

Revised

Protocol on Shared Watercourses in the Southern African Development Community (SADC)

PREAMBLE

We, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of the Congo
The Kingdom of Lesotho
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

BEARING in mind the progress with the development and codification of international water law initiated by the Helsinki Rules and that the United Nations subsequently adopted the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses;

RECOGNISING the relevant provisions of Agenda 21 of the United Nations Conference on Environment and Development, the concepts of environmentally sound management, sustainable development and equitable utilisation of shared watercourses in the SADC Region;

CONSIDERING the existing and emerging socio-economic development programmes in the SADC Region and their impact on the environment;

DESIROUS of developing close co-operation for judicious, sustainable and co-ordinated utilisation of the resources of the shared watercourses in the SADC Region;

CONVINCED of the need for co-ordinated and environmentally sound development of the resources of shared watercourses in the SADC Region in order to support sustainable socio-economic development;

RECOGNISING that there are as yet no regional conventions regulating common utilisation and management of the resources of shared watercourses in the SADC Region;

MINDFUL of the existence of other Agreements in the SADC Region regarding the common utilisation of certain watercourses; and

IN ACCORDANCE with Article 22 of the Treaty, have agreed as follows:

Article 1 Definitions

1. For the purposes of this Protocol the following terms shall have the meanings ascribed to them hereunder:
“Agricultural use” means use of water for irrigation purposes;

- “Domestic use” means use of water for drinking, washing, cooking, bathing, sanitation and stock watering purposes;
- “Emergency situation” means a situation that causes or poses an imminent threat of causing serious harm to Watercourse States and which results suddenly from natural causes, such as torrential rains, floods, landslides or earthquakes or from human conduct;
- “Environmental use” means the use of water for the preservation and maintenance of ecosystems;
- “Industrial use” means use of water for commercial, electrical power generation, industrial, manufacturing and mining purposes;
- “Management of a shared watercourse” means
- (i) planning the sustainable development of a shared watercourse and providing for the implementation of any plans adopted; and
 - (ii) otherwise promoting the rational, equitable and optimal utilisation, protection, and control of the watercourse;
- “Navigational use” means use of water for sailing whether it be for transport, fishing, recreation or tourism;
- “Pollution of a shared water course” means any detrimental alteration in the composition or quality of the waters of a shared watercourse which results directly or indirectly from human conduct;
- “Regulation of the flow of the waters of a shared watercourse” means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of waters of a shared watercourse;
- “Shared watercourse” means a watercourse passing through or forming the border between two or more Watercourse States;
- “Significant Harm” means non-trivial harm capable of being established by objective evidence without necessarily rising to the level of being substantial;
- “State Party” means a member of SADC that ratifies or accedes to this Protocol;
- “Watercourse” means a system of surface and ground waters consisting by virtue of their physical relationship a unitary whole normally flowing into a common terminus such as the sea, lake or aquifer;
- “Watercourse State” means a State Party in whose territory part of a watercourse is situated.
2. Any other term defined in the Treaty and used in this Protocol shall have the same meaning as ascribed to it in the Treaty.

Article 2

Objective

The overall objective of this Protocol is to foster closer cooperation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses and advance the SADC agenda of regional integration and poverty alleviation. In order to achieve this objective, this Protocol seeks to:

- a) promote and facilitate the establishment of shared watercourse agreements and Shared Watercourse Institutions for the management of shared watercourses;
- b) advance the sustainable, equitable and reasonable utilisation of the shared watercourses;
- c) promote a co-ordinated and integrated environmentally sound development and management of shared watercourses;
- d) promote the harmonisation and monitoring of legislation and policies for planning, development, conservation, protection of shared watercourses, and allocation of the resources thereof; and

- e) promote research and technology development, information exchange, capacity building, and the application of appropriate technologies in shared watercourses management.”

Article 3 General Principles

For the purposes of this Protocol the following general principles shall apply:

1. 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 Watercourse States and observe the objectives of regional integration and harmonisation of their socio-economic policies and plans.
2. 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.
3. 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.
4. State Parties shall maintain a 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.
5. 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.
6. State Parties shall exchange available information and data regarding the hydrological, hydro geological, water quality, meteorological and environmental condition of shared watercourses.
7.
 - a) Watercourse States shall in their respective territories utilise a shared watercourse in an equitable and reasonable manner. In particular, a shared watercourse shall be used and developed by Watercourse States with a view to attain optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the Watercourse States concerned, consistent with adequate protection of the watercourse for the benefit of current and future generations.
 - b) Watercourse States shall participate in the use, development and protection of a shared watercourse in an equitable and reasonable manner. Such participation, includes both the right to utilise the watercourse and the duty to co-operate in the protection and development thereof, as provided in this Protocol.
8.
 - a) Utilisation of a shared watercourse in an equitable and reasonable manner within the meaning of Article 7(a) and (b) requires taking into account all relevant factors and circumstances including:
 - (i) geographical, hydrographical, hydrological, climatical, ecological and other factors of a natural character;
 - (ii) the social, economic and environmental needs of the Watercourse States concerned;
 - (iii) the population dependent on the shared watercourse in each Watercourse State;
 - (iv) the effects of the use or uses of a shared watercourse in one Watercourse State on other Watercourse States;

- (v) existing and potential uses of the watercourse;
 - (vi) conservation, protection, development and economy of use of the water resources of the shared watercourse and the costs of measures taken to that effect; and
 - (vii) the availability of alternatives, of comparable value, to a particular planned or existing use.
- (b) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is an equitable and reasonable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.
9. State Parties shall deal with planned measures in conformity with the procedure set out in Article 4 (1).
10. a) State Parties shall, in utilising a shared watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other Watercourse States.
- b) Where significant harm is nevertheless caused to another Watercourse State, the State whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of paragraph (a) above in consultation with the affected States, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.
- c) Unless the Watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to a shared watercourse, a Watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.

Article 4 **Specific Provisions**

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 a significant adverse effect 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 to 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 finding a documented explanation setting 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 the 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 requested by the notified 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 that 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 the 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 public health, public safety or other equally important interests, the State planning the measures may, subject to paragraphs 7 and 10 of Article 3, 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).

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 a shared watercourse.
- 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 a shared watercourse that may cause significant harm to other Watercourse States or to their environment, including harm to human health or 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:
 - a) setting joint water quality objectives and criteria;
 - b) establishing techniques and practices to address pollution from point and non-point sources;
 - c) establishing lists of substances 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 a shared watercourse that are necessary to protect and preserve the aquatic environment, including estuaries, taking into account generally accepted international rules and standards.

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:

- a) the safe operation and maintenance of installations, facilities, or other works related to a shared watercourse; and
- b) 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.

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 on the regime of the watercourse.

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 affected States and competent organisations with a view to co-operate in the prevention, mitigation, and elimination, of harmful effects of the emergency.

Article 5
Institutional Framework For Implementation

1. The following institutional mechanisms responsible for the implementation of this Protocol are hereby established -
 - a) SADC Water Sector Organs
 - i) the Committee of Water Ministers;
 - ii) the Committee of Water Senior Officials;
 - iii) the Water Sector Co-ordinating Unit; and
 - iv) the Water Resources Technical Committee and sub-Committees.
 - b) Shared Watercourse Institutions
 - c) The Committee of Water Ministers shall consist of Ministers responsible for water.
 - d) The Committee of Water Senior Officials shall consist of the Permanent Secretaries or officials of equivalent rank responsible for water.
 - e) The Water Sector Coordinating Unit which shall be the executing agency of the Water Sector shall be headed by a Co-ordinator appointed by the State Party responsible for coordinating the Water Sector, and he or she shall be assisted by such supporting staff of professional, administrative and secretarial personnel as the Coordinator may deem necessary.
2. The SADC Water Sector Organs shall have the following functions:
 - a) The Committee of Water Ministers
 - i) Oversee and monitor the implementation of the Protocol and assist in resolving potential conflicts on shared watercourses.
 - ii) Guide and co-ordinate cooperation and harmonisation of legislation, policies, strategies, programmes and projects.
 - iii) Advise the Council on policies to be pursued.
 - iv) Recommend to Council the creation of such other organs as may be necessary for the implementation of this Protocol.
 - v) Provide regular updates to the Council on the status of the implementation of this Protocol.
 - b) The Committee of Water Senior Officials
 - i) Examine all reports and documents put before them by the Water Resources Technical Committee and the Water Sector Co-ordinating Unit.
 - ii) Initiate and advise the Committee of Water Ministers on policies, strategies, programmes and projects to be presented to the Council for approval.
 - iii) Recommend to the Committee of Water Ministers the creation of such other organs as may be necessary for the implementation of this Protocol.

- iv) Provide regular updates to the Committee of Water Ministers on the status of the implementation of this Protocol.
 - c) The Water Sector Co-ordinating Unit
 - i) Monitor the implementation of this Protocol.
 - ii) Liaise with other SADC organs and Shared Watercourse Institutions on matters pertaining to the implementation of this Protocol.
 - iii) Provide guidance on the interpretation of this Protocol.
 - iv) Advise State Parties on matters pertaining to this Protocol.
 - v) Organise and manage all technical and policy meetings.
 - vi) Draft terms of reference for consultancies and manage the execution of those assignments.
 - vii) Mobilise or facilitate the mobilisation of financial and technical resources for the implementation of this Protocol.
 - viii) Annually submit a status report on the implementation of the Protocol to the Council through the Committee of Water Ministers.
 - ix) Keep an inventory of all shared watercourse management institutions and their agreements on shared watercourses within the SADC Region.
 - d) The Water Resources Technical Committee
 - i) Provide technical support and advice to the Committee of Water Senior Officials through the Water Sector Co-ordinating Unit with respect to the implementation of this Protocol.
 - ii) Discuss issues tabled by the Water Sector Co-ordinating Unit and prepare for the Committee of Water Senior Officials.
 - iii) Consider and approve terms of reference for consultancies, including the appointment of consultants.
 - iv) Recommend to the Committee of Water Senior Officials any matter of interest to it on which agreement has not been reached.
 - v) Appoint working groups for short-term tasks and standing sub-committees for longer term tasks.
 - vi) Address any other issues that may have implications on the implementation of this Protocol.
3. Shared Watercourse Institutions
- a) Watercourse States undertake to establish appropriate institutions such as watercourse commissions, water authorities or boards as may be determined.
 - b) The responsibilities of such institutions shall be determined by the nature of their objectives which must be in conformity with the principles set out in this Protocol.
 - c) Shared Watercourse Institutions shall provide on a regular basis or as required by the Water Sector Co-ordinating Unit, all the information necessary to assess progress on the implementation of the provisions of this Protocol, including the development of their respective agreements.
4. State Parties undertake to adopt appropriate measures to give effect to the institutional framework referred to in this Article for the implementation of this Protocol.

Article 6

Shared Watercourse Agreements

1. In the absence of any agreement to the contrary, nothing in this Protocol shall affect the rights or obligations of a Watercourse State arising from agreements in force for it on the date on which it became a party to the Protocol.

2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may harmonise such agreements with this Protocol.
3. Watercourse States may enter into agreements, which apply the provision of this Protocol to the characteristics and uses of a particular shared watercourse or part thereof.
4. Where a watercourse agreement is concluded between two or more Watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire shared watercourse or any part thereof or a particular project, programme or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other Watercourse States of the waters of the watercourse, without their express consent.
5. Where some but not all Watercourse States to a particular shared watercourse are parties to an agreement, nothing contained in such agreement shall affect the rights or obligations under this Protocol of Watercourse States that are not parties to such an agreement.
6. Every Watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire shared watercourse, as well as to participate in any relevant consultations.
7. A Watercourse State whose use of a shared watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected.

Article 7 Settlement Of Disputes

1. State Parties shall strive to resolve all disputes regarding the implementation, interpretation or application of the provisions of this Protocol amicably in accordance with the principles enshrined in Article 4 of the Treaty.
2. Disputes between State Parties regarding the interpretation or application of the provisions of this Protocol which are not settled amicably, shall be referred to the Tribunal.
3. If a dispute arises between SADC on the one hand and a State Party on the other, a request shall be made for an advisory opinion in accordance with article 16(4) of the Treaty.

Article 8 Signature

This Protocol shall be signed by the duly authorised representatives of the Member States.

Article 9 Ratification

This Protocol shall be ratified by the signatory States in accordance with their constitutional procedures.

Article 10
Entry Into Force

This Protocol and any subsequent amendments thereof shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States listed in the Preamble.

Article 11
Accession

This Protocol and any subsequent amendments thereof shall remain open for accession by any Member State.

Article 12
Amendment

1. An amendment to this Protocol shall be adopted by a decision of three quarters of the Summit members who are a party to this Protocol.
2. A proposal for any amendment to this Protocol may be made to the Executive Secretary by any State Party for preliminary consideration by the Council, provided however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it and a period of three (3) months has elapsed after such notification.

Article 13
Withdrawal

1. Any State Party may withdraw from this Protocol upon the expiration of twelve (12) months from the date of giving to the Executive Secretary, a written notice to that effect.
2. Any State Party that has withdrawn pursuant to paragraph 1 shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective, but shall remain bound by the obligations herein for a period of twelve (12) months from the date of giving notice to the date the withdrawal becomes effective.

Article 14
Termination

This Protocol may be terminated by a decision of three quarters of members of the Summit.

Article 15
Depositary

1. The original of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary, who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariats of the United Nations and the Organisation of African Unity.

Article 16
Protocol on Shared Watercourse Systems in the SADC Region

1. Upon entry into force of this Protocol, the Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region, which entered into force on 29th September 1998, shall be repealed and replaced by this Protocol.

The rights and obligations of any State Party to the Protocol on Shared Watercourse Systems in the SADC Region, which does not become a party to this Protocol, shall remain in force for twelve (12) months after this Protocol has entered into force.

In witness whereof, we, the Heads of State or government, or duly authorised representatives, of SADC Member States have signed this Protocol.

Done at Windhoek, this 7th day of August 2000 in three original texts in the English, French and Portuguese languages, all texts being equally authentic.

(Signed by Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe; not signed by DR Congo.)