

## 8. CONFISCATION AND SEIZURE

### SADC Protocol

8.1 Article 8(1) of the SADC Protocol provides that each State Party must 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.”.

8.2 Furthermore, Article 8 contains the following provisions relating to confiscation and seizure:

8.2.1 In order to carry out measures referred to in Article 8(1), each State Party must empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. State Parties may not invoke bank secrecy as a basis for refusal to provide assistance (Article 8(2)).

8.2.2 The Requesting State Party may 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 the Requested State Party consents thereto (Article 8(3)).

8.2.3 State Parties must provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and confiscation of property, instrumentalities or proceeds obtained, derived from or used in the commission of offences established in accordance with the Protocol (Article 8(4)).

8.2.4 A State Party that enforces its own or another State Party’s judgment against property or proceeds described in Article 8(1), must dispose of the property or proceeds in accordance with its laws (Article 8(5)).

8.2.5 To the extent permitted by a State Party’s laws and upon such terms, as it deems appropriate, a State Party may transfer all or part of property referred to in Article 8(1) to another State Party that assisted in the underlying investigation or proceedings (Article 8(6)).

8.2.6 Article 1 of the SADC Protocol describes “confiscation” as “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;”.

### **AU Convention**

8.3 Article 16 of the AU Convention provides for a similar provision under the heading “*Confiscation and Seizure of the Proceeds and Instrumentalities of Corruption*”. The said Article contains the following provisions:

8.3.1 The provisions contained in Articles 16(1) are similar to those contained in Article 8(1) of the SADC Protocol. However, the AU Convention also provides for the adoption of such legislative measures as may be necessary to enable "repatriation of proceeds of corruption".

8.3.2 Article 16(2) requires a Requested State Party, at the request of the Requesting State Party, to seize and remit any object which may be required as evidence of the offence in question or which has been acquired as a result of the offence for which extradition is requested and which, at the time of arrest is found in possession of the persons claimed or is discovered subsequently.

8.3.3 In terms of Article 16(3) the objects referred to in Article 3(2) may, if the Requesting State so requests, be handed over to that State even if the extradition is refused or cannot be carried out due to death, disappearance or escape of the person sought. Article 8(6) of the SADC Protocol contains a similar provision.

8.3.4 Article 16(4) provides that when the said object is liable for seizure or confiscation in the territory of the Requested State Party, the latter may, in connection with pending or ongoing criminal proceedings, temporarily retain it or hand it over to the Requesting State Party, on condition that it is returned to the Requested State Party.

8.3.5 In terms of Article 17(1) of the AU Convention each State Party must adopt such measures necessary to empower its courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents with a view to implementing this Convention.

8.3.6 The definition of “*confiscation*” in Article 1 of the AU Convention is identical to the definition in Article 1 of the SADC Protocol.

### **UN Convention**

8.4 Article 31 of the UN Convention under the heading “*Freezing, seizure and confiscation*”, contains a similar provision as the above provisions of the SADC Protocol and the AU Convention. Article 31 provides for the following measures:

8.4.1 Article 31 of the UN Convention is similar to Article 8(1) and 16(1) of the SADC Protocol and AU Convention, respectively.

8.4.2 Article 31(2) of the UN Convention is similar to Article 8(4) of the SADC Protocol and provides for measures to enable the identification, tracing, freezing or seizure of any item referred to in Article 31(1) for the purpose of eventual confiscation.

8.4.3 In terms of Article 31(3) each State Party must adopt such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property.

8.4.4 Article 31(5) provides that if such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

8.4.5 In terms of Article 31(6) income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in Article 31, in the same manner and to the same extent as proceeds of crime.

8.4.6 The provisions of Article 31(7) are almost identical to the provisions of Article 8(2) of the SADC Protocol. See paragraph 8.2.1 above.

8.4.7 In terms of Article 31(8) State Parties may consider the possibility of requiring that an offender to demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation.

- 8.4.8 In terms of Article 31(9) the provisions of the Article shall not be so construed as to prejudice the rights of bona fide third parties.
- 8.5 In terms of Article 53(c) of the UN Convention each State Party must take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with the UN Convention.
- 8.6 Article 2(g) of the UN Convention describes "**confiscation**" as "the permanent deprivation of property by order of a court or other competent authority".
- 8.7 In terms of Article 3(1) of the UN Convention, the Convention applies to the prevention, investigation and prosecution of corruption and "to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention".
- 8.8 In the final instance Article 40 of the UN Convention requires that each State Party must ensure that, in the case of domestic criminal investigations of Convention offences, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.