

# **Review of SADC's market integration agenda: opportunities and challenges for regional industrial development**

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## **1. Introduction**

Industrial development concerns have now become a priority focus in Africa. This is, in some measure, prompted by developments in commodities sectors, where the need for beneficiation of minerals and value addition of the continent's natural resources is enjoying priority focus. There is also recognition that a traditional trade and integration agenda that focuses predominantly on border issues to enhance market access, is not addressing Africa's fundamental challenges of lack of industrial capacity and diversity. In short, the capacity to produce tradeables competitively and the policy mix that will enhance this capacity, are very much occupying the minds of policy makers. The adoption of the Action Plan for Accelerated Industrial Development of Africa (AIDA) by the 10<sup>th</sup> African Union Assembly of Heads of State and Government in January 2008, is a continental policy response to these challenges. This plan provides a framework for addressing industrial development challenges at national, regional and continental levels.<sup>2</sup> Regional economic communities are also addressing specific industrial development concerns in their integration agendas. This paper focuses very much on the regional aspects of industrial development and specifically, the role of the Southern African Development Community's (SADC) market integration agenda in supporting regional industrial development.

This review of industrial development policy in SADC has to be cast in a broader context; taking into account the defining features of trade and industrial development in the 21<sup>st</sup> century. Trade and industrial organisation are defined by increasingly complex global value chains, fragmentation of production and servicification of production. Outsourcing and offshoring different parts of the production chains is most evident in manufacturing, but increasingly also in services, most notably finance and telecommunications. This makes foreign direct investment an important trade policy concern. Aspects of market governance such as sector regulation and competition policy become more important in the trade policy mix too. In brief 21<sup>st</sup> century trade policy is not so much about border measures such as the import tariff, but the collection of new generation trade issues including trade in services, investment, competition policy and intellectual property matters.

The paper starts with a brief overview of industrial development, and industrial policy development in Africa, taking into account the three-pronged approach that has emerged, including a market integration agenda, industrial development and infrastructure development. These three define Africa's 'developmental regional integration' agenda. Against this background the industrial development agenda of the Tripartite Free Trade Area (TFTA) is briefly highlighted. The TFTA has also adopted a 'developmental regional integration' agenda. Following that SADC's trade and industrial development agenda is examined; with specific focus on the Protocol on Trade and its references to

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<sup>2</sup> Action Plan for the Accelerated Industrial Development of Africa; available at <http://pages.au.int/sites/default/files/Plan%20of%20Action%20of%20AIDA.pdf>

industrial development. Taking into account the role of member states in the implementation of SADC's legal instruments, and the policy space enjoyed by member states to make policy and enact domestic legislation in pursuit of national industrial development priorities, a select review of some national policy initiatives that run counter to SADC industrial development and integration objectives, is provided.

## **2. Industrial development in Africa**

As alluded to above, the approach to industrial development on the African continent is three-pronged, consisting of the Action Plan for the Accelerated Industrial Development of Africa (AIDA), the Continental Free Trade Area (CFTA) and Boosting Intra-African Trade (BIAT), and the Programme for Infrastructure Development in Africa (PIDA). The main aspects of these initiatives are highlighted in turn.

### **2.1 AIDA**

African leaders have identified industrial development as an effective, socially responsible and sustainable way of attaining the economic transformation of countries on the continent. In this regard, at the 10<sup>th</sup> Ordinary Session of the African Union (AU) Assembly of Heads of State and Government held in Addis Ababa in January 2008, the Action Plan for the Accelerated Industrial Development of Africa (AIDA) - developed by the AU and the United Nations Industrial Development Organisation (UNIDO) - was adopted. The AIDA identifies seven programme clusters for intervention namely:

- Industrial policy and institutional direction
- Upgrading production and trade capacities
- Promoting infrastructure and energy for industrial development
- Human resources for development of industry
- Industrial innovation systems, R&D and technology development
- Financing and resource mobilization
- Sustainable development

The strategic plan for implementation of the AIDA sets out programmes, projects and activities across these seven clusters aimed at fostering industrial growth and structural change and entrenching industrial integration at the regional and continental levels and into the global economy.

### **2.2 CFTA and BIAT**

The Continental Free Trade Area (CFTA) is currently at the centre of Africa's plans for regional and continental integration. In a decision taken at its 18<sup>th</sup> Summit in 2012, the AU Heads of State and Government endorsed the establishment of the CFTA, setting an indicative target date of 2017. Negotiations towards the CFTA were officially launched by the AU Summit in Johannesburg, South Africa, on 15 June, 2015.

The 2012 decision on the CFTA was taken within the broader context of increasing the currently low levels of intra-African trade. In this regard, the Boosting Intra-African Trade (BIAT) initiative was also

adopted, which aims at deepening market integration and significantly increasing such trade amongst African countries. The BIAT has the following priorities for the short term of 3 years:

- Broadening Africa's economic and market space
- Addressing infrastructural bottlenecks
- Improving trade facilitation
- Improving trade information networks
- Improving trade finance
- Addressing adjustment costs associated with trade liberalisation

The following are priorities for the medium to long term (3 to 7 years and beyond):

- Addressing multiplicity and inconvertibility of currencies
- Promoting free movement of people
- Enhancing trade in services

Different activities are envisaged within the respective priority areas. Of particular importance to note in the context of this paper are those relating to trade policy. These include:

- Adopting and implementing of coherent and efficient trade policies at national, regional and continental levels, particularly geared towards promotion of intra-African trade
- Implementing of relevant protocols for market integration
- Mainstreaming intra-African trade into national trade and development strategies
- Enhancing the role of the private sector and women in trade policy formulation
- Boosting intra-African trade in food products
- Liberalising transport, professional, financial and ICT services
- Harmonizing rules of origin and trade regimes
- Promoting 'Buy in Africa' and 'Made in Africa'

### **2.3 PIDA**

A significant barrier to increased investment, production and trade on the African continent is the deficiency in infrastructure, estimated by the World Bank at \$93 billion a year.<sup>3</sup> In July 2010, the Programme for Infrastructure Development in Africa (PIDA) was launched to address this challenge, while at the same time promoting the continent's integration agenda. The PIDA is a joint initiative of the African Union, in conjunction with the New Partnership for Africa's Development (NEPAD) and the African Development Bank (AfDB). It is seen as essential to creating large competitive markets and to lowering production and trade costs across sectors. It aims to achieve this through development of infrastructure in the areas of energy, transport, water and information and communication technology (ICT).

The programme includes projects across the four sectors, planned to be implemented in the short and medium term (from 2010 to 2030) and in the longer term (by 2040). Within this framework, a Priority Action Plan (PAP) is drawn up that includes actionable projects and programmes that can

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<sup>3</sup> See Foster and Briceño-Garmendia. (2010). Africa's Infrastructure: A Time for Transformation. [Online]. Available at: [http://siteresources.worldbank.org/INTAFRICA/Resources/aicd\\_overview\\_english\\_no\\_embargo.pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/aicd_overview_english_no_embargo.pdf).

effectively promote regional integration, to be implemented over the period 2012 to 2020. The PAP is estimated to cost \$68 billion, while the long term cost is expected to be \$360 billion.

### **3. Industrial development in the Tripartite Free Trade Area**

At the cross-regional level, negotiations towards the Tri-partite free trade (T-FTA) between members of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) are also proceeding within the three pillars of market integration, industrial development and infrastructural development. The T-FTA Agreement was recently signed by 16 of the 26 Tri-partite member states on 10 June 2015. The Agreement was signed in spite of the negotiations on market access and other related aspects not being concluded. As these negotiations continue, negotiations on industrial and infrastructural development are also set to commence.

### **4. Industrial development in SADC**

The tri-focal approach to industrial development at the continental and Tri-partite levels is now reflected within SADC. This section will first map out SADC's industrial development policy and legal framework. It will then discuss market integration aspects vis-à-vis industrial development, within the context of the SADC Protocol on Trade.

#### **4.1 Industrial development policy framework**

##### **4.1.1 Revised RISDP**

The regional integration and development programme of SADC is guided by the Regional Indicative Strategic Development Plan (RISDP), covering the duration 2005 to 2020. During the course of its implementation, a desk assessment for the period 2005 to 2010 was carried out by the SADC Secretariat. An independent mid-term review was also carried out for the period 2005 to 2012. These and other consultations over recent years have emanated into a revised RISDP document, which was adopted by the Extraordinary Summit of Heads of State and Government of SADC on 29 April, 2015. This revised document will guide implementation of SADC programmes in the remaining period i.e. 2015 to 2020.

The vision and mission in the revised RISDP remain as they were in the initial document, as do its principles and objectives. The main thrust and substantive outcome of the RISDP is a re-prioritisation of its focus areas and programmes, and a re-allocation of resources so as to make the regional integration agenda more effective.

The priorities of the initial RISDP were:

- A. Trade/economic liberalisation and development
- B. Infrastructure in support of regional integration
- C. Peace and security cooperation
- D. Special programmes with a regional dimension

The re-prioritised areas are as follows:

- A. Industrial development and market integration

- B. Infrastructure in support of regional integration
- C. Peace and security cooperation
- D. Special programmes with a regional dimension

As can be noted, the main change under priority A is a focus on industrial development with a link to the market integration agenda. Priority B has now been directly aligned with the focus areas of the Regional Infrastructure Development Master Plan (RIDMP), namely energy, transport, tourism, information and communication technology (ICT), meteorology; and water. The special programmes with a regional dimension initially included education and human resource development; health, HIV and AIDS and other communicable diseases; food security and trans-boundary natural resources; statistics; gender equality; and science, technology and innovation and research and development. They now also include employment and labour; the environment; and a focus on the private sector. In taking implementation of the RISDP forward, it has been agreed that focus will be on Priorities A and B<sup>4</sup>, with Priority D playing a catalytic role in achievement and fulfilment of Priorities A, B, and C.

The renewed focus in Priority A is particularly pertinent for the purposes of this paper. Firstly, with regard to market integration, it is important to recall that the initial RISDP envisaged that economic integration in SADC would proceed along a linear path, by forming a Free Trade Area by 2008; a Customs Union by 2010; a Common Market by 2015; Monetary Union by 2016 and an Economic Union by 2018.

A SADC free trade area (in goods) was launched in 2008, and its implementation is still ongoing.<sup>5</sup> Moving from an FTA to a customs union requires common trade policies and institutions to manage the common external tariff (CET). The 2010 deadline for the establishment of the customs union was missed, as will now be the 2015 deadline for the Common Market. Challenges associated with the establishment of a customs union include, the diverse levels of economic development among members, their different trade and industrial policy orientations and heavy dependence on customs revenue by most member states.<sup>6</sup>

Hence, the integration agenda is still at the FTA stage and progress towards the other stages of integration has been shelved pending re-assessment and potentially the setting of new deadlines. The focus now is to consolidate the FTA, while synchronising it with the Tripartite Free Trade Area and the Continental Free Trade Area.

The plans to shelve and reassess the linear integration model are a welcome development as they will help to ascertain the viability of continuing on this track that SADC has been on, given its position in a dynamically evolving world of regional integration frameworks.<sup>7</sup> In particular, given the constraints of moving along the adopted linear path of integration, certain questions will be

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<sup>4</sup> Notably the triad of market integration, industrial development and infrastructure

<sup>5</sup> Implementation of the FTA is being done according to the Action Plan Matrix adopted by Ministers of Trade and the Ministerial Task Force on Regional Economic Integration in August 2010.

<sup>6</sup> Between 2006 and 2012, SADC was involved in preparatory work to establish a customs union. A report by the High Level Committee on the SADC Customs Union adopted by Summit in 2012 highlighted these constraints and challenges.

<sup>7</sup> This includes consideration of a few regional and global developments such as the Economic Partnership Agreement concluded by some SADC countries and the European Union, and "mega-regionals" such as the Trans-Atlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP), and the Regional Comprehensive Economic Partnership (RCEP)

pertinent to answer, for example, whether free movement of capital or labour should depend on the region establishing a common market, or if some alternative approaches can be found.

The second important aspect within Priority A of the revised RISDP is the acknowledgement of the role that market integration has in industrial development, and an effort to pursue these jointly, particularly through the development of regional value chains.

Before interrogating this connection further, it is important to note that there are a number of policy documents aimed at industrial development in SADC as follows:

#### **4.1.2 The SADC Industrial Upgrading and Modernization Programme (IUMP)**

The Industrial Upgrading and Modernization Programme (IUMP) was adopted by the Committee of Ministers of Trade in 2009. It emphasized the development of regional value chains in nine identified priority sectors namely:

- Agro-food processing
- Processing of mineral, metallic and non-metallic products
- Fisheries
- Chemicals, petroleum and pharmaceuticals
- Leather and leather products
- Forestry, wood and wood products
- Textiles and garments
- Machinery and equipment
- Services

Implementation of the IUMP is designed to take place mainly at the national level, driven by the private sector. Each member state was expected to develop its national programme and to select a combination of the nine priority sectors given its national endowments, priorities and availability of funding. As of this year, only six of fifteen Member States, namely Mauritius, Madagascar, Namibia, Botswana, Tanzania and Lesotho have developed their own national programmes. Of these, Namibia, Tanzania and Botswana have started implementation.<sup>8</sup>

#### **4.1.3 The SADC Industrial Development Policy Framework (IDPF)**

The Industrial Development Policy Framework (IDPF) was adopted by the Council of Ministers in 2013. It seeks to facilitate the development of an integrated industrial base through backward and forward linkages and exploitation of synergies across industrial sectors in SADC so as to build diversified, innovative and globally competitive industries. The departure point of the IDPF is the IUMP. It seeks to promote the development of regional value chains in the agro-food processing, mineral beneficiation and pharmaceutical sectors in the first five years of implementation. This is suggested to be done through:

- Industrial upgrading – upgrading existing manufacturing industries towards more competitiveness

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<sup>8</sup> See SADC Industrialization Strategy and Roadmap adopted by the Extraordinary SADC Summit held in Harare, Zimbabwe on 29 April 2015.

- Industrial deepening – fostering forward and backward linkages between sectors and industries across the region
- Industrial diversification – the establishment of new productive activities in the region’s industrial base

The following broad cross cutting and sector specific interventions as envisaged for implementation at regional level:

- Developing and exploiting mutually beneficial opportunities in the region’
- Improving standards, technical regulations and quality infrastructure
- Promoting cooperation on innovation, technology transfer, and research and development
- Developing mechanisms to improve access to finance for manufacturing and related sectors
- Improving support for small and medium-sized enterprises
- Integrating infrastructure and services into the region’s industrialisation strategy
- Attracting local regional and foreign direct investment (FDI) and promoting exports
- Developing strategies to exploit opportunities in the region’s strategic cooperation with global partners
- Promoting alignment of IDPF with existing complementary policies

#### **4.1.4 The SADC industrialisation strategy**

The SADC industrialization strategy and road map was adopted by the Extraordinary Summit of SADC Heads of State and Government, in Harare, Zimbabwe, on 29 April, 2015. The strategy is implemented on the premise that regional integration will promote industrialization. The strategy is driven by Member State’s national development strategies, provisions of the SADC Treaty, the RISDP, the IDPF, IUMP and the AIDA.

Like the other policy documents such as the (IUMP), it acknowledges that industrial policy is primarily a national prerogative, which can be enhanced by implementation within the regional context. The strategy aims to ensure that trade and industrialisation policies are effective and complementary. It is based on three core pillars namely:

1. Industrialization as a catalyst for economic and technological transformation
2. Competitiveness as active process to move from comparative to competitive advantage
3. Regional integration as context for collective industrial development and economic prosperity

It sets out to attain a number of strategic objectives including, among others, diversification of the industrial base of SADC economies and the enhancement of their productivity, competitiveness and productive capacity; reversing de-industrialization; providing a framework for technological and industrial catch-up, export diversification, natural resources beneficiation, enhanced value-addition and increased regional trade and employment generation; raising the share of manufacturing value added to 30% of GDP by 2050; developing viable regional value chains that are linked to global value chains; and building strategic partnerships between governments, private sector, civil society and development partners as a compact for industrialization.

Having discussed the policy framework that is in place for industrial development in SADC, it is now important to also set out the legal framework as a segue to the analysis on market integration and industrial development.

#### **4.2 The legal architecture for industrial development in SADC**

The different policy documents discussed above exist within an institutional framework of various SADC Protocols – emanating from the SADC Treaty - that all have a bearing on industrial development in the region.

The Treaty provides for member states to conclude protocols as may be necessary in each area of co-operation, which spell out objectives and scope of, and institutional mechanisms for co-operation and integration.<sup>9</sup> Most protocols call for the harmonization of national policies in their respective sectors, and as such, they are regarded as important instruments towards policy convergence or harmonization among member states. The protocols constitute SADC's legal instruments and they require ratification by a two-thirds majority of member states to enter into force.<sup>10</sup> These protocols bind only those SADC states which have become Parties to the specific protocol. Even if a member has ratified the protocol but the required two-thirds majority has not been achieved that protocol will not be implemented.<sup>11</sup> Other instruments include memoranda of understanding (MoUs); declarations and policy frameworks, whose implementation is on a best-endeavor basis.

Currently, most SADC protocols and policy frameworks face implementation constraints at national levels (SADC Secretariat, 2013). Erasmus, et al (2014) in their analysis of commitments, institutional structures, mechanisms and support needed to eliminate policies and procedures that economic operators report as non-tariff barriers noted that SADC agreements do not contain a binding obligation to “domesticate” the relevant instruments and to make them part of the national legal systems in member states. Generally, the failure by member states to comply with their regional obligations does not appear to have consequences. Under these circumstances, protocols are simply regarded as best endeavor instruments, and not rules-based instruments, with consequences for non-compliance.

The previous section laid out some policy documents that have so far been adopted to guide the process. The different SADC Protocols that underpin these policy documents are now mapped.

In line with the main focus of this paper, the point of departure for mapping the network of Protocols with an effect on industrial development is the instrument that guides the market integration process in SADC itself, namely the Protocol on Trade. This Protocol includes various obligations for market integration by member states relating to:

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<sup>9</sup>SADC Treaty (1992) Article 22

<sup>10</sup> The SADC website lists the following Protocols: Combating Illicit Drug Trafficking; the Control of Firearms, Ammunition and other related materials; Culture, Information and Sport; Gender and Development; Education and Training; Energy; Extradition; the Facilitation of the Movement of Persons; Fisheries; Forestry; Health, Immunities and Privileges; Legal Affairs; Mining; Mutual Legal Assistance in Criminal Matters; Politics, Defense and Security Cooperation; Shared Watercourses; Tourism; Trade; Transport, Communication and Meteorology; Tribunal and its rules (suspended); Wildlife Conservation and Law Enforcement; Finance and Investment; and Trade in Services.

<sup>11</sup> For example, the Protocol on the Facilitation of the Movement of Persons is not yet in effect because it has not been ratified by two thirds (majority) of member states.

1. Trade in goods
  - Tariff liberalisation
  - Export duties
  - Non-tariff barriers
  - Quantitative import and export restrictions
2. Customs procedures
  - Rules of origin
  - Cooperation in customs matters
  - Trade facilitation
  - Transit trade
3. Trade laws
  - Sanitary and phytosanitary measures
  - Standards and technical regulations
  - Anti-dumping measures
  - Subsidies and countervailing duties
  - Safeguards
4. Trade-related investment matters
  - Cross-border investment
5. Other trade-related issues
  - Trade in services
  - Intellectual property rights
  - Competition policy
6. Dispute settlement
  - SADC Tribunal
  - Panel procedures

The Protocol on Trade has a number of annexes that provide more elaborate provisions on certain aspects such as the four aspects under customs procedures. Apart from this Protocol, however, there are also other SADC Protocols that relate directly to aspects covered in the Protocol on Trade. These include the Protocol on Finance and Investment, Protocol on Trade in Services, Protocol on the Tribunal. Further, there are other Protocols that cover what can be seen as other enablers of industrial development, just as the aforementioned are. These include Protocols on:

- Education and training
- Employment and labour
- Energy
- Environmental management and sustainable development
- (Draft Protocol on) Facilitation of movement of persons
- Transport, communications and meteorology
- Science, technology and innovation

There are also other relevant sectoral Protocols such as those on:

- Fisheries
- Forestry
- Mining
- Shared watercourses
- Tourism and wildlife conservation

The architecture of legal and policy frameworks directly governing industrial development or related aspects is vast and to quite some extent fragmented. Coherent implementation of industrial development efforts requires that all these frameworks are effectively harmonised. This could be through bringing the different frameworks into a single Protocol on Industrial Development, or by expanding the scope of the Protocol on Trade to include Industrial Development.

As things currently stand, however, the Protocol on Trade includes provisions on a number of areas of market integration with a direct impact on the industrial development process. A number of provisions in the six sections of the Protocol will now be reviewed. Close attention will be paid to:

- The lack of adherence to obligations by some SADC member states thereby undermining industrial development;
- The design of some instruments for the market integration process that run counter to industrial development;
- Governance matters in trade-related areas; and
- The efficacy of the dispute settlement mechanism in ensuring sound implementation of obligations emanating from SADC's legal instruments

## **5 Market integration and industrial development in SADC**

The Protocol on Trade is one of SADC's earliest legal instruments signed on 24 August 1996 and coming into force on 25 January 2000. The objectives of the Trade Protocol, as amended, are to further liberalize intra-regional trade in goods and services; ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its members; contribute to the improvement of the climate for domestic, cross-border and foreign investment; and enhance the economic development, diversification and industrialization of the region. Provisions in the six respective sections of the Protocol and their influence on effective attainment of industrial development are now discussed. Lessons will be drawn from experiences in implementation by SADC countries where applicable.

### **5.1 Trade in goods**

#### **5.1.1 Tariff liberalization**

Trade and economic liberalization have been at the heart of the SADC regional economic integration paradigm. Article 4 (1) of the Protocol provides that "there shall be a phased reduction and

eventual elimination of import duties, in accordance with Article 3 of [the] Protocol, on goods originating in Member States".<sup>12</sup>

The process and modalities for this phased elimination of these tariffs (and non-tariff barriers) is provided in Article 3 (1) (b) – that the elimination of these barriers to trade shall be achieved within a time frame of eight years from the date of entry into force of the Protocol, i.e., by 2008. Tariff phase down schedules were to be completed by 2012.

There has been an asymmetric element in tariff phase down time frames depending on the level of development of a member concerned. Mozambique's tariff phase down with respect to imports from South Africa is only to be completed by 2015. South Africa and its partners in the Southern African Customs Union (SACU) frontloaded their tariff phase down to complete by 2008, while the rest of SADC back-loaded their phasedowns up to 2012. Each non-SACU member of the Trade Protocol submitted two offers – one applicable to all SADC members except South Africa and the other applicable to South Africa. SACU members submitted a single offer applicable to all non-SACU SADC members. Table 1 and 2 provide the SADC tariff phase-down schedules as negotiated.

**Table 1: SADC offer without South Africa (percent of tariff lines at zero)**

| Country offering preference | #Tariff lines | 2001 | 2005 | 2006 | 2007 | 2008 | 2012 |
|-----------------------------|---------------|------|------|------|------|------|------|
| Malawi                      | 5 443         | 33,4 | 33,4 | 48,7 | 85,3 | 85,3 | 99,7 |
| Mauritius                   | 5 479         | 69,7 | 90,5 | 90,5 | 90,5 | 90,5 | 100  |
| Mozambique                  | 5 246         | 30,1 | 30,1 | 30,1 | 30,1 | 94   | 99,6 |
| SACU                        | 7 802         | 63,9 | 94,6 | 99,3 | 99,3 | 99,3 | 99,3 |
| Tanzania                    | 6 066         | 17,5 | 24,4 | 42,8 | 43,1 | 86,3 | 99,3 |
| Zambia                      | 6 066         | 54,2 | 54,2 | 95,9 | 95,9 | 95,9 | 100  |
| Zimbabwe                    | 7 167         | 30,7 | 30,7 | 72,2 | 72,2 | 89,8 | 98,7 |

**Table 2: SADC offer to South Africa (percent of tariff lines at zero)**

| Country offering preference | #Tariff lines | 2001 | 2005 | 2006 | 2007 | 2008 | 2012 |
|-----------------------------|---------------|------|------|------|------|------|------|
| Malawi                      | 5 443         | 33,4 | 33,4 | 34,8 | 34,8 | 84,9 | 99,7 |
| Mauritius                   | 5 479         | 69,4 | 69,7 | 69,7 | 90,5 | 90,5 | 100  |
| Mozambique                  | 5 246         | 28,1 | 28,1 | 28,1 | 28,1 | 92,6 | 92,6 |
| Tanzania                    | 6 215         | 15,7 | 15,7 | 15,7 | 15,9 | 84,6 | 99,3 |
| Zambia                      | 6 066         | 32,1 | 32,1 | 40   | 40   | 95,9 | 100  |
| Zimbabwe                    | 5 957         | 32,1 | 44   | 48,4 | 55,4 | 71,6 | 82,1 |

As indicated in Tables 2 and 3, there are products excluded from intra-SADC preferential trade as follows:

<sup>12</sup> SADC Protocol on Trade, Article 4

- SACU countries have excluded 31 tariff lines (sugar and sugar products, used clothing and motor vehicle parts);
- Malawi has excluded 19 tariff lines (sugar, weapons and ammunition);
- Mozambique has excluded 19 tariff lines (ivory, weapons and ammunition);
- Tanzania has excluded 43 tariff lines (ivory and other restricted animal hides/ materials, weapons and ammunition, opium and propellant powder (explosive));
- Zimbabwe has the highest exclusions (jet/specialized fuels, vehicles/ parts, rear view mirrors, used clothing, radioactive products, used tires and precious metals); and
- All SADC member states have excluded Chapter 93 (weapons and ammunition) even if not in the specific list.

Twelve (12) out of fifteen (15) member states are participating in the SADC FTA. Only Angola, the Democratic Republic of the Congo (DRC) and Seychelles have not acceded to the SADC FTA. Seychelles' tariff phase down offer was approved by the SADC Committee of Ministers responsible for trade matters (CMT) in July 2014 and its accession process is expected to be finalized within a year. The tariff offer covers 5,673 tariff lines constituted as follows:<sup>13</sup>

- 4,884 tariff lines (86%) for immediate liberalization;
- 103 tariff lines (2%) will be phasedown in 8 years;
- 379 tariff lines (7%) will be phasedown in 12 years; and
- 307 tariff lines (5%) will be excluded from tariff liberalization.

Since 2002, SADC engagement with Angola on submitting a tariff offer have not been successful.<sup>14</sup> Consultations with DRC were advanced during 2012, resulting in the submission of the roadmap to CMT, which envisaged its accession to the SADC FTA by January 2015. Secretariat sources have confirmed that the roadmap has not been implemented to date.

With few exceptions based on derogations<sup>15</sup>, SADC member states have made considerable progress towards implementation of their tariff phase downs as depicted by the following:<sup>16</sup>

- SACU (Botswana, Lesotho, Namibia, South Africa and Swaziland) completed its tariff phase down by 2008;
- Mauritius, Madagascar and Zambia have implemented their tariff phase down commitments by 2012;

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<sup>13</sup> As can be seen, Seychelles has exhibited less ambition in its market offer to SADC and the frontloaded liberalisation and exclusions appear to be products in which the SADC region has a potential to trade with the country.

<sup>14</sup> Upon assuming SADC chairmanship in 2002, Angola's National Assembly approved its accession to the Protocol on Trade but has not yet submitted a tariff offer.

<sup>15</sup> Article 3 (1) (c) of the Trade Protocol allows member states which consider they may be or have been adversely affected by removal of tariffs and non-tariff barriers to, upon application to CMT, be granted a grace period to afford them additional time for the elimination of tariffs and NTBs. Malawi, Tanzania and Zimbabwe have so far utilized this provision.

<sup>16</sup> Based on the findings of the 2012 Audit of the Implementation of the SADC Protocol on Trade conducted on behalf of the Secretariat as well as various periodic reports submitted to SADC policy organs.

- Mozambique has completed its tariff liberalization in respect of all other SADC members (excluding South Africa) and is expected to complete its phase down for South Africa by 2015;
- Malawi has completed its tariff phase downs to all SADC members (excluding South Africa). Malawi is still to conclude its tariff phase down on some imports from South Africa on the basis of the derogation granted;
- Tanzania has completed its tariff phase down with the exception of sugar and specific categories of paper items, which duty has been unilaterally reinstated and derogation is being sought; and
- Zimbabwe was granted derogation from implementing tariff reductions on its sensitive products until 2012 and whose phase down is to be completed by 2014.

### **5.1.2 Non-tariff barriers**

The status of tariff liberalisation as described above makes it clear that this is no longer the main consideration of SADC's market integration agenda. As tariffs have come down, there has been an increase in non-tariff barriers, posing a significant impediment to the free flow of trade in goods.

Article 6 (1) also provides that member states shall "(a) adopt policies and implement measures to eliminate all existing forms of non-tariff barriers, and (b) refrain from imposing any new non-tariff barriers".<sup>17</sup>

The notable progress on intra-SADC tariff liberalization reported in Section 3.2 has not been matched by the reduction but rather an increase in NTBs. It is reported that NTBs in SADC affect products accounting for \$3.3 billion or one-fifth of regional trade.<sup>18</sup> These are illustrated in the following table:

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<sup>17</sup> SADC Protocol on Trade, Article 6. The Protocol defines NTBs as "any barrier to trade other than import and export duties". Subsequently SADC has identified the following types of NTBs: cumbersome customs documentation and procedures; cumbersome import and export licensing /permit; import and export quotas; unnecessary import bans and prohibitions; import charges not falling within the definition of import duties; restrictive single channel marketing; prohibitive transit charges; complicated visa requirements; pre-shipment inspection; or national food security restrictions.

<sup>18</sup> World Bank, 2011, see <http://siteresources.worldbank.org/>

**Table 3: NTBs that have been notified to SADC affecting at least one-fifth of Regional Trade**

| <b>Barrier</b>               | <b>Examples of products affected</b>  | <b>Volume of intra-SADC trade potentially affected (percentage of total)</b> |
|------------------------------|---|--|
| Import bans, quotas & Levies | Wheat, beer, poultry, flour, meat, maize, UHT milk, cement, sugar, eggs, pasta, sorghum, pork, fruit & vegetables | <b>6.1</b>   |
| Preferences denied           | salt, fishmeal, pasta   | <b>0.4</b>   |
| Import permits and levies    | UHT milk, bread, eggs, sugar, fruit & vegetables, livestock, liquor, cooking oils, maize. Oysters                 | <b>5.4</b>   |
| Single marketing channels    | Wheat, meat, dairy, maize, tea & tobacco, sugar   | <b>5.3</b>   |
| Rules of Origin              | Textiles & clothing, semi-trailers; palm oil; soap; cake decorations, rice, curry powder; wheat flour             | <b>3</b>   |
| Export taxes                 | Dried beans, live animals, hides, skins, sugar tobacco<br>maize, meat, wood, coffee                               | <b>4.8</b>   |
| Standards/SPS/TBT            | Milk, meat, canned tuna, beer, honey, maize, cotton<br>cake, poultry, batteries, sugar, coffee, ostriches         | <b>2.5</b>   |
| Customs-related              | Wine, electronic equipment, copper concentrate, salt, cosmetics, medicines  | <b>5.2</b>   |

**Source: World Bank, 2012**

The inadequate implementation of the provisions in the Protocol on Trade - as they relate to adopted Annexes and provisions on NTBs - has contributed to this increase. This conclusion is supported by the high number of complaints registered on the existing Online NTB Reporting Mechanism – a collaborative programme of the COMESA-EAC-SADC Tripartite Coordination Mechanism.<sup>19</sup>

The system identifies eight (8) categories of NTBs which are divided into various sub-categories. The main categories are: government participation in trade and restrictive practices tolerated by

<sup>19</sup> The online NTB mechanism is a web-based system, which allows interested parties to report any NTB they have encountered in the region, see [www.tradebarriers.org](http://www.tradebarriers.org)

governments; customs and administrative entry procedures; TBTs; SPS measures; specific limitations; charges on imports; other procedural problems; and transport, clearing and forwarding.

Most NTBs reported in the SADC region so far fall within the following categories:

- Trade facilitation (transport, clearing and forwarding; customs and administrative entry). Complaints in this broader category are mostly biased towards customs procedures, especially long delays at the borders. This can only mean that annexes on customs cooperation, simplification and harmonization of trade documentation and procedures as well as on transit trade and transit facilities are not effectively being implemented in member states. This has been corroborated by the 2012 comprehensive audit of the implementation of SADC customs and trade facilitation initiatives which found low level implementation of agreed instruments by member states.<sup>20</sup>
- This is followed by SPS and TBT measures. Erasmus et al (2014) found that the SADC annexes on SPS and TBT measures reinforce international best practices. However, member states are still to domesticate them into their national regulatory frameworks.<sup>21</sup>
- The third category of reported NTBs relates to specific limitations, which is largely accounted for by quantitative restrictions and prohibitions, largely affecting regional trade in agriculture. This is perhaps an area where SADC is challenged by the existence of restrictive policies at national levels as a result of demands for protection from vested interest groups.

Further analysis of why some NTBs are proving difficult to resolve suggest that they are of a policy and regulatory nature whose resolution requires appropriate regulatory reform at national levels. These are mostly measures to protect domestic industries, mostly on trade in agriculture such as periodic import bans and difficulties in obtaining import licenses or permits. The following is a brief snapshot of some NTBs as reported recently in the media:

- “Zimbabwe bans imports of fresh fruits and vegetables with immediate effect. The ban will mostly impact suppliers of tomatoes, potatoes, mangoes, grapes and apples from neighboring South Africa”, see [www.freshfruitportal.com/](http://www.freshfruitportal.com/), April 3, 2014
- “Consumers slam maize meal imports ban in Zimbabwe”, see [www.newzimbabwe.com/business-16465](http://www.newzimbabwe.com/business-16465), June 27, 2014
- “Namibia still in dark about South Africa livestock restrictions”, [www.namibian.com](http://www.namibian.com), 29 August 2014
- “The court sets aside dairy import limits. Import restrictions were intended to provide protection to Namibia’s dairy industry, which itself struggling to compete against especially South African dairy products”, [www.namibian.com](http://www.namibian.com), May 19, 2014
- “South Africa lifts Namibian livestock import ban”, [www.newera.com.na](http://www.newera.com.na), Sept,2, 2014

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<sup>20</sup> See SADC Secretariat (2012) Audit of Customs and Trade Facilitation Instruments

<sup>21</sup> Amendments to improve SPS and TBT disciplines were only adopted by the CMT in July 2014.

- “Call to reinstate SA import restrictions by the SA Red Meat Producers Organization”, [www.namibiansun.com](http://www.namibiansun.com), Sept, 10, 2014
- “Zambeef products ban imported beef in Zambia”. The company said it will deal exclusively in Zambian beef products, and will no longer sell any imported beef....”in consultation with the Ministry of Health, the company has made the decision to dispose of all imported beef products to give the Zambian public our 100% commitment that only Zambian beef products will be on offer in our outlets”, see [www.tvcnews.tv?q=article/zambeef-products-ban](http://www.tvcnews.tv?q=article/zambeef-products-ban)

The lack of necessary reform has effectively made these policy and regulatory measures equate to significant non-tariff barriers.

The continued existence of complaints on the NTB online mechanism for a number of years suggests a deficiency in the system’s ability to enforce the timeous removal of such measures to the benefit of traders. This issue will be returned to later in the paper.

### **5.1.3 Export duties**

Article 5 (1) of the Protocol provides that “members shall not apply any export duties on goods for export to other Member States”.

The application of export duties, taxes or restrictions has, however, risen in prominence, largely driven by policy desire to add value to domestic natural resources or food security in case of agricultural commodities. Some examples in the SADC region:

- South Africa currently levies an export tax on unpolished diamonds of 5% of the total value in an attempt to promote the development of the local economy by encouraging the local diamond industry to process (cut, polish, etc.) locally (Sandrey, 2014).
- The WTO (2009) reports that at that time Mozambique imposed an export tax of between 18% and 22% of the f.o.b customs value on raw cashews.
- The 2002 SACU Agreement Article 25(1) recognizes the right to impose export restrictions such as export taxes, provided agreement on these measures is reached by the SACU Council of Ministers.
- The WTO (2011) reports that in Zimbabwe export bans/suspensions or taxes may apply to selected products on value-addition or self-sufficiency grounds. For example, unprocessed chrome ore is subject to an export ban (occasionally replaced by an export tax).
- The WTO (2009) reports that in Zambia, the 2008 Budget encouraged local value addition by introducing a levy of 15% on the export of copper concentrates and cotton seed in recognition of the availability of local capacity to process these products. An export tax also exists on scrap metal, which is considered an important input for manufacturing.

The political-economy context can explain the increasing use of non-tariff barriers to intra-SADC trade resulting into sub-optimal implementation of the SADC FTA, especially aggravated by ineffective enforcement and compliance mechanisms. The result is negative effects on consumers through high prices (especially of agricultural goods) and inefficient allocation of regional resources.

It can be seen from this scenario how the levying of export duties for national industrial development purposes – contrary to obligations in the Protocol - actually undermines the development of regional value chains and hence the promotion of industrial development at the regional level. It requires countries to be creative in the use other instruments that are not prohibited by SADC's legal instruments.

#### **5.1.4 Quantitative import and export restrictions**

Import restrictions are disallowed by the Protocol through Article 7 (1), which states that “Member States shall not apply any new quantitative restrictions and shall ... phase out the existing restrictions on the import of goods originating in Member States, except where otherwise provided for in [the] Protocol”. Similarly, with regard to exports, Article 8 (1) provides that “Member States shall not apply any quantitative restrictions on exports to any other Member State, except where otherwise provided for in [the] Protocol”. Article 9 then provides general exceptions to the effect that such restrictions can be adopted or enforced by Member States for reasons such as the protection human, animal or plant life or health; the protection of public morals or maintain public order; and those necessary to prevent or relieve critical shortages of foodstuffs, among others.

In spite of these provisions, the high dependence of most African countries on the agricultural sector has seen widespread restrictions imposed in different sectors. Overall, many countries continue to maintain import, export, and price controls as well as strategic reserve stocks on certain agricultural products. Marketing boards are in place and monopolies have been granted to certain public enterprises over the importation and exportation of certain products. Despite intra-SADC tariff liberalization, regional trade in agriculture has remained low. Trade policies and agricultural trade in the SADC region are characterized by frequent policy reversals caused by temporary import and export bans, and other non-tariff barriers such as restrictive rules of origin for agro-processed products, application of SPS regulations, licensing requirements and delays in border crossings. Some SADC members have excluded certain agricultural items from preferential trade such as prepared foodstuffs and beverages; live animals and animal products and vegetable products. Examples of products affected by import restrictions were provided in Table 3. The following some other examples of restrictive measures implemented in some SADC countries:

**Botswana** is a net importer of staple food commodities, such as sorghum and maize, which together account for over 90 per cent of domestic cereal production. Productivity in traditional farming is low. Commercial agriculture covers about 30 per cent of arable land, comprising mainly cattle grazing. Botswana is a net exporter of beef, exporting some 90 per cent of production, mainly chilled and frozen beef to the EU under preferences, and to South Africa. Although the country has been hailed to have open trade policies; it is important to note the following:

- imports of fresh pork are banned; import permits are granted only on processed pork products;

- poultry imports are permitted only when there is a shortfall of poultry products in the domestic market;
- a central feature of policy in the beef sector has been the state's monopoly over export of beef and live cattle, which has been implemented by Botswana Meat Commission (BMC);
- imports of maize, wheat, sorghum and related products, pulses, fresh milk, major fruits (watermelons, oranges) and vegetables (cabbages, spinach, potatoes, and tomatoes) are restricted in order to protect an infant horticultural industry, which meets about 20 per cent of domestic requirements. Import permits are withheld when there is sufficient domestic production.

**Namibia** has introduced a set of measures in support of downstream processing of meat and local production of horticultural products and fruits. Export levies are imposed on the export of live slaughter cattle, sheep and unprocessed hides and skins. For fresh product imports of fruit, the National Horticulture Market Share Initiative imposes a levy on fresh produce imports and currently requires fresh produce importers to source 25 per cent of their purchases locally. Namibia uses border controls to protect the viability of strategic food production industries. Government provides price support to commercial grain producers by imposing import restrictions on maize and wheat grain to ensure that grain is imported only after millers have purchased the commercial production at a negotiated guaranteed minimum price. White maize meal is excluded from imports, and further restrictions are applicable to UHT milk. The Namibia Agronomic Board is the only official marketing board of the controlled agricultural products of wheat and white maize and their flours, pear millet and horticultural products.

**Zimbabwe** considers agriculture as one of the engines of economic growth necessary for its reconstruction and poverty reduction. The government intends to revive all the agriculture subsectors including maize, wheat, tobacco, cotton, sugar, beef, horticulture, and floriculture. Agricultural activities remain heavily protected and supported, including through high tariffs, a price band system, and other government incentives such as export finance, insurance, guarantees and other related trade finances facilities. Some insights into Zimbabwe's agricultural policy:

- A new grain marketing policy was promulgated through a statutory instrument to address maize shortages and build up stocks. The instrument stipulated that maize, wheat, and their milled products were "controlled commodities" of which the Grain Marketing Board (GMB) was the sole buyer and seller. Although GMB's monopoly power has recently been relaxed, it has remained the buyer of last resort.
- Agriculture is the most protected sector in Zimbabwe. The average applied tariff on agricultural products of 23.4 per cent is the highest in the SADC region, whereas the corresponding average for non-agricultural products is 19.5 per cent (WTO tariff profiles, 2014).
- Imports and exports of agricultural inputs such as fertilisers, farm feeds or remedies require permits from the Ministry of Agriculture. No pesticide may be imported into Zimbabwe, unless it is registered with the applicable authority. Export of fertilizers is only allowed when production exceeds national requirements.

- In addition to customs duty, imports of tobacco and tobacco products are subject to a multitude of other levies and taxes, together with multiple controls and the associated costs. The WTO argues that these measures, combined with other structural problems, hamper the international competitiveness of the sector.

In **Malawi**, agriculture is the backbone of the economy. The sector contributes over one third of GDP, almost 90% of employment and about 90% of Malawi's foreign exchange earnings. Self-sufficiency in maize is one of the central elements of food security in the country. Policy instruments to ensure food security include tariffs, input subsidies, minimum prices, strategic reserves, and export prohibitions.

The need to speed up policy harmonization and capitalize on regional economies of scale remains evident. Policy aspirations in SADC to enhance regional value chain in agro-processing continue to be undermined by restrictive agricultural policies and regulations at national levels.

## **5.2 Customs Procedures**

The SADC Protocol on Trade includes provisions on a number of areas related to customs procedures namely rules of origin, cooperation in customs matters, trade facilitation, and transit trade. Rules of origin and trade facilitation will be highlighted in this section.

### **5.2.1 Rules of origin**

Rules of origin for products accessing preferences under the Protocol on Trade are governed by Article 12 and Annex I to the Protocol. Rules of origin were one of the most controversial aspects of the negotiations and implementation of the SADC FTA as they continue to be used to perpetuate protection and rents. Under the guise of development of deliberate policies for industrialization, the initial rules of origin were changed to offset the gains from tariff liberalization in specific sectors. The end result has been restrictive product-specific rules of origin ostensibly designed to "encourage the optimum utilization of regional resources and allow forward and backward linkages in the various production chains" (RISDP, 2003: 25). This led to rules of origin becoming an effective non-tariff barrier to trade in the region. The change of tariff heading was replaced by multiple transformation rules and/or detailed descriptions of required production processes. Value added requirements were raised and permissible levels of import content were decreased. Most of the explanations offered for such rules represented efforts to increase or preserve protection in domestic markets, particularly in the most diversified South African market.

The Mid-Term Review of the implementation of the Trade Protocol conducted in 2004 identified complex and excessively restrictive rules of origin as a major impediment to increased intra-SADC trade (Brenton et al, 2004). Although some reforms were made to the SADC rules of origin, further simplification continues to be demanded by most member states, especially by small economies.

- Great controversies still persist on the rules of origin for textile and clothing which still require double stage transformation, thereby depriving producers in economies such as Malawi, Mozambique, Tanzania, and Zambia (MMTZ countries) the opportunity to source competitively-priced inputs from global sources and increase their export

competitiveness. For example, following the expiry of the MMTZ –SACU market access arrangement in 2010, which allowed single stage transformation on selected clothing imports into SACU from the MMTZ countries, this resulted in the closure of firms in these countries. To date, however, efforts to simplify the SADC rules of origin in textile and clothing towards a single stage transformation have faced resistance from SACU (largely from South Africa).

- Wheat flour in SADC is still traded on MFN basis as a rule could not be agreed upon. This means that preferential trade on wheat flour within the region has been effectively prohibited.
- Some processed food items such as blended teas, coffee and mixtures of spices are also reported to have restrictive local content requirements.
- Woolworths, a South African retailer operating in various countries in the region, has reported that it does not use SADC preferences on consignments of food and clothing to its franchise stores in other SADC markets as the cost of paying for full tariffs is relatively lower.

Tralac (2014) noted that some SADC rules of origin are out of tune with the characteristics of 21<sup>st</sup> century production and trade. More flexible rules that require lower thresholds of regional value addition would enable many smaller SADC economies to expand their production capacity and enhance their trade performance. The currently restrictive rules disrupt the development of efficient regional and global production networks and value chains.

### **5.2.2 Trade facilitation**

Although it is the case that the current design of RoO undermines the effective development of regional value chains, it is worth noting that there have been some positive developments in the broader area of trade facilitation. Article 14 of the Protocol on Trade provides that members shall “take ... measures ... to facilitate the simplification and harmonisation of trade documentation and procedures.”<sup>22</sup> Annex III of the Protocol then provides further guidance on such implementation.

The adoption of the Trade Facilitation Agreement (TFA) of the World Trade Organisation (WTO) at the end of 2014 is a positive development as it provides SADC countries with an opportunity to make offers for support from developed countries in this area. The agreement contains provisions for expediting the movement, release and clearance of goods, including those in transit. It provides measures for effective cooperation between customs and other relevant institutions, as well as technical and capacity building.<sup>23</sup> Developing and least-developed countries continue to submit notifications to the WTO detailing the provisions of the TFA that they seek to implement once the agreement enters into force. Eight countries (out of the one hundred and eight required for entry into force) have since ratified the agreement. This includes Botswana, which became the first SADC

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<sup>22</sup> Article 14, SADC Protocol on Trade

<sup>23</sup> See ‘Trade Facilitation’. [Online]. Available at:  
[https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm).

and African country to do so on 18 June 2015.<sup>24</sup> As other SADC and African countries also ratify the agreement going forward, an important consideration will be the need for cooperation in implementation of the TFA Agreement within the context of the Protocol on Trade and its Annex III. This could entail ensuring that notifications submitted to the WTO address similar matters affecting cross-border trade, particularly with neighbouring countries.

In addition to ensuring a regional approach to resolving soft infrastructural challenges through the TFA, it is also important to highlight at this point the importance of investment into hard infrastructure – the third aspect of the tri-focal approach to industrial development and key supply-side constraint – to underpin such soft infrastructure. An encouraging development in SADC has been the formulation of the Regional Infrastructural Development Master Plan (RIDMP)<sup>25</sup>, which was alluded to in section 4.1. It would be important for these two agendas to proceed in tandem so as to ensure that hard and soft infrastructure is put in place in a synchronised way so as to effectively enhance production and trade processes and hence industrial development in the region.

### **5.3 Trade laws**

The Protocol on Trade includes a number of provisions on trade laws. Article 16 includes provisions on sanitary and phytosanitary measures (SPS), and Article 17 on standards and technical regulations on trade. These articles both provide that Member States shall base their measures on accepted international standards.

Anti-dumping measures; subsidies and countervailing measures; safeguard measures; and protection of infant industries are provided for in Articles 18, 19, 20, and 21 respectively.

These are all important for efficient flow of trade in goods and indeed for industrial development, and one recent development in the area of SPS measures will be highlighted to demonstrate the pertinence of this area.

Recent work by tralac has highlighted some developments involving the implementation of SPS measures by Member States, including one regarding restrictions on importation of organic honey exports from Zambia into South Africa.

The reason provided by the Government of South Africa for this denial of market access is that the honey is not irradiated – a requirement provided for in South Africa's honey regulations (Regulation Number 835). It only allows imports of honey from Zambia that have been irradiated due to African Foulbrood Disease (AFB), which was historically present in Zambia.

An important implication of this scenario is that irradiated honey loses its 'organic' status. Zambia has requested that its exports of organic honey be exempted from this irradiation rule based on analysis by the South African National Department of Agriculture (NDA) on a number of samples from different parts of Zambia, which has shown that AFB does not currently exist in the country. The regulations that would allow the importation of organic honey in South Africa have been drafted by

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<sup>24</sup> See 'Botswana ratifies Trade Facilitation Agreement'. [Online]. Available at:

[https://www.wto.org/english/news\\_e/news15\\_e/fac\\_18jun15\\_e.htm](https://www.wto.org/english/news_e/news15_e/fac_18jun15_e.htm).

<sup>25</sup> See Mwanza, W. (2013). Operationalising the SADC Regional Infrastructure Development Master Plan. [Online]. Available at: <http://www.tralac.org/discussions/article/5329-operationalising-the-sadc-regional-infrastructure-development-master-plan.html>.

the National Plant Protection Organisation of South Africa, but are yet to come into force. Meanwhile, imports of organic honey from Zambia remain banned. This has resulted in some Zambian companies concluding that the import ban may not be based on scientific evidence of risk from AFB, but is rather a measure to protect honey producers in South Africa.

This case illustrates how the unilateral application of national measures may affect the flow of trade and the further development of sectors such as organic honey production in Zambia, in which the country seems to be competitive and is an important area for promoting its industrial development agenda.

The fact that the complaint has not been resolved since it was lodged in 2011 and in spite of evidence of the non-existence of AFB highlights a shortfall of the Tripartite NTB reporting mechanism in its ability to enforce the removal of such NTBs by Member States, as provided for by the Protocol. This is an aspect that would have to be given due consideration in the outstanding work on the Tri-partite Free Trade Area (T-FTA) Agreement, recently signed in June, 2015.

At the SADC regional level, however, this scenario highlights the importance of ensuring that the organisation's own dispute settlement mechanism is functioning optimally, as will be discussed in more detail in section 5.6. At this point, however, it is important to highlight that Zambian companies currently do not have recourse to the SADC Tribunal to pursue such a matter. As discussed by Erasmus (2015), this is because the Tribunal's jurisdiction has been limited to disputes between Partner States. Such companies would have to rely on the Zambian Government's continued consultations with the South African Government, which may well be a drawn out process.

If such consultations are seen to not be resolving the matter, the Zambian Government has the option of lodging a case with the SADC Tribunal to resolve the matter. As will be noted in section 5.6, this can however only be possible when the Tribunal becomes active again at a later time. An alternative to this would be to engage the dispute resolution mechanism of the World Trade Organisation (WTO) based on the SPS Agreement of the WTO. This is, however, quite an unlikely option, not least in view of the costs related to taking the matter to Geneva.

A more practical option to resolving the matter would be engage in the Panel process for the resolution of disputes provided for in Annex VI of the Protocol on Trade. As pointed out by Erasmus (2015), it is imperative that SADC Member States activate this procedure to resolve disputes involving matters such as SPS and other trade remedy issues/laws highlighted earlier. Indeed, by utilising regional and other experts in the respective fields to resolve such matters, the legitimacy and effectiveness of SADC's institutional and dispute settlement framework would be reinforced. This would only help efforts on industrial development, not least by ensuring that challenges experienced by traders are resolved more promptly, thereby granting them the predictability that is necessary for their production and trade endeavours to thrive.

#### 5.4 Trade related investment matters

Increased investment is one of the dynamic gains of regional integration processes<sup>26</sup>, and is pivotal in the process of industrial development. The extent to which domestic and foreign investment will be harnessed within national jurisdictions within a regional context depends largely on the governance framework that is in place.

Article 22 of the Protocol on Trade provides that “Member States shall adopt policies and implement measures within the Community to promote an open cross-border investment regime, thereby enhancing economic development, diversification and industrialisation.” As alluded to earlier, the Protocol on Finance and Investment (FIP) then exists to govern this area. This Protocol includes provisions for the promotion and protection of investors and investments across the region such as protection from expropriation without compensation, fair and equitable treatment, and most favoured nation. These and other provisions with similar intention and effect are also provided for in bilateral investment treaties concluded by most SADC countries.

The dispute settlement process within the FIP is important for the ultimate effectiveness of its different provisions. In the event of disputes between an investor and a Partner State, the FIP provides that such disputes can be referred for international arbitration if not settled amicably and after exhausting local remedies.<sup>27</sup> The possibilities for international arbitration are provided as the SADC Tribunal, the Convention on the Settlement of Investment Disputes (ICSID), and the United Nations Commission on International Trade Law (UNCITRAL).

As will be noted in section 5.6, the fact that the jurisdiction of the SADC Tribunal has recently been limited to disputes between Partner States means that investors would not be able to bring any claims that they may have against a host Government to the Tribunal. Hence, the alternatives that they would have remain ICSID and UNCITRAL. These two platforms have proved useful for the protection of investor rights over the years.

There is potentially a gap, however, in the ability of the SADC legal framework to promote and protect the rights of individual citizens in this equation. One avenue of industrial development that has been given high prominence is beneficiation and value addition of mineral and other natural resources. This is an area that requires heavy capital investment and expertise and hence mostly entails foreign direct investment. The promotion and protection of investment is vital on the one hand. On the other hand, however, such beneficiation and value addition also brings with it health and environmental concerns, including through emissions, labour conditions and disposal of waste. Governments would have to ensure that such investment is carried out while minimising such negative effects. The SADC FIP does provide Governments with the policy space to regulate in the public interest, including for the protection of health, safety or environmental concerns.<sup>28</sup> In the event that such regulatory measures are contravened, Partner States would be limited to their national courts for redress. They cannot refer such matters to the SADC Tribunal, since it can now only hear disputes between Partner States. It also cannot refer such matters to ICSID or UNCITRAL, since these only entertain references by investors and not Governments. Due to these same reasons,

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<sup>26</sup> See Negasi (2009). Trade effects of regional economic integration in Africa: The Case of SADC. [Online]. Available at: [http://www.tips.org.za/files/13.Trade\\_effects\\_of\\_Regional\\_Economic\\_Integration\\_-\\_SSD.pdf](http://www.tips.org.za/files/13.Trade_effects_of_Regional_Economic_Integration_-_SSD.pdf).

<sup>27</sup> SADC Protocol on Finance and Investment, Article 24 and Article 28 of Annex I to the Protocol.

<sup>28</sup> SADC Protocol on Finance and Investment, Article 14.

individual citizens or civil society organisations would also only have recourse to their national courts. This is a dynamic that would have to be considered going forward, especially as the prospective Sustainable Development Goals seek to cover all these interest groups.

## **5.5 Other trade related issues**

### **5.5.1 Trade in services**

SADC member states have adopted a Protocol on Trade in Services and started negotiating market access and national treatment commitments in six priority sectors (communications, construction and related engineering, energy-related, financial, tourism and travel related, transport services). Progress in all but energy and construction services has now advanced to negotiations on pro-competitive regulation in the other four sectors. This is a positive move from the traditional General Agreement on Trade in Services (GATS) approach which emphasises market access and national treatment commitments, without focus on regulation that enhances competitiveness within the service sectors.

Negotiations are also underway on the temporary movement of persons supplying services under the Protocol on Trade in Services. A SADC Protocol on the Facilitation of Movement of Persons has been on the agenda for more than a decade, but has not yet entered into force. A Protocol on Employment and Labour was adopted by Summit in August 2014; it covers employment related matters such as social security schemes and the exportability of benefits. The Protocol is not yet in force.

### **5.5.2 Competition policy**

Most SADC member states now have national competition policies, laws and functioning competition authorities. In 2008, member states agreed in a Declaration, to cooperate in the enforcement of competition law, and competition-related capacity building. As market integration forges ahead the need to competition regulation that has extra-territorial reach grows; reflecting the reality that enterprises whose market strategies transcend national borders, may not be adequately governed by national laws. COMESA has gone a step further than SADC, by adopting a regional competition policy and law and establishing a regional competition authority, with oversight specifically of cross-border competition matters. Since several SADC member states also belong to COMESA, this market governance development is particularly important for them.

## **5.6 Institutional arrangements and dispute settlement procedures**

The nexus between market integration provisions and industrial development fully expresses itself where the commitments taken by member states in various legal instruments are implemented at the national level. As is clear from the foregoing, the failure by member states to uphold their commitments has the potential of seriously undermining the industrial development process. Hence, the institutional framework that exists to ensure that commitments are implemented, and particularly that disputes are effectively resolved in the case of non-implementation, is of vital importance.

The current SADC institutional framework comprises of eight structures, namely, the Summit of Heads of State or Government, the Organ on Politics, Defence and Security Cooperation, the Council

of Ministers, the Integrated Committee of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal and SADC National Committees.<sup>29</sup> For the purpose of this paper, the role of the Tribunal in ensuring enforcement of obligations undertaken by Member States is particularly emphasised.

Article 16 (1) of the Treaty provides that the Tribunal shall ensure adherence to the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, and to adjudicate such disputes as may be referred to it. The question of who can bring disputes before the Tribunal has had pertinent implications on its existence and operations. According to the Protocol on the Tribunal that entered into force in August 2001, member states and natural and legal persons could bring matters before the Court for its adjudication. However, when a case between Mike Campbell and the Government of Mauritius<sup>30</sup> involving the expropriation of land by the Government was ruled in favour of the former, the Government of Zimbabwe rejected the ruling and lobbied the Summit. Instead of compelling Zimbabwe to comply with the decision of the Tribunal, Summit suspended the Tribunal in 2010.

The Tribunal has now been reinstated, through a New Protocol that was adopted by the Summit in August 2014. The Tribunal will come into effect upon ratification of the Protocol by two thirds of Member States.<sup>31</sup> As opposed to the initial scenario where natural and legal persons could bring cases against Member States before the Tribunal, the new Protocol now only allows disputes between Member States to be heard.<sup>32</sup> Because most African Governments are averse to litigating against each other, this scenario significantly limits the ability of the SADC legal framework to protect the rights of private parties arising from obligations made by Member States in the different legal instruments, when they are in fact the ones engaged in production and trade, and are the main intended beneficiaries of the SADC integration process. As will be seen in tralac's upcoming book on dispute settlement, the possibility for natural and legal persons to bring cases before the regional courts of the Common Market for Southern and Eastern Africa (COMESA) and the East African Community (EAC) has ensured that their rights are well protected, and that Member States adhere to their obligations. This gap in SADC's legal framework does not put it in good standing for ensuring that Member States implement their market integration obligations, so that industrial development is well promoted.

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<sup>29</sup> SADC Treaty, Article 9(1).

<sup>30</sup> See *Mike Campbell v. Republic of Zimbabwe* SADC(T) 2/2007 (28 November 2008)

<sup>31</sup> According to Erasmus (2015), nine members had signed the Protocol, but no ratifications had been made as at January 2015.

<sup>32</sup> Erasmus (2015) comprehensively discusses the legal implications of the process by which the new Protocol on the Tribunal was adopted and some of the provisions that have been included.

## 6 Conclusion

The market integration agenda in SADC has evolved from its prior limited focus to one of consolidating its FTA while encouraging the development of regional value chains. This is with the aim of promoting industrial development – an objective set out early on in SADC’s legal instruments, but which is now being given priority focus.

From the foregoing, it has been seen that the policy and legal architecture for industrial development is vast. Within this architecture, the SADC Protocol on Trade assumes a central role in ensuring that the market integration process optimally leads to industrial development. The provisions set out in its six sections contribute to this in different ways. From those discussed in this paper and from the few examples highlighted, there are a number of issues that start to become clear.

Firstly, there are provisions in the Protocol that firmly place market integration obligations on member states. While some of these obligations are adhered to, others are infringed upon due to the national pursuit of industrial development agendas by respective Member States. This is an anomaly in the market integration – industrial development nexus that needs to be addressed.

Secondly, there are some instruments for market integration in the Protocol that are designed in a way that actually undermines the effective development of regional value chains and hence promote industrial development. Such instruments – like rules of origin – need to be revisited so as to correct this scenario.

Thirdly, there are important trade-related aspects that are provided for in the Protocol that are important for the industrial development process. While there have been some positive developments in some – such as negotiations on pro-competitive regulatory principles in trade in services – the governance structure in others still needs to be revisited to ensure that industrial development proceeds while serving the needs of all stakeholders. This is most pertinent in the area of beneficiation and value addition of mineral resources, where Governments have to promote and protect the rights of foreign investors, while regulating in the interest of the public particularly where health and environmental matters are concerned. Further, developments in other regions such as COMESA, necessitate the re-consideration of regional governance of competition policy and law in the SADC region.

Fourthly, and perhaps most importantly, SADC’s dispute settlement mechanism has an important role to play in ensuring that the various obligations in the Protocol on Trade are enforced. In its current form, however, it is limited in its ability to do this, particularly in providing private parties the right to directly seek enforcement of obligations in the SADC Tribunal. Meanwhile, there are other dispute settlement processes - such as the Panel procedure - that can play an important role in ensuring more timeous resolution of disputes. This can particularly be the case in the more highly technical areas of market integration.

All in all, effective implementation of the market integration agenda has a pivotal role to play in the pursuit of industrial development at the regional level in SADC. The effective design and implementation of provisions in this agenda - such as those highlighted in this paper - would have to be given due attention if regional industrial development is to be well attained.