

**PROTOCOL IV
TO
THE TREATY
ON THE
LESOTHO HIGHLANDS WATER PROJECT**

SUPPLEMENTARY ARRANGEMENTS

REGARDING PHASE IA

PREAMBLE

WHEREAS the Government of the Kingdom of Lesotho (hereafter called "Lesotho") and the Government of the Republic of South Africa (hereafter called "South Africa") have concluded the Treaty on the Lesotho Highlands Water Project on 24 October 1986 (hereafter called the "Treaty"); and WHEREAS it has become necessary to make provision for a number of supplementary matters relating to Phase IA of the Project;

NOW THEREFORE, Lesotho and South Africa (hereafter jointly called the "Parties") hereby agree as follows:

ARTICLE 1

ANNUAL COST ALLOCATION REPORT

- (1) In this Protocol "Annual Cost Allocation Report" means the report produced annually by the Lesotho Highlands Development Authority in fulfillment of its obligations under and in accordance with the procedures provided for in Articles 7(19) and (21) of the Treaty and which has been approved by the Joint Permanent Technical Commission in terms of Article 9(1 1)(h) of the Treaty.

- (2) An Annual Cost Allocation Report for each financial year shall, in respect of each item of cost incurred by the Lesotho Highlands Development Authority during that financial year, allocated in that Report and financed from a loan, credit facility or other borrowings-
- (a) specify the relevant drawdown and the funding facility against which such drawdown was made as well as the cumulative total of such items of cost and such drawdowns for all financial years up to and including the Annual Cost Allocation Report concerned; and shall
 - (b) contain a reconciliation of the cumulative cost incurred and allocated against cumulative funds drawn and working capital held.

ARTICLE 2

CONTRIBUTION LIABILITY TOWARDS PAYMENTS IN RESPECT OF OBLIGATIONS

(1) In this Article:

- (a) "Business Day" means any day on which commercial banks in each of the Republic of South Africa and the Kingdom of Lesotho are open for business in the ordinary course;
- (b) "Deed of Undertaking" means the Deed of Undertaking to be entered into by the parties thereto substantially in the form set out in the draft deed contained in Annexure I hereto;
- (c) "Obligations" has the same meaning as defined in the Deed of Undertaking;
- (d) "Payment Date" has the same meaning as defined in the Deed of Undertaking; and
- (e) "Payment Notice" has the same meaning as defined in the Deed of Undertaking.

- (2) Whenever South Africa becomes liable in terms of Clause 2 of the Deed of Undertaking to make a payment in respect of Obligations with regard to a loan, the proceeds of which, according to an Annual Cost Allocation Report, have been utilized in whole or in part to finance a cost in respect of which Lesotho is responsible by way of a cost related payment in terms of Article 10(2) of the Treaty, South Africa shall promptly on receipt of a Payment Notice in terms of Clause 2 of the Deed of Undertaking, inform Lesotho of the Payment Date of such payment and Lesotho shall, two Business Days prior to the Payment Date, pay into an account designated by South Africa for this purpose, an amount equal to such cost related payment.
- (3) To the extent that any payment by South Africa in terms of Clause 2 of the Deed of Undertaking incorporates a payment by Lesotho made in terms of paragraph (2) hereof, and the Trustee in terms of Clause 2.1 1 of the Deed of Undertaking credits South Africa with any interest, South Africa shall credit an account designated by Lesotho with its corresponding share of such interest.

ARTICLE 3

COST RELATED REIMBURSEMENT LIABILITY

- (1) In this Article:
 - (a) "Citibank Funding Facility" means funding made available to the Trans-Caledon Tunnel Authority in terms of a loan agreement between such Authority and Citibank entered into on 17 December 1990; and
 - (b) "Cost Related Reimbursement Liability "means the liability of one Party to pay to the other Party a pecuniary amount as provided for in paragraph (2).
- (2) In the event of one Party having discharged a cost related payment due by the other party by making a payment in respect of costs which in the case of South Africa relate to the generation of hydro-electric power in the Kingdom of Lesotho or the ancillary developments in the Kingdom of Lesotho as envisaged in Article 4(2) of the Treaty and in the case of Lesotho relate to the delivery of water to South Africa, such other Party shall, subject to the provisions of this Article, reimburse such Party in the amount of

such payment as well as any claims, demands, liabilities, costs, losses and expenses incurred by such Party in having discharged such payment.

- (3) Each Party, the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority may on the basis of an Annual Cost Allocation Report, make representations to the Joint Permanent Technical Commission with regard to any payment which it considers as having incorporated in whole or in part a Cost Related Reimbursement Liability.
- (4) As soon as reasonably practical after receipt of the representations referred to in paragraph (3), the Joint Permanent Technical Commission shall inform the Parties of its decision as to whether the payment constitutes a Cost Related Reimbursement Liability, and if it does, the Party liable to reimburse shall, within thirty (30) days after the Joint Permanent Technical Commission has informed such Party of its decision, pay to the other Party the amount of such Liability.
- (5) Each Party, the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority shall make available to a requesting Party all such records or other information relating to a particular payment with regard to which representations in terms of paragraph (3) have been made, as may be reasonably requested.
- (6) in the case of any Cost Related Reimbursement Liability on the part of Lesotho arising from a payment by the Trans-Caledon Tunnel Authority on behalf of South Africa from the proceeds of the Citibank Funding Facility, such Liability shall, notwithstanding anything to the contrary in paragraph (4), be due and payable by Lesotho on the following terms and conditions:
 - (a) The principal of each such Cost Related Reimbursement Liability shall be paid in ten (10) equal semi-annual installments on 31 March and 30 September of each year commencing on 30 September 1992;
 - (b) interest at a rate of 17,47 per cent per annum calculated in arrear, shall accrue on each such Liability as from the date of the relevant payment by the Trans-Caledon Tunnel Authority on behalf of South Africa and shall be payable semi-annually on 31 March and 30 September of each year;
 - (c) interest shall be calculated in arrear on the basis of a three hundred and sixty (360) day year of twelve (12) thirty (30) day months;
 - (d) all payments shall be made free from all monetary or fiscal restrictions and shall be effected without deduction for and free from any taxes, fees, duties or other charges, whatsoever;

- (e) whenever a payment falls due on a Saturday, Sunday or on a day which under the laws of either of the Parties is declared a public holiday, such payment shall be made on the first ensuing Business Day as defined in Article 2; and
 - (f) Lesotho shall be entitled to repay at any time all or any part of any outstanding amount without penalty or cost to Lesotho resulting from such repayment.
- (7) In the event of one Party electing to accelerate repayment of the whole or part of any loan, credit facility or other borrowings guaranteed by such Party, resulting in the other Party incurring toward the Party having accelerated such repayment a Cost Related Reimbursement Liability pursuant to any subsequent Annual Cost Allocation Report, the Party incurring such Liability may, notwithstanding anything to the contrary in paragraph (4), elect to pay the amount of such Liability to the other Party-
- (a) on terms and conditions not less favourable in the aggregate than the terms and conditions originally applicable to the repayment of such loan, credit facility or other borrowings; and
 - (b) in the event of an acceleration of the repayment of the CMA Phase III Funding Facility as defined in Article 4, on the terms and conditions provided for in that Article: Provided that to the extent that the repayment of such Facility has been accelerated by the Trans-Caledon Tunnel Authority on behalf of South Africa, the interest rate applicable shall be the rate established mutatis mutandis in accordance with the provisions of Article 4(2)(b) with regard to any commercial borrowings of the Trans-Caledon Tunnel Authority utilized to effect the said acceleration.

ARTICLE 4

COST RELATED PAYMENTS DUE BY LESOTHO IN RESPECT OF CMA PHASE III FUNDING FACILITY

- (1) In this Article "CMA Phase III Funding Facility" means funding made available in terms of a loan agreement to be entered into between the Lesotho Highlands Development Authority on the

one hand and Standard Bank of South Africa and First National Bank of South Africa on the other hand or any commercial borrowings procured in full or partial substitution thereof.

- (2) In the event of a cost incurred and paid by the Lesotho Highlands Development Authority relating to the generation of the hydro-electric power in the Kingdom of Lesotho or the ancillary developments in the Kingdom of Lesotho as envisaged in Article 4(2) of the Treaty, according to an Annual Cost Allocation Report as defined in Article 1, and having been financed by the CMA Phase III Funding Facility, Lesotho shall become liable for cost related payments on the following terms and conditions:
- (a) The principal of such financing outstanding from time to time as well as all interest capitalized in terms of paragraph (d), shall bear interest at a rate provided for in paragraph (b), from the date established in the relevant Annual Cost Allocation Report as the date on which such Funding Facility has been utilized to pay such cost;
 - (b) the rate of interest shall annually be established as the rate equal to the actual cost of borrowings weighted to produce an average annual cost of borrowings under the CMA Phase III Funding Facility including without limitation any commitment fee, penalty or stamp duty;
 - (c) interest shall be capitalized annually in arrear on 31 March up to 31 March 1997. Thereafter interest shall be calculated six (6) monthly in arrear and paid on 31 March and 30 September of each year commencing on 30 September 1997;
 - (d) interest shall be calculated in arrear on the basis of a three hundred and sixty-five (365) day year for actual days elapsed;
 - (e) the principal and all interest capitalized in terms of this Article shall be paid by Lesotho in ten (10) equal annual installments on 31 March of each year commencing on 31 March 1997;
 - (f) all payments shall be made free from all monetary or fiscal restrictions and shall be effected without deduction for and free from any taxes, fees, duties or
 - (g) whenever a payment falls due on a Saturday, Sunday or on a day which under the laws of either of the Parties is declared a public holiday, such payment shall be made on the first ensuing Business Day as defined in Article 2.

ARTICLE 5

CONCESSIONARY FINANCE

(1) In this Article:

- (a) "IBRD Loan" means funding made available to the Lesotho Highlands Development Authority in terms of a loan agreement between such Authority and the International Bank for Reconstruction and Development entered into on 16 September 1991;
- (b) "Concessionary Discount Rate" means that rate two per cent above the rate published by the Organization for Economic Co-operation and Development from time to time as the Commercial Interest Reference Rate applicable to a particular currency;
- (c) "Concessionary Loan" means a loan or other borrowings obtained by Lesotho and provided to the Lesotho Highlands Development Authority or a loan or other borrowings obtained by the Lesotho Highlands Development Authority directly, on terms and conditions in the aggregate more favourable than the terms and conditions applicable to the IBRD Loan. The terms and conditions of a loan or other borrowings shall be deemed to be in the aggregate more favourable than the terms and conditions applicable to the IBRD Loan if the present value of the debt service payments of such loan or borrowings calculated on the basis of the terms and conditions actually applicable to such loan or other borrowings, is less than the present value of the debt service payments of the same amount calculated on the terms and conditions of the IBRD Loan. The present value in each case shall be calculated by applying as a discount rate the relevant Concessionary Discount Rate. The relevant calculations shall be made as of the date on which the relevant loan or other borrowings becomes effective.

(2) Funds obtained on concessionary terms or as equity in the form of a capital contribution as referred to in Article 11(1) of the Treaty shall be designated as "Concessionary Finance" and shall-

- (a) in the case of non-refundable finance obtained by Lesotho and on-lent to the Lesotho Highlands Development Authority or obtained by the Lesotho Highlands Development Authority directly, be the total amount of such non-refundable finance;
 - (b) in the case of a concessionary Loan, be that amount of which the present value constitutes the difference between-
 - (i) the present value of the debt service payments of such Concessionary Loan calculated on the basis of the terms and conditions actually applicable to such Loan; and
 - (ii) the present value of the debt service payments of the same amount calculated on the terms and conditions of the IBRD Loan, and
 - (iii) the present value in each case to be calculated by applying as a discount rate the relevant Concessionary Discount Rate. The relevant calculations shall be made as of the date on which the relevant Concessionary Loan becomes effective; and
 - (c) in the case of goods and services utilized for purposes of implementing that part of the Project relating to the delivery of water to South Africa and acquired by the Lesotho Highlands Development Authority, with the prior consent of the Joint Permanent Technical Commission, on terms better than those on which such Authority could have acquired such goods or services on an arms length basis, be the difference between the total actual cost in Maloti of such goods and services so acquired and the calculated cost in Maloti of such goods and services had they been obtained or provided on an arms length basis, the computation of which shall be subject to the approval of the Joint Permanent Technical Commission.
- (3) Finance received from the Development Bank of Southern Africa or from any governmental or para-statal source located in the Republic of South Africa shall be deemed not to constitute Concessionary Finance.
- (4) Further to the provisions of Article 11(1) of the Treaty, the amount of Concessionary Finance shall be paid by South Africa to the Lesotho Highlands Development Authority and the terms and conditions governing the IBRD Loan relating to repayment of capital,

loan interest, interest payments and commitment fees, shall for the purposes of cost related payments apply to the payment of Concessionary Finance.

ARTICLE 6

PRE-TREATY COSTS

South Africa shall pay to Lesotho within thirty (30) days of the date on which the IBRD Loan as defined in Article 5 becomes effective, the amount of Maloti 1 657 327-60 which amount includes all capitalized interest up to and including 30 September 1990, byway of reimbursement of amounts expended by Lesotho on the implementation of the water transfer component of the Project prior to the signing of the Treaty on 24 October 1986, together with interest on such amount calculated from 1 October 1990 to the date of effectiveness of the IBRD Loan at the rate published by the [BRD from time to time, after which the interest rate applicable to the IBRD Loan shall apply.

ARTICLE 7

CONSULTATION BY THE LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY AND THE TRANS-CALEDON TUNNEL AUTHORITY WITH THE JOINT PERMANENT TECHNICAL COMMISSION

- (1)** Further to the provisions of Articles 9(11), 7(37), (38) and (39) and 8(25), (26) and (27) of the treaty, but subject to the provisions of Article 9 (14) of the Treaty, the Joint Permanent Technical Commission may after consultation with the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority, as the case maybe, formulate detailed procedures with regard to any aspect of any matter listed in the said Article 9 (11) or any relevant matter contemplated in the said article 7(38) or 8(26), which may include a provision that any act to be taken or decision to be made at any specified stage in such procedure by the Authority concerned shall require consultation with and the prior approval of

the Joint Permanent Technical Commission and the Authority concerned shall observe and take all steps necessary to ensure observance of such procedures. Where appropriate, such procedures shall take account of the requirements of any contract entered into by the Authority concerned.

- (2) In the event of the Joint Permanent Technical Commission or either delegation thereto being of the opinion that a provision of a procedure prescribed in terms of this Article has not been complied with, the Joint Permanent Technical Commission shall lodge a complaint on the alleged non-compliance with the Authority concerned.
- (3) The Authority concerned shall, after such investigation as it considers appropriate, within fourteen (14) calendar days from the date of such complaint submit a report to the Joint Permanent Technical Commission on its findings regarding the complaint in question and any action taken in regard thereto.
- (4) The Joint Permanent Technical Commission may accept the report or it may make further recommendations in respect thereof and the Authority concerned shall within fourteen (14) calendar days of such further recommendations resubmit the report, duly incorporating such recommendations, for the Joint Permanent Technical Commission's final consideration.
- (5) If the report is not accepted by the Joint Permanent Technical Commission, either delegation may propose the appointment of, and the Joint Permanent Technical Commission shall appoint, an independent consultant to undertake a management audit in terms of Article 9(10) of the Treaty.
- (6) Costs incurred by the Joint Permanent Technical Commission in connection with such management audit, shall be dealt with in accordance with the financial regulations established under the provisions of Article 9(6) of the Treaty.

ARTICLE 8

INSURANCE

- (1) By effecting the insurance arrangements approved in writing by the Joint Permanent Technical Commission, the Lesotho Highlands Development Authority shall be deemed, insofar as it relates to the delivery of water to South Africa, to have fully and properly discharged the obligation to take out insurance imposed on it by Article 7(31) of the Treaty. The insurance arrangements put into place by the Lesotho Highlands Development Authority relating to the delivery of water to South Africa, shall be subject to review and approval by the Joint Permanent Technical Commission on an annual basis.

- (2) In this Article:
- (a) "Defect" means any defect, imperfection or fault in respect of Project Works as defined in the Treaty, situated in the Kingdom of Lesotho and relating to the delivery of water to South Africa, manifesting itself during or subsequent to the construction thereof;
 - (b) "Defect Cost" means the cost incurred to Repair a Defect;
 - (c) "Defect Cost Liability" means the liability to make cost related payments in respect of a Defect Cost; and
 - (d) "Repair" means repair, rectify or make good.
- (3) In the event of any Defect, the Lesotho Highlands Development Authority remains, subject to the provisions of Article 14 of the Treaty, charged with the powers of implementation, operation and maintenance provided for in Article 7(1) of the Treaty in order to Repair such Defect.
- (4) If the consequences of such Defect are covered by insurance arrangements effected by the Lesotho Highlands Development Authority, any amount received by such Authority in terms of such insurance arrangements shall first be applied in remedying such Defect. To the extent that any Defect Cost is covered by any such amount South Africa shall not incur any Defect Cost Liability. The amount of any Defect Cost Liability discharged by South Africa prior to receipt of any such amount shall be refunded to South Africa promptly on receipt of such amount.
- (5) If the consequences of such Defect are not covered by insurance arrangements effected by the Lesotho Highlands Development Authority, South Africa shall in terms of Article 10 of the Treaty incur a Defect Cost Liability. Such Liability is incurred without prejudice to any claim the Lesotho Highlands Development Authority may have against any third party, which claim the Lesotho Highlands Development Authority shall pursue to the satisfaction of the Joint Permanent Technical Commission. To the extent that any Defect Cost is covered by the proceeds of such claim, South Africa shall not incur any Defect Cost Liability. The amount of any Defect Cost

Liability discharged by South Africa prior to receipt of any such amount shall be refunded to South Africa promptly on receipt of the proceeds of such claim.

- (6) The provisions of Article 11 of the Treaty apply in respect of all financing arrangements required to be entered into with regard to the payment of Defect Cost.

ARTICLE 9

COMMENCEMENT OF PAYMENT OF FIXED ROYALTY COMPONENT

- (1) South Africa shall, in accordance with and subject to the provisions of this Article and notwithstanding the provisions of Article 12(19)(a) of the Treaty, commence payment of the fixed component of the royalty as specified in Article 12(10)(a) of the Treaty, in the event of the level of water stored in Katse Dam attaining or exceeding 1993 metres above sea level in any month prior to 31 December 1996.
- (2) The date on which the first payment in terms of paragraph (1) becomes due is the last day of the calendar month following the month in which the level of water stored in Katse Dam for the first time attains or exceeds the level specified in paragraph (1).
- (3) Such first payment shall comprise each of the monthly amounts from January 1995 up to and including the month following the month in which the level of water stored in Katse Dam for the first time attains or exceeds the level specified in paragraph (1), which would have been due on such date in respect of such fixed component had reliable supplies from Phase IA of the Project commenced during January 1995.
- (4) In the event of the commencement of reliable supplies from Phase IA of the Project still being delayed as on 1 January 1997-
 - (a) the provisions of Article 12 (19)(a) of the Treaty shall again be of full force and effect and the payment of further monthly amounts in respect of the fixed component of the royalty shall be deferred until such time as the conditions of Article 12(19)(a) of the Treaty are satisfied; and

- (b) the aggregate amount paid by South Africa in respect of the fixed component of the royalty for the months January 1995 to December 1996 shall as from 1 July 1997 bear interest at the lowest rate of interest available to the Trans-Caledon Tunnel Authority from time to time as certified by its bankers until such time as the minimum quantities of water as specified for the calendar years 1995 and 1996 in Annexure 11 of the Treaty (which quantities are herein called "Water Deliveries Outstanding") have been delivered to South Africa at the Designated Delivery Point: Provided that in the event of the recouping of Water Deliveries Outstanding from 1 January 1997 onwards from deliveries in excess of the Scheduled Monthly Demands, such aggregate amount shall be reduced on a monthly basis by a factor corresponding to the ratio of Water Deliveries Outstanding recouped at that stage to the total quantity of Water Deliveries Outstanding.
- (5) Interest accruing on the aggregate amount referred to in paragraph (3)(b) shall be set off against any further amounts becoming due by South Africa in respect of the fixed component of the royalty

ARTICLE 10

UNDERTAKINGS BY LESOTHO

- (1) In this Article "Relevant Agreement" means the Trust Instrument, or any Designated Loan Instrument both as defined in the Deed of Undertaking, or any other loan agreement, credit facility or other borrowings entered into by the Lesotho Highlands Development Authority, the proceeds of which are intended to be used for the purposes of financing the implementation of Phase IA of the Project in the Kingdom of Lesotho insofar as it relates to water delivery to South Africa.
- (2) Lesotho shall not conduct its affairs and shall ensure that none of its agencies shall conduct its affairs in any way which can be construed as a breach of the covenants by the Lesotho Highlands Development Authority or which results in or contributes towards a breach of the obligations of the Lesotho Highlands Development Authority or which may impair the ability or right of South Africa or the Lesotho Highlands Development Authority to perform their respective obligations, as the case may be either in terms of the Deed of Undertaking or any Relevant Agreement.

- (3) Lesotho shall promptly inform South Africa of any change or prospective change in circumstances within its knowledge which might reasonably be expected to have an adverse effect on the rights and obligations of the Lesotho Highlands Development Authority or South Africa in terms of or resulting from any provision of any Relevant Agreement. In addition Lesotho shall promptly consult with South Africa with regard to all reasonable steps to be taken in order to prevent, mitigate or remove such circumstances.
- (4) Lesotho shall ensure that the Lesotho Highlands Development Authority shall be in the position and that it shall be allowed to effect payment of all amounts payable by such Authority under any Relevant Agreement, free and clear of and without deduction for or on account of any taxes as may be defined in any Relevant Agreement, imposed in Lesotho.
- (5) Lesotho shall ensure that no stamp or registration charges or any other similar taxes or charges in respect of any Relevant Agreement shall be payable in Lesotho.

ARTICLE 11

CURRENCY

- (1) Unless specifically otherwise agreed to by the Parties, all payments in terms of this Protocol or the Treaty by one Party to the other or by one of the Parties to either the Lesotho Highlands Development Authority or to the Trans-Caledon Tunnel Authority, shall be effected in Rand/Maloti irrespective of the currency of the liability in connection with which such payments are made. Should a conversion to Rand/Maloti be required to implement the provisions of this Article, such conversion shall be made two (2) Business Days, as defined in Article 2, prior to the date on which the relevant payment becomes due and shall be made at a rate equal to the mean of the buying and selling spot rates quoted by Standard Bank of South Africa for that amount at 1 1:00 on that Business Day.
- (2) South Africa shall, if so requested by Lesotho, cause the South African Reserve Bank to make available to Lesotho through the Central Bank of Lesotho at the most favourable exchange rate

prevailing at the date of such request, the equivalent of any payment made to Lesotho in terms of this Protocol in such foreign currency as Lesotho may request.

ARTICLE 12

THE PREVENTION AND SETTLEMENT OF DISPUTES

Any dispute concerning the interpretation or application of this Protocol shall be resolved in accordance with the provisions of Article 16 of the Treaty.

ARTICLE 13

COMMENCEMENT

This Protocol shall enter into force on the date of signature hereof.

IN WITNESS WHEREOF, the Parties acting through their duly authorised representatives, have caused this Protocol in the English language to be signed in duplicate in their respective names at LONDON on the NINETEENTH day of NOVEMBER in this Year Nineteen Hundred and Ninety One.

JA VAN WYK
FOR AND ON BEHALF OF
THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA

RHABI
FOR AND ON BEHALF OF
THE GOVERNMENT OF THE
KINGDOM OF LESOTHO

NOTE: FILE DOES NOT INCLUDE ANNEXURE I: DEED OF UNDERTAKING, OR SCHEDULES 1-5