

**ANCILLARY AGREEMENT TO THE DEED OF
UNDERTAKING AND RELEVANT AGREEMENTS**

ENTERED INTO BETWEEN

THE LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY

AND

**THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA**

ANCILLARY AGREEMENT TO THE DEED OF UNDERTAKING

**AND RELEVANT AGREEMENTS
ENTERED INTO BETWEEN**

- (1) THE LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY an autonomous statutory body incorporated under the laws of the Kingdom of Lesotho (hereafter called "LHDA");

AND

- (2) THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (hereafter called "South Africa").

WHEREAS:

- (A) The Government of the Kingdom of Lesotho (hereafter called "Lesotho") and South Africa have concluded the Treaty on the Lesotho Highlands Water Project on 24 October 1986 (hereafter called the "Treaty").
- (B) For the purpose of raising money to fulfil its obligations and perform its functions in respect of the implementation of the Project, LHDA shall enter into certain loan agreements and South Africa, under the provisions of the Treaty, shall be required to make cost related payments to LHDA, inter alia, to enable LHDA to effect payments which will become payable by it in terms of the said loan agreements.
- (C) LHDA, the lenders under the said loan agreements and the Trustee have entered into the Trust Instrument.
- (D) South Africa and the Trustee have entered into the Deed of Undertaking.
- (E) LHDA and South Africa (hereafter called the "Parties") deem it necessary to regulate their respective positions in relation to the obligations accepted by LHDA pursuant to the Trust Instrument and relevant loan agreements and South Africa pursuant to the Deed of Undertaking and relevant loan agreements.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 In these presents, unless the context otherwise requires, the following expressions shall have the following meanings:-

"Business Day" means any day on which commercial banks in each of the Republic of South Africa and the Kingdom of Lesotho are open for business in the ordinary course;

"Deed of Undertaking" means the Deed of Undertaking entered into by the parties thereto on 19 November 1991, a copy of which is attached as Schedule 2 hereto;

"Designated Authority" means the authority designated by South Africa pursuant to Article 2(1)(b) of the Treaty;

"Relevant Agreement" means the Trust Instrument, any Designated Loan Instrument as defined in the Deed of Undertaking, or any other loan agreement, credit facility or other borrowings entered into by LHDA, the proceeds of which are intended to be used for the purposes of financing the implementation of Phase IA of the Project in the Kingdom of Lesotho in so far as it relates to water delivery to South Africa;

"Trustee" means the Trustee as appointed pursuant to the Trust Instrument; and

"Trust Instrument" means the Trust Instrument entered into by the parties thereto on 19 November 1991, a copy of which is attached as Schedule 1 hereto.

2. UNDERTAKINGS BY LHDA

2.1 LHDA hereby undertakes to South Africa that it shall -

2.1.1 unless otherwise notified by the Designated Authority, promptly after receipt or dispatch thereof, provide such Designated Authority with copies of all communications received from and sent to the Trustee pursuant and relating to the Trust Instrument or received from or sent to any lender or its agent pursuant and relating to any other Relevant Agreement;

2.1.2 not consent to any modification of the Trust Instrument or any other Relevant Agreement without the prior agreement of South Africa conveyed in writing to it by the Designated Authority;

2.1.3 provide to the Designated Authority copies of any legal process or claim which may be commenced or made against LHDA pursuant to any Relevant Agreement and consult with South Africa as to the most appropriate way to deal with such legal process or

claim: Provided that in the event of such legal process or claim arising as a result of South Africa not agreeing to any payment or the amount thereof pursuant to the provisions of Clause 2.1.8 hereof, LHDA shall obtain South Africa's agreement, conveyed in writing to it by the Designated Authority, on dealing with such legal process or claim with the understanding that the Parties shall closely co-operate with each other in regard to all legal processes or claims;

2.1.4 not make any prepayment, cancellation or purchase in accordance with Clauses 3.2, 3.3 and 3.4 respectively of the Trust Instrument without the prior agreement of South Africa conveyed in writing to it by the Designated Authority;

2.1.5 consult with South Africa -

(a) on all matters arising as a result of the operation of Clause 7 of the Trust Instrument and on the position which LHDA might adopt on any courses of action which other attendees at such meeting may propose;

(b) prior to proposing any course of action in the course of consultations in accordance with the provisions of Clause 6.14 of the Trust Instrument;

(c) prior to contesting the validity of or prior to denying generally its liabilities under any Relevant Agreement;

(d) prior to giving any notice to any lender or its agent of any default or specified event as defined in any Relevant Agreement as well as of any steps it is or intends taking in order to remedy such default or specified event;

2.1.6 consult with South Africa on the form and contents of any certificate to be given to the Trustee pursuant to Clause 12.12 of the Trust Instrument or on the content of any notice to be given under Clause 12.7(vi) thereof;

2.1.7 obtain the agreement of South Africa conveyed in writing by the Designated Authority prior to agreeing to any fees at an adjusted rate as contemplated in Clause 13.1 of the Trust Instrument;

- 2.1.8 obtain the prior agreement of South Africa, conveyed in writing by the Designated Authority, in respect of all payments and the amounts thereof payable by LHDA pursuant to the Trust Instrument provided that South Africa shall, subject to Clause 2.1.3 hereof, unconditionally and irrevocably indemnify LHDA against any and all claims, demands, liabilities, costs, losses and expenses which may be made of LHDA or which LHDA may incur or sustain as a result of South Africa not agreeing with LHDA regarding any payment or the amount thereof. LHDA further agrees that, in bringing any claim under the indemnity provided in its favour, it shall be required to prove the loss that it has incurred and shall only be entitled to recover in respect of loss actually incurred. LHDA shall not be entitled to reimbursement for any payments made by LHDA to the Trustee in circumstances where South Africa has not agreed, as required in this Agreement, to such payment being made;
- 2.1.9 obtain the agreement of South Africa conveyed in writing by the Designated Authority prior to the giving or withholding of any approval required to be given by LHDA pursuant to Clause 15.1 or 15.4 of the Trust Instrument it or prior to any decision on whether or not an objection should be lodged pursuant to Clause 15.2 of the Trust Instrument;
- 2.1.10 if a specified event as defined in any Relevant Agreement occurs, it shall neither request to negotiate nor negotiate with any lender or its agent without first consulting with South Africa and shall not under such circumstances give any notice of prepayment unless it has obtained the consent of South Africa conveyed in writing by the Designated Authority;
- 2.1.11 it shall not conduct its affairs in any way which might reasonably be expected to have an adverse effect on its rights and obligations in terms of or resulting from any Relevant Agreement as well as the rights and obligations of South Africa in terms of or resulting from the Deed of Undertaking, including without limitation any conduct which is likely to result in a specified event or an event of default in terms of and as defined in any Relevant Agreement or which would nullify, impair or reflect negatively on any representations or warranties made pursuant to any Relevant Agreement;
- 2.1.1-2 it shall promptly inform South Africa in writing conveyed to the Designated Authority of any change or prospective change within its knowledge in circumstances not relating to any payment made or to be made by South Africa under the Deed of Undertaking or any

Relevant Agreement, which might reasonably be expected to have an adverse effect on the rights and obligations of South Africa in terms of or resulting from the Deed of Undertaking, including without limitation any change or prospective change in circumstances which is likely to result in a specified event or an event of default in terms of and as defined in any Relevant Agreement or which would nullify, impair or reflect negatively on any representation or warranty made in and pursuant to any Relevant Agreement. In addition, LHDA shall promptly consult with South Africa with a view to jointly determining the steps to be taken in order to prevent, mitigate or remove such circumstances.

2.2 LHDA undertakes to South Africa that all representations, warranties or statements made or repeated or deemed to be repeated by LH DA pursuant to any Relevant Agreement shall be based to the best of its knowledge and information on reasonable assumptions and reasonably held beliefs. LHDA represents and warrants to South Africa that no representation, warranty or statement made or repeated or deemed to be repeated by LHDA in or pursuant to any Relevant Agreement, in respect of any matter within its control or with regard to which it has or could reasonably be required to have any knowledge but excluding any matter within the exclusive control or knowledge of South Africa or of any agency, corporation, statutory body or other juridical entity in the Republic of South Africa which is directly or indirectly controlled by South Africa, was materially incorrect when made.

2.3 LHDA undertakes to South Africa that without the prior consent of South Africa conveyed to LHDA in writing by the Designated Authority, it shall not exercise any option with respect to interest rates or interest periods available to it in terms of any Designated Loan Instrument as defined in the Trust Instrument.

2.4 LHDA undertakes to provide South Africa with all information it may reasonably request in order to take appropriate action in terms of Clause 3.3

2.5 LHDA hereby undertakes to South Africa to act reasonably and in good faith in respect of all matters pertaining to this Agreement.

3. PAYMENTS BY SOUTH AFRICA UNDER RELEVANT AGREEMENTS

- 3.1 In pursuance of the provisions of Article 10(1) of the Treaty, South Africa undertakes towards LHDA that every obligation of LHDA to make a payment of money under a Relevant Agreement shall be fulfilled through the TransCaledon Tunnel Authority established by South Africa in compliance with the provisions of Article 6(5) of the Treaty, out of money made available for that purpose from the State Revenue Fund of South Africa.
- 3.2 LHDA accepts that any amount paid by the Trans-Caledon Tunnel Authority pursuant to the provisions of Clause 6.3 of the Deed of Undertaking in respect of the Obligations (such term having the meaning ascribed to it in Clause 1.1 of the Trust Instrument) or pursuant to the provisions of Clause 3.1 hereof in respect of any obligation under any other Relevant Agreement, shall be a payment in terms of Article 11 (1 0)(a) of the Treaty and shall absolve South Africa from any corresponding obligations to make cost related payments in terms of Article 10 of the Treaty.
- 3.3 South Africa shall in respect of its payment obligations in terms of any Relevant Agreement, at its risk be entitled
- to manage the foreign exchange exposure, including without limitation effecting foreign exchange cover and currency exchanges; and
 - to effect any interest rate exchange or any other hedging transaction.

4. UNDERTAKINGS BY SOUTH AFRICA

South Africa hereby undertakes to LHDA that it shall -

- 4.1 respond promptly to any request made by LHDA for South Africa to agree on any of the matters herein specified as requiring the agreement of South Africa and to use its best endeavours to respond within any such timescale as may be specified by LHDA as being the timescale in which it has to take action in respect of the relevant request;
- 4.2 act reasonably and in good faith in respect of all matters pertaining to this Agreement;

- 4.3) in the event of South Africa not agreeing to any properly substantiated proposal by LHDA on any matter herein specified as requiring the agreement of South Africa, furnish LHDA with a written statement setting out in full its reasons for not agreeing to such proposal.

5. REMEDIES AND WAIVERS

No failure to exercise, nor any delay in exercising, any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy prevent further or other exercise thereof or the exercise of any other right or remedy. The rights and remedies herein provided are cumulative of any rights or remedies provided by law.

6. NOTICES

- 6.1 Any notice, demand or any other communication to either Party required to be given made or served for any purpose under this Agreement shall be given, made or served by sending the same by registered post or facsimile transmission or by delivering it by hand as follows:-

To South Africa:

Director General: Water Affairs and Forestry c/o Trans-Caledon Tunnel Authority 971
Residensie Building 185 Schoeman Street
Pretoria
0002

P O Box 7253 Attention: Mr P M6rsner
Pretoria
0001 Facsimile No: 012-326-2630

To LHDA:

Chief Executive
Lesotho Highlands Development Authority
3rd Floor

Lesotho Bank Towers
Kingsway Street
Maseru
100

P O Box 7332 Attention: Chief Executive Maseru
100 Facsimile No: 09266-310050

or to such other address, or facsimile number as shall have been notified (in accordance with this Clause) to the other Party hereto. Any notice or demand sent by post as aforesaid shall be deemed to have been given, made or served seven (7) days after despatch and any notice or demand sent by facsimile transmission as aforesaid shall be deemed to have been given, made or served twenty four (24) hours after the time of despatch provided that -

- (a) in the case of a notice or demand given by facsimile transmission such notice or demand shall forthwith be confirmed by registered post provided that the failure of the addressee to receive such confirmation shall not invalidate the relevant notice or demand given by facsimile transmission; and
- (b) if any such communication or document would otherwise be deemed to have been received on a day which is not a Business Day it shall be deemed to have been received on the next Business Day.

7. COMMENCEMENT AND DURATION

This Agreement shall come into force on the date hereof and shall remain in full force and effect until the terminat or expiry of all Relevant Agreements.

8. APPLICABLE LAW

This Agreement shall be governed by and construed in accordance with the law of the Kingdom of Lesotho as supplemented by the law of the Republic of South Africa when necessary.

9. ARBITRATION

- 9.1 Any dispute arising out of or relating to this Agreement or any provision hereof which cannot be resolved by negotiation between the Parties shall be referred to an Arbitral Tribunal for resolution by it in the form of a written decision which shall state the reasons for such decision. Either Party shall have the right to call for the implementation of the arbitration procedure provided for in this Clause by serving written notice ("the Arbitration Notice") to that effect to the other Party which notice shall specify details of the dispute.
- 9.2 The Arbitral Tribunal shall consist of three arbitrators. The Minister of Water Affairs and Forestry of South Africa and the Chief Executive of LHDA shall within twenty one (21) days of the date of receipt of the Arbitration Notice, appoint one arbitrator each and the third arbitrator, who shall be the President of such Tribunal, shall be appointed by agreement between the two arbitrators so appointed. Failing within thirty six (36) days of the date of receipt of the Arbitration Notice, either such appointment being made on behalf of one of the Parties or such agreement being reached between the two arbitrators, the Court of Arbitration of the International Chamber of Commerce may be requested by either Party to present a list of names of persons from which the Parties acting jointly shall, as the case may be, appoint either the President or the two remaining members of the Arbitral Tribunal, one of whom shall be appointed to act as President. Failing such appointment or appointments being made by the Parties within fourteen (14) days of such list being presented to them, such Court of Arbitration may be requested by either Party to appoint either the President or, as the case may be, the remaining two members of the Arbitral Tribunal, one of whom shall be appointed as President.
- 9.3 Each of the Parties shall furnish to the Arbitral Tribunal within 21 days of its appointment a written statement setting out details of the dispute in question and particulars of the relevant Party's claim, counterclaim or defence.
- 9.4 The Arbitral Tribunal shall issue its written decision as well as the reasons for such decision, within 42 days of its appointment.

- 9.5 Subject to the provisions of this Clause, the Arbitral Tribunal shall in its sole discretion determine the time and venue of its sessions as well as the rules of procedure applicable to the arbitration procedure.
- 9.6 All decisions of the Arbitral Tribunal shall be by 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.
- 9.7 The official language of the arbitration procedure hereby provided for shall be English.
- 9.8 Each Party shall be responsible for the remuneration of the arbitrator appointed by it, all cost connected with such appointment and the costs entailed by the preparation of its own case and all other costs of the arbitration shall be borne equally by the Parties.
- 9.9 The decision of the Arbitral Tribunal shall be final and binding on the Parties.

IN WITNESS WHEREOF the Parties hereto, acting through their representatives thereunto duly authorised, have signed this Agreement in duplicate at ...on the..,31st day of AUGUST in this Year Nineteen Hundred and Ninety Two.

FOR AN ON THE BEHALF OF THE
LESOTHO HIGHLANDS
DEVELOPMENT AUTHORITY

FOR AND ON BEHALF OF THE
GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA