

Regulation of the cryptocurrency in South Africa towards a legal framework

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To Allah who gave me a second chance. To the city of Mafikeng and its people: I feel like you adopted me.

DEDICATION

To my late grandmother, I'm sorry you missed out. To my beloved brother Tawanda, this is your legacy. And to myself, for no giving up on myself.

ABSTRACT

The internet has over the years created a platform for endless possibilities. Trade in goods and service is one area that has been enabled by a mere click of a computer's mouse. This technological revolution allows clients and businesses to connect and undertake efficient and safe business transactions. This revolution has also brought to the forefront the shortfalls of the current international trading structure to acclimatise to these latest technological advancements.

Cryptocurrency is one such new phenomenon that has created challenges for legal systems and international trade with regard to predictability, legal certainty, security and confidentiality. The cybernetic and decentralised nature of blockchain technology and the absence of effective regulation makes the application of traditional legal frameworks unsustainable and the enforcement of any new legal mechanisms tedious. As a result of the above explanations, the current regulatory status of cryptocurrencies is vexatious. However, cryptocurrency platforms offer a solution to international trade issues as cryptocurrencies can transcend borders and are international by character. Furthermore, the anonymity nature of cryptocurrencies can surpass the current trade restrictions and allow for virtually instantaneous and cheaper cross border transactions, therefore making it more effective than the traditional fiat systems. However, there are associated risks as the cryptocurrency platforms can be used by criminal networks for nefarious purposes. Because of that, some jurisdictions around the globe have made headways in the regulation of cryptocurrencies and have put into place institutional and legislative frameworks. However, a unitary approach to the regulation of cryptocurrencies in international trade is well overdue as individual governments have adopted differing approaches in their efforts to regulate virtual currencies. This study explores the legal nature of cryptocurrencies in international trade, particularly in the international electronic commerce economy. The study will endeavour to determine whether international harmonisation of efforts by the major international regulatory organisations can develop a universal blueprint to harness the potential benefits of blockchain and cryptocurrency.

It will be discovered that there is an urgent need for a regulatory intervention in South Africa. Premised on this need, the study makes recommendations such as the

integration of cryptocurrencies into the existing legislative framework as well as the creation of a stand-alone statute to specifically regulate it. The creation of a cryptocurrency ombudsman should also be considered as an element of regulatory intervention.

KEYWORDS: associated risks, best practices, cryptocurrency, international trade, regulation

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LIST OF ABBREVIATIONS

ATM	Automated Teller Machines
AJEMS	African Journal of Economic and Management Studies
AML/CFT	Anti Money Laundering/Combating the Financing of Terrorism
BSA	Bank Secrecy Act
BRICSLJ	Brazil Russia India China South Africa Law Journal
CJIL	Chicago Journal of International Law
CNY	China's Yuan
DSB	Dispute Settlement Body
EJLT	European Journal of Law and Technology
FATF	Financial Action Task Force
FNB	First National Bank
FSCA	Financial Sector Conduct Authority
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICT	Information and Communication Technologies
IMF	International Monetary Fund
IJAM	International Journal of Applied Mechanics
ITLQ	International Trade Law Quarterly
MFN	Most Favoured Nation
MUNUC	Model United Nations of the University of Chicago
NT	National Treatment
NT	National Treasury

PER/PELJ	Potchefstroom Electronic Law Journal
PSG	Paris Saint-Germain
USA	United States of America
USD	United States Dollar
SAGCE	The South African Gold Coin Exchange
SCILJ	Stockholm Centre for International Law and Justice
SARB	South Africa Reserve Bank
WTO	World Trade Organisation
VAT	Value Added Tax

CHAPTER 1: INTRODUCTION

1.1 Background to the study

In August of 2021 the well-known football star Lionel Andrés Messi (Messi) left Barcelona to join Paris Saint Germain (PSG). PSG fans were so thrilled to have the star on their team such that "...part of Messi's welcome package was paid in cryptocurrency fan tokens worth close to 25-30 million euros (\$29-35 million)".¹ This is just a tip of the iceberg as to the warm embrace that cryptocurrencies have received globally. Several high-profile business and entertainment figures have backed crypto assets, with Tesla boss Elon Musk, Twitter founder Jack Dorsey and rapper Jay-Z among those to have shown support for bitcoin.² This is proof that cryptocurrencies are gaining prominence in the world.³ This research study argues for the recognition and regulation of this new phenomenon both in terms of international trade and South Africa's regulatory framework in order to mitigate associated risks.

It will be suicidal for the global community in international trade to stand aloof to the influence of world currency turnover.⁴ In his seminal study, Seetharaman explains that for close to half a century the US Dollar (USD) has been the forerunner of the world's currencies.⁵ This has been followed by China's Yuan (CNY) which has been the dominant currency turnover in Asia, pushing aside the influence of the Japanese Yen.⁶ As this 'currency war' was playing out, a 'currency' of a novel kind came into existence. This currency postulated a complete departure from the conventional fiat currency. In 2009 the Bitcoin was heralded on to the world stage by Satoshi Nakamoto. Bitcoin fast became the 'poster boy' of cryptocurrencies and it is the current forerunner of all cryptocurrencies known today.⁷ The idea of virtual or digital currency, commonly

¹ Reuters 2021 <https://www.reuters.com>

² Reuters 2021 <https://www.reuters.com>

³ Reuters 2021 <https://www.reuters.com>

⁴ Mobilerdx 2020 *Why Are Governments, Banks and Financial Institutions Scared Of Bitcoin?*
<https://www.mobilerdx.com/2020/04/why-are-governments-banks-and-financial-institutions-scared-of-bitcoin.html>.

⁵ Seetharaman *et al Impact of Bitcoin World Currency* 38.

⁶ Seetharaman *et al Impact of Bitcoin World Currency* 38.

⁷ Reuters 2019 <https://www.reuters.com>

known as cryptocurrency is said to be the brainchild of the Liberalists.⁸ Liberalists advocated for a system of life without the control of any governments or centralised regulatory authorities.⁹ They had deep seated mistrust of governments and banks as far as their privacy was concerned. As an alternative to mainstream financial institutions, Liberalists sought freedom and privacy through the usage of cryptography encryption code.¹⁰ This alternative was anonymous and existed outside the control of central governments and any other regulatory authorities. This alternative to conventional money came to be known as cryptocurrency.¹¹ The basket of cryptocurrency includes Bitcoin, Litecoin and Ethereum, among others.

On 20 November 2019 the cryptocurrency market was thrown into a serious frenzy upon the announcement by South Africa's First National Bank (FNB) that they were considering the shutting down of all bank accounts associated with cryptocurrency.¹² The driving force behind FNB's decision was the uncertainty arising from the non-regulation of cryptocurrency in South Africa.¹³ The decision by the FNB was taken against the backdrop of similar announcements by other jurisdictions like Singapore and South Korea.¹⁴ Fast forward to March 2021, India made a similar proclamation, saying it is mooted a law outlawing cryptocurrencies and fining anyone trading or even holding virtual assets.¹⁵ India sought to make use of its own home-grown cryptocurrency which will go a long way in the easier regularisation of digital currency.¹⁶

The above gives a synopsis on how the world is reacting to a non-regulated and

⁸ Liberalists are people who regard the freedom of the individual as superior to politics. Liberals contend that a central government is necessary to preserve the freedom of individual, but the same government can be regarded as a threat to liberty and freedom.

⁹ Singh 'Show me the Money': A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 2.

¹⁰ Data encryption involves the translation of data into a code and which can only be accessed by individuals with a decryption key. 'Encryption Code' available at <https://digitalguardian.com/blog/what-data-encryption>

¹¹ The word was coined by the Bitcoin blockchain system in 2009. The word "crypto" is borrowed from the Greek and means "private" or "hidden." Cryptocurrency then stands for money that is private and hidden. This is done through encryption or coding.

¹² Reuters 2019 <https://www.reuters.com>

¹³ City Press 2019 <https://city-press.news24>

¹⁴ City Press 2019
<https://city-press.news24>

¹⁵ Reuters 2019 <https://www.reuters.com>

¹⁶ Reuters 2019 <https://www.reuters.com>

decentralised phenomenon of digital currencies. This new digital currency has caused “trepidation for monetary and regulatory bodies across the globe”.¹⁷ As a result, most countries are failing to put into place sound legal and regulatory mechanisms, resulting in a gap for legal guidance for cryptocurrency users. Examples of countries that are facing a mammoth task in the regulation of cryptocurrency include Algeria, India and Singapore.¹⁸ Algeria’s 2018 Financial Law has outlawed the use of cryptocurrency. Algeria’s stance to totally ban the use and dealing in cryptocurrency gives legal certainty, as compared to South Africa’s piece-meal recognition.¹⁹ South Africa’s piece-meal recognition and regulation leads to legal uncertainty because a non-regulated situation forces unsupervised transactions beyond the established legal rules. Users will end up not having remedies if obligations are not met and where agreements are breached. With this background, this study calls for a *bona fide* approach by the South African lawmakers to develop a sound and effective legal system to monitor and regulate the operations of virtual currency.

1.1 Problem statement

The problem statement is premised on the lack of a regulatory framework for cryptocurrency in the international trade arena and in South Africa.

1.1.1 The place of cryptocurrency in international trade law

Experts in international trade jurisprudence have argued that since “...an international regulatory framework is far-off, it will first be necessary for countries to implement effective local regulations for an international system to exist in any form”.²⁰ This argument does not hold water and the study argues for the alternative. For an international system regulating cryptocurrencies to exist, the prerogative lies primarily with the World Trade Organisation (WTO). This is the body that regulates international trade. Only after the WTO has published a blueprint which will be accepted by willing

¹⁷ Singh ‘Show me the Money’: A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 4.

¹⁸ Al Jazeera 2017 <http://aljazeera.com>.

¹⁹ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

²⁰ Singh ‘Show me the Money’: A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 8.

countries will there be a varied implementation of such a framework into municipal law. Cryptocurrencies are receiving a warm reception in international trade law. However, despite the great potential of cryptocurrencies, the WTO as the parent organisation in international trade has failed to put into place an effective regulatory framework. In its 2018 annual report, the WTO admits the “infinite potential” of cryptocurrency in international trade.²¹ Blockchain is the most popular place to securely buy, store, and trade Bitcoin, Ethereum, and other top cryptocurrencies.²² The limitations and risks associated with the use of cryptocurrency will be illustrated as the discussion progresses. The author agrees with the WTO’s submission that “cryptocurrency is a double-edged sword” in that it has its good and bad.²³ Cryptocurrency can be utilised to improve cross-border trade, but it is also susceptible to “criminal use, including purchasing of child porn, illegal drugs and weapons, and even head-hunting”.²⁴ A lack of an effective regulatory framework and policing of “cryptocurrency leaves the door wide open for rampant criminal abuse”.²⁵ In order to avert these criminal elements, the WTO has admitted to the need for the development of a coherent surveillance system to be adopted by countries in international trade. This is the blueprint that the study argues for as the first step to the regulation of cryptocurrency in international trade.

Central to the workings of cryptocurrency is the blockchain technology. Blockchain technology is defined by the same principles that underpin the World Trade Organisation.²⁶ The common denominator between the WTO and blockchain technology is that both pursue liberalisation and democratisation of trade.²⁷ Cryptocurrencies rely on an open cross border data flow and dispense with

²¹ Singh ‘Show me the Money’: A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 8.

²² Al Jazeera 2017 <http://aljezeera.com>

²³ World Trade Organisation “Blockchain Technology to the Future” in *WTO Updates Conference* (25-28 September 2021 Boston) 9.

²⁴ Popper and Nathaniel. “Bitcoin Has Lost Steam. But Criminals Still Love It.” <https://www.nytimes.com/2020/01/28/technology/bitcoin-black-market.html>

²⁵ World Trade Organisation “Blockchain Technology to the Future” in *WTO Updates Conference* (25-28 September 2021 Boston) 9.

²⁶ Razon KA “Liberalising Blockchain: An Application of the GATS Digital Trade Framework” *MJIL* 126-157.

²⁷ Razon KA “Liberalising Blockchain: An Application of the GATS Digital Trade Framework” *MJIL* 126-157.

intermediaries and transactions are carried out through a peer-to-peer system of traders. WTO's General Agreement on Trade in Services (GATS) is the only multilateral treaty creating binding international obligations to be given to suppliers of services, including online services. The application of the GATS provisions to cryptocurrency means South Africa will be forced to regulate cryptocurrency into its municipal laws or if not, at least its non-regulation and non-recognition will be considered as a barrier to trade.²⁸ This research argues that the WTO should be at the fore front in the regulation of cryptocurrency and be the pushing factor to induce South Africa into coming up with its own domestic regulation framework. The WTO through GATS may provide a foundational legal framework for member states to follow on. Of course, the application of blockchain technology like Bitcoin will be challenging but at least GATS possesses flexible provisions enough to accommodate Bitcoin and therefore expand global trade in services.²⁹ The WTO has endeavoured to develop, monitor, and enhance international trade. The Model Law on Electronic Commerce and the Consumer Protection in E-Commerce Guidelines were also adopted to deal with this boom of electronic commerce.

Where the WTO has been lacking, the Financial Action Task Force (FATF) has been attempting to devise an "international standard for a cryptocurrency regulatory framework since 2019. At its core is the reduction of anonymity in crypto transactions".³⁰ The organisation has said that there are 27 countries in the world adhering to the FATF Framework.³¹ FATF efforts should be applauded, and it is critical that countries of the world to put efforts together in the creation of international legislation that would go beyond a country's municipal laws. This is "...important if crypto-related crimes are to be prevented and penalised".³²

1.1.1 The potential regulation of cryptocurrency in South Africa

Two South African brothers Ameer and Raees Cajee of Cape Town were reported missing and the question on everyone's lips was whether the bothers, barely out of

²⁸ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

²⁹ Al Jazeera 2017 <http://aljezeera.com>

³⁰ Snyders 2021 <https://mybroadband.co.za>

³¹ Snyders 2021 <https://mybroadband.co.za>

³² Snyders 2021 <https://mybroadband.co.za>

their teens "...put what may be the biggest bitcoin heist of all time, and escape with the equivalent of some R50 billion?".³³ The brothers ran a crypto-currency investment company and were rumoured to have defrauded their clients and ran into hiding. Investigations are still ongoing. This paints the grim picture of consumers being at risk of being defrauded when there is no regulatory framework for checks and balances.³⁴ It has been estimated that there are over 700 virtual currencies operating globally³⁵ existing in a legal grey area by virtue of them being decentralised and operating without an effective regulatory framework to govern their operations.³⁶ The Financial Action Task Force (FATF) has declared that the growth of cryptocurrencies calls for national action which must be prioritised.³⁷ The South Africa Reserve Bank (SARB) has also expressed the real growth of Bitcoin in its current operational environment.³⁸ The exponent growth of cryptocurrencies have attracted global interest resulting in more countries and organisations aiming at developing a legal framework to aid the regulation of cryptocurrencies.³⁹ The United States (US) did put into place the BitLicense, which is a regulatory framework in an effort to counter money laundering and minimise consumer risks, amongst others.⁴⁰ Japan has mooted a Digital Asset Authority which regulates the trading of cryptocurrency. These allow for each transaction to be taxed and scrutinised by the tax officials.⁴¹ Although cryptocurrencies are not a currency of financial product in Australia, the country's Taxation Office overlooks the trading in cryptocurrencies and does allow for the use of cryptocurrencies in commercial transactions and payment in the form of digital currencies.⁴² Some countries like South Africa have not made any significance strides in the regulation of cryptocurrencies.

³³ De Wet 2021 <https://www.businessinsider.co.za>

³⁴ De Wet 2021 <https://www.businessinsider.co.za>

³⁵ Al Jazeera 2017 <http://aljazeera.com>

³⁶ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

³⁷ FATF 2015 "Guidance Guidelines for a risk-based approach to virtual currencies" *MHR* 2015 4.

³⁸ SARB 'Position Paper on Virtual Currencies' 2014 3-4.

³⁹ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

⁴⁰ Department of Financial Services "Virtual Currencies" 2015 <http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp>

⁴¹ Diet "OKs Bill to Regulate Virtual Currency Exchanges" *AEBMR* 2018 130.

⁴² Australian Government "Tax Treatment of Cryptocurrencies 2018" <https://www.ato.gov.au/General/Gen/Tax-treatmentof->

According to the South Africa Reserve Bank Act, cryptocurrencies are not regarded as a legal tender in South Africa.⁴³ The effect is that virtual currencies do not fall under the regulation of South African legislation that regulate fiat currencies, e-money and other forms of internet or digital payment systems. This blatant lack of a legal regulatory framework promotes criminality, and compounds risks such as the enforcement of the principle of finality and irrevocability in the payment systems.⁴⁴ The SARB's Position Paper in section 4.3.4 makes mention of the risks that consumers are exposed to with the absence of a legal framework. Some of the risks include the loss or theft through security breach, fraud or illegal usage and absence of insurance mechanism to compensate account holders in case of theft or loss.⁴⁵

Although the phenomenon of cryptocurrencies is relatively new in South Africa, some companies have shown keen interest in digital currencies.⁴⁶ For an unspecified period, customers at Pick n Pay's head office campus store have been able to use the cryptocurrency Bitcoin to purchase their necessities. This move has been hailed as a world-first for a major grocery seller. The firm behind this drive is Electrum, a payments technology company based in Cape Town.⁴⁷ The firm says that Pick n Pay's checkout process is as simple as scanning a QR code using a Bitcoin wallet app on the buyer's smartphone.⁴⁸ Beyond South Africa, countries like the United States and China have started to not only look at regulating digital currencies, but also at creating their own cryptocurrencies. South Africa being the biggest economy in Africa is tacitly recognising digital currency transactions between private players.⁴⁹ However, the

⁴³ According to section 17 of SARB Act section 17 provides that a legal tender of payment of money is (a) a tender by the Bank itself, of a note of the Bank or of an outstanding note of another bank for which the Bank has assumed liability in terms of section 15 (3)(c) of the Currency and Banking Act or in terms of any agreement entered into with another bank before or after commencement of this Act.

⁴⁴ European Central Bank "Virtual Currency Schemes" 2012 40.

⁴⁵ SARB 'Position Paper on Virtual Currencies' 2014 3-4.

⁴⁶ As of 2020, some of the firms in South Africa accepting Bitcoin included Phrodata, Baseline Skate Shop, Boerbier, Bukhara, Cape Firewood Supplies.

⁴⁷ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

⁴⁸ CFO 2021 <https://cfo.co.za/articles/pick-n-pay-now-accepting-bitcoin/>

⁴⁹ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

current legal *status quo* seem not to assimilate digital currency in the domestic financial sector.⁵⁰

In light of the above loopholes and risks associated with cryptocurrencies, South Africa at this moment lacks an effective legal and regulatory framework. It is against this background that this study was mooted. In summary, this research study aims to make a compelling case for an appropriate legal and regulatory framework to govern the everyday operations of cryptocurrencies. This is as a result of a lack of clarity in the existing body of laws in the financial sector, hence the need for a sound legal and regulatory framework to govern cryptocurrencies operations in international trade and in South Africa. It is the author's opinion that it will be a wise move for South Africa to regard cryptocurrency as a commodity and regulate it, rather than ignore its growing presence.

However, this hyped about domestic regulation is no simple task. It has been submitted that "if regulations are not fit-for-purpose, that actually goes to undermine the strength of the enforcer".⁵¹ It will be a grave mistake for South Africa to force cryptocurrencies into the already existing legal frameworks. Cryptocurrency regulation will need new legislation specially tailor made for it, but complemented by other regulations already in existence.⁵² This has been heralded as "a warning to South African regulators".⁵³ The Intergovernmental Fintech Group has argued in its position paper that providers of cryptocurrency services will be subject to existing regulations including "...anti-money laundering regulations, overseen by the Financial Intelligence Centre, exchange control regulations, overseen by the Reserve Bank and financial services regulations, overseen by the Financial Sector Conduct Authority".⁵⁴

1.1 Research question

Should South Africa regulate cryptocurrency to ensure its effective use in financial

⁵⁰ Mothoka *Regulating cryptocurrencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 99.

⁵¹ Mothoka *Regulating cryptocurrencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 56.

⁵² Mothoka *Regulating cryptocurrencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 59.

⁵³ De Wet 2021 <https://www.businessinsider.co.za>

⁵⁴ Mothoka *Regulating cryptocurrencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 60.

security law and mitigate the associated risks?

1.2 Aims and objectives of the study

1.2.1 Aims of the study

The aims of this mini dissertation are to explore the place of cryptocurrencies in international trade law as well as provide advice and criticism to the WTO to provide a clear blueprint on the regulation of cryptocurrencies in international trade. This research study also aims to make a compelling case for an appropriate legal and regulatory framework to govern the everyday operations of cryptocurrencies in South Africa. There is a lack of clarity in the existing body of laws in the financial sector, hence the need for a sound legal and regulatory framework to govern cryptocurrencies operations in South Africa.

Objectives of the study

The objectives of this study are the following:

- (a) to introduce an understanding of crypto-currencies,
- (b) to understand the relevance and importance of cryptocurrency in international trade law
- (c) to assess whether there is a need for legislative intervention for the regularisation of crypto-currencies in South Africa.

1.5 Methodology

1.5.1 The qualitative approach

The qualitative approach to research involves the collection, analysis and interpretation of data which is non-numerical in nature.⁵⁵ Qualitative research is used to understand the writer's subjective perception to the realities around him or her.⁵⁶ The qualitative approach to research carries many advantages. Because the researcher is closely involved, he or she gains a closer view of the subject area. The qualitative approach is also important in the suggestion of causes and effects and the

⁵⁵ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

⁵⁶ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

solution to a given problem.

1.5.2 The quantitative approach

On the other hand, the quantitative approach puts more emphasis on objective research and makes use of statistics, numerical investigation of collected data.⁵⁷ This data is usually collected through the manipulation of pre-existing numerical data, surveys, questionnaires, and polls.⁵⁸ The quantitative approach is also premised on static data and makes use of convergent reasoning rather than divergent reasoning, that is, the generation of a variety of ideas about a research problem in a spontaneous, free-flowing manner".⁵⁹ Some of the methods used to obtain data through this approach are data analysis, data collection and population study and sampling.⁶⁰ This approach has been criticized because of its rigidity and inflexibility in absorbing new information. It has further been submitted that because of pre-set answers, the objectivity of the final findings is always objectionable.⁶¹

This mini dissertation will be undertaken using the qualitative research method. This approach is appropriate because it adopts a descriptive style beneficial to legal practitioners in examining new knowledge that might not have been available for perusal, thereby gaining new understanding. This approach will juxtapose South Africa's position on cryptocurrency with that of El Salvador and the US. The US has fully embraced the phenomenon of cryptocurrency and maybe South Africa can learn a lesson on how regularisation is a necessity. This jurisdiction has some of the best practices when it comes to the regulation of cryptocurrencies. El Salvador, by recognising Bitcoin as a legal tender, has become the flagship example on the consistent regulation of cryptocurrencies.⁶² This is marked by the country's Decree No.8 "On the Development of the Digital Economy" which is aimed at developing the modern digital economy.⁶³ To achieve the above, the mini dissertation will rely on primary sources. These include case law, legislation, reports by organisations, position

⁵⁷ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

⁵⁸ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

⁵⁹ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

⁶⁰ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

⁶¹ Research Guides 2021 <https://libguides.usc.edu/writingguide/quantitative>.

⁶² Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

⁶³ Chudinovskikh and Sevryugin 2019 *BRICSLJ* 63.

papers conventions and other international instruments. Further reliance will be on secondary sources, including journal articles, textbooks, dictionaries, dissertations, and commentaries.

1.6 Framework of the study

Chapter 1 is an introduction to the research study and contains all the elements that need to be in introduction. These elements are, the background, the research question, the aims and objectives, the research methods and framework of the study

Chapter 2 this chapter investigates and discusses the provisions of cryptocurrency in international trade law.

Chapter 3 visit the current trends in the use of cryptocurrency in South Africa and determine the extent to which it has been embraced as a means of payment. Reference is also be given to the associated risks arising from the failure to regulate cryptocurrencies. A case is on cryptocurrency and crime as well as the lack of protection of consumers. Reference is also given to the Crypto Assets Regulatory Working Group (IFWG) 2020 Position Paper on Crypto Assets as the first attempt at giving guidelines towards a regulatory framework.

Chapter 4visits the legal framework of other jurisdictions, namely, the US and El Salvador and determine what lessons South Africa may learn from these jurisdictions. El Salvador, as the first country in the world to recognise cryptocurrency as a legal tender, is also used as a case study.

Chapter 5 makes up the conclusion of the research and provides some recommendations. The chapter also identifies areas of future research.

1.7 Relevance for the Research Unit

The focus of this study is on the need for a sound legal and regulatory framework to govern cryptocurrencies in South Africa. The research deals with the status quo of cryptocurrency regulation in South Africa and argues for a sound legal and regulatory framework to govern digital currencies. Further analysis is on the current regulatory framework in South Africa and the loopholes inherent in those regulations. Law reform will be recommended to overcome such risks like criminality, money laundering associated with cryptocurrencies as well as the exposure to consumers of unfair

practices. It is hoped that the findings and recommendations of this study will be contained in the final LLM mini-dissertation and be published as book chapters or journal articles. Accordingly, the research falls under the Finance, Trade and Innovation of the Law, Justice and Sustainability Research Unit of the Faculty of Law.

CHAPTER 2: CRYPTOCURRENCY AND ITS PLACE IN INTERNATIONAL TRADE LAW

2.1 Introduction

The 21st century has seen massive global economic changes and technological boom. This economic technological boom has been made possible by Information and Communication Technologies (ICT).⁶⁴ ICT has enabled the carrying out of international transactions by electronic means. The growth of electronic trade has been referred to as “virtually borderless global economy” that allows the trade in goods and services that can be digitised and communicated by electronic means.⁶⁵ The World Trade Organisation has contributed immensely to this revolution. The WTO has endeavoured to develop, monitor and enhance international trade. To allow the free flow of trade, the WTO initiated the General Agreement on Trade and Services (GATS). The Model Law on Electronic Commerce⁶⁶ and the Consumer Protection in E-Commerce Guidelines⁶⁷ were also adopted to deal with this boom of electronic commerce.

As a response to the boom in electronic commerce, payment systems have adapted through credit cards, electronic fund transfers through organisations like Visa, Mastercard and PayPal.⁶⁸ Not to be outdone in this electronic commerce boom is cryptocurrency. For example, since its introduction in 2009, Bitcoin has given birth to major global cryptocurrency market of about 2100 competitors.⁶⁹ Rightly so, cryptocurrency has been subjected to debate with its supporters submitting that its development and regulation were likely to increase efficiency and reduce transaction costs in international trade.⁷⁰ The detractors of cryptocurrencies argue that their value is volatile and unpredictable and its non-regulation does not offer enough consumer protection and is susceptible to money laundering⁷¹. Environment activists have

⁶⁴ Moodley *The Status of B2B E-Commerce in the South African Manufacturing Sector: Evolutionary or Revolutionary* 45.

⁶⁵ International Bar Association 2002

<https://www.ibanet.org/Document/Default.aspx?DocumentUid=4F39B8D5-2110-4A8A-BDAF-7CB1D7083236>.

⁶⁶ UNCITRAL of 1996.

⁶⁷ To help ensure that consumers are protected when making online transactions.

⁶⁸ Kalender and Gürbüz 2018 <https://www.ibanet.org>.

⁶⁹ Congressional Research Service 2018 <https://crsreports.congress.gov>.

⁷⁰ Congressional Research Service 2018 <https://crsreports.congress.gov>.

⁷¹ Congressional Research Service 2018 <https://crsreports.congress.gov>.

argued that cryptocurrencies use high energy levels in their verification computations, and this will lead to environmental degradation through climate change.⁷²

This chapter seeks to establish the place of cryptocurrency in international trade and international electronic commerce systems and how some international organisations like the International Monetary Fund are warming up to the idea of cryptocurrencies being the bread and butter of international trade.⁷³ An exposition of the potential of cryptocurrencies to contribute directly and indirectly to the growth of international trade is given.

2.2 Explanation of cryptocurrency and its operations

Bitcoin as an example of cryptocurrency has been equated as the “21st century’s version of gold” by virtue of it being “mined” by its users.⁷⁴ An analogy is drawn between the physical mining of gold and that of bitcoin. Just as gold mining is carried out through intensive human physical effort, so is bitcoin extracted through the intensive use of super computers to solve complex mathematical algorithms.⁷⁵ It has been submitted that this analogy marks a “transformational shift in the perception of value”.⁷⁶ In other words, notes and coins are no longer dominating the monetary domain of some international economies.⁷⁷ As a means of illustration, only 2% of Sweden’s economy is based on notes and coins while the figure in the United States of America stands at 7.7% and in the European Union the figure is pegged at 10%.⁷⁸ These statistics are just a tip of the iceberg and points to a future where cryptocurrency will be the mainstay of international economies.

Cryptocurrencies comprise of three elements: a set of rules, transaction storage ledger and a decentralised network of users.⁷⁹ The set of rules is based on a computer code protocol that determines how users may carry out their transactions.⁸⁰ This means

⁷² Congressional Research Service 2018 <https://crsreports.congress.gov>.

⁷³ <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

⁷⁴ James 2018 <https://www.imf.org/>.

⁷⁵ James 2018 <https://www.imf.org/>

⁷⁶ James 2018 <https://www.imf.org/>

⁷⁷ James 2018 <https://www.imf.org/>

⁷⁸ James 2018 <https://www.imf.org/>

⁷⁹ Bank for International Settlements 2018 <https://www.bis.org/publ/arpdf/ar2018e5.pdf>

⁸⁰ Singh *Show Me The Money: A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa* 19.

that a digital footprint in the form of a digital ledger is left where a transaction is made which can be verified by other users.⁸¹ This process is regulated by the rules of the network protocol which act against counterfeiting and fraudulent transactions.⁸² Further, the value of cryptocurrency is based on the willingness of someone to accept them in exchange for a service rendered or a good sold. This is because cryptocurrencies are not based on financial assets. This peer-to-peer transacting banks on the honesty of users and their record of transactions. The peer-to-peer model dispenses with the use of third parties who may act as intermediaries. For traditional currencies, these intermediaries are the banks and registered financial institutions. Cryptocurrencies' blockchain technology utilise peer-to-peer networks to distribute master copy containing all recorded and verified transactions of the public ledger.⁸³ The blockchain is a vast network of computers called nodes involved in the recording and validation of all transactions in a public tamper-resistant ledger. This ledger is temper-free without the help of a trusted 3rd party.⁸⁴ The blockchain ledger is an unassailable decentralised catalogue that allows parties across the globe to engage in mutually beneficial buying and selling.

Where Thabo in South Africa buys something from Andrew in the USA, the network will verify and validate the transaction and the transaction is announced on the network and nodes called miners will set up a block of verified transactions by cracking cryptographic puzzles. The accuracy of the information entered on the block is verified by the participants and added next to existing blocks thereby forming a chain of records.⁸⁵ Where attempts are made to edit the historical books, a notice is given out to other users and the system corrupts itself as a defensive measure. This is the reason why the operations of cryptocurrencies are regarded as tamper-resistant and its records as unquestionable.⁸⁶ For example, if Thabo wants to transfer to Andrew bitcoins, Thabo will transfer the sum to Andrew and the deal is verified as complete

⁸¹ Each transaction makes use of an asymmetrical cryptography which relying on private and public keys.

⁸³ Mabunda *Cryptocurrency: The new face of cyber money laundering* 44.

⁸⁴ Gurguc and Knottenbelt 2018 <https://www.imperial.ac.uk>.

⁸⁵ The Financial Intelligence Centre 2018.

<https://www.fic.gov.za/Documents/TYPOLOGIES%20-%20September%202018.pdf>.

⁸⁶ The Financial Intelligence Centre 2018

<https://www.fic.gov.za/Documents/TYPOLOGIES%20-%20September%202018.pdf>.

and then recorded on a block, which will then be added to other existing blocks. Just as banks earn a commission for services rendered, those aiding the execution of transactions (the miners) receive cryptocurrencies⁸⁷ as their compensation. This puts more coins in circulation.⁸⁸

2.3 Cryptocurrency in the WTO

2.3.1 The story so far

The 33rd Model United Nations of the University of Chicago (MUNUC) was held in February of 2021 and the WTO was in attendance virtually due to the COVID-19 pandemic. The gathering was used to give clarification on the WTO's position on the recognition and regulation of the cryptocurrency. The WTO has been regarded as the main body in international trade driving and expanding international trade through its "market integration, reduction of trade barriers and technology".⁸⁹ It has been submitted that the WTO serves to:

"...set rules for international trade, provide a forum for negotiating, arbitrate trade disputes, assure the transparency of trade processes, cooperate with other agents to improve global economy, and assist developing countries to benefit from the global trading system".⁹⁰

Given its prominent position in international trade, it is expected of the WTO to give clarification on the legitimacy of cryptocurrency in international trade law jurisprudence.

The WTO was established in 1995 and its mandate is with regard to the supervision of international trade.⁹¹ The WTO aims to establish regulations that "promote mutual economic growth between multilateral actors"⁹² and resultantly mitigating "barriers to global trade".⁹³ The WTO's origins can be traced from the General Agreement on

⁸⁷ Nakamoto's protocol provides that the Bitcoin reward for each minor validating a block should be divided by 2 every 210 000 blocks, which is around 4 years. It represented 50 bitcoins in 2012, then 25 in 2016, now 12.5 and will become 6.25 in 2020.

⁸⁸ Sinrod 2018 <https://www.weforum.org>.

⁸⁹ The World Bank Group and The World Trade Organization 2015.

https://www.wto.org/english/res_e/booksp_e/worldbankandwto15_e.pdf.

⁹⁰ Encyclopaedia Britannica 2019. <https://www.britannica.com/topic/World-Trade-Organization>.

⁹¹ World Trade Organisation 2020 <https://munuc.org>.

⁹² The World Bank Group and The World Trade Organization 2015.

⁹³ World Trade Organisation (WTO) 2020 <https://munuc.org>.

Tariffs and Trade (GATT) of 1947. The GATT was initiated to deal with the economic consequences of the World War II, particularly on the reduction of tariffs and expansion of international trade. It has been submitted that during the GATT period, there was unparalleled increase in international trade.⁹⁴ Since GATT lacked an institutional structure, the Uruguay Round of negotiations of 1982 gave birth to the Marrakesh Agreement, "which updated the GATT to the General Agreement on Trade in Services (GATS)".⁹⁵ The Marrakesh Agreement also contributed to the formation of the WTO. In its mandate to regulate international trade, the WTO relies on the GATT and GATS frameworks.

Compared to other big global institutions, the WTO's history is relatively shorter. As such, the global trading body does not have precedent to deal with vague situations like the validity of cryptocurrency as a recognised medium of exchange in world trade. It is because of this short history that the "WTO must be able to bring up innovative policies rather than relying on old, outdated ones".⁹⁶ As much as the WTO may focus on past precedent, it is prudent to always reinvent itself in dealing with modern problems and challenges in world trade. Digital currencies are slowly becoming the new norm and the WTO cannot afford to shy away from such reality. As such, the WTO has to introduce a blueprint on the regulation of cryptocurrencies in both municipal law and international law. It should also determine to what extent a sovereign member state may opt out of recognising cryptocurrency as a currency and to put into place mechanisms to stop disruptions of trade where other Member States opts to recognise such currencies. To that end, there is significant room for the WTO "to introduce new and innovative proposals for the better global economy."⁹⁷

The WTO Committee to 33rd MUNUC conference has admitted the need "to create an international framework to better integrate cross-border cryptocurrency use and establish international standards".⁹⁸ It has been admitted that due to the fact that the cryptocurrency phenomenon is new, there is a lacuna on a global level to deal with its

⁹⁴ Heakal and Reem 2020 "What Is the World Trade Organization?" 77.

⁹⁵ Encyclopaedia Britannica 2019 <https://www.britannica.com/topic/World-Trade-Organization>.

⁹⁶ World Trade Organisation (WTO) 2020 <https://munuc.org>.

⁹⁷ World Trade Organisation (WTO) 2020 <https://munuc.org>.

⁹⁸ World Trade Organisation (WTO) 2020 <https://munuc.org>.

regulation.⁹⁹ Because each state member has currency sovereignty, the introduction of cryptocurrency to the world stage may give rise to trade conflicts. These conflicts will be due to the “diametrically different local laws and regulations of cryptocurrency in each country”.¹⁰⁰ In order to avoid these trade conflicts and uncertainty, it is prudent for the WTO to provide a documentary blueprint on the regulation of cryptocurrency that Member states will have to adhere to. The concept of sovereign currency will have to be ignored when enforcing this blue-print.

In its 2018 annual report, the WTO admits to the “infinite potential” of cryptocurrency in international trade.¹⁰¹ The report concludes that “the promise of greater security, efficiency, integrity and traceability offered by Blockchain is leading an increasing number of companies to investigate the potential of the technology as a way to cut costs and improve their current business practices.”¹⁰² The limitations and risks associated with the use of cryptocurrency will be illustrated as the discussion progresses. The study agrees with the WTO’s submission that “cryptocurrency is a double-edged sword” in that it has its good and bad.¹⁰³ Cryptocurrency can be utilised to improve cross-border trade, but it is also susceptible to “criminal use, including purchasing of child porn, illegal drugs and weapons, and even head-hunting”.¹⁰⁴ A lack of an effective regulatory framework and policing of cryptocurrency “leaves the door wide open for rampant criminal abuse”.¹⁰⁵ In order to avert these criminal elements, the WTO has admitted to the need for the development of a coherent surveillance system to be adopted by Member states.¹⁰⁶ This is the blueprint that the author argues for as the first step to the regulation of cryptocurrency in international trade.

2.3.2 WTO’s historic stances towards cryptocurrencies

Because of the short history of the WTO and the fact that cryptocurrencies are a recent phenomenon, digital currencies have not been thoroughly scrutinised at any of the full

⁹⁹ World Trade Organisation (WTO) 2020 <https://munuc.org>.

¹⁰⁰ World Trade Organisation (WTO) 2020 <https://munuc.org>.

¹⁰¹ World Trade Organisation (WTO) 2020 <https://munuc.org>.

¹⁰² World Trade Report *The Future of World Trade* 45.

¹⁰³ World Trade Organisation (WTO) 2020 <https://munuc.org>.

¹⁰⁴ Nathaniel 2020 <https://www.nytimes.com>.

¹⁰⁵ World Trade Organisation 2020 <https://munuc.org>.

¹⁰⁶ World Trade Organisation 2020 <https://munuc.org>.

meetings of the WTO.¹⁰⁷ Cryptocurrencies have only been discussed at small scale meetings, detailing its future and potential utilisation.¹⁰⁸ Despite the lack of fully fledged meetings to exclusively discuss the phenomenon of cryptocurrencies, the world trading body has taken cognisance of "...the economic values and potential drawbacks of the (cryptocurrency) technology".¹⁰⁹ This is the first step towards acknowledging cryptocurrencies as a necessary tool in international trade.

2.3.3 Venezuela v United States—DS574 Measures Relating to Trade in Goods and Services Dispute and the consequences of non-regulation of cryptocurrencies

In December of 2018, Venezuela referred its dispute with the United States of America to the Dispute Settlement Body (DSB) of the WTO. The dispute involved measures adopted by the USA through a US Presidential Executive Order barring any transactions in the USA of Venezuela's newly established "Petro" cryptocurrency.¹¹⁰ This Venezuelan national cryptocurrency, like other digital currencies, is based on the distributed ledger technology.¹¹¹ However, unlike other cryptocurrencies like Bitcoin and Litecoin, Venezuela's Petro "was stated to be backed by Venezuela's reserves of oil, gasoline, gold, and diamonds".¹¹² In March 2019, Venezuela requested for the establishment of a panel to resolve this stalemate and approached other countries to join as arbitrators.¹¹³ At the time of writing, the WTO had not released a decision on the dispute. Venezuela has argued that the unilateral measures imposed by the USA violated international trade obligations as contained in GATT's Articles I:1, II:1, III:4, V:2, X:3, XI:1 and XIII:1. Venezuela further argued their case based on GATS' Articles II:1 (Most Favoured Nation principle (MFN)), XVI:2 and XVII:1 (National Treatment principle (NT)).

As much as the WTO is yet to proclaim a decision on the dispute, a few lessons can be derived from the case. The more the WTO drags its feet with regard to the

¹⁰⁷ World Trade Organisation 2020 <https://munuc.org>.

¹⁰⁸ World Trade Organisation 2020 <https://munuc.org>.

¹⁰⁹ World Trade Organisation 2020 <https://munuc.org>.

¹¹⁰ Third World Network 2019 <https://www.twn.my/title2/finance/2019/fi190101.htm>

¹¹¹ Crypto Insider 2021 <https://cryptoinsider.21mil.com/whats-really-happening-with-el-petro/>

¹¹² New York Times 2017 <https://www.nytimes.com/2017/12/03/world/americas/venezuela-cryptocurrency-maduro.html>.

¹¹³ World Trade Organisation (WTO) 2020 <https://munuc.org>.

regulation of cryptocurrency, the more there will be self-help from Member States. Once Member States take unilateral decisions when confronted with trade disputes with other members, international trade becomes an unruly playground where no laws are observed.¹¹⁴

The most notable lesson is the problem on how the WTO will deal with future disputes involving cryptocurrencies. It has been submitted that the dispute will be “*sui generis* as the WTO would be dealing with virtual currencies for the first time.”¹¹⁵ It has been submitted that if this action by Venezuela is to proceed to the Panel stage of the WTO, “the WTO would be dealing with a dispute involving cryptocurrencies for the first time”.¹¹⁶

A lesson of importance to be derived from the Venezuela-USA stalemate is cryptocurrencies’ impact on the Most Favoured Nation Treatment and National Treatment obligations. The Most Favoured Nation principle is contained in Article II:1 of GATS. The Article stipulates that a Member state is under requirement “to accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country”.¹¹⁷ The complaining Member state will have to prove that the measure taken falls outside of the particular Member’s Schedule of Exemptions. It has been submitted that a Most Favoured Nation violation will “be relatively easy to establish”, but “the National Treatment violation would require Venezuela to identify the sector/subsector in the US’ Schedule of Commitments which can include cryptocurrencies and then establish that the US is acting inconsistently with its

¹¹⁴ <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

¹¹⁵ Chandy TS and Bhardwaj P 2020 *ITLQ* 14.

¹¹⁶ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹¹⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹¹⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹¹⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹¹⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

commitments”.¹¹⁸ The National treatment principle is applicable to imported goods or services once they enter the market of the receiving country. These imported goods or services must be treated the same as locally produced goods or services.

In order to succeed with the NT argument, Venezuela will have to follow two options. Firstly, they have to state that the technology used for cryptocurrency (the distributed ledger technology) is afforded treatment “no less favourable than that the USA affords to its own like services and service suppliers”.¹¹⁹ To succeed with this, Venezuela will have to identify the sector or sub-sector in the USA’s Schedule of Commitments where the cryptocurrency technology is involved.¹²⁰ Unfortunately enough, USA’s old Central Production Classification of 1991 does not specify any sector or subsector to which cryptocurrencies, or its underlying technology would belong.¹²¹ The sector or sub-sector closest to this is the Computer and Related Services and data related services falling under the Telecommunications sector.¹²² This is so because the distributed ledgers utilised by cryptocurrencies are a computer base.¹²³ The conclusion that cryptocurrencies belongs to the Telecommunications sector is arrived at by referring to the Appellate Body’s decision in China-Audio-visual case.¹²⁴

The Venezuela-USA dispute has been a wake-up call on the need for an effective regulatory framework of cryptocurrencies. The WTO has admitted that “while cryptocurrency trading conflicts remain minimal for the time being, they are bound to rise”.¹²⁵ The WTO needs to come up with a blueprint on how cryptocurrencies may be assimilated into international trade and provide for “...guidelines to prevent future

¹¹⁸ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹¹⁹ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹²⁰ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹²¹ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹²² Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

¹²³ For the sub-sectors that fall under “Computer and Related Services”, reference is given to WTO Doc. S/C/W/45.

¹²⁴ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹²⁵ World Trade Organisation 2020 <https://munuc.org>

hypothetical trading problems”.¹²⁶ It has been submitted that international law does recognise cryptocurrencies and already international regulations do exist.¹²⁷ The WTO seeks to build on these already existing regulations and “...reach a global framework to prevent future barriers”.¹²⁸

2.4 Contribution of cryptocurrency to e-commerce

In its publication titled “Can Blockchain Revolutionise International Trade”, the WTO adopts a supportive standpoint as to why cryptocurrencies are to be adopted.¹²⁹ Because cryptocurrencies are paperless in nature, they can contribute immensely to electronic commerce. Cryptocurrencies will eliminate the period needed to process paper-based documents and paper payments.¹³⁰ Added to this, electronic documents using cryptocurrencies are way more convenient as compared to transactions using “hundreds of pages of documents”.¹³¹ It is ironic that despite the decentralised nature of cryptocurrencies, banks hold “20% of the total patents for blockchain and cryptocurrency technology, remaining as some of the largest stakeholders”.¹³² For example, the USA based bank Capital One Financial Corporation applied for a patent of the AI system in order to foresee future trends in the cryptocurrency market.¹³³ This is a clear illustration that banks are showing a keen interest in cryptocurrencies market, proving it to be a goldmine worthy of regularisation. This interest by the banks emanates from blockchain’s possible utilisation in electronic and mobile banking “...with its nearly impenetrable security measures”.¹³⁴

2.5 Conclusion

This chapter has made a case for the urgent need for the regulation of cryptocurrency in international trade. As highlighted above, cryptocurrencies comprise of three elements: transaction storage ledger, a set of rules and a decentralised network of

¹²⁶ World Trade Organisation 2020 <https://munuc.org>.

¹²⁷ World Trade Organisation 2020 <https://munuc.org>.

¹²⁸ World Trade Organisation 2020 <https://munuc.org>.

¹²⁹ Ganne 2018. <https://www.wto.org>.

¹³⁰ Ganne 2018. <https://www.wto.org>.

¹³¹ World Trade Organisation 2020 <https://munuc.org>.

¹³² Ganne 2018. <https://www.wto.org>.

¹³³ Helms 2020. <https://news.bitcoin.com>.

¹³⁴ World Trade Organisation 2018 <https://www.wto.org>.

users. These elements make cryptocurrencies anonymous and difficult to regulate. However, as much as its regulation is not easy, the WTO has acknowledged and recognised the importance of digital currency in international trade. The importance of this regulation in the WTO is highlighted by the Venezuela v USA case. This case might open a flood gate of such cases and there is an urgent need for the WTO to deal with the validity of cryptocurrencies effectively. Cryptocurrency can also contribute to electronic commerce or paperless transactions. This will contribute to the ease of doing business across transnational boundaries. Having mentioned and discussed some international regulatory proposals by international organisations, the following chapter explores the use, regulation and associated risks of cryptocurrency in South Africa.

CHAPTER 3: THE USE OF CRYPTOCURRENCY IN SOUTH AFRICA AND THE ASSOCIATED RISKS

3.1 Introduction

South Africa's general populace and selected merchants are using and accepting cryptocurrencies as a method of payment.¹³⁵ This chapter delves into the country's current trend on the usage of digital currencies. The use of cryptocurrencies in any form has its associated risks. Some of the risks to be explored give reference to money laundering and the funding of terrorist activities. Also included is the volatility and unpredictability of cryptocurrencies and how it might be difficult for governments to model any economic policies around such a volatile currency. This is due to the fact that South Africa's tax system has loopholes, and it is easy for users and beneficiary of cryptocurrency transactions to evade the payment of taxes. The aims of this chapter is to explore the current trends in the usage of cryptocurrency in South Africa and the risks associated with such usage.

3.2 The current trends on the use of cryptocurrency in South Africa

3.2.1 The basket of cryptocurrencies predominant in South Africa

In discussing the different cryptocurrencies currently used in South Africa, the research study adopts the Sadhaseevan's approach of grouping them into "generations".¹³⁶ Sadhaseevan submits that "there are two generations of cryptocurrencies"¹³⁷ utilised in South Africa. The first-generation cryptocurrencies includes Bitcoin, and the second generation includes Ethereum. If ever legislature is to come up with a comprehensive legislative framework on cryptocurrencies, it is prudent that they understand the basket of cryptocurrencies predominant in South Africa as their similarities and differences play a crucial part in their possible regulation. These generations are as follows:

3.2.1.1 First generation cryptocurrencies

¹³⁵ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹³⁶ <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

¹³⁷ Sadhaseevan *The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector* 2019 22.

First generation cryptocurrencies are the very first cryptocurrencies to make use of the blockchain technology “designed for the decentralisation of currency and payment transactions”.¹³⁸ Bitcoin and Alt -coins belong to this generation.

(a) Bitcoin

A whitepaper with the title *Bitcoin: A Peer-to-Peer electronic cash system* heralded the birth of Bitcoin. As highlighted in the first chapter, this phenomenon was born in 2009 by some anonymous programmers who called themselves “Satoshi Nakamoto.”¹³⁹ Nakamoto came to define Bitcoin as “a purely peer-to-peer version of electronic cash which allows online payments to occur directly from one party to another, without relying on a trusted financial institution.”¹⁴⁰ A Mybroadband Survey of 2018 has revealed that Bitcoin is the most favoured cryptocurrency amongst South Africans.¹⁴¹

(b) Alt-coins

Alt-coins share common traits with Bitcoin. They are based on the same functional blocks as that of Bitcoin.¹⁴² Litecoin is the “first and most successful of Alt-coins.”¹⁴³ Whereas Bitcoin is referred to as “gold”, Alt-coins are referred to as “silver”. Although there are similarities between the two, the Alt-coins do “alter key parameters.”¹⁴⁴ As a point of illustration, Alt-coins utilise a changed mining algorithm¹⁴⁵ which increases the time taken in the confirmation of a transaction.¹⁴⁶

3.2.1.2 Second generation cryptocurrencies

(a) Ethereum

A white paper with the title *Ethereum White Paper: A Next Generation Smart Contract and Decentralised Application Platform*¹⁴⁷, written by Vitalik Buterin in 2015, heralded

¹³⁸ Spurjeon, Sahu and Dutta 2018 *IJAM* 3.

¹³⁹ Nieman 2015 *PER/PEJ* 5.

¹⁴⁰ Nakamoto 2009 <https://www.bitcoin.org>

¹⁴¹ Mybroadband 2018 <https://mybroadband.co.za>.

¹⁴² Sadhaseevan *The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector* 2019 23.

¹⁴³ Sadhaseevan *The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector* 2019 23.

¹⁴⁴ Hileman and Rauchs 2017 <https://www.jbs.cam.ac.uk>.

¹⁴⁵ Hileman and Rauchs 2017 <https://www.jbs.cam.ac.uk>.

¹⁴⁶ Nagpal 2018 <https://ssrn.com>.

¹⁴⁷ Buterin V 2017 <http://blockchainlab.com>.

the birth of Ethereum. Ethereum has some characteristics of Bitcoin. They both make use of the blockchain technology. This is where the similarities ends because unlike Bitcoin, Ethereum:

“...uses the blockchain concept for more than money to enable applications using the blockchain to generate other cryptocurrencies and tokens, to represent financial instruments, the ownership of property (referred to as “smart property”) and the development of smart contracts which encode arbitrary state transition functions allowing users to create any of the above-mentioned systems.”¹⁴⁸

Ethereum has initiated its own currency named Ether which can be purchased to give private individuals and entities the passage to run their individualised applications on the Ethereum platform.¹⁴⁹

3.2.2 A warm reception: current trends on the usage of cryptocurrencies

“In crypto, South Africa is forging a different path than the rest of Africa.”¹⁵⁰ This quote captures the warm reception that cryptocurrencies have been met within South Africa. Both businesses and private individuals are increasingly embracing this phenomenon.

Numbers don’t lie. The acceptance of cryptocurrencies by ordinary people has been nothing less than phenomenal. “Just a few years ago the thought of purchasing something in South Africa with cryptocurrency-let alone actually being able to do it-would have been unheard of. But step-by-step, crypto is becoming a part of our everyday lives.”¹⁵¹ Several businesses in South Africa are starting to accept bitcoin and other cryptocurrencies for everyday transactions. At the close of 2020, the Bitcoin price was pegged at R900 000.¹⁵² Although the price is currently pegged at R500 000, it remains an attractive investment. “Regardless of its volatility, South Africans haven’t been deterred from investing-in fact, it’s the opposite.”¹⁵³ Between June and August of 2021, Luno, a Cape Town based crypto trading platform, has welcomed one million

¹⁴⁸ Sadhaseevan *The Regulation of Cryptocurrencies in the Context of South Africa’s Financial Sector* 2019 24.

¹⁴⁹ Marr 2018 <https://www.forbes.com>.

¹⁵⁰ Quartz Africa 2019 <https://qz.com>.

¹⁵¹ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁵² Caboz 2021 <https://www.businessinsider.co.za>.

¹⁵³ Caboz 2021 <https://www.businessinsider.co.za>.

more users to its platform “with 300 000 new wallets being created over this period. South Africa accounts for 30% of the platform’s users.”¹⁵⁴ In 2020, Luno conducted a survey on its customers, asking them “whether they’d pay for goods and services using crypto given the option, over 80% of the respondents indicated that they would.”¹⁵⁵

You may not be able to use cryptocurrencies to buy milk and airtime from the grocery stores, but there are businesses accepting payments in crypto for items far worth than milk and airtime.¹⁵⁶ You may not be able to buy milk with cryptocurrencies, but you can surely buy Krugerrands and gold coins.¹⁵⁷ The South African Gold Coin Exchange (SAGCE) & The Coin Shop have been accepting payments in Litecoin, Ethereum and Bitcoin.¹⁵⁸ The company says it is a pioneer in the gold coins and collectables sector to trade in cryptocurrencies. From the company, a cryptocurrency holder may be able to purchase Modern Numismatic gold coins, rare ZAR Gold Coins, Proof Krugerrands as well as Gold Bullion.¹⁵⁹ The company has admitted that their online store has seen “cryptocurrency contribute to over 25% of total sales since we launched. It grows every month.”¹⁶⁰ You may not be able to buy milk with cryptocurrency, but you can definitely buy a Ferrari. Ferris Cars, a Johannesburg based Ferrari specialist “made history in April (2021) becoming the first car dealership in the country to sell a car in exchange for bitcoin-a timeless classic pre-owned Ferrari California.”¹⁶¹ The company however admits that it is too early to determine whether payment by cryptocurrency will be a consistent payment method.¹⁶² You may not be able to buy milk with cryptocurrency, but you can definitely buy solar cells from a solar farm. Sun Exchange, a Cape Town based tech company states that “about 13% of our South African members and 30% of global members choose to pay in Bitcoin.”¹⁶³ The company acts as host to farm crowd funding for smaller scale solar farming projects. You may not

¹⁵⁴ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁵⁵ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁵⁶ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁵⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁵⁸ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁵⁹ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁶⁰ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁶¹ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁶² Caboz 2021 <https://www.businessinsider.co.za>.

¹⁶³ Caboz 2021 <https://www.businessinsider.co.za>.

be able to buy milk with cryptocurrency, but you can definitely buy a beer making kit.¹⁶⁴ These beer making kits became a necessity when alcohol sales were banned at the height of lockdown level 5.¹⁶⁵ Boer Bier started making make-your-own-beer-starter-kits to alleviate the impact of alcohol ban. According to the company, 5% of their sales are paid in cryptocurrencies like Bitcoin, Ethereum and Litecoin.¹⁶⁶ Other companies that are accepting payments in cryptocurrency include Baseline Skate Shop, Future Light and House of Sacks.¹⁶⁷ On the 1st of November 2022, Pick n Pay announced its intentions to expand a pilot of adding cryptocurrency as a payment option to more stores. This is after the successful completion of the first phase.¹⁶⁸

The above exposition shows that traditional payment methods as we know them are becoming less popular. The use of credit and debit cards to make payments has its own limitations. "These issues relate to privacy, as credit card details and the details of the users are exposed to facilitate these transactions."¹⁶⁹ Furthermore, the utilisation of these cards as a means of payment exposes holders to card fraud. It has been submitted that it is possible for the card's "magnetic strips to be copied and used to make withdrawals."¹⁷⁰ Cryptocurrency seems to be the answer to the shortcomings of other traditional payment methods. It has been conceded that "the use of Bitcoin as a payment method has certain advantages in comparison with other methods like credit and debit cards."¹⁷¹ The major advantage is that cryptocurrency operates on a peer-to-peer basis and there are no intermediaries involved and this guarantees high levels of transparency. Again, cryptocurrencies have lower transaction costs as compared to credit cards.¹⁷² The use of bank accounts and credits cards for transnational transactions can be strenuous. This is because of the fact that the

¹⁶⁴ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁶⁵ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

¹⁶⁶ Caboz 2021 <https://www.businessinsider.co.za>.

¹⁶⁷ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

¹⁶⁸ Money web 2021 <https://www.moneyweb.co.za/moneyweb-crypto/pick-n-pay-to-start-accepting-cryptocurrency-payments/>.

¹⁶⁹ Hamukuaya 2021 *PER / PELJ* 2 4.

¹⁷⁰ Hamukuaya 2021 *PER / PELJ* 11.

¹⁷¹ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

¹⁷² Hamukuaya 2021 *PER / PELJ* 24.

particular transaction is tied to the legal tender of a particular jurisdiction. There are other costs like exchange rates, interests and added costs that may burden international transactions. Using cryptocurrencies as a method of payment for local and international transactions may become the best option available. Again, when using cryptocurrencies, one is not asked to provide personal data hence the chances of personal data fraud are next to zero. When making purchases with credit cards online, websites demand that you provide them with personal data like card number and its expiration data.¹⁷³ There are no ways such personal data can be fool proof from fraud. It is not surprising that South Africans are joining the global village in warming up to the idea of trading and using cryptocurrencies.

3.3 The associated risks

The rationale behind the regulation of cryptocurrencies is to mitigate the associated risks.¹⁷⁴ This research study regards cryptocurrency as a necessary technological revolution which should be embraced in its entirety. However, it will be naïve to regard cryptocurrencies as perfect and without blemish. South Africa needs to regulate cryptocurrencies in order to afford consumers full protection, prevent crimes associated with the anonymity and for fiscal policy protection.

3.3.1 Cryptocurrency and crime

Academics agree that individuals are prone to use cryptocurrencies to circumvent laws and use it for nefarious purposes.¹⁷⁵ For the simple reason that cryptocurrency is characterised by transferability across jurisdictions, lack of regulation, anonymity and trust in value, different schools of thought have proffered different expertise. However there has been consensus that money laundering and terrorism financing are the greatest threats associated with cryptocurrency.¹⁷⁶ Violation of exchange control

¹⁷³ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

¹⁷⁴ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁷⁵ Frebowitz *Cryptocurrency and State Sovereignty* 4.

¹⁷⁶ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

regulations is another criminal act related with cryptocurrencies.¹⁷⁷

3.3.1.1 Money laundering

Money laundering has been defined by the IMF as the processing of finances made through illicit activity to hide the link between the finances and their origins.¹⁷⁸ A 2011 survey suggested that money laundering was evident in about 2.7% of the world's total annual gross domestic product (GDP).¹⁷⁹ This percentage transforms to \$1.6 trillion, of which a mere 1% has been recovered by law enforcement agencies in conjunction with regulatory bodies.¹⁸⁰ Money laundering and terrorist funding has a negative bearing on the integrity and stability of any country's fiscal. These illicit activities are a discouragement to direct foreign investments and can alter international capital flows.¹⁸¹ Because we are living in a global village, the effects of these illicit activities go beyond a particular jurisdiction. Money launders and terrorist funders take advantage of poor financial systems and of jurisdictions with ineffective regulations.¹⁸²

Cryptocurrencies are by nature decentralised and are open to the risks of anonymity simply because no names or personal data are associated with the true identity of the user.¹⁸³ A user of these digital currencies is not required to provide any form of identification. This is different from banks, where identification is a prerequisite. The virtual currency network is not monitored by any central body nor is there any anti-money laundering (AML) software to curtail illicit trade.¹⁸⁴ The FATF and the European Union has submitted that money laundering and terrorism funding are most likely to

¹⁷⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁷⁸ International Monetary Fund 2017 <https://www.imf.org/en/News>.

<http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism>.

¹⁷⁹ United Nations Office on Drugs and Crime 2011 Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transactional Organized Crimes: Research Report 5.

¹⁸⁰ United Nations Office on Drugs and Crime 2011 Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transactional Organized Crimes: Research Report 5.

¹⁸¹ International Monetary Fund 2017.

¹⁸² International Monetary Fund 2017.

¹⁸³ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁸⁴ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

be multiplied from cryptocurrency usage.¹⁸⁵

The notorious Liberty Reserve is synonymous with money laundering. Liberty Reserve had a dual operation as a cryptocurrency and an exchange.¹⁸⁶ Between 2006 and 2013, Liberty Reserve laundered close to \$6 billion on behalf of cyber criminals, identity fraudsters, child pornographers and traders in narcotics.¹⁸⁷ Before the long arm of the law became aware of its nefarious deeds, its users amounted to a million and had an annual transactions turnover of 12 million. Sure enough, the users of Liberty Reserve were faceless; because all that was needed to open an account was a date of birth, an email address and a name, of which all could be faked.¹⁸⁸ A clear regulatory framework will help avert these ills.

The infamous Silk Road was also a virtual platform utilised by criminals to “clean” dirty money. This cryptocurrency exchange dealt exclusively in Bitcoins. The platform was a secreted black market famed for trading in goods and services such as pornography, narcotics, weapons and murder for hire.¹⁸⁹ Before being busted in late 2013, the platform had already amassed close to \$13 million in illicit dealings.¹⁹⁰ An account holder would open an account through an alias and engage in illicit dealings such as dealing in drugs, and then exchange the Bitcoins gained for such as sale for clean fiat currency.¹⁹¹ Having been busted by the US Department of Justice, Silk Road reinvented itself through Silk Road 2.0.¹⁹² The modus operandi was the same as of its predecessor. Silk Road was even more ominous because it had backups in 500 different locations, across 17 countries and was to relaunch in less than 15 minutes were it to be shut down.¹⁹³ This is a clear illustration that South Africa’s lack of an effective legal framework is a fertile breeding ground for these types of platform. The

¹⁸⁵ South Africa Reserve Bank National Payment System Department 2018.

¹⁸⁶ Liberty Reserve was indicted by the Department of Justice of the US in May 2013.

¹⁸⁷ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>

¹⁸⁸ Homeland Security Enterprise 99.

¹⁸⁹ Greenberg A 2013 <http://www.forbes.com>.

¹⁹⁰ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 27.

¹⁹¹ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 27.

¹⁹² Department of Homeland Security <https://www.dhs.gov/creation-department-homeland-security>.

¹⁹³ Greenberg A 2013 <http://www.forbes.com>.

anonymity behind cryptocurrencies users drives this demand.¹⁹⁴ An effective framework will be able to trace these offenders and sanction them for their misdemeanours.

3.3.1.2 Financing of terrorist activities

Cryptocurrencies have grown to be synonymous with terrorism financing. Cryptocurrencies can be moved across borders with relative ease and at minimal cost without jeopardising the financier's identity.¹⁹⁵ After the 9/11 terrorist attacks on the US, the country's enforcement and intelligence apparatus started trailing suspicious movement of money.¹⁹⁶ Terrorists are able to hide their underhand financial dealings "through these anonymous and pseudonymous currencies."¹⁹⁷ The now defunct State of Iraq and Syria (ISIS) illustrated via a blog titled "Bitcoin and the Charity of Violent Physical Struggle" how Bitcoin can be manipulated to fund terrorism. The blog mentions that the pseudonymous characteristic of cryptocurrencies meet the requirements of the radical Islamist group.¹⁹⁸ The blog also mentions that "this system has the potential to revive the lost sunnah of donating to the mujahedeen, it is simple, easy, and we ask Allah to hasten its usage for us."¹⁹⁹ The blog further mentions how easy it is to trade in narcotics, buy guns and conduct other illicit activities on the now defunct Silk Road website.²⁰⁰

There is a school of thought within the cryptocurrency community that disagrees with the above adverse findings against Bitcoin as a funder of terrorism.²⁰¹ It has been submitted that the block-chain technology on which cryptocurrencies is built can be used by states to trail any terrorist funding.²⁰² This submission is buttressed by the

¹⁹⁴ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 30.

¹⁹⁵ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 30.

¹⁹⁶ Homeland Security Enterprise 108.

¹⁹⁷ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 30.

¹⁹⁸ al-Munthir 2014 <http://alkhilafaridat.files.wordpress.com>.

¹⁹⁹ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 3.

²⁰⁰ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 2.

²⁰¹ Delaney P.J 2014 <http://www.cryptocoinsnews.com/bitcoin-supporting-fighting-terrorism>.

²⁰² Homeland Security Enterprise.

fact that terrorist organisations use charitable foundations as a means of funding. Since these charities are used as alias, it is not impossible for governments to trail any suspicious transactions back to the particular charity organisation. Blockchain usage by governments has vast potential to contain the abuse of cryptocurrency by terrorist organisations. Canada is the first country in the world to include cryptocurrencies in its anti-money laundering and terrorist sponsoring statute.²⁰³

3.3.1.3 Evasion of exchange control regulations

Exchange control is characterised by the central government having control over the movement of money into and out of its jurisdiction.²⁰⁴ The Exchange Control Regulations Act of 1961 oversees this function in South Africa. The central objective of this legislation is to avoid the country losing foreign currency resources through the “transfer abroad of real or financial assets held in South Africa, and to form an effective system of control over the movement of financial and real assets into and out of South Africa”.²⁰⁵

As highlighted in the opening chapters of this discussion, cryptocurrencies are characterised by identity secrecy and anonymity. This anonymity can be manipulated for undetectable transactions and illegal capital outflows.²⁰⁶ Cryptocurrencies can cause a circumvention of exchange control regulations simply because a transaction will not be detected and recorded by the relevant authorities overseeing foreign exchanges. Because cryptocurrencies remain unregulated, the risks emanating from cross-border transactions are directed to the user. Some of these transactions can be illegitimate and users can easily get away with such flouting of the regulations. In addition, cryptocurrencies possess low transaction costs, and this may lure citizens wishing to relocate to other jurisdictions to move their monies via cryptocurrencies. By having tighter border cryptocurrency transactions, illicit flows of cryptocurrencies

²⁰³ Duhaime C 2014 <http://www.duhaimelaw.com/2014/06/22/canada-implements-worlds-first-national-bitcoin-law>

²⁰⁴ Immigration & Business Solutions 2018 “*Foreign Exchange Control Regulations in South Africa*” .

²⁰⁵ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 32.

²⁰⁶ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 34.

can be averted.

3.3.2 Risks for the consumer

3.3.2.1 Absence of transparency

Despite decades of being in existence, the concept of cryptocurrency remains baffling.²⁰⁷ This is due to the scant information available to unravel its complexity. There are no transparency requirements applicable to cryptocurrencies.²⁰⁸ As a result, they remain shrouded in obscurity. This absence of transparency can be misleading for the consumer when weighing the associated risks involved.²⁰⁹ As already highlighted on the workings of cryptocurrency, mining is a complex process, and most users are not aware of the costs and risks associated with this process. This lack of transparency of explaining the process to the user remains a risk to the consumer. Third parties claim to know about the workings of cryptocurrency and always charge exorbitant fees in exchange of information that should be made readily available for everyone. This absence of transparency is being exploited by third parties and consumers are bearing the blunt.²¹⁰

3.3.2.2 Lack of legal status

At this point in time, cryptocurrencies in South lack a legal status. As a result, cryptocurrencies remain unsupervised and unregulated.²¹¹ Because the world of cryptocurrency is unregulated, consumers are not afforded any legal protection. Legal protection may come in the form of a deposit guarantee scheme.²¹² Due to an absence of regulation, the consumer is exposed to numerous risks that would be mitigated had there been a regulatory framework. In addition, the lack of awareness about the rights and obligations of the different parties to a cryptocurrency transaction expose consumers to legal requirements that may reduce their digital contracts unlawful or

²⁰⁷ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 35.

²⁰⁸ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 35.

²⁰⁹ European Central Bank 2015 Virtual currency schemes – a further analysis” 20.

²¹⁰ European Central Bank 2015 Virtual currency schemes – a further analysis” 35.

²¹¹ South Africa Reserve Bank National Payment System Department 2018 12.

²¹² European Central Bank 21.

null and void.²¹³

As much as cryptocurrencies remain unregulated in South Africa, users of digital currency are still under obligation to pay taxes on the profits derived from these currencies.²¹⁴ Where a user exchanges cryptocurrencies for Rands, a capital gain event is triggered, and such the derived profits are taxable as income tax.²¹⁵

3.3.2.3 Volatility and unpredictability

Volatility is measured by the fluctuation of a financial asset over a period of time.²¹⁶ The higher the likelihood of volatility the higher the risk for a consumer to hoard such an asset.²¹⁷ Cryptocurrencies value can change significantly due to several factors. However, where the value can be manipulated by simply sending a tweet, then investment in such cryptocurrencies becomes risky business for the consumer. In February of 2021, Tesla made it public that it had purchased about \$1.5bn in Bitcoin and showed its intention to start accepting Bitcoin as a means of payment for its vehicles.²¹⁸ In March of the same year, the company's founder Elon Musk tweeted, "you can now buy a Tesla with Bitcoin".²¹⁹ Because of this tweet, "Bitcoin surged 9.8 percent to \$39,035.47...adding \$3,492.71 to its previous close".²²⁰ Elon Musk was only to flip-flop in May that the intended practice was put on hold due to concerns about environmental concerns associated with Bitcoin's mining and transactions. As a result of his tweet, Bitcoin fell more than 10%.²²¹ This is an indication that the value of cryptocurrencies and its inflation and deflation are at the mercy of people the like Elon Musk who may manipulate the digital currencies willy nilly because of a lack of a monetary policy regulating them. Such volatility is a bad omen for consumers because they live in the constant fear of their investments being worth a lot today and only for them to be worthless the following morning.

²¹³ European Central Bank 2.

²¹⁴ McKane 2017 <http://mybroadband.co.za>.

²¹⁵ McKane 2017 <http://mybroadband.co.za>.

²¹⁶ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 36.

²¹⁷ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 36.

²¹⁸ Al Jazeera 2021 <https://www.aljazeera.com>.

²¹⁹ Al Jazeera 2021 <https://www.aljazeera.com>.

²²⁰ Al Jazeera 2021 <https://www.aljazeera.com>.

²²¹ Al Jazeera 2021 <https://www.aljazeera.com>.

Consumers need the guarantee that a cryptocurrency is steady before adopting it as a payment method. If a cryptocurrency is tumultuous, consumers will have little faith in it and this in turn stunts the adopting of cryptocurrency as a viable alternative to fiat currency.

3.3.2.4 Anonymity

As always highlighted in the preceding chapters, users of cryptocurrencies are only identifiable through virtual currency addresses acting as pseudonyms.²²² This is one of the characteristics of cryptocurrencies most attractive to consumers.²²³ It is almost impossible to relate a particular virtual currency address on a blockchain to a particular person or organisation.²²⁴ Scammers can easily mislead bona fide consumers about the real receiver of a payment.²²⁵ Owing to its anonymous nature, there is a need to regulate cryptocurrencies so that the person behind a transaction is identifiable.

3.3.5 Price and financial stability

3.3.5.1 Financial stability

Financial stability has been defined as “the joint stability of the key financial institutions and the financial markets in which they operate”.²²⁶ In order to attain financial stability, a system capable of preventing, predicting and withstanding domestic and international market shocks should be in place. A pointer towards financial stability is the existence of an effective regulatory framework comprising of standard and practices, regulations and laws.²²⁷ The main players in this financial stability matrix are market participants via private risk management and banking barons via systemic risk, market surveillance and supervision.²²⁸ Where these role players are excluded from this matrix, then financial catastrophes are likely to happen.²²⁹

²²² European Central Bank “Virtual currency schemes” 22

²²³ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 37.

²²⁴ European Central Bank “Virtual currency schemes” 22.

²²⁵ European Central Bank “Virtual currency schemes” 22.

²²⁶ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 29.

²²⁷ SARB 2017 <http://www.resbank.co.za>.

²²⁸ SARB 2017 <http://www.resbank.co.za>.

²²⁹ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 43.

Financial instability where cryptocurrencies are involved is illustrated by the relation between cryptocurrencies and the fiat economy and where cryptocurrencies threaten the free sail of payment systems.²³⁰ Cryptocurrencies are an alternative to fiat currency and exist on the periphery of the supervisory and regulatory framework and this runs the risk of breeding novel risks.²³¹ The IMF has taken cognisance of the advantages of cryptocurrency but it remains undecided on whether these digital currencies aid financial stability through effectual price discovery or whether they pave way for more volatility and instability.²³² In its Position Paper of 2014, the SARB promised to keep an eye on the rapidly changing financial and economic factors as the first step in identifying and mitigating any developing systemic risks.²³³ However, this monitoring by the SARB will be an uphill task due to “the anonymity of exposures, decentralised parties and lack of a governing regulatory framework”.²³⁴

3.3.5.2 Price stability

Price stability gives reference to the general level of prices of services and goods in the economy.²³⁵ This level of prices is kept at an equilibrium by the prevention of prolonged inflation and deflation.²³⁶

To achieve this price equilibrium, the financial system has to be stable. Cryptocurrencies lack a central regulatory authority and consequently, no policies are in place to oversee price stability. The value of cryptocurrencies is forever changing, and it has been submitted that:

“cryptocurrencies could potentially affect price stability in cases where they substantially modify the quantity of money, have an impact on the velocity of money, the use of cash and influence the measurement of monetary aggregates”.²³⁷

²³⁰ SARB 2017 <http://www.resbank.co.za>.

²³¹ D He *et al* 2017 <http://www.imf.org>.

²³² D He *et al* 2017 <http://www.imf.org>.

²³³ SARB *Position Paper on Virtual Currencies* 12.

²³⁴ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 31.

²³⁵ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 31.

²³⁶ European Central Bank “Benefits of Price Stability” 34

²³⁷ Mothokoa K *Regulating crypto-currencies in South Africa: The need for an effective legal framework to mitigate the associated risks* 32.

Cryptocurrencies will most likely impact on price stability and the country's monetary policy if they are able to affect the central bank's liabilities and disturb the control of capital.²³⁸ If more people and companies accept cryptocurrencies as an alternative tender, fiat currencies will be affected and the need for cash and coins will be in decrease.²³⁹ This will have a knock-off effect on the central bank's balance sheet and its capability to influence short-term interest rates.²⁴⁰ This will see a further multiplicity of risks as more people will gravitate towards the use and adoption cryptocurrencies.

3.4 Crypto Assets Regulatory Working Group and current legal position of cryptocurrencies in South Africa

It has been unequivocally stated that "the cryptocurrency landscape in South Africa is, at the moment, largely unregulated".²⁴¹ However, just because the landscape is unregulated does not mean transacting in these virtual currencies is illegal. Despite the legality of cryptocurrencies, in order to mitigate the associated risks, regulation is of paramount importance. The IFWG's Position Paper on Crypto Assets²⁴² is the leading authority on the proposition of regulation of cryptocurrency in South Africa and a proper interpretation of the Position Paper is central to the understanding of South Africa's current legal position.

3.4.1 A brief history of cryptocurrencies in South Africa

The first public statement on cryptocurrencies in South Africa was published in 2014 by the National Treasury (NT) in conjunction with the SARB, the then Financial Services Board (now called the Financial Sector Conduct Authority (FSCA), SARS and the Financial Intelligence Centre (FIC).²⁴³ The announcement by the NT was ominous in nature as it warned the general public on the risks associated with transacting and investing in cryptocurrencies. This cautionary tone was due to the fact that "no specific legislation or regulation existed for the use of crypto assets. Therefore, no legal protection or recourse was being offered to users, or investors in, crypto assets".²⁴⁴

²³⁸ SARB *Position Paper on Virtual Currencies* 7.

²³⁹ SARB *Position Paper on Virtual Currencies* 7.

²⁴⁰ SARB *Position Paper on Virtual Currencies* 7.

²⁴¹ Go Legal 2021 <https://www.golegal.co.za/cryptocurrency-regulation-south-africa>.

²⁴² IFWG 2020 *Position Paper on Crypto Assets* 7.

²⁴³ IFWG 2014 <http://www.treasury.gov.za>.

²⁴⁴ IFWG 2014 <http://www.treasury.gov.za>.

In the same year, the SARB followed up with its own position paper on cryptocurrencies.²⁴⁵ Like the infamous Pontius Pilate from the Bible, the SARB “washed” its hands and asserted that it did not recognise cryptocurrencies as a legal tender and that “all activities related to the acquisition, trading and/or use of cryptocurrency were done at the end users’ sole and independent risk, with no recourse to the SARB”.²⁴⁶

2016 saw the establishment of the Intergovernmental Fintech Working Group (IFWG) “comprising members from NT, SARB, FSCA and FIC”.²⁴⁷ In 2019 the National Credit Regulator (NCR) and SARS joined the grouping.

3.4.2 The current position on cryptocurrencies

Fast forward to 2021, not much has been done to comprehensively regulate cryptocurrencies in South Africa despite the bona fide efforts of the IFWG and CAR WG.²⁴⁸ These two groups have struck consensus on the objectives discussed below. The objectives will be stated, and a critical appraisal will be made as to how far has any regulation of sorts been ushered to deal with specific risks.

Objective 1: ensuring the safety and efficiency of the country’s financial system and financial institutions.²⁴⁹

Objective 2: ensuring that consumers and investors protection are protected.²⁵⁰

Objective 3: minimising risks of regulatory arbitrage.²⁵¹

Objective 4: combating the evasion of exchange control laws.²⁵²

Objective 5: combating illegal cross-border financial flow resulting in money laundering and funding of terrorism.²⁵³

²⁴⁵ SARB *Position Paper: Position Paper Virtual Currencies* 34.

²⁴⁶ IFWG *Position on Crypto Assets* 65.

²⁴⁷ IFWG *Position on Crypto Assets* 76.

²⁴⁸ IFWG *Position on Crypto Assets* 76.

²⁴⁹ IFWG *Position on Crypto Assets* 76.

²⁵⁰ IFWG *Position on Crypto Assets* 76.

²⁵¹ IFWG *Position on Crypto Assets* 76.

²⁵² IFWG *Position on Crypto Assets* 76.

²⁵³ IFWG *Position on Crypto Assets* 76.

Objective 6: combating tax evasion and tax avoidance arrangements.²⁵⁴

SARS as the custodian of tax collecting in South Africa has made efforts in reigning in cryptocurrency transactions for tax purposes.²⁵⁵ On its website, the tax men stipulate that “normal income tax rules apply to crypto assets and affected taxpayers need to declare crypto assets’ gains or losses as part of their taxable income”.²⁵⁶ In other words, cryptocurrencies are to be taxed like conventional currency. However, due to the anonymity of cryptocurrency transactions, SARS lacks the mechanism to force an individual to declare their returns. This means that unscrupulous users of cryptocurrency can actually get away without paying taxes. SARS lacks the data base of all the role players involved in cryptocurrency. As a result, SARS will not be able to trail cryptocurrency transactions if those transactions are not reported by such role players like the exchanges themselves, businesses and third parties. SARS has reportedly “requested information from certain South African crypto exchanges, including Luno, about users on the platform and their transactions”.²⁵⁷ The problem is that SARS lacks the mechanism to verify this information and may be given false or inadequate data. It has been assessed that “no one has put clear rules on it, so there is a lot of non-reporting going on.”²⁵⁸

3.5 Conclusion

Looking at South Africa’s unregulated cryptocurrency market, the associated risks are in clear manifestation. Consumers are forever exposed to the risk of fraud. Money laundering is the order of the day. Unpredictability and volatility of digital currencies will also continue if no comprehensive regulatory measures are not put in place. In spite of these, South Africa’s general populace and selected merchants are using and accepting cryptocurrencies as a method of payment. This chapter has delved into the country’s current trend on the usage of digital currencies. However, this popularity should be viewed with circumspection because in South Africa cryptocurrencies remain

²⁵⁴ IFWG *Position on Crypto Assets* 76.

²⁵⁵ Chandy 2019 <https://worldtradelaw.typepad.com/ielpblog/2019/01/guest-post-venezuela-challenges-us-blockade-of-its-national-cryptocurrency-at-the-wto.html>.

²⁵⁶ Crypto Assets and Tax 2021 <https://www.sars.gov.za>.

²⁵⁷ News24 Explainer: How SARS is tightening tax collection on crypto transactions 2021 <https://www.news24.com>.

unregulated. The following chapter takes a comparative study on how El Salvador and the USA have managed to arrest the above-mentioned associated risks related to the use of cryptocurrencies.

CHAPTER 4: REGULATION OF CRYPTOCURRENCY IN EL SALVADOR AND THE UNITED STATES OF AMERICA

4.1 Introduction

This chapter forms the comparative element of this mini-dissertation. It deals with certain jurisdictional approaches. The regulatory approaches available to any country are monitoring²⁵⁹ which can be hostile or friendly²⁶⁰, banning²⁶¹ and full recognition.²⁶² Specific emphasis will be on El Salvador and the United States of America (USA).²⁶³ These jurisdictions have been carefully selected because they have the best practices in the regulation of cryptocurrencies. El Salvador has been the flagship jurisdiction as far as the regulation of cryptocurrency is concerned.²⁶⁴ Not only has it regulated digital currencies, but it has also fully adopted it as a legal tender.²⁶⁵ The USA has been chosen because it has some of the best practices in the regulation and use of cryptocurrencies that South Africa should emulate. It has not recognised cryptocurrency as a legal tender but has put in place robust mechanisms to regulate it. This chapter delves into the good practices of these jurisdictions as far as regulation of cryptocurrency is concerned. The chapter also exposes the gaps in these attempts for regulation. In the case of El Salvador, it is argued that the easy convertibility of Bitcoin to the Dollar is a good practice. It is also argued that having a basket of currencies besides Bitcoin is a good practice as well. However, it is shown how its regulation does not meet the requirements set by the Financial Action Task Force (FATF), an intergovernmental organisation founded at the behest of the G7 countries.²⁶⁶

The discussion on the USA focuses on the federal laws. Interagency coordination, assimilation of cryptocurrencies into an already existing legal framework and meeting

²⁵⁹ This is where the central bank acts as overseer.

²⁶⁰ Chiu *Regulating the Crypto Economy* 6.

²⁶¹ This is where a country criminalises the trading in cryptocurrency.

²⁶² This is where a country's central bank recognises cryptocurrency as a legal tender and regarded as at par with fiat currency.

²⁶³ Custers and Overwater 2019 *EJLT* 34.

²⁶⁴ Chiu *Regulating the Crypto Economy* 56.

²⁶⁵ Custers and Overwater 2019 *EJLT* 34.

²⁶⁶ The Group of Seven (G7) is a political forum comprising of the USA, United Kingdom, Japan, Italy, Germany, France and Canada.

the standards of FATF are some of the good practices. Some of FATF's standards include the protection of consumers as well as the stemming of money laundering. However, this regulation is more effective at a federal level than a state level.

4.2 Adoption of cryptocurrency as legal tender in El Salvador

4.2.1 The rationale behind the adoption

El Salvador is the first jurisdiction in the world to adopt cryptocurrency as a legal tender.²⁶⁷ In September 2021, the president tweeted that Bitcoin was to be recognised as a legal tender alongside the US dollar.²⁶⁸ Paragraph 5 of the Bitcoin Law summarises the rationale for the adoption of cryptocurrency "that in order to promote the economic growth of the nation, it is necessary to authorize the circulation of a digital currency whose value answers exclusively to free-market criteria, in order to increase national wealth for the benefit of the greatest number of inhabitants."²⁶⁹ From the above, it can be surmised that the reasons why El Salvador adopted Bitcoin as a legal tender is not for the sake of speculation, but as a bold effort in improving the economy for the greater good of its citizenry. Improvement of the economy will be realised because there is no intermediary required in the exchange of cryptocurrencies.²⁷⁰ This means that the speed with which transactions are concluded is enhanced. Consequently, because of absence of intermediaries, transaction costs are substantially lower. Low transaction cost points to the efficiency in exchange and an increase in the number of transactions.²⁷¹ With cryptocurrencies, there is no need for a physical set up where people will converge and transact.²⁷² Further, fixed costs are lowered because there will not be any need for the payment of wages, utility bills or rent expenses.

4.2.2 The regulatory framework: the Bitcoin Law

In June 2021, El Salvador published in the Official Gazette comprehensive legislation regulating bitcoin transactions.²⁷³ It was this regulatory framework that made it

²⁶⁷ <https://www.theverge.com/2021/9/7/22660457/el-salvador-bitcoin-legal-tender-currency-cryptocurrency>.

²⁶⁸ <https://www.theverge.com/2021/9/7/22660457/el-salvador-bitcoin-legal-tender-currency-cryptocurrency>.

²⁶⁹ Paragraph 5 of the Bitcoin Law of 2021.

²⁷⁰ Exchange is regulated by blockchain which does not need human input or effort.

²⁷¹ Custers and Overwater 2019 *EJLT* 28.

²⁷² Custers and Overwater 2019 *EJLT* 34.

²⁷³ Chiu *Regulating the Crypto Economy* 6.

possible for the country to implement the Bitcoin cryptocurrency as a legal tender.²⁷⁴ The Bitcoin Law is the “Law for the Creation of the Bitcoin Trust, the Regulation of the Bitcoin Law, and the Guidelines for the Authorization of the Operation of the Technological Platform of Services with Bitcoin and Dollars.”²⁷⁵ In terms of the Bitcoin Law “...not only must bitcoin be accepted as a means of payment for taxes and outstanding debts, but also all businesses are required to accept bitcoin as a medium of exchange for all transactions”.²⁷⁶ The Bitcoin Law provides for the “unrestricted and unlimited clearance power in any transactions that natural persons, public or private legal entities carry out in any capacity.”²⁷⁷ It can then be deduced that the legal framework for the regulation of cryptocurrency in El Salvador revolves around the Bitcoin Law. This is the primary, stand-alone law that specifically deals with the regulation of cryptocurrency. It is going to be argued below that this is a good practice as far as a regulatory framework is concerned.

4.2.3 El Salvador’s best practices in the regulation of cryptocurrency

4.2.3.1 Existence of a standalone legislation regulating cryptocurrencies

El Salvador’s Legislative Assembly adopted the Bitcoin Law as the primary standalone legislation dealing with cryptocurrency.²⁷⁸ As far as regulation is concerned, this move has great benefits.

Legislation is a critical instrument through which the government organises society and protect its citizens.²⁷⁹ Legislation also helps create rights and obligations and as well as legal certainty. This is exactly the case with the Bitcoin Law. Instead of relying on subsidiary legislation and regulations, El Salvador decided to draft a law that specifically deals with the new phenomenon of cryptocurrency.²⁸⁰ This is due to the fact that the cryptocurrency wave is fairly new and some of the financial laws are not updated to deal with this new challenge.²⁸¹ By creating a specific Law dealing with

²⁷⁴ Chiu *Regulating the Crypto Economy* 10.

²⁷⁵ Leiva 2021 <https://consortiumlegal.com>.

²⁷⁶ <https://www.theverge.com/2021/9/7/22660457/el-salvador-bitcoin-legal-tender-currency-cryptocurrency>

²⁷⁷ Leiva 2021 <https://consortiumlegal.com>.

²⁷⁸ <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

²⁷⁹ De Jager 2000 “Importance of Legislation” *ASA* 1-36

²⁸⁰ Custers and Overwater 2019 *EJLT* 34.

²⁸¹ *Regulating the Crypto Economy* 34

Bitcoin, El Salvador is able to keep up with the technological challenges imposed by Bitcoin. These challenges include the regulation of anonymity and the creation of Bitcoin automated teller machines (ATM).²⁸²

However, the Bitcoin Law has faced some serious backlash. It has been submitted that the Bitcoin Law is "characterised by its brevity."²⁸³ Singled out is Decree No 57 which comprises of 16 articles, which, including the name of the law itself, Bitcoin Law, is less than 732 words.²⁸⁴ As a result, the Bitcoin Law is not detailed as expected.²⁸⁵ As it is worded now, the Law only recognises "bitcoin as unrestricted and unlimited legal tender in any transaction", as well as the payment of tax obligations.²⁸⁶ It can thus be submitted that this law is not explicit enough in describing the rights and obligations of any parties involved in the usage of cryptocurrency.

4.2.3.2 Easy convertibility of Bitcoin to the Dollar

The Bitcoin Law further states that economic agencies are to accept Bitcoin as a means of payment.²⁸⁷ A person acquiring goods or services, or the debtor of an obligation is entitled to use a legal tender of their own choice and the economic agent is under obligation to accept such payment in the user's currency of choice.²⁸⁸ Pursuant of Article 9 of the Bitcoin Law, Bitcoin Law is to be read alongside the Law for the Creation of the Bitcoin Trust. As per the dictates of Article 14 of the Bitcoin Law, the Government, before the Bitcoin Law comes into effect, is instructed to set up a Trust within the Development Bank of El Salvador (BANDESAL). This is done to guarantee "the automatic and instantaneous convertibility of the Bitcoin to Dollar."²⁸⁹

4.2.3.3 Creation of a basket of currencies for ease of doing business

From the above, it can be deduced that once the Bitcoin Law is entered on the statute books, the country will have a basket of three currencies as legal tender. These are

²⁸² Custers and Overwater "Regulating Initial Coin Offerings and Cryptocurrencies: A Comparison of Different Approaches in Nine Jurisdictions Worldwide" 2019 *EJLT* 29.

²⁸³ Gorjon 2021 *EB* 3.

²⁸⁴ Gorjon 2021 *EB* 3.

²⁸⁵ Gorjon 2021 *EB* 3.

²⁸⁶ Gorjon 2021 *EB* 3.

²⁸⁷ Leiva 2021 <https://consortiumlegal.com>.

²⁸⁸ Leiva 2021 <https://consortiumlegal.com>.

²⁸⁹ Leiva 2021 <https://consortiumlegal.com>

the Bitcoin, the US Dollar and the Salvadoran Colon.²⁹⁰ Therefore, it would be possible for the citizens to pay for goods, services and obligations with any of these currencies. In relation to the US Dollar, Bitcoin's exchange rate will not be fixed, but rather determined by the market forces²⁹¹; the US Dollar will only be utilised as a point of reference for purposes of accounting.²⁹² The legitimacy of the Bitcoin cryptocurrency is to apply retroactively and any monetary obligations which existed before Bitcoin came into force may now be paid in Bitcoin.^{293 294}

4.2.3.4 Eliminating remittance payments

A well planned out regulatory system will greatly lower or completely eliminate the cost associated with remittance payments. According to a Stanford University study,²⁹⁵ millions of Salvadorans live abroad, and many more have relatives outside El Salvador. The rationale behind this move lies in the fact that about 24% of the country's gross domestic product (GDP) comes from remittances of the country's citizens residing in the USA.²⁹⁶ It is believed that this move will make it easier and cheaper for the migrants to remit money back home.²⁹⁷

4.2.3.5 Access to financial services for the unbanked

Another good practice regarding regulation is that most people will now have access to financial services.²⁹⁸ The digital finance company that helped with the adoption of Bitcoin, Strike, told Cable News Network (CNN) that 70% of El Salvadorians do not own a bank account.²⁹⁹ The adoption of Bitcoin as an official currency will ameliorate this problem.

4.2.4 *The gaps in El Salvador's regulation of cryptocurrency*

²⁹⁰ Leiva 2021 <https://consortiumlegal.com>.

²⁹¹ Article 2 of the Bitcoin Law.

²⁹² Article 6 of the Bitcoin Law.

²⁹³ Leiva 2021 <https://consortiumlegal.com>.

²⁹⁴ Article 13 of the Bitcoin Law.

²⁹⁵ https://stanford.edu/~hakuta/www/archives/syllabi/E_CLAD/sfusd_cult_03/nancy/new/millions.htm

²⁹⁶ Chiu *Regulating the Crypto Economy* 56.

²⁹⁷ <https://www.theverge.com/2021/9/7/22660457/el-salvador-bitcoin-legal-tender-currency-cryptocurrency>.

²⁹⁸ <https://www.theverge.com/2021/9/7/22660457/el-salvador-bitcoin-legal-tender-currency-cryptocurrency>.

²⁹⁹ <https://www.theverge.com/2021/9/7/22660457/el-salvador-bitcoin-legal-tender-currency-cryptocurrency>.

4.2.4.1 Few mechanisms to avert anti-money laundering and financing of terrorist activities

Despite this seemingly fool proof regulatory framework, there is a school of thought that doubt the effectiveness of this Law in mitigating the risks associated with cryptocurrency, especially anti-money laundering and the financing of terrorist activities.³⁰⁰ No one is aware of the modalities to be adopted in implementing the Bitcoin Law.³⁰¹ It has already been pre-empted that “El Salvador’s Bitcoin Law is destined to be caught in the FATF’s regulatory web.”³⁰² The FATF demands that countries meet standards that curtail the financing of terrorist activities and money laundering.

4.2.4.2 Non-compliance with the FATF standards

FATF is regarded as the world’s leading “money laundering and terrorist financing watchdog.”³⁰³ The FATF is made up of 39 member countries and over 200 countries acting as affiliates. Its mandate is the prevention of organised “crime, corruption, and terrorism.”³⁰⁴ Its regulations, which are continuously updated, are contained in FATF Recommendations Guide and the FATF Virtual Assets Red Flag Indicators Report. The former gives countries standards by which they can “detect, penalize, and prevent money laundering, terrorist financing, and other related, illegal behaviours.”³⁰⁵ The latter gives an outline of any suspicious behaviour concerning virtual assets that may be in violation of the Recommendations Guide.³⁰⁶ Any failure to abide by the Recommendations Guide results in a country earning a spot on the FATF’s Grey-list called “Jurisdictions under Increased Monitoring”.³⁰⁷ Failure to cooperate by a country in monitoring money laundering activities or possible funding of terrorist activities will result in a country earning a spot on the Black-list called “High-Risk Jurisdictions subject to a Call for Action”³⁰⁸ and may result in “account seizures and fines, economic

³⁰⁰ Chiu *Regulating the Crypto Economy* 65.

³⁰¹ Hanke, Hanlon and Thakkar 2021 *SAE* 8.

³⁰² Hanke, Hanlon and Thakkar 2021 *SAE* 8.

³⁰³ FATF 2021 <https://www.fatf-gafi.org>.

³⁰⁴ FATF 2021 <https://www.fatf-gafi.org>.

³⁰⁵ Hanke, Hanlon and Thakkar 2021 *SAE* 3.

³⁰⁶ Hanke, Hanlon and Thakkar 2021 *SAE* 3.

³⁰⁷ Hanke, Hanlon and Thakkar 2021 *SAE* 3.

³⁰⁸ <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

sanctions, trade restrictions, and criminal charges for the financial parties involved.”³⁰⁹ At the time of writing, North Korea and Iran are on the Black-list and Panama and Nicaragua and twenty-two other countries are on the Grey-list.³¹⁰ El Salvador fails to meet these standards.

Firstly, there is a failure by El Salvador’s Bitcoin Law to protect consumers involved in cryptocurrency transactions.³¹¹ FATF guidelines make mention of Customer Due Diligence (CDD) and Know-Your-Customer (KYC) regulations. These regulations basically trace the source of the money, its destiny, and the reason for the transaction.³¹² The regulations make sure that users making virtual asset (VA) transactions, including cryptocurrency, over the virtual asset service providers (VASP) are not criminals and are carrying out the transactions for the sole purpose of legitimate businesses.³¹³ There are 3 shortcomings of the El Salvador’s regulatory framework related to Know-Your-Customer and Customer-Due-Diligence Regulations. These are the:

“receiving funds from or sending funds to VASPs whose CDD or know-your-customer (KYC) processes are demonstrably weak or non-existent, incomplete or insufficient KYC information, or a customer declines requests for KYC documents or inquiries regarding source of funds and sender/recipient lacking knowledge or providing inaccurate information about the transaction, the source of funds, or the relationship with the counterparty.”³¹⁴

Where customers are exposed to manipulation and thievery, then it can be summed up that indeed a huge gap exists. El Salvador will need to revise its Bitcoin Law, or maybe put into place subsidiary regulations that are more effective in KYC and CDD.

The Bitcoin Law fails to stem criminal activities involving cryptocurrency. For example, there is rampant usage of unregulated wallets across the borders and funds being used in the darknet marketplaces.³¹⁵ It is therefore prudent that El Salvador invest in

³⁰⁹ FATF Report 2020 <https://www.fatf.com>.

³¹⁰ FATF 2021 <https://www.fatf-gafi.org>.

³¹¹ Panova 2019 *JLERI* 5.

³¹² Hanke, Hanlon and Thakkar 2021 *SAE* 3.

³¹³ Hanke, Hanlon and Thakkar 2021 *SAE* 4.

³¹⁴ Hanke, Hanlon and Thakkar 2021 *SAE* 4.

³¹⁵ Hanke, Hanlon and Thakkar 2021 *SAE* 8.

people who are knowledgeable on the requirements for compliance of the FATF. It seems like the country did not make prior investment in human resources that are privy to the dictates of this watchdog. By not being able to meet the FATF requirements, El Salvador runs the risk of being a pariah state and being blacklisted as an unfriendly investment destination.

4.2.4.3 The dictatorial tendency of forcing merchants to accept Bitcoin

Article 7 of the Bitcoin stipulates that merchants are “required” to accept Bitcoin as a mode of payment. The provision does not explain what this actually entails. The most straightforward interpretation by a layperson of this provision is that merchants are under obligation to accept Bitcoin at any given dollar rate of exchange. With this interpretation, it means merchants cannot say, “no, I will only accept USD.”³¹⁶ It has been submitted that “this provision, at best, serves no purpose. At worst, it compels businesses to do something they may not want to do, that is, dealing in a potentially volatile currency”³¹⁷. While the cryptocurrency community is in support of the adoption of bitcoin as a legal tender, those who believe freedom to choose a transaction currency of their choice will condemn Article 7.³¹⁸

4.2.4.4 Uncertainty

El Salvador’s regulatory framework promises many surprises and unpredictability.³¹⁹ It is still too early to form a fair opinion on the effectiveness of the regulation mechanism adopted. Only the future will tell. The above cited shortcomings are not conclusive evidence that “it’s clear that El Salvadorans and their use of bitcoin, as envisioned under the Bitcoin Law, will be inviting trouble and will be, no doubt, ensnared in the web of FATF regulations.”³²⁰

4.2.4.5 No clear data on the scope of adoption of cryptocurrency

It is too hazy to get a full picture of the scope of Bitcoin adoption in El Salvador.³²¹ In

³¹⁶ Panova 2019 *JLERI* 3.

³¹⁷ Chiu *Regulating the Crypto Economy* 60.

³¹⁸ Chiu *Regulating the Crypto Economy* 61.

³¹⁹ Panova 2019 *JLERI* 2.

³²⁰ Hanke, Hanlon and Thakkar 2021 *SAE* 8.

³²¹ Panova 2019 *JLERI* 3.

January of 2022, the government endorsed a report³²² that claimed that at least 4 million users, nearly the country's entire population, had been indexed as genuine users of the government's wallet. This sounded like mere propaganda because in March of 2022, a survey was released³²³ by the Chamber of Commerce and Industry of El Salvador which reported that 86% of the businesses questioned denied ever conducting a transaction using Bitcoin as a medium of exchange. Because of this lack of transparency, it becomes difficult for economists to determine the success or failure of El Salvador's attempt at the regulation of cryptocurrency. It has been submitted that "access to data poses a challenge as El Salvador's government reveals only selected information and no details via the president's Twitter account".³²⁴

The concluding verdict is that El Salvador's efforts at the regulation of cryptocurrency are lukewarm. It has to be conceded that some of the policies put in place amounts to good practices. However, the Bitcoin Law fails to subscribe to the standards of FATF. Because of this, El Salvador might find itself as a pariah state and would not get financial help from international organisations like the IMF and the World Bank until its laws on cryptocurrency regulation are revisited.³²⁵ However, this gap does not amount to the discontinuation of cryptocurrency. El Salvador will simply have to revise its Bitcoin Law to address the gap.

It now has to be assessed how the USA has fared in the regulation of cryptocurrency.

4.3 Regulation of cryptocurrency in the United States of America

4.3.1 The regulatory legal framework

(i) The Bank Secrecy Act (BSA)

The BSA is also known as the Currency and Foreign Transactions Reporting Act³²⁶ and

³²² Kristin Majcher <https://www.theblockcrypto.com/post/131452/el-salvadors-chivo-wallet-keeps-breaking-and-users-are-seeking-answers>

³²³ <https://camarasal.com/empresarios-proyectan-invertir-en-el-salvador-pese-a-los-retos-que-enfrenta-el-pais/>.

³²⁴ The numbers given by the president are unverifiable. The Chivo customer service, the Central Bank, and El Salvador's Superintendent of the Financial System has failed to provide any concrete data.

³²⁵ Panova 2019 *JLERI* 6.

³²⁶ Middlebrook and Hughes 2014 *WMLR* 812.

it was mooted to prevent financial institutions from being utilised as a smokescreen by criminals to launder or hide money.³²⁷ This law forces banks and all other financial institutions to provide records, such as currency transaction reports, to regulators. Such records can be demanded from banks whenever their clients deal with suspicious cash transactions involving sums of money in excess of \$10,000.³²⁸

(ii) Financial Crimes Enforcement Network (FinCEN)

Under FinCEN, virtual currencies (cryptocurrencies) are recognised as Money Service Businesses (MSBs). The Application of FinCEN's Regulations to Persons Administering, Exchanging or Using Virtual Currencies was initiated to give guidelines on the usage and recognition of cryptocurrencies.³²⁹ FinCEN demands that MSBs have to "develop, implement, and maintain a written program that is reasonably designed to prevent the MSBs from being used to facilitate money laundering and the financing of terrorist activities."³³⁰

(iii) Internal Revenue Service (IRS)

The IRS has declared Bitcoin and other cryptocurrencies to be "property" and not currency.³³¹ In terms of the IRS regulations a business owning cryptocurrency will have to keep records of any cryptocurrency sales and purchases, pay taxes for any gains made from the selling of cryptocurrency, payment of taxes for any profits from the buying of a good or service using cryptocurrency and payment of taxes on the "fair market value of any mined cryptocurrency, as of the day of receipt".³³²

(iv) Executive Order on Ensuring Responsible Development of Digital Assets

In 2022 the president of the USA signed the Executive Order into law as part of the legal framework of the regulation of cryptocurrency.³³³ The purpose of this Executive Order is to outline the "first whole-of-government strategy to protect consumers,

³²⁷ Global Legal Insights 2022 Blockchain & Cryptocurrency Laws and Regulations| USA
<https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>

³²⁸ *The Bank Secrecy Act (BSA)*, 31 USC 5311.

³²⁹ FIN-2013-G001 of 2013.

³³⁰ Global Legal Insights 2022 Blockchain & Cryptocurrency Laws and Regulations| USA
<https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>

³³¹ IRS Notice 2014-21, Guidance on Virtual Currency (2014).

³³² IRS Notice 2014-21, Guidance on Virtual Currency (2014).

³³³ Middlebrook S T and Hughes S 2014 *WMLR* 820.

financial stability, national security and address climate risks.³³⁴

It can be submitted that this is the most important piece of legislation, specifically dealing with cryptocurrencies. This legislation is all-embracing and specific. The importance of this order lays in the fact that “The Order lays out a national policy for digital assets across six key priorities: consumer and investor protection; financial stability; illicit finance; U.S. leadership in the global financial system and economic competitiveness; financial inclusion; and responsible innovation”.³³⁵ In summary, this Order seeks to avert the associated risks that come with cryptocurrencies. It has been commented that this piece of legislation should be the blueprint for any country seeking to regulate cryptocurrencies.³³⁶

4.3.2 The USA’s best practices to cryptocurrency regulation

It has been posited that “the USA is one of the most convenient countries in the world for cryptocurrency business.”³³⁷ This part of the discussion seeks to explore the best practices by the USA for it to have earned the above praise.

4.3.2.1 Recognition of cryptocurrency as a medium of exchange

For tax purposes, the IRS does not also recognise cryptocurrencies as a legal tender, but rather defines it as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.”³³⁸ In an attempt to regulate cryptocurrencies, a clear tax guidance has been published. Virtual currencies are regarded as property for the purposes of US federal tax collection. Tax principles applicable to property transactions becomes applicable to transactions using cryptocurrencies.³³⁹ For example, where an employer pays his workers using cryptocurrencies, such payment must be reported as payroll tax. This recognition

³³⁴ The White House 2022 Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/>.

³³⁵ The White House 2022 Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/>.

³³⁶ Chiu *Regulating the Crypto Economy* 67.

³³⁷ Panova 2019 *JLERI* 3.

³³⁸ Comply advantage 2021 <https://complyadvantage.com>.

³³⁹ Chiu *Regulating the Crypto Economy* 67.

means the government is getting a slice of the cryptocurrency rush through taxation.

4.3.2.2 Registration of service providers

Cryptocurrency exchanges are legalised in the USA and are regulated in terms of the Bank Secrecy Act.³⁴⁰ Practically, this points to the fact that these service providers have to be registered with FinCEN and be issued with the requisite licence.

4.3.2.3 Implementation of anti-money laundering and combatting the financing of terrorism

After being accorded with the licence to operate, the exchange service provider is under obligation to implement the Anti Money Laundering/Combating the Financing of Terrorism (AML/CFT) and Sanctions program.

(d) Maintenance of records and report to authorities

There has been an emphasis on the maintenance of appropriate records and submitting reports to the central authorities.³⁴¹ FinCEN has put an even tighter grip on the regulation of cryptocurrencies in that “it expects crypto exchanges to comply with record-keeping requirements and the “Travel Rule” by sharing information about the originators and beneficiaries of cryptocurrency transactions”.³⁴²

4.3.2.4 Data collection requirement

To further heighten the regulation of cryptocurrencies, in December of 2020 FinCEN proposed a comprehensive data collection requirement “for persons responsible for managing cryptocurrency exchanges.”³⁴³ Again, once this regulation comes into place, it will require cryptocurrency exchanges to:

“...submit suspicious activity reports (SAR/CTR) for transactions (over the current threshold of \$10,000) and require non-registered financial institutions or MSB wallet owners to identify themselves when sending \$3,000 or more in a single or series of linked transactions.”³⁴⁴

4.3.2.5 Combatting of global and domestic criminal activities

³⁴⁰ Chiu *Regulating the Crypto Economy* 67

³⁴¹ Comply advantage 2021 <https://complyadvantage.com>.

³⁴² Comply advantage 2021 <https://complyadvantage.com>.

³⁴³ Comply advantage 2021 <https://complyadvantage.com>.

³⁴⁴ Comply advantage 2021 <https://complyadvantage.com>.

The US Treasury has called for an urgent intervention to put into place regulations to combat global and domestic criminal activities.³⁴⁵ In 2020, FinCEN put into place a new cryptocurrency regulation meant to impose data collection procedures on cryptocurrency exchanges and wallets. The Treasury has said that the rule is expected to be implemented by Fall 2022.³⁴⁶ This new regulation will “demand of exchanges to submit SAR for transactions over \$10,000 and require wallet owners to identify themselves when sending more than \$3,000 in a single transaction”.³⁴⁷ This goes a long way in averting any criminality and thievery associated with cryptocurrency.

4.3.2.6 Conformity with FATF guidelines

In responding to the guidelines set by FATF in 2019, FinCEN declared that it expects all crypto exchanges to conform with the “Travel Rule”. The Rule requires Virtual Asset Service Providers (VASPs) to collect information about the beneficiary of a cryptocurrency transaction. This rule can be equated to the SWIFT system as used by the banks. The VASPs also has to collect and share information about the source and the recipients of cryptocurrency dealings.³⁴⁸ This puts virtual currency exchanges (VCEs) in the same regulatory bracket as traditional money transmitters and applies all the same regulations, including those mentioned in the Bank Secrecy Act.³⁴⁹

4.3.2.7 Intergovernmental coordination

The preceding paragraphs have shown that the responsibility of regulation of cryptocurrencies is shared by almost government agencies, including tax, banks and intelligence. Section 3 of the Executive Order on Ensuring Responsible Development of Digital Assets demands a concerted effort by intergovernmental agencies through the interagency process in the regulation of cryptocurrencies. The section mentions agencies including “the Secretary of State, the Secretary of the Treasury, the Secretary of Defence, the Attorney General, the Secretary of Commerce, the Secretary of Labour, the Secretary of Energy, and the Secretary of Homeland Security.”³⁵⁰

³⁴⁵ Middlebrook and Hughes 2014 *WMLR* 822.

³⁴⁶ Chiu *Regulating the Crypto Economy* 77.

³⁴⁷ Chiu *Regulating the Crypto Economy* 68.

³⁴⁸ Chiu *Regulating the Crypto Economy* 67.

³⁴⁹ Chiu *Regulating the Crypto Economy* 45.

³⁵⁰ Section 3 of the Executive Order on Ensuring Responsible Development of Digital Assets.

4.3.3 Gaps in the USA's regulation of cryptocurrency

4.3.3.1 No singular definition of cryptocurrency

The USA lacks a clear definition of cryptocurrency. A clear definition goes a long way in creating legal certainty. Where a society used various legal terms to define something may lead to be ambiguity and legal uncertainty. A unitary definition would also make it easy for the courts to interpret the law. For example, cryptocurrencies in the USA are known as "virtual currency, digital assets, digital tokens, cryptoassets or simply crypto".³⁵¹ Definitions are chosen depending on who the person or government agency is. For example, the FinCEN refers to cryptocurrencies as money transmitters. This is because it regards cryptocurrency as "other value that substitutes for currency."³⁵² Also, The IRS has defined cryptocurrencies as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value".³⁵³

However, there is a school of thought that recognises the advantage of not having a singular definition of cryptocurrency.³⁵⁴ It has been submitted that "broader, more technology-agnostic definitions" are advantageous because this "approach will be better positioned to regulate as and when the technology evolves".³⁵⁵ This submission makes sense because having a closed off definition in the face of ever changing technology will be reversing the gains so far made by the USA in the regulation of cryptocurrencies.

4.3.3.2 Difficulty of finding a consistent regulatory approach at the state level

It has been submitted that:

"...the legal regulation of digital currency in the United States is no less complicated...This is mainly due to the peculiarities of the legal system of the state (the presence of both federal law and state law) and the lack of a common position among regulators regarding the legal status of a

³⁵¹ Middlebrook and Hughes 2014 *WMLR* 824.

³⁵² Chiu *Regulating the Crypto Economy* 88.

³⁵³ Chiu *Regulating the Crypto Economy* 67.

³⁵⁴ Middlebrook and Hughes 2014 *WMLR* 830.

³⁵⁵ Global Legal Insights 2022 Blockchain & Cryptocurrency Laws and Regulations| USA <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>.

cryptocurrency.”³⁵⁶

The American political system is based on federalism. Federalism entails that the power is divided between the state governments and the federal government.³⁵⁷ There is close cooperation between these two as far as legislation is concerned. As much as the state has discretion to enact some laws of its own, some laws are best passed by the federal government. This has also been extended to the laws that governs financial institutions.³⁵⁸ It is therefore not surprising that the federal government is at the forefront in the regulation of cryptocurrency. Because of this disparity between the federal government and the different states, it has been difficult for the regulation of cryptocurrencies at state level.³⁵⁹ Each state has its own peculiar challenges and experiences which are different from everyone else, hence the application of a blanket regulatory system becomes problematic.

However, certain states have been at the forefront of putting innovative regulatory frameworks in place. The state of Arizona is the first state to have initiated the “regulatory sandbox”.³⁶⁰ This law allows innovators to bring new innovative ideas into the sector by having the stricter laws of the federal government relaxed. Other states, including Hawaii, Nevada, Vermont, Kentucky, Utah and Wyoming, have all followed suit.³⁶¹ This points to the success of the “regulatory sandbox” experiment.³⁶²

4.4 Conclusion

This chapter formed the comparative element of the study. El Salvador and the USA were used as case studies on the best practices in the regulation of cryptocurrencies. El Salvador is the first country in the world to recognise Bitcoin as a legal tender. This transition is based on the Bitcoin Law which is the primary piece of legislation regulating the cryptocurrency. The fact that the country drafted a standalone legislation specifically dealing with Bitcoin is indeed a best practice as this means that

³⁵⁶ Panova 2019 *JLERI* 3.

³⁵⁷ Middlebrook and Hughes 2014 *WMLR* 847.

³⁵⁸ Middlebrook and Hughes 2014 *WMLR* 848.

³⁵⁹ Global Legal Insights 2022 Blockchain & Cryptocurrency Laws and Regulations| USA <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>.

³⁶⁰ Global Legal Insights 2022 Blockchain & Cryptocurrency Laws and Regulations| USA <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>.

³⁶¹ Middlebrook and Hughes 2014 *WMLR* 840.

³⁶² Panova 2019 *JLERI* 3.

any gaps in the law are plugged. The country has also allowed the easy convertibility of Bitcoin to the US Dollar, hence giving users access to the more stable greenback. Bitcoin is being used alongside the US Dollar and the Salvadoran Colon, hence giving users a broader choice of which currency to use. However, it has been submitted that the Bitcoin Law does not put into place effective mechanisms to avert anti-money laundering and financing terrorist activities. It has been further argued that the Bitcoin Law is not in compliance with the FATF standards as it fails to protect customers and fails to stem criminal activities. However, these gaps do not amount to the discontinuation of cryptocurrency. El Salvador will simply have to revise its Bitcoin Law to address the gap.

The USA has been touted as the flagship jurisdiction for the regulation of cryptocurrencies.³⁶³ The legal framework is not limited to one standalone legislation, but includes the Bank Secrecy Act, FinCEN and the tax body: IRS. However, the Executive Order on Ensuring Responsible Development of Digital Assets is the most comprehensive legislation regulating cryptocurrencies (also defined as digital assets). This jurisdiction's best practices include the recognition of cryptocurrency as a medium of exchange. This recognition is important because a country cannot regulate that which it cannot recognise. In order to hold service providers accountable, they must be registered and entered into a national database. The service providers are further obligated to implement the AML/CFT and Sanctions Program as a means of averting money laundering and financing of terrorist activities.³⁶⁴ Most importantly, the USA has put into place mechanisms that comply with the requirements of FATFA. This means that the regulation by this jurisdiction has passed international standards. However, it has been argued that the lack of a singular definition of cryptocurrency is actually a gap in the regulation since this may lead to legal uncertainty. However, this has been justified by those who argue that this approach actually accommodates the ever-evolving technology of cryptocurrencies.³⁶⁵ Conclusively, countries of the world can take a feather from the USA's approach and make it a blue print on how to best regulate cryptocurrencies. The best practices in these jurisdictions can be used to

³⁶³ Middlebrook and Hughes 2014 *WMLR* 812.

³⁶⁴ Middlebrook and Hughes 2014 *WMLR* 813.

³⁶⁵ Middlebrook and Hughes 2014 *WMLR* 822.

provide how South Africa can legalise the cryptocurrencies and other related benefits. The challenges faced by these jurisdictions should be avoided by South Africa when it legalises the cryptocurrency on its territory.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This mini dissertation has explored cryptocurrency and its place in international trade. The writer has also provided an explanation of cryptocurrency and its operations. Further indication has also been given to the historical stance of cryptocurrency and the case of *Venezuela v United States*³⁶⁶ was discussed. This case highlights the need for a comprehensive blueprint for the regulation of cryptocurrency in international trade, in order to avert any disputes and misunderstandings. Cryptocurrency has contributed immensely to e-commerce and some of the international organisations that regulate international trade, like the IMF and the World Bank have called for its proper regulation. However, cryptocurrency is not yet recognised in international trade law. As with other international conventions regulating different issues, it is the states who come together and form international covenant (convention) in order to regulate a problem that exists across the borders of various states. Reference has also been given to the international organisation dealing with trade issues. It has been submitted that these organisations have a critical influence or contribution to the creation of an international convention to regulate cryptocurrency.

South Africa's general populace and selected merchants are using and accepting cryptocurrencies as a method of payment. The mini-dissertation has delved into the country's current trend on the usage of digital currencies. The use of cryptocurrencies in any form has its associated risks. Some of the risks to be explored give reference to money laundering and the funding of terrorist activities. Also included are the volatility and unpredictability of cryptocurrencies and how it might be difficult for governments to model any economic policies around such a volatile currency. South Africa's tax system has loopholes, and it is easy for users and beneficiary of cryptocurrency transactions to evade the payment of taxes.

A comparative element of this mini-dissertation was introduced, and it dealt with

³⁶⁶ *Dispute Settlement - DS574: United States - Measures Relating to Trade in Goods and Services*
WT/DS574/2/Rev.1

certain jurisdictional approaches. The regulatory approaches available to any country are monitoring³⁶⁷ which can be hostile or friendly, banning and full recognition. Specific emphasis was on El Salvador and the USA. These jurisdictions have been carefully selected because they have the best practices in the regulation of cryptocurrencies. El Salvador has been the flagship jurisdiction as far as the regulation of cryptocurrency is concerned. Not only has it regulated digital currencies, but it has also fully adopted it as a legal tender. The USA has been chosen because it has some of the best practices that South Africa should emulate. It has not recognised cryptocurrency as a legal tender but has put in place robust mechanisms to regulate it. This chapter delves into the good practices of these jurisdictions as far as regulation of cryptocurrency is concerned. The mini-dissertation has also exposed the gaps in these attempts for regulation. In the case of El Salvador, it has been argued that the easy convertibility of Bitcoin to the Dollar is a good practice. It has also been submitted that having a basket of currencies besides Bitcoin is a good practice as well. However, El Salvador's cryptocurrency regulation does not meet the requirements set by FATF, an intergovernmental organisation founded at the behest of the G7 countries.³⁶⁸ The discussion on the USA has focused on the federal laws. Interagency coordination, assimilation of cryptocurrencies into an already existing legal framework and meeting the standards of FATF are some of the good practices. Some of FATF's standards include the protection of consumers as well as the stemming of money laundering. However, this regulation is more effective at a federal level than a state level.

5.2 Conclusion

One of the aims of this mini dissertation was to explore the place of cryptocurrencies in international trade law as well as provide advice and criticism to the WTO to provide a clear blueprint on the regulation of cryptocurrencies in international trade. This mini dissertation has explored cryptocurrency and its place in international trade. The writer has also provided an explanation of cryptocurrency and its operations. Further indication has also been given to the historical stance of cryptocurrency and the case

³⁶⁷ This is where the central bank acts as overseer.

³⁶⁸ The Group of Seven (G7) is a political forum comprising of the USA, United Kingdom, Japan, Italy, Germany, France and Canada.

of *Venezuela v United States*³⁶⁹ was discussed. This case highlights the need for a comprehensive blueprint for the regulation of cryptocurrency in international trade in order to avert any disputes and misunderstandings. Cryptocurrency has contributed immensely to e-commerce and some of the international organisations that regulate international trade, like the IMF and the World Bank have called for its proper regulation. However, cryptocurrency is not yet recognised in international trade law. As with other international conventions regulating different issues, it is the states who come together and form international covenant (convention) in order to regulate a problem that exists across the borders of various states. Reference has also been given to the international organisation dealing with trade issues. It has been submitted that these organisations have a critical influence or contribution to the creation of an international convention to regulate cryptocurrency.

This mini-dissertation has made a case for the urgent need for regulation of cryptocurrency in international trade. As highlighted above, cryptocurrencies comprise of three elements: a set of rules, transaction storage ledger and a decentralised network of users.³⁷⁰ These elements make cryptocurrencies anonymous and difficult to regulate. However, as much as its regulation is not easy, the WTO has acknowledged and recognised the importance of digital currency in international trade. The importance of this regulation in the WTO is highlighted by the *Venezuela v USA* case. This case might open to a flood gate of such cases and there is an urgent need for the WTO to set a precedent. Cryptocurrency can also contribute to electronic commerce or paperless transactions. This will contribute to the ease of doing business across transnational boundaries.

This research study also aimed to make a compelling case for an appropriate legal and regulatory framework to govern the everyday operations of cryptocurrencies in South Africa. There is a lack of clarity in the existing body of laws in the financial sector, hence the need for a sound legal and regulatory framework to govern cryptocurrencies operations in South Africa. Looking at South Africa's unregulated cryptocurrency

³⁶⁹ *Dispute Settlement - DS574: United States - Measures Relating to Trade in Goods and Services* WT/DS574/2/Rev.1

³⁷⁰ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

market, the associated risks are in clear manifestation. Consumers are forever exposed to the risk of fraud. Money laundering is the order of the day. Unpredictability and volatility of digital currencies will also continue if no comprehensive regulatory measures are not put in place. South Africa's general populace and selected merchants are using and accepting cryptocurrencies as a method of payment.³⁷¹ This mini-dissertation has delved into the country's current trend on the usage of digital currencies. However, this popularity should be viewed with circumspection because in South Africa cryptocurrencies remain unregulated. In order to regulate cryptocurrencies, South Africa has to learn the good practices of El Salvador and the USA.

El Salvador and the USA were used as case studies on the best practices in the regulation of cryptocurrencies. El Salvador is the first country in the world to recognise Bitcoin as a legal tender. This transition is based on the Bitcoin Law which is the primary piece of legislation regulating the cryptocurrency. The fact that the country drafted a standalone legislation specifically dealing with Bitcoin is indeed a best practice as this means that any gaps in the law are plugged. The country has also allowed the easy convertibility of Bitcoin to the US Dollar, hence giving users access to the more stable greenback. Bitcoin is being used alongside the US Dollar and the Salvadoran Colon hence giving users a broader choice of which currency to use. However, it has been submitted that the Bitcoin Law does not put into place effective mechanisms to avert anti-money laundering and financing terrorist activities.³⁷² It has been further argued that the Bitcoin Law is not in compliance with the FATF standards as it fails to protect customers and fails to stem criminal activities.³⁷³ However, these gaps do not amount to the discontinuation of cryptocurrency. El Salvador will simply have to revise its Bitcoin Law to address the gap. The USA has been touted as the flagship jurisdiction for the regulation of cryptocurrencies. The legal framework is not limited to one standalone legislation but includes the Bank Secrecy Act, FinCEN and

³⁷¹ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

³⁷² Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

³⁷³ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

the tax body: IRS. However, the Executive Order on Ensuring Responsible Development of Digital Assets is the most comprehensive legislation regulating cryptocurrencies (also defined as digital assets). This jurisdiction's best practices include the recognition of cryptocurrency as a medium of exchange. This recognition is important because a country cannot regulate that which it cannot recognise. In order to hold service providers accountable, they must be registered and entered into a national database. The service providers are further obligated to implement the AML/CFT and Sanctions Program as a means of averting money laundering and financing of terrorist activities.³⁷⁴ Most importantly, the USA has put into place mechanisms that comply with the requirements of FATFA. This means that the regulation by the USA has passed international standards. However, it has been argued that the lack of a singular definition of cryptocurrency is actually a gap in the regulation since this may lead to legal uncertainty.³⁷⁵ This has been justified by those who argue that this approach actually accommodates the ever-evolving technology of cryptocurrencies.³⁷⁶ Conclusively, countries of the world can take a feather from the USA's approach and make it a blue print on how to best regulate cryptocurrencies.

5.3 Recommendations

The recommendations are based on the study undertaken in this mini-dissertation. They are directed towards the WTO and other international organisations, South African government departments, the SARB, legislature, cryptocurrency users and trading platforms and the South African society at large. The first leg of the recommendations are in the realm of international trade and are aimed at improving and promoting the current conditions for the regulation of cryptocurrency in international trade. The second leg of the recommendations deal with South Africa and are aimed at urging the relevant authorities to adopt these suggestions as the first step to bring sanity to the cryptocurrency industry.

5.3.1 Recommendations for regulation of cryptocurrencies international trade law

³⁷⁴ Middlebrook and Hughes 2014 *WMLR* 813.

³⁷⁵ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

³⁷⁶ Middlebrook and Hughes 2014 *WMLR* 822.

a) Regulation through a framework of governments

The debate on cryptocurrency in international trade is two faced.³⁷⁷ On one end are those who are rallying for the prohibition of cryptocurrency and on the extreme end are cryptoanarchists and cypherpunks³⁷⁸ who argue for the disruptive technology of cryptocurrencies. Cryptoanarchists call for cryptocurrency adoption and regulation through a framework of international governments.³⁷⁹ This grouping further “argues that the technology herald within the cryptocurrency movement will force political, financial, or social revolutions in the governments of the world”.³⁸⁰ The cryptoanarchists are sided by the cypherpunks.³⁸¹ They have also called for the regulation and not the prohibition of cryptocurrency. This research study is in favour of the cypherpunks and cryptoanarchists. This is because through a well-crafted regulatory framework, the world economies, including South Africa, will enjoy more advantages than disadvantages of using cryptocurrency.

b) Regulation through coordination between international organisations

Fiammetta Piazza is of the opinion that “...regulating cryptocurrency requires a coordination between international organisations to set the minimum for cryptocurrency regulation for sovereign states.”³⁸² She further submits that “Given Bitcoin’s great potential of being exploited not only by financial criminals but also Dark Web traffickers, an international agreement should be implemented”.³⁸³ Nicholas Plassaras opines that cryptocurrencies can be controlled through the intervention of the International Monetary Fund (IMF). He states that Bitcoin, for example, “poses an increasingly serious threat to the stability of foreign currency exchange market and, by extension, international commerce”.³⁸⁴

c) intervention by the FATF

³⁷⁷ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

³⁷⁸ Frebowitz *Cryptocurrency and state sovereignty* 13.

³⁷⁹ Frebowitz *Cryptocurrency and state sovereignty* 15.

³⁸⁰ Frebowitz *Cryptocurrency and state sovereignty* 20.

³⁸¹ These are people who use encryption to access a computer network in order to evade government authorities.

³⁸² Frebowitz *Cryptocurrency and state sovereignty* 38.

³⁸³ Piazza 2017 *SCILJ* 545.

³⁸⁴ Plassaras 2013 *CJIL* 396.

It is recommended that where the WTO has been lacking, the FATF must step up. The organisation has to devise a blue print. The organisation has mooted an “international standard for a cryptocurrency regulatory framework since 2019.³⁸⁵ At its core is the reduction of anonymity in crypto transactions”.³⁸⁶ The organisation has said that there are 27 countries in the world adhering to the FATF Framework.³⁸⁷ FATF efforts should be applauded, and it is critical that countries of the world put efforts together in the creation of international convention that would go beyond a country’s municipal laws. This international convention should provide the rules on the usage of cryptocurrency in international trade This is “...important if crypto-related crimes are to be prevented and penalised”.³⁸⁸

d) establishment the definitions and scope of any resolution adopted for the regulation of cryptocurrencies

It is recommended that the WTO must establish the definitions and scope of any resolution adopted for the regulation of cryptocurrencies.³⁸⁹ Blockchain technology and cryptocurrency are complex technical terms and thus there is a need to define what they exactly mean. By means of illustration, does cryptocurrency only refer to digital currencies making use of blockchain technology, or may other digital currencies like Amazon credits be regarded as cryptocurrency, is there a difference between cryptocurrency owned by the government, such as Venezuela’s Petro and private owned cryptocurrency such as Ethereum and Bitcoin?. This exposition illustrates the need to agree on the definition of these basic terms, “...otherwise vague meanings of each word might create confusion and conflicts”.³⁹⁰

e) joint development of solutions that could reduce conflicts due to a disparate regulatory landscape

It is submitted that the WTO must initiate a joint development of solutions to the problems associated with cryptocurrencies. The things to put into perspective by the

³⁸⁵ Reuters 2022 <https://www.reuters.com/technology/south-africa-moves-regulate-crypto-assets-2022-10-19/>.

³⁸⁶ Snyders 2021 <https://mybroadband.co.za>.

³⁸⁷ Snyders 2021 <https://mybroadband.co.za>.

³⁸⁸ Snyders 2021 <https://mybroadband.co.za>.

³⁸⁹ World Trade Organisation (WTO) 2020 <https://munuc.org>.

³⁹⁰ World Trade Organisation (WTO) 2020 <https://munuc.org>.

WTO is how different municipal laws may affect cryptocurrency trading. For purposes of illustration, how does it fare when an individual in the United States sends Bitcoin to another person in South Africa? Will South Africa have grounds to invalidate such a transaction? Suppose South Africa does invalidate such a trading, wouldn't that be a blatant violation of the WTO's principle of free trade? In addition to this complex situation, WTO member states have different regulatory frameworks. The WTO is of the view that it cannot impose its regulations on Member states.³⁹¹ It is therefore suggested that "...delegates must jointly develop solutions that could reduce conflicts due to a disparate regulatory landscape".³⁹² GATT regulations have regulated international trade between Member states with moderate success and the WTO can simply assimilate the new cryptocurrency regulations into the multilateral treaty.

f) global cooperation in the prevention of the misuse and criminal use of cryptocurrency

It is highly recommended that the WTO must moot global cooperation in the prevention of the misuse and criminal use of cryptocurrency. Cryptocurrency is built around anonymity. To overcome this, the WTO has to vary the degree of regulation depending on an individual government's system.³⁹³ For example, "... a nation with loosely regulated markets might choose to push for an agenda that guarantees freedom in trade of cryptocurrency, even if it condones some deviations".³⁹⁴ To overcome disparate approaches to cryptocurrency regulation, it is thus suggested that the WTO must come up with a comprehensive global blueprint.

g) intervention by the IMF

It is recommended that the IMF be more involved in the regulation of cryptocurrency in the international arena. The IMF's mandate is with regard to the monitoring of world economies and financial systems.³⁹⁵ This monitoring is the catalyst for the exchange of ideas and provision of suggestions to economies on the best economic policies to adopt. The regulatory structures of the IMF help global economies in building their

³⁹¹ World Trade Organisation 2020 <https://munuc.org>.

³⁹² World Trade Organisation 2020 <https://munuc.org>.

³⁹³ World Trade Organisation 2020 <https://munuc.org>.

³⁹⁴ World Trade Organisation 2020 <https://munuc.org>.

³⁹⁵ Singh *Show me the money: A Discussion of the cryptocurrency market and its potential regulation in South Africa* 44.

own institutional capacity.³⁹⁶ Sweden's central bank Governor, in his personal contribution to an IMF article, submits that cryptocurrencies are not currency but rather an investment of a high risk nature based on its unpredictability.³⁹⁷ However, he concedes that cryptocurrency is a necessary evil as digitalisation expands international trade.³⁹⁸ He further submits that there is a need "...for collective regulatory communications that can prevent the potential market crashes".³⁹⁹ The Managing Director of the IMF has also contributed to this debate and opines that cryptocurrency has the potential to change people's lives for the better and hence, an open minded approach should be adopted.⁴⁰⁰ As a solution to the borderless jurisdiction of cryptocurrencies, the Managing Director suggests that "a collaborative forward looking regulatory framework"⁴⁰¹ should be adopted and will be utilised "for creativity and flexibility of innovation".⁴⁰² It is known that "the IMF's mandate is to safeguard the stability of the international monetary and financial system..."⁴⁰³ and "crypto assets are changing the system profoundly".⁴⁰⁴ It has been further submitted that "crypto assets are potentially changing the international monetary and financial system in profound ways"⁴⁰⁵ and hence the IMF has a key role to play in safeguarding the steadiness of the international financial and monetary system by regulating the operation of cryptocurrency, which have the potential to cause an upheaval on the global economy.

³⁹⁶ Singh *Show me the money: A Discussion of the cryptocurrency market and its potential regulation in South Africa* 44.

³⁹⁷ Ingves 2018 <https://www.imf.org>.

³⁹⁸ Ingves 2018 <https://www.imf.org>.

³⁹⁹ Singh *Show me the money: A Discussion of the cryptocurrency market and its potential regulation in South Africa* 45.

⁴⁰⁰ Singh *Show me the money: A Discussion of the cryptocurrency market and its potential regulation in South Africa* 45.

⁴⁰¹ Singh *Show me the money: A Discussion of the cryptocurrency market and its potential regulation in South Africa* 45.

⁴⁰² Singh *Show me the money: A Discussion of the cryptocurrency market and its potential regulation in South Africa* 45.

⁴⁰³ Adrian, He and Narain 2021 *Global Crypto Regulation Should be Comprehensive, Consistent, and Coordinated* <https://www.imf.org>.

⁴⁰⁴ Adrian, He and Narain 2021 *Global Crypto Regulation Should be Comprehensive, Consistent, and Coordinated* <https://www.imf.org>.

⁴⁰⁵ Adrian, He and Narain 2021 *Global Crypto Regulation Should be Comprehensive, Consistent, and Coordinated* <https://www.imf.org>.

5.3.2 Recommendations for South Africa

a) SARB should recognise cryptocurrencies

The SARB must recognise that cryptocurrencies are here to stay and move away from its denialism. The central bank's deputy governor has summarised the SARB's approach as the creation of a regulatory environment that will make cryptocurrencies safer. Regulation is not dependent on the volatility of cryptocurrencies, but rather "to regulate them so that people have an adequate health warning and investor protection."⁴⁰⁶ This approach is highly defective. The associated risks of cryptocurrencies go beyond mere consumer protection. There are deeper concerns like money laundering and financing of terrorism as the main concerns flagged by FATF. The deputy governor has further suggested some steps as the first step in the reduction of the risks associated with cryptocurrencies. By declaring cryptocurrencies to be a financial product, the SARB will allow for better oversight of tax evasion, money laundering, and terrorist financing activities. Again, once this is done, it will then be easy to bring cryptocurrency under the ambit of the FAIS Act.

b) cryptocurrencies should be brought under the regulatory regime of FSCA

The SARB must bring cryptocurrencies under the regulatory regime of Financial Sector Conduct Authority (FSCA). This would be a laudable move due to the fact that FSCA lacks the power to prosecute matters of cryptocurrency fraud. This lack of powers is reflected through a Facebook post made by the FSCA, warning the public not to enter into any cryptocurrency dealings with one Themba Selahle who goes by the social media name of @xo_grootman. Selahle would promise the public huge returns if they invest in his cryptocurrency platform.⁴⁰⁷ The only thing FSCA could do was just to warn the public because they lack the powers to have the alleged fraudster prosecuted. If cryptocurrencies were to be brought under the auspices of the FSCA, then fraudsters like Selahle would have their day in court.

⁴⁰⁶ Moonstone 2022 <https://www.moonstone.co.za/are-you-ready-for-imminent-crypto-regulation-in-south-africa/>.

⁴⁰⁷Forex 2022 <https://www.kossyderrickent.com/2022/07/forex-trade-scammer-financial-sector.html>.

c) there should be a creation of a standalone legislation specifically dealing with cryptocurrencies

It is suggested that South Africa come up with the “Cryptocurrency Act”. This will be taking a leaf from the approach of El Salvador which boasts of its own Bitcoin Law of 2021. South Africa can also learn from the USA’s experience where cryptocurrencies are primarily regulated by the Uniform Regulation of Virtual Currency Businesses Act of 2017.

Legislation is a critical instrument through which the government organises society and protects its citizens.⁴⁰⁸ Legislation also helps to create rights and obligations as well as creating legal certainty. Instead of relying on subsidiary legislation and regulations, South Africa law makers should draft legislation that specifically deals with the new phenomenon of cryptocurrency.⁴⁰⁹ The cryptocurrency wave is fairly new and some of the financial laws are not updated to deal with this new challenge.⁴¹⁰

By creating a specific Law dealing with cryptocurrency, South Africa will be able to keep up with the technological challenges imposed by cryptocurrencies. This cryptocurrency legislation can incorporate the following:

- i) regulation of anonymity; and
- ii) the creation of cryptocurrency automated teller machines (ATM).⁴¹¹

The new legislation can also prevent money laundering and the financial of terrorist activities or organisations through the use of cryptocurrency.

d) The SARB should classify cryptocurrencies as a currency

The SARB’s efforts at the regulation of cryptocurrencies is commendable, but one cannot regulate something that is devoid of definitional clarity. Instead of regarding it as a currency, the central bank has categorised cryptocurrency as an asset.⁴¹² From a regulatory standpoint, this has led to definitional ambiguity. Definitional clarity is

⁴⁰⁸ De Jager 2000 *ASA* 1-36.

⁴⁰⁹ Custers and Overwater 2019 *EJLT* 34.

⁴¹⁰ Chiu *Regulating the Crypto Economy* 34.

⁴¹¹ Custers and Overwater “Regulating Initial Coin Offerings and Cryptocurrencies: A Comparison of Different Approaches in Nine Jurisdictions Worldwide” 2019 *EJLT* 29.

⁴¹² SARB *Position Paper on Virtual Currencies* 2014 5.

critical because it has a direct influence on the classification and concomitant regulatory treatment of cryptocurrencies. With tongue in cheek, the central bank has backtracked on its definition of cryptocurrencies as an asset and has conceded that “Our view has changed and we now regard it [crypto-currency] as a financial asset and we hope to regulate it as a financial asset”.⁴¹³ This gives some form of clarity, but it is not enough for the purposes of legal certainty. This mini-dissertation is not agitating for the adoption of cryptocurrency as a legal tender as is the case with El Salvador, but rather adopt is an opposite of fiat currency. Although cryptocurrency does not meet the definition of legal tender in South Africa, currency can still exist without it being recognised as a legal tender. For the purposes of brevity, it is recommended that the SARB re-classify cryptocurrencies as a currency and inform the public that users can now legally trade in cryptocurrency but have to take cognisance of the inherent risks involved. This lack of definitional clarity also has a ripple effect on consumers because they are not protected by certain bodies, for example the ombudsman.

e) creation of an ombudsman to dealing directly with complaints related to cryptocurrency

It is recommended that an ombudsman dealing with cryptocurrency complaints must be created. Financial Services Providers (FAIS) Ombudsman’s mandate is to provide consumer protection.⁴¹⁴ In his report, the Ombudsman has submitted that there is significant increase in complaints regarding cryptocurrency investments made during the 2020/2021 financial year.⁴¹⁵ However, he concedes that he is powerless to help.⁴¹⁶ He states “We were unable to assist complainants who submitted complaints in this respect [because] crypto assets are not currently regulated in terms of any financial sector law in South Africa.”⁴¹⁷ He further contends that “Crypto assets are not classified as a financial product [and] such products fall outside of this office’s jurisdiction”.⁴¹⁸ Cryptocurrencies will then have to be included in the definition of

⁴¹³ SARB *Position Paper on Virtual Currencies 2014* 5.

⁴¹⁴ Stokes 2022 <https://www.fanews.co.za>.

⁴¹⁵ Stokes 2022 <https://www.fanews.co.za>.

⁴¹⁶ Stokes 2022 <https://www.fanews.co.za>.

⁴¹⁷ Stokes 2022 <https://www.fanews.co.za>.

⁴¹⁸ Stokes 2022 <https://www.fanews.co.za>.

financial services. This definition will then give the definitional clarity that this discussion is calling for.

f) South Africa should adoption a cautious and do no harm approach

South Africa must approach the regulation of cryptocurrencies carefully. Besides the need for definitional clarification, questions have been asked on the best approach to regulate cryptocurrencies in South Africa.⁴¹⁹ A litany of approaches that would bring some sense of sanity to the cryptocurrency in South Africa has been suggested.⁴²⁰ In its Consultation Paper, a group of South African regulatory authorities concurred on a “cautious and do no harm approach when regulating cryptocurrencies”.⁴²¹ This line of thinking is akin to the one adopted by the USA’s Commodity Futures Trading Commission.⁴²² It has been contended that this is a prudent approach⁴²³ towards regulation in that users will partake while the market regulates itself and decides which of the cryptocurrencies can be adopted as a store of value and medium of exchange.⁴²⁴ Lindquist submits that countries of the world should let cryptocurrencies to “evolve and flourish” in order for them to gain global commercial opportunities.⁴²⁵ Lindquist argues that burdensome regulation of cryptocurrencies will thwart or stifle business, therefore increasing market delivery costs.⁴²⁶ This research study therefore posits that South Africa must adopt a balancing act between regulation and the freedom of innovation and use. Regulation must not be expense of technological development hence a “no harm” mindset should be adopted.

g) South Africa should adopt a functional approach

It is recommended that South Africa adopt a functional approach. A section of scholars

⁴¹⁹ SARB *Position Paper on Virtual Currencies* 2014 5.

⁴²⁰ SARB *Position Paper on Virtual Currencies* 2014 5.

⁴²¹ Do no harm was the right approach to development of the Internet.

⁴²² World Economic Forum 2018 *What's the future of Blockchain?* <https://www.weforum.org>.

⁴²³ Singh 'Show me the Money': *A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa* 92.

⁴²⁴ Singh 'Show me the Money': *A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa* 92.

⁴²⁵ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heiononline.org>.

⁴²⁶ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heiononline.org>.

has rallied for the functional approach.⁴²⁷ They have suggested that a functional approach be adopted by South Africa's financial regulators. As already demonstrated in Chapter 4, the USA has favoured a functional approach when regulating the cryptocurrency industry.⁴²⁸ Reyes is of the opinion that:

"A functional approach is desirable because it is well suited to a highly complex or unknown structure, and it facilitates the analysis of a rapidly changing structure both of which are qualities of the financial system."⁴²⁹

Reyes' view is echoed by the Crypto Assets Regulatory Working Group (CARWG) which has also proposed a functional approach towards the regulation of the cryptocurrency industry in the Republic.⁴³⁰ The CARWG posits that rather than the regulation of the technology used in cryptocurrencies, the economic implications of cryptocurrencies should be regulated.⁴³¹ In developing its policy and regulatory responses to the emergence of cryptocurrencies in South Africa, the CARWG has favoured a functional approach.⁴³² In summary, the users' activity is to be regulated in terms of specific standards and rules.⁴³³ The USA should be commended for its adoption of the functional approach. South Africa should take a leaf from USA's approach of the clarification of the applicability of the banking legal framework to cryptocurrencies as well as the regulation of the activities of persons and businesses involved in the utilisation of cryptocurrencies.⁴³⁴

h) cryptocurrency platforms should adopt a risk-based approach

A risk-based approach is also recommended. The most feared risk associated with

⁴²⁷ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴²⁸ Sadhaseevan *The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector* 93.

⁴²⁹ Reyes *VLR* 191.

⁴³⁰ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* (2019) 9.

⁴³¹ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* (2019) 7.

⁴³² Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴³³ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* (2019) 7.

⁴³⁴ Sadhaseevan *The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector* 72.

cryptocurrencies is with regard to AML/CFT.⁴³⁵ It is suggested that in order to stem this risk, cryptocurrency platforms must adopt a risk-based approach guided by the requirements of the Financial Intelligence Centre Act⁴³⁶ (FIC Act). This risk-based approach should include customer identification and verification. These platforms should also conduct a ML/TF risk assessment. This will be in line with FATF's guidance on cryptocurrencies which all jurisdictions are obliged to follow when regulating cryptocurrencies. In implementing the FATF recommendations, the industries participating in cryptocurrencies must come up with their own tailor-made solutions that would adhere to the AML/CFT requirements.⁴³⁷

i) South Africa should adopt a sand box approach

A sand box approach has also been recommended. South Africa's Crypto Assets Regulatory Working Group (IFWG), in its Position Paper on Crypto Assets has posited that payments in cryptocurrencies should be subjected to a regulatory sandbox approach.⁴³⁸ The sandbox approach entails the trial of products and business models in a safe environment in order to determine compliance with an existing legal framework before implementation within the broader sector.⁴³⁹ The state of Arizona in the USA is the first state to have initiated the "regulatory sandbox".⁴⁴⁰ This law allows innovators to bring new innovative ideas into the sector by having the stricter laws of the federal government relaxed.⁴⁴¹ A regulatory sandbox approach is a regulatory approach, typically summarised in writing and published, that allows for live and time-bound testing of innovations under a particular regulator's oversight.⁴⁴² In the South African experience, this then means that cryptocurrencies for domestic

⁴³⁵ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* (2019) 7.

⁴³⁶ Financial Intelligence Centre Act 38 of 2001.

⁴³⁷ This calls for the adherence to the 'travel rule'.

⁴³⁸ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴³⁹ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁴⁰ Global Legal Insights 2022 Blockchain & Cryptocurrency Laws and Regulations| USA <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>.

⁴⁴¹ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁴² Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

payments may be evaluated in a controlled environment to determine the outcomes of potential adoption.⁴⁴³ A regulatory sandbox approach helps in determining the advantages and disadvantages of cryptocurrency as a means of domestic payment.⁴⁴⁴

j) a creation of a self-regulatory organisation provided in the proposed statute

It is submitted that a self-regulatory organisation (SRO) should be created and can go a long way in regulating cryptocurrencies in the Republic.⁴⁴⁵ Besides regulating financial products and services, the Financial Sector Conduct Authority (FSCA) regulates the country's financial institutions providing financial products and services.⁴⁴⁶ FSCA also acts as the overseer for self-regulatory organisations like the Johannesburg Stock Exchange (JSE), clearing houses as well as central securities depositories.⁴⁴⁷ It is then suggested that a self-regulatory organisation (SRO) be established that will be overseen by the FSCA. This submission is unequivocally seconded by Govender who posits that the establishment of an SRO will be a viable option in the regulation of cryptocurrency in South Africa.⁴⁴⁸ The idea of an SRO is sound because this is already a familiar and structured regulatory mechanism within South Africa's financial market and with the JSE having already been conferred with an SRO status.⁴⁴⁹ This self-regulation principle does not mean that the SRO will be regulating itself. Only its market and services will be regulated.⁴⁵⁰ SRO's mandate is the regulation of the affairs of the market by setting standard rules and provide dispute resolution mechanisms within the specific industry it serves.⁴⁵¹ An SRO for cryptocurrencies will thus have the mandate of providing rules regulating the cryptocurrency industry and thus bringing it within the broader ambit of financial

⁴⁴³ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* 12.

⁴⁴⁴ Lindquist "Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation" <https://heionline.org>.

⁴⁴⁵ Lindquist "Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation" <https://heionline.org>.

⁴⁴⁶ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* 12.

⁴⁴⁷ Intergovernmental Fintech Working Group, Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* 12.

⁴⁴⁸ Business Tech 2017 *How Bitcoin can be regulated in South Africa* <https://businesstech.co.za>.

⁴⁴⁹ Business Tech 2017 *How Bitcoin can be regulated in South Africa* <https://businesstech.co.za>.

⁴⁵⁰ Business Tech 2017 *How Bitcoin can be regulated in South Africa* <https://businesstech.co.za>.

⁴⁵¹ Business Tech 2017 *How Bitcoin can be regulated in South Africa* <https://businesstech.co.za>.

services in South Africa. In the USA, the creation of an SRO is underway.⁴⁵² Its mandate would be to instil a sense of uniformity across state laws and federal laws on cryptocurrency regulation.⁴⁵³ It has been submitted that the establishment of an SRO will “provide the connective tissue between the regulations, and between the industry and government.”⁴⁵⁴ If an SRO can be a workable solution towards the regulation of cryptocurrency in the USA, then South Africa is recommended to adopt the same.

k) the amendment of existing laws for them to cater for the new phenomenon of cryptocurrencies

Cryptocurrency is a fairly new phenomenon, and most of South African laws are not advanced enough to cater for it.⁴⁵⁵ However, some laws have been amended to cater for this new technology.

(i) amendment of the Consumer Protection Act

Gearing towards consumer protection, the Consumer Protection Act⁴⁵⁶ has to be amended. One of the associated risks of the use of cryptocurrencies is the lack of consumer protection.⁴⁵⁷ In South Africa, consumers are protected by the Consumer Protection Act of 2008 (CPA). However, the CPA does not regulate transactions between individuals.⁴⁵⁸ This means that due to peer-to-peer characteristic of cryptocurrencies, their regulation is not covered by the CPA. The cryptocurrency system lacks any inherent remedies for the consumer in the event of Ponzi schemes, fraud and misappropriation of funds.⁴⁵⁹ This lack of protection thus justifies the

⁴⁵² Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁵³ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁵⁴ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁵⁵ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁵⁶ Consumer Protection Act 68 of 2008.

⁴⁵⁷ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁵⁸ Singh 'Show me the Money': A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 80.

⁴⁵⁹ Law Library of Congress 2014 *Regulation of Cryptocurrency Around the World* <https://www.loc.gov>.

extension of the CPA to safeguard new digital economies.⁴⁶⁰ The CPA must then include cryptocurrencies in order to protect consumers and users from dubious businesses.⁴⁶¹ For example, in the USA, there has been an emphasis on the maintenance of appropriate records and submit reports to the central authorities.⁴⁶² This would help protect consumers as demanded by FATF.⁴⁶³ FATF guidelines make mention of Customer Due Diligence (CDD)⁴⁶⁴ and Know-Your-Customer (KYC)⁴⁶⁵ regulations. These standards are meant to protect consumers. Where there CPA is amended to include cryptocurrencies, then South Africa would have met the FATF benchmark on consumer protection.

(ii) amendment of the Currency and Exchanges Act

The Currency and Exchanges Act⁴⁶⁶ (CEA) should also be revisited. Exchange control in the country is regulated by the Currency and Exchange Act.⁴⁶⁷ In place are also the Exchange Control Regulations⁴⁶⁸ issued in terms of the Act. To transfer any monies offshore, one needs to apply with the authorised dealers.⁴⁶⁹ The purpose of the application is to ensure that no money is transferred clandestinely and at the expense of the fiscus.⁴⁷⁰ However with cryptocurrency, due to its anonymous nature, it can be transferred clandestinely since it is not regulated.⁴⁷¹ It only make sense to amend the Act to accommodate the transfer and movement of cryptocurrency for the purposes of exchange control. South Africa can learn from the American experience. The US Treasury has called for an urgent intervention to put into place regulations to combat

⁴⁶⁰ Singh 'Show me the Money': A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 80.

⁴⁶¹ Law Library of Congress 2014 *Regulation of Cryptocurrency Around the World* <https://www.loc.gov>.

⁴⁶² Comply advantage 2021 <https://complyadvantage.com>.

⁴⁶³ Comply advantage 2021 <https://complyadvantage.com>.

⁴⁶⁴ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁶⁵ Lindquist 'Funny Money: Why Bitcoin Does Not Warrant Increased Governmental Regulation' <https://heinonline.org>.

⁴⁶⁶ Currency and Exchanges Act 9 of 1933.

⁴⁶⁷ Singh 'Show me the Money': A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 82.

⁴⁶⁸ Exchange Control Regulations of 1961.

⁴⁶⁹ These are South African commercial and merchant banks.

⁴⁷⁰ Singh 'Show me the Money': A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 71.

⁴⁷¹ Singh 'Show me the Money': A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa 71.

global and domestic criminal activities.⁴⁷² In 2020, FinCEN put into place a new cryptocurrency regulation meant to impose data collection procedures on cryptocurrency exchanges and wallets. The Treasury has said that the rule is expected to be implemented by Fall 2022.⁴⁷³ This means that an offshore transfers will be under the microscope of FinCEN. The SARB's Financial Surveillance Department (FinSurv) does not have powers to demand South African cryptocurrency trading platforms to file all transactions involving cryptocurrency.⁴⁷⁴ FinSurv should thus be given powers in terms of the Act to force users and trading platforms to give reports on all offshore transactions.

5.4 Conclusion

The IFWG, in its Position Paper on Crypto Assets, has stated that the USA should be a selected jurisdiction in finding ways on the regulation of cryptocurrencies. The Paper further points out that best practices can be learnt from a jurisdiction's central bank regulatory stance. The stance can be either banned, regulated or monitoring. Currently, the USA's stance is "regulated". This discussion has been at pains to urge the South African authorities to adopt the USA approach to the regulation of cryptocurrency. South Africa does not necessarily need to regard cryptocurrencies as a legal tender like El Salvador, but it can still learn from the El Salvadorian experience of creating a standalone cryptocurrency legislation.

Technology development is advancing at a fast pace and it seems like South African regulators are failing to keep up with the laborious task of coming up with appropriate legislation, while innovators continue to provide the world with innovations. This mini-dissertation is a clear illustration of the fact that we are living in an era of ongoing and rapid technological advancement. This advancement has significant consequences on the regulation of financial services. This mini-dissertation has argued that as much as the innovation behind cryptocurrencies is for the good of humanity, this innovation needs to be reined in. Regulation of cryptocurrencies is critical, for this will help in the maintenance of a balanced financial sector. This regulation will also guard against

⁴⁷² Middlebrook and Hughes *YJR* 2015 507.

⁴⁷³ Chiu *Regulating the Crypto Economy* 77.

⁴⁷⁴ Singh 'Show me the Money': *A Discussion of the Cryptocurrency Market and its Potential Regulation in South Africa* 73.

the criminal misuse of the technology. When coming up with a suitable regulatory method to cryptocurrencies and its associated industry in South Africa, officials should take cognisance of three central issues. The first one is to assess whether or not tailored legislation is overdue. Secondly, it has to be determined whether or not cryptocurrencies and its associated industry should be included in the already existing legislation and lastly, whether or not existing legislation should be amended to include the regulation of cryptocurrencies and its associated industry.

Finally, the mini-dissertation serves as a heed to South African authorities to come up with a specific and intelligible legal and regulatory framework for cryptocurrencies in South Africa and its concomitant industry. Although South Africa has a number of sound financial regulatory bodies to bring cryptocurrencies within its regulatory realm, the eventual question is how the relevant authorities will respond to leveraging these bodies in order to acquire the most beneficial outcome. Conventional regulatory policies must be revamped in order to cater for the technological revolution.

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