

10. JUDICIAL COOPERATION AND MUTUAL LEGAL ASSISTANCE

SADC Protocol

- 10.1 Article 10(1) of the SADC Protocol requires that State Parties must 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 the Protocol, in order to –
- (a) obtain evidence; and
 - (b) take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.
- 10.2 In terms of Article 10(2) State Parties must provide each other with the widest “measure of mutual technical co-operation” on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption.
- 10.3 Article 10(3) provides that the provisions of Article 10 do not affect the obligations under any other bilateral or multilateral treaty, which governs, in whole or in part, mutual legal assistance in criminal matters. Furthermore, nothing in Article 10 prevents State Parties from affording one another more favourable forms of mutual legal assistance allowed under their respective domestic law (Article 10(4)).

AU Convention

- 10.4 Article 18 of the AU Convention deals with “*Cooperation and Mutual Legal Assistance*”. In comparing these provisions with Article 9 of the SADC Protocol, the following aspects need to be highlighted:
- (a) Article 18(1) of the AU Convention is similar to Article 10(2) of the Protocol (see paragraph 10.1.2 above). However, it is important to note that the AU Convent requires technical cooperation and assistance to prevent, detect, investigate and punish “acts of corruption **and related offences**”, whereas the Protocol only refers to “acts of corruption”. The wider provision of the AU Convention is preferred.

- (b) Article 18(2) provides that if two or several State Parties have established relations on the basis of uniform legislation or a particular regime, they may have the option to regulate such mutual relations without prejudice to the provisions of the AU Convention. The SADC Protocol does not contain a similar provision.
- (c) In terms of Article 18(3) State Parties must co-operate among themselves in conducting and exchanging studies and researches on how to combat corruption and related offences and to exchange expertise relating to preventing and combating corruption and related offences. There is no similar provision in the SADC Protocol.
- (d) In terms of Article 18(4) State Parties must co-operate among themselves in providing any available technical assistance in drawing up programmes, codes of ethics or organizing, where necessary and for the benefit of their personnel, joint training courses involving one or several states in the area of combating corruption and related offences. The SADC Protocol does not contain a similar provision.
- (e) The provision of Article 18(5) and (6) of the AU Convention are similar to the provisions of Article 10(3) and (4) of the SADC Protocol, respectively (see paragraph 10.3 above).

UN Convention

10.5 Various provisions of the UN Convention deal in detail with mutual legal assistance and cooperation between State Parties and law enforcement agencies. The above provisions of the SADC Protocol and the AU Convention are similar to provisions of the UN Convention, but the latter Convention deals in much more detail with matters. The following is a summary of the provisions of the UN Convention:

- (a) The provisions of Article 46(1) and (2) of the UN Convention are similar to the provision of the SADC Protocol and the AU Convention and require State Parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the UN Convention.
- (b) Mutual legal assistance may be requested, among others, for purposes of taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures, and

freezing; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; facilitating the voluntary appearance of persons in the requesting State Party; identifying, freezing and tracing proceeds of crime; and the recovery of assets (Article 46(3)).

- (c) A competent authority of a State Party may transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist in undertaking or successfully concluding inquiries and criminal proceedings (Article 46(4)). Article 46(5) provides for matters relating to the confidentiality and disclosure of such information.
- (d) The provisions of Article 46 do not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern mutual legal assistance (Article 46(6)). Article 46(7) deals with the application of paragraphs 9 to 29 of Article 46. State Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.
- (e) In terms Article 46(8) State Parties may not decline to render mutual legal assistance pursuant to Article 46 on the ground of bank secrecy.
- (f) In responding to a request for assistance, in the absence of dual criminality, a requested state Party must take the purposes of the Convention into account. (Article 46(9)(a)). State Parties may decline to render assistance pursuant to Article 46 on the ground of absence of dual criminality. However, a requested State Party must, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention (Article 46(9)(b)). Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this Article 46 in the absence of dual criminality (Article 46(9)(c)).
- (g) In terms of Article 46(1) a person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification,

testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings may be transferred if—

- that person freely gives his or her informed consent;
- the competent authorities of both State Parties agree, subject to such conditions as those State Parties may deem appropriate.

If a person is so transferred, the State Party to which the person is transferred has the authority and obligation to keep that person in custody unless otherwise requested or authorized thereto by the State Party from which the person was transferred. Furthermore, the State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person and the person so transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred (Article 46(11)).

(h) Article 46(12) provides that, unless the State Party from which a person is to be transferred so agrees, that person, whatever his or her nationality, may not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which he or she is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(i) In terms of Article 46(13) each State Party must designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities must ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it must encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations must be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to the Convention. Requests for mutual legal assistance and any communication related thereto must

be transmitted to the central authorities designated by the State Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the State Parties agree, through the International Criminal Police Organization, if possible.

- (j) In terms of Article 46(14) requests for mutual legal assistance must be made in writing or, where possible, by any means capable of producing a written record. In urgent circumstances and where agreed by the State Parties, requests may be made orally but must be confirmed in writing forthwith.
- (k) In terms of Article 46(15) a request for mutual legal assistance must contain the identity of the authority making the request; the subject matter and nature of the investigation, prosecution or judicial proceedings to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceedings; a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents; a description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed; where possible, the identity, location and nationality of any person concerned; and the purpose for which the evidence, information or action is sought.
- (l) Article 46(16) allows the requested State Party to request additional information when it appears necessary for the execution of the request.
- (m) In terms of Article 46(17) a request is executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party.
- (n) Article 46(18) permits the hearing of the evidence of a witness or expert to take place by video-conference in certain circumstances.
- (o) Article 46(19) prohibits the transmission or use of information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings without the prior consent of the requested State Party. However, the requesting State Party may disclose in its proceedings information or evidence that is exculpatory to an accused person, but must notify the requested State Party prior to the disclosure thereof.

(p) If so required by the requesting State Party, the requested State Party must keep confidential the fact and substance of the request. If the requested State Party cannot comply with the requirement of confidentiality, it must promptly inform the requesting State Party (Article 46(20)).

(q) In terms of Article 46(21) mutual legal assistance may be refused if—

- the request is not made in conformity with the provisions of Article 46;
- the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
- the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

However, a State Party may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters (Article 46(22)). Reasons must be given for any refusal of mutual legal assistance (Article 46(23)).

(r) In terms of Article 46(24) the requested State Party must execute the request for mutual legal assistance as soon as possible and must take full account of any deadlines suggested by the requesting State Party. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request and the requested State Party must respond to such reasonable requests. The requesting State Party must promptly inform the requested State Party when the assistance sought is no longer required.

(s) Article 46(25) provides that the requesting State Part may postpone mutual legal assistance on the ground that it interferes with an ongoing investigation, prosecution or judicial proceedings. However, before refusing a request or postponing its execution, the requested State Party must consult with the requesting State (Article 46(26)).

- (t) In terms of Article 46(27) a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in proceedings or to assist in an investigation, prosecution or judicial proceedings in the territory of the requesting State Party may not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. However, such safe conduct ceases when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the State Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.
- (u) In terms of Article 46(28) the ordinary costs of executing a request is borne by the requested State Party, unless otherwise agreed by the State Parties concerned. In case of expenses of a substantial or extraordinary nature, the State Parties must consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.
- (v) Article 46(29) provides that the requested State Party –
- (i) must provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
 - (ii) may, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.
- (w) In the final instance Article 46(30) provides that State Parties must consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of Article 46.