



the dirco

Department of International Relations
and Cooperation

REPUBLIC OF SOUTH AFRICA

**PRACTICAL GUIDE AND
PROCEDURES FOR THE DEPOSITING
AND BINDING OF AGREEMENTS
3rd edition**

OFFICE OF THE CHIEF STATE

LAW ADVISOR
INTERNATIONAL LAW



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INTRODUCTION

The process of the negotiation and conclusion of agreements and its traditional format developed through the ages. Individual countries customized these procedures to accommodate their constitutional requirements.

Because of the dissimilarity in the constitutional requirements of countries, absolute uniformity of procedures in the conclusion of agreements is not viable, and no uniform rules and regulations determining procedures for the conclusion and binding of agreements exist. Countries developed their own practice over the years especially with regard to the binding of agreements and, due to the increasing number of agreements concluded, a certain degree of uniformity in procedures for the binding of these documents has developed.

It is accepted state practice that before agreements are signed, they are bound and sealed. By sealing the agreement parties confirm that the text so bound and sealed is the final version of the agreement before them, and binding on them.

If the seal on the agreement is broken, doubt could be cast on the validity of the text.

It should be noted that all international agreements, regardless of the name thereof, e.g. Memorandum of Understanding, Agreement, Treaty, Convention, Protocol, Accord, Exchange of Notes, etc. are covered by the term “agreement” used in this guide.

TREATY PRACTICE IN SOUTH AFRICA

The Constitution of South Africa, 1996 makes provision for the conclusion of agreements in section 231 thereof.

- Section 231(2): An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub section (3)
- Section 231(3): An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the National Executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

On 8 August 2007 Cabinet confirmed the South African Treaty Section in the Office of the Chief State Law Advisor (International law), (hereinafter referred to as OCSLA (IL)), within the Department of International Relations and Cooperation as the official custodian of all agreements that South Africa is a party to.

This means that the Treaty Section acts as the depositary of all agreements and that it has to fulfil all depositary functions. All signed original agreements or any other documentation with regard to the status of agreements has to be deposited with the Treaty Section, by line function departments.

For more information on the South African treaty practice and procedures, consult Chapter 5 of the “Manual on Executive Acts of the Office of the President of South Africa - revised version” and the Practical Guide and Procedures for the Conclusion of Agreements - third edition” by OCSLA (IL) in the Department of International Relations and Cooperation.

BINDING PRACTICE IN SOUTH AFRICA

- The South African Treaty Section in the OCSLA (IL) binds and seals all international agreements;
- The host country where the signature of the agreement takes place usually assists the visiting country with the binding of agreements;
- When an agreement is signed in one language i.e. English, only two copies are bound. One copy with South Africa's name first on the title page as well as in the text, is printed on South African treaty paper and then bound in the South African treaty cover; the second copy with the other Party's name first, is printed on South African treaty paper and then bound in the South African treaty cover;
- If the other party so prefers, its own treaty paper and treaty cover may be used.

This method is known as the “alternat” method.

When agreements are printed in both languages, e.g. English and French, two copies are bound, containing both languages. One copy will feature South Africa's name first, with the English language followed by the French language. The other copy will feature France's name first, with the French language first, followed by the English language.

In some cases it can be arranged that South Africa will print and bind two copies in English using the “alternat” method and the other Party will bind two copies in their official language also using the “alternat” method. Copies can then be exchanged at the signing ceremony so that both Parties have original texts in both the languages with their country's name first.

The DIRCO desk and line function department should clear the preferred binding method with the other Party before the agreement is bound.

PROCEDURE BEFORE BINDING OF AGREEMENTS

Once the final text of the agreement has been negotiated by the responsible line function department:

- An opinion on the agreement's consistency with domestic law must be obtained from the State Law Advisors of the Department of Justice and Constitutional Development;
- An opinion on the agreement's consistency with international law and South Africa's international obligations must be obtained from the State Law Advisors in OCSLA (IL) via the relevant desk;
- The responsible line function department must prepare a President's Minute for signature by both the responsible line function Minister and the President (see Annex 1) ;
- The text of the unsigned President's Minute, a short explanatory memorandum, the two legal opinions and a copy of the agreement (documents in twofold) and contained in a Z137 folder, must be hand delivered to the OCSLA (IL) for certification in accordance with the prescribed procedures.

Certification means that the OCSLA (IL) affix the official stamp on the final, agreed text of the agreement indicating that the agreement is acceptable to be submitted for the President's approval.

After certification the line function department takes the certified agreement, legal opinions of both departments, explanatory memorandum, text of the President's Minute that has been signed by the responsible Minister, in the Z137 folder, and submit it to the Presidency for necessary approval. In the case of a multilateral agreement, a Minister's certificate is required as indication that the agreement is a true copy (see Annex 3).

Please note that no changes can be made to the text of the agreement once the President's Minute has been signed and no agreement may be bound or signed without this approval.

PREPARATION OF TEXT OF AGREEMENTS FOR BINDING

All agreements must be bound before signature. The South African Treaty Section in the OCSLA (IL) of the Department of International Relations and Cooperation is responsible for the binding of all international agreements and Instruments of Ratification. The Treaty Section also assists departments with the binding of non-binding agreements, such as Declarations of Intent.

The line function department or political desk in the Department of International Relations and Cooperation has to provide the Treaty Section with the finalised electronic text of the agreement for printing and binding.

The text must be in the following format:

Title page:

- Only the title of the agreement appears on the first page of the agreement (see Annex 5);
- Times New Roman font, size 18, bold is applied;
- The left margin is 4,7 cm;
- The right margin is 2 cm;
- See annex 5 for example.

Text of agreement:

- Times New Roman font, size 12, regular is applied;
- The left margin is 4,7 cm;
- The right margin is 2 cm;
- Spacing of articles must be uniform and the numbering of the articles must be numerical e.g. Article 1, Article 2, etc.

BINDING OF AGREEMENTS BY TREATY SECTION

The Treaty Section will commence with the printing, binding and sealing of the agreement once it has received:
the finalised text in electronic format; and
a copy of the signed President's Minute.

Electronic copies can be e-mailed to: favierl@dirco.gov.za
mantyin@dirco.gov.za
meyiwae@dirco.gov.za
vanderwaltr@dirco.gov.za

AGREEMENTS CAN NOT BE BOUND WITHOUT THE PRESIDENT'S MINUTE

The Treaty Section will inform the line function department when the bound agreement is ready for collection.

Line function departments can also make an appointment with the Treaty Section for binding in cases of urgency. The Treaty Section can be contacted at tel 012 351 0872/0851/0837/0726 during office hours.

Once the agreement has been sealed, the seal should not be broken as it can cast doubt on the validity of the text.

AT THE SIGNING CEREMONY

- On the day of the signing of the agreement, the date and place of signature are filled in by hand on the text of the agreement, in the space provided for this purpose. This is done neatly in black ink;
- During the signing ceremony the South African agreement is placed in front of the South African representative (usually the Minister), and the other party's agreement placed in front of its representative. Each representative signs the text in the space provided for this purpose;
- The copies are then exchanged and countersigned;
- After the two representatives have signed both the agreements, it is exchanged again.

Each country should now have the agreement with its own name appearing first.

INSTRUMENT OF FULL POWER

An Instrument of Full Power (see Annex 4) “means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing consent to be bound by a treaty, or for accomplishing any other act with respect to a treaty.” (Vienna Convention on the Law of Treaties, 23 May 1969, 1155, U.N.T.S, p. 331)

It is sometimes required of ministers to sign an agreement that is drafted and adopted at conferences. For this procedure an Instrument of Full Power (see Annex 4) as well as a President's Minute is required.

The President's Minute contains the approval to sign the agreement in terms of South African constitutional procedures. A full power is an internationally accepted and required document that conveys that the person to sign the agreement, has indeed been authorised to bind South Africa internationally.

DEPOSITING OF AGREEMENTS AFTER SIGNATURE

The South African Treaty Section in the OCSLA (IL) is the official custodian of all international agreements that South Africa is a party to and keeps the South African Treaty Register which is the only official record of all bilateral and multilateral agreements up to date.

It is of the utmost importance that:

- The original copy of every agreement along with the President's Minute, after signature, must be deposited with the Treaty Section for record keeping and registration at the United Nations.
- In the case of multilateral agreements where the original copy is not available, a certified copy must be deposited with the Treaty Section, as well as a signed copy of the Instrument of Ratification or Accession, and the proof of Parliament's approval, for such ratification or accession.
- Every action that causes a change in the status of an agreement must be reported and the relevant documents sent to the Treaty Section without delay.

These documents include:

- Parliament's approval (both Houses) to ratify or accede to an agreement;
- Copies of Instruments of Ratification or Accession;
- Depositary notifications;
- Entry into force dates;
- Termination or any other relevant information.

REGISTRATION OF AGREEMENTS AT UNITED NATIONS

Article 102 of the Charter of the United Nations stipulates that every member state has to register its agreements with the Secretariat of the United Nations after the entry into force thereof. This is the responsibility of the Treaty Section.

TABLING OF AGREEMENTS

All agreements have to be tabled in Parliament. Agreements falling within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996 requires tabling and approval of the National Assembly and the National Council of Provinces. Agreements falling within the ambit of section 231(3) requires tabling for information purposes only. Tabling is the responsibility of the line function department. Guidelines on the procedures for tabling of papers are available on the Parliamentary web site. (See <http://www.parliament.gov.za/content/TABLINGGUIDE.pdf>)

INSTRUMENT OF RATIFICATION/ACCESSION

After approval from both Houses of Parliament have been obtained in cases of section 231(2) agreements for ratification or accession, the line function department compiles an Instrument of Ratification or Accession that is approved by the OCSLA (IL). This Instrument must be signed by the Minister of International Relations and Cooperation after which the relevant desk in DIRCO will deposit the Instrument with the depositary of the agreement.

PUBLISHING OF AGREEMENTS IN THE GOVERNMENT GAZETTE

It is recommended, but not constitutionally prescribed that the texts of Agreements ratified and the extent of its incorporation in South African law, are published in the Government Gazette.

Agreements addressing the immunities and privileges of states or international organizations require publishing in the Government Gazette. The full text of the agreement, or relevant sections addressing immunities and privileges are published together with a note from the Minister of International Relations and Cooperation in terms of the Diplomatic Immunities and Privileges Act, 37 of 2001 through which the immunities and privileges in terms of the Agreement are accorded (see Annex 2).

ANNEX I

Example of a President's Minute



81/172488
(Z19E)

PRESIDENT'S MINUTE NO.

In terms of Section 231 of the Constitution of the Republic of South Africa, 1996 I hereby approve that the attached agreement on.....between the Republic of South Africa and (country) be entered into, and I hereby authorise the Minister of to sign the agreement.

Given under my Hand and the Seal of the Republic of South Africa
at (place) on this day of (month)
Two Thousand and Ten.

PRESIDENT

MINISTER OF THE CABINET

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ANNEX 2

Example of a Minister's Note

In accordance with the powers vested in me by section 5(3) of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), I hereby recognise the United Nations Office for Project Services for the purposes of granting the immunities and privileges as provided for in the Agreement between the United Nations Office for Project Services (UNOPS) and the Government of the Republic of South Africa as set out in the Notice.

Maite Nkoana-Mashabane

Minister of International Relations and Cooperation

Date: _____

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ANNEX 3

Example of a Minister's Certificate

(Ministerial Letterhead)

CERTIFICATE BY THE MINISTER OF

I,, in my capacity as Minister of

..... of the Republic of South Africa, hereby certify

that the attached document is a true version of the Agreement on and forms part

of President's Minute No of

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INSTRUMENT OF FULL POWER

WHEREAS the Republic of South Africa and the Federal Republic of Germany have negotiated the Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital Between South Africa and Germany (“the Agreement”);

AND WHEREAS the Parties to the Agreement intend to sign the said Agreement;

AND WHEREAS it is expedient that a fit and proper person be invested with Full Powers to sign, subject to ratification, the Agreement on behalf of the Government of the Republic of South Africa;

NOW THEREFORE I, JACOB GEDLEYIHLEKISA ZUMA President of the Republic of South Africa, do hereby declare that I have authorised and appointed, and do by this Instrument authorise and appoint, the Minister of Finance with Full Powers to sign, subject to ratification, the Agreement on behalf of the Government of the Republic of South Africa.

IN WITNESS WHEREOF I have signed this Instrument at Pretoria on this day of Two Thousand and Ten.

**JACOB GEDLEYIHLEKISA ZUMA
PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

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ANNEX 5

Example of the title page of an agreement



**AGREEMENT
BETWEEN THE

GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA

AND
THE GOVERNMENT OF THE KINGDOM OF
BELGIUM

ON AIR SERVICES**

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TERMS COMMONLY USED IN RELATION TO AGREEMENTS

Acceptance/ Approval	The act whereby a State indicates its consent to become a party to a treaty. Acceptance/Approval are specifically provided for in a treaty and can take the form of a letter or a standard format prescribed by the treaty itself.
Accession	The act whereby a State that has not signed a treaty expresses its consent to become a party by depositing an instrument of accession. Accession has the same legal effect as ratification.
Adoption	The formal act by which negotiating parties establish the form and content of a treaty. The treaty is adopted through a specific act expressing the will of the States by voting on the text, initialling, signing, etc.
Consent to be bound	A State expresses its consent to be bound by a treaty under international law by some formal act, i.e. definitive signature, ratification, acceptance, approval or accession.
Credentials	Credentials is a document issued by a State authorising a delegate or delegation of that State to attend a conference, including where necessary, for the purpose of negotiating and adopting the text of a treaty.
Depositary	The depositary of a treaty is the custodian of the treaty and is entrusted with the functions specified in article 77 of the Vienna Convention 1969.
Entry into force	The moment in time when a treaty becomes legally binding on the parties to a treaty.

TERMS COMMONLY USED IN RELATION TO AGREEMENTS

Exchange of Notes

May embody a bilateral treaty commitment. The signatures of both parties appear on two separate Notes. The agreement lies in the exchange of these Notes, each of the parties retaining one Note signed by the representative of the other party. In a bilateral treaty the parties may also exchange Notes to indicate that they have completed all domestic procedures necessary to implement the treaty.

Ratification

The act undertaken on the international plane, whereby a State that has signed the treaty confirm its consent to be bound by a treaty. This is done by depositing an instrument of ratification with the depositary. This should not be confused with the act of ratification at a national level which a State may be required to undertake, in accordance with its own constitutional provisions.



OFFICE OF THE CHIEF STATE LAW ADVISOR (IL)
DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION
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