



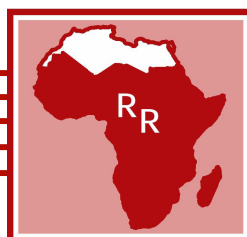
A Railway Concessioning Toolkit



Application to African Networks

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A Railway Concessions Toolkit

Application to African networks

The Sub-Saharan Africa Transport Policy Program (SSATP) is an international partnership to facilitate policy development and implementation and related capacity building in the transport sector in Sub-Saharan Africa. Sound policies lead to safe, reliable, and cost-effective transport, giving the poor access to markets and services, and helping countries to compete internationally.

The findings, interpretations, and conclusions expressed here are those of the author and do not necessarily reflect the views of the World Bank, UNECA or any of their affiliated institutions.

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PREFACE

A number of rail networks in Sub-Saharan Africa have been experiencing genuine revitalization in recent years. Traffic is once again on a growth path after a decade of decline, and a portion of the traffic volume that had been lost to road transport is returning to the railways. The customer base recognizes the improvement in quality of the service provided and notes that these railway systems have ceased to be government administrations and are becoming commercial enterprises. Generally speaking, these railway systems have been improved and modernized; they employ fewer people but who are better trained and highly motivated; infrastructure has been rehabilitated and is well maintained; and rolling stock is available and reliable. This performance has been reflected in profits for rail operators, freeing governments from the heavy burden of subsidies traditionally disbursed to the railway sector. These “new railways,” which in Côte d’Ivoire and Burkina Faso, Cameroon, Madagascar, Senegal, Mali, Zambia, or Malawi have been replacing the public railway enterprises of the 1980s, are operated under concession arrangements. The successes achieved have already prompted a number of other countries to follow this example, and new railway concessions will become operational shortly, in particular in Mozambique (Ressano-Garcia and Nacala lines), or are currently in preparation, as in Congo-Brazzaville, Benin, Niger, Kenya, Tanzania, Uganda, Mozambique (the Beira railway), and the Tanzania-Zambia railway.

The rail component of the SSATP has played a major role in this “rail revolution” in Africa. In 1997, it organized a seminar in Abidjan, where the initial experiences with concession arrangements were presented and discussed. The World Bank and the French development agency (*Agence française de développement*), whose representatives are providing the lead in this area in liaison with the senior officials of the Union of African Railways (UAR), provide critical support to the governments embarking on the concessioning process, advising them on the rules of the game to adopt for the concession and on the procedures for selecting the concessionaire. These donors also often play an essential role in mobilizing the financing necessary to facilitate the concessions.

The Toolkit presented here (also available in French as the *Guide de mise en concession ferroviaire*) is intended to provide African countries, in summary form, with an overview of the experience to date with railway concessioning in Sub-Saharan Africa. The reader will note that the Guide refrains from defining “the” model concession arrangement to be applied in every circumstance; no such model exists, and each individual situation calls for individualized solutions. But the wealth of accumulated experience should at least make it possible to avoid repetition of some of the mistakes that the pioneers with concession operations did indeed make in the course of the process, the complexity of which could hardly be underestimated.

Finally, the publication of this Toolkit provides us an opportunity to pay homage to a number of these pioneers in railway concession arrangements in sub-Saharan Africa, in particular Lou

Thompson, , Karim-Jacques Budin, and Yash Pal Kedia, all now retired from the World Bank, and Olivier Ratheau of the *Agence française de développement*. We also wish to extend our thanks to Jean-Marie Gugenheim, who, on behalf of the BIPE consulting firm, was responsible for putting this Toolkit in final form.

Marc Juhel
Transportation and Logistics Advisor
The World Bank

TABLE OF CONTENTS

| | | |
|-----------|--|-----------|
| 1. | Introduction | 1 |
| 1.1. | Purpose and Content of the Report..... | 1 |
| 1.2. | Specific characteristics of concessions discussed in this Toolkit as distinct from other arrangements..... | 2 |
| 2. | Context..... | 8 |
| 2.1 | Status of concessioning operations..... | 9 |
| 2.2. | Lessons learned..... | 14 |
| 3. | Tasks to be performed..... | 23 |
| 3.1. | Summary of concessioning process..... | 25 |
| 3.2. | The concessioning process | 26 |
| 4. | Standard agreement | 35 |
| 4.1. | Definition..... | 37 |
| 4.2. | Title 1: General Information..... | 37 |
| 4.3. | Title 2: The Railway Network Concessioned..... | 39 |
| 4.4. | Title 3: Railway Infrastructure..... | 41 |
| 4.5. | Title 4: Commercial Rail Services..... | 41 |
| 4.6. | Title 5: Public Service Obligations..... | 42 |
| 4.7. | Title 6: Use of the Network by Third Parties..... | 43 |
| 4.8. | Title 7: Railway Equipment..... | 44 |
| 4.9. | Title 8: Concession Fee | 44 |
| 4.10. | Title 10: Duration of the Agreement..... | 44 |
| 4.11. | Title 11: Disputes and Litigation..... | 46 |
| 4.12. | Title 12: Monitoring of the Agreement..... | 46 |
| 5. | Selection Procedures..... | 49 |
| 5.1. | Major stages in the selection procedure..... | 51 |
| 5.2. | Independence of technical and financial proposals | 52 |
| 6. | Annexes: Standards Documents | 57 |
| 6.1. | Terms of reference for the selection of the consultant..... | 59 |
| 6.2. | Text of call for expressions of interest..... | 73 |
| 6.3. | Text of confidentiality agreement..... | 77 |
| 6.4. | Text of undertaking on ethics and transparency | 83 |
| 6.5. | Text of undertaking on avoiding corruption | 87 |
| 6.6. | Bid security text..... | 93 |
| 6.7. | Contents of pre-qualification documents..... | 97 |
| 6.8. | Contents of selection materials..... | 101 |
| 6.9. | Promoters' commitment letter regarding capital | 105 |
| 6.10. | Standard concession agreement..... | 109 |

1. INTRODUCTION

INTRODUCTION

1.1. Purpose and Content of the Report

1.1.1. Aim of the Toolkit

The aim of the guide is to describe the method and all the instruments of value for concessioning a railway.

1.1.2. Contents of the Toolkit

The Toolkit comprises the following six parts:

- (1) Characteristics of the railway concessions studied;
- (2) A progress report on the reforms initiated in Sub-Saharan Africa and a summary of the primary lessons learned from experience with concessioning operations already completed or under way;
- (3) An aide-mémoire on the tasks to be carried out in order to maximize the chances for a successful concessioning;
- (4) Analysis of the provisions it is desirable to incorporate into a concession agreement;
- (5) Analysis of the selection procedures; and
- (6) Texts of standard documents that are likely to be used in the context of a concessioning process, in particular, the following:
 - Standard terms of reference
 - Texts for undertakings in respect of confidentiality, transparency, avoidance of corruption, and provision of bid security
 - Overview of the contents of a pre-qualification file and a selection file
 - Standard concession agreement

The standard documents and tools, as well as the analyses and explanations accompanying them, may be used by the conceding authorities and/or the firms, advisers or consultants acting on their behalf as a working basis and the starting point for the concessioning process and the preparation of the specific concession documents.

1.1.2. Sources

This report is based on and makes use of many studies previously carried out on the subject, particularly:

- The Proceedings of the Seminar on Railway Concessioning in Africa held in Abidjan in October 1997;
- Reports on the reviews and studies conducted by the World Bank (the Ifrikyia case study by Karim-Jacques Budin) or the French development agency (on railway concessioning – initial lessons from experience, or privatization workshops, by Olivier Ratheaux);
- The proceedings of the meeting on railway concertation in French-speaking Africa and Madagascar, organized by ISTED in Douala in March 2001;
- The standard documents used by donors for the selection of the advisory consultants; and
- The lessons learned from concession operations already carried out, such as those in Côte d’Ivoire, Burkina Faso, Cameroon, or Gabon.

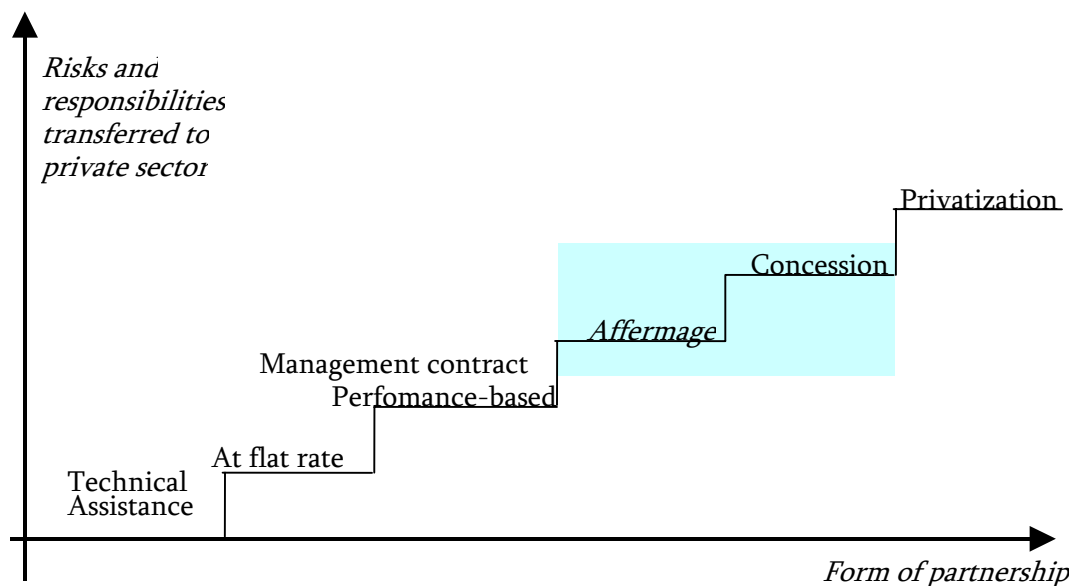
This notwithstanding, BIPE is solely accountable for the text of this report and the opinions expressed therein.

1.2. Specific characteristics of concessions discussed in this Toolkit as distinct from other arrangements

1.2.1. Comparison with other forms of public-private partnerships

A railway concession may be defined as a form of public-private partnership under which the operation of railway activities on a network is entrusted to a concessionaire, while the ownership of the railway infrastructure is directly or indirectly retained by the State, the conceding authority.

To characterize the concession operations described and analyzed here, they may be compared with other forms of public-private partnership, distinguishing in each case the level of responsibility taken up and of risk assumed by the different partners.



Concession and/or *affermage* arrangements are complex forms of partnership entailing a high degree of risk and responsibility transfer to the private sector.

The summary table below indicates the risks and responsibilities transferred by type of contract.

| | Technical Assistance | Management contract at flat rate | Performance-based management contract | <i>Affermage</i> | Concession | Privatization |
|----------------------------|----------------------|----------------------------------|---------------------------------------|------------------|------------|---------------|
| Management of operations | Public | Private | Private | Private | Private | Private |
| Commercial risk | Public | Public | Shared | Private | Private | Private |
| Operating risk | Public | Public | Shared | Private | Private | Private |
| Investment risk | Public | Public | Public | Public | Private | Private |
| Ownership of rolling stock | Public | Public | Public | Public | Private | |
| Infrastructure ownership | Public | Public | Public | Public | Public | Private |

Concession and/or *affermage* arrangements may be distinguished from technical assistance contracts and management agreements by the extent to which they transfer to the private operator the responsibilities and risks associated with traffic and revenue levels, and the coverage of operating expenses. Consequently, the operator’s compensation is not stipulated on a lump-sum basis, but depends instead on performance, and may even be negative if the railway operations result in a deficit.

The concession and/or *affermage* arrangement is also distinguished from privatization operations within the full meaning of that term by the extent to which the ownership of the infrastructure and sometimes of all or part of the equipment and rolling stock continues to be retained by the State.

1.2.2. Comparison with European institutional reforms

The concession operations studied in this report, which characterize the development of African rail networks, are part of the major institutional reform movements undertaken or being considered by most railway networks throughout the world, more specifically in Latin America.

They, however, differ significantly from railway reforms in Europe. The reforms undertaken in Africa follow a pattern of integrated concessioning, i.e. transferring to the concessionaire control over all railway functions including management of the infrastructure, even though the ownership of the infrastructure and some operating assets may continue with the Government or a public entity, and where the concessionaire continues to be the sole provider of railway transport services.

| Institutional Reforms in Sub-Saharan Africa | | | |
|---|---|------------------------|---------------------------|
| FUNCTIONS | | MARKETS | |
| | | Base traffic | 3rd-party traffic |
| Railway infrastructure | Investment Maintenance Movement- Security | Private concessionaire | Private concessionaire |
| | Rolling stock | | Investment Maintenance |
| Railway operation | | | |

The standard institutional approaches introduced in Africa call for turning over all railway functions to the primary concessionaire/operator. There are only a few secondary operators, those who have the right of access to the network and the use of the railway infrastructure managed by the principal concessionaire, for purposes of transporting specialized cargo (such as manganese in Gabon or phosphates in Senegal, for example). These secondary operators were either allowed by the public entities managing the railways prior to concessioning and the concession contract required such contracts to be respected or in very rare cases, these were discussed at the time of concessioning and awarded with full consent of the concessionaire. There are no reported cases so far where the conceding authority has issued licenses to third parties to operate on the concessioned network in competition with the main concessionaire or to restrict the main concessionaire from abusing his monopoly position.

In Europe, in contrast, the institutional approaches advocated by the EU authorities and followed by national authorities revolve around the creation of a public entity for infrastructure management (RFF in France, Banverket in Sweden), which can then be accessed by various operating companies, concessionaires, or holders of operating licenses to serve different markets and in competition with one another.

| Institutional Reforms in Europe | | | |
|---------------------------------|---|---|--------------------------|
| FUNCTIONS | | MARKETS | |
| | | National passenger lines | Regional passenger lines |
| Railway infrastructure | Investment Maintenance Movement- Security | Structure of infrastructure RFF in France Banverket in Sweden | |
| Rolling stock | Investment Maintenance | Railway operation structures SNCF in France SJ and regional companies in Sweden Private companies in the United Kingdom | |
| Railway operation | | | |

(Note: The above table needs improvement)

It should be borne in mind that integrated railway working is historically the most conventional and commonly used approach to railway management. Separating the management of infrastructure from operations is a recent development in Europe to allow for intra-rail competition. .

In Africa, as in the rest of the world, the “integrated” model has been the obvious choice, partly due to the smaller scale of the markets and of the networks for which concessions are awarded, but more as a caution against too radical a restructuring that the separation of infrastructure is perceived to embody..

1.2.3. Comparison with French concession arrangements

It is noteworthy that the partnership approach adopted in a number of African networks, while using concepts and terms similar to the legal regime for “French-style” concessions, does make radical departures from the French approach and is explicitly distinct from the French law.

The agreements, such as the standard agreement proposed and studied in this report, for example, include several stipulations that signal their difference from the French practice.

Railway Operations are considered to be a commercial activity, and ... are subject to the provisions of the ... Commercial Code... The Concessionaire shall pursue its operations on a commercial basis... (Article 1-3).

Railway Operations shall be carried out at the expense and risk of the Concessionaire. The Concessionaire may in no event lay claim to any indemnification from the State in the event that economic conditions encountered are different from those upon which it based its operational forecast. (Article 1-3)

Under French law, a concession would be primarily aimed at providing services in the general interest (or public services) and would be subject to administrative law.

To stress the commercial nature of the activity carried out by the concessionaire, the agreements further address commercial freight and passenger service, primarily in Title 4, and relegate to Title 5 the determination of manner in which services relating to public service obligations are carried out.

It bears noting that the agreements studied nevertheless do stipulate that concessionaires may be called upon, in a supplementary or ancillary manner, to carry out public service obligations at the request of the public authorities, in particular in respect of passenger traffic. In that event, they do not themselves govern the manner in which these services are rendered; instead, specific agreements are negotiated and agreed between the concessionaire and the public authority concerned.

Under French law, the concessionaire could seek, on the basis of jurisprudential theory on “frustration of purpose,” a modification in its contract as well as indemnification in order to be able to ensure the continuity of service.

The State exercises technical oversight of the Concessionaire’s activities under legal terms and conditions applicable to transport sector enterprises (Article 1-7).

Under French law, in a concession arrangement, the State would have public authority prerogatives which would enable it, for example, to replace the concessionaire. The agreements do not grant the State such prerogatives except in the event of gross negligence on the part of the concessionaire (security, abandonment of operations, etc.).

The agreements studied in this report should, therefore, be regarded as *sui generis* concession agreements, which deviate from the French legal system for concessions in many respects.

1.2.4. Relating to conventional regulatory arrangements

The railway concession agreements put in place in Africa are predicated on a principle of regulation by market forces.

The customary functions of the regulatory authorities, namely: (i) consumer protection against monopolistic abuses; (ii) protection of investors against arbitrary political intervention;

(iii) price regulation and adjustment; and (iv) oversight of service quality and standards, are expected to be performed by the market itself or, failing this, by the concession agreement.

Counting on the strong competition between rail and road transport that has prevailed in Africa in the past, owing to the continual erosion in market shares of the national railway companies, the agreements grant concessionaires the freedom to establish the commercial tariffs (Article 4-9) and define the nature, configuration, and organization of the services they offer (Article 4-3).

The agreements give the conceding authority only a limited intervention and oversight authority; accordingly, the technical oversight exercised by the State over the concessionaire's activities is carried out "under terms and conditions applicable to transport sector enterprises" (Article 1-7).

An escape is nevertheless provided in the event of serious dereliction of duty on the part of the Concessionaire. Article 6-3 of the standard agreement effectively enables the conceding authority to authorize third-party operators to utilize the railway network under the concession and to operate their own trains in the event of monopoly abuse or discriminatory treatment by the concessionaire, or the inability of the concessionaire to provide a client or group of clients with a service essential to their operations. However, to enable the escape route to be effectively utilized by the conceding authorities, it would be necessary to define the circumstances under which third party operations can be invoked as well as detail the terms for third party operations.

2. CONTEXT

CONTEXT

2.1 Status of concessioning operations

2.1.1. Situation in West Africa

West Africa has four sizable railways outside of Nigeria:

- (1) The Côte d'Ivoire-Burkina Faso network, connecting the port of Abidjan with Ouagadougou;
- (2) The Senegal-Mali network between the port of Dakar and Bamako;
- (3) The Ghanaian network, with multiple branches crossing national territory and linking the ports of Téma and Takoradi; and
- (4) The Benin-Niger network between the port of Cotonou and Parakou.



There has been uneven progress in the process of privatizing railway networks in West Africa.

- ✓ The Abidjan-Ouagadougou network was the first African network to be concessioned; it has been operated by the SITARAIL corporation since 1995, in which the Bolloré Group is the strategic shareholder;
- ✓ The concession for the Dakar-Bamako network was awarded in early 2003 to the CANAC firm from Canada, which began operating the network at the end of the year;
- ✓ During 2002, the government of Ghana an the process of privatizing the Ghana Railway Corporation (GRC) by inviting tenders ;
- ✓ The concessioning of the Benin-Niger Railway Office (OCBN) is still in the study phase.

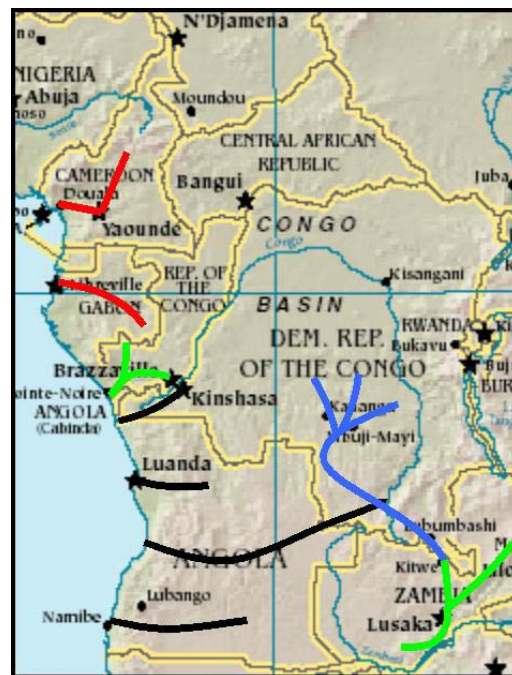
| | Status of procedure | | | |
|-------------------------|---------------------|---------------------------|----------------|-----------|
| | Preparation | Competitive bidding | Agreement | Operation |
| <i>West Africa</i> | | | | |
| COTE D'IVOIRE - BURKINA | | Concession awarded | Initiated 8/95 | |
| SENEGAL - MALI | | Concession awarded | | |
| GHANA | | Bidding process under way | | |
| BENIN | Preparation | | | |

2.1.2. Situation in Central Africa

Central Africa has 4 sizable railways.

Two have already been privatized:

- The Cameroonian network has been concessioned to the CAMRAIL corporation, whose strategic shareholders are the South African firm COMAZAR and the Bolloré Group; the concessionaire, which began operating the network in April 1999, is currently performing well;
- The Gabonese network has been concessioned to the CECFT corporation, known as the Transgabonais, comprising the National Timber Company of Gabon (SNBG), local forestry operators, and Transurb-Consult. The concessionaire's traffic volume is high but its performance suffered from the disagreements with COMILOG, the manganese mining company. These differences have led to a unilateral cancellation of the concession.



One network is expected to be privatized shortly:

- The Congo Brazzaville network, the operation of which was suspended during the civil war, has been the subject of a concessioning process since 2002.

The railways of Congo Kinshasa, which suffered from the local political context, have not yet begun the prior studies required for their privatization.

| | Status of procedure | | | |
|-----------------------|---------------------|---------------------------|--------------------|-------------------|
| | Preparation | Competitive bidding | Agreement | Operation |
| Central Africa | | | | |
| CAMEROON | | | Concession awarded | Initiated 01/1999 |
| GABON | | | Concession awarded | Initiated 12/99 |
| CONGO Brazzaville | | Bidding process under way | | |
| CONGO Kinshasa | | | | |

2.1.3. Situation in East Africa

East Africa has 5 sizable railways:

- One of the Tanzanian railways (operated by TRC) began its privatization process in early 2001; pre-qualification of the bidders was completed in May 2002, and four groups were invited to submit bids by early 2003. However, the withdrawal of 3 of the pre-qualified bidders left only COMAZAR in the running, prompting the government to cancel the procedure on March 28, 2003. The process has since been revived. A second prequalifications has been completed, the tenders have been issued and the bids are due by the end of October 2004.
- The Uganda railway (operated by URC) and Kenya railway (operated by KRC) began the preparatory work for their concessioning in 2002 by selecting their consulting firms: Canarail for URC and IFC for KRC. The two Governments have decided to go for a joint concession of the two railways. Pre-qualification documents are scheduled to be released by September 2004. The actual bidding process is scheduled to commence by the end of October 2004.¹
- The Ethiopian railway (operated by CDE) has also begun its privatization process.
- Tazara, whose shareholders are the States of Zambia and Tanzania, was built 30 years ago by the People's Republic of China to make it possible to remove mining output from the Copper Belt without traversing Rhodesia, a country then under an apartheid regime. No decision has yet been reached about the privatization option. A study has been launched to evaluate various options.



¹ The governments of Kenya and Uganda also expressed the desire that the operation of their networks, which resulted (as did the Tanzanian network) from the breakup of the East Africa Rail Corporation in 1977, be entrusted to the same concessionaire.

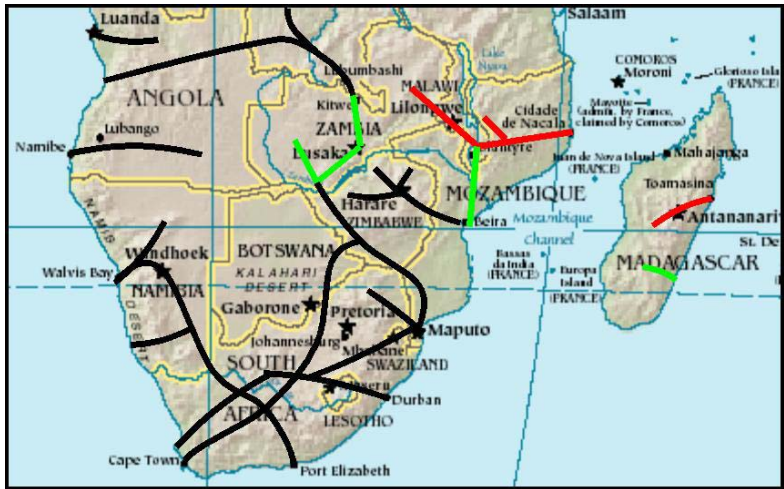
| <u>East Africa</u> | Status of procedure | | | |
|--------------------|---------------------|---|-----------|-----------|
| | Preparation | Competitive bidding | Agreement | Operation |
| TANZANIA | TRC | Prequalification completed, bidding in progress | | |
| | Tazara | Studies | | |
| KENYA | | Preparation | | |
| UGANDA | | Preparation | | |
| ETHIOPIA | | Preparation | | |

2.1.4. Situation in Southern Africa

Southern Africa has more thoroughly linked railway networks than the rest of Africa owing to the degree of development of the region and the influence of South Africa.

The institutional background of the local networks varies significantly:

- The Malawi railway was the first network in Southern Africa to be privatized; the concession agreement was signed in late 1999 with the CEAR Consortium (Central East African Railways Corporation) made up of the U.S. Railroad Development Corporation from Pittsburgh, the Mozambique National Railways Company (CFM), and private Mozambican investors. The concessionaire began operating the network in early 2000. It also sought to broaden its area of activity by expanding its coverage and initiating amicable negotiations with the government of Mozambique on the concessioning of the railway corridor from northern Mozambique to the port of Nacala. The concession agreement for the Nacala port-railway system has been signed, but the concessionaires have yet to take over.



- The concessioning of the railway from southern Mozambique (Maputo corridor) began in 1997; the negotiations initiated with the preferred bidder, Ressoano Garcia Railway Company, made up of two South African firms, NLPI (New Limpopo Bridge Projects Invest-

ments) and Spoornet, were concluded in late 2002 after being interrupted for two years. The concessionaire is expected to begin operating the network by the end of 2004.

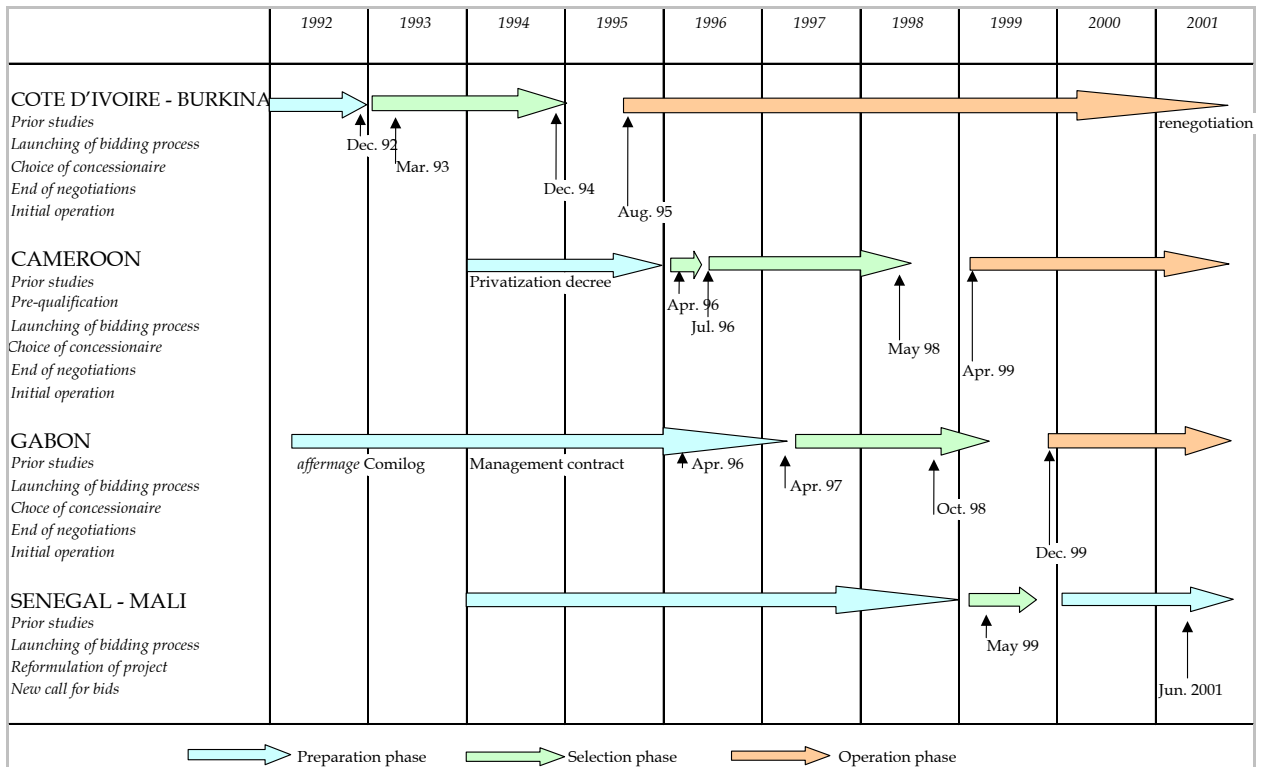
- The concession agreement for Zambia’s railway (ZRL) was signed on February 14, 2003 with a consortium including NLBI and Spoornet; the concessionaire commenced operations in December 2003. .
- The northern Malagasy railway has been concessioned to MADARAIL, an affiliate of the South African COMAZAR company, which began operating the network in late 2002.
- The southern Malagasy railway has initiated its concessioning process by selecting its consulting firm; the call for tenders is expected to be launched during the second quarter of 2003.
- The process of privatizing the Zimbabwe network has been suspended following the withdrawal of international donors discouraged by the authoritarian drift of the regime in power.
- Angola’s railways were very seriously damaged by the civil war; their privatization is being considered by the national authorities in the context of amicable agreements.
- The principle of privatizing the South African network operated by Spoornet (freight and long-distance passenger services) and by Metro-Rail (urbanized area passenger transport) has not yet reached the political decision-making stage. The same status pertains to the railways in Botswana and Namibia.
- Swaziland Railways have commenced preparatory work.

| <i>Southern Africa</i> | | Status of procedure | | | |
|------------------------|------------------|--|---------------------|--------------------|--------------------|
| | | Preparation | Competitive bidding | Agreement | Operation |
| MALAWI | | | | Concession awarded | Initiated 2000 |
| MOZAMBIQUE | Nacala | Amicable negotiation with operator from Malawi | | | |
| | Maputo | | | Concession awarded | |
| ZAMBIA | | Concession awarded | | | |
| | Harare-Beira | Preparation interrupted | | | |
| MADAGASCAR | Northern Network | | | Concession awarded | Initiated end-2002 |
| | Southern Network | Preparation in progress | | | |
| ZIMBABWE | | Preparation interrupted | | | |

2.2. Lessons learned

2.2.1. Delays in implementing arrangements

A retrospective analysis of the implementation of four railway concessioning operations in West Africa and Central Africa reveals that considerable time is required for completing the projects.



In particular:

- It took three years to prepare and carry out the concessioning process for the Abidjan-Ouagadougou railway.
- Nearly five years were required for concessioning the Cameroonian railway.
- Eight years passed between the decision to initiate institutional reform of the Transgabonais and its concessioning. After exploring an *affermage* arrangement, followed by a management contract, the Gabonese authorities, under pressure from international donors, finally opted for the comprehensive concessioning of the national railway network.

- The Senegalese and Malian authorities finally initiated, over nine years ago, the studies on concessioning the international rail line from Dakar to Bamako. After considering transferring to the private sector only those functions relating to operations with international rail traffic (with the management of infrastructures and national rail traffic operations being retained by the former national public rail companies), in 2000 the authorities decided to start over from scratch and to modify the concession arrangement, transferring all railway functions to the private sector.

A comparative analysis of these various experiences reveals that it is crucial for:

- Comprehensive prior feasibility studies to be conducted, and for the institutional structure selected to adhere to a rigorous arrangement (which was not the case for the initial approach selected for the Dakar-Bamako network).
- The proposed concessioning project to have firm political support (which the Gabonese and Senegal-Mali projects lacked for a number of years).
- The managers of the national public rail companies to have no steering authority in preparing for the concessioning operations, which should rest preferably with an independent agency.

The length of the time elapsed between the completion of the evaluation studies and expert analysis on the one hand, and the signing of the concession agreement and the implementation of works on the other hand, does have an impact on the cohesiveness of concessioning projects. Thus, for example, in Cameroon the rehabilitation of some works that initially appeared to lack urgency had to be added to the investment program.

The length of the delays also made it necessary to caution project promoters about drift in the interim management, and in particular about the decisions of the incumbent management, which may, when concessioning operations take place, grant advantages which disrupt the economic equilibrium of the projects, particularly in the social sphere.

2.2.2. On the bidders for railway concessioning operations in Africa

Examination of the number of bidders stepping forward for the various African railway concessioning operations highlights the great prudence of international rail operators and investors; most of the projects, indeed, gave rise to little competition:

- Sitarail (Côte d'Ivoire-Burkina Faso): For the concessioning of the Abidjan-Ouagadougou network, 3 groups were selected, only 2 bids were submitted in full, and these were merged into just one when the procedure was completed.

- Camrail (Cameroon): The Cameroonian concession-granting authorities received 3 technical proposals from 3 different groups (Comazar-Geodis, Saga-SDV-Systra, Canac-Lavalin) that were pre-qualified; 2 bids followed the selection procedure, and the government invited them to merge when the process was completed.
- Madarail (Madagascar): 2 groups were pre-qualified, but only 1 bid was submitted.
- Transgabonais (Gabon): When the network was offered for concessioning, 15 companies declared their interest and were pre-qualified, but rapidly just two of them came to stand out owing to the particular importance of the railway to them, namely the Ogooué Mining Company (Comilog) and the National Timber Company of Gabon (SNBG). These two companies formed two consortiums (Gabon Rail and Transgabonais, respectively) which were the only ones to submit technical proposals; as Transgabonais was the only competitor to make a financial proposal, it was declared the winner of the competitive bidding.
- Zambia Railways (Zambia): Of the 4 consortiums that showed an interest at the outset (NLBI-Spoornet, Norconsult-Canac, Sheltam, and Edlow associated with Mauritian and South African investors), two were technically qualified. The concession was awarded on the basis of financial evaluation.
- Senegal-Mali: 2 consortiums built around Bolloré-SNCFI and around Canac-Getma, respectively, submitted bids.
- Tanzania: 7 bidders professed an interest in the project, 4 consortiums were pre-qualified, of which 2 (Comazar and Genesee & Wyoming) without reservations and 2 (CANAC and SNCFI) subject to conditions; only 1 bidder (Comazar) submitted a final bid, which being conditional was rejected. The process has since been revived.
- Congo Brazzaville: 23 bidders, of which 5 were rail operators, asked for pre-qualification materials, but only 2 consortiums were involved in the selection process.

It also bears noting that the principal operators who expressed an interest in competitive bidding for railway concessioning may be grouped into 3 categories:

- (1) Enterprises tied to multimodal international transport groups such as Bolloré, Maersk, or Getma, which regard the railway as one component of the transport chains they seek to control;
- (2) Railway operators or enterprises tied to railway operators, such as
 - ✓ North American companies Genesee & Wyoming, RDC (Railroad Development Corporation), or Canac;

- ✓ European companies Systra, SNCFI (SNCF affiliates), CFD (Departmental Railways), or Transurb Consult (close to the Belgian firm SNCB);
 - ✓ African companies Comazar, Spoornet, or CFM; and
 - ✓ The Indian company Rites,
- (3) Local shippers or financial investors such as SNBG (National Timber Company of Gabon) or Comilog in Gabon, SICC in Côte d'Ivoire, and SEBC in Cameroon.

2.2.3. On bearing financing risk and asset management companies

Comparison of the two main institutional arrangements used in West Africa and Central Africa reveals two distinct models:

1. The Sitarail model, applied in Côte d'Ivoire and Burkina Faso, is characterized by the establishment of asset management companies that retained ownership of the railway assets and cover the majority of the network rehabilitation and modernization program;
2. The Camrail model, applied in Cameroon, where the concessionaire operator took over the railway equipment and rolling stock and covers all investment programs.

The risks borne by the operators, States, and credit agencies under these two arrangements may be compared:

- ✓ As regards the general economic equilibrium of the contracts, the commitments assumed by Sitarail and Camrail as concessionaires are identical; they both undertook to use resources from railway operations to cover the cost of the capital invested (directly in the case of Camrail, through royalties in the case of Sitarail) and the loans contracted to carry out railway rehabilitation works.
- ✓ In the case of Sitarail, only a marginal share of the rehabilitation works was financed by loans contracted directly by the concessionaire; most of the loans were contracted by the governments of Côte d'Ivoire and Burkina Faso, which lent them to the asset management companies. In the event of a decline in rail traffic, a cash flow crisis, etc., it is the asset management companies and, through them, the States, which bear the financing risk. In the event of payment default, the lenders may always have recourse to the States or their component entities, the asset management companies.
- ✓ In the case of Camrail, most of the financing risk is, in contrast, borne by the concessionaire; only US\$20 million out of US\$60 million comes from the

onlending of resources mobilized by the State from IDA; direct lenders, on the other hand, the amount of whose commitments comes to US\$40 million, may have recourse only to Camrail's financial capacities and, where appropriate, if they provided their guarantees (corporate guarantee), the financial capacities of Camrail's strategic shareholders.

The unwieldiness and misunderstandings observed in establishing the concession for and operating the Abidjan-Ouagadougou railway, reflected in the proliferation of disagreements and jurisdictional conflicts between the concessionaire Sitarail, the asset management firms Sipf and Sopafer, argue against advising the establishment of an asset management company to bear financing risk.

In order to correct the lenders' sizable exposure to risks resulting from arrangements of the Cameroonian variety, a number of corrective steps may be recommended, such as:

- ✓ Having the State carry a portion of the loans used for railway network rehabilitation and/or development;
- ✓ Assigning the status of "subordinated debt" to the State loans that are onlent to the concessionaire, so as to provide security to those providing funds not guaranteed by the State; and
- ✓ Introducing a mechanism for the *affermage* of part of the assets covered by the concession, without creating an asset management company;
- ✓ The concessionaires are encouraged to utilize the Partial Risk Guarantee offered by the Bank

2.2.4. On guarantees and the mobilization of credit

The concession agreements used for the African railway networks generally do not impose obligations as regards security or specific guarantees to be furnished by the concessionaire to the benefit of the conceding authority.

The rules of the call for tenders require only that bidders provide:

- Comfort letters attesting to the economic credibility of their bids;
- A bid security (CFAF 1.5 billion requested in Gabon, for example) required at the time financial proposals are submitted.

In contrast, once the concession enters into force, the agreements do not provide for the provision of security or performance bonds, for example, which might be called by the conceding

authority in the event the concessionaire fails to observe its contractual commitments or decides unilaterally to end the agreement.

For the conceding authority, the financial commitment of the promoters is ensured principally through the capital contributions they are required to make at the start of the concession arrangement. Thereafter, it is desirable to ask the promoters to generously endow the share capital of the concessionaire firms they establish, this to give substance to their financial commitments (Camrail's share capital was set at CFAF 6 billion, while that of Transgabonais was set at CFAF 10 billion).

The financing agreements, in contrast, are binding and generally provide the lenders with numerous guarantees such as:

- ✓ A performance bond, consisting in obtaining from the concessionaires' shareholders an undertaking to contribute the amounts necessary for completely financing the planned investment program in the event that, during execution, there would appear to be insufficient resources from self-financing, the initial share capital, and donors' contributions; these contributions, if made in the form of shareholder loans, must also be in the form of a "loan subordinate to senior debt;"
- ✓ A termination deficiency bond, intended to cover lenders in the event of premature cancellation of the agreement;
- ✓ First-class collateral security against the business;
- ✓ Pledging of the shares of the concessionaire and those of its shareholders;
- ✓ First-class mortgages on buildings;
- ✓ Delegation of all indemnifications, contributions, damages, or other amounts payable by the Republic of Cameroon in application of the concession agreement, including the cancellation indemnification;
- ✓ Delegation of the company's insurance;
- ✓ Delegation of the guarantees or proceeds from guarantees on works and services contracts from the program of financed works, and in particular the performance bond and guarantee to refund advances;
- ✓ Shareholders' guarantee (or guarantee from a bank agreed by the lenders) of all the obligations or commitments entered into vis-à-vis the lenders;
- ✓ The undertaking of the promoters and direct and indirect shareholders to retain effective control of the company;
- ✓ The establishment of payment mechanisms with a local bank agreed with the lenders, based on a domiciliation of the concessionaire's revenue and the estab-

ishment of a guarantee account holding a provision pledged to the lenders in an amount equivalent to one or several installment payments;

- ✓ In the event of the concessionaire's bankruptcy, the right of lenders, as recognized by the concession agreement itself (Article 10-8), to substitute themselves for the concessionaire for purposes of taking back the concession and conveying it to a third party; and
- ✓ Observance of a minimum ratio of capital and reserves to debt.

It bears noting that, given the financing volumes required for rehabilitating a railway, the guarantees sought from promoters by donors are often difficult to satisfy and require that bidders be backed by a sound group of shareholders.

The constraints are all the more cumbersome considering that, in order to release their financing, donors generally require working "pari pasu" or, in other words, "by joint decision or in consultation." Consequently, the conditions of the most demanding donor must be met in order for all the credit to be mobilized.

Slippages observed in the mobilization of the credit necessary for rehabilitating the Cameroonian network would suggest that it is desirable to impose simultaneous initiation of the concession agreement and provision of the credit allocated to financing the investments. It is also desirable for donors, who generally serve as a driving force in preparing concession projects, to participate in the projects until the credit agreements are in place.

To be sure, the State may grant its guarantee in order to provide security for the loans contracted by a concessionaire. It is logical, however, to grant this guarantee only for the financing of infrastructure works against the payment of a guarantee fee; furthermore, all States tend to be parsimonious in extending their guarantees to the extent they must comply with thresholds on commitments established by the IMF, which must not be exceeded.

2.2.5. On taking over previous staff

The personnel of the former public rail companies may be taken over by the concessionaire either by simple transfer, with acquired rights and benefits being maintained, as in the case of Camrail, or by rehiring them on the basis of a new labor contract after they have previously been dismissed.

Generally, it is necessary to pursue a restructuring plan to avoid taking over or transferring more than a portion of the former staff.

- Thus in Cameroon, while staffing had previously been reduced (from 6,600 to 3,600 employees) in 1989, it was further scaled back when the concession arrangement began; only 2,300 personnel were effectively transferred to Camrail.
- In Gabon, the concessioning was accompanied by better control of staffing. In 1999, the railway employed 1,887 persons; in November 2000, the staffing level was down to 1,485; Transgabonais plans to reduce its staffing to 1,385 in the years ahead.

The lesson from past experiences is that labor-shedding operations may prove more successful than might have been feared so long as: (i) trade unions are properly involved; (ii) a sufficiently generous redeployment program is provided; and (iii) companion measures or retraining efforts are introduced. In this regard, the labor redundancy toolkit, also prepared by the Bank, provides details.

2.2.6. On environmental requirements

Environmental demands have an increasing role in the conduct of enterprises in general, and of railway enterprises in particular.

In Cameroon, for example, the requirements set forth in the concession agreement and financing agreements related to:

- ✓ The recycling of waste oil
- ✓ Replacement of wooden ties by concrete ties
- ✓ Combating the pollution resulting from fuel spills
- ✓ Providing security for the transport of dangerous cargo (limited idle time in stations, providing guards for the rail cars, ensuring priority circulation, providing homogeneous cars, etc.)
- ✓ Combating the transport of unauthorized traffic (identification and inspection of passengers upon boarding)

Camrail, the concessionaire, has had to enter into multiple undertakings to meet the demands of environmentalists, whose pressures prompted some lenders to make the signature of credit agreements subject to satisfying those demands.

It is therefore recommended that (i) existing environmental constraints be taken into account in the context of the concession arrangement itself; (ii) the cost of implementing environmental protection measures be taken into account in concessionaires' business plans; and (iii) if

necessary, the State participate in the environmental protection program, in particular for purposes of correcting for previous damage.

The standard agreement annexed hereto requires that the State and the concessionaire prepare, when the agreement enters into force, an environmental action plan for the restoration of the sites and soil of the railway network concessioned, with implementation by the concessionaire and financing by the State (Article 1-8).

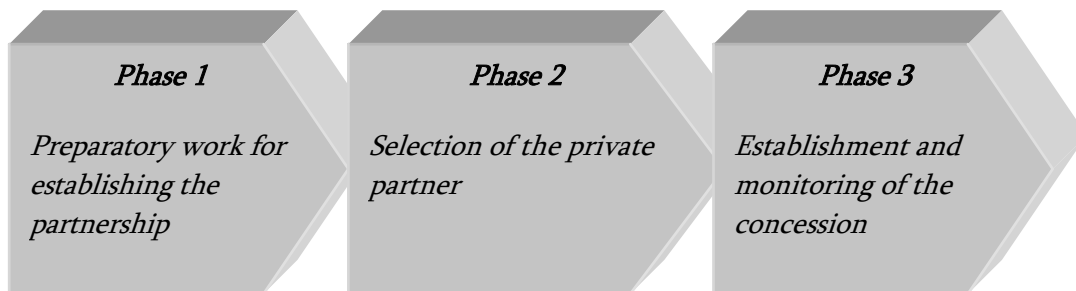
3. TASKS TO BE PERFORMED

TASKS TO BE PERFORMED

3.1. Summary of concessioning process

The conventional process for establishing a public-private partnership entails 3 phases:

- Phase 1. Preparatory work for establishing the partnership
- Phase 2. Selection of the private partner
- Phase 3. Establishment and monitoring of partnership operation



These various phases require the successful performance of seven principal tasks:

- PHASE 1. Preparatory work for establishing the partnership
 - Feasibility studies and definition of the goals sought (Task 1)
 - Review and selection of the risk-sharing mode—form of partnership (Task 2)
 - Preparation of a legal, social, tax-related, and agreement framework (Task 3)
- PHASE 2. Selection of the private partner
 - Establishment of the competitive bidding procedures (Task 4)
 - Conduct of the competitive bidding process (Task 5)
- PHASE 3. Establishment and monitoring of partnership
 - Establishment of the partnership (Task 6)
 - Monitoring of the partnership (Task 7)

| <p align="center">PHASE 1 PREPARATORY WORK FOR ESTABLISHING THE PARTNERSHIP</p> | <p align="center">PHASE 2 SELECTION OF THE PRIVATE PARTNER</p> | <p align="center">PHASE 3 ESTABLISHMENT AND MONITORING OF PARTNERSHIP</p> |
|---|---|---|
| <p>■ Feasibility studies and goals pursued</p> <ul style="list-style-type: none"> ☞ Definition of project ☞ Technical, commercial, institutional, legal, and economic feasibility study ☞ Determination of objectives | <p>■ Establishment of competitive bidding procedure</p> <ul style="list-style-type: none"> ☞ Designation of public agencies involved in the competitive bidding procedure ☞ Selection of consulting firm ☞ Communication campaign ☞ Establishment of a candidate preselection procedure ☞ Preparation of a bid materials file | <p>■ Establishment of partnership</p> <ul style="list-style-type: none"> ☞ Financial closing ☞ Monitoring and acceptance of works ☞ Inventories and transfer |
| <p>■ Inventory of risks and selection of form of partnership</p> <ul style="list-style-type: none"> ☞ Risks of public partner ☞ Risks of private partner ☞ Risks of lenders ☞ Business plan ☞ Choice of form of partnership | <p>■ Launching and conducting the competitive bidding procedure</p> <ul style="list-style-type: none"> ☞ Bidder access to information ☞ Preservation of equality among candidates ☞ Organization of bid commission's work ☞ Ranking and selection of successful bidder | <p>■ Monitoring of partnership</p> <ul style="list-style-type: none"> ☞ Definition of data to be monitored ☞ Reporting requirements ☞ Consultation modalities ☞ Monitoring agency ☞ Understanding of changes in context ☞ Appeal and arbitration procedures ☞ Exercise of regulatory function |
| <p>■ Preparation of legal, social, tax, and agreement framework</p> <ul style="list-style-type: none"> ☞ Institutional framework ☞ Social context ☞ Tax and customs context ☞ Competition conditions ☞ Preparation of basic agreement | | |

3.2. The concessioning process

3.2.1. Feasibility studies and definition of goals (Task 1)

Before initiating a concessioning operation, the conceding authorities must first conduct, or arrange for the conduct of, technical, commercial, operational, and financial, and economic studies with a view to determining the feasibility of the concessioning operation and identifying the gains to be expected from it.

The studies must cover:

- (a) **Technical aspects.** an inventory and expert opinion on the condition of infrastructure, facilities, and equipment...
- (b) **Commercial aspects.** the nature and evolution of traffic patterns, the status of competing routes, and differential advantages or disadvantages...
- (c) **Legal and institutional aspects.** current status of the network, Railways Act, Privatization Law, company law, property ownership regime, ...
- (d) **Operational aspects.** performance of the network, integration of the project within the national transportation development approach...
- (e) **Economic aspects.** impact on local production, the development of trade, employment, financial feasibility...

These studies serve four purposes:

- (a) To enable the public authorities to assess the feasibility of the partnership operation or to identify prior measures to be adopted to permit carrying it out;
- (b) To identify the gains to be anticipated from the operation so as to have arguments to counter the resistance to the project that will generally arise, doing so in the knowledge that for railway concessioning the anticipated gains are:
 - For the economy as a whole: improved national economic competitiveness through a reduction in transport costs; reduced congestion on roads, lesser environmental degradation
 - For the State budget: a reduction in public financial obligations by eliminating operating deficits and shifting a share of railway investments to the private sector;
 - For shippers and users: improvement in the quality and price of services;
 - For the rail sector itself: imparting to the railway enterprises the flexibility, dynamism, and management efficiency of the private sector.
- (c) To perform background studies that may later be consulted by bidders during the competitive bidding procedure, even though they would be well-advised to undertake their own due diligence;
- (d) To give the public authority an overall understanding of the project that will enable it to defend its views throughout the concessioning process.

These studies must be conducted while consulting as broadly as possible with all stakeholders, especially with the responsible administrative authorities and personnel trade unions in order to learn their views and forestall any risk of subsequent obstacles when the project is implemented (in respect of tax-related, environmental, town planning issues, etc.).

The studies must measure the social impacts of the concession operation and, in particular, the approach to be taken to any possible overstaffing, which in principal must not be at the cost of the future concessionaire (early retirement, reclassification, severance, etc.).

They must lead ultimately to an affirmation of the strong political will to pursue the concessioning process to its conclusion.

3.2.2. Risk identification and sharing—selection of institutional arrangement (Task 2)

To ensure familiarity with the problems associated with establishing public-private partnerships, the conceding authorities must endeavor to identify:

- (a) The risks they will have to assume in the course of a partnership operation (irresponsible bidders, private operators with poor performance, insolvent private operators, risks of deterioration of public assets, risks of abusing a privileged position, etc.)
- (b) The risks assumed by the private enterprise (country risks associated with legal practices, currency developments, or political instability, project risks associated with performing rehabilitation works, operating conditions, etc.)
- (c) The risks borne by lenders (guarantees of financial commitments backed by assets, by sponsors' own funds, by comfort letters, etc.).

The magnitude and impact of these risks must be analyzed by preparing a reference business plan and several scenarios, which involve financial modeling of the project.

The plan in question must make it possible to select the type of partnership agreement that is most appropriate, and to determine the degree of involvement of the public authorities in bearing the cost of investments. The business plan may also be used as a tool for analyzing and assessing the financial proposals and analyzing the business plans submitted by bidders during the competitive bidding procedure.

3.2.3. Preparation of an appropriate legal and agreement framework (Task 3)

To attain and maximize the chances of success of the partnership operation, it is essential before the call for tenders is launched to assess from the ground up, and to adapt, the institutional

and legal framework relating to the privatization process, competition law, the means of using public property, tax and social legislation (in particular when the concessioning operation is multilateral in scope²), mastering the problems of policing and security, etc.

The national public authorities must, to this end, decide whether to follow ordinary law procedures on the privatization of public enterprises, where such procedures exist, or to adopt special procedures. On the basis of the above, they must clearly designate the public entities responsible for the concessioning operation (the respective roles of the finance ministry, transport ministry, privatization agencies, and/or privatization commission or specially-established committees) and stipulate their prerogatives and powers.

It is advisable to clarify the tax and customs situation in which the partnership will operate, in particular as regards the tax and customs regime applicable during the investment works and during operation (procedures for recording contracts, system for the temporary admission of construction materials and equipment, overall or partial exemption from the VAT, from the domestic tax on petroleum products (TIPP), and from customs duties, etc.), the possible application of an investment code, and the accounting and tax treatment of concession operations.

Transfer to the private sector of the management of a service that is monopolistic in part (i.e., generally subject to competition only from road transport) must be accompanied by the introduction of an effective regulatory system which makes it possible to prevent taking undue advantage of a privileged position, forbidding any discriminatory practices in the treatment of customers. In this context, it is advisable to verify whether the interplay of competition and market forces does entail the introduction of effective automatic regulatory mechanisms and whether there are any national provisions under ordinary law applicable to the competitive environment in the rail sector and meeting the needs of the railway market. In the absence thereof, it is advisable to introduce specific provisions in the concession agreement.

The preparatory work should lead to the preparation of a draft concession agreement, with special focus on the clauses having an impact on the general equilibrium of the partnership.

3.2.4. Organization of the competitive bidding procedure (Task 4)

To maximize the chances for success of a concessioning operation and to select the most appropriate bidder, a complete, cohesive, and transparent competitive bidding procedure should be put in place.

To this end, the public authority must first designate an entity responsible for designing and initiating the partnership operation, and vest in it broad powers to issue directives and make

² As in the case of the Dakar-Bamako or Abidjan-Ouagadougou rail networks.

decisions. It is then desirable, at the very start of the process, to select a consulting firm with experience in providing assistance in privatization operations to work with and provide support to the public agency.

Finally, a comprehensive and rigorous selection methodology should be adopted, including:

- Specification of the procedure for designating the conceding authority
- Choice of the international call for tenders – open or limited
- Possible canvassing of potential bidders
- Preservation of national interests
- Conditions under which bids may be deemed eligible (bidder profile)
- Establishment of the competitive bidding procedure (Task 5)
- Communication campaigns (public opinion, users, personnel)

As a general rule (see comments on selection procedure below), donors tend to recommend the adoption of multiphase selection procedures involving:

- a pre-qualification stage
- a technical selection stage, leading, after a formal conference for fine-tuning as regards the adoption of a definitive concession project
- a financial selection stage

Donors also tend to recommend independent scoring (without weighting) of the technical and financial proposals.

3.2.5. Conduct of the competitive bidding procedure (Task 5)

The public authorities must ensure the proper conduct of the competitive bidding procedure by ensuring that bidders receive information in full and in an equitable manner (with the authorities providing the prior studies, maintaining a data room, authorizing local visits, organizing presentation conferences, etc.).

The bid evaluation commission responsible for the concessioning must adopt an organizational approach and working method that enable it to best assess bidders' submissions.

- Contents and formal structure of response files

- Interviews of bidders
- Modalities for examining files
- Methods for selecting bidders and ranking bids (selection criteria)

In principle, the procedure should avoid any negotiation that might distort the underlying project and undermine the principles of equity and equality that must prevail throughout the bidding process.

If necessary, the negotiation and examination body selected must have specifically defined but limited powers. This should ensure the rigorous ranking of bids, leading to the selection not only of the successful bidder but also of a credible second preferred bidder, thus enabling the public authority to explore an alternative solution in the event that negotiations with the first preferred bidder break down.

3.2.6. Establishment of the partnership (Task 6)

Once the contract has been signed, the bidder selected must, within a predetermined deadline:

- Create the structure that will carry out the project and obtain the requisite administrative authorizations;
- Mobilize the funding required to finance the project;
- Accept the assets subject of the concession when it enters into force;
- Enter into procurement and construction contracts, and then monitor and accept the works.

The public authority must be prepared to provide its support for administrative closing operations by participating actively in the administrative steps taken by the private partner to obtain work permits and building permits, register the structure established to carry out the project, obtain such administrative authorizations as may be required, etc.

Finally, the private partner must ensure the mobilization of financing and be capable, once the decision to award has been made of:

- Assembling the pool originally planned and, if necessary, offsetting the nonparticipation of one of the partners in the group;
- Raising all the loans planned; and
- Mobilizing the funds necessary for covering any possible overruns related to carrying out the project.

In order to protect the project against this type of risk, the public authority awarding the concession may require that certain forms of cover be retained, such as:

- (a) Prior transfer of capital contributions to a blocked account;
- (b) The provision of financing commitments signed by a bank syndicate;
- (c) Provision of a corporate support letter, etc.

The public authority awarding the concession must ensure the proper transfer of the pre-existing infrastructures, tools, and equipment. To this end, it is essential that an inventory be made of the assets transferred, together with a comprehensive expert assessment of the condition of those assets.

3.2.7. Monitoring of the partnership (Task 7)

It is important that the private partner be required to provide information such that the public authority is able to verify compliance with the agreement. The major aspects that the public authority in the partnership must be able to monitor relate to:

- The operator's technical and operational performance; and
- The actual performance of the investment works planned at the time of the railway concessioning operation.

A joint monitoring body should be established for purposes of monitoring the partnership agreement during its life.

The regulatory mechanisms that have been included in the on-going concessions tend to provide for regulation by:

- (a) Market forces, when the market so permits (rail-road competition);
- (b) The concession agreement for instances such as monopoly abuse and discriminatory practices.

Failing regulation by market forces and by the agreement, the monitoring body must have the authority to intervene. In the event that amicable agreements cannot be reached, means of resolving disputes including arbitration procedures must be provided and implemented.

The establishment of a public-private partnership must be accompanied by a reorganization, a modification of working methods, and a cultural change in government administrations, which must cease their interventionist practices and develop the ability to monitor the concession agreement.

To this end, it is advisable for the State, as the conceding authority, to establish a unit within one of its ministries (Ministry of Transport), perhaps at the departmental level, responsible for:

- ✓ Preparing and implementing controls and provisions applicable in the areas of railway safety and environmental protection;
- ✓ Verifying the existence of various insurances;
- ✓ Approving plans for the renewal and remodeling of railway infrastructure;
- ✓ Preparing, in consultation with the Ministry of Finance, agreements relating to the railway services operated as a public service obligation;
- ✓ Assisting the State's representatives in arranging meetings of the Monitoring Committee.

4. STANDARD AGREEMENT

STANDARD AGREEMENT

The annex to this report includes a standard concession agreement.

The following comments are intended to highlight the main provisions of the agreement, analyze their content, and to propose, where appropriate, additions or modifications justified by specific local circumstances.

Some of the suggestions are the outgrowth of the discussions, which occurred at the meeting of railway network directors of Africa and Madagascar organized in Douala in March 2001.

The comments are presented in the order of the articles of the standard concession agreement.

4.1. Definition

It is necessary, as provided in the standard agreement, to provide precise definitions of the terms used, particularly if the agreement uses concepts such as “property to be returned” and “property to be taken back,” “railway infrastructure,” and “amortization charge” which may not be part of the domestic legal order.

4.2. Title 1: General Information

On assignment of the contract (Article 1-4)

The agreement stipulates that assignment of the agreement is forbidden, and that only subcontracting is authorized.

The purpose of this clause is to note the *intuitu personnae* nature of the contract.

In practice, it is advisable to supplement the provision to cover not only assignment of the contract, but also that of the securities of the company awarded the contract.

Indeed, it is advisable to go even further and to guarantee the personal nature of the contract, which binds the authority awarding the concession not only to the concessionaire company, but also to the initial promoters (sponsors), which constitute the concessionaire company’s “strategic shareholder.”

For this purpose, it is desirable to make the assignment of all or any of the shares in the concessionaire company, in the intermediary company, and in the strategic shareholder³ subject to prior approval by the authority awarding the concession. As the sponsors of the strategic shareholder firm are not parties to the convention, and the concessionaire company is not in a position to commit its shareholders, separate undertakings must be sought from (i) sponsors to the effect that they will retain control of the strategic shareholder firm, and (ii) the strategic shareholder company to the effect that it will hold at least a 51 percent interest in the concessionaire company; any other assignment of shares that does not run counter to these undertakings is unrestricted.

On maintenance and operation methods (Article 1-7)

The agreement gives the concessionaire the right to organize the maintenance of infrastructure as the concessionaire determines and in keeping with standards and criteria that it shall define.

The aim of the agreement is to prevent any cumbersome and unjustified interventionism on the part of the conceding authority.

The State may intervene only in the event that the “arrangements made by the Concessionaire” prove to be completely incompatible with the General Regulation on the Safety of Railway Operations, resulting in operations that are clearly unsafe as indicated by frequent derailments and accidents.

On environmental protection (Article 1-8)

The agreement requires that the concessionaire protect the environment and logically provides that the State will assume the costs of environmental damage that predates the entry into force of the concession. To this end, it is desirable that existing provisions be supplemented by having a complete prior environmental audit performed by an independent agency.

On personnel (Articles 1-11 and 1-12)

The railway concession agreements in place in Africa provide alternative solutions for the hiring of personnel from the former public railway companies:

- Either a transfer of the personnel with their acquired rights and benefits (the solution adopted in the case of Camrail, one which is often required by local labor codes).

³ Article 10-1 of the standard convention makes the entry into force of the convention contingent on receipt of an undertaking from the companies controlling the strategic shareholder of the concessionaire to maintain oversight for a period of at least seven years.

- Or the termination of all the staff previously employed by the public railway company, followed by their hiring by the new operator.

The choice between these two solutions depends in particular on the status of the personnel prior to the concessioning and on the cost of implementing these solutions.

The agreements generally set a minimum staffing level corresponding to the undertakings signed by the concessionaire when its bid was submitted.

In all cases, the agreements must ensure that the concessionaire may freely choose the staff it wishes to retain or recruit.

On regulatory changes (Article 1-15)

The agreement protects the operator from any legal or regulatory change that substantially modifies the financial equilibrium of the concession agreement.

It does not bar the State from exercising its sovereign power in respect of taxation, for example, so long as the decisions taken are applicable to all economic agents, but does grant the concessionaire the right to negotiate an amendment in the event such decisions threaten the financial equilibrium of its operation.

This provision does not deviate from the principle of operation at the risk of the concessionaire, inasmuch as the matters giving rise to the financial disequilibrium are the direct responsibility of the State.

4.3. Title 2: The Railway Network Concessioned

Title 2 of the standard concession agreement deals with the concessioned railway network.

The agreement stipulates that the railway network concessioned is the State's public property. It bears noting that the concept of railway public property under French law involves a special legal regime, which deviates from ordinary law. Indeed, in France, public property is exempt from seizure, not subject to statutory limitations, and inalienable. A public enterprise may have assets that are public property as well as assets that are its private property, such as land, structures, or buildings that it has purchased, for example. The concept of public property must be defined as part of the agreement unless it is part of the internal legal order of the State awarding the concession.

It should be stressed that it is essential, as provided in Article 2-2, to conduct a complete inventory, when a railway is taken over, of all the real property involved (which goes beyond the railway property per se) and, as necessary, to clearly distinguish in advance the property from the former railway company.

In Côte d'Ivoire, the asset management company (SIPF) and the operator (SITARAIL) struggled long and hard in order to come up with the precise list of the real property covered by the concession. While staff service housing units, for example, fell within the scope of the concession, most other housing was excluded.

In Cameroon, the railway administration prepared an inventory of the public and private railway property before the concessioning, but the inventory was not annexed to the agreement; the concessionaire had a period of three months within which to draw up a counter-inventory, including a descriptive sheet on the condition of each item of property with photograph attached.

The best solution may be to provide each bidder with a list of all the "concessionable" property as part of the Data Room operation, and ask it to make a selection and appropriately linking it with the evaluation criteria.

On the protection of railway property (Article 2-11)

The protection of railway property against squatters is essential in Africa, all the more so that moving or "evicting" the people occupying public property is costly and socially and politically difficult.

In Cameroon, for squatter activity that does not pose an obstacle to operations, safety measures have been introduced, namely, lowered authorized speed, whistle sounded at all times, revolving warning light, permanent illumination.

Concessionaires must also combat walking on the tracks to prevent the loss of platform ballast and the problems of run off of wastewater. To this end, at the request of donors, a number of concessionaires have tried to establish a 35-meter safety setback on each side of the tracks; this measure, however, has proven difficult to enforce in populated areas⁴.

A health and safety unit must be created to enhance public awareness through meetings of neighborhood leaders and pamphlets. The donors consider that the concessionaire must be a corporate citizen in the broadest sense of the term; failure to comply with the obligations imposed may result in the suspension of disbursements.

⁴ The right of way could be much less, sometimes as low as 5 meters, but even this might require substantial resettlement of people inhabiting the right of way. The World Bank and Donors insist on resettling the people through proper compensation and through an appropriate "Resettlement Plan".

Status of railway police

Railway policing services may be provided by:

- Sworn officers that are part of the railway enterprise's staff, or
- Officers seconded by the national police force and made available to the operator.

In Cameroon, the second of these solutions was adopted. However, Camrail, the concessionaire, is of the opinion that this special seconded police force (i) poses a heavy financial burden (the seconded officers are paid by the State and benefit from special benefits in the form of bonuses, housing, and vehicles provided by the operator); (ii) lacks flexibility; and (iii) is difficult for the operator to control.

4.4. Title 3: Railway Infrastructure

On indemnification of the concessionaire at the end of the agreement (Article 3-5)

To prevent the concessionaire from terminating any investment operation in the years prior to the end of the concession, the agreement recognizes a right to indemnification for un-depreciated part of the investment that had been approved by the conceding authority.

The agreement sets the amount of the indemnity at the un-depreciated portion of the assets on the concessionaire's balance sheet.

The principle of indemnifying is essential for the dynamics of the agreement, but it is desirable to define the indemnification modalities more precisely. The option may for instance be the net book value of fixed assets, subject to the condition that the depreciation modalities to be used for each type of property have been set in advance.

It is also advisable, in cases where the enterprise itself performs all or part of the works (works performed by the enterprise on its own behalf) that the valuation methods for such works be predetermined and validated by the auditors of the accounts before being submitted for approval by the conceding authority.

4.5. Title 4: Commercial Rail Services

On the nature of the services performed (Articles 4-1 and 4-3)

The agreement affirms the commercial nature of the basic services performed by the concessionaire.

In exchange for the risks borne by the concessionaire (see Article 1-3), the agreement authorizes the operator to freely determine the services it provides and the rates charged. These principles constitute the backbone of the agreements in Africa.

On the price-setting policy (Article 4-9)

The agreement allows the concessionaire to set its rates freely.

It further authorizes the concessionaire to charge different rates to different customers through confidential agreements.

While this freedom is important to guarantee commercial success, it is desirable that the concession agreement includes a ban on any discriminatory practices, more so in the absence of a competition law. In this connection, the agreement extends protection to third parties under the provisions of Articles 4-3 et seq., opening the possibility that third parties subject to discrimination may become railway operators.

4.6. Title 5: Public Service Obligations

On rail services operated as a public service obligation (Article 5-1)

The agreement provides for the operation of rail services as a public service obligation.

The agreement could have appropriate provisions to govern the mode of operation of such services, but could also call for the conclusion of additional specific agreements between the State and the operator that provide for the payment of contributions by way of compensation.

It bears noting that the modalities for determining the contribution payable for the public service obligation in the Standard Agreement in the Annex are relatively imprecise. The agreement indicates that the contribution “covers all charges that would be attributable to the service concerned in a context of efficient management ... and makes a reasonable contribution to the coverage of the structural expenses;” it does not specify whether this refers to the full cost or marginal cost.

It is desirable to provide for the maintenance of separate cost accounting on public service activities, with the preparation modalities specified in an annex, stipulating that the data included therein are information items available to the conceding authority but not enforceable against it.

It may be noted that passenger transport services may be operated as a public service obligation and in the event of a shortage of locomotives the operator could well claim compensation for the entire shortfall, and not just the coverage of the operating costs borne by it.

It may further be noted that, although the agreement states that “the Concessionaire shall cease to operate the service in the case of non-payment of the compensation for mandatory public service...,” this right is theoretical in as much as the interruption of an agreed passenger service may pose serious problems of a social and political nature.

On financial compensation for public service obligations imposed by the State (Article 5-3)

The agreement protects the concessionaire against any decision by the State in the specific area of railway activity entailing a reduction of the concessionaire's profits.

It protects the operator against decisions characterized as an “act of state” [*fait du prince*] under French public law.

4.7. Title 6: Use of the Network by Third Parties

On opening the network to third-party operators (Article 6-1)

The agreement provides for and authorizes the utilization of the conceded railway network by third-party operators. Such use may occur not only at the initiative of the concessionaire, but also at the behest of the State. The third party operations in the above two cases, however, have very different characteristics. In the first case, the third party operations almost amounts to outsourcing with complete cooperation between the main concessionaire and the third party operators, while in the second case, the concessionaire will be put to competitive pressure.

The opening of the network to third parties at the behest of the State may be happen only in cases of discriminatory practices and monopoly abuse by the concessionaire.

In addition, to prevent such opening of the network to third parties from causing the economic destabilization of the concessionaire, the third-party operators may not be allowed to compete with the concessionaire and can be licensed to provide only specific rail transport services.

It should be noted that these provisions cannot reasonably be met, except at the request of major shippers, such as mine operators.

Modality for intervention by third-party railway operators (Article 6-6)

The concession agreement requires the concessionaire to negotiate a “Rail Infrastructure Usage Agreement” with the third-party operators, laying down the practical conditions for managing traffic, crossing rights, and granting priorities.

It also calls for arbitration by the State in the event that the modalities for third-party operations cannot be defined by mutual agreement of the parties.

4.8. Title 7: Railway Equipment

The agreement provides that the railway equipment is either owned by the concessionaire or by third parties and leased by the concessionaire.

As such, the equipment is excluded from the concession arrangement, although the agreement does provide a right of first refusal to the conceding authority in the event of the sale of such equipment by the concessionaire.

This arrangement was not used when the Sitarail agreement was reached, and, in that instance, the railway equipment was retained by asset management companies (SIPF and Sopafer).

The concessionaire is free to dispose of the railway equipment it has acquired, except during the final years prior to expiry of the contract (between 5 years and 1 year prior to its termination), in order to permit the conceding authority to ensure the continuity of service. In addition, the State does, as indicated before, have a right of first refusal.

4.9. Title 8: Concession Fee

The agreement uses the conventional approach of a concession fee with two elements:

- A fixed element, independent of the level of railway activity, with the amount changing over time in accordance with the bid;
- A variable element, equal to a percentage of gross revenue , with the rate changing over time.

4.10. Title 10: Duration of the Agreement

Entry into force (Article 10-1)

Entry into force is subject to the meeting of a number of pre-conditions, such as signature of the concession agreement, approval of the agreement by decree, financial closing, and approval of the mobilization of loans by the concessionaire.

Duration of the agreement (Article 10-2)

The duration of the agreement must be appropriate in view of the project characteristics, in particular with the depreciation periods for the investments made and expectations as to the return on invested capital.

The standard agreement calls for a rolling 30-year duration, thereby providing the concessionaire the opportunity to have a forward horizon that is always between 20 and 30 years in the future, if it so desires. This provision is probably satisfactory for purposes of addressing the concessionaire's investment constraints, but could unduly extend the contractual relationship between the conceding authority and the concessionaire, although the former would otherwise wish to terminate the contract. However, in the absence of clear failure by the concessionaire to abide by the obligations set forth in Article 10-4, the conceding authority would not be able to terminate the contract.

Early cancellation (Articles 10-3 et seq.)

The agreement contemplates several cases for early cancellation of the agreement:

- Automatic cancellation in the event of dissolution, liquidation, or bankruptcy, or
- Cancellation at the initiative of the State in the event of a serious breach of obligation, or
- for reasons of *force majeure*

The convention authorizes the conceding authority to substitute itself for or replace the private partner only for serious violations of the terms of the agreement.

As an alternative and/or in addition, an agreement may also provide for:

- A possibility of early cancellation, at the initiative of the conceding authority, when this is found in the general public interest, in which case, the private party would be guaranteed equitable indemnification;
- Possibilities for dismissal at the initiative of the concessionaire in the event of serious and clear interference by the State and default by the conceding authority;
- Early cancellation clauses by mutual agreement between the parties or following arbitration.

Lenders' right of substitution (Articles 10-8 et seq.)

The agreement confers on lenders a right of substitution, where it authorizes them to designate a new operator in the event of the failure of the concessionaire in place.

This right is often the subject of discussion and dispute among concessionaires, who regard it as excessive. It may be noted, however, that the concession agreements make only a passing reference to such rights. These are generally "expressly set forth in the loan contracts" signed be-

tween the concessionaire and the lenders and have the advantage of harmonizing the concession agreement and the loan contracts in advance.

In practice, it would appear that the right of substitution is a dissuasive threat, which, while legally possible, would be difficult to implement in practice.

4.11. Title 11: Disputes and Litigation

The agreement provides for recourse to arbitration; it specifies the conditions and procedures for designating arbitrators, and refers to the rules of reconciliation and arbitrage of the International Chamber of Commerce (ICC) in Paris.

Such a provision has both advantages and drawbacks.

Noteworthy among the advantages are:

- ✓ the arbitration procedures guarantee the designation of independent arbitrators;
- ✓ such procedures are in principle less formalistic and less time-consuming than court proceedings;
- ✓ arbitration makes it possible to select an arbitrator whose personal qualities and skills make him or her particularly well suited for resolving the dispute;
- ✓ arbitration makes it possible to avoid the publicity of disputes, debates, and decisions.

In respect of drawbacks, it bears noting that:

- ✓ arbitration may prove costly; the parties must not only pay the costs and fees of their attorneys, but also those of the arbitrators, and possibly cover the administrative charges of the permanent arbitration institution as well;
- ✓ in principle, the ruling is not subject to appeal; the party found at fault may possibly lodge an action to void the decision, but only on extremely limited grounds.

4.12. Title 12: Monitoring of the Agreement

The public authority's monitoring of the private partner's compliance with obligations entails the submission of regular information on:

- ✓ effective completion of the investments
- ✓ activity level (in particular if the fee is variable)
- ✓ financial performance

On the other hand, owing to the commercial nature of the activities carried out and the freedom granted to the concessionaire to define as it sees fit the nature, configuration, and organization of its services, the agreement imposes no constraints and thus introduces no controls or monitoring of the concessionaire's operating performance.

The agreement organizes the monitoring work and establishes a monitoring committee made up of two representatives each from the State awarding the concession and the concessionaire, and which is chaired by an individual from the administration.

5. SELECTION PROCEDURES

SELECTION PROCEDURES

5.1. Major stages in the selection procedure

Experience in recent years with the concessioning of railways in Sub-Saharan Africa has prompted international donors and lenders to recommend that the concessionaire selection process (or, more specifically, the selection of the strategic shareholders of the concessionaire company) be conducted in five stages:

- A *canvassing* stage during which the public authorities and their consulting firm carry out an information and canvassing campaign which generally entails a call for expressions of interest;
- A *pre-qualification* stage, intended to pre-qualify only those bidders who have the ability to mobilize (a) the requisite technical and management skills in railway operation; and (b) the financial references indicating their capacity to mobilize the financing required for implementing the investment program for the concession in a manner consistent with project financing techniques;
- An intermediate selection stage known as *technical selection*, during which the pre-qualified bidders are invited to explain what they intend to do with the railway in the event that they are the successful bidders for the concession. To this end, the bidders submit a medium-term business plan, which covers, among other items, commercial policy and traffic projections, technical operations, investments, personnel policy (personnel rehired, compensation, and training), the financing arrangements for operations and investment, and the financial equilibrium of the concession. The technical proposals are evaluated on the basis of various criteria. Upon completion of this stage, each proposal submitted is declared acceptable or rejected. A proposal is declared to be “satisfactory” if it is acceptable for each of the evaluation criteria. In the strict sense, therefore, there is no comparative ranking of the proposals (in particular, there is no reason for a global “scoring” of each proposal); as part of this stage, the bidders may be invited to propose alternative approaches and/or make suggestions with respect to the reference project prepared by the public authorities;
- A stage of formal finalization, which may take the form of convening a roundtable during which the proposals and suggestions put forward during the technical selection phase are discussed and the final draft concession agreement is prepared;
- A final selection stage known as *financial selection*, during which the various proposals deemed satisfactory following the technical selection are classified by comparing the “price” that bidders are prepared to pay to the conceding authority in order to be de-

clared the successful bidder. In practice, the price of the concession is represented by the present value amount of the concession fees that the concessionaire undertakes to pay during the duration of the concession or, in the event that the transfer price of the railway equipment is not set in advance by the conceding authority, the present value amount of the purchase price of the railway equipment plus the concession fees. The bidder proposing the highest concession price is declared the successful bidder upon the opening (in public) of the financial proposals.

5.2. Independence of technical and financial proposals

1. The fact that a bidder is making a firm commitment to a concession price proposal makes it essential that it have a complete and accurate understanding of the “rules of the game” for the concession, so that it can assess all risks of any kind that it is incurring. These rules are, for the most part, formalized in various legal instruments such as (i) the concession agreement (and, when not embodied in the concession agreement itself, in the specifications associated with it); (ii) the tax and customs provisions applicable to the concession (when, because of the binational nature of a concession operation, for example, simple ordinary law provisions are not sufficient to define the tax and customs regime); (iii) the contract for the purchase of rolling stock by the concessionaire; and possibly (iv) agreements on the operation of passenger services as a public service obligation. The bidders must make their financial proposals on the basis of the final versions of these legal instruments, for which reason they must be included in the financial bidding materials. It is further recommended that bidders, when submitting their financial proposal, remit to the conceding authority an initialed copy of the legal instruments in question as well as a surety bond (in a substantial amount, to be determined as roughly a third of the envisaged capital for the concessionaire firm) to the conceding authority as guarantee that the concessionaire firm (once established) will sign the legal instruments in their present form. It bears noting that this approach not only has obvious merits in terms of transparency in the selection of the concessionaire, but also has the extremely important advantage of forestalling any negotiation between the conceding authority and the ultimate successful bidder after the award has been made. Experience has shown that such negotiations are not only extremely lengthy in most cases, but also that they are most often concluded to the disadvantage of the conceding authority. Finally, negotiations after the award always raise doubts as to the transparency of the selection process (bidders not selected may always argue that, had they known that negotiations would have led where they ultimately did as regards the rules of the game, their own financial proposals would have been more attractive). The risks of corruption coming into play during the negotiation process must also not be overlooked.

2. It is not reasonable, however, for the conceding authority to maintain that it can set the rules of the game for the concession definitively without having asked the bidders in advance for any comments and views they may have on the rules of the game being contemplated. Indeed, even if, in major respects, consensus appears to be emerging on the rules of the game (a

consensus reflected inter alia in the standard documents prepared by World Bank specialists), each concession is an individual case for which it is essential to adapt the rules customarily followed. For this reason, in the concessionaire selection process recommended by World Bank specialists, the bidders are invited to provide the conceding authority, along with their technical proposals proper, their comments and suggestions on the wording of the legal instruments defining the rules of the game for the concession (the technical bidding materials must contain a preliminary draft thereof). The conceding authority completes the final drafting of the legal instruments (which will be included in the financial bidding materials) only in light of the comments and suggestions received from bidders; naturally, in so doing it will retain only those comments and suggestions it deems appropriate.

3. The process recommended by some World Bank specialists as described above thus entails a sequential submission of technical proposals and financial proposals. Experience has shown that the time elapsing between the submission of the technical proposals and the financial proposals tends to be considerable (often several months), not because the evaluation of the technical proposals is difficult, but because it takes time to set the final rules of the game for the concession; the process requires reaching consensus, which is often difficult, between the various concerned parties that constitute the “party granting the concession” but also with the donors expected to finance the concession's investments. Might it be possible to improve the process by adopting an approach in which the technical proposals and financial proposals are submitted simultaneously, in two separate envelopes? In such a process, only the envelopes containing the technical proposals would be opened at the outset. These bids would be evaluated in the same manner (“satisfactory/rejected”) described in paragraph 1 above. The financial proposals corresponding to rejected technical proposals would be returned unopened. Only the financial proposals corresponding to the technical proposals deemed satisfactory would be opened, in public, and the bidder making the highest financial proposal would be declared the successful bidder for the concession.

4. As in the procedure for the sequential submission of technical proposals and financial proposals, the procedure involving simultaneous submission of the technical and financial proposals requires, to avoid negotiations between the conceding authority and the successful bidder following the award (negotiations which, as explained above, entail significant drawbacks), that the final rules of the game for the concession be firmly established in the combined (technical and financial) bidding materials. Bidders must, under the same conditions as prevail in the procedure involving sequential submission of technical and financial proposals, have the possibility of expressing their comments and views on the rules of the game being contemplated. It would thus be advisable, before the bidding materials are disseminated, for the conceding authority to send all pre-qualified candidates the draft of the various legal documents establishing the rules of the game for the concession, to assemble their views, and, in light of same, arrive at the final wording for those instruments, which would then be included in the combined bidding materials. The procedure for the simultaneous submission of technical and financial proposals as defined above gives rise to the following comments.

5. All things considered, simultaneous submission of the technical and financial proposals does not help reduce the length of the concessionaire selection process since the process of consultation with the pre-qualified bidders and finalizing the bidding documents takes almost the same time as for the sequential bidding process. This means that in the simultaneous bid submission procedure, the draft legal texts to be conveyed to the candidates as part of the prior consultation process cannot actually be disseminated until the same date on which the technical bidding materials would have been disseminated in the process for the successive submission of the technical and financial proposals. Experience also shows (as indicated in paragraph 4) that another critical task in the preparation of the financial bidding materials in the procedure for successive bid submission is the preparation of the final version of the legal texts in response to the comments and suggestions made by the candidates. This means that, in the simultaneous bid submission procedure, the combined bidding materials (which include the final version of the legal texts) cannot be disseminated to the candidates until the date on which, in the successive submission scenario, the financial bidding materials would have been submitted, minus the time required for examining the technical proposals in the successive submission process. In these circumstances, the date for opening financial proposals will be the same in both procedures.

6. Serious arguments could be raised about whether it is possible to arrive at a final version of the legal documents establishing the rules of the game for the concession before the technical proposals are opened. While the strictly legal or administrative rules of the game for the concession can, of course, be finalized without reference to the economic and financial outlook of the bidders, the same does not hold true for those rules of the game that have a direct impact on the financial viability of the concession. By way of example, the conceding authority may want the concessionaire to finance all the investments under the concession as well as to take over a portion of the loans previously entered into by the public railway enterprise, and needless to say, these provisions will be clearly reflected in the concession agreement. In the procedure for the sequential submission of the technical and financial proposals, these provisions are put to the test at the technical proposal level. The bidders submit, as part of their business plan, medium-term financial forecasts which demonstrate their feasibility or otherwise (as the technical proposals are discussed, the conceding authority may, with the assistance of the consultant advising it, determine whether the possibility of non-feasibility is real or stems from deliberately pessimistic financial forecasts by the bidder, intended to prompt the conceding authority to make the corresponding rule of the game more flexible). Even when the conceding authority's financial simulations of the concession had established the feasibility of the proposal, the "full-scale" test by bidders of the feasibility of the concession agreement provisions is not possible in the procedure calling for simultaneous submission of the technical and financial proposals. As a consequence, it may occur that the—purportedly final—wording of the legal documents contained in the combined bidding materials will be such that the bidders are unable to submit a bid, or able only to submit a conditional bid, thereby obligating the party granting the concession to enter into negotiations following the award, which should be avoided under any and all conditions.

7. One disadvantage of sequential bidding appears to be that if there happens to be only one technical bid, then the bidder, knowing that he is the only bidder, is likely to offer an extremely low bid for the concession. In effect, if there is only one technical proposal, the sole candidate knows that it has no competitors when it submits its financial proposal, and may therefore propose an extremely low price. In contrast, in the case of simultaneous submission of the technical and financial proposals, the bidder would not know until the deadline for bid submission whether or not he had any competitors, and is likely to bid as if effectively competing. While this thinking is not without its logic, it is still not convincing in practice. The preparation of a bid for a concession, particularly as regards its technical component, calls for significant and costly work on the part of the bidders (it generally costs \$1-2 million for such preparations; such work cannot be carried out “on the sly,” and there are always only a few pre-qualified bidders. It is not difficult for any bidder to determine whether the other pre-qualified bidders are or are not actually going to make a bid. It would thus appear that the argument of uncertainty about the threat of competition prompting a sole bidder to propose a higher price for the concession may not hold. Indeed, the response to the situation in which the conceding authority may fear that there will be only one bidder is not simple; it generally speaks of the scant financial attractiveness of the concession as designed and tends to be indicative of the fact that the sole bidder’s interest is “strategic” in nature (for example, aimed at controlling rail activity as a segment in a multimodal transport chain); it ultimately entails negotiation between the conceding authority and the sole bidder, in accordance with approaches to be determined and the examination of which is outside the scope of this report.

8. In conclusion, it appears that effort to avoid negotiations between the conceding authority and the successful bidder for the concession after the award, the use of a sequential bidding is preferable simultaneous of the technical proposals and financial proposals as the latter does not really offer any advantages. It fails to reduce the length of the selection process, runs the risk of making it impossible for bidders to make firm offers, and does not appear to increase the price of the concession in circumstances marked by scant competition among bidders. It is therefore recommend that the three-stage selection process as described in the first paragraph of this chapter be retained.

6. ANNEXES: STANDARDS DOCUMENTS

1. *Terms of reference for the selection of the consultant*
2. *Text of call for expressions of interest*
3. *Text of confidentiality agreement*
4. *Text of undertaking on ethics and transparency*
5. *Text of undertaking on avoiding corruption*
6. *Bid security text*
7. *Contents of pre-qualification materials*
8. *Contents of selection materials*
9. *Promoters' commitment letter regarding capital*
10. *Standard concession agreement*

6.1. Terms of reference for the selection of the consultant

SUPPORT FOR THE CONCESSIONING OF ...

TERMS OF REFERENCE FOR CONSULTING SERVICES FOR ...

This document summarizes the major provisions relating to (A) the general characteristics anticipated for the railway concession, for which the consultant is to provide clarifications or suggest modifications in the context of the feasibility study and the preparation of the bidding materials, (B) the principal implementing modalities of the concession (structure of the concessionaire company, procedure for selecting strategic shareholder), (C) the services to be provided by the consultant, and (D) the provisional timetable for the process as a whole.

A. GENERAL CHARACTERISTICS OF THE PROPOSED RAILWAY CONCESSION

Freight transportation services. The concessionaire will offer its customers freight transportation services on commercial considerations and is free to decide the terms and conditions of such transportation...

Passenger transportation services. The concessionaire will operate passenger transportation services by rail as specified in schedule as public service obligations, but will be free to operate any additional services on commercial considerations.

Railway infrastructure. The existing railway infrastructure for the network/line, which is and shall remain property of the State of (or joint property of the States of), will be made available to the concessionaire. The concessionaire will organize its utilization, will operate and maintain the said railway infrastructure at its own cost. The concessionaire shall be responsible for (through delegation from the State – or from the States – if the concession agreement is entered into jointly with the State of and the State of) works relating to the renewal and remodeling of existing railway infrastructure, and will finance such works (although the State--or States--may provide its [their] guarantee for certain financing operations, or onlend the funds it [they] receive[s]). Renewal and remodeling works shall be subject to approval by the State (or States). At the conclusion of the concession, the infrastructure will automatically revert to the State (or States) and any possible non-depreciated portion of the infrastructure investment made by the concessionaire will be reimbursed by the State (or States)⁵. The development of any new infrastructure for expanding the railway shall be decided upon and financed by the State on the territory of which the infrastructure will be established.

⁵ The reimbursement condition may or may not apply. If it does not, then the concession fees will correspondingly drop.

The possible incorporation thereof into the concession would occur by means of a modification of the concession agreement.

Railway motive power and rolling stock. At the beginning of the concession, the concessionaire shall purchase or lease all the needed railway motive power and rolling stock available with the Railways (with the exception of specified passenger equipment in the event that the passenger services are not required to be provided by the concessionaire), on terms to be agreed between the concessionaire and the conceding authority. Any additional equipment that the concessionaire may require in the course of the concession—either to replace existing equipment or to handle increased traffic—shall be purchased or leased by the concessionaire, without any financial guarantee by the Government or the conceding authority (or Governments in the case of a joint concession). However, the conceding authority shall have the right of first refusal on the sale of equipment by the concessionaire during the life of the concession and the right to purchase equipment (on terms established by the concession agreement) at the end of the concession, in particular in order to ensure the continuity of railway operations at the end of the concession.

Personnel. The concessionaire's employees shall be subject to the provisions of the labor laws of the country. At the beginning of the concession, the concessionaire will hire, from among the existing personnel of the railways the staff it needs. The staff not rehired shall be the responsibility of the conceding authority. The concessionaire may also hire staff from outside for positions requiring skills not present within that organization.

Concession fee. The concessionaire shall pay the conceding authority (or the authorities in case of a joint concession) a concession fee in accordance with the concession agreement. This fee can be structured in different ways and can comprise a fixed portion and a portion proportional to the turnover or gross operating surplus of the concessionaire.

Duration of the concession. The duration of the concession, defined in the concession agreement, could vary between 15 to 25 years. The duration of the concession could be fixed or "rolling," with the option of extension, by mutual agreement between the parties, for successive five-year periods, to be decided at the end of each five-year period.

Tax provisions. The concessionaire company shall be subject to ordinary law tax provisions. Where necessary, the tax legislation shall be adapted in order to properly address the special requirements of companies holding concessions to perform public services or utilize public infrastructure (in particular, the provisions for renewing equipment and its full depreciation must be deductible from taxable earnings). In the event of a joint concession, it would be necessary for a tax agreement to be signed as an annex to the concession agreement in order to define the tax base and tax payment modalities for each State. The fuel used by locomotives and other motive power will normally be free of road user levies (contributions to the Roads Fund), but if not, the fact will be clearly stated in the bidding documents.

Monitoring of execution of the concession, and resolution of disputes. Execution of the concession will be supervised by a Monitoring Committee made up of representatives of the signatory ministries in charge of transportation and finance, and of the concessionaire. The concessionaire shall furnish, by way of an activity report, various documents to be specified in the concession agreement. An independent auditor could be designated by the Monitoring Committee to perform an annual audit of the concession (including examination of the concessionaire's accounts, an opinion on the parties' adherence to the terms of the concession agreement, etc.), if considered necessary. Disputes and litigation shall be resolved in accordance with the conciliation and arbitration rules of the International Chamber of Commerce (or, alternatively, the International Centre for the Settlement of Investment Disputes—ICSID).

Disposition of... The public railway entity known as ... will be dissolved and placed in liquidation simultaneously with the entry into force of the railway concession or its mandate modified to manage activities and assets not forming a part of the perimeter of the concession. The railway infrastructure managed by ... will be transferred to the State (or States), which will make them available to the concessionaire. Payment for the rolling stock and other movable property (inventories, office furniture, etc.) repurchased by the concessionaire from ... will be made over to the liquidator or as decided by the conceding authority. Of the liabilities of the ..., and subject to the results of the study on the financial feasibility of the concession, the concessionaire will not assume any debt or only such debt as has been agreed between the concessionaire and the conceding authority such as the medium- and long-term external debt not guaranteed or onlent by the State of ... and/or the State of ... The levels of the concession fee and the purchase price of the railway rolling stock will take this partial assumption of any liabilities into account, depending on whether it relates to infrastructure or equipment. Except for the assumption of the agreed debt, the State [States] will guarantee that the concessionaire will not be liable for any obligations predating the entry into force of the concession agreement.

B. Modalities and projected timetable of the concessioning

B1. Structure of the concessionaire company

The concessionaire company shall be a joint stock company under the law of ... or law of ..., with its headquarters in ... or A strategic shareholder, taking the form of a business corporation, shall hold at least 51 percent of the concessionaire company's capital ('A' shares) and shall undertake to maintain at least this minimum percentage of the capital for a period of at least seven years following the beginning of the concession. No suppliers of railway equipment or railway works enterprises may be part of the strategic shareholder. The strategic shareholder shall occupy a majority of the seats on the Board of Directors. The portion of the concessionaire's equity not held by the strategic shareholder ('B' shares) shall be set aside for direct assignment to individuals or legal entities of ... or ... nationality or sold on the regional securities exchange. Within this portion, 55 percent of the concessionaire's equity will be set aside for the personnel of the concessionaire company. In order to preserve the commercial nature of

operation of the concessionaire company, which will be active in a competitive environment, governments may not subscribe to its capital and the participation of public enterprises of either State shall be reserved for enterprises of an industrial or commercial nature and limited to 25 percent of the concessionaire company's total equity in the form of 'B' shares. During an interim period, all or a portion of the 'B' shares may, pending their transfer, be "warehoused" by the strategic shareholder⁶.

B2. Procedure for selecting the strategic shareholder of the concessionaire

The strategic shareholder shall be selected through international competitive bidding in a three-stage procedure as described below. The entire process shall be entrusted to an ad hoc steering structure ... composed of representatives of the two States and of ... benefiting from the consultant's support services.

Canvassing for and pre-qualification of bidders. A publicity campaign and canvassing of potential national and foreign shareholders will be carried out. A call for expressions of interest shall be published in the national press and the specialized international press, and a file of pre-qualification materials made available to bidders. Presentation meetings will be organized in the two States and a search mission shall visit various foreign countries (Western Europe, North America, and South Africa). Prequalification requests shall be from companies, which may, where appropriate, subsequently be grouped together for purposes of submitting a technical proposal and then financial proposal. Prequalification will be determined in accordance with the criteria of (i) financial capacity, (ii) experience in the management of sizable infrastructures, and (iii) competence in the railway sector or capacity to mobilize such competence.

Call for technical proposals. Proposals may be submitted by pre-qualified bidders or by a grouping of pre-qualified bidders. They shall include:

- A detailed five-year business plan, together with more summary projections for the following 20 years of the concession. The plan will cover (i) business prospects, (ii) operating and maintenance principles, (iii) commercial and rate policy, (iv) the organization of the company and its human resources and training policy, (v) the initial (five-year) investment program to be annexed to the concession agreement and an indicative investment program for the 20 subsequent years, (vi) the financing strategy, in particular the shareholders' option for completing the pool around the strategic shareholder, the borrowing policy, and, where appropriate, letters from lenders and interested investors, and (vii) an action plan for security and environmental protection.

⁶ The percentages can be varied to suit individual cases.

- Financial projections prepared in accordance with a predefined format, including provisional operating accounts, balance sheets, and supply and uses tables covering the duration of the concession; each bidder shall prepare a computerized financial model to be submitted to the administration; subsequently, the strategic shareholder's financial model, completed following the call for financial proposals, will be submitted to the lenders.
- Comments and proposals on the draft concession agreement included in the technical bidding materials.

The technical proposals will give rise to separate meetings with bidders by the steering committee, in the presence of the consultant. The bidders may clarify their proposals following such hearings. Bidders that have submitted a business plan deemed acceptable in accordance with the scoring criteria defined in the technical bidding materials will be invited to continue with the procedure.

Fine-tuning conference. Following the technical selection stage, the authorities of ... (and ...) will invite the bidders selected to discuss the suggestions and proposals made as regards changes. At the end of these discussions, the authorities will determine the final wording of the concession agreement (taking into account, where appropriate, the suggestions made by the bidders) and will invite the bidders that have survived the technical selection stage to submit their financial proposals.

Call for financial proposals. The financial proposals concerning the purchase price of the railway equipment and the concession fee will be opened at a public session. The bidder who (i) completed the technical selection, (ii) provided a valid bid security, (iii) endorsed without reservations the final draft concession agreement, and (iv) submitted the highest financial proposal (present value of the purchase price for equipment and the fixed portion of the concession fee over the duration of the concession) will be designated the strategic shareholder of the future concessionaire company.

Subsequent stages. The designated strategic shareholder—or strategic shareholder group—shall have a predetermined period of time in which to (i) establish itself in corporate form if this is not already the case, (ii) establish the concessionaire company, and (iii) sign the concession agreement. The successful bidder will be freed of any liability if the signed agreement is not approved by decree⁷ within a predetermined deadline following the date of signature. The entry into force of the concession agreement must occur within a predetermined time period following the promulgation of the decree granting approval.

⁷ If such approval is required.

The social plan of ... shall be carried out subject to oversight by the States of ... and ..., between the designation of the strategic shareholder and the entry into force of the concession agreement.⁸

C- SERVICES TO BE PROVIDED BY THE CONSULTANT

C1- Objectives of services

The services in support of the governments of ... and ... for the concessioning of ... in accordance with the approaches to privatizing operations referred to in paragraphs A and B above will be carried out by an internationally recognized consulting firm specialized in management and privatization or by an investment bank. The consulting firm or the bank (“the consultant”) shall engage the railway specialists of its choice through partnership, subcontracting, or targeted recruiting. To ensure the transparency of the process, no engineering firm participating in providing consulting services may be a member of a group bidding for the concession.

The support services include prior technical, economic, financial, and legal studies, the preparation of consultation files for the selection of the strategic shareholder of the concessionaire company, and advice on the choice of that shareholder.

C2- Content of services

Task a: Status inventory. The consultant shall prepare (i) a diagnosis and physical inventory, with values, of the infrastructures to be included in the concession as well as the motive power and rolling stock and other movable property to be transferred to the concessionaire, (ii) a diagnosis of the current management of the commercial and operational functions for the railway and road transport (quality and reliability of services, responsiveness, predominant customers), technical functions (condition and maintenance of fixed installations, buildings, equipment, and rolling stock, maintenance practices), accounting and finance functions (accounts payable, liabilities,), personnel function (staffing level, productivity, management approach, and compensation), and environmental protection function, (iii) a presentation on business results and financial performance, (iv) a legal study on the ownership of the various assets turned over to ... and a proposed structuring of the authority awarding the concession and, if the concession is signed by the Republic of ... alone, the participation of the authorities of ... in regulating the various routes and traffic streams, (v) a study of the tax and accounting measures applicable to public infrastructure concessions or public service concessions, and of the legislative and regulatory measures in the transportation sector which the State or States concerned may, if necessary, need to take in order to enable the concessionaire to operate in an appropriate financial framework and in an environment of active and fair rail-road competition.

⁸ This timetable will enable the firm taking over to select effectively the personnel it wishes to hire.

Task b: Study of the land transport market on the ... route(s). The consultant will examine the current market and make projections over a 25-year period. Demand and the price and service quality characteristics (safety , speed, frequency, and reliability) will be studied for (i) passenger traffic, by type of service and (ii) freight traffic, by product category. To this end, the consultant will survey customers (shippers, transit agents, and freight forwarders), and will examine the competitiveness of the ... corridors by comparison with the other corridors serving ... and the likely competitiveness of the future concessionaire company as regards road transport, ..., and The consultant will assess the solvency of the customer base and the risk of non-collection or poor collection of revenue.

Task c: Feasibility study. The consultant will conduct a feasibility study of the concession from the technical, legal, economic, financial, and environmental impact perspectives. The primary aim of this study will be to prepare a “reference business plan” that will serve simultaneously to (i) assess the financial feasibility and economic desirability of the concession, (ii) identify the levels of concession fees that bidders would be prepared to pay, as well as the purchase value of the rolling stock and other movable property to be set for the concession in the bidding documents, (iii) clarify the concessionaire company’s likely staffing target, (iv) establish the initial investment program to be carried out in the first five years, and (v) assess the evaluation basis of the business plans to be submitted by the bidders.

The reference business plan will address the business prospects, the commercial and rate policy, the general operating principles, human resources, training, and the detailed initial 5-year investment program,⁹ in light of transport demand, and a more summary program covering the 20 years thereafter (evaluation of investments in renovation in particular). It will be accompanied by 25-year financial projections in current CFA francs (general operating account, balance sheet, supply and uses table) in order to permit evaluation of the conditions for viability of the concession, in particular the level of the concession fee. The inflation assumptions used will be agreed between the consultant, the client, and donors.

Based on the reference business plan, the internal rate of return (IRR) of the initial investment program, and the IRR of the concession for the shareholders can be computed. It will also perform sensitivity analyses of these IRR as regards traffic and cost of the initial investment program.

⁹ It shall be assumed, in the reference business plan, that the initial investment program will be financed by own funds and debt in a minimum ratio of 20/80. The financing of subsequent investments borne by the concessionaire will be dealt with in the reference financial projections (i) by a provision for renewal if the renewal of existing facilities is involved, or (ii) in the case of new investments (capacity investments), by a combination of own funds and debt still observing the minimum ratio of 20/80.

The consultant will define and evaluate the social restructuring measures to be taken by the States, make proposals regarding clearing the liabilities of ..., and, if appropriate, for the turnover and management of the non-railway assets that are not eligible for incorporation into the concession, and will establish an action plan for security and environmental protection (clearly distinguishing between the responsibilities of the conceding authority and those befalling the concessionaire).

The consultant will study the economic role of the railway in the context of improved management in order to explain the economic interest, for the national communities, of the proposed railway privatization, operation, and investments for rehabilitation and modernization purposes. It will assess the economic rate of return of the project, taking into account the economic cost of the initial investment program, the growth in rail traffic and reduction in its cost made possible by the project, and the differential in transport costs between the rail and the road by comparing with and without the project situations.

The consultant will also provide, by comparison with the situation absent the concession project, the public finance impact of the operation, that is, the combined annual positive and negative flows between the conceding authority and the concessionaire, plus the restructuring costs associated with shutting down the activities of

Task d: Canvassing and prequalification. The consultant will write an information notice and, on the basis thereof, conduct an information campaign and canvassing of potential bidders on behalf of the State (s.) It will prepare the pre-qualification documents, which will include a general introduction to the project, a presentation on the concessioning process, the structure of the information to be provided by bidders, and the prequalification evaluation.

Task e: Technical bidding documents. The consultant will prepare the technical bidding documents, which will contain (i) technical, economic, financial, legal, and administrative information on the project and its environment, (ii) the detailed definition of the concession arrangement, (iii) the draft concession agreement, (iv) the draft tax agreement (if the concession is granted by the two States), (v) the regulation on the competitive bidding process, including the grid for analyzing and scoring proposals, and (vi) the list of documents to be submitted by bidders and, where appropriate, specimens thereof. The bidders will be invited to visit ... and ... and to conduct their own studies for purposes of preparing their proposals.

Task f: Fine-tuning conference. The consultant will participate in organizing a round table for the analysis and discussion of all the suggestions made and modifications introduced by the bidders. Upon conclusion of this conference, and in accordance with the choices made by the States, it will finalize the legal and technical documents to be incorporated into the final bidding materials.

Task g: Financial bidding documents. The consultant will prepare the financial bidding documents including (i) the final draft concession agreement, perhaps amended after hearing the

bidders during the stage of submitting technical proposals, (ii) the bid security model, (iii) the regulation governing the call for financial bids, in particular the modalities for submitting and opening bids as well as the criteria for the financial selection of the strategic shareholder (present value of the purchase price of equipment and the fixed portion of the concession fee over the duration of the concession).

Task h: Information for pre-qualified bidders. The consultant will establish and manage a documentation room (“data room”) at ... (headquarters of ...) that will be open to bidders during the period between the launch of the call for technical proposals and the submission of the technical proposals. This room will bring together all the documentation of value for evaluating the project which could not be included in the technical bidding materials themselves: the detailed accounts and traffic statistics of ..., where applicable any prior technical, economic, and financial studies, detailed plans, general reports on the economies of ... and ..., legislative and regulatory documents relating to land transport, and the investment code, tax code, labor code, etc. The list of the documentation in question will be agreed between the consultant and the steering committee.

Working with the steering committee, the consultant will be responsible for providing bidders with any written explanations they may request for purposes of responding to the calls for technical or financial bids.

Task i: Support in the selection process. The consultant will assist the steering committee with (i) opening prequalification applications, (ii) opening the technical proposals and interviewing the bidders, and (iii) opening the financial proposals. It will participate in the work of the steering committee and any ad hoc commissions established for purposes of analyzing proposals or hearing bidders.

Reports to be submitted by the consultant:

- Information notice for canvassing for bidders, in a draft version and then final version;
- Canvassing report;
- Pre-qualification documents, in a draft version and then final version;
- Report on the pre-qualification process;
- Status inventory report, inventory of property to be taken back, market study, feasibility study of the concession, and technical bidding documents , in a draft version and then final version;
- Information Memorandum
- Report on the opening of the technical proposals;
- Financial bidding documents , in a draft version and then final version; and
- Report on the opening of the financial proposals.

These reports will be produced in 24 copies (10 each for the administrations of ... and ..., 2 each for the donors financing the services).

C3. Human resources

The consultant's team shall include:

- An expert in business privatization and restructuring, including, if possible, concessioning
- A transport economist
- A railway operation specialist
- An engineer specialized in railway infrastructure
- An engineer specialized in railway motive power and rolling stock
- A financial analyst
- An accountant
- A legal specialist
- An environment specialist

The volume of work is estimated to require approximately 18 person/months of expert time. Performance of the services entails work at the head office of the consultant, visits to ... and ..., and canvassing of national and foreign bidders in ..., ..., South Africa, Western Europe, and North America.

D. INDICATIVE TIMETABLE

The total duration of the concessioning process is estimated at 21 months from its starting point, broken down as follows:

- Four months for recruiting the consultant responsible for supporting the steering entity for the concessioning (initial consultations, fine-tuning, and signing of contract);
- Three months for the feasibility study on concessioning (see C2 above);
- Ten months for the actual process of selecting the strategic shareholder of the concessionaire company (three months for canvassing and prequalification, four months for the technical selection, three months for the financial selection);
- Four months for preparation of the effective take-over of the operation by the concessionaire (creation of the concessionaire company, selection of the personnel to be required by the concessionaire, identification of financing for the investment program, and technical preparation for taking over operations).

| Task/month | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | |
|--|---|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|----|----|----|----|----|--|
| Recruitment of consultant | ■ | ■ | ■ | ■ | | | | | | | | | | | | | | | | | | | |
| Information notice for potential bidders | | | | ■ | ■ | | | | | | | | | | | | | | | | | | |
| Canvassing | | | | | | | ■ | | | | | | | | | | | | | | | | |
| Call for pre-qualification | | | | | | | | ■ | | | | | | | | | | | | | | | |
| Pre-qualification | | | | | | | | | ■ | | | | | | | | | | | | | | |
| Draft reports | | | | ■ | ■ | ■ | | | | | | | | | | | | | | | | | |
| Final reports | | | | | | | | ■ | ■ | | | | | | | | | | | | | | |
| Call for technical bids | | | | | | | | | | ■ | ■ | ■ | | | | | | | | | | | |
| Technical selection | | | | | | | | | | | | | ■ | ■ | | | | | | | | | |
| Call for financial bids | | | | | | | | | | | | | | | ■ | | | | | | | | |
| Financial selection | | | | | | | | | | | | | | | | ■ | | | | | | | |
| Signature of concession agreement | | | | | | | | | | | | | | | | | ■ | ■ | ■ | | | | |
| Entry into force | | | | | | | | | | | | | | | | | | | | | ■ | ■ | |

6.2. Text of call for expressions of interest

PRESIDENCY OF THE REPUBLIC

REPUBLIC OF

PRIVATIZATION AGENCY

PERMANENT SECRETARIAT

**NOTICE OF CALL FOR EXPRESSIONS OF INTEREST
FOR THE STRATEGIC SHAREHOLDER IN THE
CONCESSIONAIRE FOR THE ... RAILWAY**

The Government of the Republic of ... is initiating the concessioning process for the ... Railway. The concessionaire company shall take the form of a joint stock company under local laws; a minimum of 51 percent of its capital shall be held by the "strategic shareholder".

The concessionaire shall be responsible for the operation and management of the railways, including the technical and commercial operation of freight and passenger transportation services, maintenance, operation, renewal and remodeling of railway infrastructure, and for the property management of the railway property subject of the concession.

Enterprises and groups of enterprises interested in becoming the strategic shareholder are invited to make themselves known by letter, fax, or e-mail no later than at one of the addresses below:

Privatization Committee
Permanent Secretariat
(Attention: Mr.)
Street...
P. O. Box ...
City ...
Country ...
Tel: ...
Fax: ...
E-mail: ...

Address of consulting firm
(Attention: Mr.)
Street...
P. O. Box ...
City ...
Country ...
Tel: ...
Fax: ...
E-mail: ...

The pre-qualification material describing the general approach envisaged for the concession and the process for selecting the strategic shareholder will be addressed to those enterprises and groups of enterprises that have expressed their interest.

6.3. Text of confidentiality agreement

[specimen letter]

We the undersigned, [company name of corporation],

with its head office in [address of head office],

Represented by Mr./Mrs./Ms. [full name and title],

Recalling that our company _____ (hereinafter the “Bidder”) wishes to respond to the call for bids for the concessioning of the ... Railway issued by the Government of the Republic of ... (hereinafter the “Government”), and having indicated in this context our desire to receive information of a confidential nature (hereinafter the “Confidential Information”), hereby undertake to respect the conditions for the dissemination of said Confidential Information and the rules relating to its use and protection as defined below.

1. For the purposes of this Agreement, the term “Confidential Information” shall be deemed to include all information, of whatever nature, relating to the ... Railway and which we will obtain in writing or orally, including without reservation any written or printed document, or more generally any means of dissemination which may be selected by the Government and its Consultants during the period of validity of this Agreement.
2. We acknowledge that neither the Government, nor its Representatives, nor its Consultants provide or intend to provide any guarantee whatsoever as to the accuracy or completeness of the Confidential Information that will be provided. We acknowledge that the Government reserves the right to modify the conditions for and conduct of the competitive bidding process, and to refrain from following up on the bidding process, without prior notice or explanation. The decisions of the Government in this regard are final, and may not be the subject of any appeal or claim.
3. It is agreed, however, that this confidentiality obligation to which we subscribe by signing this document shall not cover information which, within the meaning of this Agreement, should be regarded as Confidential Information and which we can prove to:
 - (a) Have entered the public domain prior to its dissemination or thereafter, but in the latter case, not due to any fault which might be imputable to us; or
 - (b) Have previously been learned by us, it being possible to demonstrate such prior knowledge through the existence of appropriate records in our files; or
 - (c) Have been received legally, without limiting or violating this Agreement; or
 - (d) Have been revealed pursuant to a court injunction; or

- (e) Have been authorized for use or dissemination in writing by the Government or its Consultants.
4. In witness whereof, we expressly undertake by signing this document, without any condition or restriction, that such Confidential Information will be:
- (a) Protected and held strictly confidential and treated with the same degree of precaution and protection that we exercise with respect to our own Confidential Information of comparable importance;
 - (b) Used solely for the purposes of enabling us to formulate a proposal in respect of the concessioning of the ... Railway;
 - (c) Divulged under no circumstances, unless the written consent of the Government or its Consultants has been obtained in advance, to any individual or third company, with the exception of our own employees and consultants who, for the sole purpose of evaluating the proposed concessioning of the ... Railway, must receive said Confidential Information.

It is understood that we must warn our employees and consultants of the confidential nature of this Confidential Information and ensure that they comply with the terms of this Confidentiality Agreement. We shall be held accountable for any violation of this Agreement through their actions.

5. We recognize that the Government and its Consultants would suffer certain and significant harm in the event of failure to observe the obligation of secrecy and confidentiality set forth in this Agreement.
6. To ensure the confidentiality of the Confidential Information that may be exchanged under this Agreement, it is expressly agreed that the individuals identified below will be, respectively, the sole parties authorized to receive Confidential Information on our behalf.
7. In the event that any of the individuals mentioned in paragraph 6 were to be replaced, the new designation shall be the subject of a written notification from us.
8. In the event that the Government, its Representatives, or Consultants refrain at any time from exercising any right whatever arising from this Agreement, they may not in any case be deemed to have definitively refrained from exercising any clause whatsoever of this instrument.
9. All the Confidential Information conveyed and any copies thereof shall remain the property of the Government and must be returned immediately and automatically upon expiry of the validity of this Agreement.
10. This Agreement is concluded for a duration of 2 years from its effective date.
11. The obligation of confidentiality and secrecy shall extend until the expiry of the validity of the Agreement as provided pursuant to Article 10.

12. This Confidentiality Agreement is expressly subject to the law of

We acknowledge that any dispute which may arise as to the existence, validity, interpretation, enforcement, and execution of this Agreement and the effects thereof shall be subject to the arbitration procedures of the International Chamber of Commerce, to which jurisdiction in such matters is granted.

Done in ... on, 2002

Signature

6.4. Text of undertaking on ethics and transparency

[specimen letter]

We the undersigned, [company name of corporation],

with its head office in [address of head office],

Represented by Mr./Mrs./Ms. [full name and title],

Recalling that our company _____ (hereinafter the "Bidder") is responding to the call for bids for the concessioning of the ... Railway launched by the Government of the Republic of (hereinafter the "Government"), we hereby undertake to comply with the following provisions:

Article 1

The (*name to be inserted*) Company, in exchange for the right granted it by the Privatization Committee to submit a proposal aimed at obtaining the concession for the ... Railway, undertakes to:

- (1) Avoid any form of involvement in the preparation of the proposal aimed at obtaining the concession for the ... Railway, or of any document associated with such proposal, of
 - (a) Any employee or former employee of the (*name to be inserted*) Company who is currently in a technical assistance position with the national railway company or who was, at any time after, in a technical assistance position with the national railway company;
 - (b) Any employee or former employee of companies associated with the (*name to be inserted*) Company who is currently in a technical assistance position with the national railway company or who was, at any time after January 1, 1990, in a technical assistance position with the national railway company; or
 - (c) Any employee or former employee of any company or any agency or any third party who is currently in a technical assistance position with the national railway company or who was, at any time after January 1, 1990, in a technical assistance position with the national railway company;
- (2) Refrain from using in preparing the proposal aimed at obtaining the concession of the ... Railway, or preparing any other document associated with said proposal, any information obtained from a person referred to in subparagraph (a) above if said information is not otherwise available to all the bidders selected for submitting proposals aimed at obtaining the concession of the ... Railway.

Article 2

We acknowledge that the Privatization Committee reserves the right to exclude the (*name to be inserted*) Company from the concessioning process for the ... Railway should it determine, at any time, that the (*name to be inserted*) Company has failed to fulfill its obliga-

tions under Article 1 above, without the *(name to be inserted)* Company being entitled to claim any indemnification in this connection from the Privatization Committee or the Government of the Republic of

Article 3

It is understood that the Privatization Committee also reserves the right to cancel any agreement or understanding reached in the concessioning process for the ... Railway, including the Concession Agreement itself, should it determine, at any time, that the *(name to be inserted)* Company has failed to fulfill its obligations under Article 1 above, without the *(name to be inserted)* Company being entitled to claim any indemnification in this connection from the Privatization Committee or the Government of the Republic of However, the concession agreement, including any other understanding that constitutes an annex or codicil thereto, may only be canceled pursuant to the foregoing within a period of twelve (12) months following its signature.

Article 4

We acknowledge that this undertaking takes effect on the date it is signed by the *(name to be inserted)* Company and shall remain in force for as long as the *(name to be inserted)* Company is participating in the concessioning process for the ... Railway. However, the undertaking is deemed null and void in respect of the *(name to be inserted)* Company in the event that the latter is selected by the Privatization Committee to form the strategic shareholder for the future concessionaire company for the ... Railway, with effect from the 365th day following the signature of the Concession Agreement by the future concessionaire company.

Article 5

We acknowledge that any dispute which may arise as to the existence, validity, interpretation, enforcement, and execution of this Undertaking and the effects thereof shall be within the sole competence of the International Chamber of Commerce, to which jurisdiction in such matters is granted. Recourse to the International Chamber of Commerce shall suspend the enforcement of the measures referred to in Articles 2 and 3 above until such time as the final ruling is issued. The law applicable to this undertaking is French law. The seat for arbitration proceedings is Paris, France.

Done in on, 2002

Signature

6.5. Text of undertaking on avoiding corruption

[specimen letter]

We the undersigned, [company name of corporation],

with its head office in [address of head office],

Represented by Mr./Mrs./Ms. [full name and title],

Recalling that our company _____ (hereinafter the “Bidder”) is responding to the call for bids for the concessioning of the ... Railway Issued by the Government of the Republic of ... (hereinafter the “Government”), we hereby undertake to comply with the following provisions:

Article 1

For the purposes of this undertaking, the Government defines the following expressions as set forth below:

- (1) “corruption”: The act of any Bidder improperly proffering, at any time during the concessioning process for the ... Railway, either directly or indirectly, offers, promises, gifts, presents, or benefits of any kind in order to obtain from a public employee or advisor to the Congolese authorities, including the Cabinet of ..., that he or she perform or abstain from performing an action incumbent on his or her position, mission, or mandate or facilitated through his or her position, mission, or mandate, in order to obtain in its favor the award of the concession for the ... Railway;
- (2) “corrupt practices”: The act of any Bidder in intentionally distorting or twisting the facts in order to obtain in its favor the award of the concession for the ... Railway;
- (3) “authorities of the Republic of ...”: The Privatization Committee responsible for the concessioning process for the ... Railway;
- (4) “bidder”: A Congolese individual or legal entity participating or seeking to participate in the concessioning process for the ... Railway, including any employee, agent, or representative thereof;
- (5) “Government of the Republic of ...”: Includes all levels and subdivisions of administration at the national or local level of government.

Article 2

We have duly noted that the authorities of the Republic of ... wish to ensure that the concessioning process observes the strictest possible ethical standards applicable in this area. To this end, the authorities of the Republic of ...:

- i) Shall bar the Bidder from the concessioning process of the ... Railway if they determine at any time that the Bidder is guilty of corruption or has engaged in cor-

- rupt practices in the context of that process, in which event the Bidder may not claim indemnification of any kind from the authorities of the Republic of ... ;
- ii) Shall cancel any agreement or understanding reached in the context of the concessioning process of the ... Railway, including the Concession Agreement itself, if they determine at any time that the Bidder is guilty of corruption or has engaged in corrupt practices in the context of the concessioning process for the ... Railway, in which event the Bidder may not claim indemnification of any kind from the authorities of the Republic of ... However, the concession agreement, including any other understanding that constitutes an annex or codicil thereto, may only be canceled pursuant to the foregoing within a period of twelve (12) months following its signature;
 - iii) Shall recommend to the Government of the Republic of ... that it bar the Bidder and its affiliates, as well as the parent company of the Bidder and its other affiliates, for a period of five (5) years, from any award of contracts or public procurement to which the Government of the Republic of ... is a party, if they determine at any time that the Bidder is guilty of corruption or has engaged in corrupt practices in the context of the concessioning process for the ... Railway, in which event the Bidder may not claim indemnification of any kind from the authorities of the Republic of ...;
 - iv) Shall recommend to the Government of the Republic of ... that it initiate criminal or civil prosecution of the Bidder under the anticorruption laws and regulations in force in the Republic of ..., regardless of the domicile of the person corrupted or attempted to be corrupted, if they determine at any time that the Bidder is guilty of corruption in the context of the concessioning process for the ... Railway;
 - v) Shall inform the competent authorities of the domicile of the Bidder, in particular if the latter is domiciled in a country party to the Convention Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris on December 17, 1997, of the act of corruption of which the Bidder is accused by the authorities of the Republic of ... in the context of the concessioning process for the ... Railway.

Article 3

We acknowledge that when the authorities of the Republic of ... determine that the Bidder is guilty of corruption or has engaged in corrupt practices in the context of the concessioning process for the ... Railway, they shall inform the Bidder in writing of this finding. Prior to sending such notification, the authorities of the Republic of ... may, should they deem it appropriate, ask the Bidder to provide explanations of the deed of which it is accused.

Article 4

We acknowledge that any dispute which may arise as to the existence, validity, interpretation, enforcement, and execution of this Undertaking and the effects thereof shall be within the sole competence of the International Chamber of Commerce, to which jurisdiction in

such matters is granted. Recourse to the International Chamber of Commerce shall suspend the enforcement of the measures referred to in Article 2 (a) to (e) above until such time as the final ruling is issued. The law applicable to this undertaking is French law. The seat for arbitration proceedings is Paris, France.

Article 5

It is understood that this Undertaking shall take effect on the date it is signed by us and shall remain in force for as long as we continue to participate in the concessioning process for the ... Railway. However, the undertaking shall be null and void in respect of the Bidder selected by the authorities of the Republic of ... to become the concessionaire for the ... Railway as from the 365th day following the latter's signature of the Concession Agreement.

Done in on, 2002

Signature

6.6. Bid security text

[specimen letter]

We the undersigned, [*company name of corporation*],

with its head office in [*address of head office*],

Represented by Mr./Mrs./Ms. [*full name and title*],

Recalling that our company _____ (hereinafter the “Bidder”) is responding to the call for bids for the concessioning of the ... Railway issued by the Government of the Republic of ... (hereinafter the “Government”), hereby declare that we are providing security to the Bidder vis-à-vis the Beneficiary, up to the amount of in furtherance of the undertaking constituted by the Bidder's proposal.

We hereby obligate ourselves, successors, and assigns to pay the amount stipulated above to the beneficiary in the event that:

- (1) The Bidder should withdraw its offer during the specified validity period;
- (2) The Bidder should modify its financial proposal after the date and time deadline for submitting proposals;
- (3) The Bidder should make a false statement in its financial proposal;
- (4) The Bidder, having been declared successful bidder for the ... Railway concession, should fail, because of its demands or those of its doing, to establish the Concessionaire Company within sixty (60) calendar days following the date of award of the Concession;
- (5) The Bidder, having been declared successful bidder for the ... Railway concession, should fail to pay up a minimum amount of in capital within one hundred eighty (180) calendar days following the date of award of the Concession;
- (6) The Bidder, having been declared successful bidder for the ... Railway concession, should fail to have the Concessionaire Company sign the concession agreement as prescribed in the annex hereto, with completion of the incomplete portions, within not more than thirty (30) calendar days following the date on which the Concessionaire Company is established.

We undertake to pay to the Beneficiary the amount stipulated above, upon receipt of its first written request and without prior demand of performance, and without the capacity to defer payment or lodge a protest for any reason whatsoever. It is essential to note that, in its request, the Beneficiary shall stipulate that the amount it claims is owed to it owing to the emergence of one or more of the conditions set forth above.

This guarantee is valid for two hundred seventy (270) calendar days from the opening of the financial proposals, and shall automatically become null and void after that period, without any formality or reference to this instrument being required.

However, in the event that the Bidder is declared successful, it is agreed that the release from this guarantee shall not occur until such time as the security to be provided by the railway concessionaire has been lodged in accordance with the provisions of Article ... of, and Annex ... to, the concession agreement.

In the event that the Bidder should be disqualified upon opening of the proposals, and without prejudice to the stipulations set forth above, this guarantee shall automatically become null and void.

This undertaking is subject, for purposes of interpretation and enforcement, to the law of The courts of ... shall have jurisdiction in the event of disputes.

Done in on, 2002

[handwritten notation: Good for security of up to the amount of]

Signature.....

Title

6.7. Contents of pre-qualification documents

The pre-qualification documents must include:

- A disclaimer describing the nature of the document being conveyed, specifying in particular:
 - The official nature of the document (“these materials were approved by the Government of the Republic of ... on”).
 - The non-binding nature of the information provided (“neither the Government of the Republic of ... nor the consulting firm ... has or will assume any liability as to the precision and exhaustiveness of the information conveyed in these materials. Each bidder is invited to verify the information contained in these materials....”)
 - The government’s freedom of action (“the Government of the Republic of ... reserves the right to modify the conditions for and conduct of the competitive bidding process, and to refrain from following up on the bidding process. The Government’s decisions do not need to be explained and are not subject to appeal or justification....”)
- General information on the concessioning project, stipulating:
 - The goals pursued by the government
 - Characterization of the concession (summary contents of the anticipated basic concession agreement)
 - The qualifications expected of bidders and of the future concessionaire company
 - The selection procedure applied:
 - Answers to be provided
 - Organization of procedure and the timetable adopted
 - Evaluation criteria adopted
- Clarifications in respect of pre-qualification
 - Evaluation criteria for the pre-qualification; generally, these may relate to the technical competence and financial capacity:
 - Competency as regards railway experience (references, human resources)
 - Experience in comparable countries and with similar operations
 - Financial soundness (balance sheet structure, shareholders, profitability)
 - Instructions on information to be provided
 - Documentation and explanatory material to be provided
 - Response format
 - Commitment forms/letters

- Summary description of the network to be conceded , specifying:
 - The history and current status of the network
 - The technical characteristics of the infrastructure
 - Network length
 - Track characteristics
 - Signaling
 - Physical and human resources available
 - Motive power
 - rolling stock
 - Staffing
 - Activities of the network
 - Markets
 - Operational performance
 - General organization of network

6.8. Contents of selection materials

The Technical Bidding Documents must contain:

- An overview of the concession arrangement, summarizing the contents of the contemplated concession agreement
- A description of the procedure envisaged for the selection of the strategic shareholder
 - Stages in the procedure
 - Committee responsible (composition, organization of work)
 - Provisional timetable
 - Characteristics of the potential bidders
- General description of the due diligence phase for the preparation of the technical proposals to be submitted by the pre-qualified bidders
 - Submission modalities (date, time of submission, language)
 - Clarifications as regards information access conditions
 - Contacts for questions and requests for information
 - Data room (access conditions, contents, etc.)
 - On-site visits
- General description of the contents of the technical proposal
 - ✓ Presentation of bidder (information to be provided)
 - ✓ Business plan (with commercial strategy, personnel policy, organization, etc.)
- A description of the evaluation and selection procedure
 - Criteria
 - Points examined
 - Scoring

The Financial Bidding Documents must contain:

- Applicable rules of procedure
 - List of bidders eligible
 - Applicable rules as regards the composition of consortia (possibility for limited changes, ban on regrouping, etc.)
 - Modalities for presenting candidacies and proposals
 - ✓ Composition of consortium with itemization of shares
 - ✓ Provision of a Bid Security (in the amount of ..., using specimen text annexed)
 - ✓ Obligation to sign the final draft concession arrangement and initial each page
 - ✓ Physical submission of proposals (envelopes, etc.)

- Competent committee
 - ✓ Composition
 - ✓ Organization of sessions (public sessions and private sessions)
 - ✓ Opening of bids
- Content of financial proposals
 - Criteria adopted
 - Calculation method for financial proposals
 - Selection of preferred bidder
- Stages following designation
 - Administrative closing (formation of company, paying in of capital)
 - Signature of concession agreement
 - Financial closing
 - Timetable for entry into force

6.9. Promoters' commitment letter regarding capital

Specimen commitment letter on the stability of the shareholders of the reference company and concessionaire company

Interministerial Committee for the Concessions of

the ... Railway

(Place and date)

Gentlemen,

The Company or Group of companies (*list member companies in the bidder Group*) (“the Bidder”) hereby undertakes, in the event that the Bidder is awarded the concession:

1. to have the Company or Group of companies, within thirty days following the establishment of the concessionaire company for the ... Railway, sign a commitment letter indicating that the Company or Group of companies undertakes jointly to maintain, for a period of seven years following the effective date of the concession agreement, oversight of the Strategic Shareholder Company of the concessionaire company of the ... Railway;

and

2. to have the Strategic Shareholder Company of the concessionaire company for the ... Railway sign a commitment letter indicating that the Strategic shareholder Company undertakes to hold, directly or indirectly, a minimum of 51 percent of the capital of the concessionaire company for the ... Railway throughout the entire duration of the concession.

The Bidder explicitly acknowledges that the failure to sign this letter or any deviation in the text of this letter from the model shown in the Financial Bidding Materials shall constitute grounds for disqualification of its proposal.

The undersigned is duly authorized to represent the Bidder and to enter into the commitments set forth in this letter.

6.10. Standard concession agreement

Standard Concession Agreement for Railway Operators

Between

- . the Republic of ... , represented by the Minister of Transportation and the Minister of Finance, hereinafter referred to as “the State”,

And

- . the *Société d'exploitation des transports ferroviaires ...* , a limited liability company with headquarters in ... , represented by the Chairman of its Board of Directors, hereinafter referred to as "the concessionaire",

Jointly referred to hereinafter as “the Parties.”

It has been agreed as follows:

SUMMARY

Preamble [*to be drafted*]

Definitions

TITLE ONE. GENERAL INFORMATION

| | |
|--------------|---|
| Article 1-1 | Purpose of the Agreement |
| Article 1-2 | Railway operations |
| Article 1-3 | Commercial nature of railway operations |
| Article 1-4 | Assignment of rights and obligations of the Concessionaire |
| Article 1-5 | State guarantee |
| Article 1-6 | Equity interest |
| Article 1-7 | Standards, norms and methods of maintenance and operation of Railway Infrastructure and equipment |
| Article 1-8 | Environnemental protection |
| Article 1-9 | Insurance |
| Article 1-10 | Cooperation with other railway enterprises and with foreign railway networks |
| Article 1-11 | Personnel of the Concessionaire |
| Article 1-12 | Re-hiring by the Concessionaire of some employees of the SNCF |
| Article 1-13 | Swearing-in of some employees of the Concessionaire |
| Article 1-14 | Continued validity of some contracts concluded prior to the entry into force of the Concession Agreement |
| Article 1-15 | Changes in legislation or regulations that pose a serious and lasting threat to the financial equilibrium of the Concessionaire |

TITLE 2. THE RAILWAY NETWORK CONCESSIONED

| | |
|--------------|--|
| Article 2-1 | Composition of the Railway Network Concessioned |
| Article 2-2 | Transfer and inventory of the Railway Network Concessioned |
| Article 2-3 | Managerial powers of the Railway Network Concessioned |
| Article 2-4 | Occupancy permits and leases |
| Article 2-5 | Property no longer assigned to railway service |
| Article 2-6 | Recovery by the State of property belonging to the Network Concessioned |
| Article 2-7 | Acquisition of lands by means of expropriation in the public interest |
| Article 2-8 | Installation of conduits on public lands belonging to the Network Concessioned |
| Article 2-9 | Public crossings |
| Article 2-10 | Private crossings |
| Article 2-11 | Protection of persons, property, capital works and installations |

TITLE 3. MANAGEMENT OF RAILWAY INFRASTRUCTURE

| | |
|-------------|---|
| Article 3-1 | Delegation of contracting authority to the Concessionaire |
| Article 3-2 | Integration of works into the Railway Network Concessioned |
| Article 3-3 | Private rail branch lines |
| Article 3-4 | Telecommunications systems |
| Article 3-5 | State approval of operations to renew and remodel Railway Infrastructure |
| Article 3-6 | Non-State-approved operations to renew and remodel Railway Infrastructure |
| Article 3-7 | Current rehabilitation or development works |

TITLE 4. COMMERCIAL RAIL SERVICES OPERATED BY THE CONCESSIONAIRE

| | |
|--------------|--|
| Article 4-1 | Commercial Rail Services |
| Article 4-2 | Door-to-door and multimodal transport services |
| Article 4-3 | Configuration and organization of commercial freight services |
| Article 4-4 | Individual freight transport contracts |
| Article 4-5 | Auxiliary transport activities |
| Article 4-6 | Configuration and organization of regular commercial passenger transport |
| Article 4-7 | Individual passenger transport contracts |
| Article 4-8 | Pricing of Commercial Rail Services: general principles |
| Article 4-9 | Price-setting methods |
| Article 4-10 | Prices of intermodal and international transport |

TITLE 5. PUBLIC SERVICE OBLIGATIONS OF THE CONCESSIONNAIRE

| | |
|-------------|---|
| Article 5-1 | Rail services operated as a public service obligation |
| Article 5-2 | Reduced fares imposed on the Concessionaire |
| Article 5-3 | Financial compensation for public service obligations |
| Article 5-4 | Requisition of the Concessionaire's resources |

TITLE 6. USE BY OTHER RAIL OPERATORS OF THE INFRASTRUCTURE OF THE RAILWAY CONCESSIONED

| | |
|-------------|---|
| Article 6-1 | Operating licenses for rail transport on the Railway Network Concessioned |
| Article 6-2 | Case of serious dereliction of duty on the part of the Concessionaire vis-à-vis a client or group of clients |
| Article 6-3 | Legal proceedings related to serious dereliction of duty on the part of the Concessionaire vis-à-vis a client or group of clients |
| Article 6-4 | Usage Agreements for rail infrastructure – General observations |
| Article 6-5 | Negotiation of Rail Infrastructure Usage Agreements with holders of licenses (a) and (b) |
| Article 6-6 | Negotiation of Rail Infrastructure Usage Agreements with holders of licenses (c), (d) and (e) |

TITLE 7. RAILWAY EQUIPMENT

| | |
|-------------|--|
| Article 7-1 | Railway Equipment used by the Concessionaire |
| Article 7-2 | Railway transport equipment utilized for services operated as a mandatory public service |
| Article 7-3 | Wagons owned by private parties |
| Article 7-4 | Railway Equipment used by other Rail Transport Operators |
| Article 7-5 | State's right of first refusal upon the sale, by the Concessionaire, of Railway Equipment |
| Article 7-6 | Acquisition by the Concessionaire of SNCF Railway Equipment at the start of the concession |

TITLE 8. CONCESSION FEE

| | |
|-------------|---------------------------------------|
| Article 8-1 | Concession Fee – General observations |
| Article 8-2 | Amount of the Concession Fee |
| Article 8-3 | Payment of the Concession Fee |

TITLE 9. ACCOUNTING AND TAX PROVISIONS

| | |
|-------------|--|
| Article 9-1 | Accounts of the Concessionaire |
| Article 9-2 | Tax provisions |
| Article 9-3 | Land tax contributions |
| Article 9-4 | Purchase of fuel under an exemption from the contribution to the road fund |

TITLE 10. EFFECTIVENESS, DURATION AND END OF THE CONCESSION

| | |
|--------------|----------------------------|
| Article 10-1 | Entry into force |
| Article 10-2 | Duration of the concession |

| | |
|--------------|---|
| Article 10-3 | Early cancellation |
| Article 10-4 | Dismissal for breach of obligation |
| Article 10-5 | Dismissal by reason of dissolution or liquidation |
| Article 10-6 | Termination by reason of <i>force majeure</i> |
| Article 10-7 | Disposal of property, contracts, obligations, debts and responsibilities of the Concessionaire upon expiration of the Agreement |
| Article 10-8 | Lenders' right of substitution |

TITLE 11. DISPUTES AND LITIGATION

| | |
|--------------|---|
| Article 11-1 | Procedure for resolution of disputes and litigation |
| Article 11-2 | Applicable law |

TITLE 12. MONITORING OF EXECUTION OF THE CONCESSION

| | |
|--------------|--|
| Article 12-1 | Concession Monitoring Committee |
| Article 12-2 | Documents to be submitted by the Concessionaire |
| Article 12-3 | Audit of the concession |
| Article 12-4 | Penalties in the event of dereliction of duty or misdeed on the part of the Concessionaire |
| Article 12-5 | Service provision and technical assistance contracts |
| Article 12-6 | Management fee |

ANNEXES

| | |
|---------|---|
| Annex A | Nomenclature and functioning of balance sheet accounts specific to the concession |
| Annex B | Fixed amount F(n) of the Concession Fee |
| Annex C | List of contracts for which the Concessionaire takes the place of the SNCF |
| Annex D | Ongoing rehabilitation and development works |
| Annex E | Standard format for monthly statistical activity report |

PREAMBLE

[to be drafted]

DEFINITIONS

"Commercial Rail Services": Commercial rail freight and passenger services operated by the Concessionaire, which the Concessionaire considers able to generate adequate profits in view of the performance objectives that it has set for itself. (See Article 4-1).

"Concessionaire": the *Société d'exploitation des transports ferroviaires ...*, signatory of the Concession Agreement.

"Concession Agreement": the Concession Agreement contained herein, including its definitions, annexes, and amendments.

"Concession Fee": fee, defined in Article 8-1, payable by the Concessionaire to the State.

"General Safety Regulation (GSR) on Railway Operations": all regulatory texts establishing the rules for circulation of trains to be applied by the Concessionaire in order to ensure the safety of rail traffic. (See Article 1-6).

"Property to be Returned": Railway Infrastructure constituting the Railway Network Concessed, made available to the Concessionaire upon entry into force of the Concession Agreement or built subsequently under State financing.

"Property to be Taken Back": Railway Infrastructure constituting the Railway Network Concessed, constructed subsequent to the effectiveness of the Concession Agreement, under financing of the Concessionaire.

"Rail Service Operated as a Public Service": a rail service operated by the Concessionaire at the express request of the State or of local authorities. (See Article 5-1).

"Rail Transport Operator": an enterprise, other than the Concessionaire, that holds a Rail Transport Operator's license.

"Railway Equipment": a piece of apparatus designed to roll on the track, such as a self-propelled hauling device (locomotive), wagons, coaches, self-propelled passenger transport conveyances, track maintenance apparatus, and rescue apparatus.

"Railway Infrastructure": any real asset that is a part the Railway Network Concessioned, as described in Article 2-1.

"Railway Infrastructure Usage Agreement": an agreement entered into by the Concessionaire and a Rail Transport Operator and pertaining to the utilization, by the Rail Transport Operator, of certain infrastructure belonging to the railway network.

"Railway Network Concessioned": all rail infrastructure made available to the Concessionaire. The composition of the Railway Network Concessioned is defined in Article 2-1.

"Railway Operations:" Railway operations shall be taken to mean, in accordance with the provisions of Article 1-2:

- . the technical and commercial operation of freight and passenger transport services on the Railway Network Concessioned;
- . the operation, maintenance, renewal and remodeling of Railway Infrastructure belonging to the Railway Network Concessioned; and
- . the management of real estate of the Railway Network Concessioned.

"The State": the Republic of

"Users' License for Rail Transport": a license issued by the State to a Rail Transport Operator, who is thereby allowed to operate rail services on all or part of the Railway Network Concessioned (see Article 6-1).

TITLE ONE

GENERAL INFORMATION

Article 1-1. Purpose of the Concession Agreement

The State places under concession, with the *Société d'exploitation des transports ferroviaires ...* and under terms and conditions defined by the present Agreement (the "Concession Agreement"), railway operations on the national railway network (the "Railway Network Concessioned") as of the date of signing of the Concession Agreement.

Article 1-2. Railway operations

Railway Operations, in the context of this Concession Agreement, shall be understood to mean:

- . the technical and commercial operation of freight and passenger rail transport services on the Railway Network Concessioned;
- . the operation, maintenance, renewal and remodeling of Railway Infrastructure belonging to the Railway Network Concessioned; and, finally,
- . the management of real estate of the Railway Network Concessioned.

Article 1-3. Commercial nature of Railway Operations

Railway Operations are considered to be a commercial activity, and as such are subject to the provisions of the Concession Agreement and Commercial Code.

The Concessionaire shall pursue its operations on a commercial basis, in active competition with other modes of transport and transportation enterprises.

Railway Operations shall be carried out at the expense and risk of the Concessionaire. The Concessionaire may in no event lay claim to any indemnification from the State in the event that economic conditions encountered are different from those upon which it based its operational forecast.

Article 1-4. Assignment of rights and obligations of the Concessionaire

The Concessionaire may not assign to any third party its rights and obligations under the terms of the Concession Agreement.

However, the Concessionaire is authorized to delegate, to other Rail Transport Operators holding a rail transport license, the technical and commercial operation of certain freight or passenger transport services. The rights and obligations of the Concessionaire as defined in the Concession Agreement then become applicable, by operation of law, to the licensee with regard to the operation of the services in question.

Moreover, the Concessionaire is entitled to use the services of subcontractors for the execution of services of any nature associated with Railway Operations, and may enter into any contract of association, with third parties, for the execution of said services.

Article 1-5. State guarantee

The State guarantees the Concessionaire that it may, as soon as the Concession Agreement enters into force, take any measure in order to conduct Railway Operations, free from any commitment, obligation, or responsibility of the State or of the *Société nationale des chemins de fer ...* resulting from Railway Operations occurring prior to the entry into force of the Concession Agreement. The State guarantees that the Concessionaire shall not be held liable for any third-party action arising from events that predate the entry into force of the Concession Agreement.

Article 1-6. Equity interest

In furtherance of its objectives, the Concessionaire may hold or create subsidiaries or take out equity interest in entities or companies, whether based in the Republic of ... or abroad, the goals of which are related or complementary to its operations.

Article 1-7. Standards, norms and methods of maintenance and operation of Railway Infrastructure and Railway Equipment

The State exercises technical oversight of the Concessionaire's activities under legal terms and conditions applicable to transport sector enterprises.

In order to ensure the safety of persons and goods transported, Railway Infrastructure and Railway Equipment shall be maintained in good condition and shall be operated in accordance with standards, norms and methods of maintenance and operation determined by the Concessionaire based on common practice in the railway industry and the recommendations of the International Union of Railways.

In the event that the arrangements made by the Concessionaire prove to be completely incompatible with the requirements of the preceding paragraph, the State may, after having heard from the Concessionaire, order the adoption of the measures necessary. If the Concessionaire fails to comply and fifteen days elapse without a response to formal notification, the State may, on its own initiative, have the necessary work done, at the expense and risk of the Concessionaire.

Specific provisions intended to ensure the safety of rail transport and the protection of the environment may, in case of necessity, be made by State Decree, after hearing from the Concessionaire.

The General Regulation on the Safety (GRS) of Railway Operations is adopted and modified by Decree issued by the Minister of Transportation, either at the initiative of the Concessionaire, or at the initiative of the Minister of Transport, after hearing from the Concessionaire. The GRS applicable upon entry into force of the Concession Agreement is that applicable to the railway network of the *Société nationale des chemins de fer ...* (SNCF) on the day preceding the entry into force of the Concession Agreement.

Article 1-8. Environmental protection

The Concessionaire must adhere to legislative and regulatory provisions pertaining to environmental protection. At its own expense, it shall take the necessary measures to repair or restore sites and soil whenever capital works or equipment that it operates do damage to the environment or are carried out in violation of environmental regulations. In the event of destruction or permanent depreciation of a capital work belonging to the Railway Network Concessioned, the Concessionaire shall take the necessary measures to repair any damage done to the site by the work in question.

Subject to the provisions of the third paragraph of this Article, the Concessionaire is not responsible, however, for restoring or rebuilding the sites and soil of the Railway Network Concessioned if the environmental damage done by Railway Operations predates the entry into force of the Concession Agreement. The State and the Concessionaire shall prepare jointly, within six months of the entry into force of the Concession Agreement, an environmental action plan for the restoration and reconstruction of sites and soil of the Railway Network Concessioned that were contaminated prior to the entry into force of the Concession Agreement. The Concessionaire is responsible for implementation of the environmental action plan, which shall take place over a period not to exceed five years following its preparation. The State shall bear all costs associated with implementing the environmental action plan.

In the event of failure on the part of the Concessionaire to adhere to the procedures set forth in the environmental action plan, and if a period of three months elapses without response from the Concessionaire to the official notification from the State to the Concessionaire, then the State is no longer subject to the provisions of the preceding paragraph and can compel the Concessionaire to comply, at its sole expense, with any legislative or regulatory provision relative to the environment, even including those that would oblige the Concessionaire to restore or rebuild sites and soil belonging to the Railway Network Concessioned that were contaminated prior to the entry into force of the Concession Agreement.

Article 1-9. Insurance

The Concessionaire promises to take out the insurance policies required to cover, subject to reasonable deductibles, risks associated with Railway Operations on the Railway Network Concessioned. To this end, the Concessionaire is bound to take out one or more insurance policies covering civil liability vis-à-vis clients or third parties, as well as the risk of fire or destruction of property belonging to the Railway Network Concessioned. The Concessionaire pledges to provide the State, upon request, with a copy of the insurance policies so that the State may verify their soundness, the scope of risk covered and the procedures for indemnification.

Article 1-10. Cooperation with other railway enterprises and with foreign railway networks

The Concessionaire shall cultivate a policy of active cooperation with other rail enterprises operating within the national borders and with foreign networks, with a view to promoting national and international rail transport.

To that end and, depending on the case, subject to legal provisions pertaining to competition and international treaties, the Concessionaire shall, with other railway enterprises and foreign railway networks, sign any cooperation agreement and create any joint entity that can help promote and implement national and international rail traffic.

Article 1-11. Personnel of the Concessionaire

The Concessionaire's employees are subject to Labor Code provisions applicable to salaried employees of the private sector. They are covered by the policy on pensions, social security and medical coverage for salaried employees of the private sector.

The Concessionaire shall define and modify its personnel policy in accordance with procedures set forth in the Labor Code.

Article 1-12. Re-hiring by the Concessionaire of some employees of the SNCF

The Concessionaire shall re-hire, as of the date of entry into force of the Concession Agreement, employees of the *Société nationale des chemins de fer ...* (SNCF) as per a list which it shall forward to the State within 15 days of entry into force of this Agreement, at the latest. The total number of these employees shall not be less than ...

The State shall assume responsibility for, and bear the cost of, resolving the status of personnel rehired by the Concessionaire as of the date of their re-hiring, in particular the payment of salaries, social security, and pension contributions, as well as the payment of the pensions of employees who were, prior to their rehiring, covered by a pension policy other than the one applicable to private sector employees.

The Concessionaire has no responsibility whatsoever vis-à-vis employees of the *Société nationale des chemins de fer ...* (SNCF) whom it does not re-hire as of the date of entry into force of this Concession Agreement.

Article 1-13. Swearing-in of some employees of the Concessionaire

Employees of the Concessionaire who are appointed to tasks of fee collection, verification of passenger tickets, and railway surveillance may be sworn in.

Article 1-14. Continued validity of some contracts concluded prior to the entry into force of the Concession Agreement

As an exception to the provisions of Article 1-5, the Concessionaire, by sole virtue of the concession granted to it, takes the place of the *Société nationale des chemins de fer ...*, formerly responsible for Railway Operations, in exercising the latter's rights and responsibilities with regard to third party beneficiaries of those contracts signed prior to the date of entry into force of the Concession Agreement as listed in Annex C.

Any obligation contracted by the *Société nationale des chemins de fer ...* prior to the date of entry into force of the Concession Agreement, and that does not derive expressly from contracts listed in Annex C, is not binding with respect to the Concessionaire.

The Concessionaire does not assume any debts, claims, or liabilities of the *Société nationale des chemins de fer ...*, or in connection with any of the contracts listed in Annex C, which may have been generated by events occurring prior to the date of effectiveness of the Concession Agreement.

Article 1-15. Changes in legislation or regulations that pose a serious and lasting threat to the financial equilibrium of the Concessionaire

In the event that legislation or regulations, particularly tax laws, labor laws, or laws pertaining to environmental safety and protection, were to alter the circumstances of Railway Operations in such a way as to pose a serious and lasting threat to the financial equilibrium of the Concessionaire, the parties agree to re-examine, at the Concessionaire's request, the provisions of the Concession Agreement. In the event of agreement, the parties shall sign an amendment to the Concession Agreement. If, within six months of the Concessionaire's request, no agreement has been reached, an arbitration procedure as defined in Article 11-1 shall be initiated.

TITLE 2 – THE RAILWAY NETWORK CONCESSIONED

Article 2-1. Composition of the Railway Network Concessioned

The Railway Network Concessioned consists, at the time of the signing of the Concession Agreement, of all rail infrastructure established for the operation of freight and passenger rail transport services on the national railway network operated as of this same date. Any modifications to the general configuration of the Railway Network Concessioned (e.g., integration of new lines, elimination of lines, etc.) shall occur by means of amendments to the present Agreement.

The Railway Network Concessioned is public property.

Railway Infrastructure belonging to the Railway Network Concessioned consist of the following elements:

- lands occupied by railway infrastructure;
- track infrastructure, including: main frame and sub-grade, particularly embankments, ditches, drains, gutters, trenches, aqueducts, slope-protection plantings, passenger and freight platforms, shoulders and tracks, enclosing walls, hedges, fences;
- civil engineering structures, including : rail overpasses, viaducts, culverts and other track infrastructure for obstacle avoidance, road overpasses, foot-bridges, underpasses and other track-crossing infrastructure accommodating vehicular or pedestrian traffic, tunnels, retaining walls and works providing protection against falling rocks;
- road and pedestrian crossings, including facilities intended to ensure the safety of vehicular and pedestrian traffic;
- superstructure of the track, particularly rails and inner rails, rails and girders, ties, ballast, including gravel and sand, track apparatus;
- roadways leading to passenger- and freight-handling plazas, including road access;
- track and station security and signaling facilities and fixed telecommunications installations, including installations for the production, transformation and distribution of electricity for signaling and telecommunications functions;
- installations for the transformation, transport, and distribution of electric current for train propulsion: sub-stations, feeder lines between sub-stations and contact wires, overhead electrical lines and their supports;
- buildings at passenger stations, stops and terminals, buildings at freight stations and terminals;
- public lighting installations around stations and passenger- and freight-handling plazas;

- buildings used specifically in the service of infrastructure;
- workshops and fixed installations for the maintenance of rail equipment.

Movable goods, even if associated with the aforementioned real assets, are not part of the Railway Infrastructure.

Article 2-2. Transfer and inventory of the Railway Network Concessioned

The Railway Network Concessioned is made available to the Concessionaire by the State under the legal regime applicable to property concessioned.

Rail infrastructure of the Railway Network Concessioned handed over to the Concessionaire upon entry into force of the Concession Agreement and those built subsequently with State financing constitute the concession's Property to be Returned. Rail infrastructure of the Railway Network Concessioned that were built subsequent to the entry into force of the Concession Agreement under financing of the Concessionaire constitute the concession's Property to be Taken Back.

The Concessionaire has an obligation, at the end of the concession, to hand back to the State the Railway Network Concessioned in a condition conforming to the operational use for which it is intended.

The Concessionaire shall maintain, in a format prescribed by the State, a permanent updated inventory of the Railway Network Concessioned. This inventory may be consulted and verified at any time by the State. An initial inventory shall be established, at the Concessionaire's expense, and exchanged between the State and the Concessionaire, within six months of the entry into force of the present Concession Agreement.

Article 2-3. Managerial powers of the Railway Network Concessioned

The Concessionaire shall manage the Railway Network Concessioned.

For this purpose, and subject to the legislative and regulatory provisions applicable to the works declared to be in the general interest and of public utility, the Concessionaire shall exercise all managerial powers over real estate belonging to the Railway Network Concessioned. It assumes, subject to the following provisions relative to the transfer of property, all rights and obligations of the owner. It acts in lieu of the State and represents the State in legal proceedings.

The Concessionaire is not authorized, however, to proceed with the transfer of property of the Railway Network Concessioned. This provision does not apply to materials and components coming from operations related to the maintenance, renewal, and remodeling of rail infrastructure, which the Concessionaire may sell at a profit, as indicated in Article 3-3 below.

Article 2-4. Occupancy permits and leases

The Concessionaire may, for any real estate of the Railway Network Concessioned, grant occupancy permits, issue leases, and set and collect fees, rents and miscellaneous revenues for its own profit.

However, the occupancy permits and leases issued by the Concessionaire are subject to the counter-signature of the State in instances where their duration exceeds the duration of the period remaining under the concession.

Article 2-5. Property no longer assigned to railway service

Lands and other real estate belonging to the Railway Network Concessioned that are no longer assigned to rail services or to ancillary services of rail service and to related activities and/or that do not present reasonable prospects of future use related to said services and activities, shall be handed back, without delay and without indemnity, to the State. The handing back shall occur either at the initiative of the Concessionaire or at the express request of the State, after hearing from the Concessionaire.

Article 2-6. Recovery by the State of property belonging to the Railway Network Concessioned

Real estate belonging to the Railway Network Concessioned and used by the Concessionaire in the pursuit of his activity cannot be repossessed by the State or transferred to territorial authorities except for reasons of public utility, and in exchange either for the prior reconstitution by the State of the repossessed property, or for the payment to the Concessionaire of an indemnity equal to the replacement value of the repossessed property. This indemnity shall be evaluated and paid in such a way as to permit the Concessionaire to proceed with the reconstitution of the repossessed property prior to the date of actual repossession.

Article 2-7. Acquisition of lands by means of expropriation in the public interest

The Concessionaire is vested, for the acquisition of lands needed to carry out operations to remodel rail infrastructure, with the rights that legislation and regulations confer upon the Administration for the acquisition of lands by means of expropriation in the public interest. The lands shall be acquired by the Concessionaire on behalf of the State and shall become public property. The acquisition shall be financed by the Concessionaire, unless the State has agreed to ensure said financing in part or in whole.

Article 2-8. Installation of lines and conduits on public lands belonging to the Railway Network Concessioned

The installation by third parties, on lands belonging to the Railway Network Concessioned, of lines and conduits for public or private use, particularly including telecommunications arteries,

facilities for the transport and distribution of electric power, gas, hydrocarbons, potable water and wastewater, shall be regulated by a contract entered into by the Concessionaire and the manager or Concessionaire of the service in question.

The contract is subject to the counter-signature of the State in the event that its duration exceeds the time period remaining under the concession.

Article 2-9. Public crossings

Crossings at the intersections of rail lines of the Railway Network Concessioned and public roadways are authorized by Decree of the Minister of Roads, after hearing from the Concessionaire.

The Decree shall specify the equipment to be installed and the conditions under which any surveillance of the crossing is to be done by the Concessionaire.

Road and rail works to create the crossing shall be performed and financed by the State.

The Concessionaire shall be responsible for the maintenance of rail installations and signals at the crossing and for preparing visible lozenges. The State (or the entity designated by it in the Decree referred to in the first paragraph of the present Article) shall be responsible for setting up and maintaining road-signaling devices.

Charges incurred by the Concessionaire in connection with maintenance and operation of the crossings referred to in the present Article shall be partially (i.e. 50 percent) covered by a contribution of the State paid to the Concessionaire. The amount of the contribution shall be the object of an evaluation submitted annually by the Concessionaire on a date set by the State. The payment of the contribution shall occur in quarterly installments equal to one fourth of the evaluation, and valued as of the first day of the civil quarter.

Article 2-10. Private crossings

The installation of crossings at the intersections of rail lines belonging to the Railway Network Concessioned and of private vehicular or pedestrian thoroughfares may be authorized by the Concessionaire.

The procedures for the creation, maintenance, and management of these crossings are fixed by special Agreements between the Concessionaire and the beneficiaries. The Special Agreement shall be subject to counter-signature by the State in the event that its duration exceeds the time period remaining under the concession.

Article 2-11. Protection of persons, property, capital works and installations

Policing measures and arrangements needed to ensure the protection of persons, property, capital works and installations within the limits of the Railway Network Concessioned shall be determined by the Minister of Security, after hearing from the Concessionaire.

Policing tasks shall be handled by the State and carried out at its expense.

Guard duties shall be performed by the Concessionaire and at its expense.

Officers of the police, army and customs services who are responsible, in accordance with the provisions of this Article, for maintaining order on trains and for surveillance of the railway, shall be transported free of charge on the trains when they are on duty. This obligation does not entitle the Concessionaire to any financial compensation.

TITLE 3

MANAGEMENT OF RAILWAY INFRASTRUCTURE

Article 3-1. Delegation of contracting authority to the Concessionaire

The State shall delegate to the Concessionaire contracting authority for all works and operations to be conducted on the Railway Network Concessioned. The Concessionaire shall organize the use and ensure the operations of rail infrastructure; it shall determine programs of maintenance, renewal, and remodeling of rail infrastructure and shall carry out works or arrange for them to be carried out.

Rules for procurement of works and supplies shall be freely determined by the Concessionaire.

The Concessionaire shall bear, directly and in their entirety, charges relative to the operation, maintenance, renewal and remodeling of rail infrastructure, subject, on the one hand, to the State's financing of investments for the remodeling or development of infrastructure associated with public service operations, as may be set forth in the agreements concluded between the State and the Concessionaire under the provisions of Article 5-1 below, and, on the other hand, the provisions contained in Article 2-7 concerning the acquisition of lands.

The State, may, if it deems it appropriate, provide its guarantee to loans underwritten by the Concessionaire for the financing of renewal and remodeling works.

Borrowings underwritten by the Concessionaire for the financing of renewal and remodeling works are subject to the State's countersignature when their duration exceeds the period remaining under the concession.

Article 3-2. Integration of works into the Railway Network Concessioned

All works for the maintenance, renewal and remodeling of Railway Infrastructure carried out by the Concessionaire shall become part of the Railway Network Concessioned as of the date of works reception.

However, the Concessionaire is authorized to sell, for its own profit, any residual and used materials and components and any material resulting from dumping and demolition associated with maintenance and operations of replacement and development of rail infrastructure.

Article 3-3. Private rail branch lines

The Concessionaire may establish or promote the establishment of private rail branch lines and specialized installations for rail transport within the confines of industrial, commercial, and port enterprises.

The logistics of construction, financing, and operation of private branch lines and lines from which branches originate are set by specific contracts negotiated freely between the Concessionaire and the owners or users of the branch lines. These contracts are, however, subject to the countersignature of the State in the event that their duration exceeds the period remaining under the concession.

Article 3-4. Telecommunications systems

The Concessionaire may operate itself all telecommunications systems used in Railway Operations.

The Concessionaire may negotiate, with Rail Transport Operators with which it enters into Infrastructure Usage Agreements under conditions set forth in Title 6, contracts pertaining to the use of the telecommunications systems referred to in the preceding paragraph by said operators for the needs of their Railway Operations.

The Concessionaire may, subject to legislative and regulatory provisions pertaining to telecommunications, enter into a partnership with telecommunications operators for the creation and operation of all telecommunications systems located within the property occupied by the Railway Network Concessioned.

Article 3-5. State approval of operations to renew and remodel Railway Infrastructure

Planned Railway Infrastructure renewal and remodeling operations shall be submitted by the Concessionaire to the State for approval.

For each operation envisaged, the Concessionaire shall prepare a technical description and tentative implementation timetable, quantify the estimated amount of the investment and explain its technical and financial justification; the Concessionaire shall indicate the tentative depreciation schedule of the investment and the procedures envisaged for its financing.

The State's approval is granted by joint decision of the Minister of Transportation and the Minister of Finance, upon the recommendation of the Monitoring Committee referred to in Article 12-1, within three months of the Concessionaire's request.

At the end of the concession, and whatever the circumstances may be, the State owes the Concessionaire an indemnity equal to the non-depreciated portion, as per the Concessionaire's balance statement, of the investment corresponding to operations that were the object of approval under the conditions set forth in this Article.

Article 3-6. Non-State-approved operations to replace and develop Railway Infrastructure

Infrastructure renewal and remodeling operations proposed by the Concessionaire and for which the State has refused its approval referred to in Article 3-6 above, may, however, be carried out by the Concessionaire, absent any formal objection on the part of the State.

The objection must be duly founded and may only be based on the fact that the operation could compromise railway safety or violate environmental protection rules or urban planning and/or land occupation regulations.

The non-depreciated portion of investments corresponding to operations referred to in the present Article does not entitle the Concessionaire to indemnification by the State at the end of the concession.

Borrowings underwritten by the Concessionaire to finance operations referred to in the present Article may not benefit from a State guarantee.

Article 3-7. Current rehabilitation or development works

Property that is undergoing rehabilitation or development work when the Concession Agreement enters into force shall be made available to the Concessionaire as is and shall be completed by the Concessionaire at the State's expense. The State shall delegate to the Concessionaire for this purpose its contracting authority role and, if necessary, works supervisor, as well as the required financial resources. A specific inventory of works underway is found in Annex D.

TITLE 4

COMMERCIAL RAIL SERVICES OPERATED BY THE CONCESSIONNAIRE

Article 4-1. Commercial Rail Services

The so-called Commercial Rail Services operated by the Concessionaire are those rail transport services that the Concessionaire considers able to produce adequate returns given the financial performance objectives it has set for itself. The nature, configuration, technical and commercial organization and rate-setting of Commercial Rail Services shall be freely determined by the Concessionaire.

Article 4-2. Door-to-door and multimodal transport services

The Concessionaire is authorized to operate, or to have operated, road transport up to and in continuation of the Commercial Rail Services for freight and passengers.

The Concessionaire may also enter into any agreement with any operator aimed at the implementation of “door-to-door” commercial freight or passenger transport services or the implementation of multiple modes of transport.

Commercial Rail Freight Transport Services

Article 4-3. Configuration and organization of commercial freight services

The Concessionaire shall be free to define, on the basis of their commercial viability and profitability, the nature, configuration and technical and commercial organization of Commercial Rail Services for freight transport.

Article 4-4. Individual freight transport contracts

The Concessionaire may enter into individual contracts with one or more freight shippers or receivers, stipulating terms and prices for the transport of this merchandise that are different from those that would result from publicized rates and that are tailored to the specific nature of the transport to be carried out.

The terms of the contracts shall not be made public.

Article 4-5. Auxiliary transport activities

The Concessionaire may exercise the function of an auxiliary and particularly those of a forwarding agent, and may perform, either himself or through an intermediary to which he is answerable, services that complement freight transport, such as pick-up, delivery, warehousing, loading, unloading, processing and any operation ancillary to the primary function of transport.

Commercial Passenger Rail Transport Services

Article 4-6. Configuration and organization of regular commercial passenger transport services

The Concessionaire shall define freely, on the basis of their commercial viability and profitability, the nature, configuration and technical and commercial organization of regular commercial rail transport services for passengers, particularly with regard to the types of services offered (e.g., classes of train cars, baggage transport, provision of sleeper cars, etc.), the frequency of service, the stops, schedules, composition of trains and the specific conditions of access to the trains.

Relevant information on the configuration of said services shall be made available to the public. Terms and conditions governing the use of tickets must be specified upon the purchase of these tickets.

Any change in the configuration of the services shall be brought to the attention of the public by the Concessionaire at least fifteen days before it goes into effect. The Concessionaire shall not, except in the event of *force majeure*, make any unexpected changes to the configuration of said services.

Article 4-7. Individual passenger transport contracts

In connection with commercial passenger transport services, the Concessionaire may enter into individual contracts with third parties, the conditions of which shall be determined on a negotiated basis. These contracts may stipulate that the service is to be provided by special coaches or trains and that services in addition to the transport shall be provided.

The terms of individual contracts shall not be made public.

Pricing of Commercial Rail Services

Article 4-8. Pricing of Commercial Rail Services - General principles

Services provided by the Concessionaire in connection with Commercial Rail Services give rise to an obligation on the part of the clientele to pay a fare.

The fare collected for a given service cannot, except in the case of a one-time promotional operation of strictly limited duration, which may not, under any circumstances exceed one year, be less than the avoidable expenses attributable to the service provided.

Article 4-9. Price-setting methods

The prices of services provided under the heading of Commercial Rail Services are set, in the general context of the provisions of Article 4-8 above, either in application of publicized tariffs, or in application of individual contracts entered into by the Concessionaire and its clients.

Publicized tariffs shall be set and revised freely by the Concessionaire. Tariffs may include so-called commercial discounts intended to promote traffic, improve the conditions under which the equipment is used and, in general, increase the profitability of the services. The publicized tariffs shall be made known to the public by the Concessionaire at least fifteen days before the date on which they go into effect.

Prices set in connection with individual contracts are freely determined by the Concessionaire after negotiation with the clients. Prices set in connection with individual contracts shall not be made public.

Article 4-10. Prices of intermodal and international transport

The Concessionaire may, in the context of multimodal or international commercial freight or passenger service in which it participates, apply multimodal or international transport prices.

These prices shall be established under the same conditions as those specified in Articles 4-8 and 4-9 above.

TITLE 5

PUBLIC SERVICE OBLIGATIONS OF THE CONCESSIONNAIRE

Article 5-1. Rail services operated as a public service obligation

At the express request of the State or of public territorial authorities, the Concessionaire shall operate, as a mandatory public service, freight transport services as well as passenger service, whether regular or not, aside from the commercial services mentioned in Title 4 above.

These services shall be operated in the framework of agreements entered into between the Concessionaire, the State and the authority (or authorities) concerned.

The agreements shall specify, in particular, the configuration of the service offered (especially with regard to regular passenger services: i.e., frequency of service, approximate schedules, coach classes and numbers of seats available, stops, terms of travelers' access to the service, conditions under which baggage may be transported), the fare to be collected from users by the Concessionaire for the services supplied, as well as the specific modalities of the possible acquisition, financing and operation of the installations and equipment to be deployed to this end.

The agreements shall provide for the payment, by the State to the Concessionaire, of a contribution for the mandatory public service and shall specify the methods of its calculation and payment. The amount of the contribution shall be determined in such a way that the sum of receipts collected by the Concessionaire from users of the service and of the amount of the contribution covers all charges that would be attributable to the service concerned in a context of efficient management of the activity by the Concessionaire and makes a reasonable contribution to the coverage of the structural expenses of rail operation.

The Concessionaire shall cease to operate the service in the case of non-payment of the contribution for mandatory public service as provided for under the corresponding agreement.

Article 5-2. Reduced fares imposed on the Concessionaire

The Minister of Transportation may require the Concessionaire to apply, temporarily or permanently, on certain Commercial Rail Services and/or for the benefit of certain clients of said services, fares that are below publicized tariffs set by the Concessionaire. This obligation is deemed a public service obligation and entitles the Concessionaire to financial compensation to be paid by the State, under conditions set forth in Article 5-3 below.

Article 5-3. Financial compensation for public service obligations

Any obligations imposed by the State, whether regarding the operation of mandatory public services pursuant to Article 5-1, or regarding fares for Commercial Rail Services pursuant to Article 5-2, or, in general, any decision by the State in the specific area of railway activity not provided for under the present Concession Agreement and entailing a reduction of the Concessionaire's profits, shall entitle the Concessionaire to financial compensation from the State, which shall be referred to as the contribution for public service obligations.

Subject to the specific provisions set forth in the agreements referred to in Article 5-1, the amount of the contribution offsets the impact on the Concessionaire's operating revenues. Said amount shall be determined by common agreement between the Minister of Transportation and the Concessionaire, before the obligation takes effect. Payment of the contribution shall be made in quarterly installments valued as of the first day of the calendar quarter.

In any case, failure by the State to pay the contribution shall entail, with no need for any other formality, the cancellation of the obligation imposed on the Concessionaire.

Article 5-4. Requisition of the Concessionaire's resources

When public safety, domestic security or external State security are seriously imperiled, and troops, equipment, food rations and rescue equipment must be transported urgently to a location within the country that is served by the railway, the Concessionaire shall, without delay, make available all his assets to the State, upon a requisition made under the regulatory conditions.

The State explicitly reserves the right, under such circumstances, to take all measures it may deem appropriate, including the direct takeover of the management of Railway Operations, for a period that will be determined by Decree.

Expenses borne by the Concessionaire in application of the provisions of the present Article entitle the Concessionaire to compensation, the amount of which shall be set by the State based on a proposal from the Concessionaire.

TITLE 6

USE, BY OTHER OPERATORS, OF THE INFRASTRUCTURE OF THE RAILWAY NETWORK CONCESSIONED

Operating licenses for rail transport operations on the Railway Network Concessioned

Article 6-1. Operating licenses for rail transport on the Railway Network Concessioned

The State shall issue, to Rail Transport Operators, operating licenses for rail transport on the Railway Network Concessioned only in the following cases:

- (a) when the Concessionaire plans to delegate to the Rail Transport Operator the technical and commercial operation of certain freight and passenger transport services in the context of the provisions set forth in Article 1-4 above;
- (b) when the Concessionaire, without delegating to the Rail Transport Operator the technical and commercial operation of certain freight and passenger transport services, informs the State that it has no objection to the operation of the envisaged transport services by said operator;
- (c) when the Rail Transport Operator operates a rail transport service as a public service obligation, and has been selected on the basis of competitive bidding in which the Concessionaire was entitled to participate;
- (d) when the Rail Transport Operator holds the concession of a rail infrastructure connected to the Railway Network Concessioned. The license may then only apply, unless the Concessionaire agrees otherwise, to transport services having their origin or their destination in one of the stations located on the rail infrastructure of which the enterprise is the Concessionaire; and
- (e) in case of serious dereliction of duty on the part of the Concessionaire vis-à-vis a client or group of clients. The license shall then be issued either directly to the client or group of clients, or to a Rail Transport Operator acting on behalf of the client or group of clients. Unless the Concessionaire agrees otherwise, the rail transport services to which the license applies can only be those on which the Concessionaire was seriously delinquent, and can only be supplied to the client or group of clients in question.

Article 6-2. Case of serious dereliction of duty on the part of the Concessionaire vis-à-vis a client or group of clients

The following situations shall be considered instances of serious dereliction of duty on the part of the Concessionaire vis-à-vis a Client or group of clients, in the sense of Article 6-1, paragraph (e) above:

- (1) when transport prices applied by the Concessionaire, on a client or group of clients for a given transport that is essential to the operations of said client or group of clients, constitute an obvious abuse of its privileged position; or
- (2) when the Concessionaire applies, over a period of time, to a given transport entrusted to it by a client or group of clients, discriminatory conditions compared to those applied to other clients shipping similar volumes over the route in question, if said conditions are seriously detrimental to the operations of the client or group of clients; or
- (3) when the Concessionaire refuses over a period of time, and in a blatant or negligent manner, to provide a client or group of clients with a transport service essential to their operations, while similar service is provided to other clients; or
- (4) when the Concessionaire is incapable of supplying a client or group of client with sustained rail transport services that are essential for its operations, in terms of capacities offered or quality of services rendered, or price of service.

It is agreed in any event that the rates applied by the Concessionaire cannot be considered as constituting an abuse of privileged position or as inadequate in the situations described in (1) and (4) above, unless said rates exceed twice the amount of the charges (including depreciation and capital expenses relative to rolling stock, calculated on the basis of replacement cost) directly attributable to the traffic in question, as determined according the methods habitually used in the rail transport industry.

Article 6-3. Legal proceedings related to serious dereliction of duty on the part of the Concessionaire vis-à-vis a client or group of clients

When a client or group of clients believes that he is affected by the situations described in Article 6-2 (1), (2), (3), or (4), and therefore wishes to obtain a Rail Transport Operator's license either for itself or for an operator acting on his behalf, it shall submit a request for this to the State. The request shall be accompanied by appropriate supporting documentation.

In the event that the State believes that the request is admissible, it shall transmit to the Concessionaire, for comment, a copy of the dossier submitted by the client or group of clients. If the Concessionaire believes that the situations described in Article 6-2 (1), (2), (3), or (4) does not apply to the client or group of clients, it shall so inform the State within thirty days follow-

ing receipt of the copy of the dossier from the State. The position of the Concessionaire shall be justified by all appropriate documentation.

If, after having been informed of the Concessionaire's position, the State confirms its intention to take appropriate action at the request of the client or group of clients, the Concessionaire may, within fifteen days of notification by the State, request that the admissibility of the request of the client or group of clients be confirmed by arbitration conducted by three arbitrators, one designated by the Concessionaire, another by the client or group of clients in question, and the third jointly by the two first arbitrators; if one or another of the parties fails to designate its arbitrator within thirty days after the request for arbitration submitted by the Concessionaire, or if the arbitrators designated by the parties fail, within thirty days, to reach an agreement on the selection of the third arbitrator, the arbitrator(s) yet to be named shall be designated by the President of the Commercial Tribunal of ... called upon by the first party to submit the matter to it. The State may issue the rail transport operation permit only if the arbitration procedure confirms that the client or group of clients concerned is in fact in one of the situations described in cases (1), (2), (3) or (4) referred to in Article 6-2.

Usage Agreements for Rail Infrastructure belonging to the Railway Network Concessioned

Article 6-4 . Usage Agreements for Rail Infrastructure – General Observations

The Concessionaire shall enter into usage agreements for infrastructure belonging to the Railway Network Concessioned with Rail Transport Operators holding a rail transport operation license issued by the State under the conditions set forth in article 6-1 above. The agreements shall allow the use of rail infrastructure only for the operation of transport services for which the license is issued.

The Concessionaire shall send a copy of the agreement to the Minister of Transportation. The terms of the agreements shall not be made public, except in the case of agreements signed with Rail Transport Operators holding licenses issued pursuant to Article 6-1(c).

Article 6-5. Negotiation of Rail Infrastructure Usage Agreements with holders of licenses (a) and (b)

The Concessionaire shall freely negotiate the agreements entered into with Rail Transport Operators holding licenses issued by the State under the provisions of paragraphs (a) and (b) of Article 6-1. Payment collected by the Concessionaire under such an agreement may not, however, be less than the amount of the expenses borne by Concessionaire and directly attributable to the service in question.

Article 6-6. Negotiation of Rail Infrastructure Usage Agreements with holders of licenses (c), (d) and (e)

The Concessionaire pledges to negotiate agreements entered into with Rail Transport Operators holding licenses issued by the State under the provisions of paragraphs (c), (d) and (e) of Article 6-1 in such a way that, given the service in question, no discriminatory measures are imposed upon said operator as compared to other users of the infrastructure. The term "other users of the infrastructure" shall be taken to mean either the Concessionaire itself or other operators with which the Concessionaire has entered into infrastructure usage agreements.

When the Concessionaire and the operator fail to reach an agreement on the terms of the Rail Infrastructure Usage Agreement, these terms shall be set by decision of the Minister of Transportation, in accordance with the proposals of a group of experts, one designated by the Concessionaire, the second by the operator, and the third by common agreement of the two preceding experts, or, failing that, by the Minister of Transportation.

When the dispute between the Concessionaire and the operator concerns the amount of the payment to be collected by the Concessionaire under the agreement, said amount shall be fixed by decision of the Minister of Transportation, in accordance with the proposals of the group of experts referred to in the preceding paragraph, at a level that may not be lower than the amount of the expenses borne by the Concessionaire and attributable to the service in question, plus fifty percent for a contribution to coverage of the Concessionaire's structural expenses.

TITLE 7

RAILWAY EQUIPMENT

Article 7-1. Railway Equipment used by the Concessionaire

Railway Equipment (i.e., locomotives, wagons, coaches, and self-propelled passenger cars, track maintenance vehicles, rescue equipment, and in general, all devices and vehicles designed to roll on railway tracks) utilized by the Concessionaire in connection with Railway Operations are either owned by the Concessionaire or owned by third parties and rented by the Concessionaire in the framework of contracts freely negotiated by the Concessionaire and his fellow contracting parties.

Article 7-2. Railway transport equipment utilized for services operated as a mandatory public service

Railway transport equipment utilized by the Concessionaire for the operation of rail services as a mandatory public service may be provided free of charge to the Concessionaire by the State (or the local authority for which the obligation is incurred). The list of equipment concerned shall, if necessary, be specified in the service agreement signed between the State (or the local authority) and the Concessionaire under the provisions of Article 5-1 above.

The Concessionaire is obligated to take out insurance against damage to and loss of equipment referred to in the present Article.

Article 7-3. Wagons owned by private parties

The Concessionaire may authorize and promote the utilization, for transport that it operates, of rail equipment belonging to third parties, particularly the so-called privately owned wagons for freight transport.

Article 7-4. Railway Equipment used by other Rail Transport Operators

Rail equipment utilized by Rail Transport Operators holding a rail transport operation license for the Railway Network Concessioned is subject to the Concessionaire's technical approval. The refusal of permission shall always be justified, and may only be motivated by the equipment's failure to conform to the size, weight, and safety standards set by the Concessionaire.

Article 7-5. State's right of first refusal upon the sale, by the Concessionaire, of Railway Equipment

Subject to the provisions of Article 10-7, paragraph (b) below, the Concessionaire is free to dispose of rail equipment that it owns. However, the State shall have right of first refusal for the acquisition of the property concerned.

Sales contracts for the property entered into by the Concessionaire with third parties shall only become enforceable after a period of thirty days from the time they were brought to the attention of the State, and provided that, by the date of expiration of said period, the State has not made known its intention to replace the purchaser, under the same conditions as those set forth in the contracts.

Miscellaneous equipment of the Concessionaire, other than rail equipment, even if utilized for railway operation purposes, is not covered by the provisions of the preceding paragraph.

Article 7-6. Acquisition by the Concessionaire of SNCF Railway Equipment at the start of the concession

The Concessionaire, on the date of effectiveness of the concession, shall enter into a contract for the acquisition of rail equipment belonging to the *Société nationale des chemins de fer* This contract is entered into on a commercial basis and is considered to be separate from the Concession Agreement.

TITLE 8

CONCESSION FEE

Article 8-1. Concession Fee – General Observations

In exchange for the use of rail infrastructure of the Railway Network Concessioned and for the right granted to the Concessionaire to operate rail services, the Concessionaire owes the State a fee, referred to as the “Concession Fee”.

The Concession Fee shall be due beginning with the fiscal year following the first anniversary of the entry into force of this Concession Agreement.

For accounting and tax purposes, the Concession Fee shall be considered to be an operating expense of the Concessionaire for the fiscal year to which it refers.

Article 8-2. Amount of the Concession Fee

The annual amount of the Concession Fee referred to in Article 8-1 above and payable by the Concessionaire for fiscal year (n) is equal to the sum of two elements:

- (a) a fixed element F(n), the amount of which is determined in Annex B ; and
- (b) a variable element equal to the following percentage of the turnover, exclusive of taxes, of the Concessionaire's Railway Operations during the fiscal year in question, namely:
 - *[x]*percent for the first fiscal year for which the Concession Fee is due;
 - *[y]*percent for the second and third fiscal years;
 - *[z]*percent for the fourth, fifth, and sixth fiscal years; and
 - *[w]*percent for subsequent fiscal years.

The term "turnover, excluding taxes, of Railway Operations" shall be taken to mean the sum of the following elements:

- . revenues generated by rail transport services operated by the Concessionaire, excluding transport for the own use of the Concessionaire, namely: revenues from commercial freight and passenger transport, revenues from services operated as mandatory public services (receipts collected from users plus contribution for mandatory public service payable by the State), financial compensation due from the State to the Concessionaire in connection with the public service obligations referred to under Title 5;
- . remuneration of the Concessionaire for utilization of rail infrastructure by other Rail Transport Operators; and
- . fees, rents and miscellaneous revenues from the management of property belonging to the Railway Network Concessioned.

Article 8-3. Payment of the Concession Fee

The Concession Fee mentioned in Article 8-1 above shall be paid in quarterly installments, each installment payable within sixty days after the end of the quarter that it covers. The amount of each quarterly payment shall be equal to the sum of one quarter of the amount of the fixed portion F(n) and of the variable portion covering the quarter in question. The variable portion shall be determined based on the estimated turnover for said quarter, insofar as it is known to the Concessionaire on the day prior to payment of the installment, with adjustment made, if necessary, for any disparities between estimated turnover and definitive turnover of preceding quarters.

Any late payment by the Concessionaire of the Concession Fee shall give rise to a late fee payable by the Concessionaire calculated based on the discount rate of the Central Bank, plus two percent.

TITLE 9 – ACCOUNTING AND TAX PROVISIONS

Article 9-1. Accounts of the Concessionaire

The Concessionaire shall keep his accounts in a commercial format, in accordance with prevailing legislative and regulatory provisions and the provisions of the present Convention.

Balance accounts specific to the concession, the nomenclature and operation of which are specified in Annex A, shall be opened by the Concessionaire.

Article 9-2. Tax provisions

The Concessionaire shall be subject to the tax provisions legally applicable to commercial, industrial and service enterprises.

It shall benefit, however, from specific tax provisions applicable to concessionary companies, particularly as regards depreciation and the provision for replacement, under the conditions set forth in Annex A.

The State pledges that levies and taxes owed by the Concessionaire, as well as any fees, taxes or surtaxes of a fiscal or semi-fiscal nature that may be added to the sale price of rail services, shall not have any character specific to Railway Operations or to rail transport, and shall be applied equally to the transporters with which the Concessionaire is likely to be in competition, and under conditions that avoid influencing the competitiveness of rail transport in relation to competing modes of transportation.

Article 9-3. Land tax contributions

Since the Concessionaire is only the manager of the public property belonging to the Railway Network Concessioned, it is exempt, as far as said public real estate is concerned, from all levies and assessments relative to land tax contributions and mortmain property, as well as from any fee of the same type.

Article 9-4. Purchase of fuel under an exemption from the contribution to the road fund

Fuel used in the rolling stock shall be purchased by the Concessionaire under an exemption from the road or highway fund contribution collected for road usage, maintenance, and replacement costs generated by road transport.

TITLE 10

EFFECTIVENESS, DURATION AND END OF THE CONCESSION

Article 10-1. Entry into force

The Concession Agreement shall enter into force, with no particular formality, fifteen days after all of the following conditions have been met:

- (a) the Concession Agreement has been signed by the parties;
- (b) the Concession Agreement has been approved by Decree of the Council of Ministers and the Decree of Approval has been published in the Official Gazette;
- (c) The Concessionaire has obtained, from donors and financial and banking institutions, assurances deemed satisfactory by the State and by the Concessionaire that they will finance the investment program that the Concessionaire plans to implement within the first five years of the concession;
- (d) The Concessionaire has conveyed to the State the list of staff of the *Société nationale des chemins de fer ...* (SNCF) to be re-hired by the Concessionaire under conditions set forth in Article 1-12 above; and
- (e) The companies [*insert names of companies*] providing upstream control of the strategic shareholder of the *Société d'exploitation des transports ferroviaires ...* have made a commitment to the State to maintain this joint oversight for a period of at least seven years starting from the date of entry into force of the Concession Agreement, and said strategic shareholder has promised to hold at least 51 percent of the capital of the *Société d'exploitation des transports ferroviaires* for a period of at least the same duration.

However, unless the parties agree otherwise, the Concession Agreement shall be considered null and void if it does not take effect one hundred and eighty (180) days following its signature by the parties.

Article 10-2. Duration of the concession

This agreement is entered into for an initial period of thirty years.

The parties shall meet between the ninth and tenth anniversary of the entry into force of the present Agreement in order to decide if grounds exist for extending the Agreement for an additional ten years beyond its initial term.

In the event that an extension is decided, the parties shall meet between the nineteenth and twentieth anniversary of the date of entry into force of the present Agreement to decide if there are grounds to extend the concession for another period of ten years, and so on, at ten-year intervals.

Article 10-3. Early cancellation

Aside from the case in which this agreement expires at term under the conditions set forth in Article 10-2 above, it can be terminated either by forfeiture on the part of the Concessionaire, or officially through dissolution, legal liquidation, or bankruptcy of the *Société d'exploitation des transports ferroviaires ...*, or, finally, by contract cancellation for reasons of *force majeure*.

Article 10-4. Dismissal for breach of obligation

In the event that, except for a case of *force majeure*, (a) either the Concessionaire should seriously default on its obligations as defined by the present Agreement; (b) the Concessionaire were to cease all rail transport operation for a prolonged period or were to carry out operations only at an extremely reduced level, and even if this cessation of operations were due to financial difficulties; (c) or the companies [*insert names of companies*] handling upstream control of the strategic shareholder of the *Société d'exploitation des transports ferroviaires ...* were to default on their commitment referred to in paragraph (e) of Article 10-1; (d) or the strategic shareholder of the *Société d'exploitation des transports ferroviaires ...* were to fail to meet his commitment referred to in paragraph (e) of Article 10-1, the State may, if no remedy is provided within three months after official notification by the State, decide to dismiss the Concessionaire. This dismissal would be pronounced against the Concessionaire and at its expense and risk.

Possession of all property utilized by the Concessionaire in connection with Railway Operations would be transferred, as of the date of dismissal, to the State or to any other person or company designated by the State, which would, by operation of law, replace the Concessionaire, the Concessionaire having no entitlement to indemnification in this connection.

Article 10-5. Dismissal by reason of dissolution or liquidation

The dissolution, legal liquidation or bankruptcy of the *Société d'exploitation des chemins de fer ...* automatically terminates the Agreement, at the fault, expense, and risk of the Concession-

aire, under conditions identical to those set forth in Article 10-4 above relative to the dismissal of the Concessionaire.

Article 10-6. Termination by reason of *force majeure*

Cases of *force majeure* are considered to be those events that are unforeseeable, external to the parties, and unpreventable.

In the event of an occurrence that would constitute a case of *force majeure*, the party that invokes *force majeure* must, immediately after the occurrence of this event, provide written notification thereof to the other party. The notification shall specify the precipitating event involved as well as its consequences for the concession's operations. Within eight days following this notification, the parties shall meet to assess the event and to agree on arrangements to mitigate the consequences of the *force majeure* on the operation of the concession.

In the event that, due to an occurrence constituting *force majeure*, the operation of the concession proves to be irretrievably compromised or is suspended for a period exceeding one year, the State or the Concessionaire may cancel the concession.

To the extent that the financial equilibrium of the concession is affected by the occurrence of the case of *force majeure*, the parties agree to meet and to adopt, if necessary, any measure that can remedy the situation. If no agreement is reached within a period of three months, either party may proceed with the cancellation of the concession.

Article 10-7. Disposal of property, contracts, obligations, debts and responsibilities of Concessionaire upon expiration of the Concession Agreement

Upon the conclusion of the present Concession Agreement, either at the date agreed upon by the parties, or by reason of one of the causes of cancellation referred to in Articles 10-4, 10-5 and 10-6, and whatever the reason may be, the disposal of the property, contracts, obligations, debts and responsibilities of the Concessionaire shall be handled as follows:

- (a) Rail infrastructure constituting the Railway Network Concessioned, the concession's Property to be Returned and Property to be Taken Back shall be immediately handed back to the State for its disposition, with the State having no obligation to pay the Concessionaire any indemnity, except with regard to renewal and remodeling operations that received State approval, and for which indemnification shall be made under the conditions set forth in Article 3-6 (last paragraph) above.
- (b) Real assets, other than rail infrastructure and movable property owned by the Concessionaire and used by the Concessionaire for Railway Operations, may be

acquired by the State or by any person or company designated by the State. Such acquisition shall occur at the net book value of the property as it appears in the Concessionaire's balance sheet as of the date of the conclusion of the Concession Agreement. The State shall inform the Concessionaire of its intention to purchase all or part of the property concerned no sooner than five years and no later than one year prior to the expiration date of the Concession Agreement, if this Concession Agreement runs until the expiration date agreed upon by the parties, and no later than three months after the date of expiration in the event of early cancellation referred to in Articles 10-4, 10-5 and 10-6. The Concessionaire shall dispose freely of property which the State has not expressed an interest in acquiring within the stated timeframes.

- (c) Regarding loans obtained by the Concessionaire to finance operations of infrastructure renewal or remodeling that received State approval under the conditions set forth in Article 3-6 above, the State shall pay the Concessionaire, within six months following the end of the Concession Agreement, an indemnity established in such a way as to allow the Concessionaire to disengage itself entirely from all lenders and representing the sums due (for principal and ancillary charges) in connection with such borrowings. The indemnity is, however, reduced by the sums to be reimbursed by the State to the Concessionaire by virtue of the provisions of said Article 3-6 which were the object of an actual reimbursement by the State within the same six-month time limit following the end of the Concession Agreement. The amount of the indemnity shall be paid into an escrow account opened by the Concessionaire in a top-ranking banking establishment and earmarked solely for the reimbursement by the Concessionaire of sums due in connection with the borrowings. The State cannot be held legally responsible for the non-payment of lenders provided that it has paid the aforementioned amount into the escrow account.
- (d) The Concessionaire's obligations in connection with its borrowings for the financing of infrastructure renewal and remodeling for which, under the provisions of Article 3-7, the State refused its approval, shall not be taken over by the State.
- (e) Regarding sub-contracting contracts, all rights and obligations of the Concessionaire are transferred to the State by means of notification made to the creditor of the fact of this transfer, at the initiative of one of the parties. This notification shall indicate that the Concessionaire is free of any obligation vis-à-vis the subcontractor. The State takes the place of the Concessionaire and assumes, as of the date of notification, all rights and obligations resulting from these contracts. The Concessionaire shall inform its co-contractors of the substitution au-

thority conferred upon the State, through the inclusion of the appropriate contractual clauses.

- (f) Labor contracts entered into by the Concessionaire with its personnel are taken over by the State.
- (g) Contracts, commitments, authorizations and leases entered into by the Concessionaire in connection with the management of railway real estate shall be taken over by the State; and
- (h) Claims and debts other than those mentioned above and for which the precipitating event occurred prior to the end of the Concession Agreement, remain the responsibility of the Concessionaire.

The State immediately takes the place of the Concessionaire, and assumes all its rights, and collects all revenues and income from Railway Operations occurring in a time period after the end of the Concession Agreement. The Concessionaire shall still be obliged to pay off all expenses and debts incurred prior to the end of the Concession Agreement if they are not taken over by the State.

Article 10-8. Lenders' right of substitution

The right of lenders to substitute themselves for the Concessionaire may be granted to said lenders in the context of medium- and long-term loan contracts underwritten for the financing of investment programs implemented by the Concessionaire. This right shall then be expressly set forth in the loan contract. The compatibility of the conditions under which the right of substitution is exercised with the conditions mentioned hereinafter must be approved by the State prior to the signature of loan contracts.

Upon the occurrence of one of the events referred to in the following paragraph, and to the extent that these events continue over time, a legal entity designated and approved by the lenders (the "Entity") shall be, at the option of these lenders and under the conditions set forth below, simultaneously substituted by the State for the Concessionaire. The Entity must justify to the State, prior to such substitution, that it has sufficient financial and technical capability to continue Railway Operations. The Entity shall assume all rights and obligations of the Concessionaire as provided for under the present Agreement.

The events referred to for purposes of the substitution are the following:

- (a) Non-payment, within six months of notification addressed to the Concessionaire by registered letter from lenders referring to the present provision, of any sum due by virtue of the lending agreements referred to in the first paragraph of the present Article.

- (b) Significant postponement, on the basis of objective data, of the date of total termination of lenders' claims.
- (c) Declaration, by any one of the lenders, of the event of default of one or more of the loans granted under the loan contracts referred to in the first paragraph of the present Article, such event being duly notified to the Concessionaire.
- (d) Cessation of payment, liquidation, bankruptcy of the *Société d'exploitation des transports ferroviaires ...*, or other similar events.

The lenders or the Entity notify the State of their intention, and at the same time provide information allowing the State to verify that the conditions of the present Article have been met. Unless the State has indicated, within two months of such notification, that the conditions have not been met, it shall be assumed to have confirmed the Entity's substitution for the Concessionaire.

From the time of the State's express or implicit confirmation of the substitution, the Entity shall enjoy all the rights and assume all obligations provided for under the present Agreement vis-à-vis the State in the place of the Concessionaire. To this end, the substitution entails the devolution of real estate and property rights necessary for the operation of rail services.

TITLE 11

DISPUTES AND LITIGATION

Article 11-1. Procedure for resolution of disputes and litigation

The State and the Concessionaire shall endeavor to resolve amicably any dispute or litigation relative to the interpretation and application of the clauses of the present Agreement.

In the event that an amicable resolution is not possible, the dispute or litigation shall be resolved in accordance with the arbitration procedure described hereinafter.

The dispute or litigation shall be definitively and irrevocably resolved by an arbitration commission composed of three arbitrators, one designated by the State, the second by the Concessionaire, and the third by common agreement of the first two. If the parties fail to designate their arbitrators within thirty days of the arbitration request submitted by one of the parties, or if the arbitrators designated by the parties fail to reach an agreement on the nomination of the third arbitrator within thirty days, the rules of reconciliation and arbitration of the International Chamber of Commerce in Paris, France shall be applied at the request of the party filing the complaint first.

Arbitration shall be conducted in *[language to be specified]*, in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in Paris, France. It shall take place in ... or, if the arbitration commission should so decide unanimously, in any other place in the Republic of

Each of the parties shall bear the cost of the arbitrator that it designates. Other expenses generated by the arbitration shall be shared equally between the parties.

The parties pledge from the outset to abide by the arbitration decisions.

Article 11-2. Applicable law

Any dispute or litigation as to the validity, interpretation or application of the Concession Agreement shall be resolved by the applicable law of the Republic ... in effect at the date of the dispute or litigation.

TITLE 12

MONITORING OF EXECUTION OF THE CONCESSION

Article 12-1. Concession Monitoring Committee

The monitoring of execution of this Concession Agreement shall be handled by a Committee (the "Monitoring Committee") presided over by a person not belonging to the Administration and appointed for five years by the Minister of Transportation on the recommendation of the President of the Chamber of Commerce of The Committee shall include a representative of the Minister of Transportation, a representative of the Minister of Finance, and two representatives of the Concessionaire.

The Monitoring Committee shall meet in regular session once a year to examine the documents referred to in Article 12-2 below and, if necessary, the audit report referred to in Article 12-3 below, and in special session as required at the request of any one of its members.

The Monitoring Committee shall examine any question pertaining to execution of the Concession Agreement, which requires consultation between the parties.

The Monitoring Committee shall not interfere in any way whatsoever with the internal management of the Concessionaire.

The Monitoring Committee shall copy the minutes of its sessions to the Minister of Transportation and to the Minister of Finance.

Article 12-2. Documents to be submitted by the Concessionaire

The Concessionaire shall submit, by the 20th of each month to the Minister of Transportation and to the Minister of Finance, with copy to the Chairman of the Monitoring Committee, a statistical report of activity for the preceding month. The report shall be prepared according to the format provided in Annex E.

The Concessionaire shall address each year, as a report on its activity, and within four months of the closure of the preceding fiscal year, the following documents to the President of the Monitoring Committee:

- . the corporate statements of the *Société d'exploitation des transports ferroviaires* ..., accompanied by the report of the auditor and external auditor;
- . an annual implementation report and an estimated annual program for the public service obligations imposed on the Concessionaire under the terms of the Concession Agreement;
- . an annual implementation report on the Rail Infrastructure Usage Agreements involving other Rail Transport Operators;
- . an annual report on matters related to railway safety (analysis of rail accidents, measures taken to improve safety, etc.) and, if necessary, on the specific aspects of Railway Operations associated with environmental protection;
- . an updated version of the inventory of lands and rail infrastructure belonging to the Railway Network Concessioned; and
- . the status of execution of the infrastructure renewal and remodeling program.

These documents shall also be copied for information purposes to the Minister of Transportation and to the Minister of Finance.

Article 12-3. Audit of the concession

At least every four years, an audit of the concession shall be done by an independent auditor designated by the Monitoring Committee.

The auditor shall give his opinion on the parties' adherence to the clauses of the Concession Agreement. The auditor shall have access to the accounts, books, contracts, accounting documents and any other item or document of the Concessionaire, as well as to all operational offices and work sites of the Concessionaire. He shall perform any verification and inspection he deems appropriate. He may obtain the assistance of consultants.

The audit report shall be conveyed to the Monitoring Committee within six months of the closure of the fiscal year to which it refers.

The cost of the audit shall be shared equally by the State and the Concessionaire.

Article 12-4. Penalties in the event of dereliction of duty or misdeed on the part of the Concessionaire

In the event of total or partial dereliction of duty or misdeed on the part of the Concessionaire in the execution of the obligations entrusted to it under the Concession Agreement, and with the exception of cases of *force majeure*, the State may, after a thirty-day period with no remedy to official notification, impose penalties on the Concessionaire in the form of a daily late fee.

The late fee shall be due from the date of expiration of the notification until such time as the Concessionaire has made full restitution for the dereliction of duty or misdeed.

The amount of the daily late fee shall be set by the State based on the seriousness of the dereliction of duty or misdeed. It may not, however, exceed the amount of ... per day for the first thirty days of application, and ... per day thereafter. The aforementioned amounts shall be set with reference to the economic conditions prevailing in the year ...; they shall be revised annually by application of the consumer price index of the preceding year.

The penalties cited in the present Article are payable immediately and in full. They may not, under any circumstances, be invoked by the Concessionaire in order to limit the scope of his responsibility and are understood not to include possible damages.

Article 12-5. Service provision and technical assistance contracts

Service provision and technical assistance contracts entered into by the Concessionaire with enterprises belonging to the strategic shareholder of the *Société d'exploitation des transports ferroviaires ...* or affiliated with them shall be subject, prior to their signing, to the approval of SETRAF Board of Directors. These contracts must correspond to clearly identified services and must be for defined amounts and durations. Aside from the obligations to which they are subject under the legislation pertaining to commercial companies, these contracts shall be subject to systematic and specific review by the auditor referred to in Article 12-3, who shall ascertain whether the services are actually being provided and the reasonableness of the prices charged.

The provisions of this Article are also applicable to contracts for supplies, equipment rental and works execution for amounts that exceed a threshold set by the Monitoring Committee referred to in Article 12-1, and that are entered into with enterprises belonging to the strategic shareholder of SETRAF and enterprises affiliated with them.

For the purposes of the present Article and of Article 12-6 below, the following shall be considered to be enterprises affiliated with the enterprises counted among strategic shareholders of SETRAF: (a) any enterprise of which more than 50 percent of the capital is held, directly or indirectly, by one or more enterprises belonging to the strategic shareholder; (b) any enterprise that holds, directly or indirectly, more than 50 percent of the capital of an enterprise counted among the strategic shareholder; and (c) any enterprise of which more than 50 percent of the capital is held by an enterprise that itself holds more than 50 percent of an enterprise counted among the strategic shareholder.

Article 12-6. Management Fee

The annual amount of any management fee or similar commission paid by the Concessionaire to the strategic shareholder of the *Société d'exploitation des transports ferroviaires ...*, to one or more enterprises counted among the strategic shareholders, or to one or more enterprises affiliated with the enterprises counted among the strategic shareholders, in connection with services other than those referred to in Article 12-5, may not, under any circumstances, exceed one percent of the turnover, excluding taxes, of Railway Operations for the year in question, as defined in Article 8-2.

..., January 15, 1999

For the State

The Minister of Transportation

The Minister of Finance

For the Concessionaire

The Chairman of the Board of Directors

of the *Société d'exploitation des transports ferroviaires ...*

(The Concession Agreement was approved by Decree No. 99/12 dated February 3, 1999.)

ANNEX A

NOMENCLATURE AND FUNCTIONING OF BALANCE SHEET ACCOUNTS SPECIFIC TO THE CONCESSION

6.1.1.1. Nomenclature of accounts

15. Reserves for risks and expenses

156. Reserves for replacement of fixed assets

1561. Reserves for replacement of fixed assets concessioned by the party awarding the concession

1562. Reserves for replacement of fixed assets concessioned by the Concessionaire

1572. Reserves for large-scale repairs

22. Fixed assets concessioned

220. Fixed assets concessioned by the party awarding the concession

225. Fixed assets concessioned by the Concessionaire

229. In-kind entitlements of the party awarding the concession

2290. Cost-free contributions of the party awarding the concession

2295. Assets concessioned by the Concessionaire

28. Depreciation of fixed assets

282. Depreciation of fixed assets concessioned

2820. Fixed assets concessioned by the party awarding the concession

2825. Fixed assets concessioned by the Concessionaire

Functioning of accounts

1. Accounting related to the fixed assets assigned to the concession by the State

1.1. Commencement of the concession

Property is valued on the basis of its estimated value at the time of its transfer to the Concessionaire. Account 220 is debited and Account 2290, credited.

1.2. Depreciation and reserves

1.2.a. Non-renewable fixed assets

The Concessionaire shall proceed to depreciate the property at the usual rates. Depreciation is credited to Account 2820 and debited from Account 2290. Since the cost of these fixed assets is zero for the Concessionaire, their depreciation shall not be considered an expense and shall have no impact on its bottom line.

A reserve for major repairs may be created (under Account 1572); it shall be debited from the bottom line once the repair has been completed.

1.2.b. Renewable fixed assets

Apart from the depreciation occurring as described in 1.2.a. above, the Concessionaire shall make an annual payment into the reserve for replacement calculated on the basis of the estimated replacement cost of the real asset. It shall be credited to Account 1560 and, at the time of the replacement, shall be deposited to Account 2290. The reserve for replacement shall be considered an expense of the Concessionaire and shall be accounted for in the bottom line.

2. Accounting pertaining to fixed assets brought to the concession by the Concessionaire [fixed assets in the form of rail infrastructure handed over cost-free by the Concessionaire to the State at the end of the concession; Concession Agreement Article 10-7, paragraph (a)]

2.a. Depreciation. The Concessionaire shall depreciate the property at the usual rates. Depreciation is credited to Account 2825 and Account 2295 is debited. Depreciation shall not be considered an operating cost for the Concessionaire and shall not be accounted for in the bottom line.

2.b. Caducity Amortization Charge. In order to allow the reconstitution of capital invested by the Concessionaire, a caducity amortization charge shall be debited from the expense account and credited to Account 2295. For each operation, the duration of the amortization shall be equal, at the Concessionaire's option: (a) to the period remaining until the end of the concession at the time that the operation is initiated; (b) to the duration of depreciation, in the event

that this duration is less than the period remaining until the end of the concession at the time that the operation is initiated and provided that the asset is amortizable; or (c) the loan repayment period when over 50 percent of the operation's financing is covered by the loan. A capacity amortization charge is levied regardless of whether the property is amortizable. It constitutes an operating cost for the Concessionaire and shall be accounted for in the bottom line.

ANNEX B

FIXED AMOUNT F(n) OF THE CONCESSION FEE

The fixed amount F(n) of the Concession Fee payable for fiscal year (n) is equal to the product of the amounts f(n) taken from the preceding table, multiplied by the revision coefficient R(n)/R(0) in which:

R(n) is the consumer price index in the Republic of ... for the year (n-2) ; and

R(0) is the consumer price index for the Republic of ... for the year *[year preceding date of signature of the Concession Agreement]*

Values of f(n)

(in thousands of ...)

| (n) | F(n) | (n) | f(n) |
|-----|------|----------|------|
| 1 | | 11 | |
| 2 | | 12 | |
| 3 | | 13 | |
| 4 | | 14 | |
| 5 | | 15 | |
| 6 | | 16 | |
| 7 | | 17 | |
| 8 | | 18 | |
| 9 | | 19 | |
| 10 | | 20 to 30 | |

ANNEX C

LIST OF CONTRACTS FOR WHICH THE CONCESSIONAIRE TAKES THE PLACE OF THE
SNCFI

(Article 1-14)

[section to be completed]

ANNEX D

ONGOING REHABILITATION OR DEVELOPMENT WORKS

(Article 3-8)

[section to be completed]

ANNEX E

6.1.1.2. *STANDARD FORMAT FOR MONTHLY STATISTICAL ACTIVITY
REPORT*

(Article 12-2)

[section to be completed]