# In Pursuit of Transparency for Trade Facilitation in Southern Africa

**By:**

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The concept of trade facilitation has been defined by scholars as involving improvements in “infrastructure, information and communications technology, business environment, and border and transport efficiency.” Some International organisations succinctly describe it as the “simplification, modernization and harmonization of export and import processes.” This ethos is replicated in treaty instruments that refer to it as requiring “the coordination and rationalization of trade procedures and documents relating to the movement of goods in international trade from the place of consignment to the destination.” There are various trade facilitation measures that may be applied to achieve its objective of reducing trade transaction costs and improving trade efficiency.. One of the most important, especially from an African standpoint, is that of ensuring transparency in the regulation of trade.

The foundations of transparency in international trade law emanate from article X:1 of the General Agreement on Tariffs and Trade (GATT). It requires that members promptly publish all trade-related information, such as laws, procedures, taxes, restrictions and prohibitions. In the context of trade facilitation in particular, transparency is necessary so that traders, and other stakeholders, are expeditiously apprised of the regulations and requirements affecting trade. For example, if traders are so apprised, they will be able to make sound business decisions based on an accurate understanding of the regulatory environment. In addition, they will be able to ensure that their goods arrive at borders fully compliant. This will increase the likelihood of them being quickly and easily cleared for import or export, thus going a long way towards the ease of congestion and delays at borders.

Cognisant of the fact that trade facilitation can be subverted by a lack of transparency, both the World Trade Organization's Trade Facilitation Agreement (TFA) and the African Continental Free Trade Agreement (AfCFTA) contain commitments that are related to this imperative. Article 1 of the TFA contains the general obligation of transparency. Article 1.1 outlines the information that members should make available by publication. Article 1.2 requires that, to the greatest extent possible, information should be availed, and updated, through the internet. In the AfCFTA, transparency appears in article 5 (e) as one of the foundational principles of the arrangement. Part IV of the agreement fleshes out the concept in articles 16 and 17. The former contains a general commitment on prompt publication:

Each State Party shall promptly publish or make publicly available through accessible mediums its laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement.

Article 17.1 is a notification commitment. It enjoins members to notify the Secretariat of the information required in article 16. Article 17.3 empowers members to make information requests to other members through the Secretariat. The other party is also to provide the response through the Secretariat. The principle of transparency is further encapsulated in article 25 of the Protocol on Trade in Goods. It requires transparency regarding the activities of State Trading Enterprises (STE). These are defined as:

governmental, non-governmental enterprises, including Marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports with reference to provisions of Article XVII of GATT 1994.

State Parties are to notify the Secretariat of these activities and it will relay the information to other State Parties.

There is some evidence of Southern Africa generally being a non-transparent region in some regards. For example, from the reports of Transparency International on corruption. This weakness has also been somewhat apparent in the trading context. Some Southern African firms have complained that they are not furnished with trade-related information in a timely manner. For example, Vodacom (a South African mobile communications company) has complained that tariff and Customs legislation seemingly changes overnight without any notification being given to traders.

There are several officials who are involved in the regulation of cross-border trade. These include: Customs officials who control the movement of goods; agriculture and health officials who apply sanitary and phytosanitary (SPS) measures, and officials from the department of transport who verify vehicle and driver authorisations. These officials implement scores of measures that arise from a variety of laws that are made by diverse regulatory authorities. This complexity contributes to the potential difficulties that traders experience in trying to ascertain and to comply with the applicable regulations. Ideally transparency begins with traders being consulted before the promulgation, amendment or abrogation of any laws. This is recommended in article 2 of the TFA. Prior consultation assists traders to know well in advance what changes they can expect in the regulatory environment. Buyonge and Kireeva have found that, generally, African traders are not regularly engaged by regulatory authorities when there are changes to be made to the trade regulatory environment. There have been some reports of this happening in Southern Africa. For example, a Tanzanian firm that conducts trade with firms in the Democratic Republic of the Congo, Malawi, Mozambique, South Africa and Zambia has reported that there is a lack of engagement by the Tanzanian government when implementing or abrogating laws. It argues that this lack of

transparency hampers its ability to be adequately prepared to comply with cross-border requirements and thus to have their goods processed quickly and cost-effectively. If more nations could adopt appropriate forums and regular channels for prior and ongoing consultation, this would enhance transparency for trade facilitation in Southern Africa.

A second strategy that States implement to improve transparency in trade is the installation of trade portals. The World Bank gives a basic definition of a trade portal as being “the primary site where one can obtain all the information on regulatory requirements needed to undertake international trade.” Out of the fifteen Southern African States, eleven have trade portals. These are: Botswana, eSwatini, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Tanzania, Zambia and Zimbabwe. By and large the States have done their utmost to ensure that these portals have up-to-date and complete information. Most contain all of the applicable trading laws and procedures with an easy to navigate interface. Documents and forms are also availed, as well as contact details for enquiries. Some improvements that could be made would be to also include existing trade agreements and information on trade dispute-settlement. Some portals have this information, but not all of them. Southern African nations face some challenges in establishing information portals. These include the costs of site hosting and of keeping the information updated and training and equipping staff that are responsible for the portal. In addition general infrastructural deficits in the countries (for example power supply and internet connectivity) at times cause the portals to go offline. However, generally the Southern African States are doing very well on this front to ensure that trade stakeholders have access to all of the relevant trade information on one convenient portal.

Transparency may also be enhanced by the institution of enquiry points. These are recommended in the TFA – in article 1.3. An enquiry point is an office that is tasked with responding to enquiries made by governments, traders or any other interested parties on trade-related issues. The enquiries can relate to the applicable trade regulations, procedures, restrictions, rates of duties and penalties etc. An enquiry point should also, ideally, be able to provide stakeholders with all relevant forms and documents. In Southern Africa, Botswana, the Democratic Republic of the Congo (DRC), eSwatini, Lesotho, Madagascar, Mozambique and Zambia do not, as yet, have enquiry points.

However, they have all requested technical assistance from the World Trade Organization's trade facilitation facility, to institute them. For example, the DRC has specified that it will require support for capacity building of the focal point. With such support it envisions being able to implement an enquiry point by February 2022. If the requests for assistance are honoured this will further increase transparency for trade facilitation in the region.

Finally, mention can be made of other specific transparency obligations that are imposed in the Trade Facilitation Agreement. These are under article 10.6.2 (transparency regarding measures on the use of Customs brokers) and article 12.2.2 (transparency on contact points for Customs enquiries). Only four Southern African States have managed to provide information related to article 10.6.2. These are: Botswana, eSwatini, Malawi and Mozambique. The other States are in the process of complying and have notified implementation dates that range from 2021 (Namibia) to 2038 (Zambia). With respect to article 12.2.2, three States (Botswana, Malawi and Mauritius) have provided information on their contact points for the exchange of Customs information. The other States are in the process of complying and have notified implementation dates that range from 2022 (Zambia) to 2027 (eSwatini).

In conclusion, it is argued that trade facilitation is important for advancing regional integration and development. Trade facilitation is assisted by the creation of transparent trade regulatory environments. The first step is that governments should engage with stakeholders to (amongst others) inform them of any anticipated or imminent changes to trade regulations. Secondly, they should publicise all trade-related information on easily accessible platforms. This will assist to ameliorate the time and costs of searching for information. When traders are well-informed they will be able to comply with requirements and, thus, are more likely to have their imports/exports processed more expediently and cost-effectively.. This will contribute towards the alleviation of existing bottlenecks at Southern African borders. Conversely, a non-transparent and unpredictable trading environment breeds unintentional non-compliance. This leads to time being wasted at borders trying to rectify defects and introduces the possibility of liability for penalties for non-compliance. Thus, the success of integration and development in Southern Africa depends on alleviating trader frustrations of operating in an opaque trading environment.

Therefore, the Southern African States are encouraged to continue with their laudable efforts of implementing transparency measures. They should strive to meet the implementation deadlines that they have set for themselves. They should seek assistance to mitigate any capacity constraints that are preventing them from making necessary reforms. Fortunately both the TFA and the AfCFTA recognise the importance of special and differential treatment (S&DT) and technical assistance to improve prospects of compliance. This gives some assurance that members will continue to achieve greater success in improving transparency going forward.

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