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Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

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Date: 11 May 2017

Ms N Ngcaba  
Director-General  
Department of Environmental Affairs  
Private Bag X447  
PRETORIA  
0001

**For attention:** Tebogo Sebego  
**E-mail:** [TSebego@environment.gov.za](mailto:TSebego@environment.gov.za)

Dear Ms Ngcaba

**RE: LEGAL OPINION REGARDING THE RATIFICATION OF THE KIGALI AMENDMENT ON THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER: YOUR EMAIL DATED 20 MARCH 2017**

**INTRODUCTION**

1. The Department of Environmental Affairs (the "Department") has submitted the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (the "Amended Protocol" and the "Protocol", respectively), for our consideration and legal opinion on whether the Amended Protocol is consistent with the domestic law of the Republic of South Africa. The Amended Protocol submitted by the Department already incorporates the proposed amendments into the text of the Protocol.

2. The Protocol was acceded to by South Africa on 15 January 1990,<sup>1</sup> with the following amendments:<sup>2</sup>

- (a) The London Amendment, accepted on 12 May 1992;
- (b) the Copenhagen Amendment, acceded to on 13 March 2001;
- (c) the Montreal Amendment, acceded to on 11 November 2004; and
- (d) the Beijing Amendment, acceded to on 11 November 2004.

## BACKGROUND

3. We have scrutinised the Amended Protocol in terms of paragraph 5.20(a) of the *Manual on Executive Acts of the President of the Republic of South Africa* (the "Manual on Executive Acts") and Chapter 5 of the *Constitutional Handbook for Members of the Executive* (the "Constitutional Handbook").

4. For the purposes of scrutinising the Amended Protocol, we deal first with an analysis of the Articles of the Amended Protocol and then provide an indication of the constitutional requirements in relation to the Amended Protocol. We have limited our scrutiny and comments to those Articles that have been amended by the Amended Protocol.

5. It is evident from the Department's instruction<sup>3</sup> that the "*Kigali Amendment...took place during MOP 28, 10-14 October 2016*" and that "[b]y agreeing to the Kigali Amendment, parties took a critical step in officially recognizing the need to control HFCs under the Montreal Protocol.". Since the Amended Protocol is a multilateral protocol that has already been agreed to by the Parties to the Protocol, and since Article 18<sup>4</sup> of the Protocol provides that no reservations<sup>5</sup> may

<sup>1</sup> <https://treaties.dirco.gov.za/dbtw-wpd/exec/dbtwpub.dll>, accessed 8 May 2017 and <http://www.satreatyseries.net/trindex.htm>, accessed on 10 May 2017.

<sup>2</sup> *Ibid.*

<sup>3</sup> In paragraph 2 of the letter from the Department, dated 27 February 2017.

<sup>4</sup> Article 18 of the Protocol states as follows:

**"Article 18: Reservations**  
*No reservations may be made to this Protocol.*"

be made to the Protocol, we have not proposed any amendments to the format, style and structure of the Amended Protocol, since any further amendment to the Amended Protocol would have to be considered again by the Parties to the Protocol.

6. Due to the technical nature of the amendments, in particular the amendments contained in the annexes to the Amended Protocol, the Department must verify the technical information (e.g. formulas and composition) regarding the specific substances in relation to that which appears in domestic legislation and where necessary, amend the domestic legislation appropriately.<sup>6</sup>

## **ANALYSIS OF ARTICLES OF AMENDED PROTOCOL**

### **Ad Article 1, paragraph 4**

7. Article 1 of the Protocol provides for the definitions applicable to the Protocol, with the amendment providing for an amended definition of the term “Controlled substance” to include Annex F to the definition.

### **Ad Article 2, paragraphs 5, 8(a), 9(a) and 11**

8. Article 2 of the Protocol provides for control measures, and provides for an amendment to the calculated levels of production for a specified control period.

### **Ad Article 2J**

9. Article 2J is inserted by the Amended Protocol and provides for control measures, the addition of hydrofluorocarbons as a controlled substance, as well as the relevant control measures in relation to hydrofluorocarbons.

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<sup>5</sup> Article 2(1)(d) of the Vienna Convention on the Law of Treaties, 1969 defines “reservation” as follows:

*“reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;”.*

<sup>6</sup> We list the domestic legislation that we have found in paragraph 10 of our opinion.

10. The Department's attention is drawn to section 53(e) of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004), which states that the Minister responsible for environmental affairs may make regulations relating to ozone-depleting substances. In this regard, we note that the Regulations Regarding the Phasing-Out and Management of Ozone-Depleting Substances<sup>7</sup> have been promulgated. We could not find any further domestic legislation relevant to the Amended Protocol.

### **Ad Article 3**

11. Article 3 of the Protocol provides for the calculation of control levels, with the amendments making provision for those controlled substances listed in Annex F of the Amended Protocol.

### **Ad Article 4, paragraphs, 1 sept, 2 sept, 5, 6, 7 and 8**

12. Article 4 of the Protocol provides for the control of trade with non-parties, with the amendments making provision for the applicability of Article 4 of the Protocol to the controlled substances listed in Annex F of the Amended Protocol, and the control measures detailed in Article 2J of the Amended Protocol.

### **Ad Article 4B**

13. Article 4B of the Protocol provides for licensing requirements, with the amendments providing for licensing requirements relating to the controlled substances listed in Annex F of the Amended Protocol, as well as the delayed implementation of the amendments for those countries operating under paragraph 1 of Article 5 of the Protocol.

14. The Department's attention is drawn to section 6 of the International Trade Administration, 2002 (Act No. 71 of 2002), which provides for the powers of the Minister responsible for trade and industry to regulate imports and exports. The

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<sup>7</sup> Published in Government *Gazette* No. 37621, under Government Notice No. 351, dated 8 May 2014.

Minister for Trade and Industry may, by notice in the *Gazette*, prescribe that no goods of a specified class or kind, or no goods other than goods of a specified class or kind, may be imported or exported, except in terms of a permit issued by the International Trade Administration Commission.

15. In this regard, we note that the Minister of Economic Development has included goods containing hydrofluorocarbons in Schedule 2 to the Notice as prescribed goods that require an import permit,<sup>8</sup> as well as in Schedule 2 as prescribed goods that require an export permit.<sup>9</sup>

#### **Ad Article 5**

16. Article 5 of the Protocol provides for the special situation of developing countries, with the amendments making provision for the applicability of Article 5 of the Protocol to those controlled substances listed in Annex F of the Amended Protocol and the control measures detailed in Article 2J of the Amended Protocol.

#### **Ad Article 6**

17. Article 6 of the Protocol provides for the assessment and review of control measures, with the amendments providing for the applicability of Article 6 of the Protocol to those control measures detailed in Article 2J.

#### **Ad Article 7, paragraphs 2, 3, 3 *ter* and 4**

18. Article 7 of the Protocol provides for the reporting of data, with the amendments providing for the applicability of Article 7 of the Protocol to the controlled substances listed in Annex F of the Amended Protocol.

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<sup>8</sup> Published in Government *Gazette* No. 35007, under Government Notice No R.91, dated 10 February 2012.

<sup>9</sup> Published in Government *Gazette* No. 35007, under Government Notice No R.92, dated 10 February 2012.

**Ad Article 10, paragraph 1**

19. Article 10 of the Protocol provides for the financial mechanism applicable to Parties operating under paragraph 1 of Article 5 of the Protocol, to be applicable to the control measures detailed in Article 2J of the Amended Protocol.

**Ad Article 17**

20. Article 17 of the Protocol provides for the obligations of the Parties who join after the entry into force of the Protocol. The amendments include the obligations relating to the control measures detailed in Article 2J of the Amended Protocol.

**Ad Annex A**

21. Annex A of the Amended Protocol provides for the controlled substances, and further provides for the addition of a column titled "100-Year Global Warming Potential", in relation to the substances listed in Group I thereof.

**Ad Annex C**

22. Annex C of the Amended Protocol provides for the controlled substances, and further provides for the addition of a column titled "100-Year Global Warming Potential" in relation to some of the substances listed in Group I thereof.

**Ad Annex F**

23. Annex F of the Amended Protocol provides for the addition of additional controlled substances.

## DISCUSSION

24. The Department's attention is drawn to the provisions of section 231 of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), which provides as follows, in relation to the negotiation and signing of international agreements:

### *"International agreements*

**231.(1)** *The negotiating and signing of all international agreements is the responsibility of the national executive.*

(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 subsection (3).*

(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.*

(4) *Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*

(5) *The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."*

25. The nature of an agreement will determine whether the process provided for in section 231(2) or (3) must be followed. According to Chapter 5 of the Constitutional Handbook,<sup>10</sup> the requirement for ratification or accession of an international agreement would generally be stated in the text of the agreement.

<sup>10</sup>

Paragraph 5 of Chapter 5 of the Constitutional Handbook.

26. Article 16 of the Protocol provides for the entry into force of the Protocol “on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two-thirds of 1986 estimated global consumption of the controlled substances”, and states as follows:

**“Article 16: Entry into force**

1. *This Protocol shall enter into force on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two-thirds of 1986 estimated global consumption of the controlled substances, and the provisions of paragraph 1 of Article 17 of the Convention have been fulfilled. In the event that these conditions have not been fulfilled by that date, the Protocol shall enter into force on the ninetieth day following the date on which the conditions have been fulfilled.*

2. *For the purposes of paragraph 1, any such instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.*

3. *After the entry into force of this Protocol, any State or regional economic integration organization shall become a Party to it on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.”.*

27. As a general principle, the classification of the original agreement determines the classification of the amendment agreement or protocol.<sup>11</sup> We thus consider it

<sup>11</sup>

The Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, provides in Part IV, Article 39, that the rules laid down for the conclusion and entry into force of treaties (as detailed in Part II of the Vienna Convention on the Law of Treaties) are applicable to any agreements to amend a treaty, unless the treaty provides otherwise. Article 39 of Part IV of the Vienna Convention of the Law of Treaties states as follows:

**“PART IV. AMENDMENT AND MODIFICATION OF TREATIES  
GENERAL RULE REGARDING THE AMENDMENT OF TREATIES  
39. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.”.**



relevant to consider the classification of the Protocol since the Amended Protocol incorporates amendments to the Protocol.

28. Since the Protocol provides for its ratification or accession thereto, we are of the view that the Amended Protocol must be dealt with in accordance with section 231(2) of the Constitution. The Amended Protocol will thus require the approval of the National Assembly and the National Council of Provinces before it can bind the Republic.

29. Subject to our aforesaid remarks and comments, no provision of the Amended Protocol is, as far as we could ascertain, inconsistent with the domestic law of the Republic of South Africa.

Yours sincerely,

A handwritten signature in black ink, consisting of a vertical line on the left, a horizontal line crossing it, and a long, sweeping horizontal line extending to the right.

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**OFFICE OF THE CHIEF STATE LAW ADVISER  
A PERSOTAM/ Y VAN ASWEGEN/ S MASAPU**