

AGREEMENT ON THE DEVELOPMENT AND UTILISATION OF THE WATER
RESOURCES OF THE KOMATI RIVER BASIN BETWEEN THE GOVERNMENT
OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF
KANGWANE

PREAMBLE

The Government of KaNgwane and the Government of the Republic of South Africa (hereafter called "the Parties");

CONSCIOUS of the value of the scarce water resources in the Southern African region;
CONSCIOUS of the advantages of regional development and recognising that co-operation between the Parties with regard to the establishment of mutual projects for the development of water resources of common interest, in particular the water resources of the Komati River Basin, will significantly contribute towards the economic prosperity of the Parties and the welfare of its people in particular as well as the Southern African region in general;

HAVING due regard to the principle of "best joint utilisation" as defined in the "Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal in regard to Rivers of Mutual Interest and the Cunene River Scheme", 1964, to which the Kingdom of Swaziland acceded in 1967 and to the "Treaty on the Development and Utilisation of the Water Resources of the Komati River Basin between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland" 1992; and

WISHING to maintain the tradition of good neighbourliness and peaceful co-operation on a regional basis between the Parties acknowledged by the establishment of the Permanent Water Commission between the Parties, and

wishing to further promote the tradition of good neighbourliness and peaceful co-operation on a regional basis between the Parties on the basis of the rules approved in 1966 at Helsinki by the 52nd Conference -of the International Law Association;

HEREBY agree as Follows:

ARTICLE 1

DEFINITIONS

Unless otherwise indicated or inconsistent with the context in which it is used, all words and phrases in this Agreement shall have the same meaning as in the Treaty (as hereafter defined) and -

"Figtree Scheme" means the off-channel storage and balancing, dam with auxiliary abstraction works referred to in Article 7(2)(a);

"KaNgwane" means the Government of KaNgwane;

"PWC " means the Permanent Water Commission established by a separate agreement between the Parties; and

"Treaty" means the "Treaty on the Development and Utilisation of the Water Resources of the Komati River Basin between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland", 1992.

ARTICLE 2

PURPOSE OF THE AGREEMENT

The purpose of this Agreement is to provide for the equitable sharing and apportioning between KaNgwane and South Africa, of South Africa's benefits and obligations arising from the Treaty, a copy of which is attached as Annex 1 to this Agreement, and to provide for all matters related thereto.

ARTICLE 3

GENERAL OBLIGATIONS OF THE PARTIES RELATING TO THE IMPLEMENTATION OF THE TREATY

- 1) KaNgwane acknowledges that it has taken cognisance of the provisions of the Treaty and shall, in addition to complying with the provisions of this Agreement, take all steps within its jurisdiction required of it by South Africa which are necessary to enable South Africa to meet its obligations in terms of the Treaty.
- 2) South Africa acknowledges KaNgwane's interest in the development and utilisation of the water resources of the Komati River Basin and shall in the implementation of the Treaty, use its best endeavours to protect and promote the said interest of KaNgwane.
- 3) Without derogating from the generality of the provisions of sub-articles 1 and 2-

- (a) South Africa shall consult with KaNgwane through the PWC before concluding negotiations on any matter contemplated in the Treaty; and
- (b) KaNgwane shall furnish to South Africa through the PWC all information within its jurisdiction, required to be submitted by South Africa to the JWC or to Swaziland in terms of the Treaty.

ARTICLE 3: GENERAL OBLIGATIONS OF THE PARTIES RELATING TO THE IMPLEMENTATION OF THE TREATY (Continued)

4. Notwithstanding anything to the contrary contained in the Treaty, South Africa shall not without the prior consent of KaNgwane, obtained through the PWC, divert any water from the Theespruit referred to in Article 3(2) of the Treaty.

ARTICLE 4

ALLOCATION OF WATER

1. Subject to the provisions of the Treaty, the Parties shall after completion of sub-phase IA of the Project, from a date to be determined by the PWC and subject to the provisions of Article 7(1) of this Agreement, be entitled annually to the following Net Consumption:

KaNgwane - 6,6 million cubic metres at high assurance
120,4 million cubic metres at low assurance

South Africa - 139,8 million cubic metres at high assurance
252,5 million cubic metres at low assurance.

2. The Parties hereby record and accept that in addition to the water allocations set out in sub-article 1, the following quantities of water forming part of South Africa's allocation of water in terms of the Treaty, are not allocated and are reserved for allocation, by way of a decision of the PWC, towards making up any deficit due to a possible underestimate of system losses, towards satisfying any recognized claim to water from the Komati River Basin on the part of the Republic of Mozambique and to the Parties, on such conditions as the PWC may determine, when the PWC is satisfied that a Party has fully utilised its allocation:

11,4 million cubic metres at high assurance
8,1 million cubic metres at low assurance.

ARTICLE 4: ALLOCATION OF WATER (Continued)

3. Any proposal by KaNgwane for the conversion of its allocation from one category of assurance to another, shall be submitted to South Africa through the PWC and South Africa shall use its best endeavours to obtain the approval of the JWC required in terms of Article 12(4) of the Treaty.

4. (a) The maximum area of afforestation in the Komati River Basin permitted to South Africa in terms of Article 12(8) of the Treaty shall be shared by the Parties as follows:

KaNgwane- 1 906 hectares (estimated mean gross annual water use 3 million cubic meters) within the area of jurisdiction of KaNgwane as described in Proclamation R. 229 of 24 December 1986;

South Africa- 88 327 hectares (estimated mean gross annual water use 96 million cubic metres).

(b) Any right of afforestation issued in respect of any land in the Komati River Basin, which, after the date of this Agreement is added to the area of jurisdiction of KaNgwane as described in Proclamation R. 229 of 24 December 1986, shall accrue to KaNgwane.

ARTICLE 5

APPORTIONMENT OF THE CAPITAL COST OF THE PROJECT

(a) In pursuance of the provisions of Article 5(3)(a) of the Treaty, KaNgwane shall in accordance with a relocation plan approved by the PWC make available to South Africa sufficient land, free of all third party interests, for the construction, operation and maintenance of sub-phase IA of the Project.

(b) Costs incurred by KaNgwane in making land referred to in paragraph (a) available shall, to ail amount not exceeding the value of such land as determined by the PWC, also form part of the Capital Cost or, in the event that such costs are less than the value of such land so determined, then the value of such land shall instead form part of the Capital Cost.

2. (a) In pursuance of the provisions of Article 5(4)(a) of the Treaty, KaNgwane shall in accordance with a relocation plan approved by the PWC be responsible for the physical relocation of all persons resident on or having a right to use land within its area of jurisdiction which is to be made available in accordance with sub-article 1(a).

(b) Costs incurred by KaNgwane in connection with such relocation shall, after approval by the PWC, also form part of the Capital Cost.

ARTICLE 5: APPORTIONMENT OF THE CAPITAL COST OF THE PROJECT
(Continued)

3. (a) In pursuance of the provisions of Article 5(5)(a) of the Treaty, KaNgwane shall in accordance with a relocation plan approved by the PWC, be responsible for the relocation of roads, power lines, telephone lines and other services and of graves within its area of jurisdiction, necessitated as a direct result of having to make available land referred to in sub-article 1(a).

(b) Costs incurred by KaNgwane in connection with such relocation shall, after approval by the PWC, also form part of the Capital Cost.

4. (a) Any amount actually to be expended by KaNgwane pursuant to the provisions of sub-articles (2)(a) and 3(a) and compensation payable as contemplated in paragraph (b) of this sub-article shall, after approval by the PWC, be paid to KaNgwane by South Africa.

(b) Such portion of the value of the land contemplated in sub-article 1(b) as is not in the form of actual expenditure by KaNgwane required for the payment of compensation in accordance with the said relocation plan, shall be set off against: the obligation on the part of KaNgwane in respect of the Capital Cost as provided in sub-articles 5(b) and 5(c).

ARTICLE 5: APPORTIONMENT OF THE CAPITAL COST OF THE PROJECT
(Continued)

5. South Africa's share of the Capital Cost as determined in Article 5(6) of the Treaty shall -

(a) subject to the provisions of Article 7(3)(b) of this Agreement, in respect of sub-phase 1A of the Project be fully for the account of South Africa;

(b) in respect of sub-phase 1B of the Project be divided between the Parties as to 55,2% (fifty-five comma two per cent) for the account of KaNgwane and 44,8% (forty-four comma eight per cent) for the account of South Africa; and

(c) in respect of any gauging weir or other measuring device constructed as part of the Project in terms of Article 4(1)(c) of the Treaty and which is not included as an appurtenant ancillary work in either sub-phase 1A or sub-phase 1B, be divided between the Parties as to 25,2% (twenty-five comma two per cent) for the account of KaNgwane and 74,8% (seventy-four comma eight per cent) for the account of South Africa.

ARTICLE 6
APPORTIONMENT OF THE OPERATION AND MAINTENANCE COST OF
THE PROJECT

South Africa's share of the Operation and Maintenance Cost as determined in Article 6(3) of the Treaty shall, subject to the provisions of Article 7(3)(b) of this Agreement, be apportioned between the Parties on the basis set out in Article 5(5) of this Agreement in respect of the Capital Cost.

ARTICLE 7

INTERIM ARRANGEMENT RELATING TO PHASE 1B OF THE PROJECT

1. The Parties agree that as from the date determined by the PWC in terms of Article 4(i) of this Agreement, the allocation of water set out in that Article shall at a reduced level of assurance be of full force and effect, notwithstanding the fact that sub-phase 1B of the Project has not been completed or, as the case may be, will in accordance with the provisions of Article 4(3)(b) of the Treaty no longer form part of the Project.

2(a) In order to enable KaNgwane to utilize more of its allocation of water along the Komati River upstream of the confluence of the Lomati River than is available at the assurances accepted for sub-phase IA before the completion of sub-phase IB, KaNgwane shall, subject to the provisions of sub-article 1 and the provisions of paragraphs (b) and (c) of this sub-article, be entitled at its cost to construct and operate the Figtree Scheme comprising an off-channel storage and balancing dam with a capacity not exceeding 14 million cubic metres at Figtree, together with the concomitant abstraction or diversion works from the Komati River.

(b) The construction of the Figtree Scheme shall be subject to the prior approval of the JWC in terms of Article 12(12) of the Treaty having been obtained and South Africa undertakes to use its best endeavours to procure such approval as expeditiously as possible.

ARTICLE 7: INTERIM ARRANGEMENT RELATING TO PHASE 1B OF THE PROJECT (Continued)

(c) The Figtree Scheme shall be operated in accordance with operating rules approved by the PWC.

3. In the event of sub-phase IB of the Project no longer forming part of the Project as provided for in Article 4(3)(b) of the Treaty, the Parties shall -

(a) subject to the provisions of the Treaty, identify and decide on the implementation of an alternative project; and

(b) renegotiate the apportionment between them of South Africa's share of the Capital Cost and of the Operation and Maintenance Cost of the Project then comprising only sub-phase 1A, together with the cost of the implementation, operation and maintenance of the Figtree Scheme.

ARTICLE 8

INSTITUTIONAL ARRANGEMENTS

South Africa shall appoint as one of its Directors on the Board of Directors of KOB14A, a suitably qualified and experienced person nominated by KaNgwane and approved by the PWC.

2. Copies of all cash flow forecasts provided for in Article 11 of the Treaty shall as soon as possible after receipt thereof by South Africa be submitted to the officer designated by KaNgwane as responsible for making payments. KaNgwane shall pay to South Africa all amounts due by it in terms of this Agreement not later than seven days prior to the date referred to in Article 11(4) of the Treaty.

ARTICLE 9

GENERAL RIGHTS AND OBLIGATIONS OF THE PARTIES RELATING TO THE PROJECT

1. KaNgwane shall in respect of sub-phase 1A of the Project, within its area of jurisdiction, be entitled to exercise any right vested in South Africa by the provisions of Article 14(1) of the Treaty, subject to the approval of the PWC.

2. KaNgwane shall allow, free of any royalties, the utilization of ally naturally occurring unprocessed rock, sand, clay and soil found suitable and economical by KOBWA for use in the construction of the Project.

3. With reference to Article 14(7) of the Treaty, KaNgwane shall be responsible for the maintenance at its own cost of any fencing or other means of demarcating any Reservoir Area or part thereof within its area of jurisdiction.

4. South Africa shall on receipt of a report and financial statement referred to in Article 10(6) of the Treaty, submit a copy thereof to KaNgwane.

ARTICLE 10

PROCEDURE IN CASE OF VIS MAJOR

In the case of any substantial impairment of the implementation of the provisions of this Agreement caused by Vis Major, the PWC and the Parties shall at their various levels, jointly and severally, immediately take all necessary [sic] measures permitted by circumstances to mitigate such impairment Thereafter the Parties shall agree on further action.

ARTICLE 11

PREVENTION AND SETTLEMENT OF DISPUTES

1. The PWC and the Parties shall at their various levels have due regard to the overriding consideration that any dispute concerning the interpretation or application of this Agreement shall be resolved in a spirit of conciliation and that any impairment of the design, construction, operation and maintenance of the Project shall be avoided.
2. In the event of the Parties failing to settle a dispute arising between them, the Parties shall jointly institute arbitration proceedings on the basis of an agreement to this effect which agreement shall set out the nature of the dispute.
3. An arbitral tribunal shall be constituted by the Parties in respect of each dispute arising and shall consist of one arbitrator to be appointed by each Party within thirty days of the date of the agreement referred to in sub-article 2 and a third arbitrator who shall act as chairman of the tribunal and who shall be appointed jointly by the arbitrators appointed by the Parties, within thirty days of their appointment.
4. In the event of the two arbitrators appointed by the Parties failing to reach agreement on the appointment of the third arbitrator, the Parties shall jointly appoint the third arbitrator.

ARTICLE 11: PREVENTION AND SETTLEMENT OF DISPUTES (Continued)

5. The arbitral tribunal shall determine its own rules of conduct and procedure.
6. The majority decision of the arbitral tribunal shall be final and binding on the Parties.
7. Each Party shall be responsible for the remuneration of the arbitrator appointed by such Party, all other costs connected with such appointment and all costs incurred in the preparation and presentation of its case to the arbitral tribunal. All other costs incurred in connection with the arbitration proceedings shall be shared equally between the Parties.

ARTICLE 12

AMENDMENT OF AGREEMENT

The Parties may agree to amend this Agreement and any such amendment agreed upon by them shall be committed to writing and signed on their behalf.

ARTICLE 13

CONCLUDING PROVISIONS

This Agreement shall come into force on the date on which South Africa notifies KaNgwane of the ratification of the Treaty in terms of Article 19(a) of the Treaty and shall supersede any previous agreement between the Parties relating to the utilisation of water to the extent that the provisions of such agreement are in conflict with this Agreement.

In WITNESS WHEREOF the Parties hereto acting through their respective representatives hereunto duly authorised, have caused this Agreement, in the English language, to be signed in duplicate In their respective names at *Maleano* on the 7th day of *October* 1992 in the presence of the undersigned witnesses.

For and on behalf of the Government of South Africa
For and on behalf of the Government of KaNgwane