

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

No. R. 311

7 April 2006

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

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATY BETWEEN THE REPUBLIC OF
SOUTH AFRICA AND THE REPUBLIC OF INDIA**

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 9 November 2004 agreed to the ratification of the Mutual Legal Assistance in Criminal Matters Treaty between the Republic of South Africa and the Republic of India as set out *in* the Schedule. The said Treaty entered into force on 6 December 2005.

Mrs B S Mabandla
Minister for Justice and Constitutional Development

SCHEDULE

TREATY BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA
AND
THE GOVERNMENT OF THE REPUBLIC OF INDIA
ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA; (hereinafter referred to as Contracting States);

DESIRING to improve the effectiveness of both countries in the investigation, prosecution and suppression of crime, including crimes related to terrorism, through cooperation and mutual legal assistance in criminal matters;

HAVE AGREED as follows:

Article 1 Scope of Application

1. The Contracting States shall, in accordance with this Treaty, provide each other with the widest measure of mutual legal assistance in criminal matters.
2. Mutual legal assistance is any assistance given by the Requested State in respect of investigations, prosecutions or proceedings to the Requesting State in criminal matters, irrespective of whether the assistance is sought or is to be provided by a court or some other authority.
3. Assistance shall be provided without regard to whether the conduct which is the subject of the investigation, prosecution or proceedings in the Requesting State would constitute an offence under the laws of the Requested State.
4. Assistance includes –
 - (a) locating and identifying persons and objects;
 - (b) serving documents, including documents seeking the attendance of persons;
 - (c) providing information, documents and records;
 - (d) providing objects, including lending exhibits;
 - (e) search and seizure;
 - (f) taking evidence and obtaining statements;
 - (g) authorizing the presence of persons from the Requesting State at the execution of requests;
 - (h) making detained persons available to give evidence or assist investigations;
 - (i) facilitating the appearance of witnesses or the assistance of persons in investigations;
 - (j) taking measures to locate, restrain or forfeit the proceeds of crime; and
 - (k) any other form of assistance not prohibited by the law of the Requested State.
5. This Treaty shall also apply to any requests for legal assistance relating to acts or omissions committed before its entry into force.

Article 2 Definitions

For the purpose of this Treaty –

1. criminal matters means for the Republic of South Africa, both statutory and common law offences and, for the Republic of India, investigations, inquiries, trials or other proceedings relating to an offence created by Parliament or by the legislature of a state/province;

2. criminal matters shall include investigations, prosecutions or proceedings relating to offences concerning taxation, duties, customs and foreign exchange.

Article 3 Central Authorities

The Central Authorities shall transmit and receive all requests for the purposes of this Treaty. The Central Authority for the Republic of South Africa shall be the Director-General, Department for Justice and Constitutional Development or a person designated by the Director-General and the Central Authority for the Republic of India is the Ministry of Home Affairs.

Article 4 Execution of Requests

1. Requests for assistance shall be executed promptly in accordance with the law of the Requested State and, in so far as not prohibited by that law, in the manner specified by the Requesting State.
2. The Requested State shall, on request, inform the Requesting State of the date and place of execution of the request for assistance.
3. The Requested State shall not refuse to execute a request on the ground of bank secrecy.

Article 5 Contents of Requests

1. In all cases, requests for assistance shall indicate –
 - (a) the competent authority conducting the investigation, prosecution or proceedings to which the request relates;
 - (b) the nature of the investigation, prosecution or proceedings, and include a summary of the facts and a copy of the applicable laws;
 - (c) the purpose of the request and the nature of the assistance sought;
 - (d) the degree of confidentiality required and the reasons therefor; and
 - (e) any time limit within which the request should be executed.
2. In the following cases, requests for assistance shall include –
 - (a) in the case of requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of proceeds of crime, a statement indicating the basis for belief that evidence or proceeds may be found in the Requested State;
 - (b) in the case of requests to take evidence from a person, an indication as to whether sworn or affirmed statements are required and a description of the subject matter of the evidence or statement sought;
 - (c) in the case of lending of exhibits, the current location of the exhibits in the Requested State and an indication of the person or class of persons who will have custody of the exhibits in the Requesting State, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned;

- (d) in the case of making a detained person available, an indication of the person or class of persons who will have custody during the transfer, the place to which *the* detained person is to be transferred and the probable date of that person's return; and
 - (e) in the case of requests in respect of search and seizure, a statement describing the basis of belief that the money or property is the proceeds of crime and liable for search and seizure.
3. If necessary, and where possible, requests for assistance shall include –
- (a) the identity, nationality and location of a person who is the subject of the investigation, prosecution or proceedings;
 - (b) details of any particular procedure or requirement that the Requesting State wishes to be followed and the reasons therefor.
4. If the Requested State considers that the information is not sufficient to enable the request to be executed, it may request additional information.
5. A request shall be made in writing. In urgent circumstances, a request may be made orally but shall be confirmed in writing promptly thereafter.

Article 6 Refusal or Postponement of Assistance

1. Assistance may be refused if in the opinion of the Requested State, the execution of ~~the~~ request would impair its sovereignty, security, public order, essential public interest or prejudice *the* safety of any person.
2. Assistance may be refused if the execution of the request would be contrary to the domestic law of the Requested State.
3. Assistance may be refused if ~~the~~ request relates to ~~an~~ offence in respect of ~~of~~ which ~~the~~ accused person had been finally acquitted or pardoned.
4. Assistance may be refused if the request seeking restraint, forfeiture or confiscation of proceeds of crime or seizure of property is in respect of ~~conduct/activity~~ which cannot be made the basis for *such* restraint, forfeiture, confiscation or seizure in the Requested State.
5. Assistance may be postponed by the Requested State if execution of ~~the~~ request would interfere with ~~an~~ ongoing investigation or prosecution in the Requested State.
6. The Requested State shall promptly inform the Requesting State of ~~its decision~~ not to comply in whole or in part with a request for assistance, or to postpone execution, and shall give reasons for that decision.
7. Before refusing a request for assistance or before postponing the execution of a request, ~~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.

Article 7 Service of Documents

1. The Requested State shall serve ~~any~~ document transmitted to ~~it~~ for the purpose of service.
2. The Requesting State shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting State within a reasonable time, before the scheduled response or appearance.

3. The Requested State shall return a proof of service in the manner required by the Requesting State.

Article 8
Provision of Information, Documents, Records and Objects

1. The Requested State shall provide copies of publicly available information, documents and records of government departments, ministries and agencies.
2. The Requested State may provide any information, documents, records and objects in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as they would be available to its own law enforcement and judicial authorities.
3. The Requested State may provide certified copies of documents or records, unless the Requesting State expressly requests originals.
4. Original documents, records or objects provided to the Requesting State shall be returned to the Requested State as soon as possible, upon request.
5. In so far as permitted by the law of the Requested State, documents, records or objects shall be provided in a form or accompanied by such certification as may be specified by the Requesting State in order to make them admissible according to the law of the Requesting State.

Article 9
Search and Seizure

1. The Requested State shall execute a request for a search and seizure.
2. Search and seizure shall be conducted by the Requested State in accordance with its domestic laws.
3. The competent authority that has executed a request for a search and seizure shall provide such information as may be required by the Requesting State concerning, but not limited to, the identity, condition, integrity and continuity of possession of the documents, records or objects seized and the circumstances of the seizure.

Article 10
Taking Evidence in the Requested State

1. A person requested to testify and produce documents, records or objects in the Requested State may be compelled, if necessary, to appear and testify and produce such documents, records or objects, in accordance with the law of the Requested State.
2. Subject to the law of the Requested State, commissioners, other officials of the Requesting State and persons concerned in the proceedings in the Requesting State shall be permitted to be present when evidence is taken in the Requested State and to participate in the taking of such evidence in the manner as may be specified by the Requested State. The right to participate in the taking of evidence includes the right to pose questions.
3. The persons present at the execution of a request may be permitted to make a verbatim transcript of the proceedings. The use of technical means to make such a verbatim transcript may be permitted.
4. To the extent permitted by its law, the Requested State shall execute a request for the taking of evidence in the manner requested by the Requesting State.

Article 11

Presence of Persons at the Execution of Requests

To the extent permitted by the law of the Requested State, persons specified in the request shall be permitted to be present at the execution of the request.

Article 12

Making Detained Persons Available to give Evidence or Assist in Investigations

1. Upon request, a person serving a sentence in the Requested State shall be temporarily transferred to the Requesting State to assist in investigations or to testify, provided that the person consents.
2. When the person transferred is required to be kept in custody under the law of the Requested State, the Requesting State shall hold that person in custody and shall return the person in custody at the conclusion of the execution of the request.
3. When the sentence imposed expires, or where the Requested State advises the Requesting State that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person present in the Requesting State pursuant to a request seeking that person's attendance.

Article 13

Providing Evidence or Assisting in Investigations in the Requesting State

The Requested State shall invite the person to assist in the investigation or to appear as a witness in the proceedings and seek that person's agreement thereto. That person shall be informed of any expenses and allowances payable.

Article 14

Safe Conduct

1. Subject to Article 12(2), a person present in the Requesting State in response to a request shall not be prosecuted, detained or subjected to any other restriction of personal liberty in that State for any acts or omissions which preceded that person's departure from the Requested State, nor shall that person be obliged to give evidence in any proceeding other than that to which the request relates.
2. Paragraph 1 of this Article shall cease to apply if a person, being free to leave the Requesting State, has not left within thirty (30) days after receiving official notification that the person's attendance is no longer required or, having left, has voluntarily returned.
3. Any person who fails to appear in the Requesting State may not be subjected to any sanction or compulsory measure in the Requesting or the Requested State.

Article 15

Proceeds and Instruments of Crime

1. The Requested State shall, upon request, endeavour to ascertain whether any proceeds of a crime are located within its jurisdiction and shall notify the Requesting State of the results of its inquiries.
2. When, pursuant to paragraph 1 of this Article, suspected proceeds of crime are found, the Requested State shall take such measures as are permitted by its law to restrain and forfeit those proceeds.

3. Proceeds forfeited pursuant to this Treaty shall accrue to the Requested State, unless otherwise agreed.

Article 16
Restitution and Fine Enforcement

The Requested State shall, to the extent permitted by its law, provide assistance concerning restitution to the victims of crime and the collection of fines imposed as a sentence in a criminal prosecution.

Article 17
Confidentiality

1. The Requested State may require, after consultation with the Requesting State, that information or evidence furnished or the source of such information or evidence be kept confidential, disclosed or used only subject to such terms and conditions as it may specify.
2. The Requesting State may require that the request, its contents, supporting documents and any action taken pursuant to the request be kept confidential. If the request cannot be executed without breaching the confidentiality requirement, the Requested State shall so inform the Requesting State prior to executing the request and the latter shall then determine whether the request should nevertheless be executed.

Article 18
Limitation of Use

The Requesting State shall not disclose or use information or evidence furnished for purposes other than those stated in the request, without the prior consent of the Requested State.

Article 19
Authentication

Documents, records or objects transmitted pursuant to this Treaty shall not require any form of authentication, except as specified in Article 8, or as required by the Requesting State.

Article 20
Language

1. Requests shall be submitted in the English language.
2. Supporting documents, if not in the English language, shall be accompanied by an English translation.

Article 21
Expenses

1. The Requested State shall meet the cost of executing the request for assistance, except that the Requesting State shall bear –
 - (a) the expenses associated with conveying any person to or from the territory of the Requested State at the request of the Requesting State, and any expenses payable to that person while in the Requesting State pursuant to a request under Article 12 or 13 of this Treaty;
 - (b) the expenses and fees of experts either in the Requested State or the Requesting State; and

(c) the expenses of translation, interpretation and transcription.

2. If it becomes apparent that the execution of the request requires expenses of an extraordinary nature, the Contracting States shall consult to determine the terms and conditions under which the requested assistance can be provided.

Article 22 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 conventions or 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 23 Consultation

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

Article 24 Entry into Force, Amendment 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 on the date of exchange of the instruments of ratification.
3. This Treaty may be amended by mutual consent.
4. Either Contracting State may terminate this Treaty. The termination shall take effect six (6) months from the date on which it was notified to the other Contracting State.
5. The Contracting States may also by mutual consent terminate this Treaty on such terms and conditions as may be agreed to between the States.

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

DONE at New Delhi this the sixteenth day of October of the year Two Thousand and Three in two originals each, in English and Hindi, both texts being equally authentic. However, in case of divergence of interpretation, the English text shall prevail.

Dr P M Maduna
Minister for Justice and
Constitutional Development
FOR THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA

Mr R Singh
Secretary of State
FOR THE GOVERNMENT
OF THE REPUBLIC OF INDIA