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GOVERNMENT NOTICES
GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DEPARTEMENT VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING

No. R. 33

21 January 2005

INTERNATIONAL CO-OPERATION IN CRIMINAL MATTER ACT, 1996
(ACT NO. 75 OF 1996)

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATY BETWEEN THE REPUBLIC OF
SOUTH AFRICA AND THE PEOPLE'S REPUBLIC OF CHINA

I, Brigitte Sylvia Mabandla, Minister for Justice and Constitutional Development, hereby give notice in terms of section 27(2) of the International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), that the Parliament of the Republic of South Africa has on 21 October 2003 agreed to the ratification of the Mutual Legal Assistance in Criminal Matters Treaty between the Republic of South Africa and the People's Republic of China as set out in the Schedule. The said Treaty entered into force on 17 November 2004.

Mrs B S Mabandla
Minister for Justice and Constitutional Development

SCHEDULE

TREATY

BETWEEN

THE REPUBLIC OF SOUTH AFRICA

AND

THE PEOPLE'S REPUBLIC OF CHINA

ON

MUTUAL LEGAL ASSISTANCE

IN

CRIMINAL MATTERS

THE REPUBLIC OF SOUTH AFRICA AND THE PEOPLE'S REPUBLIC OF CHINA (hereinafter referred to as "the Contracting States"),

DESIRING to make more effective their co-operation in the prevention and suppression of crime by concluding a treaty on mutual legal assistance in criminal matters;

AFFIRMING their mutual respect for sovereignty and equality and mutual benefit and respect for each other's legal systems and judicial institutions;

HAVE agreed as follows:

ARTICLE 1

Scope of Application

1. The Contracting States shall, in accordance with the provisions of this Treaty, provide mutual legal assistance in criminal matters.
2. Such assistance shall include:
 - (a) serving documents of proceedings;
 - (b) taking testimonies or statements from persons;
 - (c) providing documents, records and articles of evidence;
 - (d) obtaining and providing expert evaluations;
 - (e) locating and identifying persons;
 - (f) conducting judicial inspections or examining sites or objects;
 - (g) making persons available for giving evidence or assisting in investigations;
 - (h) transferring persons in custody for giving evidence or assisting in investigations;
 - (i) conducting inquiries, searches, freezing or restraining and seizures;
 - (j) forfeiting or confiscating proceeds of criminal activities and instruments of crime;
 - (k) notifying results of criminal proceedings and supplying criminal records;
 - (l) exchanging information on law; and
 - (m) any other forms of assistance which are not contrary to the laws of the Requested State.

ARTICLE 2

Central Authorities

1. For the purpose of this Treaty, the Central Authorities designated by the Contracting States shall communicate directly with each other for matters concerning mutual request and assistance.
2. The Central Authorities referred to in paragraph 1 of this Article shall be the Director-General: Department for Justice and Constitutional Development for the Republic of South Africa and the Ministry of Justice for the People's Republic of China.
3. Should either Contracting State change its designated Central Authority, it shall inform the other Contracting State of such change through diplomatic channels.

ARTICLE 3

Refusal or Postponement of Assistance

1. The Requested State may refuse to provide assistance if:
 - (a) the request relates to conduct which would not constitute an offence under the laws of the Requested State;
 - (b) the request is considered by the, Requested State as relating to a political offence;
 - (c) the request relates to an offence which is a purely military offence under the laws of the Requesting State;
 - (d) there are substantial grounds for the Requested State to believe that the request has been made for the purpose of investigating, prosecuting, punishing or instituting other proceedings against a person on account of that person's race, sex, religion, nationality or political opinions, or that that person's position may be prejudiced for any of those reasons;
 - (e) the Requested State is in the process of or has terminated criminal proceedings or has already rendered a final judgment against the same suspect or accused for the same offence as contained in the request;
 - (f) the Requested State considers that the assistance requested lacks substantial connection with the case; or
 - (g) the Requested State is of the opinion that the execution of the request would impair its sovereignty, security, **public order** or other

essential public interests, or would be contrary to the fundamental principles of its domestic law.

2. The Requested State may postpone assistance if execution of the request would interfere with an ongoing investigation, prosecution or other proceeding in the Requested State.
3. Before refusing a request or postponing its execution, the Requested State shall consider whether assistance may be provided subject to such conditions as it deems necessary. If the Requesting State accepts assistance subject to those conditions, it shall comply with them.
4. If the Requested State refuses or postpones assistance, it shall inform the Requesting State of the reasons for the refusal or postponement.

ARTICLE 4

Form and Content of Requests

1. A request shall be made in writing. In urgent situations, the Requested State may accept a request in another form and the Requesting State shall confirm the request in writing promptly thereafter unless the Requested State agrees otherwise.
2. A request for assistance shall include the following:
 - (a) the name of the competent authority conducting the investigation, prosecution or other proceeding to which the request relates;
 - (b) a description of the nature of the relevant case, a summary of the relevant facts of and the provisions of laws applicable to the case to which the request relates;
 - (c) a description of the assistance sought and that of the purpose and relevance for which the assistance is sought; and
 - (d) the time limit within which the request should be executed.
3. To the extent necessary and possible, a request shall also include the following:
 - (a) information on the identity and residence of a person from whom evidence is sought;
 - (b) information on the identity and residence of a person to be served and that person's relationship to the proceedings;
 - (c) information on the identity and whereabouts of the **person** to be

located or identified;

- (d) a description of the place or object to be inspected or examined;
- (e) a description of any particular procedure to be followed in executing the request and reasons therefor;
- (f) a description of the place to be searched and of the property to be inquired into or searched, inspected, frozen or restrained and seized;
- (g) any degree of confidentiality and the reasons therefor;
- (h) information as to the allowances and expenses to which a person invited to be present in the Requesting State to give evidence or assist in the investigation will be entitled; and
- (i) such other information which may facilitate execution of the request.

4. If the Requested State considers the contents contained in the request not sufficient to enable it to deal with the request, it may request additional information.

5. Requests and supporting documents made under this Article shall be accompanied by a translation in an official language of the Requested State.

ARTICLE 5 **Execution of Requests**

1. The Requested State shall promptly execute a request for assistance in accordance with its domestic law.

2. Subject to its domestic law, the Requested State may execute the request for assistance in the manner requested by the Requesting State.

3. The Requested State shall promptly inform the Requesting State of the outcome of the execution of the request. If the assistance requested can not be provided, the Requested State shall inform the Requesting State of the reasons.

ARTICLE 6 **Confidentiality and Limitation on Use**

1. The Requested State shall subject to the fundamental principles of its domestic law, keep confidential a request, including its contents, supporting

documents and any action taken in accordance with the request, if so requested by the Requesting State. If the request cannot be executed without such confidentiality, the Requested State shall so inform the Requesting State, which shall then determine whether the request should nevertheless be executed.

2. The Requesting State shall, subject to the fundamental principles of its domestic law, keep confidential the information and evidence provided by the Requested State, if so requested by the Requested State, or shall use such information or evidence only under the terms and conditions specified by the Requested State. In the event of the confidentiality being breached in any way the Requesting State shall promptly inform the Requested State.

3. The Requesting State shall not use any information or evidence obtained under this Treaty for any purposes other than for the case described in the request without the prior consent of the Requested State.

ARTICLE 7

Service of Documents

1. The Requested State shall, in accordance with its domestic law and upon request, effect service of documents that are transmitted by the Requesting State. However, the Requested State shall not be obliged to effect service of a document which requires a person to appear as the accused.

2. The Requested State shall, after effecting service, provide the Requesting State with proof of service that shall include the description of the date, place, and manner of service and the authority which served the document. If service cannot be effected, the Requesting State shall be so informed and be advised of the reasons therefor.

ARTICLE 8

Takinn of Evidence

1. The Requested State shall, in accordance with its domestic law and upon request, take evidence and transmit it to the Requesting State.

2. When the request concerns the transmission of documents or records, the Requested State may transmit certified copies or photocopies thereof. However, where the Requesting State explicitly requires transmission of originals, the

Requested State shall meet such requirement to the extent possible.

3. Subject to the domestic law of the Requested State, the documents and other materials to be transmitted to the Requesting State in accordance with this Article shall be certified in such forms as may be requested by the Requesting State in order to make them admissible in accordance with the domestic law of the Requesting State.

4. Subject to the domestic law of the Requested State, 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 pose questions, through judicial or law enforcement personnel of the Requested State, to the person from whom evidence is to be taken. For this purpose, the Requested State shall promptly inform the Requesting State of the time and place of the execution of the request.

ARTICLE 9

Refusal to Give Evidence

1. A person who is required to give evidence in the Requested State pursuant to a request may refuse to give evidence where the laws of either State permit or require that person to refuse to give evidence.

2. If a person claims that there is a right or obligation to refuse to give evidence under the laws of the Requesting State, the Requested State shall, with respect to the right or obligation, rely on a certificate of the competent authority of the Requesting State as evidence of the existence or non-existence of that right or obligation.

ARTICLE 10

Availability of Persons to Give Evidence or Assist in Investigations

1. When the Requesting State requests the appearance of a person to give evidence or assist in investigations in the territory of the Requesting State, the Requested State shall invite the person to appear before the appropriate authority in the territory of the Requesting State. The Requesting State shall indicate the extent to which allowances and expenses will be paid to the person. The Requested State shall promptly inform the Requesting State of the person's response.

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 territory of the Requesting State no less than sixty (60) days before the scheduled appearance unless, in urgent cases, the Requested State has agreed to a shorter period of time.

ARTICLE 11
Transfer of Persons in Custody
for Giving Evidence or Assisting in Investigations

1. To the extent permitted by its laws, the Requested State may, at the request of the Requesting State, temporarily transfer a person in custody in its territory to the Requesting State for appearing before an authority to give evidence or assist in investigations, provided that the person so consents and the Contracting States have previously reached a written agreement on the conditions of the transfer.

2. If the person transferred is required to be kept in custody under the laws of the Requested State, the Requesting State shall hold that person in custody.

3. The Requesting State shall promptly return the person transferred to the Requested State as soon as he/she finished giving evidence or assisting in investigations.

4. For the purposes of this Article, the person transferred shall receive credit for service of the sentence imposed in the Requested State for the period of time served in the custody of the Requesting State.

ARTICLE 12
Protection of Witnesses and Experts

1. Any witness or expert present in the territory of the Requesting State shall not be investigated, prosecuted, detained, punished or subjected to any other restriction of personal liberty by the Requesting State for any acts or omissions which preceded that person's entry into its territory, nor shall that person be obliged to give evidence or to assist in any investigations, prosecution or other proceedings other than that to which the request relates, except with the prior consent of the Requested State and that person.

2. Paragraph 1 of this Article shall cease to apply if the person referred to in paragraph 1 of this Article has stayed on in the territory of the Requesting State thirty (30) days after that person has been officially notified that his/her presence is no longer required or, after having left, has voluntarily returned. But this period of time shall not include the time during which the person fails to leave the territory of the Requesting State for reasons beyond his/her control.

3. A person who refuses to give evidence or assist in investigations in accordance with Articles 10 or 11 shall not be subject to any penalty or mandatory restriction of personal liberty for such refusal.

ARTICLE 13

Inquiry, Search, Freezing or Restraining and Seizure

1. The Requested State shall, subject to its domestic law, execute a request for inquiring, searching, freezing or restraining and seizing of evidential materials, articles and assets.

2. The Requested State shall provide the Requesting State with such information as requested concerning the results of executing the request, including information on the results of inquiring or searching, the place and circumstances of freezing or restraining or seizing, and the subsequent custody of such materials, articles or assets.

3. The Requested State may transmit the seized materials, articles or assets to the Requesting State if the Requesting State agrees to the terms and conditions for such transmission proposed by the Requested State.

ARTICLE 14

Return of Documents, Records and Articles of Evidence to the Requested State

At the request of the Requested State, the Requesting State shall, as soon as possible, return to the Requested State the original documents or records and articles of evidence provided to it by the latter under this Treaty.

ARTICLE 15
Proceeds of Crime
and Instruments of Crime

1. The Requested State shall, upon request, endeavour to ascertain whether any proceeds and instruments of crime are deposited within its territory and shall notify the Requesting State of the result of inquiries made. In making the request, the Requesting State shall give the Requested State the reasons for inferring that the proceeds or instruments may be deposited in the latter's territory.
2. Once the suspected proceeds or instruments of crime are found in accordance with paragraph 1 of this Article, the Requested State shall, at the request of the Requesting State, take measures to freeze or restrain, seize and forfeit or confiscate such proceeds or instruments according to its domestic law.
3. At the request of the Requesting State, the Requested State may, to the extent permitted by its domestic law and under the terms and conditions agreed to by the Contracting States, transfer all or part of the proceeds or instruments of crime, or the proceeds from the sale of such assets to the Requesting State.
4. In applying this Article, the legitimate rights and interests of the Requested State and any third party to such proceeds or instruments shall be respected under the domestic law of the Requested State.

ARTICLE 16
Notification of Results of Proceedings
in Criminal Matters

1. A Contracting State that has made a request to the other in accordance with this Treaty shall, at the request of the latter, inform the latter of results of the criminal proceedings to which the request for assistance relates.
2. Either Contracting State shall, upon request, inform the other Contracting State of the results of any criminal proceedings it may have instituted against a national of the latter.

ARTICLE 17
Supply of Criminal Records

The Requested State shall provide, upon request, the Requesting State with the

past criminal records and information of the sentence against the person investigated or prosecuted in a criminal matter in the territory of the Requesting State, if the person concerned has also been prosecuted in the Requested State.

ARTICLE 18

Exchange of Information on Law

The Contracting States shall, upon request, furnish each other with information on the laws and on judicial and law enforcement practice in the respective States relating to the implementation of this Treaty.

ARTICLE 19

Authentication

For the purpose of this Treaty, any documents transmitted in accordance with this Treaty shall not require any form of authentication unless this Treaty otherwise provides.

ARTICLE 20

Expenses

1. The Requested State shall meet the cost of executing the request, but the Requesting State shall bear the following:
 - (a) expenses for persons to travel to, stay in and leave from the Requested State under Article **8 (4)**;
 - (b) allowances or expenses for persons to travel to, stay in and leave from the Requesting State under Articles 10 or 11 in accordance with the standards or regulations of the place where such allowances or expenses have been incurred;
 - (c) expenses and fees of experts; and
 - (d) expenses and fees of translation and interpretation.

2. The Requesting State shall, upon request, pay in advance the expenses, allowances and fees it shall bear.

3. If it becomes apparent that the execution of a request requires expenses of an extraordinary nature, the Contracting States shall consult each other to determine the terms and conditions under which the request can be executed.

ARTICLE 21**Service of Documents and Takinn of Evidence
by Diplomatic or Consular Officials**

Either Contracting State may serve documents on and take evidence from its nationals in the territory of the other Contracting State through its diplomatic or consular agents therein, provided that the domestic law of the other Contracting State will not be violated and no coercive measures of any kind are taken.

ARTICLE 22**Compatibilities with other Treaties**

This Treaty shall not prevent either Contracting State from providing assistance to the other Contracting State according to other applicable international agreements or its domestic laws. The Contracting States may also provide assistance in accordance with any other arrangement, agreement, or practice which may be applicable.

ARTICLE 23**Settlement of Disputes**

Any dispute arising out of the interpretation and application of this Treaty shall be resolved through consultation by diplomatic channels if the Central Authorities of the Contracting States are themselves unable to reach agreement.

ARTICLE 24**Entry into Force, Amendment and Termination**

1. This Treaty is subject to ratification. The instruments of ratification shall be exchanged at a place to be determined by the Contracting States. This Treaty shall enter into force on the thirtieth day after the date of the exchange of the instruments of ratification.
2. This Treaty may be amended at any time by written agreement between the Contracting States.

3. Either Contracting State may terminate this Treaty at any time by notice in writing to the other Contracting State through diplomatic channels. Termination shall take effect on the one hundred and eightieth day after the date on which the notice is given.

4. This Treaty applies to any requests presented after its entry into force even if the relevant acts or omissions occurred before this Treaty enters into force.

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

DONE at Pretoria on this 20th day of January 2003, in duplicate in the English and Chinese languages, both texts being equally authentic.

Dr P M Maduna
Minister for Justice and Constitutional
Development
For The Republic of South Africa

Mr Wang Yi
Deputy Minister for Foreign Affairs
For The People's Republic of China