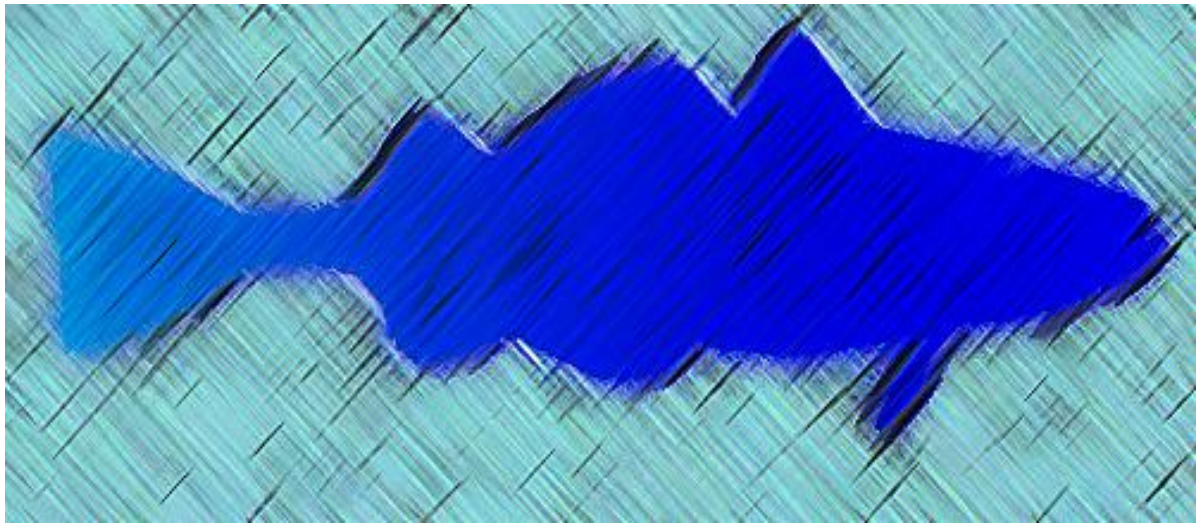


# A BCLME REGIONAL INTEGRATION STUDY REGARDING TRADE IN FISH AND FISH PRODUCTS

Project LMR/SE/03/02:  
Equitable Trade in Fish Resources and Fish Products



PRESENTED TO:



BCLME Activity Centre for Living Marine Resources

PRESENTED BY:



ON BEHALF OF:



THE CONSORTIUM

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## 1. SUMMARY

The potential for integration and convergence in the fishing industry between Angola, Namibia and South Africa is examined, from the perspective of the regional dynamic brought to bear in the field of the trading regime. The three BCLME States are all members of the Southern African Development Community (SADC), while Namibia and South Africa are also the leading participants in the Southern African Customs Union (SACU). The analysis is thus focused on the SADC Protocol on Fisheries, and comments are made on the suitability of this instrument to facilitate collaboration in support of trade by the three BCLME countries, allied to the SADC Protocol on Trade. This investigation is augmented by looking at the influence of the SACU Agreement on the potential for harmonization under the SADC system. This is followed by a brief commentary on the role of fisheries in the trade relationship between the EU, South Africa and the Economic Partnership Agreement candidate States (Angola and Namibia).

The overall finding of the study was that the SADC *legal acquis* (body of law), both in the fields of fisheries and related trade law, provides a resounding undertaking to pursue a harmonized legal and policy framework within SADC. This framework provides for, and in fact encourages this harmonization at devolved groupings of SADC Members, and as such is fully supportive of the BCLME harmonization initiative. The necessary enabling legal regime is essentially sound and the progression of the harmonization process now depends on the political impetus and capacity allocations to proceed to the actions of implementation. The legal framework most certainly supports the convergence of the fisheries sector to the extent that Angola, Namibia and South Africa are able to operate as neatly fitted, individual parts making up the common elements of a single jigsaw puzzle in creating a seamless picture of orderly congruity along the Benguela Current Large Marine Ecosystem.

## 2. INTRODUCTION

This report is an analysis of the potential for integration and convergence in the fishing industries of Angola, Namibia and South Africa. In the BCLME Consortium's Inception Report, it was noted that the desirability for this convergence is voiced in the SADC Protocol on Fisheries. The following investigation focuses on the potential for the achievement of the aims of the SADC Protocol, in terms of the regional harmonization of national fishing industry regulations and practices, and in context of the trade regime.

Angola, Namibia and South Africa are all members of the Southern African Development Community (SADC). Namibia and South Africa are also the leading participants in the Southern African Customs Union (SACU). While the thrust of the present project falls (in the main) within the ambit of the SADC Protocol on Fisheries, allied to the SADC Protocol on Trade, the analysis of the Protocol will need to be augmented by an additional examination of the 'millennium' revision of the SACU Agreement. In general, the project calls for research into the development of appropriate legal mechanisms at various levels. As the regulatory legal framework will most likely only be of value if implemented jointly by the BCLME countries, the inter-state collaboration mechanism between the three BCLME countries will be crucial. The pre-existence of a regional initiative under the SADC banner is a logical facilitation mechanism to house this collaboration. It is well understood that institutional capacity to support common legal regimes in the southern African region is not extensive. The ability to work within existing institutional frameworks would thus be sensible, as the countries simply do not have the depth of bureaucratic resources to replicate regional structures for different collaborative efforts in the region. In the face of this reality the examination of the suitability of the existing SADC frameworks assumes a high degree of importance in establishing a legal framework to ensure optimal, equitable and sustainable development of the fisheries sectors in the BCLME countries.

The report will commence by examining and elucidating the SADC Protocol on Fisheries and commenting upon the suitability of this instrument to facilitate collaboration by the three BCLME countries. Allied to this, an exposition of the SADC Protocol on Trade will be provided, with the relevant cross linkages to the Protocol on Fisheries identified.

The report will then examine the SACU Agreement (2002) and comment upon the influence (if any), upon the matters identified under the SADC system. This will be followed by a brief comment on the role of fisheries in the Trade Development and Cooperation Agreement (TDCA) between the EU and South Africa and the related Economic Partnership Agreement currently being considered between the SACU states of Angola, Mozambique and Tanzania (excluding South Africa).

Upon conclusion of the analysis, a preliminary finding on the potential for harmonization will be expressed. This will be a preliminary conclusion, based solely on regional law considerations, with the aim of providing an input to the other studies within the BCLME/LMR/03/02 project, in order to finally draw a wider finding on the harmonization hypothesis.

The term 'harmonization' needs to be understood *ab initio*<sup>1</sup> as this is essentially the grail that the present analysis pursues. Black's Law Dictionary (7<sup>th</sup> edition) defines the verb 'harmonize' as derived from the noun 'harmony' meaning 'agreement or accord; conformity'. The Shorter Oxford English Dictionary (5<sup>th</sup> edition) defines 'harmonization' as 'the action or process of bringing into harmony or agreement; reconciliation, standardization'. The same source defines the underlying noun 'harmony' as 'combination or adaptation of parts, elements, or related

<sup>1</sup> Prior to or upon commencement.

things, so as to form a consistent and orderly whole, agreement, accord, congruity'. It is thus understood that harmonization does not necessarily infer that legislation will be standardised to the extent that it needs to be exactly the same in all SADC Members, but rather that they are similar enough to operate as a neat fit, as would the individual parts that are the common elements of a jigsaw puzzle, in creating a seamless picture of orderly congruity.



### 3. THE SADC PROTOCOL ON FISHERIES

This section will explain the objectives and operation of the SADC Fisheries Protocol in light of the rights and constraints that the text brings to bear on member countries and the relationship that this bears to the other international agreements that deal with the same subject matter.

Essentially the Agreement has three broad thrusts in regional co-operation:

1. Human development through food security and health.
2. Economic beneficiation via industrial development of the sector.
3. Resource protection and conservation for sustainability.

The structure of the Agreement may be viewed in six distinct elements, set out in the table below.

<b>Structure of the SADC Protocol on Fisheries</b>	
<b>Distinct Element</b>	<b>Section of the Agreement</b>
1. Scope & Context	Preamble & Articles 1 - 4
2. National & International	Articles 5 & 6
3. Integration Provisions	Articles 7-13 & 18
4. Social Clauses	Articles 14 & 15
5. Trade & Science	Articles 16 & 17
6. Treaty Administration	Articles 19 - 31

#### 3.1 SCOPE & CONTEXT

The preamble correctly places the Protocol within the context of the wider Declaration and Treaty of SADC (the Treaty). The Treaty recognises the ‘sovereign equality’ of all Member States in applying the rule of law for the mutual benefit of the Member States.<sup>2</sup> In light of this the preamble then emphasises the ‘important role of fisheries in the social and economic well-being and livelihood of the people of the Region, notably in ensuring food security and the alleviation of poverty with the ultimate objective of its eradication’. This wording essentially paraphrases Article 5 of the Treaty and transplants this into the fisheries context. The interplay between sovereign action and communal action is raised again in Article 4 of the Protocol which states that the responsibility for the implementation of the Protocol is a primarily ‘national’ matter. This is then followed by a qualification that in the case of shared resources there is a duty to co-operate with one another. This reflects a lucid recognition that while Members do not intend to relinquish their sovereign power to legislate, a level of derogation to regional arrangements is indeed needed to attain the aims of Protocol when faced with the physical reality of a commonly shared resource.

The preamble then continues to state that the Members are ‘convinced’ of the necessity for joint co-operative and integrative actions at a regional level to optimise the sustainable use of the fisheries resources of SADC for the ongoing benefit of the people of the region. This is a crucial statement for current purposes as it indicates a pre-existing high level of commitment at a political level to the concept of the integration of the fisheries sector. Furthermore, this

<sup>2</sup> Declaration and Treaty of SADC Article 4 available on: <http://www.tralac.org/scripts/content.php?id=439#article4>.

leads to a recognition of the trans-boundary character of fisheries resources and ecosystems and, hence the need to 'co-operate in the management of shared resources'. This reference to 'ecosystems' provides the opening at an early stage for the dovetailing of the Protocol with the present BCLME initiative.

In Article 2 the scope of the Protocol is cast widely to include resources within the jurisdiction of a Member, resources that extend outside the areas under their jurisdiction (high seas resources) and international activities outside SADC that promote the objectives of the Protocol<sup>3</sup>. Conceivably the reference to international activities would not only include those activities related directly to fisheries but also the work generated in other international fora, such as the WTO where the international trade and subsidisation issues in the multilateral fisheries arena are addressed. Article 2 neatly provides for this linkage in fisheries trade.

Within this scope the Protocol seeks the 'responsible and sustainable use of the living aquatic resources and aquatic ecosystems' (Article 3) in order more specifically to:

- a) promote and enhance food security and human health;
- b) safeguard the livelihood of fishing communities;
- c) generate economic opportunities for nationals in the Region;
- d) ensure that future generations benefit from these renewable resources; and
- e) alleviate poverty with the ultimate objective of its eradication.

In pursuing these objectives, States have undertaken the principle of ensuring the participation of 'all stakeholders'. While this is a non-obligatory<sup>4</sup> provision, it does at least provide the platform for the potentially crucial role that the fishing industry itself could play in the harmonization process under the Protocol<sup>5</sup>. It would have been more reassuring if this was couched in affirmative language making this a firm obligation. However, the concept of sovereign action is applicable here as it has to be accepted that the level of domestic consultation with the private sector and civil society is not conducted in a uniform manner within SADC countries<sup>6</sup>.

One would thus conclude that the text is contextually very encouraging in setting a good scope for harmonization.

## **3.2 NATIONAL & INTERNATIONAL**

### **3.2.1 Article 5 (National)**

National and international responsibilities of the States are covered by Articles 5 and 6 of the Protocol respectively.

<sup>3</sup> In line with the preamble this would refer specifically, but not exclusively, to the United Nations Convention on the Law of the Sea (1982) and the FAO Code of Conduct for Responsible Fisheries.

<sup>4</sup> Article 4.2 uses the term 'shall endeavour'.

<sup>5</sup> It is notable that this principle is covered again in Article 7.7. The wording again refers to best endeavours and further widens government discretion by limiting civil & business participation to 'the appropriate level'.

<sup>6</sup> From a societal perspective it is notable that the matter of 'gender equality' is referred to both in the preamble and in the principles under Article 4. This may bear further investigation as a separate analysis outside of the current project.



In the area of national responsibility the wording of the Protocol is very firm with each of the five paragraphs conveying definite duties upon the States. Essentially the responsibilities are threefold:

1. Harmonization of laws.
2. Control of the actions of nationals and vessels.
3. Avoiding over exploitation.

The matter of harmonization is particularly pertinent for present purposes and is thus quoted in full (Article 5.1):

‘State Parties shall take measures, at national and international levels, suitable for the harmonization of laws, policies, plans and programmes on fisheries aimed at promoting the objective of this Protocol.’

On first reading this provision provides a definite obligation to Members to seek harmonization of their legal and policy environments in terms of the Protocol. On closer inspection one would have to delve into the question as to what exactly the States intend to harmonize. The harmonization could be at two levels, either States will harmonize their own laws and policies within their domestic jurisdictions. This is supported by the notion that ‘domestically’ is the only place that they have competence to do anything concrete. The second interpretation is that the harmonization refers to an alignment of domestic laws and policies with the domestic laws and policies of other SADC Member States.

When one evaluates these options as a treaty interpreter one considers the ordinary meaning of the text, taken in context and in light of its object and purpose<sup>7</sup>. In the present context the Protocol text is couched within a regional agreement which by its very nature is an allusion to a context that is wider than just national application. The Protocol itself does not define the term ‘harmonize’ within its terminology in Article 1 of the Protocol, so this does not give an indication of the breadth of the coverage of the term. However the Protocol, by its own Preamble places the Protocol within the realm of Article 5 of the main SADC Treaty. The SADC Treaty clearly states that it sees its objective (*inter alia*) to ‘harmonize political and socio-economic policies and plans of Member States’. This contextual link provides a very strong indication that the “harmonization” mentioned within the Protocol does indeed refer to a harmonization of the legislation and policy of the States as between one State and another. This is supported by the wording of text which specifically refers to measures at ‘national and international’ levels. If the purpose of the text was to indicate a harmonization of domestic law with domestic policy and domestic law with other domestic law, then it is most unlikely that the word ‘international’ would have been introduced within the phrase. It is thus safe to conclude that States have undertaken a duty to harmonize their laws, policies, plans and programmes in the fishing sector at a regional level.

In maintaining discipline over the actions of their citizens, Member States assume a responsibility to govern the behaviour of their natural and judicial persons as well as vessels (whether fishing vessels or not). This responsibility extends to an extra territorial application of this discipline to ‘areas within and beyond the limits of national jurisdiction’<sup>8</sup>. In this instance it would be difficult to envisage how this extraterritorial discipline could be exercised without a close level of cooperation between the States; such cooperation logically being enhanced by a harmonization of their legal and policy regimes. The text follows to say that a State shall only authorise the use of nationally flagged vessels for fishing to the extent that it is able to

<sup>7</sup> The Vienna Convention on the Law of Treaties Article 31.

<sup>8</sup> SADC Protocol on Fisheries Article 5.2.

'exercise its responsibilities' within the waters to which the Protocol applies. This highlights the regional nature of the fishing industry, as the reference to the waters to which the Protocol applies refers to the collective waters of the SADC States that are signatories to the Protocol. States thus assume a collective responsibility for the actions of their nationals<sup>9</sup> throughout the collective sphere of SADC fishing waters. The required assurance of compliance and abstinence from action by nationals to undermine the effectiveness<sup>10</sup> of the provisions of the Protocol effectively place a duty on these nationals, *inter alia*, to respect any harmonization initiatives under the Protocol.

In the third area of the threefold responsibility (avoidance of over-exploitation) the text in paragraph 5.5 narrows and makes reference only to conservation and management measures under the 'national jurisdiction' of the States. This is perhaps unexpected as one might expect the theme of extra-territorial responsibility to be continued here. Perhaps the omission is deliberate to the extent that the extraterritorial responsibility assigned in respect of 'nationals' is related to the notion that such nationals are mobile across SADC waters while conservation strategies applied nationally cover the activity of any SADC national moving into any domestic water of a Member State. The distinction seems subtle at best and the overall impression relayed by the text of Article 5 is certainly an impression of regional harmonization.

### 3.2.2 Article 6 (International)

International relations in terms of this Article refer to international relations outside of the SADC context. The areas cover a non-exhaustive list of international fora and bodies which are fully listed as appendices to the Protocol.<sup>11</sup> The provision is non-obligatory<sup>12</sup> and is merely aspirational in seeking to have SADC States develop common positions, coordinate and undertake complementary actions in their dealings with other international fora. In aspiring to do this it would follow that any prior attempts at regional harmonization within SADC would greatly assist in bringing about the endeavoured coordination on the wider international sphere. It is notable that in defining the international fora, appendix 1 to the Protocol makes particular reference to the World Trade Organisation and any related body which fosters sustainable fish trade. This reference is one of the most direct links established within the Fisheries Protocol to the multilateral trading system.

The clause does introduce a binding obligation to facilitate the free movement of people, vessels, vehicles and equipment required to foster the furtherance of the objectives of the Protocol. This obligation is clearly of value to the conduct of trade between the States and this freedom of movement may be considered as closely supporting the concept of 'trade facilitation' which is loosely defined as those flanking measures which ease the flow of goods and serviced within the trading system. What is absent from this undertaking is a reference to the movement of aquatic resources in the sense of supporting the cross border movement of fish and fish products to foster trade. It is suggested that the insertion of such a reference at this juncture would consolidate the synergy between this Protocol and the SADC Protocol on Trade.

<sup>9</sup> Article 1 of the Protocol considers 'nationals' to include persons who are citizens of a State Party and any body corporate, society or other association of persons established under the laws of a State Party.

<sup>10</sup> SADC Protocol on Fisheries Article 5.4.

<sup>11</sup> Appendices 1 & 2 of the Protocol.

<sup>12</sup> Article 6.1 uses the term 'shall endeavour'.

### 3.3 INTEGRATION PROVISIONS

#### 3.3.1 Management of shared resources (Article 7).

In dealing with shared resources the Protocol commences by recognising that the definition of a shared resource may be at issue. The Protocol thus indicates that any determination of this position will be done by a committee of SADC Ministers. The assumption is that this committee is in fact that provided for in Article 19 of the Protocol. It is recommended that for clarity this Article is amended to provide a direct reference to Article 19 for purposes of textual clarity. It is notable that when the Ministers deliberate on this issue, deference is provided to the UNCLOS but only to the extent that the UNCLOS does not interfere with the relevant rights and obligations established under the Protocol. The text thus establishes a hierarchy. Granted this hierarchy is specific to the determination of a shared resource. However this notion could be used as a persuasive argument should it be that an interpreter would need to establish an order of application as between the Protocol and other international laws in other parts of the Protocol. In the present instance this is a moot determination as there is no dispute between Angola, Namibia and South Africa that the BCLME is indeed a shared resource within the ambit of the Protocol.

In managing shared resources the States have a duty to share information as regards:

- a) the state of the shared resources;
- b) levels of fishing effort ;
- c) measures taken to monitor and control exploitation of shared resources;
- d) plans for new or expanded exploitation; and
- e) relevant research activities and results.

The text does not explain how this sharing of information should be done. It is suggested that this would be most expeditiously dealt with as a notification requirement to the Committee that oversees the implementation of the Protocol (Article 19). It is suggested that the notification requirement be textually inserted for purposes of clarity. It is further suggested that this data requirement is moved from its current location in Article 7.3 to a more apt location in Article 18 which explicitly deals with the exchange of information under the Protocol. Indications from the SADC Secretariat are that this information is not yet being compiled, notified or shared as intended under the Protocol. It is suggested that this information is critical in a supportive manner to the wider harmonization objectives under the Protocol and that immediate attention should be paid to the implementation of the data collection and dissemination function under this Protocol.

For current purposes the wording of Article 7.4 is highly relevant. This Article establishes the facility whereby a subset<sup>13</sup> of the SADC States is empowered to 'establish instruments for co-ordination, co-operation, or integration of management of shared resources'. The text suggests a list of five non-exhaustive factors that the proposed instruments could cover. These are:

- a) specialist scientific advisory groups;
- b) joint programmes and projects, in particular on integrated assessment of shared stocks;
- c) joint technical or advisory committees on resources management;

<sup>13</sup> This is taken to be two or more Member States from the text.

- d) joint ministerial commissions with powers to allocate shared resources among State Parties and agree on management measures; and
- e) collaboration in enforcement of management plans for shared resources.

For present purposes item d) above is particularly relevant. This item provides the required functional vehicle for the cooperation between the three countries making up the BCLME. The provision indicates that a tri-national commission so established can be vested with the power to allocate and manage the BCLME aquatic resource. The Protocol thus directly provides for the very collaborative mechanism that the present analysis seeks to foster in the pursuit of legal and policy harmonization. The facility has merely to be established on the initiative of Angola, Namibia and South Africa, and would *ab initio* be compliant with the SADC Protocol on Fisheries.

On a more specific level the text then proceeds to create the facility for the establishment of management plans for shared resources. These management plans are envisaged to cover integrated systems to monitor resource exploitation, enforcement of measures so implemented and the establishment of joint enterprises. In addition these management plans can provide for the principles, policies, and means for the allocation of shared resources<sup>14</sup>.

The text on coordination and management is couched in non-binding language which is indicative of its facilitatory nature. It would be surprising to find that these provisions are binding, as their role is to provide optional policy space for Member States to establish smaller subsets of cooperation within the Fisheries Protocol, should smaller groups of countries (such as the BCLME countries) find this to be a beneficial means to pursuing the effects of the Protocol more widely.

At the SADC level the text does impose firm obligations to act against over-fishing and the development of excess fishing capacity at a regional level, including discipline to prevent the deployment of excess foreign fishing capacity (from outside of SADC) to the extent that such fishing capacity would adversely impact upon the fish resources within SADC.

### 3.3.2 Harmonization of legislation (Article 8)

The text commences with the statement that ‘State Parties shall take measures required to harmonize legislation with particular reference to the management of shared resources.’ This creates a clear and direct duty to harmonize the fisheries legal regimes within SADC. There is a focus upon, but not a limitation to the harmonization in relation to shared resource management. It is suggested that this statement may justify being a stand-alone Article, confirming the integrative provisions expressed in the Protocol’s preamble.

This is supported by the fact that the rest of the Article (paragraphs 2 – 5) deals with matters of law enforcement, with an emphasis on compliance and legal sanction. In the main, the Article criminalises illegal fishing and requires national legislation to reflect the same. Provision is made for ‘hot pursuit’ of vessels, extradition, comparable (read harmonized) penalties and vessel registration. It is recognised that these elements dealt with super-nationally will still need to be consistent with national legislation.<sup>15</sup>

<sup>14</sup> SADC Protocol on Fisheries Article 7.5.c).

<sup>15</sup> This is a healthy refinement of the general principle of international law which provides that the provisions of an international obligation supercede the provisions of conflicting domestic legislation and that non alignment of domestic legislation to the international treaty cannot be raised as a defence for non compliance with the treaty. The current provision proactively seeks to avoid these potential mismatches as a spillover cost of harmonization.

From a drafting perspective it is suggested that these paragraphs would be more suitably housed in Article 9 which deals specifically with law enforcement. This would then also serve to enhance the emphasis on the true harmonization provision under paragraph 1.

### 3.3.3 Law enforcement (Article 9)

The crux of this provision relates to the optimal use of the limited existing law enforcement resources in the region. Member States are tasked to co-operate in the use of surveillance resources with a view to improved cost effectiveness of surveillance activities. This duty stems from the realisation that adequate monitoring underlies any regional effort at managing stocks. In a similar vein to the collaboration envisaged in Article 7.4, a subset of two or more States are authorised to conclude an arrangement to cooperate in the provision of human and physical resources (personnel, vessels, aircraft, communications, databases) for surveillance and law enforcement. This would then follow to the joint appointment of ‘enforcement officers’ to act on behalf of the subset. This cooperation is supported by a “best endeavours”<sup>16</sup> effort to harmonize technical specifications for vessel monitoring systems and surveillance activities.

The text also recognises that compliance and law enforcement is conducted in other international fisheries fora and states a duty for SADC States to co-operate to ensure compliance with and enforcement of such other international management measures.

There is thus a strong impetus for legal harmonization based on the law enforcement provisions of the Protocol.

### 3.3.4 Access agreements (Article 10)

This Article provides for the conditions of entry of non SADC flagged fishing vessels into the waters of SADC Member States. Under this Article Member States undertake 2 harmonization initiatives.

Firstly, there is a binding duty upon Members to set ‘harmonized’ minimum terms of access to SADC fisheries resources for foreign (non SADC) fishing vessels. It is understood that to date these minimum conditions have not been established. In establishing these criteria for foreigners there is a most favourite nation (MFN) provision of application to SADC flagged vessels<sup>17</sup>. This makes good sense as it would be counter productive in pursuit of regional integration within SADC if Member States were able to discriminate more harshly against the access of other SADC flagged vessels to their waters than would be the case for foreign vessels. This might however be a temptation at times, due to the proximity of neighbouring countries providing a more imminent threat. This has at times been at issue in the field of trade under the relevant SADC Protocol on Trade. However, experience has shown that in the exploitation of fishing resources, proximity is not a limiting factor in establishing a competitive advantage, as between locally based vessels and foreign vessels.

Secondly there is a non binding, but enabling provision made to allow Members to establish the agreements for foreign access at a regional level, which could be at SADC level or at a sub-SADC level. This would dovetail with the reference to collaboration between two or more

<sup>16</sup> Article 9.1 e) uses the wording ‘shall strive’.

<sup>17</sup> MFN treatment here is considered akin to that provided for in Article 1 of the General Agreement on Tariffs and Trade – the GATT 1994. This means that the conditions under which SADC-flag vessels fish in the waters of other SADC States shall be no less favourable than those conditions applied to the foreign vessels.



SADC Members referred to in Article 7.4. The text recognises that this may be of particular value in the case of highly migratory species<sup>18</sup>.

This Article makes a direct reference to harmonization and moreover makes this a duty regarding the setting of terms of access for foreign vessels.

### 3.3.5 High seas fishing (Article 11)

The provision on High Seas Fishing is closely connected to the provisions relating to international relations which are covered in Article 6 of the Protocol. The Article essentially acknowledges the right to high seas fishing by SADC Members, and reiterates the gist of Article 6 in emphasising collaboration with international bodies and the presentation of common positions by SADC at such international meetings.

From a drafting perspective it is suggested that this Article could be included within the Ambit of Article 6 or alternatively be located to directly follow the international relations provision.

Harmonization of SADC views and joint positions in this area would appear to be critical. It has been noted by EFA (2003) that there virtually no resources worth exploiting on the high seas that are not already heavily exploited by foreign fishing fleets. These 'high seas' resources fall under the management jurisdiction of existing international or regional fisheries management organizations. These organisations allocate the resources primarily on past catch performance, which has been substantively foreign. If SADC States were to reverse this allocation trend, there would have to be strong joint positions presented at these international fora by SADC Members. A clear benefit exists here in harmonizing positions on high seas fishing in order to obtain an allocation of this resource which is currently elusive to the SADC region.

### 3.3.6 Artisanal, subsistence fisheries and small-scale commercial fisheries (Article 12)

The social element of the Protocol is introduced in this article dealing with small scale fisheries. The Article states that there should be 'rational and equitable balance' in recognition of the potential trade-off and ensuing tension that exists between the social and economic aspects of exploiting fisheries resources.

The Article has its primary focus on State responsibility towards small scale fishing in areas such as development, infrastructure provision and empowerment.

Harmonization is specifically addressed in paragraph 7 which places an aspirational<sup>19</sup> duty on States to harmonize their legislation on traditional resource management systems with due consideration for indigenous knowledge. The need for joint action is again alluded to in the following article (Article 8) in that States need to adopt 'equitable arrangements' which cater for the preservation of pre-existing trans-boundary fishery trade in both goods and services by small scale operators. Although no direct reference is made to harmonization, it is difficult to foresee how traditional cross boundary issues can be addressed without cooperation due to the very nature of the activity straddling the boundaries of singular jurisdictions.

In summary small scale operations are placed largely in the frame of national responsibility and harmonization is not strongly pursued in this instance.

<sup>18</sup> This is understood as meaning species of fish which move seasonally from one ecological area to another, as is the case in the BCLME.

<sup>19</sup> Article 12.7 uses the term 'shall work towards'.



### 3.3.7 Aquaculture (Article 13)

In terms of this Article the producing, processing and marketing of plants and fish is addressed and recognised as a 'distinct enterprise', but limited to 'restricted areas'. While this is relevant to both marine and fresh water operations, the focus seems to be pointed at the use of fresh water resources.

There is however a generally applicable duty to standardise 'guidelines and regulations' for the conduct of environmental impact assessments. This would by necessity entail the harmonization of environmental impact assessment legislation.

### 3.3.8 Information exchange (Article 18)

The exchange of information is an important activity as it is a primary facilitator of any harmonization process. Having access to common information provides the basis for assessing where there are areas of legal and policy divergence, which is the first step in taking positive action to fill in these gaps. To this end the Article confirms that the Members have *agreed* to share 'complete and detailed information' considered essential for achieving the objectives of the Fisheries Protocol<sup>20</sup>. To this end Members are required to 'consult' as to how to firstly harmonize data collection, and secondly enhance the reliability of such data collection. The use of the term consult leaves the text short of requiring Members to take any positive action in these two areas. In all probability consultations may end up being just a process of discussion, without realising any concrete actions.

It is suggested, due to the importance of the information sharing function in the overall harmonization effort, that this provision be amended to confer a positive duty to share information. It should be noted that this in any event seems to be intended if the wording relating to the management of shared resources is considered in Article 7.3. Recall that Article 7.3 imposed a definite obligation on Members to share information as regards:

- a) the state of the shared resources;
- b) levels of fishing effort ;
- c) measures taken to monitor and control exploitation of shared resources;
- d) plans for new or expanded exploitation; and
- e) relevant research activities and results.

The text in Article 7.2 does not explain how this sharing of information should be done. It is suggested that this would be most expeditiously dealt with as a notification requirement to the Committee that oversees the implementation of the Protocol (Article 19). It was previously suggested that the notification requirement be textually inserted for purposes of clarity. It was further suggested that this data requirement is moved from its current location in Article 7.3 to the more apt location in the present Article 18 which explicitly deals with the exchange of information under the Protocol. Indications from the SADC Secretariat are that this information is not yet being compiled, notified or shared as intended under the Protocol. It is suggested that this information is critical in a supportive manner to the wider harmonization objectives under the Protocol and that immediate attention should be paid to the implementation of the data collection and dissemination function under this Protocol.

<sup>20</sup> It should be noted for completeness that there is also a transparency requirement in Article 18.4 whereby Members need to make public not only the and criteria pertaining to the determination of total allowable catches, allocation of quotas, permits, licensing and other rights to the use of living aquatic resources, but also the rationale behind the establishment of such criteria. This transparency is to be commended.

For instance, in their report on the requirements for development of effective cooperative arrangements for the management of shared fish stocks in the SADC region, EFA (2003) have suggested that the implementation of formal shared-stocks management agreements, with standardised requirements for monitoring and data provision, is the most successful way of improving the coverage and compatibility of fisheries data collection systems. By this view it may be inferred that the establishment of a joint management arrangement, in the vein of Article 7, will in any event ensure that the sharing function (as contemplated in Article 18) takes place. The current analysis would confirm this, but it is still further mooted that for good order and legal clarity the firm obligation in Article 7 is mirrored in Article 18 with an amalgamation of the information-sharing provisions into one omnibus provision<sup>21</sup>.

### 3.4 SOCIAL CLAUSES

The ambit of social dynamics is dealt with by way of protection of the aquatic environment (Article 14) and human resources development (Article 15).

Article 14 places a duty on Members to conserve aquatic ecosystems. The aim of this conservation has both an economic element and a multifunctional component. In the first instance conservation is seen to contribute to the livelihood of SADC citizens and in the second instance conservation has a distinctly non-trade (extra-economic) objective of preserving the natural beauty of the aquatic and surrounding environment<sup>22</sup> of the people and the SADC region. In making reference to both the people and the region it follows that some averaging of aesthetic views, a harmonization of opinion, needs to happen in order to come to a shared SADC standard as regards what constitutes an acceptable aesthetic surrounding.

In the area of harmonization, Members have a duty to cooperate by way of coordinating the establishment of marine protected areas, with an emphasis on the presence of migratory species in trans-boundary areas. The fit of this description with the BCLME is striking. It is foreseen that the establishment of these areas would of necessity form part of a wider management strategy.

Also Members are required to exercise caution in ensuring that activities within their jurisdictions do not have adverse cross boundary effects. The exercise of caution is required when available information is uncertain, unreliable or inadequate. This means in essence that the rule of thumb is 'when in doubt act restrictively'. The use of the precautionary principle is notoriously suspect in the field of international trade as setting surreptitious, non-tariff barriers to trade in the form of disguised protectionism. The attention to the management and cooperation elements of the Protocol by nature reduces the instances when information will be doubtful and hence reduces the need to invoke the precautionary principle.

EFA (2003) found it difficult to envisage a situation where the precautionary principle can be effectively applied to management of trans-boundary stocks, unless all countries fishing the stocks concerned cooperate in data provision, assessment and development of responsible management policies for these stocks. The present analysis only partly concurs in the sense that the effective application of precaution means an application as a last resort based on uncertainty. To the extent that Members are collaborating, the extent of the uncertainty is curtailed, and therewith the need to act without ordinary just cause. The present analysis would thus moot that the preferred aim would not in fact be to collaborate to the extent that precaution can be effectively practised cross boundary, but to collaborate to the extent that it

<sup>21</sup> The option to cross reference to the information provision (Article 18) from the management provision (Article 7) would also make sense.

<sup>22</sup> Article 14.1 refers to 'aesthetic values'.

becomes unnecessary to act based on uncertainty. This takes a negative view of the wholesale use of precaution due to its possible negative impact on trade. This interpretation is supported by the text of Article 16.1.a) which seeks to reduce barriers to trade.

Article 15 deals with human resources development mainly by focussing on the enhancement of skills to enable the responsible use of fisheries resources based on equity, participation, effectiveness and mutual benefit. There is recognition of the link between understanding brought about through training and the conservation and efficient use of the fisheries resource.

On the collaborative level, Members have a non-binding commitment<sup>23</sup> to affect skills transfers throughout SADC, from institutions of best practice within SADC, and to promote the establishment of regional professional associations in the fishing industry.

### 3.5 TRADE & SCIENCE

#### 3.5.1 Trade and investment (Article 16)

The Article aims to promote trade, investment (including industry development) and food security in the fishing industry and related support sectors<sup>24</sup>. The essential methods of achieving this are via:

- reducing barriers to trade,
- reducing barriers to investment and promoting investment,
- facilitating business contacts,
- the exchange of information,
- establishing infrastructure,
- promoting the use of joint ventures.

Regarding the establishment of joint ventures, States must give special consideration to:

- a) ensuring sustainability of living aquatic resources and prevent over-fishing and excess fishing capacity;
- b) promoting regional food security;
- c) promoting trade in fish products in the Region;
- d) promoting value-added processing;
- e) establishing a favourable cross-border investment regime through, *inter alia* :
  - (i) encouraging mobility of key personnel and associated transfer of skills;
  - (ii) developing key infrastructure;
  - (iii) promoting the mobility of vessels, and
  - (iv) protecting associated assets; and

<sup>23</sup> Article 15.6 uses the term 'shall encourage'.

<sup>24</sup> It is notable that this includes the related service sectors. In the encouragement of joint fishing ventures we find that the "mobility of key personnel" and concomitant transfer of skills is desired. This is perhaps a provision ahead of its time as free movement of labour is certainly not practiced among SADC States.

- f) ensuring that nationals and their vessels comply with applicable domestic and international laws.

Members assume a duty to create enabling policy for the promotion of investment in the fisheries sector. There is some indication that there is a super-national element to this; as in the description of joint venture activity, special attention is given to potential investment by entrepreneurs from other States, by placing a duty on Members to clearly indicate ‘opportunities’ and ‘comparative advantages’ within its ‘fisheries investment policy guidelines’. In considering harmonization issues, there would be an underlying logic to have a coherence in investment policy under each State’s fisheries investment policy guidelines as national operators who wish to engage in joint venture activity will find it easier to do so if they find that the investment incentive framework in the home State of the potential joint venture partner is comparable to that to which they are accustomed in their own home jurisdiction. Although the text is not specific on this, the firm duty that has been undertaken to create ‘an enabling policy’<sup>25</sup> would be difficult to carry out in the absence of a coordination of investment policy.<sup>26</sup>

The Article also covers some facilitation provisions with a firm duty to cooperate. These are in the fields of reducing post harvest losses and the implementation of international standards on quality control and certification. In this regard the Article makes mention of ‘eco-labelling’ as a possible trade enhancing opportunity.<sup>27</sup>

In support of the aim of establishing basic infrastructure the Article makes specific reference to a best endeavours attempt to comply with the standards on port infrastructures as set forth in the SADC Protocol on Transport, Communication and Meteorology. The Protocol on Transport, Communication and Meteorology places a firm obligation on Members to undertake improvements to ports to facilitate trade and requires that there is non discrimination as between the access to ports by nationals and other SADC citizens<sup>28</sup>. As there is no hierarchy among the Protocols of the SADC Treaty, the Protocol on Fisheries cannot dilute an obligation assumed under the Protocol on Transport, Communication and Meteorology. Both Protocols also have articles on reservation meaning that no reservations (read exclusions) are allowed when signing on to the Protocols.<sup>29</sup> It is thus suggested that the current text the words ‘endeavour to’ are deleted in order to remove any possible conflict between the fisheries and transport protocols.

In the field of trade, the Preamble to the SADC Protocol on Fisheries highlights that the fisheries sector has important linkages to other SADC sectors and Protocols. It also recognises that intra-regional trade, investment and commercial development are essential to the economic integration of the SADC region. It is notable that the current Article dealing with trade and investment makes no direct reference to the SADC Protocol on Trade. This is even more so given that there is a reference to the SADC Protocol on Transport, Communication and Meteorology. It is suggested that an additional Article is inserted along the lines of Article 16.6 (referring to the transport Protocol) which similarly makes a direct link between the SADC Protocol on Fisheries and the SADC Protocol on Trade.

<sup>25</sup> SADC Protocol on Fisheries Article 16.5.

<sup>26</sup> Note the legal regimes of the BCLME countries are covered by separate papers under this project. This is primarily by FEIKE under project LMR/SE/03/03 and secondly by tralac under the present LSM/SE/03/02 as a separate deliverable. The matter is thus not expanded upon currently.

<sup>27</sup> Note that eco labeling will be expanded in a separate contribution by UCT and tralac under project LSM/SE/03/02.

<sup>28</sup> SADC Protocol on Transport, Communication and Meteorology Article 8.3. Available on [http://www.sadc.int/index.php?action=a1001&page\\_id=risdg](http://www.sadc.int/index.php?action=a1001&page_id=risdg).

<sup>29</sup> SADC Protocol on Fisheries Article 28. SADC Protocol on Transport, Communication and Meteorology Article 14.3.

### 3.5.2 Science and technology (Article 17)

In the arena of international trade agreements, the provisions that refer to science based aspects of trade are generally less prone to controversy. This is for instance evidenced in the WTO arena where the Agreement on Sanitary and Phytosanitary Measures is functioning to the extent that it has been found unnecessary to revise this agreement under the current Doha Round of multilateral WTO negotiations<sup>30</sup>.

Within this milieu the Protocol on Fisheries provides a firm obligation for Members to cooperate in establishing joint research programmes and projects with particular reference to shared resources and scientific problems common within SADC. This is a clear and unequivocal mandate for collaboration at the SADC level. The achievement this scientific collaboration involves *inter alia*:

- the application of best scientific advice for decisions,
- evaluation of research by recognized centres of excellence,
- promoting publications, research seminars and professional associations and networks,
- knowledge sharing,
- avoidance of duplication in research undertakings,
- technology transfer and sharing,
- collaboration in meteorology and cartography,
- collaboration in the SADC early warning system (for food security purposes).

Of particular relevance to the BCLME initiative is the undertaking in Article 17.5 to adequately cover the full extent of maritime areas and *large marine ecosystems* by remote sensing.

According to EFA (2003) the development of joint research programs for monitoring and characterization of shared stocks is the first logical first step towards the development of formal management agreements for such stocks. This is so because the assessment of stocks, development of management plans and implementation of cooperative strategies is difficult without initial cooperation in data collection and research. In their view progress in regional research collaboration, fostered *inter alia* by the BCLME, will be beneficial in establishing formal cooperative management arrangements. In terms of the current legal analysis this would then formally infer that that Article 17 is a necessary flanking provision to core joint management provision in Article 7.

## 3.6 TREATY ADMINISTRATION

The administrative elements of the Protocol are covered in Articles 19 through 31. Essentially these elements deal with the legal and bureaucratic technical elements needed to facilitate the functioning of the Protocol. In many respects the elements are generic to a treaty, in covering dispute settlement, ratification, accession, withdrawal and the like.

For purposes of the harmonization examination one of these Articles is relevant. This is Article 19 dealing with institutional arrangements. The Article provides for the establishment of a committee to oversee the implementation of the Protocol. In many ways this committee is

<sup>30</sup> See HE Zunckel & DB Malzbender 'Current International Trade Negotiations - Some Implications for the South African Grain Trade' on <http://www.tralac.org/scripts/content.php?id=3018>.



the trigger for the activation of all the harmonization, cooperation and collaborative work that is required in terms of the Protocol. The establishment and functioning of this body is critical to the progress of all the elements of the Protocol, and essential to the process of legal and policy harmonization. According to the SADC Secretariat this Committee has yet to make a showing due to the short time which has elapsed since the entry into force of the Protocol.

It is suggested that the Council of Ministers provide the necessary guiding influence to expedite the establishment and operation of the Committee.

### 3.7 THE SADC PROTOCOL ON FISHERIES TO DATE <sup>31</sup>

Fisheries in the SADC region are a vital economic sector contributing to the food security and income of millions of people. Benefits from fisheries accrue in a multitude of ways, through business opportunities in capture fisheries or aquaculture production, fish processing, trade, associated industries and, ultimately, by providing vital nutrients for human development through a wide variety of fish products in local and regional markets. Today, the sector faces fundamental changes that may put many of these benefits at risk, while also creating new opportunities. Among the drivers of these changes are population growth, climate change, growing pressure on land and water resources, urbanisation, poverty constraints, HIV/AIDS, and increased market integration at regional and global levels. As a result, the demand for fish is growing steadily and trade is reaching wider markets, while fish supply from natural stocks is stagnating in many areas and consumption in local markets is declining. There is concern, therefore, about the future of fish supply in the region, and an urgent need to develop strategies for sustained production and balanced trade.

The SADC region produces about 2.5 million tons of fish every year, having increased substantially from 1.5 million in 1980 and 1.8 million in 1990. This growth has come mainly from the marine sector (1.9 million tons), while inland fisheries have stagnated in recent years (at 0.6 million tons). In line with the overall position in Africa, capture fisheries dominate fish production, with aquaculture contributing only about 25,000 tons a year (1%).

Fish is a heavily traded commodity in the SADC region. Exports of fish are valued at US\$ 1.2 billion a year. In addition to the industrial trade, there is a dynamic trade of fish products between SADC countries and as well as to and from other African countries. While this trade is often unreported, it provides affordable fish products to millions of consumers in the region. It is estimated, for example, that up to 50% of supply from lake fisheries enters this regional trade.

There are important differences between Member States in the volume and type of fish production and trade. South Africa, Namibia and, to a lesser extent, Angola are the main marine producers (together over 90%). Inland fisheries, on the other hand, are dominant in Tanzania, the DRC and the land-locked countries, in particular Zambia, Malawi, and Zimbabwe. Freshwater aquaculture production is of particular importance in the DRC, Zambia and Zimbabwe, while mariculture has grown into a significant economic sector in South Africa, Mozambique, Seychelles and Tanzania. These differences are again reflected in the countries' involvement in fish trade. The marine producers are also the main exporters, joined by Tanzania with its exports from Lake Victoria. Several countries are net importers of fish, including the DRC, Malawi, Mauritius, Zambia and Zimbabwe. At regional level, it might be important to review the current production and trade strategies in the Member States and identify comparative advantages.

<sup>31</sup> The text under this heading is paraphrased from a 'Concept Note' provided to the author by the SADC Secretariat on 13 October 2004. This document is on file with the author.



The SADC Secretariat notes that no solid data exist on fish consumption in the SADC region. Supply figures calculated from production data suggest that several countries are experiencing declines in per capita fish supply. There is an urgent need to improve the information base on fish consumption and to monitor the future trends of this vital source of human nutrition. It is estimated that sub-Saharan Africa will need over 60% more fish per year by 2020 to maintain current consumption levels. This challenge can only be met through a concerted effort to stabilise capture fisheries, develop aquaculture production and improve the balance of trade targeted at a variety of markets. The SADC region is well equipped to do so through its dynamic fisheries sector and its strong commitment to food security and poverty reduction. The SADC Protocol on Fisheries is an apt instrument in addressing the issues raised above.

The SADC Protocol on Fisheries was drafted in recognition of the importance of its 6 million km<sup>2</sup> of marine (503 646 km<sup>2</sup> of inland) fisheries resources to the socio-economic development of the SADC region. The Protocol came into force in August 2003 after being ratified by nine Member States<sup>32</sup>, thus providing the framework for regional cooperation in the sector. As part of the implementation strategies, a number of projects were developed. Three projects are currently ongoing and these are: the Benguela Environment Fisheries Interaction and Training project, whose focus is on research and training; the Benguela Current Large Marine Ecosystem Programme, which focuses on overall management of the Benguela ecosystem; and the Monitoring, Control and Surveillance of Fishing Activities project, which is aimed at controlling illegal, unreported and unregulated fishing in the exclusive economic zones of coastal States.

There is an apparent gap in the promotion of aquaculture to address food security concerns as well as income generation particularly of the 70% of the region's communities who live in the rural areas. Major challenges relate to ineffective management policies, inadequate strategies for scaling up aquaculture and quality improvements in fish handling, processing and distribution. The Dar-Es-Salaam Declaration on Agriculture and Food Security in May 2004 illustrates the SADC region's commitment to eliminate hunger and ensure food security not just through agriculture, but also through sustainable natural resources utilisation, of which fisheries is a critical component. This food security element of the Protocol is considered as important for immediate attention<sup>33</sup>.

According to the SADC Secretariat (Food Agriculture & Natural Resources Directorate - FANR)<sup>34</sup>, when the Protocol came into force in August the intention was that the Secretariat would engage the services of a fisheries expert to closely work on the Protocol. The recruitment need arose in December 2003, but to date a suitable candidate has not been appointed. As a result, there has been no research or substantive work carried out by the Secretariat and the Secretariat is at the stage of initiating the implementation of the Protocol.

It is suggested that as with the establishment of the Fisheries Committee (Article 19) that the Council of Ministers provide the necessary guiding influence to expedite the effective resourcing of the Secretariat to support the establishment and operation of the Committee and the concomitant implementation of the Protocol and the compilation of data.

<sup>32</sup> This is a requirement of Article 26 of the Protocol. The 3 BCLME countries where among the initial signatories.

<sup>33</sup> It is understood that SADC Members and the SADC Secretariat plan to meet in Malawi in late November 2004 to discuss and make recommendations as to priorities for improving the contribution of fish to food security and poverty reduction. The outcome of this discussion was not yet available at the time of writing.

<sup>34</sup> Electronic correspondence with the author on 18 October 2004.

## 4. THE SADC PROTOCOL ON TRADE <sup>35</sup>

### 4.1 OPERATION

The Protocol on Trade was signed in Maseru, Lesotho, some four years after the signing of the SADC Treaty, by 11 of the 12 SADC Member States at that time. Angola, the Member State that did not sign the Protocol, eventually acceded to it in March 2003 but has yet to finalise arrangements for its implementation. The Protocol received the required number of ratifications to enter into force among the original signatories as from January 2000. Before it could be implemented, however, the signatories concluded an amendment Protocol on 7 August 2000, which revised or made new rules on implementation of the protocol, dispute resolution, cooperation in customs matters, rules of origin, trade in sugar and second hand goods. The Amendment Protocol entered into force among the 11 signatories to the original protocol on 1 September 2000. For Members not party to the Original Protocol, like Angola, accession to both the Original and the Amendment Protocol is obviously necessary. Although this is not stated in either the Original or the Amendment Protocol, it would also be necessary for acceding Member States to negotiate a tariff and trade barrier phase-down comparable in terms of its scope and timing to that agreed between the original implementing parties.

### 4.2 NATURE AND SCOPE OF THE SADC FTA

The SADC Trade Protocol, as amended, is divided into nine parts and accompanied by seven Annexes on rules of origin, customs co-operation, trade documentation and procedures, transit trade, trade development, dispute settlement, and sugar trade. From Article 2 in Part One, the main objectives of the Protocol are to 'further liberalize intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements', and 'to establish a free trade area for the SADC region.' The other objectives are to ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its members; to contribute towards the improvement of the climate for domestic, cross border and foreign investment; and to enhance economic development, diversification and industrialisation of the Region. These objectives find an according resonance with the objectives of the Protocol on Fisheries. The SADC FTA is a first step towards the establishment of a customs union by 2010, and a common market by 2015.

In WTO terms, the SADC Member States implementing the Trade Protocol fall into the categories of developing countries and LDCs. The LDCs are Angola, Lesotho, Malawi, Mozambique, Tanzania and Zambia. The developing countries are Botswana, Mauritius, Namibia, South Africa, Swaziland, and Zimbabwe. This profile of membership qualifies the proposed FTA for notification to the WTO under Paragraph 2(c) of the Enabling Clause, as a 'regional arrangement entered into amongst developing countries' or, in the original terminology of the Clause, 'less-developed contracting parties'. However, SADC Trade Ministers and the Council decided in 2002 to notify the FTA under Article XXIV of GATT 1994. The position of South Africa as an important trading nation in Africa and in the world economy, and the fact that many of the trade agreements it has or is likely conclude will be notified or scrutinised in terms of Article XXIV, may have influenced the decision. Notification and assessment of the FTA under Article XXIV is also likely to give the SADC arrangement some of the political credibility and legitimacy it may require if it is to be seriously regarded as

<sup>35</sup> The following exposition on the SADC Protocol on Trade is provided largely by tralac associate Professor Clement Ngongola (University of Botswana). This text forms part of a wider tralac study on EPA negotiations presently being conducted jointly by tralac and the WTO Secretariat. The authors gratefully acknowledge this insight and acknowledge this source. Comments and linkages to the SADC Protocol on fisheries are ascribed to the present authors.

a catalyst for investment in the SADC region. We recall that this would be supportive of the investment encouragement sought in Article 16 of the Protocol on Fisheries, and the Protocols are complimentary in this area.

Although the objectives of the Trade Protocol refer to liberalisation of intra-regional trade in goods and services, the only other provision on services in the Protocol simply recognised ‘the importance of trade in services for the development of the economies of the SADC countries’, and enjoined SADC Member States to ‘adopt policies or implement measures’ in accordance with their obligations under the GATS in the WTO, ‘with a view to liberalising their services sector within the Community’.<sup>36</sup> The trade liberalisation programme proposed for implementation as from 1 September 2000 covered only trade in goods. However, SADC Member States have agreed on some of the modalities for services liberalisation, and have identified the following priority sectors on which negotiations will initially focus: transport, communications, tourism, construction, finance and investments.

The SADC Protocol on Fisheries indicates in Article 16.1 that trade and investment promotion in the fisheries sector extends to the services which support fisheries. The liberalisation of services trade under the Trade Protocol is thus essential to the functioning of the Fisheries Protocol. It is suggested that Members ensure that fisheries service support sectors are also identified within the list of priority liberalisation areas.

### 4.3 TARIFF PHASE-DOWN

Part Two of the Protocol on Trade contains some of the basic rules and guiding principles on elimination of tariffs and non-tariff barriers (NTBs) in intra-SADC trade, and on the application of the national treatment rule to goods traded within SADC. The tariff barriers covered by the Protocol are import and export duties. Article 4 proposed a standstill, followed by a phased reduction and eventual elimination of import duties over a period of eight years from the date when the Protocol enters into force. It also provided that Member States shall not be precluded from imposing ‘across-the-board internal charges’, or the levying service ‘fees and similar charges’ commensurate with the costs of the service rendered. Article 5, on the other hand, proposed immediate abolition of export duties on goods for export to other Member States, except those designed to prevent the erosion of any prohibitions or restrictions applicable to exports outside the community.

In addition to the specification of the eight-year time frame for completion of the process, Article 3 laid down four other guidelines to be applied in the elimination of both tariffs and NTBs. It suggested that account should be taken of ‘existing preferential trade agreements between and among the Member States’; that ‘adversely affected’ Member States may, ‘upon application’ and in accordance with criteria to be developed by the Committee of Trade ministers (CMT), be granted ‘a grace period to afford them additional time’ within which to complete the process; that within the agreed time-frame the pace of liberalisation may vary for different tariff lines and products; and that detailed modalities of the process and the criteria for the listing of products for special consideration shall be negotiated in the Trade Negotiation Forum (TNF).

The interpretation and application of the guidelines in Article 3 regarding the negotiation and development of the tariff phase-down plan, which led to the implementation of the Trade Protocol, was problematic. To begin with, it was probably not feasible to take into account the numerous bilateral trade agreements concluded between and among the SADC Member States. The TNF and CMT instead took cognisance of the fact South Africa, Botswana,

<sup>36</sup> SADC Protocol on Trade Article 23.

Lesotho, Namibia and Swaziland (BLNS countries) were partners in SACU. Under the agreement in force at the time, the BLNS countries applied South African laws and common external tariffs to their external trade relations, and effectively conceded to South Africa the right to conduct negotiations affecting SACU's external trade relations. The SADC tariff phase-down plan could thus be negotiated largely as a series of offers of concessions, by South Africa, on behalf of its SACU partners, to the non-SACU SADC Member States, on one side, and each non-SACU SADC Member State to South Africa, on behalf of SACU, on the other side. This was also logical because trade flow patterns in the region suggested that the bulk of intra-SADC trade was conducted between South Africa its SACU partners on one side, and between South Africa and each non-SACU SADC Member State on the other side.

On the side of the non-SACU SADC Member States, however, the TNF and CMT failed to take into account the fact Malawi, Mauritius, Zambia and Zimbabwe were members of COMESA, which was expecting to establish its own FTA in 2000, and a Customs Union in 2004. The construction of the COMESA FTA, launched by its predecessor, the PTA Authority, involved periodic 'across-the-board tariff reductions' by specified percentage points, without reservation of specified products or tariff lines. The FTA was scheduled for launch once a core group of members reached the target of 100% tariff reductions. The four SADC Member States were among nine COMESA parties that qualified for participation in the COMESA FTA by the launch date, at the end of October 2000. It is notable that their offers to South Africa, and SACU, in the SADC tariff phase-down negotiations did not reflect or resemble their commitments in COMESA.

The negotiation and construction of the SADC's tariff phase-down also involved a problematic reinterpretation of the guideline on giving 'adversely affected' Member States additional time to complete the process. The CMT did not, as required, consider specific 'applications' for time extension. It was instead agreed that the tariff phase-down could be asymmetrical. SACU would thus liberalise more quickly than the non-SACU SADC Member States. The language employed was that SACU could 'front-load' its commitments, and the other side could 'back-load' the process and achieve liberalisation of most of their trade with SACU towards the end of the phase-down period. It would appear that this was intended particularly as a concession for the LDCs on the non-SACU side, (Malawi, Mozambique and Tanzania), identified as the MMTZ group, but the offers initially made in the negotiations indicated that even Mauritius and Zimbabwe proposed to back-load significantly.

The guideline on liberalisation of different tariff lines and products differently within the agreed time frame led to the identification of three or four broad categories of products. Category A was intended for products destined for immediate liberalisation, on which duties were already low. Category B was intended for the majority of the products, destined for gradual liberalisation within the suggested 8-year implementation period. Categories C and E were for sensitive products, to be liberalised within an additional period of 4 years, or excluded from the general programme and covered by special arrangements. The selection of sensitive products was supposed to be based on factors such as the impact of liberalisation on revenue, employment and domestic industries. Member States were also expected to justify the selection, and to provide an indication of the percentage of SADC imports over the previous three years covered by the selected products, and what they intended to do as regards the reduction of tariffs on the selected products. The expectation was that each participating country would not place more than 15 % of its SADC imports in Categories C and E, so that at the end of the phase-in period at least 85 % of intra-SADC would have been liberalized.

The SADC tariff phase-down programme thus initially proposed to exceed by 4 years the time frame suggested in the Trade Protocol, albeit only for sensitive products. It also envisaged that some sensitive products might be excluded altogether from trade liberalisation.



Analyses of the offers initially made also suggested that some of the non-SACU Member States sought to delay liberalisation of more than the recommended percentages of Categories C and E products. Although the SACU offer generally fell within the suggested guidelines, some have contended that the selection of sensitive products on both sides was not necessarily based on empirical assessments of the impact of intra-SADC trade liberalisation on revenue, employment or domestic industries, but on the need to satisfy vested domestic interests unwilling to have their sectors opened to international competition. The classification of products under the SADC tariff liberalisation programme thus led to proposals for the exclusion or special treatment of a variety of products, potentially vital to the growth of intra-SADC trade, such as textiles and garments, leather, footwear, sugar, confectionery, wheat and other cereals, flour, beer, matches and motor vehicles. Fisheries products were not considered to be contentious.

In the present instance the BCLME regime will involve the examination of two tariff offers. Namibia and South Africa have made one joint offer to the rest of SADC through SACU. Angola has not made a tariff reduction offer to date. If Angola follows the route of the other non-SACU SADC countries that have made offers to date, Angola could potentially also make a differentiated offer which is more liberal to the non-SACU SADC Members, while being less liberal to SACU. In the realm of the trade linkage to the Protocol on Fisheries, this would make no sense at all. There is an inherent conflict in creating a trade regulation framework which seeks to restrict the trade flow of a product once caught, when before capture, the product is aquatically free in nature to move between Angola and the two SACU States in the BCLME. The inherent nature of the resource lends itself to a harmonized tariff regime. Furthermore this tariff regime should be duty free.

In looking at the SACU tariff offer (including Namibia and South Africa) to SADC (including Angola), we see that in fish and fish products under tariff headings 0301, 0302 and 1604 respectively, SACU has made a very liberal offer. The products are treated either as category A or as expedited category B. This provided a mixture of immediate liberalisation and liberalisation within the first two years of implementation. In 2000, the first year some (processed) products had duties of 17%. These dropped to 8% in 2001, the second year. Since 2002, all these products have been free of duty. In other words, in the time since the Protocol on Fisheries became operational, SACU has practiced duty free trade in fish and fish products.

What are the options when examining the tariff case for Angola? Angola has not yet made a tariff offer even though it has acceded to the Protocol on Trade. This is because the compilation of a comprehensive offer is a strenuous task which requires much forethought and the application of resources in aligning the tariff offers with wider trade policy, in turn informed by industrial policy. Industrial policy is not always readily determined in LDCs. In the present instance this is not the case. In adopting the SADC Protocol on Fisheries, the flavour of Angolan industrial policy in the fisheries sector is stated and legally adopted at the regional level. Assuming that Angola is facing a capacity constraint in making a comprehensive tariff offer, there is no reason why it should not make a limited tariff offer in the areas where it is comfortable to make such an offer. For present purposes this might even be only in the fishing sector. Angola could even make it clear in the offer that its offer under the fisheries tariff headings of tariff codes 0300 and 1600 are presented to facilitate its obligations under the Protocol on Fisheries. Because it would not be sensible to prohibit trade in a resource already mobile between Angola, Namibia and South Africa, Angola should make a general duty free offer to SADC<sup>37</sup>. It would not be necessary to make a differentiated offer, as the aim

<sup>37</sup> The spurious logic that an un-harmonized tariff regime raises is that trade is stopped. To avoid the duty trading partners simply wait for the resource to move into their waters and then make the catch

of such an offer is to make slower liberalisation as between SACU and the rest of SADC. In a zero duty instance this dynamic is moot. It is suggested that Angola make this tariff offer as soon as possible in order to affect coherence between its trade and industrial policy in the fisheries area. Such an offer will have the additional benefit of signalling a willingness to engage with the rest of SADC in the trade arena, and is bound to be taken as a positive signal that an expanded offer could follow, a small step being better than no step at all.

#### 4.4 ELIMINATION OF NON-TARIFF BARRIERS

Article 6 of the SADC Trade Protocol generally calls on Member States to ‘eliminate all existing forms of NTBs’ and to ‘refrain from’ imposing any new forms. Article 7 more specifically prohibits the application of ‘any new quantitative import restrictions’ and calls on member states to ‘phase out existing restrictions’ within the time frame for the implementation of the Protocol. This is however subject to other contrary provisions in the Protocol. In the present instance Article 9(h) could have a bearing on the fishing sector as it allows Members to apply measures to conserve ‘exhaustible natural resources and the environment’. This would accord with possible actions required to protect the aquatic environment in Article 14 of the Protocol on Fisheries.

Member States may also replace quantitative import restrictions with more favourable tariff quotas. As for quantitative export restrictions, Article 8 of the Protocol does not envisage a phase-out. They are proscribed immediately. They may be applied only in the situations so provided for in the Protocol. This includes where a Member State deems it necessary to apply them to prevent the erosion of prohibitions or restrictions applicable to non-SADC trade. In the Protocol on Fisheries this may be required in limiting access to non-SADC vessels as contemplated in Article 10.1 of the Fisheries Protocol.

Article 1 of the Trade Protocol identified the quantitative import and export restrictions addressed in these provisions as ‘prohibitions or restrictions’ on imports and exports, ‘whether made effective through quotas, import licences, foreign exchange allocation practices or other measures and requirements’. In negotiations leading to the implementation of the Protocol the following were identified as ‘core NTBs’ to be eliminated within a year of the implementation of the Protocol: cumbersome customs documentation and procedures; cumbersome import and export licensing/permits; import and export quotas, except those relating to specified sensitive products; and unnecessary import bans/prohibitions. Other NTBs identified but not regarded as core included restrictive service charges, not falling within the definition of import duties; restrictive single channel marketing; prohibitive transit charges, cumbersome visa requirements and restrictive technical regulations.

The challenge for the SADC since the implementation of the Protocol has been to agree on a suitable framework for eliminating identified NTBs, and monitoring the use of forms not yet identified. It would appear that Member States have so far only managed to designate national contact points for notification of NTBs, who are also expected to liaise with the TNF on implementation of decisions taken in this area. The monitoring of compliance with the rules and disciplines in this area is obviously compounded by delays in establishing effective dispute settlement mechanisms. However the gradual implementation of Annexes to the Trade Protocol implementation of Annexes to the Protocol on customs cooperation, trade facilitation and transit trade, and the development of other Protocols and subsidiary instruments such as the Memorandum of Understanding on Standards Quality and Metrology (SQAM), is reportedly contributing to the elimination of NTBs in intra-SADC trade.

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themselves. This is despite the fact that from an efficient fisheries management perspective, this may equate to unsound and un-scientific exploitation.



## 4.5 TECHNICAL REGULATIONS

As noted above, technical regulations have already been identified as non-core NTBs, hopefully to be eliminated from SADC trade. Part Four of the Trade Protocol lays down other disciplines of a general nature to be observed by Member States on specific NTBs like sanitary and phytosanitary measures, standards and technical regulations, and on trade remedies applicable in intra-SADC trade. It should be recalled that the Trade Protocol was signed almost one and a half years after the establishment of the WTO in 1995. The imprint of WTO rules and disciplines, readily acknowledged in the Preamble to the Trade Protocol, is most evident in the provisions on trade laws and remedies in Part Four.

### 4.5.1 SPS Measures

Under WTO law, SPS measures are measures or regulations imposed for the protection of human, animal or plant life or health from pests, diseases, toxins, contaminants or organisms<sup>38</sup>. In the absence any contrary indication in the Trade Protocol or any other SADC legal instrument, it must be presumed that the WTO understanding of the concept prevails in the SADC. Article 16 of the Trade Protocol imposes two sets of obligations on SADC Member States in relation to SPS measures that appear to be derived from comparable WTO provisions. Article 16 (1) states that Member States shall base their SPS measures on international standards, guidelines and recommendations, 'so as to harmonize SPS measures for agricultural and livestock production'. Article 16(2) states that Member States shall, upon request, enter into consultations 'with the aim of achieving agreements on recognition of the equivalence of specific [SPS] measures, in accordance with the WTO Agreement on the Application of [SPS] Measures.' Articles 3(1) and 4(2) of the WTO Agreement on SPS Measures impose almost identical obligations on WTO members, except that the obligation to harmonize in the SADC is restricted to SPS measures for 'agricultural and livestock production'. There is no obligation to harmonize, for example, SPS measures for non-agricultural products such as beverages.

Whether fisheries products are 'agricultural' in the SADC context is unclear. It is recommended that as the SPS provisions of the Trade Protocol have a distinctly uniform approach and make reference to international standards, it is conceptually aligned with the harmonization aims expressed in the Protocol on Fisheries. It is recommended that reference be made to the Protocol on Fisheries to the effect that fishing activity is considered to be an agricultural pursuit. This is supported by the fact that the SADC Secretariat unit responsible for the Protocol on Fisheries is the 'Food Agriculture & Natural Resources Directorate' (FANR).

### 4.5.2 Standards and Technical Regulations

In WTO law, standards and technical regulations are mandatory technical requirements on product characteristics and 'standards specifications' that do not fall within the scope of SPS measures. They generally seek to regulate product characteristics such as quality, terminology or description, symbols, packaging, marking or labelling. 'Standards' as opposed to 'technical regulations' are specifications that may not be mandatory, set by an approved or recognised body, for common or repeated use.

Article 17 of the Trade Protocol imposes several obligations on standards and technical regulations on trade, also seemingly extracted from the WTO Agreement on Technical Barriers to Trade (TBTs). Article 17(1) requires each Member State to use international

<sup>38</sup> Annex A of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

standards as a basis for the development of its ‘standards-related measures’, except where such standards would be an ineffective or inappropriate means of fulfilling its legitimate objectives. This would appear to be a rephrasing of Article 2.4 of the TBT Agreement. Article 17(2) of the Protocol states that standards-related measures that conform to an international standard shall be presumed not to create an unnecessary obstacle to trade. This is also a reproduction of part of Article 2.5 of the WTO TBT Agreement, without the prior obligations in Article 2.2 of the Agreement that technical regulations shall not be prepared, adopted or applied to create unnecessary obstacles to international trade and shall not be made more trade restrictive than necessary to fulfil a legitimate objective.

Article 17(3) of the Protocol commits the SADC member states, ‘to the greatest extent practicable’, to make their standards-related measures compatible, so as to facilitate trade in goods and services within the community. It also states that that this shall not compromise the protection of human, animal or plant life, or the safety or protection of consumers or the environment. This is the ‘legitimate objectives’ consideration, attached in Article 2.2 of the WTO Agreement to the preparation, application or adoption of technical regulations. The Protocol attaches the exception to an attenuated obligation on SADC member states to make their TBTs compatible. This is a very, very weak requirement on harmonization of TBTs.

Article 17(4) of the Protocol would appear to be a reproduction of Article 2.7 of the WTO TBT Agreement. It calls on member states to accept the equivalence of each other’s technical regulations, even if they may differ, provided that they fulfil required objectives. Equivalence is an important tool in the pursuit of harmonization and here there is support for the metrology collaboration as described in Article 17.5 of the Fisheries Protocol.

Article 17(5) of the Protocol deals with specific standards and conformity assessments. If ‘standards-related measures’ in the other paragraphs of Article 17 generally refer to ‘technical regulations’, Article 17(5) is the only paragraph devoted to these issues, which take up a substantial proportion of the WTO TBT Agreement. Article 17(5) calls upon SADC member states, upon request, to seek, through appropriate measures, to promote the compatibility of specific standards or conformity assessment procedures maintained in each other’s territories. In the absence of the details, disciplines and procedures of the type contained in Articles 4 to 9 and Annex 3 of the WTO TBT Agreement, the SADC Protocol must be adjudged as weak and vague on adoption of standards and conduct of conformity assessments. This indeed is the general effect of attempting to condense in five brief paragraphs complex WTO disciplines and procedures on both technical regulations and standards.

It was partly because of the deficiencies of Article 17 of the Trade Protocol that the conclusion of the Memorandum of Understanding (MOU) on Standards Quality and Metrology (SQAM) was deemed necessary in 1999.<sup>39</sup> The MOU establishes a formal framework for cooperation amongst SADC national institutions on a wide range of SQAM activities, encompassing standardisation, accreditation, certification, conformity assessment, testing, inspection, metrology and related matters. This is described as the SADC SQAM Programme. Article 4 of the MOU states that the objective of the Programme shall be ‘the progressive elimination of Technical Barriers to Trade (TBTs) amongst the Member States and between SADC and other Regional and International Trading Blocks, and the promotion of quality and of an infrastructure for quality in the Members States.’ The MOU creates not less than five structures to be responsible for the implementation of the SADC SQAM Programme. For our purposes the most important of these is the SADC SQAM Expert Group (SQAMEG), which is

<sup>39</sup> It is acknowledged in the Preamble that cognizance was taken of Article 6 and 17 of the Trade Protocol in the framing of the MOU.

charged with coordination of regional SQAM activities, providing a forum for dealing with conformity assessments and providing the link between the CMT and the other SQAM structures. The general function of the other structures is to facilitate harmonization and adoption of international standards within the SADC region in their respective fields of activity.

The application and refinement of these disciplines would be supportive of the Protocol on Fisheries. It is suggested that the Fisheries Committee make the necessary arrangements to liaise with the SQAM structure.

## **5. THE SOUTHERN AFRICAN CUSTOMS UNION (SACU)**

### **5.1 BACKGROUND**

SACU was originally established through the Customs Union Agreement of 1910 between the Union of South Africa and the three so-called High Commission Territories of Bechuanaland (now Botswana), Basutoland (now Lesotho) and Swaziland. The 1969 Customs Union Agreement between South Africa, Botswana, Lesotho and Swaziland replaced that Agreement. The customs union currently consists of Botswana, Lesotho, Namibia and Swaziland (also referred to as the BLNS-countries) and South Africa. The main reasons for the establishment of SACU were that of regional integration and the facilitation of trade between the members of the Agreement in order to improve economic development of the whole area, in particular the less advanced Members.

The five Members took a decision to negotiate a revised 'millennium' SACU Agreement in 1994. The negotiations took eight years to complete. SACU has recently undergone this modernization with the implementation of the 2002 'millennium' version of the Agreement in July 2004. One of the deficiencies recognised by the Member States of SACU was the fact that the 1969 SACU was hampered by a lack of common policies and common institutions. In other words, real integration was not possible.

SACU is united in a customs duty free zone. This means that all import duties between members are abolished. Although this is also the case in SADC, which is a free-trade area, a customs union is more integrated than a free trade area as a common external tariff (CET) is imposed against all non-members of the customs union, whereas in a free trade area the independent tariffs of the individual members are retained against non-members. This is the essential structural difference between SADC and SACU.

In addition to the common external tariff, the SACU Agreement provides for a common excise tariff for all its members. The revenue is shared by all members according to a revenue-sharing formula. SACU revenue constitutes a substantial share of the state revenue of the BLNS countries.

The millennium Agreement democratises SACU and to create institutions that will enable the BLNS countries to participate fully in the decision making processes in the customs union in three main areas:

1. New institutional framework,
2. Revenue sharing,
3. Policy matters.

### **5.2 SELECTED ELEMENTS OF THE TEXT**

Provision has been made in the new Agreement for the development of common policies and strategies to enhance industrial development. It further provides for cooperation on agricultural policies to ensure the co-ordinated development of the agricultural sector.

The objectives of the SACU Agreement find several common tones with those of the SADC Protocol on Fisheries. The SACU objectives are expressed in Article 2 and include:

- ensuring the benefits of equitable trade,
- substantial increases in investment opportunities,

- enhancing economic development,
- facilitating the development of common policies and strategies.

The last element is particularly interesting to a harmonization initiative. The text will thus be examined to assess the extent to which this is possible.

*Secretariat:* Article 10.4 provides that the Secretariat is to assist in the harmonization of national policies and strategies to the extent that they relate to SACU. It has been noted that the definition of the extent of the relationship, while focussed on revenue-sharing and customs duties on goods trade, may be more widely cast under the objective of developing common policies and strategies.

*Technical Liaison:* Article 12 provides for four committees, namely agriculture, customs, trade & industry and transport. There is no specific provision for fisheries, but it's likely that the named committees, especially the agriculture and trade group, could go some way to addressing any fisheries matters.

*Free movement of goods:* Articles 18 and 24 exempt trade within the Union from duties and quantitative measures and provide for freedom of transit. This applies to fish and fish products.

*Customs Cooperation:* Article 23 refers directly to harmonization in calling for Members to 'take such measures as are necessary to facilitate the simplification and harmonization of trade documentation and procedures'. This sentiment is reiterated in Article 29.5 with particular reference to agricultural products.

*Trade Relations:* Article 31 recognises that the SACU Members may maintain pre-existing trade agreements with other States, which would *inter alia* cater for the SADC Protocol on Trade. More importantly Article 31.3 requires that all future trade agreements must be concluded by SACU as a group and individual States thus relinquish their competency to do this individually. This a strong movement towards the harmonization of trade policy as it ensures that all future international trade agreements are harmonized *ab initio* due to their joint conclusion by the five States. Currently such agreements are either in the process of negotiation or being envisaged with the USA, EFTA, Mercosur, China and India<sup>40</sup>.

*Common Policies:* In Articles 38 and 39 SACU Members recognise the importance of balanced industrial development in the pursuit of economic development, and as such agree to develop common industrial development policies and strategies. Agriculture is noted as particularly important in this economic and the text mandates the 'co-ordinated' development of the SACU agricultural sector. Within this mandate it would be legally plausible and possible to compile and implement a common fisheries industrial policy for SACU.

### 5.3 ANALYSIS

For purposes of the present analysis in relation to the BCLME countries, the first glaring observation is that Angola is not a member of SACU. Due to the historical advent and development of SACU and the geographical separation between Angola and South Africa and the existing relationship between the SACU Members and Angola under the SADC

<sup>40</sup> For a detailed discussion dealing with the challenges that this negotiation format places before the SACU Members, see Erasmus MG, 'New SACU Institutions: Prospects for Regional Integration' – available on <http://www.tralac.org/scripts/content.php?id=3071>.



Treaty, it is high unlikely that Angola will accede to SACU.<sup>41</sup> Of the five SACU States, only South Africa and Namibia have ocean borders, while the other three States are land-locked.

To the extent that Namibia was formerly a South African protectorate and thus only became a contracting party to the SACU Agreement upon its independence from South Africa in 1990, there is indeed some legacy of commonality in the development of the legal regimes of the countries. Thus the harmonization process between these two Members is likely to be a rather more straightforward task than with the Portuguese legal legacy in Angola.

In the area of trade the harmonization between South Africa and Namibia is *de facto* in place as there are no duties between the Members, and hence the free movement of goods, including fisheries products, between the two Members. While it is not suggested that Angola join SACU, the pre-existing level of harmonization between South Africa and Namibia will certainly facilitate the further harmonization between the two SACU Members and Angola under the SADC arrangement, and more pertinently under Article 7.4 of the SADC Protocol on Fisheries which caters for arrangements of coordination between subsets of SADC States.

It would thus appear that in the regional harmonization of fisheries policies between the three countries bordering on the BCLME (Angola, Namibia and South Africa), the SACU Agreement is not a suitable vehicle to pursue fisheries harmonization. That being said, the provisions of the Agreement would not retard or prevent South Africa and Namibia from pursuing fisheries integration under the SADC structures. In fact there are sufficient common policy imperatives between the SACU Agreement and the SADC Protocol on Fisheries for the SACU Agreement to be seen as complimentary to and supportive of the SADC Protocol on Fisheries. A common fisheries regime at the SADC level could readily be equated with the mandate of common industrial and agricultural policy under the SACU Agreement. The SACU Agreement is thus not the most appropriate vehicle for regional cooperation in the realm of the BCLME, but would certainly not hamper a BCLME harmonization initiative under the provisions of the SADC Protocol on Fisheries.

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<sup>41</sup> This is not to say that accession is not possible. Article 47 of the SACU Agreement 2002 specifically provides that accession is open to 'any other State'. It has been speculated upon, for instance, that Mozambique may be a logical candidate to join SACU, see <http://www.tralac.org/scripts/content.php?id=1920>.

## 6. THE EUROPEAN DYNAMIC IN THE SADC REGION

African countries are currently facing a complete shift in their trade relations with the European Union (EU). Under the Lomé Conventions these countries have been enjoying unilateral trade preferences into the EU market for decades<sup>42</sup>. The Fourth Lomé Convention was replaced by the Cotonou Agreement in 2000. While Cotonou extends these unilateral trade preferences to 1st of January 2008, it aims to completely overhaul EU-ACP (African, Caribbean and Pacific) trade relations. It requires ACP countries to negotiate World Trade Organisation (WTO) compatible reciprocal trade agreements, called Economic Partnership Agreements (EPAs) providing for the progressive removal of barriers to trade between them and enhancing cooperation in all areas relevant to trade. These EPAs have to be concluded by no later than the beginning of 2008.

The EPA negotiations started in September 2002. So far five out of the six different regional groupings within the ACP have launched negotiations with the EU, including the Eastern and Southern Africa (ESA) group and a SADC configuration consisting of Mozambique, Angola and Tanzania and all Southern African Customs Union (SACU) countries except for South Africa. As South Africa already has a bilateral free trade agreement (the Trade, Development and Cooperation Agreement, TDCA) with the EU it only has observer status in the EPA negotiations. These configurations obviously complicate the relationship between Angola, Namibia and South Africa in the BCLME context.

ACP countries, of which many are Least Developed Countries (LDCs) will now for the first time face reciprocal EU access into their markets. This poses a threat to their economies and necessitates many adjustments. EPAs however also offer an opportunity for ACP countries to secure increased market access to the EU.

It is recognised that fishing is not included in trade agreements concluded by the EU with third countries. In this regard the trade agreement is usually accompanied by a fisheries agreement. A good indicator of the European Union fisheries policy to the BCLME region can be gleaned from the European Parliament and its Parliamentary Fisheries Committee.

In September 2004, Commissioner Fischler presented an overview to the Committee covering activities over the last five years.<sup>43</sup> One of Fischler's themes in promoting sustainable fishing beyond EU waters is the role of the EU's trade policy towards developing countries. With reference to the EU Green Paper on Fisheries, we find that the EU is looking to 'promote the responsible and rational exploitation of fishery resources in international waters and to develop partnerships with third countries in a manner coherent with Community Development policy'<sup>44</sup>. In this regard the EU recognises that trade measures can make an impact in the fight against illegal fishing. In fish trade relations with developing countries the EU concludes Fisheries Partnership Agreements (FPAs)<sup>45</sup>. Fischler was of the view that FPAs should have a two-pronged approach. The FPA would firstly allow for the protection of the interests of the EU distant water fleets, and secondly support the development of sustainable fisheries in the waters of the partner country. It is difficult to see that these divergent aims can be comfortably be accommodated together in an FPA, at least when

<sup>42</sup> For relevant a selection of papers on the EPA topic, see: <http://www.tralac.org/scripts/content.php?id=2419> .

<sup>43</sup> See 'The Common Fisheries Policy on the way to sustainability' on: [http://europa.eu.int/comm/fisheries/news\\_corner/press/inf04\\_37\\_en.htm](http://europa.eu.int/comm/fisheries/news_corner/press/inf04_37_en.htm) .

<sup>44</sup> EU Green Paper 'The Common Fisheries Policy after 2002' available on: [http://europa.eu.int/comm/fisheries/greenpaper/green1\\_en.htm](http://europa.eu.int/comm/fisheries/greenpaper/green1_en.htm) .

<sup>45</sup> The EU has concluded such FPAs in the SADC region with Angola, Seychelles, Madagascar, Mozambique, and the Comoros.

considering the short to medium term interests of the EU distant water fleet<sup>46</sup>. It must however be acknowledged that capacity-enhancing initiatives like the strengthening of control through the application of the satellite vessel monitoring technology, as the FPA concluded with Angola, must go some way in strengthening the control capacity of the developing partner country. This should also assist the EU in adopting market related measures to stop illegally caught fish entering the EU market, including fish caught by EU fleets.

In the BCLME case two completely different relationships can be observed. In the South African instance there was a strong resistance to the conclusion of a fisheries agreement in tandem with the trade agreement (TDCA). This despite severe pressure on South Africa to concede fishing rights in exchange for the benefit of market access for industrial goods. South African negotiators have indicated that the notion of a fisheries agreement has been placed on the back burner and will not be discussed as part of the mid term review of the TDCA that is taking place in November – December 2004,<sup>47</sup> this despite the probable raising of the matter by the EU. Contrasted to this is the Angolan position. Angola has recently signed a new FPA with the EU, while not having any formal free trade agreement with the EU. Angola is part of the SADC EPA configuration together with Tanzania, Mozambique and the non-SA SACU countries. It is clear that in negotiating an EPA, the linkage with a FPA has *de facto* been established in the SADC EPA configuration. Given the differing views on fisheries relations with the EU, clearly the harmonization of fish trade policy with the EU within the SADC or BCLME context will be extremely difficult.

EPA negotiators from the SADC configuration should be aware of the trade and fish linkage in approaching the EPA negotiations with the EU. In the EPA negotiations to date, it has not yet clearly emerged what linkages are to be made between the EPAs and FPAs. The EU does require that FPAs should be coherent with other EU policies as well as issues like monitoring and supervision of fishing activities, hygiene requirements and the business environment of the sector. A potential contradiction arises in the fact that the primary objective of fisheries partnerships is socio-economic and that FPAs should help to remedy the trade deficit and protect direct and indirect employment in fisheries and the related industries. In as much as the employment in EU fisheries is increasingly in the processing and marketing sectors, there is *de facto* competition between EU and ACP operators over access to the processing of fish caught in ACP waters. This could significantly affect the ability of ACP countries to develop local, value-added fish processing sectors.

In addition the EPA / FPA dynamic is clearly a potential hindrance to the harmonization of the legal and trade regimes within SADC and may in fact be directly in conflict with the cooperative elements of the SADC Protocol on Fisheries. It is suggested that this issue be red flagged by the SADC Secretariat with some urgency to the SADC EPA negotiators and that some exchange of views between the fledgling Fisheries Committee (under the Fisheries Protocol) and the Committee of Trade Ministers (under the Trade Protocol) be established. In this matter we see both a lack of policy harmonization leading to potential incongruities and at the same time this position highlights the very need for such harmonization<sup>48</sup>.

<sup>46</sup> It has been commented by CTA that 'these efforts are directed more at protecting EU's activities through eliminating unfair competition by fleets fishing illegally, rather than ensuring the protection of the third-state's resources. But overall, there has been a positive impact on the policing capacity of ACP countries.' See Agritrade Fisheries bi-monthly news update, August 2004 on <http://agritrade.cta.int/fisheries/newsf0410.htm>.

<sup>47</sup> On the TDCA Mid Term Review see <http://www.tralac.org/scripts/content.php?id=3016>.

<sup>48</sup> The EU dynamic under the Common Fisheries Policy (CFP) warrants further exposition and this will be provided in the study 'Analysis of Export Markets' which is the subject of a separate report under BCLME Project LMR/SE/03/02.

## 7. CONCLUDING COMMENTS AND RECOMMENDATIONS

The potential for integration and convergence in the fishing industry between Angola, Namibia and South Africa was examined, from the perspective of the regional dynamic brought to bear in the field of the trading regime. The three BCLME States are all members of the Southern African Development Community (SADC), while Namibia and South Africa are also the leading participants in the Southern African Customs Union (SACU). The analysis was thus focused on the SADC Protocol on Fisheries, and comments were made on the suitability of this instrument to facilitate collaboration in support of trade by the three BCLME countries, allied to the SADC Protocol on Trade. This investigation was augmented by looking at the influence of the SACU Agreement on the potential for harmonization under the SADC system. This was followed by a brief commentary on the role of fisheries in the trade relationship between the EU, South Africa and the Economic Partnership Agreement candidate States (Angola and Namibia).

The SADC Protocol on Fisheries indicates from the start within its preambular provisions that SADC Members are convinced of the necessity for joint co-operative and integrative actions, at a regional level, to optimise the sustainable use of the fisheries resources of SADC for the ongoing benefit of the people of the region. This is a crucial statement with regard to the current analysis, as it indicates a high level of commitment at a political level to the concept of integration of the fisheries sector. Furthermore, this leads to recognition of the trans-boundary character of the fisheries resources and ecosystems, and hence the need to co-operate in the management of shared resources. The early reference to 'ecosystems' in the Protocol provides the platform for the harmonization initiative within the present BCLME context. The text is contextually very encouraging in setting a good scope for harmonization. This encouragement is consolidated in the specific provisions of the Protocol. Pertinent elements of these detailed items were elucidated and are summarised hereafter.

Article 6 introduces a binding obligation to facilitate the free movement of people, vessels, vehicles and equipment required to foster the furtherance of the objectives of the Protocol. This obligation is clearly of value to the conduct of trade between the States and this freedom of movement may be considered as closely supporting the concept of 'trade facilitation', which is defined as those flanking measures which ease the flow of goods and services within the trading system. Absent from this undertaking is a reference to the movement of aquatic resources in the sense of supporting the cross-border movement of fish and fish products to foster trade. It is suggested that the insertion of such a reference is made at this juncture to consolidate the potential synergy between the Protocol on Fisheries and the Protocol on Trade.

In Article 7 information sharing is emphasised, but the text does not explain how this sharing of information should be done. It is suggested that this would be most expeditiously dealt with as a notification requirement to the Committee that oversees the implementation of the Protocol (Article 19). It is suggested that the notification requirement be textually inserted for purposes of clarity. It is further suggested that this data requirement is moved from its current location in Article 7.3 to a more apt location in Article 18 which explicitly deals with the exchange of information under the Protocol. It is further suggested in respect of information sharing that information is critical in a supportive manner to the wider harmonization objectives under the Protocol and that immediate attention should be paid to the implementation of the data collection and dissemination function under the Protocol on Fisheries.

The wording of Article 7.4 is particularly relevant in the harmonization process. The Article establishes the facility whereby a subset of the SADC States is empowered to establish



instruments for co-ordination, co-operation, or integration of management of shared resources. This item provides the required functional vehicle for the cooperation between the three countries making up the BCLME. The provision indicates that a tri-national commission so established can be vested with the power to allocate and manage the BCLME aquatic resources. The Protocol thus directly provides for the very collaborative mechanism that the present analysis seeks to foster in the pursuit of legal and policy harmonization. The facility has merely to be established on the initiative of Angola, Namibia and South Africa, and would, by nature, immediately be compliant with the SADC Protocol on Fisheries. This conclusion is further supported in Article 8 where Member States commit to take measures required to harmonize legislation with particular reference to the management of shared resources.

Article 8 deals with harmonization of legislation. Paragraphs 2 – 5 of the Article deal with matters of law enforcement, with an emphasis on compliance and legal sanction. From a drafting perspective it is suggested that these paragraphs would be more suitably housed in Article 9 which deals specifically with law enforcement. Article 9 in itself provides a strong impetus for legal harmonization based on the law enforcement provisions of the Protocol.

Article 10 (dealing with foreign access) makes a direct reference to harmonization and moreover makes this a duty as regards setting the terms of access for foreign vessels.

Harmonization of SADC views and joint positions in the area of high seas fishing would appear to be critical for Article 10. A clear benefit exists here in harmonizing positions on high seas fishing in order to obtain an allocation of this resource which is currently elusive to the SADC region. From a drafting perspective it is suggested that Article 10 could be included within the ambit of Article 6 on international relations or alternatively be located to directly follow the international relations provision.

In the area of aquaculture there is a generally applicable duty to standardise guidelines and regulations for the conduct of environmental impact assessments. This, by necessity, entails the harmonization of environmental impact assessment legislation.

Article 16 makes specific reference to a *best endeavours* attempt to comply with the standards on port infrastructures as set forth in the SADC Protocol on Transport, Communication and Meteorology. The Protocol on Transport, Communication and Meteorology however places a *firm* obligation on Members to undertake improvements to ports to facilitate trade. It is thus suggested that in the text of Article 16 the words 'endeavour to' are deleted in order to remove any possible conflict between the fisheries and transport protocols.

In the field of trade, the Preamble to the SADC Protocol on Fisheries highlights that the fisheries sector has important linkages to other SADC sectors and Protocols. It also recognises that intra-regional trade, investment and commercial development are essential to the economic integration of the SADC region. It is notable that Article 16 dealing with trade and investment makes no direct reference to the SADC Protocol on Trade. It is suggested that an additional Article is inserted along the lines of Article 16.6 (referring to the transport Protocol) which similarly makes a direct link between the SADC Protocol on Fisheries and the SADC Protocol on Trade.

The Protocol on Fisheries provides a firm obligation for Members to co-operate in establishing joint research programmes and projects with particular reference to shared resources and scientific problems common within SADC (Article 17). This is a clear and unequivocal mandate for collaboration at the SADC level. Of particular relevance to the BCLME initiative is the undertaking to adequately cover the full extent of maritime areas and *large marine ecosystems* by remote sensing.



Regarding institutional arrangements, Article 19 provides for the establishment of a committee to oversee the implementation of the Protocol. In many ways this committee is the trigger for the activation of all the harmonization, cooperation and collaborative work that is required in terms of the Protocol. The establishment and functioning of this body is critical to the progress of all the elements of the Protocol, and essential to the process of legal and policy harmonization. This Committee has yet to make a showing. It is suggested that the Council of Ministers provide the necessary guiding influence to expedite the establishment and operation of the Committee. Allied to this the Council of Ministers should provide the necessary guiding influence to expedite the effective resourcing of the Secretariat to support the establishment and operation of the Committee and the concomitant implementation of the Protocol and the compilation of data.

In the realm of the SADC Protocol on Trade the main thrust of the Protocol is the liberalisation of tariffs between SADC Members. The duty free movement of fish and fish products between the three BCLME countries is almost a precursor to the ability to deal with harmonized fisheries management. While this is the case for Namibia and South Africa, Angola has yet to make a tariff offer. It is suggested that Angola make this tariff offer as soon as possible in order to affect coherence between its trade and industrial policy in the fisheries area. Such an offer will have the additional benefit of signalling a willingness to engage with the rest of SADC in the trade arena, and is bound to be taken as a positive signal that an expanded offer could follow, a small step being better than no step at all.

In the area of services trade SADC Member States have agreed on some of the modalities for services liberalisation, and have identified priority sectors on which negotiations will initially focus. The SADC Protocol on Fisheries indicates in Article 16.1 that trade and investment promotion in the fisheries sector extends to the services which support fisheries. The liberalisation of services trade under the Trade Protocol is thus essential to the functioning of the Fisheries Protocol. It is suggested that Members ensure that fisheries service support sectors are also identified within the list of priority liberalisation areas under the Trade Protocol.

The obligation to harmonize SPS measures in the Trade Protocol are restricted to SPS measures for agricultural production. There is no obligation to harmonize, for example, SPS measures for non-agricultural products. Whether fisheries products are 'agricultural' in the SADC context is unclear. It is recommended that as the SPS provisions of the Trade Protocol have a distinctly uniform approach and make reference to international standards, it is conceptually aligned with the harmonization aims expressed in the Protocol on Fisheries. It is recommended that reference be made in the Protocol on Fisheries to the effect that fishing activity is considered to be an agricultural pursuit. This is supported by the fact that the SADC Secretariat unit responsible for the Protocol on Fisheries is the 'Food Agriculture & Natural Resources Directorate' (FANR).

Under the Protocol on Trade a Memorandum of Understanding on Standards Quality and Metrology (SQAM) was established for a formal framework of cooperation amongst SADC national institutions on a wide range of SQAM activities, encompassing standardisation, accreditation, certification, conformity assessment, testing, inspection, metrology and related matters. The application and refinement of these SQAM disciplines would be supportive of the Protocol on Fisheries. It is suggested that the Fisheries Committee make the necessary arrangements to liaise with the SQAM structures.

The SACU Agreement is thus not the most appropriate vehicle for regional cooperation in the realm of the BCLME, but would certainly not hamper a BCLME harmonization initiative under the provisions of the SADC Protocol on Fisheries. That being said, the provisions of the

Agreement would not retard or prevent South Africa and Namibia from pursuing fisheries integration under the SADC structures. In fact there are sufficient common policy imperatives between the SACU Agreement and the SADC Protocol on Fisheries for the SACU Agreement to be seen as complimentary to and supportive of the SADC Protocol on Fisheries.

The trade relationship between the BCLME Members in the EPA and TDCA arenas is clearly a potential hindrance to the harmonization of the legal and trade regimes within SADC and may in fact be directly in conflict with the cooperative elements of the SADC Protocol on Fisheries. It is suggested that this issue be red flagged by the SADC Secretariat with some urgency to the SADC EPA negotiators and that some exchange of views between the fledgling Fisheries Committee under the Fisheries Protocol and the Committee of Trade Ministers under the Trade Protocol be established. In this matter we see both a lack of policy harmonization leading to potential incongruities and at the same time this position highlights the very need for such harmonization.

The overall finding of this study is that the SADC *legal arquis* (body of law), both in the fields of fisheries and related trade law, provides a resounding undertaking to pursue a harmonized legal and policy framework within SADC. This framework provides for, and in fact encourages this harmonization at devolved groupings of SADC Members, and as such is fully supportive of the BCLME harmonization initiative. The necessary enabling legal regime is essentially sound and the progression of the harmonization process now depends on the political impetus and capacity allocations to proceed to the actions of implementation. The legal framework most certainly supports the convergence of the fisheries sector to the extent that Angola, Namibia and South Africa are able to operate as neatly fitted, individual parts making up the common elements of a single jigsaw puzzle in creating a seamless picture of orderly congruity along the Benguela Current Large Marine Ecosystem.

## 8. DEFINITIONS

(Listed as per Article 1 of the SADC Protocol on Fisheries. Reference to these terms in this paper are taken to be in terms of these definitions.)

1. In this Protocol, the 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:

"access agreement" means an agreement between one Member State or several Member States and a non-SADC State or non-SADC States to exploit the fishery resources of a Member State or Member States;

"aquaculture" means all activities aimed at producing in restricted areas, processing and marketing aquatic plants and animals from fresh, brackish or salt waters;

"Compliance Agreement" means the Food and Agriculture Organisation's Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993;

"control" means the establishment and enforcement of the legal and administrative measures under which living aquatic resources and aquatic ecosystems can be exploited;

"critical habitat" means a habitat that is essential for maintaining the integrity of an ecosystem, species or assemblages of species;

"excess fishing capacity" means the capability to exploit fish greater than the allowable catch permitted;

"exotic species" means those species that are not indigenous or endemic to a specific area;

"fish" means any aquatic plant or animal, and includes eggs, larvae and all juvenile stages;

"fishing" means all activities directly related to the exploitation of living aquatic resources and includes transshipment;

"fishing effort" means the level of fishing, as may be defined, *inter alia*, by the number of fishing vessels, number of fishers, amount of fishing gear, and the time spent on fishing or searching for fish;

"fish stock" means a population of fish, including migratory species, which constitutes a coherent reproductive unit;

"fishing vessel" means any vessel, boat, ship or other craft, which is used for, equipped to be used for or of a type that is normally used for fishing or related activities, and all its equipment;

"illegal fishing" means any fishing or related activity carried out in contravention of the laws of a State Party or the measures of an international fisheries management organisation accepted by a State Party and subject to the jurisdiction of that State Party;

"management plans" means specific arrangements aimed at regulating the exploitation of living aquatic resources;

"monitoring" means the collection, compilation, analysis, and reporting of information on fishing and related activities, including fish processing, fish trade and aquaculture;

"nationals" means persons who are citizens of a State Party and includes any body corporate, society or other association of persons established under the laws of a State Party;

"highly migratory species" means species of fish which move seasonally from one ecological area to another;

"precautionary principle" means the application of caution to the conservation, management and exploitation of fish stocks and aquatic ecosystems when information is uncertain, unreliable or inadequate;

"recreational fisheries" refers to fishing done on a part-time basis for leisure and sport, including but not limited to angling, diving, collecting shells or lobsters and spear-hunting;

"related activities" means all activities associated with the exploitation of fish including processing, marketing, transportation and trade of fish and fish products;

"resources" means all aquatic ecosystems, fish and fish stocks to which this Protocol applies;

"shared resources" means shared aquatic ecosystem, shared fishery and shared fish stock;

"small-scale commercial fisheries" means fisheries that generate profits and earn income large enough to meet the basic needs of life, employ staff or operate as profit-sharing collective enterprises;

"stakeholders" means all persons whose interests are materially affected, either directly or indirectly, by fishing and fishing related activities under this Protocol;

"State Party" means a member of SADC that is party to this Protocol;

"subsistence fisheries" means those fishing activities whose fishers regularly catch fish for personal and household consumption and engage from time to time in the local sale or barter of excess catch;

"subsistence fishers" means fishers who regularly catch fish for personal and household consumption and who engage from time to time in the local sale or barter of excess catch;

"surveillance" means the monitoring and supervision of fishing and related activities to ensure compliance with control measures;

"transboundary" means populations, natural systems, activities, measures and effects, which extend beyond the effective jurisdiction of a State Party;

"transshipment" means unloading of all or any of the aquatic resources on board a fishing vessel to another fishing vessel either at sea or in port without the products having been recorded by a port State as landed;

"UNCLOS" means the United Nations Convention on the Law of the Sea, 1982; and

"vessel" means any water navigable craft of any description, whether self-propelled or not.





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