

OECD-SADC Policy Brief

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Addressing development challenges in Southern Africa

AN INVESTMENT POLICY FRAMEWORK FOR THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

- ▶ Private investment, both foreign and domestic, is a powerful development enabler. Well channelled it can create jobs, diversify national economies, develop infrastructure networks, and provide opportunities for broad-based entrepreneurship.
- ▶ Attracting investment has been placed at the core of the development agenda of the Southern African Development Community (SADC).
- ▶ Despite reforms, investment policies in the SADC region need to be scaled up to support sustainable growth. The design of sound policies which enhance the development benefits of investment is key.
- ▶ To help policymakers strike the right balance, a set of policy options has been developed: the SADC Investment Policy Framework (IPF). It provides a roadmap for actions on investment policy reform in a non-prescriptive manner in five areas having a strong bearing on the investment climate in the region.

What's the issue?

Attracting investment has been placed at the core of the development integration agenda of the Southern African Development Community (SADC). Member States acknowledge that creating a favourable investment climate is central to diversifying their economies, creating new labour skills, developing infrastructure, and enhancing their participation in regional and global value chains.

During the last decade, the stock of inward foreign direct investment (FDI) in the SADC region has increased at a steady rate of nearly 14% annually.

The vitality of FDI flows into SADC countries is a reflection of the region's improved overall economic performance and growing attractiveness. According to the IMF, Sub-Saharan Africa has become the second fastest growing region of the world.

However, the fruits of rapid growth and increased investment have not been spread evenly. High growth rates have not yet led to significant advances in poverty reduction and human development.

Foreign investment, in particular in large-scale projects, did not always boost employment creation

and had little impact on the development of local entrepreneurship and in empowering women. There is growing inequality in income and distribution of wealth throughout the region. In addition, poor infrastructure is preventing sectors such as tourism, agriculture, mining or commerce from reaching their full growth potential. Today, the SADC Secretariat estimates that the cost of meeting Member States' infrastructure needs is USD 500 billion.

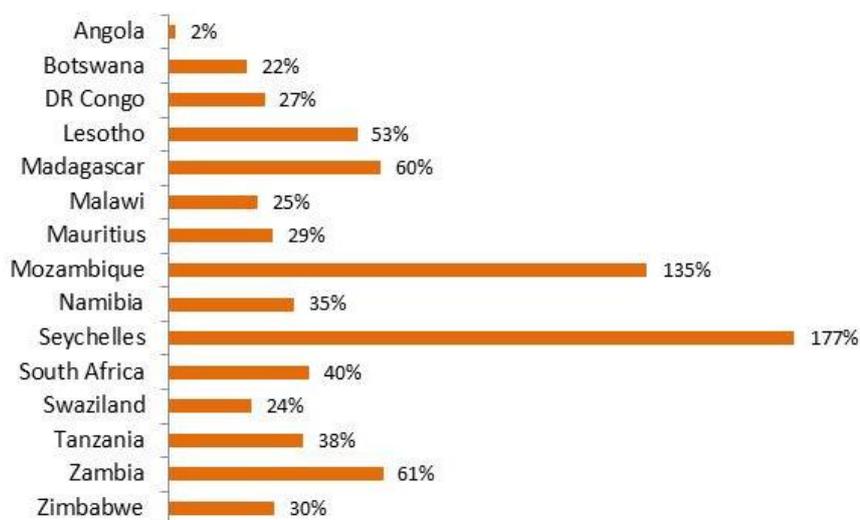
This demands a more inclusive growth path, with private investment playing a potentially more important role in creating jobs, promoting economic diversification and environmental sustainability, as well as infrastructure development and broad-based entrepreneurship, including for Micro, Small and Medium Enterprises (MSMEs), women entrepreneurs, and firms in rural areas. All SADC governments recognise the role investment may play in sustaining economic development and alleviating poverty. This however requires sound and coherent policies, which go hand-in-hand with deeper regional integration.

This policy brief presents the main findings of an assessment of SADC investment policy frameworks undertaken by the OECD in partnership with SADC



www.oecd.org/daf/inv/investment-policy/africa.htm

» FDI stock as a percentage of GDP in SADC countries (2013)



Source: UNCTAD FDI/TNC database

Member States. It summarises policy developments in the region, highlights several areas identified as priorities for reform as a result of the assessment, and presents the prospects for improving the investment climate across the region.

SADC countries' growing competitiveness

As development pressures continue to rise, governments throughout the SADC region have been at the forefront to attract more investment. There are still important disparities in the region's investment policy frameworks but all countries have made efforts at reforms over the last five-ten years.

Reforms have resulted in the removal of obstacles to FDI so that foreign investors can now participate in most sectors of national economies. The standards of treatment of FDI have been improved, with the principle of non-discrimination recognised across the region. If exceptions exist, they are primarily motivated by the aim of increasing local participation in investment projects and to provide special support to local enterprises.

Limitations on profit remittances and repatriation of capital have been dropped or substantially relaxed. This has come together with constitutional provisions on the protection of property rights in most countries, which allow expropriations only in exceptional circumstances to be motivated by a public purpose. The need for compensation when a government expropriates property is also uncontested across the region.

There are also statutory guarantees for contract enforcement and recourse to legal systems for redress.

Mechanisms for dispute settlement are on the rise with arbitration and mediation centres set up in several countries. Governments have also initiated reforms to improve access to land.

To further attract investors, all SADC countries have set-up investment promotion agencies, even though their performance varies from one country to another. Some countries also house one-stop shops service centres.

A related trend has been to offer generous tax incentives to make the FDI climate more attractive, this despite growing recognition that they have mostly proven ineffective while resulting in fiscal erosion and triggering a harmful 'race to the bottom' among neighbouring countries competing to attract investors. Recent past has nevertheless seen efforts by several countries in rationalising their investment tax incentives.

The signing of bilateral investment treaties (BITs), as an affirmation of an open investment climate, has supplemented domestic regulations to liberalise and protect investment. Together, the 15 SADC Member States have signed over 250 BITs, of which over 100 are in force, primarily with OECD countries.

Countries in the consolidating phase of their enabling environment for investment, like Mauritius, Mozambique, the Seychelles and Zambia have in particular been quite active in expanding their network of investment treaties. Other countries, like Botswana and South Africa, have discontinued them, considering that while helpful in the earlier stage of development, they achieve less useful purpose today. Among these countries, there is the tendency to craft treaties that are more aligned with sustainable growth objectives. There

is also an emerging trend towards conclusion of BITs with emerging economies and among SADC countries themselves.

A number of countries have also joined international organisations and mechanisms related with investment such as the World Bank's Multilateral Investment Guarantee Agency (MIGA), the International Centre for Settlement of Investment Disputes (ICSID), the World Intellectual Property Organisation (WIPO), the African Regional Intellectual Property Association (ARIPO), and the World Trade Organisation (WTO).

Access to infrastructure markets has also been reformed. Following the disappointing outcomes of privatisation in the 1990s, many SADC countries re-nationalised infrastructure utilities and increased reliance on state-owned enterprises (SOEs). This is gradually changing with the realisation that infrastructure services may in some instances be best provided in partnership with the private sector.

This shift is manifested in widespread efforts to create policy frameworks that enable private investment in infrastructure – ranging from partial privatisation and/or private public partnerships (PPPs), through concession and public procurement contracts, to opening networks to independent providers and/or distributors. The SADC Regional Infrastructure Development Master Plan (RIDMP) also emphasises the important role to be played by private investors in making cross-border infrastructure projects a reality.

SADC countries have been in particular keen on strengthening their procurement framework to facilitate infrastructure market entry for new operators. Standardised contracting procedures have been introduced in several countries to reduce arbitrariness in bidder selection and contract design. E-procurement systems have begun to spread. PPP laws and policies, aimed at better articulating and demarcating the responsibilities and risks assumed by government and private partners, are on the rise.

This process has often gone hand in hand with the establishment of central procurement authorities and of appeal mechanisms for better oversight of procurement processes. Many countries have also set-up specific PPP units.

Given the still dominant role played by SOEs in many SADC infrastructure sectors, measures have also been taken to improve competition, and to make room for private investors to participate on an equal footing with public providers. There is now greater emphasis on better regulated utility markets to achieve sounder tariff-setting policies, although practices still vary widely across the region.

More to be done

Despite reforms, the response to investment policy changes has been mixed. Although inward FDI to the region has been marked by a steady increase over the past decade, total world FDI has grown faster, with other emerging markets attracting higher levels.

There is also a wide disparity among SADC countries in attracting and retaining FDI, including across national sectors. In addition, few countries have succeeded to attract significant amounts of investments beyond the extractive sector. This suggests that the investment regime could be still inadequate or lack consistency. This can be problematic for investment projects that span several national jurisdictions, for instance in infrastructure.

Addressing these challenges is essential to put the SADC region on a sustainable and inclusive growth path. More investment is not enough, however. It must also be beneficial to host economies and societies as a whole. Tapping the sustainable development potential of investment requires not only strengthening the framework conditions for investment, but also increasing the absorptive capacity of the local economy, and promoting responsible investment.

The OECD and SADC Member States have worked together on assessing outstanding policy challenges to enhancing investment and its positive contribution to the host economy. Guided by the OECD Policy Framework for Investment (PFI), the analysis has focused on key policy areas relevant to the investment climate in the SADC region - namely investor protection, FDI restrictions, infrastructure investment, and tax incentives for investment - to help shape the reform agenda throughout the region. Main areas for reform that have been identified as the result of this assessment are highlighted below.

Strengthening security and protection of investors' property rights. Standards of protection are still unevenly addressed across the region. Some legislation does not clearly define the public purpose for which an expropriation can lawfully occur or is silent on how the amount for compensation should be determined. Different standards may also apply across national sectors. Indirect expropriation may occur through target state intervention such as pricing policies, significantly affecting the value of investment.

Regulatory inconsistencies, which may generate confusion for both public authorities and private investors, should be avoided at all costs. By clearly delineating investment protection principles, countries can also better protect themselves from costly cases of international arbitration.

Access for investors to effective mechanisms for enforcing contracts and property rights is also still lacking in many domestic legal and regulatory frameworks. Although there has been progress in upgrading the judicial system within the region, investors often remain concerned about the reliability of national courts and the application of the rule of law. Alternative means for commercial dispute resolution, such as mediation and arbitration, remain underdeveloped. Furthermore, where local arbitration mechanisms exist, they often lack the technical capacities to adjudicate claims. Regional mechanisms, like the Arbitration Centre for Southern Africa, could provide economies of scale.

Providing well-defined rights for land access and use.

Stable and well-defined land rights are an integral part of investor's protection. Processes for acquiring and registering property still pose barriers for investment across the region. Investors can now acquire full title of land in the majority of SADC countries but in most cases special screening procedures and controls apply. Elsewhere, they can acquire the right to use land through leasehold contracts, generally renewable, but subject to certain conditions. The often extensive network of government agencies and traditional communities involved in granting land rights and, in some countries, problems with identifying the actual owners of a piece of land, are a further challenge, raising risks and administrative burden on investor.

On the other hand, issues arise concerning the alienation of agricultural lands to the detriment of local populations as well as with large-scale acquisitions of land by investors. One particular challenge is land ownership for women, which remains low across the region - ranging from 11% in the Seychelles to about 25% in DRC and Tanzania according to the SADC Gender Protocol 2014 Barometer. This calls for striking a balance between the interests of investors and those of local communities when developing land use plans.

Tackling restrictions on foreign investment and the economic costs arising from them. Restrictions of FDI are still relatively common across the region. Many of them impose differential, general and specific restrictions on investment, either by prohibiting foreign investment below a certain size, through minimum capital investment or by adopting screening mechanisms specifically targeting foreigners, thus going beyond the licensing requirements applicable to domestic investors.

Policies that limit foreign participation or ownership are particularly common in certain strategic sectors of SADC economies, especially in mining, oil and gas; transport and telecommunications; and tourism. These sectors, which represent major economic pillars of many SADC countries, fall under special policies generally aimed at

economically empowering citizens or at spurring the development of domestic supply chains. These policies are frequently combined with local content requirements, particularly in extractives; public procurement clauses establishing preference margins for domestic bidders; and/or with policies reserving a certain share of privatised entities to nationals.

Notwithstanding their legitimate purposes, they risk constraining the investment attraction potential of SADC countries. They for instance impose a first-order limitation on the level of private participation in infrastructure markets. Alternative measures do exist to promote greater domestic involvement, for example business linkage, training programmes and support programmes for SMEs. Limitations on FDI need to be evaluated against non-discriminatory, alternative policy options. If some controls have to be maintained, they should be clearly defined and applied in a transparent manner.

Overall, governments should be aware that policies that favour some firms over others involve a cost. Such policies may not only have a negative effect on FDI flows in the concerned sectors but also impact the development dimension of different types of investments. In addition, they can result in less competition and efficiency losses. This is the case, for instance, in telecommunications, a key enabler for a sound investment climate that remains fairly restrictive in several SADC countries. In any case, countries should ensure that restrictions are no greater than what is strictly necessary to meet policy objectives.

Facilitating private participation in infrastructure investments and promoting good governance of state-owned enterprises. Private investment inflows have not rallied in response to increased market openness in SADC infrastructure sectors. If SADC governments want to successfully attract private partners, they need to win the trust and confidence of investors, to demonstrate that private participation in infrastructure investment will ultimately be profitable, and to engage in more systematic regulatory and governance reforms.

In addition to ensuring adequate protection of investors' property rights, increased private participation in infrastructure requires establishing a competitive environment, which includes dismantling unnecessary barriers to market entry, and establishing public procurement and PPP regimes for infrastructure that guarantee procedural fairness and minimise risks of bid-rigging. As demonstrated by recent successful tenders for solar PV and wind energy in South Africa, structural separation of infrastructure markets, where appropriate, can also make more space for private investment and favour greater innovation.

Despite efforts to improve infrastructure procurement, processes remain opaque in many SADC countries. Measures for greater transparency in bidding and tendering procedures are required, together with an effective set of institutions for their implementation.

This includes building stronger procurement and PPP capacities within governments. SADC countries have tended to underestimate the importance of well-trained professionals able to manage complex tender offerings and risks linked to large-scale infrastructure projects. The institutional framework for infrastructure investment is also too often diffuse, involving a large number of actors that are insufficiently coordinated.

Alongside procurement bodies, competition authorities, provided that they have adequate independence, can also help flag and prevent situations of bid-rigging or collusion in infrastructure projects. In addition they can denounce abuse of dominant market position by SOEs, as well as disproportionate subsidisation of SOEs by the state, thus contributing to a more level playing field for private investors. To date, these helpful functions of competition authorities have not been sufficiently leveraged by SADC countries.

Given the still strong interdependency between SOEs and the private sector in many SADC countries, there is also a need to strengthen SOEs performance. SOE efficiency varies across sectors and across SADC countries, and in many cases SOEs suffer from crippling deficiencies. This can negatively influence both entry and operations of private investors in utility markets, notably by influencing investor confidence as well as the cost of capital.

Measures contributing to a level-playing field between state-owned incumbents and private infrastructure operators, together with corporate governance standards which ensure that all relevant rules applicable to private companies also apply to SOEs, may further enhance private involvement.

Revenue predictability and return on investment are of equal concern for investors and have yet to be well addressed in the SADC region. This requires that appropriate regulatory frameworks are in place, including independent regulators. Sector regulators have been set up in many SADC countries but their independence and scope of action varies from country to country and also across different sub-sectors. Establishing independent, well-resourced sector regulators can help set tariffs in such a way as to balance cost-recovery needs of investors with affordability.

Building a coherent and transparent investment environment. With governments further opening opportunities for domestic and foreign investment, there is now often a plethora of institutions involved in promotion and regulation with different lines of

accountability. In certain countries, the investment promotion agency coexists with agencies as diverse as special offices for economic zones, ministerial departments for private sector development, special PPP units and bodies responsible for SMEs development. In others, the design and administration of tax incentives may be the responsibility of several different ministries (e.g. finance, trade and investment) which do not necessarily coordinate with each other or the tax authority. Several agencies may also have the authority to grant tax incentives and exemptions.

This multiplicity of actors generates confusion among both government bodies and investors. There needs to be an alignment of major role players to ensure policy coherence, including clear and unambiguous mandates given to them. Adequate resources are also required to attract staff with the necessary expertise.

As laws and policies continue to evolve, governments should also promote transparency. This includes detailing governments' commitment to private participation in infrastructure. Changes in government positions can severely shake investor confidence. An effective policy that encompasses a strategic vision for private sector participation in all economic sectors is critical for accelerated investment. Mauritius' Government Programme for Moving the Nation Forward 2012-15 is a model in this regard.

This also includes making publicly available a list of sectors and business activities where special requirements apply as well as ensuring clarity in the provisions of tax incentives. A poorly designed system for private sector-driven development, where the rules lack transparency and are overly complex or unpredictable due to a multiplicity of laws and regulations, may well discourage investment, adding to project costs and uncertainty.

In general, more systematic consultation with relevant stakeholders, including civil society, should be allowed. There has been greater collaboration between governments and investors on the development of a conducive investment environment in some countries; but in others too few opportunities are provided for interested parties to express their views prior to the introduction of new regulations bearing on the investment climate. Public consultations may ensure more effective rules by bringing to light any possible adverse implications or inconsistencies, including as to whether FDI restrictions and targeted tax incentives respond to their intended public policy objectives.

Strategies for increased private sector participation and rules applying to foreign investment should not only involve businesses and other relevant stakeholders but also be shared throughout all levels of government and

in all relevant parts of public administration. Similarly, line ministries, tax and competition authorities and other agencies, should be involved in the process of strategic design and law-making. An inter-ministerial body placed at the centre of government, as established in South Africa for the development of its Promotion and Protection of Investment Bill, can have a useful facilitating and coordinating role in this regard.

Revisiting tax incentives schemes. Coherence of government actions applies to the tax investment incentives area where weak coordination may impede consistency between sustainable growth objectives and the overall investment attraction agenda. Investment promotion and revenue collection agencies in the SADC region are often working towards different objectives, with the former feeling compelled to offer tax incentives to attract investors while the latter being concerned about the resulting loss of revenue.

Although tax incentives are less widely provided by SADC countries today than a decade ago, there remains a wide range of incentives with overlapping and sometimes incoherent mandates. Despite rationalization, the current taxation regimes are often complex, most countries applying tax reliefs that vary depending on the type of investment, its location, activity or ownership structure (e.g. domestic versus foreign-owned business). Many tax incentives remain discretionary and there is uncertainty as to whether they meet their intended objectives. In general, there has been inadequate analysis to assess their effectiveness. Establishing mechanisms to evaluate the costs and benefits of tax incentives could help assess them against their intended policy objectives as well as the associated fiscal cost.

Before taking targeted tax incentives measures SADC countries could consider alternative options for investment attraction. Furthermore, unless the tax competition between SADC countries is based upon transparent and internationally accepted standards, the regional economy as a whole will feature a sub-optimal investment and growth. The SADC Protocol on Finance and Investment (FIP) makes a commitment to co-operation on tax matters, and SADC countries have already developed a number of regional agreements to boost regional coordination with regard to taxation.

Protecting FDI but asserting the right to regulate. In their efforts to attract FDI, SADC countries have been reforming their policy framework in an environment characterised by the proliferation of international investment rules at the bilateral, regional and multilateral levels. The resulting rules are multi-layered and multi-faceted, with a myriad of provisions diverging in scope and content, adding confusion as to the overall approach of SADC countries to foreign investors against sustainable and inclusive growth objectives.

Measures should be taken to ensure that international investment rules consolidate domestic priorities instead of creating further complexities and inconsistencies. Governments should not derogate from their domestic, health, safety, labour and environment rules and standards as an encouragement to the establishment or operation of an investment.

There is currently a reassessment of investment treaty policy within the SADC region, with countries such as Botswana, Namibia and South Africa refusing to renew old treaties that are perceived as altering the balance of rights and obligations between investors and states. Among these countries, there is the tendency to craft investment treaties that are better in line with sustainable growth objectives. The SADC Model Bilateral Investment Treaty Template illustrates this shifting approach to investment governance in southern Africa.

Ensuring responsible and inclusive investment for development. In seeking to make growth more sustainable, governments should ensure that investors act in a socially responsible manner. The long-term stability of an investment can only be enhanced if it is able to bring tangible benefits to the society in which it is located. Responsible business conduct requirements, in the areas of human rights, labour, environment, corruption, should not create major problems as they are also in the interest of investors, many of which already apply them on a voluntary basis.

Some countries have included references to investors' responsibilities in their investment law. Others have made responsible business conduct part of the authorisation process for investment, in particular where large-scale projects are concerned. In Mozambique, concessions for mining and infrastructure projects may include requirements for social sustainability programs with local communities. The introduction of due diligence considerations in national regulations has nevertheless been uneven across the region.

While governments continue to make their investment regime more open, they may as well identify new ways to maximise the positive impacts of investment. Foreign and large domestic companies could in this context be encouraged to adopt policies in line with agreed international standards of responsible business conduct such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy. Investment policies could also place greater attention on the environmental impact of investment projects.

The challenge of regional integration. Together, the 15 SADC Member States have a population of over 200 million with an expanding consumer class, thus

presenting huge opportunities. If countries such as DRC and South Africa have the advantage of a large consumer base, while countries like Angola and Mozambique can rely on large national resources to attract investment, many SADC economies are too small to draw significant investment on their own.

Regional integration and cooperation is a means of creating a more attractive environment for foreign investment, building regional infrastructure and goods markets, and capitalising on economies of scale across sectors. This involves, in addition to investment and tax policies designed at both national and regional levels, other elements of the broader investment environment such as infrastructure development policies, and the removal of technical barriers to trade in SADC and between SADC and other regions of the world.

Next steps

Investment policies in the SADC region need to be scaled up to support sustainable growth. While this is ambitious, it is achievable. In this regard, cooperation among SADC countries may help considerably. Collaboration and coordination will not only facilitate and reinforce domestic actions to develop an enabling environment for investment, prevent harmful competition amongst countries, including damaging tax competition, but will also facilitate the development and re-enforcement of best practices across the region.

Similarly, infrastructure investment can benefit from a regional policy approach. The SADC RIDMP lists a variety of projects which necessarily require a degree of regional harmonisation of infrastructure policies.

The good news is that increased co-ordination of investment policies has been placed at the core of the regional agenda since the entry into force of the SADC Protocol on Finance and Investment (FIP) in April 2010. A key objective of the FIP is to improve the investment climate in each Member State and thus catalyse foreign, intraregional and domestic investment flows.

The SADC Investment Policy Framework (IPF). To fulfil this goal, one of the action tasks identified under the SADC Regional Action Programme on Investment (RAPI) has been to develop regional guidance, based on country experiences and international good practices. Its overarching goal is to facilitate coordinated improvement of investment policy frameworks across Member States in support of the developmental integration agenda.

The *SADC Investment Policy Framework* is the result of this call. A product of close collaboration between the OECD and SADC governments, it builds on the analytical assessment of national investment policy



OECD-SADC Investment Focus Group Meeting, Johannesburg, March 2015

frameworks by the OECD, extensive consultations with SADC Sub-Committee on Investment, and evolving international and regional practice. This includes - together with protocols and other regional frameworks which are provided for in the SADC treaty - the OECD Policy Framework for Investment, the most multilaterally-backed instrument for improving investment conditions; the OECD Principles for Private Sector Participation in Infrastructure; the OECD Principles to Enhance the Transparency and Governance of Tax Incentives for Investment; and the Guidelines on Corporate Governance of SOEs for Southern Africa.

A consensus-driven and action-oriented tool, the *Framework* combines the findings of the analytical assessment conducted by the OECD into a unified investment policy framework which addresses five critical dimensions of the investment climate in the region as identified by SADC Member States: (1) coherence and transparency of the investment environment; (2) market access and competition; (3) security and protection of investors' rights; (4) responsible and inclusive investment for development; and (5) regional and international co-operation. These areas interact with each other with the objective of supporting development objectives.

While recognising that there is no-one-size-fits-all approach, the *SADC Investment Policy Framework* provides a reference point for policy-makers to achieve greater convergence of investment policies across the region. The regional *Investment Policy Framework* provides in a non-prescriptive manner the SADC community with the necessary framework to attract sustainable investment and maximise the development benefits from it. Indeed, it is expected that key economic development objectives, including poverty reduction, enhanced economic opportunities for women, local entrepreneurship and environmentally friendly growth, can materialise if investment inflows are well channelled and used by SADC countries.

Implementation mechanisms and partnerships. Starting in the second half of 2015, the OECD, in partnership with SADC and other international organisations, will begin implementation-related activities. In addition to providing a basis for the development of indicators to benchmark reforms and their impact, the *SADC Investment Policy Framework* will facilitate peer-learning on priority areas of regional concern drawing on regional and global good practices and reform experiences. Through partnerships with other international organisations and donor agencies the *Framework* will also promote capacity building in support of implementation.

This partnership between SADC and the OECD is an integral part of the broader NEPAD-OECD Africa Investment Initiative, an African-led partnership supported by the OECD. This Initiative responds to the objective to promote cooperation with regional and international organisations to advance policy reforms that can create beneficial investment opportunities for Africa. Through this partnership SADC Member States have been actively involved in broader OECD policy processes, such as the recent update of the Policy Framework for Investment. ■

About SADC

SADC's main objectives are to achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration, built on democratic principles and equitable and sustainable development. Find out more at: www.sadc.int

About the OECD

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