



international relations & cooperation

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REPUBLIC OF SOUTH AFRICA

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CONVENTION ESTABLISHING THE SQUARE KILOMETRE ARRAY OBSERVATORY

1. Your request for legal advice regarding the abovementioned matter refers.
2. As requested, we have reviewed the *Convention establishing the Square Kilometre Array Observatory* ("the Convention"), which includes an Annex A: *Protocol on Privileges and Immunities of the Square Kilometre Array Observatory* and an Annex B: *Financial Protocol of the Square Kilometre Array Observatory*, and which form an integral part of the Convention, from an international law perspective.
3. We have also taken note of the comments made by the legal advisers from the Department of Justice and Constitutional Development on the Convention's consistency with South African law. This Office participated in the negotiations to develop the text of the Convention, including the legal scrubbing process. In our view this final draft of the Convention is in order from an international law perspective and not otherwise in conflict with South Africa's international law obligations.

Procedure for the conclusion of the Convention

4. Article 19(1) of the Convention provides that—

"This Convention shall be open for signature in Rome on and thereafter with the Depository from for all States listed below:

Australia

The People's Republic of China

The Republic of India

The Italian Republic

The Kingdom of the Netherlands

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New Zealand
 The Republic of Portugal
 Kingdom of Sweden
 Republic of South Africa
 United Kingdom of Great Britain and Northern Ireland”

5. Article 19(2) of the Convention provides that—

“This Convention shall be subject to ratification, acceptance or approval by the States listed in paragraph 1 in accordance with their domestic requirements...”

6. In our view, the Convention falls within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996, which provides that—

“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).”¹

7. Our reasons for making this classification are as follows:

- The Convention provides that it should be ratified/accepted/approved by States;
- The Convention appears to be of major political and economic significance; and
- The Convention is likely to require extra-budgetary financial resources for its implementation.

8. As an international agreement falling within the ambit of section 231, the President’s approval through a President’s Minute is necessary in order for the Convention to be signed. The President’s Minute needs to be obtained before the Convention can be signed on behalf of South Africa.

9. In order to obtain Presidential approval, the Convention needs to be certified by this Office. The documentation required for certification consists of—

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

¹ Subsection (3) of section 231 governs agreements of a technical, administrative or executive nature, which do not require the approval of Parliament.

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10. A President's Minute is the instrument through which the National Executive (comprised of the President in conjunction with the responsible line-function Minister) grants prior authorisation for a Minister to sign an international agreement. Failure to obtain the approval translates into 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 was signed without the necessary constitutional authorisations, it must be regarded as void in terms of South African law. It may also hold serious political and legal implications in that international law may regard the international agreement as binding notwithstanding the position under South Africa's domestic law.
11. The Agreement may not be amended in any way after a President's Minute has been obtained.

Ratification, acceptance or approval

12. After signature, both the National Assembly and the National Council of Provinces need to approve the Convention before it can be ratified.
13. In order to obtain Parliamentary approval, the line function department must take the following steps:
 - 13.1. 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.
 - 13.2. The Convention 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 Convention;
 - the projected financial and other costs of the Convention;
 - whether the Convention contains any self-executing provisions in terms of section 231(4) of the Constitution; and
 - all other information needed to take an informed decision.
14. Once Parliament's approval of the Convention has been obtained, the Convention can be ratified by depositing an Instrument of Ratification with the Depository. In this regard, the steps required are as follows:
 - 14.1. The line function Department must prepare the Instrument of Ratification and submit it to the South African Treaty Section at DIRCO;

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14.2. The Minister of International Relations and Cooperation or the President must sign the Instrument; and

14.3. DIRCO will deposit the Instrument with the Depository through the diplomatic channel.

15. Finally, the Convention must be deposited with the Treaty Section at DIRCO. Copies of the following documents are required:

- a certified copy of the Convention;
- President's Minute;
- Parliamentary approval; and
- a copy of the signed Instrument of Ratification.

Domestic legislation

16. The line department must ensure that any national legislation which may be required for the implementation of the Convention is in place by the time the Convention is ratified, otherwise the Convention's eventual entry into force could place South Africa in breach of its international law obligations.²

Legal Privilege and Confidentiality

17. 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.

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



CORNELIUS SCHOLTZ
STATE LAW ADVISER (IL)

21 NOVEMBER 2018
PRETORIA

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

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