

## **7. ACTS OF CORRUPTION RELATING TO AN OFFICIAL OF A FOREIGN STATE**

This prohibition emanates from the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997. The position in the SADC Protocol, AU Convention and UN Convention is as follows:

### **SADC Protocol**

- 7.1 These acts of corruption are covered by Article 6 of the SADC Protocol and are subject to each State Party's domestic laws. Article 6(1) of the Protocol requires that each State Party must prohibit and punish the offering or granting, directly or indirectly, to an official of a foreign State of any article or 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. This prohibition applies to each State party's own nationals, persons having their habitual residence in its territory, and any businesses domiciled there.
- 7.2 Article 6(2) provides that among those State Parties that have established the above offence, such offence shall be considered an act of corruption for the purposes of the SADC Protocol. Furthermore, any State Party that has not established such an offence is obliged, insofar as its laws permit, to provide assistance and co-operation with respect to this offence as provided in the Protocol.

### **AU Convention**

- 7.3 The AU Convention does not contain a similar provision.

### **UN Convention**

- 7.4 Article 16 of the UN Convention contains a similar prohibition. Article 16(1) deals with active corruption, whereas Article 16(2) deals with passive corruption.
- 7.5 In terms of Article 16(1) each State Party must adopt legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign

public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

7.6 In terms of Article 16(2) each State Party must consider adopting legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

7.7 The following definitions in Article 2 of the Convention are relevant for the purposes of the application of the above provisions:

(a) In the first instance the expression “**Foreign public official**” means “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise”.

(b) Secondly, “**Official of a public international organization**” is defined as “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization”.

## 7.8 Conclusion

The prohibition in the UN Convention is broader than the prohibition in the SADC Protocol. As indicated above, the UN Convention provides for—

(a) the promise, offering or giving to a foreign public official or an official of a public international organization of an undue advantage (the so-called active corruption); and

(b) the solicitation or acceptance by a foreign public official or an official of a public international organization of an undue advantage (the so-called passive corruption).

On the other hand the SADC Protocol only provides for the offering or granting to an official of a foreign State of an undue advantage. It is proposed that State Parties should adopt the prohibitions contained in the UN Convention.