Summary Report

02 August 2019

Developing an Effective Mechanism to Monitor and Ensure Compliance to SADC Protocols and other Legal Instruments and Commitments

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1. OBJECTIVE

The Southern African Development Community (SADC) has been instrumental in organising, coordinating, and implementing the region's integration agenda. It was established in 1992, through the Declaration and Treaty of the Southern African Development Community, to achieve a *"...shared future in an environment of peace, security and stability, regional cooperation and integration based on equity, mutual benefit and solidarity..."* (SADC, 1992).

A key challenge to fulfilling the SADC vision is the "…slow ratification and domestication of Protocols, which is linked to weak accountability provisions, a gap between regional and national priorities, and limited or weak engagement with key stakeholders such as the private sector, civil society and academia, and resulting in low visibility of SADC achievements and impact among citizens…" (SADC Ministerial Retreat 2017).

This report provides recommendations for an effective mechanism to ensure compliance to SADC Protocols and other legal instruments and regional commitments at Member State level. These recommendations are based on: a) a review of the existing mechanisms/approaches employed by SADC to ensure compliance, and their effectiveness (or lack thereof); and b) lessons learnt from relevant compliance mechanisms employed in other Regional Economic Communities (RECs). The recommendations are therefore cognisant of the broader context of regional integration and compliance, and the characteristics of the Southern African context in which they will be implemented (if accepted).

1.1   Compliance Different from Implementation Monitoring

There is a difference between a compliance mechanism and an implementation monitoring system. This is important to keep in mind and is best conveyed by defining the two terms.

Compliance can be defined as "the fulfilment by Member States of their obligations under an Agreement and any amendments to the agreement". Compliance mechanisms are in turn defined as "the system adopted to promote compliance".

- **Focus of compliance:** Those who want to exercise the rights provided for in the SADC Treaty and Protocols but are not able to do so.

Implementation is a necessary condition for compliance but is not equivalent to compliance. Implementation monitoring is a management tool adopted to monitor and promote implementation.

- **Focus of implementation monitoring:** A management tool for those responsible for establishing the framework that delivers the rights provided for in the SADC Treaty and Protocols.

FIGURE 1: Compliance versus Implementation

Compliance
relates to users of the rights under SADC.

Implementation
relates to the efforts of member states to deliver those rights.

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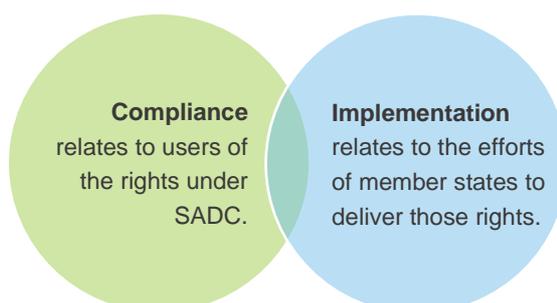
2. BENCHMARKING OF REGIONAL AND INTERNATIONAL MECHANISMS AND APPROACHES

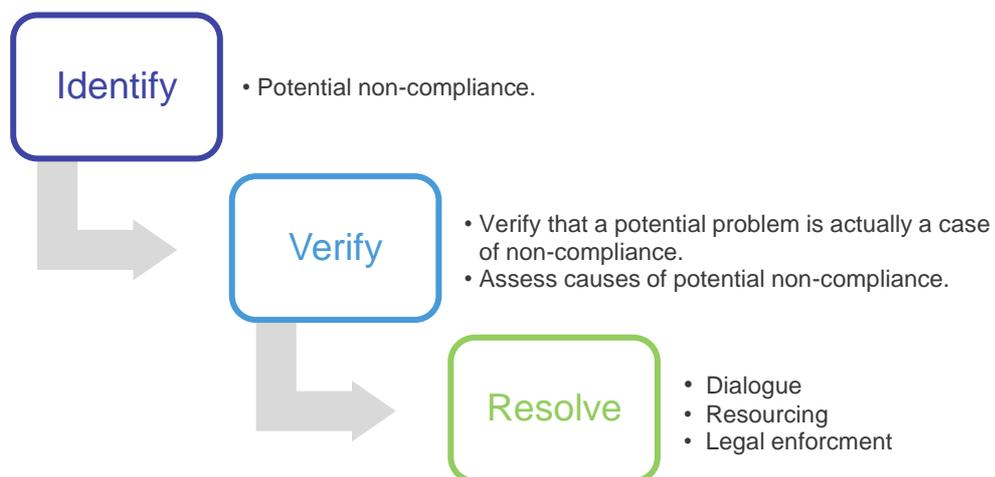Part of the process of developing recommendations for a relevant, realistic, and effective SADC compliance mechanism was achieved through a benchmarking exercise. In this exercise, the EU's comprehensive, integrated compliance system and eight other systems were analysed and assessed for relevance, effectiveness, innovation, and efficiency. Our analysis of these systems led us to understand that any effective compliance mechanism needs the capacity to identify, verify, and resolve non-compliance.

2.1   Key Components of Compliance

An optimal compliance system is built on three core components: a) identification; b) verification; and c) resolution, as illustrated in FIGURE 2 (below):

FIGURE 2: **The Three Core Components of a Compliance System**

Identify
• Potential non-compliance.

Verify
• Verify that a potential problem is actually a case of non-compliance.
• Assess causes of potential non-compliance.

Resolve
• Dialogue
• Resourcing
• Legal enforcment

2.2   Different Compliance Tools Available

Additionally, the analysis and research carried out in the benchmarking give us an understanding of all the compliance tools SADC can use, their areas of application, and their strength and weaknesses.

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Tool	Identify	Verify	Resolve
Private Sector Whistleblowing	EU SOLVIT, TFTA Online NTB-MM, ASSIST		
Dialogue Platforms and National Contact Points	EAC Time Bound Programme for the Elimination of NTBs		
Scorecards and Compliance Review Processes	EAC CMS, Single Market Scorecard, WTO Trade Policy & Peer review Mechanism		
Specific Missions at the Discretion of the Commission/Secretariat	EU Framework and APRM →		[Occasionally] ⟶
Peer Review Process	APRM, OECD Code of Liberalisation of Capital Movements & OECD Investment Policy Review		
Sanction			EAC Time Bound Programme for the Elimination of NTBs, EU Compliance Framework
Dispute Settlement			WTO DSM, ECJ, EACJ

2.2.1   Private sector whistleblowing

The SOLVIT model, and the mechanisms that draw upon it, provide a framework for companies and citizens to report – either online or via their associations – the barriers they experience when trading within a REC.

Strengths	Weaknesses
• This approach has the great advantage of identifying issues that have real economic value to the private sector. It is also efficient, as it harnesses the resources and incentives of the private sector to provide surveillance.	• Whistleblowing needs to be accompanied by a process for verification, as the problems that the private sector reports may stem from legitimate government regulation permissible under SADC. • Online reporting also carries the risk of unrealistic turnaround expectations (real time solutions), which could result in the private sector losing interest.

2.2.2   Dialogue platforms and National Contact Points

The EAC Time Bound Programme for the Removal of Identified NTBs places great emphasis on dialogue platforms such as National Monitoring Committees (NMCs). These platforms bring together government and non-state actors (potentially from multiple countries) to explore solutions at a technical level.

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Strengths	Weaknesses
• This approach identifies issues that have real economic value to the private sector, and there is scope to go beyond monitoring to resolution through bilateral platforms and the RMC. • As the process involves ongoing dialogue with other Member States, private sector complainants are better able to see the actions that are being taken on their behalf and therefore remain engaged.	• There is a heavy investment to be made in supporting ongoing dialogue, and there is a danger that only non-compliance resulting from technical – as opposed to protectionist, for example – challenges are addressed.

2.2.3   Scorecards and compliance review processes

Scorecards and compliance review mechanisms provide transparency and surveillance, by assessing the extent to which Member/Partner States are honouring their commitments in terms of ratification and transposition, and conformity of laws, regulations, procedures, and processes.

Strengths	Weaknesses
• These processes often reveal what member states themselves do not know and can offer guidance as to the issues that need to be tackled. • They can help provide the technical leadership required by Member States that are capacity-constrained and help guide resources for implementation to where it is most needed.	• They are very resource-intensive, and require the political engagement and support of Member States to access information.

2.2.4   Specific missions and the discretion of the Commission/ Secretariat

The EU and the APRM Secretariat have the discretion to launch specific missions at their own discretion to assess urgent issues.

Strengths	Weaknesses
• This allows the Commission/Secretariat to be proactive and either address urgent issues timeously or capitalise on political will or concern.	• They can be resource-intensive and the selection of missions needs to be handled with political sensitivity.

2.2.5   Peer review process

Peer-review processes provide a framework for transparency and surveillance, often in the context of clearly-defined indicators, and requiring members to explain underperformance and share lessons.

Strengths	Weaknesses
• Peer pressure and sometimes "naming and shaming" can be effective to promote compliance, and the process allows for expertise and knowledge to be pooled.	• These processes can become "talk shops", with the semblance of holding Members to account. It can be ineffective if there are competing political pressures and/or wide disparities among Members.

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2.2.6   Sanction

Within the EU framework the Commission has the right to hold Member States to account for non-compliance under infringement procedures.

Strengths	Weaknesses
• The process is largely immune from inter-governmental politics and fears over reprisals and "skeletons in the closet" that prevent the use of State-to-State dispute in regional blocks.	• Unless the process for Sanction is clear and automatic, the Commission/Secretariat can be put under great pressure to withdraw proceedings.

2.2.7   Dispute settlement

Dispute settlement can take the form of a Regional Court or Tribunal as with the European Court of Justice (and the SADC Tribunal). It can also be through a dispute settlement mechanism such as the WTO which offers good offices, consultations and mediation as well as Panel Adjudication.

Strengths	Weaknesses
• It offers a stick to propel compliance and promote the rule of law.	• It can be a hollow threat if Member States can rely upon consensus to block unfavourable rulings. • Furthermore, the remedy generally available – the withdrawal of sanctions – can, when exercised by smaller and poorer economies, be more harmful to the plaintiff than the offending party.

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3. ASSESSMENT OF COMPLIANCE SYSTEMS IN SADC

The SPME serves as an overarching framework for monitoring ratification and impact. Within this framework, there are other initiatives that we assessed.

Our assessment of the SADC SPME Framework revealed that in the area of the STP, there is little capacity to support the STP monitoring at a Secretariat level. A post originally created in 2009 for the purpose of implementing the SADC's Trade Monitoring and Compliance Mechanism (TMCM) had been vacant since mid-2010, and was in fact abolished under the new SADC structure in 2017. **More specifically, the assessment of the SPS and TBT Mechanism** revealed that the submission of reports tends to be delayed and incomplete. In the 2016/2017 MRE cycle, only six Member States submitted all three implementation reports (STP, TBT and SPS) and only seven submitted implementation plans for the following year (2017). In total, 10 of the 14 Member States submitted STP and TBT Annex implementation reports, and 11 out of 14 submitted SPS Annex implementation reports. Furthermore, all Member States submitted their reports late, which affected the preparation of a timely regional report for the Trade Negotiation Forum (TNF).

The assessment of the TFTA NTB Monitoring Mechanism revealed that the system's ability to resolve reported NTBs remains mixed. The primary reason for this is that the system is standalone, rather than being integrated into a comprehensive system that also looks at the (correct) transposition of community law. This could explain the reason for an NTB occurring in the first place, as well as what needs to be done to resolve this. A second reason is that the technical capacity of NMCs and related National Focal Points remains varied, and fully-capacitating an NMC requires a substantial investment of resources. Finally, the reporting of NTBs has declined over the past 10 years, and many of the NTBs that were reported still remain unresolved, which in turn results in lower levels of reporting. This is aggravated by the lack of a legal framework for resolving NTBs.

Assessing the current status of SADC FIP MRE revealed that the non-involvement of the Secretariat or other FIP structures in the collection and verification of data limits their ability to insist on accurate, high-quality, and timeous reporting. Furthermore, ownership of the process largely exists in those Member States that previously had a FIP consultant who ensured that FIP issues remained on the agenda of senior-level meetings, and organized regular stakeholder dialogue sessions. **At a Member State level**, FIP issues have not been prioritized by key stakeholders, and increased staff turnover in government institutions and strategic stakeholders have affected the reporting on FIP indicators. Finally, FIP stakeholders have been working in silos, and have failed to connect with other focal areas or departments within the Ministries responsible for Finance and Investment or the Central Banks.

Finally, our assessment of the SADC FIP Macroeconomic Surveillance Mechanism revealed that the first round of the MCSM peer review process (2013-2018) has been completed and the process has proven to be strong. There has been commitment to the process at the highest level (Ministers of Finance and Central Bank Governors), giving it political and policy direction and weight. Over time, the quality of reports and recommendations by Member States has improved, reflecting the technical skills that were continuously provided to the peer review teams. The provision of high-quality data still needs to be improved, however, and key to the success measures was the resourcing offered by GIZ.

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4. THE CASE STUDIES

We carried out case studies to understand how certain mechanisms worked in practice, and to learn what is effective and what is not. These case studies included a range of compliance mechanisms, such as:

a) Review mechanisms, which aim to enhance compliance through transparency, surveillance, and engagement with stakeholders and by bolstering political will;

b) Variable geometry initiatives, which aim to harness political will and address political constraints;

c) Integrated systems of monitoring and enforcement; and

d) Experience with Dispute Settlement of Relevance for the SADC region.

4.1   Key Lessons

A series of case studies were conducted to understand how different systems work in practice, what tools they use, and where they can achieve compliance. The key lessons from these case studies are presented in the subsections below.

4.1.1   Peer-review mechanisms

Peer-review mechanisms aim to enhance compliance through transparency, surveillance, and engagement with stakeholders, and the bolstering of political will. An overview of the lessons and resourcing of the three peer-review mechanisms investigated is provided in FIGURE 3 (below).

FIGURE 3: Lessons and Resourcing of Different Peer-Review Mechanisms

WTO Trade Polic Review Mechanism	OECD Code of Liberalisation for Capital Movements	APRM
• **LESSONS** • Review process should be separate to DSM. • Trade-off between transparency and accountability. • Importance of scheduled, regular, well-resourced, and independent reviews. • Importance of Member State commitment. • **RESOURCING** • The Trade Policy Review Division has 51 staff in total (including economists, statisticians, and secretaries). Technical assistance is given upon request to developing and least-developed countries.	• **LESSONS** • Gradual and phased compliance is allowed for. • Peer-to-peer technical support and leadership is encouraged and facilitated. • **RESOURCING** • "Significant investment" is made in each review. • Funding from membership fees.	• **LESSONS** • Effectiveness of issue specific reviews. • Importance of national ownership. • Secretariat-initiated reviews. • **RESOURCING** • There are approximately 70 staff members of the Secretariat who provide technical support across the four areas of governance revised under the APRM. It has a budget of USD 10 million per year.

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4.1.2   Variable Geometry Initiatives

Our case studies of the Accelerated Programme for Economic Acceleration (APEI) and the Northern Corridor Infrastructure Project (NCIP) revealed the following key lessons:

- Targeted and focused initiatives that use, and are sensitive towards, variable geometry are very effective.

- It is very important to house compliance initiatives within an institutional framework. While high-level involvement is effective, other priorities often emerge, and momentum and resourcing is lost.

- Limited effectiveness of Champions (e.g. Mauritius) in APEI.

4.1.3   Integrated Systems of Monitoring and Resolution

From analysing and conducting interviews with staff within the EAC Timebound Programme for the Elimination of Identified NTBs, we learnt the following key lessons:

- The identification, verification, and resolution of NTBs is resource-intensive.
    - Examples of this include the Rwanda NMC project funded by TMEA (US$1,869,449 for the 2011-2016 period), the Tanzanian NMC project (US$1,374,014 for the 2011-2017 period) and the Burundian NMC project (US$587,137 for the 2011-2015 period). This amounts to a total of US$3,830,600 between 2011 and 2017 for 3 out of the 5 EAC Partner States.

- Empowering NMCs and NFPs to conduct their own identification and verification missions is crucial.

- The need for legal clarity.

- The importance of targeted initiatives being embedded in larger coordinated and integrated compliance frameworks.

4.1.4   Dispute Settlement Mechanisms

Three dispute settlement mechanisms of relevance to SADC were investigated, namely the WTO's Dispute Settlement Mechanism, the ASEAN Dispute Settlement Mechanism, and the SADC Tribunal. The key findings from these investigations are provided in FIGURE 4 (below):

FIGURE 4: **Overview of the Different Dispute Settlement Mechanisms**

WTO DSM	ASEAN DSM	SADC Tribunal
• Very limited participation by African states. • Although recently there has been a notification made to the WTO regarding a dispute between Mauritius and Madagascar.	• Need for reverse consensus (negative consensus). • The pointlessness of having and resourcing regional state-to-state DSMs as DSM has not been used. • WTO DSM is preferred.	• During its time, it only saw disputes between natural or legal persons and Member States; it presided over no State-to-State disputes.

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5. RECOMMENDATIONS

Benchmarking, the assessment of current SADC mechanisms, fieldwork and stakeholder consultation, and the case studies revealed the combination of tools that were best suited to form an integrated compliance mechanism to steadily move SADC towards the "SADC We Want".

Being cognizant of limited resources and limited credibility of successfully enforcing SADC commitments, we propose a phased approach to compliance monitoring and enforcement. The first Phase will cover all SADC Protocols and will only look at ratification, transposition, and notification of protocols and other SADC commitments. The second Phase will be more targeted and work on the conformity, operationalization, and application of the law or regulation contained within the SADC Protocol on Trade and related annexes. In the third Phase, the scope of enforcement of Phase 2 will be broadened to the SADC Protocol on Trade in Services (TiS). The proceeding recommendations elaborate on the combination of tools proposed and how to achieve an integrated and effective compliance system.

5.1   Phased Approach

5.1.1   Phase 1: All SADC Protocols for ratification, transposition, and notification

We recommend that in the areas of ratification, transposition, and notification all SADC Protocols be within the scope of an automatic sanction process. We recommend this because the enforcement of ratification, transposition, and notification is not a resource-intensive exercise and non-compliance can be easily and objectively determined. This is important given that the resources at a Secretariat- and Member State-level are scarce, there is limited national ownership of the regional agenda, and there is pervasive scepticism of both Non-State Actors (NSA) and, ironically, governments as to the likely success of efforts to enforce SADC Commitments.

An automatic sanction process for ratification, transposition, and notification

Ultimately a compliance system needs to have a "stick" to force Member States to honour commitments when they have persistently failed to do so, and this is why we recommend an automatic sanctions process.

An automatic process of sanction is a great advantage for ensuring compliance, as it binds the hands of the Secretariat and makes it less vulnerable to political pressure from Member States. It can, however, only be used where no judgement needs to be exercised by the Secretariat.

The failure to ratify, transpose, and notify thereof does not require any interpretation of the SADC Protocols. It can be objectively assessed, as can a Member State being in arrears. We therefore propose a sanction process that follows the already established procedures for arrears set out in Treaty Article 33.3 and 33.4 be followed to enforce ratification, transposition, and notification.

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Ammendments Required	Authorising Body	Scope	Triggering Sanctions
• Treaty Article 33.3 and 33.4 should be amended to include ratification, transposition or notification thereof. • This would allow for automatic sanction proceedings to be put in place that are the same as for Member States being in arrears.	• Sanctions would be applied by the Secretariat without reference to the Council or Summit, but the application of sanctions is subject to notification by the Secretariat prior to and at the beginning of SADC Meetings as to which Member States are in default.	• Sanctions – set out in 33.4 – relate to restrictions on Member State's participation in the deliberations of SADC. • Sanctions will apply to matters relating to the ratification, transposition, and notification of all SADC Protocols.	• Sanctions are triggered by specific milestones: a) failure to comply for one year; b) two years; c) three years, and; d) four years.

5.1.2   Phase 2: Protocol on Trade for conformity, operationalisation and application
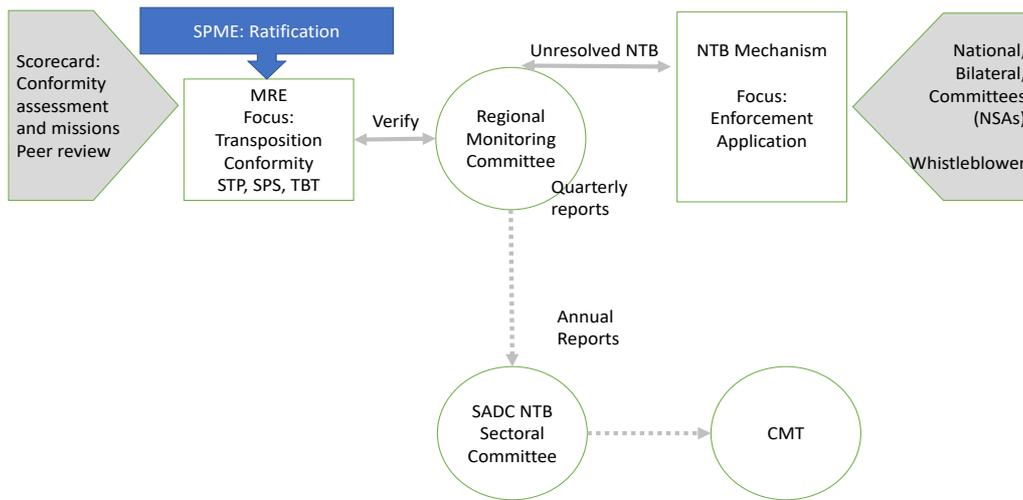
In Phase 2, we recommend that enforcement with regard to conformity, operationalisation, and application focus on the SADC Protocol on Trade and its Annexes. This is because these are more resource demanding areas of compliance that are not as amenable to objective judgement. Additionally, with little visible progress on enforcing compliance in regional integration – from the NTB reporting process to the rulings of the Tribunal and then the Tribunal's de facto suspension – credibility is a fundamental challenge facing a SADC compliance system. The private sector and governments are sceptical as to how much will result from efforts at enforcement given the history of enforcement in SADC. Any progress will, therefore, be hard fought. Consequently, a sharp focus of enforcement is needed if anything is to be achieved with the resources available and the current credibility gap.

Tools for Identification and Verification

There are several actions to take to strengthen the SADC system to identify and verify non-compliance. It needs to be recognised that strengthening the system will require a significant commitment of resources, however, due to the need for:

- Enhancing the MRE system;
- Re-establishing the NTB monitoring mechanism and making it a focus for compliance; and
- Integrating the systems of monitoring (see FIGURE 6, below).

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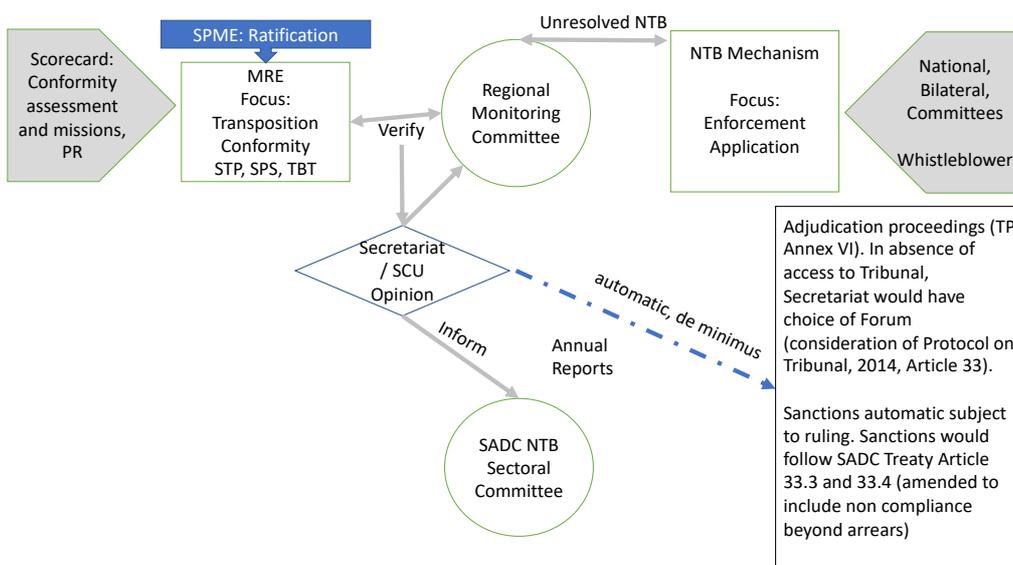**FIGURE 6: An integrated system for identification and verification**

Enforcement mechanisms

For non-compliance, we recommend applying the following enforcement tools:

- The introduction of automatic sanctions for non-conformity that amounts to in part or in sum an NTB, focusing on priority products and limited to the rights granted under the Protocol on Trade and its Annexes (see FIGURE 7, below).

  o A lighter touch on conformity gaps: conformity gaps that do not cause (in part or in sum) an NTB reported through the Monitoring Mechanism, are not subject to sanctions. They are to be incorporated in implementation plans of the MRE process and become a standing item at the relevant committee.

- The re-introduction of natural or legal persons access to DSM for the Protocol on Trade and related Annexes.

FIGURE 7: NTB Sanction Process

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5.1.3 Phase 3 extend to Trade in Services Protocol

In Phase 3, we recommend the scope of enforcement of Phase 2 – once credibility has been secured and momentum maintained – be broadened to include conformity, operationalisation, and application with regard to the SADC Protocol on Trade in Services (TiS).

5.2 Strengthening the Preconditions for Compliance

Phases 1, 2, and 3 will only be effective if the preconditions for compliance are in place, as an "efficient breach" is likely if they are not. Non-compliance, even when sanctions are imposed on Member States, can be the result of an "efficient breach" (Posner & Sophes, 2011) if the actual or perceived benefits of "breach" outweigh the actual or perceived costs of compliance. "Breach" will also be inevitable if the Member State does not know how, or is not able to, comply or is put under no pressure to comply from its domestic constituencies.

A system of compliance will, therefore, only be effective if certain preconditions are met:

a. Technical knowledge at Member State level of what compliance with SADC commitments involves;
b. Capacitated National Structures;
c. Resources; and
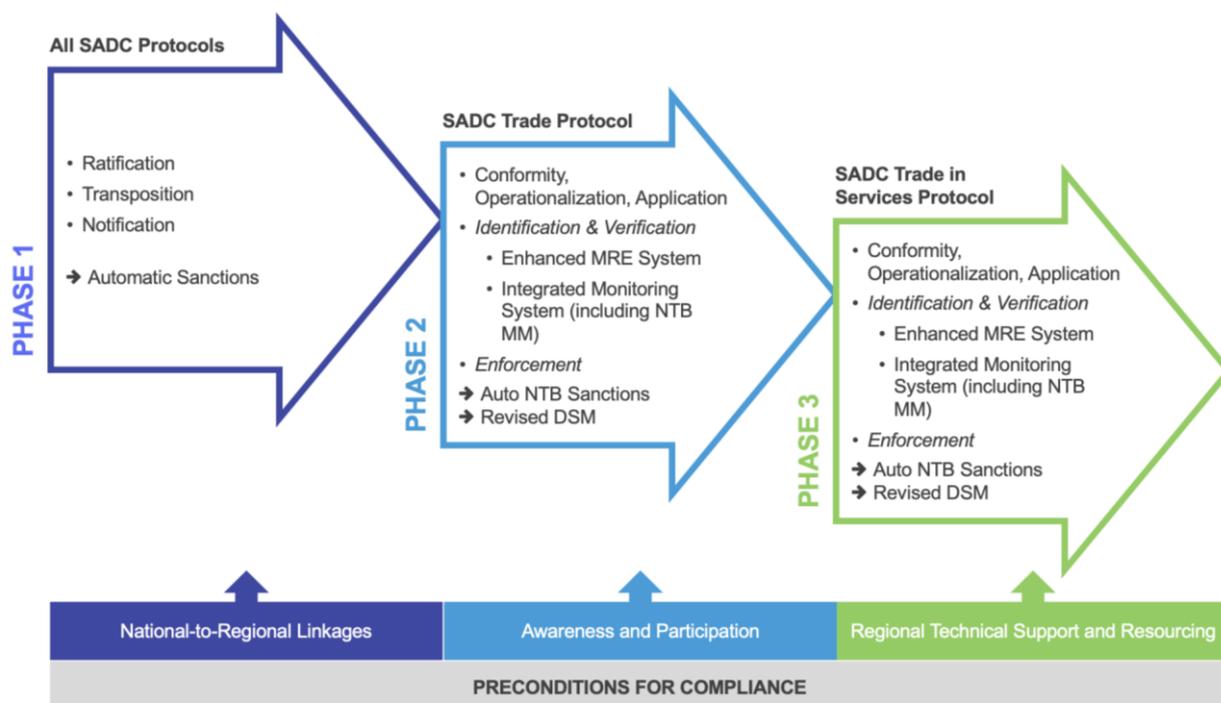d. Awareness and participation.

Taking these preconditions into consideration, we make the following recommendations:

- National–Regional Linkages need to be strengthened, in particular through the SADC National Committees;
- Regional technical support to and resourcing of compliance related initiatives:
o STP/MRE Implementation plans be amended to incorporate the results of the proposed Scorecard, peer learning and NTB monitoring;
o That any future Trade Related Facility operate, in fact not in theory, on effective approved and published implementation plans, linking them in part to identified NTBs;
o To mitigate the challenges of national laws and implementing instruments not conforming with regional commitments, a process of comitology be followed in key areas top develop model implementing laws;

5.3 Summary

In sum, we recommend a phased approach to SADC compliance monitoring and enforcement, underpinned by a set of preconditions for compliance, as outlined in FIGURE 8 (below):

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All SADC Protocols

PHASE 1
- Ratification
- Transposition
- Notification
→ Automatic Sanctions

SADC Trade Protocol

PHASE 2
- Conformity, Operationalization, Application
- *Identification & Verification*
  - Enhanced MRE System
  - Integrated Monitoring System (including NTB MM)
- *Enforcement*
→ Auto NTB Sanctions
→ Revised DSM

SADC Trade in Services Protocol

PHASE 3
- Conformity, Operationalization, Application
- *Identification & Verification*
  - Enhanced MRE System
  - Integrated Monitoring System (including NTB MM)
- *Enforcement*
→ Auto NTB Sanctions
→ Revised DSM

| National-to-Regional Linkages | Awareness and Participation | Regional Technical Support and Resourcing |

PRECONDITIONS FOR COMPLIANCE

Phase 1 deals with the ratification, transposition, and notification of protocols. Compliance in the areas of ratification, transposition, and notification is not resource intensive and can therefore cover all SADC Protocols and Commitments. We recommend an automatic sanction process to be applied to all Member States that fail to comply.

Phase 2 extends Phase 1 to assess and enforce conformity, and the operationalisation and application of community laws and regulations. Being significantly more resource intense than the enforcement of ratification, transposition, and notification, we recommend that Phase 2 focus only on the SADC Protocol on Trade and related annexes. We recommend an enhancement of the MRE system, to reinvigorate the NTB Monitoring Mechanism and to integrate the different systems of monitoring. Our recommendation for enforcement is to introduce a DSM for natural or legal persons to state limited by variable geometry, as well as a sanction process for NTBs, focusing on priority products.

In Phase 3, we recommend extending enforcement of conformity, operationalisation, and application to the commitments outlined in the Protocol on Trade in Services, once credibility and momentum has been achieved by the activities in Phase 2.

The measures recommended and outlined in detail will only be effective, however, if certain pre-conditions for compliance are strengthened and met. These include stronger national-regional linkages and national ownership, greater regional technical support and resourcing, and increased awareness and participation of the private sector and SADC citizens.

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