

National Interest Analysis [2012] ATNIA 23

with attachment on consultation

**Agreement Establishing the African Development Fund,
done at Abidjan on 29 November 1972, as amended
[2012] ATNIF 17**

and

**Agreement Establishing the African Development Bank,
done at Khartoum on 4 August 1963, as amended
[2012] ATNIF 18**

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Agreement Establishing the African Development Fund, done at Abidjan, Côte d'Ivoire on 29 November 1972 as amended [2012] ATNIF 17; and

Agreement Establishing the African Development Bank, done at Khartoum, Sudan on 4 August 1963 as amended [2012] ATNIF 18

Nature and timing of proposed treaty actions

1. It is proposed that Australia sign and ratify the *Agreement Establishing the African Development Fund* as amended (AfDF Agreement) and the *Agreement Establishing the African Development Bank* as amended (AfDB Agreement). While the relevant provisions suggest, on the face of it, that accession alone would meet the requirements of the AfDB Agreement, firm advice to Treasury from the African Development Bank (AfDB) is that it expects Australia to sign and ratify both Agreements.

2. Australia must first become a State Participant in the African Development Fund (AfDF; the AfDB Group's concessional arm) before it is eligible to become a member of the AfDB (Article 3(3) of the AfDB Agreement). In practice, both treaty actions will be progressed concurrently. The term 'the AfDB Group' in this National Interest Analysis collectively refers to the AfDF and the AfDB.

3. The relevant treaty actions will be undertaken in the following order. First, Australia will lodge a letter with the AfDB Group indicating Australia's intention to become a party to the AfDF and AfDB Agreements and outlining the size of membership contributions that Australia will make (Terms of Membership). Second, following negotiations with the AfDB Group and approval of the Terms of Membership by the Board of Governors of the AfDF and the AfDB, Australia will sign the AfDF Agreement and the AfDB Agreement. Third, following the passage of necessary legislation, Australia will lodge instruments of ratification for the AfDF Agreement and the AfDB Agreement with the AfDB and the Secretary-General of the United Nations respectively.

4. Australia's membership of the AfDF and the AfDB will become effective on the date of deposit of the relevant instrument (Article 57(2) of the AfDF Agreement, Article 3(3) of the AfDB Agreement, and the general rules established by the Board of Governors). It is intended that Australia will lodge such instruments of ratification between 1 July 2014 and 30 June 2015.

5. Subject to approval by the Government, upon depositing its instruments of ratification Australia will make a reservation that it retains the right to tax salaries and emoluments of Australian citizens, nationals or residents who work at the AfDF or AfDB (Article 58(2) of the AfDF Agreement and Article 64(3) of the AfDB Agreement). However, consistent with the current tax treatment of Australian staff working at other international development institutions, the Government may elect not to exercise this right.

Overview and national interest summary

6. The purpose of these treaty actions is to allow Australia to become a member of the AfDB Group. Australia intends to have an active membership and contribute to the AfDB Group both financially and through participating in its governance.

7. Addressing poverty is the core mandate of the AfDB Group and is the fundamental purpose of Australia's aid program. AfDB Group priorities are well aligned with the aid program's strategic goals as set out in Australia's Comprehensive Aid Policy Framework and also with Australia's current approach to delivering aid in Africa.

8. Membership of the AfDB Group would place Australia in a good position to participate in and influence Africa's development as a continent through a respected and credible regional institution. Australia is well placed to develop a strategic, distinctive and productive partnership with the AfDB Group.

9. The Australian Multilateral Assessment (AMA) concluded that "the Australian Government can have a reasonably high degree of confidence that increases in the AfDB core funding will deliver tangible development benefits in line with Australia's development objectives, and that the investment will represent good value for money." (The AMA is conducted by AusAID every five years, with a minor update in each of the intervening four years.) Through the AfDB's Annual Development Effectiveness Review the AfDB has demonstrated that it is a valuable contributor to Africa's development and Australia's own assessment supports this.

10. The AfDB Group focuses on areas critical to Australia's national interest. Other groups work in a similar or expanded space, for example, the World Bank or European Union (EU). However, Australia is already a member of the World Bank and Australia cannot join the EU. Simply increasing project level funding to, for example, the World Bank will not advance Australia's interests to the same extent as membership of the AfDB, nor would increasing levels of project funding be likely to help Australia's reciprocal global agenda to the same degree, as these options would not provide Australia with any degree of representation or influence over policy and programming in Africa. Other potential partners, including civil society groups, simply cannot operate on the scale or in the range of areas that the AfDB works.

11. Membership of the AfDB will also give Australia access to new networks in Africa, which can assist in pursuing Australia's multilateral interests, including trade liberalisation, climate change, human rights and peace and security. It would also be consistent with Australia's role as a developed Group of Twenty (G20) economy and Organisation for Economic Co-operation and Development (OECD) member, and reinforce Australia's increased policy dialogue and practical cooperation in Africa.

12. Further, AfDB membership will assist in creating business opportunities for Australian companies via procurement opportunities and infrastructure development.

13. As a shareholder, Australia could contribute to the governance of the AfDB and, in partnership with like-minded members, continue to push for ongoing reforms and improvements in operational and development performance.

Reasons for Australia to Take the Proposed Treaty Action

Background

14. Africa's role in the world is growing in importance. Between 2001 and 2010, its economic growth outstripped the global average, with total Gross Domestic Product of all African nations growing by an annual average of 5.2 per cent. However, immense challenges remain. Africa is the continent with the highest proportion of people living in extreme poverty. By 2015, 40 per cent of the world's extreme poor are expected to be living in Africa. Sub-Saharan Africa is the region least likely to meet the Millennium Development Goals.

15. The AfDB Group is majority African-owned and led (60 per cent of capital is owned by African countries and once the current General Capital Increase is paid-up the largest shareholder will be Nigeria at about 9.3 per cent, followed by the US at about 6.6 per cent), and therefore has access to key African stakeholders that other development partners do not. This helps the Group to better understand Africa's development challenges and so offer better solutions. Membership of the AfDB Group would improve Australia's knowledge base and development expertise in Africa.

16. In 2010, AfDB members expressed confidence in the Group's capacities, agreeing to a 200 per cent capital increase and pledging a total of US\$9.5 billion for the AfDB's 2011-2013 replenishment. Members commended the AfDB Group for progressing reforms to improve its focus on development results.

Advantages of the proposed treaty action

17. There is a strong congruence between the AfDB's medium term strategic direction and AusAID's current strategic focus in Africa. Indeed, Australia already works with the AfDB, providing \$13.4 million in joint funding to AfDB projects in 2011-12.

18. Aid to sub-Saharan Africa is forecast to expand from \$291 million in 2012-11 to an estimated \$500 million in 2015-16, with Australia's Comprehensive Aid Policy Framework suggesting that this funding be channelled mainly through effective multilateral partners who have experience in the African region.

19. The AMA confirmed that the AfDB Group is an effective organisation delivering strong, tangible results at a country level and in support of regional integration. It rates the AfDB Group as 'strong' on its contribution to the wider multilateral system and its alignment with Australian aid program priorities, and between 'satisfactory' and 'strong' on its organisational strengths. Other ratings exercises, such as the UK Multilateral Aid Review, produced similar assessments. This indicates that the AfDB Group would be an excellent partner in delivering Australia's aid to Africa.

20. In 2011 the AfDB Group released its first Annual Development Effectiveness Review, assessing its development impact over 2008-2010. The report showed 76 per cent of operations had reached or surpassed their goal, making a strong contribution to Africa's development.

21. Between 2009 and 2011 the AfDB Group has contributed to Africa's development in the following ways:

- providing 12,483,000 people with new or improved access to water and sanitation and constructing or rehabilitating 38,614 latrines;
- 228,770 students newly enrolled at school and 107,728 teachers and education staff recruited and/or trained;
- supplying close to 14 million textbooks and teaching materials;
- 9,478km roads and 15,474km feeder roads were constructed, rehabilitated or maintained;
- 1,065,963 rural people trained, recruited, using improved agricultural technology; and
- 12,829,000 people benefitting from access to microfinance.

22. Given the AfDB's legitimacy and credibility among African Governments, membership would signal Australia's intent to become a long-term partner in Africa's development. Membership of the AfDB Group would allow Australia to forge deeper and stronger links with African governments and become a true and trusted partner. Australia will be able to build upon the AfDB Group's unique position in Africa as a majority African-owned development bank to better form partnerships with African Governments.

23. The AfDB Group is also an increasingly important component of the global multilateral system so membership would contribute to Australia's global standing. It would also be consistent with Australia's role as a developed G20 economy and OECD member. Australia is one of only a few major OECD members, and the only developed G20 member, not a member of the AfDB Group.

24. Membership will: lend support to an organisation focussed on sustainable economic growth; help to build an improved and expanded trade platform for Australian companies; and create profile and opportunities for Australian business in Africa. Procurement for AfDB projects is currently restricted to AfDB Group members only. If Australia becomes a member, Australian firms will be able to bid for AfDB work in all 54 African member nations, working alongside African governments, businesses and local communities.

Obligations

Financial

25. Upon becoming a participant in the AfDF, Australia is required to make an initial subscription to the AfDF (Article 6 of the AfDF Agreement). Upon becoming a member of the AfDB, Australia is required to make an initial capital contribution to the AfDB (Article 7 of the AfDB Agreement). As Australia is seeking to join both bodies simultaneously, the AfDB has requested that a commitment be made to pay Australia's initial contribution to the AfDF in full, in the form of a single promissory note (although this payment will be drawn down over 8 years). This would allow Australia to join the AfDB immediately on admission to the AfDF instead of waiting three years, as would be the case if Australia's initial contribution were paid in annual instalments in accordance with Article 6.2 of the AfDF Agreement.

26. The estimated amounts of Australia's initial subscription to the AfDF, initial capital contribution to the AfDB, and Australia's other financial obligations are outlined below at paragraphs 32 through 38.

27. Article 13 of the AfDF Agreement and Article 28 of the AfDB Agreement would require Australia to maintain the value of currency holdings at the AfDF and AfDB. If, in the opinion of the AfDF or AfDB, the currency used by Australia to make its payments to each institution were to appreciate or depreciate significantly, Australia shall either be reimbursed (in the case of appreciation) or be required to make further payments (in the case of depreciation) in order to maintain the value of its holdings.

Governance

28. Australia would be obliged to abide by the governance arrangements set out in Chapter V of the AfDB Agreement and Chapter VI of the AfDF Agreement, including (but not limited to) representation, voting rights and financial arrangements.

Implementation

29. To enable Australia to ratify the AfDF and AfDB Agreements and to make financial contributions to the AfDF and AfDB, new enabling legislation is required. This legislation will prescribe the conditions under which Australia's initial and future contributions are made.

30. If a policy decision is taken not to exercise the right to tax Australian staff working at the AfDB, legislation would be required to provide the tax exemption under Australian domestic law. Specifically, regulations would need to be made under the *International Organisations (Privileges and Immunities) Act 1963*. The regulations would provide for categories of employees of the AfDB Group to be entitled to privileges and immunities under domestic law (including tax exemptions on salaries and emoluments).

31. Consistent with management of Australia's relationship with other multilateral development banks, Treasury will manage the relationship between Australia and the Board of Governors (including Governors' votes), the Board of Directors, and payment of capital to the AfDB, while AusAID will manage the relationship on operational matters with the AfDF and AfDB, as well as the AfDF replenishment rounds.

Costs

32. The final estimate of the initial contributions to the AfDF and AfDB are yet to be determined by the Government. The minimum and maximum amounts are outlined by the AfDB and relate to Australia's economic size relative to other donors. Payments are denominated in International Monetary Fund Special Drawing Rights (SDR) and therefore subject to exchange rate movements between Australian dollars and SDR.

33. The AfDB currently estimates the minimum initial payment to the AfDF would be approximately SDR106 million (A\$165 million) drawn down over eight years, with the initial capital subscription to the AfDB being between approximately SDR29.6 million (A\$46 million) and SDR59.2 million (A\$92 million) drawn down over eight years. The figures in brackets are the approximate cost in Australian dollars at May 2012 exchange rates.

34. In relation to the AfDF, each State participant is given an opportunity to make regular additional contributions (in the form of individual subscriptions) which would allow the participant to maintain its relative voting power (Article 7(2) of the AfDF Agreement). While there is no legal obligation to make such payments (Article 7(3) of the AfDF Agreement), there is an expectation that Australia will make such regular additional contributions to the AfDF at the three-yearly replenishment meetings. The size and conditions around these payments would be decided by the Australian Government, in consultation with the AfDF and its other donor countries.

35. Similarly, in relation to the AfDB, each member has the right to purchase newly issued shares (which may arise through a general or special capital increase). While there is no obligation to purchase such shares (Article 6(2) of the AfDB Agreement), there is the general expectation that members will purchase such shares. Capital increases are approved by the Board of Governors.

36. As part of its initial contribution, Australia will take on a contingent liability ('callable capital') with the AfDB of between SDR463 million (approximately A\$721 million) and SDR926 million (approximately A\$1.4 billion), which would be called on if the AfDB is unable to meet its financial liabilities. Should the AfDB require this extra capital, members will be required to contribute from their callable capital in proportion to their holding of AfDB shares. The AfDB has never called on this extra capital, nor has any other multilateral development bank with similar provisions for callable capital.

37. If Australia ceased to be a member of the AfDB, subject to certain conditions, the AfDB would arrange for the repurchase of Australia's shares at the value shown by the books of the AfDB on the termination date (Article 45(2) and 45(3) of the AfDB Agreement).

38. If Australia ceased to be a member of the AfDF, the AfDF and Australia would proceed to a settlement of accounts and agree on the amount to be paid to Australia on account of its subscription (Article 39(2) of the AfDF Agreement). If no such agreement is reached within 6 months from the date on which Australia ceased to be a member of the AfDF, or such later date as agreed, the AfDF Agreement provides that, among other provisions, the AfDF shall return to Australia its subscription or the principal repayments derived therefrom and held by the AfDF on the date on which Australia ceased to be a member of the AfDF, except to the extent that, in the opinion of the AfDF, such funds will be needed by the AfDF to meet its financial commitments (Article 39(3) of the AfDF Agreement).

Regulation Impact Statement

39. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

Future Treaty Action

40. The relevant Board of Directors, a member country, or a Governor can propose amendments to the AfDB or AfDF Agreements at any time (Article 60 of the AfDB Agreement and Article 51 of the AfDF Agreement), which will then be considered by the Board of Governors.

41. Article 60 of the AfDB Agreement provides that if the proposed amendments are approved by the Board of Governors, subject to the exception mentioned below, the amendments need to be accepted by at least two-thirds of the AfDB's members, having three-quarters of the total voting power of the members, including two-thirds of the regional members having three-quarters of the total voting power of the regional members. The AfDB will then communicate the acceptance to members. However, Article 60(3) provides that acceptance by all members is required for any amendment modifying the right of members to subscribe to a proportion of increased capital stock (Article 6(2) of the AfDB Agreement), the limitation of liability to the unpaid portion of the issue price of shares (Article 6(5) of the AfDB Agreement) or the right to withdraw from the AfDB (Article 43 of the AfDB Agreement). The AfDB will formally communicate the acceptance of any proposed amendment to the members. Amendments enter into force for all members three months after the date of such communication unless the Board of Governors specifies a different period (Article 60(4) of AfDB Agreement).

42. Article 51 of the AfDF Agreement provides that, if the proposed amendments are approved by the Board of Governors, the amendments need to be accepted by at least three-fourths of the AfDF's participants having eighty-five per cent of the total voting power. The AfDF will then communicate the acceptance to members. Amendments enter into force for all members three months after the date of the formal communication unless the Board of

Governors specifies a different period or date (Article 51(1) of the AfDF Agreement). In addition, Article 51(2) specifies that the unanimous approval of the Board of Governors is required for the approval of any amendment modifying the limitation on liability (Article 10 of the AfDF Agreement), the subscription of additional funds (Articles 7(2) and 7(3) of the AfDF Agreement), the right to withdraw from the AfDF and the voting majority requirements contained in the AfDF Agreement.

43. Pursuant to Article 58 of the AfDF Agreement, reservations can be made in respect of certain matters when Australia deposits its instrument of ratification, including that Australia retains the right to tax salaries and emoluments paid by the AfDF to Australia's citizens, nationals and residents (which can also be the subject of a reservation under Article 64(3) of the AfDB Agreement). As noted in paragraph 5 above subject to Government approval, Australia intends to make (but not action) such a reservation.

Withdrawal or Denunciation

44. Article 43 of the AfDB Agreement sets out the procedure for withdrawal from the AfDB. It provides that any member may withdraw from the AfDB Agreement at any time by transmitting a notice in writing to the AfDB at its principal office. The withdrawal would become effective on the date specified in the written notice, but no less than six months after the date that notice was received by the AfDB.

45. Article 37 of the AfDF Agreement provides the procedure for withdrawal from the AfDF. It provides that any participant may withdraw from participation in the AfDF at any time by transmitting a notice in writing to the AfDF at its principal office. The withdrawal would become effective on the date such notice is received, or upon the date specified in the notice, provided that it is not more than six months after the date of the notice.

46. Any decision to withdraw from either the AfDB Agreement or the AfDF Agreement would be subject to Australia's domestic treaty process.

47. If Australia withdraws from the AfDF Agreement, it will remain liable for all financial obligations undertaken by it to the AfDF (Article 39(1) of the AfDF Agreement) during its membership. If Australia withdraws from the AfDB Agreement, it will remain liable for its direct obligations and contingent liabilities to the AfDB so long as any part of the loans or guarantees contracted before the termination date is outstanding (Article 45(1) of the AfDB Agreement).

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ATTACHMENT ON CONSULTATION

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CONSULTATION

48. Between 17 July and 14 August 2012, AusAID and Treasury undertook a public consultation process to gauge the views of the Australian public. The consultation process was advertised in the newspaper, through a joint media release by the Deputy Prime Minister and Treasurer and the Minister for Foreign Affairs and on the AusAID website.

49. The Agency received three (3) responses to the request for submissions. Submissions were received from the Australia-Africa Mining Industry Group (AAMIG), the International Road Assessment Programme (iRAP) lobby group, and SMEC International Pty Ltd.

50. AusAID and Treasury engaged with the NGO peak body, Australian Council for International Development (ACFID) to gather responses from the international development NGO community. ACFID did not receive any responses. ACFID advised that this did not mean that the Australian development NGO community was not interested in the Government's proposal.

51. All submissions reacted positively to the proposal and recommended Australia pursue membership of the AfDB Group.

52. Respondents noted:

- that the AfDB Group is “effective in addressing poverty and development challenges in Africa” (iRAP). “[M]embership would provide Australia with the opportunity to engage in a policy dialogue on key development issues and to see how other member countries see African development challenges and priorities” (AAMIG).
- that “the AfDBs [sic] priorities include support for the drivers of strong and more equitable growth – including through infrastructure, economic integration, private sector operations, governance and higher education” which reflected “....Australia’s strategic goals for its aid programs....” (AAMIG).
- “that Australia becoming a member of the AfDB and AfDF is definitely in Australia’s national interest and fully supports Australia’s membership plans...”(iRAP).
- that “[w]e (the Australia) [sic] must be in the forefront of global movement for building a world which is more fair and equitable for all its citizen [sic]. Contribution to such effort will automatically result in us benefiting from such an effort both in material

pursuit and satisfaction from contributing to betterment of the world.” (SMEC International Pty Ltd)

53. The iRAP submission highlighted that “Australia’s membership will accelerate the pace at which poverty reduction through safe and sustainable development is achieved [sic]. Australia’s involvement will reflect our ability and desire to be a global leader in the development space and support our ongoing leadership within the G20 and OECD nations. Supporting the African Development Bank direct will avoid aid fragmentation as recommended in the aid effectiveness review, and will ensure effective deployment of Australian resources.”