

**Treaty on the Lesotho highlands water project between
the government of the Kingdom of Lesotho and the
government of the Republic of South Africa signed at
Maseru, 24 October 1986**

PREAMBLE

The Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (hereinafter called the Parties);

CONSIDERING the value of the water resources in Southern Africa;

RECOGNISING the advantages of regional development and that co-operation between the Parties with regard to the development of mutual water resources can significantly contribute towards the peace and prosperity of the Southern African region and the welfare of its peoples;

DESIRING to enhance the conditions of life of the people of the Kingdom of Lesotho and the Republic of South Africa by raising the level of development of those resources;

CONSIDERING the mutual benefits for the Kingdom of Lesotho and the Republic of South Africa to be derived from the enhancement, conservation and equitable sharing of the water resources of the Senqu/Orange River and its affluents, and taking account of their particular natural advantages; and

WISHING to promote the traditions of good neighbourly relations and peaceful co-operation between the Parties: hereby agree as follows:

Article 1 - Definitions

(1) In this Treaty, unless inconsistent with the context:

"Average Annual Electricity Price" means: the average unit price of all electricity sold in any one year by ESCOM or its successors in the Republic of South Africa, which price is published in the annual reports and accounts of ESCOM or its successors;

"Customs Union Agreement" means: the Customs Union Agreement of 11 December 1969 between the Governments of the Republic of South Africa, Botswana, Lesotho and Swaziland and all memoranda and addenda thereto;

"Customs Union" means: the Customs Union established in terms of the Customs Union Agreement;

"Designated Delivery Point" means: that point, situated at the Caledon River, in the conveyance system connecting the tailpond dam of the hydro-electric power complex of the Project with the Designated Outlet Point;

"Designated Outlet Point" means: that point of outlet of the conveyance system connecting the tailpond dam of the hydro-electric power complex of the Project to the catchment of the Ash River in the Republic of South Africa or such other point or points as may be agreed upon by the Parties;

"Due Date" means: the date at which payments in terms of paragraphs (15), (16), (17) and (18) of Article 12 and paragraph (1) of Article 13 become due, which date in each instance is specified in accordance with the provisions of paragraph (21) of Article 12 and paragraph (2) of Article 13, as the case may be;

"Financial Year" means: a period of twelve months commencing 1 April of any given year and ending 31 March of the following year, both dates inclusive;

"Hydrological Year" means: a period of twelve months commencing 1 October of any given year and ending 30 September of the following year, both dates inclusive;

"Internationally Recognised Standards" means: the best relevant national or international standard of competence, expertise and practice;

"Lesotho" means: the Government of the Kingdom of Lesotho;

"Lesotho Central Bank" means: the Central Bank of Lesotho established by the Lesotho Monetary Authority Act, 1978;

"Nominal Annual Yield" means: that quantity of water determined from time to time in accordance with the provisions of paragraph (5) of Article 7;

"Present Value" means: the 1995 equivalent value of costs, computed in accordance with the procedures set out in the Royalty Manual;

"Production Price Index" means: the Production Prices Index (Commodities for South African Consumption) issued monthly by the Central Statistical Services of South Africa;

"Project" means: that water delivery project ultimately delivering seventy cubic metres of water per second consequent upon the implementation of the phases provided for in paragraph (1) of Article 5 as well as the concomitant hydro-electric power project identified in Annexure I;

"Project Implementation" means: all the steps required to complete the Project to its operating state including studies, investigations, designs, procurement of equipment, construction and commissioning;

"Project Works" means: all constructions, installations, facilities, equipment, supplies and infrastructure of a temporary or permanent nature comprising the Project or required for implementing the Project;

"Royalty Manual" means: the technical document denoted as such and agreed to by the Parties by way of Protocol I to this Treaty and annexed thereto;

"SACU Study" means: the technical document denoted as such and agreed to by the Parties by way of Protocol II to this Treaty and annexed thereto;

"Scheduled Monthly Demand" means: that portion of the minimum quantity of water specified for any one calendar year in Annexure II scheduled by the Lesotho Highlands Development Authority in operation plans compiled in terms of paragraph (7) of Article 7 for delivery each month during such year;

"South Africa" means: the Government of the Republic of South Africa;

"South African Reserve Bank" means: the central bank of the Republic of South Africa operating in terms of the South African Reserve Bank Act. No 29 of 1944; and cognate expressions shall be construed accordingly.

(2) "Delivery to South Africa" shall mean delivery at the Designated Delivery Point and cognate expressions shall be construed accordingly.

(3) The term "phase" shall include "sub-phase" unless otherwise indicated or inconsistent with the context.

(4) The terms "Article" and "Annexure" mean respectively an Article of, and an Annexure to, this Treaty. Except as otherwise indicated, reference to a paragraph is to a paragraph in the Article or in the Annexure in which the reference is made.

(5) Annexures I to III shall be read with and shall form an integral part of this Treaty.

Article 2 - Designated authorities at Government Level

(1) Unless otherwise specified in this Treaty, the Parties respectively designate the following authorities to implement the provisions of this Treaty:

(a) on the part of Lesotho, the Ministry of Water, Energy and Mining or such other Ministry as may be designated from time to time in order to implement specific provisions of this Treaty; and

(b) on the part of South Africa, the Department of Water Affairs or such other Departments of State as may be designated from time to time in order to implement specific provisions of this Treaty.

(2) Each Party shall have the power to effect changes to any such designation provided for in paragraph (1) and shall promptly notify, as far as possible in advance, the other Party of any such change.

Article 3 - Purpose of the Treaty

The purpose of this Treaty shall be to provide for the establishment, implementation, operation and maintenance of the Project.

Article 4 - Purpose of the Project

(1) The purpose of the Project shall be to enhance the use of the water of the Senqu/Orange River by storing, regulating, diverting and controlling the flow of the Senqu/Orange River and its affluents in order to effect the delivery of specified quantities of water to the Designated Outlet Point in the Republic of South Africa and by utilizing such delivery system to generate hydro-electric power in the Kingdom of Lesotho.

(2) Without prejudice to the provisions of paragraph (1) each Party shall be allowed the opportunity to undertake ancillary developments in its territory including:

- (i) the provision of water for irrigation, potable water supply and other uses;
- (ii) the development of other projects to generate hydro-electric power, and
- (iii) the development of tourism, fisheries and other projects for economic and social development.

Article 5 - Project Implementation

(1) The Project shall be implemented by way of any or all of the phases described in Annexure I or such additional phases as may be required ultimately to deliver seventy cubic metres of water per second: Provided that any phase described in Annexure I may be modified by agreement between the Parties.

(2) Unless the Parties decide otherwise each phase of the Project shall be implemented in time to satisfy the minimum water deliveries as specified in Annexure II. Water deliveries to South Africa from Sub-phase IA of the Project shall be due to commence in the year 1995 and water deliveries to South Africa from Sub-phase IB of the Project shall be due to commence in the year 2002.

(3) The conveyance systems for the discharge from the most downstream hydro-electric power station in the Kingdom of Lesotho shall be designed, built, operated and maintained in such a manner that neither Party shall be in a position to interfere unilaterally with the flow of water to the Designated Delivery Point.

(4) The conveyance systems referred to in paragraph (3) shall be designed, built, operated and maintained in such a manner that:

(a) the hydro-electric power generation shall not be affected when, for any reason, all or part of the water due to be delivered to South Africa cannot be received at the Designated Outlet Point: and

(b) the flow of water to the Designated Outlet Point shall not be impaired when, for any reason, all or part of the water due to be delivered to South Africa cannot be passed through the hydro-electric power complex forming part of the Project.

(5) The outlet facilities at the dam of the tailpond reservoir of the hydro-electric power complex forming part of the Project shall be designed, built, operated and maintained in such a manner that the maximum discharge from such outlet

facilities other than a discharge by means of a spillway, cannot exceed eight cubic metres of water per second.

Article 6 - General Duties Regarding the Project

(1) The Parties shall use their best endeavours to secure and facilitate the implementation of the Project: Provided that the implementation of each phase of the Project subsequent to Phase I, shall be subject to the consent of each Party prior to such implementation and provided further that, without prejudice to the provisions of Article 12, a Party not consenting to the implementation of any such subsequent phase of the Project shall compensate the other Party for any wasted Project implementation costs reasonably expended by such other Party in anticipation of the implementation of such subsequent phase.

(2) Lesotho shall, in accordance with the provisions of this Treaty, have the overall responsibility for that part of the Project situated in the Kingdom of Lesotho and the security thereof.

(3) South Africa shall, in accordance with the provisions of this Treaty, have the overall responsibility for that part of the Project situated in the Republic of South Africa and the security thereof.

(4) Lesotho shall establish the Lesotho Highlands Development Authority as an autonomous statutory body under the laws of the Kingdom of Lesotho in accordance with the provisions of this Treaty.

(5) South Africa shall establish the Trans-Caledon Tunnel Authority as an autonomous statutory body by means of appropriate legislation in accordance with the provisions of this Treaty.

(6) The Parties hereby establish the Joint Permanent Technical Commission in accordance with the provisions of this Treaty.

(7) Lesotho shall, in accordance with the provisions of this Treaty, ensure the delivery of such quantities of water as specified in Annexure II, to South Africa.

(8) Neither of the Parties shall cause or permit under any circumstance nor for any reason whatsoever any unilateral interference with the delivery of water to the Designated Outlet Point.

(9) Lesotho shall, in accordance with the provisions of this Treaty, ensure that minimum rates of flow as provided for in Article 7 be maintained in the natural river channel downstream of each of the Project dams.

(10) Each Party shall, in respect of its territory, provide the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority respectively, with all powers, authorizations, exemptions and rights necessary for the implementation, operation and maintenance of the Project, including the procurement of land and interest in land. Each Party shall engage its best endeavours to assist any such Authority in obtaining, in an expeditious manner

so as not to delay the Project, land or any interest in land required for such purposes.

(11) Each Party shall provide the Lesotho Highlands Development Authority, the Trans-Caledon Tunnel Authority, and the Joint Permanent Technical Commission, respectively with all the necessary access rights required in the course of the implementation, operation and maintenance of the Project.

(12) The Parties shall, subject to the normal requirements of national legislation, secure the granting of visas and other travel documents to personnel engaged in the implementation, operation and maintenance of the Project and shall ensure the necessary freedom of access to the locations of the Project Works to such personnel.

(13) Each Party shall enact appropriate legislation to enable it to give effect to the terms of this Treaty and shall ensure that all such legislation be enacted in time to allow for the effective implementation, operation and maintenance of the Project.

(14) The implementation, operation, maintenance, safety inspection and monitoring procedures of the Project Works shall be carried out in accordance with Internationally Recognized Standards.

(15) Lesotho shall take the necessary measures to prevent or abate any significant pollution of the water to be delivered to South Africa. The Parties shall consult through the Joint Permanent Technical Commission with a view to reaching agreement with regard to the defrayment of the costs for prevention or abatement of pollution caused by adverse effects of the Project.

(16) Notwithstanding the tied finance or tied finance guarantee requirements of financing institutions, tendering for the Project Works shall be by competitive bidding without discrimination as to the nationality of any tenderer, unless the Parties approve of such requirements. The approval of South Africa shall not be required with regard to such tied finance or tied finance guarantee requirements in respect of that part of the Project Works solely concerned with generating hydro-electric power in the Kingdom of Lesotho, unless only tenderers of South African nationality are precluded from tendering in terms of such requirements.

(17) The consulting services relating to the delivery of water to South Africa shall allow for the contribution of consultants nominated by South Africa to the extent of not less than fifty percent in value with regard to that part of the Project situated in the Kingdom of Lesotho.

(18) Neither Party shall apply quantitative restrictions on goods, materials, plant, equipment or services, whether produced or manufactured in the territory of any of the Parties or imported from outside such territories, required for the implementation, operation or maintenance of the project or any phase thereof. The procurement of all such goods, materials, plant, equipment or services shall be without any restriction whatsoever as regards the primary or secondary source of supply except as may be required by tied finance or tied finance

guarantee arrangements and shall be without prejudice to the provisions of paragraphs (16) and (17).

Article 7 - Lesotho Highlands Development Authority

(1) The Lesotho Highlands Development Authority shall have the responsibility for the implementation, operation and maintenance of that part of the Project situated in the Kingdom of Lesotho, in accordance with the provisions of this Treaty and shall be vested with all powers necessary for the discharge of such responsibilities.

(2) Subsequent to the implementation of Sub-phase IA of the Project, the Lesotho Highlands Development Authority shall annually deliver such minimum quantities of water as specified for each calendar year in Annexure II, to South Africa at the Designated Delivery Point: Provided that any shortfall in the delivery of the minimum quantity of water specified for any calendar year in Annexure II may be recouped utilizing water delivered in excess of the Scheduled Monthly Demands during the six months following the end of such year which quantity of water so utilized shall constitute part of the water deliveries for the calendar year in respect of which the shortfall is recouped and provided further that on the request of South Africa, the annual quantities of water specified in Annexure II shall be adjusted in accordance with changes as projected by South Africa in the water use requirements in the Republic of South Africa and provided further that adjustments shall be made to only those annual quantities of water specified in Annexure II which exceed the total of the Nominal Annual Yield and the yield forecast by the Lesotho Highlands Development Authority for Sub-phase IB or as the case may be, the total of the Nominal Annual Yield and such yield forecast by such Authority for any phase of the Project which is being implemented at the time of such adjustment which yield forecasts shall be established on the same basis as the Nominal Annual Yield.

(3) Without prejudice to the provisions of paragraph (2), the Lesotho Highlands Development Authority shall, up to the date water deliveries from Phase II of the Project commence, annually deliver to South Africa the quantity of water equal to the Nominal Annual Yield: Provided that the Lesotho Highlands Development Authority shall not be obliged to deliver to South Africa the quantity of water in excess of the minimum quantity specified for the relevant year in Annexure II required for the initial filling of reservoirs forming part of the Project and provided further that in the event of insufficient inflow into the storage reservoirs forming part of the Project, the Lesotho Highlands Development Authority shall be obliged to deliver only such quantity of water in excess of the minimum specified for that particular year in Annexure II as shall be prescribed by reservoir operating rules constituted by the applicable operation plan compiled in accordance with the provisions of paragraph (7).

(4) The quantity of water to be delivered in each calendar year by the Lesotho Highlands Development Authority to South Africa either in terms of paragraph (2) or (3) as the case may be, shall be delivered in monthly quantities scheduled in operation plans established in accordance with the provisions of paragraph (7).

(5) The Lesotho Highlands Development Authority shall from time to time establish the Nominal Annual Yield which shall be that quantity of water, the annual delivery of which from the phases of the Project implemented at that stage can be maintained continuously on a long term basis with a reliability of ninety-eight per cent.

(6) In the event of the storage reservoirs forming part of the Project being at full storage capacity, the Lesotho Highlands Development Authority may, if agreed to by South Africa, and in accordance with reservoir operating rules constituted by the applicable operation plan compiled in accordance with the provisions of paragraph (7), deliver to South Africa in any one calendar year, water in excess of the Nominal Annual Yield: Provided that should South Africa not agree to such delivery the Lesotho Highlands Development Authority shall have the right to pass such water through the hydro-electric power complex forming part of the Project.

(7) The Lesotho Highlands Development Authority shall, two months prior to the end of 1994 and the end of each subsequent calendar year, compile for the ensuing calendar year, operation plans in respect of all water deliveries to South Africa as provided for in this Article as well as the generation of hydro-electric power in the Kingdom of Lesotho. Such plans shall allow for operational contingencies and shall be adjusted and updated during the course of such calendar year whenever changing circumstances necessitate such adjustment and updating.

(8) The Lesotho Highlands Development Authority shall monitor the quantity of water delivered to South Africa and, Jointly with the Trans-Caledon Tunnel Authority, shall at the end of each calendar month take the measure of the quantity of water so delivered during that month, at the measuring point in the conveyance system connecting the tailpond dam of the hydro-electric power complex of the Project with the Designated Outlet Point: Provided that if the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority should dispute such measurement the Joint Permanent Technical Commission shall resolve such dispute by determining the quantity of water which shall be deemed to have been delivered to South Africa.

(9) The Lesotho Highlands Development Authority shall at all times maintain rates of flow in the natural river channels immediately downstream of the Katse and Mohale dams of not less than five hundred and three hundred litres per second respectively and shall, if so required, release the quantities of water, from either the Katse or Mohale reservoirs as the case may be, necessary to maintain such rates of flow: Provided that subsequent to the implementation of Phase II of the Project, such rates of flow may be adjusted by agreement between the Parties and provided further that in the event of either reservoir being at its minimum operating level, the quantities of water released shall be equal to the flow rate into such reservoir not in excess of the specified rate of release.

(10) The Lesotho Highlands Development Authority shall on the request of Lesotho release into the natural river channels downstream of the headpond and tailpond reservoirs forming part of the hydro-electric power complex the

quantities of water which have originated in the catchment areas of these reservoirs. In the event of such quantities not being released by way of overflow from such reservoirs, the relevant quantities shall be released through the low level outlets of such reservoirs.

(11) Prior to the implementation of any phase subsequent to Phase I, the minimum rate of flow to be maintained in the natural river channels downstream of dams forming part of such phase, shall be established by agreement between the Parties.

(12) Without prejudice to the provisions of paragraph (2) of Article 17 the minimum rate of flow to be maintained in the Senqu/Orange River from the Kingdom of Lesotho to the Republic of South Africa, shall be established by agreement between the Parties from time to time.

(13) The Lesotho Highlands Development Authority shall, of the water to be delivered to South Africa in terms of this Treaty, release such quantity as may be requested by either Party and subject to agreement by the other Party, downstream of any storage reservoir forming part of the Project: Provided that the Joint Permanent Technical Commission shall establish the procedure to be followed in the event of such releases including the measurement of such quantities of water.

(14) The Lesotho Highlands Development Authority shall, of the water to be delivered to South Africa in terms of this Treaty, release such quantity as may be requested by Lesotho and subject to agreement by South Africa, at abstraction points in the conveyance system upstream of the hydro-electric power complex of the Project Provided that the joint Permanent Technical Commission shall establish the procedure to be followed in the event of such abstractions including the measurement of such quantities of water.

(15) The Lesotho Highlands Development Authority shall provide the Joint Permanent Technical Commission with all information, as and when required by such Commission, regarding all operational aspects of any phase of the Project implemented at that stage.

(16) The Lesotho Highlands Development Authority shall give its full co-operation to the Joint Permanent Technical Commission and shall give full effect to the applicable provisions of Article 9.

(17) The Lesotho Highlands Development Authority shall carry out its functions in accordance with Internationally Recognized Standards of managerial and technical competence, expertise and practice and to this end shall appoint, whenever appropriate, project management, design, financial or other consultants.

(18) The Lesotho Highlands Development Authority shall effect all measures to ensure that members of local communities in the Kingdom of Lesotho, who will be affected by flooding, construction works, or other similar Project related causes, will be enabled to maintain a standard of living not inferior to that obtaining at the time of first disturbance: Provided that such Authority shall

effect compensation for any loss to such member as a result of such Project related causes, not adequately met by such measures.

(19) The Lesotho Highlands Development Authority shall, as provided for in paragraph (6) of Article 10, establish comprehensive accounting and costing systems in accordance with the recommendations of financial management system consultants. Such systems shall be subject to periodical review. The Joint Permanent Technical Commission shall have the right to request such review.

(20) The Lesotho Highlands Development Authority shall establish effective and comprehensive management information systems including performance indicators, which shall be used to provide the information required for management decision making during the implementation, operation and maintenance of that part of the Project entrusted to such Authority.

(21) The Lesotho Highlands Development Authority shall, on the basis of the accounting and costing systems and procedures referred to in paragraph (19), apportion all costs incurred by such Authority as costs attributable to the delivery of water to South Africa and costs attributable to the generation of hydro-electric power in the Kingdom of Lesotho as well as for developments envisaged by the provisions of paragraph (2) of Article 4.

(22) The Lesotho Highlands Development Authority shall effect all necessary catchment conservation measures as well as all measures necessary to prevent pollution of the water to be delivered to South Africa and pollution caused by the adverse effects of the implementation of the Project.

(23) The Lesotho Highlands Development Authority shall, at least six months prior to the commencement of each phase of the Project and thereafter during the course of the implementation, operation and maintenance such phase at least four months prior to the commencement of each Financial Year, separately, in respect of that part of the project relating to the delivery of water to South Africa and in respect of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho, compile:

(a) a long term cost plan. Such plan shall differentiate between capital and operating costs and shall identify the total estimated expenditure for such phase and contain an analysis of such expenditure on an annual basis. Such plan shall further include an estimate of contingency costs on an annual basis covering the period of the long term cost plan;

(b) a detailed cost plan covering the ensuing Financial Year. Such plan shall differentiate between capital and operating costs and shall identify the total estimated expenditure for such year and contain an analysis of such expenditure on a monthly basis. Such plan shall further include an estimate of contingency costs with regard to such Financial Year as well as each month covered;

(c) a long term funding plan identifying the total funding for such phase by way of loans, credit facilities and other borrowings and shall provide an analysis thereof on an annual basis;

(d) a short term funding plan for the ensuing Financial Year identifying the total funding for such year by way of loans, credit facilities or other borrowings and shall provide an analysis thereof on a monthly basis;

(e) a schedule of the repayment of all loans, credit facilities and other borrowings covering the repayment of capital, interest and financing charges;

(f) a long term cash flow forecast for such phase and shall provide an analysis of such cash flow on an annual basis. Such forecast shall *inter alia* identify any foreign exchange requirements; and

(g) a detailed cash flow forecast for the ensuing Financial Year, and shall provide an analysis of such cash flow on a monthly basis. Such forecast shall *inter alia* identify any foreign exchange requirements.

(24) The Lesotho Highlands Development Authority shall compile, at regular intervals, reconciliation statements with regard to all long term plans, forecasts and schedules referred to in paragraph (23) and shall update them to the extent necessitated by such reconciliation: Provided that such plans, forecasts or schedules shall further be reconciled and updated whenever an event or occurrence results in a significant variation thereof.

(25) The Lesotho Highlands Development Authority shall compile on a monthly basis reconciliation statements with regard to all short term plans and forecasts referred to in paragraph (23) and shall account for any significant difference regarding any such plans or forecasts. Such plans and forecasts shall be updated on a monthly basis to the extent necessitated by such reconciliation.

(26) The books and accounts of the Lesotho Highlands Development Authority shall be subject to annual and independent external auditing by chartered accountants.

(27) The Lesotho Highlands Development Authority shall establish separate banking accounts for:

(a) all amounts received from South Africa as cost related payments as provided for in Article 10 as well as amounts drawn down on loans or other borrowings procured for the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa; and

(b) all amounts received from Lesotho as cost related payments as provided for in Article 10 as well as all amounts drawn down on loans and other borrowings procured for the implementation, operation and maintenance of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho or for the developments envisaged by the provisions of paragraph (2) of Article 4.

Such banking accounts shall be established with the Central Bank of Lesotho or such other banking institution as approved, in respect of amounts referred to in sub-paragraph (a), by the Joint Permanent Technical Commission and in respect of amounts referred to in sub-paragraph (b) by Lesotho.

(28) The Lesotho Highlands Development Authority shall, if necessary to meet foreign expenditure and subject to the approval of the appropriate authorities of both Parties, establish with banking institutions outside the territory of either Party separate banking and deposit accounts for all moneys drawn down on loans and other borrowings obtained from outside such territories and procured for the implementation, operation and maintenance of that part of the Project:

(a) relating to the delivery of water to South Africa; and

(b) relating to the generation of hydro-electric power in the Kingdom of Lesotho or for the developments envisaged by the provisions of paragraph (2) of Article 4.

(29) All moneys held by the Lesotho Highlands Development Authority in any banking account and not immediately required to effect any payment shall be placed on deposit at market related interest rates.

(30) All interest accruing on moneys in the accounts referred to in paragraphs (27) and (28) shall be utilized exclusively for the implementation, operation and maintenance of that part of the Project for which the moneys bearing such interest shall have been obtained.

(31) The Lesotho Highlands Development Authority shall take out insurance against all loss or damage from whatever cause and against risks and public liabilities, which may arise in the course of implementing, operating and maintaining that part of the Project which is entrusted to such Authority on the basis of normal commercial considerations.

(32) All managerial and professional staff positions of the Lesotho Highlands Development Authority shall be filled by personnel in possession of appropriate qualifications and experience for such appointments.

(33) The Lesotho Highlands Development Authority shall be managed and controlled by a Board of Directors which shall be appointed by Lesotho and shall comprise a Chairman and such other members as shall be appointed on merit for their managerial, technical and financial qualifications and experience.

(34) The Board of Directors shall establish the policy of the Lesotho Highlands Development Authority in accordance with the provisions of this Treaty giving priority to its duties arising from the delivery of water to South Africa and the generation of hydro-electric power in the Kingdom of Lesotho as its primary functions.

(35) Lesotho shall appoint a Chief Executive who shall have appropriate qualifications and experience for such appointment.

(36) The Chief Executive shall implement the policies laid down by the Board of Directors of the Lesotho Highlands Development Authority.

(37) The Chief Executive of the Lesotho Highlands Development Authority shall be under the obligation to consult with and to give his full co-operation to the Joint Permanent Technical Commission.

(38) In carrying out his duties and in implementing the policies established by the Board of Directors the Chief Executive shall *inter alia* be responsible for:

(a) presenting proposals concerning the implementation, operation and maintenance of that part of the Project which is entrusted to the Lesotho Highlands Development Authority and concerning the internal administration and procedures of such Authority to the Board of Directors and to the Joint Permanent Technical Commission for approval;

(b) preparing and presenting to the Board of Directors and the Joint Permanent Technical Commission for approval the annual budget and proposals for borrowings of the Lesotho Highlands Development Authority;

(c) controlling the expenditure and borrowings of the Lesotho Highlands Development Authority within limits set by the Board of Directors and ensuring that the costs incurred are accurately recorded and allocated to the appropriate cost centre;

(d) providing the Board of Directors and the Joint Permanent Technical Commission with the information they require or request for the discharge of their duties;

(e) issuing all tender documents and signing agreements, undertakings and contracts on behalf of the Lesotho Highlands Development Authority;

(f) appointing and terminating the appointment of all managerial professional and administrative staff; and

(g) such other duties as the Board of Directors may from time to time assign to such Chief Executive.

(39) The Office of the Chief Executive of the Lesotho Highlands Development Authority shall act as the main channel of communication between such Authority and the Joint Permanent Technical Commission.

(40) The Chief Executive of the Lesotho Highlands Development Authority shall give advance notification of at least five calendar days to the Joint Permanent Technical Commission of all meetings provided for in paragraph (21) of Article 9 and shall provide copies of all relevant documents in good time.

Article 8 - Trans-Caledon Tunnel Authority

(1) The Trans-Caledon Tunnel Authority shall have the responsibility for the implementation, operation and maintenance of that part of the project in the Republic of South Africa, in accordance with the provisions of this Treaty, and shall be vested with all powers necessary for the discharge of such responsibilities.

(2) Notwithstanding the provisions of paragraph (1) of Article 7, the Trans-Caledon Tunnel Authority may be entrusted by the Parties, furthermore, with the responsibility for the implementation, operation and maintenance of that part of the water conveyance system situated in the Kingdom of Lesotho; for this purpose, the Trans-Caledon Tunnel Authority shall be vested by Lesotho with all powers, authorizations and exemptions necessary for the discharge of such responsibilities and shall furthermore maintain close liaison with the Lesotho Highlands Development Authority in relation to the implementation of the water conveyance system without prejudice, however, to the title or any other rights in respect of the said water conveyance system and related land.

(3) The Trans-Caledon Tunnel Authority shall monitor the quantity of water delivered to South Africa and, jointly with the Lesotho Highlands Development Authority, shall at the end of each calendar month take the measure of the quantity of water so delivered during that month, at the measuring point in the conveyance system connecting the tailpond dam of the hydro-electric power complex of the Project with the Designated Outlet Point: Provided that if the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority should dispute such measurement the Joint Permanent Technical Commission shall resolve such dispute by determining the quantity of water which shall be deemed to have been delivered to South Africa.

(4) The Trans-Caledon Tunnel Authority shall provide the Joint Permanent Technical Commission with all information as and when required by such Commission, regarding all operational aspects of any phase of the Project implemented at that stage.

(5) The Trans-Caledon Tunnel Authority shall give its full co-operation to the Joint Permanent Technical Commission and shall give full effect to the applicable provisions of Article 9.

(6) The Trans-Caledon Tunnel Authority shall carry out its functions in accordance with Internationally Recognized Standards of managerial and technical competence, expertise and practice and to this end shall appoint, whenever appropriate, project management, design, financial or other consultants.

(7) The Trans-Caledon Tunnel Authority shall as provided for in paragraph (6) of Article 10, establish comprehensive accounting and costing systems in accordance with the recommendations of financial management system consultants. Such systems shall be subject to periodical review. The Joint Permanent Technical Commission shall have the right to request such review.

(8) The Trans-Caledon Tunnel Authority shall establish effective and comprehensive management information systems including performance indicators, which shall be used to provide the information required for management decision making during the design, implementation, operation and maintenance of that part of the Project entrusted to such Authority.

(9) The Trans-Caledon Tunnel Authority shall, on the basis of the accounting and costing systems and procedures referred to in paragraph (7), apportion all costs

incurred by such Authority as costs attributable to the delivery of water to South Africa and costs attributable to the generation of hydro-electric power in the Kingdom of Lesotho as well as for developments envisaged by the provisions of paragraph (2) of Article 4.

(10) The Trans-Caledon Tunnel Authority shall effect all necessary catchment conservation measures as well as all measures necessary to prevent pollution of the water to be delivered to South Africa and pollution caused by the adverse effects of the implementation of the Project.

(11) The Trans-Caledon Tunnel Authority shall, at least six months prior to the commencement of each phase of the Project and thereafter during the course of the implementation, operation and maintenance of such phase at least four months prior to the commencement of each Financial Year, separately, in respect of that part of the Project relating to the delivery of water to South Africa and in respect of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho, compile:

(a) a long term cost plan. Such plan shall differentiate between capital and operating costs and shall identify the total estimated expenditure for such phase and contain an analysis of such expenditure on an annual basis. Such plan shall further include an estimate of contingency costs on an annual basis covering the period of the long term cost plan;

(b) a detailed cost plan covering the ensuing Financial Year. Such plan shall differentiate between capital and operating costs and shall identify the total estimated expenditure for such year and contain an analysis of such expenditure on a monthly basis. Such plan shall further include an estimate of contingency costs with regard to such Financial Year as well as each month covered;

(c) a long term funding plan identifying the total funding for such phase by way of loans, credit facilities or other borrowings and shall provide an analysis thereof on an annual basis;

(d) a short term funding plan for the ensuing Financial Year identifying the total funding for such year by way of loans, credit facilities or other borrowings and shall provide an analysis thereof on a monthly basis;

(e) a schedule of the repayment of all loans, credit facilities and other borrowings, covering the repayment of capital, interest and financing charges;

(f) a long term cash flow forecast for such phase and shall provide an analysis of such cash flow on an annual basis. Such forecast shall *inter alia* identify any foreign exchange requirements; and

(g) a detailed cash flow forecast for the ensuing Financial Year, and shall provide an analysis of such cash flow on a monthly basis. Such forecast shall *inter alia* identify any foreign exchange requirements.

(12) The Trans-Caledon Tunnel Authority shall compile, at regular intervals, reconciliation statements with regard to all long term plans, forecasts and

schedules referred to in paragraph (11) and shall update them to the extent necessitated by such reconciliation:

Provided that such plans, forecasts or schedules shall further be reconciled and updated whenever an event or occurrence results in a significant variation thereof.

(13) The Trans-Caledon Tunnel Authority shall compile on a monthly basis reconciliation statements with regard to all short term plans and forecasts referred to in paragraph (11) and shall account for any significant difference regarding any such plans or forecasts. Such plans and forecasts shall be updated on a monthly basis to the extent necessitated by such reconciliation.

(14) The books and accounts of the Trans-Caledon Tunnel Authority shall be subject to annual and independent external auditing by chartered accountants.

(15) The Trans-Caledon Tunnel Authority shall establish separate banking accounts for:

(a) all amounts received from South Africa as cost related payments as provided for in Article 10 as well as all amounts drawn down on loans or other borrowings procured for the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa; and

(b) all amounts received from Lesotho as cost related payments as provided for in Article 10 as well as all amounts drawn down on loans and other borrowings procured for the implementation, operation and maintenance of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho or for the developments envisaged by the provisions of paragraph (2) of Article 4.

Such accounts shall be established with the South African Reserve Bank or such other banking institution as approved, in respect of amounts referred to in subparagraph (a), by South Africa and in respect of amounts referred to in subparagraph (b) by the Joint Permanent Technical Commission.

(16) The Trans-Caledon Tunnel Authority shall, if necessary to meet foreign expenditure and subject to the approval of the appropriate authorities in the Republic of South Africa, establish with banking institutions outside the territory of either Party separate banking accounts for all moneys drawn down on loans and other borrowings obtained from outside such territories and procured for the implementation, operation and maintenance of that part of the Project:

(a) relating to the delivery of water to South Africa: and

(b) relating to the generation of hydro-electric power in the Kingdom of Lesotho or for the developments envisaged by the provisions of paragraph (2) of Article 4.

(17) All moneys held by the Trans-Caledon Tunnel Authority in any banking account and not immediately required to effect any payment, shall be placed on deposit at market related interest rates.

(18) All interest accruing on moneys in the accounts referred to in paragraphs (15) and (16) shall be utilized exclusively for the implementation, operation and maintenance of that part of the Project for which the moneys bearing such interest shall have been obtained.

(19) The Trans-Caledon Tunnel Authority shall take out insurance against all loss or damage from whatever cause and against all risks and public liabilities which may arise in the course of implementing, operating and maintaining that part of the Project entrusted to such Authority, on the basis of normal commercial considerations.

(20) All managerial and professional staff positions of the Trans-Caledon Tunnel Authority shall be filled by personnel in possession of appropriate qualifications and experience for such appointments.

(21) The Trans-Caledon Tunnel Authority shall be managed and controlled by a Board of Directors appointed by South Africa, and shall comprise a Chairman and such other members as shall be appointed on merit for their managerial, technical and financial qualifications and experience.

(22) The Board of Directors shall establish the policy of the Trans-Caledon Tunnel Authority in accordance with the provisions of this Treaty giving priority to its duties arising from the delivery of water to South Africa and the generation of hydro-electric power in the Kingdom of Lesotho.

(23) The Board of Directors of the Trans-Caledon Tunnel Authority shall appoint a Chief Executive who shall have appropriate qualifications and experience for such appointment.

(24) The Chief Executive shall implement the policies laid down by the Board of Directors of the Trans-Caledon Tunnel Authority.

(25) The Chief Executive of the Trans-Caledon Tunnel Authority shall be under the obligation to consult with and to give his full co-operation to the Joint Permanent Technical Commission.

(26) In carrying out his duties and in implementing the policies established by the Board of Directors the Chief Executive shall *inter alia* be responsible for:

(a) presenting proposals concerning the implementation, operation and maintenance of that part of the Project entrusted to the Trans-Caledon Tunnel Authority and concerning the internal administration and procedures of such Authority to the Board of Directors and to the Joint Permanent Technical Commission for approval;

(b) preparing and presenting to the Board of Directors and the Joint Permanent Technical Commission for approval the annual budget and proposals for borrowings of the Trans-Caledon Tunnel Authority;

(c) controlling the expenditure and borrowings of the Trans-Caledon Tunnel Authority within limits set by the Board of Directors and ensuring that the costs incurred are accurately recorded and allocated to the appropriate cost centre;

(d) providing the Board of Directors and the Joint Permanent Technical Commission with the information they require or request for the discharge of their duties;

(e) issuing all tender documents and signing all agreements, undertakings and contracts on behalf of the Trans-Caledon Tunnel Authority;

(f) appointing and terminating the appointment of all managerial, professional and administrative staff; and

(g) such other duties as the Board of Directors may from time to time assign to such Chief Executive.

(27) The Office of the Chief Executive of the Trans-Caledon Tunnel Authority shall act as the main channel of communication between such Authority and the Joint Permanent Technical Commission.

(28) The Chief Executive of the Trans-Caledon Tunnel Authority shall give advance notification of at least five calendar days to the Joint Permanent Technical Commission of all meetings provided for in paragraph (21) of Article 9 and shall provide copies of all relevant documents in good time.

Article 9 - Joint Permanent Technical Commission

(1) The Joint Permanent Technical Commissions is composed of two delegations, one from each Party. Each Party shall nominate three representatives constituting its delegation, as well as an alternate for each of the nominated resident in Maseru. Each delegation shall alternately nominate a chairman for meetings of the Joint Permanent Technical Commission.

(2) Each Party shall, within three months of the signature of this Treaty, nominate its representatives on the Joint Permanent Technical Commission as well as alternates for such representatives and shall such period communicate the names of such nominees to the other Party. Each Party may at any time terminate any such nomination and nominate any other person instead of a representative or alternate whose nomination has been terminated:

Provided that such termination shall only take effect one month after notice to the other Party.

(3) All decisions of the Joint Permanent Technical Commission shall require the agreement of both delegations.

(4) In the event of the two delegations not being able to reach agreement on any matter, such matter shall be reconsidered at the next meeting of the Joint Permanent Technical Commission which meeting shall be convened at the earliest possible opportunity, but not later than one month after the failure to agree.

(5) In the event of the two delegations not being able to reach agreement on any matter after following the procedure set out in paragraph (16) the Joint Permanent Technical Commission shall refer the matter to the Parties.

(6) The Joint Permanent Technical Commission shall establish its own rules of procedures and shall establish the necessary regulations with regard to meetings, technical, administrative and financial activities.

(7) The Joint Permanent Technical Commission shall possess full legal personality in the territory of each Party.

(8) The Joint Permanent Technical Commission and advisory powers relating to the activities of the Lesotho Highlands Development Authority in so far as such activities may have an effect on the delivery of water to South Africa,

(9) The Joint Permanent Technical Commission shall have monitoring and advisory powers relating to the activities of the Trans-Caledon Tunnel Authority in so far as such activities may have an effect on the generation of hydro-electric power in the Kingdom of Lesotho.

(10) The Joint Permanent Technical Commission shall have the right to subject to management audit, all those aspects of the management, organization and accounts or the Lesotho Highlands Development Authority relating to the delivery of water to South Africa and all those aspects of the management, organization and accounts of the Trans-Caledon Tunnel Authority relating to the generation of hydro-electric power in the Kingdom of Lesotho.

(11) The Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority shall each consult with the Joint Permanent Technical Commission on a continuous basis with regard to all aspects of the matters listed below and any decision of the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority and any organ of such Authorities, with regard to all aspect of such matters, shall require the approval of the Joint Permanent Technical Commission in order to take effect:

(a) the appointment of external auditors for each Authority;

(b) all budgets for the expenditure of or by each such Authority including all cost plans, funding plans and cash flow forecasts and reconciliation statements relating to such plans and forecasts, as provided for in Articles 7 and 8;

(c) implementation plans for each phase of the Project;

(d) annual as well as short term operation plans;

- (e) annual maintenance plans;
- (f) the design of Project Works, tender procedures and tender documents relating to the implementation, operation and maintenance of the Project;
- (g) the appointment of consultants and contractors for the implementation, operation and maintenance of the Project as well as the issuing of variation orders and the settlement of all claims;
- (h) the allocation of costs between the Parties in accordance with the provisions of Article 10;
- (i) financing arrangements and loan agreements as well as all borrowings from whatever source for the purpose of the implementation of the Project;
- (j) the appointment of professional and managerial staff of the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority, other than the Chief Executive of such Authorities;
- (k) the establishment and review of comprehensive accounting, costing and management information systems provided for in paragraphs (19) and (20) of Article 7 and paragraphs (7) and (8) of Article 8;
- (l) the establishment of accounts with banking institutions;
- (m) foreign exchange forward cover on loans, credit facilities or other borrowings;
- (n) the taking out of any insurance; and
- (o) the determination of the Nominal Annual Yield.

(12) The Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority shall, with regard to any decision requiring the approval of the Joint Permanent Technical Commission, present such decision to the Joint Permanent Technical Commission for approval at the earliest practicable time in order to allow the fullest possible opportunity for adequate consideration.

(13) The approval of the Joint Permanent Technical Commission with regard to all matters referred to in paragraph (11) shall be notified in writing to all parties concerned through the Office of the Secretary.

(14) Notwithstanding the provisions of paragraph (11), any decision of the Lesotho Highlands Development Authority affecting only the generation of hydro-electric power in the Kingdom of Lesotho, and any decision of the Trans-Caledon Tunnel Authority in respect of that part of the Project situated in the Republic of South Africa affecting only the delivery of water to South Africa, shall be exempt from approval of the Joint Permanent Technical Commission.

(15) The Joint Permanent Technical Commission shall hold regular meetings to discuss issues relating to the delivery of water to South Africa and the

generation of hydro-electric power in the Kingdom of Lesotho and either delegation shall have the right to request a meeting of the Joint Permanent Technical Commission which shall take place within seven calendar days of the request.

(16) All matters referred to the Joint Permanent Technical Commission for discussion, approval or report by the Lesotho Highlands Development Authority, the Trans-Caledon Tunnel Authority or either delegation or Party shall be dealt with in an expeditious manner. If the Joint Permanent Technical Commission cannot consider a matter within twelve calendar days, it shall notify the referring party and, where appropriate, request an extension of time for consideration of the matter.

(17) The Joint Permanent Technical Commission shall establish a permanent office in the Kingdom of Lesotho with the necessary staff and facilities.

(18) The Joint Permanent Technical Commission shall appoint a full-time Secretary who shall have appropriate qualifications and experience for such appointment.

(19) The Joint Permanent Technical Commission shall establish the terms of the appointment of the Secretary. The terms of appointment shall *inter alia* provide for the termination of such appointment on the request of either Party.

(20) The Secretary shall, subject to the provisions of paragraph (19), be responsible for supervising the day to day administration of the Joint Permanent Technical Commission and for maintaining effective and efficient support services to both delegations. Such responsibilities shall *inter alia* include:

(a) the maintenance on behalf of, and as directed by, the Joint Permanent Technical Commission of close and efficient working liaison with the Lesotho Highlands Development Authority, the Trans-Caledon Tunnel Authority, and such other persons and bodies as may be required; and

(b) The preparation of the annual budget including cash flow forecasts of the Joint Permanent Technical Commission, and the control of expenditure against the approved budget.

(21) Members of the Joint Permanent Technical Commission shall have the right to attend management meetings and technical working meetings of the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority other than meetings of the Boards of Directors of such authorities respectively.

(22) Members of the Joint Permanent Technical Commission shall have all the necessary access rights required in the course of the implementation, operation and maintenance of the Project.

(23) The Joint Permanent Technical Commission may appoint technical experts and consultants to provide expert opinion and advice whenever this appears to be necessary.

(24) The accounts of the Joint Permanent Technical Commission shall be subject to annual and independent external auditing by chartered accountants appointed by agreement of the Parties.

(25) The Joint Permanent Technical Commission shall be responsible for taking out insurance against all loss or damage from whatever cause, and against risks and public and professional liability, which may arise in the course of discharging the responsibilities entrusted to such Commission as well as loss or damage, risks or public liability arising from acts performed by the Secretary and the personnel of the Joint Permanent Technical Commission in their official capacity, on the basis of normal commercial considerations.

(26) The costs of establishing the Joint Permanent Technical Commission as well as the working capital necessary for the functioning of the Joint Permanent Technical Commission, shall be shared by the Parties. Each Party shall be liable for the costs of its own delegation and all other costs shall be met by the Parties on an equal basis.

(27) The Joint Permanent Technical Commission and its Secretary as well as the persons nominated by each Party as representatives or alternates to such Commission, shall enjoy such privileges and immunities as provided for in Annexure III.

(28) The Joint Permanent Technical Commission shall establish with a banking institution registered in the Kingdom of Lesotho in terms of the applicable statutory requirements, a banking account, which account shall be accredited with all moneys placed at the disposal of such Commission by any of the Parties or received from any source whatsoever.

Article 10 - Cost Related Payments

(1) South Africa shall, by way of cost related payments to the Lesotho Highlands Development Authority and to the Trans-Caledon Tunnel Authority, be responsible for all costs referred to in paragraph (3), incurred for the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa.

(2) Lesotho shall, by way of cost related payments to the Lesotho Highlands Development Authority and to the Trans-Caledon Tunnel Authority, be responsible for all costs referred to in paragraph (3), incurred for the implementation, operation and maintenance of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho and for the developments envisaged by the provisions of paragraph (2) of Article 4 in the Kingdom of Lesotho.

(3) For the purposes of this Article costs shall comprise all costs wholly and reasonably incurred subsequent to the entry into force of this Treaty, relating to:

(a) the implementation of the Project including all costs of investigations, surveys, feasibility studies, engineering studies, preparation of designs, construction, construction supervision, procurement and commissioning;

(b) the operation, maintenance, and other recurring costs of the Project, including replacement of equipment;

(c) the establishment, administration and operation of the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority including the appointment of consultants as well as Project related staff training programmes for employees of such Authorities, necessary for the functioning of such Authorities;

(d) measures necessary for catchment conservation as well as the prevention of pollution, resulting from the implementation, operation and maintenance of the Project;

(e) the taking out of insurance as provided for in paragraph (31) of Article 7 and paragraph (19) of Article 8;

(f) annual audits as provided for in paragraph (26) of Article 7 and paragraph (14) of Article 8;

(g) land or any interest in land acquired for the purpose of the implementation, operation and maintenance of the Project: Provided that in the case of that part of the Project to be executed in the Republic of South Africa such land shall be held under freehold or ninety-nine year leasehold title, and in the case of that part of the Project to be executed in the Kingdom of Lesotho, such land shall be held under ninety year leasehold title, licence or registrable title;

(h) the measures in order to ensure that members of local communities in the Kingdom of Lesotho affected by Project related causes shall be enabled to maintain a standard of living not inferior to that obtaining at the time of first disturbance as well as compensation for loss to such members as a result of such causes not met by such measures; and

(i) interest payments, financing and foreign exchange forward cover charges on loans, credit facilities or other borrowings as well as all other charges relating to the securing of financing, obtained by the Lesotho Highland Development Authority, or the Trans-Caledon Tunnel Authority, for the implementation, operation and maintenance of the Project.

Provided that any allowance for a return on or depreciation of any asset the cost of which is partly or wholly met by way of cost related payments as well as any dues, taxes, or charges other than dues, taxes or charges payable into the common revenue pool of the Customs Union, payable in the territory of either Party in respect of services, goods, materials, plant, equipment and related items required for the implementation, operation and maintenance of the Project or any phase thereof, shall not constitute such costs.

(4) Cost related payments in respect of each item of costs referred to in paragraph (3) shall become due relative to the date on which payment of such cost item by the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority respectively becomes due: Provided that a Party may elect and shall be allowed by the respective Authority to pay moneys due by such Party as

cost related payments directly to contractors and consultants engaged in the implementation, operation and maintenance of that part of the Project in respect of which such payments shall be due and provided further that in the event of loans, credit facilities or other borrowings being procured by the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority respectively in accordance with the provisions of paragraph (1) of Article 11, cost related payments in respect of costs financed by way of such loans, credit facilities or other borrowings shall become due at the time and to the extent to which such loans, utilized credit facilities or other borrowings become redeemable.

(5) All moneys due by each Party as cost related payments, shall be paid to the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority as the case may be, at times and in amounts identified as income derived from cost related payments due by that Party, in the updated detailed cash flow forecasts compiled by such Authorities in accordance with the provisions of paragraph (25) of Article 7 and paragraph (13) of Article 8 respectively.

(6) The accounting and costing systems referred to in paragraph (19) of Article 7 and paragraph (7) of Article 8 shall provide for cost centres as well as associated accounting and costing procedures in order to ensure:

(a) the separate identification of capital and operating expenditure;

(b) the allocation of all costs to specific activities, functions or segments of the Project; and

(c) the allocation of costs attributable to the delivery of water to South Africa and costs attributable to the generation of hydro-electric power in the Kingdom of Lesotho or for the developments envisaged by the provisions of paragraph (2) of Article 4.

(7) The methodology of apportioning the liability between the Parties for the costs of Phase 1A Project Works shall be agreed to by the Parties by way of Protocol III to this Treaty.

(8) The payments made under the provisions of this Article shall not be taken to confer any rights of ownership or equity.

Article 11 - Financing Arrangements

(1) The Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority shall have the obligation to raise money from time to time by way of loans, credit facilities or other borrowings, in such amounts as may be required for the implementation, operation and maintenance of the Project or any phase thereof or which may otherwise be required to meet the obligations of such Authority or to perform its functions: Provided that the entering into of any agreement with regard to all loans, credit facilities or other borrowings, relating to water delivery to South Africa shall be subject to the prior consent of South Africa and all loans, credit facilities or other borrowings relating to the generation of hydro-electric power in the Kingdom of Lesotho shall be subject to

the prior consent of Lesotho and provided further that any funds, relating to water delivery to South Africa, obtained on concessionary terms or as equity in the form of a capital contribution, shall, for the purpose of this Article and of the cost related payments in terms of Article 10, be deemed to be a loan at the interest rate and redemption terms applicable to loans of the International Bank for Reconstruction and Development at the time such funds are obtained.

(2) The implementation of each successive phase of the Project and any rights or obligations with regard thereto shall, unless the Parties agree otherwise, be conditional on the entering into of funding arrangements by the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority respectively for such implementation on terms and conditions acceptable to each Party as provided for in paragraph (1).

(3) The Parties shall engage their best endeavours to assist in procuring for the purpose of the Project from appropriate sources moneys by way of loans, credit facilities and other borrowings, required for the implementation, operation and maintenance of the Project or moneys which may otherwise be required to meet the obligations and perform the functions of such Authorities.

(4) The Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority respectively shall administer, with *inter alia* full cognisance of foreign exchange risks, all moneys raised by it by way of loans, credit facilities and other borrowings.

(5) Without prejudice to the provisions of paragraph (16) of Article 6, the Parties shall accept the normal obligations imposed by lenders with respect to approvals, monitoring, information and inspection of and access to sites and works, with regard to the Project.

(6) South Africa shall, with respect to all loans, credit facilities or other borrowings procured by the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority for the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa, provide such guarantees as the lenders of such loans, credit facilities or other borrowings, may require.

(7) Lesotho shall, with respect to all loans, credit facilities or other borrowings procured by the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority for the implementation, operation and maintenance of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho provide such guarantees as the lenders of such loans, credit facilities or other borrowings, may require.

(8) The Lesotho Highlands Development Authority shall through the Central Bank of Lesotho or authorised dealers in the Kingdom of Lesotho authorised by Lesotho to deal in gold and foreign exchange in terms of the exchange control provisions applicable in the Kingdom of Lesotho, have access to the foreign exchange market in the Republic of South Africa in order to comply with its obligations in terms of this Treaty.

(9) South Africa shall, if so requested by Lesotho, cause the South African Reserve Bank to make available to the Lesotho Highlands Development Authority the foreign exchange required for any transaction with regard to the implementation, operation or maintenance of the Project.

(10) The Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority as the case may be shall, on the request of South Africa:

(a) allow South Africa to pay all moneys due and payable as cost related payments, directly to any creditor from whom any loans, credit facilities or other borrowings are procured by such Authority for the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa;

(b) engage its best endeavours to substitute a second stage loan for any loan procured for the implementation, operation and maintenance of that part of the Project relating to water delivery to South Africa; and

(c) allow South Africa to pay moneys due by it as cost related payments in redemption of any loans, utilized credit facilities or other borrowings procured for the implementation, operation and maintenance of that part of the Project relating to water delivery to South Africa, at any time prior to the date for the redemption of such loans, utilized credit facilities or other borrowings, subject to the provisions of any financing agreement.

(11) The Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority as the case may be, shall on the request of Lesotho, allow Lesotho to pay all moneys due and payable as cost related payments, directly to any creditor from whom any loans, credit facilities or other borrowings are procured by such Authority for the generation of hydro-electric power or for the developments envisaged by the provisions of paragraph (2) of Article 4, in the Kingdom of Lesotho.

(12) Any loss or gain as a result of foreign exchange fluctuations with regard to transactions engaged in by the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority, relating to the implementation, operation and maintenance of that part of the Project pertaining to the delivery of water to South Africa shall, as the case may be, either be borne by or accrue to South Africa.

(13) Any loss or gain as a result of foreign exchange fluctuations, with regard to transactions engaged in by the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority, relating to the generation of hydro-electric power or the developments envisaged by the provisions of paragraph (2) of Article 4, in the Kingdom of Lesotho, shall as the case may be, either be borne by or accrue to Lesotho.

Article 12 - Royalty Payments

(1) Consequent upon the implementation of Sub-phase IA of the Project and in accordance with the provisions of this Article, South Africa undertakes to share

with Lesotho, by way of royalty payments, on the basis of fifty-six per cent on the part of Lesotho and forty-four per cent on the part of South Africa, the net benefit computed in accordance with the provisions of paragraph (2) or recomputed in accordance with the provisions of paragraph (6) or (7) or (8) as the case may be.

(2) The net benefit shall be computed in accordance with the procedures set out in the Royalty Manual on the basis of the difference between:

(a) the cost, at its Present Value, of the least cost scheme, identified as the "Optimal Scheme" in the Royalty Manual, which scheme shall comprise either a least cost combination with a combined water delivery capacity of seventy cubic metres per second of a water project solely concerned with the delivery of water, identified as the "Lesotho Highlands Water Project Initial Development" in the Royalty Manual and a subsequent supplementary water project identified as the "Follow-on Orange Vaal Transfer Scheme" in the Royalty Manual, or a water project solely concerned with the delivery of water, identified in the Royalty Manual as the least cost "Lesotho Highlands Water Project Initial Development" with a delivery capacity of seventy cubic metres per second; and

(b) the cost, at its Present Value, of the alternative water project with a delivery capacity of seventy cubic metres per second, identified as the "Least Cost Orange Vaal Transfer Scheme" in the Royalty Manual.

(3) The provisional assessment at the time of the signing of this Treaty of the share of the Parties of the net benefit computed in accordance with the general principles contained in paragraph (2) and determined on the basis of the preliminary reservoir inflow data as shown in the Royalty Manual, expressed in Present Values at January 1995 using December 1985 price levels and a discount rate of six per cent per annum amounts to one thousand two hundred and ninety seven million two hundred and fifty thousand maloti (m 1 297 250 000) on the part of Lesotho and one thousand and nineteen million two hundred and seventy thousand rand (R 1 019 270 000) on the part of South Africa. Such amounts shall be subject to recomputation as provided for in this Article.

(4) In the calendar year preceding the date of first delivery of water to South Africa which shall be January 1995 or at such other stage prior to such year as may be determined by the Joint Permanent Technical Commission, the preliminary reservoir inflow data utilized in the computation of the share of the Parties of the net benefit as provided for in paragraph (3) shall be revised or updated in accordance with the provisions of paragraph (5), retaining the reservoir inflow data format set out in the Royalty Manual and taking account of all relevant hydrological data collected prior to such year. Such revised or updated reservoir inflow data shall be used for the computation of the net benefit as provided for in paragraph (2) and without further revision or updating for the recomputation of the net benefit as provided for in paragraph (6) or (7) or (8) as the case may be.

(5) The revised or updated reservoir inflow data provided for in paragraph (4) shall be determined by the Lesotho Highlands Development Authority in consultation with representatives of the hydrology division of the appropriate

Department or Ministry of each of the Parties and shall require the approval of the Joint Permanent Technical Commission in order to take effect. In the event of the Joint Permanent Technical Commission not approving of such revision or updating as a result of a disagreement on this issue between the respective delegations, such issue shall be referred to an expert consultant in the field of hydrology, appointed by the Parties. Should the Parties fail to agree on the appointment of such consultant within sixty calendar days of a request by either Party to make such appointment, then at the request of either Party, the President of the International Commission on Large Dams (ICOLD) shall appoint such consultant. The findings and decisions of such consultant shall be final and binding on the Parties.

(6) In the event of adjustments to the minimum annual quantities of water specified for each year in Annexure II in accordance with the provisions of paragraph (2) of Article 7, the net benefit shall be recomputed on the basis provided for in paragraph (2) taking account of such adjustments. In accordance with the procedures set out in the Royalty Manual.

(7) In the event of the remaining part of the Project being cancelled at a phase subsequent to Phase I in circumstances other than those provided for in paragraph (8) the net benefit shall be recomputed in accordance with the procedures set out in the Royalty Manual on the basis of the difference between:

(a) the cost, at its Present Value, of the least cost combination with a combined water delivery capacity of seventy cubic metres per second, of a water project solely concerned with the delivery of water identified as the "Lesotho Highlands Water Project Initial Development" in the Royalty Manual with a delivery capacity equal to the combined delivery capacity of those phases of the Project, implemented and those agreed by the Parties to be implemented, at that stage, and a subsequent supplementary water project identified as the "Follow-on Orange Vaal Transfer Scheme" in the Royalty Manual: Provided that in the event of the combined delivery capacity of those phases of the Project implemented and those agreed by the Parties to be implemented at that stage, exceeding the delivery capacity of the "Lesotho Highlands Water Project Initial Development" forming part of the scheme identified as the "Optimal Scheme" in the Royalty Manual, the cost of the latter shall apply in respect of such recomputation; and

(b) the cost, at its Present Value, of the alternative water project with a delivery capacity of seventy cubic metres per second, identified as the "Least Cost Orange Vaal Transfer Scheme" in the Royalty Manual.

(8) In the event of the remaining part of the Project being cancelled at a phase subsequent to Phase I on the insistence, unilaterally, of South Africa, the net benefit shall be recomputed in accordance with the procedures set out in the Royalty Manual on the basis of the difference between:

(a) the cost, at its Present Value, of a water project solely concerned with the delivery of water and identified as the "Lesotho Highlands Water Project Initial Development" in the Royalty Manual with a delivery capacity equal to the combined delivery capacity of those phases of the Project., implemented, and those agreed to by the Parties to be implemented, at that stage; and

(b) the cost, at its Present Value, of an alternative water project identified as the "Comparable Orange Vaal Transfer Scheme" in the Royalty Manual with a delivery capacity equal to the combined delivery capacity of those phases of the Project referred to in sub-paragraph (a).

(9) The net benefit computed or recomputed in accordance with the provisions of either paragraph (2) or (6) or (7) or (8) as the case may be, shall comprise:

(a) an investment element representing the investment costs difference;

(b) an operation element representing the electricity costs difference attributable to pumping operations; and

(c) an operation and maintenance element representing the remaining operation and maintenance costs difference.

(10) The share of Lesotho of the net benefit shall, subject to the provisions of paragraph (11), be due to Lesotho in the form of a royalty comprising:

(a) a fixed component relating to the investment element of the net benefit in the form of a monthly amount which shall be derived in accordance with the provisions of paragraph (12) and which shall accrue in accordance with the provisions of paragraph (15);

(b) a variable component relating to the operation element of the net benefit representing the difference in electricity costs attributable to pumping operations, in the form of a monthly amount which amount shall be derived by applying the unit rate computed in accordance with the provisions of paragraph (13) and which shall accrue in accordance with the provisions of paragraph (16); and

(c) a variable component relating to the operation and maintenance element of the net benefit representing the difference in the remaining operation and maintenance costs, in the form of a monthly amount which amount shall be derived by applying the unit rate computed in accordance with the provisions of paragraph (14) and which shall accrue in accordance with the provisions of paragraph (16).

(11) Revenue accruing to Lesotho as a direct result of the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa by way of its share of the common revenue pool of the Customs Union shall be deemed to amount to an advance payment by South Africa in respect of the share of Lesotho of the investment element of the net benefit. Such advance payment shall, in accordance with the procedures set out in the Royalty Manual, be computed as a fixed percentage amounting to ten comma six nine (10.69) per cent of the Present Value of the total cost of the "Lesotho Highlands Water Project Initial Development", for the computation or recomputation of the net benefit in accordance with the provisions of either paragraph (2) or (6) or (7) or (8) as the case may be. Such advance payment shall be set off against the share of Lesotho of the investment element of the net benefit prior to the computation of the fixed component of the royalty:

Provided that in the event of any change to the Customs Union Agreement affecting the share of Lesotho of the common customs revenue pool of the Customs Union such fixed percentage shall be adjusted *mutatis mutandis* in accordance with the procedures set out in the SACU Study using the same project cost data contained therein and provided further that in the event of termination of the Customs Union Agreement the Parties shall agree on an amount to be set off against the share of Lesotho of the investment element of the net benefit equivalent to any revenue accruing to Lesotho as a result of any substitute dues, taxes or charges and provided further that in the event of the provisions of sub-paragraph (a) of paragraph (19) becoming applicable, either Party may request that it be compensated on the grounds that such advance payment no longer adequately represents the revenue accruing to Lesotho as a direct result of the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa, by way of its share of the common revenue pool of the Customs Union which compensation shall be determined by agreement between the Parties and in accordance with the principles established in the SACU Study.

(12) The Present Value of the share of Lesotho of the investment element of the net benefit computed in accordance with the provisions of paragraph (2), having made due allowance in accordance with the provisions of paragraph (11) for the revenue accruing to Lesotho by way of its share of the common revenue pool of the Customs Union, shall be equal to the aggregate of the Present Values of a uniform monthly amount when discounted at a discount rate of six per cent per annum from the Due Date applicable to each such monthly amount for a period of fifty years from January 1995, in accordance with the procedures set out in the Royalty Manual, which monthly amount shall constitute the fixed component of the royalty as provided for in paragraph (15): Provided that in the event of recomputation of the net benefit in accordance with the provisions of paragraph (6) or (7) or (8) as the case may be, the recomputed monthly amount shall be that which when paid uniformly for the balance of the period of fifty years from January 1995 after the date on which the recomputed monthly amount becomes effective together with the monthly amount or amounts paid up to such date shall have in the aggregate a Present Value equal to that of the share of Lesotho of the investment element of the recomputed net benefit, having made due allowance in accordance with the provisions of paragraph (11) for the revenue accruing to Lesotho by way of its share of the common revenue pool of the Customs Union.

(13) The Present Value of the share of Lesotho of the operation element of the net benefit representing the difference in electricity costs attributable to pumping operations computed in accordance with the provisions of paragraph (2) shall be equal to the aggregate of the Present Values of the monthly amounts computed as the products of a constant unit rate in cents per cubic metre of water and the monthly average of the annual minimum quantity of water specified for each year in Annexure II, having made due allowance for shortfalls in such minimum quantities derived in the computation of the net benefit, when discounted at a discount rate of six percent per annum from the Due Date applicable to each such amount for a period of fifty years from January 1995 in accordance with the procedures set out in the Royalty Manual. Such unit rate shall form the basis for the computation of the variable component of the royalty in respect of the operation element representing the difference in

electricity costs relating to pumping operations as provided for in paragraph (16): Provided that in the event of recomputation of the net benefit in accordance with the provisions of paragraph (6) or (7) or (8) as the case may be, the monthly amounts derived as the products of a recomputed constant unit rate in cents per cubic metre of water and the monthly average of the annual minimum quantity of water specified in Annexure II for each year from the date such recomputed unit rate becomes effective, when paid monthly for the balance of the period of fifty years from January 1995 after such date together with the monthly amounts paid up to such date, shall have in the aggregate a Present Value equal to the share of Lesotho of the operation element of the recomputed net benefit representing the difference in electricity costs attributable to pumping operations.

(14) The Present Value of the share of Lesotho of the operation and maintenance element of the net benefit representing the difference in the remaining operation and maintenance costs computed in accordance with the provisions of paragraph (2) shall be equal to the aggregate of the Present Values of the monthly amounts computed as the products of a constant unit rate in cents per cubic metre of water and the monthly average of the annual minimum quantity of water specified for each year in Annexure II, having made due allowance for shortfalls in such minimum quantities derived in the computation of the net benefit, when discounted at a discount rate of six percent per annum from the Due Date applicable to each such amount for a period of fifty years from January 1995 in accordance with the procedures set out in the Royalty Manual. Such unit rate shall form the basis for the computation of the variable component of the royalty in respect of the operation element representing the difference in the remaining operation and maintenance costs as provided for in paragraph (16): Provided that in the event of recomputation of the net benefit in accordance with the provisions of paragraph (6) or (7) or (8) as the case may be, the monthly amounts derived as the products of a recomputed constant unit rate in cents per cubic metre of water and the monthly average of the annual minimum quantity of water specified in Annexure II for each year from the date such recomputed unit rate becomes effective, when paid monthly for the balance of the period of fifty years from January 1995 after such date together with the monthly amounts paid up to such date, shall have in the aggregate a Present Value equal to the share of Lesotho of the operation and maintenance element of the recomputed net benefit representing the difference in the remaining operation and maintenance costs.

(15) Subject to the provisions of paragraph (19) the monthly amount computed in accordance with the provisions of paragraph (12) shall accrue monthly as the fixed component of the royalty for a period of fifty years relative to the month of the first delivery of water to South Africa which shall be January 1995.

(16) Both variable components of the royalty shall accrue monthly for a period of fifty years relative to the month of the first delivery of water to South Africa which shall be January 1995, and such monthly amounts shall be determined as the products of the unit rates computed in accordance with the provisions of paragraphs (13) and (14) and the quantity of water actually delivered to South Africa during each month not in excess of the Scheduled Monthly Demand and the quantity of water in excess of such Scheduled Monthly Demand utilized to recoup any shortfall in the Scheduled Monthly Demand for any previous month

during such year or utilized during the first six months of any year to recoup any shortfall in the delivery of the minimum quantity specified for the previous year in Annexure II.

(17) South Africa shall be liable to pay to Lesotho royalties in respect of any quantity of water actually delivered to South Africa, in excess of the Scheduled Monthly Demand in any month during any one calendar year, which has not been utilized as provided for in paragraph (16) to recoup any previous shortfalls and which is utilized to recoup a shortfall in any subsequent month during the same calendar year. Such royalties shall be the product of the quantity of water utilized to effect such recoupment and a unit rate equal to the difference between the sum of the unit rates referred to in paragraphs (13) and (14) applicable at the time of such shortfall and the sum of the unit rates referred to in paragraph (1) of Article 13 applicable at the time such quantity of water is delivered.

(18) The unit rates computed in accordance with the provisions of paragraphs (13) and (14) and applicable at the termination of the period of fifty years on 31 December 2044 shall continue to apply subsequent to such period and subsequent to such date South Africa shall be liable to pay monthly to Lesotho amounts computed as:

(a) the products of the unit rates and the quantity of water actually delivered to South Africa during each month not in excess of the Scheduled Monthly Demand and the quantity of water in excess of such Scheduled Monthly Demand, utilized to recoup any shortfall in the Scheduled Monthly Demand for any previous month during such year or utilized during the first six months of any year to recoup any shortfall in the delivery of the minimum annual quantity specified for the previous year in Annexure II; and

(b) the product of the quantity of water actually delivered to South Africa in excess of the Scheduled Monthly Demand in any month during any one calendar year which has not been utilized to recoup any previous shortfall as provided for in sub-paragraph (a) and which is utilized to recoup a shortfall in any subsequent month in the same calendar year and a unit rate equal to the difference between the sum of the unit rates referred to in paragraphs (13) and (14) applicable at the time of such shortfall and the sum of the unit rates referred to in paragraph (1) of Article 13 applicable at the time such quantity of water is delivered.

All such amounts shall be adjusted *mutatis mutandis* in accordance with the provisions of paragraph (20).

(19) In the event of the Scheduled Monthly Demand for any month not being delivered to South Africa, the fixed component of the royalty due shall, in accordance with the procedures set out in the Royalty Manual, be reduced in proportion to such shortfall provided that such shortfall results from:

(a) the commencement of reliable supplies from any phase of the Project being delayed relative to the time when such supplies shall be required to satisfy the minimum deliveries to South Africa specified for any year in Annexure II:

Provided that South Africa shall not be exempt from its obligation to pay such fixed component in the event of such delay occurring as the result of any act or omission on the part of the Trans-Caledon Tunnel Authority in respect of that part of the Project for which such Authority shall be wholly responsible; and

(b) any of the contingencies referred to in paragraph (2) of Article 1 occurring: Provided that in the event of a contingency referred to in sub-paragraph (a) of paragraph (2) of Article 14 occurring, South Africa shall continue to pay to Lesotho the fixed component only of the royalty.

Provided that such reduction shall be reimbursed in proportion to the extent that such shortfall is recouped by deliveries in excess of the Scheduled Monthly Demand in subsequent months during that calendar year or during the first six months following the end of such year.

(20) The fixed and variable components of the royalty shall be adjusted as provided for in this paragraph and as more fully set out in the Royalty Manual:

(a) the fixed component of the royalty as well as the variable component of the royalty relating to the remaining operation and maintenance element of the net benefit shall be indexed to the Production Price Index interpolated to the actual date of payment;

(b) the variable component of the royalty relating to the electricity element of the net benefit shall be indexed to the Average Annual Electricity Price interpolated to the actual date of payment.

(21) The Due Date for payment of:

(a) amounts in terms of paragraph (15) shall be the date at the end of each month for the fifty year period commencing in January 1995. Provided that in the event of a delay in the commencement of reliable supplies from Phase IA in accordance with the provisions of sub-paragraph (a) of paragraph (19), the Due Date for each of the monthly amounts from January 1995 up to and including the month before that in which such supplies commence shall be the date at the end of that month in which such supplies commence;

(b) amounts in terms of paragraph (16) shall be the date at the end of the month during which the relevant quantity of water is actually delivered;

(c) amounts in terms of paragraph (17) shall be the date at the end of the month in which the shortfall which is recouped occurs;

(d) amounts in terms of sub-paragraph (a) of paragraph (18) shall be the date at the end of the month during which the relevant quantity of water is actually delivered;

(e) amounts in terms of sub-paragraph (b) of paragraph (18) shall be the date at the end of the month in which the shortfall which is recouped occurs.

(22) Prior to the implementation of Phase IA of the Project, an invoicing procedure in respect of royalty payments and payments in terms of paragraph (18) shall be established by agreement between the Parties and in accordance with such procedure the Lesotho Highlands Development Authority shall, not later than five calendar days following the end of each month, on behalf of Lesotho, present to South Africa an invoice in respect of the royalty payments or payments in terms of paragraph (18) for the preceding month and such invoices shall incorporate adjustments to earlier invoiced amounts in accordance with the provisions of this Article.

(23) South Africa shall settle invoices presented by the Lesotho Highlands Development Authority within thirty calendar days from the date of receipt of such invoices.

(24) Royalty amounts due or amounts due in terms of paragraph (18) shall attract interest at a rate of six per cent per annum for the period between the Due Date and the actual date of payment of such amounts: Provided that South Africa shall compensate Lesotho for any reasonable loss incurred by Lesotho as a result of such royalty payments being received later than thirty calendar days from the date of receipt of such invoice.

(25) Any dispute in respect of royalty payments and payments in terms of paragraph (18) as invoiced by the Lesotho Highlands Development Authority shall be settled by the Joint Permanent Technical Commission: Provided that until the settlement of such dispute. South Africa shall make payment for the month in dispute on the basis of the best possible estimate by the Joint Permanent Technical Commission of royalties due for such period. Adjustments to royalty payments as a result of the settlement of such dispute shall be reflected in subsequent invoices.

(26) All royalty payments and payments in terms of paragraph (18) shall be deposited in a special account designated by Lesotho at the Central Bank of Lesotho.

(27) South Africa shall cause the South African Reserve Bank to make available to Lesotho through the Central Bank of Lesotho freely convertible foreign exchange at its most favourable exchange rate for any foreign transactions that Lesotho authorizes from the proceeds of royalty payments and payments in terms of paragraph (18).

Article 13 - Payments with Regard to Excess Water, Downstream Releases and Water Abstractions

(1) South Africa shall be liable to pay each month to Lesotho in respect of water delivered in terms of paragraphs (3), (6) and (7) of Article 7 in excess of the Scheduled Monthly Demand for such month, less any portion of such excess utilized to recoup any shortfall in the Scheduled Monthly Demand for any previous month during the same year and if the relevant month be one of the first six months of any calendar year, less any portion of such excess utilized to recoup any shortfall in the delivery of the minimum quantity specified for the

previous year in Annexure II (which difference is hereinafter referred to as "Excess Water"), an amount equal to the sum of:

(a) an amount computed as the product of a unit rate equal to fifty per cent of the unit rate referred to in paragraph (13) of Article 12, and the quantity of Excess Water actually delivered to South Africa during any such month; and

(b) an amount computed as the product of a unit rate equal to fifty per cent of the unit rate referred to in paragraph (14) of Article 12, and the quantity of Excess Water actually delivered to South Africa during any such month.

(2) The Due Date for payment of each amount computed in accordance with the provisions of paragraph (1) shall be the date at the end of the month during which the relevant quantity of water is actually delivered.

(3) Any amount computed in accordance with the provisions of sub-paragraph (a) of paragraph (1), shall, as set out in the Royalty Manual, be indexed to the Average Annual Electricity Price interpolated to the actual date of payment.

(4) Any amount computed in accordance with the provisions of sub-paragraph (b) of paragraph (1), shall, as set out in the Royalty Manual, be indexed to the Production Price Index interpolated to the actual date of payment.

(5) Not later than five calendar days following the end of each month, the Lesotho Highlands Development Authority shall, on behalf of Lesotho present South Africa an invoice for the amounts due in respect of Excess Water delivered during the preceding month. The provisions of paragraphs (22), (23), (24) and (25) of Article 12 shall apply *mutatis mutandis* with regard to such invoice procedures and invoices.

(6) In the event of downstream releases at the request of Lesotho in accordance with the provisions of paragraph (13) of Article 7 as well as water abstractions in accordance with the provisions of paragraph (14) of Article 7 such releases and abstractions shall be subject to compensation payments by Lesotho to South Africa as agreed to by the Parties from time to time. Such agreement shall further provide for the time and manner of payment of any amounts due.

(7) In the event of downstream releases at the request of South Africa in accordance with paragraph (13) of Article 7, South Africa shall compensate Lesotho:

(a) for any loss the Parties agree results from the effect of such release on the operation of the hydro-electric complex forming part of the Project. The Parties shall further agree with regard to the time and manner of payment of any amounts due; and

(b) for any loss in royalties or reduction in payments in terms of the provisions of paragraph (1) or paragraph (18) of Article 12 as a result of water so released not being delivered to South Africa at the Designated Delivery Point. Within thirty days of such release the Lesotho Highlands Development Authority shall, on behalf of Lesotho, present to South Africa an invoice in respect of amounts due as a result of such loss. The provisions of paragraphs (22), (23), (24) and

(25) of Article 12 shall apply *mutatis mutandis* with regard to such invoice procedures and invoices.

(8) All payments in accordance with the provisions of paragraph (1) and sub-paragraph (b) of paragraph (7) shall be effected for the credit of Lesotho in the special account at the Central Bank of Lesotho referred to in paragraph (26) of Article 12.

(9) South Africa shall cause the South African Reserve Bank to make available to Lesotho through the Central Bank of Lesotho freely convertible foreign exchange at its most favourable exchange rate for any foreign transactions that Lesotho authorizes from the proceeds of payments to Lesotho in terms of the provisions of this Article.

Article 14 - Procedure in Cases of *Force Majeure*

(1) In case of any substantial impairment of the implementation of this Treaty caused by *force majeure* as defined in paragraph (2), the Parties shall take the necessary measures of palliation and restoration on the basis of consultation and in a spirit of co-operation, in so far as the immediate circumstances of emergency so permit, and shall subsequently agree on joint action.

(2) For the purpose of this Article, "*force majeure*" includes the following:

(a) any disturbance due to an extreme hydrological or other natural event, including extreme drought, and affecting the delivery of water to South Africa;

(b) the use of force by the states;

(c) armed insurrection and other forms of civil strife; and

(d) episodes of sabotage in so far as these do not form part of the contingencies referred to in sub-paragraphs (b) and (c) of this paragraph.

(3) The provisions of this Article are without prejudice to the application of the principles of international law relating to treaties.

Article 15 - Social and Environmental Considerations

The Parties agree to take all reasonable measures to ensure that the implementation operation and maintenance of the Project are compatible with the protection of the existing quality of the environment and, in particular, shall pay due regard to the maintenance of the welfare of persons and communities immediately affected by the Project.

Article 16: The Prevention and Settlement of Disputes

(1) For the purpose of this Article "dispute" shall mean any dispute concerning the interpretation and application of this Treaty.

(2) Lesotho, South Africa, the Lesotho Highlands Development Authority, the Trans-Caledon Tunnel Authority, and the Joint Permanent Technical Commission shall pay due regard to the overriding consideration that any dispute shall be resolved in a spirit of conciliation and that any impairment of the implementation, operation and maintenance of the Project shall be avoided.

(3) The Chief Executive of the Lesotho Highlands Development Authority and the Chief Executive of the Trans-Caledon Tunnel Authority shall have the power to institute, each within his own sphere of responsibility and after prior notification of the Joint Permanent Technical Commission, the minimum action required to safeguard the safety and integrity of the Project during the period in which the dispute procedure provided for in this Article is in operation.

(4) In the event of a dispute arising, either Party or the Parties jointly or the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority, may request the Joint Permanent Technical Commission to conduct an investigation and to present a written report containing its recommendations to both Parties, the Lesotho Highlands Development Authority and the Trans-Caledon Tunnel Authority.

(5) The Joint Permanent Technical Commission shall conduct the investigation and present its written report in terms of paragraph (4) with all reasonable dispatch. If the Joint Permanent Technical Commission cannot consider the matter within fourteen calendar days, it shall notify the referring party and, where appropriate, request an extension of time for consideration of the matter.

(6) The Joint Permanent Technical Commission may either report that no actions called for or may make recommendations calling for measures to be taken by one of the Parties, the Parties jointly, the Lesotho Highlands Development Authority or the Trans-Caledon Tunnel Authority, or may report that the matter is of such a nature that recourse to more formal procedures is called for.

(7) In the event of a dispute not being resolved by means of any action taken in accordance with the provisions of paragraphs (4), (5) and (6), it shall be made the subject of negotiation between the Parties.

(8) If a dispute cannot be resolved by negotiation between the Parties, such dispute shall be submitted to the Arbitral Tribunal as hereinafter provided.

(9) The Parties may jointly institute arbitration proceedings on the basis of an agreement to that effect between them which agreement shall set forth the nature of the dispute and the names of the arbitrators appointed by each Party.

Provided that any Party may institute arbitration proceedings by giving written notice thereof to the other Party which notice shall set forth the nature of the dispute and the name of the arbitrator appointed by such Party.

(10) The Arbitral Tribunal shall consist of three arbitrators who shall be legally qualified persons and such Tribunal shall be constituted in each instance as follows:

(a) Each Party shall appoint one arbitrator and the third arbitrator, who shall be the President of such Tribunal, shall be appointed by agreement between the two arbitrators appointed by the Parties;

(b) Should the arbitrators appointed by the Parties fail to agree on the appointment of the President of the Tribunal within sixty calendar days of the agreement or notice, as the case may be, referred to in paragraph (9), the President of the International Commission on Large Dams (ICOLD) shall, at the request of either Party, appoint a person as President of such Tribunal, who shall not be a citizen or former citizen of the Kingdom of Lesotho or the Republic of South Africa or a resident or former resident in the territory of any Party;

(c) Should the Party notified of the initiation of arbitration proceedings as provided for in paragraph (9), fail to appoint its arbitrator within sixty calendar days of such notification, such arbitrator shall at the request of the Party instituting such proceedings, be appointed by the President of such Tribunal which President shall be appointed *mutatis mutandis* by the President of the International Commission on Large Dams (ICOLD) in accordance with the provisions of sub-paragraph (b) at the request of the Party initiating such arbitration proceedings.

(11) Any arbitrator may resign by submitting his resignation in writing to both Parties and any arbitrator may at any time be removed from office by agreement between the Parties.

(12) In the event of death, resignation or removal of an arbitrator for whose appointment a Party is responsible, such Party shall appoint a replacement within sixty calendar days from the date of death, resignation or removal. Should such Party fail to make such appointment within such period, the President of the Arbitral Tribunal shall appoint an arbitrator in his stead. In the event of death, resignation or removal of the President of such Tribunal a replacement shall be nominated by agreement between the remaining arbitrators, within a period of sixty calendar days of such death, resignation or removal. Should the remaining arbitrators fail to agree on the appointment of the President, such appointment shall be made *mutatis mutandis* in accordance with the provisions of sub-paragraph (b) of paragraph (10).

(13) Notwithstanding anything to the contrary contained in this Article, the Parties may at any time agree to refer a dispute to arbitration.

(14)

(a) The Arbitral Tribunal shall convene at a time and venue to be determined by the President and such Tribunal shall thereafter determine the time and venue of any further sessions;

(b) Subject to the provisions of this Article, the Arbitral Tribunal shall establish its rules of procedure and shall decide all questions relating to its competence, jurisdiction and procedure;

(c) The official language of the Arbitral Tribunal shall be English;

(d) The Arbitral Tribunal may appoint such personnel, including a Registrar, as it may deem necessary for the proper execution of its functions in terms of this Article;

(e) All decisions of the Arbitral Tribunal shall be by a majority vote of the members but in the event of there being no majority vote, the President shall have a casting vote in addition to a deliberative vote;

(f) The Arbitral Tribunal shall afford both Parties a fair hearing and may render an award by default;

(g) The proceedings and deliberations of the Arbitral Tribunal shall take place in private and all documents relating thereto as well as the award of such Tribunal shall remain secret, unless the Parties otherwise agree;

(15)

(a) The award of the Arbitral Tribunal shall be in writing and signed by the members who voted for it and shall constitute the award of the Tribunal, and a signed counterpart of such award shall be transmitted to each Party;

(b) The award of the Arbitral Tribunal shall be definitive and binding on the Parties, and they shall duly and expeditiously give effect thereto;

(c) During a period of thirty calendar days after the award has been communicated to the Parties the Arbitral Tribunal may, either of its own accord or at the request of either Party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of similar nature and shall forthwith communicate any such rectification to both Parties;

(d) Any dispute between the Parties as to the meaning and scope of the award shall, at the request of either Party and within sixty calendar days of the rendering of the award, be referred for decision to the Arbitral Tribunal which rendered the award.

(16)

(a) Without prejudice to the provisions of sub-paragraph (b) each Party shall be responsible for the remuneration of the arbitrator appointed by such Party, all other costs connected with such appointment and the costs entailed by the preparation of its own case. The remuneration of an arbitrator appointed by the President of the Arbitral Tribunal as provided for in sub-paragraph (c) of paragraph (10) or paragraph (12), as the case may be, as well as all other costs connected with such appointment shall be borne by the Party failing to effect such appointment. The remuneration of the President of such Tribunal, any personnel appointed by such Tribunal and all general expenses incurred as a result of the arbitration process, shall be borne equally by the Parties;

(b) In the case of a unilateral application to the Arbitral Tribunal, instituted by way of notice as provided for in paragraph (9), such Tribunal may, with regard to the remuneration of the President of the Tribunal and all other general

expenses in respect of such arbitration process, make such order as to cost as it may deem equitable;

(c) The Parties shall within fourteen calendar days after receiving notice from the Arbitral Tribunal to that effect, deposit in the manner prescribed in such notice equal amounts specified in the notice in order to meet the estimated expenses with regard to the remuneration of the President of such Tribunal and personnel appointed by such Tribunal as well as all other general expenses in respect of the arbitration proceedings.

(17) Except as the Parties may otherwise agree the law to be applied by the Arbitral Tribunal shall be this Treaty and, whenever necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed:

(a) international agreements entered into by both Parties;

(b) customary international law universally recognized or having received the assent of both Parties;

(c) Roman Dutch customary law; and

(d) all such other rules of law in force in both the Kingdom of Lesotho and the Republic of South Africa.

(18) At the conclusion of any arbitration proceedings, the President of the Arbitral Tribunal shall hand all records and documents relating thereto, to the Secretary of the Joint Permanent Technical Commission for safekeeping.

Article 17 - Savings Clauses

(1) The provisions of this Treaty are without prejudice to the views of each Party relating to the delimitation and demarcation of its international boundary.

(2) The provisions of this Treaty are without prejudice to the rights under public international law of riparians of the Senqu/Orange River other than the Kingdom of Lesotho and the Republic of South Africa.

(3) This Treaty is concluded without prejudice to all existing bilateral and multilateral agreements presently in operation between the two Parties, including the Customs Union Agreement, the Trilateral Monetary Agreement between the Governments of Lesotho, Swaziland, and South Africa of 18 April 1986, and the Bilateral Monetary Agreement between the Governments of Lesotho and South Africa of 18 April 1986.

(4) South Africa shall cause ESCOM or its successors, to supply electricity to the Kingdom of Lesotho on such terms as are being or will be granted to any other comparable bulk consumer with its own generating capacity in the Republic of South Africa.

Article 18 - Procedure For Review And Revision

(1) The provisions of this Treaty shall be reviewed at intervals of twelve years, calculated from the date of signature hereof or at such other intervals as the Parties may agree upon.

(2) Notwithstanding the foregoing, this Treaty may be amended at any time by agreement of both Parties.