



international relations & cooperation

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International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

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WORLD INTELLECTUAL PROPERTY ORGANISATION COPYRIGHT TREATY (“WCT”)

1. Your request for legal advice, dated 15 June 2018 refers. We have been advised that the WCT is one of a number of Intellectual Property Right treaties which the dti has identified for ratification or accession by South Africa.
2. As a first point, we note the fact that an IMC has been established in relation to the development of South Africa's new Intellectual Property law policy. We assume that the IMC has approved South Africa becoming a party to the WCT. Further, in light of the domestic process of amending South Africa's Intellectual Property legislation that is currently ongoing, we advise the line function department to ensure that South Africa does not become a party to the WCT until such time as South Africa's domestic legislation is in line with the obligations contained in the WCT.
3. Please be advised that we have reviewed the WCT from an international law perspective. Subject to the comments hereunder, the WCT is acceptable from an international law point of view and not in conflict with South Africa's international obligations. We note that the State Law Advisers at the Department of Justice and Constitutional Development have not raised any concerns about the WCT's compatibility with South African law.

Substantive comments

4. Ad Article 1:

Article 1 determines that the WCT is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works. The South African Treaty Section confirmed that South Africa is a Contracting State to the Berne Convention.

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Procedural comments

5. While neither the Office of the Chief State Law Adviser (IL) nor the South African Treaty Section has any records relating to the WCT, the website of the World Intellectual Property Organisation (WIPO) indicated that South Africa signed the WCT on 12 December 1997. The line function department advised that they were not in possession of a President's Minute for the signature of the WCT and were not able to obtain a copy of a President's Minute from the Presidency for the signature.
6. It is not possible to obtain a President's Minute *ex post facto* in order to authorise the signature of an international agreement. In the absence of a President's Minute, this Office is concerned that the necessary Constitutional authorisation may not have been obtained prior to signing the WCT. As a result, it is our view that, from a South African point of view, the signature of the WCT should be viewed as void.
7. It is imperative that the absence of a President's Minute is brought to the attention of Cabinet as well as Parliament.
8. The WCT does not clearly distinguish between when States should ratify the treaty and when States should accede to the treaty. It merely provides in Article 17(1) that "[a]ny Member State of WIPO may become party to this Treaty". South Africa is a Member State of WIPO and, as such, may become a Party to the WCT.
9. The WCT does provide that the WCT shall be open for signature until December 31, 1997 by Member States of WIPO and the EU (Article 19). It further provides that the Treaty shall enter into force 3 months after 30 instruments of "ratification or accession" have been deposited with the Director-General of WIPO.
10. In the ordinary course, States would ratify international agreements that have not yet enter into force or that they are signatories to. States would accede to international agreements that are in force, or that they did not sign during the time the international agreement was open for signature.
11. In this instance, given that the WCT entered into force on 6 March 2002, and given the uncertainty surrounding South Africa's signature of the Treaty, it is our advice that South Africa should accede to the WCT.
12. In the circumstances it does not seem practical or in the interests of South Africa's international reputation to withdraw the signature and then to proceed with accession. As a result, we propose that the signature be disregarded internally and South Africa should express its interest on the international level to be bound by the WPPT by way of an Instrument of Accession rather than through an Instrument of Ratification, especially since accession and ratification will have the same legal effect, namely that South Africa is bound by the terms of the treaty.
13. We are of the view that this draft Agreement falls 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 Agreement can be ratified.
14. We classify the Agreement as one falling within the ambit of section 231(2) as:
 - 14.1. The WCT is a multilateral instrument under the auspices of WIPO; and
 - 14.2. On its own terms, the WCT (article 17 read with article 20) requires States to ratify or accede to the treaty.
15. In order to obtain Parliamentary approval the Agreement needs to be certified by this Office. The documentation required for certification consists of:
 - two copies of the Explanatory Memorandum setting out the purpose of the Agreement and proposed date of signature;
 - two copies of the finally agreed text of the Agreement;

- 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.

16. Following Certification, the line function department must obtain Cabinet approval for the WCT to be tabled in Parliament, which should be done in the following manner:

16.1. Approach the relevant cabinet portfolio committee for Cabinet approval :

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.

16.2. The Agreement must be considered by Parliament (both the National Assembly and National Council of Provinces) :

- 16.2.1.1. The line function department must prepare an Explanatory Memorandum setting out the history, objectives and implications of the agreement;
- 16.2.1.2. The legal opinions from the State Law Advisors of both Departments (DOJ&CD and DIRCO) must be included;
- 16.2.1.3. It must be stated whether the agreement contains any self-executing provisions in terms of section 231(4) of the Constitution;
- 16.2.1.4. The projected financial and other costs of the agreement must be set out;
- 16.2.1.5. The Explanatory Memorandum must contain all other information needed to take an informed decision.

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

- 17.1. The Line Function Department must prepare the Instrument of Ratification and submit it to the South African Treaty Section within DIRCO;
- 17.2. The Minister of International Relations and Cooperation or the President must sign the Instrument of Ratification;
- 17.3. DIRCO will send the Instrument of Ratification to the relevant depository through the diplomatic channels.

18. The Agreement 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).

19. Legal Privilege and Confidentiality: Kindly be reminded that this communication constitutes legal advice that is legally privileged and confidential. It is intended solely 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.

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



TANIA STEENKAMP HEFER
STATE LAW ADVISER (IL)

PRETORIA
9 July 2018