

## Revised Protocol on Shared Watercourses in the Southern African Development Community

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### **Abstract**

*The paper describes recent progress by states of the Southern African Development Community towards establishing an agreed set of rules and institutions for the management of trans-boundary river systems. A protocol was established initially among 10 states of the region in 1995, and was further revised in 2000. The paper presents the general principles underlying the protocol, and the special provisions incorporated into the revised version.*

*Institutions established in connection with the implementation of the protocol are discussed, in particular the role of the Water Sector Co-ordinating Unit. The paper ends with a short presentation of progress in formulating a Regional Strategic Action Plan.*

### **1. Background**

The Southern African Development Community (SADC) is a regional grouping of 14 sovereign member states with one common goal of regional integration on the basis of balance, equity and mutual benefit for all peoples of the region. The grouping was formalised by the signing of the declaration and treaty (the SADC Treaty) on 27 August 1992 in Windhoek, Namibia by the then 10 member states, Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia, and Zimbabwe. The other four member states, Mauritius, Democratic Republic of the Congo, Seychelles and South Africa joined later by accession to the treaty. The treaty is the single most important document that outlines the vision, overall objectives and institutional framework of SADC.

Article 22 (1) of the Treaty provides for member states to conclude a series of protocols to spell out the objectives, scope of and institutional mechanisms for co-operation and integration. These protocols are developed, negotiated and agreed upon, covering various areas of co-operation, identified in article 21 (3) of the treaty. Each protocol, after negotiation by member states and approval and signing by a summit, becomes an integral part of the treaty. The SADC Protocol on Shared Watercourse Systems is based on this provision and it takes its power from it.

This protocol was developed as an offshoot of the development of one of the SADC projects under a broad programme called the Zambezi River Action Plan (ZACPLAN). The programme is made up of 19 projects called ZACPLAN Projects (ZACPROs in short). Project number two of the programme, ZACPRO 2 was the

Development of an Institutional and Legal Framework for the Management of the Zambezi River Basin. It was during the process of developing this project that member states felt that it would be improper to develop legal instruments for one basin, when there was no over-arching legal framework for the management of shared river basins within the SADC region. This was done in consonance with the provisions of the then newly signed treaty establishing SADC, as outlined above.

After several consultations and negotiations, starting in 1993, the protocol was finally signed by 10 member states, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe, in Johannesburg, South Africa, on 28 August 1995. The development process had also included the carrying out of an analysis of national water legislation in SADC member states. The process of ratification was then initiated and the protocol came into force on 29 September 1998, after being ratified by the two-thirds of the signatory member states.

In the interim period other developments took place which will have a lasting impact on the protocol and its implementation. The most important of these developments was the establishment of a distinct and dedicated Water Sector Co-ordinating Unit by Council and Summit at their meeting in Maseru, Lesotho, in August 1996. Prior to the establishment of the Water Sector Co-ordinating Unit, regional water resources issues were carried out under the auspices of the SADC Environment and Land Management Sector.

The second development was the adoption of the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, in April 1997. These and other developments have led to significant amendments to the protocol as will be highlighted in the following paragraphs and sections below. A Protocol Implementation Programme was also developed during the process of ratification, was approved by the Water Resources Technical Committee in 1997, and has been included within the context of the Regional Strategic Action Plan on Integrated Water Resources Development and Management.

## **2. Provisions of the protocol and their implications**

### **2.1 Outline**

The SADC Protocol on Shared Watercourse Systems, the first-ever-sectoral legal instrument in SADC, was greatly influenced by various international water law instruments such as the Helsinki rules, the Dublin Principles, and Agenda 21. It recognises the international consensus on a number of concepts and principles related to water resources development and management in an environmentally sound manner.

The SADC Protocol on Shared Watercourse Systems covers all uses of surface water, including agricultural, domestic, industrial, and navigational uses. It follows principles laid out in international rules and conventions and is premised on the effort to maintain a balance between development needs in the national interest of member countries, and the needs for conservation and sustainable development. It aims to achieve and maintain close co-operation between member countries.

The protocol sets out rights and obligations of member states in respect of shared watercourse systems in the SADC region. The protocol can be divided into four main sections composing a total of 17 articles. These main sections are:

- Interpretation of terms and concepts;
- General principles;
- Institutional framework for implementation;
- Monitoring and dispute settlement.

## **2.2 Interpretation of terms and concepts**

This section interprets the various terms and concepts that are used in the body of the protocol in order that there can never be misinterpretation of these terms as they are read in the protocol. About 14 concepts and terms are defined, covering areas of uses, and physical and management aspects of the protocol. These form a very important part of the protocol especially in relation to its implementation and dispute settlement.

This section was a subject of long and serious discussions and negotiations during the development of the protocol and during the subsequent amendment process. To this effect, three negotiations and consensus-building workshops were held, to try to come up with a set of definitions that would be acceptable to all parties, and would portray the meanings of concepts and terms, capturing the spirit of the protocol and the treaty. As has been mentioned above, some of the concepts take cognisance of and bear a strong influence of international legal instruments on the subject.

As a result of the amendment process, several terms have been enhanced or replaced by others that give a better representation of the provisions of the protocol. For instance the terms “basin”, “basin state”, and “drainage basin” have been replaced by the new concepts of “watercourse” and “watercourse state” which by definition covers the intended meanings ascribed to them. Other new terms have been introduced or their meanings expanded and subsequently defined, such as “environmental use.”

## **2.3 General principles**

The following is a summary of the general principles that guide the protocol and its implementation arrangements.

- Respect for the sovereignty of member states in the utilisation of shared watercourse.

This principle recognises the right of member states to develop resources of shared watercourses within their territory. The principle stipulates, without necessarily being restrictive, the uses to which these waters can be put. These include agricultural, domestic, industrial,

and navigational uses. This differs slightly from the United Nations Convention, in that it includes navigational uses. Other uses are introduced, such as “environmental use” to enhance the practicality of this principle, especially for implementation.

- Application of rules of general or customary international law, community of interest and equitable utilisation.

Member states party to the protocol undertake to apply in their respective water laws existing rules of customary international law, as well as respecting the community of interest in equitable utilisation of the shared watercourses. This is an important recognition of the responsibility of member states towards equitable utilisation of the resources of shared watercourses.

- Maintaining a proper balance between development and environment protection and conservation.

This is a principle that recognises the importance of member states developing their resources in order to uplift the livelihoods of their citizens, while on the other hand protecting the environment that yields the resources. Member states here undertake to apply the principle of sustainable development.

- Co-operation on joint projects and studies.

This principle is in support of the overall objective of SADC of co-operation in various fields of economic development. This is important to prevent potential conflicts that might arise as a result of uncoordinated development of shared watercourse systems and competing demands.

- Information and data sharing.

This is strongly related to the above principle and is aimed at levelling the playing field and creating an enabling environment for negotiations for equitable utilisation of shared watercourses. The development of the SADC Hydrological Cycle Observing Systems (SADC-HYCOS) will go a long way in trying to address this issue. Information sharing is central to the co-operation and economic integration envisaged by the treaty.

- Equitable and reasonable utilisation of shared watercourse systems.

Here member states undertake to use the resources of shared watercourse systems in an equitable and reasonable manner. This is in line with international water law principles such as the Helsinki rules and the UN Convention. Several aspects must be taken into consideration in order to achieve equity and reasonable sharing. Some of these are the natural physical characteristics of the watercourse, social and economic needs, existing and potential effects of the intended use, and guidelines and agreed standards of use.

- Use of discharge and abstraction permits or licences.

This confers some responsibility on member states to regulate the use of the watercourse to ensure that adequate protection is given to the resource. This is already a practice in most member states although the level of enforcement differs from one state to the next. This principle supports the polluter-pays principle that is gaining acceptance in the global water sector. Monitoring for compliance and enforcement at the national level is very important for this to have any significant impact at a regional level.

- Obligation to notify about emergency situation, protection against pollution and use of installations for peaceful purposes.

Signatories to the protocol have responsibility to notify potentially affected states about an emergency that originates in their territory and to take any necessary measures to ameliorate the impact of the situation.

The principles are covered under the last paragraph of the Article 2 of the protocol. If the above principles are adhered to, the protocol will be easily implemented at both national and regional levels.

## **2.4 Institutional framework for implementation of the protocol**

The protocol sets out an institutional framework necessary for effective implementation of the various provisions such as the ones mentioned above. The member states, signatories to the protocol and those that subsequently acceded to it, undertook to establish the institutions. These are:

- a) A Monitoring Unit based at the Water Sector Co-ordination Unit;
- b) River Basin Commissions between Basin States and in respect of each drainage basin (e.g. the Zambezi River Basin Commission, ZAMCOM);
- c) River Basin Authorities or Boards in respect of each drainage basin.

The protocol elaborates objectives and specific functions of the proposed river basin management institutions. The objectives cover issues of monitoring, policy development, promotion of equitable utilisation, formulation of strategies and monitoring execution of joint development plans in shared watercourse systems. This is the functional part of the protocol and is the most important to address in the implementation of the protocol, both at national and regional levels.

## **2.5 Monitoring and dispute settlement**

Monitoring for compliance in the implementation of the protocol is entrusted to the various institutions that will have been established.

The settlement of disputes, when they occur, was to follow the spirit of the treaty, that is amicable settlement, failing which arbitration can be pursued. Disputes that cannot be settled amicably will be referred to the SADC Tribunal for adjudication under Article 16 (1) of the treaty. Council can also be requested to render an advisory opinion in accordance with Article 16 (4) of the treaty. In the case of disputes being referred to the tribunal, the tribunal shall render a final and binding opinion.

### **3. Revisions of the protocol on shared watercourses in the SADC Region**

#### **3.1 Background**

Following recent developments in the implementation of the protocol or in preparation for its implementation, substantial amendments have been made to it, which have implications for its implementation. The SADC Protocol on Shared Watercourse Systems has undergone several amendment workshops. This was to address the concerns expressed by Angola and Mozambique during the time of signing.

The Council then directed the SADC Secretariat and SADC Water Sector Coordinating Unit to solicit more concerns from member states, if any, and hold workshops to address them. Member states submitted their comments as requested and they were discussed on three different workshops. Consensus on the document was reached in the fifth and last workshop that was held in Johannesburg, South Africa, in March 2000.

Two documents were produced during that workshop, namely: The Amendment Protocol and the Consolidated Version Containing Original Provisions and Proposed Amendments.

#### **3.2 Outline of the revised protocol**

The revised protocol has six major sections:

- Interpretation of terms
- General principles
- Specific provisions
- Institutional framework for implementation
- Shared watercourse agreements
- Settlement of disputes

### **3.3 General principles**

The principles still convey the same message as in the original protocol, but in this document they have been elaborated further for better understanding. The following is the list of principles and it will be recognised that they have the similarity with the original document.

- The state parties recognise the principle of the unity and coherence of each shared watercourse, and in accordance with this principle, undertake to harmonise the water uses in the shared watercourses and to ensure that all necessary interventions are consistent with the sustainable development of all watercourses' states and observe the objectives of regional integration and harmonisation of their socio-economic policies and plans.
- The utilisation of shared watercourses within the SADC region shall be open to each watercourse state, in respect of the watercourses within its territory and without prejudice to its sovereign rights, in accordance with the principles contained in this protocol. The utilisation of the resources of the watercourses shall include agricultural, domestic, industrial, navigational and environmental uses.
- The state parties undertake to respect the existing rules of customary or general international law relating to the utilisation and management of the resources of shared watercourses.
- State parties shall maintain proper balance between resource development for a higher standard of living for their people and conservation and enhancement of the environment to promote sustainable development.
- State parties undertake to pursue and establish close co-operation with regard to the study and execution of all projects likely to have an effect on the regime of the shared watercourse.
- State parties shall exchange available information and data regarding the hydrological, hydro-geological, water quality, meteorological and environmental condition of shared watercourses.

### **3.4 Specific provisions**

The specific provisions in the revised protocol are:

#### *3.4.1 Planned measures*

- (a) Information concerning planned measures

State parties shall exchange information and consult each other and, if necessary, negotiate the possible effects of planned measures on the condition of a shared watercourse.

- (b) Notification concerning planned measures with possible adverse effects

Before a state party implements or permits the implementation of planned measures which may have significant adverse effects upon other watercourse states, it shall provide those states with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified states to evaluate the possible effects of the planned measures.

- (c) Period for reply to notification

(i) Unless otherwise agreed, a state party providing a notification under paragraph (b) shall allow the notified states a period of six months within which to study and evaluate the possible effects of the planned measures and communicate the findings to it;

(ii) This period, shall at the request of a notified state for which the evaluation of the planned measures poses difficulty, be extended for a period of six months.

- (d) Obligations of the notifying state during the period for reply

During the period referred to in paragraph (c), the notifying state:

(i) shall co-operate with the notified states by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation; and

(ii) shall not implement or permit the implementation of the planned measures without the consent of the notified states.

- (e) Reply to notification

The notified states shall communicate their findings to the notifying state as early as possible within the period applicable pursuant to paragraph (c). If a notified state finds that implementation of the planned measures would be inconsistent with the provisions of Article 3 (7) or (10), it shall attach to its findings a documented explanation setting out the reasons for the findings.

- (f) Absence of reply to notification

(i) If, within the period applicable pursuant to paragraph (c), the notifying State receives no communication under (e), it may, subject to its obligations under Article 3 (7) and (10), proceed with implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified states.

(ii) Any claim to compensation by a notified state which has failed to reply within the period applicable pursuant to paragraph (c) may be



offset by the costs incurred by the notifying state for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified state had objected within that period.

(g) Consultations and negotiations concerning planned measures

(i) If a communication is made under paragraph (e) that implementation of the planned measures would be inconsistent with the provisions of Article 3 (7) or (10), the notifying state and the state making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.

(ii) The consultations and negotiations shall be conducted on the basis that each state must in good faith pay reasonable regard to the rights and legitimate interests of the other states.

(iii) During the course of the consultations and negotiations, the notifying state shall, if so required by the notifying state at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months, unless otherwise agreed.

(h) Procedures in the absence of notification

(i) If a state party has reasonable grounds to believe that another watercourse state is planning measures that may have a significant adverse effect upon it, the former state may request the latter to apply the provisions of paragraph (b). The request shall be accompanied by a documented explanation setting forth its grounds.

(ii) If the state planning the measures finds that it is not under an obligation to provide a notification under paragraph (b), it shall so inform the other state, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other state, the two states shall, at the request of the other state, promptly enter into consultations and negotiations in the manner provided in sub-paragraphs (i) and (ii) of paragraph (g).

(iii) During the course of the consultations and negotiations, the state planning the measures shall, if so requested by the other state at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting implementation of those measures for a period of six months unless otherwise agreed.

(i) Urgent implementation of planned measures

(i) In the event that the implementation of planned measures is of the utmost urgency in order to protect the public health, public safety or other equally important interests, the state planning the measures may, subject to paragraph 7 and 10 of article 3 (7) and (10), immediately

proceed to implementation, notwithstanding the provisions of paragraph (d) and sub-paragraph (iii) of paragraph (g).

- (ii) In such case, a formal declaration of the urgency of the measures shall be communicated without delay to the other watercourse states referred to in paragraph (b) together with the relevant data and information.
- (iii) The state planning the measures shall, at the request of any of the states referred to in paragraph (ii), promptly enter into consultations and negotiations with it in the manner indicated in sub-paragraphs (i) and (ii) of paragraph (g).

### *3.4.2 Environmental protection and preservation*

- (a) Protection and preservation of ecosystems

State parties shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of shared watercourses.

- (b) Prevention, reduction and control of pollution

i. State parties shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution and environmental degradation of shared watercourses that may cause significant harm to other watercourse states or to their environment, including harm to human health and safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse.

ii. Watercourse states shall take steps to harmonise their policies and legislation in this connection.

iii. State parties shall, at the request of any one or more of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of a shared watercourse, such as:

- setting joint water quality objectives and criteria;
- establishing techniques and practices to address pollution from point and non-point sources;
- establishing lists of substances in the introduction of which, into the waters of a shared watercourse, is to be prohibited, limited, investigated or monitored.

- (c) Introduction of alien or new species

State parties shall take all measures necessary to prevent the introduction of species, alien or new, into a shared watercourse which

may have effects detrimental to the ecosystems of the watercourse resulting in significant harm to other watercourse states.

(d) Protection and preservation of the aquatic environment

State parties shall individually and, where appropriate, in co-operation with other states, take all measures with respect to shared watercourses that are necessary to protect and preserve the aquatic environment, including estuaries, taking into account generally accepted international rules and standards.

### *3.4.3 Management of shared watercourses*

(a) Management

Watercourse states shall, at the request of any of them, enter into consultations concerning the management of a shared watercourse, which may include the establishment of a joint management mechanism.

(b) Regulation

(i) Watercourse states shall co-operate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of a shared watercourse.

(ii) Unless otherwise agreed, watercourse states shall participate on an equitable and reasonable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

(c) Installations

(i) Watercourse states shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to a shared watercourse.

(ii) Watercourse states shall, at the request of any of them, which has reasonable grounds to believe that it may suffer significant adverse effects, enter into consultations with regards to:

- the safe operation and maintenance of installations, facilities or other works related to a shared watercourse; and
- the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

(iii) Shared watercourses and related installations, facilities and other works, shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international

armed conflict and shall not be used in violation of those principles and rules.

#### *3.4.4 Prevention and mitigation of harmful conditions*

- (a) State parties shall individually and, where appropriate, jointly take all appropriate measures to prevent or mitigate conditions related to a shared watercourse that may be harmful to other watercourse states, whether resulting from natural causes or human conduct, such as floods, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.
- (b) State parties shall require any person intending to use the waters of a shared watercourse within their respective territories, for purposes other than domestic or environmental use, or who intends to discharge any type of waste into such waters, to first obtain a permit, licence or other similar authorisation from the relevant authority within the state concerned. The permit or other similar authorisation shall be granted only after such state has determined that the intended use or discharge will not cause significant harm to the regime of the watercourse.

#### *3.4.5 Emergency situations*

State parties shall, without delay, notify other potentially affected states, the SADC Water Sector Co-ordinating Unit and competent international organisations of any emergency situation originating within their respective territories, and promptly supply the necessary information to such states and competent organisations with a view to co-operating in the prevention, mitigation, and elimination, of the harmful effects of the emergency.

## **4. Role of the Water Sector of SADC**

### **4.1 Goals**

The vision of the water sector is:

To attain the sustainable, integrated planning, development, utilisation and management of water resources that contribute to the attainment of SADC's overall objective of an integrated regional economy on the basis of balance, equity and mutual benefit for all member states.

The overall objective is:

To promote co-operation in all water matters in the SADC region for the sustainable and equitable development, utilisation and management of water resources, and contribute towards the uplifting of the quality of life of the people of SADC region.

## **4.2 Functions of the Water Sector Co-ordinating Unit**

The role of the SADC Water Sector Co-ordinating Unit is primarily one of stimulating and facilitating development and co-operation in the region. In order to achieve this, the Water Sector Co-ordinating Unit:

- (a) Co-ordinates water resources research and development, including appropriate technological development, data and information collection, processing and dissemination among member States;
- (b) Facilitates integrated planning, development, management and utilisation of water resources at both the national and regional levels;
- (c) Monitors the implementation of the protocol and assists in resolving potential conflicts on shared water resources;
- (d) Facilitates identification and preparation of regional water resources programmes and projects;
- (e) Mobilises resources (financial, human and institutional) including the appointment of Technical Assistance and Consultancy services for the implementation of approved regional programmes;
- (f) Co-ordinates the implementation, operation and maintenance of regional projects;
- (g) Provides advice and guidance on equitable water resources allocation among riparian countries;
- (h) Facilitates human resources development, capacity building and institutional strengthening at both national and regional levels;
- (i) Promotes joint and cross-border water resources development and investments, and provides guidance on cost-sharing arrangements;
- (j) Advises on policy and cross-border water resources development and investments;
- (k) Promotes the participation by all relevant stakeholders in water resources development and management at both national and regional levels;
- (l) Provides strategic leadership in the development and management of water resources, including the development of appropriate policies and strategies at regional level;
- (m) Facilitates the establishment of shared river basin institutions where required and strengthening of their capacities where they do exist.

## **5. Regional strategic action plan**

The Regional Strategic Action Plan (RSAP) is a programme consisting of several regional projects. The United Nations Development Programme (UNDP) funded this programme for the Water Sector to be in a position to hold the first Water Round Table Conference.

UNDP funded the consultants to assist the member states to prepare Country Situation Reports and to come up with the projects that they wanted. The Water Sector Co-ordinating Unit engaged a consultant to propose a comprehensive programme, the RSAP. This consultant was funded by the UNDP. There were many projects that the member states submitted to the Water Sector Co-ordinating Unit (WSCU), and the consultant produced a list of 31 priority projects of regional nature. Out of these 31 projects, 10 were fast-tracked to level the playing field for the remaining 21.

UNDP funded the Water Round Table Conference in Geneva, Switzerland, in December 1998. This Round Table Conference was very fruitful, since most of the co-operating partners attended it and showed their interest in the various projects. At the moment, all these projects are in the form of Project Concept Notes (PCNs) for anyone interested to have an understanding of what they are about. The Co-operating Partners in collaboration with the Water Sector prepared these PCNs. Some of the PCNs are in a process where terms of references are being prepared in order to come up with fully-fledged project proposals.