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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM OF ACCESSION TO THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) COPYRIGHT TREATY, 1996 ('THE WCT')

The World Intellectual Property Organization (WIPO) adopted the WIPO Copyright Treaty (WCT) at Geneva on 20 December 1996. In terms of the World Intellectual Property Organization's web database, South Africa signed the WCT on 12 December 1997. A copy of the Presidential Minute authorizing such signature is not in the Department of Trade and Industry's possession and could not be obtained from the Presidency. Given the concern that the necessary constitutional authorisation may not have been obtained prior to signing the WCT, the Department of International Relations and Cooperation advised that the signature should be disregarded internally and South Africa must express its interest to be bound by way of an Instrument of Accession rather than an Instrument of Ratification, especially since accession and ratification will have the same legal effect of binding South Africa to the terms of the WCT.

The WCT entered into force in March 2002, three months following ratification or accession by at least thirty member states as per the provisions of Article 20. Essentially amendments cannot be effected to the WCT. Contracting Parties have the obligation to ensure that appropriate provisions exist in their national laws for the effective enforcement of the rights in the Treaty (Article 14). The Treaty is hence a non-self-executing Treaty and will not automatically become judicially enforceable once Parliament has approved it in terms of section 231(2) of the Constitution. It will only become judicially enforceable through the implementation of domestic legislation. The Copyright Amendment Bill and the Performers' Protection Amendment Bill address this matter and are before Parliament.

Legislation is also required to ensure that other parties to the WCT are granted, under South African copyright law, the rights to which they are entitled under the Treaties. Acceding to the Treaty will not require amendments to the Constitution but will introduce new rights for performers, producers and authors of copyright works which enhances intellectual property rights.

The WCT is a special agreement under the Berne Convention and it deals with the protection of works and authors specifically on the digital platform (Article 1). The WCT extends copyright protection to computer programs (whatever the mode or form of expression) and compilations of data or other material ("databases"), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations.

The WCT grants authors the right of distribution; the right of rental; and a broader right of communication to the public (Article 6 to 8). Limitations and exceptions can be provided in domestic legislation in line with a three step test and provided that legitimate interests

of authors are not unreasonably prejudiced (Article 10). The WCT also obliges Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g. encryption) and against unauthorised modification rights management information necessary for licensing, collecting and distribution of their royalties (Article 11 to 12).

The WCT is in the best interests of the South Africa as it ensures that South African copyright law will keep pace with technological change, thus affording important protection against piracy for rights holders in the areas of computer programmes and databases. The WCT does not allow contracting parties to make reservations to any of its provisions (Article 22). Each Contracting Party can be represented by one member at the Assembly responsible for maintenance and development of the WCT, expenses of the delegate are borne by the Contracting Party (Article 15).

Besides the expenses provided for in Article 15 of the delegates attending the Assembly to be constituted to deal with matters concerning the operation, application, development and maintenance of the WCT and the annual WIPO member's fees which South Africa by virtue of being a WIPO member pays, no further expenses will be incurred with respect to this Treaty. Any financial implications that may be incurred by government or industry in the application of this Treaty will be offset by the greater benefits the Treaty introduces for copyright owners and authors.

ANNEXURE A

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Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
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Date: 22 May 2018

Mr Lionel October
Director-General
Department of Trade and Industry
Private Bag X84
PRETORIA
0001

Dear Mr October

Attention: Ms Tshilllo Mabirimisa

WIPO COPYRIGHT TREATY AND THE AGREED STATEMENTS OF THE DIPLOMATIC CONFERENCE THAT ADOPTED THE TREATY AND THE PROVISIONS OF THE BERNE CONVENTION (1971): YOUR E-MAIL DATED 09 APRIL 2018

INTRODUCTION

1. The Department of Trade and Industry (the "Department") informs us that it is embarking on a process to ratify the World Intellectual Property Organization (the "WIPO") Treaties/Agreements. It appears from the Department's e-mail that the Department is requesting our assistance on the procedure to be followed to have the WIPO Copyright Treaty ratified or acceded to and to obtain legal opinions on whether these Treaties are in conflict with the South African domestic law .

2. In terms of Article 1 of the WIPO Copyright Treaty it is a special agreement under Article 20 of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention") that deals with the protection of works and the rights of their authors in the digital environment. Any Contracting Party must comply with the substantive provisions of the 1971 (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works. Furthermore, the WIPO Copyright Treaty mentions the following two subject matters to be protected by copyright: (i) computer programs, whatever the mode or form of their expression; and (ii) compilations of

data or other material ("databases"), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. (Where a database does not constitute such a creation, it is outside the scope of this Treaty.)[1]

3. As regards the rights granted to authors, apart from the rights recognized by the Berne Convention, the WIPO Copyright Treaty also grants (i) the right of distribution; (ii) the right of rental; and (iii) a broader right of communication to the public.[2]

4. We have therefore scrutinised the "WIPO Copyright Treaty and the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty" ("WCT"), in terms of *paragraph 5.20(a)* of the *Manual on Executive Acts of the President of the Republic of South Africa* ("Manual") and with reference to *Chapter 5* of the *Constitutional Handbook for Members of the Executive* ("Constitutional Handbook"), the Constitution of the Republic of South Africa, 1996 ("Constitution") and other relevant legislation in order to ascertain whether it is not in conflict with the domestic law of the Republic of South Africa.

5. Since the WTC was concluded in 1996 and entered into force in 2002,[3] we naturally refrained from effecting any amendments to the WCT. It must further be noted that South Africa became a member of WIPO on 23 March 1975. In October 1977 it was decided not to permit further South African participation in activities of WIPO. South Africa again resumed participation in the activities of WIPO and its subsidiary bodies, after a decision to this effect by an Extraordinary Session of its Co-ordination Committee, held on 29 July 1994.[4]

DISCUSSION OF THE WCT

Ad Preamble

6. The Preamble indicates the Contracting Parties' intention which is to develop and maintain the protection of the rights of authors in their literary and artistic works in an effective and uniform way and to further introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological

[1] http://www.wipo.int/treaties/en/ip/wct/summary_wct.html at page 1
[2] Ibid at page 1
[3] Ibid at page 2
[4] http://www.dirco.gov.za/foreign/Multilateral/inter/wipo.htm at page 1

developments in a manner that maintains a balance between the rights of authors and the larger public interest, particularly in education, research and access to information, as reflected in the Berne Convention. It appears to be in order.

Ad Article 1 – Relation to the Berne Convention

7. Article 1 provides that the WCT is a special agreement under the Berne Convention within the meaning of Article 20 of the Berne Convention, which Article stipulates that "[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.".[5]

8. This Article further provides that the WCT shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties. Therefore, although the Contracting Parties are permitted to enter into the WCT, it is precisely stipulated that nothing in the WCT shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

9. More importantly the Contacting Parties are obligated to comply with Articles 1 to 21 and the Appendix of the Berne Convention. This Article appears to be in order.

Ad Article 2: - Scope of Copyright Protection

10. Article 2 precisely provides that copyright protection extends to expressions and not to ideas, procedures, or methods of operation or mathematical concepts as such. It appears to be in order.

Ad Article 3 – Application of Articles 2 to 6 of the Berne Convention

11. Article 3 provides that Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 1 to 6 of the Berne Convention in respect of the protection provided for in the WCT in which Articles 1 and 2 spell out in detail what is included in the expression "literary and artistic works". Articles 1 and 2 of the Berne Convention further oblige countries of the Union, through legislation, to determine, if

[5] Berne Convention for the Protection of Literary and Artistic Works as amended, downloaded at http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P212_41948

necessary, the protection to be prescribed to works in general or any specified categories of works.

12. Article 3 of the Berne Convention provides the criteria of eligibility for protection of published works, whilst Article 4 provides for criteria of eligibility for protection of cinematographic works, works of architecture and certain artistic works, even if the conditions of Article 3 are not fulfilled.

13. Article 5 of the Berne Convention spells out the rights enjoyed by authors of works and under what circumstances, and which laws would be applicable to authors to enforce their respective rights, whilst Article 6 places a possible restriction of protection in respect of certain works of authors- 'nationals' of certain countries outside the Union and the means of redress available to them for safeguarding the rights granted to them by this Article while providing that the applicable legislation shall be governed by the country where protection is claimed. This Article appears to be in order.

Ad Article 4 – Computer Programs

14. Article 4 provides that computer programs, whatever mode or form of their expression, are protected as literary works within the meaning of Article 2 of the Berne Convention. It appears to be in order.

Ad Article 5 – Compilations of Data (Databases)

15. Article 5 provides that compilations of data or other material in any form, other than the data and material itself, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. It appears to be in order.

Ad Article 6 – Right of Distribution

16. Article 6 provides authors of literary and artistic works with the exclusive right of distributing or authorizing the distribution of the original and copies of their works through sale or other transfer of ownership subject to the Contracting Parties determining other applicable conditions after the first sale or other transfer of ownership of the original or a copy of the work which has to be done with the authorization of the author. It appears to be in order.

Ad Article 7 – Right of Rental

17. Article 7 provides that authors of computer programs, cinematographic works and works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works subject to conditions in subsection (2) and (3) in this Article. It appears to be in order.

Ad Article 8 – Right of Communication to the Public

18. Article 8 provides that authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them without having the exclusive rights they enjoy under the Berne Convention, as fully expounded in provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, compromised. This Article appears to be in order.

Ad Article 9 – Duration of the Protection of Photographic Works

19. Article 9 provides for the non-application of protection afforded to authors of photographic works, for a certain period of time or term, from the making of such a photographic work. It appears to be in order.

Ad Article 10 – Limitations and Exceptions

20. Article 10 provides Contracting Parties with the discretion to provide, in their national legislation, for limitations of or exceptions to the rights granted to authors of literary and artistic works under the WCT, provided such limitations or exceptions do not unreasonably prejudice the legitimate interests of the authors. It appears to be in order.

Ad Article 11 – Obligations concerning Technological Measures

21. Article 11 obliges the Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the WCT or the Berne Convention in respect of acts which are not authorized by the authors concerned or permitted by law. It appears to be in order.

Ad Article 12 – Obligations concerning Rights Management Information

22. Article 12 further obliges the Contracting Parties to provide adequate and effective legal remedies against any person/s who knowingly removes or alters any electronic "rights management information" without authority; and distributes, imports for distribution, broadcasts or communicates to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority. The Article further provides the meaning of or what is covered under "rights management information". It appears to be in order.

Ad Article 13 – Application in Time

23. Article 13 obliges the Contracting Parties to apply the provisions of Article 18 of the Berne Convention to all protection provided for in the WCT, which Article provides protection to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. Article 18 of the Berne Convention further provides that these provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations. This Article appears to be in order.

Ad Article 14 – Provisions on Enforcement of Rights

24. The Department's attention is drawn to Article 14 that obliges the Contracting Parties to provide an undertaking to adopt, in accordance with their legal systems, the measures necessary to ensure the application of the WCT and to provide speedy and effective remedies against any act of infringement of rights covered under this Treaty, which remedies will also constitute a deterrent to further infringements. Should South Africa decide to accede to the WCT, the Department will have to ensure that the provisions of this Article are adhered to. This Article appears to be in order.

Ad Article 15 – Assembly

25. Article 15 makes it peremptory for Contracting Parties to have an Assembly which shall perform the functions allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to the WCT. This Article further provides that each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts and that each Contracting Party shall have one vote and shall vote only in its own name. This Article further provides that the expenses of each delegation shall be borne by the

Contracting Party that has appointed the delegation. The Article further allows the Assembly to establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of the WCT, the required majority for various kinds of decisions. This Article appears to be in order.

Ad Article 16 – International Bureau

26. Article 16 provides that the International Bureau of WIPO shall perform the administrative tasks concerning the Treaty. It appears to be in order.

Ad Article 17 – Eligibility for Becoming Party to the Treaty

27. Article 17 provides that any Member State of WIPO may become a party to the WCT Treaty. Most importantly this Article provides the Assembly with the discretion to decide to admit any intergovernmental organization to become party to the WCT which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

28. This Article further provides the European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, with the discretion to become party to this Treaty. This Article appears to be in order.

Ad Article 18 – Rights and Obligations under the Treaty

29. Article 19 provides that each Contracting Party shall enjoy all of the rights and assume all of the obligations under the WCT. It appears to be in order.

Ad Article 19 – Signature of the Treaty

30. Article 19 provides that the WCT shall be open for signature by any Member State of WIPO and by the European Community until 31 December 1997. It appears to be in order.

Ad Article 20 – Entry into Force of the Treaty

31. Article 20 provides that the WCT shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO. It appears to be in order.

Ad Article 21 – Effective Date of Becoming Party to the Treaty

32. Article 21 provides that the WCT shall bind the 30 States referred to in Article 20, from the date on which this Treaty has entered into force. **The Article further provides that each other State shall accede to this Treaty after the expiration of three months from the date on which the State has deposited its instrument of ratification with the Director General of WIPO.** As regards the European Community, it is provided that it shall be bound by the WCT, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of the WCT in accordance with Article 20, or, three months after the entry into force of the WCT if such instrument has been deposited before the entry into force thereof. Any other intergovernmental organization that is admitted to become party to the WCT shall be bound, from the expiration of three months after the deposit of its instrument of accession. This Article appears to be in order.

Ad Article 22 – No Reservations to the Treaty

33. The Department's attention is drawn thereto that Article 22 provides that **no reservation to the WCT shall be admitted.** It appears in order.

Ad Article 23 – Denunciation of the Treaty

34. Article 23 provides that any Contracting Party may, by notification addressed to the Director General of WIPO, denounce the WCT and that such denunciation shall only take effect one year from the date on which the Director General of WIPO received the notification. It appears to be in order.

Ad Article 24 – Languages of the Treaty

35. Article 24 provides for the languages in which this Treaty can be signed, which is English, Arabic, Chinese, French, Russian and Spanish and provides that all these languages shall be equally authentic. The usage of any language other than the mentioned languages shall be established by the Director General of WIPO at the request of an interested party after consultation with all the interested parties. This Article appears to be in order.

Ad Article 25 – Depositary

36. Article 25 provides that the Director General of WIPO is the depositary of this Treaty. It appears to be in order.

37. As pointed out in paragraph 5 of this opinion, the WCT had entered into force in 2002, It would therefore appear that the WCT was ratified or acceded to by 30 States as provided in Article 20 without South Africa either ratifying or acceding to the WCT as required by Article 20 and without further appending its signature on or before 31 December 1997 as provided by Article 19 of the WCT. The implication thereof was that South Africa did not become a member of the WCT. However, Article 21 provides ways in which any member State could become a member of the WCT and thus be bound by the WCT after the WCT has entered into force. Put succinctly, each other State could only accede to the WCT after the expiration of three months from the date on which the State has deposited its instrument of ratification with the Director General of WIPO. Thus to be part of the WCT, South Africa would have to deposit its accession instrument with the Director General of WIPO and will then be bound only after the expiration of three months from the date on which it has deposited such an instrument with Director General of WIPO .

38. Having said the above, it must be noted that South Africa must still comply with our internal procedures for it to accede to the WCT. In this regard we wish to draw Department's attention to the provisions of section 231 of the Constitution which deals with international agreements and the procedures to be followed by South Africa to accede to the WCT. The said section reads as follows:

> "231. International agreements.-
> (1) The negotiation and signing of all 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, administration 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".

39. The provisions of section 231 of the Constitution were discussed comprehensively by the Constitutional Court in the case of **Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC).** The court remarked as follows at p375 with regard to the approval of international agreements:

"[89] The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic, unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament.
[90] The approval of an agreement by Parliament does not, however, make it law in the Republic, unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval, unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an 'international agreement becomes law in the Republic when it is enacted into law by national legislation'.
[91] The approval of an international agreement, under s 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an 'international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty'. The approval of an international agreement under s 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other States, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law, or taking other steps to bring our laws in line with the agreement, to the extent they do not already comply.
[92] An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory States. An international agreement that has been ratified by Parliament under s 231(2), however, does not become part of our law, until and unless it is incorporated into our law by national legislation." (See also Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC) at paragraph [26] on 688A/B-C/D.)

40. Paragraph 5.5 of the Manual stipulates that agreements of a technical, administrative or executive nature refer to agreements which are departmentally specific and which are not of any major political or other significance. These agreements generally have no financial consequences and do not affect the domestic law of both parties. With regards to the determination of whether an agreement is of a technical, administrative or executive nature, **Erika de Wet** in **Shelton, International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion**, at pp. 567-593, states as follows:

"The Constitution does not give any indication of which agreements would qualify as technical, administrative or executive. The internal practice which has developed within the Office of the Chief State Law Adviser is to consider

as "technical" those agreements which do not have major political significance; do not require additional budgetary allocation from Parliament over and above the budget provided by particular government department; and agreements which do not impact domestic law. They are often of a bilateral nature and concern routine agreements for which a single government department is responsible for implementation. ..."

41. According to chapter 5 (paragraph 5 on p 44) of the Constitutional Handbook, technical, administrative or executive agreements are agreements which -

(a) are departmental specific;

(b) are of no major political or other significance;

(c) have no financial consequences; and

(d) do not affect domestic laws.

42. As regards agreements requiring approval by Parliament, paragraphs 5.4, 5.6 and 5.7 of the Manual provide as follows:

"5.4 Section **231(2) of the Constitution provides that all international agreements shall bind the Republic only after they have been approved by resolution of both Houses of Parliament.** The exceptions are: (1) agreements of a technical, administrative or executive nature, or (2) those which do not require accession or ratification. **The result is that Parliament is required to approve only agreements which require "ratification or accession"** and which are not of a technical, administrative or executive nature.

5.6 Departments should not lightly determine that such agreements requiring ratification or accession are "technical, administrative or executive". Failure to allow Parliament to ratify an agreement might result in a defect in the conclusion of the agreement.

5.7 **Although there is no rule as to which types of agreement require ratification or accession, this requirement is generally stated in the text of the agreement.** As a general guideline this applies normally to multilateral agreements, although in some cases such a procedure could also be required for bilateral agreements." (Our emphasis.)

43. In this regard and as pointed out earlier, Articles 20 and 21 of the WCT clearly indicate how any party can become a member to this international agreement, which is either through ratification or accession. We have further pointed out that since the WCT has already entered into force, South Africa could only become a party to the WCT through accession.

44. **J Dugard,** International Law. A South African Perspective, (3rd Ed), at pp. 408-409 remarks as follows with regard to formal and multilateral agreements such as the present Convention:

> "Formal agreements, particularly multilateral agreements, normally require ratification in addition to signature. This requires the representative of the state subsequently to endorse the earlier signature. This provides the state with an opportunity to reconsider its decision to be bound by the treaty and, if necessary, to effect changes to its own law to enable it to fulfil its obligations under the treaty. In practice treaties generally indicate whether ratification is required, but where this is not done the intention of the parties will have to be ascertained from the surrounding circumstances. Although a state is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts which would defeat the object and purpose of such a treaty until it has made clear its intention not to be bound by the treaty.
> **A state may later become a party to a treaty in whose negotiation it did not participate, and which it did not sign, by means of accession, provided that the original parties accept that such states may accede to the treaty.** Multilateral law-making treaties that seek to achieve a large measure of universality generally include an accession clause. For instance, the International Covenant on Civil and Political Rights provides that it shall be open to accession, inter alia, by any member state of the United Nations.
> While it is not difficult to identify an international agreement subject to ratification or accession, in practice, it may prove difficult to identify an agreement of a technical, administrative or executive nature which comes into force on signature alone. All will depend upon the intention of the parties which must be ascertained from the circumstances surrounding the conclusion of the treaty. The practice of the government law advisors is to treat agreements of a routine nature, flowing from the daily activities of government departments' as not requiring parliamentary approval. Where, however, there is any doubt, the agreement is referred to Parliament.". (Our emphasis.) (With regard to the highlighted parts see also M Olivier, Informal international agreements under the1996 constitution, SAYIL Vol. 22, 1997, p63 at p 64.)

45. Since Articles 17, 20 and 21 of the WCT clearly provide for ratification of or accession to the WCT in accordance with the applicable constitutional or internal rules and procedures of a Member State, and since it is a multilateral agreement, we are of the opinion that it falls within the scope of section 231(2) of the Constitution and will therefore bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. In view thereof, the WCT still has to be submitted to Parliament for purposes of ratification if it is to bind the Republic. We must hasten to state that although a state is not bound by a treaty that it has not ratified, it is obliged to refrain from acts which would defeat the object and purpose of such a treaty until it has made clear its intention not to be bound by the treaty.

46. We have also considered the provisions of the following Acts:

Copyright Act, 1978 (Act No. 98 of 1978); and

Intellectual Property Laws Rationalisation Act, 1996 (Act No. 107 of 1996).

Article 14 of the WCT obliges the Contracting Parties to provide an undertaking to adopt, in accordance with their legal systems, the measures necessary to ensure the application of the WCT. In this regard the Department's attention is in particular drawn to Chapter I of the Copyright Act.

CONCLUSION

47. Subject to our aforementioned remarks and comments, no provision of the WCT is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.

Yours sincerely,

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
TW MESEFO // W J J NEL // M A OLWAGE // A JOHAAR

ANNEXURE B

international relations
& cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

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RO197/2018

Ms M Herfurth
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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

ANNEXURE C

S MPOTISOASHA
STATE LAW ADVISER
(INTERNATIONAL LAW)
05/10/2018

WIPO Copyright Treaty

and

the agreed statements of the Diplomatic Conference that adopted the Treaty

(WIPO Copyright Treaty) (1996)

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Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

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Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.
(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.
(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.
(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.[1]

Article 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.[2]

Article 4

Computer Programs

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Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.[3]

Article 5

Compilations of Data (Databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.[4]

Article 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.[5]

Article 7

Right of Rental

(1) Authors of
(i) computer programs;
(ii) cinematographic works; and
(iii) works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.
(2) Paragraph (1) shall not apply
(i) in the case of computer programs, where the program itself is not the essential object of the rental; and
(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.
(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the

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commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.[5] [6]

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[7]

Article 9

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

Article 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.[8]

Article 11

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

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Article 12

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.[2]

Article 13

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 14

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Article 15

Assembly

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

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(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 16

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 17

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.

(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

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Article 18

Rights and Obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 19

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 20

Entry into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 21

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

(i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 20, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 22

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

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Article 23

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 24

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 25

Depositary

The Director General of WIPO is the depositary of this Treaty.

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[1] **Agreed statements concerning Article 1(4)**: The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.
[2] **Agreed statements concerning Article 3** : It is understood that in applying Article 3 of this Treaty, the expression "country of the Union" in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression "country outside the Union" in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that "this Convention" in Articles 2(8), 2*bis*(2) , 3 , 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a "national of one of the countries of the Union" will, when these Articles are applied to this Treaty, mean, in regard to an

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intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization.

[3] **Agreed statements concerning Article 4:** The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

[4] **Agreed statements concerning Article 5:** The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

[5] **Agreed statements concerning Articles 6 and 7:** As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

[6] **Agreed statements concerning Article 7:** It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

[7] **Agreed statements concerning Article 8 :** It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2) .

[8] **Agreed statement concerning Article 10:** It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

[9] **Agreed statements concerning Article 12:** It is understood that the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

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ANNEXURE D

81/172488

(Z 19E)

PRESIDENT'S MINUTE NO. 293

In terms of section 231 of the Constitution of the Republic of South Africa, 1996, I hereby approve that the attached agreement on the WIPO Copyright Treaty and the agreed statements of the Diplomatic Conference that adopted the Treaty (1996) between the Republic of South Africa and the World Intellectual Property Organisation be entered into, and I hereby authorise the Minister of Trade and Industry to sign this agreement on behalf of the Republic of South Africa.

Given under my Hand at Johannesburg on this 04 day of November, Two Thousand and Eighteen.

PRESIDENT

MINISTER OF THE CABINET