist change by continuing the use of paper. Only a limited number of the procedures currently available on the platform are made use of.⁴¹⁵ The fourth founding principle of customs modernisation namely the promotion of transparency, predictability and good governance is also well in place in Cameroon with a strong accent on ethics and accountable human resources.

6.2.2.4 Promoting transparency, predictability and good governance: an accent on ethics and accountable human resources management

Before going in-depth into how the administration ensures the promotion of good governance, ethics, transparency and accountable human resources management, it is essential to note a few things about governance as a crucial element in the overall country's public administration reform programme and the specific element of governance in the customs modernisation programme.

6.2.2.4.1 Governance in the Cameroon customs modernisation programme

After the devaluation of the CFA franc in 1994, Cameroon put in place a medium-term economic and financial programme (1997-2000) that enabled, with the help of some donor organisations, consistent macro-economic and structural reforms all aimed at strengthening the country's economy.⁴¹⁶ From 2000, the government undertook a new path in its governance strategy by starting a new three-year public finance consolidation programme.⁴¹⁷ As its name implies, the second phase sought to

413 AAEC 2014 *Cameroon Peer Review Country Report* <https://www.slideshare.net>.

414 Faouzi 2017 *The single form for foreign trade operators-GUCE GIE – Cameroon* <https://www.slideshare.net>.

415 AAEC 2014 *Cameroon Peer Review Country Report* <https://www.slideshare.net>.

416 African Development Bank 2001 *The National Governance Programme Support* <https://www.afdb.org>.

417 African Development Bank Group 2012 *Cameroon - National Governance Programme* file:///E:/2018%20Documents%20for%20Research/Cameroon-National_Governance_Programme_Support-19-03-2010_.pdf.

consolidate the results obtained in the first phase while taking its goals even further, but with a particular accent being placed on governance issues and corruption control.⁴¹⁸ Supported by donor agencies including the World Bank and the International Monetary Fund, the government developed an interim Poverty Reduction Strategy Paper (PRSP) that sought to considerably and sustainably decrease the size of the population living below the poverty line according to the Food and Agriculture Organization of the United Nations (FAO) standards.⁴¹⁹ Despite being encouraging, the results obtained at the macro-economic level revealed that there were still a number of challenges that the country had to deal with in order to reach the expected goals.⁴²⁰ In an attempt to remediate the shortcomings slowing the country's development and the success of the poverty reduction plan, and thus to ensure that its public resource management was built on robust, efficient and progressive strategies, the government drafted a National Governance Programme (NGP).⁴²¹ The preparation of the NGP was drafted in 1996.⁴²² Having been adopted on 31 August 1999 as the consequent global strategy implementation document, it was approved by the Head of State on 29 June 2000.⁴²³ The NGP is a "standard-setting instrument" or a "generic public action programme" that reflects the goals and the plans of action that a state has developed to help it achieve a certain level of efficiency in the field of economic and social development.⁴²⁴ The programme also sets out how the state intends to involve the private sector and civil society in achieving overall state efficiency.⁴²⁵ The United Nation Development Programme (UNDP) actively participated

418 African Development Bank 2001 *The National Governance Programme Support* <https://www.afdb.org>.

419 United Nations 1999 *Report of the Republic of Cameroon* <http://unpan1.un.org>.

420 African Development Bank 2001 *The National Governance Programme Support* <https://www.afdb.org>.

421 African Development Bank Group 2012 *Cameroon - National Governance Programme* file:///E:/2018%20Documents%20for%20Research/Cameroon-National_Governance_Programme_Support-19-03-2010_.pdf.

422 Some sources refer to 1996 and others to 11 August 1998 as the date when the process of designing and developing the NGP was started. Tamekou 2008 *International Review of Administrative Sciences* 219; African Development Bank 2001 *The National Governance Programme Support* <https://www.afdb.org>.

423 Tamekou 2008 *International Review of Administrative Sciences* 219.

424 Tamekou 2008 *International Review of Administrative Sciences* 218.

425 Tamekou 2008 *International Review of Administrative Sciences* 218.

in the development of the NGP. The NGP seeks, amongst other things to:

help transform the State into an effective instrument of administration and regulation adapted to the requirements of a modern democratic society capable of identifying and implementing action programmes that meet the expectations of the population and ensure sustainable economic and social development.⁴²⁶

Its overall aim is to enable the country to better itself, its services, its infrastructures, its environment, and the hope is that this may help to alleviate poverty to the satisfaction of all participants. The NGP is a constitutive part of the Poverty Reduction Strategy Paper (PRSP). This Programme deals with six issues, namely reforming the justice system, improving economic and financial management, reforming the administration, decentralising and improving the provision of essential services, combatting corruption, and lastly involving citizens, the private sector and civil society in the management of public affairs.⁴²⁷ This state of affairs has prompted Bilangna⁴²⁸ to suggest that customs reform in Cameroon has to do chiefly with reinforcing trade facilitation and improving governance. It is in this vein that the government instituted the culture of performance measurement to ensure that its governance is transparent, that ethics rules are prioritised, and that every single role player is accountable for his/her actions.

The Committee for the Promotion of Ethics and Governance is the main body established by the administration that deals with matters of good governance, ethics, transparency and accountable human resources management.

6.2.2.4.2 Committee for the Promotion of Ethics and Governance (CPEG)

Four objectives underlie governance as an aspect of the Cameroon customs modernisation programme. They are involving the hierarchy in reform processes by making it an agent of the envisaged change; empowering office heads regarding the

426 African Development Bank Group 2012 *Cameroon - National Governance Programme* file:///E:/2018%20Documents%20for%20Research/Cameroon-National_Governance_Programme_Support-19-03-2010_.pdf.

427 African Development Bank Group 2012 *Cameroon - National Governance Programme* file:///E:/2018%20Documents%20for%20Research/Cameroon-National_Governance_Programme_Support-19-03-2010_.pdf.

428 Bilangna 2009 *Afrique Contemporaine* 104.

objectives to attain and the level of performance of the agents working under them; ensuring that no doors are opened for “negotiated” procedures; and lastly, constraining field-workers to take corrective measures within their power and give account accordingly.⁴²⁹

A diagnostic study conducted in the administration in 2008 revealed that there was a lack of attention to problems of governance in the organisation and the operation of customs services, which was reinforced by the absence of a code of ethics defining the professional norms to which customs officers must adhere.⁴³⁰ Furthermore, little or no consideration was being given to the public service general status provisions; the subject of ethics was scarcely dealt with in training programs; there was no communication plan on issues relating to ethics; there was a trend for some agents to conduct their businesses within the administration’s business to the detriment of the latter; and the poor working conditions of the personnel added to the need to address these issues.⁴³¹ This state of affairs led to the establishment in 2009,⁴³² besides other actions taken, of the Committee for the Promotion of Ethics and Governance (CPEG), the mission of which is to help the Cameroon Customs DG to inculcate ethics and the principles of good governance in the administration on an ongoing and sustainable basis.⁴³³ The role of the Committee for the Promotion of Ethics and Governance (CPEG) is to promote ethical practices in customs operations.⁴³⁴ It also works to reinforce capacity in ethics through seminars.⁴³⁵ The Committee is supported in its endeavours by two bodies, namely the Governance Operational Unit (GOU) and the call centre.⁴³⁶ Besides following up and monitoring

429 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 5* (Appui à la mise en oeuvre du plan de modernisation).

430 Likeng Cameroon *Customs The Time of Change Vol I*, 31 (Douanes Camerounaises le temps des mutations); CCDG 2002 *General Report Summary Customs Reform in Cameroon* 37.

431 CCDG 2002 *General Report Summary Customs Reform in Cameroon* 38.

432 Ebosse 2013 *Douane: le comité de l'éthique et de la gouvernance* <https://fr.allafrica.com/stories/201307241484.html>.

433 Likeng Cameroon *Customs The Time of Change Vol I*, 34 (Douanes Camerounaises Le Temps des Mutations); Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

434 Likeng Cameroon *Customs The Time of Change Vol II*, 92 (Douanes Camerounaises Le Temps des Mutations).

435 Likeng Cameroon *Customs The Time of Change Vol II*, 92 (Douanes Camerounaises Le Temps des Mutations).

436 CCDG 2012 *Annual Report* 67.

the activities of the GOU, the Committee makes proposals to the DG with regards to steps that can be taken to promote ethics and the principles of good governance.⁴³⁷ In other words, the Committee seeks to improve governance and to efficiently fight corruption in the Cameroon customs administration.⁴³⁸ The call centre receives complaints and conveys them to the GOU, which processes them and makes recommendations to the DG of customs with reference to such complaints.⁴³⁹ The Committee also works towards building capacity with regard to ethics by organising conferences and training sessions involving specific customs services and the main interested parties of the Douala port and airport platform.⁴⁴⁰ One of those seminars led to the adoption of the Mbankomo Declaration,⁴⁴¹ through which all customs personnel reiterated their commitment to work as vectors of good governance.⁴⁴²

The CPEG is a mixed workforce made up of representatives of the public and private sectors as well as civil society organisations involved in the fight against corruption.⁴⁴³ This mixture certainly portrays the desire of Cameroon customs to make the Committee as independent⁴⁴⁴ and efficient as possible by involving different stakeholders, thereby making ethics and governance issues of common concern. The Committee meets once every two months and whenever necessary and is founded by *Memorandum No. 0127/MINFI/DGD of 23 June 2009 establishing the Committee for the Promotion of Ethics and Governance within the customs administration.*⁴⁴⁵ The Committee is the administration's attempt to enforce the measures contained in the WCO's *Arusha Declaration (Declaration of the Customs Co-operation Council*

437 Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

438 Nyandem 2013 *Revue des Douanes Camerounaises* 8.

439 CCDG 2012 *Annual Report* 67.

440 Likeng 2014 *Revue des Douanes Camerounaises* 49; CCDG 2012 *Annual Report* 67.

441 Adopted at a conference organised by the EGPC with the assistance of associations such as *Avocates International* and Pointman Leadership Institute from 22 to 24 July 2013 in Mbankomo under the theme "Professional and individual ethics".

442 Likeng *Revue des Douanes Camerounaises* 49; Likeng 2014 *Cameroon Customs The Time of Change Vol II*, 92 (*Douanes Camerounaises Le Temps des Mutations*).

443 Likeng *Cameroon Customs The Time of Change Vol I*, 35 (*Douanes Camerounaises Le Temps des Mutations*); Likeng 2014 *Revue des Douanes Camerounaises* 49; Fétué 2009 *La douane camerounaise à l'heure de la morale* <http://www.journalducameroun.com>.

444 Nyandem 2013 *Revue des Douanes Camerounaises* 22.

445 Cameroon Customs 2011 <http://www.douanescustoms-cm.net>; Anonymous Date Unknown *CEMAC Regulations* https://cncc.cm/pdf/reglementation/Recueil_textes.doc.

concerning Good Governance and Integrity in Customs).⁴⁴⁶ Having such a committee in the customs administration should act as a deterrent to many fraud-minded agents, provided the Committee is active at customs offices nationwide. Limiting contacts between customs agents and clients to avoid corrupt dealings has been a goal of the automation of procedures, which seems to be coming to fruition.

Despite all these efforts, complaints of corruption in customs services seem never to end, and the problem is said to be compounded by the complex system of tariff and indirect taxes.⁴⁴⁷ This state of affairs is said to be the custom for those whose trade transactions involve goods not subject to the *Société Générale de Surveillance* (SGS) valuation.⁴⁴⁸

One determining practical feature of the Cameroon customs modernisation programme is the performance measurement or monitoring the execution of services approach, which is presented in its specificities below.

6.2.2.4.3 Modernisation through performance measurement or monitoring the execution of services

Making performance contracts part of the Cameroon customs' modernisation plan started in 2008 with the DG of the administration setting up a task team to assess the feasibility of the intended transformation.⁴⁴⁹ This experimental phase aimed at weighing up the good and bad aspects of introducing the new approach and enabling a thorough transformation of the administration in order to accommodate the new intended contracts.⁴⁵⁰

446 WCO 2010 *Cameroon Customs is taking steps to combat corruption* <http://www.wcoomd.org>.

447 Political Risk Yearbook 2017 *Cameroon Country Report* 19.

448 SGS is a Swiss company carrying out customs valuation for the Cameroon Government. It is a multinational company based in Geneva, Switzerland, which provides inspection, verification, testing and certification services. This structure has been working with Cameroon Customs since September 30, 1988 through a contract relating to the (Import Verification Programme (PVI) instituted by Law No 88/007 of 15 July 1988. CCDG *Guide de l'utilisateur en douanes* 17 (Customs user's guide); Political Risk Yearbook 2017 *Cameroon Country Report* 19.

449 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 60; Kameni 2013 *Revue des Douanes Camerounaises* 55; Likeng 2011 *Les Actes du Club Management* 13.

450 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 17; Ekoube 2014 *Revue des Douanes Camerounaises* 13.

The WCO is of the view that:

Performance measurement within Customs is more than a tool to fight corruption, and enhance effectiveness and efficiency: it is a methodology to inspire its senior management to carry out reform at different levels.⁴⁵¹

The administration thought it crucial to devote a significant part of its modernisation programme to monitor the performance of its officers and partners and to have a closer look at the way it delivers its services and conducts its business. This gave rise to the system of performance contracts.

Performance contracts were formally introduced in February 2010,⁴⁵² some years after the launch of the modernisation programme, as a further step to modernise customs.⁴⁵³ The principal objective of performance contracts is to combat fraud and corruption efficiently while seeking higher speed and efficiency in processing goods declarations.⁴⁵⁴ In other words, performance contracts seek to render more efficient, accountable and transparent services while putting a particular accent on ethical rules.⁴⁵⁵ Measuring performance serves two crucial goals of the administration. It is both an effort to modernise customs and a way of boosting economic competitiveness.⁴⁵⁶ Performance contracts rest on two fundamental pillars, namely that the public agent involved can be required to do only what he can reasonably achieve and that a sense of accountability must be cultivated in him/her.⁴⁵⁷

There are two main types of performance contracts, namely those signed between the customs DG and its officers, and those signed by the same DG and the economic operators.⁴⁵⁸ The latter category is often referred to as a mere continuation of the first

451 WCO 2016 *ASYCUDA Newsletter* 12.

452 Kameni 2013 *Revue des Douanes Camerounaises* 55; Cantens, Raballand and Bilangna 2010 *World Customs Journal* 56; WCO 2010 *Integrity Newsletter* 5.

453 Ekoube 2013 *Revue des Douanes Camerounaises* 26.

454 Ekoube 2013 *Revue des Douanes Camerounaises* 26; Cameroon Ministry of Finance 2014 *Reform and modernisation of customs* <http://www.minfi.gov.cm>.

455 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 5-6; Ekoube 2013 *Revue des Douanes Camerounaises* 26.

456 Ekoube 2014 *Revue des Douanes Camerounaises* 13.

457 Ekoube 2014 *Revue des Douanes Camerounaises* 13.

458 Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

category, which is contracts between the DG and customs officers.⁴⁵⁹ Objective-based contracts are singled out because they are meant for management and are usually not referred to as performance contracts.⁴⁶⁰ Performance contracts are part of the broader implementation of best practices that are expected to enable the administration to improve its role in facilitating trade and its performance in the fight against fraud, which is its core business.⁴⁶¹ Regarding these three sets of contracts,⁴⁶² the administration suggests that while the first two pursue the same objectives, they do not respond to the same concerns. Both of them aim at cutting down the processing times of goods and improving the administration's revenue collection.⁴⁶³ They further seek to combat bad practices and most importantly, corruption from a more strategic angle.⁴⁶⁴ In introducing this new approach, the administration wishes to monitor the execution of services and to measure the performance of internal as well as external entities working with it.⁴⁶⁵

As a customs modernisation step, performance measurement seeks to institute transparency in the administration, to promote the accountability of all internal as well as external parties involved, and the monitoring of the execution of the services this administration provides, which three aims are compatible and if achieved could lead to efficiencies and ethical behaviour throughout the organisation.⁴⁶⁶ The overall aim of the performance measurement in Cameroon customs is to build the foundation of a new professional culture among all role players for the benefit of all.⁴⁶⁷ The three

459 Economic operators' contracts are referred to by the administration as "contrats de performance opérateurs" i.e. Operators' performance contracts. Cameroon Customs 2014 *Les contrats de performance* <http://www.douanes.cm>.

460 Djeuwo and Bilangna 2013 *Revue des Douanes Camerounaises* 29; Likeng 2011 *Les Actes du Club Management* 13.

461 Likeng *Cameroon Customs The Time of Change Vol I*, 13 (Douanes Camerounaises Le Temps des Mutations).

462 The administration is certainly not done signing performance contracts with all entities taking part in its activities.

463 Djeuwo 2013 *Revue des Douanes Camerounaises* 30; Likeng 2014 *Revue des Douanes Camerounaises* 49.

464 Djeuwo 2013 *Revue des Douanes Camerounaises* 30.

465 Likeng 2014 *Revue des Douanes Camerounaises* 49.

466 Likeng 2011 *Les Actes du Club Management* 17; Likeng 2014 *Revue des Douanes Camerounaises* 49; Kameni 2013 *Revue des Douanes Camerounaises* 54.

467 CCDG 2012 *Annual Report* 18; Likeng *Cameroon Customs The Time of Change Vol I*, 56 (Douanes Camerounaises Le Temps des Mutations).

sets of contracts are discussed in more details hereunder.

6.2.2.4.3.1 Inspectors' performance contracts

As a result of the process described above, individual performance contracts were signed between the DG of Cameroon customs and her colleagues serving at the major offices located at the Douala Port (Douala Port I and Douala Port V), which offices provide 76% of the customs revenue of the port.⁴⁶⁸ The performance contracts bear the form of individual undertakings by customs inspectors to work in line with eight identified scored performance objectives that will constitute the basis of their assessment.⁴⁶⁹ The indicators were extracted from the Automated System for Customs Data (ASYCUDA).⁴⁷⁰ The inspector that so commits himself or herself must, on the one hand, work fast and on the other hand, uncover fraud.⁴⁷¹ This means that every one of them must carry out his/her duty bearing in mind that his/her contribution and conduct is indispensable in reducing the time and the cost of processing merchandise.⁴⁷² Beyond their action-orienting function, the indicators seek to give the Cameroon customs directorate general a management tool for human resources as their results will help in charting the careers of members of staff.⁴⁷³ Another aim of performance contracts in Cameroon is to continually remind customs officials of the work ethic and integrity for which they must strive.⁴⁷⁴ Performance contracts are seen

468 From one's understanding, it appears that these two offices only were chosen at that stage as testing platforms and the contracts were later on, once they proved successful, introduced in other offices and the extension is progressive. Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations); Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 2.

469 Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

470 ASYCUDA was devised by the United Nations Conference for Trade and Development (UNCTAD). ASYCUDA stands for Automated System for Customs Data. "ASYCUDA simplifies and automates customs functions with a view toward increasing revenue collection, speeding clearance of cargo, and improving data collection and dissemination." Montagnat-Rentier and parent *IMF Working Paper WP/12/259*, 21; The World Trade Organization *Trade Policy Review WT/TPR/S/187*, 31; Cantens, Raballand and Bilangna 2010 *WCJ* 55, 56, 57, 73; Staples "Trade Facilitation: Improving the Invisible Infrastructure" 141; United Nations Conference on Trade and Development (UNCTAD) Date Unknown *ASYCUDA* <https://unstats.un.org>.

471 Ekoube 2013 *Revue des Douanes Camerounaises* 26.

472 Ekoube 2013 *Revue des Douanes Camerounaises* 26.

473 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 6* (Appui à la mise en oeuvre du plan de modernisation).

474 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 56.

as an instrument of dialogue that seeks to solve existing problems and in so doing to build the dynamics of an administration that continually aims to evolve.⁴⁷⁵ More aptly, the overall aim of this process is boosting Cameroon customs performance by offering quality services to companies, improving the efficiency of customs controls and alleviating the administrative congestion when cross-border issues are involved.⁴⁷⁶ It is also to “recreate and strengthen the hierarchy” in order to build a strong foundation for the ongoing reform.⁴⁷⁷ In general, the indicators record assessments of individuals’ observance of the organisation’s set rules.⁴⁷⁸

In February 2008, a team put in place a set of twenty-four indicators divided into four groups, namely activity indicators, performance indicators, control indicators and risk indicators.⁴⁷⁹ These indicators made it possible to monitor customs activity, measure each actor’s performance, closely monitor sensitive customs procedures and finally, curb fraud.⁴⁸⁰ Performance indicators seek to institute a transparent system of information between central services and operational services by making it possible for the officer in the front line and the manager in the office to have access to the same information and operate in the way expected by the administration.⁴⁸¹ It is also a tool the administration uses to evaluate how well its modernisation efforts are implemented on the ground.⁴⁸²

In order to ensure a proper balance between trade facilitation and efficiently uprooting all types of fraud affecting the customs administration, the administration set eight

475 Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

476 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 62, 70; WCO 2010 *WCO Integrity Newsletter* 5; Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

477 Ekoube 2013 *Revue des Douanes Camerounaises* 26; Cantens, Raballand and Bilangna 2010 *World Customs Journal* 56.

478 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 62, 70; WCO 2010 *WCO Integrity Newsletter* 5; Cameroon Customs 2011 <http://www.douanescustoms-cm.net>.

479 Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

480 Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

481 Likeng *Cameroon Customs The Time of Change vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

482 Likeng *Cameroon Customs The Time of Change Vol I*, 36-37 (Douanes Camerounaises Le Temps des Mutations).

indicators through which inspectors' performance were to be evaluated.⁴⁸³ While four of the objectives are channelled to ensure speedy processing times (trade facilitation), the four others are meant to combat customs fraud and bad practices (crime control).⁴⁸⁴ As the first four fall beyond the scope of this study, only the indicators aiming at combatting customs offences will be scrutinised.

Specifically, on the 10th of February 2010, individual performance contracts were signed between the DG of customs and customs officers working in the Douala Port major offices.⁴⁸⁵ The contract runs for six months and is tacitly renewable over and over again.⁴⁸⁶ The aim is to assess after every three of the six months if the set indicators are still consistent and worthwhile.⁴⁸⁷ The findings of such an assessment may lead to the amendment of the initial indicators.⁴⁸⁸ The indicators must thus be progressive and amendable.⁴⁸⁹ This does not affect the parties' obligations in any way, however.⁴⁹⁰ The contract imposes mutual obligations, and both parties have an interest in the fixed objectives being realised. The outcome of the performance monitoring has, on the one hand, a significant impact on the inspectors' careers, and on the other hand, the DG has to play his/her part, as a "well-behaved" administration not only benefits the economy, but also sends out a strong and positive message about the administration's managers.⁴⁹¹ The indicators contain set results that the inspector is expected to attain.⁴⁹² The contracts also set out the rewards for abiding by their provisions as well as the sanctions to which those who fail to fulfil their obligations under the contracts are exposed.⁴⁹³ The DG of customs so commits to

483 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 6.

484 WCO 2010 *WCO Integrity Newsletter* 5-6; Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

485 Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations).

486 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 11; Ekoube 2013 *Revue des Douanes Camerounaises* 27.

487 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 11.

488 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 11.

489 Tchouawou, Rabaey and Sala *Support to the Implementation of the Modernisation Plan 3* (Appui à la mise en oeuvre du plan de modernisation).

490 Ekoube 2013 *Revue des Douanes Camerounaises* 27.

491 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 6-7.

492 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 62.

493 Ekoube 2013 *Revue des Douanes Camerounaises* 26; Likeng 2011 *Les Actes du Club Management* 16.

assisting and supervising the inspectors with any queries they may have regarding their evaluation and the carrying out of their obligations⁴⁹⁴ and to rewarding outstanding inspectors.⁴⁹⁵

The DG's obligations under the contract also include delivering congratulatory letters, conducting interviews with inspectors on an annual basis with the aim of exploring existing opportunities to increase professionalism within the administration,⁴⁹⁶ and rewarding and promoting the achievements of the three best inspectors at the end of a term by including their names in a monthly bulletin⁴⁹⁷ published by the Directorate General of customs as well as on the website of the said Directorate.⁴⁹⁸ Furthermore, the DG undertakes through these contracts to make mention of the efforts of the said outstanding inspectors in their individual files⁴⁹⁹ and to provide and sponsor further training for them at the end of the term.⁵⁰⁰ All these are rewards for deserving inspectors.

The rewards may, in certain circumstances, be monetary.⁵⁰¹ However, and as pointed out by Likeng, Djeuwo and Bilangna,⁵⁰² monetary incentives are in themselves limitative. The limitations would spring from the fact that no amount of money can ever be enough to compete with the amount that an officer can make by engaging in corruption, and financially compensating worthy servants of the administration may provoke the fury of those who do not receive similar treatment.⁵⁰³ Their conclusion in

494 This task is assumed by a Risk Management Unit created by the DG. The said unit measures performance, monitors on a continual basis, evaluates and oversees the contracts. Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 8.

495 Ekoube 2013 *Revue des Douanes Camerounaises* 27.

496 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 9.

497 The bulletin in question is named "Customs & Business Challenge" and it describes customs performance and that of other clearance officers on a monthly basis. Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10.

498 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10; see also in this regard Cantens *et al* 2011 *Afrique-Notes de politique Commerciale Note #13*, 2.

499 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10; Cantens *et al* 2011 *Afrique-Notes de politique Commerciale Note #13*, 2.

500 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10; Cantens, Raballand and Bilangna 2010 *World Customs Journal* 63; Cantens *et al* 2011 *Afrique-Notes de politique Commerciale Note #13*, 2; Ekoube 2013 *Revue des Douanes Camerounaises* 27.

501 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 9.

502 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 9.

503 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 9.

this regard is that there should be a balance between the two types of incentives the administration provides to the inspectors.⁵⁰⁴ They are further of the opinion that non-financial incentives have a more long-lasting effect than financial incentives.⁵⁰⁵ This may be so as they contribute to the career advancement of the inspector (s) in question. This last view is, however, disputable in the sense that the worth or the weight of an incentive can only be appreciated by the person who receives it. One inspector may find financial incentives of more value than the other may. This means that although incentives have a symbolic value,⁵⁰⁶ even small financial incentives can appear more important or more valuable to one officer than to another. The appreciation of the value of incentives is therefore subjective, and the administration should, as suggested by the authors, ensure that it strikes the right balance between the two types of incentives in order to avoid undesirable consequences.

With reference to sanctions, if the inspector fails to meet the minimum/maximum result expected of him/her within a month, he is given a warning.⁵⁰⁷ If after two months no change occurs, the head of that specific office or area will require the inspector in question to explain his/her poor performance.⁵⁰⁸ If no improvement is noticed during the following period, the inspector will face disciplinary sanctions and could even be posted to a less prestigious area or office as a disciplinary measure because of his/her failure to meet the expected results.⁵⁰⁹ The words used by customs officers to designate such a movement is that the inspector in question has been moved from the "Barça"⁵¹⁰ or the "Promised land" to an office that offers less

504 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 9; Cantens *et al* 2011 *Afrique-Notes de Politique Commerciale Note #13*, 2.

505 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 9; Cantens *et al* 2011 *Afrique-Notes de Politique Commerciale Note #13*, 2.

506 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10.

507 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10; Likeng *Cameroon Customs The Time of Change Vol I*, 38 (Douanes Camerounaises Le Temps des Mutations).

508 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10; Likeng *Cameroon Customs The Time of Change Vol I*, 38 (Douanes Camerounaises Le Temps des Mutations).

509 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10-11, 18; Cantens *et al* 2011 *Afrique-Notes de Politique Commerciale Note #13*, 2; Likeng 2011 *Les Actes du Club Management* 13; Likeng *Cameroon Customs The Time of Change Vol I*, 38 (Douanes Camerounaises Le Temps des Mutations).

510 Making reference to the FC Barcelona football team as a prestigious team.

prestige.⁵¹¹ This level of performance will be included in the inspector's file in the same way that good performance would be.⁵¹²

The main objectives of these disciplinary steps are to deter unethical practices, instil in the inspectors the love of hard work, and challenge them to uphold the administration's vision of reform and modernisation.⁵¹³ In this regard, it is suggested that these contracts should not be viewed as a way to "trap" individuals, but simply as an approach seeking to urge every single individual belonging to the administration to contribute to the building up and maintenance of an ever progressive administration where the desire to earn money easily does not take precedence over the administration's set goals.⁵¹⁴ It is thus suggested that performance contracts are the right way to go and that their purely descriptive system of indicators could be changed to prescriptive indicators, whereby measurable and quantitative objectives are defined for inspectors and are the basis on which they are evaluated.⁵¹⁵ This whole new way of management within the administration is sometimes termed "Gazing into the mirror". It enables self-evaluation and so leads to the reduction of bad practices within the administration.⁵¹⁶

The impact of these contracts is summarised hereunder.

6.2.2.4.3.1.1 Impact of inspectors' contracts on the fight against customs offences

Without referring to the numbers, the administration points out that these contracts have increased customs revenues and instilled in the officers concerned a greater

511 Cantens 2009 *Afrique Contemporaine* 88.

512 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 10-11, 18; Cantens *et al* 2011 *Afrique-Notes de Politique Commerciale Note #13*, 2; Likeng *Cameroon Customs The Time of Change Vol I*, 40 (Douanes Camerounaises Le Temps des Mutations).

513 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 11; Ekoube 2013 *Revue des Douanes Camerounaises* 27.

514 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 7, 11.

515 Likeng *Cameroon Customs The Time of Change Vol I*, 37 (Douanes Camerounaises Le Temps des Mutations); Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 4; Djeuwo and Bilangna 2013 *Revue des Douanes Camerounaises* 28; Cantens, Raballand and Bilangna 2010 *World Customs Journal* 61.

516 Likeng 2011 *Les Actes du Club Management* 13; Likeng *Cameroon Customs The Time of Change Vol I*, 38 (Douanes Camerounaises Le Temps des Mutations).

sense of responsibility.⁵¹⁷ With regards to the latter aspect, it is said that officers now spend more time in their offices than they used to.⁵¹⁸ The time spent in processing declarations has been considerably reduced to the satisfaction of the administration and the trading community.⁵¹⁹ The fight against fraud, according to the results obtained in the offices placed under contract, was being won, judging by the decrease in the percentage of cases recorded compared to previous statistics.⁵²⁰ Last but not least, the experiment is said, through the institution of the system of sanctions and rewards, to have brought about a new psychological environment in which the inspectors perform their duties.⁵²¹

Considering the positive outcomes of the first phase, the administration took its action further and launched a second set of performance contracts, this time involving economic operators.

6.2.2.4.3.2 Economic operator performance contracts

Extending performance contracts to economic operators as an initiative materialised in January 2011 with the launch of the experimental phase.⁵²² Beyond the objectives attached to this process, it is essential to emphasise that this is also the materialisation of the partnership approach that is promoted by the WCO in its instruments. Eleven companies selected on the basis of set criteria took part in the experimental phase for six months and signed contracts with the DG of Cameroon Customs.⁵²³ The administration hoped to involve companies meeting objective criteria such as the size of their businesses, the rate of the occurrence of their engagement in litigation, the

517 Likeng *Cameroon Customs The Time of Change Vol I*, 38 (Douanes Camerounaises Le Temps des Mutations).

518 Likeng *Cameroon Customs The Time of Change Vol I*, 38 (Douanes Camerounaises Le Temps des Mutations).

519 Likeng *Cameroon Customs The Time of Change Vol I*, 38-39 (Douanes Camerounaises Le Temps des Mutations).

520 Likeng *Cameroon Customs The Time of Change Vol I*, 39 (Douanes Camerounaises Le Temps des Mutations).

521 Likeng *Cameroon Customs The Time of Change Vol I*, 39-40 (Douanes Camerounaises Le Temps des Mutations).

522 Likeng 2011 *Les Actes du Club Management* 16; Likeng *Cameroon Customs The Time of Change Vol I*, 40 (Douanes Camerounaises Le Temps des Mutations).

523 Likeng 2011 *Les Actes du Club Management* 16; Likeng *Cameroon Customs The Time of Change Vol I*, 40 (Douanes Camerounaises Le Temps des Mutations).

profitability of their declarations, the regularity of their operations, their financial power, and most importantly, their willingness to assist in reducing the time and cost involved in clearing goods and maximising revenue collection at the Port of Douala.⁵²⁴

This initiative was developed from the inspectors' performance contracts and was founded on the idea that economic operators, which are an essential component of the customs clearance chain, needed to be more involved, as such involvement could only strengthen the results so far achieved and expected by the administration.⁵²⁵

A facilitation channel named "Blue Circuit" was open to importers, including in the form of contracts.⁵²⁶ The Circuit is what the administration offers to companies willing to facilitate the achievement of its goals.⁵²⁷ It is "a corridor of speedy clearance involving a very simplified level of control".⁵²⁸ The Blue Circuit has a follow-up process whereby a strict targeting approach is used to restrain certain abuses.⁵²⁹ This entails periodic physical inspections of goods at a later stage at the business's premises.⁵³⁰ These facilities offered by the customs administration place on the operators several obligations, among which the most important are refraining from committing any act of fraud or violation of the stipulations of the contract, and paying duties in due time, without any delay.⁵³¹ Operators meeting the set targets have the opportunity to remove their goods before their assessment is made and before paying duties on the said goods if they provide the administration with a bank-secured guarantee for the said duties.⁵³²

524 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 32; Djeuwo and Bilangna 2013 *Revue des Douanes Camerounaises* 29; CCDG 2012 *Annual Report* 19; Likeng 2011 *Les Actes du Club Management* 16.

525 The DG of Cameroon customs recently announced that more port role players (such as stevedores and freight forwarders) were to be included in this new culture of performance contracts for greater efficiency. Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 32; Djeuwo and Bilangna 2013 *Revue des Douanes Camerounaises* 29; Djeuwo 2013 *Revue des Douanes Camerounaises* 31.

526 Likeng 2011 *Les Actes du Club Management* 16.

527 Likeng *Cameroon Customs The Time of Change Vol I*, 40 (Douanes Camerounaises Le Temps des Mutations).

528 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 37; CCDG 2012 *Annual Report* 19.

529 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 37.

530 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 37.

531 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 37.

532 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 38.

On the other hand, operators who do not reach the level of achievement expected of them will lose their privileges and could even see their contracts terminated if they or their agents are found guilty of offences such as smuggling, importing without declaration, etc...⁵³³ The main objectives of this form of contracts are to reduce the time and costs of processing goods as well as to boost revenue collection.⁵³⁴ It is the administration's view that this form of contract was also meant to enable the enterprises involved to restructure their internal operations and improve their liaison with their partners (intermediaries such as banks) by urging them to improve their performance, as these partners' conduct was often problematic for the administration.⁵³⁵ Contracts with operators, according to Likeng, Djeuwo and Bilangna,⁵³⁶ are mostly a "dialogue tool" that is meant to build the foundation for "dynamic growth" within the Cameroon customs administration.

The administration also sees this step as preparation for fully adopting the international concept of Authorised Economic Operator (AEO), which forms part of international instruments such as the RKC and the SAFE Framework of Standards.⁵³⁷ The administration prefers for the time being, however, to hold onto the term "operators' contracts" for two main reasons, namely that contracts are much more flexible in that they can be reviewed and adapted on an ongoing basis, and the term "performance contracts" is original to the administration and gives it a sense of pride from which it cannot easily detach itself.⁵³⁸ The administration hoped this second variant of performance contracts would enable more transparency and more

533 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 38.

534 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 35; Cameroon Customs 2013 *Customs & Business Challenge* 9; Likeng *Cameroon Customs The Time of Change Vol I*, 40 (Douanes Camerounaises Le Temps des Mutations).

535 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 41.

536 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 35.

537 The WCO SAFE Framework of Standards defines an AEO as "a party involved in the international movement of goods, in whatever function, that has been approved by, or on behalf of, a national Customs administration as complying with WCO or equivalent supply chain security standards." Authorised Economic Operators are manufacturers, importers, exporters, brokers, carriers, consolidators, intermediaries, ports, airports, terminal operators, integrated operators, warehouses and distributors. Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 33-34; Djeuwo 2013 *Revue des Douanes Camerounaises* 31; CCDG 2012 *Annual Report* 19; Cameroon Customs 2013 *Customs & Business Challenge* 9.

538 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 34.

predictability in customs operations as well as in companies' activities.⁵³⁹ The assessment process of operators is similar to that used to measure inspectors' performance.⁵⁴⁰

The impact of having instituted these contracts within the administration is summarised hereunder.

6.2.2.4.3.2.1 Impact of operators' contracts on the fight against customs offences

The first evaluation conducted led to the conclusion that the processing time for goods had decreased from 22 days in the first semester of 2010 to 12 days in the first semester of 2011.⁵⁴¹ 10 days was the average in 2014 for processing goods.⁵⁴² The average time of goods' removal in the "blue circuit" is eleven and a half days, whereas the term average for goods in the other circuit is 22 days.⁵⁴³ Operators under contracts now enjoy direct advantages that lead to the removal of about 40-80% of their goods at the port of Douala without any control.⁵⁴⁴ The figure of 80% is applied to the most law-abiding operators.⁵⁴⁵ This rate of facilitation can either be lowered or increased, depending on importers' performance, which is weighed in terms of specific indicators consensually set by the administration and the said importers.⁵⁴⁶ The impact of operators' contracts on the Douala port crossing is equally tangible, as operators under these contracts wait on average 10 days, where others wait for at least 22 days.⁵⁴⁷ The administration took the risk of a considerable loss of revenue by conceding such advantages to these operators, but it seems, according to the former, that it was a

539 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 35.

540 Likeng, Djeuwo and Bilangna *Gazing into the Mirror II*, 37.

541 Likeng *Cameroon Customs The Time of Change Vol I*, 40-41 (Douanes Camerounaises Le Temps des Mutations).

542 Likeng *Cameroon Customs The Time of Change Vol II*, 95 (Douanes Camerounaises Le temps des Mutations).

543 Likeng *Cameroon Customs The Time of Change Vol I*, 41 (Douanes Camerounaises Le Temps des Mutations).

544 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations).

545 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations).

546 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations).

547 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations).

risk worth taking.⁵⁴⁸ This assertion is based on the fact that the taxes and duties paid, as well as the value of the imports of these operators, are increasing on an ongoing base.⁵⁴⁹ Involving the economic operators in the whole modernisation programme means establishing a culture of compliance conducive to good governance.

From what has been said above, performance contracts as a whole, according to the results drawn from ASYCUDA, have enabled a considerable decrease in the time taken to process customs documents, and thus of the time taken to clear goods. It is pointed out as an example that at the principal customs office of Douala Port I that handles the most important traffic at the port of Douala, the time taken to process documents has dropped from eight hours a few years ago to six minutes (2013).⁵⁵⁰ At the Douala transfer office, the documents' processing time went from about 37 hours to less than 5 hours in the same period.⁵⁵¹ If this is the case, then it can be assumed (as of 2018) that the time taken to process documents today is negligible.

The following paragraph scrutinises the third round of contracts instituted by Cameroon customs.

6.2.2.4.3.3 Objectives-based contracts

Though referred to in some documents as the continuation of performance contracts,⁵⁵² objectives contracts are not, in fact, performance contracts in the sense described above.⁵⁵³ While performance contracts are issued in the main revenue collecting offices, objective contracts reference all services in the customs clearance chain, as well as control and surveillance activities and various other administrative

548 Likeng *Cameroon Customs The Time of Change Vol I*, 123 (Douanes Camerounaises Le Temps des Mutations).

549 Likeng *Cameroon Customs The Time of Change Vol I*, 122 (Douanes Camerounaises Le Temps des Mutations).

550 Likeng *Cameroon Customs The Time of Change Vol I*, 121 (Douanes Camerounaises Le Temps des Mutations).

551 Likeng *Cameroon Customs The Time of Change Vol I*, 121 (Douanes Camerounaises Le Temps des Mutations).

552 Likeng *Cameroon Customs The Time of Change Vol I*, 53 (Douanes Camerounaises Le Temps des Mutations).

553 Likeng *Cameroon Customs The Time of Change Vol I*, 55 (Douanes Camerounaises Le Temps des Mutations).

tasks.⁵⁵⁴ It appears, then, that the difference between the two categories of contracts resides in the places and levels at which they are issued. The common fact remains, however, that both categories seek to better the administration's performance in providing its services, and both are rooted in a managerial governance plan put in place by the government.⁵⁵⁵

Objectives or target contracts are "managerial instruments designed for officials working at the strategic and tactical levels" of the customs administration.⁵⁵⁶ This form of contract has enabled a new approach, whereby each official of the Directorate General of customs forms part of a structure which has a pre-defined mission. It delineates the extent of the official's workload within the organisation.⁵⁵⁷ Each official is assigned specific objectives, the achievement of which is evaluated after a certain period.⁵⁵⁸ Objectives contracts thus seek to boost the administration's performance; instil in the customs manager a sense of accountability by helping him/her to better understand his/her duties; progressively build a new culture whereby reports are made at all levels of responsibilities; improve the facilitation and securing of customs clearance operations; demystify customs activities by systematically communicating the results of the programmes and various customs activities; make available information necessary for appropriate decision-taking and a better allocation of resources; accommodate the requirements of modern customs; make management dialogue part and parcel of the administration; and constantly work towards building real professionalism and a strong culture of ethics within customs circles.⁵⁵⁹ In a nutshell, the administration hopes through these contracts to quantitatively and qualitatively improve performance within the broad approach of a customs

554 Likeng *Cameroon Customs The Time of Change Vol I*, 53-54 (Douanes Camerounaises Le Temps des Mutations).

555 Likeng *Cameroon Customs The Time of Change Vol I*, 56 (Douanes Camerounaises Le Temps des Mutations).

556 CCDG 2012 *Annual Report* 18.

557 CCDG 2012 *Annual Report* 18; Likeng *Cameroon Customs The Time of Change Vol I*, 47 (Douanes Camerounaises Le Temps des Mutations).

558 CCDG 2012 *Annual Report* 18; Likeng *Cameroon Customs The Time of Change Vol I*, 47 (Douanes Camerounaises Le Temps des Mutations).

559 CCDG 2012 *Annual Report* 18; Likeng *Cameroon Customs The Time of Change Vol I*, 48 (Douanes Camerounaises Le Temps des Mutations).

administration of proximity.⁵⁶⁰ Objective contracts clearly define tasks and set out the goals to achieve and the criteria according to which the evaluation will be conducted.⁵⁶¹ From a practical viewpoint, it is the part of the implementation of an operational strategy aimed at stimulating governance, strengthening professional ethics, developing organisational structures and carrying out statutory tasks to achieve a certain level of performance.⁵⁶² Objectives contracts are referred to as the pillar of responsible governance within Cameroon customs.⁵⁶³

Having evaluated the specificities of each set of contracts as issued within the customs administration, it is now possible to ascertain how this overall culture of performance measurement or monitoring the execution of services reinforces the fight against customs offences.

6.2.2.4.3.4 How performance measurement or monitoring the execution of services generally influences the fight against customs offences

The system of measurement as a whole helps improve the overall performance of customs administration.⁵⁶⁴ Corruption having been identified as one of the key factors prompting the Cameroon Customs modernisation programme and by direct consequence the institution of performance measurement,⁵⁶⁵ it is vital to establish how these contracts have impacted on the aim to eradicate retrograde practices from within the administration. Cantens, Raballand and Bilangna⁵⁶⁶ regard performance contracts as being mostly the product of a policy to prevent and detect corruption. They acknowledge that corruption usually flourishes where there are opportunities to engage in it. Because every act of a customs officer is monitored and evaluated in

560 Likeng *Cameroon Customs The Time of Change Vol I*, 47 (Douanes Camerounaises Le Temps des Mutations).

561 Likeng *Cameroon Customs The Time of Change Vol I*, 47 (Douanes Camerounaises Le Temps des Mutations).

562 Likeng *Cameroon Customs The Time of Change Vol I*, 52 (Douanes Camerounaises Le Temps des Mutations).

563 Likeng *Cameroon Customs The Time of Change Vol I*, 52 (Douanes Camerounaises Le Temps des Mutations).

564 The World Bank 2018.

565 WCO 2010 *Integrity newsletter* 5; Cantens, Raballand and Bilangna 2010 *World Customs Journal* 62, 70; kameni 2013 *Revue des Douanes Camerounaises* 55.

566 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 62, 70.

terms of a performance contract after a given period, this in itself constitutes a way to address corruption and other bad practices within the administration.⁵⁶⁷ As they put it, performance contracts' interest lies in the fact that "they penalise corruption and poor practice while distancing themselves from any points in common with corruption."⁵⁶⁸ Cameroon customs administration prides itself on the impact this approach has had, not only nationally but also internationally, judging by the number of customs administration delegations from different countries that have come to find out about this new operating system.⁵⁶⁹ Cameroon customs acknowledges that the success of performance contracts in their varied forms is attributed mainly to the unfailing and active support (technical and financial) received from the WCO and the World Bank, before, during and after their implementation.⁵⁷⁰ Generally speaking, performance contracts have instituted a new era of reform, mostly centred on controlling, monitoring and evaluating internal as well as external actors' performance in customs dealings, thereby reducing to a considerable extent bad practices.⁵⁷¹

The same goes for objective contracts. Monitoring the actions of those operating at managerial levels also enables concrete detachment from any type of malpractice. Objective contracts reinforce transparency, predictability, responsibility, specialisation, control, the execution of service and, most importantly, performance on an ongoing basis.⁵⁷² Because corruption in customs is often said to be an institutional problem⁵⁷³ involving even the highest placed officials, extending this approach to the leadership is a way of tackling corruption and other bad practices at top levels.

The introduction of performance measurement or the monitoring of the execution of

567 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 70; Kameni 2013 *Revue des Douanes Camerounaises* 55.

568 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 70.

569 Likeng *Cameroon Customs The Time of Change Vol I*, 41 (Douanes Camerounaises Le Temps des Mutations).

570 Djeuwo 2013 *Revue des Douanes Camerounaises* 31; Likeng *Cameroon Customs The Time of Change Vol I*, 42 (Douanes Camerounaises Le Temps des Mutations).

571 Likeng *Cameroon Customs The Time of Change Vol I*, 42 (Douanes Camerounaises Le Temps des Mutations).

572 Likeng *Cameroon Customs The Time of Change Vol I*, 52-53 (Douanes Camerounaises Le Temps des Mutations).

573 Keen "The future of fiscal frontiers" 15.

services by the Cameroon customs administration has been lauded internationally.

6.2.2.4.3.5 Cameroon customs' experience of performance contracts internationally lauded

The adoption of this unique approach is said to have been applauded by several international organisations, including the World Bank and the WCO and is being copied by other customs administrations worldwide.⁵⁷⁴ The UNCTAD, at the WCO's 121st and 122nd annual sessions, endorsed the Cameroonian approach to measuring customs performance by officially signing a protocol with the WCO in order to include it into one section of ASYCUDA WORLD.⁵⁷⁵ The WCO and UNCTAD together signed a Memorandum of Understanding (MoU) in this regard in March 2013. The purpose of the said MoU was to develop and pilot an ASYCUDA module for performance measurement (ASYPM).⁵⁷⁶ The tool promotes integrity both within the customs institution and among the people dealing with the institution.⁵⁷⁷ The module comprises twenty-nine performance indicators and is drawn from the Cameroon and Togo experiences scrutinised by the WCO and piloted in Liberia.⁵⁷⁸ The overall aim of ASYPM is to increase efficiency and uncover bad practices.⁵⁷⁹ In furthering its aim to fight corruption and institute a new form of governance, Cameroon customs has established a Committee to ensure its efforts in this regard are not in vain and are carried forward on an ongoing basis. Making it possible for customs disputes to be resolved in ways that save time and costs to all parties involved has become indispensable for all modernising customs administrations.

6.2.2.5 Enabling smooth and time-effective dispute settlement processes

Dispute settlement in Cameroon customs activities was discussed at 6.2.1.2.1.3 above and the subsequent sub-paragraphs. The work of customs is diverse by nature. The discussion therefore now turns to the various general practical efforts undertaken by

574 Djeuwo and Bilangna 2013 *Revue des Douanes Camerounaises* 28.

575 Djeuwo and Bilangna 2013 *Revue des Douanes Camerounaises* 28.

576 WCO 2016 *ASYCUDA Newsletter* 12.

577 WCO 2016 *ASYCUDA Newsletter* 12.

578 WCO 2016 *ASYCUDA Newsletter* 12.

579 WCO 2016 *ASYCUDA Newsletter* 12.

the Cameroon customs administration that are relevant to this study.

6.2.2.6 Other general practical customs modernisation efforts that contribute to the fight against customs offences

A varied set of other customs modernisation steps have been taken that also contribute to the fight against customs offences. The most important of these are the International Maritime Transportation Facilitation Committee or FAL Committee (1997); the Ad Hoc Committee coordinating operations to flight fraud, smuggling and counterfeiting; and the sticker approach.

6.2.2.6.1 The International Maritime Transportation Facilitation Committee or FAL Committee (1997)

The aim of the International Maritime Transportation Facilitation Committee or FAL Committee was to ensure the monitoring and coordination of the implementation of measures meant to facilitate and speed up international traffic, and improve the fluidity of the maritime and port traffic through Douala.⁵⁸⁰ To attain this aim it had to conduct research relating to the facilitation of international shipping transport; suggest a programme to simplify and reduce procedures, the formalities relating to documents submission for entry, sojourn at the port and the departure of ships engaged in international *voyages*; and make recommendations to different administrations, to government bodies and to private professional bodies intervening in the international maritime traffic on the best possible practices and methods to render import-export and transit operation less burdensome.⁵⁸¹ The GUCE; the use of a scanner for cargo inspections as from 2006; the implementation of the continuous work system (08h00 to 18h00, 24h/24) at the Douala Port; prohibiting the implementation of non-approved tariffs at the Douala Port (1999) and the adoption of laws relating to electronic transactions (2010) and many more are some of the recommendations of the FAL Committee that have been introduced into the system and have become vital binding

580 Nguene "L'expérience du Cameroun dans la Mise en Œuvre de la Facilitation des Echanges" 9 (Cameroon's Experience in the implementation of trade facilitation).

581 Belinga "Regional forum of the OECD on trade facilitation" 5; Nguene "L'expérience du Cameroun dans la Mise en Œuvre de la Facilitation des Echanges" 9 (Cameroon's Experience in the implementation of trade facilitation).

administrative acts.⁵⁸² *Decree* N° 2009/19/PM of 01 September 2009 reorganises the FAL Committee. The FAL Committee, therefore, acts as a research and advisory body and it could be said that it is for Cameroon (customs) what the WCO is for its member states, both through its mandate and through its activities. No fraud eradication initiatives will bear any fruit if bodies of such a nature are not in place to facilitate both the knowledge and the implementation of approaches that are efficient. The other body whose actions directly affect customs offences is the ad hoc committee to fight fraud.

6.2.2.6.2 Fighting fraud and counterfeiting: the ad hoc committee coordinating operations of the fight against fraud, smuggling and counterfeiting

Fraud and counterfeiting lead to unfair competition and endanger human health.⁵⁸³ Within the ministry of trade, an *ad hoc* committee has been established that coordinates operations relating to the fight against fraud, smuggling and counterfeiting.⁵⁸⁴ The creation and mandate of the latter Committee derive from *Decree* No 2005/0528/PM of 15 February 2005 (hereafter the Decree). Its overall mission comes down to ensuring that commercial operations are carried out in an environment that enables and ensures healthy competition in economic activities.⁵⁸⁵ In more details, the Committee has among others the duties to:

fight against the importation, storage or sale of products deriving from fraud, smuggling and counterfeiting;

initiate and coordinate the execution of preventative and repressive programmes thereto related;

make proposals to the government regarding measures to dismantle illicit manufacturing channels, the penetration and distribution of such products with the view of guaranteeing related tax and customs revenues collection;

ensure that existing sanctions related to these offences are properly implemented; and centralise information and intelligence regarding illicit commercial practices.⁵⁸⁶

582 Nguene 2014 "L'expérience du Cameroun dans la Mise en Œuvre de la Facilitation des Echanges" 11 (Cameroon's Experience in the implementation of trade facilitation).

583 CCDG 2002 *General Report Summary Customs Reform in Cameroon* 74.

584 Article 1 of *Decree* No 2005/0528/PM of 15 February 2005.

585 Article 2 of *Decree* No 2005/0528/PM of 15 February 2005.

586 Article 2 of *Decree* No 2005/0528/PM of 15 February 2005.

The Committee coordinates the activities of regional committees in matters relating to its mandate.⁵⁸⁷

The Committee's members are from various ministries, amongst which are the ministry responsible for the Economy and Finance. The customs Directorate General, which falls under this ministry, has one representative on the Committee.⁵⁸⁸ Considering that customs has a determining role to play in fighting these offences, there might be a need on the one hand to increase the number of officials from this administration on the Committee, and on the other hand there is certainly a need for a committee of this sort led and supervised by the Directorate General of Customs. Though the position of Secretary of the Committee is held by the Customs Directorate assisted by the External Trade Directorate and the Trade Ministry,⁵⁸⁹ this involvement seems insufficient, given the prominent role to be played by customs, as pointed out above. In order to ensure that its functions are adequately carried out nationwide, the Committee is endowed with units of mixed forces operating at the regional level, which are called mixed control provincial brigades.⁵⁹⁰

The president of the Committee, the members of the Committee and the members of the provincial brigades carry out their mandate without receiving any remuneration.⁵⁹¹ However, members of the secretariat, as well as people that may be invited for consultative purposes receive a session's stipend, which amount is fixed by the ministry in charge of trade.⁵⁹² One point can be raised, however. How do some members of the Committee feel about not receiving any stipend while others do? Could the performance of their duties free of charge be a cause of potential involvement in corrupt practices? How (well) does the non-remuneration of these Committee members help them to perform their duties in the way expected by the administration? Although they belong to different bodies and are thus remunerated as officials of those bodies, there should be a stipend for every member of the Committee to motivate them not to default in their duties. Money does not guarantee that they will perform

587 International Business Publications *Cameroon Investment Trade Laws* 85.

588 Article 3 of *Decree* No 2005/0528/PM of 15 February 2005.

589 Article 6 of *Decree* No 2005/0528/PM of 15 February 2005.

590 Article 4(1) of *Decree* No 2005/0528/PM of 15 February 2005.

591 Article 9(1) of *Decree* No 2005/0528/PM of 15 February 2005.

592 Article 9(2) of *Decree* No 2005/0528/PM of 15 February 2005.

their duties in full integrity, but at least it would partially diminish the desire to engage in retrograde practices. The last element that this thesis pays attention to is to understand how some initiatives unfold in practice and to ascertain their influence on the fight against customs offences.

6.2.2.6.3 Sticker to fight fraud, smuggling and counterfeiting on some local and imported goods

In its fourth article, the *Law* N° 2008/012 of 29 December 2008, on the Budget Law for the Republic of Cameroon for the 2009 financial year, instituted the practice of placing a sticker on some local and imported goods with the purpose of combatting fraud, smuggling and counterfeiting. The implementation of this prescription of the Finance Act saw the light in June 2012 with the opening of a bond storage/bonded warehouse at the Autonomous Port of Douala for the stamping of goods submitted to the sticker regime.⁵⁹³ A number of regulations were made dealing with the attachment of the sticker to some manufactured goods,⁵⁹⁴ establishing the list of manufactured goods submitted to the sticker regime,⁵⁹⁵ specifying the rules of the regime in relation to some manufactured goods,⁵⁹⁶ on the stamping procedure at the port of Douala,⁵⁹⁷ as well as on the creation of partnerships.⁵⁹⁸ In essence, the goods involved were tobacco, alcoholic beverages, fruit and vegetable juices, mineral water, carbonated water, medicine and food supplements.⁵⁹⁹

Mention has been made of the fact that the new sticker regime was due for implementation in January 2012, but at that stage, the regime was applied to tobacco products only. Alcoholic beverages followed in April of the same year.⁶⁰⁰ Customs

593 Likeng *Cameroon Customs The Time of Change Vol I*, 84-85 (Douanes Camerounaises Le Temps des Mutations).

594 *Decree* N° 2010/0483/PM of 18 March 2010.

595 *Joint Order* N° 0000082/MINFI/MINCOMMERCE of 19 May 2010.

596 *Circular* N° 0000136/MINFI of 19 September 2011.

597 *Memorandum* N° 017/MINFI/DGD/SDLT1 of 4 May 2012.

598 With the permission of the Prime Minister, the Head of Government, the Finance Minister entered into a partnership with the company "De La Rue Security Print" for the design and supply of stickers to affix on the goods under the new regime. The partnership also sought the company's technical assistance to the ministry of finance and to all the administrations involved in the implementation of the sticker regime.

599 See the *Joint Order* N° 0000082/MINFI/MINCOMMERCE of 19 May 2010.

600 Likeng *Cameroon Customs The Time of Change Vol I*, 86 (Douanes Camerounaises Le Temps des

intervention in this new system was to monitor the importation and exportation of the goods subject to the sticker regime.⁶⁰¹

The customs agency had to carry out this duty while taking into consideration the role played by the various other administrations in this process, and this is what led to the concept of customs of proximity where all stakeholders are involved.⁶⁰² Despite the above discussion which portrays the Cameroon customs administration as one very active in the customs modernisation process, there are still some challenges that choke the customs administration's efforts. These challenges are presented below.

6.2.3 The challenges of the Cameroon customs modernisation programme

There is no doubt that modernisation in Cameroon customs is a fact. However, there have been a number of difficulties related to the project throughout the years of its implementation that have slowed it down to an extent, though they occurred mainly in the beginning. These were a lack of interest by some role players and constant resistance by some executives. It also appears that it is difficult for customs to identify and carry out its economic mission.⁶⁰³ Regarding this problem, the difficulty comes from the fact that the economic crisis made customs revenue drop considerably. According to Tchouawou, Rabaey and Sala,⁶⁰⁴ despite the automation of clearance procedures, the checking circuits still need to be decongested. In other words, there is still considerable work to be done to enable total transparency in the clearance circuit. The practice of corruption combined with a lack of scruples on the part of some commissioners stops customs from focusing on its economic role. In this regard, these authors suggest that laws and regulations be made available online, where anyone can easily access them. It is their view, and the view is reasonably held, that such steps would bring a certain level of transparency and predictability into customs

Mutations).

601 Likeng *Cameroon Customs The Time of Change Vol 1*, 86 (Douanes Camerounaises Le Temps des Mutations).

602 Likeng *Cameroon Customs The Time of Change Vol 1*, 86 (Douanes Camerounaises Le Temps des Mutations).

603 Tchouawou, Rabaey and Sala *Support for the Implementation of the Modernisation Plan 7* (Appui à la mise en oeuvre du plan de modernisation).

604 Tchouawou, Rabaey and Sala *Support for the Implementation of the Modernisation Plan 7* (Appui à la mise en oeuvre du plan de modernisation).

actions. This is a founding principle of customs modernisation. It prevents arbitrariness by making customs laws and regulations to anyone who has an interest in them. These steps should be complemented with rules of procedure decreed in this regard. These should include but not be limited to rules drafted by technical ministries in terms of norms, the requirement of sanitary certificates, phytosanitary regulations, authorisation to commercialise and the like, in order to give international trade operators a full mastery of the legislative and procedural requirements.

It is also suggested that those who make the law and decide on procedures should carefully consider whether or not the said law and procedures are fully intelligible.⁶⁰⁵ This is to avoid multiple, irrelevant and unintended interpretations. Customs decisions in such circumstances will be watched closely, thus limiting to a considerable extent all arbitrariness as mentioned in the previous paragraph. Even though this is not likely to completely eradicate bad practices, it will nevertheless mitigate their negative impact on the range of activities and people affected by the work of customs. Concerted efforts by all role-players, not only customs officers, is said to be crucial in this context. This has been the WCO vision *ab ovo* (see 2.2.2.2 in Chapter 2 above).

6.3 Summary

This Chapter endeavoured to assess the extent to which Cameroon customs has been able to incorporate the WCO's proposals⁶⁰⁶ with regard to customs modernisation into its operating system. It also aimed to ascertain how such incorporation has assisted the administration in its attempt to curb customs offences more effectively.

This Chapter finds that Cameroon's customs administration is fully acquainted with world standards in matters of customs and trade operations. A number of tools have accordingly been implemented and are currently running and enabling the administration to meet its obligations both nationally and internationally. These steps have further enabled the administration to fight customs fraud more strategically. One

605 Tchouawou, Rabaey and Sala *Support for the Implementation of the Modernisation Plan 6*, 14 (Appui à la mise en oeuvre du plan de modernisation).

606 From a legal and practical viewpoint.

such steps has been the performance measurement⁶⁰⁷ culture that has been lauded internationally as it kills many birds with one stone while simply appearing as a management tool. This Chapter further finds that the country seems to have been sleeping on its laurels if one considers when customs modernisation started⁶⁰⁸ and the support the country has been receiving from the piloting organisations (the WCO, the WTO and donors like the IMF) and other groups like the European Union (through the PAPMOD).⁶⁰⁹ This stance derives from the fact that Cameroon ranks very much behind in the recent WTO TFA Database profile.⁶¹⁰ The database reports that there are quite a number of steps for which the administration still needs considerable time to implement fully. The country is said to have only reached 1.7% of the implementation rate commitments regarding already unfolded initiatives before the WTO TFA was ratified. The remainder of the percentage is shared between Categories B and C. Category B notifications (achieved at 45.4%) still need some time for full implementation, and Category C notifications (achieved at 52.9%) need both time and capacity building support for full implementation. In other words, many initiatives have been ongoing, but they still need these organisations' and/or groups' assistance and support for further development.⁶¹¹ The Cameroon customs administration is hereby urged to rework its strategies in ways that will enable it to develop an independent character by building on and taking to new heights all the support it has received thus far from the WCO and its allies and those to come.

More succinctly, the modernisation of the Cameroon customs administration as a whole has been ongoing for many years, and these steps have enabled it to respond positively to the challenges posed by globalisation amongst which, consistent and active fight against customs offences. Beyond the desire to increase revenue collection, reforms in Cameroon customs seek to facilitate trade, to efficiently fight customs fraud, to partner with companies in search of competitiveness and

607 See generally 6.2.2.4.3 above and the subsequent sub-headings.

608 About a decade ago or even more than that. See generally the introductory paragraph to this Chapter at 6.1 above.

609 See generally discussion at 6.2.2.2.2 above.

610 WTO TFA Database 2019 *Cameroon Notification Status*
<https://www.tfadatabase.org/members/cameroon>.

611 WTO TFA Database 2019 *Cameroon Notification Status*
<https://www.tfadatabase.org/members/cameroon>.

performance, and to build a healthier business climate for all involved. That is why the keywords of the reform in Cameroon are transparency, automation, predictability, accountability and feedback/reporting. This position rests on the main founding principles of customs modernisation as can be seen in Chapter 2 above.

Becoming a modern and efficient administration at the service of an emerging Cameroon is the underlying goal behind the customs modernisation programme. In order to achieve that goal, the administration has to work towards striking the right balance between securing revenues and reducing the cost and time spent in clearing goods at its major ports (in order to facilitate trade), as well as to ensure that its mission of control and protection is not negatively affected. Customs modernisation in Cameroon has also been deeply rooted in the reform of institutions, procedures and human resources. No sector with a stake in the domain has been left untouched. The country relies heavily on the WCO and WTO instruments, initiatives and tools, and shares with other members of the CEMAC the CEMAC Customs Code (CCC). The CCC is used as the main common piece of legislation in the sub-region, which also takes precedence over each member state's national customs laws. From all these bodies of rules and the administration's initiatives, a variety of steps and initiatives have been taken and developed in the country. Their variety has strengthened the administration as a whole and given it a better image internationally.

With reference to efficiently curbing customs offences and other bad practices, the impact of laws and regulations as well as various other initiatives and tools has been felt at all possible levels. This statement is justified not only by the statistics given by the administration, but also by the very nature and number of the initiatives taken. It is clear that the Cameroon customs administration's focus, as part of the CEMAC, is mostly felt in the practical dimension drawing from the WCO founding principles.

The performance measurement culture is an obvious example. Through adopting this unique approach, the administration has built a new culture that it endeavours to continually improve not only by spreading it to all sectors and all role-players in the customs service but also by committing to regularly working toward rebuilding the public's trust making the administration an example to be followed by other nations.

Each individual, from the agent on the lowest grade to the highest placed official, all are accountable and considered crucial to the sweeping change sought by the administration. The newly instituted culture aims at ensuring that the role-players of this tactical administration (from an internal and external viewpoint) act in all their dealings in a transparent and accountable manner by monitoring the execution of the services provided by them.⁶¹² The measurement of such performance is done against a set of specific objectives that are clearly defined from the onset. This enables the promotion of the agents that meet the expected goals and the demotion of those that do not. This approach inevitably leaves little or no room for discretionary intervention and therefore, efficiently counters bad practices in general and corruption in particular although from a distance.

The impact of the new culture in combatting bad practices is readily appreciable in the sense that all who deal with customs are aware that their actions are being monitored, and this state of affairs makes them impermeable primarily to the temptation to engage into illegal activities. The emphasis placed on ethics in this context makes it possible for all actors to behave in a way that portrays the administration's vision and consider themselves as essential instruments through which the goals of the organisation can be achieved. It all comes down to what might be called "be the change you want to see", or "change starts with you". So, from the inspectors (who have inspectors' contracts),⁶¹³ to the managers (who have objectives contracts),⁶¹⁴ via the economic operators (who have operators' contracts),⁶¹⁵ the administration hopes to build a customs environment where every single participant has a determined role to play and actually plays that role to the satisfaction of the administration and its trade partners. And this, the administration hopes will enable a fraud-free trade environment.

It is no doubt that the automation of customs procedures (reducing physical

612 This is what the WCO considers as promoting transparency, predictability and good governance as discussed 2.2.2.4 in Chapter 2 above.

613 See generally 6.2.2.4.3.1 above.

614 See generally 6.2.2.4.3.3 above.

615 See generally 6.2.2.4.3.2 above.

interaction between officials and clients) diminishes considerably the rate of offences that can be committed. Be it the GPS system or the GUCE,⁶¹⁶ the partnership approach,⁶¹⁷ the bodies established to attend to specific aspects of the administrative work or to customs offences,⁶¹⁸ the Cameroon customs administration has so far made considerable progress in terms of uprooting those behaviours that previously characterised it as a corrupt and bureaucratic environment.⁶¹⁹ This justifies the variety and number of the actions or networks in which the administration has involved itself. All its efforts are directed at enhancing governance and performance in the administration with the purpose of providing quality services and optimum output, and this is going a long way towards uprooting customs offences.

Admittedly, a lot still needs to be done, as the administration itself acknowledges, to attain a fully modernised and sustainable institution. New cultures take time to blend in thoroughly, and all the administration needs is to place a particular accent on the enforcement of the legal framework governing its activities, as well as monitoring the progress of the multifaceted and multidimensional initiatives that have been taken. There is no point in having a legal framework or developing a multitude of initiatives if no importance is given to their enforcement and follow up. Furthermore, there is an urgent need to ensure laws and regulations in customs are readily available to any party having an interest in them for predictability's sake. This is one aspect the administration ought to work on.

The administration also has to ensure that all international instruments it purports to have ratified are in actual facts so ratified. Moreover, instead of merely drawing inspiration from some instruments as alleged by itself, it is advisable to adopt these instruments as if inspiration can be drawn from them, it means they are good enough for ratification. This fact will enable the country to build for itself a more consistent body of rules governing its activities.

Cameroon customs has identified four elements of its modernisation programme that

616 See respectively 6.2.2.3.2 and 6.2.2.3.3 above.

617 See generally 6.2.2.2 above and the subsequent sub-headings.

618 See generally 6.2.2.4.2 above.

619 The administration's performance measurement approach (6.2.4.3 above) has largely contributed to the transformation of the entire customs system.

need to be carefully guarded to sustain the current achievements. These are the improvement of customs governance, the deepening of cooperation, the intensification of communication, and the tightening of the links between customs and businesses.⁶²⁰ According to the administration,⁶²¹ this is the way forward. Beyond the legal improvement customs modernisation brings about, structural, institutional and organisational changes have taken place and made an undeniable impact on the prevalence of customs offences. The idea of involving all role-players in the process is a winner's strategy. Especially with regards to combating customs offences more efficiently. Bringing together the talents, wills and commitment of all role-players is crucial to achieving that specific goal. The administration further acknowledges that had the partners not been involved, it would not have been possible to reach its goals and to sustain them thus far.⁶²² It is also the administration's view that only a network can destroy another network.⁶²³

620 Likeng *Cameroon Customs The Time of Change Vol I*, 3 (Douanes Camerounaises Le Temps des Mutations).

621 Likeng *Cameroon Customs The Time of Change Vol I*, 3 (Douanes Camerounaises Le Temps des Mutations).

622 Likeng *Cameroon Customs The Time of Change Vol II*, 22 and 70 (Douanes Camerounaises Le Temps des Mutations).

623 Referring to destroying networks that perpetrate customs offences.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This Chapter sums up the previous Chapters and retraces the “why, how, for what, through what, and to what extent?” of customs modernisation. It draws from the above development the similarities and differences in the application of customs modernisation rules and tools to combat customs offences in France, South Africa and Cameroon under the auspices of the WCO. The summary is done with a view to drawing useful recommendations out of the comparison for each of the countries.

The pieces of legislation of the countries under study are differently drafted, so are their capacities to accommodate customs modernisation as well as the actual approach to customs modernisation. The impact of the respective communities' or union's rules¹ on each of the three countries is equally different, and these factors have led to a broad but limited legal comparative study. Restating the problem is very important in achieving the goals of this Chapter.

7.2 Restating the problem

Because customs modernisation and trade facilitation tend to be assimilated to mean the same thing, and naturally so, it was necessary right from the outset to establish the link between these two trading concepts, both of which seek to ensure that all benefits associated with trading across borders are realised without obstruction. It was established that these two concepts are inseparable from each other.² Trade facilitation appears as the primary goal motivating all efforts to simplify and streamline trade procedures and processes, while customs modernisation and all that goes with it are the means of attaining that goal. In simpler terms, all efforts carried out by customs administrations to streamline rules, procedures and processes have a broader impact as they not only change the way customs businesses are run but they also

1 Both South Africa and Cameroon belong to customs communities while France is part of a customs union.

2 See generally 1.1.1 above.

affect the rules governing international trade in general. This means that there is no trade facilitation without prior customs modernisation, and the two concepts are mutually inclusive.³

France, South Africa, and Cameroon are member states of the world's leading organisation in customs matters, namely the WCO. Since its inception, the WCO has endeavoured to perform the task of developing rules and tools that could be used in all its member states as a way of positively and adequately responding to the ever-transforming and increasingly demanding trade environment. The international nature of customs work and intervention is at the heart of all efforts so far undertaken by the WCO. The organisation has been working to ensure that it sustains its members in their efforts and desire to build well-capacitated customs administrations or, to prompt them to modernise by providing them with standardised and harmonised rules and tools for use in excellently carrying out the various missions assigned to the customs administration.

Out of date, inadequate, complex and inconsistent laws and regulations, as well as bureaucratic and burdensome practices render the introduction and sustainability of new approaches that aim to boost customs efficiency and consequently curb crime somewhat tricky.

Customs modernisation is an inclusive process. It encompasses a range of activities which all aim at empowering customs administrations. The introductory Chapter of this thesis gave an overview of how the concepts of customs modernisation, customs offences and customs regulations relate to one another.⁴ Customs was defined as the government service that enforces customs law and administers other law in respect of goods and people moving across borders.⁵ The development of trade challenges customs' role and responsibility. Such development is what prompted customs modernisation, which could be summarised as the process that seeks to ameliorate the way customs delivers its services in a continually changing trade space by boosting

3 This was discussed in 1.1.1 above.

4 See generally 1.1.2 above.

5 See generally 1.1.2 above.

its efficiency and effectiveness through facilitated and automated processes and procedures, accountable organisation and staff, all of which should be rooted in an up-to-date and consistent legal framework.⁶ In simpler terms, and drawing from all the definitions provided for this concept, this thesis views customs modernisation as a broad legal and practical approach that seeks to address customs administrations' inefficiencies and shortcomings with the view of upgrading and aligning their capacities with new development in the trade environment, sustaining them going forward, with efficiency as the ultimate goal. This process of customs modernisation, in essence, entails the development of administrations that are well equipped, well prepared, and legally grounded in order that they may address every issue that confronts them appropriately and purposefully. Customs modernisation, besides every other consideration, seeks to curb customs offences more efficiently.

The introductory Chapter was the place where the enquiry was made as to what prompted the customs modernisation process, how it has developed over the years, what organisation are monitoring it, whether it is imperative to modernise, and the implications of the process on the country undertaking it.⁷ Customs offences were summarised as those behaviours that contravene or attempt to contravene customs law. Addressing the issue of customs offences in today's fast transforming trade environment is a matter of international concern as no state involved in cross-border trade is sheltered from these offending behaviours, which fact reinforces the idea that there need to be cooperative and internationally recognised approaches to dealing with them. This is what customs modernisation seeks to address. The need for substantial responses⁸ to all these changes is a priority for the international community. This is indispensable as the workload of customs has increased, and the demands⁹ are also growing.

6 See generally 1.1.2 for the contextual definitions; 1.1.5 for the driving force behind customs modernisation; and 1.1.6 where it is explained how customs modernisation fits into the legal context.

7 See generally 1.1.3 on the general importance of customs; 1.1.5 about what prompted customs modernisation and 1.1.7 where the enquiry was made as to whether customs modernisation is obligatory for every WCO's member.

8 Both in laws, regulations and practices.

9 On the one hand from of the states (revenues), and on the other hand from the trading community.

On the other hand, customs offences have also developed and taken various new shapes and so threatened trading activities as a whole. Customs administrations, more than any other government administration operating at countries' borders, are at the heart of cross-border trade.¹⁰ Their strategic position enables them to play a critical role in controlling the entry and departure of goods in and from a country.¹¹

There is a belief that in developing countries customs is valued because it is where the government draws most of its revenues, and that in developed countries customs focuses more on circumventing terrorism and similar crimes that have irreversible consequences on a state's security.¹² Although correct, the fact, however, remains that customs plays a prominent role in regulating international trade and in uprooting customs offences, irrespective of their nature and irrespective of the country's location. More specifically, customs plays a determinant role in shaping, strengthening and sustaining countries' economies and security. It plays a crucial role in controlling the import and export of goods. Changes occurring in cross-border trade have laid more onerous burdens on customs administrations. Before this era of ongoing changes and growing demands, their main focus was on collecting duties and ensuring that everything coming in or leaving a country was adequately accounted for. Today the scope of their work has broadened just by the changes occurring. They are required to be service-oriented and to approach their work more strategically for better results. Beyond the general efficiency targeted, the new approaches for which modernisation advocates seek to equip customs administrations with the adequate and appropriate rules and tools for customs offences that have equally grown in numbers and techniques with time.¹³

At first glance, customs modernisation can be reduced to a technical process, not having anything to do with the law. However, the introductory Chapter concluded that no changes in society could have their full desired impact unless the said changes are equally reflected in laws and regulations.¹⁴ In other words, as technical processes and

10 See respectively 1.1.3 on customs' general role and importance and 1.1.4 on the administration's specific role in the fight against customs offences.

11 See generally 1.1.4 above.

12 See generally 1.1.3 above.

13 See generally 1.1.3; 1.1.4 and 1.1.5 above.

14 See generally 1.1.6 above.

tools are introduced to smooth customs work for the benefit of all parties involved in trade, it is imperative that laws and regulations be accordingly amended and developed and that they be consistent with one another, easily understandable, and readily available. The reality is that abuses are limited when laws are made available to the public. This is to say that adequate customs laws and regulations must sustain active customs modernisation programmes. The new approaches to the customs work must be reflected in customs legislation for harmonious and consistent implementation as this creates certainty for this field of activities as a whole.

It is in this context that this thesis sought to answer the following question:

With specific reference to combatting customs offences, how has the modernisation of customs regulation and practices as proposed by the World Customs Organization (WCO) and progressively adopted by the French, South African, Cameroonian customs administrations helped, and how can it help in future, in adequately addressing and strengthening the fight against customs-related offences in these territories? In response to this research question, the following lines are what could be gathered in general.

7.3 General findings of the study

The WCO strategic document entitled *Customs in the 21st Century* enumerates a list of modern tools for the efficient performance of customs activities today. These strategic aspects are: reinforcing the ties between customs administrations and their counterparts worldwide, as well as between customs and businesses and customs and other government agencies, through meaningful partnerships; ensuring a better coordination of border management; emphasising the use of risk management techniques; capitalising on the use of modern and simple working methods, procedures and techniques; taking advantage of information technology by using it to its full capacity; developing laws and regulations that reflect modern practices and tools; building a professional, knowledge-based service culture; reinforcing and sustaining capacity; and lastly, instilling in all customs officers a culture that is

conducive to integrity.¹⁵ Every single one of the above-mentioned aspects, in one way or another, impacts on the fight against customs offences and is in application in France, South Africa and Cameroon under various labels. The WCO has diversified its approach in building a robust legal framework and suggesting tools in support of efficiency in its member's customs administrations.

The member states have responded differently to these legislative proposals and tools, and that is true of the three countries under study. That is why modernisation is said not to be a "one size fits all" concept.¹⁶ The differences in the ways the framework and tools are received are mostly reflective of the respective capacities and economic powers of the said member states. The fact remains though that trading in a modern environment run by modern rules is imperative in today's world, to attract foreign investment, to boost states' revenues, and to meet the trading community's expectations.¹⁷ Furthermore, the fast-developing trade environment does not only have benefits. The interest of traders and customs entities (states) are also adversely affected by the simultaneous development of customs offences. The nature of customs offences keeps changing as trade grows.

This study finds that each of these three countries is well involved in the customs modernisation of its administration. They all are well acquainted with the WCO's framework and tools even if they have not adhered to all of them. Their incorporation of the WCO instruments and principles in their respective national legal framework is more visible in one country and less visible in the other for different reasons not always ascertainable. Although their approaches are different, they, however, are rooted in the same principles of efficiency and effectiveness. In France, the customs modernisation programme is part of a broader programme to modernise public policy for which all spheres of the government are invited to partake with two main objectives to achieve namely improving efficiency and reducing public expenditures. France focuses on policy, people and systems which are together well in place in the overall

15 WCO 2008 *Customs in the 21st Century* <http://www.wcoomd.org>.

16 See De Wulf "Strategy for Customs Modernization" 9; Mikuriya "Legal framework for customs operations" 58-59. This was also indicated in the assumptions in Chapter 1.

17 Especially for those countries that heavily depend on customs revenues. Mikuriya "Legal framework for customs operations" 51.

customs modernisation of the administration. Its position as a member of the EU customs union enables it to be more advanced and more strategic in its approach to customs modernisation to fight customs offences.

While the South African Customs Modernisation Programme is deeply rooted in systems, policies, processes and people; the Cameroon initiative focuses on reforming institutions, procedures and human resources.¹⁸ In simpler terms, Cameroon's approach focuses more on governance (institutional, infrastructural, people), which significantly contributes to reducing the scourge of corruption within the administration. South Africa says¹⁹ it places a particular accent on systems, people and policies. However, it appears that the aspects of systems (infrastructural and technological advancements) and policies (modern legal framework) are more prioritised. The people aspect, which is supposed to mean the SARS interlocutors (traders and citizen) and its staff (human resource), are not really represented, or the efforts made in that regard are not documented enough. For instance, the efforts to better the staff members capacities and knowledge in a fast transforming trade environment are not really spoken of as can be seen in the administration efforts as evaluated in this study. The very adoption and implementation of the world customs best practices and tools speak volume as to the impact of customs modernisation on the fight against customs offences. The diverse nature of the new approaches to customs work adequately respond to the diverse scourge of customs offences, and this is palpable in the three countries in their own respective and unique ways but always resting on and drawing from the same customs modernisation founding principles as presented in Chapter 2.

Overall, France, South Africa and Cameroon have responded positively to the call for customs modernisation by the WCO and such response has enabled the three customs administration to curb customs offences more effectively than before. This aspect is not only acknowledged by the respective administrations but also stems from the very sophisticated, strategic and technical nature of the modernisation process as a whole.

18 Some sources state that the keywords of customs reform in Cameroon are transparency, automation, predictability, accountability and feedback/reporting. These keywords reflect best all steps the administration has taken thus far to modernise itself.

19 See generally the introduction to Chapter 5.

Cameroon still has a long way to go despite its many efforts that have been lauded internationally. France and South Africa, on the other hand, are much more advanced. Luckily enough, the customs modernisation process is not a competition, it is a journey that each customs administration has to take bearing in mind its specific environment, yet not forgetting that growing or improving is imperative in today's global trading context. The synopsis of the respective highlights and main findings of the different Chapters is given below.

7.4 Major conclusions, chapter by chapter

The following paragraphs are a summary of each of the Chapters of this work.

7.4.1 The founding principles of customs modernisation by the WCO that impact the fight against customs offences

Chapter 2 of this study focused on the work of the WCO, which aims at reinforcing the capacities of its member states worldwide. The publications of this organisation are various, ranging from international conventions to practical and technical tools. The RKC was given special attention in this Chapter because it is considered the blueprint of a modern customs administration.²⁰ Irrespective of their nature, these instruments and tools all have one aim, which is reinforcing customs efficiency internationally. Efficiency in the context of this study not only means more revenue for the state or speedy and more profitable procedures for traders, but it also and most importantly means a reduced rate of customs offences, if not complete eradication. As new laws come into play, risks are managed before the arrival of goods; procedures are automated that facilitate the processing of goods' declarations; customs staff are monitored in their performance and accordingly give account; customs offences in all their variety are thereby strategically rooted out.²¹ The various founding principles making up customs modernisation are briefly summarised below.

²⁰ See generally 2.2.1 above.

²¹ This is the aim of customs modernisation as unfolded in its founding principles and as generally reflected in Chapter 2 above.

7.4.1.1 Risk management and post-clearance audit

Risk management techniques and post-clearance audit instil in customs a sense of acting strategically.²² Essentially, risk management enables a proper study of risks regarding a specific consignment before the consignment in question reaches its destination and as soon as it enters a customs area. The study or evaluation thereof enables customs to allocate more resources to consignments with high risks rates and allows a smooth flow of those carrying fewer risks. This practice is well in place at the EU level through a centralised declaration system (the Import Control System).²³ South Africa uses the customs risk engine and the 24 hours advanced cargo loading notice for containerised cargo for the same purpose of managing the risks associated with international trade.²⁴ In Cameroon, the use of scanner combined with electronic risk management is well in place and within the administration, is found the Risk Management Unit that assists in managing risks in general.²⁵ These tools are used primarily as trade facilitators platforms, and in the process of their use, they enable a consistent reduction of risk and help the respective administrations to counter threats and frauds of all nature.

The post-clearance audit, on the other hand, draws from the trust established between traders and the customs administration. This state of trust enables the trader to pass through customs without any thorough check (control) and to have their goods and operating systems checked afterwards. While it saves time for the business and customs, it also enables the customs to have a clear view of how compliant the specific trader or traders are with customs laws and regulations. This reduces the incidence of customs offences. As for France, its customs administration carries out post-clearance controls²⁶ with the aim of verifying the truthfulness of the information provided during clearance. Upon this process, and if the customs agents have sufficient reasons to suspect that an offence was committed or that an attempt was made in that respect, they may proceed to conduct what is called a free audit (*audition libre*), a simple

22 See generally 2.2.2.1 above and the subsequent sub-paragraphs.

23 See generally 4.2.1.2.1 and 4.2.2.1.1 above.

24 See respectively 5.2.2.1.1 and 5.2.2.1.2 above.

25 See generally 6.2.2.1 above.

26 See generally 4.2.1.3.1.4 above.

question and answer session regarding the suspicions. In a nutshell, post-clearance audit, as suggested by the WCO, is still growing as a practice in the three countries. South Africa has instituted the SARS's compliance programme,²⁷ which rests on the administration's desire to induce voluntary adherence to the rules by everyone having a role to play, by educating the latter accordingly. The administration is still growing its post-clearance audit culture, as suggested by the SARS.²⁸ Cameroon on the other hand, has an almost similar concept that is called post-clearance verification, which is of two kinds.²⁹

On the one hand, there is deferred control, and on the other hand, post-clearance verification. While deferred control seeks to compare the information filed in the declaration with that appearing on the documents accompanying the goods, post-clearance verification involves a thorough enquiry into the accounting entries and records of the external trade operators carried out on the sites of their operations. The other founding principle of customs modernisation is the cooperation and/or partnership approach, which is briefly summarised below.

7.4.1.2 An accent on cooperation and partnership

Cooperation and partnership for better enforcement cannot be emphasized enough considering the international nature of customs work and consequently of customs offences. Cooperating with other customs administrations or partnering with businesses and other government bodies help reach the highest levels of simplification, harmonisation and most importantly, compliance with customs laws and regulations.³⁰ These approaches give customs a step ahead on customs law offenders. There is no better way of rooting out customs offences than to enforce customs regulations in collaboration with counterpart administrations, the trading community and other relevant state agencies. This type of partnership that the customs administration must build with different entities has been sectioned into customs-to-

27 See generally 5.2.2.2.2 above.

28 See generally the introduction to Chapter 5 at 5.1 above; see also Khanderia 2016 *Journal of African Law* 461.

29 See generally 6.2.1.2.1.2.6 above.

30 See generally 2.2.2.2 above and the subsequent sub-heading.

customs, customs-to-legitimate businesses, as well as customs-to-other law enforcement authorities. These are concepts that the WCO SAFE Framework of Standards to Secure and Facilitate Global Trade advocates for.³¹ The WCO has emphasised enough that better enforcement is only possible through comprehensive cooperation and/or partnership approaches with relevant stakeholders. So, this emphasis draws from the international character of customs activities. The WCO international instruments seek to strengthen such partnerships and give them strong legal foundations.³² These instruments further open the way for other bilateral or multilateral cooperation instruments amongst the member states. Other tools developed by the organisation also assist in building such partnerships. Customs not being the only state representative involved in international trade, there is a need for it to ensure that it works in close cooperation with those other state entities.

As regards the partnership with legitimate businesses or economic operators, the concept of Authorised Economic Operators (AEO) has been put forward, especially in the SAFE Framework and has been extensively developed over the years.³³ An AEO is, in essence, a party involved in the international movement of goods with whom the customs administration partners based on the former party's satisfactory level of compliance with customs regulations.³⁴ The AEO undertakes to keep complying with such regulations and thereby helps the administration in achieving its various goals amongst which curbing customs fraud. On the other hand, and so long as the AEO abides by the terms of the agreement, it benefits from facilitated procedures in the movement of its goods and services. The concept of AEO is well in place in the EU and France as a member.³⁵ Amongst the many innovations that the European *Union Customs Code* (UCC) seeks to align itself with, the AEO concept as presented by the

31 See generally 2.2.3.1 above.

32 These are more specifically the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (1977); the *International Convention on mutual Administrative Assistance in Customs Matters* (2003); the *Compendium of Customs Operational Practices for Enforcement and Seizures* (COPES) discussed at 2.2.2.2.2.1; 2.2.2.2.2.2 and 2.2.2.2.2.3 respectively.

33 See generally 2.2.2.2.1 and 2.2.3.1 above.

34 The full definition is found in the 2007 version of the SAFE Framework of Standards.

35 See generally 4.2.1.2.1 above regarding the founding principles of the *European Union's Customs Code* (UCC).

WCO was one of its priorities.³⁶ South Africa's way of embracing the concept started with the "Preferred Trader" Initiative/programme.³⁷ The preferred trader initiative entails building strong ties with businesses for better and mutual understanding and from which each party benefits something. These partnerships are built from the compliance record of the trader concerned. In other words, the concept of AOE is still "loading" in South Africa, but the foundations have long been laid. Moreover, there is in South Africa, what is called the SARS's Compliance Programme,³⁸ through which the SARS further strengthens its relationship with different stakeholders to ensure their compliance with customs laws and regulations. The particularity of this programme lies in the fact that beyond the dialogue platform created for communication with the relevant stakeholders, the administration prioritises seven areas of concern.³⁹ The SARS Compliance Programme seeks to answer the questions of what laws and regulations stakeholders should comply with, how they should comply with such laws and regulations and why they should comply with them. The same goes for Cameroon.

The latter country does not entirely make use of the AEO concept, not as yet. It is content with its partnership with Economic operators (Cameroon customs-business forum and the Economic Operator performance contracts) that it believes, responds best to its needs at this point and are more flexible than the AEO.⁴⁰ But the administration acknowledges that it is, however, working towards fully embracing the AEO as a whole soon. The Economic operator performance contracts enable the administration to sign contracts with economic operators whereby their assistance to the administration are evaluated on a certain number of criteria and within a specific timeframe and in return, if the results are satisfactory, they benefit from many facilities in their trade dealings. This partnership is extended to what is called the Customs-

36 French Customs 2016 *Objectifs et indicateurs de performance* <https://www.performance-publique.budget.gouv.fr>.

37 See generally 5.2.2.2.1 above.

38 See generally 5.2.2.2.2 above.

39 The fact that some areas are prioritised does not mean the other areas are neglected according to the administration. The prioritised areas are large business, transfer pricing, illicit cigarettes, the undervaluation of imports in the clothing and textile industry, tax practitioners and lastly, trade intermediaries.

40 See generally 6.2.2.2.1 and 6.2.2.4.3.2 above.

business forum,⁴¹ yet another dialogue platform for mutual understanding between customs and businesses in Cameroon. There is also an emphasis on the maximum use of information technology and the customs modernisation process is wholly dependent on such sophisticated systems.

7.4.1.3 Maximum use of Information Technology

Pressures arising from both the changing trade environment and the different stakeholders requiring customs to align its systems and procedures with the sophisticated logistics networks used for international trade and transport transactions are real. This entails the use of information technology (IT) as a means to boost organisational and operational efficiency and effectiveness. The computerisation or automation of customs procedures is a crucial element in the whole customs modernisation process.⁴² Automation in customs is used in support of core customs functions amongst which are goods declaration processing; revenue assessment; revenue collection; risk management; management reporting; and performance monitoring. Although the importance of IT in modern customs administration is undisputed, the priorities, expectations, experience, capabilities and resources of individual customs administrations differ. This is true of the three customs administrations under study. Computerisation is a streamlined way of handling the import and export business. Its benefits are numerous and range from speed, better results, better cooperation and communication, better enforcement and better statistics gathering. However, computerisation is not the answer to all problems. As customs engage therein, customs offenders are also in the business of using sophisticated techniques to contravene customs systems and their rules. The complete mastering of the technological environment is on its own a challenge even within a fully modernised customs environment. The automation of customs systems is an undeniable reality in France, South Africa and Cameroon. This is realised for the most important in the "Single Window" (*Guichet Unique*) and the Import Control System in France.⁴³ The Regional IT connectivity; the single registration process (SR1); the

41 See generally 6.2.2.2.1 above.

42 See generally 2.2.2.3 above and the subsequent sub-headings.

43 See respectively 4.2.1.2.1 and 4.2.2.1.1 above.

SARS's e@syScan Software; the Automated Cargo Management for sea, air and road; the Customs-to-customs data exchange under the WCO's SAFE Framework of Standards; as well as the clearance declaration for transit operations for the most relevant, are all in use in South Africa.⁴⁴ In Cameroon, the Nexus+ Cameroon Customs GPS, the ASYCUDA World, and the GUCE are fully functional and are also interconnected.⁴⁵ South Africa and Cameroon, to an almost insignificant extent, still accommodate paper-based transactions but are working towards a complete shift to fully automated customs procedures. The Single Window is set in South Africa as a goal to achieve by November 2022, and that should be fully operational by February 2038.⁴⁶ Khanderia⁴⁷ is of the view that the country has been very reluctant to engage in the process of instituting a Single Window culture, which factor constitutes a significant handicap to the country's overall trade facilitation goals.

The nature of customs work is such that promoting transparency, predictability and good governance is a crucial component of the overall success of the modernisation process.

7.4.1.4 Promoting transparency, predictability and good governance

Promoting transparency, predictability and good governance in the context of customs modernisation entails a range of different aspects of the customs administration's work. The WCO has developed the *Revised Arusha Declaration* and also suggests integrity programmes and guidelines to enable customs administrations to address issues of integrity and transparency in their own environment more effectively. Concerning the laws and regulations governing the work of customs, a modern customs administration is one whose practices and procedures are rooted in adequate legal texts that should be easy to understand, accessible and consistent with one another, leaving no space for discretionary undertakings.⁴⁸ Failing to provide such is a handicap for the system and an invitation issued to customs offenders to act. This

44 See respectively 5.2.2.3.1; 5.2.2.3.2; 5.2.2.3.3; 5.2.2.3.4; 5.2.2.3.5 and 5.2.2.3.6 above.

45 See respectively 6.2.2.3.1; 6.2.2.3.2; and 6.2.2.3.3 above.

46 WTO TFA Database *Notification Status G/TFA/N/ZAF/1/Add.1* available at <https://www.tfadatabase.org/members/south-africa>.

47 Khanderia 2016 *Journal of African Law* 464, 465.

48 See generally 2.2.2.4 above.

is transparency, predictability and good governance in their basic forms. The customs law in France is up to date, available and readily accessible. So is the South African legal framework governing customs, which is however not yet into force. As for Cameroon, the *CEMAC Customs Code* is accessible and consistent with global standards. What lacks in Cameroon, however, is the online facility to access all its legal instruments. It is indeed challenging to access these instruments that form the body of rules governing customs in Cameroon.

The new and transforming environment in which customs operates requires specific rules, and proper attention must be given to the structural and infrastructural needs of the administration as well as its staffing needs. Customs administrations in some countries like Cameroon are part of the Ministry of Finance.⁴⁹ While this attachment serves the interests of the state well, it does not, however, enable this administration to operate as freely as it should. There have been allegations⁵⁰ that it takes time to root out corruption in customs because highly placed officials have an interest in preserving it. Detaching customs departments from Ministries of Finance or any other ministry as the case may be would enable a more transparent management system where all participants in its activities can be associated with the rejection of dishonesty. It is the OECD Forum on Tax Administration's⁵¹ view that in order to render their services in an efficient and effective manner, revenue bodies need their autonomy. Customs administrations should, therefore, be independent government structures. This would help them to fulfil better the various missions assigned to them. This raises the problem of governance in general.

An essential aspect of governance in customs modernisation is building the capacity of the customs workforce. No customs modernisation efforts will have the intended efficient impact if adequate training and monitoring of the customs workforce is not performed on an ongoing basis. Customs staff need to be trained as regards the new developments happening in their operating environment so that they can be adequately responsive. Empowering customs staff and developing progressive career

49 See generally 6.1 above.

50 See generally 3.2.6.3 above.

51 OECD Forum on Tax Administration 2009 *Tax administration in OECD*
<https://www.oecd.org/ctp/administration/CIS-2008.pdf>

programmes for them are ways of limiting their engaging in corrupt activities. This would provide more revenue for the state and increase the administration's credibility vis-à-vis business. France has a whole programme in place to empower its staff members.⁵² One example of this is the Consultancy, Professional Mobility and Careers Unit established in 2014,⁵³ which helps staff members in their personal career development. With specific reference to corruption, France has a Central office to fight against corruption, financial and tax offences.⁵⁴ As a governance tool, the French customs administration has also instituted the performance measurement culture.⁵⁵ The administration also devises strategic plans that enable it to operate in a predictable environment.⁵⁶ Beyond every other effort to institute a culture of integrity within the administration and beyond the countries borders, the SARS applies the zero-tolerance policy against corruption and has established in this respect a joint Anti-Corruption, Security and Customs Forum to address issues of corruption in customs.⁵⁷ People issuing invoice in trade transaction are equally bound to act in full integrity while performing their duties.⁵⁸ Furthermore, in line with the SARS's ongoing tax reforms, customs utilises the "get next item" which is an anti-corruption tool distancing customs officials from clients by automatically allocating, on random basis cases bearing identified risks to different inspectors.⁵⁹ This was part of the re-engineering of SARS' inspection system. In this case, the client does not know which officer is dealing with a specific case, and this works well as an anti-corruption initiative as the opportunity to engage thereof are shattered. The Cameroon customs administration addresses the issue of transparency, predictability and good governance primarily via the performance measurement,⁶⁰ and in other ways⁶¹ whereby it monitors its agents' actions and advances the carriers of those that help it grow. The zero-tolerance approach against corruption is indeed true in the countries under discussion. The

52 See generally 4.2.2.4.2 above.

53 See generally discussion under 4.2.2.4.2 above.

54 See generally 4.2.2.2.2 above.

55 See generally 4.2.2.4.1 above.

56 See generally 4.2.2.4.3 above.

57 See generally 5.2.1.3.1.2.8 above.

58 See generally 5.2.1.3.1.2.9 above.

59 See generally 5.2.2.4.1 above.

60 See generally 6.2.2.4.3 above and the subsequent sub-headings.

61 For instance through the Committee for the promotion of ethics and governance (CEPG) discussed at 6.2.2.1.2 above.

difference lies only in the approaches and strategies to rid the sector of this scourge. While the performance measurement approach is well rooted in the French and Cameroonian customs modernisation steps, this approach is only projected in South Africa. An efficient customs modernisation process is also one that makes room for smooth and time-effective dispute settlement as demonstrated below.

7.4.1.5 Enabling smooth and time-effective dispute settlement processes

Beyond every other consideration, smooth and time-effective dispute settlement approaches are crucial in a modernised or modernising customs environment, as they save time and costs both for the administration and for businesses. There is no point in the administration's keeping matters unsettled while its workload keeps increasing. This also excludes the possibility of corruption that may arise from a lengthy dispute, where a trader may want to bribe an official to help speed up and settle his/her case. France, South Africa and Cameroon all have well-defined approaches to settling customs disputes. A specific way of quickly settling not very serious offences in France and Cameroon⁶² is done through the settlement (*la transaction*) whereby the administration reaches an amicable solution to a customs dispute and thus forfeits its right to take the matter to court. The settlement (*la transaction*) usually requires the offender to do something, and this may be paying a certain amount as fine. In South Africa,⁶³ the settlement of customs disputes is also well in place and is mostly used as a step as long as it serves well the administration's interests. Settlement in a modern customs environment has the advantage of lightening the burden of the administration with regards to disputes as it enables it to spend more time and allocate the necessary resources to more serious cases. Furthermore, the involvement of different entities in the settlement processes enables a certain level of transparency, which is a quality customs administrations strive for, all over the world. Since customs offences are broad and very diverse in nature, Chapter 3 focused on providing a brief and somewhat international description of what customs offences are and how the WCO practically deals with these offences. Below follows a summary of this discussion.

62 See respectively 4.2.1.3.1.5.1 and 6.2.1.2.1.3.4.1 above.

63 See generally 5.2.1.3.1.2.11.1 above.

7.4.2 An international perspective on customs-related offences

Chapter 3 purported to give an overview of the most prevalent types of customs offences. For precision's sake, there was a need to limit the number of offences described in this study, the reason for the limitation being that these offences are innumerable and trying to cover them all here would have been irrational. As the leading world organisation explicitly focusing on customs matters, the WCO⁶⁴ has sorted customs offences into different categories concerning the domains of customs work they affect. The first category is revenue collection offences,⁶⁵ made up of those offences that aim at avoiding paying duties, or paying less than what is actually due, or unduly benefitting from some financial advantage attached to specific types of goods. All the offences perpetrated under this category are often grouped under the title of commercial fraud.⁶⁶ The second category is made up of offences, like terrorism, that directly affects the state and its citizens' security. These are known as offences against security.⁶⁷ Some offences seek to deprive legitimate businesses of their property rights by counterfeiting their products, and the impact of such offences is dangerous for health and safety. That is why the latter category is named offences against intellectual property rights (IPR)/Health and Safety.⁶⁸ Other offences focus only on the breeding, manufacturing and disseminating of drugs across borders. That is why the WCO has a drugs and precursors' enforcement programme⁶⁹ that focuses explicitly on offences dealing in drugs and their derivatives, to limit their adverse consequences on society and its citizens. Because the environment is essential to citizens and the state, there is also a category dealing with offences against the environment.⁷⁰

Corruption in customs was singled out from among these different categories.⁷¹ The reason is that corruption on its own bears the characteristics of each of these

64 Through its Working Group on Commercial Fraud.

65 See generally 3.2.1 above and the subsequent sub-headings.

66 See generally 3.2.1.1 above.

67 See generally 3.2.2 above.

68 See generally 3.2.3 above.

69 See generally 3.2.4 above.

70 See generally 3.2.5 above.

71 See generally 3.2.6 and the subsequent sub-headings above.

categories and has received considerable attention over the years. Corruption in customs takes three forms, namely routine corruption, fraudulent corruption and criminal corruption as described by Hors.⁷² In the latter type, an economic operator bribes customs in order to conduct illegal and very profitable operations. If, for instance, the deal in question involves importing or exporting weapons of mass destruction, the impact of such deals is indescribable and devastating for the society. Beyond such a negative impact, corruption in customs has been extensively studied over the years. It appears that the difficulty in eradicating corruption in customs lies in the fact that it has been practised for so long in this administration that it has been assimilated as a standard business practice.⁷³ Some⁷⁴ attribute the fact that no solution to this problem has been found thus far to the fact that the leadership in the administration in some instances is reluctant to engage in programmes or actions (modernisation) to eradicate such activities because of the benefits they draw from the practice. The reasons for the persistence of corruption in customs are numerous. Whatever the reasons may be, corruption is a dangerous crime. One simple act of corruption in customs can have a chain of negative impacts such as discouraging foreign investment, exposing the international trade platform and states to constant risks and depriving the latter of customs revenues, tarnishing this administration's reputation and placing citizens and the environment at risk. Customs modernisation advocates the automation of procedures, thus limiting the interaction between customs officials and traders.⁷⁵

Furthermore, in a modernised customs environment, everyone's actions are monitored, which efficiently and effectively limits the commission of acts of corruption. There have been many suggestions⁷⁶ about how corruption can be prevented, including that states should consider providing customs officers with adequate remuneration packages, as this will lessen their desire to engage in corrupt activities. It is important to note that performance measurement or monitoring the execution of services in customs administrations could be the ultimate solution to the persisting

72 See generally 3.2.6.2 above.

73 Klitgaard 1998 *Finance & Development* 4.

74 Klitgaard 1998 *Finance & Development* 3 and 5.

75 See generally 2.2.2.3 above.

76 See generally 3.2.6.5 above.

problem of corruption in customs as this practice impacts different areas of this administration's work and considers every single member of the administration and its interlocutors as essential elements in the achievement of the administration's goals.

This Chapter also elaborated to a considerable extent on some operations led by the WCO that sought to facilitate member states' understanding of the features attached to different categories of offences and to strengthen their capacities accordingly.⁷⁷ These projects are carried out because a successful fight is one that is started when all the elements of the battle are known. They complement the other efforts of the organisation that builds international standards through its instruments, practical tools and techniques. All these approaches (unfolded in Chapters 2 and 3) constitute the legal and practical steps of customs modernisation by the WCO. The next three paragraphs summarise Chapters 4, 5 and 6, which respectively dealt with customs modernisation in France, South Africa and Cameroon to combat customs offences.

7.4.3 Customs modernisation and its impact on customs offences in France

Chapter 4 was an inquiry into France's modernisation of customs regulations and practices to combat customs offences. As in the other Chapters, the legal and practical aspects of French customs modernisation that impact on the fight against customs offences were scrutinised. As a member of the European Union Customs Union, France shares with the other members of the union a common piece of legislation, namely the *Union Customs Code* (UCC), which is a modern framework for customs and trade.⁷⁸ Besides the UCC, France has also incorporated the WCO Conventions and other instruments in its legal order.⁷⁹ At the national level, the *French Customs Code*⁸⁰ is the primary legal instrument. From a legal point of view, France, as a member of the EU's Customs Union and as an individual state, has what it takes to deal with customs in a continually changing trade environment. In practice, a lot⁸¹ is also being done that

77 See generally 3.3 and the subsequent sub-headings above.

78 See the development in 4.2.1.2.1 above.

79 This through the adoption and ratification of the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences* (1977) and the Revised Kyoto Convention. See respectively the discussions in 4.2.1.1.1 and 4.2.1.1.2 above.

80 See generally 4.2.1.3.1 above.

81 The practical aspects of French customs modernisation that impact the fight against customs

draws from these legal sources and assists the French customs administration to address various challenges it faces deriving from the different aspects of customs work. Because these steps match the founding principles of customs modernisation as drawn from the WCO's publications, there is no doubt that they contribute effectively to the fight against customs offences in the French territory and beyond. The economic power of the union and France's strategic position in the said union gives its administration no choice but to be highly alerted to changes in the international trade and to act proactively in this regard. France is in a nutshell, well acquainted with the founding principles of customs modernisation as presented by the WCO and this work well in aiding the administration to tackle customs offences.

7.4.4 Customs modernisation and its impact on customs offences in South Africa

Chapter 5 sought to assess the impact customs modernisation efforts have had on the fight against customs offences in South Africa. More specifically, this Chapter sought to scrutinise all customs modernisation efforts made by South Africa so far from a legal but also from a practical point of view, and ascertain the extent to which such efforts have helped and will help curb customs offences. From a legal point of view, there is a clear and precise national framework governing South African customs activities. Besides this national and updated framework, the country has also committed to international instruments both by the WCO and the WTO from which it relied heavily in compiling its own national framework.⁸² At the regional level, the only instrument mentioned in this study was *Annex E to the SACU Agreement on Mutual Administrative Assistance*.⁸³ The first modernisation steps in the country's legal framework were taken through several amendments of the then major piece of legislation, namely the *Customs and Excise Act 91 of 1964*. As time went by, the amendments were found not to be able to meet the demands of time. Essentially, despite the Act's having undergone several amendments over the years, it still could not keep pace with the role of customs in the 21st century. That is how the new legal

offences and that were discussed in 4.2.2 are a true reflection of the administration's commitment to operate efficiently and effectively.

82 See generally 5.2.1.1.1 above.

83 See generally 5.2.1.2.1 above.

framework came about. It is important to note that the new acts have not yet come into force.⁸⁴ It is said to have been inspired by the WCO's *Revised Kyoto Convention* and other international instruments.⁸⁵ The new framework, according to the SARS, is founded on sound, clear and logical rules that are easily understood and practical in their use. This is manifested through the core aspects of the administration's work so far. And this is a massive shift compared to the type of environment the administration use to operate in.⁸⁶

Furthermore, it seeks to reflect constitutional values.⁸⁷ Beyond all other consideration, it is a way for the country to make its presence known and felt on the international level as a country well in line with new development in the trade industry and one ready and able to efficiently balance the different interests at stake in customs dealings. The administration having started a Customs Modernisation Programme, it was only logical that laws should be enacted to support the ongoing and projected transformation. This is the ultimate reflection of customs modernisation. The customs legal framework as of this date in South Africa is made up of *Customs Control Act 31 of 2014*, the *Customs and Excise Amendment Act 32 of 2014*, and the *Customs Duty Act 30 of 2014*.

Section 3 of the *Customs Control Act 31 of 2014* specifies the Act's aim as being to provide systems and procedures for the customs check of all goods and persons moving across the Republic's borders; to collect tax more effectively on imported and exported goods; and finally, to ease the implementation of the *Tax Levying Acts* and other legislation applying to such goods or persons. The systems and procedures referred to are a real reflection of simplified and more effective procedures for better results. The one aspect worth emphasising concerning this thesis is that customs officers are given extensive powers in the Act for the performance of their duties. These extensive powers enable them to uncover and counter fraud more effectively. However, any step taken by customs officers should remain within the boundaries of

84 See Section 944 (1) of the CCA.

85 See preamble of the *Customs Control Act 31 of 2014*.

86 Khanderia 2016 *Journal of African Law* 450, 453-454.

87 See generally 5.2.1.3 above.

what is constitutionally acceptable.

The Excise Duty Act 91 of 1964 is basically the new name given to the former *Customs and Excise Act 91 of 1964*.⁸⁸ After a considerable number of provisions were deleted from the *Customs and Excise Act 91 of 1964* through the enactment of the *Customs and Excise Amendment Act 32 of 2014*, the former was to bear the name *Excise Duty Act 91 of 1964*. In simpler terms, the former *Customs and Excise Act* of 1964 was amended by the *Customs and Excise Amendment Act* of 2014, and the final product is what is now called the *Excise Duty Act 91 of 1964*. This new version of the former *Customs and Excise Act 91 of 1964* caters only for excise duty-related matters. Because this study deals with customs and not excise, this Act was not discussed any further.

The third piece of legislation introduced in the process of customs modernisation in South Africa is the *Customs Duty Act 30 of 2014*. It focuses primarily on customs duties and describes the procedure for the imposition, assessment, payment and recovery of those duties.⁸⁹

Besides these legal instruments, other instruments from other administrations have a bearing on customs dealings. These are the *International Trade Administration Act*,⁹⁰ the *Counterfeit Goods Act*,⁹¹ the *South African Police Services Act*.⁹² They were referred to in the Chapter because each of them deals with essential aspects of customs work. Furthermore, because modernisation should be performed in a sequence so that the efforts of one administration are not invalidated by the fact that another administration is not modernising, this was also a way of inviting the said administrations to follow in the footsteps of the SARS so that all of them could function in a more efficient way. At the regional level, the *SACU's Agreement Annex (E) on mutual administrative assistance* could be said to be for the SACU's countries what the WCO instruments on mutual administrative assistance are for its member states.

88 See generally 5.2.1.3.1.3 above.

89 See generally 5.2.1.3.1.4 above.

90 71 of 2002.

91 37 of 1997.

92 68 of 1995. How these instruments relate to the work of customs was discussed respectively at 5.2.1.3.2.1; 5.2.1.3.2.2; and 5.2.1.3.2.3 above.

It advocates the same values of reinforcing customs-to-customs cooperation and other forms of cooperation with other administrations for better enforcement.⁹³ It is important to reiterate that cooperation is said to be a crucial approach in all efforts to combat customs offences. The international character of customs offences justifies this stance.

Finally, yet importantly, SARS has taken several practical steps of various kinds as a way of furthering its modernisation purposes. In one way or another, all of these have positive implications for the fight against customs offences. One aspect worth emphasising is the SARS' willingness to cooperate with bodies constituted to deal specifically with particular aspects of trade, such as the National Economic Development and Labour Council⁹⁴ and the South African Federation against Copyright Theft.⁹⁵ Overall, customs modernisation founding principles as presented by the WCO are well incorporated in the South African customs modernisation efforts both legally and practically, and this helps the country to combat customs offences.

7.4.5 Customs modernisation and its impact on customs offences in Cameroon

Chapter 6 investigated how customs modernisation unfolded in Cameroon and how this has impacted on the country's efforts in dealing with customs offences. Cameroon is a member state of the Economic and Monetary Community of Central Africa (CEMAC), together with Gabon, the Central African Republic, Chad, the Republic of Congo and Equatorial Guinea. These countries utilise the *CEMAC Customs Code* as their main common piece of legislation in customs dealings. So that is essentially the primary legal source governing Cameroon customs combined with the Common External Tariff at the sub-regional level.⁹⁶ Because Cameroon is also a member of both the WCO and the WTO, it has adopted several instruments and tools developed by these organisations which constitute international sources of its customs legal framework.⁹⁷ Otherwise, the country also has national sources⁹⁸ to manage its daily

93 See generally 5.2.1.2.1 above.

94 That represents the textile industry and the importers of other products. This was discussed at 5.2.2.2.3 above.

95 See generally 5.2.2.2.4 above.

96 See respectively the discussions in 6.2.1.2.1 and 6.2.1.2.2 above.

97 See 6.2.1.1 above and the subsequent sub-headings.

98 Notably the *Budget Law and Ordinances* as well as the *Regulatory measures* discussed in 6.2.1.3.1

customs business. The Cameroon customs modernisation programme is said to have been instituted by the head of state and carried out by the Customs Directorate General under the watch of its governing ministry, which is the Ministry of Finance.⁹⁹

Customs modernisation is said to have been started in Cameroon because the issue of corruption in this administration was growing out of proportion. The customs modernisation project took concrete shape through the creation of the Customs Administration Reform Committee (CRAD), which was mandated to scrutinise the projected reforms and make recommendations to the government as to its feasibility.¹⁰⁰ The following step was the establishment of different technical commissions within the CRAD with missions to study the feasibility of the projected reforms regarding specific dimensions of customs work. These dimensions were the organisation and its procedures, its training and information;¹⁰¹ the automation of the administration's procedures, its audit system, the development of the PAGODE¹⁰² system and the monitoring of the clearance chain;¹⁰³ matters relating to security and customs offences in general;¹⁰⁴ and lastly, the infrastructural dimension and working conditions within the administration.¹⁰⁵ Each of these technical commissions compiled a report at the end of their work, with recommendations for the government. These recommendations are the roadmap the government used in unfolding its modernisation project.¹⁰⁶ The stages and dates at which things were unfolded in the process of the modernisation of the Cameroon customs administration are not all consistent. The fact remains, however, that customs modernisation is a reality in the country and has been ongoing for many years.

Because the prevalence of corruption was the primary reason why the steps to modernise were taken, and beyond other considerations of facilitation and efficiency,

and 6.2.1.3.2 above.

99 See generally the introduction to chapter 6 at 6.1.

100 See generally the introduction to Chapter 6 at 6.1.

101 Technical Commission number one.

102 A semi-computerised customs operations management system.

103 Technical Commission number two.

104 Technical Commission number three.

105 Technical Commission number four.

106 See generally the introduction to Chapter 6 at 6.1.

the Cameroon customs modernisation programme focuses strongly on governance and ethics. It concentrated on building an environment where each and every human resource¹⁰⁷ is considered a valuable asset in assisting the government in fulfilling its goals, and in which each actor's actions would be closely monitored. The performance measurement culture¹⁰⁸ instituted by the Cameroon customs administration is what stood out in all the administration's endeavours. The reality is that performance measurement is actually a way of "killing many birds with one stone." It raises the standard of ethics of the administration and its staff, and it is used as a way of strengthening governance within the administration and for the government as a whole. It fights corruption and bad practices from a distance,¹⁰⁹ opens the country to foreign investment, and rebuilds the administration reputation among its interlocutors. The advantage of such an approach regarding this thesis lies in the value assigned to the human agent. The customs agent is given a sense of belonging, as the administration counts on him/her to achieve its goals. This feeling is reinforced by the reward attached to the administration's meeting its objectives. Furthermore, being aware that each of his/her moves is being monitored, the customs agent is likely to refrain from engaging in corrupt activities and any other bad practices, and this helps to reduce customs offences to a considerable extent. This is essentially a very efficient way of combatting customs offences. Another outstanding feature of the performance measurement culture is the partnership with economic operators¹¹⁰ which partnership reinforces compliance and institutes a very healthy business climate where every party knows what is expected of it and actually does it. Overall, the country has made tremendous efforts in customs modernisation in response to the WCO's call. The founding principles of this process as advocated by the organisation are well adopted by the administration and reflected in its diverse efforts, although not to the extent one would expect, but definitely to an acceptable level. The country's progress compared to that of France and South Africa is very slow. For this, Cameroon is hereby urged not to sleep on its current achievements as this can tarnish the image it has

107 From the lower-placed official to the management level.

108 See generally 6.2.2.4.3 above and the subsequent sub-headings.

109 Cantens, Raballand and Bilangna 2010 *World Customs Journal* 70; see further Djeuwo 2013 *Revue des Douanes Camerounaises* 30.

110 Discussed at 6.2.2.4.3.2 above.

worked so hard to build. From the above development, a number of recommendations can be made.

7.5 Recommendations

From what has been said above, the following recommendations of general and specific character are therefore made.

7.5.1 As regards to the approaches that work

While performance measurement in Cameroon, besides being a management tool that enables transparency and therefore contributes effectively to tackling bad practices in the administration, France's approach is slightly different. Performance measurement in the latter country is mostly seen as a management dialogue tool and a tool for managing services.¹¹¹ France's performance measurement system focuses on the administration and its operating system, its management approach, as well as its expenditures while neglecting the impact this approach may have in tackling corruption in the administration. Issues of corruption in customs are said not to be very relevant in France.¹¹² Cameroon may copy some aspects of the French customs performance measurement notably the approach of evaluating performance collectively and rewarding employees collectively (i.e. giving them the same amount of bonus), which approach serves best the interests of the administration. Here everyone works towards achieving a common goal, and this definitely helps the administration to achieve more significant results.¹¹³ Cameroon uses the "individualistic" approach,¹¹⁴ and the Director-General personally enters into an agreement with customs officers or other stakeholders and rewards them individually depending on the extent to which they help meet specific targets. While this approach is inclusive and provides individual officers with an opportunity to participate in the achievement of the administration's goals and advance their career when they actually help meet the targets set, it has the challenging effect that in seeking to meet targets for the administration and getting the promised reward (s), the collective vision and

111 See generally 4.2.2.4.1 above.

112 Pascual "measuring Performance" 66.

113 See generally 4.2.2.4.1 above.

114 See specifically in this regard 6.2.2.4.3 above.

the team spirit may be adversely affected. France, on the other hand, may learn from Cameroon how to ensure that issues of bad practices, notably corruption, are simultaneously resolved in the process of enabling better management and dialogue for more efficient services. Although issues of fraud to customs laws and regulations are well catered for in France's performance measurement approach, corruption, in particular, can never be neglected on the basis that it is not common practice in the specific French customs environment. The suggestion that corruption is not relevant to the French customs environment cannot entirely be correct. Why would the country establish a body such as the Central Office to Fight against Corruption, Financial and Tax Offences discussed at 4.2.2.2 if issues of corruption are not relevant to its environment?

France's style of performance measurement is a broad government project involving all government structures, which advances the state's objectives well. This approach makes it possible for all government structures to operate in an environment where they understand each other and where the actions of one administration do not impact in any negative way the actions of the other. Furthermore, the involvement of all administrations in raising the standard of the government as a whole both nationally and internationally is a laudable approach. In Cameroon, there is barely any indication that the performance measurement approach is a state's approach that involves not only customs, but also every other government structure. This points to the fact that Cameroon has to extend the approach to other spheres of government as this enables the state to grow economically and otherwise while operating in an environment of mutual understanding. Furthermore, corruption not being a scourge only in customs, instituting this culture in every other government administration will go a long way in raising Cameroon government employees' ethics standards. This will place the country on a level path for international competitiveness.

The performance measurement or monitoring the execution of customs services well-rooted in France and Cameroon appears as a key approach, if not the ultimate and fundamental approach to tackling customs offences in their diversity and corruption in particular. This is so because performance measurement involves customs

stakeholders from different levels including the management level; brings organisational changes within the administration thereby enhancing governance; makes use of automated procedures to monitor the activities of the administration; and enables the valorisation and building up of the capacities of the customs human resources. This approach stands as the way forward for each customs administration that seeks to grow in today's trading context. South Africa should, therefore, explore the possibility of instituting this culture in its customs modernisation process.

Still, on the performance measurement approach, President Cyril Ramaphosa in his Cabinet announcement on May 29, 2019, emphasised that the members of its cabinet will sign performance agreements through which their performance will be evaluated, both individually and collectively, against specified outcomes. Action will be taken if the expectations are not met. The President put it straightforward in these words: "Their performance – individually and collectively – will be closely monitored against specific outcomes. Where implementation is unsatisfactory, action will be taken."¹¹⁵ This could be the start of a national performance culture not limited to customs, but that is instituted and piloted by the state for its different administrations. This should further not be limited to high management levels. The members of the cabinet will pilot the initiative in their respective ministries for the national involvement of all state representatives, the discipline of all stakeholders and the growth of the economy. In this regard, it is recommended, depending on how this project will to be implemented (collectively and individually), that the South African government considers partnering with France to get insight into the broad government implementation of the performance measurement approach. It could also partner with the Cameroon (customs) government to get further insight into individual approaches to performance measurement. Whichever road the South African government chooses to take in this regard, it can benefit from the French and Cameroonian experiences. Many customs administrations have sent delegations to Cameroon to do in situ investigations to learn about what the performance measurement entails. The WCO itself could assist the South African government in unfolding this project since it has the necessary

115 Ramaphosa 2019 *Statement on the appointment of members of the National Executive* <https://www.gov.za>.

capabilities in the field. Whatever the way forward may be, it should be borne in mind that new cultures take time to take hold and often meet serious resistance. It is advisable that the South African government first studies the feasibility of this project. Based on the unique reality of the specific territory, the government can decide its way forward based on the recommendations of the commission that would have been established in this regard. Judging from the fact that this approach will involve all state branches, it is evident that the South African approach will be similar to the French approach. The Banking Association of South Africa suggests¹¹⁶ that upon signature, the relevant performance agreements should be made public so that the public can hold the incumbent ministers accountable. This suggestion should be taken very serious as this is another efficient way of ensuring good governance and accountable state officers.

Transit operations are one of those customs processes most used by fraudsters to enable the circulation of dangerous and counterfeit products. Cameroon has been able to control these operations through the Nexus GPS system and the system of guarantee¹¹⁷ whereby the person in charge of the goods pays a specific deposit (guarantee) which he or she receives back once he or she has provided proof that the goods cleared for transit purposes were eventually exported. South Africa through Sections 216 (1)(a) and 217 (3)(a) of the CCA subjects the provision of proof that the goods cleared for transit were effectively exported only upon request by the customs authority. The wording of these articles leaves the reader with the impression that no proof will be provided if the customs authority makes no request thereof. It may be advisable to rephrase these articles before the Act comes into effect by making it compulsory for the people in charge of the goods in question to provide proof upon their exportation. The words "if the customs authority requests such proof" in Section 216 (1)(a) of the CCA and "on request by the customs authority" in Section 217 (3)(a) of the CCA should, therefore, be substituted from these Sections as this approach plays a determinant role in the reduction of acts of fraud in transit operations. The

116 Banking Association of South Africa 2019 *Cabinet performance agreements should be made public*
<https://www.iol.co.za>.

117 See generally 6.2.2.3.2 above.

system of guarantee may also be used in the said process if it is not yet the case as the CCA is silent in this regard.

7.5.2 As regards to the effective use of all WCO's existing tools

The WCO communication networks are well structured and said to be in use in France, South Africa and Cameroon. The primary purpose behind their development is to facilitate cooperation between the organisation customs' administrations for better enforcement. However, there is no clear illustration in the three countries processes of how specifically these networks are used. In this respect, it is recommended that each of these states specifies how they interact with these networks and also give a clear indication of whether they utilise the said networks and the extent to which they do so and whether they utilise them, but under different names. This aspect is mentioned because, amongst the many electronic systems used by the three countries to process customs operations, there is hardly any information that expressly mentions the networks developed by the WCO as discussed in 2.2.2.3 above.

7.5.3 Where more effort is still needed

The WTO captures data that show how well signatories' countries are doing with regards to the implementation of its long-awaited *Trade Facilitation Agreement* for the growth of international trade. It has defined different categories that project the current situation on the ground for the signatory states.¹¹⁸ France has a 100% rate of implementation commitment, meaning its standard of involvement in sharpening its customs and international trade environment is very high.¹¹⁹ South Africa has the following data recorded: category A notifications: 90.3% implementation, category B notifications: 9.7% implementation and 0% for category C.¹²⁰ This, in other words, means that its modernisation efforts are laudable, and only a few aspects are still

118 See generally discussion in 5.2.1 above. WTO TFA Database 2019 *Implementation notifications (Categories A, B, C)* <https://www.tfadatabase.org/notifications/implementation>.

119 As of June 2019. See WTO TFA Database 2019 *France Rate of implementation commitments* <https://www.tfadatabase.org/members/france>.

120 As of February 2018. WTO TFA Database 2019 *South Africa Notification Status* <https://www.tfadatabase.org/members/south-africa>.

missing. Even the WCO attests to the tangible progress that South Africa has made.¹²¹ As for Cameroon, 1.7% represents the implementation level for category A notifications, 45.4% for category B notifications and 52.9% for category C notifications.¹²² This means that although well involved in the modernisation of its customs environment, Cameroon still has a huge task ahead to operate freely in the global market. Based on these statistics, it is recommended that the Cameroon customs administration does not rest on its laurels of performance measurement and neglect the other aspects of the overall customs modernisation process. It is further recommended that Cameroon should capitalise on the assistance it has been getting to support its modernisation process and sustain these efforts going forward. In this way, it can reach a point where it is elevated to a fully modernised customs administration like France or reaches the stage where South Africa is at present. Cameroon should strive to build its independence through the assistance it gets to support its customs modernisation project.

The CEMAC countries and the EU customs union should translate their respective common Customs Codes from French into English in order to enhance the understanding of their procedures beyond the sub-regional and regional borders. This may help in attracting more foreign investments, especially for the CEMAC countries which seem to be more in need.

Cameroon should develop an online database that includes all the steps that are in place to curb customs offences, drawing from its legal instruments. The country is often inclined to give only statistics of offences dealt with, without a proper description of the legal basis from which its actions in this regard proceed. France and South Africa are well advanced in this regard as updates regarding their customs legal framework can be found on the respective administrations' site.¹²³ Cameroon should

121 WCO 2017 *WCO successfully facilitates a WTO TFA scoping mission in South Africa* <http://www.wcoomd.org>.

122 For Cameroon, these are statistics as of 10 July 2019. WTO TFA Database 2019 *Cameroon Notification Status* <https://www.tfadatabase.org/members/cameroon>.

123 SARS 2019 *PRIMARY LEGISLATION*
 <<http://www.sars.gov.za/Legal/PrimaryLegislation/Pages/Acts-administered-by-the-Commissioner.aspx>; French Customs Date Unknown *Code des douanes*
<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071570>.

further make available, or at least on the market in hard copies, all the legal sources of its customs work. A customs link entitled "Cameroon Customs Regulations" on the administration's webpage is crucial, and the link should indeed direct the searcher to all of the instruments forming part of its legal framework, and not just be empty links. It is a struggle to access the said instruments both at the country's customs Directorate General and online.

The legal dimension of customs modernisation seems to be neglected in Cameroon compared to France and South Africa. The two latter countries have shown by their relatively recent frameworks¹²⁴ that they not only keep pace with practical developments but also attend to the legal (policies) sphere in this domain on an ongoing basis. Cameroon, on the other hand, makes use of the *CEMAC Customs Code*¹²⁵ which does not bear any indication as to when it was last updated or how often it is so updated. The Cameroon Customs administration is, therefore, more involved in the practical aspects of customs modernisation than the legal aspect. This makes it sometimes difficult to ascertain the legal basis upon which the administration's modernisation efforts proceed. This stance is supported for instance in cases where the administration says it is part of a Convention, but its name is not mentioned on the list of members that have actually ratified the said instrument. The Cameroon Customs administration should, therefore, improve in this respect.

This thesis finds that the legal and practical aspects of customs modernisation are complementary. Practical tools often reflect the implementation of principles contained in laws and regulations or are merely there to fill the gaps of the law. The three countries reasonable efforts in customs modernisation to fight customs offences are sparse. There seems to be in the three countries an unending list of practical modernisation efforts. Although they reflect the broadness of customs work, there should be a proper delineation of work in such a way there is no mixing up of mandates amongst some of the bodies or structures established. It could be simpler for each

124 The *Union Customs Code* and the French *Customs Code* in France; and the *Customs Control Act*, the *Customs Duty Act* and the *Excise Duty Act* in South Africa.

125 Besides the other international and national sources.

country or customs community to define its practical tools to combat customs offences based on the five risk areas as characterised by the WCO Working Group on Commercial Fraud.¹²⁶ This would give more perspective and better visibility into the diverse approaches rather than having an unending list of bodies and tools that are for the most, confusing and the competences sometimes overlapping.

It is clear that the Union's rules supersede national rules and that the former benefit from the principle of direct applicability in member states' territories. Although the enactment of the UCC could be the solution to some problems generated by diverse national legislation within the EU, there is still a concern about what prompts sub-regional groups to seek integration, yet retain differing individual national laws and regulations. Cameroon, as part of the CEMAC, makes use of the *CEMAC Customs Code* as its central piece of legislation besides the international sources and the less authoritative national source. It is easier to understand how the system operates since there is a clear indication that the community's instruments take precedence over national instruments. In the SACU, each country seems to have its own internal framework complemented by the communities' rules. The CEMAC system seems less confusing in this regard as all legal questions in customs matters, besides the international instruments to which each country may adhere, can be found in the one *CEMAC Customs Code*. This is an approach that the SACU's and EU customs' union could consider adopting as this provides absolute clarity in the vast and diverse domain that is customs. This will undoubtedly facilitate regional integration, which is also a fundamental goal of customs modernisation.

France and Cameroon have the same principles of jurisdiction,¹²⁷ which principles involve a variety of courts in customs matters, and this aspect, to some extent, creates confusion regarding courts' competence. South Africa has a more straightforward and less complicated system. The Magistrate Court is vested with general jurisdiction over customs matters in Section 899 of the CCA. Even though this general jurisdiction is

126 See generally 3.2 above and the subsequent sub-headings.

127 Where jurisdiction is founded on the subject-matter jurisdiction (*ratione materiae*) or territorial competence (*ratione loci*).

said¹²⁸ to be for “actions and not appeals”, this, therefore, means that appeals in matters of tariff classification still fall back under the jurisdiction of the High Court. Even so, the South African court’s jurisdiction in customs matters is still less complicated than in France and Cameroon. Territorial diversity is indeed what prompts these different approaches, but it should be remembered that in today’s trading context, celerity and simplicity are the winning approaches.

7.5.4 The need to secure and sustain already acquired benefits

The Cameroon Government should do all in its power to fight the various wars, both in the Northern part of the country against the Islamist sect Boko Haram and in the South-West and North-West regions of the country. These crises are growing out of proportion day by day. Besides the frightening numbers of lives lost in them, there are many implications for the country’s economy. Finding permanent solutions to these crises should be the top priority for the government, as the extent to which these crises escalate will determine the country’s future economic power. No unstable state will maintain a good image for potential investors, and the efforts thus far made for instance to modernise customs regarding infrastructures may be wiped out in the blink of an eye if the country becomes a war zone and the crisis persist and spread. The example of the blocking by Boko Haram of roads essential to international transport speaks volumes in this regard.¹²⁹

7.5.5 Recommendations in brief

Performance measurement in the French and Cameroonian context proceeds from different angles but rests on the same principle of bettering the customs administration (and other administrations involved) and its services. France model neglects the impact such an approach has in curbing corruption and can get some insight in that regard from Cameroon. Cameroon can learn from France how to evaluate performance from a collective point of view and reward the employees collectively. This approach has the advantage of giving the employees a common vision for which they should strive, while advancing the administration’s goals better

128 Colesky and Franzsen 2015 *UPSpace Institutional Repository* 264-265.

129 See generally the discussion under 6.2.2.3.2.1 above.

than the individualistic approach used in Cameroon.

With issues of ethics/integrity becoming more and more important for public administrations, the French style of performance measurement is a broad government project that is not limited to customs but extends to all government structures. In Cameroon there is no indication that the performance measurement approach extends beyond the boundaries of customs. Cameroon should therefore imitate the example of France by instituting this culture in all government bodies as this sets the standard very high for the country and enables better understanding between government bodies.

The founding principles of performance measurement in general portray this culture as a key approach, if not the ultimate and fundamental approach for efficiently tackling customs offences in general and corruption in particular in today's trading context. South Africa should consider adopting this approach in its overall customs modernisation process.

Drawing from the previous recommendation, the culture of performance measurement is indeed imminent in South Africa. President Cyril Ramaphosa in his recent Cabinet announcement in May 2019, spoke about initiating this process. According to the President, his Cabinet members are to sign performance agreements through which they will be evaluated, both individually and collectively as the case may be. Where the set targets are not met, action will be taken accordingly. This approach is more like the French approach. It is therefore recommended that South Africa establishes, where necessary, a partnership with France in order to gain insight as to how the approach of including all government bodies in this process works. South Africa could also get some guidance from Cameroon regarding the individualistic aspect of its customs modernisation steps which have highly impacted the fight against customs offences. These recommended partnerships do not exclude the assistance South Africa can seek from the WCO itself in this regard. Overall, the South African government should first establish a commission to work on the projected reform so that it can unfold the programme based on the commission's findings and this will enable a fast adjustment to the new culture.

The Nexus Cameroon Gps and the system of guarantee is used in Cameroon to prevent the abuse of customs systems by transit operations/operators. The Gps monitors the cargo throughout its journey and the guarantee is a sum of money paid by the person in charge of the goods. The guarantee (a deposit) is paid back once the customs officer is given proof that the good that were in transit have been exported. South Africa through Sections 216 (1)(a) and 217 (3)(a) of the CCA subjects the provision of proof that the goods cleared for transit were effectively exported only upon request by the customs authority. The wording of these sections should be rephrased and the submission of proof of export should be made obligatory. This means that the system of guarantee should also be instituted.

It is recommended that each of countries under study specifies how they interact with the WCO networks and also give a clear indication of whether they utilise the said networks and the extent to which they do so and whether they utilise them, but under different names.

According to the WTO, Cameroon ranks very low compared to other countries involved in the overall trade facilitation efforts despite the many initiatives undertaken by the administration. This points to the fact that the country may have been sleeping on its laurels. It is recommended that Cameroon ensures it is not blinded by its success in unfolding performance measurement. The country should work harder in order to sustain the initiatives that different organisation have already set into motion through funding and capacity building.

The CEMAC countries and the EU customs union should translate their respective common Customs Codes from French into English in order to enhance the understanding of their procedures beyond the sub-regional and regional borders.

Cameroon should develop an online database that includes all the steps that are in place to curb customs offences, drawing from its legal instruments. Cameroon should further make available, or at least on the market in hard copies, all the legal sources of its customs work.

The Cameroon customs administration should enable coherence and uniformity

between the legal instruments governing its activities and the practical steps thereof. This is not always readily ascertainable as access to information is a challenge.

To avoid having a multitude of bodies, units and initiatives which mandates are sometimes overlapping and confusing, it is recommended that each customs administration of the countries under study develop their initiatives to fight customs offences, following the foundation laid by the WCO Working Group on Commercial Fraud through the identification of customs offences per risk area.

The CEMAC countries make use of one customs code for their respective customs dealings. This approach gives proper visibility into how the system in that sub-region functions. The same cannot be said of France and South Africa. It is recommended that the European Union and the SACU member states work towards achieving the same uniformity prevailing in the CEMAC.

In a global trading environment where celerity and simplicity of dispute settlement approaches are required, France and Cameroon should look into enabling less complicated principles of jurisdiction as it is the case in South Africa.

The Cameroon Government should do all in its power to fight the various wars, both in the Northern part of the country against the Islamist sect Boko Haram and in the South-West and North-West regions of the country. The growth of these crisis is already affecting the customs administration activities through roadblocks, and this will only get worse as time goes by. No unstable state will maintain a good image for potential investors, and the efforts thus far made for instance to modernise customs regarding infrastructures may be wiped out in the blink of an eye if the country becomes a war zone and the crisis persist and spread.

7.6 Suggestions for future research

Future research should develop the body of knowledge as regards to the specificity of customs offences and the deep criminal dimension thereof.

A study and compilation of the case laws involving more than one state and dealing specifically with customs-related offences would add value to this field of study especially those showing the use of the WCO legal instruments and tools. The general

trend of an international organisation is to report on the seizure made, but the report on international case law in customs matters specifically is rare. The WCO should consider undertaking work in this regard as this would be an exciting way of finding further, how its instruments on mutual administrative assistance are being used in courts internationally. This would surely add more value to the work already performed by the administration.

Studies should be undertaken that aim at establishing a clear difference between “colonisation” in its proper sense and the work the WCO is currently doing amongst its member states as many believe that it is still a form of colonisation in disguise. This also goes for Economic Partnerships Agreement like the one that links Cameroon to France.¹³⁰

A study should be carried out that evaluates the practical inter-operability of communities' rules and national rules in the specific domain of customs. This, beyond the Monist and Dualist cultures generally and vaguely discussed. Even though this aspect is evident in some legal contexts, the enquiry should be carried further, on a practical level and the advantages and disadvantages of having both national and communities' legal instruments or only communities' instruments applicable to all members for the same processes and procedures should be emphasised.

This thesis mostly focused on a body of already existing legislation and tools. Further investigation into the impact on ground level in the respective customs administrations of the French, South African and Cameroonian systems would offer a better and more detailed understanding of the particularities of these various systems.

7.7 Final conclusion

As stated at the beginning of this thesis, modernisation is a broad concept that covers a multitude of aspects involved in the import and export of goods across borders. Not all the aspects of the modernisation of customs have been referred to in this work, the reason being that this thesis focused mostly on those aspects of the modernisation of customs processes, procedure and policies that have an impact (direct or indirect) on the fight against customs offences. Not all of them actually have the legal

¹³⁰ See generally 6.2.2.2.3 above.

implications sought in this thesis. The primary objective of customs modernisation is to lighten the burden of trading across borders. It is an initiative that seeks to render trading across the border more enjoyable through the fast and relaxed nature of the procedures and rules governing such transactions. The rapid changes taking place in today's trade environment require customs administrations to be proactive and to align their procedures, practices and rules of operations with techniques that make it easy to detect non-compliance and sanction it with sufficient severity to deter future offenders.

There is no doubt that the modernisation of customs regulations and practices is a reality in France, South Africa and Cameroon under the guidance and support of the WCO and its partners; and that these new approaches have enabled the three customs administrations to tackle customs offences more efficiently. Accommodating new ways of approaching customs work is a challenge on its own that requires of the governments involved a full commitment and ongoing monitoring at all possible level. These customs administrations have in their own ways demonstrated the willingness to mend their respective approaches in accordance not only with the WCO's suggestions but also, as a response to the fast-developing trade environment. This is ascertainable by their adoption of the WCO's instruments and the application in their respective territories of the tools and techniques suggested by the organisation. Beyond efficiency for which the founding principles of customs modernisation (drawn from these instruments and tools) advocates, these principles have an undeniable impact on the fight against customs offences. The practical application of the said principles constitutes barriers to customs offending behaviours. Efficiency and effectivity for this study simply meant a fraud-free trade environment or at least one where offences are easily detected and rigorously fought. Since customs offences are as varied as the work of customs itself and because customs offenders are equally transforming their means of operation as trade develops, the primary recommendation for France, South Africa and Cameroon is to continue their respective cooperative works within their communities, Union and beyond. They should also keep sharpening their respective adaptive capacities as this is a burden laid on them all by trade development.

ANNEXURES

ANNEXURE 1: A SKELETON OF THE FRENCH COMPONENT AND DIVISION OF CUSTOMS OFFENCES ACCORDING TO ITS CUSTOMS CODE

Category of offences	Examples of fraudulent acts targeted	Penalties attached	FCC Articles
CONTRAVENTION			
First-class contravention	Any omission or inaccuracy concerning any of the indications that the declarations must contain, any breach of the quality or packing requirements imposed on the importation or exportation.	A fine of € 300 to 3000	410
Second class contravention	Deficits in the quantity of goods placed under a suspensive procedure, surpluses on declared weight, number or measurement; any tricks with the purpose or the result of unduly benefiting its author or a third party of any exemption etc.	A fine between one and two times the amount of the duties and taxes evaded or jeopardised.	411
Third class contravention	Any smuggling and any fact of import or export without a declaration; any false declaration in the case, the value or the origin of the goods imported, exported	Confiscation of the goods in dispute and a fine of €150 to 1 500	412

	or placed under a suspensive procedure; any diversion of non-prohibited goods from their preferred destination.		
Fourth class contravention	Any infringement of the legal and regulatory provisions governing the tax system; hindering the access to the parts or documents on computer support, to their reading or their seizure.	A maximum fine of € 750	413
Fifth class contravention	Refusal of communication of the documents and information requested by the customs officers.	Liable to a fine of € 3700	413bis
OFFENCES			
First-class offences	Smuggling, import and export without a declaration.	Liable to imprisonment for three years, confiscation of the object of fraud, confiscation of means of transport, confiscation of objects used to hide fraud, confiscation of property and assets that are the product direct or indirect offence and a fine of between one and two times the value of the object of fraud.	414

Second class offences	Fraudulent financial transfers or attempt to do so.	Punished by imprisonment for ten years; the confiscation of goods and assets which are the direct or indirect product of the offence and a fine of between one and five times the amount of the offence.	415
Third class offences	Obstruct access to documents or documents on computer media, to their reading or their seizure.	Is liable to a fine equal to € 10 000, or 5% of the rights and taxes evaded or compromised or the value of the object of the fraud when this amount is higher.	416

ANNEXURE 2: THE NORMAL CATEGORISATION OF CUSTOMS OFFENCES AS PRESENTED BY THE CCC

Category of offences	Examples of fraudulent acts targeted	Penalties attached	CCC Articles
CONTRAVENTION			
First-class contravention	All omission and misstatements regarding information that must appear on goods' declarations when the irregularities do not impact on the implementation of rights and prohibitions.	50000 to 200 000 CFAF ¹	397
Second class contravention	Refusal to provide requested documents; All inaccuracies or omission in the presentation of the constituencies of the declaration on value.	500000 to 2000000 CFAF ²	76, 112-115, 399
Third class contravention	A deficit in the number of parcels declared, presented and transported; A deficit in the quantity of goods placed under a suspensive procedure; Surpluses on the weight, the number and the measure declared;	Triple the duties and taxes evaded or compromised	400

1 Approximately 87 to 348 USD.

2 Approximately 870 to 3481 USD.

	All offences compromising the collection of port taxes.		
Fourth class contravention	All false declaration about the species, the value, the origin of imported-exported goods or those placed under a suspensive procedure when a customs or tax duty has been evaded or compromised by the said false declaration; All false declaration in the designation of the real recipient or the real sender.	Value of the goods subject matter of fraud	401
Fifth class contravention	All customs offences infringing against customs laws and regulation that customs are tasked to enforce when the irregularity concerns goods belonging to the category of those that are prohibited at the entrance or the exit and is not explicitly punished by the CCC.	Triple the value of goods	402
OFFENCES			
First-class offences	Smuggling and its derivatives	Fine: double the value of the subject matter of fraud Imprisonment: one to thirty days. Complementary penalties: confiscation of the subject matter of fraud; confiscation of means	Article 403 of the CCC

		of transport; confiscation of the items used to conceal the fraud.	
Second class offences	Smuggling by at least three to six people	Fine: double the value of the subject matter of fraud Imprisonment: three months to one year	404 of the CCC
Third class offences	Smuggling committed either by more than six individuals or by three individuals or more; Counterfeiting.	Fine: quadruple the value of confiscated objects Imprisonment: from six months to three years Complementary penalties: confiscation of the subject matter of fraud; confiscation of means of transport; confiscation of the items used to conceal the fraud.	405

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