

Southern African Development Community, African Regional Bodies

## Protocol Against Corruption

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Southern African Development Community

## Protocol Against Corruption

Published

**Commenced in full on 6 July 2005**

*[This is the version of this document at 14 August 2001.]*

We, the Heads of State or Government of:

The Republic of Angola

The Republic of Botswana

The Democratic Republic of Congo

The Kingdom of Lesotho

The Republic of Malawi

The Republic of Mauritius

The Republic of Mozambique

The Republic of Namibia

The Republic of Seychelles

The Republic of South Africa

The Kingdom of Swaziland

The United Republic of Tanzania

The Republic of Zambia

The Republic of Zimbabwe

**MINDFUL** of Article 21 of the Treaty establishing the Southern African Development Community which enjoins Member States to cooperate in all areas necessary to foster regional development, integration and cooperation and Article 22 of the Treaty which mandates Member states to conclude Protocols as may be necessary in each are of cooperation;

**CONCERNED** about the adverse and destabilizing effects of corruption throughout the world on the culture, economic, social and political foundations of society;

**NOTING** that corruption is a serious international problem which is presently the subject of concerted action in other parts of the world and one which countries in every stage of development should tackle as a matter of urgency;

**WELCOMING** initiatives of the United Nations General Assembly (UNGA) and collective regional efforts to combat corruption;

**TAKING** cognizance of the Resolutions adopted by Ministers of Justice and Attorneys-General of the Southern African Development Community at the 3<sup>rd</sup> Regional Roundtable on Ethics and Governance held at Victoria Falls, Zimbabwe in August, 2000 in which they agreed on initiatives to fight corruption in the Region;

**AWARE** of the inter-relationships between corruption and other criminal activities;

**ACKNOWLEDGEING** that corruption undermines good governance which includes the principles of accountability and transparency;

**RECOGNISING** that demonstrable political will and leadership are essential ingredients to wage an effective war against the scourge of corruption;

**REAFFIRMING** the need to eliminate the scourge of corruption through the adoption of effective preventative and deterrent measures and by strictly enforcing legislation against all types of corruption and fostering public support for these initiatives;

**BEARING IN MIND** the responsibility of Member States to hold corrupt persons in the public and private sectors accountable and to take appropriate action against persons who commit acts of corruption in the performance of their functions and duties;

**CONVINCED** of the need for a joint and concerted effort as well as the prompt adoption of a regional instrument to promote and facilitate cooperation in fighting corruption;

**HEREBY AGREE AS FOLLOWS:**

## Article 1 – Definitions

In this Protocol, unless the context otherwise requires:

“**confiscation**” means any penalty or measure resulting in a final deprivation of property, proceeds or instrumentalities ordered by a court of law following proceedings in relation to a criminal offence or offences connected with or related to corruption;

“**Corruption**” means any act referred to in Article III and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others;

“**Council**” means the Council of Ministers of the Southern African Development Community established by Article 9 of the Treaty;

“**Executive Secretary**” means the chief executive officer of the Southern African Development Community appointed under Article 10 (7) of the Treaty;

“**Member State**” means a Member of the Southern African Development Community;

“**property**” includes assets of any kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets;

“**Public Official**” means any person in the employment of the State, its agencies, local authorities or parastatals and includes any person holding office in the legislative, executive or judicial branch of a State or exercising a public function or duty in any of its agencies or enterprises;

“**Requested State Party**” means a State Party being requested to extradite or to provide assistance in terms of this Protocol;

“**Requesting State Party**” means a State Party making a request for extradition or assistance in terms of this Protocol;

“**State Parties**” means Member States who have ratified or acceded to this Protocol;

“**Treaty**” means the Treaty establishing the Southern African Development Community;

“**Tribunal**” means the Tribunal of the Community established by Article 9 of the Treaty.

## Article 2 – Purposes

1. The purpose of this Protocol are:
  - a) to promote and strengthen the development, by each of the State Parties, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector,
  - b) to promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the public and private sectors.
  - c) to foster the development and harmonization of policies and domestic legislation of the State Parties relating to the prevention, detection, punishment and eradication of corruption in the public and private sectors.

## Article 3 – Acts of corruption

1. This Protocol is applicable to the following acts of corruption:
  - a) the solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
  - b) the offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
  - c) any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
  - d) the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons.
  - e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
  - f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
  - g) the fraudulent use or concealment of property derived from any of the acts referred to in this Article; and
  - h) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this Article.

2. This Protocol shall also be applicable by mutual agreement between or among two or more State Parties with respect to any other act of corruption not described in this Protocol.

#### **Article 4 – Preventative measures**

1. For the purposes set forth in Article II of this Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen:
  - a) standards of conduct for the correct, honourable and proper fulfillment of public functions as well as mechanisms to enforce those standards;
  - b) systems of government hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems;
  - c) government revenue collection and control systems that deter corruption as well as laws that deny favourable tax treatment for any individual or corporation for expenditures made in violation of the anti-corruption laws of the State Parties;
  - d) mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption;
  - e) systems for protecting individuals who, in good faith, report acts of corruption;
  - f) laws that punish those who make false and malicious reports against innocent persons;
  - g) institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption;
  - h) deterrents to the bribery of domestic public officials, and officials of foreign States, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable details, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable the law enforcement agencies to detect acts of corruption;
  - i) mechanisms to encourage participation by the media, civil society and non-governmental organizations in efforts to prevent corruption; and
  - j) mechanisms for promoting public education and awareness in the fight against corruption.
2. Each State Party shall adopt such legislative and other measures under its domestic law to prevent and combat acts of corruption committed in and by private sector entities.

#### **Article 5 – Jurisdiction**

1. Each State Party shall adopt measures necessary to establish its jurisdiction over the offences established in accordance with this Protocol when:
  - a) the offence in question is committed in its territory;
  - b) the offence is committed by one of its nationals or by a person who habitually resides in its territory; and
  - c) the alleged criminal is present in its territory and it does not extradite such person to another country.
2. This Protocol does not exclude any criminal jurisdiction exercised by a State Party in accordance with its domestic law.
3. Paragraph 1 of this Article shall be subject to the principle that a person shall not be tried twice for the same offence.

## **Article 6 – Acts of corruption relating to an official of a foreign State**

1. Subject to its domestic law, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its own nationals, persons having their habitual residence in its territory, and businesses domiciled there, to an official of a foreign State, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.
2. Among those State Parties that have established the offence referred to in paragraph 1, such offence shall be considered an act of corruption for the purposes of this Protocol and any State Party that has not established such an offence shall, insofar as its laws permit, provide assistance and cooperation with respect to this offence as provided in this Protocol.

## **Article 7 – Development and harmonization of policies and domestic legislation**

1. State Parties undertake, to the extent possible, to develop and harmonise their policies and domestic legislation for the attainment of the purpose of this Protocol.
2. Each State Party shall adopt the necessary legislative or other measures to establish as criminal offences under its domestic law the acts of corruption described in Article III.

## **Article 8 – Confiscation and seizure**

1. Each State Party shall adopt such measures as may be necessary to enable:
  - a) confiscation of proceeds derived from offences established in accordance with this Protocol, or property the value of which corresponds to that of such proceeds; and
  - b) its competent authorities to identify, trace and freeze or seize proceeds, property or instrumentalities for the purpose of eventual confiscation.
2. In order to carry out measures referred to in this Article, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized and shall not invoke bank secrecy as a basis for refusal to provide assistance.
3. The Requesting State Party shall not use any information received that is protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless with the consent of the Requested State Party.
4. In accordance with their applicable domestic law and the relevant treaties or other agreements that may be in force between or among them, State Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freeing, seizure and confiscation of property, instrumentalities or proceeds obtained, derived from or used in the commission of offences established in accordance with this Protocol.
5. A State Party that enforces its own or another State Party's judgment against property or proceeds described in paragraph 1 of this Article shall dispose of the property or proceeds in accordance with its laws.
6. To the extent permitted by a State Party's laws and upon such terms, as it deems appropriate, it may transfer all or part of property referred to in paragraph 1 of this Article to another State Party that assisted in the underlying investigation or proceedings.

## Article 9 – Extradition

1. This Article shall apply to the offences established by the State Parties in accordance with this Protocol.
2. Each of the offences to which this Article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between or among the State Parties.
3. State Parties undertake to include offences referred to in this Protocol as extraditable offences in every extradition treaty to be concluded between or among them.
4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Protocol as the legal basis for extradition with respect to any offence to which this Protocol applies.
5. State Parties that do not make extradition conditional on the existence of a treaty shall recognise offences to which this Article applies as extraditable offences among themselves.
6. Extradition shall be subject to the conditions provided for by the law of the Requested State Party or by applicable extradition treaties, including the grounds on which the Requested State Party may refuse extradition.
7. If extradition for any offence to which this Article applies is refused because the Requested State Party deems that it has jurisdiction over the offence, the Requested State Party shall within a reasonable time, submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State Party, and shall report the final outcome to the Requesting State Party.
8. Subject to the provisions of its domestic law and its extradition treaties, a Requested State Party may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State Party, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure that the person is present at the extradition proceedings.
9. State Parties shall endeavour to conclude bilateral and multilateral agreements to carry out or enhance the effectiveness of extradition.

## Article 10 – Judicial cooperation and legal assistance

1. In accordance with their domestic law and applicable treaties, State Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic law, have the power to investigate or prosecute the acts of corruption described in this Protocol, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.
2. State Parties shall provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption.
3. The provision of this Article shall not affect the obligations under any other bilateral or multilateral treaty which governs, in whole or in part, mutual legal assistance in criminal matters.
4. Nothing in this Article shall prevent State Parties from affording one another more favourable forms of mutual legal assistance allowed under their respective domestic law.

## Article 11 – Institutional arrangements for implementation

1. A Committee consisting of State Parties is hereby established to oversee the implementation of this Protocol.

2. Each State Party shall report to the Committee within one year of becoming a Party, on the progress made in the implementation of this Protocol. Thereafter, each State Party shall report to the Committee every two years.
3. The Committee shall, inter-alia, be responsible for the following:
  - a) gathering and disseminating information amongst State Parties;
  - b) organising training programmes as and when appropriate;
  - c) evaluating programmes to be put in place and a programme of co-operation for the implementation of this Protocol; and
  - d) providing any other related assistance to State Parties as and when appropriate;
  - e) reporting to Council on a regular basis on the progress made by each State Party in complying with the provisions of this Protocol.

### **Article 12 – Authority**

1. For the purposes of cooperation and assistance under this Protocol, each State Party shall designate an Authority.
2. The Authority shall be responsible for making and receiving the requests for assistance and cooperation referred to in this Protocol.
3. The Authority shall communicate with each other directly for the purpose of this Protocol.

### **Article 13 – Transitional provisions**

1. Subject to the domestic law of each State Party and existing treaties between State Parties, nothing shall prevent a State Party from providing procedural cooperation in criminal matters solely on the basis that the alleged act of corruption was committed before this Protocol entered into force.
2. The provision of this Article shall not affect the principle of non-retroactivity in criminal law, nor shall application of this provision interrupt existing statutes of limitations relating to crimes committed prior to the date of the entry into force of this Protocol.

### **Article 14 – Relationship with other treaties**

Subject to the provisions of Article III paragraph 2, this Protocol shall in respect of those countries to which it applies, supercede the provisions of any treaty or bilateral agreement governing corruption between any two State Parties.

### **Article 15 – Notification**

Any State Party which has or enacts any legislation pursuant to Articles III, VI or VII shall notify the Executive Secretary who shall in turn notify the other State Parties.

### **Article 16 – Signature**

This Protocol shall be signed by duly authorized representatives of Member States.

### **Article 17 – Ratification**

This Protocol shall be ratified by the Signatory States in accordance with their constitutional or other procedures.

### **Article 18 – Entry into force**

1. This Protocol shall enter into force 30 days after the deposit of the instruments of ratification by two thirds of the Member States.
2. In respect of each Member State ratifying or acceding to the Protocol after the deposit of the ninth instrument of ratification, this Protocol shall enter into force in respect of that Member State, 30 days after the date of deposit of its instrument of ratification or accession.

### **Article 19 – Accession**

This Protocol shall remain open for accession by any Member State.

### **Article 20 – Depositary**

1. This Protocol and all instruments of ratification or accession shall be deposited with the Executive Secretary, who shall transmit certified copies thereof to all Member States.
2. The Executive Secretary shall notify Member States of the dates of deposit of instruments of ratification and accession.
3. The Executive Secretary shall register this Protocol with the United Nations, and the Organisation of African Unity.

### **Article 21 – Amendment**

1. An amendment to this Protocol shall be adopted by a decision of three quarters of Members of the Summit.
2. A proposal for the amendment of this Protocol may be made to the Executive Secretary by any State Party for preliminary consideration by the Council, provided however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.

### **Article 22 – Settlement of disputes**

Any dispute arising from the interpretation or application of this Protocol which cannot be settled amicably shall be referred to the Tribunal.

IN WITNESS WHEREOF, WE, the Heads of State or Government or our duly authorized representatives, have signed this Protocol.

Done at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ in three (3) original texts, in the English, French and Portuguese languages, all text being equally authentic.