



The Financial Advisory and Intermediary Services Act 37 of 2002 regulation of crypto assets and its impact on South Africa's international trade

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Declaration

I, UG Ikpechukwu student number 30678374, declare that the mini dissertation titled **The Financial Advisory and Intermediary Services Act 37 of 2002 Regulation of Crypto Assets and its Impact on South Africa's international trade** is my original work and has not been submitted for examination anywhere before. This mini dissertation is submitted for examination to NWU in partial requirement for the degree LLM in International Trade Law.

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Dedication

However unorthodox, I dedicate this project to myself. It is a manifestation of my resilience and dedication to honouring my dreams.

ABSTRACT

In October 2022, the Financial Sector Conduct Authority (FSCA) published a General Notice wherein crypto assets were declared as financial products in terms of section 1 of the *Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act)*. This study examines how the regulation of crypto assets as financial products under the *FAIS Act* impacts international trade in South Africa.

It commences by exploring the nature of crypto assets and distinguishing them from fiat currency as some crypto assets can be currencies. It establishes their classification as decentralised convertible virtual currencies. This means that crypto assets have no centralised authority, like a central bank, which issues them. Instead, they operate on a decentralised network, blockchain.

The study further examines the development of international trade and the factors that influence it, focusing, especially on, the theory of comparative advantage. This theory claims that benefit from trading with each other by specialising in the production of a certain good or service at a lower cost. This leads to the examination of the role currency plays in international trade transactions. It establishes that the US Dollar is the dominant currency used in international trade transactions and that there is a global call for the use of an alternative currency for international trade transactions.

This study contends that certain crypto assets in the form of cryptocurrencies are a viable alternative to the US Dollar that could be used as the dominant currency in international trade transactions. It further asserts that crypto assets offer potential solutions to the many challenges of international trade such as high transaction costs. The use of crypto assets as a medium of exchange in international trade transactions eliminates the need for intermediaries thereby making the transaction cheaper and faster.

Finally, this study analyses the *FAIS Act* as a regulatory framework for crypto assets in South Africa. It contends that this regulation classifies crypto assets as derivative financial products. It further explores how this regulation impacts international trade. It concludes that the regulation of crypto assets as financial products positively impacts

international trade in South Africa. Crypto assets offer a much cheaper and faster alternative to fiat currency in international trade transactions. This regulation balances risk management and innovation thereby fostering an environment in which crypto assets can positively contribute to the development and modernization of international trade in South Africa.

Keywords

Crypto assets, *Financial Advisory and Intermediary Services Act*, regulation, international trade

TABLE OF CONTENTS

DECLARATION	I
ACKNOWLEDGEMENTS	II
DEDICATION	III
ABSTRACT	IV
KEYWORDS	VI
LIST OF ABBREVIATIONS	IX
LIST OF FIGURES	XI
1. Chapter 1 Introduction	1
1.1 Title	1
1.2 Research Problem	1
1.2.1 Background	1
1.2.2 Motivation and problem statement	2
1.2.3 Research question	11
1.2.4 Research aims and objectives	12
1.3 Research methods	13
1.4 Framework of study	13
1.5 Conclusion	13
2 Chapter 2 Nature of crypto assets	15
2.1 Introduction	15
2.2 The classification of crypto assets	15
2.3 The creation and use of crypto assets	19
2.4 The difference between crypto assets and fiat currency	22
2.5 Conclusion	26
3 Chapter 3 The use of crypto assets in international trade	27

3.1	Introduction	27
3.2	Understanding international trade	28
3.3	Currency of exchange in international trade transactions	32
3.4	Crypto assets as a currency of exchange in international trade transactions.....	35
3.5	Conclusion	39
4	Chapter 4 The regulation of crypto assets as financial products under the <i>FAIS Act</i>.....	41
4.1	Introduction	41
4.2	Crypto assets as financial products	41
4.3	The authorisation of financial products and crypto asset service providers in terms of <i>FAIS Act</i>	45
4.4	<i>Risk protection under FAIS Act regarding crypto assets.....</i>	49
4.5	Regulatory risks	54
4.6	Conclusion	57
5	Chapter 5 Conclusion	59
5.1	The impact of FSA's regulation of crypto assets on international trade in South Africa	59
5.2	Recommendations	61
	Bibliography	63

LIST OF ABBREVIATIONS

AJBE	Athens Journal of Business and Economics
BJPIR	British Journal of Politics and International Relations
CAR WG	Crypto Assets Regulatory Working Group
CCVC	Centralised Convertible Virtual Currencies
CVC	Convertible Virtual Currencies
CJE	Canadian Journal of Economics
DCVC	Decentralised Convertible Virtual Currencies
De Jure	De Jure Law Journal
EFM	European Financial Management
<i>FAIS Act</i>	Financial Advisory and Intermediary Services Act 37 of 2002
FATF	Financial Action Task Force
FSCA	Financial Sector Conduct Authority
FSP	Financial Services Provider
GATT	General Agreement on Tariffs and Trade
IFWG	Intergovernmental Fintech Working Group
IJSER	International Journal of Scientific and Engineering Research
JABA	Journal of Applied Business and Economics
JFC	Journal of Financial Crime
JIFMIM	Journal of International Financial Markets, Institutions and Money

MPRA	Munich Personal RePEc Archive
NAUJILJ	Nnamdi Azikiwe University Journal of International Law and Jurisprudence
NCVC	Non-convertible Virtual Currencies
NFT	Non-Fungible Token
SARB	South African Reserve Bank
SSRN	Social Science Electronic Network Journal
PER	Potchefstroom Electronic Law Journal

LIST OF FIGURES

Figure 1: Classification of virtual currencies 17

CHAPTER 1 INTRODUCTION

1.1 Title

The *Financial Advisory and Intermediary Services Act 37 of 2002* regulation of crypto assets and its impact on South Africa's international trade

1.2 Research Problem

1.2.1 Background

In 1983, an American cryptographer, David Chaum, published a conference paper outlining the concept of cryptographic electronic money. Chaum described and explained the use of a decentralised currency that is used in untraceable transactions.¹ It proposed a system that would prevent third parties from determining the payee, time, or amount of payment.² The system would also allow individuals to provide proof of payment, determine the identity of the payee under exceptional circumstances, and would have the ability to stop the use of payments reported as stolen.³ Based on his paper, Chaum developed Digicash in 1995.⁴ Digicash was a prototype-crypto asset that required the use of software to withdraw funds from banks as well as required specific encrypted keys before a transaction could occur.⁵ Digicash, however, relied on centralised entities such as banks, which meant that banks needed to adopt Digicash technology.⁶ It is this exact reason that led to its ultimate failure. Chaum's Digicash innovation did not convince banks, which led to the rejection of the technology.⁷

In 2008, Satoshi Nakamoto (a pseudonym) built on Chaum's concept and created the first crypto asset known as Bitcoin.⁸ Nakamoto published a paper titled "Bitcoin: A Peer-to-Peer Electronic Cash System".⁹ This paper proposed a system for creating a

¹ Chaum "Blind Signatures for Untraceable Payments" 199.

² Chaum "Blind Signatures for Untraceable Payments" 199.

³ Chaum "Blind Signatures for Untraceable Payments" 200.

⁴ Shust and Dostov 2014 *JFC* 250.

⁵ Shust and Dostov 2014 *JFC* 252.

⁶ Shust and Dostov 2014 *JFC* 254.

⁷ Shust and Dostov 2014 *JFC* 254.

⁸ Shust and Dostov 2014 *JFC* 256.

⁹ Shust and Dostov 2014 *JFC* 256.

digital currency that, unlike Digicash, did not rely on any third party to facilitate transactions.¹⁰ The global financial crisis of 2008 catalysed the creation of Bitcoin.¹¹ Due to the crisis, many companies were bankrupted which led not only to massive job losses but a loss of confidence in the financial system too.¹² The lack of trust in the financial system led to a growing need for different approaches to financial payment methods.¹³ This resulted in the development of technological innovations aimed at facilitating peer-to-peer commerce, financial product individualization, and flexibility in financial methods.¹⁴

The creation of Bitcoin offered alternative financial methods for payment and the storage of value to fiat currency-based systems.¹⁵ Since its creation over five thousand forms of crypto assets have been created of which Ethereum and Tether, in addition to Bitcoin, are but two of many crypto assets currently in use.¹⁶ Each of these crypto assets is unique. Their use continues to grow because, unlike fiat currency, they transcend national geographic legal boundaries and are not restricted to just one jurisdiction.¹⁷

1.2.2 Motivation and Problem Statement

Crypto assets have made great strides in the financial sector as a viable alternative to traditional currencies and they have had a significant impact on how international trade is conducted.¹⁸ Crypto assets can be used as a medium of exchange.¹⁹ This is beneficial to buyers and sellers because the transactions are instantaneous.²⁰ Traditional methods of payment used in international trade transactions can take weeks to

10 Shust and Dostov 2014 *JFC* 257.
 11 Ukwueze 2021 Potchefstroom Electronic Law Journal (*PER*) 6.
 12 Ukwueze 2021 *PER* 6.
 13 Ukwueze 2021 *PER* 6
 14 Ukwueze 2021 *PER* 6.
 15 Ukwueze 2021 *PER* 6.
 16 Ukwueze 2021 *PER* 6.
 17 Ukwueze 2021 *PER* 6.
 18 The Baltic Times 2023
https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.
 19 The Baltic Times 2023
https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.
 20 The Baltic Times 2023
https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

process.²¹ Therefore the use of crypto assets as a medium of exchange in international trade transactions makes the transactions faster.²² Additionally, the use of crypto assets in international trade offers a level of security that traditional methods lack.²³ This is because crypto asset transactions use blockchain technology which is highly secure and almost temper-proof.²⁴ Using crypto assets in international trade transactions also eliminates the exposure to currency fluctuations which affect the value of the transaction.²⁵

Despite the progress crypto assets have made and the benefits they have for international trade, they remain unregulated and the lack of regulation surrounding crypto assets creates uncertainty among buyers and sellers.²⁶ For a long time, crypto assets remained unregulated in South Africa. However, this did not mean that people in South Africa were not using them. Despite being unregulated, the trade and use of crypto assets became increasingly popular in South Africa and across the globe.²⁷ As of 28 July 2023, the total global market capitalisation of crypto assets is estimated to be USD 1.18 trillion.²⁸ South Africa is estimated to have over 60 crypto asset trading platforms with Binance, VALR, Coinbase, and Luno being rated as some of the best trading platforms.²⁹ Luno’s manager for South Africa, Christo de Wit,³⁰ stated that an estimated 70% of digital currencies on their platform have been traded in South Africa. He also confirmed that in the 10 years of Luno’s existence, a total of R655 billion in

21 The Baltic Times 2023 https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

22 The Baltic Times 2023 https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

23 The Baltic Times 2023 https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

24 The Baltic Times 2023 https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

25 The Baltic Times 2023 https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

26 The Baltic Times 2023 https://www.baltictimes.com/cryptocurrency_and_its_role_in_international_trade/.

27 Ukwueze 2021 *PER* 2.

28 Maheshwari *Forbes Advisor* 2023 <https://www.forbes.com/advisor/in/investing/cryptocurrency/why-is-crypto-going-up/>.

29 Corva *Finder* 2023 <https://www.finder.com/cryptocurrency/exchanges-south-africa/>; Changole *Bloomberg* 2024 <https://www.bloomberg.com/news/articles/2024-03-13/south-africa-poised-to-license-60-crypto-platforms-by-month-end>.

30 Brederode *News24* 2023 <https://www.news24.com/news24/tech-and-trends/news/sas-crypto-craze-hundreds-of-billions-of-rands-worth-of-digital-currency-have-been-traded-20230820>.

crypto assets had been traded in South Africa.³¹ In May 2023 Binance reported a 51.1% increase in active users compared to the previous year.³² They also witnessed a 58% yearly increase in new registrations for the past two years.³³ According to the Global Digital Overview, the percentage of internet users in South Africa who own crypto assets is almost double that of the global average.³⁴ The Global Digital Overview reported that as of January 2022, 19.4% of internet users in South Africa own crypto assets, which is almost double the global average of 10.2% measured across 50 countries including Nigeria and Kenya.³⁵

Until October 2022, South Africa had no legislation regulating the use and trade of crypto assets.³⁶ The non-regulation of crypto assets has, among other problems, resulted in some concerns over consumer risk exposure and protection.³⁷ Consumers invest in these highly volatile products or services under the banner of crypto assets without fully understanding them.³⁸ This often results in consumers falling prey to scams purporting to relate to crypto assets.³⁹ The Stellenbosch-based Mirror Trading International scheme is an example of fraud that presented itself as a bitcoin-trading scheme.⁴⁰ This scheme received hundreds of millions of Rand in deposits from

³¹ Brederode *News24* 2023 <https://www.news24.com/news24/tech-and-trends/news/sas-crypto-craze-hundreds-of-billions-of-rands-worth-of-digital-currency-have-been-traded-20230820>.

³² Brederode *News24* 2023 <https://www.news24.com/news24/tech-and-trends/news/sas-crypto-craze-hundreds-of-billions-of-rands-worth-of-digital-currency-have-been-traded-20230820>.

³³ Brederode *News24* 2023 <https://www.news24.com/news24/tech-and-trends/news/sas-crypto-craze-hundreds-of-billions-of-rands-worth-of-digital-currency-have-been-traded-20230820>.

³⁴ Arc Solutions 2022 <https://www.arc-solutions.global/crypto-assets-in-south-africa/#:~:text=The%20Digital%202022%3A%20Global%20Digital,measured%20across%2050%20countries%20worldwide.>

³⁵ Arc Solutions 2022 <https://www.arc-solutions.global/crypto-assets-in-south-africa/#:~:text=The%20Digital%202022%3A%20Global%20Digital,measured%20across%2050%20countries%20worldwide.>

³⁶ Reg 2 in GN 1350 of October 2022.

³⁷ Intergovernmental Fintech Working Group (IFWG) 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

³⁸ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

³⁹ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁴⁰ Cronje *News24* <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>. Also see Techcentral 2022 <https://techcentral.co.za/crypto-scams-on-the-rise-in-south-africa-how-to-protect-yourself/>.

unsuspecting investors with the promise of lavish returns.⁴¹ It even offered commissions to investors who recruited new members.⁴² It is noteworthy that Mirror Trading International was not a registered financial service provider (hereafter referred to as FSP) in terms of the *Financial Advisory and Intermediary Services Act*⁴³ (hereafter referred to as *FAIS Act*). Mirror Trading used crypto assets gambling services as a money laundering and cash-out mechanism.⁴⁴ The scheme imploded in December 2020 after its offices were raided by authorities and it stopped paying out funds to its members.⁴⁵ It was even named the largest crypto scam of 2020 by Chainalysis (a data analysis firm).⁴⁶ The scheme made USD 589 million in crypto assets by receiving an estimate of a half million deposits.⁴⁷

Another concern with using crypto assets is their use for illicit activities such as tax evasion, money laundering, and financing terrorism.⁴⁸ Thus, in 2019, the Financial Action Task Force (FATF) issued revised standards that required all jurisdictions to regulate crypto assets including crypto asset service providers for money laundering and combating the financing of terrorism.⁴⁹ There is also concern over the potential

⁴¹ Cronje *News24* <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>. Also see Techcentral 2022 <https://techcentral.co.za/crypto-scams-on-the-rise-in-south-africa-how-to-protect-yourself/>.

⁴² Cronje *News24* <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>.

⁴³ *Financial Advisory and Intermediary Services Act* 37 of 2002 (hereafter referred to as the *FAIS Act*).

⁴⁴ Cronje *News24* <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>.

⁴⁵ Cronje *News24* 2021 <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>.

⁴⁶ Cronje *News24* 2021 <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>.

⁴⁷ Cronje *News24* 2021 <https://www.news24.com/fin24/economy/stellenbosch-headquartered-mti-named-largest-global-crypto-scam-of-2020-by-data-firm-20210215>. Also see Reuters 2023 <https://www.reuters.com/legal/us-court-orders-south-african-firms-ceo-pay-34-bln-bitcoin-fraud-2023-04-27/>

⁴⁸ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6; It is important to note that FATF guidelines are only applicable to its 39 member countries and this sets international standards because more than 200 other countries have committed to implement FATF's standards.

⁴⁹ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

long-term effect crypto assets may have on financial stability as they create parallel payment methods.⁵⁰

Therefore, with the use of and trade in crypto assets increasing, countries are faced with the challenge of regulating them.⁵¹ As a result, regulating authorities have approached this challenge in one of two ways. They either equate crypto assets to already existing objects of legal regulation such as non-documentary securities, foreign currency, or commodities.⁵² Australia followed this approach, as it does not have new specific legislation that regulates crypto assets. Instead, existing laws have been confirmed to apply to crypto assets.⁵³ An example of these laws will be the financial services regime which regulates activities of crypto assets relating to financial products in terms of the *Corporations Act 2001*.⁵⁴ South Africa also followed this first approach as will be demonstrated in this study. Alternatively, some regulating authorities introduce the concept of crypto assets into legislation and recognise them as fundamentally new objects, subsequently creating crypto asset legislation from the beginning.⁵⁵ El Salvador has used this approach to regulating cryptocurrencies with the adoption of a *Digital Securities Bill* which recognises Bitcoin as a legal tender.⁵⁶

Crypto assets are multi-faceted because they can serve different functions and purposes.⁵⁷ As a result, regulators have to consider the impact the regulation of crypto assets will have on existing legislation.⁵⁸ Consequently, crypto assets may be defined in multiple different ways which means that there must be different legislation and

⁵⁰ IFWG
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁵¹ Bolotaeva "The Legal Nature of Cryptocurrency" 2.

⁵² Bolotaeva "The Legal Nature of Cryptocurrency" 2.

⁵³ Launder and Rogers 2022 <https://www.landars.com.au/legal-insights-news/whats-next-for-cryptocurrency-regulation-in-australia-2023>.

⁵⁴ Launder and Rogers 2022 <https://www.landars.com.au/legal-insights-news/whats-next-for-cryptocurrency-regulation-in-australia-2023>.

⁵⁵ Bolotaeva "The Legal Nature of Cryptocurrency" 2.

⁵⁶ Bolotaeva "The Legal Nature of Cryptocurrency" 2.

⁵⁷ IFWG 2020
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁵⁸ IFWG 2020
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

regulations for each definition of a crypto asset.⁵⁹ They also combine multiple functions that transcend different financial sector laws, hence regulating them requires a holistic and coordinated approach.⁶⁰

In 2020 the Crypto Assets Regulatory Working Group (CAR WG), under the umbrella of the Intergovernmental Fintech Working Group (IFWG), published a position paper in which it made a variety of recommendations relating to the regulation of crypto assets.⁶¹ The IFWG reiterated its stance that crypto assets may perform some of the functions of currency and legal tender, but they are not currency nor are they legal tender.⁶² The IFWG believed that currency should, firstly, be a store of value, in that it should retain its value over some time without depreciating.⁶³ Even though crypto assets perform this function they are volatile, and their value often fluctuates making them unable to retain their value over long periods without depreciating.⁶⁴ For example, the annual volatility of bitcoin was between 70% and 80% which is higher than the annual volatility of other commodities and stocks.⁶⁵ In 2021 alone, bitcoin had an annual volatility of more than 100%. It was valued at 1 bitcoin to 30 000 USD in January 2021, it skyrocketed to 1 bitcoin to 60 000 USD by April of the same year and by June 2021 it was back at 1 bitcoin to 30 000 USD.⁶⁶

⁵⁹ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁶⁰ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁶¹ Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

⁶² IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁶³ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

⁶⁴ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

⁶⁵ Forbes 2024 <https://www.forbes.com/advisor/in/investing/cryptocurrency/bitcoin-price-history-chart/>.

⁶⁶ Forbes 2024 <https://www.forbes.com/advisor/in/investing/cryptocurrency/bitcoin-price-history-chart/>. As of November 2024, the value is 1 bitcoin to 93 756.33 USD that's R 1 688 514.

Secondly, a currency should be a unit of account, set by the government, which is used to value goods and services.⁶⁷ Crypto assets fail to meet this criterion because they are not accepted as a measure of value.⁶⁸ Thirdly, the currency should have general acceptance.⁶⁹ Even though crypto assets have become popular, they are still far from having general acceptance because many people still do not essentially understand what they are and what they do.⁷⁰ Lastly, currency should be a medium of exchange.⁷¹ Crypto assets do perform this function; however, it is not effective because they are not accepted for a large number of goods and services.⁷² It is for these reasons that the IFWG, in this report, deliberately referred to crypto assets and not cryptocurrency.⁷³

In the early 1990s, there was an increase in the complexities and risks associated with emerging modern financial products.⁷⁴ The financial services sector was expanding and with this expansion came loopholes for malpractice by financial service providers.⁷⁵ This created a need for a stronger regulatory framework for the financial services sector.⁷⁶ In 1993 the Ministry of Finance began investigating regulatory frameworks for the financial services industry.⁷⁷ The Ministry of Finance sought to find a regulatory framework that would promote innovation in the financial services sector by ensuring

⁶⁷ Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

⁶⁸ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

⁶⁹ Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

⁷⁰ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

⁷¹ Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

⁷² Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

⁷³ Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

⁷⁴ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

⁷⁵ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

⁷⁶ The Bank Association of South Africa 2021 <https://www.banking.org.za/consumer-information/consumer-information-legislation/financial-advisory-and-intermediary-services-act>.

⁷⁷ The Bank Association of South Africa 2021 <https://www.banking.org.za/consumer-information/consumer-information-legislation/financial-advisory-and-intermediary-services-act>.

that financial service providers met professional competency standards and offered consumers protection from the malpractice of financial service providers.⁷⁸

Thus, in 2002 the *FAIS Act* was enacted as part of a regulatory statute of the South African financial services sector.⁷⁹ The main purpose of the *FAIS Act* includes consumer protection, regulation of services and market stability and confidence.⁸⁰ By ensuring that financial service providers are licenced, the *FAIS Act* provides a regulatory framework for industry practices ensuring that financial services providers meet specific competency and integrity standards thereby protecting consumers.⁸¹ It also provides consumers with dispute resolution mechanisms with the establishment of the FAIS Ombud.⁸² These regulations instil confidence in the consumer and in turn, stabilise the market.⁸³

Section 1(h) of the *FAIS Act* provides that the registrar, after consultation with the Advisory Committee, may by notice in a gazette declare any other product to be a financial product in terms of the *FAIS Act*. The product so declared should however be similar to any financial product referred to in section 1(a) to (g) of the *FAIS Act*.⁸⁴ After some deliberations based on the IFWG recommendations, the FSCA published a General Notice on the 19th of October 2022 wherein crypto assets were declared as financial products in terms of section 1 of the *FAIS Act*.⁸⁵ The declaration defined a crypto asset as:

A digital representation of value that-

(a) is not issued by a central bank, but is capable of being traded, transferred, or stored electronically by natural and legal persons for payment, investment and other forms of utility;

⁷⁸ The Bank Association of South Africa 2021 <https://www.banking.org.za/consumer-information/consumer-information-legislation/financial-advisory-and-intermediary-services-act>.

⁷⁹ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

⁸⁰ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

⁸¹ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

⁸² The Bank Association of South Africa 2021 <https://www.banking.org.za/consumer-information/consumer-information-legislation/financial-advisory-and-intermediary-services-act>.

⁸³ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

⁸⁴ S 1 of the *FAIS Act*.

⁸⁵ GN 1350 of 2022 in GG 47334 of 19 October 2022; Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>;

(b) applies cryptographic techniques; and

(c) using distributed ledger technology.⁸⁶

With the publishing of the general notice, crypto assets are now equated to already existing financial products, such as securities, long-term or short-term insurance contracts, benefits in a pension fund, and a foreign currency-dominated instrument. The general notice applies to any person, who as a regular feature of their business, renders financial services (as defined in section 1 of the *FAIS Act*) concerning crypto assets.⁸⁷ It provides that such a person must either be authorised under section 8 of the *FAIS Act* as an FSP or in terms of section 13 of the *FAIS Act* be appointed as a representative of an authorised FSP.⁸⁸ Additionally, such a person needs to comply with the requirements of the *FAIS Act* and its subordinate legislation.⁸⁹ This general notice also provides for a licensing regime for crypto asset service providers; that they must comply with section 8 of the Determination of Fit and Proper Requirements.⁹⁰

The IFWG, in its Position Paper, stated that its objectives were to achieve regulatory and legal certainty, most appropriately and responsibly, with the regulation of crypto assets.⁹¹ It is therefore important to evaluate the FSA's general notice, on crypto assets, to ascertain whether it meets these objectives as set in the Position Paper, as, at face value, it appears that crypto assets are now regulated in the same manner as other financial products. Because crypto assets are now regulated as financial

⁸⁶ Reg 2 in GN 1350 of October 2022.

⁸⁷ FSCA 2023
[https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20\(FAIS\).pdf](https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20(FAIS).pdf).

⁸⁸ FSCA 2023
[https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20\(FAIS\).pdf](https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20(FAIS).pdf).

⁸⁹ FSCA 2023
[https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20\(FAIS\).pdf](https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20(FAIS).pdf).

⁹⁰ FSCA 2023
[https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20\(FAIS\).pdf](https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2016%20of%202023%20(FAIS).pdf).

⁹¹ IFWG, CAR WG 2020
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf 2.

products, it can be assumed that crypto asset service providers will be regulated in the same manner as other financial service providers.

This raises the question of whether buyers and sellers using crypto assets to conclude their international trade transactions need to be authorised as financial service providers in terms of the *FAIS Act* or whether they can outsource the services to other authorised financial services providers to conclude their transactions. Both these instances need to be evaluated to establish how each of them will affect international trade in South Africa. A clear understanding of what crypto assets are also needed as it lays down the foundation for understanding what crypto assets as financial products are. Another of the IFWG's concerns with regulating crypto assets was the protection of consumers.⁹²

Therefore, to address the problem, the risk protection offered to buyers and sellers (as they are essentially consumers of crypto assets) by the FSCA's regulation needs to be examined.

1.2.3 Research Question

To what extent does the *FAIS Act's* regulation impact the use of crypto assets in South African international trade transactions?

1.2.4 Research aims and objectives

With the problem statement and proposed research question in mind, the following aim and main research objective are proposed. The sub-objectives will be used in conjunction with the research question and the main objective to guide the research for each chapter.

⁹² IFWG 2020
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 2.

1.2.4.1 Aims

The principal aim of this study is to assess the legislation regulating crypto assets as financial products and the effect it has on the South African international trade sector.

1.2.4.2 Objectives

The main objective of this study is to explore whether regulating crypto assets, as financial products, is a workable option to be used as a medium of exchange for international trade in South Africa.

To address the main objective as well as the research question, the following sub-objectives will be used. Each sub-objective will guide the research for a specific chapter of this study.

- Establish what crypto assets are by considering their characteristics and comparing them to fiat currency.
- Analyse the definition of a financial product, and how crypto assets, bearing in mind their characteristics as discussed, fit into this definition.
- Identify the role of crypto assets in international trade.
- Examine the authorisation of crypto asset service providers under the *FAIS Act*.
- Establish the risk protection offered to buyers and sellers by the FSCA's regulation.
- Examine the regulatory challenges of crypto assets in South Africa and the effects of these challenges on international trade.

1.3 Research methods

The methodological approach to be followed will be that of document analysis. Existing documents such as legislation, regulations, scholarly work, and others, will be scrutinised and analysed to ascertain how the *FAIS Act's* regulation impacts the use of crypto assets in South African international trade transactions.

The reference style adopted in this study will be that of the Law Faculty of North-West University.

1.4 Framework (structure) of study

Chapter 1 is an introduction to the study. The chapter outlines the research problem, definition of the research question, motivation of the study, research approach of the dissertation, limitations and key assumptions and contribution to be made by research. It also provides background/ context to research.

Chapter 2 The chapter gives the perspective and sets parameters within which the research problem and research questions are investigated. More importantly, an overview of all concepts and theories applied in the study is given in this chapter. It will thus establish what crypto assets are and compare them to fiat currency.

Chapter 3 will identify the uses of crypto assets in international trade, especially as a medium of exchange.

Chapter 4 will provide an in-depth investigation into the authorisation of crypto assets as financial products in terms of the *FAIS Act* and the authorisation of crypto asset service providers. It will also examine the risk protection offered to buyers and sellers by the FSCA's regulation as well as the challenges that are still not addressed by this regulation. The chapter further outlines the research findings but more importantly discusses the findings and all other factors thrown up by the study as it progressed to align all the recommendations and conclusions to be reached.

Chapter 5 emphasizes the results obtained, and the contribution made by the results and makes suggestions for further research in this area.

1.5 Conclusion

The increase in the use and trade of crypto assets has prompted the international community to regulate the new phenomenon of crypto assets. As such regulation is imperative to address the risks associated with crypto assets. South Africa took a step

by regulating crypto assets as financial products in terms of the *FAIS Act*. This study seeks to establish the impact the FSCA's regulation of crypto assets has on South Africa's international trade and if such regulation is a workable option for international trade.

This chapter briefly introduced crypto assets and the regulatory approach South Africa has taken regarding crypto assets. Chapter 2 will provide a detailed discussion of the nature of crypto assets by analysing their characteristics and comparing them to fiat currencies.

CHAPTER 2 THE NATURE OF CRYPTO ASSETS

2.1 Introduction

Advancements in encryption and network technologies are transforming how people assess trade and conduct commercial transactions.⁹³ Global statistics show a consistent increase in the use and trade of crypto assets and other virtual currencies.⁹⁴ This demonstrates the transformation being ushered in by encryption and network technologies, raising the issue of understanding the essence of crypto assets.⁹⁵

To understand the impact the *FAIS Act's* regulation has on the use of crypto assets in South African international trade transactions, we must first understand what crypto assets are. This chapter defines crypto assets by considering their characteristics and comparing them to fiat currency. This lays down the foundation for understanding crypto assets and how they work, which is the basis for further understanding the role of crypto assets in international trade.

2.2 The classification of crypto assets

Crypto assets are a subset of virtual currencies, and to understand what crypto assets are, it is necessary to understand what virtual currencies are. Due to their novelty, it has been challenging for scholars to propose a universally accepted definition for virtual currencies.⁹⁶ However, as is discussed in the following paragraphs, their core features or dimensions can be defined as falling into the broader category of digital.⁹⁷ In 2015, the Financial Action Task Force (FATF) linked the meaning of virtual currencies to that of digital currency and e-money.⁹⁸ It defined digital currency as:

⁹³ Abboushi 2017 *Journal of Applied Business and Economics (JABA)* 10.

⁹⁴ Ukwueze 2021 *PER* 2.

⁹⁵ Ukwueze 2021 *PER* 2.

⁹⁶ Abboushi 2017 *JABA* 10.

⁹⁷ Abboushi 2017 *JABA* 10.

⁹⁸ FATF 2015 <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Guidance-rba-virtual-currencies.html>.

A digital representation of either virtual currency (non-fiat) or e-money (fiat) and thus is often used interchangeably with the term virtual currency.⁹⁹

He *et al*¹⁰⁰ concluded that a virtual asset, based on its core features and dimensions, is a digital representation of value, created and issued by non-governmental developers, and is denominated in its systematic unit of account. It can be used for various purposes because it is stored, accessed, and transacted through designated software electronically.¹⁰¹ There exist two types of virtual currencies; non-convertible virtual currencies (hereafter referred to as NCVCs) and convertible virtual currencies (hereafter referred to as CVCs).¹⁰²

NCVCs are specific to self-contained virtual domains such as multiple-player online games.¹⁰³ The exchange of NCVCs with fiat currency and their use as a method of payment outside of the virtual domain is significantly restricted.¹⁰⁴ This restriction occurs because they have no links to the real economy as they cannot be exchanged for fiat currency.¹⁰⁵ Even though some NCVCs can be purchased with fiat currency at specified exchange rates, it is important to note that they cannot be converted back to the original fiat currency they were purchased in.¹⁰⁶ NCVCs are centralised as they are issued by a single administrating authority. For example, massively multiplayer online role-playing games such as World of Warcraft.¹⁰⁷ In World of Warcraft, players control virtual characters whose progression is driven by a quest-based system.¹⁰⁸ Players complete quests and receive rewards in the form of the in-game currency known as WoW gold.¹⁰⁹ Alternatively, players can use fiat currency to purchase WoW gold.¹¹⁰ This gold can be used to buy items within the game's fantasy world but holds

⁹⁹ FATF 2015 <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Guidance-rba-virtual-currencies.html>.

¹⁰⁰ He *et al* *IMF Virtual Currencies and Beyond* 7.

¹⁰¹ He *et al* *IMF Virtual Currencies and Beyond* 7.

¹⁰² He *et al* *IMF Virtual Currencies and Beyond* 8.

¹⁰³ Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.

¹⁰⁴ He *et al* *IMF Virtual Currencies and Beyond* 8.

¹⁰⁵ Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.

¹⁰⁶ Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.

¹⁰⁷ Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.

¹⁰⁸ Tosoni *The composition of virtual currencies and the prospects of a comprehensive regulatory framework* 9.

¹⁰⁹ Tosoni *The composition of virtual currencies and the prospects of a comprehensive regulatory framework* 9.

¹¹⁰ Tosoni *The composition of virtual currencies and the prospects of a comprehensive regulatory framework* 9.

no value outside of the game in real life and as such it cannot be converted into fiat currency used in the real world.¹¹¹

Conversely, to NCVCs, CVCs can be exchanged for fiat currency at either a fixed or floating exchange rate as they have equivalent value in fiat currency.¹¹² This can be done in several ways. Firstly, a crypto asset exchange platform such as Luno and Binance can be used.¹¹³ As these platforms enable their users to convert crypto assets into fiat currency.¹¹⁴ If a person holds a Bitcoin crypto asset, they can use a Bitcoin ATM to convert their Bitcoin into fiat currency.¹¹⁵ Lastly, a person can sell their crypto assets for fiat currency, thereby converting them into fiat currency.¹¹⁶ Therefore, converse to NCVCs, CVCs have greater links to the real economy.¹¹⁷ CVCs can either be centralised or decentralised.¹¹⁸

Convertible centralised virtual currencies (hereafter referred to as CCVCs) also have a single administrating authority that issues them and determines their regulatory rules.¹¹⁹ Convertible decentralised virtual currencies (hereafter referred to as CDVCs) do not have an administrating authority as they are governed by a framework of internal protocols.¹²⁰ These internal protocols are complex maths-based peer-to-peer technological systems that are used by network users, known as miners, to facilitate the creation, authentication and distribution of these CDVCs.¹²¹ Crypto assets are classified as CDVCs because they are decentralised and have no single administrating

¹¹¹ Tosoni *The composition of virtual currencies and the prospects of a comprehensive regulatory framework* 9.

¹¹² Braga *A Regulatory Approach to Crypto-Currency in South Africa* 14.

¹¹³ The Economic Times 2024 <https://m.economictimes.com/markets/cryptocurrency/a-step-by-step-guide-how-to-convert-bitcoin-crypto-to-cash/>.

¹¹⁴ The Economic Times 2024 <https://m.economictimes.com/markets/cryptocurrency/a-step-by-step-guide-how-to-convert-bitcoin-crypto-to-cash/>.

¹¹⁵ The Economic Times 2024 <https://m.economictimes.com/markets/cryptocurrency/a-step-by-step-guide-how-to-convert-bitcoin-crypto-to-cash/>.

¹¹⁶ The Economic Times 2024 <https://m.economictimes.com/markets/cryptocurrency/a-step-by-step-guide-how-to-convert-bitcoin-crypto-to-cash/>.

¹¹⁷ He *et al IMF Virtual Currencies and Beyond* 8.

¹¹⁸ He *et al IMF Virtual Currencies and Beyond* 8. Centralised currencies are issued and controlled by centralised institutions such as central banks, whereas decentralised currencies do not rely on any central institution/authority to exist and function.

¹¹⁹ Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.

¹²⁰ He *et al IMF Virtual Currencies and Beyond* 9.

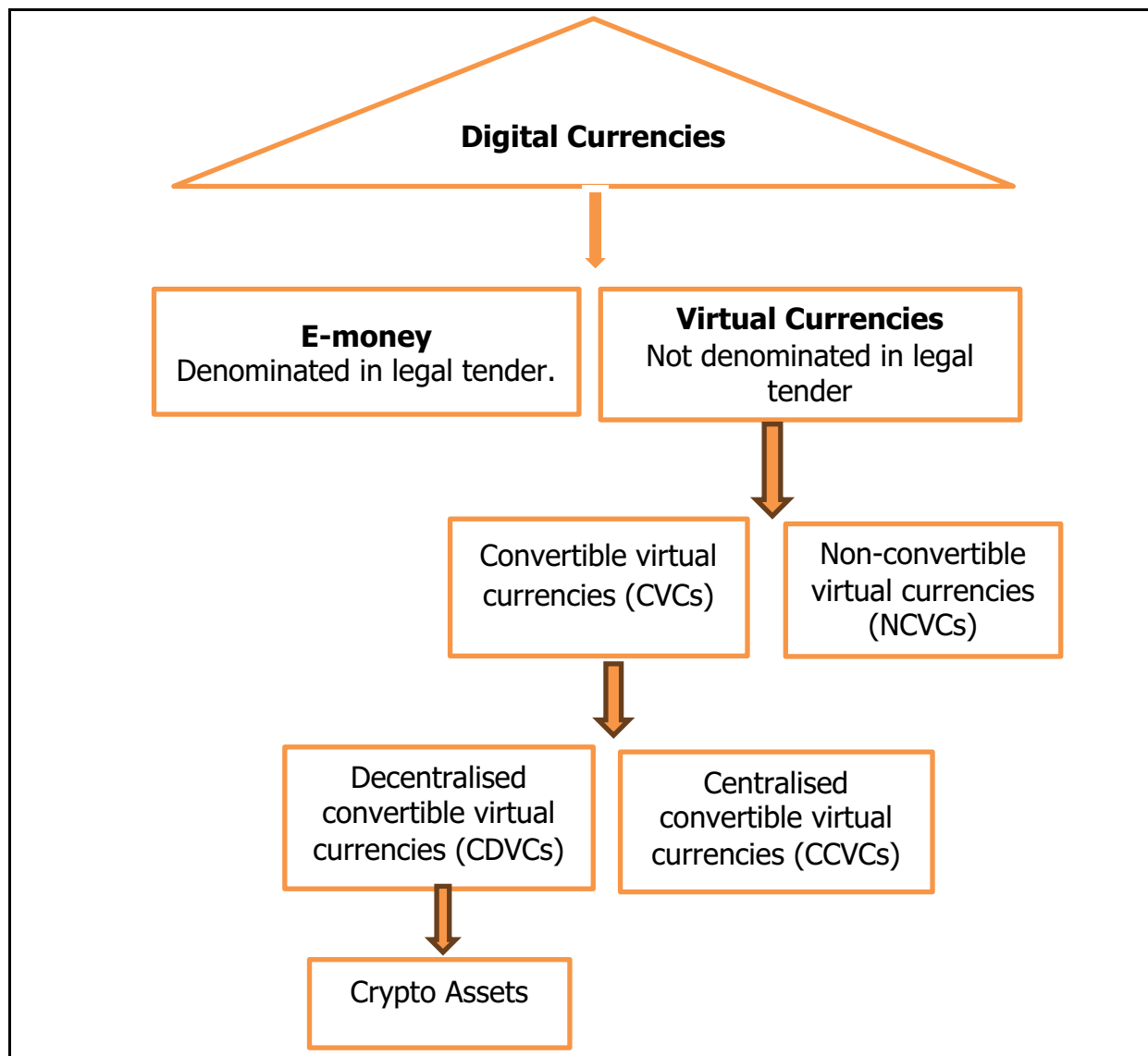
¹²¹ He *et al IMF Virtual Currencies and Beyond* 9.

authority that issues and regulates them.¹²² They are also convertible because they can be exchanged at a rate for fiat currency and vice versa.¹²³ CCVCs and CDVCs can be used in international trade transactions as mediums of exchange.¹²⁴ This is because they are convertible.¹²⁵ This means that a buyer in an international trade transaction could convert fiat currency into a CCVC or a CDVC.¹²⁶ Once they have deposited the fiat currency into the crypto asset exchange platform that fiat currency is converted into a CCVC or CDVC.¹²⁷ Therefore, the buyer can now use it as a medium of exchange transferring it into the seller's digital wallet address.¹²⁸ The seller will then receive the CCVC or CDVC and then convert it into their fiat currency of choice.¹²⁹

The diagram below (**Figure 1**) further illustrates digital currencies and the classification of crypto assets as decentralised convertible virtual currencies.¹³⁰

¹²² Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.
¹²³ Ally *et al* "The Potential Impact of Digital Currencies on the Australian Economy" 3.
¹²⁴ Ganne *Can Blockchain Revolutionize International Trade?* 20.
¹²⁵ Ganne *Can Blockchain Revolutionize International Trade?* 20.
¹²⁶ Ganne *Can Blockchain Revolutionize International Trade?* 20.
¹²⁷ Ganne *Can Blockchain Revolutionize International Trade?* 20.
¹²⁸ Ganne *Can Blockchain Revolutionize International Trade?* 20.
¹²⁹ Ganne *Can Blockchain Revolutionize International Trade?* 20.
¹³⁰ The diagram was adapted from Figure 1 in He *et al IMF Virtual Currencies and Beyond* 8.

Figure 1: Classification of virtual currencies.¹³¹



With an understanding of the classification of crypto assets, it becomes possible to delve deeper into the mechanisms of creating crypto assets. Allowing for an in-depth analysis of the characteristics of crypto assets.

2.3 The creation and use of crypto assets

To determine how crypto assets are utilized in international trade transactions, it is essential to understand not only their characteristics but also how they are created and their overall usage and application. Crypto assets exist in a system made up of

¹³¹ He *et al* *IMF Virtual Currencies and Beyond* 9.

miners and cryptography.¹³² Cryptography is a technological security technique that is used to guarantee the safety of crypto asset transactions.¹³³ A miner needs to have a digital wallet that allows them to obtain crypto assets by mining or purchasing them.¹³⁴ A digital wallet is an encrypted online account that allows a miner to store, transfer, and accept crypto assets.¹³⁵ The digital wallet contains a public and private key.¹³⁶ The public key is similar to an email address used by the miners allowing them to send and receive crypto assets transactions.¹³⁷ The private key, on the other hand, is similar to a password as it allows a specific miner to authorise transactions.¹³⁸ Since the digital wallet is protected by cryptography, the transactions that occur are authenticated as the keys cannot be faked or forged.¹³⁹

As already mentioned, crypto asset miners not only verify crypto asset transactions but also create new crypto asset units by mining them.¹⁴⁰ Mining crypto assets is similar to the mining of precious metals but instead of digging the earth's core, crypto asset miners solve complex mathematical equations in the form of cryptographic hashes.¹⁴¹ This is done to authenticate crypto asset transactions and update the blockchain.¹⁴² Solving these cryptographic hashes creates new crypto assets with which the miners are rewarded.¹⁴³ Since crypto assets are decentralised, by solving these equations, the miners prove, mathematically, whether a transaction is valid or not.¹⁴⁴ Therefore, a miner's primary function is to legitimatise and monitor crypto asset transactions by solving these complex mathematical equations.¹⁴⁵ Once a miner cracks a hash, they

¹³² Erasmus and Bowden 2020 *PER* 310.

¹³³ Jirwan *et al* 2013 *International Journal of Scientific & Engineering Research (IJSER)* 1.

¹³⁴ Erasmus and Bowden 2020 *PER* 311.

¹³⁵ Erasmus and Bowden 2020 *PER* 311.

¹³⁶ Erasmus and Bowden 2020 *PER* 311.

¹³⁷ Erasmus and Bowden 2020 *PER* 311.

¹³⁸ Erasmus and Bowden 2020 *PER* 311.

¹³⁹ Erasmus and Bowden 2020 *PER* 311.

¹⁴⁰ Freeman Law 2022 <https://freemanlaw.co./mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>.

¹⁴¹ Freeman Law 2022 <https://freemanlaw.co./mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>. A hash is a truncated digital signature of a bunch of data which are generated to secure the crypto asset transaction.

¹⁴² Freeman Law 2022 <https://freemanlaw.co./mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>.

¹⁴³ Freeman Law 2022 <https://freemanlaw.co./mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>.

¹⁴⁴ Morris 2023 <https://coinformant.com.au/what-are-the-math-problems-in-bitcoin-mining/>.

¹⁴⁵ Morris 2023 <https://coinformant.com.au/what-are-the-math-problems-in-bitcoin-mining/>.

add it to the blockchain as a block and then receive their reward.¹⁴⁶ This reward is just an incentive to encourage network users to assist as miners. Miners compete with each other to crack these hashes and add them, to the blockchain.¹⁴⁷ At first, this competition led to somewhat of a 'gold rush' among miners but this soon dissipated when most crypto asset systems declared a limit on the number of crypto asset units that can be issued.¹⁴⁸ This has made crypto asset mining even harder because cracking the hashes has become increasingly difficult.¹⁴⁹

Crypto asset transactions are recorded in a blockchain.¹⁵⁰ A blockchain can be defined as a distribution database, which is executed simultaneously on multiple computers, that records crypto asset transactions as 'blocks'.¹⁵¹ Each block contains a timestamp and a link to the previous block, thereby forming a 'chain'.¹⁵² Therefore when a buyer wants to use crypto assets as a medium of payment, they create a transaction which forms the first block in a blockchain.¹⁵³ Simply put, blockchain is a public ledger that contains crypto-asset transactions.¹⁵⁴ Once the first block has been created, a random miner receives it, solves a hash and then adds a block to the blockchain, the process of proof-of-work begins.¹⁵⁵ This is a process in which other miners can confirm whether the hash was indeed solved properly.¹⁵⁶ As soon as the verification of the block has been completed, only then is a new mathematical equation generated the seller receives the payment in the form of a crypto asset.¹⁵⁷ Any changes made to a blockchain (such as adding blocks or manipulating the information in the blockchain) can be traced back to the individual who made it.¹⁵⁸ Therefore, because of these

¹⁴⁶ Freeman Law 2022 <https://freemanlaw.co/mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>.

¹⁴⁷ Freeman Law 2022 <https://freemanlaw.co/mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>.

¹⁴⁸ He *et al* *IMF Virtual Currencies and Beyond* 9.

¹⁴⁹ Freeman Law 2022 <https://freemanlaw.co/mining-explained-a-detailed-guide-on-how-cryptocurrency-mining-works/>; Erasmus and Bowden 2020 *PER* 311.

¹⁵⁰ Erasmus and Bowden 2020 *PER* 311.

¹⁵¹ Banafa *Blockchain Technology and Applications* 5.

¹⁵² Banafa *Blockchain Technology and Applications* 5.

¹⁵³ Banafa *Blockchain Technology and Applications* 5.

¹⁵⁴ Erasmus and Bowden 2020 *PER* 311.

¹⁵⁵ Erasmus and Bowden 2020 *PER* 311.

¹⁵⁶ Erasmus and Bowden 2020 *PER* 312.

¹⁵⁷ Erasmus and Bowden 2020 *PER* 312.

¹⁵⁸ Erasmus and Bowden 2020 *PER* 311.

cryptographic techniques, it is impossible to hack crypto assets.¹⁵⁹ However, it is important to know that crypto assets are pseudo-anonymous.¹⁶⁰ So changes made to the blockchain cannot be traced back to an individual's real identity but rather to their public key which is essentially their virtual currency address.¹⁶¹ Even though blockchain is public, the real identities of the people transacting in crypto assets are not.¹⁶² Once crypto assets have been created, they can be traded in the financial markets.

The creation of crypto assets is fundamentally different from the creation of fiat currency. Understanding how crypto assets are created is essential for understanding how they differ from fiat currency.

2.4 The difference between crypto assets and fiat currency

Fiat currency is a medium of exchange that allows people to purchase food, property, and other services within the jurisdiction of the issuing State.¹⁶³ This makes it territorial because it will differ from one jurisdiction to another.¹⁶⁴ Fiat is a Latin word that refers to an official order given by authority.¹⁶⁵ Hence the term 'fiat currency' was devised as it refers to any currency issued and declared to be legal tender by the authority of a country.¹⁶⁶ Fiat currency is not backed by any commodity, such as gold or silver, but it is rather backed by the country that issues it through monetary policies and regulations.¹⁶⁷ Fiat currency finds its value in the relationship between demand and supply as well as in the stability of the State that issues it. Greater demand for a particular fiat currency appreciates its value and exchange rate, thereby creating a strong currency.¹⁶⁸ A lesser demand for a particular currency depreciates its value and creates a weaker currency.¹⁶⁹ A State's political stability plays a huge role in the demand for its fiat currency. Political instability negatively affects the demand for fiat currency,

¹⁵⁹ Erasmus and Bowden 2020 *PER* 311.

¹⁶⁰ He *et al IMF Virtual Currencies and Beyond* 9.

¹⁶¹ He *et al IMF Virtual Currencies and Beyond* 9.

¹⁶² He *et al IMF Virtual Currencies and Beyond* 9.

¹⁶³ Hamukuaya 2021 *PER* 2.

¹⁶⁴ Hamukuaya 2021 *PER* 2.

¹⁶⁵ Schoeman 2021 <https://sashares.co.za/fiat-currency>.

¹⁶⁶ Schoeman 2021 <https://sashares.co.za/fiat-currency>.

¹⁶⁷ Schoeman 2021 <https://sashares.co.za/fiat-currency>.

¹⁶⁸ Schoeman 2021 <https://sashares.co.za/fiat-currency>.

¹⁶⁹ Schoeman 2021 <https://sashares.co.za/fiat-currency>.

as it creates uncertainty for investors and as a result, the value and exchange rate of the said fiat currency depreciates.¹⁷⁰

The value of crypto assets is also determined by demand and supply. However, unlike fiat currency, crypto assets are transnational as they transcend geographical boundaries.¹⁷¹ This means that a crypto asset such as Bitcoin can be used as a medium of exchange within the borders of any country that allows it and across borders where buyers and sellers are citizens of different countries.¹⁷²

Banknotes and coins issued by the government of a country are fiat currency known as legal tender.¹⁷³ This is referred to as the 'money' and will be issued and controlled by its central bank.¹⁷⁴ Therefore, it can be said that legal tender is money.¹⁷⁵ Sharrock¹⁷⁶ defines money as:

A chattel issued by the authority of the law of a State, and it is denominated concerning a unit of account and serves as the universal means of exchange within the jurisdiction of that particular state.

From the definition of money, it is evident that fiat currency is issued and controlled by an administrative authority (usually a central bank), making it centralised.¹⁷⁷ In South Africa, the South African Reserve Bank (hereafter the SARB) is the central bank of the Republic. It was first established in 1921 by the Currency and Bank Act of 10 August 1920, and as of 1989, the SARB is governed by the *South African Reserve Bank Act* 90 of 1989 (hereafter referred to as the *SARB Act*).¹⁷⁸ The *SARB Act* provides that the SARB has the sole right to issue currency.¹⁷⁹ The South African Rand is the fiat currency of the Republic of South Africa, issued by section 15 of the *SARB Act*, and is therefore the currency of the Republic.¹⁸⁰ According to section 17 of the *SARB Act*,

¹⁷⁰ Schoeman 2021 <https://sashares.co.za/fiat-currency>.

¹⁷¹ He *et al* *IMF Virtual Currencies and Beyond* 9.

¹⁷² He *et al* *IMF Virtual Currencies and Beyond* 9.

¹⁷³ Stephen *Modern Forms of Money and the Development of the Concept of Legal Tender* 12.

¹⁷⁴ Hamukuaya 2021 *PER* 2.

¹⁷⁵ Stephen *Modern Forms of Money and the Development of the Concept of Legal Tender* 12

¹⁷⁶ Sharrock *The Law of Banking and Payment in South Africa* 197.

¹⁷⁷ Stephen *Modern Forms of Money and the Development of the Concept of Legal Tender* 12.

¹⁷⁸ Section 2 of the *SARB Act*. SARB 2024 <https://www.resbank.co.za/en/home/about-us/history>.

¹⁷⁹ Hamukuaya 2021 *PER* 2.

¹⁸⁰ Section 15 of the *SARB Act*.

legal tender consists of banknotes and gold coins.¹⁸¹ Crypto assets, on the other hand, are decentralised and are not backed by any government authority.¹⁸² They can remain decentralised because of the work being done by crypto asset miners.¹⁸³ The miner's main functions of verifying transactions and creating new crypto assets eliminate the need for a centralised authority.¹⁸⁴

Fiat currency is subject to inflation. Since fiat currency is not pegged on the value of any commodity but rather determined by demand and supply, central banks can print new currency units as and when they see fit.¹⁸⁵ Printing more currency units is often based on the demand for more currency units in the country and may result in hyperinflation.¹⁸⁶ An example of this is the Zimbabwean dollar, in 2008 amid the global financial crisis the Reserve Bank of Zimbabwe went on a printing spree which resulted in the Zimbabwean dollar being devalued due to hyperinflation.¹⁸⁷ The fall of the Zimbabwean Dollar was due to a cumulation of many factors such as mismanagement, corruption, controversial land reform policies and political instability.¹⁸⁸ In the year 2000, the Zimbabwean government seized land from white farm owners and redistributed it to black farmers. However, this led to a significant decrease in agricultural output as many of the new farm owners lacked the experience and resources to maintain agricultural productivity.¹⁸⁹ This did not only raise food prices locally but it also resulted in economic sanctions from the international community.¹⁹⁰ The Zimbabwean government printed vast sums of currency to import enough food to avoid nationwide starvation.¹⁹¹ This resulted in an increased volume of currency in circulation thereby further rapidly increasing food prices since it is the central bank's

¹⁸¹ Section 17 of the *SARB Act*.

¹⁸² Erasmus and Bowden 2020 *PER* 312.

¹⁸³ Erasmus and Bowden 2020 *PER* 312.

¹⁸⁴ Erasmus and Bowden 2020 *PER* 312.

¹⁸⁵ Reddish 1993 *Canadian Journal of Economics (CJE)* 778.

¹⁸⁶ Reddish 1993 *CJE* 778. Hyperinflation is the increase in the inflation rate above 50% *PER* month. It depreciates the value of the currency and leads to price volatility and economic stagnation.

¹⁸⁷ Freiheit 2022 <https://www.freiheit.org/sub-saharan-africa/behind-zimbabwes-currency-woes>.

¹⁸⁸ River Learn 2024 <https://river.com/learn/history-of-monetary-collapse-in-zimbabwe/>.

¹⁸⁹ River Learn 2024 <https://river.com/learn/history-of-monetary-collapse-in-zimbabwe/>.

¹⁹⁰ River Learn 2024 <https://river.com/learn/history-of-monetary-collapse-in-zimbabwe/>.

¹⁹¹ River Learn 2024 <https://river.com/learn/history-of-monetary-collapse-in-zimbabwe/>. River Learn 2024 <https://river.com/learn/history-of-monetary-collapse-in-zimbabwe/>.

responsibility to regulate the value of its fiat currency.¹⁹² It must exercise this power of printing currency with great caution.¹⁹³ By being the sole issuer of fiat currency within its jurisdiction, the central bank can regulate the quantity of currency in circulation, enabling it to achieve its mandate of price and financial stability.¹⁹⁴ Inflation, however, does not affect crypto assets.¹⁹⁵ This is because a limited number of crypto asset units can be created.¹⁹⁶ However, the value of crypto assets is still volatile.¹⁹⁷ Unlike fiat currency, whose value is regulated by a centralised authority, crypto assets have no such authority and are subject to market fluctuations due to supply and demand.¹⁹⁸

Often, fiat currency transactions are risky and may take some time to be verified.¹⁹⁹ This makes room for the potential reversal of the transaction.²⁰⁰ For instance, in South Africa, banks are obligated to pass a credit entry in favour of a customer who has deposited into their account.²⁰¹ This credit entry serves as *prima facie* evidence that the transaction has been recorded and the bank cannot reverse it without the customer's consent.²⁰² However, a reversal without the consent of the customer is permitted under certain circumstances; such as in cases where the money was erroneously transferred.²⁰³ On the contrary, crypto assets transactions have a rapid verification process with significantly low costs and are therefore irreversible.²⁰⁴

¹⁹² Freiheit 2022 <https://www.freiheit.org/sub-saharan-africa/behind-zimbabwes-currency-woes>.

¹⁹³ Maggetti *Handbook of Regulatory Authorities* 96.

¹⁹⁴ Maggetti *Handbook of Regulatory Authorities* 96.

¹⁹⁵ He *et al IMF Virtual Currencies and Beyond* 9.

¹⁹⁶ He *et al IMF Virtual Currencies and Beyond* 9.

¹⁹⁷ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

¹⁹⁸ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

¹⁹⁹ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

²⁰⁰ Noor *An Imminent Transition from Fiat Currency to a Cryptocurrency-based Money System: A German Prospective* 13.

²⁰¹ Sharrock *The Law of Banking and Payment in South Africa* 151.

²⁰² Sharrock *The Law of Banking and Payment in South Africa* 151.

²⁰³ Sharrock *The Law of Banking and Payment in South Africa* 152.

²⁰⁴ He *et al IMF Virtual Currencies and Beyond* 9.

2.5 Conclusion

This chapter has provided a cursory overview of the nature and characteristics of crypto assets. This is essential in addressing how the regulation of crypto assets under the *FAIS Act* impacts their use in South African international trade transactions. By exploring the classification of crypto assets, their creation, and their comparison to fiat currency, this chapter established the key distinctions between centralized, government-issued fiat currencies and decentralized crypto assets. This will be crucial for understanding the FCA's regulatory framework for crypto assets in subsequent chapters.

The transnational nature of crypto assets, compared to fiat currency's territorial scope, highlights the potential advantages and risks of using crypto assets in international trade transactions. This will play a pivotal role in the analysis of the practical usage of crypto assets in international trade transactions in the following chapter.

Understanding the nature of crypto assets lays the foundation for identifying the use of crypto assets in international trade.

CHAPTER 3 THE USE OF CRYPTO ASSETS IN INTERNATIONAL TRADE

3.1 Introduction

The world has become a global village due to globalisation.²⁰⁵ Globalisation is the integration of national economies into a global economic system.²⁰⁶ This has been greatly facilitated by international trade.²⁰⁷ Currency exchanges are a major part of international trade since each country has its government-authorised fiat currency.²⁰⁸ Therefore when trading internationally with different countries, the trading parties must choose a currency for which their trade transaction will be invoiced.²⁰⁹ The US dollar is currently the dominant currency of choice in international trade transactions.²¹⁰ In the previous chapter how crypto assets originate and the distinct characteristics of crypto assets were discussed. Some of these characteristics were that crypto assets are decentralised with no central issuing authority and that they can be used as a medium of exchange which is more efficient for international trade than fiat currency.²¹¹ The use of crypto assets as currency of exchange in international trade transactions is beneficial for international trade in many aspects such as security, efficiency and avoidance of costly exchange rates.²¹²

This chapter identifies the role of crypto assets in international trade, bearing in mind the characteristics of crypto assets as discussed in Chapter 2. Reaching these objectives will provide a comprehensive understanding of how international trade operates and the dynamic factors and use of crypto assets in international trade. This is important for Chapter 4 as understanding the role of crypto assets in international

²⁰⁵ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

²⁰⁶ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

²⁰⁷ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

²⁰⁸ Herbert 2020 *NAUJILJ* 48.

²⁰⁹ Herbert 2020 *NAUJILJ* 48.

²¹⁰ Gopinath G *et al* 2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²¹¹ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

²¹² Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

trade leads to a better analysis of FSCA’s regulation of crypto assets and its impact on international trade in South Africa.

3.2 Understanding International Trade

International trade is the exchange of goods and services between countries.²¹³ It is facilitated by imports and exports. Imports are the goods and services that are bought from other countries and brought into a country and exports are the goods and services sold to other countries.²¹⁴ International trade is vital for economic survival because countries can receive goods and services that would ordinarily not be available to them domestically. Countries are also able to broaden their market reach for goods and services available domestically to the international market.²¹⁵

International trade is driven by comparative advantage.²¹⁶ The theory of comparative advantage was formulated in the 19th century by an economist named David Ricardo.²¹⁷ Ricardo²¹⁸ proposed that countries will benefit economically by specialising in the production of goods in which they have a relative advantage and then trading such goods for goods produced more efficiently by other countries. This, however, does not suggest that the most efficient country will always dominate the international trade markets. Instead, it signifies that if a country excels in producing various goods and services, it should concentrate only on the goods and services in which it has the greatest advantage. The theory of comparative advantage can extend to a macroeconomic scale.²¹⁹ Accordingly, international trade will not only take place to satisfy the conditions of comparative advantage but global wealth can also increase if

²¹³ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
²¹⁴ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
²¹⁵ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
²¹⁶ International Monetary Fund 2023 www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Trade.
²¹⁷ Ricardo *On the Principles of Political Economy and Taxation* 133; Sherlock and Reuvid *The Handbook of International Trade* 4.
²¹⁸ Ricardo *On the Principles of Political Economy and Taxation* 133; Sherlock and Reuvid *The Handbook of International Trade* 4
²¹⁹ Sherlock and Reuvid *The Handbook of International Trade* 4.

each country specialises in what it does best.²²⁰ It should however be noted that this is an oversimplified reality as it fails to factor in, for example, the fact that there is limited international demand for the specialised output of certain nations.²²¹

Comparative advantage is influenced by several factors. One such factor is the difference in international climate.²²² Climate and variations in geographical seasons have a significant influence on the type of goods and services a country may have available thereby giving them an advantage at that stage.²²³ This in turn influences international trade as the countries who do not have certain goods because of their climate will import those goods from the countries that have the said goods. For instance, coffee grows ideally between the tropics of Cancer and Capricorn at altitudes between 800 and 2000 meters.²²⁴ In the region known as the Coffee Belt, with tropical and equatorial climate where moisture prevails all year round.²²⁵ Hence tropical countries along the equator are exporters of coffee globally, with Brazil being the biggest producer of coffee globally.²²⁶ In situations when Brazil cannot deliver, it creates a shortage and spikes prices of coffee beans.²²⁷ In July 2024, the price of coffee beans hit a two-year high due to weather disruptions in Brazil.²²⁸ Another influence on comparative advantage is factor endowments. This means that some countries have more abundant resources in terms of land, labour, capital, and human capital than others.²²⁹ Therefore, these countries will enjoy a comparative advantage because the

²²⁰ Sherlock and Reuvid The Handbook of International Trade 4.

²²¹ Sherlock and Reuvid The Handbook of International Trade 4.

²²² Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/; Kowalski 2011 Organisation for Economic Co-operation and Development (OECD) 5.

²²³ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

²²⁴ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

²²⁵ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

²²⁶ Scott 2015 <https://www.climate.gov/news-features/climate-and/climate-coffee>.

²²⁷ Brew Markets 2024 <https://www.morningbrew.com/brew-markets/stories/2024/07/10/coffee-commodities>.

²²⁸ Brew Markets 2024 <https://www.morningbrew.com/brew-markets/stories/2024/07/10/coffee-commodities>.

²²⁹ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.

opportunity cost is lower for a country rich in a related resource.²³⁰ For instance, Canada is rich in terms of forest resources and therefore might enjoy a comparative advantage in the forestry industry.²³¹ Differences in technology also influence comparative advantage.²³² The differences in technology are mostly observed in the advanced production process of a country.²³³ Japan, in the 1970s, enjoyed a comparative advantage in automobile manufacturing.²³⁴ To date, Japan can produce more automobile product output with given input than most country because of their advanced technological production processes, ranking third in the world for automobile manufacturing.²³⁵ Furthermore, regarding the input of resources, the output of the product is in general better than other countries because of their technological advancement giving them further advantage in automobile manufacturing.²³⁶ However, there is currently no evidence that the use of crypto assets in international trade offers a comparative advantage.²³⁷ Instead, the benefits of using crypto assets in international trade are functional.²³⁸ In that case, crypto assets make international trade transactions cheaper and faster. Countries can use crypto assets to maximise economic gain from the goods and services in which they have a comparative advantage, thereby improving the process of trade.²³⁹

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- ²³⁰ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
- ²³¹ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
- ²³² Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
- ²³³ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
- ²³⁴ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/. Statista 2024 <https://www.statista.com/statistics/226032/light-vehicle-producing-countries/>.
- ²³⁵ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
- ²³⁶ Corporate Finance Institute 2024 www.corporatefinanceinstitute.com/resources/economics/international-trade/.
- ²³⁷ Ganne *Can Blockchain Revolutionize International Trade?* 21
- ²³⁸ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.
- ²³⁹ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

Some countries however do not benefit from their comparative advantage.²⁴⁰ This is because each country has economic sovereignty and can control the trade within its territory.²⁴¹ A country may close its borders to international trade, preventing the importation or exportation of goods and services and thereby creating a trade barrier.²⁴² Such barriers distort trade and decrease the economic development of a country.²⁴³ Historically, this was China's economic stance. It viewed the importation of foreign goods as alien incursion, infiltration, and adulteration of their cultural uniqueness.²⁴⁴ This, however, created a scarcity and unavailability of certain goods and services in their market thus necessitating the removal of trade barriers between countries.²⁴⁵

Initially, to remove the trade barriers and to benefit from comparative advantages, countries entered into bilateral trade treaties with each other. Bilateral trade treaties are trade agreements between two countries that promote trade of goods or services between them.²⁴⁶ These treaties provide for the removal of trade barriers, such as tariffs, between the parties to the agreement so as to facilitate smoother and open trade.²⁴⁷ This facilitated international trade.²⁴⁸ However, there was a need for international trade to expand and develop and this could only be achieved through the formation of international trade organisations by multilateral treaties.²⁴⁹ Hence in 1948, the General Agreements on Trade and Tariffs (hereafter referred to as GATT) came into effect.²⁵⁰ It aimed to remove import quotas and reduce tariffs on goods.²⁵¹ With 130 countries as signatories to GATT, it remained the main multilateral treaty

²⁴⁰ Herbert 2020 Nnamdi Azikiwe *University Journal of International Law and Jurisprudence* (NAUJILJ) 48.

²⁴¹ Herbert 2020 *NAUJILJ* 48.

²⁴² Herbert 2020 *NAUJILJ* 48.

²⁴³ Herbert 2020 *NAUJILJ* 49.

²⁴⁴ Herbert 2020 *NAUJILJ* 48.

²⁴⁵ Herbert 2020 *NAUJILJ* 48.

²⁴⁶ Bakaki and Bohmelt 2022 *British Journal of Politics and International Relations (BJPIR)* 406.

²⁴⁷ Bakaki and Bohmelt 2022 *BJPIR* 406.

²⁴⁸ Herbert 2020 *NAUJILJ* 49.

²⁴⁹ Herbert 2020 *NAUJILJ* 49.

²⁵⁰ Herbert 2020 *NAUJILJ* 49.

²⁵¹ Herbert 2020 *NAUJILJ* 49.

governing international trade for 45 years until the establishment of the World Trade Organisation in 1995.²⁵²

With over 160 member countries, the World Trade Organisation (hereafter referred to as WTO) is currently the largest trade institution in the world.²⁵³ The WTO regulates trade within countries. The WTO aims to remove trade barriers by promoting progressive trade between countries.²⁵⁴ It also serves as a negotiation platform for member states.²⁵⁵ Lastly, it provides clear rules and engagements to ensure a more transparent and predictable international trade.²⁵⁶

The use of crypto assets in international trade helps to achieve the WTO's goal of reducing trade barriers.²⁵⁷ Crypto assets are cost-effective as they bypass traditional banking costs and eliminate the need for intermediaries, reducing transaction costs and increasing efficiency.²⁵⁸

There is room for the use of crypto assets in international trade. The following paragraphs will explore how crypto assets fit into international trade.

3.3 Currency of exchange in international trade transactions

Normally, the currency of a particular country will be referred to as the legal tender and will be issued and controlled by its central bank.²⁵⁹ Legal tender allows a person to purchase goods and services within the jurisdiction of the issuing country.²⁶⁰ This makes legal tender territorial because it will differ from one jurisdiction to the other.

This poses a challenge in international trade since trade takes place between two or more countries that have their respective currencies. Hence countries must choose

²⁵² Herbert 2020 *NAUJILJ* 49.
²⁵³ World Trade Organisation 2025 https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm. Herbert 2020 *NAUJILJ* 49.
²⁵⁴ World Trade Organisation 2025 https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm. Herbert 2020 *NAUJILJ* 50.
²⁵⁵ Herbert 2020 *NAUJILJ* 50.
²⁵⁶ Herbert 2020 *NAUJILJ* 50.
²⁵⁷ Ganne *Can Blockchain Revolutionize International Trade?* 21.
²⁵⁸ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.
²⁵⁹ Hamukuaya 2021 *PER* 2.
²⁶⁰ Hamukuaya 2021 *PER* 2.

which currency they will conduct their trade in. There are three currency options that countries can choose from when concluding international trade transactions.²⁶¹ The first is the producer's currency pricing, which is the currency of the exporting country. This option is said to improve competitiveness as a depreciation of the producer's currency increases the price of imports relative to exports.²⁶² Secondly, is the local currency pricing which is the currency of the importing country.²⁶³ This is said to worsen competitiveness as a depreciation in the importer's currency lowers the price of imports relative to exports thus resulting in a decline in trade.²⁶⁴ Lastly is the vehicle currency pricing, which is the currency of a third currency that is not party to the transaction.²⁶⁵ This vehicle currency is the dominant currency used in international trade transactions because of its strength against other currencies and its stability.²⁶⁶ There is very little evidence that producer currency pricing or local currency pricing are the best choices of currency in international trade transactions.²⁶⁷ However, evidence shows that the majority of international trade transactions are concluded using vehicle currency pricing using the dominant currencies such as the US dollar, the euro or the Chinese Yuan.²⁶⁸

The US dollar is still the most preferred currency in international trade transactions as a large fraction of international trade transactions are invoiced in the US dollar.²⁶⁹ The US dollar is still considered to be more stable than their local currencies and therefore provides security in their international trade transactions.²⁷⁰ In 2022, almost 90% of international trade transactions involved the US dollar.²⁷¹ Banks outside of the United States raise large amounts of US dollar deposits, with the US dollar making up 63% of central banks' reserves globally.²⁷² Further, the US dollar can maintain its dominance

²⁶¹ Tao *et al* /2017 Munich *PERSONAL* RePEc Archive (*MPRA*) 1.

²⁶² Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁶³ Tao *et al* /2017 *MPRA* 1. It is important to note that the value of the local currency is determined by supply and demand as well as the issuing authority through monetary policy.

²⁶⁴ Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁶⁵ Tao *et al* /2017 *MPRA* 1.

²⁶⁶ Tao *et al* /2017 *MPRA* 1.

²⁶⁷ Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁶⁸ Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁶⁹ Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁷⁰ Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁷¹ Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

²⁷² Gopinath G *et al* /2019 https://scholar.harvard.edu/files/gopinath/files/paper_121018h.pdf.

because corporate lending institutes issue US dollar-dominated debt to their borrowers.²⁷³ According to the Bank for International Settlements (BIS), 60% of local currency claims of banks are dominated by US dollars.²⁷⁴

However, the US dollar is just another world currency, any of the other world's currencies can replace it as the dominant currency of vehicle currency pricing.²⁷⁵ History shows that one currency may dominate international trade as the dominant currency but changes in economy and global power politics may result in it being dethroned as the dominant currency.²⁷⁶ This is seen in how the British Pound Sterling dominated international trade transactions between 1860 and 1914.²⁷⁷ This was a time when Britain wielded strong political powers as it had several colonies across the globe and encouraged trade in the Pound Sterling.²⁷⁸

There have been many calls to use another country's (stronger and more stable) currency as vehicle currency instead of the US dollar for international trade transactions. The latest call came from BRICS, an intergovernmental organisation founded by Brazil, Russia, India, China, and South Africa.²⁷⁹ BRICS has formed a strategy to bring to an end the use of the US dollar as vehicle currency and part of it includes creating a BRICS currency that can substitute the US dollar as the dominant currency in international trade transactions.²⁸⁰ Such calls open a window for the potential use of crypto assets as the vehicle currency pricing for international trade transactions.²⁸¹

²⁷³ Gopinath G *et al* 2019 https://scholar.harvard.edu/files/gopinath/files/paPER_121018h.pdf.

²⁷⁴ Gopinath G *et al* 2019 https://scholar.harvard.edu/files/gopinath/files/paPER_121018h.pdf.

²⁷⁵ Kalim 2020 *Athens Journal of Business and Economics (AJBE)* 23.

²⁷⁶ Kalim 2020 *AJBE* 23.

²⁷⁷ Kalim 2020 *AJBE* 23.

²⁷⁸ Kalim 2020 *AJBE* 23.

²⁷⁹ Kalim 2020 *AJBE* 23.

²⁸⁰ Kalim 2020 *AJBE* 23.

²⁸¹ Kalim 2020 *AJBE* 23.

3.4 Crypto assets as a currency of exchange in international trade transactions

A small percentage of international trade transactions are paid in cash in advance as buyers usually pay when the goods have been delivered.²⁸² About 80% of international trade transactions are financed through traditional methods such as letters of credit.²⁸³ As discussed in Chapter 2 paragraph 2.4, it is important to note that these traditional methods of payment are associated with high cost and burdensome procedures due to multiple parties being involved to authenticate the transaction.²⁸⁴ As a result traders, alongside their banks and fintech companies have looked at the possibility of crypto assets, facilitated by blockchain, being the currency of exchange in international trade transactions.²⁸⁵

Crypto assets are not regarded in South Africa as legal tender but rather as financial products in terms of the *FAIS Act* and as discussed in Chapter 2, crypto assets are DCVCs.²⁸⁶ This means that crypto asset holders can convert them into fiat currency, therefore international trade transactions in South Africa can be invoiced in crypto assets.

Crypto assets offer an alternative to the traditional method of payment. Unlike fiat currency, they are not tied to any country's economy since they are universal.²⁸⁷ In 2016 several banks in the European Union created a platform for the use of crypto assets and blockchain technology in international transactions.²⁸⁸ This platform was called the 'Digital Trade Chain Consortium' which was later renamed to 'We.trade'.²⁸⁹ This platform allowed traders to register via their banks and importers and exporters recorded their transactions after having agreed on the terms and conditions of their

²⁸² Ganne *Can Blockchain Revolutionize International Trade?* 19

²⁸³ Ganne *Can Blockchain Revolutionize International Trade?* 19. Also see Hamukuaya 2021 *PER* 5.

²⁸⁴ Ganne *Can Blockchain Revolutionize International Trade?* 20.

²⁸⁵ Ganne *Can Blockchain Revolutionize International Trade?* 20.

²⁸⁶ IFWG 2020
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

²⁸⁷ Shust and Dostov 2014 *JFC* 256.

²⁸⁸ Ganne *Can Blockchain Revolutionize International Trade?* 24.

²⁸⁹ Ganne *Can Blockchain Revolutionize International Trade?* 24.

contracts.²⁹⁰ Payments invoiced in crypto assets can either proceed on account or via bank payment undertaking.²⁹¹ Many projects such as 'We.trade' have since launched in different parts of the world that have developed new blockchain-based solutions for international trade transactions.²⁹² These platforms leverage blockchain technology and crypto assets to streamline financial flows between importers and exporters.²⁹³ Thus enhancing the speed, security, and reliability of international trade transactions.²⁹⁴ Many companies have also started using crypto assets in international trade. 'OpenBazaar', an open-source marketplace, also allows the use of the crypto asset Bitcoin as a medium of exchange for the trading of goods and services on its platform.²⁹⁵

Crypto assets have not only been used in international trade, but they also have, in some instances been used domestically as a medium of exchange. Crypto assets are in a sense resistant to confiscation.²⁹⁶ This has been seen in harsh legal environments, where authoritative governments froze their citizen's bank accounts.²⁹⁷ This is to deter them from founding social organisations rising against the government's oppression.²⁹⁸ In such situations, protestors use crypto assets such as Bitcoin to protect themselves and their privacy.²⁹⁹ In countries such as Hong Kong, Belarus, and Nigeria, Bitcoin has been used domestically as a medium of exchange and a form of resistance to authoritative governments.³⁰⁰

The advantages of using crypto assets as a medium of exchange are also seen in international trade. These transactions are typically conducted at lower costs.³⁰¹ It is reported that exporters and importers save money as it avoids the payment of

²⁹⁰ Ganne *Can Blockchain Revolutionize International Trade?* 24.

²⁹¹ Ganne *Can Blockchain Revolutionize International Trade?* 24.

²⁹² Ganne *Can Blockchain Revolutionize International Trade?* 24.

²⁹³ Ganne *Can Blockchain Revolutionize International Trade?* 24.

²⁹⁴ Ganne *Can Blockchain Revolutionize International Trade?* 24.

²⁹⁵ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

²⁹⁶ River Learn 2024 <https://river.com/learn/bitcoin-as-a-medium-of-exchange/>.

²⁹⁷ River Learn 2024 <https://river.com/learn/bitcoin-as-a-medium-of-exchange/>.

²⁹⁸ River Learn 2024 <https://river.com/learn/bitcoin-as-a-medium-of-exchange/>.

²⁹⁹ River Learn 2024 <https://river.com/learn/bitcoin-as-a-medium-of-exchange/>.

³⁰⁰ River Learn 2024 <https://river.com/learn/bitcoin-as-a-medium-of-exchange/>.

³⁰¹ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

commission-related fees.³⁰² Crypto assets as a medium of exchange in international trade transactions eliminate the need for financial intermediaries.³⁰³ Hence the importer will not be required to pay additional bank fees.³⁰⁴ Using crypto assets for vehicle currency pricing also eliminates the need for conversion of currencies of different countries and foreign exchange-related fees.³⁰⁵ Since crypto assets are universal no conversion is needed.³⁰⁶ This also means that there are no delays in payment as the blockchain technology used in transferring crypto assets is efficient and almost immediate.³⁰⁷

The use of crypto assets as a medium of exchange in international trade transactions is beneficial to the entire international trade process because of the use of blockchain technology.³⁰⁸ Traditionally an intermediary, a trusted third party, keeps a transaction record and works to validate and facilitate these international transactions.³⁰⁹ This has been efficient but to a point because errors can be made by intermediaries which delays, or in some cases, corrupt the transactions.³¹⁰ By using crypto assets multiparty data is put simultaneously on a shared blockchain ledger and this ensures that all parties to a transaction can see the verified transactions as they occur.³¹¹ Thus speeding up the process of verification and facilitating of the transactions.³¹²

Since there is a gap between when goods are purchased and when they are delivered to the buyer the goods need to be insured against any damage.³¹³ Additionally, trade

³⁰² Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³⁰³ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³⁰⁴ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³⁰⁵ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³⁰⁶ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³⁰⁷ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³⁰⁸ McDaniel and Norberg 2019 *Social Science Electronic Network Electronic Journal (SSRN)* 4.

³⁰⁹ McDaniel and Norberg 2019 *SSRN* 4.

³¹⁰ McDaniel and Norberg 2019 *SSRN* 4.

³¹¹ McDaniel and Norberg 2019 *SSRN* 6. Also see Baur *et al* 2018 *Journal of International Financial Markets, Institutions and Money (JIFMIM)* 178.

³¹² Baur *et al* 2018 *JIFMIM* 178.

³¹³ McDaniel and Norberg 2019 *SSRN* 7.

finance and credit insurance will benefit from the use of crypto assets in international trade as currency of exchange, since exporters and importers rely on banks as intermediaries for the promise of payment.³¹⁴ This is based on the collateral and indemnification of the related parties if goods are damaged, stolen, or lost while in transit.³¹⁵ To do this, banks require importers and exporters to provide a solid credit history and a strong balance to issue letters of credit to them.³¹⁶ The use of crypto assets as a currency of exchange can increase transparency in trade finance, which will decrease risk and expand credit availability.³¹⁷ It is important to note that this is only a marginal improvement as the blockchain technology used in crypto assets cannot alter the fundamental risk of creditors.³¹⁸ However, because the blockchain ledger can be monitored, it reduces the risk that an importer or exporter presents to the bank or insurer.³¹⁹

The use of crypto assets in international trade transactions can also benefit the customs process. The customs process involves rules and regulations related to the transportation of goods across national borders.³²⁰ It is a complex process that involves several separate steps that must be taken for goods to be cleared for import or export.³²¹ As a result, many importers and exporters find difficulty navigating the customs process.³²² Importers and exporters from developing nations are often faced with challenges for example caused by burdensome compliance requirements, costly delays, border corruption, and security breaches.³²³ Fraud also constitutes one of the challenges faced by developing countries.³²⁴ Fraudulent behaviour such as the forgery of bills of lading and other export documentation such as certificates of origin.³²⁵ When a crypto asset is used in international trade transactions, it can also be incorporated

³¹⁴ McDaniel and Norberg 2019 *SSRN* 7.

³¹⁵ McDaniel and Norberg 2019 *SSRN* 7.

³¹⁶ McDaniel and Norberg 2019 *SSRN* 7.

³¹⁷ McDaniel and Norberg 2019 *SSRN* 7.

³¹⁸ McDaniel and Norberg 2019 *SSRN* 8.

³¹⁹ McDaniel and Norberg 2019 *SSRN* 8.

³²⁰ McDaniel and Norberg 2019 *SSRN* 10.

³²¹ McDaniel and Norberg 2019 *SSRN* 10.

³²² McDaniel and Norberg 2019 *SSRN* 10.

³²³ McDaniel and Norberg 2019 *SSRN* 10.

³²⁴ McDaniel and Norberg 2019 *SSRN* 10.

³²⁵ McDaniel and Norberg 2019 *SSRN* 12.

blockchain technology in the customs process.³²⁶ The crypto asset digital ledger is secure and it is nearly impossible to make a fraudulent entry or edit a transaction without the approval of other network users.³²⁷ Thereby allowing for real-time audibility as parties can see when exactly discrepancies arise.³²⁸ By using crypto assets the customs process would be made more simpler as well as discourage corruption.³²⁹

3.5 Conclusion

This chapter has analysed the role of crypto assets. In doing so it explored the complexities of international trade by examining its foundational aspects, including the role of comparative advantage, currency exchange, and the emerging potential of crypto assets. Comparative advantage, influenced by factors such as climate, resource endowment, and technological progress, continues to be a key driver of international trade, enabling countries to specialise in what they do best and trade for other goods. It found that the use of crypto assets in international trade transactions does offer a comparative advantage.

Further, it established that trade barriers and the choice of currency can complicate these transactions, often requiring the use of a stable, dominant vehicle currency like the US dollar. While the US dollar remains the dominant global currency, emerging challenges to its supremacy, such as the BRICS initiative, reflect a desire for alternatives in international trade. This has shown that there is a need to develop international trade and make it more efficient. Using crypto assets as the dominant vehicle currency in international trade will address the developmental challenges and make international trade more efficient.

The use of crypto assets in international trade transactions presents the potential to solve more than just the issue of efficiency in international trade. By using crypto assets as the currency of exchange in international trade transactions, there is the

³²⁶ McDaniel and Norberg 2019 *SSRN* 12.

³²⁷ McDaniel and Norberg 2019 *SSRN* 13.

³²⁸ McDaniel and Norberg 2019 *SSRN* 13.

³²⁹ McDaniel and Norberg 2019 *SSRN* 13.

added advantage of blockchain technology which can be used to curb corruption in international trade.

This chapter has provided a comprehensive understanding of how crypto assets are set to reshape international trade. This is important in understanding how crypto assets are used in international trade and the possibility for it to replace the USD as a dominant currency. This will analyse South Africa's regulatory framework for crypto assets and its implications on international trade.

CHAPTER 4 THE REGULATION OF CRYPTO ASSETS AS FINANCIAL PRODUCTS UNDER THE *FAIS ACT*

4.1 Introduction

The global increase in the use of crypto assets has brought forth both opportunities and challenges in international trade.³³⁰ In response to these emerging developments of crypto assets, South Africa has implemented a regulatory framework to govern the use and trade of crypto assets.³³¹ This regulatory framework addresses the various risks associated with the use of crypto assets. At the centre of this regulatory framework is the *FAIS Act*, which aims to regulate the provision of financial services and protect consumers from financial risks.³³²

This chapter examines the authorisation of crypto assets service providers under the *FAIS Act* by exploring the licencing process and the duties of accountable institutions in terms of *FICA*. It also examines the associated risks and the protections offered to buyers and sellers through the regulation of crypto assets as financial products. It also explores the challenges of the FCA's regulatory framework for crypto assets. Through this analysis, the chapter establishes the extent to which the *FAIS Act* regulation impacts the use of crypto assets in South African international trade transactions and explores the regulatory challenges. It highlights the significant role regulation plays in fostering a secure and trustworthy environment for crypto asset transactions in South Africa's international trade.

4.2 Crypto assets as financial products

The *FAIS Act* regulates a wide range of financial products. A financial product (also known as a financial instrument) is an asset that holds capital and can be traded in the financial markets.³³³ This asset is typically in the form of a monetary contract

³³⁰ Fintech News 2023 <https://www.fintechnews.org/the-use-of-cryptocurrency-in-international-trade-and-cross-border-transactions/>.

³³¹ Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

³³² Van der Merwe 2023 <https://fincor.co.za/declaration-of-crypto-assets-as-a-financial-product-under-the-financial-advisory-and-intermediary-services-act>.

³³³ Cleartax 2023 <https://cleartax.in/glossary/financial-instrument>.

between consumers and financial institutions such as banks, brokerage firms, and insurance companies.³³⁴ The regulation of financial products in South Africa falls under the *FAIS Act*.³³⁵ Section 1 of this *FAIS Act* defines a financial product to include, *inter alia*, securities, and instruments such as shares in a company, participatory interest in a collective investment scheme, a long-term or short-term insurance contract or policy, and a foreign currency-dominated investment instrument including foreign currency deposits.³³⁶

Financial products can be classified into two main categories, namely, derivative products and cash products.³³⁷ Derivative financial products are linked to a specific commodity through which they can be traded in the financial market.³³⁸ This financial product enables trade in assets such as currency, equity, and commodities.³³⁹ Derivative financial products find their value in the price of the underlying asset or index.³⁴⁰ Cash financial products on the other hand are assets that are directly influenced by the conditions of the financial market.³⁴¹ Financial market fluctuations directly impact the value of the cash financial products.³⁴² There are two types of cash financial products. The first is security, which is a financial product that when purchased or traded represents ownership of a part of a publicly traded company on the financial market, for example, Sanlam shares or government bonds.³⁴³ The second are deposits and loans, these financial products are based on a monetary contract between the parties involved.³⁴⁴

As discussed in Chapter 1, the FSCA's declaration defined crypto assets as:

³³⁴ Cleartax 2023 <https://cleartax.in/glossary/financial-instrument>.

³³⁵ Cleartax 2023 <https://cleartax.in/glossary/financial-instrument>.

³³⁶ Section 1 of the FAIS Act 37 of 2002.

³³⁷ Cleartax 2023 <https://cleartax.in/glossary/financial-instrument>.

³³⁸ International Monetary Fund (IMF) 2023 <https://www.imf.org/external/np/sta/fd/index.htm>.

³³⁹ IMF 2023 <https://www.imf.org/external/np/sta/fd/index.htm>.

³⁴⁰ IMF2023 <https://www.imf.org/external/np/sta/fd/index.htm>.

³⁴¹ Corporate Finance Institute (CFI) 2023 <https://corporatefinanceinstitute.com/resources/wealth-management/financial-instrument/>.

³⁴² CFI 2023 <https://corporatefinanceinstitute.com/resources/wealth-management/financial-instrument>.

³⁴³ CFI 2023 <https://corporatefinanceinstitute.com/resources/wealth-management/financial-instrument>.

³⁴⁴ CFI 2023 <https://corporatefinanceinstitute.com/resources/wealth-management/financial-instrument>.

A digital representation of value that-

(a) is not issued by a central bank, but is capable of being traded, transferred, or stored electronically by natural and legal persons for payment, investment and other forms of utility;

(b) applies cryptographic techniques; and

(c) using distributed ledger technology.³⁴⁵

When analysing this definition against the backdrop of the classification of financial products, it is difficult to ascertain the category under which crypto assets should be classified as financial products. At first, it might appear that crypto assets should be classified as cash financial products because not only are they used as a medium of exchange, but their value is also dependent on the conditions of the financial market.³⁴⁶ However, this is not the case in the South African financial sector because it is not regulated as a medium of exchange. As discussed above as well as in Chapter 1, the IFWG refused to acknowledge crypto assets as currency or legal tender because they failed to meet all the requirements of currency or legal tender.³⁴⁷ Hence it seems more appropriate to classify crypto assets as derivative financial products because they can be traded in the financial market in their own right and there is no investment accrual with crypto assets.³⁴⁸

Further, for crypto assets to qualify as derivative financial products they need to be a 'digital representation' of a contract having an underlying reference determining its value.³⁴⁹ This means that the crypto asset is a digital representation of a financial contract and its value is linked to an external asset such as the price of a commodity or interest rate.³⁵⁰ In analysing the FSA's definition of crypto assets, it can be said that paragraph (a) tacitly expresses the existence of a financial contract because for crypto

³⁴⁵ Reg 2 in GN 1350 of October 2022.

³⁴⁶ CFI 2023 <https://corporatefinanceinstitute.com/resources/wealth-management/financial-instrument>.

³⁴⁷ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

³⁴⁸ IMF 2023 <https://www.imf.org/external/np/sta/fd/index.htm>.

³⁴⁹ Bird & Bird 2024 <https://www.twobirds.com/en/insights/2024/german/crytpoassets-versus-financial-instruments-how-to-tell-them-apart>.

³⁵⁰ Bird & Bird 2024 <https://www.twobirds.com/en/insights/2024/german/crytpoassets-versus-financial-instruments-how-to-tell-them-apart>.

assets to be traded, invested or used as a payment method there needs to be an agreement between the parties to such transaction.

Classifying crypto assets as derivative financial products with underlying contractual references similarly regulates them to traditional financial products. Since traditional financial products are bound by clear contractual terms, this classification improves the contractual clarity and enforceability of international trade transactions involving crypto assets.³⁵¹ However, the high volatility of crypto assets will still pose a risk to the parties involved in international trade transactions. To bypass this risk the international trade agreement could be structured around an underlying reference such as a commodity and hedging may be used as a risk management mechanism.³⁵² Hedging is a risk management mechanism whereby another investment is made in another commodity or financial product to offset the potential loss.³⁵³ International trade agreements that use crypto assets could base the crypto assets on a stable commodity to offset the price volatility of crypto assets.³⁵⁴ Therefore, categorising crypto assets as derivatives with an underlying asset solidifies their usefulness in international trade transactions.

It is also important to consider whether the FSCA's regulation of crypto assets extends to Non-fungible Tokens (hereafter referred to as NFTs). NFTs are unique digital assets that, through the use of blockchain technology, represent ownership of a specific item such as digital art, video clips and audio files.³⁵⁵ Each NFT has a distinct value and cannot be exchanged for something else of a similar value.³⁵⁶ FSCA's regulation of crypto assets does not expressly mention NFTs. This regulation defines crypto assets and classifies them as financial products, focusing on their ability to be stored electronically, traded, used as a medium of exchange and converted into fiat currency. NFTs and crypto assets are similar in that they both use blockchain technology and

³⁵¹ International Monetary Fund 2023 <https://www.elibrary.imf.org/view/journals/007/2023/004/article-A001-en.xml>

³⁵² Chen *et al* 2017 *European Financial Management (EFM)* 9.

³⁵³ Chen *et al* *EFM* 9.

³⁵⁴ Chen *et al* *EFM* 9.

³⁵⁵ Spoor & Fisher 2023 <https://spoor.com/nfts/>.

³⁵⁶ Spoor & Fisher 2023 <https://spoor.com/nfts/>.

are traded on similar platforms.³⁵⁷ However, crypto assets and NFTs are still materially different from one another. Crypto assets can be exchanged for something of a similar value, whereas NFTs cannot.³⁵⁸ Crypto assets can be used as a medium of exchange and NFTs cannot because they mainly represent ownership of an item.³⁵⁹ NFTs are also used as collateral in money lending. An NFT holder seeking a fiat currency loan may use their NFT as security for the said loan.³⁶⁰ NFT loan collateral transactions are credit agreements and as such attract regulation under the *National Credit Act* 34 of 2005.³⁶¹ Lenders need to be registered with the National Credit Regulator for the NFT loan collateral transactions to be valid.³⁶² The FSCA's lack of express mention of NFTs in the regulation of crypto assets, combined with the material differences between NFTs and crypto assets. It can be said that the regulation of crypto assets as financial products does not extend to NFTs. This means that, unlike crypto asset service providers, NFT traders need not be authorised as financial service providers in terms of the *FAIS Act*.

4.3 The authorisation of financial products and crypto asset service providers in terms of the FAIS Act

To trade and offer advice or intermediary services on these financial products, the *FAIS Act* prescribes a structured application process for authorisation as financial service providers.³⁶³ Since crypto assets are regulated as financial products, this structured application process applies to persons, natural or juristic, who wish to become crypto assets service providers.

The *FAIS Act* has key mandatory provisions regarding the authorisation of financial service providers including crypto asset service providers, namely; licensing,

³⁵⁷ SA Financial Regulation Journal 2022 <https://www.financialregulationjournal.co.za/2022/09/16/south-africa-nfts-present-complex-indirect-tax-challenges/>.

³⁵⁸ McDaniel and Norberg 2019 *SSRN* 4.

³⁵⁹ Spoor & Fisher 2023 <https://spoor.com/nfts/>.

³⁶⁰ Blockworks 2023 <https://blockworks.co/news/how-nft-lending-works>.

³⁶¹ Baker Mckenzie 2024 <https://resourcehub.bakermckenzie.com/en/resources/global-financial-services-regulatory-guide/Europe-middle-east-and-africa/south-africa/topics/what-types-of-activities-require-a-licence-in-your-jurisdiction>.

³⁶² Baker Mckenzie 2024 <https://resourcehub.bakermckenzie.com/en/resources/global-financial-services-regulatory-guide/Europe-middle-east-and-africa/south-africa/topics/what-types-of-activities-require-a-licence-in-your-jurisdiction>.

³⁶³ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

qualification and competency, determination of fit and proper, compliance and record keeping as well as dispute resolution.³⁶⁴

The *FAIS Act* has a structured process for the authorisation of financial service providers,³⁶⁵ namely;

- Application for a Licence to the FSCA;
- Complying with fit and proper requirements;
- Complying with requirements for adequate business systems; and
- Complying with competency requirements.

Institutions or individuals wishing to be authorised as crypto asset service providers must apply to the FSCA for a licence.³⁶⁶ Section 7(1) of the FAIS provides that no person may act as a financial service provider unless such a person has been issued a licence in terms of section 8.³⁶⁷ In terms of section 8(1) of the FAIS Act any person wishing to practice as a financial service provider must apply with the registrar.³⁶⁸ The application must satisfy the registrar that such person complies with the requirements for fit and proper financial service providers.³⁶⁹

The applicant must meet the fit and proper requirements as well as comply with adequate business systems requirements.³⁷⁰ Regarding the latter requirement, the applicant must have control systems in place to assist them in managing financial risks to ensure the protection of the consumer.³⁷¹ The former requirement refers to the operational ability and financial soundness of the applicant.³⁷² Section 8 of the FAIS Act provides that the registrar must after consultation with the Advisory

³⁶⁴ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

³⁶⁵ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

³⁶⁶ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

³⁶⁷ Section 7(1) of the *FAIS Act*.

³⁶⁸ Section 8(1) of the *FAIS Act*.

³⁶⁹ Section 8(1) of *FAIS Act*.

³⁷⁰ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

³⁷¹ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

³⁷² Van der Westhuizen Evaluating the effect of the legislative and regulatory requirements in the financial services industry 18.

Committee determine the requirements that financial service providers must comply with.³⁷³ These requirements contain sections on honesty and integrity requirements, competency, experience requirements, qualification requirements and regulatory examination requirements.³⁷⁴ For juristic persons, the corporate behaviour and personal conduct of persons who govern it such as directors determines the compliance with the requirements of fit and proper.³⁷⁵

In terms of the competency requirements of the determination of fit and proper, financial service providers must complete business training or product-specific training before rendering any financial services for a particular financial product.³⁷⁶ The product-specific training focuses on the nature and complexities of the specific financial product, the underlying components of that financial product, the fee structure, charges and other costs associated with the financial product.³⁷⁷ This means that persons wishing to be authorised as financial service providers dealing in crypto assets need to undergo competency training in crypto assets. If a registrar is satisfied that an applicant meets the fit and proper requirements, shows competency in crypto assets and complies with the business systems required for dealing with crypto assets, the FCSA will issue a financial service provider licence, and such a person will be authorised as a crypto asset service provider.³⁷⁸

The licencing of crypto assets service providers began on 1 June 2023. As of 2 July 2024, the FCSA had received 383 applications, of which 138 were approved and authorised crypto asset service providers, 5 of which were declined and 80 were withdrawn by the applicants.³⁷⁹ The FSCA stated that there are two main reasons for

³⁷³ Van der Westhuizen Evaluating the effect of the legislative and regulatory requirements in the financial services industry 18.

³⁷⁴ Van der Westhuizen Evaluating the effect of the legislative and regulatory requirements in the financial services industry 18.

³⁷⁵ Van der Westhuizen Evaluating the effect of the legislative and regulatory requirements in the financial services industry 18.

³⁷⁶ Momentum 2018 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2018/Legal_Update_5-2018_Determination_of_Fit_and_ProPER_Requirements_January2018.pdf.

³⁷⁷ Momentum 2018 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2018/Legal_Update_5-2018_Determination_of_Fit_and_ProPER_Requirements_January2018.pdf.

³⁷⁸ Section 8(3) of the *FAIS Act*.

³⁷⁹ FSCA 2024 <https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20update%20on%20approved%20Crypto%20Asset%20Service%20Providers%20%2002%20July%202024.pdf>.

applications being declined or withdrawn.³⁸⁰ Firstly, applicants are failing to reach the operational ability requirement, in that applicants are unable to provide clear business models outlining crypto asset activity and operational frameworks that support such activities.³⁸¹ Secondly, applicants are failing to meet the competency requirements, in that applicants fail to demonstrate the required knowledge regarding crypto assets.³⁸² This shows that in issuing crypto asset licences, the FSCA takes great precautions to mitigate risk and promote industry standards and ethics as well as safeguard the interests of clients.

Once a person is authorised as a crypto asset service provider, the *FAIS Act* bestows duties on such person such as reporting duties and the duty to maintain comprehensive records.³⁸³ Crypto asset service providers report to the FSCA, depending on a quarterly, biannually or annual basis.³⁸⁴ As per this reporting duty, crypto asset service providers must submit compliance reports, financial soundness reports and governance reports.³⁸⁵ This is to ensure accountability and transparency thereby guarding against malpractice by the financial service providers.³⁸⁶ This will be discussed further in the next subtopic.

Therefore, it can be inferred that the authorisation of crypto asset service providers under the *FAIS Act* promotes transparency and accountability. Thus, creating a stable financial sector that instils confidence in foreign investors, thereby boosting

³⁸⁰ FSCA 2024 <https://www.fsc.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20update%20on%20approved%20Crypto%20Asset%20Service%20Providers%20%2002%20July%202024.pdf>.

³⁸¹ FSCA 2024 <https://www.fsc.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20update%20on%20approved%20Crypto%20Asset%20Service%20Providers%20%2002%20July%202024.pdf>.

³⁸² FSCA 2024 <https://www.fsc.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20update%20on%20approved%20Crypto%20Asset%20Service%20Providers%20%2002%20July%202024.pdf>.

³⁸³ Section 28 and 29 of the Financial Intelligence Centre Act 38 of 2004 . Section 18 of the Financial Advisory and Intermediary Services Act 37 of 2002.

³⁸⁴ FSCA 2024 <https://www.fsc.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20update%20on%20approved%20Crypto%20Asset%20Service%20Providers%20%2002%20July%202024.pdf>.

³⁸⁵ FSCA 2024 <https://www.fsc.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20update%20on%20approved%20Crypto%20Asset%20Service%20Providers%20%2002%20July%202024.pdf>.

³⁸⁶ Van der Westhuizen Evaluating the effect of the legislative and regulatory requirements in the financial services industry 18.

international trade and fostering stronger international trade relationships. It allows parties to conclude their international trade transactions in crypto assets, knowing that the *FAIS Act* offers them protection against the risk associated with crypto assets.

4.4 Risk protection under the FAIS Act regarding crypto assets

Before the FSCA regulated crypto assets, buyers and sellers who encountered challenges when concluding crypto asset transactions had little to no recourse. However, with the FSCA’s regulation, the *FAIS Act* appears to address some of these challenges.

Due to being decentralised, crypto assets lack formalised governance and this makes it difficult to address operational risks such as fraud risks and cyber security.³⁸⁷ As a result crypto assets are often targets of fraudulent schemes.³⁸⁸ Fraudsters target the crypto exchange trading platforms and hack into them to gain access to crypto assets stored in the digital wallet.³⁸⁹ The most common way in which crypto assets are hacked is through phishing attacks. Phishing is a cyberattack in which hackers impersonate legitimate websites such as crypto exchange platforms and wallet providers.³⁹⁰ The hackers use fake websites and emails, that resemble legitimate websites to deceive consumers into sharing their crypto keys.³⁹¹ These cyber-attacks may lead to the bankruptcy of trading platforms. It is estimated that 6% of Bitcoin crypto assets have been affected by cyber-attacks.³⁹²

Organised criminal groups rely on money laundering tactics to conceal the origins of their illicit money and reintegrate it into the economy.³⁹³ These groups take advantage of the anonymisation service in blockchain technology.³⁹⁴ These criminal groups

³⁸⁷ European Central Bank 2019 https://www.ecb.europa.eu/economic-bulletin/articles/2019/html/ecb.ebart201905_03.
³⁸⁸ European Central Bank 2019 https://www.ecb.europa.eu/economic-bulletin/articles/2019/html/ecb.ebart201905_03.
³⁸⁹ European Central Bank 2019 https://www.ecb.europa.eu/economic-bulletin/articles/2019/html/ecb.ebart201905_03.
³⁹⁰ Cybercrime 2024 <https://cybercrime.org.za/phishing/>.
³⁹¹ Cybercrime 2024 <https://cybercrime.org.za/phishing/>.
³⁹² European Central Bank 2019 https://www.ecb.europa.eu/economic-bulletin/articles/2019/html/ecb.ebart201905_03.
³⁹³ Ncube and Kabwe 2023 *De Jure Law Journal (De Jure)* 364.
³⁹⁴ Ncube and Kabwe 2023 *De Jure* 364.

convert their illicit fiat money into crypto assets using pseudonyms for their digital wallets.³⁹⁵ These crypto assets are then used as a medium of exchange for their purchases to reintegrate the illicit fiat money into the economy.³⁹⁶ It becomes difficult for law enforcement authorities to identify and trace the flow of this illicit fiat money.³⁹⁷

The FSCA's regulation of crypto assets as financial products offers some mechanisms that address these risks, thereby offering protection to buyers and sellers. As already discussed in paragraph 4.3, crypto asset service providers must demonstrate sufficient knowledge of crypto assets as well as comply with the fit and proper requirements before they can be authorised as crypto asset service providers.³⁹⁸ This not only reduces the risk of buyers and sellers receiving ill-informed advice on crypto assets but it also reduces the risk of fraud and mismanagement.³⁹⁹

The *FAIS Act* also requires that financial service providers adhere to the ethical standards of the industry.⁴⁰⁰ This includes full disclosure to clients, in that financial service providers must disclose to their clients the risk involved such as the volatility and potential loss associated with using crypto assets.⁴⁰¹ This regulation also brings in the application of sections 28 and 29 of the *Financial Intelligence Centre Act 38 of 2001* (hereafter referred to as *FICA*). *FICA* was enacted to combat financial crimes such as money laundering.⁴⁰² It creates a legal framework which effectively identifies clients and verifies the source of the funds they use in financial transactions.⁴⁰³ Schedule 1 of *FICA* provides for accountable institutions, these are institutions that must adhere to *FICA* regulations to prevent financial crimes in South Africa.⁴⁰⁴ In terms of Schedule 1 of *FICA*, financial service providers under the *FAIS Act* are accountable

³⁹⁵ Ncube and Kabwe 2023 *De Jure* 364.

³⁹⁶ Ncube and Kabwe 2023 *De Jure* 364.

³⁹⁷ Ncube and Kabwe 2023 *De Jure* 364.

³⁹⁸ Webber Wentzel 2022 <https://www.webberwentzel.com/News/Pages/impending-regulation-of-crypto-asset-service-providers.aspx>.

³⁹⁹ Webber Wentzel 2022 <https://www.webberwentzel.com/News/Pages/impending-regulation-of-crypto-asset-service-providers.aspx>.

⁴⁰⁰ Masthead 2017 <https://www.masthead.co.za/newsletter/importance-disclosure-advisors-know>

⁴⁰¹ Masthead 2017 <https://www.masthead.co.za/newsletter/importance-disclosure-advisors-know>

⁴⁰² Preamble of *Financial Intelligence Centre Act 38 of 2001*. (hereafter referred to as *FICA*).

⁴⁰³ Preamble of *FICA*.

⁴⁰⁴ Schedule 1 of *FICA*.

institutions under *FICA*.⁴⁰⁵ Hence crypto asset service providers are bound by *FICA* regulations.

Section 28 of *FICA* provides that accountable institutions, which include crypto asset service providers, must report cash transactions exceeding R44 999.99 (forty-nine thousand nine hundred and ninety-nine rand) to the Financial Intelligence Centre (hereafter referred to as FIC).⁴⁰⁶ This could be a single transaction or multiple related transactions.⁴⁰⁷ The report must contain the identity information of the client making the said transaction and details of the transaction. Crypto asset transactions are subject to this regulation. Authorised crypto asset service providers must declare cash transactions exceeding R44 999.99. By reporting these cash transactions it enables the FIC to monitor cash flow and detect suspicious transactions that may be used for money laundering.

Section 29 provides that accountable institutions must report unusual transactions they suspect to be suspicious to the FIC, even if such transactions are below the threshold provided for in Section 28.⁴⁰⁸ Therefore once a crypto asset service provider has a reasonable suspicion that the funds used or to be used in a particular transaction are from illicit activities, such a transaction must be reported to the FIC.⁴⁰⁹ It is for this reason that when applying for authorisation as a financial service provider under the *FAIS Act* the applicant must show that they have control systems in place to assist them in managing financial risks.⁴¹⁰ These control systems assist in picking up suspicious transactions thereby assisting in the furtherance of section 29 of *FICA*. Once the transactions have been reported, the crypto assets service provider must not disclose to any other person including the client, that the transaction has been reported

⁴⁰⁵ Schedule 1 of *FICA*.

⁴⁰⁶ Section 28 of *FICA*. FIC 2022 <https://www.fic.gov.za/wp-content/uploads/2023/09/2022.10-Guidance-Guidance-Note-5C-CTRs.pdf>.

⁴⁰⁷ FIC 2022 <https://www.fic.gov.za/wp-content/uploads/2023/09/2022.10-Guidance-Guidance-Note-5C-CTRs.pdf>.

⁴⁰⁸ Section 29 of the *Financial Intelligence Centre Act* 38 of 2001. Synmans Inc 2021 <http://www.Synmans.com/advice/a-closer-look-at-section-29-of-the-fic-act>.

⁴⁰⁹ Synmans Inc 2021 <http://www.synmans.com/advice/a-closer-look-at-section-29-of-the-fic-act>.

⁴¹⁰ Financial Services Board 2024 <https://www.fscamymoney.co.za/Publications/FAIS>.

to the FIC.⁴¹¹ This is to avoid tipping off the client that they are being investigated and thus compromising the investigation.⁴¹²

In terms of section 21A of *FICA*, accountable institutions, are required to ascertain information from a prospective client regarding the nature purpose of the prospective business relationship.⁴¹³ Part of the information the accountable institution must ascertain is the source of funds which the prospective client expects to use in concluding transactions in the course of the business relationship.⁴¹⁴ This means that parties involved in an international trade transaction that is concluded in crypto assets must disclose to crypto asset service providers the source of the funds used in the conclusion of the transaction. This is another risk-mitigating mechanism in that money used in illicit activities is not laundered back into the economy by using crypto assets. In essence, this duty to disclose the source of funds helps to prevent money laundering.⁴¹⁵

FSCA's regulation also offers buyers and sellers legal recourse in case of any challenges that may arise from using crypto assets in international trade transactions.⁴¹⁶ Buyers and sellers now have access to formal complaint mechanisms such as ombud services and dispute resolution options.⁴¹⁷ Any party to the transaction who believes that they have suffered prejudice as a result of using crypto assets in their transaction can now lodge a complaint with the FAIS Ombud.⁴¹⁸ The FAIS Ombud acts as an independent institution that resolves disputes between financial services providers and their clients. This avenue allows buyers and sellers to recover any loss they might have suffered due to the negligence and/or failure to act of the financial service provider through

⁴¹¹ Section 29(3) of the *Financial Intelligence Centre Act 38 of 2001*.

⁴¹² Synmans Inc 2021 <http://www.synmans.com/advice/a-closer-look-at-section-29-of-the-fic-act>.

⁴¹³ Section 21A *Financial Intelligence Centre Act 38 of 2001*. FIC 2017 <https://www.fic.gov.za/wp-content/uploads/2023/09/2017.10-Guidance-Guidance-Note-7-FIC-Act-obligations.pdf>.

⁴¹⁴ Section 21A (c) of the *Financial Intelligence Centre Act 38 of 2001*.

⁴¹⁵ FIC 2017 <https://www.fic.gov.za/wp-content/uploads/2023/09/2017.10-Guidance-Guidance-Note-7-FIC-Act-obligations.pdf>.

⁴¹⁶ Masthead 2024 <https://www.masthead.co.za/newsletter/crypto-and-compliance-navigating-new-regulatory-waters>.

⁴¹⁷ Masthead 2024 <https://www.masthead.co.za/newsletter/crypto-and-compliance-navigating-new-regulatory-waters>.

⁴¹⁸ Masthead 2024 <https://www.masthead.co.za/newsletter/crypto-and-compliance-navigating-new-regulatory-waters>.

whom the transaction was facilitated.⁴¹⁹ Further, the existence of formal dispute-resolution avenues ensures that financial service providers uphold ethical standards when discharging their duties.⁴²⁰

The regulation of crypto assets as financial products under the *FAIS Act* helps curtail the prevalence of the use of crypto assets for money laundering.⁴²¹ Financial service providers dealing in crypto assets are required to adhere to the *FAIS Act's* requirements on anti-money laundering.⁴²² This includes conducting due diligence to satisfy themselves of their client's identity and gather detailed information about the source of the funds used for the transaction.⁴²³

Overall, it appears that the *FAIS Act* addresses the risks associated with the use of crypto assets in international trade transactions. Although the *FAIS Act* does not entirely prevent cyber-security attacks or mitigate the volatility of the value of crypto assets. However, it improves consumer protection by mandating transparency and compliance with industry ethics and professional standards.

While these risk protection mechanisms are effective, there are still some regulatory challenges that the *FAIS Act* does not address.

4.5 Regulatory Challenges

As mentioned before, FSCA's regulatory framework of crypto assets addresses the risk associated with the use of crypto assets in international trade, however, there are still some challenges that regulation fails to properly address.

One of the challenges not addressed by the FSCA's regulation is the taxing of crypto assets. Normal income tax and capital gains tax rules apply to crypto assets.⁴²⁴ This means that a person who invests in a crypto asset and gains profit from the same

⁴¹⁹ Masthead 2024 <https://www.masthead.co.za/newsletter/crypto-and-compliance-navigating-new-regulatory-waters>.

⁴²⁰ Masthead 2024 <https://www.masthead.co.za/newsletter/crypto-and-compliance-navigating-new-regulatory-waters>.

⁴²¹ Ncube and Kabwe 2023 *De Jure* 364.

⁴²² Ncube and Kabwe 2023 *De Jure* 364.

⁴²³ Ncube and Kabwe 2023 *De Jure* 364.

⁴²⁴ SARS 2023 <https://www.sars.gov.za/individuals/crypto-assets-tax/>

(usually by selling the crypto asset), such profits are subject to capital gains tax.⁴²⁵ However, if a person receives crypto assets as a form of remuneration, as is the case in international trade transactions, such earnings are subject to income tax.⁴²⁶

Therefore to calculate tax implications, the crypto assets need to be valued, this is where the challenge arises. Crypto assets are highly volatile and such volatility makes valuation difficult.⁴²⁷ Due to the volatility, it becomes difficult to establish consistent and accurate crypto asset values for tax implications.⁴²⁸ Without a uniform method for the valuation of crypto assets for tax purposes, holders of crypto assets will continue to declare inconsistent values to SARS when filing for their taxes. The FSCA in collaboration with SARS can investigate methods of evaluating crypto assets to have uniform regulation for the taxation of crypto assets.

There is also a lack of education and consumer awareness regarding crypto assets. The FCSA's regulation does not address this lack. As discussed in Chapter 1 part of the reason consumers fall prey to crypto asset scams, is that they do not understand them.⁴²⁹ Furthermore, this lack of crypto asset education hinders the integration of crypto assets in international trade.⁴³⁰ This is because businesses and individuals involved in international trade lack an understanding of what crypto assets are and how they could improve their international trade transactions.

Another regulatory challenge for crypto assets is the need for international harmonized regulation.⁴³¹ Since crypto assets are transnational, many countries have taken different regulatory approaches to crypto assets.⁴³² This creates inconsistencies and legal ambiguity for international trade transactions as there is no international

⁴²⁵ Kionly 2023 <https://kionly.io/guides/crypto-tax-south-africa/>

⁴²⁶ Kionly 2023 <https://kionly.io/guides/crypto-tax-south-africa/>

⁴²⁷ OECD 2020 <https://www.oecd-ilibrary.org/taxation/taxing-virtual-currencies-e29bb804-en>.

⁴²⁸ OECD 2020 <https://www.oecd-ilibrary.org/taxation/taxing-virtual-currencies-e29bb804-en>.

⁴²⁹ IFWG 2020
https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets_Final.pdf 6.

⁴³⁰ McDaniel and Norberg 2019 *SSRN* 13.

⁴³¹ De Rebus 2024 <https://www.derebus.org.za/regulation-of-crypto-assets-in-south-africa-challenges-and-opportunities/>.

⁴³² World Economic Forum 2023 https://www3.weforum.org/docs/WEF_Pathways_to_the_Regulation_of_Crypto_Assets_2023.pdf.

harmonized regulation of crypto assets.⁴³³ To achieve international harmonisation the FSCA needs to have a regulatory body that investigates global crypto asset regulatory trends. Seeing that for international trade transactions, one country's regulation of crypto assets is not sufficient in mitigating the risks associated with crypto assets.⁴³⁴ There needs to be a harmonized regulatory framework between the countries involved in international trade transactions to ensure maximum risk protection.⁴³⁵

Having discussed the risks associated with crypto assets, it can be said that a harmonized international regulation of crypto assets should consider the following key areas of regulation, namely, anti-money laundering rules, consumer protection rules and a unified classification of crypto assets.

As discussed, crypto assets can and are often used for money laundering. It is therefore important for the international community to address this risk when regulating crypto assets. This can be done by having a provision that ensures that all crypto asset transactions are traceable, and the funds used are accounted for.⁴³⁶ The FATF has set guidelines on anti-money laundering rules regarding crypto assets and all member states are expected to abide by the guidelines.⁴³⁷ The FSCA's regulation of crypto assets addresses this as already discussed above.

As a result of their novelty, crypto asset consumers are faced with multiple risks. International regulation of crypto assets must ensure consumer protection. This includes adherence to financial industry standards on competency and ethics. Lastly, there needs to be a unified classification of crypto assets internationally.⁴³⁸ As it stands, there are contrasting national regulatory approaches to crypto assets, some countries

⁴³³ De Rebus 2024 <https://www.derebus.org.za/regulation-of-crypto-assets-in-south-africa-challenges-and-opportunities/>.

⁴³⁴ World Economic Forum 2023 https://www3.weforum.org/docs/WEF_Pathways_to_the_Regulation_of_Crypto_Assets_2023.pdf.

⁴³⁵ World Economic Forum 2023 https://www3.weforum.org/docs/WEF_Pathways_to_the_Regulation_of_Crypto_Assets_2023.pdf.

⁴³⁶ World Economic Forum 2023 https://www3.weforum.org/docs/WEF_Pathways_to_the_Regulation_of_Crypto_Assets_2023.pdf.

⁴³⁷ IFWG 2020 https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paPER%20on%20crypto%20assets%20_Final.pdf 6.

⁴³⁸ International Monetary Fund 2022 <https://www.imf.org/en/Publications/fandd/issues/2022/09/Regulating-crypto-Narain-Moretti>.

have classified crypto assets as legal tender, while others have classified them as commodities.⁴³⁹ The FSCA’s regulatory framework does not make provisions for a regulatory body that will keep up-to-date with these national regulations of crypto assets and report back to industry stakeholders for them to comply with these regulations when conducting international trade. This makes compliance with these regulations complex and hinders the efficiency of using crypto assets in international trade transactions.⁴⁴⁰ Parties to international trade transactions have to navigate different regulations in every country they trade with.⁴⁴¹ Harmonized classification of crypto assets would simplify international trade transactions as there would be uniform international standards that provide consistency, making international trade in crypto assets efficient.

4.6 Conclusion

This chapter analysed South Africa’s regulatory framework of crypto assets as financial products. In doing so, the chapter explored the nature of crypto assets as financial products, the authorisation of crypto asset service providers, the risk protection the regulation offers to buyers as well as the regulatory challenges as well as the regulatory challenges.

On analysis of the nature of crypto assets as financial products, it was established that the regulation allows crypto assets to be classified as derivative financial products. This enhances the clarity of international trade agreements in which crypto assets are used.

In analysing the authorisation of crypto asset service providers, the structured licencing application process was explored. It was then established that this licencing process promotes accountability and transparency among authorised crypto asset service providers.

⁴³⁹ International Monetary Fund 2022 <https://www.imf.org/en/Publications/fandd/issues/2022/09/Regulating-crypto-Narain-Moretti>.

⁴⁴⁰ International Monetary Fund 2022 <https://www.imf.org/en/Publications/fandd/issues/2022/09/Regulating-crypto-Narain-Moretti>.

⁴⁴¹ International Monetary Fund 2022 <https://www.imf.org/en/Publications/fandd/issues/2022/09/Regulating-crypto-Narain-Moretti>.

Further, in the analysis of the risk protection, the regulation offers to buyers, this chapter establishes that the application of the *FAIS Act* to crypto assets helps mitigate the risks associated with the use of crypto assets, such as price volatility, fraud, cybersecurity threats, and money laundering.

It was also established that this regulatory framework offers buyers and sellers formal complainant mechanisms. This increases confidence in using crypto assets in international trade as it protects against loss and malpractice. It also has a positive impact on international trade as it offers crypto assets as a secure alternative to concluding international trade transactions. This further contributes to the market stability and financial integrity of crypto assets and ultimately fosters a secure environment for the growth and use of crypto assets in international trade transactions.

Although there are still some regulatory challenges surrounding crypto assets, the *FAIS Act* does not entirely curtail the price volatility of crypto assets nor the risk of cybersecurity attacks. It can be said that the FSCA's regulation of crypto assets as financial products under the *FAIS Act* is a remarkable first step towards integrating crypto assets into international trade and it has a positive impact on South Africa's international trade.

CHAPTER 5 CONCLUSION

5.1 Impact of the FSCA's regulation of crypto assets on international trade in South Africa

This study was undertaken to answer the research question "To what extent does the *FAIS Act's* regulation impact the use of crypto assets in South African international trade transactions." The related principal aim was to assess the legislation regulating crypto assets as financial products and its effect on the South African international trade sector. This study has expansively analysed crypto assets and their use in international trade, especially in South Africa.

Six different sub-objectives guided the research process in answering the research question. The first sub-objective was to establish the characteristics of crypto assets, amongst others, and to determine how they compare with fiat currency. A foundational understanding was established in the initial chapters. This step was essential to understand how regulating crypto assets under the *FAIS Act* impacts their use in South African international trade transactions. It was determined that crypto assets are decentralised and have transnational ability. Unfortunately, the value of crypto assets has also proven to be very volatile.

The second sub-objective was to identify the role of crypto assets in international trade. To reach this sub-objective, the study took a deep dive into the dynamics of international trade. It highlighted the factors that influence international trade, such as comparative advantage and currency exchange. It also pointed out that international trade heavily relied on a dominant vehicle currency, the US dollar, for international trade transactions. However, there is growing interest in an alternative dominant vehicle currency, and crypto assets present a viable alternative that can streamline international trade transactions.

Furthermore, this study analysed South Africa's regulatory framework of crypto assets. The regulatory framework was analysed employing the following sub-objectives to guide this process. Firstly, the definition of a financial product and how crypto assets fit into this definition, bearing in mind their characteristics as discussed. The *FAIS Act*

was analysed to determine its applicability to crypto assets. It was established that crypto assets can be classified as derivative financial products. This strengthens their integrity and promotes their use in international trade transactions. This demonstrated that regulating crypto assets as financial products is a workable option for international trade in South Africa.

Secondly, it examined the authorisation of crypto asset service providers. It was established that the *FAIS Act* has a structured process for the authorisation of crypto asset service providers. Authorised crypto asset service providers must have a licence subject to ongoing reporting to the FSCA, and meet the fit and proper requirements as well as the competency requirements. This process is aimed at ensuring consumer protection through accountability and transparency.

Therefore, it can be inferred that the authorisation of crypto asset service providers under the *FAIS Act* promotes transparency and accountability. Thus, creating a stable financial sector that instils confidence in foreign investors, thereby boosting international trade and fostering stronger international trade relationships. It allows parties to conclude their international trade transactions in crypto assets, knowing that the *FAIS Act* offers them protection against the risk associated with crypto assets.

Lastly, this study established that the regulation of crypto assets as financial products offers significant protection to buyers and sellers in international trade transactions. Authorising crypto-asset financial providers creates a system of accountability and transparency, thereby protecting buyers and sellers from malpractice. It was also established that this regulation integrates provisions of *FICA* which combat money laundering. Collectively ensuring that professional and ethical standards are upheld and consumers are protected from loss.

South Africa's regulatory approach to crypto assets is a necessary step towards integrating crypto assets into international trade. This regulatory framework provides great protection to the consumers including giving them legal recourse for any disputes.

Parties to an international trade transaction, that wish to conclude their transaction in crypto assets are faced with two options, namely:

- i. To be authorised as a crypto assets service provider, or
- ii. to outsource the services of an authorised crypto asset service provider.

When looking at the first option, it means these parties, must comply with the structured licensing process for financial service providers. Authorisation as a crypto asset service provider requires specialised knowledge of crypto assets and business entities involved in international trade transactions lack this knowledge since they mostly use crypto assets as a medium of exchange. Therefore, to meet the competency requirements for licencing and to set up crypto asset business control systems, these parties may have to employ persons who are knowledgeable in crypto assets and this is costly.

The second option seems to be the more workable option, as it is cost-effective. These businesses can use the services of authorised crypto asset service providers to conclude their transactions. By opening and maintaining an account with a trading platform that is an authorised crypto asset service provider, these businesses can make payments through these platforms as they would through a bank. However, the transaction is faster and cheaper due to blockchain technology.

The most impactful and workable option for international trade regarding this regulation is the aspect of curtailing risks associated with the use of crypto assets in international trade. Regulating crypto assets as financial products means that financial service providers dealing in crypto assets must not only be authorised but must also comply with industry standards and ethics. The protection offered under the *FAIS Act* instils confidence among buyers and sellers to use crypto assets as an alternative to fiat currency in international transactions. This is a workable option for the mitigation of risks associated with crypto assets.

Furthermore, this regulation promotes innovation as it encourages a safe and structured environment for the use of crypto assets. This is impactful because international trade is ever evolving. Therefore, integrating crypto assets into international trade enables international trade transactions to be efficient as it eliminates the need for intermediaries. The elimination of intermediaries makes international trade transactions cheaper and faster because crypto assets allow for

peer-to-peer exchange. This means that South African traders can use crypto assets for their international trade transactions at cheaper and much faster rates, thereby increasing their accessibility to international markets and reducing reliance on dominant vehicle currencies.

It can therefore be said that the regulation of crypto assets and financial products in terms of the *FAIS Act* might positively impact international trade in South Africa. This regulation balances risk management and innovation thereby fostering an environment in which crypto assets can positively contribute to the development and modernization of international trade in South Africa.

While this regulatory framework is a step in the right direction, it has been established that it fails to address some risks in international trade. The regulation fails to establish a uniform valuation mechanism for crypto assets for taxation purposes thereby creating discrepancies when filing for tax. Further, it does not address the widespread lack of knowledge and understanding of crypto assets among stakeholders in the international trade sector. This hinders the use of crypto assets in international trade transactions, as stakeholders will remain unaware of the benefits of using crypto assets in their international trade transactions. Lastly, due to the lack of international harmonisation of crypto assets, this regulation may create uncertainty on how crypto assets are treated when South Africa trades with different countries, thereby affecting the efficiency of using crypto assets in international trade transactions.

5.2 Recommendations

To enhance the role of crypto assets in international trade the following recommendations are made:

- The *FAIS Act* could make provisions for hedging as a risk mitigation mechanism to curtail the volatility of crypto assets. The *FAIS Act* could establish a framework for crypto asset contracts to be hedged against stable commodities. This will help mitigate loss for buyers and sellers concluding their international trade transactions in crypto assets. However, this framework would require international coordination, given the transnational nature of crypto assets.

Therefore, South Africa can propose such a framework to the international community. Upon international acceptance, such a framework would not only curtail the volatility of crypto assets, but it would also be a harmonised international regulation of crypto assets. Further, the FSCA could engage with insurance companies to develop insurance policies that are tailor-made for international trade transactions concluded in crypto assets. This will provide buyers and sellers with an added layer of protection against loss.

- The FSCA could establish education programmes for industry stakeholders such as businesses or individuals involved in international trade as well as financial service providers dealing in crypto assets. These education programmes would educate the industry stakeholders about the benefits of using crypto assets in international trade transactions further enforcing the view of crypto assets as an alternative to fiat currency in international trade transactions. This will also ensure that every person involved in crypto asset-based international trade transactions is well-informed on the advantages and shortfalls of using crypto assets and which risk management mechanisms to adopt.
- The FSCA could have a task- force that will stay abreast of the development of crypto assets globally. By investigating the developments in crypto assets, this task force could make recommendations to the FSCA for a regulatory framework that is adapted to the developments. This could aid in developing an international harmonized regulatory framework. The task force could also spearhead the innovation of crypto assets in South Africa by exploring ways in which crypto assets could be improved. Thus placing South Africa at the forefront of crypto asset innovation and regulation.
- The FSCA could make provisions for the taxation of crypto assets. Through collaboration with industry experts, the FSCA could develop a reliable system that determines the value of crypto assets for tax implications.

The above recommendations, if implemented, could improve the acceptability of crypto assets in international trade. As they would provide further knowledge on the crypto assets, drive innovation and strengthen the risk management.

Future research may include a comparative analysis of another country's regulation of crypto assets and how the said regulation impacted that country's international trade. This will provide an understanding of the global regulatory landscape of crypto assets.

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