



international relations & cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)

Private Bag X 152, PRETORIA, 0001 · OR Tambo Building, 460 Soutpansberg Road, Rietondale, PRETORIA, 0084
Telephone +27 (0) 12 351 0857 · Facsimile +27 (0) 12 329 1721 · www.dirco.gov.za

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Mr Roberto Gomes
Directorate: China

SOUTH AFRICA'S MEMBERSHIP OF THE ASIAN INFRASTRUCTURE INVESTMENT BANK

1. Your request for legal advice of 24 January 2022 bears reference.
2. The National Treasury has requested a legal opinion on South African membership of the Asian Infrastructure Investment Bank (hereinafter "the AIIB"). A legal opinion by the Law Advisers of the Department of Justice and Constitutional Development (hereinafter "DOJ&CD"), under reference 251A&B/2021/2022 of 13 December 2021, as well as a draft Cabinet Memorandum drafted by the National Treasury, seeking to obtain approval from Cabinet that the Articles of Agreement of the AIIB be submitted to Parliament for approval of the ratification thereof, have also been submitted.
3. South Africa participated in the negotiations of the Articles of Agreement (hereinafter "the Agreement") of the AIIB. Article 57(1) of the Agreement provides that it shall remain open for signature until December 31, 2015. Article 58(1) provides for ratification, acceptance or approval by signatory States until 31 December 2016, or by such other dates as may be decided by the Board of Governors in terms of its powers contained in Article 28. The Minister of Finance signed the Agreement on 3 December 2015. States signing before the 31 December 2015 deadline, are considered to be Prospective Founding Members, and States ratifying, accepting or approving the Agreement before the 31 December 2016 deadline would be considered Founding Members. The Board of Governors have extended this latter deadline several times, the latest being 31 December 2022. South Africa must therefore ratify, accept or approve the Agreement by 31 December 2022 to be considered a Founding Member.
4. South Africa has not ratified, accepted or approved the Agreement as yet. The Agreement has entered into force on 25 December 2015,
5. The National Treasury has not indicated specific questions on which it requires advice. We have therefore concentrated on issues of international law which may be of guidance to the National Treasury.
6. At the outset, we note that we agree with the opinion of the Law Advisers of the DOJ&CD in paragraphs 7.1 – 7.4 of their opinion on the requirement for the Agreement to be

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published in the *Government Gazette* in terms of Article 7(1) of the *Diplomatic Immunities and Privileges Act, 2001* (Act No. 37 of 2001) in order to give effect to the immunities accorded to the AIIB and its officials in South African domestic law.

7. The Law Advisers of the DOJ&CD note in paragraph 7.4 of their opinion with respect to Article 51(2) of the Agreement, which provides for exemption from tax on or in respect of the salaries, emoluments and expenses paid by the AIIB to the Directors, Alternate Directors, the President, vice-President and other officers or employees of the Bank, including experts and consultants, that the Government must declare in its instrument of ratification, that it retains the right to tax such salaries paid by the Bank to South African citizens and nationals.
8. Article 2(1)(d) of the *Vienna Convention on the Law of Treaties, 1969* (hereinafter “the Vienna Convention”) defines a reservation as:

A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Aust (*Modern Treaty Law and Practice*, 3rd Ed., p. 120) describes a reservation as a mechanism to be used by a State for which it may be politically difficult not to become a party, to seek to adjust the application of certain provisions to it so as to make it possible for it to become a party.
9. Article 19 of the Vienna Convention states that the general rule of international law is that a State may formulate reservations unless:
 - (a) The reservation is prohibited by the treaty;
 - (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
 - (c) In cases not falling under (a) and (b), the reservation is incompatible with the object and purpose of a treaty (the so-called “compatibility test”).
10. The Agreement is silent on the issue of reservations. The question therefore will be whether a reservation will pass the compatibility test, which in practice is difficult to establish and for which no firm rule exists (Aust, *op cit*, p. 123).
11. Our experience is that international organisations like the AIIB are generally not keen on reservations by Member States. It may therefore be considered to establish the position held by the AIIB in this respect from the depositary, the Foreign Ministry of the People’s Republic of China.
12. In any event, if it is considered to enter a reservation(s), such reservation(s) must be approved by Parliament.
13. In respect of Article 53 of the Agreement, dealing with amendments, it is provided in Article 53(3) that amendments having been adopted by the Board of Governors by means of the prescribed procedure, will enter into force for all members three months after the date of the official communication thereof, unless the Board of Governors specify a different period. The DOJ&CD Law Advisers correctly point out that in South African practice, an amendment to an international agreement *per se* constitutes an international agreement as provided for in Article 231 of the *Constitution of the Republic of South Africa, 1996*,

which will have to be approved (in this case, by Parliament in terms of Section 231(2) of the Constitution. They propose that a reservation be entered in this regard in the instrument of ratification. We agree with this approach as it would prevent that an amendment containing an international obligation in conflict with South African domestic law, will become binding on South Africa from the perspective of international law. In this respect, we refer to our comments in paragraphs 10 – 12 above.

14. We confirm, according to paragraph 5.21 of the *Manual on Executive Acts of the President of the Republic of South Africa*, that we agree with the interpretation of the Law Advisers of DOJ&CD that the Agreement falls under Section 231(2) of the Constitution, and requires approval by resolution in both the National Assembly and the National Council of Provinces.
15. We also note that with respect to the Agreement, Article 58(3) provides that a signatory State will become a member of the AIIB following depositing of its instrument of ratification, acceptance or approval. Signature of the Agreement therefore is not an expression as consent to be bound, and there is no obligation, either in terms of general international law or the Agreement, for a signatory State to ratify, accept or approve the Agreement.
16. While the Cabinet Memorandum is the responsibility of National Treasury, and we do not wish to comment on its substance, we wish to propose the following drafting amendment for consideration:

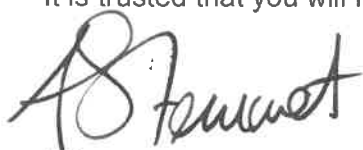
Ad paragraph 3.3:

Change the word “ratified” in the second sentence to “approved”:

“However, South Africa has not acceded full membership of the Bank as parliament has not **approved** the Agreement.”

Section 231 of the Constitution refers to “approval” of international agreements, and the use of the term “ratified” may also cause confusion as the next sentence refers to South Africa’s ratification of the Agreement on the international plane.

17. It is trusted that you will find our comments of assistance.



ADV ANDRE STEMMET
STATE LAW ADVISER (INTERNATIONAL LAW)

PRETORIA
25 JANUARY 2022

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