

SADC PROTOCOL AGAINST CORRUPTION:

Making It Work

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1.0. **Introduction**

The Southern African Development Community (SADC) Protocol Against Corruption was adopted by the SADC Heads of State and Government at their August 2001 Summit held in Malawi making it the first sub-regional anti-corruption treaty in Africa.

Because of its historic significance many questions arise as to its origin, purpose, context, implementation mechanisms, modalities and more importantly its impact in the fight against corruption in Southern Africa.

The SADC Protocol follows in the wake of the Inter-American Convention Against Corruption of 1996, the European Convention on the Fight Against Corruption of 1997, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business, Transactions also of 1997 from which it derives inspiration, thus adding an African perspective in the globalisation of the fight against corruption.

The adoption of the SADC Protocol is a recognition of the extent to which corruption has become a menace world wide, and Southern Africa is not an exception in this regard.

2.0. **Background**

The origins of a regional framework to fight corruption in Southern Africa first came to light in the form of a draft Declaration Against Corruption at a meeting of SADC Senior Officials held on 23 August 1998, in Harare Zimbabwe at the initiation of the SADC Secretariat who emphasised the need for Southern Africa as a region to take a stance against corruption. The meeting of Ministers of Justice and Home Affairs which took place the following day at the same venue recommended the draft Declaration to the SADC Council of Ministers meeting which was held two weeks later in

Mauritius. The Declaration was subsequently rejected by Heads of States and Government of SADC because of the limited consultations on the Declaration and lack of political will on the part of the leadership to fight corruption. It had surfaced only two weeks before the summit and the main players in the form of anti-corruption agencies were not involved in its origination, no one country had requested or sponsored the declaration as is the tradition in SADC making the heads of states and governments suspicious. Issues of ownership and consultation led to the rejection of the declaration without going into the merits of the documents itself which was basically non-controversial.

Even if the process for the adoption of the Declaration was flawed, SADC leaders could have referred it for further consultations instead of an outright rejection.

It was at this juncture that the Human Rights Trust of Southern Africa (SAHRIT) was invited by the National Democratic Institute (NDI) a United States based non-governmental organisation to cooperate in efforts to resuscitate a sustainable discourse against corruption which would lead to a regional framework against corruption. Whatever strategies used had to take cognisance of the reasons for the rejection of the declaration which included inadequate consultations at national and regional levels the question of ownership and origin of the document and lack of political will.

The SAHRIT subsequently organised regional roundtables on ethics and governance, which targeted policy makers, to discuss the magnitude, impact and consequences of corruption in the region. The roundtables also specifically looked at strategies and methodologies to combat corruption in the region. The roundtables were held at Mashatu in Botswana in 1998, Dar-Es-Salaam Tanzania in 1999 and Victoria Falls Zimbabwe in 2000.

Studies were commissioned to quantify and qualify corruption in the region. This was intended to substantiate the magnitude and extent of the negative impact of corruption to the economies of the region. The first study concentrated on an inventory of existing anti-corruption mechanisms and strategies being used in the SADC countries to combat corruption.

Further, an opinion survey on corruption was conducted in the region and diagnostic tools for measuring corruption in the region developed. The findings of these studies were used as the main discussion frameworks at the above roundtables on ethics and governance.

The ministers, attorneys general, judges, and heads of anti-corruption agencies attending the roundtables recommended among other things that the SADC Legal Sector should spearhead the development of a SADC regional instrument against corruption with the technical and financial support of SAHRIT. The SADC Legal Sector finally accepted the responsibility to re-introduce the discourse on anti-corruption during SADC at the third roundtable held in Zimbabwe in August 2000. Following this roundtable the Sector Chair which is Namibia formally requested SAHRIT to facilitate the development and adoption of a SADC Protocol Against Corruption.

Subsequently SAHRIT was joined by a team of consultants from the region to produce the draft protocol for consideration by the Legal Sector.

The assumption of leadership for the development and adoption of the SADC protocol by the SADC Legal Sector addressed the issue of ownership of the process for the development of the protocol which had torpedoed the efforts for a declaration as discussed earlier.

The issue of consultations were addressed by the fact that the Legal Sector distributed the draft protocol to all member countries and requested each country to make internal consultations to maximise acceptability of the protocol.

The protocol was approved by the Legal Sector with minor amendments in November 2000 in Lusaka, Zambia.

Due to extensive national and regional consultations the draft protocol was well received at the Lusaka meeting and at other subsequent legal sector meeting.

The SADC Legal Sector should be commended for skilfully handling the political and diplomatic sensitivities that could have possibly derailed the process as before. This was more so because a non-governmental organisation, namely SAHRIT was spearheading the efforts. The sector mandated the sector coordinating units at national levels to lobby their governments to support the protocol. SADC Council of Ministers further adopted it without substantial amendments. The SADC Heads of State and Government adopted the protocol at their Summit held in August 2001 in Malawi.

3.0. **Content of the Protocol**

The preamble notes the serious magnitude of corruption in the region, its destabilising effects particularly that it undermines good governance. The protocol provides both preventive and enforcement mechanisms and demonstrates some form of political will in the region to combat corruption

The purpose of the protocol is threefold viz:

- (a) to promote the development of anti-corruption mechanisms at the national level
- (b) to promote cooperation in the fight against corruption by state parties
- (c) To harmonise anti-corruption national legislation in the region

The Protocol provides a wide set of preventive mechanisms which include the following:

- development of code of conduct for public officials
- transparency in public procurement of goods and services
- easy access to public information
- protection of whistle blowers
- establishment of anti-corruption agencies
- develop systems of accountability and controls
- participation of the media and civil society; and
- use of public education and awareness as a way of introducing zero tolerance for corruption.

Article VI of the protocol criminalizes the bribery of foreign officials. This is in line with the OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction.

The Protocol also addresses the issue of proceeds of crime by allowing for their confiscation and seizure thereby making it more difficult to benefit from proceeds of corruption.

It makes corruption or any of the offences under it an extraditable offence making it difficult for criminals to have a haven in one of the SADC countries. More so the protocol can be a legal basis for extradition in the absence of a bilateral extradition treaty.

The SADC Protocol also provides for judicial cooperation and legal assistance among state parties. This is important as corruption often involves more than one country.

4.0. **Implementation Mechanisms**

Probably, this is one of the most difficult aspects of the protocol as its success depends on its effective implementation. The protocol establishes a committee which works along the same lines as committees established by most treaty bodies.

The responsibilities of the committee include:

- (a) Gathering and dissemination of information and intelligence on corruption among member states.
- (b) Organising training programmes as and when appropriate.
- (c) Putting into place a programme of implementation of the protocol.
- (d) Providing technical assistance to State Parties where necessary.
- (e) The committee has to report to Council on progress made by each State Party in complying with the provisions of this protocol. This could mobilise shame on delinquent states depending on the effective reporting system.

It is envisaged that this Committee shall be made up of stakeholders under the auspices of Southern African Forum Against Corruption (SAFAC) which should also be the designated authority to implement the protocol at national level.

5.0. **Making it Work**

The signing of the Protocol on its own is a good move which does not necessarily guarantee its implementation nor the successful eradication of corruption in the region. The protocol merely provides an operational framework for the region. At least nine countries need to ratify the protocol before it becomes operational. Even then it is operational to those countries that will have ratified it.

The actual format of the committee, its terms of reference and operational modalities and responsibilities are to be discussed at its formulation as this could not be inserted in the protocol as it was alleged to be a matter of detail. If the composition of the committee is inappropriate, this can compromise its effectiveness. In this regard, SADC should move away from state centric approach to implementation of protocols and include civil society, the media and private sector in the committee. A multi-sectoral committee will rely on its component sectors for devising multi-disciplinary strategies to combat corruption in the region.

It is important to realise that the implementation of the protocol is at national level with the region providing the operational framework and standards. It is therefore imperative that institutions to fight corruption be established with the necessary resources to fight corruption at national level.

Civil society needs to continue to play its role at two levels. One is to facilitate where possible the establishment of independent anti-corruption institutions, undertake researches to quantify and qualify corruption and to oversee the implementation of the protocol. Political will should not be taken for granted and civil society including the media must work tirelessly

to secure government commitment to the implementation of the protocol. This is particularly important in Southern Africa where corruption is more prevalent in the public sector than in other sectors.

It is necessary that SAFAC be transformed from an informal institution to a formal organ of SADC with responsibilities of implementing the protocol because all anti-corruption agencies in the region are members of SAFAC and its constitution allow for participation of civil society particularly at the national level.

Mobilisation of citizens through the media and public education programmes is essential to force government to take the implementation of the protocol seriously.

SADC itself should draw up an implementation plan of action for the protocol.

The protocol is therefore not the end but just the beginning of the longest road to fighting corruption in the region.