

The Southern African region is one of the richest parts of the continent having enormous natural and mineral resources. Inversely proportionate to its vast wealth is the extreme poverty and substandard living circumstances experienced by most of its citizens. Hunger, joblessness, disease, degradation of its land and natural resources, poor governance, minimal revenue inflow and investment and corruption are all elements of the politico-socio and economic landscape of Southern Africa. This is largely due to lack of an effective regulatory framework for the extraction and management of the resources.

The vast potential for investment and development in the region should result in countries with sustainable growth, positive economic indicators and improved living standards for its people. Its attractive natural resource and mineral opportunities have ensured that wealthy developed countries and multi-national organisations have seen, and used, the region for systematic and ongoing resource extraction.

Hand-in-hand with resource extraction is the often consequential large-scale corruption. A common situation is the incentive, commission, bribe, *subornar*, or *gratificacao*, that a private company or institution from the “home country” needs to pay a public official in the “host country” to facilitate the required plan of work. In some parts of the region, this form of corruption has become endemic and systematic. Private institutions factor it into their expenses and it is seen as being part of doing business in Africa. This exploitative situation is cyclical as there is always a willing payer along with a willing taker.

One of the most effective ways of combating this form of corruption is to have an effective legal regulatory framework that makes provision for implementable prevention, investigation and prosecution mechanisms. Strong domestic legislation and the political will to enforce it is the most effective way to ensure that resource extraction is not an exploitative practice that results in a perpetuation of the poverty and poor governance that the region has experienced.

This article reviews the legislative framework in relation to the prevention and combating of corruption associated with resource allocation in the region. It looks at the extent to which countries in the Southern African Development Community (SADC) have committed themselves to international, continental and regional conventions and protocols and the extent to which domestic legislation have been adopted and utilised to curb resource allocation corruption.

Resource Extraction in Southern Africa

Providing an Effective Regulatory Framework

By Louise Olivier

International, continental and regional initiatives

Global legislative initiatives in the fight against spoliation have recently been given impetus with a number of conventions, protocols and initiatives. Membership to these conventions provides countries with the motivation to develop and structure their own anti-corruption legal frameworks. Also, the signature and ratification of conventions and protocols may be used as a rallying point by civil society and the private sector to lobby for their governments to adopt national anti-corruption legislations.

The United Nations Convention against Corruption (adopted by the General Assembly of the UN on 31 October 2003) has as its purposes to:

- promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- promote, support and facilitate international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and
- promote integrity, accountability and proper management of public affairs and public property.¹

The Convention provides an inclusive definition of what constitutes corruption. The inclusion of asset recovery is of particular importance for African countries, as much of the illegal proceeds of its natural and mineral resources reside in foreign countries. The Convention provides an entry point for the recovery of these assets. The Convention also requires countries to establish criminal and other offences to cover acts of corruption, if this is not already contained in their national legislation.

Table 1 SADC Countries that have Ratified, Accepted, Approved or Acceded to the UN Convention against Corruption

Country	Signature	Ratification, accession, acceptance, approval
Angola	yes	no
Botswana	no	no
Democratic Republic of Congo	no	no
Lesotho	no	no
Madagascar	-	-
Malawi		Yes 21 September 2004
Mauritius	yes	no
Mozambique	yes	no
Namibia	yes	Yes 3 August 2004
South Africa	yes	no
Swaziland	no	no
Tanzania	yes	no
Zambia	yes	no
Zimbabwe	yes	no

The position, as at May 2006, of ratification, acceptance, approval or accession by SADC countries of the UN Convention is illustrated in Table 1.

The African Union's Convention on Preventing and Combating Corruption predates that of the UN's by a few months. It was adopted by the Assembly of the AU on 11 July 2003 in Maputo, Mozambique. The objectives of the AU Convention are to:

- promote and strengthen the development – by each State Party in Africa – of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;
- promote, facilitate and regulate co-operation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;
- coordinate and harmonise the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent;
- promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights; and establish the necessary conditions to foster transparency and accountability in the management of public affairs.²

The AU Convention refers to the African Charter on Human and Peoples' Rights and lists respect for the

Charter as one of the principles of the Convention.³ Article 21 of the Charter has particular relevance for resource protection. It recognises the specific problems associated with resource extraction and spoliation and requires Member States to recognise economic rights and provide remedies for asset recovery. It says that all people shall freely dispose of their wealth and natural resources. In case of spoliation the dispossessed people shall have the right to recovery of its property as well as to adequate compensation. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. State Parties shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. State Parties shall undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their natural resources.

The AU Convention requires State Parties to adopt national legislation that establishes corruption offences in line with the Convention, strengthen national control measures to ensure that the setting up and operations of foreign companies shall be subject to such national legislation and to establish and strengthen independent national anti-corruption authorities or agencies. Some of the shortfalls of the Convention are that there is no requirement for company liability and no provision for sanctions. Of the 53 Member States, to date 35 have signed and nine have ratified the Convention. The Convention requires a minimum of 15 ratifications to come into force. As at May 2006, the country positions in SADC to the AU Convention are as indicated in Table 2.

At regional level, the SADC's contribution to the anti-corruption framework is the Protocol against Corruption adopted by Heads of State and government in August 2001 at the Malawi Summit. Its objectives are very similar to the AU Convention which it predates by two years. The Protocol is a comprehensive document that provides for preventative measures, investigative procedures and access to information. It requires that national governments criminalise corruption offences and that national anti-corruption measures are introduced and implemented. As at May 2006, the SADC countries that had ratified or acceded to the Protocol are indicated in Table 3.

Most Southern African countries have indicated their strongest commitment to the SADC Protocol and with the required nine ratifications, it came into force on 6 July 2005.

Table 2 SADC Countries that have ratified, accepted, approved or acceded to the AU Convention against Corruption

Country	Signature	Ratification, accession, acceptance, approval
Angola	no	no
Botswana	no	no
Democratic Republic of Congo	yes	no
Lesotho	yes	no
Madagascar	-	-
Malawi	no	no
Mauritius	yes	no
Mozambique	yes	no
Namibia	yes	Yes 5 August 2004
South Africa	yes	no
Swaziland	no	no
Tanzania	yes	no
Zambia	no	no
Zimbabwe	yes	no

Table 3 SADC Countries that have signed, ratified, acceded to, accepted or approved of the SADC Protocol against Corruption

Country	Signature	Ratification, accession, acceptance, approval
Angola	yes	no
Botswana	yes	yes 2005
Democratic Republic of Congo	yes	no
Lesotho	yes	yes 2003
Madagascar	-	-
Malawi	yes	yes 2002
Mauritius	yes	yes 2002
Mozambique	yes	no
Namibia	yes	yes 2005
South Africa	yes	yes 2003
Swaziland	yes	no
Tanzania	yes	yes 2003
Zambia	yes	yes 2003
Zimbabwe	yes	yes 2004

As the most important African initiative, NEPAD provides for an African Peer Review Mechanism (APRM) as one of its key elements. The APRM is an instrument that has to date been acceded to by 23 Member States of the African Union as a self-monitoring mechanism. Its mandate is to ensure that policies and practices of participating states conform to the agreed political, economical and corporate gov-

ernance values contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

Although the APRM does not specifically focus on corruption and ethics issues, these are implicit in the overall objective of the APRM. The primary purpose of the APRM is “to foster the adoption of policies, standards and practices that lead to political stability and high economic growth.” In the framework of NEPAD, The Pan-African Conference of Ministers of Public Service⁴ launched an initiative on “Capacity Development for Governance in Public Administration.” This programme is a multi-year proposal working on six functional areas including anti-corruption. It aims to employ a variety of tools including peer review mechanisms, professional networks, and secretariat-based data collection and analysis to improve governance and public administration systems in Africa.

Despite the array of conventions and protocols that address corruption and their application for countries in the region, there is only one initiative that deals specifically with extractive industries. It would be remiss not to mention the Extractive Industries Transparency Initiative (EITI). The EITI was announced by the British Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg, South Africa in 2002. Its aim is to increase transparency over payments by oil, gas and mining companies to governments and transparency of revenues received by those governments.⁵ These areas of operation have particular association with spoliation, “the larger the oil sector relative to a country’s economy, the greater the potential for political corruption.”⁶

The EITI provides for strategies and guidelines for increased transparency and a trust fund has been established to provide funding and technical assistance for countries that wish to implement EITI programmes. On 13 May 2004 the Angolan government disclosed details of payments it will receive from ChevronTexaco. The payments total \$300 million and are part of an oil concession in the Cabinda province. The move by the dos Santos government to make such declaration is in support of transparency initiatives and was widely applauded.

National legislation

Conventions and Protocols place obligations on states to enact legislation in line with their provisions. Most Southern African countries have anti-corruption legislation in place to a greater or lesser degree. The main challenge is how effectively the legislation has been used to successfully prosecute corruption related to resource extraction. In this respect there has been little evidence of successful prosecutions. Perhaps the most well known corruption trial involving bribery and foreign multi-nationals is the Lesotho

Highlands Water Project case, which is detailed elsewhere in this Issue. In prosecuting this matter Lesotho was faced with a number of challenges including an insufficient legal framework and lack of resources.

The lack of a regulatory legal framework that specifically addresses resource extraction is a challenge in the region. Any prosecutions would need to take place in terms of general corruption law that criminalises various corrupt activities and provides for sanctions if convicted. Malawi has the Corrupt Practices Act⁷ that has as its objective the prevention of corruption in public and private bodies. The Act establishes the Anti-Corruption Bureau (ACB) that is legally mandated to investigate corruption in Malawi. Initially the ACB had difficulties getting the Director of Public Prosecutions to prosecute high level corruption cases. With the new wa Mutharika government, in 2005, the prosecution of corruption cases was given priority. Malawian law does not provide for any government screening of foreign investment.

This is in direct contrast to the situation in Angola, where the 2003 Law on the Bases for Private Investment⁸ stipulates the general parameters, benefits and obligations for foreign investment. The National Private Investment Agency must approve foreign investment between US\$100 000 and US\$5million. Any foreign investment over US\$5million requires authorisation from the Council of Ministers, as well as any investment that requires a concession (such as oil or mining) or involves the participation of a parastatal.⁹

Angola also has a number of performance requirements and expectations of foreign investors. Oil and diamond sectors are expected to invest in infrastructure and social services that will benefit local communities. It is not clear how effectively this requirement has been implemented. Angola does not have a specific anti-corruption law and is not a signatory to the OECD Convention on Combating Bribery or the EITI, but it is a participant in NEPAD that includes the APRM on good governance and transparency. In 2000, the Angolan government approved an Audit Court to investigate the abuse of public funds by public institutions. The Court has had some successes handing down sentences for embezzlement and ordering government officials to return misappropriated money. Yet, the common perception of doing business in Angola is that the only law is “How big is your bribe?” In a country that has a systematic and endemic culture of bribery Angola has a long way to go before it complies with requirements in international, continental and regional conventions, protocols and initiatives on transparency and anti-corruption measures.

Mozambique is another country in the region that struggles with its corruption reputation. The World Bank cites

Mozambique as one of the most corrupt countries in Southern Africa, after Angola and Zimbabwe.¹⁰ Some of the challenges identified to effectively address corruption are the application of the legislation, simplification of administrative processes, professionalisation of administrative processes, an overhaul of the justice system, a commitment to legality and enforcement and accountability.¹¹ There is not a lack of political will in the highest office. President Guebuza has frequently prioritised the fight against corruption. The primary anti-corruption law is Law No 6/2004.¹² The law provides a comprehensive regulatory framework for combating corruption and introduces an interesting clause on the role of a Private Participant (*assistente*). This may be any person who wishes to take a role in corruption cases. Their powers include developing a separate indictment from the Public Prosecutor, participating directly in preliminary evidentiary hearings, submitting evidence and requiring the judge to pursue the evidence. They are also entitled to apply for an appeal, even if the Public Prosecutor chooses not to. Mozambican law provides ample opportunity to pursue corruption cases and to advocate for prosecutions and civil claims.

In the region and internationally, Botswana enjoys a reputation as a country that is committed to combating and preventing corruption.¹³ Legislation that provides the framework for corruption is the Corruption and Economic Crime Act,¹⁴ which defines offences of corruption, including being in control of disproportionate assets or maintaining an unexplained high standard of living. The Act also established the Directorate on Corruption and Economic Crime in the Office of the President. The Directorate has special powers of investigation, arrest, search and seizure. However, prosecution lies with the Attorney General. There is no record of prosecutions of foreign institutions or companies for spoliation connected to resource allocation. Yet, the current legislation sufficiently provides for such prosecutions if a relevant case arose.

Other countries in the region with corruption legislation that provides a framework for prosecution in spoliation matters include South Africa’s progressive and comprehensive Prevention and Combating of Corrupt Activities Act,¹⁵ that refers to its responsibilities under the UN Convention and the SADC Protocol to establish national legislation in line with their provisions. Namibia has the Anti-Corruption Act of 2003¹⁶ that includes the prohibition of bribery of public officers and foreign public officials. It provides for the establishment of an independent and impartial Anti-Corruption Commission with investigative, but not prosecutorial powers. The Commission has the powers to request any person to give written disclosure of their assets.

Swaziland's corruption legislation has experienced a somewhat torrid time in the courts. The Prevention of Corruption Order No 19 of 1993 (as amended) was nullified by the High Court of Swaziland in 2002.¹⁷ The Appeal Court set aside the order and reinstated the law. The Swazi government has promised reform in this area and wants to give the Anti-Corruption Commission "its biting teeth."¹⁸ Whether this country's anti-corruption and transparency legislation will be effectively utilised by the state is yet to be tested.

Zambia's anti-corruption law established the Anti-Corruption Commission, which has in the past been criticised for not playing a prominent role in the corruption war and not being sufficiently independent from the government, thus rendering it ineffective. However, the legislation has been used (or is currently used) to prosecute high profile individuals, but not necessarily connected to resource extraction spoliation.

Zimbabwe has managed to politicise its fight against corruption. As one of the three most corrupt countries in the region¹⁹ too few corruption matters and only those that are selected by the political powers are prosecuted. The Prevention of Corruption Act provides the legal framework for the prosecution of corruption offences. In 2004, the government passed the Criminal Procedure and Evidence Amendment Act as part of President Mugabe's attempt to stop corruption after a senior ZANU-PF central committee member, James Makamba, was arrested and charged with illegally dealing in foreign currency. Another ZANU-PF MP and a director of Telecel²⁰ were also arrested and charged. The Act received widespread condemnation from civil society, human rights lawyers and the opposition as being legislation that violates Zimbabwe's Bill of Rights. The Act enables the police to detain people suspected of committing economic crimes, including corruption, money laundering and illegal dealing in foreign exchange and gold for up to a week. They may hold suspects for a further 21 days if *prima facie* evidence is produced against them without the option of bail. This Act sways attention from the overall requirements of effective transparency and corruption legislation, as it becomes a rallying point for criticising the State enacting further oppressive legislation.

Conclusion

The successful combating, detection and prevention of corrupt practices does not rely solely on the presence of a legal regulatory framework. By and large countries in the region have anti-corruption and transparency legislation that provides for prosecutions of people and institutions involved in corruption related to resource extraction. Yet, prosecutions have been too few and, in some countries, illicit transactions continue to take place and are increasing.

Standards for global integrity require the adoption of co-operative arrangements in the region to provide for the exchange of experiences and ideas. All countries in the region need to accede to relevant transparency and anti-corruption conventions and protocols and commit to the EITI, as well as to peer review in terms of NEPAD. There should be a regional network of anti-corruption institutions. Countries should ensure that their national legislation adheres to their international, continental and regional commitments to fighting corruption, and corruption charges should be made free from politically subjective discretion. Government should also ensure that sufficient funding is committed, or they should actively seek such funding, to prosecute spoliation offences. Due to the highly intricate and complicated nature of these cases extensive resources are needed for their investigation and prosecution. Adherence to ministerial codes of conduct and declaration of interests should be made a legal requirement.

While the response of multi-nationals and the industrialised nations are important to preventing resource extraction corruption, without similar response from the smaller and poorer countries in Southern Africa, this scourge will continue to grow and intensify the poverty of the people of its countries. ■

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Endnotes

- 1 Article 1.
- 2 Article 2.
- 3 Article 3.
- 4 14-15 December 2005, Addis Ababa, Ethiopia.
- 5 EITI Newsletter, Department for International Development, March 2004, pg. 1.
- 6 Transparency International's Global Corruption Report, 2004.
- 7 No 18 of 1995, revised in 2004.
- 8 Law 11/03, replacing the 1994 Foreign Investment Law.
- 9 www.state.gov/e/eb/afd/2005/43019.htm
- 10 World Bank, World Bank Governance Indicators 1996 – 2004.
- 11 ACIS Discussion Paper – Combating Business Participation in Corruption in Mozambique, 31 October 2005.
- 12 17 June 2004.
- 13 Botswana is consistently voted the least corrupt country in Africa, see Transparency International and the World Economic Forum (WEF).
- 14 19 August 1994.
- 15 No 12 of 2004.
- 16 Act 8 of 2003.
- 17 In the case of *Rex v Mandla Ablon Dlamini* (Criminal Case No 7/2002)
- 18 Responses by the Prime Minister of Swaziland to questions from the Nation Magazine, June 2004.
- 19 See World Bank report referenced above.
- 20 One of Zimbabwe's cellular telephone companies.