



**tralac** | trade law centre

**SADC Protocol on Finance &  
Investment  
National & Int. Legal Implications**

**Gerhard Erasmus  
Johannesburg 16 April 2012**

# Overview of Presentation

---

- 1. Int. Agreements: Conclusion and Effect**
- 2. Nature of the SADC Legal Regime**
- 3. Nature of FIP as Int. Legal Instrument**
- 4. Specific FIP Issues and Questions**
- 5. Way forward: Deeper Integration and T-FTA**
- 6. Multilateral Legal Context**

# Int. Agreements: Conclusion & Effect

- States are primary subjects of Int. Law
- States are sovereign – what does this mean?
- Where do Int. Agreements come from?
- How do they enter into force?
- How are they complied with/enforced?
- Relationship between national/Int. Law?
- Role of Parliaments?
- Can Int. Agreements apply within states?
- Where do Int. Organizations fit in?
- Where to find Int. Legal instruments?



# Nature of the SADC Legal Regime

**Art. 3 SADC Treaty:** *International organisation, and shall have legal personality .....power to enter into contract, own ....property ....sue and be sued...*

**Art. 5: Objectives:** *Promote sustainable and equitable economic growth and socio-economic development ...poverty alleviation ...enhance the quality of life of the people of Southern Africa ...regional integration...*

## **Art. 6: General Undertakings**

- 1. MS undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.*
- 2. SADC and MS shall not discriminate against any person.*
- 3. SADC shall not discriminate against any Member State.*

## Nature of SADC Legal Regime ... Contd.

4. *MS shall take all steps necessary to ensure the uniform application of this Treaty.*
5. *MS shall take all necessary steps to accord this Treaty the force of national law.*
6. *MS shall co-operate with and assist institutions of SADC....*

### **Art. 17: Specific Undertakings**

- 1 *MS shall respect the international character and responsibilities of SADC.... and shall not seek to influence them .. in their functions.*
2. *Tribunal, the Executive Secretary ...staff of SADC shall be committed to the international character of SADC, shall not seek or receive instructions from any MS or authority external to SADC... responsible only to SADC.*

# Nature of SADC Legal Regime ...contd.

## Art. 21: Areas of Co-operation

- 1. Member States shall cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.*
- 2. Member States shall, through appropriate institutions of SADC, coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of co-operation.....*

# Nature of SADC Legal Regime ...contd.

## Art. 22: Protocols

1. *Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.*
2. *Each Protocol shall be approved by the Summit on the recommendation of the Council.*
3. *Each Protocol shall be open to signature and ratification.*
4. *Each Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the Member States.*
5. *Once a Protocol has entered into force, a Member State may only become a party thereto by accession.*
6. *Each Protocol shall remain open for accession by any State subject to Article 8 of this Treaty.*

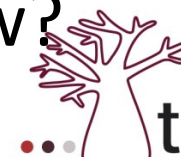
# Nature of SADC Legal Regime ...contd.

7. *The original texts of each Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies thereof to all Member States.*
8. *The Executive Secretary shall register each Protocol with the Secretariat of the United Nations Organization and the Commission of the African Union.*
9. *Each Protocol shall be binding only on the Member States that are party to the Protocol in question.*
10. *Decisions concerning any Protocol that has entered into force shall be taken by the parties to the protocol in question.*
11. *No reservation shall be made to any Protocol.*



# SADC Legal Regime: Final Questions

- How are SADC obligations monitored/enforced?
- What happens if obligations are violated?
- Role of the SADC Tribunal?
- Are private parties ever protected?
- What does SADC Law include?
- Relationship between Treaty – Protocols – Annexes?
- Do MS have to respect SADC Law?
- Do MS have to enforce SADC Law?



# Nature of FIP as Int. Legal Instrument

---

- This is an Int. Agreement ... which has entered into force ... and binds the parties thereto
- SADC's Finance & Investment Law consists of FIP and all its Annexes as part of the SADC legal regime
- Are these “hard law” obligations? Will a court of law enforce them? Which court?
- What did the Parties intend?
- The legal obligations are in the Annexes (Arts 3,4..)
- Let's look at the Annexes.....
- Will private parties enjoy protection/remedies?

# FIP as Int. Legal Instrument...contd

- **Objectives:** Art 2. Harmonisation ....Reg. Intg..
- Look at the chapter headings...
- **Institutions:** Arts. 17 - 22. What powers?
- **Status of Annexes:** Art. 23 (but note the mistake)
- How will MS enforce FIP? Art. 25
- Will FIP become national law?
- Amendments Art. 26
- **Dispute settlement:** Art. 24 (why not 2(a) ?)
- Who implements/monitors this Protocol and how?
- Accession and withdrawal (Arts. 30 & 31)

# Specific FIP Issues and Questions

---

1. Implications of FIP ratification /or not
2. Domestication of FIP
3. Competing commitments re overlapping membership - national effects
4. What if MS has ratified FIP and there is a conflict with national law?
5. Effects for FIP of overlapping REC membership
6. Implications for MS if a FIP Committee adopts standards which are not in the Protocol?

## Way forward: Deeper Integration and T-FTA

- FIP a process or once off occasion?
- Deeper integration in SADC
- Deeper integration in Africa
- What is deep integration? (2011 WTO WT Report)
- Will governments accept implications of integration?
- Why not have overlapping membership?
- T-FTA: What is it about and what will it bring?
- What will happen back home?
- Int. legal instruments not an end in themselves

# Multilateral Legal Context

- Regional trade arrangements are exceptions to MFN (Non – discrimination) rule
- Therefore: Must comply with applicable rules
- CU: CET & Single Customs Territory
- In FTAs Rules of Origin NB
- Art. XXIV GATT
- Enabling Clause
- Art V GATS
- Notification & transparency

# Text: Protocol on Finance and Investment

## PREAMBLE

**WE**, the Heads of State or Government of...

**HAVING** regard to Article 21 of the Treaty which enjoins Member States to cooperate in all areas necessary to foster regional development and integration;

**NOTING** Article 22 of the Treaty which calls for the conclusion of protocols as may be necessary in each area of co-operation and which shall spell out the objectives and scope of, and the institutional mechanisms for, co-operation and integration;

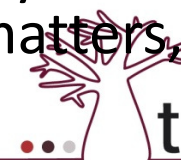
**FURTHER** noting that the RISDP map and targets for enhancing socio-economic development and deeper regional integration.....

**HEREBY AGREE** as follows:

# FIP Text

## ARTICLE 1 DEFINITIONS

1. In this Protocol, terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires:
  - “Annex” means an Annex to this Protocol;
  - “BIS” means the Bank for International Settlements;
  - “capital market” means a market where capital funds, debt or equities and any other financial instrument are traded
  - “CCBG” means the Committee of Central Bank Governors in SADC;
  - “Central Bank” means, in relation to a State Party, the central bank of that State Party;
  - “Committee of Ministers responsible for Finance and Investment” means the Committee of Ministers for policy development and policy making for finance and investment matters, or such similar body as the Council may establish;





# FIP Text

“Committee of Senior Treasury Officials” means the technical advisory body to the

Committee of Ministers for Finance and Investment consisting of Heads of Treasuries;

“DFIs” means, in relation to a State Party, those financial institutions which are designated, or classified, as “Development Finance Institutions” by that State Party;

“financial markets” means markets for the exchange of capital and credit in the economy;

“Protocol” means this SADC Protocol on Finance and Investment including its annexes;

“State Party” means a Member State that has ratified or acceded to this Protocol; and

“RISDP” means the Regional Indicative Strategic Development Plan.

# FIP Text

## ARTICLE 2 OBJECTIVES

---

1. This Protocol seeks to foster harmonisation of the financial and investment policies of the State Parties in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State Party do not necessitate undesirable adjustments in other State Parties.
2. The objective referred to in paragraph 1 shall be achieved through facilitation of regional integration, co-operation and co-ordination within finance and investment sectors with the aim of diversifying and expanding the productive sectors of the economy, and enhancing trade in the Region to achieve sustainable economic development and growth and eradication of poverty by:
  - (a) creating a favourable investment climate within SADC with the aim of promoting and attracting investment in the Region;
  - (b) achieving and maintaining macroeconomic stability and convergence within the Region;

# FIP Text

- (c) co-operating in respect of taxation and related matters within the Region;
- (d) co-operating and co-ordinating amongst State Parties in collaboration with Central Banks on exchange control policies;
- (e) establishing principles which will facilitate the creation of a coherent and convergent status in the legal and operational frameworks of Central Banks;
- (f) establishing a framework for co-operation and co-ordination between (amongst) Central Banks on payment, clearing and settlement systems;
- (g) co-operating in the area of information technology and communications technology amongst Central Banks;
- (h) co-operating on bank supervision amongst Central Banks;
- (i) co-operating in the activities of DFIs in the Region;
- (j) co-operating in the area of non-banking financial institutions and services;
- (k) facilitating the development of capital markets in the Region;
- (l) co-operating in the area of SADC Stock Exchanges;
- (m) co-operating with regard to anti-money laundering issues amongst State Parties; and
- (n) cooperation in respect of a SADC Project Preparation and Development Fund.

2 The objectives set out in paragraph 1, the implementation thereof and the mechanism for such implementation are fully described in the Annexes to this Protocol.

# FIP Text

## CHAPTER: TWO CO-OPERATION ON INVESTMENT

---

### ARTICLE 3: CO-OPERATION ON INVESTMENT

State Parties shall co-ordinate their investment regimes and cooperate to create a favourable investment climate within the Region as set out in Annex 1.

## CHAPTER THREE: MACROECONOMIC CONVERGENCE

ERROR: stackunderflow  
OFFENDING COMMAND: ~  
STACK: