



international relations & cooperation

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RATIFICATION OF THE KIGALI AMENDMENT TO THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER

1. Your request for legal advice, dated 19 September 2017, regarding the abovementioned matter refers.
2. Please be advised that we have reviewed the text of the Amendment to the Montreal Protocol adopted by the 28th Meeting of the Parties to the Protocol in Kigali in October 2016 in Decision XXVIII/1 (“the Amendment”) from an international law perspective and are of the view that the Amendment is acceptable from an international law point of view and not in conflict with South Africa’s international obligations.
3. Please note that in terms of its Article IV, the Amendment shall enter into force on 1 January 2019, provided that at least twenty Parties to the Protocol have ratified, accepted or approved the Amendment.
4. Article II of the Amendment also requires that a ratifying Party be party to the 1999 Beijing Amendment. South Africa accepted the Beijing Amendment on 11 November 2004.
5. According to the UN Treaty Collection, there are currently nine countries that have ratified the Amendment.¹ It should be noted that one of the considerations that states often take into account when deciding to ratify a treaty is fair burden sharing, i.e. whether a sufficient number of other states are party to the treaty in question. Even if the minimum threshold for entry into force is reached, some states may withhold

¹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2-f&chapter=27&clang=_en

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ratification until such time as countries with greater capacity or historical responsibility have become party to the treaty.

6. Since the Amendment is subject to ratification, acceptance or approval, it falls within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996, requiring parliamentary approval for ratification. The Amendment potentially also requires enactment of domestic legislation, which *a fortiori* would bring it under the ambit of section 231(2). Parliament's approval therefore needs to be obtained before the Amendment can be ratified.
7. The line function department must ensure that any national legislation which may be required for the implementation of the Amendment is in place before the Amendment is ratified, otherwise the Amendment's eventual entry into force could place South Africa in breach of its obligations.² This is particularly important since the Amendment adds a category of greenhouse gases (HFCs) to the list of substances it controls, whereas applicable national legislation (e.g. the National Environmental Management: Air Quality Act 39 of 2004) and regulations may currently not include these substances.
8. In order to obtain Parliamentary approval the Amendment needs to be certified by this Office. The following documentation, submitted in a Z137 folder, is required for certification:
 - two copies of a draft President's Minute;
 - two copies of an explanatory memorandum setting out the purpose of the Amendment and proposed date of signature or date of adoption;
 - two copies of the finally agreed text of the Amendment;
 - two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and this Office; and
 - a completed certification checklist (attached herewith).
9. Following certification, the Presidency must be approached to obtain a President's Minute. A President's Minute is the instrument through which the National Executive (constituted by the President in conjunction with the responsible line-function Minister) grants prior authorisation in terms of section 231 of the Constitution for a Minister to sign an international agreement. Failure to obtain this approval amounts to constitutional non-compliance, and no powers to authorise the retrospective or *ex post facto* creation of a President's Minute exists. If an international agreement is signed without the necessary domestic/constitutional authorisation, it must be regarded as void in terms of South African law. It may also hold serious political and legal implications in that, contrary to the domestic law implications, international law may regard the international agreement as binding. It must also be noted that once the President has signed the Minute, the agreement cannot be amended in any way.

² A Aust (2007) *Modern Treaty Law and Practice* (2nd ed.), p. 103.

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10. Following the process to obtain the President's Minute, the Amendment must be submitted to Parliament for consideration. Both the National Assembly and the National Council of Provinces needs to approve the Amendment before it can be ratified. In order to obtain Parliamentary approval, the line function department must take the following steps:
 - 10.1. 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; and Recommendations.
 - 10.2. The Amendment must be submitted to Parliament (both the National Assembly and National Council of Provinces) with an explanatory memorandum and the legal opinions from the State Law Advisers of both DOJCD and DIRCO. The explanatory memorandum must contain the following information:
 - the history, objectives and implications of the Amendment;
 - the projected financial and other costs of the Amendment;
 - whether the Amendment contains any self-executing provisions in terms of section 231(4) of the Constitution; and
 - all other information needed to take an informed decision.
11. Once Parliament's approval of the Amendment has been obtained, the Amendment can be ratified by depositing an Instrument of Ratification with the depository. In this regard, the steps required are as follows:
 - 11.1. The Line Function Department must prepare the Instrument of Ratification and submit it to the South African Treaty Section at DIRCO;
 - 11.2. The Minister of International Relations and Cooperation or the President must sign the Instrument of Ratification; and
 - 11.3. DIRCO will deposit the Instrument of Ratification with the relevant depository through the diplomatic channel.
12. Finally, the Amendment must be deposited with the Treaty Section at DIRCO. Copies of the following documents are required:
 - a certified copy of the amendment;
 - President's Minute;
 - Parliamentary approval; and
 - a copy of the signed Instrument of Ratification.
13. Legal Privilege and Confidentiality: Kindly be reminded that this communication constitutes legal advice that is legally privileged and confidential. It is intended solely

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for the consumption of the client, desk or Department, and may not be freely disclosed to any third party, foreign State or international organisation without the express consent of the client, after taking legal advice from Departmental legal advisers. In the event that the client releases this opinion to a party that is legally entitled to it (e.g. auditors) the third party must be informed that they are under a legal obligation to maintain the confidentiality and legal privilege of the legal opinion, and also implement measures that will prevent unauthorised disclosure of the legal opinion.

14. We trust that our comments will be of assistance to you.

CORNELIUS SCHOLTZ
STATE LAW ADVISER (IL)

16 OCTOBER 2017
PRETORIA

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