



## 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 Tel: +27 12 351 0857 Fax: +27 12 329 1721

18mpongoshas062201  
File: 10/16/3/4  
RO: 199/2018

Ms M Herfurth  
Route: herfurthm  
Directorate: Multilateral Trade Relations

### **SOUTH AFRICA'S ACCESSION TO THE BEIJING TREATY AUDIOVISUAL PERFORMANCES, 2012**

1. Reference is made to your request for legal advice under reference number 18herfurthm0614c received by this Office on 15 June 2018 in relation to the above-mentioned subject matter.
2. The State Law Advisers (IL) have been requested to advise whether the Beijing Treaty on Audiovisual Performances, 2012 (hereinafter referred to as the "Treaty") is consistent with international law in general and South Africa's international obligations specifically, and to provide an advice on the procedure for accession.
3. We note that the State Law Advisers at the Department of Justice and Constitutional Development (hereinafter referred to as "the DOJ&CD") have scrutinised the Treaty for consistency with the domestic law of the Republic of South Africa and have advised under paragraph 23 of their legal opinion that the Treaty falls within the scope of section 231(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution") and will therefore bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Under paragraph 20 of their opinion, they further advised that no provision of the Treaty is, as far as they could ascertain, in conflict with the domestic law of the Republic of South Africa.
4. In this respect, as requested, we have scrutinised the Treaty for consistency with international law and South Africa's international obligations, and have found it to be consistent with international law and South Africa's international obligations.
5. The Treaty deals with the intellectual property rights of performers in audiovisual performances. It grants performers four kinds of economic rights for their performances

**CONFIDENTIALITY NOTE:**

This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).

fixed in audiovisual fixations, such as motion pictures: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available. It obliges each Contracting Party to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement.

6. Articles 26 of the Treaty deals with entry into force of the Treaty. It provides that the Treaty will enter into force three months after 30 eligible Parties have deposited their instruments of ratification or accession. Eligible Party according to article 23 are any Member State of WIPO. Those WIPO Member State may become party to this Treaty by depositing an instrument of ratification or accession. The effective date of becoming a Party to the Treaty for those Member State who have not deposited their instruments of ratification or accession, is according to article 27, from the expiration of three months from the date on which the Party has deposited its instrument of ratification or accession with the Director General of WIPO. South Africa is therefore required to deposit its instruments of accession with the Director General of WIPO to be bound by the Treaty.
7. In order for South Africa to accede to the Treaty, the following domestic procedures need to be followed:
  - 7.1 Agreements that require ratification or accession falls within the ambit of section 231(2) of the Constitution. Parliament must approve that South Africa ratify or accede to the Treaty. All agreements that require parliamentary approval must be submitted to cabinet for consideration and approval.
  - 7.2 A cabinet memorandum submitted through the relevant Ministry to the cabinet secretariat must be prepared. The legal opinions from the State Law Advisers at the DOJ&CD and the State Law Advisers at the Department of International Relations and Cooperation must be included. The text of the Treaty must be certified by the State Law Advisers at the Department of International Relations and Cooperation and attached to the cabinet memorandum.
  - 7.3 Once cabinet recommended that the Treaty should be approved by parliament, the Treaty needs to be tabled in parliament. In this regard, please note that:
    - Tabling is the authority of the Presiding Officers;
    - Letters requesting tabling should be addressed to the Speaker of the National Assembly and Chairperson of the National Council of Provinces;
    - The letter must clearly indicate that the tabling is done in terms of **section 231(2)** of the Constitution;
    - The requesting letter must be signed and dated by the responsible Minister;
    - An explanatory memorandum and a draft resolution must accompany the tabling of an international agreement that has to be approved by Parliament; and
    - A certified copy of the Treaty must be tabled.
  - 7.4 The explanatory memorandum referred to above must:
    - Briefly set out the history, objective and implications of the agreement;
    - Indicate the recommendation to cabinet;

- Include the legal opinions from the State Law Advisers at the DOJ&CD and the State Law Advisers at the Department of International Relations and Cooperation;
  - State whether the agreement has self-executing provisions that will become law in the Republic upon the approval of the agreement in parliament; and
  - Give account of the projected financial and other costs of the agreement for the state and contain all information needed by parliament to make an informed decision.
- 7.5 Once parliament has approved the accession of the Treaty, draft instruments of accession for signature by the Minister of International Relations and Cooperation must be submitted to the Department of International Relations and Cooperation.
- 7.6 Copies of the minutes of both Houses of Parliament reflecting the decision of the Houses must accompany the draft instruments of accession.
- 7.7 While the preparation of the instrument of accession is the responsibility of the line function department, this Office is available to assist.
- 7.8 Arrangements are made by the line function desk of the Department of International Relations and Cooperation for the binding of the Instrument before it is submitted for signature to the Minister of International Relations and Cooperation
8. Please note that copies of the signed instrument of accession must be deposited with the South African Treaty Section at the Department of International Relations and Cooperation.
9. Kindly be reminded that this communication constitutes legal advice that is legally privileged and confidential. It is intended solely for the consumption of the addressee, and may not be freely disclosed to any third party, without the express consent of the client, after having obtained legal advice from this Office.
10. We trust that our comments will be of assistance to you.



**SABONGA MPONGOSHA**  
**STATE LAW ADVISER (IL)**

**PRETORIA**  
**22 JUNE 2018**