

MEMORANDUM OF UNDERSTANDING
AMONGST
THE MEMBER STATES OF THE SOUTHERN AFRICAN
DEVELOPMENT COMMUNITY
ON THE NEW HEADQUARTERS OF SADC

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**MEMORANDUM OF UNDERSTANDING AMONGST THE MEMBER STATES
OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY ON THE NEW
HEADQUARTERS OF SADC**

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 Madagascar

The Republic of Malawi

The Republic of Mauritius

The Republic of Mozambique

The Republic of Namibia

The Republic of South Africa

The Kingdom of Swaziland

The United Republic of Tanzania

The Republic of Zambia

The Republic of Zimbabwe

CONSCIOUS of our collective duty to the attainment of the objectives set forth in Article 5 of the Treaty of SADC, as amended in August 2001, amongst other things, to achieve development and economic growth, achieve complementarity

between national and regional strategies and programmes, harmonize our political and socio-economic policies and plans, develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of the peoples of our States, improve economic management and performance through regional co-operation and reduce economic imbalances;

WHEREAS the SADC Summit of Heads of State or Government has decided to procure the design, financing and construction of the new headquarters accommodation for SADC in Gaborone, Republic of Botswana;

BEARING IN MIND that the SADC Council of Ministers has mandated the Double Troika Finance Ministers comprising six Member States, namely Republic of Botswana, Kingdom of Lesotho, the Republic of Mauritius, Republic of Namibia, Republic of South Africa and United Republic of Tanzania known as the Double Troika Finance Ministers to determine the preferred technical solution option and the preferred procurement mechanism for the new headquarters accommodation for SADC;

NOTING that the Double Troika Finance Ministers has established a committee of experts the SADC Double Troika Member States, known as the Double Troika Technical Committee, to facilitate the process of implementation of the Project;

RECOGNISING that, following the completion of a Feasibility Study Report on the proposed Project, in August 2005 the SADC Summit approved it and directed the Double Troika Finance Ministers to consider the recommendations made thereunder by the Double Troika Technical Committee on the new headquarters accommodation for SADC to procure the design, finance and construction of the new headquarters accommodation for SADC through a Public Private Partnership ("PPP");

AWARE that the Double Troika Finance Ministers considered and approved the recommendation by the Double Troika Technical Committee in December 2005, and mandated the Secretariat to develop a Memorandum of Understanding to the effect that due to SADC's reliance on Member State contributions, one of the Member States should underwrite the financial obligations that SADC will incur under the PPP Agreement, and that the most appropriate Member State to perform this function is the Republic of Botswana;

NOW THEREFORE, it has been agreed as follows:

ARTICLE 1 DEFINITIONS AND INTERPRETATION

1. The headings of the clauses in this Memorandum of Understanding are for the purpose of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this Memorandum of Understanding nor any provision hereof.

2. In this Memorandum of Understanding, unless the context otherwise requires:

“Facilities” means the buildings and other facilities together with all supporting infrastructure, plant and equipment which accede to the Project Site, as required to enable the Private Party to exercise its rights and perform its obligations included in the Project Deliverables;

“GoB” means the Government of the Republic of Botswana;

“Lease Agreement” means the Lease Agreement in respect of Plot 54385 in the Central Business District of Gaborone entered into between the GoB and SADC;

“Member States” means the members of SADC, or where the context indicates any one or more of them;

“MoU” means this memorandum of understanding and includes all annexures or schedules hereto;

“Party” means each of the signatories to this MoU all being Member States, and “Parties” has a corresponding meaning;

“PPP Agreement” means the proposed public private partnership agreement for the Project;

“Private Party” means the preferred bidder in the Project procurement process, once the PPP Agreement has been signed by the parties thereto;

“Project” means the provision by the private party of the project deliverables to SADC including, *inter alia*:

- (a) carrying out the Works in respect of the facilities;
- (b) undertaking relocation; and
- (c) providing the services at the facilities;

each pursuant to and in accordance with the provisions of the PPP Agreement where:

“Works” means the design, construction, fitting out, installation and commissioning works to be undertaken by the private party in respect of the facilities and the facilities assets, to enable it to meet the design and construction specifications and performance standards, as may be subsequently amended in accordance with the PPP Agreement;

“Property” means the immovable property which is Plot number 54385 in the Central Business District of Gaborone, with an area of 11,343m², on which the new headquarters for SADC with floor space area of approximately 19,000m² will be built and includes all structures built thereon and all fixtures, fittings, furniture, information technology and other equipment provided by the Private Party under the PPP Agreement, but excludes any item previously owned by SADC and brought to the new site during the course of the PPP Agreement;

“SADC” means the Southern African Development Community, an international organization set up under the 1992 Treaty establishing the Southern African Development Community;

“SADC Secretariat” means the executive arm of SADC, with its headquarters in Gaborone, Botswana.

3. If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the MoU.
4. When any number of days is prescribed in this MoU, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday in the Republic of Botswana, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday in the Republic of Botswana.
5. Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.
6. Expressions defined in this MoU shall bear the same meanings in schedules or annexures to this MoU which do not themselves contain their own definitions.
7. Where any term is defined within the context of any particular clause in this MoU, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this MoU, notwithstanding that that term has not been defined in this interpretation clause.
8. The words “include”, “including” and “in particular” shall be construed as being by way of example or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding word/s.
9. The words “other” and “otherwise” shall not be construed *eiusdem generis* with any preceding words where a wider construction is possible.

ARTICLE 2 UNDERTAKINGS

This MoU shall be binding on all Member States.

ARTICLE 3 DURATION

This MoU shall subsist for such a period of time until it terminates upon the occurrence of the earlier of:

- (a) expiry of the PPP Agreement without the underwriting obligations of the GoB having been triggered; or
- (b) final determination and implementation of the consequences of any payment made by GoB as provided for in this MoU, including determination and implementation of the respective liability of the other Member States arising therefrom, as provided for in Article 5 herein.

ARTICLE 4 NOMINATION AND OBLIGATIONS OF THE GOVERNMENT OF BOTSWANA

1. SADC Member States hereby acknowledge the need for a Member State amongst them to underwrite the financial obligations to be incurred by SADC under the PPP Agreement, and hereby request and nominate the GoB, which hereby accepts the request and nomination, to underwrite such obligations on their behalf.
2. SADC Member States acknowledge that the Project has undergone a competitive procurement process, and that the final mechanism for underwriting SADC's financial obligations is as set out in the PPP Agreement.
3. SADC Member States thus mandate the GoB to underwrite the financial obligations to be incurred by SADC under the PPP Agreement in accordance with the provisions of the PPP Agreement.
4. SADC Member States agree that the role of GoB in underwriting the financial obligations of SADC shall be limited to making payment, on behalf of SADC where SADC is unable to pay, or unable to pay timeously, of either the monthly unitary charge payable by SADC to the Private Party under the PPP Agreement, or of termination compensation in the event that the PPP Agreement is terminated early due to default by either SADC or the Private Party, or due to *force majeure*, corruption or any other trigger event that in terms of the PPP Agreement could lead to early termination thereof.

ARTICLE 5 GENERAL OBLIGATIONS

1. SADC Member States agree that in the event that the GoB's obligation to make payment on behalf of SADC of any amounts due to the Private Party under the PPP Agreement is triggered during the course of the PPP Agreement, and the GoB does in fact make such payment, the following principles shall be applied in determining the consequences thereof for the Member States and the respective liabilities of the Member States other than the Republic of Botswana, unless the Member States agree, as and when a trigger event occurs, on an alternative mechanism for determining the consequences of a payment by the GoB as contemplated in this MoU and their respective liabilities arising therefrom:
 - (a) if the GoB makes payment of the monthly unitary charge on behalf of SADC and the PPP Agreement continues to operate as if SADC itself had paid such monthly unitary charge, then:
 - (i) SADC Member States shall each be liable in proportion to their annual contribution obligation vis-à-vis SADC for that proportion of the moneys paid by the GoB on behalf of SADC, and SADC shall in turn be liable to effect repayment to the GoB for the amount paid by the GoB on its behalf; and
 - (ii) in the event of SADC failing to effect payment of any amount due by it to the GoB in terms of Article 5 (1) (a) (i) above, then such amount shall be regarded as a loan granted by the GoB to SADC which shall be repayable by SADC as a first call on any membership contribution received by SADC from any other Member State;
 - (b) in the event of termination of the PPP Agreement and the GoB is called upon to discharge its obligations under the PPP Agreement and one or more of the other SADC Member States fails, neglects or otherwise refuses to provide its portion of the contribution required to keep the GoB reimbursed following the discharge of its obligations under the PPP Agreement, and provided further that the Parties are unable to reach agreement regarding the continued operation of the Lease Agreement entered into between SADC and the GoB on terms mutually accepted to the Parties, the GoB may terminate the Lease Agreement on no less than Ninety (90) days prior to written notice to SADC.
2. SADC Member States undertake to notify the GoB immediately should any event occur during the course of the PPP Agreement that SADC reasonably believes may lead to the GoB's obligations under the PPP Agreement, as contemplated in this MoU and as finally determined in the PPP Agreement itself, being triggered.

3. The GoB undertakes, in turn, to notify the other Member States immediately it receives notification whether from SADC or the Private Party that its obligations under the PPP Agreement have been or will be triggered by any event.
4. In the event of a notification by SADC or the GoB under sub-articles 2 or 3 above, representatives of the GoB and the SADC Secretariat will as soon as possible thereafter meet to attempt to resolve the matter without triggering default by SADC under the PPP Agreement or interruption of the services to be provided under the PPP Agreement, and to discuss the consequences for the GoB, SADC and the Member States of any payment made by the GoB on behalf of SADC under the PPP Agreement.
5. The certificates provided in terms of the PPP Agreement setting out the liabilities of GoB in respect of its obligations shall be sufficient proof of such liabilities for the purposes of this MoU.

ARTICLE 6 SEVERABILITY

Any provision in this MoU which is or may become illegal, invalid or unenforceable shall be ineffective to the extent of such prohibition or unenforceability and shall be treated *pro non scripto* and severed from the balance of this MoU, without invalidating the remaining provisions of this MoU.

ARTICLE 7 WHOLE AGREEMENT

SADC Member States agree that this MoU sets out the responsibilities among themselves relating to the subject matter and constitutes the whole agreement.

ARTICLE 8 SETTLEMENT OF DISPUTES

Any dispute arising from the interpretation or application of this MoU which cannot be settled amicably shall be referred to the SADC Tribunal for determination.

ARTICLE 9 AMENDMENT

1. Any Member State may propose amendments to this MoU.

2. Proposals for amendment to this MoU may be made to the SADC Executive Secretary who shall duly notify other Member States of the proposed amendments, at least thirty (30) days in advance of consideration of the amendments by Member States, but such period of notice may be waived by Member States.
3. Amendments to this MoU shall be adopted by consensus all Member States, and shall become effective thirty (30) days after such adoption.

ARTICLE 10 ENTRY INTO FORCE

This MoU shall enter into force on the Date of Signature by two thirds of all Member States.

ARTICLE 11 ACCESSION

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

ARTICLE 12 WITHDRAWAL

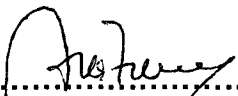
Any Member State signatory to this MoU may withdraw from it if it is withdrawing from SADC in accordance with the provisions of Article 34 of the SADC Treaty subject to settling its outstanding liabilities under this MoU as certified by the Executive Secretary of SADC.

ARTICLE 13 DEPOSITORY

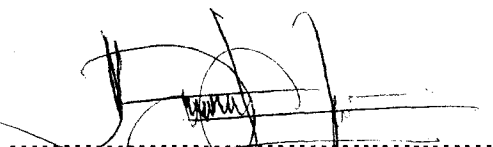
The original texts of this MoU shall be deposited with the Executive Secretary of SADC, who shall transmit certified true copies thereof, to all SADC Member States.

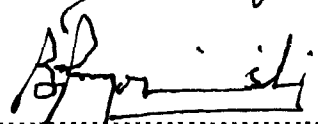
IN WITNESS WHEREOF, WE, the duly authorised representatives of our Heads of State or Government, have signed this Memorandum of Understanding.

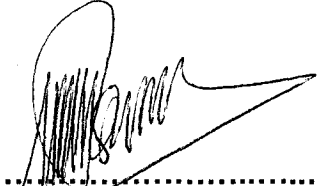
DONE at Lusaka, Republic of Zambia, on this ^{17th} day of August 2007 in three (3) original texts in the English, French and Portuguese languages, all texts being equally authentic.


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REPUBLIC OF ANGOLA

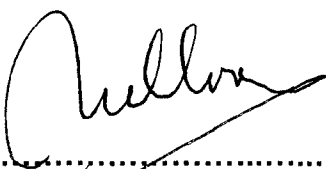

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REPUBLIC OF BOTSWANA

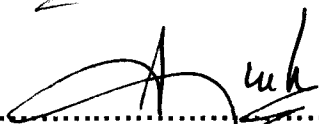

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DEMOCRATIC REPUBLIC OF CONGO

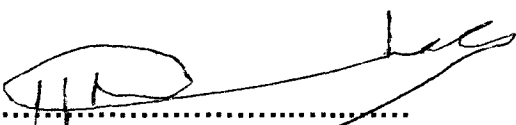

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KINGDOM OF LESOTHO

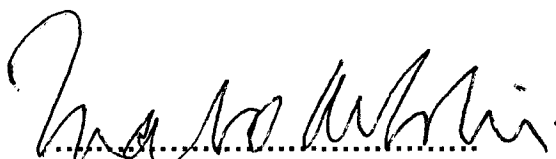

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REPUBLIC OF MADAGASCAR

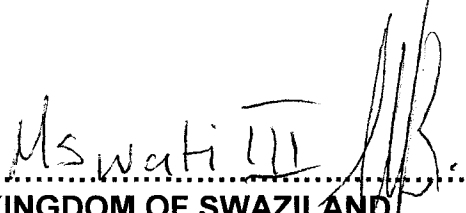

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REPUBLIC OF MALAWI


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REPUBLIC OF MAURITIUS

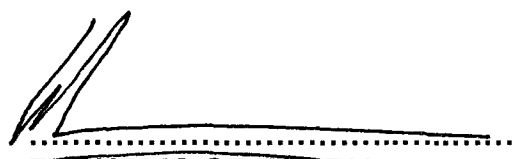

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REPUBLIC OF MOZAMBIQUE


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REPUBLIC OF NAMIBIA


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REPUBLIC OF SOUTH AFRICA


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KINGDOM OF SWAZILAND


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UNITED REPUBLIC OF TANZANIA


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REPUBLIC OF ZAMBIA

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REPUBLIC OF ZIMBABWE