

PROTOCOL

ON

TRIBUNAL

IN THE

· SOUTHERN AFRICAN DEVELOPMENT  
· COMMUNITY

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## PREAMBLE

WE, the Heads of State or Government of:

The Republic of Angola

The Republic of Botswana

The Democratic Republic of 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

DESIRING to conclude the Protocol on the Tribunal established by Article 9 as read with Article 16 of the Treaty,

HEREBY AGREE as follows:

### PART ■ Preliminary

#### ARTICLE I DEFINITIONS

1. In this Protocol terms and expressions defined in Article I of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires;

"Committee of Ministers" means the Committee of Ministers of Justice/Attorneys-General referred to in the Protocol on Legal Affairs;

"Member" means a Member of the Tribunal appointed in terms of Article 4 of this Protocol;



"President"	means President of the Tribunal elected in terms of paragraph 1 of Article 7 of this Protocol;
"Rules"	means the Rules of Procedures referred to in Article 23 of this Protocol; and
"State"	means a Member State of the Community

## PART II Organisation

### ARTICLE 2 CONSTITUTION OF THE TRIBUNAL

The Tribunal of the Community (hereinafter referred to as "the Tribunal"), is hereby constituted in terms of Article 16 of the Treaty and shall function in accordance with the provisions of the Treaty and this Protocol.

### ARTICLE 3 CONSTITUTION AND COMPOSITION

1. The Tribunal shall consist of not less than ten (10) Members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised competence.
2. The Council shall designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.
3. The Tribunal shall be constituted by three (3) Members; provided that the Tribunal may decide to constitute a full bench composed of five (5) Members.
4. The President shall be responsible for selecting the Members who shall constitute the Tribunal for the purpose of hearing any case brought before it.
5. On a proposal from the Tribunal, the Council may increase the number of Members.
6. No two or more members may, at any time, be nationals of the same State.

### ARTICLE 4 NOMINATION, SELECTION AND APPOINTMENT OF MEMBERS

1. Each State may nominate one candidate having the qualifications prescribed in Article 3 of this Protocol.



2. Due consideration shall be given to fair gender representation in the nomination and appointment process.
3. The Members shall be selected by the Council from the list of candidates so nominated by States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.
4. The Members shall be appointed by the Summit upon recommendation of the Council.
5. Where a Member is appointed to replace a Member whose terms of office has not expired, the Member so appointed shall serve for the remainder of his or her predecessor's term.
6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within three (3) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply *mutatis mutandis*.

#### ARTICLE 5 SOLEMN DECLARATION

Every Member shall, before taking up his or her duties, make a solemn declaration in open session that he or she will carry out his or her duties independently, impartially and conscientiously.

#### ARTICLE 6 TENURE OF OFFICE OF MEMBERS

1. The Members shall be appointed for a term of five (5) years and may only be re-appointed for a further term of five (5) years. However, of the Members initially appointed, the terms of two (2) of the regular and two (2) of the additional Members shall expire at the end of three (3) years. The Members whose term is to expire at the end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.
2. Subject to paragraph 3 of this Article, the Tribunal shall sit when required to consider a case submitted to it. The Members shall, therefore, not be appointed on a full-time basis.
3. On the recommendation of the President, the Council may at any time decide that the workload of the Tribunal requires that the Members should serve on a full-time basis. In that event:
  - (a) existing Members who elect to serve on a full-time basis shall not hold any other office or employment; and
  - (b) the Members subsequently appointed shall not hold any other office or employment.



ARTICLE 7  
THE PRESIDENT

1. The Tribunal shall elect its President for a term of three (3) years.
2. If the President is temporarily absent or otherwise unable to carry out his or her functions, the other Members shall elect an Acting President.

ARTICLES  
RESIGNATION AND TERMINATION OF OFFICE

1. The President may at any time resign his or her office by a letter to the Council delivered through the Executive Secretary.
2. A Member other than the President may at any time resign his or her office by a letter delivered to the President for transmission to the Council through the Executive Secretary.
3. No Member may be dismissed unless in accordance with the rules.
4. Notwithstanding the expiration of his or her term of office, a Member shall continue to hear and to complete those cases partly heard by him or her.

ARTICLE 9  
DISQUALIFICATION OR RECUSAL

1. No Member may exercise any political or administrative function, or may hold any political office or any office in the service of a State, the Community or an organisation or engage in any trade, vocation or profession or any other occupation which might interfere with the proper exercise of his or her judicial functions, impartiality or independence.
2. No Member may participate in the decision of any case in which he or she has previously taken part as an agent, a representative or an advisor, or as a member of a national or international court or tribunal or in any other capacity or in any matter in which a State of which he or she is a national is a party to a dispute before the Tribunal.
3. Any dispute regarding the provisions of paragraphs 1 and 2 of this Article shall be resolved by a decision of the Tribunal sitting without the Member concerned.

ARTICLE 10  
IMMUNITY FROM LEGAL PROCEEDINGS

The Members shall be immune from legal proceedings in respect of anything said or done by them in their judicial capacity. They shall continue to enjoy such immunity after they have ceased to hold office.



ARTICLE 11  
TERMS AND CONDITIONS OF SERVICE AND SALARIES OF MEMBERS

The terms and conditions of service, salaries and benefits of the Members shall be determined by the Council.

ARTICLE 12  
REGISTRAR

1. The Tribunal shall appoint a Registrar who shall, subject to overall supervision of the President, be responsible for the day to day administration of the Tribunal.
2. The Tribunal shall employ such other staff as may be required to enable it to perform its functions.
3. The terms and conditions of service, salaries and benefits of the Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

ARTICLE 13  
SEAT OF THE TRIBUNAL

The Tribunal shall have its seat at a place designated by the Council, provided it may in any particular case sit and exercise its functions anywhere within the Community if it considers it desirable.

PART III  
Jurisdiction

ARTICLE 14  
BASIS OF JURISDICTION

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- (a) the interpretation and application of the Treaty;
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
- (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.



ARTICLE 15  
SCOPE OF JURISDICTION

1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
2. No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

ARTICLE 16  
PRELIMINARY RULINGS

1. Subject to the provisions of paragraph 2 of this Article, the Tribunal shall have jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of States.
2. The Tribunal shall not have original jurisdiction but may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State for a preliminary ruling in accordance with this Protocol.

ARTICLE 17  
DISPUTES BETWEEN STATES AND COMMUNITY

Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between the States and the Community. Such disputes may be referred to the Tribunal either by the State concerned or by the competent institution or organ of the Community.

ARTICLE 18  
DISPUTES BETWEEN NATURAL OR LEGAL PERSONS AND COMMUNITY

Subject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community.





ARTICLE 19  
DISPUTES BETWEEN COMMUNITY AND STAFF

Subject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment.

ARTICLE 20  
ADVISORY

The Tribunal shall have jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council in terms of paragraph 4 of Article 16 of the Treaty.

ARTICLE 21  
APPLICABLE LAW

The Tribunal shall:

- (a) apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
- (b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.

ARTICLE 22  
WORKING LANGUAGES

The working languages of the Tribunal shall be English, Portuguese and French. The Council may determine that any other language be used as a working language.

PART IV  
Procedure Of The Tribunal

ARTICLE 23  
RULES OF PROCEDURES

The rules annexed to this Protocol shall form an integral part thereof.



ARTICLE 24  
DECISIONS

1. Decisions of the Tribunal shall be in writing and delivered in open court and shall state the reasons on which they are based.
2. Decisions of the Tribunal shall be taken by a majority.
3. Decisions and rulings of the Tribunal shall be final and binding.

ARTICLE 25  
DEFAULT DECISIONS

1. The Tribunal may give a decision in default.
2. Before giving such decision the Tribunal shall satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.
3. A party against whom a default decision is made may apply to the Tribunal for the rescission of such decision. The applicant shall set out the grounds for such application.

ARTICLE 26  
APPLICATION FOR REVIEW OF A DECISION

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application; provided always that such ignorance was not due to negligence.

ARTICLE 27  
REPRESENTATION BEFORE THE TRIBUNAL

1. The States and the institutions of the Community shall be represented before the Tribunal by an agent appointed for each case. The agent may be assisted by an advisor.
2. Other parties shall be represented by an agent or other persons before a court of a State.
3. Such agents, advisers and representatives shall, when they appear before the Tribunal, enjoy the rights, privileges and immunities necessary for the independent exercise of their duties, under conditions laid down in the rules of procedure.



4. As regards such agents, representatives and advisers who appear before it, the Tribunal shall have the powers normally accorded to courts of law, under conditions laid down in the rules of procedure.

ARTICLE 28  
INTERIM MEASURES

The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.

ARTICLE 29  
LEGAL COSTS

Unless the Tribunal decides otherwise, each party to a dispute shall pay its, his, or her own legal costs.

ARTICLE 30  
APPLICATION TO BE JOINED AS A PARTY

Should a State, natural or legal person consider that it or he or she has an interest of a legal nature that may affect or be affected by the subject matter of a dispute before the Tribunal, it or he or she may submit by way of a written application in such a form and manner as the rules of procedure may prescribe a request to be permitted to intervene.

ARTICLE 31  
FEES AND LEGAL AID

Fees payable by parties other than States and the granting of legal aid, within limits agreed by the budgetary authorities of the Community, may be prescribed by the rules.

ARTICLE 32  
ENFORCEMENT AND EXECUTION

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.
2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.
4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.



5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

ARTICLE 33  
BUDGET

The budget of the Tribunal shall be funded through the regular budget of the Community, in accordance with criteria that the Council may, from time to time determine, and from such other sources as may be determined by the Council.

PARTY  
Final Provisions

ARTICLE 34  
SIGNATURE

1. This Protocol shall be signed by the Heads of State or Government, or their duly authorised representatives.
2. This Protocol shall remain open for signature by the States listed in the Preamble, until the date of its entry into force.

ARTICLE 35  
RATIFICATION

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

ARTICLE 36  
ACCESSION

This Protocol shall remain open for accession by any State subject to Article 8 of the Treaty.

ARTICLE 37  
AMENDMENT

1. Any State which is a Party to this Protocol may propose an amendment thereto.
2. Proposals for amendment to this Protocol may be made to the Executive Secretary who shall duly notify all States of the proposed amendment or amendments at least thirty (30) days in advance of consideration of the amendment by the Committee of Ministers. Such period of notice may be waived by the States.



3. An amendment to this Protocol shall be adopted by a decision of three (3) quarters of all the members of the Summit, and shall become effective subject to Article 36 of this Protocol.

ARTICLE 38

**ENTRY INTO FORCE**

This Protocol shall enter into force thirty (30) days after deposit, in terms of Article 43 of the Treaty, of instruments of ratification by two-thirds of the States.

ARTICLE 39

**DEPOSITARY**

- I. The original text 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.



IN WITNESS WHEREOF, WE, the Heads of State or Government, or duly authorised representatives, of SADC Member States have signed this Protocol.

Done at *. tJ*, this *Jf!*... day of ..2000 in three original texts in the English, French and Portuguese languages, all texts being equally authentic.

REPUBLIC -----

*[Signature]*  
REPUBLIC OF BOTSWANA

DEMOCRATIC REPUBLIC OF CONGO

*[Signature]*  
KINGDOM OF LESOTHO

*[Signature]*  
REPUBLIC OF MALAWI

*[Signature]*  
REPUBLIC OF MAURITIUS

*[Signature]*  
REPUBLIC OF MOZAMBIQUE

*[Signature]*  
REPUBLIC OF NAMIBIA

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*[Signature]*  
REPUBLIC OF SOUTH AFRICA

M 2.L: L - ---jj} .. *[Signature]*  
KINGDOM OF SWAZILAND

UNITED REPUBLIC OF TANZANIA

*[Signature]*  
REPUBLIC OF ZAMBIA

*[Signature]*  
REPUBLIC OF ZIMBABWE