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Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Annex 1

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Date: 15 November 2011

Mr. Lionel October

Director-General

Department of Trade and Industry

Private Bag X 84

PRETORIA

0001

Attention: Malose Letsoalo

Dear Mr. October

**AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH
AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF CUBA ON
ECONOMIC ASSISTANCE**

1. We have scrutinised the draft "Agreement between the Government of the Republic of South Africa and the Government of the Republic of Cuba on Economic Assistance" ("the Agreement") in terms of paragraph 5.20(a) of the *Manual on Executive Acts of the President of the Republic of South Africa* and with reference to the *Constitutional Handbook for Members of the Executive*, the Constitution of the Republic of South Africa, 1996 (the "Constitution"), and other relevant legislation and applicable international instruments. We have indicated

suggested amendments and made certain comments directly on the electronic draft.

Summary of Agreement and Comments

Ad Preamble

2. The Preamble to this Agreement provides for the strengthening of friendly ties between the Parties, taking into cognisance the significant economic challenges that both countries are facing. It also envisages finding a new approach and strategy to consolidate and expand bilateral relations while fully respecting the principles of national sovereignty and self-determination.

Ad Article 1

3. This Article deals with the definition of terms and phrases used in this Agreement and it is in order.

Ad Article 2

4. This Article provides for the Competent Authorities that are charged with the implementation of the Agreement. The Article is in order.

Ad Article 3

5. This Article lays down rights and duties of both the Parties and Competent Authorities in terms of the Agreement. This Article is in order.

Ad Article 4

6. This Article provides that the Parties must appoint Facility Agents and may also change such Agents as they wish. However in the event of a change, the Party changing its Facility Agent must inform the other in writing. This Article is in order.

Ad Article 5

7. This Article provides for the objectives of the Agreement which are to contribute to the economic development of both South Africa and Cuba in a mutually beneficial way, through trade exchanges. South Africa will provide Cuba with a funding package of R350 Million for economic assistance.

8. We draw the attention of the Department to section 5(4) of the African Renaissance and International Co-operation Fund Act, 2000 (Act 51 of 2000) which provides as follows"

"Loans or other financial assistance must be granted or rendered in accordance with an agreement entered into between the relevant parties, excluding assistance for the promotion of democracy and good governance or the prevention or resolution of conflict."

9. The Department of International Relations and Co-operation (DIRCO) administers this Act. The Department may want to consider using the above mentioned route considering that the amount stipulated in the Agreement consists of R140 million which is a grant and R240 million which is a credit line.. This will make the agreement self-executing. We understand that the two Departments (DTI and DIRCO) are already in discussion on the implementation of this Agreement.

We also draw the Department's attention to the provisions of the Export Credit and Foreign Investments Insurance Act, 1957 (Act No. 78 of 1957), which provides for the provision of insurance on behalf of the Government for contracts in connection with export transactions, foreign investments and loans or similar facilities. The Department may use the services of the Export Credit Insurance Corporation of South Africa Limited to protect the Department by providing insurance for this Agreement.

10. We have noted that the Agreement indicates that there will be a Lender's Facility Agent. However, this agent is not named in the Agreement. The Agreement is also silent on the repayment terms. We have noted that the repayment provisions are provided for in the Annexure 2. We recommend that such provisions be migrated to the Agreement as suggested in Article 8 of the Agreement.

Ad Article 6 and 7

11. This Article deals with the scope of application of the funding package. It provides that the package will comprise of facilities B and C to be used for procurement by the importer of South African Goods Facility A of the package may be used to buy goods up to the value of R35 million from any country. Article 7 outlines the entire Package, which is divided into facility A (R40 million), facility B (R100 million) and facility C (R210 million). This Article is in order.

12. Facility C is divided into two tranches of R70 and R140 million respectively. The latter amount may only be used once the former amount has been repaid in full. The sum of R140 million also has to be repaid.

Ad Article 8

13. The Article deals with the General terms and conditions. It states that the goods purchased must be purchased from a South African entity. The Article further states that all exchange rate risks emanating from this Agreement shall be for the account of Cuba. This Article is in order

Ad Article 9

14. The Article allows the Parties to review the implementation of the Agreement at any time. This Article is in order.

Ad Articles 10-12

15. These are general articles usually contained in international agreements and appear to be in order.

Ad General

15. The Department's attention is drawn to the provisions of section 231 of the Constitution which provides as follows:

"231.(1) The negotiating and signing of all international 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, administrative 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."

In relation to section 231 (4) we draw your attention to paragraph 9 of this opinion.

We now turn to the relevant provisions of section 231 of the Constitution which we have quoted in full above. The Department's attention is also drawn to section 231(3) which deals with international agreements of a technical, administrative or executive nature.

16. According to the *Constitutional Handbook for Members of the Executive*, technical, administrative and executive agreements refer to the following categories of international agreements:

- a. Agreements which are departmentally specific.
- b. Agreements which are not of major political or other significance. or
- c. Agreements which have no financial consequences and do not affect domestic law. These are agreements flowing from the everyday activities of government departments and are often drafted in a simplified form.

17. The Department's attention is drawn to paragraph 5.16 on the Executive Acts of the President, which stipulates as follows:

"Accordingly, international agreements dealing with routine departmental matters would be covered by this convention. In this

regard, as with all other matters, line function Ministers must determine whether the international agreement in fact deals with routine departmental matters or may have contentious, including financial, consequences. If it does then it must go to the Cabinet. If not, the line function Minister may then seek to have the agreement approved by the President and, if the President is not personally able to sign the agreement, to have a person authorized to sign the agreement on behalf of the National Executive, without first referring the agreement to the Cabinet."

18. We are of the view that this Agreement is one which must be dealt with in terms of section 231(2) of the Constitution, in that the latter states the following- "231(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)."

19. Section 231(3) states that an international agreement of a technical, administrative 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 it must be tabled in the Assembly and the Council within a reasonable time.

20. The Manual on Executive Acts of the President In paragraph 5.5 guides us as to what constitutes –"technical, administrative, and executive nature of the agreement". It states that such an agreement must be – (a) agreements must be departmental specific; (b) agreement must not have major political or other significance; and (c) agreement must not have financial consequences, and do not affect domestic law...

21. We are of the view that this agreement does not meet all the three mentioned requirements, and thus Parliament is required to approve it by resolution in accordance with section 231(2).. It should be noted that although the

agreement appears to be departmental specific, it does have major political and economic significance and has financial consequences. For this reason we suggested that the department considers using the African Renaissance and International Co-operation Act, 2000.

22. Finally section 231(2) is not mandatory, in that, it does not say which agreements must be tabled in Parliament. However our conclusion is that this agreement falls within the purview of section 231(2) which finds expression in the above analysis.

23. Subject to our foregoing remarks and comments on the draft Agreement, no provision of the Agreement is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.

24. We understand that there may have been payment difficulties regarding transaction with Cuba in the past. The agreement stipulates that any dispute between the Parties must be settled amicably. In this regard, we refer you to article 11 of the Agreement. In the light of the past experience, the Department may want to include a clause which confers jurisdiction on the South African courts to deal with the matter, if a dispute regarding the repayment of the credit line of R210 million, mentioned in article 6.3 arises and cannot be resolved. If the department agrees to this, we suggest that the following clause be inserted in the Agreement:

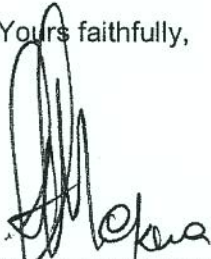
"This Agreement, its formation and its validity must be governed by and construed in all respects in accordance with the laws of the Republic of South Africa.

By execution of this Agreement, the Parties irrevocably agree that any legal proceedings, action or suit arising out of or relating to this Agreement shall be submitted to the exclusive jurisdiction of the High Court of South Africa (North Gauteng Division). A final judgment of that High Court in any

such proceedings, action or suit shall be conclusive and binding on the parties without restriction or reservation.

Each Party specifically agrees to accept service on its behalf on or at its Competent Authority of any writ, notice, order, summons judgment or other legal process by prepaid registered post and that any failure of its Competent Authority to notify it of the service of any process will not invalidate the proceedings."

Yours faithfully,

A handwritten signature in black ink, appearing to be 'P Setati', written over a horizontal line.

**FOR CHIEF STATE LAW ADVISER
P SETATI /H MEKWA/ S MASAPU**