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Treaty Between The Government Of The United States Of America And The Government Of The Republic Of South Africa On Mutual Legal Assistance In Criminal Matters

Signed at Washington on 16 September 1999

Entered into force on 25 June 2001

The Government of the United States of America and the Government of the Republic of South Africa,

Desiring to improve the effectiveness of the law enforcement authorities of both countries in the investigation, prosecution, and prevention of crime through cooperation and mutual legal assistance in criminal matters,

Hereby agree as follows:

Article 1

Scope of Assistance

1. The Contracting States shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of offences, and in proceedings related to criminal matters.
2. Assistance shall include:
 - (a) taking the testimony or statements of persons;
 - (b) providing documents, records, and articles of evidence;
 - (c) locating or identifying persons;
 - (d) serving documents;
 - (e) transferring persons in custody for testimony or other purposes;
 - (f) executing requests for searches and seizures;
 - (g) assisting in proceedings related to restraint or immobilization and confiscation or forfeiture of assets or property; compensation or restitution; recovery or collection of fines; and
 - (h) any other form of assistance not prohibited by the laws of the Requested State.
3. Assistance shall be provided without regard to whether the conduct which is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offence under the laws of the Requested State.

4. This Treaty is intended solely for mutual legal assistance between the States. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

Article 2

Central Authorities

1. Each Contracting State shall designate a Central Authority to make and receive requests pursuant to this Treaty.
2. For the Government of the United States of America, the Central Authority shall be the Attorney General or a person designated by the Attorney General. For the Government of the Republic of South Africa, the Central Authority shall be the Director-General: Department of Justice or a person designated by the Director-General.
3. The Central Authorities shall communicate directly with one another for the purposes of this Treaty. Such communication may, in exceptional circumstances, be effected through their diplomatic channels or through INTERPOL.

Article 3

Limitations on Assistance

1. The Central Authority of the Requested State may deny assistance if:
 - (a) the request relates to a political offence;
 - (b) the request relates to an offence under military law which would not be an offence under ordinary criminal law;
 - (c) the execution of the request would prejudice the national security or any other essential interests of the Requested State; or
 - (d) the request is not made in conformity with the Treaty.
2. For the purposes of paragraph 1(a) of this Article, the following offences shall not be considered political offences:
 - (a) a murder or other violent crime against a Head of State or Deputy Head of State of the Requesting or Requested State, or of or against a member of such person's family;
 - (b) an offence for which both the Requesting or Requested State have an obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution;
 - (c) murder;
 - (d) an offence involving kidnapping, abduction, or any other form of unlawful detention, including the taking of hostages; and
 - (e) attempting or conspiring to commit, aiding, abetting, inducing, counseling or procuring commission of, or being an accessory before or after the fact to such offences.
3. Before denying assistance pursuant to this Article, the Central Authority of the Requested State shall consult with the Central Authority of the Requesting State to consider whether assistance can be given subject to such conditions as it deems necessary. If the Requesting State accepts assistance subject to these conditions, it shall comply with the conditions.
4. If the Central Authority of the Requested State denies assistance, it shall inform the Central Authority

of the Requesting State of that decision and the reasons therefor.

Article 4

Form and Contents of Requests

1. A request for assistance shall be in writing except that the Central Authority of the Requested State may accept a request in another form in emergency situations. In any such case, the request shall be confirmed in writing within ten days thereafter unless the Central Authority of the Requested State agrees otherwise. The request shall be in English.

2. The request shall include the following:

(a) the name of the authority conducting the investigation, prosecution, or proceeding to which the request relates;

(b) a description of the subject matter and nature of the investigation, prosecution, or proceeding, including the specific criminal offences which relate to the matter;

(c) a description of the evidence, information, or other assistance sought; and

(d) a statement of the purpose for which the evidence, information, or other assistance is sought.

3. To the extent necessary and possible, a request shall also include:

(a) information on the identity and location of any person from whom evidence is sought;

(b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;

(c) information on the identity and whereabouts of a person to be located;

(d) a precise description of the place or person to be searched and of the articles to be seized;

(e) a description of the manner in which any testimony or statement is to be taken and recorded;

(f) a list of questions to be asked of a witness;

(g) a description of any particular procedure to be followed in executing the request;

(h) information as to the allowances and expenses to which a person asked to appear in the Requesting State will be entitled;

(i) any requirements for confidentiality and the reasons therefor;

(j) a court order, if any, or a certified copy thereof, which is to be enforced and a statement that such order is final; and

(k) any other information which may be brought to the attention of the Requested State to facilitate its execution of the request.

Article 5

Execution of Requests

1. The Central Authority of the Requested State shall promptly execute the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the Requested State shall do everything in their power to execute the request. The Courts of the

Requested State have authority to issue subpoenas, search warrants, or other orders necessary to execute the request.

2. The Central Authority of the Requested State shall make all necessary arrangements for representation in the Requested State of the Requesting State in any proceedings arising out of a request for assistance.

3. Requests shall be executed in accordance with the laws of the Requested State, including the terms of this Treaty. However, the method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested State.

4. If the Central Authority of the Requested State determines that execution of a request would interfere with an ongoing criminal investigation, prosecution, or proceeding in that State, it may postpone execution, or make execution subject to conditions determined to be necessary after consultations with the Central Authority of the Requesting State. If the Requesting State accepts the assistance subject to the conditions, it shall comply with the conditions.

5. The Requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Central Authority of the Requesting State. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested State shall so inform the Central Authority of the Requesting State, which shall then determine whether the request should nevertheless be executed.

6. The Central Authority of the Requested State shall respond to reasonable inquiries by the Central Authority of the Requesting State concerning progress in executing the request.

7. The Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the outcome of the execution of the request. If the request cannot successfully be executed in whole or in part, the Central Authority of the Requested State shall inform the Central Authority of the Requesting State of the reasons therefor.

Article 6

Authentication or Certification

1. Upon request by the United States, information or evidence furnished to the United States shall be authenticated or certified in the following manner:

(a) Information or evidence provided pursuant to Articles 9, 10 or 16 shall be authenticated or certified in the manner indicated in Form A for Article 9, Form B for Article 10 or Form E for Article 16, appended to this Treaty, or in such other manner as the Central Authority requests; and

(b) The absence or non-existence of evidence requested pursuant to Article 9 or 10 shall be certified in the manner indicated in Form C for Article 9 or Form D for Article 10, appended to this Treaty.

(c) The following shall be admissible in the United States as proof of the truth of the matters set forth therein:

(i) records authenticated by Form A or B or certified by Form E; and

(ii) Forms C or D, certifying the absence of such records.

2. (a) Upon request by the Republic of South Africa, documents or articles of evidence furnished to the Republic of South Africa shall be authenticated or certified by attestation, affidavit, or other affirmation covering or recording the required or requested subject matter. The substantive form of the said attestation, affidavit or declaration will be communicated by the Central Authority of the Republic of South Africa to its counterpart in the United States from time to time.

(b) Despite the provisions of subparagraph (a), in the case of court records or records of judicial proceedings, it shall be sufficient if a copy of such records is certified as a true copy of the original recorded by the relevant judicial officer or another competent authority in the United States.

(c) All documents referred to in this paragraph must be accompanied by a certificate according to the example set out in Form F to this Treaty.

(d) Despite the provisions of sub-paragraph (c), any document referred to therein, may be authenticated or certified in the manner in which foreign documents are authenticated or certified to enable them to be produced in any court in the Republic of South Africa.

(e) In the case of documents contemplated in Article 10 of this Treaty it shall be sufficient if such documents or certified copies thereof are authenticated or certified in accordance with sub-paragraphs (c) or (d).

Article 7

Costs

1. The Requested State shall pay all costs relating to the execution of the request, except for the fees of expert witnesses, the costs of translation, interpretation, and transcription, and the allowances and expenses related to travel of persons pursuant to Articles 11, 12 and 13, which costs, fees, allowances, and expenses shall be paid by the Requesting State.
2. If, during the execution of a request, it becomes apparent that fulfillment of the request will entail expenses of an extraordinary nature, the Central Authorities shall consult to determine the terms and conditions under which execution may continue.

Article 8

Limitations on Use

1. The Central Authority of the Requested State may require that the Requesting State not use any information or evidence obtained under this Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested State. In such cases, the Requesting State shall comply with the requirement.
2. The Central Authority of the Requested State may request that information or evidence furnished under this Treaty be kept confidential or be used only subject to terms and conditions it may specify. If the Requesting State accepts the information or evidence subject to such conditions, the Requesting State shall use its best efforts to comply with the conditions.
3. Nothing in this Article shall preclude the use or disclosure of information or evidence to the extent that there is an obligation to do so under the Constitution of the Requesting State in criminal proceedings. The Requesting State shall notify the Requested State in advance of any such proposed disclosure.
4. Information or evidence which has been made public in the Requesting State in accordance with paragraph 1 or 2 may thereafter be used for any purpose.

Article 9

Testimony or Evidence in the Requested State

1. A person in the Requested State from whom testimony or evidence is requested pursuant to this Treaty shall be compelled, if necessary, to appear and testify or produce items, including documents, records, and articles of evidence.
2. Upon request, the Central Authority of the Requested State shall furnish information in advance

about the date and place of the taking of the testimony or evidence pursuant to this Article.

3. The Requested State shall permit the presence of such persons as specified in the request during the execution of the request, and shall allow such persons to question, directly or indirectly, the person giving the testimony or evidence.

4. If the person referred to in paragraph 1 asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the testimony or evidence shall nonetheless be taken and the claim made known to the Central Authority of the Requesting State for resolution by the authorities of that State.

Article 10

Official Records

1. The Requested State shall provide the Requesting State with copies of publicly available records, including documents or information in any form, in the possession of organs of State and government departments and agencies in the Requested State.

2. The Requested State may provide copies of any documents, records, or information which are in the possession of an organ of State or a government department or agency in that State, but which are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities. The Requested State may in its discretion deny a request pursuant to this paragraph entirely or in part.

Article 11

Testimony in the Requesting State

1. When the Requesting State requests the appearance of a person in that State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting State. The Requesting State shall indicate the extent to which the expenses will be paid. The Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the response of the person.

2. The Central Authority of the Requesting State may, in its discretion, determine that a person appearing in the Requesting State pursuant to this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any acts or convictions which preceded his departure from the Requested State.

3. The safe conduct provided for by this Article shall cease seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or when the person, having left the Requesting State, voluntarily returns. The Central Authority of the Requesting State may, in its discretion, extend this period for up to fifteen days if it determines that there is good cause to do so.

Article 12

Transfer of Persons in Custody

A person in the custody of either State whose presence for purposes of assistance under this Treaty is sought may be transferred from the custody of one State to the custody of the other State for that purpose provided that:

(a) the person concerned and both Central Authorities to this Treaty agree thereto; and

(b) any terms or conditions set by the State that will transfer such person for the purposes of this Article will be adhered to by the receiving State, including:

(i) the receiving State shall have the authority and the obligation to keep the person transferred in

custody unless otherwise authorized by the sending State;

(ii) the receiving State shall return the person transferred to the custody of the sending State as soon as circumstances permit or as otherwise agreed by both Central Authorities;

(iii) the receiving State shall not require the sending State to initiate extradition proceedings for the return of the person transferred; and

(iv) the person transferred shall receive credit for service of the sentence imposed in the sending State for time served in the custody of the receiving State.

Article 13

Transit of Persons in Custody

1. The Requested State may authorize the transit through its territory of a person held in custody by a third State whose personal appearance has been requested by the Requesting State to give testimony or evidence or otherwise provide assistance in an investigation, prosecution or proceeding.

2. Where such transit is authorized, the Requested State shall have the authority and the obligation to keep the person in custody during transit in accordance with the laws of the Requested State, including the terms of this Treaty.

Article 14

Location or Identification of Persons or Items

The Requested State shall use its best efforts to ascertain the location or identity of persons or items specified in the request.

Article 15

Service of Documents

1. The Requested State shall use its best efforts to effect service of any document relating, in whole or in part, to any request for assistance made by the Requesting State under the provisions of this Treaty.

2. The Requesting State shall transmit any request for the service of a document requiring the appearance of a person before an authority in the Requesting State a reasonable time before the scheduled appearance.

3. The Requested State shall return a proof of service in the manner specified in the request.

Article 16

Search and Seizure

1. The Requested State shall execute a request for the search, seizure, and delivery of any item to the Requesting State if the request includes the information justifying such action under the laws of the Requested State.

2. Upon request, every official who has custody of a seized item shall certify the continuity of custody, the identity of the item, and the integrity of its condition.

3. The Central Authority of the Requested State may require that the Requesting State agree to the terms and conditions deemed to be necessary to protect third party interests in the item to be transferred.

Article 17

Return of Items

The Central Authority of the Requested State may require that the Central Authority of the Requesting State return any items, including documents, records, or articles of evidence furnished to it in execution of a request under this Treaty, as soon as possible.

Article 18

Assistance in Forfeiture Proceedings

1. If the Central Authority of one Contracting State becomes aware of proceeds of crimes or instrumentalities or objects used in the commission of crimes that are located in the other State and may be forfeitable or otherwise subject to seizure under the laws of that State, it may so inform the Central Authority of the other State. If that other State has jurisdiction in this regard, it may present this information to its authorities for a determination whether any action is appropriate. These authorities shall issue their decision in accordance with the laws of their country, and shall, through their Central Authority, report to the other State on the action taken.

2. The Contracting States shall assist each other to the extent permitted by their respective laws in proceedings relating to:

(a) restraint or immobilization of proceeds of crimes and instrumentalities or objects used in the commission of crimes;

(b) confiscation or forfeiture of proceeds of crimes and instrumentalities or objects used in the commission of crimes;

(c) recovery or collection of fines imposed by courts as sentences in criminal proceedings; and

(d) compensation or restitution to victims of crime.

3. The State that has custody over proceeds of crimes and instrumentalities or objects used in the commission of crimes shall dispose thereof in accordance with its laws. Either State may transfer all or part of such assets or property, or the proceeds of the sale thereof, to the other State, to the extent permitted under the transferring State's laws and upon such terms as it deems appropriate.

Article 19

Compatibility with Other Treaties

Assistance and procedures set forth in this Treaty shall not prevent either Contracting State from granting assistance to the other State through the provisions of other applicable international agreements, or through the provisions of its domestic law. The States may also provide assistance pursuant to any bilateral arrangement, agreement, or practice which may be applicable.

Article 20

Consultation

The Central Authorities shall consult, at times mutually agreed to by them, to promote the most effective use of this Treaty. They may also agree on such practical measures as may be necessary to facilitate the implementation of this Treaty.

Article 21

Application

This Treaty shall apply to any assistance contemplated in Article 1, whether the acts were committed before, on, or after the date upon which this Treaty enters into force. Nothing in this treaty shall be deemed to require or authorize any action by the Requested State that is contrary to the constitution of

that State.

Article 22

Ratification, Entry Into Force, and Termination

1. This Treaty shall be subject to ratification, and the instruments of ratification shall be exchanged as soon as possible.
2. This Treaty shall enter into force upon the exchange of instruments of ratification.
3. Either State may terminate this Treaty by means of written notice to the other State through the diplomatic channel. Termination shall take effect six months following the date of notification.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments have signed this Treaty.

DONE at Washington, in duplicate, this sixteenth day of September, 1999.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA:

APPENDICES:

FORM A

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS

I, ____ (Name), attest on penalty of criminal punishment for false statement or false attestation that I am employed by ____ (name of business from which documents are sought) and that my official title is ____.

I further state that each of the records attached hereto is the original or a duplicate of the original records in the custody of ____ (name of business from which documents are sought).

I further state that:

(A) such records were made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such records were kept in the course of a regularly conducted business activity;

(C) the business activity made such records as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original. ____ (Signature) ____ (Date)

Sworn to or affirmed before me ____ (Name), a ____ (notary public, judicial officer, etc.) this ____ (Day) day of ____ (Month), ____ (Year).

FORM B

ATTESTATION OF AUTHENTICITY OF FOREIGN PUBLIC DOCUMENTS

I, ____ (Name), attest on penalty of criminal punishment for false statement or attestation that my position with the Government of ____ (Country) is ____ (Official Title) and that in that position I am authorized by the law of ____ (Country) to attest that the documents attached and described below are true and accurate copies of original official records that are recorded or filed in ____ (Name of Office or Agency), which is a government office or agency of ____ (Country), Description of Documents:

____ (Signature)

____ (Title)

____ (Date)

FORM C

CERTIFICATION OF ABSENCE OR NON-EXISTENCE OF BUSINESS RECORDS

I, ____ (name) ____, having been advised as a witness that a false attestation subjects me to a penalty of criminal punishment, attest as follows:

I am employed by/associated with ____ (name of business from which documents are sought) ____ in the position of ____ (business position or title) ____ and by reason of my position am authorized and qualified to make this attestation.

As a result of my employment/association with the above-named business, I am familiar with the business records it maintains. The business maintains business records that:

(A) are made, at or near the time of the occurrence of the matters set forth therein by, or from information transmitted by, a person with knowledge of those matters;

(B) are kept in the course of a regularly conducted business activity; and

(C) are made by the business as a regular practice.

Among the records so maintained are records of individuals and entities that have accounts or otherwise transact business with the above-named business. I have made or caused to be made a diligent search of those records. No records have been found reflecting any business activity between the business and the following individuals and entities: ____.

If the business had maintained an account on behalf of or had participated in a transaction with any of the foregoing individuals or entities, its business records would, reflect that fact.

____ (date of execution) ____

____ (place of execution) ____

____ (signature) ____

FORM D

CERTIFICATION OF ABSENCE OR NON-EXISTENCE OF OFFICIAL RECORDS

I, ____ (name) ____, certify as follows:

1. ____ (name of public authority) ____ is a government office or agency of ____ (country) ____ and is authorized by law to maintain official records setting forth matters that are authorized by law to be reported and recorded or filed;

2. records of the type described below set forth matters that are authorized by law to be reported and recorded or filed, and such matters regularly are recorded or filed by the above-named public authority;

3. my position with the above-named public authority is ____ (official title) ____;

4. in my official capacity I have made, or caused to be made, a diligent search of the above-named

public authority's records for the records described below; and

5. no such records have been found to exist therein.

Description of records:

____ (signature) ____

____ (date) ____ (Official Seal or Stamp)

FORM E

ATTESTATION WITH RESPECT TO SEIZED ARTICLES

I, ____ (Name), attest on penalty of criminal punishment for false statements or attestation that my position with the Government of ____ (Country) is ____ (Official Title). I received the articles listed below from ____ on ____ (Date), at ____ (Place) in the following condition:

Description of Article:

Changes in Condition while in my custody:

Official Seal

____ (Signature)

____ (Title)

____ (Date)

FORM F

APPOSTILLE

(Convention de la Haye du 5 Octobre 1961)

1. Country

This public document

2. has been signed by

3. acting in the capacity of

4. bears the seal/stamp of

Certified

5. at

6. the (date)

7. by

8. No.

9. Seal/stamp:

. . . .

10. Signature:

.....

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