

Chapter 7: Environmental Law and Policy in the Southern African Development Community

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1 Introduction

The Southern African Development Community (SADC)¹ was established in Windhoek in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC currently counts 16 states among its members, namely Angola, Botswana, the Democratic Republic of Congo (DRC), Comoros, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.

SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages²

a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice, and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

To this end, SADC's objectives include the achievement of development and economic growth, the alleviation of poverty, the enhancement of the standard and quality of life, support of the socially disadvantaged through regional integration, the evolution of common political values, systems and institutions, the promotion and defence of peace and security, and achieving the sustainable utilisation of natural resources and effective protection of the environment.³

2 Institutional Structure of SADC

Several institutions build the foundations for SADC: The Summit of Heads of State or Government is the supreme policy-making institution of SADC. It consists of the Heads of State or Government of all member states and is responsible for the overall policy direction and control of the functions of SADC. All decisions reached by consensus are binding. The Council of Ministers consists of one Minister from each member state, preferably the Minister for economic planning or finance. The Council of

1 For more details on SADC see <http://www.sadc.int/>, accessed 13 May 2021.

2 For SADC's vision see <https://www.sadc.int/about-sadc/overview/sadc-vision/>, accessed 4 May 2021.

3 These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

Ministers oversees the functioning and development of SADC, as well as the proper implementation of SADC policies and approves the policies, strategies and work programmes of SADC. Commissions are convened for specific sectoral tasks or programmes to coordinate the integration of policies and programmes in designated sectoral areas. Commissions report to the Council. The Standing Committee of Officials consists of one permanent secretary or equivalent official from each member state, preferably from the ministry for economic planning or finance ministry. The Committee serves as a technical advisory committee to the Council. The Secretariat is the principal executive institution of SADC. The Secretariat is headed by the Executive Secretary, who is the diplomatic representative of SADC. The Secretariat is responsible for the strategic planning and management of the programmes of SADC. The Secretariat implements decisions of the Summit and of the Council, provides financial and general administration, promotes SADC, and coordinates the policies of member states.

3 Heterogeneity within SADC

Although the 16 member states differ from each other in many respects, efforts to enhance environmental conservation and to promote sustainable development can be seen as overall unifiers. The heterogeneity of SADC member states is not only reflected by surface area, population figures, size of the domestic markets, per capita incomes, the endowment with natural resources and the social and political situation, but also by the variety of legal systems applied in different member states.⁴

4 See Ruppel / Ruppel-Schlichting (2017b) and Ruppel-Schlichting / Ruppel (2011).

Table 1: Selected Indicators for SADC Countries

SADC Country	Surface Area (sq. km) ¹	Surface (% of total SADC) ¹	Population (Mio Persons) ²	GDP (Estimates for 2020 in Billion USD) ²	GDP per Capita (Estimates for 2020 in USD) ²	HDI (2020 Estimates) ³	HDI Rank ³
Angola	1,246,700	12.92	31.031	62.440	2,012.147	0.581	148
Botswana	566,730	5.87	2.346	15.910	6,780.720	0.735	100
Comoros	1,861	0.01	0.897	1.222	1,361.855	0.554	156
DRC	2,267,050	23.50	90.794	49.077	540.534	0.480	175
Eswatini	17,200	0.18	1.127	3.949	3,504.452	0.611	138
Lesotho	30,360	0.31	2.062	2.068	1,002.980	0.527	165
Madagascar	581,540	6.03	27.578	13.837	501.756	0.528	164
Malawi	94,280	0.98	20.873	8.488	406.650	0.483	174
Mauritius	2,030	0.02	1.267	11.396	8,993.480	0.804	66
Mozambique	786,380	8.15	31.993	14.385	449.630	0.456	181
Namibia	823,290	8.53	2.530	10.564	4,175.183	0.646	130
Seychelles	460	0.00	0.097	1.131	11,638.721	0.796	67
South Africa	1,214,470	12.59	59.622	302.114	5,067.152	0.709	114
Tanzania	885,800	9.18	58.001	63.244	1,090.385	0.529	163
Zambia	743,390	7.71	18.882	18.529	981.311	0.584	146
Zimbabwe	386,850	4.01	15.189	21.038	1,385.035	0.571	150
Total	9,646,530		280.201	662.664			

Source: Table compiled by the author based on:

¹ World Bank Development Indicators, at <https://databank.worldbank.org/source/world-development-indicators#>, accessed 30 April 2021;

² IMF World Economic Outlook Database at <https://www.imf.org/en/Publications/WEO/weo-database/2021/April>, accessed 30 April 2021; and

³ UNDP Human Development Reports at <http://hdr.undp.org/en/content/latest-human-development-index-ranking>, accessed 30 April 2021.

In the states of sub-Saharan Africa, the concept of legal pluralism is predominant. In view of such heterogeneity within SADC it is of increasing significance for SADC member states to harmonise the law by means of implementation and transformation of SADC Protocols aiming to reduce or eliminate the differences between national and SADC community law.

Table 2: Heterogeneity of Non-religious Legal Systems within SADC

Country	Legal System		
Angola	Civil Law		Customary Law
Botswana	Roman Dutch Law	Common Law	Customary Law
Comoros	Civil Law	Islamic Law	Customary Law
DR Congo	Civil Law		Customary Law
Eswatini	Roman Dutch Law	Common Law	Customary Law
Lesotho	Roman Dutch Law	Common Law	Customary Law
Madagascar	Civil Law		Customary Law
Malawi		Common Law	Customary Law
Mauritius	Civil Law	Common Law	
Mozambique	Civil Law		Customary Law
Namibia	Roman Dutch Law	Common Law	Customary Law
Seychelles	Civil Law	Common Law	
South Africa	Roman Dutch Law	Common Law	Customary Law
Tanzania		Common Law	Customary Law
Zambia		Common Law	Customary Law
Zimbabwe	Roman Dutch Law	Common Law	Customary Law

Source: Table compiled by the author.

4 Environmentally Relevant Legal Framework

Environmental concerns are, similar to the protection and promotion of human rights, not at the heart of the constitutive acts of regional economic communities (RECs) like SADC. However, environmental concerns have, at least to some extent, found their way into the legal framework of most RECs. In founding SADC, environmental protection was explicitly included. The Declaration and Treaty of SADC lays down in Article 5(g) as one of SADC’s objectives⁵ to “achieve sustainable utilisation of natural resources and effective protection of the environment”. In order to achieve this, member states are, amongst others,⁶ called to seek to harmonise their political and socio-

5 Other objectives of SADC are to: achieve development and economic growth and alleviate poverty; evolve common political values, systems and institutions; promote peace and security; achieve collective self-reliance, and the interdependence of Member States; maximise productive employment and utilisation of resources of the Region; and to consolidate the long standing historical, social and cultural affinities and links among the people of the region.

6 Other means to achieve the objectives of SADC include: Eliminating obstacles to the free movement of capital and labour, goods and services, and of the people of the region among Member

economic policies and plans towards this aim and in particular to push forward the institutional development of environmental protection. Considering the multitude of environmental issues in single SADC countries and within SADC as a region, it is of utmost importance to achieve the objective of Article 5(g) of the SADC Treaty to the best possible extent.

4.1 The SADC Treaty

In terms of SADC community law, the SADC Treaty is the highest source of law within SADC's legal framework. In its Preamble, the Treaty determines, inter alia, to ensure, through common action, the progress and well-being of the people of southern Africa, and recognises the need to involve the people of the SADC region centrally in the process of development and integration. As stated above, the sustainable utilisation of natural resources and the effective protection of the environment have been laid down in Article 5(g) of the SADC Treaty as one of SADC's objectives. Furthermore, food security, land and agriculture as well as natural resources and the environment have, among other issues, been identified as areas of cooperation by the SADC Treaty.⁷

4.2 The SADC Protocols

Besides the aforementioned provisions and objectives in the SADC Treaty, the SADC legal regime becomes responsive to environmental concerns in various other legal instruments as well. One category of such documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented, and they have the same legal force as the Treaty itself. A Protocol comes into force after two thirds of SADC member states have ratified it. The Protocols which are of most relevance with regard to the environment are listed in the table and briefly explained below.

States; promoting the development, transfer and mastery of technology; improving economic management and performance through regional co-operation; securing international understanding, co-operation and support; and mobilising the inflow of public and private resources into the region.

⁷ Article 21.3 SADC Treaty.

Table 3: SADC Protocols

Protocol	Date of entry into force
Protocol on Energy	17/04/1998
Protocol on Environmental Management for Sustainable Development	–
Protocol on Fisheries	08/08/2003
Protocol on Forestry	17/07/2009
Protocol on Health	14/08/2004
Protocol on Mining	10/02/2000
Protocol on Shared Watercourse Systems	28/09/1998
Revised Protocol on Shared Watercourses	22/09/2003
Protocol on Tourism	26/11/2002
Protocol on Trade	25/01/2000
Protocol on Transport, Communications and Meteorology	06/07/1998
Protocol on Wildlife Conservation and Law Enforcement	30/11/2003

Source: Table compiled by the author.

4.2.1 The Protocol on Energy

Energy is a defining issue and closely linked with key contemporary global challenges in the SADC region – social development and poverty alleviation, environmental degradation, climate change, food security etc. Energy efficiency plays an important role in sustainable growth and development. Better energy efficiency can produce substantial benefits both for global economic growth and poverty reduction as well as for mitigating climate change. In the household sector, improved energy efficiency can directly reduce household expenditures on energy services, and therefore directly help to reduce poverty. Conducive policies are central to the development of sustainable energy generation and markets. Laws governing sustainable energy development and supply cut across many sectors such as, mining, forestry, agriculture, environment, water, industry, electricity, and petroleum, and hence require coordination – a complex challenge that is not easily overcome.⁸ The energy sector and the provision of electricity for southern Africa’s population and industries comprise a complex issue without including the influence of climate change to the equation. If SADC intends reducing its GHG and carbon emissions a transition to sustainable energy is inevitable. This requires redefining its competitive advantage from attracting energy intensive sectors on the basis of non-renewable energy (e.g. coal) to building a new advantage around climate friendly technology and energy. What remains a challenge, and that needs to be researched more extensively, is, how emerging regional and national legislation can harmonise and coordinate the work around the issues of sustainable energy. Cross-

8 For various aspects related to energy security and renewable energies in sub-Saharan Africa see Ruppel / Althusmann (2015), Ruppel / Ruppel-Schlichting (2015).

sectoral coordination and responsibilities need to be streamlined in order to assure decision making to promote energy security in the region through more effective energy trade mechanisms in future. In the same context policymakers and Government officials need to be capacitated to translate international policy to national and local levels, and vice versa. Further research emphasis needs to be placed on linking national, regional and international policymaking, especially in relation to all emerging climate change related issues, such as the Green Climate Fund.

The Protocol on Energy strives to outline means of cooperation in the development of energy to ensure security and reliability of energy supply and the minimisation of costs. It is emphasised in the Protocol that development and use of energy must be environmentally sound.⁹ To achieve this objective, the Protocol *inter alia* provides for cooperation in the development and utilisation of energy in the sub-sectors of wood fuel, petroleum and natural gas, electricity, coal, new and renewable energy sources, and energy efficiency and conservation. The Protocol formulates the intention to promote increased production of new and renewable sources of energy in an economically and socially acceptable manner, including biogas, windmills, mini-hydro plants, passive solar design of buildings, photo-voltaic, solar thermal and solar stoves and water heaters. The development of national energy efficiency and conservation plans is encouraged. Article 4 establishes an Energy Commission, consisting of the Committee of Ministers, the Committee of Senior Officials, the Technical Unit, and sub-committees. The Commission is responsible for the implementation of the Protocol. Annex 1 to the Protocol contains guidelines for cooperation in the Energy Commission.

Under the Protocol, the Regional Electricity Regulators Association of Southern Africa (RERA) was established in July 2002. RERA is a formal association of electricity regulators in pursuit of the broader initiative of the New Partnership for Africa's development (NEPAD) and the African Energy Commission (AFREC).¹⁰ RERA strives to facilitate harmonisation of regulatory policies, legislation, standards and practices and to be a platform for effective cooperation among energy regulators within the SADC region. The objectives of RERA fall into three broad categories, namely: Capacity building and information sharing; facilitation of electricity supply industry policy, legislation and regulations, and regional regulatory cooperation. Each SADC country can have one electricity supply industry regulator as a member of RERA.

On the basis of the Treaty and the Protocol on Energy, the SADC Energy Corporation Policy and Strategy (1996), the Energy Action Plan (1997), the Energy Sector Activity Plan (2000), the Regional Infrastructure Development Master Plan: Energy Sector Plan (2012), the SADC Industrialization Strategy and Roadmap (2015), and the Regional Energy Access Strategy and Action Plan have been drafted. Furthermore, the Renewable Energy and Efficiency Strategy and Action Plan (REEESAP) spanning the

9 Article 2.8.

10 For further information see <https://rerasadc.com>, accessed 13 May 2021.

period from 2016 to 2030 was adopted in 2017. It provides a framework for member states to develop their own renewable energy and energy efficiency strategies and action plans, leading to greater uptake of renewable energy resources as well as mobilisation of financial resources. The REEESAP intends to contribute to energy supply security, stimulate economic growth and improve access to modern energy services. Furthermore, the action plan seeks to ensure that the regional energy strategy is aligned with global trends towards clean and alternative energy sources. Alternative fuels and environmental protection are important aspects and goals of REEESAP. SADC has set a target to achieve that 32% of the electricity demand should be covered by renewable energies by 2020 and 39% by 2030.¹¹

In July 2015, the Energy Ministers of the SADC approved the establishment of the SADC Centre for Renewable Energy and Energy Efficiency (SACREEE). In line with this action plan, the SADC Centre for Renewable Energy and Energy Efficiency (SACREEE) was established in Namibia in 2016. SACREEE monitors the implementation of REEESAP and contributes towards increased access to modern energy services and improved energy security within SADC by promoting market-based uptake of renewable energy and energy efficient technologies and energy services.¹² One of the objectives of REEESAP is to achieve low carbon development paths and climate resilient energy systems in the region.

4.2.2 The Protocol on Environmental Management for Sustainable Development

The Protocol on Environmental Management for Sustainable Development has been signed in 2014 at the occasion of the 34th SADC Summit, held in Victoria Falls, Zimbabwe. In terms of environmental conservation on the regional level, it is a legal document of utmost importance. For the Protocol to come into force, ratification by two-thirds of the member states is required. So far, only Namibia and Eswatini have ratified the Protocol.¹³ The importance of accelerated ratification has been addressed by the SADC Executive Secretary at the occasion of the 2020 World Environment Day as member states were called “to expedite the ratification of the SADC Protocol on Environmental Management for Sustainable Development which will allow SADC Member States to achieve sustainable use and management of the environment”.¹⁴

The Protocol is composed of a Preamble and six parts. Part 1 sets out definitions, scope, principles and objectives of the Protocol; Part 2 deals with the management of the environment and transboundary considerations; Part 3 contains provisions relevant

11 SADC (2018:30).

12 Ibid.

13 SADC (2019a).

14 See <https://bit.ly/3vVXjD7>, accessed 8 May 2021.

for the implementation of the Protocol, while Part 4 relates to cross-sectoral issues. Institutional provisions are outlined in Part 5, while the last Part 6 concludes with final provisions such as entry into force.

The Protocol recognises the sovereign right of member states to use their natural resources to meet their developmental needs sustainably and a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and natural resources of other states. Main objectives of the Protocol are to enhance environmental protection to contribute to human health, well-being and poverty alleviation; to promote equitable and sustainable utilisation of natural and cultural resources for the benefit of present and future generations; to promote the shared management of trans-boundary natural resources; and to promote an effective management and response to the impacts of climate change. Thematic areas of the Protocol include air quality, waste and pollution, chemicals management, biodiversity and natural heritage, cultural heritage, sustainable land management, marine and inland water resources and climate change. Cross-sectoral issues comprise human resources development, trade and investment, science and technology, gender equality, information management, and exchange and reporting.

Institutions responsible for the implementation as established by the Protocol are the Committee of Ministers Responsible for the Environment, a Committee of Senior Officials Responsible for the Environment, and the Technical Committee on Environmental Management. The Protocol has conceptualised dispute settlement as a three-step process starting with efforts to resolve disputes amicably among member states; if such process is unsuccessful, disputes are referred to the Committee of Ministers Responsible for the Environment for amicable settlement and, as a last resort, a dispute may be brought to the SADC Tribunal.¹⁵

Once in force, the Protocol will contribute towards environmental protection, sustainable development and regional integration of SADC as it will facilitate the harmonisation of policies, strategies and legal frameworks through the management of shared and transboundary natural resources, including the monitoring and reporting on environmental trends, and the co-ordination of environmental management plans. The Protocol will provide a basis for coordinated environmental management, co-operation on environmental crime, for developing and implementing co-ordinated environmental disaster management responses and, most importantly, for joint implementation of environment impact assessment in order to harmonise EIA processes for cross-border infrastructure development.

15 See the section on the SADC Tribunal below. At this stage, the SADC Tribunal is not operational.

4.2.3 The Protocol on Fisheries

Considering that fisheries are essential for the social and economic well-being and livelihood of the people in the region, with regard to food security and the alleviation of poverty, the Protocol on Fisheries provides for cooperation and integrative actions in order to optimise the sustainable use of the living aquatic resources within SADC. Thus, the objective of the Protocol is to promote the responsible and sustainable use of living aquatic resources and aquatic ecosystems, in order to enhance food security and human health, safeguard the livelihood of fishing communities, generate economic opportunities for citizens, and alleviate poverty. The Protocol recognises the UN Convention on the Law of the Sea (UNCLOS) and takes into account the FAO Code of Conduct for Responsible Fisheries. Its objective is to promote the responsible and sustainable use of the living aquatic resources and aquatic ecosystems and interestingly defines a fish as any aquatic plant or animal and resources as all aquatic ecosystems. The Preamble emphasises the necessity for joint co-operative and integrative action at regional level, awareness and support of national initiatives to implement international conventions on sustainable use and recognises the unique trans-boundary character of the aquatic resources and ecosystems and the need to cooperate in their management.¹⁶

Legal measures provided for in the Protocol to achieve this objective include the protection of resources against over-exploitation, the transfer of skills and technologies to other member states to enhance effective regional co-operation, and the exchange of information on the state of shared resources, levels of fishing, measures taken to monitor and control exploitation of shared resources, plans for new or expanded exploitation, and relevant research activities and results. The Protocol envisages to integrate systems to monitor resources, joint fish stock assessment programmes, agreed scientific methodologies, and preparation of best scientific advice on sustainable levels of exploitation. Of specific importance with regard to environmental protection relating to fisheries is the requirement to balance the needs of industrial enterprises, artisanal fishers, subsistence fishers, recreational fishers, and aquaculture practitioners, in a politically, environmentally and economically sustainable manner (Article 12) and the provision providing for the protection of aquatic ecosystems, including their biodiversity and unique habitats (Article 14).

The harmonisation of legislation has been taken up by Article 8, asking for cooperation with regard to establishing region-wide penalties for illegal fishing by SADC and non-SADC flagged vessels in the waters of member states. Annexed to the Protocol are a list of international fora, conventions and agreements with which member states are to establish common positions and undertake co-ordinated and complementary actions, as well as a list of international bodies particularly relevant to the Protocol in

16 Ruppel / Bethune (2007).

Annex 2. Appendices 3 and 4 list international declarations on integrated coastal zone management and agreements on international rivers, respectively.

4.2.4 The Protocol on Forestry

Forests are dealt with in the Protocol on Forestry; as per figures estimated by the Food and Agricultural Organization¹⁷ and summarised in the table below, forests in the SADC cover an area of 392 million hectares of the SADC region corresponding to about 40% of the land area.

Table 4: Forest Area in SADC Countries

Country	Forest area (1,000 ha)				Net annual change					
	1990	2000	2010	2020	1990-2000		2000-2010		2010-2020	
					1,000 ha/yr	%	1,000 ha/yr	%	1,000 ha/yr	%
Angola	79,263	77,709	72,158	66,607	-155.4	-0.20	-555.1	-0.74	-555.1	-0.80
Botswana	18,804	17,621	16,438	15,255	-118.3	-0.65	-118.3	-0.69	-118.3	-0.74
Comoros	46	42	37	33	-0.4	-0.99	-0.4	-1.10	-0.4	-1.24
DRC	150,629	143,899	137,169	126,155	-673.0	-0.46	-673.0	-0.48	-1 101.4	-0.83
Eswatini	461	473	485	498	1.2	0.26	1.2	0.25	1.2	0.25
Lesotho	35	35	35	35	0.0	0.00	0.0	0.00	0.0	0.00
Madagascar	13,693	13,031	12,562	12,430	-66.3	-0.49	-46.9	-0.37	-13.2	-0.11
Malawi	3,502	3,082	2,662	2,242	-42.0	-1.27	-42.0	-1.45	-42.0	-1.70
Mauritius	41	42	38	39	0.1	0.21	-0.4	-0.88	n.s.	0.10
Mozambique	43,378	41,188	38,972	36,744	-219.0	-0.52	-221.6	-0.55	-222.8	-0.59
Namibia	8,769	8,059	7,349	6,639	-71.0	-0.84	-71.0	-0.92	-71.0	-1.01
Seychelles	34	34	34	34	0.0	0.00	0.0	0.00	0.0	0.00
South Africa	18,142	17,778	17,414	17,050	-36.4	-0.20	-36.4	-0.21	-36.4	-0.21
Tanzania	57,390	53,670	49,950	45,745	-372.0	-0.67	-372.0	-0.72	-420.5	-0.88
Zambia	47,412	47,054	46,696	44,814	-35.8	-0.08	-35.8	-0.08	-188.2	-0.41
Zimbabwe	18,827	18,366	17,905	17,445	-46.1	-0.25	-46.1	-0.25	-46.1	-0.26

Source: Table compiled by the author based of figures from FAO (2020a).

The basic regional policy for sustainable management of forests in the SADC region is the Protocol on Forestry. It is a set of rules or principles agreed upon by the SADC member states on how to integrate and cooperate among themselves in order to commonly conserve and manage the SADC forests and woodlands for the benefit of the

17 FAO (2020a:136).

SADC people. The Protocol recognises the trans-boundary nature of these forests, the importance of transboundary management strategies, the vital role of forests in protecting water catchments particularly of shared water courses and understands that potential harm to these forests is not limited by national boundaries. One of the objectives of the protocol is the effective protection of the environment and the ways listed to achieve the objectives include “harmonising approaches to sustainable forest management, forest policy, legislation and enforcement...”¹⁸ The guiding principles include the obligation of member states to “facilitate, promote and continually improve policy and legal frameworks that promote sustainable forest management”.¹⁹

Forests are home to a rich biodiversity, and millions of people live within the forests and woodlands, which directly support their livelihoods. Forest products from which the population can benefit include charcoal, honey, bush meat, and construction materials amongst many others. Thus, the transboundary conservation and management of forests are essential contributions to the protection and conservation of the environment and its biodiversity, and ultimately, to poverty alleviation. Regional approaches for policy harmonisation and transboundary forest conservation and sustainable use concepts are important mechanisms to attain regional integration. Recognising the essential role which forests play with regard to maintaining the earth’s climate, controlling floods and erosion, and as sources of food, wood and other forest products, the Protocol’s primary objective is to promote the development, conservation, sustainable management and utilisation of all types of forests and forest products in order to alleviate poverty and generate economic opportunities. To this end, the Protocol *inter alia* addresses issues of common concern including deforestation, genetic erosion, climate change, forest fires, pests, diseases, invasive alien species, and law enforcement.

Furthermore, states are called upon to facilitate the gathering and monitoring of information, and the sharing and dissemination of information, expertise and technology concerning forests; and to harmonise approaches to sustainable forest management, forest policy, legislation and enforcement, and issues of international concern. Trade and investment are to be promoted based on the sustainable management and utilisation of forests and the rights of communities are to be strengthened by facilitating their participation in forest policy development, planning, and management. The Protocol emphasises that traditional forest-related knowledge must be protected and requires mechanisms to ensure the equitable sharing of benefits from forest resources. SADC is currently in the process of drafting a SADC Regional Forestry Strategy and implementation plan.

18 Article 3(1)(f) of the Protocol.

19 Article 4(4) of the Protocol.

4.2.5 The Protocol on Health

The Protocol on Health was primarily adopted in order to enhance cooperation in addressing the health problems and challenges facing member states through effective regional collaboration and mutual support. As a clean environment can provide best for the health of the region's population, member states undertake to collaborate, co-operate and assist each other in a cross-sectoral approach in addressing regional environmental health issues and other concerns, including toxic waste, waste management, port health services, pollution of air, land and water, and the degradation of natural resources (Article 23).

Health largely depends on a minimum protection from diseases and unhealthy lifestyles. Many people in southern Africa are particularly vulnerable with regard to health threats as these threats are usually greater for poor people in rural areas, particularly children, women and indigenous groups due to malnutrition, insufficient access to health services, lack of clean water and other basic necessities.²⁰

4.2.6 The Protocol on Mining

The SADC region is extremely rich in natural resources, including minerals, which can contribute to accelerating economic and social development and growth. The Protocol on Mining *inter alia* strives to harmonise national and regional policies and strategies related to the development and exploitation of mineral resources through developing human and technological capacity, including collaboration between the mining industry and training institutions.

SADC states must ensure a balance between mineral development and environmental protection, including conducting environmental impact assessments (especially in shared systems and cross border projects), and sharing information on environmental protection and rehabilitation (Article 8). According to the 'fixed stock paradigm' mining is unsustainable because it is an unavoidable fact that resources will eventually be exhausted.²¹ According to the 'opportunity cost paradigm' mining can be sustainable because the costs caused by resource depletion will be counter-acted by new technology and future developments.²² With regards to the latter argument, foreign investment certainly plays a key part in the development of SADC's mining sector and effective mining policies and legal frameworks must ensure the best possible outcomes in terms of sustainability of the mining sector in the region.²³

20 UNEP (2016:9).

21 Tilton (2009:7).

22 Ibid.

23 Frick (2002:2).

4.2.7 The Revised Protocol on Shared Watercourses

The Revised Protocol on Shared Watercourses of the Southern African Development Community repeals and replaces the 1995 Protocol on Shared Watercourse Systems. This Protocol recognises international consensus on a number of concepts and principles related to water resource development and management in an environmentally sound manner. The policy acknowledges the Helsinki Rules, the UN Convention on the law of the Non-Navigational Uses of International Watercourses and Agenda 21 concepts and facilitates the establishment of shared water agreements.²⁴ The scarcity of water restricts economic development and social upliftment in the SADC region.²⁵ Successfully managing water resources in southern Africa will contribute to reaching SADC's vision of sustainable development in the region.²⁶

The people of southern Africa call for a desirable future in which the region's environment is conserved among all the competing uses of water, recognising the constraints inherent in natural ecosystems so that the environment can be sustainably improved, used and managed in the spirit of social and environmental justice.

The Protocol aims to foster closer cooperation for judicious, sustainable and coordinated management, protection and utilisation of shared watercourses and advance the SADC agenda of regional integration and poverty alleviation. In order to achieve the objective, this Protocol, by virtue of Article 2, seeks to promote and facilitate the establishment of shared watercourse agreements and shared watercourse institutions for the management of shared watercourses; advance the sustainable, equitable and reasonable utilisation of the shared watercourses; promote a coordinated and integrated environmentally sound development and management of shared watercourses; promote the harmonisation and monitoring of legislation and policies for planning, development, conservation, protection of shared watercourses, and allocation of the resources thereof; and promote research and technology development, information exchange, capacity building, and the application of appropriate technologies in shared watercourses management.

Recognising the principle of the unity and coherence of each shared watercourse, SADC states undertake to harmonise the water uses in the shared watercourses and to ensure that all necessary interventions are consistent with the sustainable development of all watercourse states and observe the objectives of regional integration and harmonisation of their socio-economic policies and plans. The utilisation of shared watercourses (including agricultural, domestic, industrial, navigational and environmental uses) within the SADC region is open to each watercourse state, in respect of the watercourses within its territory and without prejudice to its sovereign rights, in accordance with the principles contained in the Protocol.

24 See Ruppel / Bethune (2007).

25 SADC (undated).

26 Ibid.

Member states are obliged to respect the existing rules of customary or general international law relating to the utilisation and management of the resources of shared watercourses. According to Article 3.4 of the Protocol, member states commit themselves to maintain a proper balance between resource development for a higher standard of living for their people and conservation and enhancement of the environment to promote sustainable development.

Watercourse states in their respective territories undertake to utilise a shared watercourse in an equitable and reasonable manner taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse for the benefit of current and future generations, and they participate in the use, development and protection of a shared watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to co-operate in the protection and development thereof, as provided in this Protocol. Furthermore, the Protocol states that member states have to take all appropriate measures to prevent the causing of significant harm to other watercourse states. Where significant harm is caused to another watercourse state, the state whose use causes such harm is to take all appropriate measures to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation. Disputes between member states regarding the interpretation or application of the provisions of the Protocol which are not settled amicably, are to be referred to the SADC Tribunal under the SADC Treaty.

The Protocol established several SADC water sector organs (Committee of Water Ministers, Committee of Water Senior Officials, Water Sector Coordinating Unit, and Water Resources Technical Committee and sub-committees) and shared watercourse institutions.

Various bilateral and multilateral water commissions within the SADC region have been established, which include the following:

- The Permanent Joint Technical Commission (PTJC) is an agreement between the governments of the People's Republic of Angola and the Republic of Namibia to endorse and affirm the old agreements between the colonial powers, Portugal and South Africa, in order to re-establish the Permanent Joint Technical Commission (PJTC) and the Joint Operating Authority on the Cunene River.
- The Joint Permanent Water Commission (JPWC) is an agreement between the governments of the Republic of Botswana and the Republic of Namibia on the establishment of a Joint Permanent Water Commission (JPWC). The agreement relates to water matters of common interest. The Commission concentrated its Policy and Legislative Review of Wetland Use and Management in Namibia activities mostly on the Kwando – Linyanti – Chobe River System, a tributary of the Zambezi River that forms the border between Botswana and Namibia in the eastern part of the Caprivi Region in Namibia, and included work on the Okavango River. The Commission became inactive due

to the Kasikili/Sedudu Island border dispute between Namibia and Botswana and the fact that the Permanent Okavango River Basin Water Commission (OKACOM), established in September 1994, took over the responsibility of advising the respective governments on issues and developments related to the Okavango River. The negotiations leading to the establishment of the Zambezi River Commission (ZAMCOM) further reduced the need for the JPWC to meet because the Kwando – Linyanti – Chobe River System is a tributary of the Zambezi River and can thus be included under the ZAMCOM.

- The Permanent Water Commission (PWC) is an agreement between the governments of the Republic of Namibia and the Republic of South Africa on the establishment of a Permanent Water Commission (PWC) on water matters of mutual interest, concentrating at present on the lower Orange River. This Commission is active and responsible for the development of the lower Orange River where it forms the common border between South Africa and Namibia.
- The Vioolsdrift and Noordoewer Joint Irrigation Scheme is an agreement between the governments of the Republic of South Africa and the Republic of Namibia on the Vioolsdrift and Noordoewer Joint Irrigation Scheme (on the lower Orange River). The agreement provides for the establishment of a Joint Irrigation Authority (JIA) responsible for the management of the joint irrigation scheme on both sides of the lower Orange River at Noordoewer in Namibia and Vioolsdrift in South Africa.
- The Permanent Okavango River Basin Water Commission (OKACOM) is an agreement between the governments of the Republic of Angola, the Republic of Botswana and the Republic of Namibia, on the establishment of a Permanent Okavango River Basin Water Commission (OKACOM). This Commission is active and the objective is to act as technical adviser to the parties on matters relating to the conservation, development and utilisation of water resources of common interest and to perform such other functions pertaining to the development and utilisation of such resources as the parties may agree to assign to the Commission. The vision of the Commission is to develop an integrated management plan for the Okavango Basin.
- The Orange-Senqu River Commission (ORASECOM) is an agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia and the Republic of South Africa on the establishment of the Orange-Senqu River Commission (ORASECOM). This Commission is active and responsible for advising the governments on developments related to the Orange River Basin.
- The Zambezi River Commission (ZAMCOM) is an agreement between the governments of the Republic of Angola, the Republic of Botswana, the

Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the United Republic of Tanzania, and the Republic of Zimbabwe on the establishment of the Zambezi River Commission (ZAMCOM).

- The hosting agreement of the Secretariat for the Incomati and Maputo River Basins (Eswatini, Mozambique, and South Africa) have been signed and the Cuvelai Secretariat (Namibia and Angola) has been established.
- A Tri-Basin Cooperation Agreement of the Buzi, Pungwe, and Save (BU-PUSA) has been signed between Mozambique and Zimbabwe in 2019.

SADC's efforts in the water sector are implemented through the SADC Regional Strategic Action Plan (RSAP) for Integrated Water Resources Development and Management, currently in its fourth phase (RSAP IV).²⁷ Activities and outputs include the adoption of Shared River Basin Management Strategies/Plans, awareness-raising and communication on Integrated Water Resources Management and Development (IWRMD), as well as coordinated Guidelines for Implementation of the Protocol on Shared Watercourses.

4.2.8 The Protocol on Tourism

Considering that the tourism sector is one of the largest and fastest growing sectors in the region, the SADC Protocol on Tourism was primarily adopted to increase regional tourism trade and to utilise the wide range of natural, cultural and historical sites in the region as a means to achieve sustainable social and economic development. In order to achieve these objectives, the Protocol requires member states to better use resources through collective efforts and co-operation in an environmentally sustainable manner. Environmentally and socially sustainable tourism development based on sound management practices is to be promoted. The Protocol puts an emphasis on preserving the natural, cultural and historical resources of the region (Article 11).

Several instruments have been developed in the tourism sector such as guidelines for best practice, including: SADC Guidelines on the Establishment of Transfrontier Conservation Areas and for Tourism Concessions, and Guidelines for Community Engagement and Development of Cross-Border Tourism Products. Furthermore, the SADC Tourism Programme 2020 to 2030 has been published in 2019 "as a roadmap to guide and coordinate the development of a sustainable tourism industry in the region and to facilitate the removal of barriers to tourism development and growth."²⁸

27 SADC (2016).

28 SADC (2019b:2).

4.2.9 The Protocol on Trade

The primary objective of the Protocol on Trade is to liberalise intra-regional trade in goods and services to ensure efficient production within SADC, reflecting the dynamic comparative advantages of its members states, contributing towards the domestic, cross-border and foreign investment climate, and enhancing the development, diversification and industrialisation of the region. Environmental conservation is integrated in that the Protocol provides for general exceptions from the Protocol's principles in order to ensure the conservation of exhaustible natural resources and the environment (Article 9(h)). Furthermore, member states undertake to make compatible their respective standards-related measures, so as to facilitate trade in goods and services within SADC, without reducing the level of protection of human, animal or plant life or health, or of the environment (Article 17).

Regional trade can be a powerful source of economic growth. But trade does not automatically mean economic growth, let alone poverty reduction or sustainable development. The ability to benefit from regional trade and foreign investment is dependent on a number of factors, particularly the quality of the policies and institutions on the ground. Thus, trade should be considered a means to an end, but not as the end in itself. An effective SADC trade regime must first and foremost be friendly to the environment, address poverty reduction and promote sustainable development.

4.2.10 The SADC Protocol on Wildlife Conservation and Law Enforcement

The Protocol on Wildlife Conservation and Law Enforcement of SADC aims to establish within the framework of the respective national laws of each member state common approaches to the conservation and sustainable use of wildlife resources and to assist with the effective enforcement of laws governing those resources. The Protocol applies to the conservation and sustainable use of wildlife, excluding forestry and fishery resources. Each member state has to ensure the conservation and sustainable use of wildlife resources under its jurisdiction, and that activities within its jurisdiction or control do not cause damage to the wildlife resources of other states or in areas beyond the limits of national jurisdiction.

In line with Article 4 of the Protocol, appropriate policy, administrative and legal measures have to be taken to ensure the conservation and sustainable use of wildlife and to effectively enforce national legislation pertaining to wildlife. Cooperation among member states is envisaged to manage shared wildlife resources as well as any trans-frontier effects of activities within their jurisdiction or control. To achieve its overall objectives, the Protocol is to promote the sustainable use of wildlife, harmonise legal instruments governing wildlife use and conservation, enforce wildlife laws within, between and among member states, facilitate the exchange of information

concerning wildlife management, utilisation and the enforcement of wildlife laws, assist in the building of national and regional capacity for wildlife management, conservation and enforcement of wildlife laws, promote the conservation of shared wildlife resources through the establishment of trans-frontier conservation areas, and facilitate community-based natural resource management practices for management of wildlife resources.

The Protocol establishes the Wildlife Sector Technical Coordinating Unit; the Committee of Ministers responsible for Food, Agriculture and Natural Resources; the Committee of Senior Officials; and the Technical Committee. The Wildlife Conservation Fund is established by Article 11.

As per the Protocol and the SADC Programme for Transfrontier Conservation Areas,²⁹ several Transfrontier Conservation Areas (TFCAs) have been established³⁰ and defined as components of a large ecological region that includes the boundaries of two or more countries encompassing one or more protected areas as well as multiple resource use areas. The aim of establishing TFCAs is to collaboratively manage shared natural and cultural resources across national boundaries for improved biodiversity conservation and socio-economic development.

4.2.11 The SADC Protocol on Transport, Communications and Meteorology

Member states acknowledge that they are members of the World Meteorological Organisation (WMO) and, through their national meteorological services, constitute an integral part of the regional and global system or network of the WMO's programmes and structures, in particular the World Weather Watch programme (Article 12.1). Within the regional and international cooperative system of the WMO, members are encouraged to provide adequate legal frameworks and appropriate financial support to the national meteorological services to establish an integrated network of observation, data processing and communications systems; and enhance the provision of meteorological services for general and specialised applications in the region and

29 SADC (2019c).

30 The following TFCAs have been established, see SADC (2019c:4): /Ai/Ais - Richtersveld (Namibia/South Africa); Chimaninani (Mozambique/Zimbabwe); Great Limpopo (Mozambique/South Africa/Zimbabwe); Great Mapungubwe (Botswana/South Africa/Zimbabwe); Iona-Skeleton Coast (Angola/Namibia); Kagera (Rwanda/Tanzania/Uganda); Kavango Zambezi (Angola/Botswana/Namibia/Zambia/ Zimbabwe); Kgalagadi (Botswana/South Africa); Liuwa Plains-Mussuma (Angola/Zambia); Lower Zambezi-Mana Pools (Zambia/Zimbabwe); Lumombo (Mozambique/South Africa/Swaziland); Malawi-Zambia (Malawi/Zambia); Maloti-Drakensberg (Lesotho/South Africa); Mayombe Forest (Angola/Congo/DRC); Mnazi Bay-Quirimbas (Tanzania/Mozambique); Niassa-Selous (Mozambique/Tanzania); Western Indian Ocean (Comoros/France/Madagascar/Mauritius/Mozambique/Seychelles/Tanzania); ZIMOZA (Mozambique/Zambia/Zimbabwe).

internationally (Article 12.2). Such co-operation framework obliges member states to inter alia strengthen their weather and climate monitoring systems, improve public and specialised weather services, promote sustainable development with the emphasis on climate change and protection of the environment, and strengthen meteorology research capacity in the region. The Protocol emphasises that sustainable development is to be promoted with an emphasis on climate change and protection of the environment. These aims are to be achieved by means of strengthening the capabilities of national meteorological centres in climate applications and advice; enhancing existing environmental monitoring activities; optimising the use of regional structures; and fostering an awareness of the contributions which can be made by national meteorological centres to planning sustainable development in agriculture, forestry and related areas (Article 12.7).

4.3 SADC Vision 2050 and the Regional Indicative Strategic Development Plan (RISDP)

Apart from the Treaty and protocols, SADC also provides other instruments at different levels. These are not binding and do not require ratification by SADC member states.

4.3.1 SADC Vision 2050

Following a comprehensive consultative process, SADC's Vision 2050 was released in 2020 as a fundamental document aiming to foster regional cooperation and integration.³¹ Founded on peace, security, and good governance, three pillars have been identified for Vision 2050: Industrial development and market integration; infrastructure development in support of regional integration; and social and human capital development. Besides gender, youth, and disaster risk management, the environment and climate change are singled out as cross cutting issues and thus play a prominent role for Vision 2050. SADC member states commit themselves to realise strengthened climate change adaptation and mitigation as well as the sustainable utilisation and conservation of natural resources and an effective management of the environment.

31 SADC (2020a).

4.3.2 The Regional Indicative Strategic Development Plan (RISDP)

In 2001, the Heads of State and Government met at an Extraordinary Summit in Windhoek and approved the restructuring of SADC institutions by means of a Regional Indicative Strategic Development Plan (RISDP) which was approved by the SADC Summit in 2003. The RISDP reaffirms the commitment of SADC member states to good political, economic and corporate governance entrenched in a culture of democracy, full participation by civil society, transparency and respect for the rule of law. With regard to monitoring the implementation of the RISDP, the Summit exercises oversight through progress reports from the SADC Secretariat.

The focal point of the RISDP is thus to provide strategic direction with respect to SADC programmes and activities, and to align the strategic objectives and priorities of SADC with the policies and strategies for achieving its long-term goals. The RISDP is indicative in nature, merely outlining the necessary conditions that should be realised towards achieving those goals. The purpose of the RISDP is to deepen regional integration in SADC. The RISDP has identified gaps and challenges in the current policies and strategies, and used them to reorient those policies and strategies. In light of the identified gaps and challenges, Chapter 4 focuses on a number of priority intervention areas of both cross-sectoral and sectoral nature that are critical for the achievement of SADC's objectives, in particular in promoting deeper regional integration, integrating SADC into the world economy, promoting equitable and balanced development, eradicating poverty and promoting gender equality, protecting the environment and strengthening sustainable development.

In order to attain these goals, SADC embarked to harmonise policies, legal and regulatory frameworks for the free movement of factors of production and to implement policies to attain macroeconomic stability and build policy credibility. Although it has to be emphasised that the RISDP it is not a binding instrument, at every Summit in recent years member states reaffirmed their commitment to regional integration as per the RISDP, which has identified environment and development as cross-sectoral priority intervention areas, as environment and sustainable development present opportunities for the region to advance its programme of action in environment and natural resources management and forge harmonisation of and compliance with environmental policies, standards and guidelines by pursuing the strategic objectives outlined in the RISDP.³² With regard to environment and sustainable development, the RISDP has elaborated the following areas of focus:³³

- Creating the requisite harmonised policy environment, as well as legal and regulatory frameworks to promote regional cooperation on all issues relating

32 Cf. SADC (2003:66ff.).

33 Ibid.

to environment and natural resource management including trans-boundary ecosystems;

- Promote environmental mainstreaming in order to ensure the responsiveness of all SADC policies, strategies and programmes for sustainable development;
- Regular assessment, monitoring and reporting on environmental conditions and trends in the SADC region;
- Capacity building, information sharing and awareness creation on problems and perspectives in environmental management; and
- Ensuring a coordinated regional position in the negotiations and implementation of Multilateral Environmental Agreements (MEAs), and other agreements.

An internal desk assessment of the RISDP in 2011 which was approved by SADC Council in 2011 was followed by an independent mid-term review carried out and approved by Council in 2012 and 2013. In 2014 and 2015, a task force comprising the SADC Secretariat, all member states and key stakeholders developed and finalised the Draft Revised RISDP 2015-2020 and its Implementation Framework and Indicative Costs. In 2015, the SADC Summit approved the Revised Regional Indicative Strategy of Development Plan (RRISDP) and Implementation Framework of 2015-2020. The Revised RISDP comprised seven chapters with four priority areas (of which only the first priority area has been revised substantially as compared to the initial RISDP):

- Industrial development and market integration (with a focus on sustainable industrial development, productive competitiveness and supply side capacity; the free movement of goods and services; financial market integration and monetary cooperation; intra-regional investment and foreign direct investment; and stability oriented macroeconomic convergence);
- infrastructure in support of regional integration (covering the focus areas of water; energy; transport; tourism; information and communication technology; and meteorology);
- peace and security cooperation;
- special programmes of regional dimension (besides programmes already included in the initial RISDP on human resource development; health, HIV and AIDS and other communicable diseases; food security and transboundary natural resources; statistics; and
- gender equality; science, technology and innovation and research and development, special programmes in the revised RISDP also cover the topics of employment and labour; the environment; and a focus on the private sector).

In 2020, SADC's Regional Indicative Strategic Development Plan (RISDP) 2020 – 2030³⁴ was launched. In line with SADC's vision 2050, the environment and climate change have been identified as cross cutting issues around the strategic priorities industrial development and market integration, infrastructure development in support of regional integration and social and human capital development. RISDP 2020 – 2030 includes as strategic objectives strengthened climate change adaptation and mitigation with enhanced sector-based approaches towards developing climate change resilience and a reduced carbon footprint in the region as outcomes. Furthermore, the strategic objective of sustainable utilisation and conservation of natural resources and effective management of the environment envisages as outcome an improved management of the environment and the sustainable utilisation of natural resources. A third strategic objective related to environment and climate change is improved disaster risk management in support of regional resilience. Key interventions within these strategic objectives include among many others the operationalisation of SADC Climate Change Strategy and Action Plan and other regional and international instruments, the promotion of the use of climate-smart techniques and technological advancements, the implementation of the SADC Regional Green Economy Strategy, the monitoring of compliance with prioritised multilateral environment agreements, and the promotion of the ratification and domestication of the SADC Protocol on Environmental Management.

4.4 Selected Environmental Strategies and Declarations

4.4.1 The SADC Declaration on Agriculture and Food Security

With the 2004 Declaration on Agriculture and Food Security, Heads of State and Government gave substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation, with the ultimate objective of its eradication and the achievement of sustainable utilisation of natural resources and effective protection of the environment. With this Declaration, SADC member states committed themselves to promote agriculture as a pillar of strength in national and regional development strategies and programmes, in order to attain their short-, medium-, and long-term objectives on agriculture and food security.

The Declaration covers a broad range of human-rights-relevant issues including the sustainable use and management of natural resources and human health. This is because increasing temperatures and declining precipitation in the region resulting from climate change are likely to reduce yields for primary crops in the next decades, changes which will have a substantial impact on food security in SADC, although the

34 SADC (2020b).

extent and nature is still uncertain.³⁵ Periods of drought and flooding will have an impact on food availability, food access, and on nutrient access.³⁶ It is predicted that the impacts of climate change, such as sea-level rise, droughts, heat waves, floods and rainfall variation, could push millions of people into malnutrition and increase the number of people facing water scarcity.³⁷

4.4.2 The SADC Charter of Fundamental and Social Rights

The 2003 Charter of Fundamental and Social Rights in SADC, although not legally binding, is an important human rights document that specifies the objectives laid down in Article 5 of the SADC Treaty for the employment and labour sector. The Charter enshrines the right to a safe and healthy environment, among others. To mobilise the policy value, and indeed the legal force, of a right to a safe and healthy environment in the SADC regime requires the introduction of likely human rights impacts and outcomes. For instance, are the specific rights potentially affected by climate change – the rights to food, water, shelter, and health or rights associated with gender, children and indigenous peoples – addressed in context? The right to a safe and healthy environment become highly relevant to the design and implementation of approaches to adverse environmental effects in policy and legal terms. This dimension includes arguments based on human rights obligations of SADC members under a variety of international law instruments. These range from the integration of human rights into country strategies in terms of priority entitlements or more procedural rights that are relevant to the design and implementation of national policies (e.g. right to information, participation, or access to decision-making). Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed in the concept environmental justice.³⁸ Internationally, the experience of courts that have been asked to decide on cases with regard to environmental rights shows that the judiciary is crucial when it comes to interpreting existing law and policy in a way that takes into account environmental concerns. In the 2009, South African case of *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, O’Reagan J held that³⁹

[t]he purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of Government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds Government accountable and requires it to account between elections [for] specific aspects of Government

35 Boko *et al.* (2007); Niang / Ruppel (2014:1202).

36 Ziervogel *et al.* (2006b). Niang / Ruppel (2014:1221).

37 Niang / Ruppel (2014:1217).

38 Ruppel (2010h:323).

39 *Lindiwe Mazibuko and Others v City of Johannesburg and Others* Case CCT 39/09 [2009] ZACC 28.

policy. When challenged as to its policies relating to social and economic rights, the Government agency must explain why the policy is reasonable.

The aforementioned reasoning does not only apply to the domestic level and should thus in future also be considered on the regional level. This shall become even clearer in the passage below dealing with SADC law enforcement and relevant case law.

4.4.3 SADC Climate Change Strategy and Action Plan

The SADC Climate Change Strategy and Action Plan (2015-2020) has been drafted to “provide a regional framework for collective action and enhanced cooperation in addressing climate change issues in order to improve local livelihoods, achieve sustainable economic growth and contribute fairly towards preserving a global good”.⁴⁰ Its objectives include the reduction of vulnerability and the managing of risks related to climate change and climate induced extreme events through the effective implementation of adaptation programmes; the promotion of the reduction of greenhouse gas emissions at below business as usual levels taking into consideration the respective capabilities of member states; and the enhancement of the region’s ability and capacity to mobilise resources, access technology and build capacity to facilitate adaptation and mitigation actions.

4.4.4 SADC Regional Biodiversity Strategy

The SADC Regional Biodiversity Strategy was signed in 2008 to provide guidelines that build the region’s capacity to implement provisions of the Convention on Biological Diversity and to provide a framework for obtaining regional consensus on key biodiversity issues. Its vision is to conserve biodiversity within SADC and “to sustain the region’s economic and social development in harmony with the spiritual and cultural values of its people. Its goal is to promote equitable and regulated access to, sharing of benefits from, and responsibilities for protecting biodiversity in the SADC region.”⁴¹

40 SADC (2015:12).

41 SADC (2008).

4.4.5 SADC Law Enforcement and Anti-Poaching Strategy

The SADC Law Enforcement and Anti-Poaching Strategy (LEAP) was adopted in 2017.⁴² The objective of this Strategy is to reduce the level of poaching and illegal trade in wildlife fauna and flora and enhance law enforcement capacity in the SADC Region. The focus of the Strategy is on enhancing legislation and judicial processes, the reduction of wildlife crime and illegal trade and the improvement of field protection among others. A Regional Wildlife Crime Prevention and Coordination Unit (WCPCU) has been established as per the Strategy and the SADC Trade in Wildlife Information eXchange (TWIX) System has been launched.

4.5 The SADC Judicial Body

Given that, in the legal sense, only provisions of a binding nature can be enforced, the SADC Treaty and its protocols are pivotal to enforcing environmental provisions within SADC. The binding nature of such legal provisions is intrinsically linked to enforcement and dispute settlement mechanisms, which is why judicial bodies are created. Under the legal umbrella of SADC, such a judicial body was conceived in the form of the SADC Tribunal.

4.5.1 The SADC Tribunal: The Beginnings

The SADC Tribunal was established in 1992 by Article 9 of the SADC Treaty as the judicial institution within SADC. The inauguration of the Tribunal and the swearing in of its members took place in November 2005 in Windhoek, Namibia. The Council designated the seat of the Tribunal to be in Windhoek. The judicial body began hearing cases in 2007. No case dealing specifically with environmental issues has been received.

Originally, the Tribunal was established to have the mandate to adjudicate disputes between states and between natural and legal persons in SADC and to have jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community and that confer jurisdiction on the Tribunal.⁴³ In this context, the SADC Tribunal also had jurisdiction over any dispute arising from the interpretation or application of environmentally relevant Protocols. The Tribunal was primarily set up to resolve disputes arising from closer economic and

42 See <https://bit.ly/34Diphm>, accessed 14 February 2022.

43 Article 15(2) of the Protocol on the Tribunal and Rules of Procedure thereof.

political union.⁴⁴ However, the Tribunal in the 25 cases it heard between its operationalisation in 2007 and 2010, has demonstrated⁴⁵ that it could also be called upon to consider the human rights implications of economic policies and programmes.

4.5.2 The *Campbell* Case

The following case with reflects the promising beginnings of the SADC Tribunal before it had been cut its wings. It is to be seen as decisive trigger in the saga around the SADC Tribunal and it is as such of utmost importance for judicial developments within the SADC.⁴⁶

In 2005, the Constitution of Zimbabwe was amended. The Constitutional Amendment (No. 17) Act 2005 allowed the Government to seize or expropriate farmland without compensation, and it bars courts from adjudicating on legal challenges filed by dispossessed and aggrieved farmers. The practical implications of the Amendment Act resulted in farm seizures, where the majority of the approximately 4,000 white farmers were forcibly ejected from their properties with no compensation being paid for the land. On 11 October 2007, Mike Campbell (Pvt) Ltd, a Zimbabwean-registered company, and others instituted a case with the SADC Tribunal to challenge violations by the expropriation of agricultural land in Zimbabwe by that country's Government. Mike Campbell had purchased the farm in question on the open market in 1980, after Zimbabwe's Independence.

The Zimbabwean Constitutional Amendment (No. 17) Act 2005 allowed the government to seize or expropriate farmland without compensation, and it bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved farmers. The practical implications of the Amendment Act resulted in farm seizures, where the majority of the approximately 4,000 white farmers were forcibly ejected from their properties with no compensation being paid for the land. The only compensation the government paid was for developments on the land such as dams, farm buildings and other improvements.

Section 16B of the Zimbabwean Constitution deprives affected landowners of their right to seek remedy within domestic courts.⁴⁷ In fact, when the applicants in this case approached the SADC Tribunal seeking an interim order in terms of Article 28 of the

44 Viljoen (2007:503).

45 *Mike Campbell and Another (PVT) Limited v The Republic of Zimbabwe* SADC (T) 2/2007 (cited hereafter as the *Campbell* case).

46 For more information on the SADC Tribunal and the *Campbell* Case see for example De Wet (2020), Phooko / Nyathi (2019), Ruppel (2012a, 2011a, 2009a, b, c, k), Ruppel / Bangamwabo (2008) and Ruppel / Ruppel-Schlichting (2017b).

47 Section 16B(3) of the Zimbabwean Constitution reads as follows: "(...) [A] person having any right or interest in the land (expropriated land) shall not apply to court to challenge the acquisition of the land by the state, and no court shall entertain such challenge (...)".

Protocol as read with Rule 61(2) and (5) of its Rules of Procedure, the respondent state argued that the application had not been properly placed before the Tribunal in that the applicants had not exhausted local remedies in terms of Article 15(2) of the Protocol.⁴⁸ When the matter was filed with the Tribunal in 2007, the Supreme Court of Zimbabwe, sitting as a Constitutional Court, was still dealing with the constitutional challenge of Section 16B of the Zimbabwean Constitution brought by the same applicants.⁴⁹ The relief being sought from the highest court in Zimbabwe was similar to that which the applicants sought from the SADC Tribunal. However, the Tribunal held as follows:⁵⁰

Referring to the issue of failure to exhaust local remedies by applicants, we are of the view that the issue is not of relevance to the present application but that it may only be raised in the main case. It may not be raised in the present case in which applicants are seeking an interim measure of protection pending the final determination of the matter.

It was put forward by Campbell that the constitutional amendments behind the farm seizures were contrary to SADC statutes, and that the Supreme Court of Zimbabwe had failed to rule on an application by Campbell and other white Zimbabwean commercial farmers to have the race-based acquisition declared unlawful.⁵¹ On 13 December 2007, the SADC Tribunal ruled that Campbell should remain on his farm until the dispute in the main case had been resolved by the Tribunal.⁵² The main hearing before the SADC Tribunal originally scheduled for 28 May 2008 was postponed until 16 July 2008. In the meantime, Campbell and members of his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal.⁵³ On 18 July 2008, applicants and other interveners in the *Campbell case* made an urgent application to the Tribunal seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders.

After hearing the urgent application, the Tribunal found that Zimbabwe was indeed in contempt of its orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the SADC Summit for the latter to take appropriate action. On 28 November 2008 the SADC Tribunal in its final decision ruled in favour of Mike Campbell and 78 other white commercial farmers. In its decision the Tribunal held that the Republic of Zimbabwe was in breach of its obligations

48 *Mike Campbell (Pvt) Ltd and others v the Republic of Zimbabwe*, SADC (T) Case No. 2/2007. Interim order dated 13 December 2007.

49 *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* 2008 ZWSC 1 (124/06) (22 January 2008).

50 *Mike Campbell (Pvt) Ltd and others v the Republic of Zimbabwe*, SADC (T) Case No. 2/2007. Interim order dated 13 December 2007.

51 Grebe (2008aa).

52 Cf. Campbell Interim order (13 December 2007). This interim relief was also applied for by and granted to other applicants/intervenors on 28 March 2008; cf. cases SADC (T) 03/08, 04/08 and 06/08.

53 Grebe (2008b).

under Articles 4(c) and 6(2) of the SADC Treaty and that the applicants had been denied access to the courts in Zimbabwe; the applicants had been discriminated against on the ground of race;⁵⁴ and fair compensation had to be paid to the applicants for their lands compulsorily acquired by the Republic of Zimbabwe. The Tribunal further directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of those applicants who had not yet been evicted from their lands, and to pay fair compensation to those who had already been evicted.

The ruling was considered to be a landmark decision to influence the legal landscape in the SADC region.⁵⁵ Despite the rule that the Tribunal's decisions are final and binding,⁵⁶ at the beginning of 2009 the Zimbabwean government announced that it would not accept the Tribunal's judgement in the Campbell case.⁵⁷ Subsequently, the farm of Mike Campbell was invaded.⁵⁸

On 7 May 2009, an urgent application was filed with the Tribunal, seeking, in substance, a declaration to the effect that the respondent was in breach and contempt of the Tribunal's decision of 28 November 2008 in the *Campbell* matter. In its decision on 5 June 2009,⁵⁹ the Tribunal noted "that the respondent has not taken part in the proceedings since, as learned Counsel for the respondent has put it, he lacks instructions from the respondent". The Tribunal further held that "the applicants have adduced enough material to demonstrate that the existence of a failure on the part of the respondent and its agents to comply with the decision of the Tribunal has been established".

54 The issue of racial discrimination was decided by a majority judgement (4 to 1). Judge O.B. Tshosa, in his dissenting opinion, concluded that 'Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under Article 6(2) of the Treaty'. He argues that 'the target of Amendment 17 is agricultural land and not people of a particular racial group and that – although few in number – not only white Zimbabweans have been affected by the amendment'. Cf. *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe* SADC (T) Case No. 2/2007.

55 Ruppel (2009j).

56 SADC Treaty, Article 16(5).

57 On 28 February 2009, Zimbabwe's President Robert Mugabe said that "[t]here is no going back on the land reforms", and that "[s]ome formers went to the SADC tribunal in Namibia but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC tribunal". See *The Namibian* (2009a).

58 On 25 February 2009, Michael Campbell and his wife had to leave the farm in fear of their safety after a group of two vehicles led by Peter Chamada, nephew of Cabinet Minister Nathan Shamuyarira, claiming to be from the Lands Office, came to the farm and said that they did not care about the law or the police, and that they had come to take over the land. Cf. *The Namibian* (2009b).

59 *Campbell v The Republic of Zimbabwe* SADC (T) Case No. 03/2009 1 (5 June 2009).

Late President Robert Mugabe, in the course of his 2009 birthday celebrations, then qualified the Tribunal's decision as 'nonsense' and 'of no consequence'.⁶⁰ Zimbabwe has not been censured by the Summit over its controversial land reform programme. Despite the Tribunal's rulings in the Campbell case, seizures of white-owned farms have continued. The Campbell farm has been robbed on numerous occasions and in August / September 2009, the homesteads of Mike Campbell and his son-in-law Ben Freeth, respectively, were destroyed by fire.⁶¹

4.5.3 Suspension of the SADC Tribunal and Subsequent Developments

Surprisingly, the SADC Heads of State and Government suspended the Tribunal during 2010. In all probability, this was linked to the continued non-compliance by Zimbabwe with the Tribunal's judgments. It was decided that "a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months".⁶²

In August 2010, the SADC committee of justice ministers and attorney generals was tasked to examine the role and functions of the Windhoek-based Tribunal and also the implications of a member state ignoring its rulings. The Tribunal was at this stage temporarily suspended as Summit also instructed that the SADC Tribunal may not hear new cases until the role, functions and terms of reference of the Tribunal have been reviewed.⁶³ A consultancy firm was then appointed to review the operations of the SADC Tribunal. The study *inter alia* addressed the role and functioning of the Tribunal, its jurisdiction, the interface with national laws in SADC, the mandate of the existing appeals chamber of the Tribunal, the recognition and enforcement of the Tribunal's decisions, the qualifications and the process of nomination and appointment the SADC Tribunal Judges, the legal status of the SADC Tribunal Protocol and the overall role and functioning of the Tribunal, focusing in particular on practical aspects of its effectiveness.

What is important to note is that this independent review had been commissioned, extensive consultations conducted and, the recommendations discussed by stakeholders before being amended and unanimously approved by SADC Senior Law Officials at their meeting held in April 2011 in Swakopmund, Namibia. Shortly thereafter,

60 And on 26 January 2010, the Zimbabwean High Court ruled that the Tribunal's decision could not be enforced at national level as this would be in contradiction to the Constitution of Zimbabwe. See *Gramara (Pvt) Ltd and Colin Bailie Cloete v The Government of the Republic of Zimbabwe*, High Court of Zimbabwe decision dated 26 January 2014.

61 Raath (2009).

62 See SADC Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, 17 August 2010; <https://bit.ly/3w4KXsf>, accessed 14 May 2021.

63 Ndlovu (2011).

however, SADC Ministers of Justice and Attorney Generals again started to question the review.

At an Extraordinary Summit of Heads of State and Government in May 2011, the following was decided:⁶⁴

- The Summit reiterated the moratorium on receiving any new cases or hearings of any cases by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved;
- the Summit decided not to reappoint members of the Tribunal whose term of office expired on August 31, 2010;
- the Summit decided not to replace members of the Tribunal whose term of office will expire on October 31, 2011; and
- the Summit mandated the Ministers of Justice/Attorneys General to initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report at the Summit in August 2011 and the final report to the Summit in August 2012.

These decisions have been subject to critical debate.⁶⁵ With its decisions, the SADC Summit decided against its original duty to support its Tribunal in the judgment it had provided in the Campbell case. It decided not to take appropriate action against Zimbabwe's non-compliance but rather defer consideration of the matter by questioning the legitimacy of its own legal framework. At the 32nd Session of the Summit of the Heads of State and Government in 2012, it was *inter alia* concluded as follows:

24. Summit considered the Report of the Committee of Ministers of Justice/Attorneys General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

De facto, the aforementioned decision meant a drastic limitation of the competence (if not paralysis) of the SADC Tribunal as it was initially provided with the competence to deal with proceedings initiated by private parties against either the community or member states. Without the competence to deal with proceedings initiated by private parties the new SADC Tribunal will only operate with its wings cut and most likely become unemployed, due to the fact that basically all proceedings before the old SADC Tribunal had so far been initiated by natural or legal persons. Instead of strengthening the mandate of the new SADC Tribunal it has been weakened at the cost of national sovereignty thinking. The fear of loss of state autonomy, the lack of vision

64 Communiqué of the Extraordinary Summit Heads of State and Government of the Southern Africa Development Community Windhoek, Republic of Namibia, 20 May 2011. At <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf>, accessed 14 May 2021.

65 For a critical view on these decisions see for example Pillay (2011) as well as the letter to the Executive Secretary of SADC by former president and members of the SADC Tribunal dated 13 June 2011 available at <http://www.az.com.na/fileadmin/pdf/2011/az/SADC-Letter-06-24-11.pdf>, accessed 10 May 2012.

and the unwillingness to compromise are obstacles that prompted SADC to decide against strengthening SADC citizens' rights in the regional community.

Since then, the Tribunal in its original form remained suspended. In August 2014, the SADC Council of Ministers have considered and approved a draft new Protocol on the SADC Tribunal and recommended it to Summit for further consideration, approval and signature.⁶⁶ Not only with regard to the variety of binding SADC Protocols with an environmental impact, the revival of the Tribunal would have been an important step towards the development of environmental jurisprudence at the African sub-regional level. However, the draft Protocol for the Tribunal limits its competence, as it was initially provided with the competence to deal with proceedings initiated by private parties against either the community or member states.

4.5.4 The SADC Administrative Tribunal (SADCAT)

At its 35th Summit held in Gaborone, Botswana in August 2015, the SADC Heads of State and Government approved a resolution on the establishment of the Southern African Development Community Administrative Tribunal (SADCAT), which at present is the only operational judicial body within the SADC.⁶⁷ The SADCAT's tasks are limited to resolving labour disputes between the SADC Secretariat and SADC employees. Following the creation of SADCAT, seven SADCAT judges have been appointed by the SADC Council of Ministers in March 2017. The SADCAT is based in Gaborone, Botswana and has heard five cases from 2018 to 2020.

4.5.5 Revival of the SADC Tribunal?

The decision of SADC Heads of States to suspend the SADC Tribunal has subsequently been questioned in national courts.⁶⁸ The Constitutional Court of South Africa ruled that the decision by former President Jacob Zuma to sign on behalf of South Africa the decision to suspend the tribunal was unconstitutional, irrational and unlawful.⁶⁹ According the court, this amounted to denial of justice and human rights

66 See Outcome of the SADC Council of Ministers Meeting held on 14-15 August 2014 at Victoria Falls, Zimbabwe. At http://www.sadc.int/files/2314/0821/8588/Outcome_of_the_Council_of_Ministers_meeting_of_August_14_and_15_2014L.pdf, accessed 14 May 2021.

67 See Communiqué of the 35th Summit of SADC Heads of State and Government held in Gaborone, Botswana 17-18 August 2015. At <https://bit.ly/3rNKM5n>, accessed 14 February 2022.

68 For a critical discussion of the controversial role of litigation in the struggle to revive individual access to the SADC Tribunal See De Wet (2020). See also Phooko / Nyathi (2019).

69 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018).

protection and it was ordered that the President must withdraw South Africa's signature. At the SADC Summit in Dar es Salaam in 2019, South African President Cyril Ramaphosa withdrew South Africa's signature from the 2012 decision. The High Court in Tanzania in a similar case ruled that undermining the operational capacity of the Tribunal was contrary to the principle of the rule of law, which is essential for the protection of human rights, democracy and good governance and thus a violation of the right to a fair hearing before an independent tribunal as entrenched in the SADC Treaty.⁷⁰ Whether the tribunal will be reinstated - and if so, under what conditions and with what mandate - remains to be seen. SADC's vision includes a common future that will ensure economic and social well-being for all the people of Southern Africa.⁷¹ The objectives of the SADC Treaty in particular include "promotion and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication".⁷² Although a basic legal framework is in place, these objectives stand largely unfulfilled at present. Unsustainable development in SADC is a reality due to "economic and sectoral policies which are too narrowly conceived and focused and which neglect the negative consequences on the people and the environment."⁷³ Other obstacles in SADC include "duplication and fragmentation of authority" and "institutional failure (...) caused by policies that are not backed up by legislation and therefore cannot be legally enforced".⁷⁴

The SADC legal framework provides for a broad bandwidth of provisions with high relevance for environmental protection and it cannot be overemphasised that the rule of law, good governance and the protection of the environment play an essential role in economic development which again contributes to growth, productivity and employment creation, all being essential for sustainable reductions in poverty. However, a major part of any successful legal strategy towards sustainable development includes enforcement. The rule of law means nothing without effective access to justice, without compliance with and enforcement of judgments made by legitimate courts.

70 *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and others* (2019) 23 of 2014 (High Court).

71 Cf. <https://www.sadc.int/about-sadc/overview/sadc-vision/>, accessed 14 May 2021.

72 Article 5 Amended Declaration and Treaty of SADC 1992.

73 Susswein (2003:297).

74 Ibid:303.

