



## South Africa's International Climate Obligations: The Domestication of the Paris Agreement

### 1. Introduction

On 12 December 2015, 195 countries adopted the Paris Agreement (“the Agreement”) at the 21<sup>st</sup> Conference of the Parties (COP 21) of the UN Framework Convention on Climate Change (UNFCCC) in Paris. The Agreement was the product of eight years of negotiations, starting in Bali in 2008, and including a failed attempt to finalise an agreement in 2009. The impacts of climate change have become increasingly visible over the last years, with extreme weather events from floods to droughts reoccurring more frequently. The urgency and pressure to finally conclude a meaningful and effective global climate agreement was palpable throughout the meeting in Paris. After overcoming many different hurdles the negotiators came up with a final agreement that could be adopted by consensus. After the official signing ceremony in New York on 22 April 2016, countries now need to present their instruments of ratification,<sup>1</sup> which ensures that the outcomes of the Paris Agreement are embedded in national policy and can be implemented effectively.

### 2. Background on International Climate Change Negotiations

When the world negotiated the first international environmental treaty at the Earth Summit in Rio de Janeiro in 1992, it led to the United Nations Framework Convention on Climate Change being formed in 1994. The aim of this Framework was to “stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>2</sup> Since 1995 the Parties to the Convention (nation states) have been meeting in Conferences of the

Parties (COP) every year to assess the progress of developments around climate change and greenhouse gas concentrations. South Africa signed the Convention in 1998. Recognising that stronger action was needed, countries concluded the Kyoto Protocol in 1997, a legally binding obligation for developed countries to reduce their greenhouse gas emissions by 5.2% below the 1990 levels by 2012. South Africa signed the protocol in 2002, and it entered into force in 2005. Due to a failed attempt to adopt a new agreement in Copenhagen in 2009, the Conference of the Parties agreed on an amendment to the Kyoto Protocol – the Doha Amendment. This established a second commitment period for reduction of emissions for developed countries from 2013 to 2020. In 2015, with the Paris Agreement, the parties finally adopted a new agreement with a global temperature goal of staying well below a rise of 2 degrees Celsius compared to pre-industrial levels; it will come into effect from 2020. In addition, the Paris Agreement looks not only at mitigation but also at adaptation to climate change and to the loss and damage it could cause.

The first step to implement the Paris Agreement was taken in New York on 22 April 2016 when 175 countries officially signed it. A significant triumph was that among them were all the key emitters, such as the USA, Russia and the European Union. South Africa's Minister of Environmental Affairs attended the signing ceremony. More importantly, 17 countries so far have already presented their instruments of ratification. These mainly include small island states and least-developed countries whose carbon emissions account for 0.04% of global greenhouse gas (GHG) emissions. In order for the

Agreement to come into effect, the 'double threshold' requires its ratification in at least 55% of the countries accounting for 55% of global emissions. The ratification process of an international treaty such as the Paris Agreement is different in each country and needs to be done according to the respective domestic constitutional or legislative procedures.

For some countries the ratification process is not very complicated and can be done swiftly, but for the large and middle-sized economies and GHG emitters this can be a lengthy process that includes their national parliament's approval.

### **3. South Africa's Obligations under the Paris Agreement**

There are overall (general) obligations as well as specific implications for South Africa with regard to the Paris Agreement. Overall obligations relate to:

The required fee for South Africa's membership of the Paris Agreement;

The compilation of Presidential minutes which approve South Africa's participation and consent to be bound by the Paris Agreement through the institutions of signing and ratification;

The mobilisation of financial resources and capacity building to implement nationally determined contributions (NDCs);

Ensuring that there is institutional memory for various reporting cycles (reporting will be done every five years); and

Ensuring that there are adequate institutional arrangements for planning, preparing and submitting NDCs every five years.

Among the specific obligations that affect South Africa are the following:

Article 3 (NDCs): We will be required to prepare and submit NDCs periodically, and such NDCs will have to be progressive over time. This Article states that parties must undertake efforts to achieve the purpose of the Agreement, which is set out in article 2,<sup>3</sup> and contains the elements of future and current NDCs.

Article 4 (Mitigation): The Paris Agreement is unique in the sense that it has universal applicability, and article 4 is an attempt to further embed this principle. It applies to all parties, with a particular focus on developed countries taking the lead, with developing and least-developed countries contributing as they can in light of their national circumstances and respective capabilities. South Africa is obliged to submit an NDC with a mitigation focus and must pursue steps to achieve the communicated contribution. Subsequent South African NDCs must represent an increase in ambition when communicated every five years. Article 4 also accounts for short term and long term time frames with regard to contributions, where the frequent and regular NDCs are revised and updated every five years. A long term aspect of Article 4 is found in the form of long term low greenhouse gas development strategies.

Article 7 (Adaptation): With regard to the innovative (bottom up and country-driven) approach of the Paris Agreement, adaptation is now recognised as an integral part of addressing climate change. In article 7, adaptation is placed as a primary concern for developing countries. South Africa, as a developing country, has always insisted on parity between adaptation and mitigation. South Africa will have to implement its adaptation contribution as communicated in its NDC with an adaptation component.

Obligations under the Agreement are numerous, yet many are conditional because they are dependent on the content of the various NDCs. Some of these obligations will be further elaborated on and communicated prior to 2020, when the Agreement will come into effect. As stated before, the Agreement is a unique hybrid and was hatched in vexing circumstances; it is an evolving and flexible agreement. Therefore, there may be unknown or unrecognised obligations which may come to attention as the negotiations on modalities continue.

### **4. South Africa and the Ratification Process**

The Vienna Convention<sup>4</sup> defines ratification as "the international act whereby a state indicates its consent to be bound to a treaty". It also states that the "institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give

domestic effect to that treaty". In South Africa ratification is mandated and provided for by the Constitution,<sup>5</sup> specifically s231(2). The lead department on climate change, the Department of Environmental Affairs, has communicated that the ratification process is underway, and will take two to three years.

Section 231(2) of the Constitution provides that Parliament must approve South Africa's ratification of or accession<sup>6</sup> to agreements. Agreements requiring Parliamentary approval are agreements which:

Require ratification or accession (usually multilateral agreements) such as the Paris Agreement, as stipulated in Article 20(1)<sup>7</sup> of the Agreement;

Have financial implications which require an additional budgetary allocation from Parliament;

Have legislative or domestic implications (e.g. require new legislation or legislative amendments); this is the case with the Kyoto Protocol, for example.

The ratification process involves the agreement's text being submitted to the state law advisors at the Department of Justice and Constitutional Development for scrutiny to ensure that the agreement is consistent with domestic law. It must also be submitted to the Department of International Relations and Co-operation to ensure that the agreement is consistent with international law. The agreement is then sent to cabinet and once cabinet recommends that the agreement be approved by Parliament, the agreement is then tabled in Parliament in terms of s231(2) of the Constitution. An explanatory memorandum and a draft resolution must accompany the tabling of the agreement; the memorandum must:

Briefly set out the history, objectives and implications of the agreement;

Indicate the recommendations of cabinet;

Include the legal opinions of the state law advisors;

State whether the agreement has self-executing provisions that will become law in the Republic upon its approval by Parliament;

Give account of the projected financial and other costs of the agreement for the state; and

Contain all other information needed by Parliament to make an informed decision.

The agreement is then referred to the relevant committees of Parliament for debate, and this presents an opportunity for public consultation and stakeholder participation on the ratification of the agreement. The reports of the committees are considered by the National Assembly and National Council of Provinces sitting separately. When approved, an instrument of ratification or accession is drafted and deposited with the depositary as prescribed in the agreement under Article 20, in conjunction with a copy of the instrument of ratification or accession which must be deposited with the Treaty Section of the Department of International Relations and Cooperation.

At present, South Africa has signed the Paris Agreement; signature does not establish the consent to be bound to the Agreement, but it does qualify South Africa to proceed with ratification. It also creates an obligation for South Africa to refrain from acts that would defeat the object and the purpose of the Paris Agreement. Article 20 of the Paris agreement states that signature is subject to ratification, acceptance or approval.

## 5. Roundtable Discussion

On 27 May 2016, the CPLO, in collaboration with Project 90 by 2030, held a roundtable discussion on South Africa's International Obligations: The Domestication of the Paris Agreement. Domestication of the agreement has yet to be defined, and the impacts are far-reaching, so the purpose of this roundtable was to unpack the ratification process of such multilateral environmental agreements and to provide insight into their implications for South Africa. Mr Happy Khambhule from Project 90 by 2030 gave a very detailed introduction to the Paris Agreement and the ratification process. It is hoped that ratification will be completed in time for the Global Stocktake in 2018.<sup>8</sup> The process is arduous, culminating in the production of a single A4 page, and results in the collected information not being optimally dispersed internationally.

Ms Olivia Rumble from ENSAfrica, a law firm, explored the different forms the domestication process may take in South Africa, and whether the country should consider enacting legislation that is specific to climate change. Climate change is a cross-sectional issue, and the manner in which we address it will affect many aspects of life, including current legislation concerning the environmental; transport; health; energy; mineral resources; disaster management; and migration; as well as municipal by-laws and management. She indicated that it is not mandatory to have a Climate Change Act to give effect to the Paris Agreement. The fact that South Africa has agreed to be bound by an international agreement means that we have to do something. Because climate change is a human rights issue, South Africa has a legal duty to take steps, and these will be in the form of the domestication of the Paris Agreement. One potential problem is that the Agreement is not prescriptive enough. The language is softer and more cordial than in preceding documents; and it is phrased in broad terms that aim to encourage the behaviour of parties. This may make it difficult to translate into strict legal language.

Mr Goosain Isaacs represented the Western Cape Government. He informed us of the process of development, implementation and co-ordination of provincial climate change mitigation and adaptation policies, programmes and projects. If we go in the direction of an Act of law, we need to determine what we want to do to give effect to the Agreement, particularly from an emissions point of view. It was also important to bear in mind that the already over-burdened municipalities would be responsible for much of the implementation of the Agreement.

In the discussion that ensued, a recurring key input had to do with the urgency of deciding which route South Africa would take regarding domesticating the Paris Agreement, and implementing other climate change measures. A major part of the domestication process is public participation, which informs the citizens of the details of the agreement, in accordance with our democratic Constitution. There was therefore a plea for climate change related information to be simplified in a way that makes it understandable to the general population. It was posited that existing laws be updated and implemented in such a way that stops pitting economic growth

against climate change concerns. Scientists say that action is crucial in this decade (up to 2020), and the proposed plans by politicians will be effected only after this decade; in the meantime, people are already experiencing the impacts of climate change.

Members of the faith sector highlighted the human rights and dignity transgressions that accompany many climate change impacts. The encyclical *Laudato Si'*, released by Pope Francis in 2015, was impactful in raising the social profile of some of the issues involved, and can be used to generate social pressure. Civil society organisations need to build strategic alliances,<sup>9</sup> and to demand more of their respective governments. Governments know how to find and communicate with people when they want their votes, but when people need to be given information, geographic and language barriers are cited as obstacles to sharing climate change information with the people on the ground. There was resounding agreement regarding the need for more effective communication on educating people about climate change and what ordinary citizens can do to minimise and adapt to its effects.

## 6. Conclusion

It must be acknowledged that South Africa is dealing with a new kind of agreement. Inconsistencies in law, policy and planning must be rectified; and a balance must be struck between the imperatives of mitigating climate change, on the one hand, and adapting to it on the other. The need for increased transparency is crucial (especially in relation to the informative memorandum), along with the expansion of proper public participation. It is worth noting that an entire industry – that of renewable energy – is being developed, and it is important for civil society to be able to influence decisions that are being taken about this industry. For the first time in the history of global climate policy, the Paris Agreement establishes an ongoing, regular process to increase action by all countries. It is the duty of governments and civil society and other stakeholders to unite in sharing the climate change information necessary for citizens to make the right choices, and to participate in the parliamentary process that will lead to the ratification and domestication of the Paris Agreement by South Africa.

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**Palesa Ngwenya**  
**Researcher: CPLO**

**Happy Khambule**  
**Policy & Research Co-ordinator: Project 90 by 2030**

**Tina Schubert**  
**Policy & Research Manager: Project 90 by 2030**

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<sup>1</sup> Instrument of ratification - Defines the international act whereby a state indicates its consent to be bound to a treaty ... The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

<sup>2</sup>United Nations Framework Convention On Climate Change <https://unfccc.int/resource/docs/convkp/conveng.pdf>

<sup>3</sup> Article 2 of the Paris Agreement

1) This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development.

2) This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

<sup>4</sup> Vienna Convention of the Law of Treaties 1969

<sup>5</sup> Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)

<sup>6</sup> Accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. [Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]

<sup>7</sup> Article 20.1 This Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the Convention. It shall be open for signature at the United Nations Headquarters in New York from 22 April 2016 to 21 April 2017. Thereafter, this Agreement shall be open for accession from the day following the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

<sup>8</sup> In 2018, Parties will reconvene to take stock of their collective efforts (referred to as a “facilitative dialogue”). This facilitative dialogue will review progress made towards the long-term Paris Agreement goal to peak emissions and achieve net-zero emissions. After the 2018 assessment, the next moment for all countries to come back and assess implementation and collective progress will be in 2023, referred to in the Paris Agreement as the Global Stocktake. This Global Stocktake will then occur every five years and serve as the pivotal collective moment to assess implementation and progress towards achieving long-term Paris Agreement goals.

<sup>9</sup> An example of this can be seen in the alliance between South African faith based organisations and unions for COP21, which led to the Paris Agreement.

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