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TREATY SERIES No. 30 (1926)

Agreement

between the Government of the Union of South Africa and the Government of the Republic of Portugal regulating the Use of the Water of the Kunene River for the purposes of generating Hydraulic Power and of Inundation and Irrigation in the Mandated Territory of South-West Africa

SIGNED AT CAPE TOWN, JULY 1, 1926

[*In continuation of "Treaty Series No. 29 (1926)" (Cmd. 2777)*]

Presented by the Secretary of State for Foreign Affairs
to Parliament by Command of His Majesty

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Agreement between the Government of the Union of South Africa and the Government of the Republic of Portugal regulating the Use of the Water of the Kunene River for the purposes of generating Hydraulic Power and of Inundation and Irrigation in the Mandated Territory of South-West Africa.

Signed at Cape Town, July 1, 1926.

WHEREAS by Agreement entered into at Cape Town and dated the 22nd day of June, 1926, between the plenipotentiaries of the Government of the Union of South Africa in its capacity as Mandatory of the Territory of South-West Africa (hereinafter referred to as the Mandated Territory) and the plenipotentiaries of the Government of the Republic of Portugal, it has been finally settled that the boundary between the Mandated Territory and Angola is the middle line of the Kunene River from its mouth up to a point on the great Rua Cana Falls above its lip or crest, and that the parallel of latitude further forming the boundary starts from that point and extends due east so as to cause the Kunene River, above the Rua Cana Falls, to be excluded wholly from the Mandated Territory;

And whereas by this final settlement the use of the waters of the Kunene River at the Rua Cana Falls is common to the Government of the Union of South Africa and the Government of the Republic of Portugal;

And whereas the Government of the Union of South Africa may be desirous of utilising its share of the water for the purpose of generating hydraulic power;

And whereas it is not feasible for economic reasons to construct all the works required for the aforesaid purpose within the Mandated Territory;

And whereas the Government of the Republic of Portugal is mindful of the fact that from time immemorial portions of Ovamboland now forming part of the Mandated Territory of South-West Africa have periodically been inundated by the flood waters of the Kunene River overflowing its banks at various points in Portuguese Territory;

And whereas the Government of the Republic of Portugal is further mindful of the fact that by the silting up of the inlets of some of the natural channels of these waters into Ovamboland the volume of such overflow has greatly decreased;

And whereas it is vital to the health and comfort if not to the very existence of the native tribes of Ovamboland to ensure that these natural channels shall be and remain open;

And whereas the Government of the Union of South Africa has asked the Government of the Republic of Portugal for leave to undertake works for the purpose of restoring to the Mandated Territory the benefits of inundation it previously enjoyed;

And whereas the Government of the Republic of Portugal, for reasons of humanity, agree, under certain conditions, to allow the diversion of the waters of the River Kunene for the benefit of the Mandated Territory;

And whereas the Government of the Union of South Africa in its aforesaid capacity has appointed as its plenipotentiaries:—

1. The Honourable Jacob de Villiers, Judge of Appeal of the Supreme Court of South Africa (Chairman);
2. Gysbert Reitz Hofmeyr, Esquire, Companion of the Most Distinguished Order of St. Michael and St. George, Ex-Administrator of South-West Africa;
3. Reenen Jacob van Reenen, Esquire, Bachelor of Arts of the University of the Cape of Good Hope, Civil Engineer of the Lehigh University, Associate Member of the American Society of Civil Engineers, Associate Member of the Institute of Civil Engineers;

and the Government of the Republic of Portugal has appointed as its plenipotentiaries:—

1. Dr. Augusto de Vasconcellos, President of the Delegation, Senator, Minister Plenipotentiary, Ex-Prime Minister, Ex-Minister for Foreign Affairs, Chief of the Portuguese Department for the League of Nations;
2. Vice-Admiral Ernesto de Vasconcellos, Director-General of the Ministry for the Colonies, Ex-Director of Diplomatic, Geographical and Marine Services in the Ministry of the Colonies, Professor of the Lisbon Colonial School, Permanent Secretary of the Geographical Society of Lisbon;
3. Colonel Carlos Roma Machado, Military Engineer, Director of the Geographical Society of Lisbon, Ex-Director of Railways and Public Works in the Colonies;

for the purpose of negotiating an agreement whereunder, whilst retaining its sovereign rights intact, the Government of the Republic of Portugal concedes to the Government of the Union of South Africa as Mandatory the right to construct and use works in the Kunene River within Portuguese Territory for drawing and conveying water from the Kunene River for use in the Mandated Territory for the purposes aforesaid:

Now therefore, under and by virtue of the authority committed to them, the said plenipotentiaries on behalf of their respective Governments, after due negotiation, agree as follows:—

1. A dam, weir or barrage, for the diversion of water to be utilised for the generation of hydraulic power in the Mandated Territory, may be constructed across the Kunene River on Portuguese Territory at a distance of not more than three kilometres upstream from the point on the Rua Cana Falls at which, in terms of the Agreement dated the 22nd day of June, 1926, between the two Governments, the parallel of latitude defining the boundary eastwards takes its start.

2. Such dam, weir or barrage may be constructed either by the Government of the Union of South Africa or by the Government of the Republic of Portugal. If either Government wishes to construct such dam, weir or barrage it shall give two years' written notice to the other Government, and within that period the other Government may signify its intention to share in the construction, in which case plans and estimates must be approved and the construction technically and financially supervised by both Governments. If the dam, weir or barrage is jointly constructed, the cost of construction shall be equally divided between the two Governments. If the other Government does not within the period specified signify its intention of sharing in the scheme, the Government which gave the notice shall, in consultation with the other Government, be entitled to construct such dam, weir or barrage, the cost thereof being borne by the Government constructing the works. The other Government may, however, at any time by giving ten years' previous notice, and upon payment of one half the costs of construction as agreed upon at the time of completion of the said dam, weir or barrage, acquire a right to share in the scheme to the extent of one half of the water in the river. Notwithstanding the right which each Government has to one half share of the water, the Government which constructs the dam, weir or barrage shall be entitled to the use of all the water, until such time as the other Government shares in the scheme. But the Government entitled to the use of all the water may, under contract, give a share of the power to the other Government.

3. If the said dam, weir or barrage is jointly constructed, the cost of maintenance shall be equally divided between the two Governments; if the said works be constructed by one Government, the maintenance of the works shall be a charge upon that Government until the other Government shares therein, in which case the cost of maintenance shall from that time onwards be equally divided between the two Governments.

4. The Government of the Union of South Africa shall have the right to construct intake works in the Kunene River immediately above the said dam, weir or barrage on the left bank and thus to impound and to divert into a canal to be constructed by it on the left bank of the river in Portuguese Territory so much of the water of the river as it may at that point be entitled to.

5. The limits within which construction operations, in so far as the canal is concerned, may take place within Portuguese Territory shall, without any owners' rights accruing to the Government of the Union of South Africa, be bounded on the right side of the canal by the left bank of the Kunene River and on the left side of the canal by a line starting 300 metres above the intake of the canal and continuing parallel with and at a distance of 150 metres from the left edge of the canal to the said boundary.

6. The Government of the Republic of Portugal concedes to the Government of the Union of South Africa the right to use up to one half of the flood water of the Kunene River for the purposes of inundation and irrigation in the Mandated Territory provided that

the report contemplated in Article 9 (a) below shows the scheme to be feasible.

7. No diversion of water shall be made by either Government between the Kazambue Rapids and Naulila unless a quantity sufficient for any power works constructed at any point below the Rapids is allowed to pass down.

8. The Government of the Union of South Africa shall have the right—

- (a.) Subject to the provisions of Article 7 above, to divert by means of diversion works of any kind the whole or part of its half share of the flood water of the Kunene River at such point or points as may on investigation by a joint technical Commission, constituted as provided in Article 9 below, prove to be the most suitable;
- (b.) To construct and maintain the above works on the Kunene River together with such embankments and training works as may be necessary for the protection of the diversion works and for the efficient operation of such works;
- (c.) From the point or points mentioned in paragraph (a) hereof, to construct and maintain a canal, channel or other aqueduct from the Kunene River across Portuguese Territory; and
- (d.) To construct and maintain on both sides of the river head regulators at the diversion works and canals.

9. In order to undertake the investigation mentioned in Article 8 (a) above, the Government of the Union of South Africa and the Government of the Republic of Portugal shall at an early date, not being later than March 1927, each appoint an equal number of members on a joint technical Commission which shall proceed to the locality.

Such Commission shall devise a means of supplying water for the purposes of inundation and irrigation in the Mandated Territory and with that object in view, *inter alia*—

- (a.) Report on the feasibility of diverting the water of the Kunene River;
- (b.) Fix the point or points for such diversion;
- (c.) Design the necessary diversion works and canals;
- (d.) Estimate the cost of construction and maintenance of such works; and
- (e.) Submit proposals regarding the operation and maintenance of the works after construction.

10. The costs of investigation by the said Commission shall be borne by the Government of the Union of South Africa.

11. The cost of construction and maintenance of any works for inundation and irrigation purposes in the Mandated Territory shall be borne solely by the Government of the Union of South Africa, who shall reimburse the Government of the Republic of Portugal to the extent of any expenditure which the latter may by mutual

arrangement incur in connection with or in consequence of the construction or maintenance of these works.

12. No charge shall be made for the water diverted from the Kunene River for the purpose of providing means of subsistence for the native tribes in the Mandated Territory; but should it be desired to utilise a portion of the water referred to in Article 6 above for any other purposes, being for purposes of gain, the Government of the Union of South Africa shall give to the Government of the Republic of Portugal three months' written notice of such intention and shall pay, for such portion of the water so utilised, to that Government such compensation as may be mutually agreed upon.

13. The Government of the Union of South Africa shall, subject to three months' written notice to the Government of the Republic of Portugal, have the right through its engineers, surveyors and other servants to enter upon Portuguese Territory in Angola for the purpose of surveys and generally for obtaining information necessary for the proper design of any works contemplated in this Agreement. Such investigation shall be conducted in consultation with the Government of the Republic of Portugal. With reference to the inundation and irrigation works, however, the Government of the Union of South Africa shall not be entitled to exercise this right unless a scheme for the diversion of the water has been approved of by both Governments.

14. The Government of the Union of South Africa shall have the right—

- (a.) To appropriate, remove and use in the construction of any works contemplated in this Agreement, free of charge, any materials lying convenient to the works on land the property of the Government of the Republic of Portugal; and
- (b.) Of access through its servants to the sites of the works contemplated in this Agreement for construction, maintenance and operation purposes and, in connection therewith, to do all that is necessary and incidental to such construction, maintenance and operation, including the erection of a permanent dwelling between the River and the Canal for a caretaker of the diversion works at the Rua Cana Falls.

15. All temporary dwellings, buildings and labour camps that it may be necessary to erect during the construction will be handed over to the Government of the Republic of Portugal after the completion of the works.

In order that no artificial swamps may be caused, the holes, trenches or excavations shall, upon the completion of the works, be filled up.

16. It is recognised and expressly declared that, notwithstanding the rights granted under this Agreement, the Government of the Republic of Portugal retains its sovereignty over the areas affected by the aforesaid works.

17. It is further recognised and expressly declared that, notwithstanding the rights granted under this Agreement, the design, construction, maintenance and operation of the works contemplated in this Agreement shall be subject to the laws obtaining in the Province of Angola.

18. No hydraulic works on the Kunene or Okavango (Cubango) Rivers, except those at the Rua Cana Falls, may, where these rivers form the boundary between the Mandated Territory and Angola, be constructed by the Government of the Union of South Africa or by that of the Republic of Portugal without the previous consent of the other Government having been obtained.

19. All disputes between the parties arising out of this Agreement shall be settled by arbitration.

20. This Agreement shall take effect as from the date of the execution thereof by the plenipotentiaries.

Thus done and signed at the City of Cape Town on the 1st day of July, 1926.

JACOB DE VILLIERS (*Chairman*).

GYS. R. HOFMEYR.

R. J. VAN REENEN.

AUGUSTO DE VASCONCELLOS.

ERNESTO DE VASCONCELLOS.

CARLOS ROMA MACHADO.