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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

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Mr GJ Smith
Email: Smithg@dirco.gov.za

POSSIBLE RATIFICATION OF THE INTERNATIONAL TELECOMMUNICATIONS REGULATIONS OF 2012

1. Your request for legal advice, dated 11 March 2015, together with our correspondence over the period 19 March 2015 to 27 March 2015 refers.
2. On 27 March 2015, we were provided a copy of the International Telecommunications Regulations, 2012 (the "Regulations") via reference to the webpage <http://www.itu.int/en/sama/Pages/download.aspx?pub=S-CONF-WCIT-2012-PDF-E>. We have reviewed the Regulations from an international law perspective. We take note of the comments of the Department of Justice and Constitutional Development ("DOJ&CD") regarding the compatibility of the Regulations with South African law.

Ratification of the Regulations

3. Article 14.1 of the Regulations provide that the Regulations (which includes Appendices 1 and 2) will enter into force on 15 January 2015. However, the Article does not contain any further guidance regarding the requirement for ratification of the Regulations. For this, it is necessary to turn to the Constitution of the International Telecommunication Union (the "Constitution"), which entered into force for South Africa on 1 July 1994.
4. In accordance with Article 4 of the Constitution, the Regulations form part of the International Telecommunication Union's (the "Union") Administrative Regulations. Article 25 of the Constitution provides that a world conference on international telecommunications may partially, or in exceptional cases, completely revise the Regulations. Article 54 of the Constitution determines that Administrative Regulations are binding international instruments. Article 54 then proceeds to set out the procedure for ratification of Administrative Regulations:
 - 4.1. In terms of Article 54.3, revisions of the Regulations shall, to the extent permitted by local law, apply provisionally in respect of all Member States that have signed the revision.

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4.2. Article 54.4 further provides that the provisional application shall continue until either a Member notifies the Secretary-General of its consent to be bound by the revision, including any reservations or declarations that the Member State intends to attach, or until 60 days after receipt by the Secretary-General of a notification by the Member State informing him that the State does not consent to be bound by the revision.

In other words, at this point, as a signatory to the revision, the Regulations are being provisionally applied to South Africa, until such time as South Africa either ratifies the Regulations, or informs the Secretary-General that it does not consent to be bound by the Regulations.

5. Importantly, the line function department should keep in mind that Article 54.5 of the Constitution provides that after a period of 36 months following the revision, if a State has not either ratified the revision or given notification that it does not intend to be bound by the revision, that State shall be deemed to have consented to be bound by the revision. Effectively, therefore, if the ratification process is not completed 36 months after 15 January 2015, South Africa will, under international law, be deemed to have the same obligations as a State that has ratified the Regulations, regardless of whether South Africa's internal processes have been completed or not.

Classification of the Regulations

6. We are of the view that the Regulations fall within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996, requiring parliamentary approval for ratification. Parliament's approval needs to be obtained **before** the Regulations can be ratified.

7. In order to obtain Parliamentary approval the Regulations need to be certified by this Office. The documentation required for certification consists of:

- two copies of the President's Minute;
- two copies of the Explanatory Memorandum setting out the purpose of the Regulations and proposed date of signature;
- two copies of the finally agreed text of the Regulations;
- two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and this Office;
- Completed certification form (attached herewith)
- all documentation in folder Z137.

8. Once the President has signed the Minute, the Regulations cannot be amended in any way. With regard to the Regulations, being an exception to the general rule stated here, the Presidential Minute was obtained before the Regulations were negotiated, as the Regulations had to be signed at the negotiating conference. Although exceptional in nature, this process is acceptable.

9. Following the process to obtain the Presidential Minute, the Protocol must be submitted to Parliament in the following manner :

9.1. Approach the relevant cabinet portfolio committee :

The line function department must prepare a Cabinet Memorandum. The various Cabinet Committees may have their own requirements for the format of Cabinet Memoranda. The usual headings required are: Subject; Purpose; Summary; Discussion; Organisational and Personnel Implications; Financial Implications; Communication Implications; Constitutional Implications; Other Departments/Bodies consulted; Recommendations.

9.2. The Regulations must be considered by Parliament (National Assembly and National Council of Provinces) :

9.2.1.1. The line function department must prepare an Explanatory Memorandum setting out the history, objectives and implications of the agreement;

- 9.2.1.2. The legal opinions from the State Law Advisors of both Departments (DOJ&CD and DIRCO) must be included;
- 9.2.1.3. It must be stated whether the Regulations contain any self-executing provisions in terms of section 231(4) of the Constitution;
- 9.2.1.4. The projected financial and other costs of the agreement must be set out;
- 9.2.1.5. The Explanatory Memorandum must contain all other information needed to take an informed decision.

9.3. In cases of treaties requiring an Instrument of Ratification, such Instrument of Ratification must be deposited with the Depository:

- 9.3.1.1. The Line Function Department must prepare the Instrument of Ratification;
- 9.3.1.2. The Minister of International Relations and Cooperation or the President must sign the Instrument of Ratification;
- 9.3.1.3. DIRCO will send the Instrument of Ratification to the relevant depository through the diplomatic channels.

9.4. The Regulations must be deposited with the Treaty Section at DIRCO :

The documents required are :

- A certified copy of the agreement;
- The President's Minute or Parliamentary authorisation
- Copy of the signed Instrument of Ratification (where applicable).

10. It is trusted that our comments would be of assistance to you.

**TANIA STEENKAMP HEFER
STATE LAW ADVISER (IL)**

**PRETORIA
27 MARCH 2015**

**CHECKLIST
FOR THE CERTIFICATION AND APPROVAL OF AGREEMENTS¹**

TITLE OF AGREEMENT: _____

RESPONSIBLE DEPARTMENT: _____

THE TEXT

- 1. Have all the changes from the State Law Advisers at DOJ&CD been effected? Yes No
- 2. If not, provide an explanation.

- 3. Have all the changes from the State Law Advisers (IL) at DFA been effected? Yes No
- 4. If not, provide an explanation.

- 5. Has the other Party been informed of the changes and agreed thereto? Yes No
- 6. Is this the finally agreed text? Yes No

CERTIFICATION DOCUMENTS

- 7. Does the Z137 coversheet reflect the title of the Agreement exactly as it appears on the text? Yes No
- 8. Does the President's Minute reflect the title of the Agreement exactly as it appears on the text? Yes No
- 9. Has the Agreement been proof-read and all typographical and spacing issues finalised i.e. text must be justified, title page with size 16 Times New Roman Font, Agreement with size 12 Times New Roman Font, two spaces between Articles, one space between sub-Articles. Yes No

SIGNATURE AND BINDING

- 10. What is the intended date and venue for signature of the Agreement?

¹ This checklist must be completed by the responsible line function Department and returned to OCLSA (IL) with the documents required for certification.

11. Has it been confirmed with the Minister authorised to sign the Agreement that he/she will be present at the signing ceremony?

Yes No

12. If the Agreement is to be signed also in another language the English and other language text will be bound together in one cover for South Africa. Has this been confirmed with the other Party?

Yes No

13. Will the other Party be providing their own bound text in English and in the other language?

Yes No

14. If no, what alternative arrangements are being made?

15. What arrangements are being made to return the Agreement to the Treaty Section at DFA after signature?

16. Contact details of person responsible for processing Agreement:

Name: _____

Title: _____

Telephone number: _____ Cell phone: _____

Fax: _____

17. Contact details of Chief Director of the division in the Department responsible for processing the Agreement:

Name: _____

Title: _____

Telephone number: _____ Cell phone: _____

Fax: _____

For the line function Department

For the Office of the Chief State Law Adviser (IL)

Signed: _____

Signed: _____

Name: _____

Name: _____

Date: _____

Date: _____