ECONOMIC
CONSULTING
ASSOCIATES

Development of a framework and roadmap for the establishment of a Regional Energy Regulatory Authority for SADC

Final Report

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Submitted to RERA and COMESA by:

Economic Consulting Associates

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Abbreviations and acronyms

ACER	Agency for the Cooperation of Energy Regulators (EU)
ARENE	Autoridade Reguladora de Energia (Mozambique)
ASEAN	Association of South East Asian Nations
BERA	Botswana Energy Regulatory Authority
CEER	Council of European Energy Regulators (EU)
COMESA	Common Market for Eastern and Southern Africa
CRIE	Regulatory Commission on Electrical Interconnection (Central America)
DAM	Day Ahead Market
ECA	Economic Consulting Associates
ECB	Electricity Control Board (Namibia)
ECOWAS	Economic Community of West African States
EE	Energy efficiency
ENTSO-E	European Network of Transmission System Operators (Electricity) (EU)
ERB	Energy Regulation Board (Zambia)
ERERA	ECOWAS Regional Electricity Regulatory Authority
ERRA	The Energy Regulators Regional Association (International)
ESERA	Eswatini Energy Regulatory Authority
EU	European Union
EWURA	Energy and Water Utilities Regulatory Authority (Tanzania)
FERC	Federal Energy Regulatory Commission (USA)
FPM	Forward Physical Market
HCB	Hidroeléctrica de Cahora Bassa
IDM	Intra-Day Market
IOC	Indian Ocean Commission
IPP	Independent power producer
IRB	Independent Regulatory Board (Eastern Africa Power Pool)
IRSE	Instituto Regulador dos Serviços de Electricidade e de Água (Angola)
KGRTC	Kafue Gorge Regional Training Centre
LEWA	Lesotho Electricity and Water Authority
MERA	Malawi Energy Regulatory Authority
MOTRACO	Mozambique Transmission Company (Mozambique, Eswatini and South Africa)
NERSA	National Energy Regulator of South Africa
PPA	Power Purchase Agreement
RAERESA	Regional Association of Energy Regulators for Eastern and Southern Africa (COMESA)
RE	Renewable energy

REEESAP	Southern Africa Renewable Energy and Energy Efficiency Strategy and Action Plan
RERA	Regional Energy Regulators Association of Southern Africa
RIDMP	Regional Infrastructure Development Master Plan
SACREEE	SADC Centre for Renewable Energy and Energy Efficiency
SADC	Southern African Development Community
SAPP	Southern African Power Pool
SARERA	SADC Regional Energy Regulatory Authority
SIEPAC	Sistema de Interconexión Eléctrica de los Países de América Central
SMO	System and Market Operator
STEM	Short Term Energy Market
TUoS	Transmission use of system
UCT	University of Cape Town
ZERA	Zimbabwe Energy Regulatory Authority
ZIZABONA	Zimbabwe, Zambia, Botswana, Namibia transmission project

Energy units

To > To Convert:	Cubic meter of LNG	Metric Ton of LNG	Cubic Meter of gas	Cubic Foot of Gas	Million Btu of Gas	Therm	Gigajoule	Kilowatt Hour	Barrel Crude
From	**Multiply by**								
1 Cubic Meter of LNG	1	.405	584	20,631	21.04	210.4	22.19	6,173	3.83
1 Metric Ton of LNG	2.47	1	1,379	48,690	52	520	54.8	15,222	9.43
1 Cubic Meter of gas	.00171	.000725	1	35.3	.036	.36	.038	10.54	.0065
1 Cubic Foot of Gas	.00005	.00002	.0283	1	.00102	.0102	.00108	.299	.00019
1 Million Btu of Gas	.048	.0192	27.8	981	1	10	1.054	292.7	.182
1 Therm	.0048	.00192	2.78	98.1	0.1	1	.1054	29.27	.0182
1 Gigajoule	.045	0.18	26.3	930	0.95	9.5	1	277.5	.173
1 Kilowatt Hour	.000162	.000065	.0949	3.3	.00341	.03418	.0036	1	.00062
1 Barrel Crude	.261	.106	153	5.390	5.5	55.0	5.79	1.610	1

Preamble

The study on the transformation of SARERA as an association of national energy regulators into a regional energy regulatory authority started in May 2019. Key events were:

- Inception Workshop in Windhoek on 10 June
- Country visits to Namibia, Botswana, South Africa, Zambia, Zimbabwe and Malawi over the period 10-25 June
- Zeroth Draft Report sent to RERA on 22 July
- Regional Consultative Meeting in Maputo on 31 July – 1 August.
- Country visit to Angola on 28-29 August.
- Draft Final Report sent to RERA on 5 September.
- Validation Workshop in Johannesburg on 3 October.

In addition to the face-to-face visits, the consultants have also had conference calls to obtain feedback on the study from the Indian Ocean Commission and held discussions with former members of the ERERA Regulatory Council.

The Final Report incorporates all of the feedback received on earlier drafts and presentations. Annex A5 provides a table with a summary of the comments and the consultant responses to the written comments on the Zeroth Draft Report, the presentation made at the Consultative Workshop, the Draft Final Report and the Validation Workshop.

The consultant team would like to express its appreciation for all of the feedback received and for the constant support of the client's representatives, Harrison Murabula, Samuel Mgweno and Yohane Mukabe.

This report was produced with the financial assistance of the European Union, channelled through the Project on Enhancement of a Sustainable Regional Energy Market. The views expressed herein can in no way be taken to reflect the official opinion of the European Union.

Executive Summary

Need for a SADC Regional Energy Regulator

RERA was established in 2002 as the Regional Electricity Regulators Association of Southern Africa. In seeking to respond to the needs of the regional energy market, RERA recently transformed from an Electricity Regulators Association into an Energy Regulators Association. The next step is the transformation of RERA from a loose association with recommendatory authority only into a SADC Regional Energy Regulatory Authority (SARERA) with substantive powers. This has been under discussion for more than a decade. The SADC Heads of State and Government agreed to this need as part of their adoption of the 2012 Energy Sector plan in RIDMP (the Regional Infrastructure Development Master Plan), and the directive to proceed with the transformation has been repeated in successive annual meetings of the SADC Ministers of Energy.

The impetus underlying the decision to transform RERA is the recognition that growth in regional energy trade is being impeded by the lack of clear and enforceable regulatory provisions. This already clearly applies in the electricity sector and will do so as well in the cross-border trade of other energy products such as petroleum and gas which have relatively recently come under RERA's purview.

Much has been achieved by SAPP, with support from RERA, in developing a market platform for competitive trade in electricity. But trade is heavily constrained by transmission bottlenecks, reflecting a failure to achieve the levels of investment needed. One of the main objectives in RERA's transformation into a substantive regional energy regulator is to pave the way for public and private sector investment to support increased levels of cross-border trade.

International regional energy regulatory experience

Responding to requests from workshop participants, detailed profiles of seven regulators in six regions (USA, India, Europe, Central America, west and east Africa) have been provided in the report. Insights from the experience of these regulators have informed the analysis and recommendations of this Report, while maintaining the central principle that SARERA is to be designed as a tailor-made institution for the specific conditions and needs of the SADC region.

Legal framework – a SADC Charter

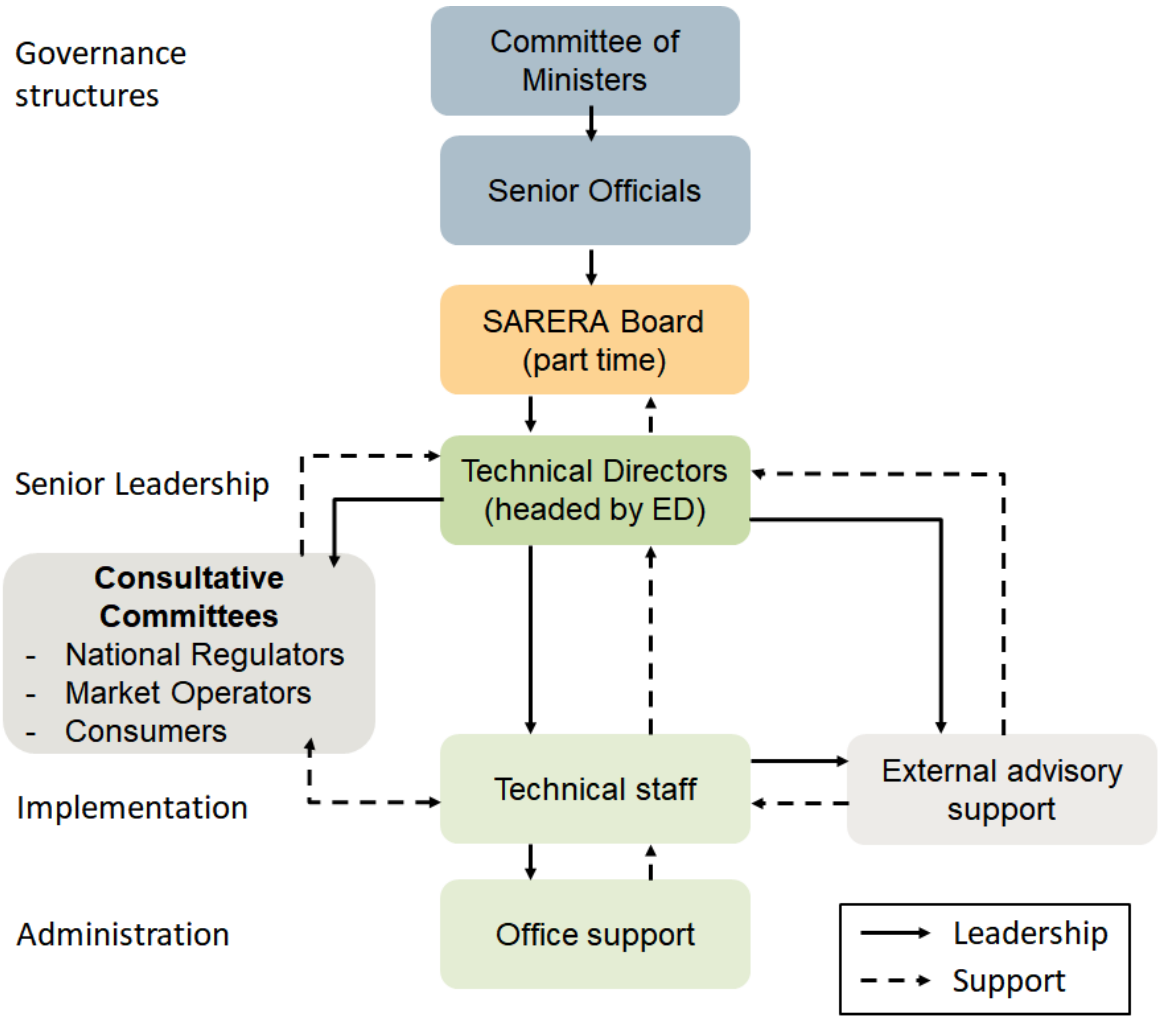
Establishing a regional energy regulator with substantive powers is problematic in Southern Africa, because of the voluntary nature of SADC and all of its organs. The SADC Legal Division has issued a set of *Guidelines for Drafting SADC Legal Instruments*, in which it is stipulated that that a new subsidiarity organisation of SADC, such as SARERA, should be founded under a **Charter**. The provisions of the SARERA Charter will be governed by:

- The SADC Treaty

- ❑ The SADC Subsidiarity Guidelines approved by the SADC Summit in 2004
- ❑ The SADC Energy Protocol.

The substance to be inserted in the SARERA Charter when it is drafted is provided in this Report, notably the Mandate, Functions and Powers in Section 6 and the Funding Model in Section 9. An important part of the *Guidelines* is the section on institutional arrangements. The structure for a Charter consists of the Committees of Ministers and Senior Officials, the SARERA Board and the Secretariat. Together with external Consultative Committees and advisory support, this structure is illustrated in the diagram below.

SARERA institutional structure as defined by the *Guidelines* for a SADC Charter



The crucial link envisaged in the *Guidelines* between the Board and the Secretariat is the Executive Director. Subject to the endorsement of the Committee of Ministers, the Board appoints and reviews the performance of the Executive Director, who in turn is responsible for the performance of the Secretariat. The Executive Director is the Secretary of the Board.

Role of national regulatory agencies

The existing members of the RERA association will play an important role in the future of the Authority, but it should be a different role. For this reason, the membership rights as described for RERA need to be revised for SARERA.

Specifically, the **Board** in the SARERA Charter Structure should **not** be composed of officials from the national regulatory agencies which are, albeit to a degree limited by subsidiarity, subject to regulation by the regional body. The need for avoidance of conflict of interest was discussed and agreed at the Validation Workshop. Similarly, to preserve the institutional domains for policy-making and the implementation of policy through regulation, members of the SARERA Board should also not be officials from Ministries of Energy.

The Board can be selected from retired regulators and energy officials. Academics with relevant skills and representatives of consumers, the intended primary beneficiaries of regulation, could also be considered.

Stakeholder interface

It is only through purposeful interaction with stakeholders and their participation in designing SARERA's regulatory instruments before they are promulgated, that the new regulator will achieve the respect and authority needed for it to be effective in carrying out its mandate. Following the example of ERERA, it is envisaged that SARERA will initially have three Consultative Committees:

- Consultative Committee for National Energy Regulators
- Consultative Committee for representatives of Cross-Border Energy Market Operators
- Consultative Committee for Energy Consumers.

Other Consultative Committees can be added later, particularly as SARERA broadens its initial focus on the electricity sector to encompass all aspects of cross-border energy trade.

Compliance and enforcement

Compliance is to be achieved through agreement over the purpose of its regulations and perception that rules and procedures are clear, fair and transparent. Enforcement may not in practice be necessary, but provision will be made for measures which will include the imposition of fines.

Disputes could be of two kinds. Disputes involving the Charter are to be resolved via the procedures laid out in the SADC Guidelines, while other disputes involving SARERA should be resolved in the first instance through discussion and mutual agreement, and thereafter through international arbitration.

This route is recommended because SARERA will not be regarded as a credible regulatory organisation, and it will not improve the investment climate for the SADC

region, if disputes involving SARERA are ultimately resolved by decision of Governments rather than a Court of Law.

Mandate, functions and powers

These are summarised in the chart on the chart on the next page. An important issue discussed at the Consultative Workshop is the extent to which SARERA should have powers to enforce harmonisation. The enforcement of harmonisation in the matters related to the primary functions of SARERA – wheeling charges, access arrangements and technical regulation – was widely endorsed.

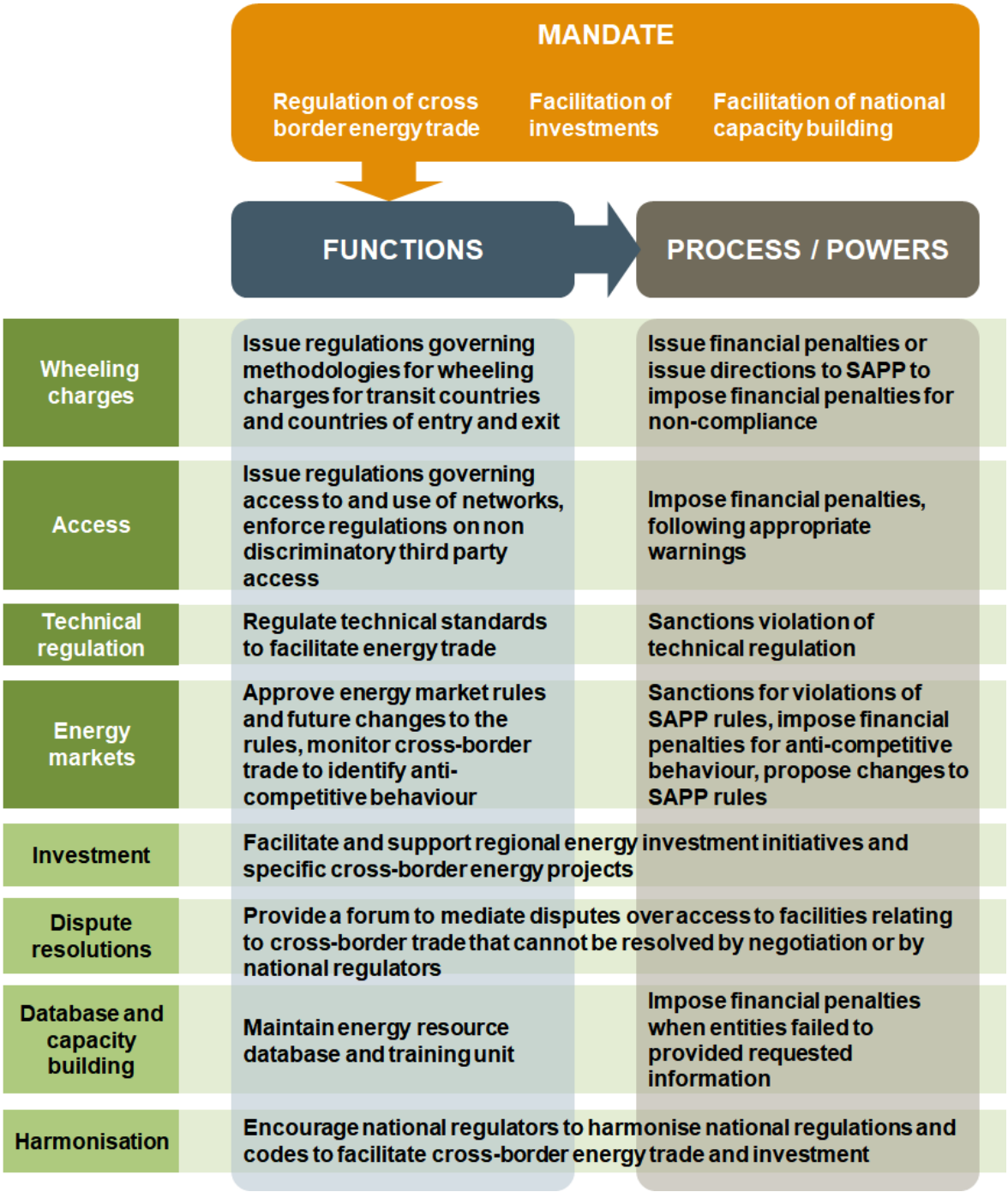
Consistent with multi-speed integration, in other areas there was tolerance of countries progressively harmonising their regulatory arrangements at their own pace. The same conclusion was reached on domestic power sector restructuring and the development of domestic power markets.

Regulatory instruments / tools

The main regulatory instruments or tools that SARERA will develop are:

- ❑ SARERA code for accessing the grid
- ❑ Light-handed regulation for setting wheeling charges
- ❑ Monitoring of trade and ability to modify SAPP rules to obligate participant behaviour
- ❑ Technical standards to facilitate unhindered trade
- ❑ Grid code related to cross-border trade
- ❑ Best practice guidelines on market structure and model contracts.

Mandate, functions and powers



Funding model

Alternative sources of funding were thoroughly discussed at both workshops. The consensus was that the new functions of SARERA relating to cross-border energy trade should be funded by levies on those trades. Numerically, this will quickly become the most important source of funding for SARERA. However, it was felt that annual contributions should remain to cover the continuation of RERA's existing functions, and

particularly to cater for Member States not involved in energy trade. These countries should neither be subsidised by, nor subsidise, cross-border trade conducted by others.

The amount of the levy on energy trade (initially only electricity trade) will be determined in accordance with SARERA's budget requirements. The current RERA budget is approximately $ 500,000[1]. This will more than triple in due course. For each US$1 million that needs to be raised, the levy on traded electricity to cover this would be tiny ($0.47/MWh or 0.047 c/kWh if applied to 2017/18 levels of energy traded through the SAPP market platform or $0.11 / MWh or 0.011 c/kWh if applied to all traded electricity).

Roadmap

The principles on which the Roadmap is based include SARERA starting small and progressively evolving, time being taken to ensure an effective legal framework is in place, and SARERA aiming to have some 'quick wins' to boost the status and authority of the new regulator. One such item for transboundary electricity trade would be for SARERA to finalise and implement the long-discussed, advanced framework for transmission use of system pricing / wheeling charges.

Donor assistance is to be sought to cover the transitional once-off costs involved in the establishment of SARERA. The estimated annual operating budget when SARERA is first fully established is $1.8 million, more than three times the current RERA budget.

Using SADC procedures, staff for SARERA should be recruited based on merit, from within the SADC region. The composition of SARERA structures should reflect the SADC gender requirements, as laid out in the SADC Protocol on gender.

As illustrated in the Gantt charts below, the timeframe for the transformation of RERA into SARERA needs to take account both of the legal activities and the operational activities that will be involved.

[1] All $ references in this report relate to United States dollars.

Gantt chart for activities in the transition from RERA to SARERA

Activity	Responsibility	2019		2020												2021											
		Nov 19	Dec 19	Jan 20	Feb 20	Mar 20	Apr 20	May 20	Jun 20	Jul 20	Aug 20	Sep 20	Oct 20	Nov 20	Dec 20	Jan 21	Feb 21	Mar 21	Apr 21	May 21	Jun 21	Jul 21	Aug 21	Sep 21	Oct 21	Nov 21	Dec 21
Legal activities - SARERA establishment via a Charter																											
Authorisation to proceed with transformation																											
RERA Plenary	RERA Plenary	X																									
SADC Sub-Committee on Electricity/Energy	SADC Sub-Committee				X																						
Senior Officials	SADC Sub-Committee					X																					
Ministers of Energy	Ministers of Energy						X																				
Council of Ministers (if deemed necessary)	Council of Ministers											X						X									
Charter preparation																											
Drafting of Charter instrument	SADC Energy Division								X																		
Negotiation of draft instrument	Senior Energy officials												X														
Consensus on Charter instrument	SADC Energy Division												X														
Charter approvals																											
Committee of Ministers of Justice/Attorneys-General	SADC Legal Division															X											
Council of Ministers (if deemed necessary)	Council of Ministers																	X									
Charter instrument open for signature	SADC Energy Ministers																					X	X	X	X		
Charter instrument enters into force (when 2/3 have signed)	SADC Secretariat																									X	

Activity	Responsibility	2019		2020												2021											
		Nov 19	Dec 19	Jan 20	Feb 20	Mar 20	Apr 20	May 20	Jun 20	Jul 20	Aug 20	Sep 20	Oct 20	Nov 20	Dec 20	Jan 21	Feb 21	Mar 21	Apr 21	May 21	Jun 21	Jul 21	Aug 21	Sep 21	Oct 21	Nov 21	Dec 21
Operational activities - RERA transition to new institutional structure and functions																											
Agreement to proceed with transformation	RERA Plenary	X																									
SARERA Transition Plan																											
Drafting and confirmation of Transition Plan	RERA Secretariat			X																							
Identification of donor to support transition	RERA Secretariat		X																								
Budget for transition	RERA Secretariat			X																							
Confirmation of donor funding for transition (if required)	RERA Secretariat			X																							
Office establishment																											
Identification of location	SADC Energy Ministers			X																							
Identification and establishment of premises	RERA Secretariat						X																				
Staff recruitment																											
Recruitment of Executive Secreatry & Technical Directors	SADC Secretariat										X																
Appointment of Executive Secretary & Technical Directors	SADC Secretariat										X																
Recruitment of additional technical staff	Technical Directors												X														
Recruitment of office support staff	Technical Directors													X													
Initial activities (first 1-2 years)																											
Identification of initial activities	RERA Secretariat				X																						
Budget and funding plan for initial activities	RERA Secretariat				X																						
Approval of initial activities and agreement with donor	RERA Secretariat					X																					
Continuation of relevant RERA activities	RERA Secretariat																										
Intermediate development of initial activities	RERA Secretariat																										
Transition to / commencement of SARERA operations	Technical Directors																										
Preparatory work on SARERA Board	SADC Secretariat																										
Preparatory work on Consultative Committees (CCs)	RERA Secretariat																										
Appointment of SARERA Board and CCs	SADC Secretariat																									X	
Initial SARERA decisions/rulings	SARERA Board																										X

Regulatory initiatives and SARERA Transition Plan

SARERA's initial activities will, in the first instance, be a continuation of RERA's existing coordination, capacity building and harmonisation activities and initiatives. The new activities focussed on regional electricity trade might include:

- Drafting of **SARERA regulation for access to the grid**, which is needed to enable cross-border trade. The regulation will provide the minimum requirements but will allow national regulators to implement these through national regulations.

- **Wheeling charge regulation,** covering pricing of access to transmission networks for cross-border trade, for transit and, where countries have adopted bilateral contracting, for national network charges.

- Drawing on the lessons from the Indian regulator CERC, SARERA could develop a **roadmap for members to unbundle and initiate the development of national electricity markets**.

- **Implementation of the cost-recovery and cost-reflective tariffs** which were first made a regional commitment by the SADC Energy Ministers at a meeting in Lusaka in 2008.

Development of national wholesale electricity markets and the establishment of adequate tariffs across the region would contribute to increased levels of investment.

While the regulatory framework for cross-border electricity trade is being developed, attention can also be given to the requirements for cross-border trade in gas and petroleum products.

Once the primary agreement to proceed with the transformation of RERA into SARERA has been made, an important task is for RERA to prepare the **SARERA Transition Plan**. This will draw heavily on the Roadmap section of this Report, but will be a stand-alone RERA document.

PART 1 – NEED FOR A SADC REGIONAL ENERGY REGULATOR

1 Impetus for transformation of RERA

1.1 Regional energy trade and investment

The transformation of the Regional Energy Regulators Association of Southern Africa (RERA) from a loose association with only recommendatory authority into a SADC Regional Energy Regulatory Authority (SARERA) with substantive powers has been under discussion for more than a decade. For convenience, and without pre-empting the name that might ultimately be agreed, this new entity will be referred to by the acronym **SARERA** to distinguish it from the current Regional Electricity Regulators Association of Southern Africa, **RERA**. The SADC Heads of State and Government agreed to this need as part of their adoption of the 2012 Energy Sector plan in RIDMP (the Regional Infrastructure Development Master Plan), and the directive to proceed with the transformation has been repeated in successive annual meetings of the SADC Ministers of Energy.

The impetus underlying the decision to transform RERA is the recognition that growth in regional energy trade is being impeded by the lack of clear and enforceable regulatory provisions that promote both public and private sector investment. This already clearly applies in the electricity sector and will do so as well in the cross-border trade of other energy products such as petroleum products and gas which have relatively recently come under RERA's purview.

As will be spelt out in detail in Section 2.1, much has been achieved by SAPP, with some support from RERA, in developing a market platform for competitive trade in electricity. The next phase of development is likely to see national wholesale electricity markets develop in tandem with the regional competitive market, a theme which is developed in Section 2.4. At this juncture, much of the trade that should be taking place is curtailed by transmission constraints. These reflect a failure to increase the levels of investment beyond that historically developed for national grids and bilateral trade upon which the current regional power trade depends.

The recently completed and approved SAPP Pool Plan 2017 provides projections on the significant savings that can be achieved by enhancing energy trade and documents the relatively small levels of investment in regional interconnectors needed to unlock those benefits. In this context, it is imperative for the regional institutions to 'raise their game'. SAPP has established a Project Advisory Unit which has funds to assist with cross-border project preparation and is in the process of setting up a SAPP Regional Transmission Financing Facility. In support, one of the main objectives in RERA's transformation into a substantive regional energy regulator is to pave the way for increased levels of cross-border investment.

1.2 Study objectives

The overall objective of this study for which ECA has been contracted is to develop a **framework and roadmap for the establishment of a Regional Energy Regulatory Authority for the SADC Region**.

As defined in the TOR, the specific objectives of the project are:

- to ensure SARERA is a credible organisation with the requisite institutional frameworks, tools, and capacity to effectively execute its role as a regulator for the energy sector of the SADC region;
- to facilitate the development of a well-integrated, competitive, and credible regional energy market operated by SAPP through improved regulatory oversight;
- to improve the investment climate for the development of the regional energy market for the SADC region through effective monitoring of market activities, increased transparency, and open access to information.

As already noted, the concept of a Regional Energy Regulatory Authority has been supported on a number of occasions by the SADC Ministers of Energy, most recently at their meeting at the end of June 2018.

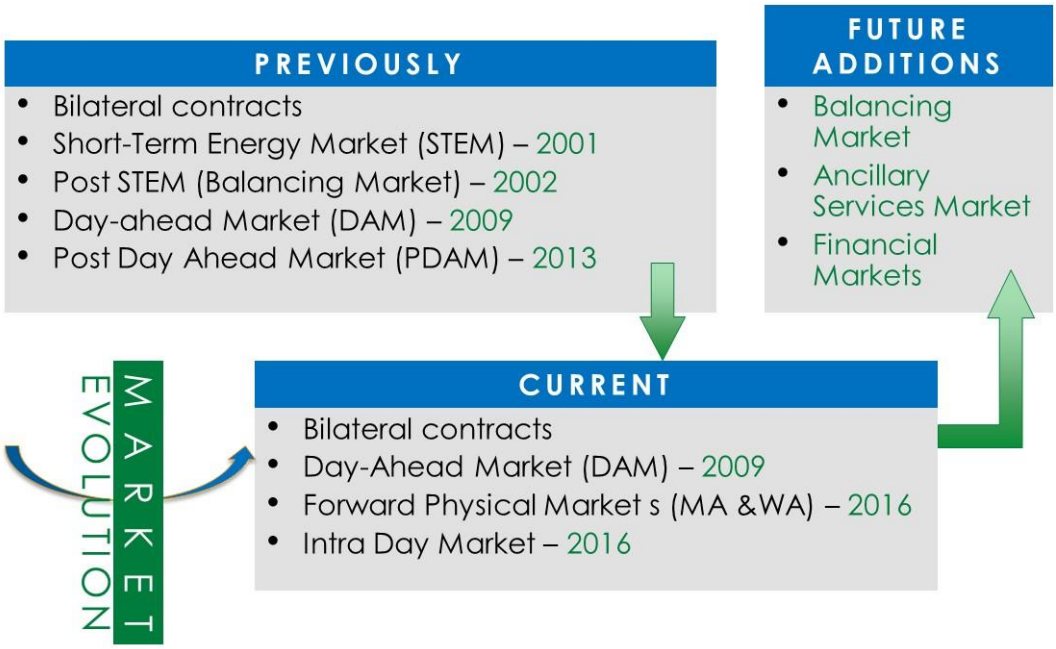
2 Evolution of the regional wholesale electricity market

2.1 Developments to date in the SAPP competitive markets

SAPP first introduced a competitive power market in 2001, through the Short-Term Energy Market (STEM). The progressive evaluation of market offerings is illustrated in Figure 1. The current situation is one in which there is a Day-Ahead Market (DAM), backed by an Intra-Day Market as well as two forward physical markets (FPM) (Week ahead and Month ahead).

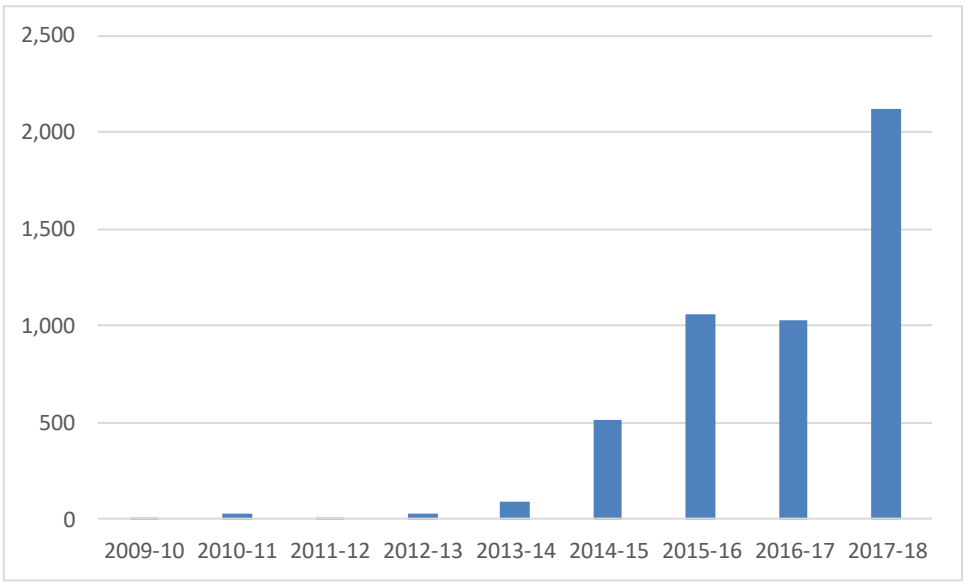
Bilateral contracts, upon which most of the existing cross border infrastructure was developed, still account for the bulk of energy traded in the region, but the share of total energy traded in the competitive market has increased, reaching 24% in 2017-18. Figure 2 shows the volumes traded on the SAPP competitive markets in the last 9 years. Volumes were very low over 2009-10 to 2013-14, but have grown significantly from 508 GWh in 2014-15 to 2,124 GWh in 2017-18. In that year, $106.6 million was exchanged among market players compared to $75.8 million in 2016/17.

Figure 1 Evolution of the SAPP competitive market



Source: SAPP

Figure 2 Growth of SAPP competitive market traded volumes (GWh per financial year)



The competitive market breakdown in 2017-18 was:

- Day Ahead Market (DAM) – 72 %
- Intra Day Market (IDM) – 16%
- Forward Physical Market – Weekly 9%
- Forward Physical Market – Monthly 3%

As already mentioned in Section 1.1, the volumes traded were much lower than they might have been due to transmission constraints. In 2016-17, for example, in round numbers sell offers were 15,000 GWh, buy bids were 10,000 GWh, matched bids were 3,000 GWh, but actual trade was only 1,000 GWh.

One of the main SARERA objectives is to contribute to increasing investment in transmission interconnectors, in the first instance to remove existing constraints but also to increase interconnection capacity to pave the way for future growth in trade. The interconnection of Angola, Malawi and Tanzania to allow them to become operating members of SAPP is long overdue. It is indeed the existence of constraints induced by persistent failure to investment in additional interconnector capacity which provides a major impetus to the formation of SARERA.

2.2 Regional wholesale market vision

SAPP intends to continue developing and extending its competitive market platform, adding first a Balancing Market, Ancillary Services Market and Financial Market to enhance trade opportunities. SAPP's long-term vision is that the competitive markets will eventually become more dominant than the bilateral market, eventually allowing end-users to have a choice of supplier. The relatively recent introduction of the physical week and month ahead markets, and later possibility even longer period markets, is seen by SAPP as providing a viable alternative to bilateral contracts for the bulk of trade. The SAPP vision is one in which, for example, a small country whose peaking power is more expensive than regional alternatives could be met in a typical day on the basis of a larger competitive market than the bilateral market:

- ***Base load*** capacity would be met by a combination of own supply, bilateral contracts and monthly forward contracts.
- ***Intermediate and peak demand*** would be met from a combination of the weekly forward contracts, Day Ahead Market (DAM) and Intra-Day Market (IDM)
- Shortfalls and surpluses over positions on the other trading platforms covered through the ***balancing market***.
- ***Ancillary services*** (reserves and reactive power) potentially provided through markets.

Large electricity customers can also be designated as being eligible to participate in the wholesale market in the early stages before extending eligibility to medium and small power users. The introduction of direct trading between eligible customers and IPPs in other SAPP countries would provide a major stimulus to market development.

In 2016, a comprehensive study was conducted for RERA to develop a Market and Investment Framework for SADC Power Projects, including a Regional Market Model and Implementation Plan[2]. The market model has 2 phases and 6 stages, with implementation

[2] Study funded by the US Department of State and accrued out by Deloitte Financial Advisory Services LLP.

focussing on large IPPs in 2 chosen pilot countries progressively being allowed to sell through SAPP to the other country. Eventually, all countries would be involved, through the mandatory unbundling and competition within electricity supply industries and between countries.

The intention of the regional market development is to increase bilateral trade, both between existing state-owned utility players and other market participants. This will require harmonising codes, access arrangements and use-of-system charges. Increasing trade will also provide incentives for investment, particularly by private sector developers with the skills and capital that are needed for power development requirements to be met in the region.

The role of regional energy institutions in regional power trade is anticipated to be:

- SADC Secretariat (Energy Division) – platform for policymakers (SADC Energy Ministers and Senior Officials)
- SAPP Coordination Centre – trading platform and market operator
- SARERA – regional energy regulator and market oversight
- SACREEE – promoter for renewable energy and energy efficiency at all levels and across all SADC Member States
- Kafue Gorge Regional Training Centre (KGRTC) – training in electricity technologies and planning, with a particular focus on hydropower.

The remainder of this section discusses how the roles of SAPP and SARERA will need to evolve to facilitate growth in regional power trade.

2.3 Vision to reality

The Regional Market Framework study provides a useful vision, but there are concerns about how the vision can be turned into practical reality. The lessons from regional integration in many different sectors are that harmonisation takes a good deal of time and cannot easily be managed. Two useful principles of regional integration, tried and tested in the European Union, are:

- ***Subsidiarity*** – a regional authority should have a subsidiary function, performing only those tasks which cannot be performed at the national level.
- ***Multi-speed integration / variable geometry*** - different countries have different levels of commitment to regional integration, arising from different levels of perceived benefits and preparedness.

The evolution of RERA into a regional regulator SARERA and the deepening of regional trade need to be managed in tandem so that Member States accept the handing over of certain powers to the regional regulator, something that will be very new in Southern Africa. Legitimate market development concerns regarding cherry picking and stranded

assets need to be recognised and accommodated through giving importance to subsidiarity and multi-speed integration.

This approach is also likely to make it easier for member states to accept that certain **minimal powers** are to be ceded to a regional regulatory body. This need not and should not be done as once off set of sweeping changes. The crucial immediate steps that are required are:

- ***open access*** to the interconnected network to be assured;
- ***wheeling charges*** for power trades to be based on economic transmission use of system (TUoS) charges that are fair for both sellers and purchasers throughout the transmission wheeling path;
- ***technical regulation*** of cross-border trade.

Open access means non-discriminatory rights to connect to the network and to use the network to transport power. Where transmission lines have been developed and paid for by specific parties, they may be deemed to have guaranteed transmission rights while the other regional market players may not, but this is still non-discriminatory within the latter category. SAPP recognises this principle by giving precedence to the bilateral market over the competitive market, subject to emergencies overruling all planned access.

It is not necessary to wait for the ideal situation of all countries unbundling utilities and establishing domestic wholesale energy markets before enhancing regional trade. Indeed, much has already been achieved without progress in domestic markets. At present in southern Africa, there are no mandatory obligations on access to grids to allow international electricity trade by eligible consumers and IPPs. Some countries do have third-party access provisions for national entities enshrined in their electricity laws in theory (e.g., Lesotho, South Africa, Zambia) and some countries, in theory, allow bilateral trade between IPPs and eligible consumers across borders. But few have implemented access provisions in practice. SARERA should be given powers to deal with obstacles to implementation.

Wheeling/TUoS charges: the SAPP agreement on Wheeling Charges, otherwise known as TUoS charges, currently applies only to third countries – the regulators in the origin and destination countries are not required to apply the same wheeling formulae. At present, SAPP wheeling / TUoS charges are set on a MW-km basis and are paid by purchaser. The intention, already approved at SAPP Executive Committee level, is for SAPP to migrate to zonal pricing, where use of system charges reflect transmission constraints and are shared between sellers and purchasers[3].

In a situation where, say, a big user in country A wishes to have a bilateral contract to purchase power directly from an IPP in country C, with wheeling through country B, countries A and C can impose very high wheeling charges which make the trading arrangement uneconomic. It is only the wheeling charges in country B which are covered

[3] Sub-study by Deloittes, completed in 2018, is on *Transmission Pricing Methodology*. It is also to be noted that there is an initiative to put a continent-wide transmission pricing methodology in place. This concept is being piloted in the ECOWAS region.

by the current SAPP agreement on wheeling charges. The effect is to protect the monopoly position of the incumbent utilities in countries A and C.

Technical regulation will in the first instance be a formalisation of the technical arrangements in SAPP, which have resulted in successful synchronous operation of the interconnected network ever since SAPP's formation in 1995.

Technical and other forms of regulation at the regional level would be facilitated by harmonisation of regulatory arrangements within Member States. As spelt out in the Market Framework study, the aspects to be harmonised might include:

- the Grid code;
- adoption of uniform regulatory accounting principles;
- accounting unbundling for generation, transmission and distribution to allow for transparent allocation of costs for the different licensed activities;
- regulatory decision-making authority with respect to licensing, technical and economic regulation;
- eligibility criteria for end user participating in the market;
- model contracts for bilateral trading;
- operational rules for balancing markets;
- uniform performance measures for financial health, quality of supply and service levels to facilitate benchmarking.

Subsidiarity dictates that harmonisation need not imply uniformity, nor the same pace of alignment in each country.

2.4 Progressive wholesale market development

Ideally, all member states should develop domestic wholesale electricity markets, which include balancing arrangements, before eligible customers are permitted to import from energy suppliers in other countries. Waiting for this ideal situation to happen across all the member states before eligible customers can trade within the SAPP region may mean that this might never happen[4] for a very long time.

The Market Framework study envisages highly structured implementation of the regional wholesale market. However, that implementation plan which was due to start in 2016 has not yet been initiated and could easily run into difficulties and delays once it is underway. In the past, SAPP has always acted pragmatically, and in so doing the power pool has

[4] A recent paper (Power Futures Laboratory, UCT (May 2019): *Key Lessons on Institutional Arrangements for Managing the Restructuring of Power Utilities*) notes that there is no 'one size fits all' market structure. Reform that introduces wholesale competition needs to be incremental and iterative, with learning by doing, and the process necessarily takes a considerable amount of time.

grown organically through '**learning by doing'**. This is arguably one of SAPP's greatest strengths and the reason it is ahead in regional power sector integration, despite not being granted the same level of powers as its peers in other power pools.

SAPP would do well to continue with this approach. A more pragmatic attitude being adopted to the development of national and regional wholesale markets would involve building on existing initiatives, such as the following:

- The unbundling of the power sectors of two of the countries which are soon to become operating members of SAPP – Angola and Malawi.
- Namibia's modified single buyer model, which will allow large electricity customers to buy up to 30% of their demand directly from an IPP rather than from NamPower. The immediate intention is to stimulate IPP development in the country, but eligible customers may also be permitted to import from outside Namibia.
- Zambia is in the process of finalising an Open Access regime which will allow bilateral trading agreements between different entities. ZESCO has a 5-year interim System and Market Operator (SMO) licence, in subsequent years an independent SMO might be licensed.
- South Africa's recently announced unbundling of Eskom, while motivated by the need to resolve the utility's financial challenges, may in time become a pre-cursor to the establishment of a wholesale market managed by an independent transmission and system operator. This will offer similar opportunities to those being opened up in Namibia, but on a much larger scale.
- The corporate PPA model, where a utility buys the power from an IPP, (virtually) ring-fences it, and on-sells to a nominated customer at a premium price. This model is being adopted by global companies (such as Google and Microsoft) which want to be seen as users of renewable energy and it remains to be seen whether there will be demand from Southern Africa's big corporates.

A variant of the corporate PPA model would apply to a utility that has chronic power shortages, lacks financial resources and the customer needs firm power. The current arrangement with some members of the Chamber of Mines in Zimbabwe provides an example: ZESA purchases power from HCB for resale to large mines which pay in foreign currency in return for security of supply.

In future, it is conceivable that large mines in Zimbabwe might purchase directly from HCB or other IPPs in SAPP, and this model might be replicated elsewhere in SAPP. It would require incumbent utilities permitting the transmission of power at reasonable wheeling rates and the utility in the importing country to be willing to provide balancing services.

As already highlighted, decisions about wheeling charges in future should become the responsibility of SARERA, which needs to be given the powers to set and enforce wheeling charges on agreed principles. Some countries will clearly be more open than

others to specifying which customers are to be allowed to be eligible to participate in national and regional wholesale markets, but once the principle is established and regional transmission pricing regulation is assured, there would be a significant incentive for IPP investment to take place.

3 Institutional diagnosis and options

3.1 SADC institutions

In the Inception Report, the structure and organs of the Southern African Development Community (SADC) are presented and discussed. The organs covered are:

- Summit of Heads of State or Government
- Organ on Politics, Defence and Security Cooperation
- SADC Tribunal
- SADC Council of Ministers
- Sectoral & Cluster Ministerial Committees
- Standing Committee of Senior Officials
- SADC Secretariat
- SADC National Committees
- SADC Parliamentary Forum

The three regional energy entities, RERA, SAPP and SACREEE (The Southern African Development Community Centre for Renewable Energy and Energy Efficiency) are also covered.

In any comparative assessment of regional institutions in different Regional Economic Communities in Africa, the voluntary nature of arrangements in Southern Africa stands out. SADC has not hitherto required its members to surrender any sovereignty. SADC agreements do not contain a binding obligation to 'domesticate' protocols or other instruments by translating or integrating these into their national legislation. In other words, failure of SADC Member States to comply with their regional obligations has no consequences. Under these circumstances, protocols are simply regarded as best endeavour instruments, and not rules-based instruments, with consequences for non-compliance.

The requirements for the regional regulator will require a change to SADC practice, albeit a change that is minimised and made as compatible as possible with SADC precepts. At present, RERA has only recommendatory authority in discharging its coordination and facilitation role. As the member states have seen the need for the role of SAPP to be

enhanced to facilitate development of projects of regional significance in addition to coordinating planning, environmental, system and market operations, the role of RERA also needs to evolve if it is to have enhanced capacity to deal with regulatory issues relating to cross-border energy trade and investment.

As the participants at the Consultative Workshop clearly articulated, harmonisation (policy/regulation) is the cornerstone of regional integration and the establishment of SARERA. Cross-border harmonisation may be defined as "The process by which two or more states, sometimes under the auspices of an interstate or international organization, change their legislation relevant to some area of common concern to conform their statutes and to facilitate compliance and enforcement across borders." For there to be meaningful harmonisation of regulatory approaches, a clear and decisive enforcement procedure is required and power over that enforcement procedure must be clearly vested in an institution with the authority to take action.

3.2 Lessons from regional regulators in other regions

For RERA to move beyond voluntary cooperation and information sharing, it is interesting to study the experiences of regional regulators in other regions which have responsibilities similar to those envisaged for SARERA. It was evident that the participants at the Consultative Workshop had a keen interest in international experience, and in this report detailed profiles of seven regulators in six regions (USA, India, Europe, Central America, west and east Africa) have been provided in Annex A1. Interested readers will find for each one details of:

- ❑ Background to formation
- ❑ Legal basis
- ❑ Mandate, functions and powers
- ❑ Organisational structure and funding
- ❑ Stakeholder interface
- ❑ Assessment of relevance for SARERA
- ❑ References used for the case study.

In this section, we present two summary tables, the first providing the main characteristics of each of the regulators, the second a summary of the assessed relevance for SARERA.

Table 1 Regulatory power pool arrangements in other parts of the world

Regulator	Members	Main characteristics
Federal Energy Regulatory Commission (FERC)	USA	FERC's mandate covers the interstate wholesale sales and transmission of electricity and gas as well as the interstate transportation of oil by pipelines. The powers of the regulator are granted by the Congress and are described in numerous laws including the Federal Power Act.

Regulator	Members	Main characteristics
		FERC participates in the rate setting process, market oversight and enforcement mechanisms. It has the power to regulate the market via industry-wide decisions and party-specific orders. The President selects up to 5 Commissioners who coordinate the work of 12 offices.
Central Electricity Regulatory Commission (CERC)- India	India	CERC's mission is to contribute to the power market development, facilitate competition and efficiency and improve the quality of supply in the Indian power market. CERC has substantial powers in the tariff-setting process. The Commission regulates the tariff of state-owned generating companies and generating companies which sell power in more than one State. Additionally, the Commission determines tariffs for inter-state transmission of electricity, specifies the grid code and issues licenses to operate in the market. CERC is supported by the State Electricity Regulatory Commissions which perform similar tasks on the intra-state level. CERC powers stem from section 76 of the 2003 Electricity Act. The Commission consists of 5 members who are elected by the President of India and represent a broad spectrum of expertise in engineering, law, economics, commerce, finance and management.
Agency for the Cooperation of Energy Regulators (ACER)	EU Countries	ACER provides the regulatory oversight over national regulators at the EU level with the aim to facilitate the development of the single market for electricity and natural gas. The Agency delivers its mandate by issuing recommendations, decisions and guidelines. The nature of ACER's work is non-binding. Whenever the Agency identifies the need for legally binding documents, it informs the European Commission which takes the appropriate action. The organisation's legal functions and powers are governed by the Third Energy Package and Regulation (EU) 2019/942 (recast). The Agency comprises a Director, the Administrative Board (9 members and their alternates), the Board of Regulators (one senior representative per Member State and their alternates; an additional non-voting seat is granted to the Commission representative) and the Board of Appeal (6 members and their alternates).
European Network of Transmission System Operators for Electricity (ENTSO-E)	36 European Countries	ENTSO-E is an association of 43 electricity transmission system operators (TSOs) from 36 European countries. The organisation aims to facilitate the development of an internal energy market in electricity and cross-border trading by participating in the policy-setting process, coordinating the operation of TSOs and facilitating regional cooperation. The legal powers were granted to ENTSO-E under the Third Legislative Package for the Internal Energy Market in 2009. The operation of ENTSO-E is governed by the Articles of Association and Internal Regulations and its responsibilities are described in several EU regulations. The organisational structure of ENTSO-E comprises the Assembly (representatives of the 43 TSOs), the Board (12 members), 4 Committees, the Legal and Regulatory Group (one representative per Member State), the Regional Groups and the Secretariat.
Regulatory Commission on Electrical Interconnection (CRIE)- Central America	El Salvador, Guatemala, Nicaragua, Panama, Costa Rica, Honduras	CRIE's main objective is to facilitate the integration of the regional power market. The organisation achieves this objective by reviewing, approving and enforcing regional market rules and by developing pricing rules for transmission tariffs. In the event of non-compliance, CRIE has the right to impose sanctions on market participants. CRIE is governed by the Central American Electricity Market Framework Treaty. The organisational structure comprises 6 Commissioners representing the regulatory agency of each country.
ECOWAS Regional Electricity Regulatory	15 West African States (Benin, Burkina Faso, Cabo-Verde, Côte-	ERERA aims to contribute to the development of the regional power market by regulating the regional cross-border electricity interconnections in the Member States. The organisation delivers its mission by performing important functions in the field of technical

Regulator	Members	Main characteristics
Authority (ERERA)- West Africa	d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra-Leone and Togo)	regulation of cross-border power pooling, management of the regional market, facilitating market development and determination of transmission and ancillary services tariffs ERERA performs its functions by acting as a regional entity promoting cross-border trading and by acting as a regional regulator which encourages best practice in the sector and ensures the national and regional regulations complement each other (particularly relevant in case a Member State does not have a national regulator). The organisation is governed by the ECOWAS Energy Protocol and the Supplementary Act A/SA.2/1/08 which are complemented by other Decisions and Directives. ERERA's organisational structure comprises the Regulatory Council (3 members), a Support Structure unit (pool of experts and an HR and finance unit), working groups and consultative committees.
Independent Regulatory Board (IRB)- East Africa	Burundi, the Democratic Republic of the Congo (DRC), Djibouti, Egypt, Ethiopia, Kenya, Libya, Rwanda, Sudan, Tanzania and Uganda	The IRB aims to contribute to the development of the regional power market by determining and enforcing regional market rules, setting regional transmission and wheeling tariffs, issuing recommendation on changes to domestic legislation and issuing licenses to market participants. The IRB derives its authority from the Inter-Governmental Memorandum of Understanding (IGMOU) which was signed by the Energy Ministers of the EAPP countries. The organisational structure of the IRB comprises representatives of national regulators or commissions who are supported by 4 operational units (technical regulation, legal affairs, economic regulation and the administration and finance unit).

Source: Listed in the full case studies in the Annex A1

Table 2 Relevance of regulatory arrangements in other parts of the world for SARERA

Regulator	Assessment of SARERA relevance
Federal Energy Regulatory Commission (FERC)	The responsibilities of FERC and SARERA will necessarily differ due to the differences in the power markets these organisations aim to regulate. Nevertheless, the case of FERC is interesting to look at as it illustrates how transparency and clear definition of evaluation processes results in increased cross-border trading. FERC regularly engages in consultations with the relevant stakeholders which helps manage regulatory expectations. By including experts in relevant fields, the commission ensures high standards of its services.
Central Electricity Regulatory Commission (CERC)- India	The establishment of the independent regulator in the Indian power sector took many years and was accompanied with numerous reforms in the power sector. The lessons that SARERA can draw from this particular case study are certainly limited in scope given the fact that the CERC regulates the electricity sector of just one country, while SARERA will serve as a regional regulator. The experience of India shows that the establishment of the regulator needs to be performed in parallel with other reforms facilitating the integration of the power market structure, such as unbundling, introduction of competition in the power market or unification of the power grid frequency across members.
Agency for the Cooperation of Energy Regulators (ACER)	The ACER context is the European Union's attempts to introduce competition in the energy market and to increase the volume of trade between Member States. The creation of a single regulatory authority undoubtedly contributed to a uniform application of the EU law and to better regulatory practice domestically and regionally. This integration process was only made possible by the Member States allowing changes in their national policies. Countries were presented with a few options that they could potentially pursue to be compliant with the EU regulations. These options accounted for different circumstances under which Member States operated before the process of integration began.
European Network of Transmission System Operators for	ENTSO-E plays an important role in facilitating the integration of the European electricity market by contributing to the development and maintenance of the high voltage network. ENTSO-E can serve as an ambitious example of what SARERA could aim to achieve in terms of integration of the transmission markets and international cooperation.

Regulator	Assessment of SARERA relevance
Electricity (ENTSO-E)	ENTSO-E plans to expand its operations further by extending the single market to South East Europe and the Western Balkans; it also maintains close ties with Turkey. It carries out knowledge sharing meetings with international partners from the United States, Japan, India, Korea and India.
Regulatory Commission on Electrical Interconnection (CRIE)- Central America	CRIE is one of the few examples of a successful regulatory arrangement with legally binding measures that ensure the enforceability of the agreement. Lessons for SARERA start with it being important that member states are involved in all aspects of drafting of the functions and powers granted to the regional regulator from the outset. The non-discriminatory approach adapted in the CRIE Treaty ensures that countries will not place their national interests above the interests of the regional power market. Granting CRIE the right to make legally enforceable decisions in the absence of complete agreement is perhaps the best example of individual countries prioritising regional interests over their own. This mechanism also ensures that CRIE can always reach a decision and it does not get stuck in a political impasse
ECOWAS Regional Electricity Regulatory Authority (ERERA)- West Africa	The Western African regulator has been granted substantial authority which was only possible due to the strong commitment of Member States to materialise the concept of an integrated power sector. Furthermore, the ECOWAS treaty makes special provisions for foreign investment, dispute resolution, institutional capacity development and establishing a non-discriminatory framework for energy imports and exports. All these factors are crucial from the perspective of power market development and provide the certainty that market participants need to operate in the market. The organisational structure of ERERA provides other valuable lessons for SARERA. The ECOWAS Member States have initially set up ERERA as a simple organisational unit with just three full time Council Members who are supported by a pool of experts and consultative committees. Once ERERA expands its operations, it is anticipated that the organisational set up will grow in a flexible manner according to the needs.
Independent Regulatory Board (IRB)- East Africa	The case study of the IRB shows that there is a need for the regional authority (such as the IRB) and the power pool (EAPP) to coordinate their strategic goals. Cooperation is necessary in order to synchronise power market development with the necessary improvements in the regulatory environment. It is encouraging to note that Further development of regulatory tools is necessary to establish the IRB as an operating entity regulating the regional power market of the EAPP Member States. The existence of a credible independent regional regulator plays a crucial role in facilitating the development of the regional power market.

Source: Listed in the full case studies in the Annex A1

It is encouraging to be assured from experience in developed countries that **transparent, professional regulation of cross-border power trade does lead to investment in infrastructure and growth in the volume of electricity traded** (FERC, ACER, ENTSO-E). These systems are very large in relation to SAPP, as is India, where an important lesson is that the **establishment of the regulator should be in parallel with other reforms facilitating the integration of the power market structure**, such as unbundling and introduction of competition in the power market. Both FERC and CERC are well served by small bodies of full-time professional decision-makers.

CRIE in Central America provides a clear example of a successful regulatory arrangement with legally binding measures that ensure the enforceability of the agreement. However, the setting for CRIE is more straightforward than for SARERA in that there are only 6 countries involved and CRIE was established precisely to facilitate a particular regional integration project (SIEPAC). The situation in Southern Africa is very different in that the trade options are far more complex. Nonetheless, there are important lessons on **member state involvement in the legal founding of SARERA**, and in **ensuring that there is a non-discriminatory approach to the implementation of the SARERA Charter**.

The regulators from East and West Africa have obvious relevance, being established to assist in promoting investment and trade in the East and West African Power Pools

respectively. The IRB in East Africa is not fully operational, whereas ERERA is fully operational and has interesting lessons for SARERA, including that the regulator has been made operational with an extremely streamlined structure, with just three Council Members who are supported by a pool of experts and consultative committees. Once ERERA expands its operations, it is anticipated that the organisational set up will also change by appointing additional members to the Council who will serve as experts in engineering, law, economics and accounting. Additionally, the previous support unit will be expanded into a technical regulation department, a finance and administration department, internal auditing unit, external relations and communications cell and a strategy advisor. ERERA shows that **the regulator should be fluid and adaptable, growing organically as and when required by evolving regulatory needs**.

The regional regulatory arrangements studied are all interesting, but there are legal, regulatory and political limitations on the extent to which ideas and concepts can be imported into the SADC environment. This is because in the design of RERA's transformation SADC and RERA are not starting with a blank sheet of paper (as, for example, was the case with the SIEPAC project in Central America) and there is no SADC precedent for the delegation of powers to a regional entity.

In other regions, the legal environment is well suited to regional regulatory requirements. In the European Union, for example, it has been possible to introduce the concept of cross-border regulation in the electricity and other sectors because the legal system facilitates it, and the politicians have effectively agreed to it by signing the various European treaties. European Union institutions often have large memberships of governance structures – ENTS-E, for example, has representatives of 43 transmission system operators in its leading body, the Assembly, while ACER has around 30 members of its Board of Regulators (one per country, plus the European Commission).

Having one representative per country works well if either the number of countries is ow (CRIE in Central America) or Member States involved agree to give up some of their sovereignty (ACER). ACER needs to be put in a broader context of the European Union structure: ACER can make its decisions legally binding by seeking the involvement of the European Commission. Members want to avoid being non-EU compliant, which provides an extra spur to compliance. ACER was only created at the final stage of market integration (which started in late 1990s). Its relatively complex structure is consistent with its role in shaping the EU energy market.

In southern Africa, any transformation of RERA must address the issue of how RERA will exercise enforcement powers, and for this there are no Southern Africa precedents. The approach adopted, which is developed in Part 2, is to see to what extent the existing structures can be adapted and minimally built upon to facilitate a smooth transformation of RERA into an effective regional energy regulator.

PART 2 – FRAMEWORK FOR SARERA

4 Legal framework

4.1 RERA today: the starting point

Establishment of RERA

The list below refers to the legal and policy instruments of SADC which led to the creation of RERA and from which RERA derives its authority:

- By Article 22.1 of the SADC Treaty it is acknowledged that "Member States shall conclude such Protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration".

- In August 1996, a Protocol on Energy was agreed. A Protocol is a legally binding document committing Member States to the objectives and specific procedures stated within it. In order for a Protocol to enter into force, two thirds of the Member States need to ratify or sign the agreement, giving formal consent and making the document officially valid. The Protocol on Energy entered into force in April 1998.

- The April 2010 RERA *Guidelines for Regulating Cross-border Power Trading in Southern Africa* state that RERA was also established under the terms of the SADC Energy Co-operation Policy and Strategy (1996), the SADC Energy Sector Action Plan (1997) and the SADC Energy Activity Plan (2000).

- The Energy Protocol sets out a detailed structure for the supervision of the activities in the energy sector promoted by the Protocol. Ultimate governance rests with the SADC Council of Ministers but supervisory powers are delegated down through a Committee of Ministers to a Commission, which has however never been established. Amendment of the Energy Protocol is in progress (the amended version will be presented for Ministers in May/June 2020). There is now explicit reference to promoting the institutional framework for regional energy regulation.

These instruments will also form the basis for the new SADC regional energy regulator, supplemented as described below.

Legal status of RERA

RERA's current legal status is as a company not having a share capital incorporated under the Companies Act 1973 of the Republic of Namibia. In its Articles of Association, it is described as an "…incorporated association not for gain…". Its registered office (that is, the official address it is required to maintain for compliance purposes) is in Namibia.

There is sometimes a perception that a company is an organisation engaged in commercial activities and that an association (such as RERA) or an authority (such as SARERA may become) are, because they are different types of organisation, set up in a different way. However, it is the case that many organisations not engaged in commercial activities do nonetheless choose to establish themselves in corporate form. Among the advantages is the legal protection it gives to the officers and executives of an association and authority in the discharge of their duties.

RERA holds annual shareholder meetings, as is usual with a body corporate, at which annual reports, financial statements, business plans and budgets are approved.

4.2 SARERA: Association or Authority?

In relation to the change of the A (for Association) in the name of RERA to the A (for Authority) in the name of SARERA there is no clear legal distinction to be drawn between the two names. The words "Association" and "Authority" do not carry with them a legal definition of powers and responsibilities. Those powers and responsibilities depend upon the detailed rules which are written for the organisation. In other words, the mere act of calling SARERA an authority would not of itself make any change to its legal status. So, when it is stated that the envisaged transformation of RERA into a regulatory authority will greatly enhance the ability to implement, monitor, enforce and take remedial action on regional regulatory decisions and other imperatives, the success of the transformation will depend on the grant of new powers to it[5].

As an authority there is no legal reason why SARERA may not continue the RERA approach of operating as an incorporated body. Indeed, from a legal perspective the transformation can be achieved by making changes to the existing RERA corporate structure; there is no legal requirement to establish a new legal entity. That said, bearing in mind the length of time during which RERA has been in existence and the differences in the institutional framework for SARERA which are recommended, there can be merit in starting SARERA with a legal structure which is new and bespoke for it, rather than an adaptation of what was designed for RERA.

In making this analysis, comment is made only from a legal perspective while acknowledging that there may be other, policy considerations to be taken into account.

4.3 Precedents for the creation of SARERA

As part of this assignment the consultant team has looked at analogous experiences from other parts of Africa and from elsewhere in the world which might provide learning experiences for this assignment (see Section 3.2 above). But it is important to keep in mind that in its structure SADC has important legal characteristics which make it different from other regional groupings and these differences bear directly on the institutional framework to be adopted by SADC for SARERA.

[5] This statement will apply to whatever name is finally chosen for the new regulator. During the country visits, some preferred "Agency". The name is a topic to be discussed at the Consultative Workshop.

Most importantly SADC does not have a single, unifying SADC legal system which creates a uniform legal approach and facilitates, for instance, a harmonised regulatory system across member states. This means that the sort of regulatory approaches found in regional federations such as the European Union or the USA are not easily applicable within SADC.

In the absence of a single unifying legal system, a different way has to be found to create a structure by which a group of independent sovereign states can be bound together for the purpose a common initiative. In SADC this is done by way of a **Treaty**. A treaty is an agreement under international law entered into by actors in international law, namely sovereign states and international organizations. A treaty may also be known as an (international) agreement, protocol, covenant, convention, pact, or exchange of letters, among other terms. Regardless of terminology, all of these forms of agreements are, under international law, equally considered treaties and the rules are the same. Treaties can be loosely compared to contracts: both are examples of willing parties assuming obligations among themselves, and any party that fails to live up to their obligations can be held liable under international law.

In Section 4.1 above it is noted how the authority for the creation of RERA flows ultimately from the SADC Treaty. The SADC Treaty having established the legal "umbrella" under which the agreed SADC objectives can be pursued, there is a then a range of legal tools available to give effect to and implement those objectives. SADC has exercised its ingenuity in finding its own solutions to create mechanisms for collaboration between member states.

SAPP is a prime example. SAPP is one of the most successful initiatives for regional co-operation within SADC. The key documents in the foundation of the SAPP are the **Inter-Governmental Memorandum of Understanding** and the **Inter-Utility Memorandum of Understanding**.

A similar approach is found in the establishment of SACREEE. SACREEE is a subsidiary agency of SADC with the instrument of its establishment being an **Inter-governmental Memorandum of Agreement** to be signed by all Member States.

Neither "memorandum of understanding" nor "memorandum of agreement" is a term which carries any automatic legal meaning. It is sometimes the case that within a government, or international organisation such as SADC, as a result of custom and practice or other legal convention, terms such as memorandum of understanding and memorandum of agreement carry a specific meaning understood in that country or organisation. The consultant team is not aware if this is the case within SADC.

This report is written on the basis that these document titles carry their normally understood meaning, the most important of which is that their contents are <u>not</u> legally binding. A memorandum has force in that governments and others who enter into them, and are seen to have entered into them, feel a degree of compulsion to honour the commitments made in them. **The statements contained in documents so titled are made in good faith, but ultimately are not legally enforceable**. This is the crucial point: in order for the next stage in the transformation of RERA to be achieved, the actions must give rise to legally binding rights and obligations of SARERA.

4.4 A Charter for SARERA

In the Zeroth Draft Report and at the Consultative Workshop, the consultant team suggested that a standalone Regulatory Protocol might be created, distinct from the Energy Protocol which is the administrative law mechanism by which effect is given by SADC Member States to SADC policies and objectives for energy development and use in the region.

Following the Consultative Workshop, the team was provided with the draft *Guidelines for Drafting SADC Legal Instruments,* dated August 2019, by the SADC Legal Division. It is preproduced in this report as Annex A2. The *Guidelines* make clear that "a Protocol shall be used to govern cooperation among Member States in the areas stated in Article 12(2) of the Treaty", while "a Charter shall be used when establishing a subsidiarity organisation of SADC".

It is therefore quite clear from these *Guidelines* that SARERA, as a new subsidiarity organisation of SADC, should be founded under a **Charter.** This was confirmed at the Validation Workshop. A SADC Charter is a legally binding instrument under the SADC Treaty, imposing binding obligations on those Member states who sign it. Thus it has direct legal effect in a way that a memorandum of understanding or a memorandum of agreement does not.

The provisions of the SARERA Charter will be governed by:

- ❑ The SADC Treaty
- ❑ The SADC Subsidiarity Guidelines approved by the SADC Summit in 2004
- ❑ The SADC Energy Protocol.

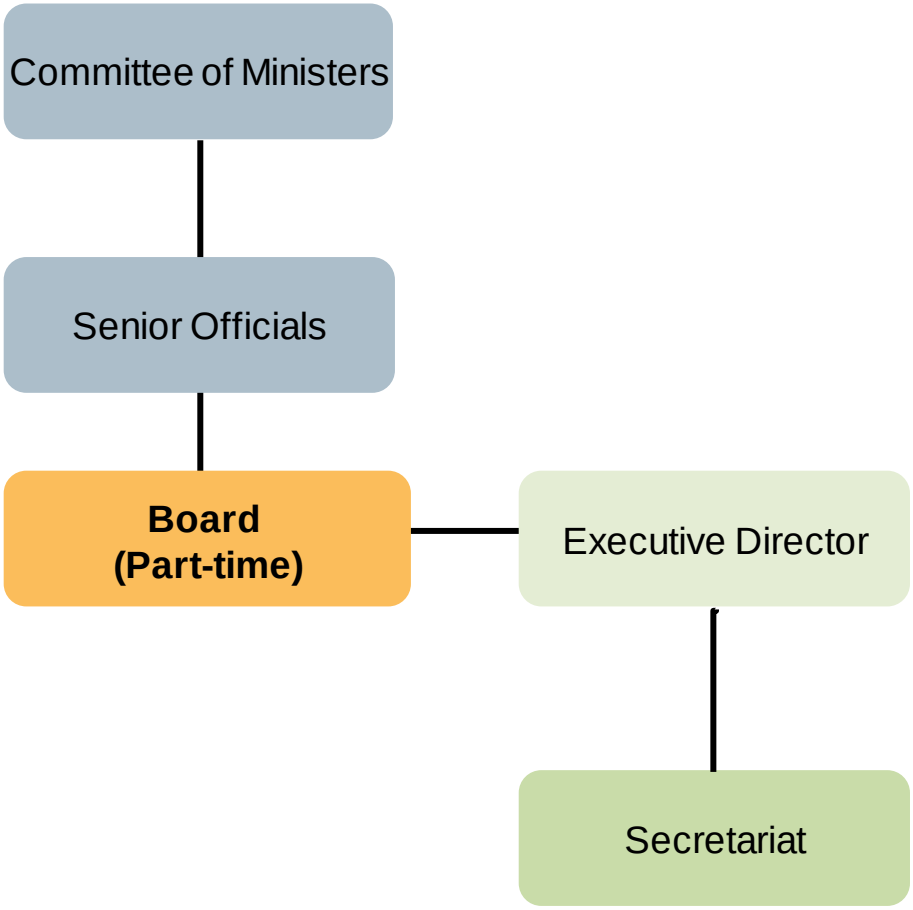
Section 4 of the *Guidelines* provide the detailed legal requirements for the Charter document – Preamble, Definitions, Scope, Establishment Clause, Seat, Objectives, Functions, Institutional Arrangements, Secretariat, Sources of Funding, Settlement of Disputes, Signature, Entry into Force, Depositary, Amendments, Withdrawal, Termination, SADC Agreements.

The substance to be inserted in the SARERA Charter when it is drafted is provided in this report, notably the Mandate, Functions and Powers in Section 6 and the Funding Model in Section 9. An important part of the *Guidelines* is the section on institutional arrangements. This specifies that the institutions responsible for the direction and implementation of a Charter shall be:

- ❑ Committee of Ministers
- ❑ Senior Officials
- ❑ Board
- ❑ Secretariat

This structure is illustrated in Figure 3 below. The crucial link envisaged in the *Guidelines* between the Board and the Secretariat is the Executive Director. Subject to the endorsement of the Committee of Ministers, the Board appoints and reviews the performance of the Executive Director, who in turn is responsible for the performance of the Secretariat. The Executive Director is the Secretary of the Board. Although not explicitly stated, it is clear that the intention is for members of the Board, other than the Executive Director, to be part-time.

Figure 3 SARERA institutional structure as defined by the *Guidelines* for a SADC Charter



There was discussion both at the Consultative Meeting in Maputo and the Validation Workshop in Johannesburg on whether full-time Board members might be preferable. FERC, CERC and ERERA have full-time Board members recruited for their technical skills and they focus all of their time and energy on the regional regulatory matters at hand. In Southern Africa, this would provide an efficient way of using the scarce high-level regulatory resources which exist in the region, as well as lowering overall costs. However, the majority opinion amongst the Member Country representatives at the two meetings was that the SARERA Board should be a part-time Board.

Whether all SADC countries should be directly represented on the Board, or whether there should be a rotating membership was left to be resolved at a later stage. There might also be a distinction between Board members representing countries which engage in

regional energy trade and others who do not (analogous to the 'connected' and 'non-connected' membership structure of SAPP).

4.5 Role of national regulatory agencies in new Authority

In order to better operationalise the regulatory authority to discharge its new SARERA mandate, changes will be required to the way in which the internal affairs of SARERA are organised.

As an association, RERA is essentially a club in which the members collaborate to try to achieve some shared objectives. There are membership rules; there are some officers who deal with the day to day management; there are numerous committees in which members can participate; disputes are resolved at a meeting of members (the Plenary).

A regulatory authority cannot operate in this way. It is a fundamental principle of regulation that a regulatory authority is seen to be independent in its actions. If, as this Report proposes, the transformation of RERA into SARERA is to lead SARERA to be given stronger powers, including the power to take enforcement action, the very independence of SARERA is compromised if legal persons from the member states it is regulating have the sort of powers presently enjoyed by the members of RERA under its constitution.

To illustrate this point – under the Constitution of RERA membership is open to all energy regulatory bodies in the Member States. All members also become members of RERA's Plenary, which is described in the Constitution as "…*the highest decision-making authority of RERA*.". What this means is that the affairs of RERA are under the control of regulatory agencies of the Member States. For so long as RERA discharges its current functions of stimulating collaboration and facilitating regional initiatives, this structure can be effective.

However, with the transformation of the Association into an Authority, and the allocation to that entity of decision-making powers, it is necessary to re-appraise what membership does and should mean. A state will often have economic and political interests in incumbent utilities (such as national energy companies), and its government will retain to some degree a connection with and influence over its regulatory bodies. To be effective and to command the respect and confidence of energy market participants a regulator must be independent of the commercial and political interests of the sector it regulates and must be seen to be independent.

The existing members of the RERA association will play an important role in the future of the Authority, but it should be a different role. For this reason, the membership rights as described for RERA need to be revised for SARERA. Specifically, the Board in the SARERA Charter Structure should **not** be composed of officials from the national regulatory agencies which are, albeit to a degree limited by subsidiarity, subject to regulation by the regional body. The need for avoidance of conflict of interest was discussed and agreed at the Validation Workshop. Similarly, to preserve the institutional domains for policy-making and the implementation of policy through regulation, members of the SARERA Board should also not be officials from Ministries of Energy. The Board can be selected from retired regulators and energy officials. Academics with

relevant skills and representatives of consumers, the intended primary beneficiaries of regulation, could also be considered.

The main forum for the involvement of national regulatory agencies will be through the Consultative Committee structure, with the main Consultative Committee being the national regulatory agencies. This is discussed further in Section 8.

4.6 Notes for the drafting of the SARERA Charter

The SADC *Guidelines for Drafting SADC Legal Instruments* contain a section on the drafting of Charters. The purpose of the Notes provided as Annex A1 is to supplement this by providing advice to the draftsmen on how they can draw on the information in the Final Report to populate the draft Charter with information specific to SARERA.

It should be kept in mind that the final version of any Charter will be arrived at by a process of negotiation and consensus building. The first draft of the SARERA Charter will thus constitute the starting point for a further round of negotiations on the final details of the regional energy regulator. This discussion may be at a different level: as the *Guidelines* point out, the negotiation of a Charter is carried out between Member States acting in a sectoral or cluster Ministerial structure.

5 Compliance and enforcement mechanisms

5.1 Compliance

The single most effective way to ensure compliance with regulations is to ensure as far as is possible that those to whom the regulations will apply:

- ❑ can see that the regulations have a purpose they can understand and support;
- ❑ the regulations are applied according to rules and procedures that are clear, fair and transparent.

Compliance is also facilitated if regulations in Member States and at the SADC level are similar (not necessarily identical) in approach. For this reason, the initiative pursuant to the Energy Protocol to harmonise national and regional energy policies is especially important. With harmonisation comes an alignment in approach which in turn facilitates the co-operation between Member States which the Energy Protocol promotes.

Widespread consultation in advance of the creation of regulations, giving stakeholders the opportunity to comment, is always beneficial. Compliance can also be promoted by the use of appropriate instruments such as directives, guidelines, toolkits and checklists.

But it is the case that compliance sometimes needs to be encouraged and one of the best means of providing that encouragement is to give a regulator powers to enforce regulations where compliance does not occur voluntarily. In practice, it will normally be

the mere existence of enforcement powers which will secure compliance with obligations. Regulators rarely have to exercise the powers they are given.

5.2 Enforcement

This report deals with the transformation of RERA. One of the ways in which this transformation will be exemplified is by giving to SARERA powers of enforcement, something which RERA does not have. However, the topic of regulatory enforcement has previously been extensively presented to RERA members through two documents:

- RERA's *Guidelines for Regulating Cross-border Power Trading in Southern Africa (*April 2010);
- *Manual for RERA Guidelines for Regulating Cross-border Power Trading in the SADC Region: A User's Guide* Report to the Regional Electricity Regulators' Association of Southern Africa (May 2010).

Although these two documents were developed for the use of individual Member States, much of the regulatory methodology described is directly applicable if the regulatory authority is to be SARERA as opposed to a Member State regulator.

It is to be expected that SARERA stakeholders are, through the development of these documents, sensitised to the issue of enforcement, the procedures to be followed and different enforcement mechanisms available to a regulator. On the basis that the transformation of RERA into SARERA is to be an evolutionary process, and the framework for SARERA will draw on the work contained in these two documents.

5.3 Enforcement powers

There are two basic powers that any regulatory authority requires:

- The power to compel compliance with a requirement of the regulator, failing which the person may have its rights suspended or forfeited altogether;
- The power to impose a financial penalty for non-compliance.

Section 6 of this report, which deals with the mandate, functions and powers of SARERA, describes what SARERA is to do in its initial phase and indicates appropriate forms of enforcement. SARERA will derive its authority to compel compliance with the mandate it has been given in the following way. The Charter will need to bind Member States, Member State organisations and other persons authorised by that Member State to comply with the lawful requirements of SARERA. In the event of a failure to so comply SARERA shall be authorised ultimately to invoke the SADC Treaty procedures, specifically Article 33 of the SADC Treaty which states that sanctions may be imposed on a Member State that persistently fails, without good reason, to fulfil obligations assumed under the Treaty. In the rules of procedure which will be required as part of the establishment of SARERA, there will be a much more nuanced sequence of steps leading

up to this ultimate remedy, in the hope and expectation that formal Treaty sanctions will not need to be imposed.

5.4 Disputes concerning the Charter

The draft *Guidelines for Drafting SADC Legal Instruments* contains at Section 4(13) provisions to be included to regulate the resolution of disputes *"…regarding the interpretation or application of this Charter"*.

These procedures set out in the *Guidelines* follow a series of steps, namely an initial step of negotiation among the interested parties to see if an amicable resolution can be achieved; if not, then the dispute can be referred to a committee of experts. The *Guidelines* provide that the final step in a dispute between State Parties is the referral of the decision of the expert committee to a Committee of Ministers for approval and the decision of that Committee of Ministers is to be final and binding.

5.5 Other disputes involving SARERA

The recommended Guideline for the settlement of disputes deals only with disputes between State Parties. It appears that SARERA would not be regarded as a State Party. SARERA might find itself involved in a dispute where a person disagrees with the way in which it exercises a regulatory power. Alternatively, SARERA could find itself in a position where it sees no alternative to invoking dispute resolution procedures in order to ensure that its authority is complied with by those it regulates.

Therefore, additional dispute procedures will be required, to set out how disputes involving SARERA itself may be resolved. These additional dispute procedures fall outside the scope of the Charter which is a document of limited scope for the purpose of establishing the subsidiarity organisation. These additional dispute procedures could follow a similar series of steps to those outlined in the *Guidelines*, namely an initial step of negotiation among the interested parties to see if an amicable resolution can be achieved; if not, then the dispute could be referred to a committee of experts.

The *Guidelines* provide that the final step in a dispute between State Parties is the referral of the decision of the expert committee to a Committee of Ministers for approval and the decision of that Committee of Ministers is to be final and binding. The Terms of Reference for the work of the consultant team set out three specific objectives:

a. to entrench RERA as a credible organization with the requisite institutional frameworks, tools and capacity to effectively execute its role as a regulator for the energy sector of the SADC region;

b. to facilitate the development of a well-integrated, competitive and credible regional energy market through improved regulatory oversight;

c. to improve the investment climate for the development of the regional energy market for the SADC region through effective monitoring of market activities, increased transparency and open access to information.

SARERA will not be regarded as a credible regulatory organisation, and it will not improve the investment climate for the SADC region, if disputes involving SARERA were to be ultimately resolved by decision of Governments rather than a Court of Law.

Therefore, in order for these objectives to be achieved and in contrast to the procedure for the resolution of internal Charter disputes among State Parties, the recommendation of the consultant team is that expert decision over disputes involving SARERA should be capable of challenge, with final decision to be reached by international arbitration. It will be open to SADC and State Parties to select a method of arbitration which they feel is most appropriate to the existing legal and administrative processes within SADC, within due consideration to the costs involved. In this way it will be open to SADC and its Member States to design a process which they feel is fit for purpose and best suits the objectives they wish to achieve.

6 Mandate, functions, and powers

In its current form as an association of electricity regulators of Southern Africa, RERA does not have a mandate to exercise the power of regulatory oversight over the regional energy market in SADC. It has an important but limited role to encourage cooperation and to facilitate legal harmonisation and capacity building. But it does not exercise regulatory power, by which is meant power to compel compliance with regulations. As already discussed, the allocation of such regulatory power is the next step in the transformation of RERA.

The regulatory analysis below is in three parts. Firstly, the *mandate* to be given to SARERA. By this is meant the objectives which SARERA is constituted to achieve. Secondly, the *functions* which SARERA is to perform in order to discharge its mandate. "Functions" is a term of art commonly used in regulatory law to describe the tasks or *duties* which a regulator is to carry out. Thirdly, the *powers* which SARERA requires in order to be able to carry out the listed functions.

SARERA's mandate, functions and powers are to be specified in a ***SARERA Charter*** which is to be approved by SADC Member States.

6.1 Mandate

In order to reflect the approach enshrined in the SADC Treaty it is proposed that the mandate given to SARERA should take full cognisance of the **principle of subsidiarity**. As already defined in Section 2.3, subsidiarity is the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level. It is a principle which respects the national competence of the SADC Member States and allows delegation to a supra-national body such as SARERA only those powers which are necessary for the discharge of the agreed mandate to be given to SARERA.

Accordingly, SARERA's mandate should have three components:

1) Regulation of cross border energy trade.

2) Facilitation of investment (in the infrastructure that makes cross border trade possible).

3) Facilitation of national capacity building (to develop energy markets modelled on regional and international best practice, as well as existing function of capacity building in energy regulation[6]).

In executing its mandate, SARERA is to complement other regional institutions, notably in the field of electricity, SAPP. The aspects of SAPP most closely allied to the SARERA mandate is the development competitive electricity markets in the SADC region and accelerating the development of power projects to optimise electricity trading.

6.2 Functions

In order to fulfil its mandate, SARERA shall have the following primary functions:

1) **Wheeling charges or pricing arrangements through transit countries**: SARERA shall issue regulations governing the methodologies for allocation of transmission capacity and calculation of wheeling charges to be applied by SAPP, and its equivalent in the gas and petroleum sectors when established, for wheeling through transit countries.

2) **Wheeling charges or pricing arrangements in countries of entry and exit**: In member states that have approved bilateral contracting arrangements for electricity or natural gas, SARERA shall issue regulations governing the methodology to be used by national regulators and network utilities in relation to wheeling charges applied in the country of entry and country of exit. The regulations shall be applied in the first instance by the national regulators when reviewing and approving wheeling charges or pricing arrangements proposed by network utilities. SARERA shall have an oversight role over such charges or pricing arrangements and shall have powers to take action in the event of non-compliance with regulations.

3) **Access arrangements**: In member states that have approved bilateral contracting arrangements, SARERA shall issue regulations governing access to and use of the network by electricity generators/gas producers and off-takers that are located in different countries. Such regulations shall be applied by national network companies and enforced by national regulators with SARERA having enforcement powers if national network companies do not comply.

4) **Network access to pure cross-border infrastructure**: SARERA shall promulgate and enforce regulations on non-discriminatory third party access to pipelines and electricity transmission networks that shall apply to infrastructure that is classified as being purely for cross-border trade and where it is agreed between the parties

[6] This is existing function is particularly important for the Member States in the Indian Ocean Commission (IOC). See Annex A4.

owning or developing the infrastructure that it shall be subject to third-party access.

5) **Technical regulation**: SARERA shall regulate technical standards where necessary to facilitate unhindered trade in energy (gas, electricity and petroleum products). In the electricity sector, SARERA may start by adopting SAPP instruments such as the SAPP Operating Guidelines. Alternatively, subject to retaining the right to approve the technical standards, SARERA may delegate the regulatory duty to another appropriate entity such as SAPP in the case of electricity.

6) **Participate in governance of Market Rules**: SARERA shall have the right to approve energy market rules and any future changes to those rules. Where deemed necessary by SARERA, SARERA shall be entitled to instigate the process for modifying Market Rules in accordance with the Market governance procedures in order to promote competition or avoid anti-competitive behaviour.

7) **Competitiveness of energy markets**: SARERA shall monitor cross-border trade to identify anti-competitive behaviour in the wholesale energy markets. SARERA shall be granted the power to apply appropriate sanctions (financial penalties, changes to the Market Rules, obligations to dispose of certain businesses) against market participants who are found to be engaging in anti-competitive behaviour.

SARERA shall also have the following secondary functions. These require SARERA and regulated persons in the Member States to act positively and in good faith to achieve their objectives while not giving rise to the same legal consequences if the objectives are not achieved. In legal terminology these secondary functions are akin to soft law rights and obligations, whereas the primary functions give rise to hard law rights and obligations.

8) **Investment in regional infrastructure**: facilitate and support regional energy investment initiatives and specific cross-border energy projects.

9) **Dispute settlement**: in cases where disagreements over access to facilities relating to cross-border trade cannot be resolved by negotiation between parties, and the disagreements cannot be resolved by the national regulator or regulators, SARERA shall provide a forum to mediate those disputes.

10) **Database and capacity building:** maintain an energy resource database and training unit that is complementary to regional and national body activities in these areas.

11) **Harmonisation**: encourage national regulators to harmonise national regulations and codes and contract templates etc. in order to facilitate cross-border energy trade and investment.

While participants at the Consultative Workshop rightly pointed out that harmonisation is fundamental to regional regulation, there were differences on the extent to which SARERA should have powers to enforce harmonisation. The enforcement of harmonisation in the matters related to the primary functions of SARERA – wheeling charges, access arrangements and technical regulation – was widely endorsed. Consistent with multi-speed integration, in other areas there was tolerance of countries progressively harmonising their regulatory arrangements at their own pace. The same conclusion was

reached on domestic power sector restructuring and the development of domestic power markets.

6.3 Process, powers and risks

SARERA will be scrupulous in being transparent in the application of its procedures, processes and regulatory decision-making.

Regulations to be issued by SARERA (e.g., methodology for wheeling charges) shall be proposed by SARERA and circulated to the national regulatory agencies in SADC Member States before being issued by SARERA as formal regulations. SARERA shall endeavour to ensure that the views of the national regulators and other stakeholders are reflected in the final regulation.

Wherever possible, SARERA shall first seek to cooperate with national regulators to enforce its regulations.

To carry out its functions described above, SARERA shall have the following powers to enforce regulations:

- **Wheeling charges or pricing arrangements through transit countries/ Wheeling charges or pricing arrangements in countries of entry and exit/ Access arrangements**

  Following appropriate requests to national regulators and warnings to network companies, and the issuance of rulings to such parties in respect thereof, SARERA may issue financial penalties to the national network companies in the event of non-compliance. In the case of electricity, SARERA may issue directions to SAPP to impose financial penalties on its members for violation of SARERA regulations. Monies collected by SAPP as financial penalties shall be retained by SAPP and used to support regional infrastructure investments.

- **Network access to pure cross-border infrastructure**

  Following appropriate warnings to the violating companies, SARERA may impose financial penalties.

- **Technical regulation**

  Sanctions for violation of technical regulations shall be stated in the technical regulations to which all transmission system operators shall subscribe.

- **Participate in governance of SAPP Rules**

  Sanctions for violation of SAPP Rules shall be stated in the SAPP Rules to which all SAPP members subscribe.

- **Competitiveness of electricity and gas markets**

SARERA shall have typical regulatory powers to impose financial penalties, divest assets, avoid certain types of activity or not undertake certain behaviour. SARERA also has the power to propose a change to SAPP Rules where such a change would be necessary to avoid anti-competitive behaviour.

- **Regulatory information**

  SARERA may impose financial penalties where entities licensed by national regulators fail to supply information requested by SARERA that is necessary for it to fulfil its responsibilities.

Monies collected as financial penalties by SARERA, or by SAPP on SARERA's behalf, shall be used to support regional infrastructure investments.

There are risks in SARERA exercising its powers. As discussed at the workshops, SARERA would face reputational risks if Member States do not comply with its regulations, and this would undermine investor confidence. The powers to compel compliance need to be enshrined in the SARERA Charter, but the risk of non-compliance can be mitigated by SARERA striving to get agreement on regulations before these are promulgated. SARERA also needs to remain aware of variable geometry, which means some Member States may lag behind predominant view. SARERA should be flexible and adaptable as conditions in the region change.

7 Regulatory instruments / tools

The regulatory instruments that shall be used by SARERA will focus in the first instance on the regulation of cross border trade. The instruments are presented in Table 3.

Table 3 Potential regulatory instruments for SARERA

Focus area	Instrument description
Network access. Regulation of network access for cross-border trade, for countries that have adopted bilateral contracting.	The proposed instrument is a **SARERA regulation for access to the grid** needed to enable cross-border trade. The regulation will provide the minimum requirements but will allow national regulators to implement these through national regulations. The underlying principle to specified in the regulation will be non-discriminatory access. This instrument is **not** a license for access from SARERA.
Wheeling charges. Pricing of access to transmission networks for cross-border trade, for transit and, where countries have adopted bilateral contracting, for national network charges.	The proposed instruments are: • a **high-level regulation for setting transmission charges**. It will leave open scope for implementation by national regulators, to conform with existing methodologies or approaches while being consistent with the SARERA principles. • **Wheeling charges for transit countries** where cross-border trade uses the transmission network of third countries. The underlying principle to be specified in the regulations are that tariffs should be cost-reflective and cost-recovering. Beyond this, for national regulations, the approach is at the discretion of the national regulators (eg, cost assessment, charging structure) though may be guided by SARERA.
Anti-competitive behaviour. Preventing abuse of dominant positions	The proposed instrument is the ability, where necessary, to intervene to **modify SAPP trading rules to obligate company behaviour**, eg, bidding at marginal cost rather than prices which earn additional profits.

Focus area	Instrument description
	Market surveillance will be through appropriate software tool used to monitor the wholesale energy market for anti-competitive behaviour.
Governance of SAPP market rule development. Contributing to the development of SAPP rules and their adoption at the country level.	Three instruments are proposed at this stage, although additional ones may be added. The first instrument is proposed **technical standards that facilitate unhindered energy trade**, eg, acceptable frequency ranges. The second instrument will be a regulation governing that part of national **grid codes specifically related to cross-border trade**. National grid codes should be consistent with the principles in SARERA's grid code regulation with respect to cross-border trade. This may be done in a range of ways including by referencing SARERA's regulation, by repeating the text from a template specified in SARERA's regulation in the national code or drafting a code that is consistent with the principles specified in the SARERA regulation. The third instrument will be **best practice guidelines on market structure and model contracts**. The requirements for the national grid codes for countries that have not adopted bilateral contracting will differ from those countries that have adopted bilateral contracting.

For each of the instruments presented in Table 3, SARERA will have oversight of implementation and the power to take action over non-compliance. The **Market Surveillance** function is to be shared between SAPP and SARERA in that the market monitoring will be carried out at the SAPP Coordination Centre, but with the staff involved reporting the results to SARERA, which will have the responsibility for taking action in response to any issues that have been detected.

8 Organisational structure and stakeholder interface

8.1 Role of Consultative Committees in SARERA

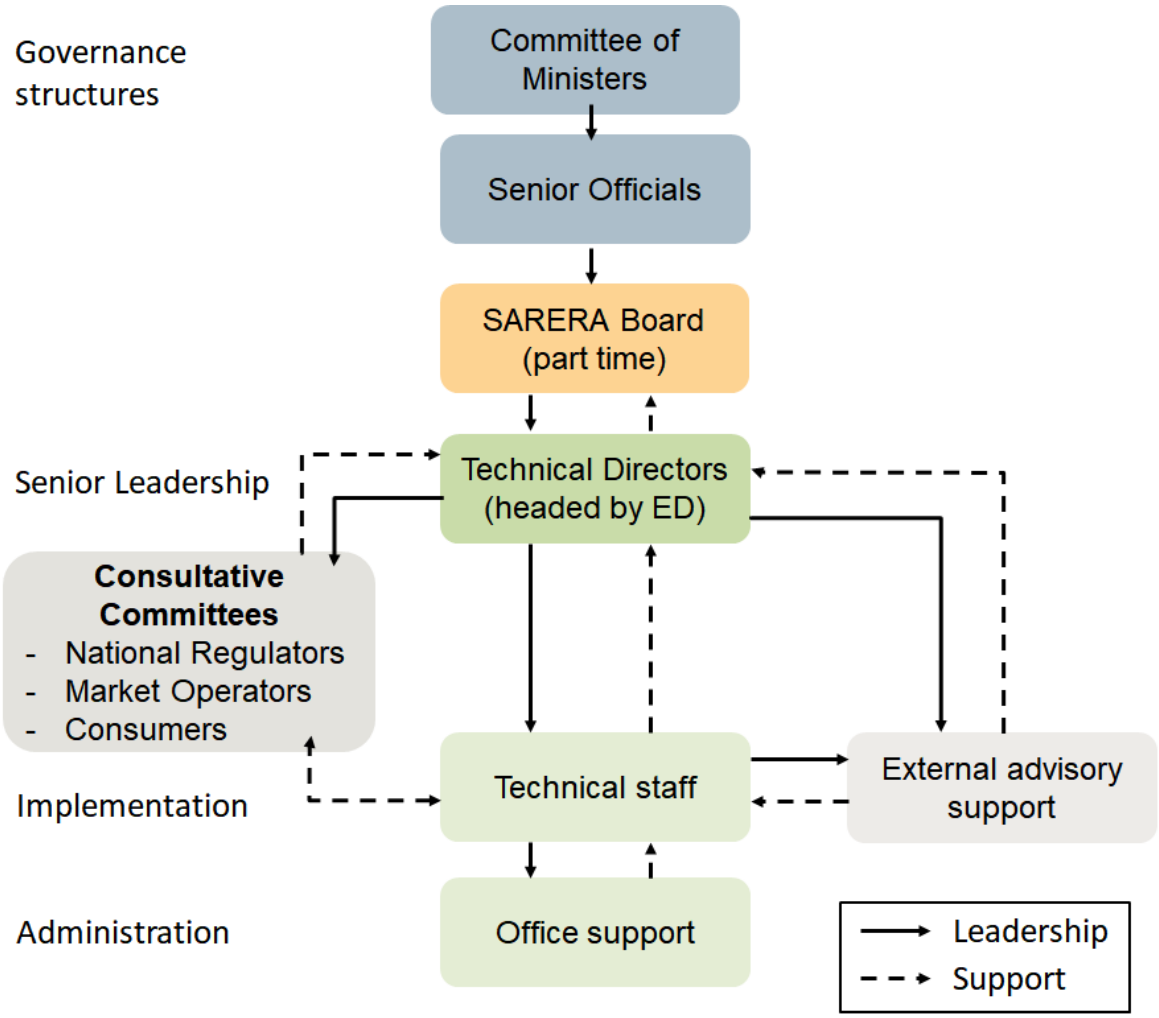
The structure for a Charter that follows the SADC *Guidelines for Drafting SADC Legal Instruments* has already been introduced in Section 4.4 (Figure 3). In this section the discussion is taken a stage further by emphasizing the importance of the Consultative Committees which are also to part of the overall structure of the new regulator. It is only through purposeful interaction with stakeholders and their participation in designing SARERA's regulatory instruments before they are promulgated, that the new regulator will achieve the respect and authority needed for it to be effective in carrying out its mandate.

Following the example of ERERA, it is envisaged that SARERA will initially have three Consultative Committees:

- ❑ Consultative Committee for National Energy Regulators
- ❑ Consultative Committee for representatives of Cross-Border Energy Market Operators
- ❑ Consultative Committee for Energy Consumers.

Other Consultative Committees can be added later, particularly as SARERA broadens its initial focus on the electricity sector to encompass all aspects of cross-border energy trade. On an as needed basis, Consultative Committees may appoint Working Groups with on-going responsibilities (similar to the current RERA Sub-committees) and Task Forces to address specific issues. Figure 4 illustrates the proposed structure.

Figure 4 SARERA structure



8.2 SARERA Board

The members of the part-time, non-executive Board will have the following characteristics:

- Members are to be selected first and foremost for their professional skills and relevant experience. The primary purpose of the Board is to approve decisions in a professional and efficient manner, rather than to provide a vehicle for country representation in decision-making.

- No more than 5-7 members at any one time.
- Rotational representation on 2-year terms. The initial appointment terms for Board members should be of different duration so as to avoid the situation where all or a majority are replaced at the same time, thereby causing a loss of continuity of oversight.
- As already discussed in Section 4.5, to ensure no conflicts of interest or institutional responsibility, Board members should not be from national regulatory bodies, nor from Ministries of Energy.
- The Board can be selected from retired regulators and energy officials. Academics with relevant skills and representatives of consumers, the intended primary beneficiaries of regulation, could also be considered.
- The Board will hold periodic meetings to deal with matters presented by the Technical Directors and in particular to ratify draft Regulations which can then be promulgated. For example, there could be a rota of quarterly meetings, with any other matters being dealt with via video conference as required.

9 Funding model

The funding model for SARERA considers two factors, each of which is discussed in turn:

- the type of revenue accrued by SARERA, and
- the source of that revenue.

9.1 Type of funding accrued

RERA is currently funded primarily by annual contributions from members, in the form of annual subscription fees. In addition to this, its other revenues include special contributions from members, grant funding or donations (eg, by development partners), and other income (eg, conference fees, training courses, publications). Based on this, Table 4 presents a summary of **types** of funding that could support SARERA, with pros and cons of each.

Table 4 Possible types of funding

Funding method	Pros	Cons
Contributions based on GDP	No change from current model	Payment from those not 'benefitting' from primary 'new' activities of SARERA
'Levies' on cross-border trade	Aligns with main activities of SARERA in the short run	Few payments from those not engaged in trade
Payment 'in-kind' by host country	May be an easier transaction for host country than financial contribution	Need to ensure right incentives for appropriate level in the provision of support

Funding method	Pros	Cons
Payment 'in-kind' by staff providers	Easier to manage secondments and align remuneration	Ensure balance in contributions Remuneration must be sufficient for local conditions

After discussion on this point, stakeholders at the workshop agreed that annual contributions at their current RERA levels are retained as the base revenue source for SARERA. This should continue at least for the early years of SARERA's operation, to minimise the changes involved in the transition.

As SARERA's role develops, particularly around cross-border trade, it should seek additional revenues as 'levies' on each trade. The amount of this levy is to be determined in accordance with SARERA's budget requirements, thereby aligning SARERA's revenues with its main functions. However, it will also lead to misalignments:

- SARERA is not responsible solely for regulating cross-border electricity trade. As an **energy** regulator, it will develop additional capacity and functions related to other forms of energy, and revenue should be earned to correspond with these activities.
- SARERA's members are not all equally involved in cross-border electricity trade. In fact, some are unlikely ever to be, notably the IOC members, and therefore revenue is unlikely ever to be earned in this way from these countries.
- SARERA has a range of activities beyond regulating energy, eg, capacity building and information dissemination, which may benefit countries not engaged in electricity trade. They should still be able to make contributions to SARERA's budget.

The volume of energy traded through SAPP and bilaterally is such that, when compared with initial estimates of the expenses of SARERA, there should be very little impact on the price of electricity traded. Table 5 presents the calculation of an estimated initial levy on both SAPP and total traded volumes, to cover the consultant's assumed budget increase (if the current contributions remain, at a level equivalent to the current RERA budget).

Table 5 Estimation of levy required to cover a $1 million SARERA budget increase

Variable	Estimation / calculation	Comment
Reference budget increase	$ 1,000,000	A reference value of $1 million is selected for easy scalability. As discussed in Section 13.1.1 the SARERA budget will progressively increase from the current RERA budget level of around $ 500,000 per year to approximately $ 1,800,000 at the end of the initial phase of establishment.
SAPP traded volumes	2,124 GWh	2017/18 annual volumes. Source: SAPP 2018 Annual Report
Total traded volumes (including bilateral PPAs)	8,850 GWh	SAPP traded volumes represent 24% of the total traded volume. Source: SAPP 2018 Annual Report

Variable	Estimation / calculation	Comment
Levy on SAPP traded volumes	**$ 0.47 / MWh 0.047 c/kWh**	Budget increase divided by SAPP traded volume
Levy on all trades	**$ 0.11 / MWh 0.011 c/kWh**	Budget increase divided by total traded volume

The estimates above show that the levy per million dollars that needs to be raised would be very small, too small to have any material impact on market prices. If trading volumes increase as is expected, the required levy per MWh (or per kWh) would decrease.

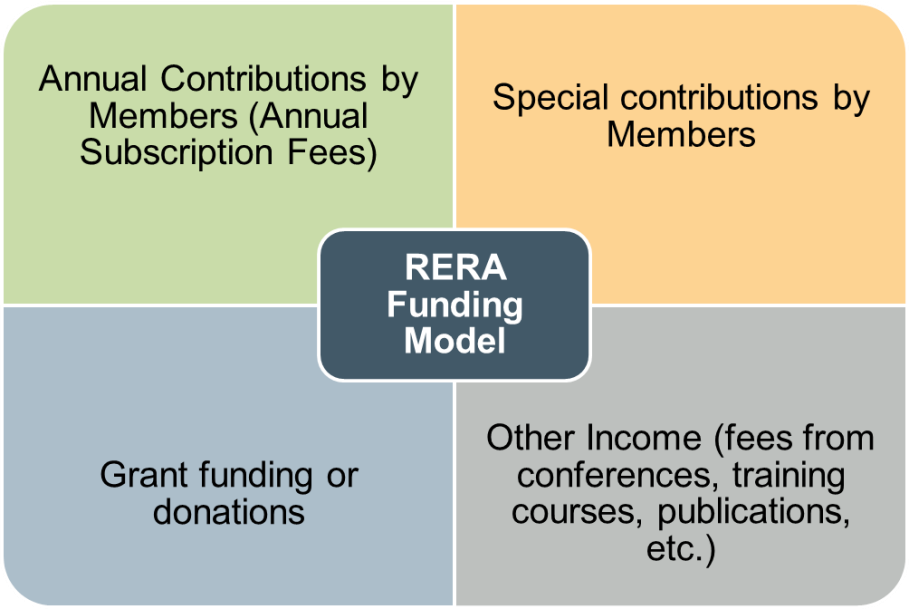
As noted by participants at the Consultative Workshop, the SAPP Coordination Centre may be used to collect the levies and remit to SARERA. Any **surplus** beyond that required to cover SARERA's budget would be directed to SAPP's Cross-border Investment Fund account.

While annual contribution and levies on electricity trade may provide additional sources of revenue to SARERA, they should not be the sole source of revenue. Additional sources of revenue might include in-kind contributions, eg, the provision of office space by SARERA's host country, or the employment costs of staff seconded from other countries.

9.2 Sources of revenue

RERA's current sources of funding are summarised in Figure 5. The significant majority of funding is in the upper left quadrant of the diagram, representing the members' annual contributions, determined by SADC's Executive Committee as equitable contributions for each country.

Figure 5 RERA current funding sources



Source: RERA

Table 6 provides a table summarising the pros and cons of the possible **sources** of funding to match the types of funding identified in the previous section.

Table 6 Possible sources of funding

Funding source	Pros	Cons
Member regulators	No change from current model	Changes in levels may be difficult to get approved
Government budgets	In some cases, channelled through regulators Can support transition to SARERA	Requires budgetary certainty
Utilities	Major players for cross-border trade; 'user pays' system	Proposed collection via SAPP may not be feasible outside of the competitive market
Private players, eg, IPPs, large consumers, traders		
Donors	Helpful to manage transition costs to SARERA	Short-term only – not sustainable

In its early years, while SARERA is being established it is likely to incur once-off transition costs. Such costs will be difficult to recover from members or levies, particularly if they are incurred before SARERA is formally established as a legal entity. A more promising source for these is likely to be some of RERA's development partners.

SARERA will continue to receive some of the other sources of revenue it currently accrues, eg, conference fees, proceeds from the sale of training materials.

PART 3 – ROADMAP FOR SARERA ESTABLISHMENT

The roadmap for SARERA is both the legal process of establishing the new institution via a SADC Charter, and the transition of RERA to the new institutional structure and functions of SARERA. This section discusses both of these aspects, with the Gantt Chart in

Figure 6 providing a summary of the legal establishment steps in the top half and the operational transition steps in the lower part.

Once the primary agreement to proceed with the transformation of RERA into SARERA has been made, an important task is for RERA to prepare the **SARERA Transition Plan**. This will draw heavily on Part 3 of this Report, but will be a stand-alone RERA document.

10 Roadmap principles

The following principles provide useful guidance for the Roadmap:

- **The legal establishment of SARERA is likely to be a long process**. Time must be allowed for the legal basis of RERA's transformation into SARERA to be established properly. As this is to involve agreement on a SARERA Charter and its subsequent ratification by two thirds of the Member States, the process could take longer than the roughly 2 years shown in the Gantt Chart.

- **The operational aspects of SARERA's establishment need not wait for the legal establishment**. While the legal framework is being put in place, there are several steps that can be taken to start the transformation from RERA to SARERA, including recruitment of Technical Directors and support staff, securing premises, establishing IT systems, etc. Work can also be initiated on the regulatory tools that have been identified. However, SARERA will not be able to make formal regulatory rulings until it has been established legally.

- **SARERA should start small and evolve progressively**, both in terms of its organisational size and budget, and the scope of its enforceable regulatory powers. The foreseeable activities are limited in scale and scope, and as such, organisational and budgetary capacity should grow to match the evolution.

- **SARERA should aim to have some 'quick wins'**. The establishment of any new entity requires evidence of its effectiveness to gain momentum and help to boost the status, authority, and acceptance of the new regulator. The quick wins need not be particularly significant rulings but should show initiative and credibility.

- **Funding should match the budget as it grows**. SARERA's funding sources should match the regulatory activities, particularly in respect of the regulation of cross-border energy trade. As SARERA's budget will grow with its increased activities, the funding to cover the budget should grow to match it. Too little funding will mean a shortfall in SARERA's ability to cover its

expenses. Too much funding is less of a problem, provided an appropriate outlet is available to receive any surplus, such as the SAPP Cross-border Investment Fund discussed as part of the funding model in Section 9.

11 Timeline for transition activities and associated responsibilities

The establishment of SARERA will involve several steps, with associated responsibilities sitting with different individuals, groups of individuals, and entities. The timing for each of these is uncertain and dependent on many factors outside the control of any single individual or body. However, many of the activities listed are independent of each other, provided the authorisation to proceed with the transformation to SARERA is given and the expectation is that formalising this is more a routine series of necessary events than stages with risks of approvals being declined.

A Gantt chart presenting a detailed breakdown of activities is presented in

Figure 6 below. It is separated into two key workstreams:

- **Legal activities**, focused on the necessary approval of the new SARERA, and the drafting and implementation of the SARERA Charter.
- **Operational activities**, focused on the transformation of RERA into SARERA, including staff recruitment and operationalisation of the SARERA office.

The first key decision point in both the legal and operational activities is the decision by the RERA Plenary to proceed with the transformation on the basis of this SARERA Report. This decision is expected to be made at the annual RERA meetings in Luanda in November 2019.

Once the agreement to proceed with the transformation has been reached, and there is an understanding that this decision will not be rescinded, the workstreams can largely diverge. That is, the operational activities can take place without the legal formation of the new SARERA, up until the point that SARERA is required to make regulatory decisions/rulings. With most of the necessary operational activities being reliant primarily on RERA's Secretariat in the first instance, there is little reason why delays due to pending approvals from other individuals or entities should occur.

Figure 6 Gantt chart for activities in the transition from RERA to SARERA

Activity	Responsibility	2019		2020												2021											
		Nov 19	Dec 19	Jan 20	Feb 20	Mar 20	Apr 20	May 20	Jun 20	Jul 20	Aug 20	Sep 20	Oct 20	Nov 20	Dec 20	Jan 21	Feb 21	Mar 21	Apr 21	May 21	Jun 21	Jul 21	Aug 21	Sep 21	Oct 21	Nov 21	Dec 21
Legal activities - SARERA establishment via a Charter																											
Authorisation to proceed with transformation																											
RERA Plenary	RERA Plenary	X																									
SADC Sub-Committee on Electricity/Energy	SADC Sub-Committee				X																						
Senior Officials	SADC Sub-Committee					X																					
Ministers of Energy	Ministers of Energy						X																				
Council of Ministers (if deemed necessary)	Council of Ministers											X						X									
Charter preparation																											
Drafting of Charter instrument	SADC Energy Division								X																		
Negotiation of draft instrument	Senior Energy officials												X														
Consensus on Charter instrument	SADC Energy Division												X	X													
Charter approvals																											
Committee of Ministers of Justice/Attorneys-General	SADC Legal Division															X											
Council of Ministers (if deemed necessary)	Council of Ministers																	X									
Charter instrument open for signature	SADC Energy Ministers																					X	X	X	X		
Charter instrument enters into force (when 2/3 have signed)	SADC Secretariat																									X	

Activity	Responsibility	2019		2020												2021											
		Nov 19	Dec 19	Jan 20	Feb 20	Mar 20	Apr 20	May 20	Jun 20	Jul 20	Aug 20	Sep 20	Oct 20	Nov 20	Dec 20	Jan 21	Feb 21	Mar 21	Apr 21	May 21	Jun 21	Jul 21	Aug 21	Sep 21	Oct 21	Nov 21	Dec 21
Operational activities - RERA transition to new institutional structure and functions																											
Agreement to proceed with transformation	RERA Plenary	X																									
SARERA Transition Plan																											
Drafting and confirmation of Transition Plan	RERA Secretariat			X																							
Identification of donor to support transition	RERA Secretariat		X																								
Budget for transition	RERA Secretariat			X																							
Confirmation of donor funding for transition (if required)	RERA Secretariat			X																							
Office establishment																											
Identification of location	SADC Energy Ministers			X																							
Identification and establishment of premises	RERA Secretariat						X																				
Staff recruitment																											
Recruitment of Executive Secreatry & Technical Directors	SADC Secretariat										X																
Appointment of Executive Secretary & Technical Directors	SADC Secretariat										X																
Recruitment of additional technical staff	Technical Directors												X														
Recruitment of office support staff	Technical Directors													X													
Initial activities (first 1-2 years)																											
Identification of initial activities	RERA Secretariat				X																						
Budget and funding plan for initial activities	RERA Secretariat				X																						
Approval of initial activities and agreement with donor	RERA Secretariat					X																					
Continuation of relevant RERA activities	RERA Secretariat																										
Intermediate development of initial activities	RERA Secretariat																										
Transition to / commencement of SARERA operations	Technical Directors																										
Preparatory work on SARERA Board	SADC Secretariat																										
Preparatory work on Consultative Committees (CCs)	RERA Secretariat																										
Appointment of SARERA Board and CCs	SADC Secretariat																									X	
Initial SARERA decisions/rulings	SARERA Board																										X

11.1 Legal transition activities

Legal activities will be led by the SADC Sub-Committee on Energy. The activities, responsibilities, and timelines identified in the Gantt chart are indicative. The main elements are:

- ❑ Authorisation to proceed with the transformation (from RERA Plenary, SADC Sub-Committee for Electricity / Energy, Ministers of Energy and possibly also the Council of Ministers)
- ❑ Charter preparation (SADC Energy Division to supervise drafting, negotiation of the contents by Senior Officials and consensus-building)
- ❑ Charter approvals (by SADC Legal Division and Council of Ministers if deemed necessary, signature by Ministers of Energy)
- ❑ Charter instruments enters into force (when two thirds of the members have signed).

Indications from the SADC Secretariat are that approvals may be deferred to higher bodies during the approvals process. Similarly, the timeline for approvals will be determined by the decision-making bodies themselves, depending on their availability, and in the case of approvals at the national level, by national-level approvals processes. As an example, it is uncertain if the approval by the Council of Ministers is required, and if so, the timing is uncertain between possible meetings in August/September 2020 or January/February 2021 (coloured in light blue in the Gantt chart).

The legal activities do not deal with the legal mechanics of closing the existing RERA. That is, RERA exists as a company set up in Namibia. Once SARERA has been established as a new legal entity, the RERA company can be dissolved.

11.2 Operational transition activities

Up to the point when the SARERA Board can be constituted, operational activities will be led by the RERA Secretariat. There is an assumption of continuity between RERA and SARERA such that there is a relatively seamless transition of the existing operations and activities from RERA into the new SARERA, since these include RERA's current mandate plus the new areas of responsibility. Table 7 presents further explanation and discussion of the operational activities outlined in the Gantt chart in Figure 6.

Table 7 Explanatory notes of operational activities

Category of activity	Explanatory notes
SARERA Transition Plan	The SARERA Transition Plan is discussed further in Section 11. It will be prepared by the RERA Secretariat. The Gantt chart notes the possible requirement for donor funding to assist with covering expenses until SARERA can fund its transition and initial activities. This is discussed further in Section 13.
Office establishment	It should not automatically be assumed that SARERA will continue to be based in Windhoek, Namibia; the SADC Energy Ministers will likely want to make this decision. Once the location has been determined, the RERA Secretariat should

Category of activity	Explanatory notes
	undertake all activities necessary to establish the office, eg, finding an office space, agreeing a lease/purchase, resourcing the office.
Staff recruitment	The first recruitment for SARERA is the Executive Secretary and the Technical Directors. This recruitment should be led and managed by the SADC Secretariat. Once the Executive Secretary and Technical Directors have been appointed, they, as operational heads of SARERA, will take responsibility for recruiting both additional technical staff and office support staff[7].
Initial activities	The initial activities refer to the new activities that will be undertaken by SARERA that are not currently being undertaken by RERA. However, the Gantt chart also notes the continuation of the RERA Secretariat's current activities, eg, RERA Plenary coordination, capacity building, research, and technical assistance. The initial activities are discussed further in Section 15. While the RERA Secretariat continues with its current activities, it will identify in more detail the initial activities for SARERA, an associated budget, and a funding plan. If the funding plan determines the requirement for donor assistance to cover the initial activities, this will be sought and confirmed. Once the Executive Secretary and the Technical Directors have been appointed, they will immediately commence leadership of SARERA's initial activities and the continuation of RERA's activities. However, the Transition Plan will specify whether the RERA Secretariat should commence the initial activities before the Technical Directors are appointed. On one hand, it is positive to continue and commence initiatives that are necessary for the continued development of the energy market, but on the other hand, the newly appointed Technical Directors will have greater ownership of the initial activities if they are responsible for them from the outset of the activity. This interim phase is coloured blue in the Gantt chart. In anticipation of SARERA being formally launched, the members of the first SARERA Board should be identified in advance and the Board terms of reference and initial modus operandi put in place. Similarly, preparatory work con be carried out on the formation of the Consultative Committees. Formal regulatory rulings cannot be made until SARERA is legally established and the SARERA Board is appointed. This can happen very quickly if the preparatory work on the Board and the Consultative Committees has been carried out in advance.

12 Regulatory initiatives

SARERA's initial activities will, in the first instance, be a continuation of RERA's existing activities and initiatives. This will include:

- ❑ arranging regional meetings and workshops for information sharing and gaining approvals,
- ❑ development of capacity building resources and fora, and
- ❑ regulatory initiatives, such as studies on the integration of cross-border activities in petroleum and gas distribution and pricing.

In addition to the existing activities and initiatives, SARERA will focus primarily on the electricity sector, as discussed extensively in Section 6 and Section 7. The initiatives

[7] In all recruitments, due consideration should be given for the existing employees of RERA and their employment agreements. It may be expedient to recruit the SARERA Executive Secretary and Technical Directors initially on temporary consultancy contracts, as their full employment contracts can only be formalised after SARERA is established as a legal entity.

involved would start from the regulatory tools identified in Section 7, but might include additional items:

- Drafting of **SARERA regulation for access to the grid**, which is needed to enable cross-border trade. The regulation will provide the minimum requirements but will allow national regulators to implement these through national regulations.

- **Wheeling charge regulation,** covering pricing of access to transmission networks for cross-border trade, for transit and, where countries have adopted bilateral contracting, for national network charges.

- Drawing on the lessons from the Indian regulator CERC, SARERA could develop a **roadmap for members to unbundle and initiate the development of national electricity markets**.

- **Implementation of the cost-recovery and cost-reflective tariffs** which were first made a regional commitment by the SADC Energy Ministers at a meeting in Lusaka in 2008.

Development of national wholesale electricity markets and the establishment of adequate tariffs across the region would contribute to increased levels of investment.

As regards the 'quick wins' mentioned in the previous section, one major item for transboundary electricity trade would be for SARERA to finalise and implement the long-discussed advanced framework for transmission pricing - nodal transmission use of system / wheeling charges.

While the regulatory framework for cross-border electricity trade is being developed, attention can also be given to the requirements for cross-border trade in gas and petroleum products. Financial resources permitting, the work plan of the Petroleum, Gas and Biofuel Regulation Sub-Committee for 2020 consists of the following six items:

- Update the SADC Regional Petroleum and Gas Status Review Report including biofuel and bridging the gaps.

- Carry out benchmarking exercises for petroleum, gas and biofuel functions within the selected regulatory authority.

- Capacity building (for at least 10 pax, each from RERA Member States) in priority areas of Regulatory Impact Assessment and Transmission infrastructure (development of the "network code") for natural gas.

- Develop a standard Key Performance Index framework to improve regulatory compliance in the petroleum, gas and biofuel industry in the SADC region

- Development of guidelines for Gas Tariff and Price Setting to be applied by member countries.

- Establishment of a portal for Petroleum and Gas data.

13 Budget requirements

This section outlines both the funding requirements and funding sources for two phases: the transition from RERA to SARERA, and the initial activities of SARERA once it is fully established.

13.1 Funding the transition from RERA to SARERA

13.1.1 Funding requirements for the transition

The anticipated once-off funding requirements of the transition include:

- Development of the Transition Plan, including confirmation of funding requirements and sources.
- Establishment of SARERA's office.
- Recruitment costs of the Executive Secretary and Technical Directors and additional technical and support staff, and associated relocation costs.
- Identification and funding plan for initial activities.

It is anticipated that the budget for these activities should be around $ 100,000. This amount will be clarified in the development of the Transition Plan by the RERA Secretariat.

13.1.2 Sources to fund the transition

As discussed above, the costs of transition are not likely to be very high, perhaps in the order of $ 100,000. Without greater clarity on the RERA Secretariat's operational budget, it cannot be stated whether these activities might fall under existing budgetary allocations, or if additional funding will be needed to cover these costs. If RERA's existing budget is unable to cover this, this could be sought from one of RERA's donors, owing to its one-off nature.

Both the funding requirement and the source of funding will be clarified in the Transition Plan.

13.2 Funding the initial activities of SARERA

13.2.1 Funding requirements for the initial activities

With most of the activities of RERA continuing, RERA's current budget of roughly half a million dollars per year is the starting point for the estimated future budget of SARERA and should be sufficient to cover the existing activities at least until SARERA's new

activities commence. Thereafter, a budget for SARERA is necessary, distinct from RERA's budget, and shall be confirmed in the Transition Plan.

The Transition Plan will also include a budget that evolves with the increase in activities of SARERA. As noted in Section 10, SARERA will start small and evolve progressively. This will be reflected in its staffing requirements; SARERA's budget is likely to increase in each of the first few years of its operation as additional staff are hired to meet the operational requirements.

To comprehend the budget for the initial activities, a good starting point is the budget for SARERA when it is fully resourced, as presented in Table 8. These figures include the continuation of existing RERA activities.

Table 8 Budget estimate for SARERA when fully operational (incl. existing RERA activities)

Cost item	Cost per unit ($'000)	Number of units	Annual requirement ($'000)
Executive Secretary and full-time Technical Directors	120	3	360
Full-time technical experts	70	3	210
Part-time technical experts	50	4	200
Specialised consultancy			200
Office support			120
Office costs, including rent			30
Stakeholder meeting costs			500
Training budget			160
Stakeholder communications			20
TOTAL			**1,800**

Commentary on the cost items is provided in Table 9.

Table 9 Commentary on budget estimate for SARERA

Cost item	Commentary
SARERA Board	No provision is made for the time of the SARERA Board members. It is assumed that the time of Board members will continue to be covered by the organisations where they are based. Any logistical costs associated with Board meetings, eg, flights and accommodation, are included in the budget for stakeholder meetings.
Executive Secretary and full-time Technical Directors	These appointments are necessary from SARERA's outset, to lead the organisation's establishment and its initial activities. Indicative timing for this is presented in the Gantt chart, and will be confirmed in the Transition Plan. Experts covering legal, technical and economic regulation will be needed from the start.

Cost item	Commentary
Full-time technical experts	The requirement for additional technical experts and outsourced experts is likely to vary over time. Where the initial activities are clear, experts (whether full-time or part-time) are more likely to be needed.
Part-time technical experts	
Specialised consultancy	The breakdown between full-time and part-time experts is indicative. The use of part-time experts may be contingent in part on whether those experts would need to relocate to the SARERA office; relocation costs (including for families) might make prohibitive the costs of hiring experts for roles that do not require full-time employment. Part-time experts could possibly be based away from the SARERA office. Specialised consultancy is likely to be necessary for some of SARERA's technical activities. This figure may vary from year to year as different needs arise and as the limits of what can done with in-house expertise are tested.
Office support	These costs may be an increase from RERA's budget only because of the increased size of SARERA compared with RERA.
Office costs, including rent	
Stakeholder meeting costs	These costs are in increase from RERA's budget as more meetings may be initiated to accommodate consultation on the wider range of areas than RERA currently oversees, with an associated wider range of stakeholders with concerns that should be considered. Whether all this budget is required in the interim period between SARERA's establishment and it reaching its fully resourced status is uncertain.
Training budget	These costs are likely to be approximately the same as for RERA as these activities are a continuation of RERA's current activities.
Stakeholder communications	

It is understood that RERA's current budget is around $ 500,000, and the proposed budget for SARERA once resourced fully is around $ 1,800,000. However, for the interim period between appointing SARERA's Executive Secretary and Technical Directors and reaching the stage of being fully resourced, the budget requirement is unclear, as is the length of this interim period. Based on the commentary in 13, it can be assumed that the budget during this period will be at least $ 1,000,000 (excluding the costs for additional technical experts, including the costs for specialised consultancy, reducing the costs for stakeholder meetings). Annual budgets should be determined in the Transition Plan.

13.2.2 Sources to fund the initial activities

RERA's current funding sources should be continued throughout the transition period and into SARERA's operational phase. These should be sufficient to cover the existing operations of RERA as they continue into part of the operations of SARERA.

As detailed in Section 9, SARERA's funding sources should be matched, as much as is practicable, with SARERA's activities. As SARERA's activities grow, particularly from the time new expenses are incurred (the appointment of an Executive Secretary and Technical Directors are the first significant new expense), additional sustainable funding sources should be targeted. Levies on cross-border trades will be the primary funding source, based on the expectation that SARERA's primary regulatory activity will focus on cross-border electricity trade. As indicated in Section 9.2, the size of the levy that will be required will be very small and will not have a disrupting or distorting impact on trade.

The time taken to introduce such a levy and establish the associated mechanism to collect the levy and pass it on to SARERA will determine whether this can be introduced from

the time the Executive Secretary and Technical Directors are appointed. If it is not possible to introduce this levy by this time, then external, temporary funding will be required until that point, likely to come from a donor. This will be clarified in the Transition Plan, with any donor identified and agreement sought.

Given the uncertainty over the timing of SARERA's budget requirements increasing to the fully resourced stage, there could be parallel uncertainty over the sufficiency of the funding resources available. If funding is sought from donors, flexibility should be incorporated to ensure there is no funding shortfall; a surplus should not be possible if disbursements are made according to detailed forecasts. If funding is available from a levy on cross-border electricity trade, then there is less flexibility in the mechanism to match budget requirements. Therefore, the size of the levy and the funding it may provide should err on the side of caution and provide for more funding than may be forecast as required. As noted in Section 9, any surplus funds from the levy that are not required by SARERA (either in its fully resourced or transitional state) can be redirected to SAPP's Cross-border Investment Fund account

14 Recruitment and training of staff

Using SADC procedures, staff for SARERA should be recruited based on merit, from within the SADC region. The composition of SARERA structures should reflect the SADC gender requirements, as laid out in the SADC Protocol on gender. As much as staff should be SADC citizens, consideration can be made in the interim to hiring short-term experts who could be non-SADC citizens. Within SADC, consideration should be given to diversifying positions across the Member States, including those with relatively small roles in energy trading and those from Indian Ocean Commission states. Table 10 provides considerations for the approach to recruitment of SARERA staff.

Table 10 Considerations for staff recruitment

Roles	Considerations
Executive Secretary, Technical Directors and technical staff	▪ Merit-based from around the region, Executive Secretary and/or at least one Technical Director to be a woman ▪ Technical Directors must have experience working at a senior level within an energy or electricity regulator, in the area for which they have responsibility within SARERA ▪ The term of Executive Director and Technical Director appointments should avoid simultaneity in contract expiration so that continuity is maintained through any new recruitment ▪ Other technical staff should have current or recent regulatory experience ▪ Secondments could be considered, particularly in the establishment phase
SARERA Board	▪ Discussed in Section 8 ▪ Rolling appointments ▪ Representatives of Member States, due regard to gender ▪ Members should not be from national regulators or departments of energy – retired staff, academics etc are suitable
Consultative committees (CCs)	▪ Primary CC to be representatives of national energy regulators ▪ Key consultation body for Board decision-making ▪ Other consultative committees for market participants and for consumers

Roles	Considerations
Operational staff	▪ Merit-based appointments ▪ Recruited from the country in which SARERA is based

All appointments of technical staff will require international-class expertise. However, skills can be augmented through additional training. Such training could include:

- ❑ secondments to other regulators,
- ❑ outsourced expertise working in-house with SARERA staff, with a focus on both technical assistance and capacity building, and
- ❑ external training courses.

A mix of approaches to training is likely to be most effective.

The members of the SARERA Board should have protection from outside influences one they are appointed. Following the precedent of other regional energy regulators, dismissal of SARERA Board members should only be allowed in the event of a serious offence, criminal conviction or the unavailability to serve on the Board.

15 Formalisation of SARERA Transition Plan

As noted at the outset of the Roadmap section, a crucial step is for the guidance on the Roadmap provided in this report to be adapted and adopted into a SARERA Transition Plan that is drawn up by the RERA Secretariat and accepted by the RERA Board. The main elements of the Transition Plan will be:

- ❑ The responsibilities and timetable for the legal establishment of SARERA (Section 11.1).
- ❑ The responsibilities and timetable for the operational transition of RERA into SARERA (Section 11.2).
- ❑ Annual budgets for the 2020 and 2021 (expected to be transitional years) and for 2022 (when it is hoped that SARERA will be fully functional) (Section 13).
- ❑ Recommendations on funding for the transitional period (Section 13.1).
- ❑ Necessary steps to identify the location for, and establish the presence of, a SARERA office (Section 11.2).
- ❑ Necessary steps for the recruitment of SARERA Executive Secretary and Technical Directors in the first instance, followed by additional technical staff, and office support staff (Section 14).
- ❑ Confirmation of the initial activities for SARERA (Section 11).

The Gantt chart in Figure 6 above provides a guide for the Transition Plan.

ANNEXES

A1 Regional energy regulators in other regions

A1.1 Federal Energy Regulatory Commission (FERC)- USA

A1.1.1 Background

The Federal Energy Regulatory Commission (FERC) is an independent agency that regulates the transmission and wholesale sale of electricity and natural gas in interstate commerce and regulates the transportation of oil by pipelines in interstate commerce. FERC also reviews proposals to build interstate natural gas pipelines, natural gas storage projects, liquefied natural gas (LNG) terminals, and the license for non-federal hydropower projects.

A1.1.2 Legal basis

FERC's powers and responsibilities were granted by the Congress and are described in numerous laws including the Federal Power Act, Public Utility Regulatory Policies Act, Natural Gas Act and Interstate Commerce Act.

A1.1.3 Mandate, functions and powers

FERC's mandate covers the interstate wholesale sales and transmission of electricity and gas as well as the interstate transportation of oil by pipelines. FERC's mission is to ensure that consumers have access to economically efficient, safe, reliable, and secure energy.

The strategic plan defines that FERC fulfils its mission by realising the following objectives:

- Ensuring fair rates, terms, and conditions of jurisdictional services.
- Promoting safe, reliable, and secure infrastructure
- Achieving organisational excellence

FERC attains the first objective by participating in the rate setting, performance measure, market oversight and enforcement mechanisms. Within the rate-setting mandate, FERC issues orders and designs policies that result in fair rates both for service providers and for customers. An overview of FERC's responsibilities, as defined in the 2018-2022 Strategic Plan, is shown in Table 11. The rulemaking proceedings can be initiated either by the Commission itself or by a stakeholder writing a petition to change the existing laws and is followed by consultations with the relevant stakeholders.

In addition to rate setting activities, the Commission is also tasked with ensuring compliance by market participants, deterring market manipulation and facilitating the settlement of disputes. The Commission is supported by administrative law judges if the disputed issues are not easily resolved.

The Energy Policy Act of 2005 expanded FERC's powers and its authority to impose sanctions resulting from potential violations. FERC has the right to conduct public and non-public investigations of potential violations of the law, whether they are self-reported or initiated by FERC or a third-party. An investigation can result in a resolution through settlement, financial penalty, disgorgement of unfairly earned profits or non-financial measures such as increased performance monitoring.

With regard to infrastructure development, FERC's role involves conducting a review and granting an approval of interstate natural gas pipelines, storage projects, LNG terminals and non-federal hydropower construction sites. In its review, FERC ensures that proposed projects adhere to the security standards and provides an oversight during the development stage. In the course of the review process, FERC establishes a team consisting of subject-matter experts in various fields, including engineering, economics, legal and accounting. Once the construction of an infrastructure project is completed, FERC is tasked with ensuring the safety and reliability of the project.

Table 11 Overview of FERC's responsibilities

What FERC does	What FERC does not do
Regulate the transmission and wholesale sales of electricity in interstate commerce	Regulation of retail electricity and natural gas sales to consumers
Review certain mergers and acquisitions and corporate transactions by electricity companies	Approval for the physical construction of electric generation facilities
Regulates the transportation and sale of natural gas for resale in interstate commerce	Regulation of many activities of state and municipal power systems, federal power marketing agencies, and most rural electric cooperatives
Regulates the transportation of oil by pipeline in interstate commerce	Regulation of nuclear power plants
Approves the sitting and abandonment of interstate natural gas pipelines and storage facilities	Issuance of state water quality certificates
Reviews siting applications for electric transmission projects under limited circumstances	Oversight for the construction of oil pipelines
Ensures the safe operation and reliability of proposed and operating LNG terminals	Abandonment of service as related to oil facilities
Licenses and inspects private, municipal and state hydroelectric projects	Mergers and acquisitions as related to natural gas and oil companies
Protects the reliability and security of the high voltage interstate transmission system through mandatory reliability standards	Responsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf
Monitors and investigates energy markets	Regulation of local distribution of electricity and natural gas
Enforces FERC regulatory requirements through imposition of civil penalties and other means	Development and operation of natural gas vehicles
Oversees environmental matters related to natural gas and hydroelectricity projects and other matters	Reliability problems related to local distribution facilities
Administers accounting and financial	Tree trimming near local distribution power

What FERC does	What FERC does not do
reporting regulations and conduct of regulated companies	lines in residential neighbourhoods

Source: Federal Energy Regulatory Commission Strategic Plan, FY 2018-2022. Published in September 2018.

A1.1.4 Organisational structure

The President selects up to five commissioners with the advice and consent of the Senate and appoints one of them to be the chairman. There is a limit of three commissioners representing one political party and commissioners are selected in staggered five-year terms. The commission coordinates the work of twelve offices which include:

- Office of Electric Reliability
- Office of Energy Market Regulation
- Office of Energy Policy and Innovation
- Office of Administrative Litigation
- Office of the Executive Director
- Office of the Secretary
- Office of Enforcement
- Office of Energy Projects
- Office of Energy Infrastructure Security
- Office of the General Counsel
- Office of Administrative Law Judges and Dispute Resolution
- Office of External Affairs

The commissioners hold regular public meetings on the third Tuesday of each month (except August) and my also hold additional closed meetings.

A1.1.5 Stakeholder interface

FERC's regulates the power market via industry-wide decisions (such as new laws or policy statements) and party-specific orders (e.g. referring to mergers and acquisitions or granting approval of new LNG terminals and hydro power plants). In case of industry-wide, law-setting proceedings, interested stakeholders can respond by submitting their comments by a pre-specified date. FERC usually investigates party-specific proceedings by conducting interviews. The affected parties are granted the right to ask FERC to reconsider its decision, file a complaint or seek a subsequent judicial review.

If a party is found in violation of the relevant laws, FERC is granted a variety of tools to ensure enforcement. These include:

- Civil penalties
- Disgorgement of unjust profits
- Suspension or cancellation of market-based rate authority
- Referral to the Department of Justice for criminal prosecution which includes financial fines and imprisonment

According to FERC website the total civil penalties assessed between 2007 and 2019 amounted to $783,756,520. Over the same time the Commission ordered the disgorgement of profits of $517,938,115.

A1.1.6 Assessment

The responsibilities of FERC and SARERA will necessarily differ due to the differences in the power markets these organisations aim to regulate. Nevertheless, the case of FERC is interesting to look at as it illustrates how transparency and clear definition of evaluation processes results in increased cross-border trading. FERC regularly engages in consultations with the relevant stakeholders which helps manage regulatory expectations. By including experts in relevant fields, the commission ensures high standards of its services.

A1.1.7 References

Federal Energy Regulatory Commission Strategic Plan, 2018-2022

An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities, 2018

Federal Energy Regulatory Commission 2018 Agency Financial Report, 2018

Federal Energy Regulatory Commission Policy Statement of Enforcement, issued in October 2005

International Experience with Cross-border Power Trading, Castalia, 2009

A1.2 Central Electricity Regulatory Commission (CERC)- India

A1.2.1 Background

The concept of independent regulatory commissions in the Indian power sector has been the topic of discussions since the early 1990's when the National Development Council (NDC) recommended the establishment of 'independent professional Tariff Boards at the regional level for regulating the tariff policies of the public and private utilities'[8]. The need for independent regulatory commissions was deliberated again in 1996 during the Chief Minister's Conference in 1996 and resulted in the formulation of the Common Minimum National Action Plan for Power which advocated the establishment or regulatory commissions.

The 1998 Electricity Act was written with the objective of separating tariff-setting regulation in the electricity sector from the Government and provided the legal basis for the establishment of the Central Electricity Regulatory Commission (CERC). In its early days, CERC was only tasked with tariff determination at the inter-state level. The 1998 Act was subsequently replaced in 2003 with the 2003 Electricity Act which significantly expanded the functions of CERC by adding the power to issue and revoke licenses for inter-state transmission and trading.

A1.2.2 Legal basis

The 1998 Electricity Regulatory Commissions Act provided the legal basis to establish the Central Electricity Regulatory Commission. Currently, the Commission operates under section 76 of the 2003 Electricity Act. The Act aims to consolidate the laws relating to generation, transmission, distribution and trading of electricity, as well as to encourage transparency, efficiency and competition in the power sector.

A1.2.3 Mandate, functions and powers

CERC's mission is to facilitate competition and efficiency in the wholesale power market, increase the quality of supply and contribute to the power market development. The Commission achieves these objectives by performing the following primary tasks[9]:

- Regulating the tariff of:
  - generating companies owned or controlled by the Indian Government
  - generating companies that sell electricity in more than one State;
- Regulating and determining tariffs for inter-state transmission of electricity;

[8] CERC Annual Report, 2017-2018
[9] http://www.cercind.gov.in/Function.html

- Issuing licences to operate on the market and imposing fees in accordance with the Electricity Act;
- Specifying grid code;
- Advising the Government on matters related to the electricity and tariff policy

Similar functions (including tariff determination) on the intra-state level are performed by State Electricity Regulatory Commissions (SERCs). Central and state commissions are independent bodies with functions specified under the Electricity Act.

A1.2.4 Organisational structure

The Commission consists of the chairperson, three full-time members and the chairperson of the Central Electricity Authority who are elected by the President of India following the recommendation of a selection committee. The members of the Commission should represent a broad spectrum of expertise in engineering, law, economics, commerce, finance and management. The Electricity Act additionally stipulates that the Commission will have a Secretary whose powers and duties are defined by the Commission.

The organisational set up of the Commission is split according to seven divisions:

- Legal- provides the legal input on matters related to tariffs, licenses, orders, regulations, petitions and others;
- Engineering- provides the technical expertise on matters related to tariffs, grid operation, trading, licenses, orders, regulations petitions and others;
- Finance- the external finance team is primarily tasked with matters relating to tariffs and licenses. The internal finance team prepares and manages the budget and performs various audit activities;
- Regulatory affairs- tasked with the policy and regulatory analysis as requested by the Commission;
- Economics- primarily tasked with the assessment of petitions related to power exchange and inter-state;
- MIS Division- responsible for the management of the website, software, networks and facilities;
- Administration- primarily responsible for human resources and accounting

A1.2.5 Stakeholder interface

The Commission operates in a quasi-judicial manner and has the powers of Civil Courts. The regulation-setting process follows the steps outlined below:

- The CERC staff prepare the consultation (staff) paper which describes the proposed regulation;

- The consultation (staff) paper is published and the interested parties can submit their comments;
- A public hearing is scheduled to discuss the comments raised above;
- The Commission revises the proposed regulation and publishes the draft on the basis of 'previous publication', meaning that the stakeholders and interested parties can still comment on the draft;
- Once the Commission revises the published draft for additional comments, the new law is published in the Gazette of India and a Statement of Reasons is posted.

The procedure for orders on petitions relating to tariff determination in transmission and generation business and granting of petitions follows a slightly different process. The applicant is obliged to provide all interested parties with a copy of their petition and to publish the application on their website. Subsequently, the applicants and stakeholders are invited to argue their case in front of the Commission in a public hearing. After considering the comments, the Commission passes the final order. The applicants have the right to request the Commission to review the order or to appeal to the Appellate Tribunal for Electricity.

A1.2.6 Assessment

The establishment of the independent regulator in the Indian power sector took many years and was accompanied with numerous reforms in the power sector. These include the State Reform Acts passed by eight states in 1995 which introduced unbundling, corporatisation, privatisation and independent regulation in the power sector and the introduction of competitive bidding guidelines in 2006. Prior to 1991, when the process of unifying the frequency began, the states operated under five frequencies. The unification took over twenty years and was finalised in 2013.

The lessons that SARERA can draw from this particular case study are certainly limited in scope given the fact that the CERC regulates the electricity sector of just one country, while SARERA will serve as a regional regulator. Nevertheless, the case is interesting to look at as the states which CERC regulates enjoy a certain degree of independence and thus some comparison can be made between the Indian states and the member states of SARERA. The experience of India shows that the establishment of the regulator needs to be performed in parallel with other reforms facilitating the integration of the power market structure, such as unbundling, introduction of competition in the power market or unification of the power grid frequency across members.

A1.2.7 References

The Electricity Act, 2003

CERC Annual Report 2017-2018

A1.3 Agency for the Cooperation of Energy Regulators (ACER)- EU

A1.3.1 Background

The Agency for the Cooperation of Energy Regulators (ACER) was established in 2009 by the European Parliament. Regulation (EU) No 1227/2011 and Regulation (EU) No 347/2013 expanded the Agency's responsibilities further by including an oversight of the wholesale energy market integrity and transparency (REMIT) and guidelines for trans-European energy infrastructure. As part of its mandate, the Agency has contributed to the development of EU-wide network infrastructure and cross-border initiatives.

A1.3.2 Legal basis

ACER is set up as a Union body with legal personality. Its legal functions and powers are governed by the Third Energy Package and Regulation (EC) 713/2009 establishing the agency in 2011 which was repealed in 2019 by Regulation (EU) 2019/942 (recast). Regulation (EU) 2019/942 (recast) states that in each member country, ACER will be granted the most extensive legal person status allowed under the national law.

A1.3.3 Mandate, functions and powers

ACER's mission is to provide oversight over national regulators at the EU level[10] with the aim to facilitate the development of the single market for electricity and natural gas. As part of its mandate, the Agency coordinates cross-country initiatives that encourage competition and the consolidation of the market.

ACER facilitates regional cooperation between Member States by providing common regulatory guidelines and by sharing best regulatory practices. The agency publishes an integrated framework which helps achieve uniform application of the electricity and natural gas legislation across the European Union. Additionally, the Agency provides an oversight of regulations and serves as a mediator in the event of disagreement between countries.

Finally, the Agency monitors the regional cooperation between transmission system operators (ENTSOs), the performance of markets and wholesale electricity trading. As an additional task, the Agency provides an oversight over cross-country development plans.

The Agency has several options in which it can deliver its mandate. It can issue opinions, recommendations, decisions or publish guidelines. However, the nature of the Agency's guidelines is non-binding.

[10] ACER provides regulatory oversight over the EU member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom

A1.3.4 Organisational structure

ACER's headquarters are located in Ljubljana, Slovenia. The Agency comprises an Administrative Board, a Board of Regulators, a Board of Appeal and one Director.

The Administrative Board

The composition of the Administrative Board is defined in Article 18 of Regulation (EU) 2019/942. The Administrative Board includes nine members and nine alternates who are selected for four years and may be reselected once. The selection procedure involves two members (and their alternates) being selected by the Commission, another two (and their alternates) by the European Parliament and five (and their alternates) by the Council. The Chairman and Vice-chairman are elected from the members of the Administrative Board by a two-thirds majority. Their term of office is two years and they may be re-elected once provided they are still part of the Administrative Board. No member of the Administrative Board is allowed to be a member of the Board of Regulators.

The Administrative Board meets at least twice a year and may meet more frequently at the request of the Chairman, the Commission or at least a third of the members of the Administrative Board. The Board's meetings will be attended by the Chair of the Board of Regulators. The Administrative Board can additionally invite experts or anyone whose attendance may be relevant to conducting a meeting.

The Administrative Board formally appoints the Director, the members of the Board of Regulators and the Board of Appeal, agrees ACER's annual budget and ensures that the Agency's programming document is kept updated. Additionally, the Board ensures that the Agency performs its tasks as defined in the relevant regulations. The Board members adopt new decisions on the basis of a two-thirds majority of the members present in the voting unless specified otherwise in the regulation.

If deemed necessary, the Administrative Board may establish or remove working groups following a request from the Director and the Board of Regulators. The working groups are meant to support the work of the Director and the Board of Regulators in preparing their opinions, decisions and recommendations. Working groups may consist of experts from the Agency, the Commission and regulatory authorities' staff.

The Board of Regulators

The composition of the Board of Regulators is defined in Article 21 of Regulation (EU) 2019/942. The Board includes one senior representative of the regulatory authority per Member State and one alternate per Member State who are both selected by the Regulatory Authority. An additional non-voting seat is granted to a representative of the Commission. Decisions of the Board are taken on the basis of a two-thirds majority of the members present.

The Board of Regulators elects the Chairman and Vice-chairman from among its members for two and a half year-long term of office which can be renewed. However, at all times the Chairman and the Vice-chairman need to be part of the Board of Regulators.

The tasks carried out by the Board of Regulators include, but are not limited to, providing opinions and comments on the Director's draft recommendations, opinions and decisions, approving the Agency's work programme as well as providing comments on the candidate to be selected as the Director of the Agency.

Director

The Director of the Agency is elected by the Administrative Board once the Board of Regulators approves the nomination. The candidates (at least three) are proposed by the Commission in an open selection. The term of office is five years which may be extended once by no more than five years. The Director may be removed from the office if two thirds of the Administrative Board vote in favour of such decision and following an approval of the Regulatory Board.

The Director acts as a legal representative of the Agency and manages its daily operations. His or her tasks are defined in Article 24 of Regulation (EU) 2019/942 and involve drafting and implementing the Agency's work programme, drafting, adopting and publishing opinions, recommendations and decisions or relocating a member of staff to a member state. Additionally, the Director prepares the work of the Administrative Board and ensures the Agency works in accordance with its mandate. The Director is held accountable for his performance relating to administrative, budgetary and managerial tasks but enjoys full independence when it comes to drafting, adopting and publishing opinions, recommendations and decisions.

The Board of Appeal

The composition of the Board of Appeal is defined in Article 25 of Regulation (EU) 2019/942. The Board consists of six members and six alternates who are appointed by the Administrative Board following an open call for expressions of interest and after receiving a favourable opinion from the Board of Regulators. The Board of Appeal elects its own Chairman. The Board of Appeal members are selected for five years and may be reselected once. A member shall not be removed from the Board unless he or she has been found guilty of serious misconduct.

Any natural or legal person may challenge the Agency's decision by appealing against it to the Board of Appeal. In considering the case, the Board acts independently and is not bound by any instructions or any other duties in ACER. The Board of Appeal approves decisions on the basis of a two-thirds majority and may confirm the decision or remit the case to the relevant ACER unit.

A1.3.5 Funding

The budget structure is defined in Article 31 of Regulation (EU) 2019/942 and states that the Agency's revenues will consist of EU contributions, fees, voluntary contributions, donations and grants.

A1.3.6 Stakeholder interface

The Agency was established to bridge the regulatory gap that would ensure a uniform application of the EU energy laws at the EU level and an effective operation of electricity and gas markets. In order to achieve these objectives, the Agency publishes a framework that encourages cross-border cooperation and the creation of a single market. ACER's guidelines take consideration of different circumstances under which various member states operate. The Agency acts independently from electricity and gas producers, transmission and distribution system operators, private and corporate agents, Governments and European Union institutions.

The nature of ACER's guidelines is non-binding. Whenever the Agency identifies the need for legally binding documents, it informs the Commission which takes the appropriate action. The regulatory authorities of Member States and ENTSOs are required to cooperate on the cross-country level to facilitate the creation of the single market. In the event of non-compliance, the Agency will issue a recommendation to the relevant regulatory authority and will inform the Commission. In case of the regulatory authority being non-complaint, the Agency informs the Commission and the relevant Member State.

A1.3.7 Assessment

The assessment of ACER should be performed in the broader context of the European Union's attempts to introduce competition in the energy market and to increase the volume of trade between Member States. The creation of a single regulatory authority undoubtedly contributed to a uniform application of the EU law on the international level and to a better regulatory practice on both domestic and international accounts. Internationally, we observe regulatory convergence across the Member States.

At the time when the energy market integration in Europe began, very few countries (Norway, Sweden, UK) had liberalised their electricity sectors. Power markets in most Member States were operated by domestic monopolists with the sector exhibiting large degrees of horizontal and vertical bundling. These monopolists also controlled cross border trade between Member State with the exception of the NordPool (Box 1) which operated on a market basis. The creation of a single market resulted in an increased number of mergers across the European gas and electricity companies. Many previously domestic generators and retailers have expanded their operations outside their home country. Examples include the French EdF, Italian ENEL and German RWe. Cross-border trade is further encouraged by the European Commission which promotes cross-border projects that increase transmission capacity between countries, the so-called Projects of Common Interests (PCIs).

This integration process was only made possible thanks to the Member States allowing changes in their national policies. Countries were presented with a few options that they could potentially pursue to be compliant with the EU regulations. These options accounted for different circumstances under which Member States operated before the process of integration began.

Box 1 Nordpool

Nordpool organises and operates a power market for 380 companies from 20 countries. The services offered include trading, clearing and settlement in day-ahead and intraday markets across nine European countries. The power pool is owned by a consortium of Nordic transmission system operators (Statnett SF, Svenska kraftnät, Fingrid Oy, Energinet.dk) and the Baltic transmission system operators (Elering, Litgrid and Augstsprieguma tikls (AST)).

The power pool is licensed by the Norwegian Water Resources and Energy Directorate (NVE) and by the Norwegian Ministry of Petroleum and Energy. It is appointed as a Nominated Electricity Market Operator (NEMO) in Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Great Britain, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland and Sweden.

Nordpool is under the regulatory oversight of the Norwegian Energy Regulatory Authority which is the national regulator for the Norwegian electricity and downstream gas market and organised physical power exchange. The Norwegian Energy Regulatory Authority participates in regional power market initiatives through the Council of European Energy Regulations (CEER), Agency for the Cooperation of Energy Regulators (ACER) and the Nordic Energy Regulators (NordREG).

NordREG has been set up with the aim of creating the right conditions necessary for the development of the Nordic and European electricity markets. Currently, Denmark. Sweden, Finland, Iceland and Norway are members of NordREG. CEER facilitates cooperation and exchange of best practice in the energy sector and has 30 members (28 EU countries, Iceland and Norway).

The power exchange traded 512 TWh of power in 2017. This comprises the Nordic and Baltic day-ahead market (394 TWh), the UK day-ahead market (111 TWh) and the Nordic, Baltic and German intraday market (6.7 TWh).

Source: https://www.nordpoolgroup.com/, https://www.nve.no/energy-market-and-regulation/

A1.3.8 References

Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast)

A1.4 European Network of Transmission System Operators (Electricity, ENTSO-E)- EU

A1.4.1 Background

The European Network of Transmission System Operators (ENTSO-E) is an association of 43 electricity transmission system operators (TSOs) from 36 European countries[11]. TSOs grant grid access to electricity market participants and are responsible for the bulk transmission of power on the high voltage lines and the maintenance of the electricity networks.

ENTSO-E is based in Brussels and operates on a non-profit basis. The organisation aims to facilitate the development of an internal energy market in electricity and cross-border trading by participating in the policy-setting process, coordinating the operation of TSOs and facilitating regional cooperation.

A1.4.2 Legal basis

The legal powers were granted to ENTSO-E under the Third Legislative Package for the Internal Energy Market in 2009. The operation of ENTSO-E is governed by the Articles of Association and Internal Regulations which ENTSO-E submitted to the Agency for the Cooperation of Energy Regulators (ACER) and the European Commission (EC) in 2010 and subsequently adopted in 2011.The documents were reviewed and amended in 2014. As per the Articles of Association, ENTSO-E is 'governed by the provisions of title III of the Belgian Law dated June 27, 1921 granting legal personality to non-profit associations, international non-profit associations and foundations'[12].

The European Union (EU) Council, Parliament and Commission have tasked ENTSO-E with responsibilities which are described in several EU Regulations, including the 2009 Regulation on Cross Border Electricity Trading and the 2013 Regulation on Guidelines for Trans-European Energy Infrastructure.

A1.4.3 Mandate, functions and powers

ENTSO-E aims to facilitate the development of the internal energy market in a way that supports the climate and energy goals set by the European countries. The organisation achieves these objectives by performing the following primary tasks[13]:

- Issuing policy recommendations;

[11] Austria, Albania, Bosnia and Herzegovina, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, United Kingdom, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Lithuania, Luxembourg, Latvia, Montenegro, Republic of North Macedonia, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovak Republic and Turkey (an observer member)

[12] ENTSO-E Articles of Association, Edition 30.09,2014

[13] https://www.entsoe.eu/about/inside-entsoe/objectives/

- Developing network codes, contributing to their implementation and where applicable enforcing the implementation of network codes;
- Facilitating regional cooperation through the Regional Security Coordination Initiatives (RSCIs);
- Facilitating technical cooperation between the TSOs;
- Developing the long-term pan-European network plans (TYNDPs);
- Issuing summer and winter outlook reports for electricity generation;
- Coordinating research and development (R&D) initiatives

A1.4.4 Organisational structure

ENTSO-E comprises the Assembly, the Board, the Committees, the Legal and Regulatory Group, the Regional Groups and the Secretariat. The functions of each regulatory body are outlined below.

The Assembly

The Assembly represents the 43 Transmission System Operators and is the general leading body of ENTSO-E. It has the powers to appoint or exclude a member of ENTSO-E, amend the Articles of Association or Internal Regulations and to appoint or dismiss representatives of the organisational units mentioned above.

The number of votes attributed to each representative is proportionate to the number of votes each country has as an EU Member State in the Council of the European Union. For countries outside the European Union, the same mechanism defined under the Lisbon Treaty is applied. The meetings of the Assembly are chaired by the President or, in the absence of the President, the vice-President of the Assembly who are appointed by the Assembly for a term of two years (and may be re-elected once).

The Board

The Board consists of a maximum of 12 members (including the Chairperson of the Board) who are elected for a term of two years (and may be re-elected once). The Board is responsible for the adoption of position papers, preparation of the work programme for the Assembly meetings, coordination of the work between the ENTSO-E bodies and other tasks.

The Committees

There are currently four Committees operating within ENTSO-E: a System Development Committee, a System Operations Committee, a Market Committee and a Research and Development Committee. The Assembly may appoint additional committees if deemed

appropriate. The Committees are led by the Chairperson of the relevant Committee who is appointed for a fixed term of two years (and may be re-elected once).

The primary tasks assigned to the Committees include coordination of regional activities and facilitation of the cooperation of TSOs, preparation of positions and proposals that are later debated by the Board or the Assembly and preparation of position paper proposals as requested by the Board. Additionally, the Committees conduct studies of common interest as delegated by the Board, propose cross-border harmonisation of grid codes and implement the network codes and the ten-year network development plan.

The Legal and Regulatory Group

The representatives of the Legal and Regulatory Group are appointed by the ENTSO-E members and are led by a chairperson elected for a fixed term of two years (who may be re-elected once). Each ENTSO-E member appoints one representative. The Legal and Regulatory Group is tasked with providing legal consultation upon a request of the Assembly, the Board, the Committees or the Secretariat. The Group additionally ensures that ENTSO-E remains compliant with its regulatory status.

The Regional Groups, the Voluntary Regional Groups and the Advisory Council

ENTSO-E additionally acknowledges the establishment of Voluntary Regional Groups, the Advisory Council and Expert Groups. The Advisory Council consists of 10 members nominated by European stakeholders and issues public recommendations on the ENTSO-E work programme. The representatives of the European Commission, the European Commission and ACER are granted an observer status in the meetings of the Council.

The Secretariat

The Secretariat supports the delivery of tasks assigned to the ENTSO-E bodies, drafts proposals for decision making and communicates with external stakeholders on behalf on ENTSO-E. The Assembly appoints the Secretary-General for a fixed term of four years after which he or she may be re-elected for additional terms. The Secretary General is responsible for the daily management of ENTSO-E.

A1.4.5 Funding

The ENTSO-E members pay an annual subscription fee determined in proportion to their voting power. The associated members pay a fixed charge of 100,000 euros per year while the observer members are charged with a variable fee between 10,000 and 70,000 which is determined in the Observer Membership agreement.

A1.4.6 Stakeholder interface

ENTSO-E cooperates closely with other European institutions, such as the Agency for the Cooperation of Energy Regulators (ACER), the European Commission and the European Network of Transmission System Operators for Gas (ENTSO-G).

A1.4.7 Assessment

ENTSO-E plays an important role in facilitating the integration of the European electricity market by contributing to the development and maintenance of the high voltage network. Transmission infrastructure is a central element in the delivery of EU's strategic goals of sustainability, competitiveness and security of supply. ENTSO-E replaced former TSO organisations such as the Union for the Coordination of the Transmission of Electricity (UCTE), European Transmission System Operators (ETSO), NORDEL (a body for cooperation between the transmission system operators in Denmark, Finland, Iceland, Norway and Sweden), UK Transmission System Operators Association (UKTSOA), ATSOI (a body for transmission cooperation in Ireland and Northern Ireland) and the Baltic Transmission System Operators (BALTSO).

While the case of ENTSO-E involves countries which operate in a very different context (most of them are members of the European Union), the association can serve as an ambitious example of what SARERA could aim to achieve in terms of integration of the transmission markets and international cooperation. ENTSO-E plans to expand its operations further by extending the single market to South East Europe and the Western Balkans. Furthermore, the organisation maintains close ties with Turkey (which has been granted a status of an observer member), MedTSO (18 members) and carries out knowledge sharing meetings with international partners from the United States, Japan, India, Korea and India.

A1.4.8 References

ENTSO-E Articles of Association, Edition 30.09,2014

https://www.entsoe.eu/

A1.5 Regulatory Commission on Electrical Interconnection (CRIE)- Central America

A1.5.1 Background

The Central American Electricity Market Framework Treaty (the Treaty) initiated the development of a regional electricity market and defined the role for a regional regulatory entity which was subsequently established in 2002. The context was the intention to develop a regional interconnector known as SIEPAC (Sistema de Interconexión Eléctrica de los Países de América Central) for electricity trade. The case of CRIE is interesting as it is one of the few examples of developing countries coming together to create a regional power market with legally binding regulations. The respective power markets are all at different stages of development. El Salvador, Guatemala, Nicaragua and Panama have already unbundled the generation, transmission and distribution business while Costa Rica and Honduras still maintain a state-owned vertical monopoly.

A1.5.2 Legal basis

The integration process of the Central American power markets was initiated in 1996 when the presidents of six countries (Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama) signed The Central American Electricity Market Framework Treaty which defined a role for the regional regulator. The Treaty was ratified in 1998 by the respective national legislative bodies and was followed by two protocols signed in 1997 and 2007.

The Regulatory Commission on Electrical Interconnection (CRIE) was subsequently established in 2002 together with the Regional System Operator (EOR) and the Regional Transmission Owner (EPR), another two regional entities defined in the Treaty. The document additionally established the principles to form the seventh market- the Central American Regional Electricity Market (MER) which is superimposed on the six national markets.

A1.5.3 Mandate, functions and powers

CRIE's mission is to "provide a regulatory environment that facilitates a competitive Regional Electricity Market that contributes to expanding and ensuring sustainable electricity supply for the benefit of the inhabitants of Central America."[14]

CRIE aims to facilitate regional integration by creating an appropriate regulatory, institutional and technical framework that will enable the development of a harmonious Regional Electricity Market, particularly by attracting private sector participation and promoting regional investments.

CRIE defines its general objectives as[15]:

[14] http://crie.org.gt/wp/mision-vision/
[15] http://crie.org.gt/wp/objetivos/

- Enforcing the Framework Treaty and its protocols, as well as its regulations and other complementary instruments
- Ensuring the development and consolidation of the market, as well as ensure its transparency and proper functioning
- Promoting competition among market agents

CRIE realises these objectives by reviewing and approving market rules which are initially proposed by the EOR. The review panel consists of CRIE board members and a panel of independent experts. Once reviewed and approved, CRIE assumes the monitoring and enforcement role to ensure member countries comply with the Treaty. CRIE derives its enforcement rights from the Treaty which was ratified by all member countries. In the event of noncompliance, CRIE has the right to impose sanctions and the decisions are legally enforceable. Additionally, CRIE is tasked with the mandate to resolve disputes between market participants.

A1.5.4 Organisational structure

The regulatory commission consists of six Commissioners representing the electricity regulatory agency of each country. The president of the CRIE is selected from the Commissioners board on a rotational basis and is assisted by the executive Secretary and a legal assistant who coordinate the work of the legal, technical and marketing management teams, supervision and surveillance department, administration team and the chief of finance and accounting.

A1.5.5 Stakeholder interface

CRIE's relevant stakeholders include the EOR, EPR, the Council for Central American Electrification (CEAC) and national regulators. The EOR manages financial settlement, market operation (including day-ahead and real-time power dispatch), information dissemination and develops an indicative power generation and transmission expansion plan. The decision to put the projects into implementation lies within the national governments and the private sector. The EPR owns and operates the existing transmission infrastructure and coordinates the construction of new transmission lines. The ownership structure is 75% public (national utilities and transmission companies in the six member countries) and 25% private. CEAC serves as an advisor with the mandate to promote regional power integration and cooperation of national entities.

CRIE approved the market rules in 2005. The Treaty grants third-party generation and transmission access to the market on regulated or merchant terms. Generation developers can enter the market and sell the power in any of the member countries and the government is obliged to create market conditions that facilitate regional trade. Preferential treatment of domestic companies would constitute a violation of the Treaty. With regard to transmission systems, market participants are allowed to use regional and domestic transmission lines.

The pricing rules for transmission tariffs have been developed and approved by CRIE and EOR and are based on the principle that transmission owners are allowed to earn revenue that compensates them for operating and capital expenditures. The Treaty requires that all

transmission system users pay tariffs which consist of a variable transmission component and a regional transmission network use fee. The pricing formula does not apply to third-party transmission lines. Rather than use a fixed price methodology, the parties are expected to come to an agreement. CRIE is granted the right to set transmission tariffs if the parties cannot reach an agreement.

With regard to national policies, countries are free to develop their own, however the regulations must facilitate regional cooperation and are not allowed to discriminate against other member countries. CRIE does not engage in the domestic power sectors of member countries.

A1.5.6 Assessment

CRIE is one of the few examples of a successful regulatory arrangement with legally binding measures that ensure the enforceability of the agreement. There are multiple lessons that SARERA can draw from CRIE. Firstly, it is important that member countries are involved in all aspects of drafting of the functions and powers granted to the regional regulator from the outset. The member countries are ultimately the signatories of the agreement granting the powers to the regulator and ensuring their commitment is necessary to create a well-functioning regional power market with an effective regulator.

The structure of the Treaty is central to the successful operation of the power pool. Elaborating on the market pricing rules and clear definitions of responsibilities born by each market participant resulted in a creation of a legally-binding document that sets the foundation of the regional power market. The non-discriminatory approach adapted in the Treaty ensures that countries will not place their national interests above the interests of the regional power market. Granting CRIE the right to make legally enforceable decisions in the absence of complete agreement is perhaps the best example of individual countries prioritising regional interests over their own. This mechanism also ensures that CRIE can always reach a decision and it does not get stuck in a political impasse.

The legally binding nature of the Treaty provides and additional layer of confidence among investors and other market participants. The commitment of national governments is additionally strengthened by selecting commissioners who are also representatives of respective national regulatory agencies.

Importantly, CRIE recognises that there is significant room for improvement and takes steps to further strengthen the regional power market. Improvement of the dispute settling process, better coordination between CRIE and national regulators and ensuring adequate technical experience of the commissioners are among the most pressing issues.

A1.5.7 References

http://crie.org.gt/wp/

A1.6 ECOWAS Regional Electricity Regulatory Authority (ERERA)- West Africa

A1.6.1 Background

The Economic Community of West African States (ECOWAS) is a community of 15 West African States (Benin, Burkina Faso, Cabo-Verde, Côte-d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra- Leone and Togo) which are committed to facilitating economic cooperation amongst Community members. As part of this commitment, ECOWAS developed the West African Power Pool (WAPP) - a regional platform that aims to integrate the power market of the ECOWAS Member States. The ECOWAS Regional Electricity Regulatory Authority (ERERA) is the regulator which oversees regional cross-border electricity interconnections in West African.

A1.6.2 Legal basis

The roots of the regional electricity market regulator can be traced back to the ECOWAS Treaty adopted in May 1978 and revised in 1993. The ECOWAS Energy Protocol (Protocol A/P4/1/03 of 31 January 2003) established the regulatory framework intended to achieve increased power market integration across the ECOWAS member states. The Energy Protocol is complemented with Decisions and Supplementary Acts which further elaborate on the operations of the common power market:

- Decision A/DEC.3/5/82 of the Authority of Heads of State and Government which addressed the energy policy of ECOWAS;
- Decision A/DEC.5/12/99 of the Authority of Heads of State and Government which established the Western African Power Pool (WAPP) and adopted the Master Plan;
- Decision A/DEC.6/01/05 of the Authority of Heads of State which addressed the development of a regional regulatory power framework for ECOWAS members;
- The Supplementary Act A/SA.2/1/08 of January 2008 which established the ECOWAS Regional Electricity Regulatory Authority (ERERA) as a specialised institution of ECOWAS;
- Regulation C/REG.27.12/07 of December 2007 on the Composition, Organisation, Functions and Operations of ERERA;
- Directive C/DIR/1/06/13 of June 2013 which addresses regional market design, strengthening of national regulatory authorities and the structure of national electricity markets.

A1.6.3 Mandate, functions and powers

The Supplementary Act A/SA.2/1/08 created ERERA with the objective of regulating cross-border power exchange amongst ECOWAS members, contributing to the development of a regulatory and economic environment suitable for the integration of the regional power market, providing technical assistance and facilitating cooperation amongst the national regulatory authorities of ECOWAS members. ERERA's mission is to 'implement effective regulatory mechanisms for the development of regional electricity trade in ECOWAS'[16]. The organisation delivers its mission by performing important functions in the field of technical regulation of cross-border power pooling, management of the regional market, facilitating market development and determination of transmission and ancillary services tariffs. Some of the key tasks performed by ERERA are listed below[17]:

- Provide regulatory and technical advice on the structure of the regional power market;
- Facilitate the harmonisation of national policies across Member States and ensure ECOWAS members comply with the Community law;
- Approve and oversee the implementation of rules relevant to the functioning of the regional power market;
- Impose sanctions on operators that breach the law;
- Review and provide comments on the WAPP Master Plan;
- Determine rules for tariff structure and cost assessment for transmission and ancillary services;
- Approve tariff proposals submitted by operators;
- Publish applicable tariff rates and supervise their implementation

A1.6.4 Organisational structure

ERERA's headquarters are located in Accra, Ghana. The organisational structure of ERERA is broadly divided into two units: a Regulatory Council unit which deals with strategic management and regulatory decisions and the Support Structure unit which is responsible for the financial and administrative management, preparation and implementation of regulatory decisions.

The Regulatory Council

The Regulatory Council consists of three members appointed for a fixed term of 5 years in staggered elections. The recruitment process is overseen by the ECOWAS Commission.

[16] https://erera.arrec.org/en/about-erera/overview/
[17] https://erera.arrec.org/en/about-erera/mission-and-vision/

The dismissal of Council members is not allowed unless in the event of a serious offence, criminal conviction or the unavailability to serve in the Council.

Support structure

The support structure unit consists of a pool of experts and an HR and finance unit. The pool of experts assists the Regulatory Council in delivering its mandate by providing relevant expertise in the field of economics, law, engineering, communication and IT. The HR and finance unit deals with the daily management of ERERA and cover the administration side of the organisation, staffing and accounting.

Consultative Committees

Consultative Committees are appointed by ERERA and consist of representatives of national electricity regulators (CCR), representatives of operators (CCO) and representatives of ECOWAS electricity consumers (CCC). The Committees review and comment on ERERA's work programme which is presented to the Committees in an annual meeting.

Currently there are two Consultative Committees in operation: the Consultative Committee of Regulators (CCR) and the Consultative Committee of Operators (CCO). Each Committee is led by one Chairperson and one Vice-chairperson who are appointed for a term of two years.

Working Groups

A working group is established to assist with the work of a Consultative Committee and consists of the Working Group Bureau and experts nominated by the members of the Consultative Committee.

The Chairman of the Consultative Committee establishes the Working Group Bureau for a term of two years. The Bureau consists of 5 to 7 members and includes a Chairman, a Vice-chairman, an administrative secretariat and between 2 and 4 experts sourced from a pool of registered members.

A1.6.5 Funding

ERERA is funded through two sources. Ordinary sources of funds include annual fees levied on cross-border power trades and charges paid by market participants. In the initial transition period ERERA was funded solely through extraordinary sources of funding which included grants, subsidies, gifts and legacies.

A1.6.6 Stakeholder interface

Due to the weak regulatory authority in some Member States, ERERA is expected to deliver its mandate in two ways:

- As a regional entity promoting cross-border trading;

- As a regional regulator who encourages adopting best practice in the national regulatory setting and ensures the national and regional regulations complement each other. This role covers a broader spectrum in countries that do not yet have a regional regulator.

It has been recommended that the rule-setting process is initiated by WAPP by proposing a new legislation which is subsequently reviewed by ERERA. However, ERERA is granted the authority to initiate the development of new legislation itself.

In addition to cooperating with national regulators, ERERA maintains close ties with other entities such as ECOWAS, WAPP, the West African Pipeline Authority (WAGPA), ECOWAS Centre for Renewable Energy and Energy Efficiency (ECREEE) and others.

A1.6.7 Assessment

While it is important to realise that there are some significant differences in the regulatory environment in which ERERA and SARERA operate, there are some valuable lessons that can be drawn from the ERERA case study. The Western African regulator has been granted substantial authority which was only possible due to the strong commitment of Member States to materialise the concept of an integrated power sector.

Furthermore, the ECOWAS treaty makes special provisions for foreign investment, dispute resolution, institutional capacity development and establishing a non-discriminatory framework for energy imports and exports. All these factors are crucial from the perspective of power market development and provide the certainty that market participants need to operate in the market. In order to further improve the regulatory environment for power sector development, ECOWAS issued a number of supplementary acts which explicitly address key implementation issues.

The organisational structure of ERERA can provide another valuable lesson for SARERA. The ECOWAS Member States have initially set up ERERA as a simple organisational unit with just three Council Members who are supported by a pool of experts and consultative committees. Once ERERA expands its operations, it is anticipated that the organisational set up will also change by appointing additional members to the Council who will serve as experts in engineering, law, economics and accounting. Additionally, the previous support unit will be expanded into a technical regulation department, a finance and administration department, internal auditing unit, external relations and communications cell and a strategy advisor. This case shows that the regulator should be fluid and adaptable, growing organically as and when required by evolving regulatory needs.

A1.6.8 References

ERERA's Strategic Plan and Activity Programme 2016-2020

ECOWAS Regional Electricity Regulatory Authority Presentation delivered on the 18th of July 2018 in Accra, Ghana

International Experience with Cross-border Power Trading, Castalia, 2009

A1.7 Independent Regulatory Board (IRB)- East Africa

A1.7.1 Background

The roots of the Independent Regulatory Board (IRB) can be traced back to 2012 when the national regulators and energy ministry representatives of Burundi, the Democratic Republic of the Congo (DRC), Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda started the debate on the regulatory environment of the Eastern African Power Pool. The discussions resulted in the creation of the Regulatory Forum tasked with the establishment of an independent regulator for EAPP.

In March 2012, the Council of Ministers transformed the Regulatory Forum into the Independent Regulatory Board. The IRB was established as the regulatory arm of the Eastern African Power Pool and reports directly to the Council of Ministers. The 2013 working programme anticipated a development plan that was meant to make the IRB fully operational. Stage one, scheduled between 2012 and 2015 was supposed to amend regulatory provisions of national regulators in order to provide a favourable environment for the development of the regional power market and to facilitate the adoption of common standards and regulations relating to the regional power market. The lack of funding has slowed done the implementation of the programme which has not been completed yet.

A1.7.2 Legal basis

The IRB derives its authority from the Inter-Governmental Memorandum of Understanding (IGMOU) which was signed by the Energy Ministers of EAPP countries.

A1.7.3 Mandate, functions and powers

The IRB mission is to 'provide regulatory services to the regional power market in an efficient, transparent and non-discriminatory manner and thereby contribute to the regional market's sustainable development'[18]. The IRB delivers its mission by performing the following key functions[19]:

- Issue operating licenses to market participants;
- Determine the methodology for calculating regional transmission and wheeling tariffs;
- Approve amendments of EAPP market rules, interconnection codes, standards and procedures and enforce their implementation;
- Issue recommendations on changes to domestic legislation to facilitate the development of a regional power market;

[18] http://eappool.org/independent-regulatory-board/
[19] http://eappool.org/independent-regulatory-board/

- Monitor cross border electricity trading between Member States and settle any disputes that arise from trading in the regional power market;
- Impose sanctions on Member States that fail to comply with the relevant rules and regulations

A1.7.4 Organisational structure

The Regulatory Forum elected the representative of Tanzania to be the Chairman and the representative of Ethiopia to be the secretary of IRB. The Forum agreed on the temporary secretariat to be located in Addis Ababa together with the headquarters of EAPP.

The IRB consists of representatives of national regulatory authorities or commissions of each member country. The IRB reports directly to the Council of Ministers and is divided into the following units:

- The Technical Regulation unit which deals with matters relating to grid code and standards, domestic regulation and environment;
- The Legal Affairs unit;
- The Economic Regulation unit which addresses issues relating to tariffs, market rules and market surveillance;
- The Administration and Finance unit which deals with day-to-day management of the organisation (human resources, IT and finance)

The number of staff is expected to increase as the IRB's role as a regional regulator expands.

A1.7.5 Stakeholder interface

The IRB is granted substantial powers by being able to impose the regional market rules upon the EAPP Member States and market participants. As per the 5th Council of Ministers meeting declaration, the IRB reports directly to the Council of Ministers and is obliged to present an annual report of its activities.

A1.7.6 Assessment

The case study of the IRB shows that there is a need for the regional authority (such as the IRB) and the power pool (EAPP) to coordinate their strategic goals. Cooperation is necessary in order to synchronise power market development with the necessary improvements in the regulatory environment.

Further development of regulatory tools is necessary to establish the IRB as an operating entity regulating the regional power market of the EAPP Member States. The existence of a credible independent regional regulator plays a crucial role in facilitating the development of the regional power market.

A1.7.7 References

http://eappool.org/

The draft of the EAPP-IRB Revised Working Manual of EAPP, 2014

Eastern African Power Pool Strategic Plan (2018-2027), 2017

A2 Guidelines for drafting SADC regional legal instruments lines

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GUIDELINES FOR DRAFTING SADC REGIONAL LEGAL INSTRUMENTS

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SECTION 1
INTRODUCTION

(1) Issuing Authority

These Guidelines for Drafting of SADC Legal Instruments are promulgated by the Committee of Ministers of Justice/Attorneys-General (hereinafter "the Committee") under the provisions of Article 3(2)(b)(i) of the Protocol on Legal Affairs, 2000 as read together with Article 12 (2) (a) (vi) of the SADC Treaty, 1991, as amended.

(2) Background and Purpose

The Committee at its meeting held in Ezulwini, Eswatini in July 2017, directed the Secretariat to develop and submit draft standard guidelines and templates for drafting SADC legal instruments. It is at this instance that these Guidelines are developed. These Guidelines will provide guidance to Member States and the SADC Secretariat in preparation of SADC regional legal instruments to be approved by the Council of Ministers.

(3) Entry into Force

These Guidelines shall enter into force on the date of its approval by the Committee of Ministers of Justice/Attorneys-General.

(4) Definitions

The terms in these Guidelines shall be defined in accordance with the SADC Treaty and the Protocol on Legal Affairs.

SECTION 2
GENERAL GUIDELINES

(1) Negotiation and consensus

Before submission to the Committee, a SADC Regional legal instrument shall be developed and referred to the Committee following negotiations and consensus of Member States in a sectoral or cluster Ministerial structure.

(2) Role of the SADC Secretariat

The SADC Secretariat shall ensure that these Guidelines are adhered to during negotiations of a SADC legal instrument by sectoral or cluster Ministers.

(3) Arrangement

A SADC Regional legal instrument shall be in the form of articles, clauses and/or paragraphs arranged in accordance with these Guidelines.

(4) Consistency with SADC legal instruments

(a) The provisions of a SADC Regional legal instrument shall not contravene the provisions of the SADC Treaty.

(b) The provisions of a SADC Regional legal instrument shall in all cases be in harmony with the provisions of other SADC Protocols such that there shall be no contradicting overlapping obligations between it and a Protocol in force.

(c) In case of a need for amendment of a provision **of a** SADC Protocol in force so as to ensure harmonisation, a motivation for the amendment shall be referred for consideration by **the** State Parties to **that** SADC Protocol in force in terms of Article 22 (11) of the SADC Treaty.

(d) Save as clearly stated in these Guidelines, provisions of a SADC Regional legal instrument shall not make State Parties assume obligations stipulated under other SADC Protocols to avoid a situation where a State Party becomes bound by provisions of a Protocol to which it is not a Party.

(e) Notwithstanding the provisions of sub-paragraph (4) (d) **[…]** of this Guideline, a Protocol may contain obligations similar to other Protocol(s) in force on cross-cutting issues but not to the extent of overriding the **scope** of the Protocol in force.

(5) Consistency with international and continental legal instruments

A SADC Regional legal instrument shall be prepared in such a way not to contravene:

(i) an international instrument to which Member States are parties;
(ii) a rule of customary international law applicable to Member States; and
(iii) an African Union legal instrument to which the Member States are parties.

(6) Language

a. A SADC Regional legal instrument shall be in the three (3) SADC official languages namely English, French and Portuguese.

b. For English versions, the English-United Kingdom shall be used.

c. The choice whether to use imperative verb “shall” or softer verbs “will” or “may” shall be negotiated by the relevant sectoral/cluster ministerial structure guided by what the legal instrument is intended to achieve. In case of lack of consensus, the matter shall be reserved for the Committee.

SECTION 3
PROTOCOLS

Removed in this annex

SECTION 4
CHARTERS

(1) General

(d) A Charter shall be the used when establishing a subsidiarity organisation of SADC.
(e) Provisions of a Charter shall be governed by:

(i) SADC Treaty;
(ii) SADC Subsidiarity Guidelines approved by SADC Summit in 2004; and
(iii) any Protocol under whose mandate a subsidiarity organisation is to be established.

(2) Preamble

(a) A Charter shall contain a preambular statement providing, in sequential order, a summarised background behind the adoption of the Charter.

(b) The preambular paragraph shall be separated by semi-colons (;).

(c) The penultimate preambular paragraph shall be followed with a conjunction
“and”.

(d) The last preambular paragraph shall end up with a comma (,).

(e) The last preambular paragraph shall be followed with the following words:
“Hereby agree as follows:”

(f) The preambular paragraphs shall make reference to “Member States” and not “State Parties”.

(g) The order of reference to other legal instruments shall be as stated in Guideline

3 (1) h above:

(3) Definitions and Abbreviations

(a) The definition Article shall start with the opening statement reading as follows:

"In this Charter, unless the context otherwise requires, a word defined in the SADC Treaty and the Protocol on (*in case the Charter is prepared to implement a programme activity under a Protocol in force*) shall have the same meaning, and:"

(b) The terms already defined in the SADC Treaty and relevant Protocol under whose area the Charter is drafted shall not be redefined.

(c) All key terms repeatedly used in a Charter shall be defined.

(d) All abbreviations used in a Charter shall be put in the abbreviation section separated from the definitions.

(4) Objective of the Charter

A Charter shall contain a provision stating its main objective.

(5) Scope

A Charter shall contain a provision stating the scope of the Charter. The scope shall state the main area or programme of activity on which the subsidiarity organisation shall operate.

(6) Establishment Clause

A Charter shall contain an establishment clause reading as follows:

"ESTABLISHMENT OF [XX]

1 The State Parties hereby establish **[XX]** as an international organisation.

2 The **[XX]** shall exist as a Subsidiarity Organisation within SADC and shall be a legal entity observing the laws of the hosting State.

3 **[XX]** is established as an autonomous and self-accounting institution of SADC.

4 **[XX]** shall enjoy such legal status and capacity as may be necessary for the fulfilment of its objectives and the exercise of its functions. In particular, the **[XX]** shall have the capacity to:

(a) enter into contracts;

(b) acquire and dispose of movable and immovable property; and

5 sue and be sued in its own name.

The **[XX]** shall have its own seal and logotype."

(7) Seat

(a) A Charter shall state the location of the Secretariat of the subsidiarity organisation.

(b) In cases where the location is not identified, the location shall be inserted any time before the signing of a Charter.

(8) Objective(s) of the Subsidiarity Organisation

(a) A Charter shall state the objectives of the subsidiarity organisation reflecting the aims of establishing it.

(b) The objectives shall also reflect and be a summary of the contents of the substantive provisions of the Charter aimed to govern the operationalisation of the subsidiarity organisation.

(9) Functions

(a) A Charter shall contain a provision stating the principles that will govern the operationalisation of the subsidiarity organisation.

(b) The provision shall refer to:

(i) principles enshrined in Article 4 of the SADC Treaty;
(ii) principles enshrined in any Protocol under whose mandate the Charter is developed; and

(iii) specific principles to govern the operationalisation of the subsidiarity organisation.

(10) Institutional Arrangements

(a) A Charter shall clearly state the institutional structures responsible for the operationalisation of the subsidiarity organisation.

(b) The following shall be stated as the institutions responsible for the direction and implementation of the Charter:

(i) committee of ministers;
(ii) senior officials;
(iii) board; and
(iv) secretariat.

(c) A Charter shall state the following in respect to each structure, excluding the Secretariat:

(i) chairmanship;
(ii) responsibilities;
(iii) reporting line; and
(iv) frequency of meetings.

(d) The relevant SADC sectoral or cluster Ministerial committee shall be the supreme organ of the subsidiarity organisation and responsible for:

(i) approving:

(a) subsidiarity organisation's organizational chart, related job descriptions and salary structure;

(b) annual budgets of the subsidiarity organisation;
(c) policies;

(d) rules and procedures on procurement, disposal of assets, staff affairs, contracting and financial matters of the subsidiarity organisation;

(e) annual reports of activities of the subsidiarity organisation;

(f) annual audit reports covering operations and finance;

(g) the appointment of experts to constitute the *ad hoc* committee for settlement of disputes under the Charter; and

(h) proposals for amendments to the Charter.

(ii) taking of other decisions for better implementation of the provisions of this Charter.

(e) A sectoral or cluster ministerial committee shall be assisted by the committee of its senior officials as its technical advisory committee when discharging its mandate under the Charter.

(f) Notwithstanding the provisions of paragraph (b) of this Guideline, a Charter may include a structure involving stakeholders as envisaged in Article 23 of the SADC Treaty.

(g) A Charter shall contain provisions on the board of directors stating the following:

(i) composition of the board;
(ii) members of the board and their appointment, on rotational basis;
(iii) chairmanship of the board by the state parties chairing SADC;
(iv) representation of the SADC Secretariat in the board;
(v) establishment of board committees when necessary;
(vi) the executive director as the board secretary; and
(vii) functions of the board of directors being *inter alia* to:

a) recommend subsidiarity organisation's organizational chart, related job descriptions and salary structure for Committee of Ministers' approval;

b) appoint, renew or terminate the services of the Executive Director of the subsidiarity organisation's secretariat subject to Committee of Ministers' endorsement;

c) approve recruitment of Regional staff other than the Executive Director;

d) provide oversight and direction to the subsidiarity organisation's secretariat;

e) approve subsidiarity organisation's strategic plans and annual work plan;

f) monitor the progress and performance of the Executive Director;

g) recommend subsidiarity organisation's annual budget for Committee of Ministers' approval;

h) recommend annual reports for the Committee of Ministers' approval;

i) approve the appointment of external auditors;

j) recommend consolidated administrative and audited financial statements for Committee of Ministers' approval;

k) recommend for the Committee of Ministers' approval of subsidiarity organisation's rules and procedures relating to procurement, disposal of assets, staff, and contracting in line with SADC procedures, rules and regulations; and

l) perform such other functions as may be assigned to it by the Committee of Ministers.

(viii) meetings of the board of directors' provision reading:

(i) *The Board of Directors shall hold at least two ordinary meetings per year, and may hold extraordinary meetings as may be necessary. All meetings shall be sanctioned by Chairperson of the Board.*

(ii) The quorum for any meeting of the Board of Directors shall be two thirds of the voting members.

(iii) *Decision of the Board on any question shall be by the majority of the members present and voting. In the event of equality of votes, the Chairperson shall have a casting vote.*

(iv) The Board shall establish and adopt rules and regulations for the conduct of its meetings.

(v) The Board may invite to its meeting non-voting ex-officio members from related international networks, law enforcement agencies, international cooperating partners and regional organisations.

(11) Secretariat

(a) A Charter shall contain provisions on the Secretariat of the subsidiarity organisation reading as follows:

"(i) The [XX] Secretariat shall consist of the Executive Director, appointed through a competitive process involving candidates from State Parties, and such other staff as the Board of Directors may deem necessary.

(ii) A person appointed as the Executive Director shall hold office for a period of four (4) years and shall be eligible for re-appointment for another period of not more than four (4) years subject to satisfactory performance.

(iii) The Executive Director shall not serve for more than two consecutive terms.

(iv) The Executive Director of **[XX]** shall recruit and appoint Regional staff of SO Secretariat from State Parties subject to approval of the Board.

(V) All other **[XX]'s** non-Regional staff shall be appointed by the Executive Director on the terms and conditions approved by the Committee of Ministers.

(vi) The Executive Director shall be the Chief Executive Officer of **[XX]**.

(vii) The Executive Director shall be the representative of the **[XX]** and the principal liaison officer between State Parties and the **[XX]**.

(viii) The Executive Director shall be responsible for the administration of the functions of the **[XX]** and accountable to the Bo**ard."**

(b) The functions of the Secretariat shall be, *inter alia*:

(i) perform day-to-day management and technical coordination of subsidiarity organisation's activities;

(ii) ensure that plans, strategies, policies, rules, programmes and projects of subsidiarity organisation are properly developed and implemented to attain the objectives of subsidiarity organisation;

(iii) prepare budgets for presentation to the board before the start of each financial year;

(iii) prepare annual work plan for approval by the board;

(iv) ensure that procurement of goods, services and works is carried out in accordance with laid down procurement rules and procedures;

(vi) compile annual reports of the regional fisheries monitoring, control and surveillance activities for presentation to the board;

(vii) facilitate the appointment of external auditors;

(viii) prepare consolidated administrative and audited financial reports for presentation and approval of the board;

(ix) organise meetings of the board and implement its decisions;

(x) safeguard the protection of State Parties' confidential information obtained in the implementation of its functions;

(xi) facilitate effective and efficient communications pertaining to subsidiarity organisation's activities and visibility in the SADC Region and beyond; and

(xii) facilitate the appointment of experts to constitute the *ad hoc* committee for dispute settlement under this Charter.

(12) Sources of Funding

(a) A Charter shall have a provision stating how projects, programmes or other implementation activities under the Protocol will be financed.

(b) The sources of funding may be stated to be:

(i) membership contributions;
(ii) fees from programmes, projects, operations and services under the subsidiarity organisation's portfolio, if any;
(iii) grants or donations received from the private sector, international organisations and other co-operating partners in conformity with the objectives of subsidiarity organisation; and/or
(iv) any other form of financing.

(c) The provision shall state that the subsidiarity organisation shall not incur debts, without the approval of the board.

(13) Settlement of Disputes

(a) A Charter shall contain a dispute provision reading as follows:

"1. Any dispute between State Parties regarding the interpretation or application of this Charter, its annexures and any of its other subsidiary legal instruments, shall in the first instance be resolved by negotiation and agreement amongst the concerned State Parties within ninety (90) working days of the dispute arising.

2 If the negotiations referred to in sub-article (1) fail to resolve the dispute under consideration, a complaining party may within 30 working days notify the **[xx]** Secretariat of the failure to resolve the dispute.

3 Upon notification of a dispute to the **[XX]** secretariat the complaining party shall pay to the **[XX]** Secretariat such fee as may be prescribed from time to time.

4 The **[XX]** **Secretariat** shall upon receiving notification under sub-article (2), facilitate the appointment of an *ad hoc* committee within thirty (30) working days for determination of the dispute.

5 The *ad hoc* Committee shall consist of five (5) experts on the relevant matter to be appointed by the Committee of Ministers, provided that Ministers of the State Parties being parties to the issue in dispute shall not sit on the Committee of Ministers.

6 The *ad hoc* Committee shall reach a decision, by majority, within sixty (60) days of its appointment.

7 The decision of the *ad hoc* Committee shall be referred to the Committee of Ministers, not being parties to the issue in dispute, for approval.

9 The decision of the Committee of Ministers shall be final and binding.

(14) Signature

A Charter shall contain a provision on signature by State Parties reading as follows:

"This Charter shall be open for signature by any Member State."

(15) Entry into Force

A Charter shall have a provision on entry into force reading as follows:

" This Charter shall enter into force thirty (30) days after signature by two-thirds of the Member States and thereafter, shall remain open for signature."

(16) Depositary

A Charter shall contain a depositary provision reading as follows:

"The original texts of this Charter shall be deposited with the Executive Secretary who shall transmit certified copies to all Member States."

(17) Amendments

A Charter shall contain amendment provision reading as follows:

"1 A State Party may propose amendments to this Charter.

2 Proposals for amendments to this Charter shall be made in writing to the Executive Director, who shall duly notify all State Parties of the proposed amendment(s) at least thirty (30) days before consideration of the proposed amendments.

3 Amendments to this Charter shall be adopted by a decision of three quarters of the State Parties."

(18) Withdrawal

A Charter shall contain a withdrawal provision stating as follows:

"1 A State Party may withdraw from this Charter upon expiry of twelve (12) months from the date of giving a written notice of withdrawal to the **[XX]** Secretariat.

2 The Executive Director of the **[XX]** secretariat, upon receiving the notification, shall inform the State Parties of the intention of that State Party to withdraw.

3 A State Party that has given notice to withdraw pursuant to paragraph 1 of this Article shall cease to enjoy all rights and benefits under this Charter upon the withdrawal becoming effective but shall be obligated to settle its outstanding obligations under this Charter.

4 In the event that a host country withdraws from this Charter, or for any other reason, any State Party interested in hosting the **[XX]** may make an offer for hosting subject to approval by the Committee of Ministers."

(19) Termination of the Charter

A Charter shall contain a termination provision reading as follows:

"1 This Charter shall terminate in the event that:

(a) membership to this Charter becomes less than two thirds of the Member States; or

(b) two thirds of the State Parties agree to terminate this Charter.

2 Upon termination of this Charter any funds and assets, movable and immovable property remaining under the jurisdiction and responsibility of the **[XX]** shall be re-distributed amongst the State Parties on terms agreed by State Parties after full and lawful settlement of all operations, staff and creditor liabilities and obligations."

(20) Agreements

An Agreement between SADC and an existing institution/organisation within the region to designate such an institution/organisation as a subsidiarity organisation of SADC shall comply with the principles set out in the SADC Subsidiarity Principles adopted by Summit in 2004 and the principles set forth in this Section.

(21) Agreement Amending Charters

An amendment of a Charter shall be in the form of an agreement containing the following:

(a) Preambular statement containing names of State Parties to the Charter and the background of the proposed amendment;

(b) Articles disclosing the provisions to be amended;

(c) Entry into force provision reading as follows;

"This Agreement shall enter into force on the date of its adoption by a decision of three-quarters of the States Parties to the Charter."

(d) Signature page containing the names of State Parties to the Charter.

ADOPTION OF THE GUIDELINES

Adopted by the Committee of Ministers of Justice/Attorneys-General, at its meeting held in Swakopmund, Namibia on **2 day of August 2019**.

_____

Honourable Mr Sakeus Shanghala, MP, and
Minister of Justice of the Republic of Namibia
and Chairperson of the Committee
of Ministers of Justice/ Attorneys General

A3 Notes on the drafting of the Charter for SARERA

The notes in this annex are written to assist the persons charged with the task of preparing a draft Charter for the new SARERA.

It is acknowledged that a document already exists under the auspices of SADC with the title *Guidelines for Drafting of SADC Legal Instruments* and these *Guidelines* (reproduced as Annex A2 in this report) contain a section on the drafting of Charters. The purpose of these notes is to provide advice to the draftsmen on how they can draw on the information in the Final Report to populate the draft Charter with information specific to SARERA.

The *Guidelines* to hand are in draft form and have not yet formally entered into force. Nonetheless, the Consultants have prepared the Notes on the assumption that they (or a document similar in terms to those contained in the draft (SADC/MJ/2/2019/10 2 August 2019 1422 hours) will be approved and enter into force.

Additional points are given in Section 4.6. Although the *Guidelines* might suggest that the advice being provided is only general in nature, the text of the document is in fact prescriptive in nature, in that the document seems to expect its stipulations to be followed very closely. Therefore, in the comments below Section 4 of the *Guidelines* is followed (including the numbering and headings) in which the contents of a Charter are enumerated and described:

- **4(2) Preamble and 4(3) Definitions –** these are standard drafting clauses.
- **4(4) Objective of the Charter –** this clause requires a statement about the purpose of the Charter document itself (as opposed to the objectives of SARERA which are to be addressed in a later clause). Therefore, this clause need say little more than the purpose of the Charter is to set out the rules and procedures which are to govern the operation of the organisation established by this Charter.
- **4(5) Scope –** this clause requires a statement of the main activity of the new organisation. A statement might be as follows :" The scope of this Charter is the establishment of a regional energy regulatory authority to deal with regulatory issues relating to cross-border energy trade and investment in the Southern African Development Community with an enhanced ability to implement, monitor, enforce and take remedial action on regional regulatory decisions."
- **4(6) Establishment Clause –** for this clause the *Guidelines* contain specific drafting to be used in any Charter.
- **4(7) Seat –** this clause is to deal with the naming of the location of the Secretariat of the organisation.
- **4(8) Objective(s) of the Subsidiarity Organisation –** the word "objectives" has the same meaning as the word "mandate" which is used in the Final

Report. Section 6.1 of the Final Report contains a suggested mandate for the new organisation.

- **4(9) Functions** – Section 6.2 of the Final Report contains detailed drafting on the functions recommended for the organisation.

- **4(10) Institutional Arrangements** – for this clause the *Guidelines* again contain specific drafting to be used in any Charter. This standard form drafting will require only minor customisation subject to discussion among SADC Member States over how they wish to exercise institutional control. The *Guidelines* specify that the institutions responsible for the direction and implementation of a Charter shall be:

  - Committee of Ministers
  - Senior Officials
  - Board
  - Secretariat.

  However, the Secretariat is dealt with under its own clause (see 4(11) below). This is because, whilst the Committee of Ministers, the Senior Officials and the Board are to exercise governance over and institutional oversight of the organisation it is the Executive Director, leading the Secretariat, who is to exercise day to day leadership of the organisation.

- **4(11) Secretariat** – again, the *Guidelines* contain some specific drafting to be used in the Charter. Section 4(11)(b) of the *Guidelines* specifies the functions which should be allocated to the Secretariat. Significantly, the list is preceded by the words "inter alia". In other words, this Guideline recognises there may be other functions which the Secretariat should discharge. Section 6.3 of the Final Report describes powers which SARERA requires in order to carry out its mandate and the list given in this Section 6.3 should be taken into account in the drafting of 4(11).

  There is also latitude in 4(11) for more detail to be added to describe further how the operationalisation of the organisation is to be achieved. This operationalisation is described in Section 8 of the Final Report.

- **4(12) Sources of Funding** – the drafting of this clause should draw on Section 9 of the Final Report.

- **4(13) Settlement of Disputes** – for this clause the *Guidelines* contain specific drafting to be used in any Charter. It should be noted that the clause in the *Guidelines* deals only with disputes between State Parties regarding the interpretation or application of this Charter. There are other categories of dispute outside the scope of the Charter which the parties negotiating the Charter text should consider. These include (a) enforcement action being taken by SARERA; and (b) a dispute that an affected party might raise against SARERA if it disagrees with a decision made or enforcement action being

taken by SARERA. A process for these matters will need to be drafted outside the scope of the Charter.

- **4(14) – 4(21)** – these are standard drafting clauses.

A4 Action items of the IOC Network of Regulators

Translated from the original French document, the actions are envisaged in different categories:

- **Knowledge and best practices sharing** on all topics related to regulatory professions. In addition to physical workshops, useful support will be provided through access to documentation via a computer management tool managed by a dedicated administrator. The current tool needs to be improved accordingly. The knowledge sharing workshops will start with the following subjects:
  - Pricing issues - level and method of calculation;
  - Assessment of the performance of investors intervening in some of the countries from the zone;
  - Planning and development;
  - Institutional issues related to the organisation of the electricity sector.
- Coordinated **benchmarking** actions to compare the countries of the zone with each other and with neighbours: costs, fuels, means of production development costs. This can be done as an extension of the work already undertaken by the Regulatory School of Florence.
- A comparison of **shared issues** across member state regulators will be provided in order to help regulators in their quest for competence in various issues and subjects: pricing approach, control policy (costs, procedures), investigative powers, economic regulation.

  The expected benefit from this is to be more effective in cross-cutting issues that regulators may face by developing a regional view whilst integrating local context elements.
- **Joint projects** - when interests converge - will give the opportunity to build specific actions, as evidenced already with the grid code. This will concern the areas where progress is to be made in all countries, i.e. accounting unbundling, drafting of certain technical regulations, development of document templates.
- **Methodological support** in the main sectors, in particular:
  - To complete or even start the development of regulatory texts in coordination with relevant ministries in the context of the distribution of powers between stakeholders.
  - To train on specific topics that appear as key factors in progress towards transparency, such as accounting unbundling.

Immersion training of members of regulatory bodies from one country to another in order to learn best working methods practices in a given profession within a given department.

A5 Comments and responses – earlier versions of the report and workshop presentations

The table below summarises responses / corrections made in the Final report in response to written comments received on earlier versions and points raised in discussion at the workshops.

A5.1 Zeroth Draft Report

Section / Topic	Comment	Response
	SADC Energy Division	
Executive Summary	Protocol: SADC Energy Protocol exists. Protocols are signed by Heads of State and Government. Consider replication of Agreement Between Operating Members (ABOM) of SAPP	Overtaken by the Charter directive from SADC Legal Division
	International arbitration: Which one? SADC arbitrations is suspended for national issues but dealing SADC Secretariat matters	Noted. Justification for international arbitration is given at the end of Section 5.5 for other disputes concerning SARERA (Disputes concerning the Charter to be resolved according to the procedures laid out in the SADC Guidelines – Section 5.5).
	Study recommends' not 'we'	Noted. First person removed from the text.
	Development partner financing: Mobilisation of resources may take time. This approach is not sustainable!	Noted
2.2	Kafue Gorge Regional Training Centre (KGRTC) – proving training and capacity building on technical and techno-managerial energy programmes and courses	KGRTC added as SADC energy institution.
2.3	In SADC Countries are usually referred to be Member States	Noted
	Who imposes wheeling charges? Country B as the owner of transition transmission assets or A and C? Please clarify?	Text clarified
4.1	The SADC Protocol on Energy of 1996 is under review and will be presented for Ministers in May/June 2020. Commission could not be established due restructuring of SADC	Text added / altered
4.3	SADC has guidelines for its Subsidiarity organisation as newly established and those being applying for subsidiarity status	Subsidiarity guidelines checked.

Section / Topic	Comment	Response
	SACREEE IGMOA has to signed by at least 10 Member States	Noted.
4.4	Protocol for SARERA	Replaced by Charter to conform with SADC Legal Division directives.
6.2	Clarify wheeling charges for this arrangement	Text verified
	Electricity Control Board (Namibia) – marked up comments	
Funding Model	"The primary source of revenues will continue to be contributions by member regulators". I don't think this is fair. If a regional Regulator is established as a SADC organ, SADC should pay for it, and not member regulators.	Funding by SADC was not supported as an option at either of the workshops.
	"Member regulators will be required to collect revenue for such trades on behalf of SARERA". Is this not a SADC obligation?	After further discussion, it was agreed that SAPP should collect revenue from the levy on electricity trading (see Section 9.1)
Wheeling charges	"The long-discussed framework". I don't' think this documents should pre-empt the type of Tx charging	Noted.
Previous study	"Market and Investment Framework for SADC Power Projects" Is this the same doc as the Regional Market Framework referred to below?	Yes. In Final Report, there are fewer references to this report.
Eskom	"South Africa's recently announced unbundling of Eskom" Has this been formally announced, or is it a possibility still in dealing with Eskom's financial challenges?	Subsequent announcements have confirmed the unbundling intention. Whether this is to be a pre-cursor to a wholesale electricity market in South Africa is still unclear.
RERA founding documents	"We have not seen these three documents but assume that they contain further encouragement for the establishment of RERA". I suggest this sentence should be deleted. We should not assume what are in documents.	Agreed. Sentence removed.
Legal framework	The SADC Energy Protocol to become enforceable will have to be ratified at national level, and incorporated in national legislation.	Noted.
	"SARERA will derive its authority to compel compliance with the mandate it has been given in the following way". This should be compared to ERERA's enforcement provisions.	Further discussion of ERERA in Section 3.2 and Annex A1.6.
SARERA mandate	The mandate should make a clear distinction between SAPP and SARERA areas of responsibility.	Distinction added in Section 6.1.
	"Participate in governance of SAPP Rules" This must be specifically provided for. I foresee resistance from SAPP members	Noted.
	Explain enforcement of competitive behaviour better	New wording in Section 6.2.
Funding model	"Retaining annual contributions as the primary revenue source" I propose it comes from SADC, firstly because there will be no member regulators of SARERA, and secondly for	As noted above, direct funding of SARERA by SADC was not supported by other stakeholders.

Section / Topic	Comment	Response
	independence purposes it cannot rely on subscriptions from those regulated by it. Related: How independent will SARERA be if funded by those regulated by it? SARERA would have no member regulators. They would form part of a consultative committee.	This is a fundamental point about the transformation of RERA into SARERA. It is more clearly explained in the Final Report (Section 4.5 and Section 8.2).
	"Member regulators will be required to collect revenue for such trades on behalf of SARERA". Better to use SAPP as it in any event deals with the DAM and other SAPP markets.	Agreed by stakeholders in subsequent workshops, and has been adopted (Section 9.2).

A5.2 Regional consultation workshop

Slide / ref. #	Comment	Response
	ZERA	
16, 23	Wheeling charged and Access, no legislation available	SARERA to be given powers to provide legally binding regulations for cross-border trade
23	Risk column to be added to mandate and powers chart	Risk is important, discussed in the text (in Section 6.3)
23	SAPP Operating Guidelines	SARERA to endorse and take over relevant SAPP Guidelines.
25	Considering the interlinkages between various energy sub-sectors, there is need to consider the other SADC institutions e.g SACREEE, REPGA, Coal Association to be under the regulation of SARERA.	These institutions are of a different character to SAPP, which itself needs at most very light-handed regulation. SARERA would be over-reaching itself to attempt to regulate these other bodies.
31	The structure has a missing link of the Centre manager/ Accounting officer to which the commissioners are accountable to or a person that will be responsible for the day-day running of the organisation. Similar institutions under SADC such as SACREEE and SAPP have Directors that are mandated to ensure the operations of the institutions. If the current RERA structure is maintained Slide 33, then there is need to outline the reporting hierarchy between the Executive Secretary and the commissioners.	New discussion of the structure is provided, taking account of the Charter requirements laid out in the SADC legal directive. In that document, the official is called the Executive Director. See Section 4.4 for a discussion of the role of the Executive Director.
34	I recall in Namibia during the inception meeting, there was unanimous agreement that the Market Surveillance and Monitoring function currently under SAPP should be under SARERA. Does that then not mean we should have a Permanent /full time post for monitoring.	Discussion in Maputo was of the technical monitoring to remain housed in SAPP, but the substantive surveillance function to reside in SARERA. This is noted in Section 7.
35-37	Funding model - The projected budget for SARERA is estimated at $1.5 million (subsequently raised to $1.8 million). If the	It is an important point that a very small levy on trade would generate the required revenue. Member States would

Slide / ref. #	Comment	Response
	current funding regime is maintained, the bulk of SARERA has to come through a portion levied on the energy traded on the SAPP competitive market. Slide 12 of the presentation indicates that more than 2000GWhs was traded between 2007/2018. Thus, a rate of USc0.075/kWh traded on the competitive market will be able to cover running costs of SARERA without burdening energy market players	surely welcome the idea that existing national contributions need not be increased, with the additional budget being covered from this small levy on trade. Your figure covers the entire $1.5 million. Table 5 in Section 9.1 has the levy required for each $1 million that is required to top up the existing National Contributions for RERA to the projected total budget for SARERA.
	Group 1: Legal aspects	
1	Standalone regulatory Protocol for SARERA, not part of revised Energy Protocol	Overtaken by Charter as the legal form for SARERA
2	SARERA establishment to follow RERA & SADC approval processes	Noted.
3	Compliance to be achieved through agreement, so enforcement may in practice not be necessary, but provision should be made for imposition of fines	This is captured in Section 5.3.
4	Dispute Resolution approach: • discussion and mutual agreement as a first step • Intermediary action is resolution through a SADC Expert Standby Tribunal (set up as and when required) • Last resort through international arbitration (costly and lengthy)	Two types of disputes need to be recognised: those involving the Charter (to be resolved via the procedures laid out in the SADC Guidelines) and other disputes involving SARERA (which in the final resort may require international arbitration). Details are provided in Sections 5.4 and 5.5.
5	A baseline be established for all SADC member states. This will in turn assist in the process of harmonising their legislations.	Good idea (Section 6.2).
6	Consideration for use of existing rules within SAPP to convert into regulations	Covered in Section 6.2.
7	SADC procedures to be adopted for the appointments	Included in Section 14.
8	Key personnel must be citizens of a SADC country, exhibit gender balance and have appropriate technical skills	Included in Section 14.
	Group 2: Market structure	
1	SADC should institute legal powers upon inception to SARERA by amending / development of SADC policy on Harmonisation.	Noted
2	SARERA to develop a road map for all members to unbundle the market and	Good proposal. Listed under Regulatory Initiatives (Section 12).

Slide / ref. #	Comment	Response
	implement cost reflective tariffs to attract investments into the sector.	
3	SARERA should provide technical advisory services by conducting benchmarking exercises to guide member countries on processes and elements of cost reflective tariffs for the different modes of power generation	Included in Regulatory Initiatives (Section 12).
4	SARERA should facilitate the development of regulations which oblige /encourage regulators to issue export licence to IPP's to sell power to SAPP.	IPPs selling power to the SAPP market or direct to customers in other countries requires wholesale market development in Member States. SARERA will encourage this but needs to be careful in taking actions which could be construed to be contrary to the principle of subsidiarity.
5	SARERA to develop regulations that allow utilities to provide wheeling passage. SARERA should facilitate the development of frameworks that promote implementation of merchant transmission lines for new producers to access the power pools.	Wheeling charges are one of the key functions identified in Section 6.2 Merchant transmission lines are arguably a long way off in the SADC region, but having a competent, well respected regional regulator in SARERA will be one of the elements assessed by future promoters of merchant transmission lines.
6	SARERA should incentivise country projects that are aligned to regional master plan by making the projects bankable and linking them to donor funding to promote alignment.	Such a direct role unlikely to be possible or acceptable. SARWERA can and should play a supportive role.
7	SARERA to provide technical assistance during tendering process for country projects to ensure uniformity.	SARERA should offer to assist, but Member States would have to request this.
8	SARERA should consider implementing the Scandinavian market surveillance model where market surveillance is done by the power pool, which in turn reports cases to the regulator which impose sanctions developed by the regulators association.	This is substantially what has been endorsed by stakeholders and included in the Final Report (Section 7).
	Group 3: Organisational structure and funding model	
1	Commissioners to have an oversight / governance role as opposed to technical specialists doing the job.	This model endorsed at Validation Workshop and is reflected in the Final Report (Section 4.4)
2	Staggered Fixed Term Contracts for smooth transition.	Agreed (Section 14).
3	Technical Team (Legal / Economic / Engineering) to be full time and appointed on merit but without country dominancy.	Agreed (Section 14).

Slide / ref. #	Comment	Response
4	If a large number of Commissioners is adopted, Authority becomes inefficient and it becomes more challenging due to the Geographical Spread.	Noted.
5	SARERA may levy cross border transactions at an appropriate level informed by the organization's revenue requirement (Budget) to secure revenue for its operations. SAPP CC may be used to collect the levies and remit to SARERA	Endorsed at subsequent workshop (Section 9.1)
6	Develop a formula with agreed criteria for determining Member contributions and Levies on cross border transactions for funding SARERA	Discussed and illustrated in Section 9.1.

A5.3 Draft Final Report

Item	Comment	Response
	COMESA / RERA written and marked-up comments	
Preamble	1. In order to recognize the contribution of the European Union and also increase the visibility of the ESREM project, please include the following text in the preamble; "This report was produced with the financial assistance of the European Union channelled through the Project on Enhancement of a sustainable regional energy market. The views expressed herein can in no way be taken to reflect the official opinion of the European Union."	Done.
Executive Summary	2. Give a short background here highlighting the fact that; "… RERA, in seeking to respond to the needs of the regional energy market, recently transformed from an Electricity Regulators Association into an Energy Regulators Association"	Done.
	3. There is no need to summarize the Annex in the Executive Summary. If the information is considered pertinent to have can we just label that section as; "Lessons from International Regional Energy Regulatory Experience"	Annex now has separate sub-sections for each international regulator and a summary in Section 3.2.
	4. In the funding model here, please mention the option to source for alternative funding from cooperating partners especially in the formative period	Donor funding is one of the options in Section 9.2.

Item	Comment	Response
Framework for SARERA	5. While the Charter has been selected as a favoured option here, it would be good to get the consultant's analysis of the other option (Protocol) which was considered in the Zeroeth Draft and state why it was initially preferred. It would be good to then reflect on why the Charter is now being proposed and qualify if it will be just as effective as the Protocol	Point was made in the Zeroth Draft and at the Consultative Workshop that the name of the legal instrument is not determinant, it is what is put into the actual wording that counts. The Consultants have no allegiance to the idea of a Protocol. It seemed a possible route at the Zeroth draft stage, but the SADC Legal document we were sent subsequently clearly states that SADC Protocols are for areas of cooperation and SADC Charters are for new institutions.
	(Marked-up comment) SIEPAC to be introduced when first mentioned.	In the Final Report, SIEPAC is described in Annex A1.5
	6. While the status and structure of these institutions is presented in detail, no analysis has been done in terms of evaluation of what has worked and what failed or is presenting challenges to the organizations. Are there any obvious pros and cons for each of the cases presented (ACER, FERC, ERERA, CERC, etc.) which can then be used as a basis for adoption of recommended structure?	Discussion of relevant lessons for SARERA in Section 3.2.
	(Marked-up comment) How does the SADC Secretariat fit in here given that in the staffing section it's indicated SADC will be carrying out recruitment of the Technical Directors?	SADC Secretariat has various up-front roles during the transition of RERA to SARERA, as laid out in Section 11.1, but does not require a permanent place in the organisational structure. In the final legal framework involving a Charter, the key step is the appointment of the members of the SARERA Board. How this is to be done is to be specified in the Charter (see Annex A2). Thereafter, the Board takes responsibility for appointments of the Executive Director, who then recruits and appoints others in consultation with the Board.
	7. Recommended structure is based on the ERERA model which is fine. However, the consultant should justify why the ERERA model is being favoured in this case given that ERERA has not had the opportunity yet to oversee the operations of a functioning regional energy market. What are the pros and cons of the structure proposed and just how have these been demonstrated in the short time ERERA has been in existence?	Point taken. Pre-eminence of ERERA removed from the Final Report.
	8. What will be the functions of the various entities (e.g. senior officials, council of Ministers) in the structure as relates to the role and mandate of the regional regulatory authority? Related marked-up comment: Can we have clearly stated roles for each level of the structure here e.g. Senior officials, Committee of Ministers etc. For instance, at which level will regulatory decisions be taken; which level gives	The functions and responsibilities are laid our in the Charter Guidelines (Annex A2). The intention is that the SARERA Board will take regulatory decisions and will give final approval of the market rules and such instruments; etc, but this needs to be codified in the legal wording of the Charter. As made clear in Section 4.6, the final version of the SARERA Charter will be arrived at by a process of negotiation and consensus building. The first draft of

Item	Comment	Response
	final approval of the market rules and such instruments; etc	the Charter will constitute the starting point for those negotiations.
	9. ACER has 30 board of regulators and seems to be doing just fine. Perhaps draw the expected challenges based on experiences from existing bodies.	Point is taken up in Section 3.2.
Compliance	10. Perhaps fully specify the acceptable optional "seats" or rather the legal framework(s) under which international arbitration will take place? SADC tribunal, London, Paris or what? What are the options that you consider will be attractive to investment? (Similar marked-up comment).	As noted previously, two types of disputes need to be recognised: those involving the Charter (to be resolved via the procedures laid out in the SADC Guidelines) and other disputes involving SARERA (which in the final resort may require international arbitration, the form of which needs to be chosen by SADC at the time taking account of a variety of factors). Details are provided in Sections 5.4 and 5.5.
Organisational structure	11. Why should members of the part-time, non-executive Board of Commissioners Board come from the Ministries and not regulators as stated? One would argue that representatives of regulators would be better suited to contributing to technical deliberations and decision-making processes rather than bureaucrats from the ministries. What is the basis for this suggestion?	For conflict of interest and conflict of role reasons, Board members should neither be from national regulatory bodies nor from ministries of energy. The national regulatory agencies are, albeit to a degree limited by subsidiarity, subject to regulation by the regional body. Similarly, to preserve the institutional domains for policy-making and the implementation of policy through regulation, members of the SARERA Board should also not be officials from Ministries of Energy (Section 4.5).
	12. ACER's board comprises of close to 30 representatives of Member States. Has this arrangement presented challenges to the organization? What learning can we draw from ACER as a basis for discounting the option of a part-time, non-executive Board of Commissioners, and, if adopted, for going for a maximum of 5-7 commissioners instead of the full representation from each Member State?	Like the earlier question about ACER, this point is taken up in Section 3.2.
	13. While initially focused on electricity, SARERA's structure should be reflecting the broad energy portfolios – not just electricity	Highlighted at various points in the Final Report.
Funding Model	14. Would it make sense considering the levies on transactions in the market as the primary funding source for SARERA? Other sources including member contributions, grants etc. would then be additional sources of revenue. Related marked-up comment: Following my argument from above, I wouldn't say that these is an "additional "source. Rather, in the long-term, it should be the primary source. The rest (including member contributions that are in any case not mandatory) are secondary	The alternatives were thoroughly discussed at both workshops. The consensus was that the new functions of SARERA relating to cross-border energy trade should be funded by levies on those trades. Numerically, this will quickly become the most important source of funding for SARERA. However, it was felt that annual contributions should remain to cover the continuation of RERA's existing functions, and particularly to cater for Member States not involved in energy trade. These countries should neither be

Item	Comment	Response
		subsidised by, nor subsidise, cross-border trade conducted by others (Section 9).
	(Marked-up comment) Annual Contributions to continue - Thought that this arrangement would only be temporary. Since the new structure will take away the decision-making and ownership privileges of the new SARERA from the NRAs, there is no compelling reason why they should continue funding it – at least not as relates to its oversight of the regional energy market.	See above.
	(Marked-up comment). Required level on trade estimated from current trade levels?	Yes, see Section 9.2 for details.
	(Marked-up comment) It would be good to explicitly state that these contributions will primarily continue funding the current activities/roles of RERA that will be usurped by SARERA. Non-participating member states in the market should not feel they are subsidizing activities of a market they are not currently party to (or that they do not intend to be party to as is the case for the IOC countries).	Agreed, see above.
Roadmap	15. Generally, this section needs reinforcement in the form of providing additional detail on the various sub-activities necessary to be implemented in order to achieve final outcome. For instance, how will consensus on the Charter be arrived at?	Agreed, Road Map section has been considerable strengthened in the Final Report (Part 3).
	16. A Gantt chart providing the expected timeline and flow of activities is necessary to summarize the detailed roadmap. It should be as detailed as possible. Related marked-up comment: There is need to expound more on what each individual activity entails in the roadmap. For instance, how consensus will be arrived at.	Gantt chart in Section 11 of the Final Report.
	17. Please clearly state what the initial activities will comprise. The roadmap is incomplete without knowing what exactly comprises these activities	See Section 12.
Budget Estimate	18. Which specific experts are you recommending to be hired initially in the different categories – full-time, part-time, outsourced?	Executive Director and at least two full-time Technical Directors with skills covering legal, technical and economic regulation (Section 13.2).
	19. The finance manager is a substantive position and need not be outsourced. Where in this estimate is the salary for the finance officer?	Agreed. Salaries for the revised Road Map re-appraised with assistance from COMESA and RERA.
	20. Disparity in salaries between technical directors and the rest of the technical staff is quite large. Is this reflective of general good practice?	Adjusted in the final budget.

Item	Comment	Response
	(Marked up comment): What is the basis for the rates adopted?	See above.
Recruitment	(Marked-up comment): Revise to read, the composition of SARERA structures should reflect the SADC gender requirements (there is a SADC Protocol on gender)	Included in Section 14.
	(Marked up comment): "In ERERA, the dismissal of Council members is not allowed unless in the event of a serious offence, criminal conviction or the unavailability to serve in the Council". It would be good to include this provision in the staffing section for SARERA otherwise the appointing authorities may have some influence on the technical directors	Included in Section 14.
	BERA comments	
1	It is noted that the consultant has retained the structure with full time board; our comment is that the board should be part time representing the member states equally, providing external corporate governance and making decisions that benefit the region with a buy in of member states;	In the Final Report, the recommendation is a part-time Board for SARER (Section 4.4).
2	While penalties and fines may be imposed for lack of adherence to regulatory requirements, incentivising compliance could also be tried as an enforcement measure;	Agreed. This is spelt out in Section 5.1.
3	The structure must also allow for an appeals body through which disputes can be settled prior to international arbitration;	As noted previously, two types of disputes need to be recognised: those involving the Charter (to be resolved via the procedures laid out in the SADC Guidelines) and other disputes involving SARERA (which in the final resort may require international arbitration, the form of which needs to be chosen by SADC at the time taking account of a variety of factors). Details are provided in Sections 5.4 and 5.5.
4	The regulatory instruments and tools, in fact the whole report is biased towards electricity, however, ministers of energy in SADC have already made various decisions on other forms of energy (oil and gas) therefore the transformation of RERA must cover the whole scope in all regulatory aspects;	Agreed. That SARERA will be responsible for all forms of cross-border energy trade is noted in many places in the report. Nonetheless the TOR for the study and the agreed initial focus for the new regulator should be the electricity sector.
5	SARERA's mandate should include harmonisation of regulatory instruments and tools because RERA has already made quite significant progress regards to this and therefore it would be beneficial to the region if that is not lost;	Agreed. Harmonisation is highlighted in several different places in the Final Report, including Section 6.2.

Item	Comment	Response
6	Apart from participating in consultative committees (which are not decision making but rather just advisory), it is not clear as to how SARERA will relate to the national regulators. In our view national regulators must have a meaningful role to play especially in the decision-making process, this would make it easy for them to assist in the enforcement role;	There is, however, the danger of conflict of interest. This matter is discussed in Section 4.5.
7	It has also been noted that the consultant has provided the timelines for the transformation, but these are vague because long, medium and short terms are not defined by definite time scales;	In the Final Report there is more detail on time lines (Section 11).
8	While it is appreciated that reference is made to other international bodies, it must also be acknowledged that SADC is a unique region and has made significant strides through RERA and SAPP. It is therefore vital to look at how both RERA and SAPP have been able to effectively function, consider their failures and use those to strengthen SARERA.	The Consultant team has decades of involvement in the Southern Africa energy sector. The entire study has been very much based on the analysis and understanding of RERA and SAPP.

A5.4 Validation workshop

The Validation Workshop was for the most part precisely that - a validation of previously adopted agreements on a variety of issues which had been incorporated in the Draft Final Report and the presentation for the Workshop. Nonetheless, there were a number of issues which were discussed afresh.

#	Comment	Response
	Comments from the workshop report and other verbal interventions	
1	The legal tool that would establish SARERA would need to bind Member States, Member State organisations and other persons authorised by that Member State to comply with the lawful requirements of SARERA. In the event of a failure to so comply SARERA needed to be authorised ultimately to invoke the SADC Treaty procedures to address the non-compliance.	Noted. The Guidelines for Charters provides the basis for the legal powers of SARERA (Annex A2).
2	It was reiterated that, need for policy clarity was crucial otherwise interference would prevail. The principle to observe was such that Ministries would remain with a policy function and Regulators would oversee implementation of policies.	The principle of separating policy making and implementation is particularly important in the choice of members of the SARERA Board (see Section 4.5.

#	Comment	Response
3	It was also reiterated that harmonization (policy/regulation) was the cornerstone of regional integration and the establishment of a regional Energy Regulatory Authority.	Agreed. See Section 6.2.
4	It was agreed that SARERA's mandate should focus on regulating cross boarder energy trade while observing subsidiarity (performing only those tasks which cannot be performed at a local level).	This is captured in Section 6.1.
5	It was resolved that legal process should prevail during dispute resolution so as to create confidence and certainty which are critical factors for investment and mobilization of finance.	Captured in Section 5.
6	It was informed that International Arbitration provided more confidence to investors and financiers compared to local processes. However, it was cautioned that International Arbitration could be lengthy.	Often also very costly. See Section 5.5.
7	SADC and RERA are to work on timing for the approval process (involving RERA Plenary, SADC Energy Sub-Committees meeting, Meeting of Ministers responsible for Energy and Council of Ministers) and transitional activities.	Advice provided by SADC Secretariat is incorporated into the Roadmap (See Section 11).
8	It was recommended to staff SARERA on merit basis with gender consideration. Further, it was informed that, SADC had a policy which guides gender issues.	See Section 14.
9	While considerations for full time Board Members vs Part Time Board Members were debated, it was advised not to overlook the practical risk of full time Board Members, especially with regard to micromanaging operations.	Part-time Board was decided upon and incorporated in the Final Report (Section 4.4)
10	It was proposed to fund SARERA through levies on cross border transactions as well as Member State contributions. Some Principles of funding deployed by RERA/SAPP may be adopted for funding the activities of SARERA.	Section 9 captures these points.
11	It was recommended that SARERA should have powers to promote competitive market structures and incentivize those who demonstrated compliance to minimum requirements.	Section 7 refers. There has to be adherence to the Subsidiarity Principle.
12	It was reiterated that market reforms were a pre-requisite for a healthy Electricity Supply Industry in the region. The reforms should include fostering transparency, cost recovery, efficiency as well as legally binding measures to build market confidence.	Agreed. See Sections 2 and 3.2.