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DRAFT CONCESSION CONTRACT

**THE DESIGN, CONSTRUCTION, FINANCE, OPERATION AND MAINTENANCE OF A
TOLL HIGHWAY, INCLUDING ASSOCIATED FACILITIES AND DEVELOPMENTS
UNDER A CONCESSION CONTRACT**

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SAMPLE

CONCESSION CONTRACT

between

(1) [Insert name of Implementing Authority]

and

(2) [insert name of concessionaire]

THIS CONCESSION CONTRACT is made the λ day of λ

BETWEEN

(1) [Insert name of Implementing Authority] as conessor; and

(2) [insert name of concessionaire] as the Concessionaire

WHEREAS:

- (A) The Implementing Authority issued an Invitation to Tender to λ prospective tenderers inviting proposals for the Project.
- (B) The Implementing Authority was established by the Act.
- (C) The Consortium was one of the prospective tenderers who responded to the Invitation to Tender and was selected by the Implementing Authority as the preferred tenderer.
- (D) The Concessionaire has been formed by the Consortium with the object of entering into this Concession Contract and undertaking the Project.

NOW THEREFORE in consideration of the mutual covenants, conditions, representations and warranties set forth herein the Parties hereto agree as follows-

1. DEFINITIONS AND INTERPRETATION

- 1.1 The headings in this Concession Contract and the Annexures are for convenience only and shall not be deemed part thereof or be taken into consideration in the interpretation or construction thereof.
- 1.2 Words importing the singular only, also include the plural and vice versa where the context requires.
- 1.3 Any reference to any agreement or Annexure shall be construed as including a reference to any agreement or Annexure amending or substituting that agreement or Annexure.

- 1.4 If any definition in this Clause 1 contains a substantive provision conferring rights or imposing obligations on any Party, effect shall be given to such provision as if it were a substantive provision in the body of this Concession Contract.
- 1.5 References in this Concession Contract to amounts "in Base Date prices" means that such amounts are stated in Base Date values and shall, for the purposes of this Concession Contract, be escalated on the Effective Date and on each anniversary thereof in accordance with the following formulae:

$$EA = CA \cdot \frac{CPI_x}{CPI_y}$$

where

EA = the escalated amount;

CA = the amount specified in this Concession Contract in Base Date prices;

CPI_x = CPI for, in the case of the Effective Date, the fifth month prior to the Effective Date, and, in the case of each subsequent anniversary thereof, the fifth month prior to such subsequent anniversary; and

CPI_y = CPI for, in the case of the Base Date, the fifth month prior to the Base Date.

- 1.6 In this Concession Contract (including the recitals) and the Annexures the following words and expressions shall have the meanings hereby assigned to them when said terms are used with a capitalised first letter:

"**Act**" means the

"**Additional Construction Works**" means all Construction Works other than those included within the Initial Construction Works;

"**Additional Construction Works Programme**" means the indicative programme for the carrying out of the Additional Construction Works as the same may be amended from time to time in accordance with Clause 13.3;

"**Annexure**" means any annexures hereto;

"**Associated Agreements**" means the contracts related to the design, construction, financing, Operation and Maintenance of the Highway or otherwise to be entered into by the Concessionaire in connection with the Project in the form approved by the Implementing Authority including but not limited to, those contracts listed in Annexure XXIII;

"**Associated Facilities**" means all those facilities which do not form part of the Highway which are to be built by the Concessionaire so as to satisfy the Implementing Authority's Requirements and which are not to be operated or maintained by the Concessionaire;

"**Base Toll Tariff**" has the meaning ascribed to that phrase in Annexure XV hereto;

"**Business Day**" means any day other than a Saturday, Sunday or a day which has been declared/gazetted as a public holiday by the State;

"**Concession Contract**" means this concession contract between the Implementing Authority and the Concessionaire including the Annexures hereto;

"**Concession Period**" means the period specified in Clause 2.3 and any extensions thereof;

"**Concession Rights**" means all the rights conferred and obligations imposed on the Concessionaire pursuant to this Concession Contract for the purposes of the Project, including, without limitation, the right to design, construct, commission, operate, maintain, repair, charge and collect tolls on the Highway and raise revenues from Developments;

"**Concessionaire**" means [insert name of concessionaire], a company established under the laws of the [host country] and its legal successors and assigns permitted by the Implementing Authority;

"**Consortium**" means the [insert name of consortium] comprising the Sponsors;

"**Construction Commencement**" means the commencement of any Construction Works as certified by the Independent Engineer;

"**Construction Completion**" in respect of any Construction Works means the completion of such Construction Works as certified by the issue of the Taking Over Certificate by the Independent Engineer;

"**Construction Contracts**" means any contracts entered into by the Concessionaire in relation to Construction Works;

"**Construction Documents**" has the meaning ascribed to it in each Construction Contract;

"**Construction Works**" means the design, construction, upgrade, rehabilitation and periodic maintenance works required to be undertaken by the Concessionaire so as to meet its obligations under this Concession Contract including, without limitation, the Initial Construction Works, the Additional Construction Works and the construction of Associated Facilities, but excluding Operation and Maintenance;

"**Consumer Price Index**" or "**CPI**" means the Consumer Price Index provided that if, after the Effective Date: (i) such index shall cease to be published, or (ii) either the Implementing Authority or the Concessionaire should notify the other that, due to a change in circumstances, the index is no longer representative then, in any such circumstances, the Parties will use such other official information or index as may be available and acceptable to them or, failing such acceptance, an index determined in writing as fair and reasonable by a majority decision of a panel of 3 (three) independent chartered

accountants of the [host country] appointed by the Independent Engineer, which determination shall be final and binding upon the Parties. Any determination made by such panel as to the date from which any revised index shall take effect and liability for the costs of determination of the index by the panel shall be final and binding on the Parties. If the index is rebased or the calculation of the index is otherwise changed, the Parties will recalculate the index so that it reflects the original base and/or calculation;

"Contractor" means the party or parties designated as Contractor pursuant to any Construction Contract;

"Contract Price" means:-

- (a) in the case of the Initial Construction Works, the contract price as specified in the Initial Construction Works Contract; and
- (b) in the case of any Additional Construction Works, the contract price as specified in the relevant Construction Contract for such works;

"Correction Period" means the period specified for the rectification of any non-conformance with the acceptance criteria specified in Annexure II;

"Debt Amount" has the meaning ascribed to that term in the Deed of Suretyship;

"Day" or **"day"** means a calendar day;

"Deed of Suretyship" means the Deed of Suretyship to be executed by the Implementing Authority in favour of the General Agent in the form set out in Annexure XXV as the same may require to be amended to take account of the final form of the Loan Agreements;

"Delivery Date(s)" means in relation to each Highway Section the date(s) upon which the Implementing Authority delivers that Highway Section and the Rights of Way relating thereto to the Concessionaire;

"Design and Construction Contract" means the terms specified in Annexure VII;

"Detailed Design" means the detailed design for the Construction Works prepared or procured by the Concessionaire and reviewed and approved in accordance with the procedure set out in the Engineering Requirements;

"Detailed Design Procedure" means the procedure for approval of the Detailed Design as specified in the Engineering Requirements;

"Development Period" means the period between the date of this Concession Contract and the Effective Date;

"Developments" means petrol and service stations, rest areas, industrial parks, health and sport facilities, restaurants and lodging facilities, commercial facilities, buildings related to parking and other similar facilities (but excluding infrastructure

for the Concessionaire's operation and maintenance centres) not directly related to the Construction Works or the operation and maintenance of the Highway, on, over or attaching to the Highway, which are carried out by the Concessionaire or its nominees pursuant to Clause 12;

"Effective Date" means the day after the date when the conditions specified in Clause 24.2 have been met or waived;

"Engineering Requirements" means the requirements (including without limitation the standards) specified in Annexure II to this Concession Contract;

"Environmental Approval" means the []

"Equity" means any form of share capital or subordinated debt issued by the Concessionaire (other than under a Loan Agreement);

"Equity Subscription Agreements" means the agreements to be entered into between the Shareholders and the Concessionaire setting out the terms on which the Shareholders are to subscribe for Equity in the Concessionaire;

"Expected Equity Value" means, at any date, the present value at that date of the gross amount of any future dividends, interest and repayments of principal or capital that would have been paid in respect of Equity from such date to the end of the Full Concession Period, as determined in accordance with Clause 19.7;

"Final Maintenance Bond" means the bond described in Clause 11.7;

"Financial Base Case" means the project forecast prepared by the Concessionaire and approved by the Lenders on the basis of certain base case assumptions and attached as Annexure XIV hereto;

"Financial Closing" means the signing of (i) the Loan Agreements and the satisfaction or waiver of the conditions precedent therein in respect of the initial drawdown to be made thereunder and (ii) the Equity Subscription Agreements representing binding commitments for the subscription of Equity by the Shareholders, in each case in a form satisfactory to the Implementing Authority;

"Financial Model" means the Financial Base Case for the Project as prepared for, updated and approved by the Lenders from time to time;

"Force Majeure" shall have the meaning set forth in Clause 18.1;

"Full Concession Period" means, at any date, the Concession Period (or the remaining balance thereof) assuming that it endures for 30 years from the Effective Date plus the aggregate of any extension periods previously awarded under the terms of this Concession Contract;

"General Agent" means the general agent as defined in the Loan Agreements;

"Generally Accepted Accounting Practices" means the generally accepted accounting practices developed by the [] Institute of Chartered Accountants as approved by the Accounting Practices Board in effect from time to time in the [host country];

"Good Industry Practice" means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced contractor or professional seeking in good faith to comply with its contractual obligations, complying with all applicable legislation and laws and engaged in the same type of undertaking and under the same or similar circumstances and conditions as those envisaged by this Concession Contract;

"Gross Toll Revenues" means the gross toll revenues (net of VAT and collection expenses) received by the Concessionaire during the relevant period;

"Highway" means as more fully described in Annexure III, together with all works, structures, facilities, plant and equipment (including all relevant software) which are integral to, or necessary for, the operation of the Highway, including, without limitation, toll facilities, road furniture and other structures and infrastructure for highway service areas to be built pursuant to this Concession Contract (but excluding, for the avoidance of doubt, Associated Facilities or Developments);

"Highway Sections" means the sections of the Highway described in Annexure I;

"Highway Usage Fee" means the fee to be paid by the Concessionaire to the Implementing Authority in accordance with Annexure XVI;

"Implementing Authority" means the

"Implementing Authority's Requirements" means the description of the scope, standards, design and performance criteria required by the Implementing Authority in terms of this Concession Contract and its Annexures;

"Independent Engineer" means the consulting engineer(s) or expert(s) jointly appointed by the Implementing Authority and the Concessionaire pursuant to Clause 6.1 or such other successor consulting engineer(s) or expert(s) as may be appointed from time to time by the Implementing Authority and the Concessionaire and whose duties are set forth in the Independent Engineer's Agreement, this Concession Contract, the Construction Contracts and the Operation and Maintenance Contracts;

"Independent Engineer's Agreement" means the contract(s) to be entered into by the Implementing Authority, the Concessionaire and the Independent Engineer for the purpose of this Concession Contract in the form of Annexure VI;

"Independent Expert" has the meaning given in Clause 19.7.1;

"Initial Construction Period" means the period of months commencing on the Effective Date as the same may be extended pursuant to the terms of this Concession Contract;

"Initial Construction Programme" means the programme for the Initial Construction Works as set out in Annexure I;

"Initial Construction Works" means those design and construction works that are specified to be carried out in the Initial Construction Period as specified in Annexure I;

"Initial Construction Works Contract" means the contract to be entered into on or before the date of this Concession Contract between the Concessionaire and the Initial Contractor for the design and construction of the Initial Construction Works in the form of Annexure VII;

"Initial Contractor" means the unincorporated joint venture established between [insert name of contractor who is to carry out the Initial Construction Works];

"Initial Operation and Maintenance Contract" means the Operation and Maintenance Contract entered into on or before the date of this Concession Contract in the form of Annexure VIII;

"International Trunk Road" means a primary road serving traffic with, inter alia, international origins and destinations;

"Invitation to Tender" means the Invitation to Tender for the Project issued by the Implementing Authority together with all its associated documents, annexures and appendices as supplemented from time to time;

"IRR" means the real post tax internal rate of return which a holder of Equity in the Concessionaire is forecast in the Financial Base Case to achieve on its investment in Equity over the life of the Project.

"Key Personnel Positions" means the positions designated as such in Annexure XX;

"Lender" or "Lenders" means any or all Persons providing loan facilities, credit facilities or guarantee facilities or hedging arrangements to the Concessionaire for the financing of the Project, in terms of the Loan Agreement(s) provided that, for the purposes of this Concession Contract, where the Lenders are required to take action or are to be given notice or are to be provided with documents under this Concession Contract, the General Agent shall be authorised to take such action, and to receive such notice or such documents, on behalf of the Lenders;

"Loan Agreement(s)" means the agreement or agreements to be entered into between the Concessionaire and the Lenders in respect of the loan facilities, credit facilities, hedging arrangements and guarantee facilities provided to the Concessionaire for the financing of the Concessionaire's obligations under this Concession Contract and any security documentation in relation thereto as initially

specified in Annexure XXIII and as further agreed by the Parties in accordance with clause 8.5;

"Long Stop Date" means in relation to:

- (a) the Initial Construction Works, the date which is months after the Effective Date provided that where the Concessionaire is entitled to an extension to the Time for Completion of such Construction Works beyond the date which is months after the Effective Date, the Long Stop Date for such Construction Works shall be extended to the date which is 6 (six) months after the Time for Completion of such Construction Works;
- (b) any other Construction Works, the date which is 6 (six) months after the Time for Completion for such Construction Works;

"LOS "D" means the minimum acceptable level of service "D" as specified by Annexure II;

"Material Adverse Governmental Action" shall have the meaning set forth in Clause 17;

"National Trunk Road" means a primary road serving traffic with, inter alia, national origins and destinations;

"Opening Date" shall have the meaning set forth in Clause 9.3;

"Operation" means the operation of the Highway as described in the Engineering Requirements;

"Operation and Maintenance" means all Operation and Routine Maintenance activities that are necessary for the proper operation and maintenance of the Highway in accordance with the requirements of this Concession Contract, and **"Operate and Maintain"** shall have a corresponding meaning;

"Operation and Maintenance Bond" means the bond described in Clause 11.6;

"Operation and Maintenance Contracts" means the agreements entered into by the Concessionaire and the O&M Contractors, for the Operation and Maintenance of the Highway;

"Operation and Maintenance Manuals" shall have the meaning ascribed to them in the Engineering Requirements;

"O&M Contractors" means the counterparties to the Concessionaire in the Operation and Maintenance Contracts;

"Party" means the Implementing Authority or the Concessionaire, as the case may be;

"Parties" means, collectively, the Implementing Authority and the Concessionaire;

"Performance Certificate" means the Performance Certificate to be issued by the Independent Engineer under Clause 9.2;

"Periodic Maintenance" means that maintenance work which is pre-planned over periods exceeding 6 months and for which a programme and design has to be submitted for approval in terms of Annexure 1, excluding Rehabilitation;

"Person" means any individual, partnership, corporation, company, business organisation, trust, Relevant Authority, governmental agency, the State or any other entity;

"Preliminary Design" means the preliminary design carried out by the Concessionaire in accordance with the preliminary design procedure described in Annexure II;

"Prime Rate" means the interest rate (nominal, annual compounded monthly in arrears) from time to time published by the Account Bank (as defined in the Loan Agreements) or, in the absence of an Account Bank, any Reference Bank, as its prime overdraft rate, as certified by any manager of such bank;

"Project" means the design, construction, commissioning, financing, rehabilitation, upgrading, operation and maintenance of the Highway, the design, construction rehabilitation and financing of the Associated Facilities and the undertaking of any Developments, all as envisaged or required by this Concession Contract;

"Project Documentation" means (i) the records, plans, specifications, engineering documents, soil data and analysis, systems, procedures, software, property acquisition documents, insurance policies, diaries, utility relocation plans, record maps, other reports and samples relating to the Project and in the possession of the Concessionaire and (ii) the licences, permits, contracts, warranties and contract rights of the Concessionaire relating to the Project;

"Project Value" has the meaning ascribed to that term in Annexure XXV;

"Public Road " is a road declared as such by the [highways ministry];

"Reference Bank" means any of the major commercial banks operating in the [host country], ranked in order of size of market capitalisation as may be agreed between the Parties, or in default of agreement, nominated by the Independent Expert;

"Refinancing" means any waiver, variation, amendment, supplement, novation or replacement of the Loan Agreements after the date of this Concession Contract which, whether independently or in combination with any connected arrangement has the effect of changing:

- (a) the margin or the effective rate of interest in respect of the Lenders' Liabilities;

- (b) the date for any payment or repayment of principal or interest in respect of the Lender Liabilities;
- (c) the Lender Liabilities outstanding at any time or the amount;
- (d) the balance required to be standing to the credit of the restricted accounts pursuant to the Loan Agreements;
- (e) the dividend cover ratios referred to in the Loan Agreements; and/or
- (f) the IRR;

"Rehabilitation" means the extensive repairs and/or reworking of structural layers, the laying of overlays in asphalt or other materials (in excess of 50mm thickness) on surfaced roads, extensive repairs and/or extensions on drainage structures and other appurtenant works;

"Related Party" means a Person who, directly or indirectly, through one or more intermediaries, controls or is controlled by a Person who holds at least a 5% equity interest in the Concessionaire, or is under common control of any Person who holds at least a 5% equity interest in the Concessionaire, and any Person who holds at least a 5% equity interest in the Concessionaire, where "control" with respect to any Person means the power to direct the management and policies of such Person whether through the ownership of voting securities, by contract or otherwise and the term "controlled" has the meaning correlative to the foregoing;

"Related Party Transaction" means any transaction relating in any way directly or indirectly to the Project in which the Concessionaire, any Contractor, any O&M Contractor or the Independent Engineer leases, transfers or otherwise disposes of any of its properties or assets to, or purchases any property or assets from, or enters into any contract, agreement, understanding, loan, advance or guarantee with, or for the benefit of, a Related Party (other than the Concessionaire) excluding any transaction of a de minimis or minor nature which is entered into or effected on arm's length terms in the ordinary course of the Concessionaire's business;

"Relevant Authority" means any ministry, department, provincial or local agency, authority or body of the State and any other public authority, body, entity or Person having jurisdiction under the laws of the State over any matter which may affect the Concessionaire or the Project;

"Remedy Period" means a period of 60 (sixty) Days. or such longer period as in the reasonable opinion of the Independent Engineer is required to remedy a breach or a default;

"Resolutive Conditions" means the conditions referred to in Clause 24.2.1;

"Resolutive Conditions Bond" means the guarantee procured by the Concessionaire in the form of a guarantee payable to the Implementing Authority for million US\$ in prices in accordance with the requirements of Clause 25 hereof in the form prescribed in Annexure XI;

"Rights of Way" means rights of passage over or under, and of access and egress to and from, the Site and any part or parts thereof, or where applicable land additional to the Site, without undue interference by any third party, for the purpose of the Construction Works and Operation and Maintenance of the Highway;

"Road Reserve" means the entire area reserved for the Highway and any Associated Facilities to be constructed by the Concessionaire, as proclaimed in accordance with the Act or any other relevant legislation;

"Route Section" means a specific portion of a proclaimed International or National Trunk Road, which portions are numbered; defined by magisterial district boundaries, rivers, cadastral boundaries; and measured from a chosen datum point;

"Routine Maintenance" has the meaning ascribed to it in the Engineering Requirements;

"Shareholders" means the Persons listed in Annexure XVII together with such other persons who hold Equity from time to time;

"Shareholders' Agreement" means the agreement between the Shareholders entitled "Shareholders Agreement" in the form approved by the Implementing Authority and included in Annexure XXI and any revisions thereto approved by the Implementing Authority;

"Site" means the land and Rights of Way specified in Annexure III together with such other land and rights of way as the Implementing Authority is obliged to make available to the Concessionaire under this Concession Contract;

"Local Currency" means the lawful currency of the [host country] from time to time;

"Sponsors" means [insert name of sponsors];

"State" means the Government of .the [host country], acting directly or through its lawfully designated representatives;

"Subsidiary(ies)" means, with respect to any Person, any corporation, company, association or other business entity of which the majority of the issued share capital having ordinary voting power is, at the time as of which any determination is being made, owned or controlled by such Person or by one or more Subsidiaries of such Person or by such Person and/or one or more Subsidiaries of such Person;

"Substituted Entity" means any Person selected by the Implementing Authority or the Lenders to replace the Concessionaire in this Concession Contract and who has entered into the requisite agreements, all in accordance with Clauses 20.4 or 20.5 hereof;

"Taking Over Certificate" means Taking Over Certificate to be issued by the Independent Engineer pursuant to Clause 9.2;

"Target IRR" means the rate of return on the Equity as determined in accordance with Clause 19.7;

"Tax" means any present or future income, franchise, excise, stamp or other tax, fee, duty or other levy, impost or charge imposed by the State (but not banking funds transfer taxes or duties of any kind);

"Time for Completion" means in relation to the Initial Construction Works the date(s) specified for the completion of the relevant Construction Works as specified in Annexure I and, in relation to the Additional Construction Works, the date(s) specified for completion of the relevant Construction Works in Clause 13.1 or 13.2 (as appropriate) as such dates may be extended in accordance with this Concession Contract in the case of either the Initial Construction Works or the Additional Construction Works;

"Tolling Date" means with respect to Highway Sections identified in Clause 10, the date or dates from which the Concessionaire is entitled to charge and collect tolls at the relevant toll plazas in respect of such Highway Sections pursuant to Clause 10;

"Toll Tariff" has the meaning ascribed to that phrase in Annexure XV hereto;

"Uninsurable Event" means an event for which insurance is required to be effected pursuant to Annexure XVIII which insurance is not available in the world-wide insurance market or an event which is not generally insured against in the worldwide insurance market due to the level of premiums payable for such insurance;

"Unknown Utilities" means existing Utilities, the location of which could not reasonably have been foreseen and which are either charted with unknown positions or uncharted;

"Upgrade Works" means capacity improvements to the Highway such as the addition of lanes (including climbing lanes) and/or shoulders to single and/or dual carriageways, major alignment relocation, upgrade of single carriageway roads to dual carriageway or multiple lane facilities, improvements to the capacity of bridges, toll plazas and other structures;

"Utilities" means all facilities serving the population such as water, power, electricity, lighting, gas and telecommunications;

- 1.7 When any number of Days is prescribed in this Concession Contract, the same shall be calculated by excluding the first day and including the last day unless the last day is not a Business Day. Where the last day is not a Business Day, the time shall be calculated by excluding the first day, excluding such non Business Day and including the next Business Day.

2. CONCESSION RIGHTS AND OBLIGATIONS

2.1 Concessionaire Obligations

2.1.1 The Concessionaire will undertake the Project at its own cost and risk in accordance with the provisions of this Concession Contract. Neither the Implementing Authority nor any Relevant Authority shall provide any guarantee or support to the Concessionaire except as otherwise specifically provided herein or as provided in law. This Concession Contract shall not be deemed to grant the Concessionaire any right or impose any obligations on the Implementing Authority or any Relevant Authority except as specifically stated in this Concession Contract.

2.1.2 No instructions or approvals given by the Implementing Authority in accordance with the law and the provisions of this Concession Contract will affect the Concessionaire's responsibility to undertake the Project. Notwithstanding that this Concession Contract permits or requires the Concessionaire to engage third parties to perform part of the Project, such engagements shall not release the Concessionaire from any of its obligations and responsibilities to the Implementing Authority hereunder, and the Concessionaire shall be fully responsible to the Implementing Authority for the acts and omissions of such third parties in relation to the Project.

2.2 Exclusive Grant of Concession Rights

Subject to the terms of this Concession Contract, the Concession Rights are granted exclusively to the Concessionaire from the date of this Concession Contract until the termination or expiry of this Concession Contract in accordance with the terms of this Concession Contract.

2.3 Term of Concession Period

The Concession Period shall be for a period of 30 (thirty) years from the Effective Date, subject to extension and/or termination in accordance with this Concession Contract.

[Note: tenderers will be able to submit alternative bids with an alternative length of Concession Period]

2.4 Concession Contract Legally Binding

Without prejudice to the Resolutive Conditions to be satisfied prior to the Effective Date, each Party hereto hereby represents and warrants that this Concession Contract is legally valid and binding upon itself.

2.5 Payments

2.5.1 Save as expressly provided in this Concession Contract, the Implementing Authority shall not require payment by the Concessionaire for or in respect of the Concession Rights or otherwise for or in connection with the Highway or the Associated Facilities.

2.5.2 The Concessionaire will be responsible for all taxes of general application and, without limiting the generality of the foregoing, any duties, fees or taxes assessed by any Relevant Authority in respect of this Concession Contract, the Site and the Highway and in respect of any tolls charged for use of the Highway.

2.5.3 For the avoidance of any doubt, neither the Implementing Authority nor any Relevant Authority shall be liable for any payments except as expressly specified in this Concession Contract or in any applicable law.

3. CONCESSIONAIRE COVENANTS

3.1 Registration

3.1.1 The Concessionaire is incorporated in the [host country] and shall remain validly registered for the entire Concession Period.

3.1.2 The Concessionaire shall not amend, restate, supplement or otherwise modify its Certificate of Incorporation, Memorandum of Association or Articles of Association unless otherwise approved by the Implementing Authority in writing.

3.2 Compliance with Laws, Regulations and Standards

The Concessionaire shall comply with all laws, regulations and standards having the force of law of the State during the Development Period and the Concession Period.

3.3 Consents and Approvals

The Concessionaire shall at its cost:

3.3.1 comply with the Environmental Approval; and

3.3.2 obtain and comply with all other necessary permits and approvals in accordance with any applicable laws and regulations for the implementation of the Project.

3.4 Compliance with Requirements

3.4.1 The Concessionaire shall comply and shall ensure compliance by its sub-contractors with this Concession Contract.

3.4.2 The Concessionaire warrants that it shall comply with, and the Project shall be carried out in conformity with, the Implementing Authority's Requirements (including without limitation the standards specified therein) and using equipment and materials which are of suitable quality for the purpose and uses intended and free of defects and deficiencies. All such work shall be completed to the satisfaction of the Independent Engineer.

3.5 Single Purpose Concessionaire; No Subsidiaries

- 3.5.1 The Concessionaire shall be a single purpose corporation with the sole purpose of implementing the Project except as the Implementing Authority may otherwise agree in writing and the Concessionaire shall not assume any liability other than in connection with the Project. The Memorandum and Articles of Association of the Concessionaire shall include a provision to such effect.
- 3.5.2 The Concessionaire shall have no Subsidiaries throughout the Concession Period except with the prior written consent of the Implementing Authority.

3.6 Related Party Transactions

- 3.6.1 Unless otherwise agreed by the Implementing Authority in writing, the Concessionaire will enter into no Related Party Transactions, other than Related Party Transactions which are no less favourable to the Concessionaire than those that could have been obtained in a comparable arm's-length transaction by the Concessionaire with an unrelated Person.
- 3.6.2 The Implementing Authority shall have the right to review the basis for all costs charged, directly or indirectly, to the Concessionaire by a Related Party .The Concessionaire shall give prior written notice to the Implementing Authority of any Related Party Transaction to be entered into by the Concessionaire prior to entry therein together with all relevant details relating thereto.
- 3.6.3 The Implementing Authority acknowledges that the Initial Construction Works Contract and the Initial Operation and Maintenance Contract will be regarded as Related Party Transactions which are no less favourable to the Concessionaire than those that could have been obtained in comparable arm's length transactions by the Concessionaire with Persons which are not Related Parties.

[Note: The Initial Construction Works Contract and the Initial Operations and Maintenance Contracts must be entered into on the date of the Concession Contract and must reflect the risk allocations and prices set out in the heads of terms submitted with the bids.]

3.7 Equity Contribution

The Concessionaire shall ensure that:

- 3.7.1 on Financial Closing, the Shareholders have subscribed or have made unconditional commitments to subscribe for at least Rλ of Equity; and
- 3.7.2 the Equity referred to in Clause 3.7. 1 which is not subscribed as at Financial Closing will be subscribed and paid for by the Shareholders listed in Annexure XVII on the dates specified in the Equity Subscription Agreements.

3.8 Limitation on Financial Indebtedness

The Concessionaire shall not incur, assume or permit to exist any indebtedness including guarantees issued to third parties and the creation of charges, pledges or other encumbrances over its assets, otherwise than in accordance with the Associated Agreements or in the ordinary course of business in furtherance of the Project, without the prior written consent of the Implementing Authority.

3.9 Refinancing

3.9.1 The Concessionaire shall not, without the prior written consent of the Implementing Authority, undertake or enter into any Refinancing (which consent shall be given in the absolute discretion of the Implementing Authority unless such Refinancing is necessitated by a default or potential event of default of the Concessionaire under the Loan Agreements in which case the Implementing Authority must not unreasonably withhold such consent).

3.9.2 The Concessionaire shall provide the Implementing Authority with not less than 60 days notice of any proposed Refinancing, including the terms of such Refinancing and the Concessionaire's proposals as to the amount and terms of payment of the Refinancing Gain (if any).

3.9.3 Where the Implementing Authority consents to any Refinancing, the Concessionaire shall pay to the Implementing Authority in accordance with Clause 3.9.4 λ per cent of an amount which is the lesser of:

- (a) the Refinancing Gain; and
- (b) that part of the Refinancing Gain that results in the IRR exceeding λ per cent.

For the purposes of Clause 3.9, "Refinancing Gain" shall mean an amount equal to the monetary value that would, but for the provisions of this clause 3.9, be derived by the Shareholders from the increase in the IRR which results from the Refinancing; such IRR and monetary value to be determined by amending the Financial Base Case to reflect the terms of the Refinancing and updating the Financial Base Case to reflect the then current financial status of the Concessionaire and the Project (in both cases) on such basis as is agreed by the Implementing Authority.

3.9.4 The amount payable to the Implementing Authority pursuant to Clause 3.9.3 shall be paid to the Implementing Authority as follows:

- (a) if the Refinancing entitles the Concessionaire to draw additional funds, an immediate cash payment on the first date on which the Concessionaire is entitled to draw such additional or new funds; or
- (b) in all other cases, on the dates and in the amounts agreed by the Parties (or, in the event of disagreement, as determined in accordance with the Dispute Resolution Procedure) as being the dates when the Refinancing Gain would otherwise accrue to the Shareholders and the amounts of the Refinancing

Gain that would otherwise accrue to the Shareholders, which dates and amounts shall be specified in a schedule prior to the date the Refinancing takes effect.

For the avoidance of doubt, payments of amounts payable to the Implementing Authority pursuant to this Clause 3.9 shall rank in priority to all Distributions (as defined in accordance with Annexure XVI) but shall otherwise be subject to the same restrictions as apply to the payment of Distributions under the Loan Agreements.

3.10 The Concessionaire to Make Documents Available to the Implementing Authority

As hereinafter provided in this Clause 3.10, the Concessionaire shall, upon the written request of the Implementing Authority and at no cost to the Implementing Authority, make available at all times documents which are or were acquired or brought into existence by the Concessionaire or supplied to the Concessionaire by other parties to the Associated Agreements for the purposes of the Project. The Concessionaire shall not be obliged to disclose any document in respect of which the Concessionaire can claim legal privilege against the Implementing Authority. Documents in respect of which the Concessionaire can claim legal privilege against third parties shall be held in confidence by the Implementing Authority in terms of Clause 3.11.5 as if the Implementing Authority was bound by that Clause provided always that this restriction shall not prevent any disclosure by the Implementing Authority which is required by law or to the State.

3.11 Copyright and Confidentiality

3.11.1 The Concessionaire shall procure to the extent legally possible that any software, programmes and documentation used by an O&M Contractor in connection with the Project and which are required for the continuing performance of the functions performed by the relevant O&M Contractor (other than software or software licences which are freely commercially available and are not transferable in terms of the standard licences by which the right to use the software was acquired) shall be provided to the Concessionaire by the relevant O&M Contractor upon termination or expiry of the relevant Operation and Maintenance Contract and that the Concessionaire shall be granted a perpetual non-exclusive, royalty-free licence to use the same for the Operation and Maintenance of the Highway which licence shall be transferable to a Substituted Entity or to a third party or the Implementing Authority for continuing the Operation and Maintenance of the Highway. The Concessionaire shall, on termination of this Concession Contract or expiry of the Concession Period, whichever is the earlier, grant to the Implementing Authority a transferable perpetual non-exclusive royalty free licence to use such software for the Operation and Maintenance of the Highway.

3.11.2 Copyright in the Implementing Authority's Requirements and other documents issued by the Implementing Authority or the Concessionaire (excluding any documents in respect of which the Concessionaire can claim legal privilege against the Implementing Authority) shall be the exclusive property of the Implementing Authority. The Concessionaire may at its cost (and shall allow other parties to

Associated Agreements at their cost to) copy, use and communicate any such document for the purposes of the respective Associated Agreements. The Concessionaire shall not (and shall ensure that other parties to Associated Agreements shall not), without the Implementing Authority's consent, use, copy or communicate to a third party such documents, except as strictly necessary for the purposes of the Associated Agreements or as permitted by Clause 3.11.5.

- 3.11.3 The Concessionaire agrees, upon request by the Implementing Authority, to make available to the Implementing Authority, or to any Relevant Authority designated by the Implementing Authority in writing, at no cost to the Implementing Authority or such Relevant Authority, for their use in relation to the Construction Works, financing and Operation and Maintenance of the Highway such copies of all drawings, data, books, reports, documents, software, source codes and manuals and other information as are required. To the extent that such source codes are not owned by the Concessionaire, the Concessionaire will ensure that such source codes either be licensed to the Implementing Authority or, if not capable of being licensed, be deposited with a recognised escrow agent and available to be accessed by the Implementing Authority on the terms of the applicable escrow agreement as approved by the Implementing Authority. This requirement excludes software or software licences which are freely commercially available and are not transferable in terms of the standard licences by which the right to use the software was acquired ("**Proprietary Materials**") which the Concessionaire and/or any Contractor or O&M Contractor has been using and which are necessary for continuing operation of the Construction Works, financing and Operation and Maintenance of the Highway as the Implementing Authority may reasonably require in the performance of its functions under this Concession Contract or in the performance of its or the Relevant Authority's statutory duties. The Concessionaire further agrees, upon expiry of the Concession Period or termination of this Concession Contract, to grant or procure the grant to the Implementing Authority or, if this Concession Contract is terminated and a Substituted Entity is appointed in terms of Clause 20, to such Substituted Entity of a transferable perpetual non-exclusive royalty free licence to use the Proprietary Materials (to the extent owned by the Concessionaire, Contractor or O&M Contractor). The Concessionaire shall procure that the Implementing Authority or, if applicable, any Substituted Entity (at the cost of the Implementing Authority or the Substituted Entity, as the case may be, in respect of any reasonable licence fees payable to any licensor) is legally entitled to use such Proprietary Materials as are used but not owned by the Concessionaire, Contractor or any O&M Contractor and which are necessary for continuing Construction Works and the continued Operation and Maintenance of the Highway.

The Concessionaire shall indemnify the Implementing Authority against and hold the Implementing Authority harmless from any liability or cost which is suffered or incurred by the Implementing Authority as a result of the infringement of any third party's rights arising from the proper use by the Implementing Authority of the Proprietary Materials in relation to the Project and/or the Highway.

- 3.11.4 The Concessionaire shall not (and shall ensure that other parties to the Associated Agreements shall not), without the prior written approval of the Implementing Authority (which approval shall not be unreasonably withheld or delayed), take or authorise the taking of photographs of the Highway for use in any publicity or

advertising or publish alone or in conjunction with any other Person, any articles, photographs or other illustrations relating to the Project or any part thereof nor shall it impart to any publication, journal or newspaper or any radio or television programme any information regarding the Highway other than information that is or becomes in the public domain (other than through the default of the Concessionaire or other parties to the Associated Agreements) and such information or documentation that is required by law to be delivered to any Relevant Authority, stock exchange, the Implementing Authority or any other Person.

3.11.5 The Concessionaire shall not (and shall ensure that other parties to the Associated Agreements shall not) during its engagement hereunder (save in the course of its duties or as contemplated under this Concession Contract) or at any time after the expiry or termination of this Concession Contract for any reason disclose to any person (other than to its professional advisers, actual or prospective Lenders and their professional advisers, and actual or prospective subscribers for or purchasers of Equity and their professional advisers or a proposed Substituted Entity, in each case subject to obtaining similar confidentiality undertakings in favour of the Implementing Authority to those contained in this Concession Contract) or otherwise make use of any confidential information including, without limitation, information relating to methods and techniques of construction for the Highway or the Project, financial information relating to the Highway, the Project, the Implementing Authority or the Concessionaire and the contents of any documents, including any legal agreements, prepared by or on behalf of the Concessionaire or to which the Concessionaire is a party which it has or may in the course of its engagement hereunder become possessed of relating to the Concessionaire, the Highway or the Project or otherwise, without the prior written approval of the Implementing Authority save for such information or documentation that is or becomes in the public domain (other than through the default of the Concessionaire or other parties to the Associated Agreements) and such information or documentation that is required by law to be delivered to any Person. Nothing in this Clause shall preclude the Concessionaire from using such information and documents in enforcing its rights against the Implementing Authority or any other person.

3.11.6 Unless otherwise agreed in writing by the Implementing Authority, the Concessionaire and other parties to the Associated Agreements shall have no interest in nor receive remuneration in connection with the Highway except as provided for in this Concession Contract or the Associated Agreements. Subject to the proper enforcement of rights under the Associated Agreements, the Concessionaire shall not (and shall take all reasonable steps to ensure that other parties, excluding the Lenders acting in their capacity as Lenders, to the Associated Agreements shall not) engage in any activity which might conflict with the interests of the Implementing Authority under this Concession Contract or the Associated Agreements, unless such activity is carried out pursuant to the enforcement of its rights hereunder or thereunder .

3.12 Transfer of Highway and Developments

At the end of the Concession Period or at such earlier time as may be provided herein, the Concessionaire shall hand over the Highway and Associated Facilities to the Implementing Authority free of charges, liens, claims or encumbrances of any

kind whatsoever, free of any liabilities and in good condition in accordance with the standards set out in the Implementing Authority's Requirements, and shall not, other than as provided for in this Concession Contract, be entitled to payment of any monies in connection therewith. The rights held by the Concessionaire relating to the Developments shall be transferred to the Implementing Authority free of charges, liens, claims or encumbrances of any kind whatsoever, and free of any liabilities on termination of the Concession Period. The Concessionaire shall ensure that from the date which is 12 (twelve) months prior to the expiry of the Concession Period and for the remainder of such period, the Highway shall be in the condition that will meet the standards required at the end of the Concession Period as set out in the Engineering Requirements. The Independent Engineer shall certify whether the Concessionaire has discharged its obligations under this Clause 3.12.

3.13 Contracts, Employment, Letting, Training

3.13.1 The Concessionaire shall:-

- (a) on or before the date of Financial Closing enter into those Associated Agreements listed in Annexure II in the form previously approved by the Implementing Authority;
- (b) thereafter, enter into such other contracts as are necessary to ensure the timely and proper completion of the Preliminary Design, Detailed Design, Construction Works, financing, Operation and Maintenance of the Highway, and such future design and construction as may be necessary to meet the Concessionaire's obligations under this Concession Contract;
- (c) not enter into any contract or arrangement referred to in sub-paragraph (b) above unless the form of such contract or arrangement has been approved by the Implementing Authority, provided that the Concessionaire is not required to obtain such approval in relation to any such contract or arrangement which is of an immaterial nature. For the purposes of this clause a contract or arrangement is immaterial if the contract or arrangement is not material in financial terms or not material to the performance of the Concessionaire's obligations hereunder; and
- (d) not enter into any other material contract or arrangement unless the form of such contract or arrangement has been approved by the Implementing Authority.

3.13.2 The Concessionaire shall ensure that the Contractors perform the Construction Works in accordance with the terms of the relevant Construction Contracts. The terms of the Initial Construction Works Contract shall serve as the basis of any subsequent Construction Contract to be entered into by the Concessionaire.

3.13.3 The Concessionaire shall ensure that the O&M Contractors perform their functions relating to Operation and Maintenance of the Highway in accordance with the relevant Operation and Maintenance Contracts. The terms of the Initial Operations and Maintenance Contract shall serve as the basis of any subsequent Operations and Maintenance Contract to be entered into by the Concessionaire.

- 3.13.4 Subject to Clause 3.9, the Concessionaire shall not, without the prior written consent of the Implementing Authority, change the terms of any Associated Agreement or other contract that requires the approval of the Implementing Authority after the Implementing Authority has expressed its satisfaction therewith .
- 3.13.5 The Concessionaire shall employ, to the extent that it is reasonable and practicable, citizens of the [host country], and shall implement Annexure V to the reasonable satisfaction of the Implementing Authority.
- 3.13.6 The Concessionaire will put out to competitive tender on an arms length basis all contracts for Construction Works other than those Construction Works that are the subject of the Initial Construction Works Contract. The terms of such tenders shall be supplied in advance to the Implementing Authority and must be in accordance with Good Industry Practice.

3.14 Costs Recoverable from the Contractors or the O&M Contractors

Where the Concessionaire is entitled under any Construction Contract and/or any Operation and Maintenance Contract to recover costs which have been incurred by the Implementing Authority in connection with the Project, the Concessionaire shall enforce its rights to recover such costs and shall pay any amounts so recovered promptly to the Implementing Authority.

3.15 Approvals

- 3.15.1 The Concessionaire warrants and shall ensure that any decision, determination, instruction, inspection, examination, testing, consent, approval, expression of satisfaction, acceptance, agreement, exercise of discretion (whether sole or otherwise) or similar act by the Implementing Authority or the Independent Engineer in respect of this Concession Contract, the Construction Contracts, the Operation and Maintenance Contracts or other Associated Agreements shall be so applied for or requested promptly.
- 3.15.2 Unless expressly provided otherwise in this Agreement, the Implementing Authority shall not unreasonably withhold or delay the giving of any consent, approval or expression of satisfaction referred to in Clause 3.15.1 and shall exercise its rights referred to in that Clause reasonably and fairly.

3.16 Contingency Fund

The Concessionaire shall on the Effective Date pay to the Implementing Authority the sum of US\$..... (.....US dollar in prices) [in respect of the permanent work and the road pavement comprised in the Highway.]. The application of such sum shall be under the sole control of the Implementing Authority for the purposes of the Project.

3.17 Highway Usage Fee

The Concessionaire shall from time to time pay to the Implementing Authority the Highway Usage Fee in accordance with Annexure XVI.

4. IMPLEMENTING AUTHORITY'S CONTRIBUTION

Except as otherwise expressly provided in this Concession Contract, the contribution of the Implementing Authority shall be limited to the granting of the Concession Rights upon the terms and conditions set out herein and the Concessionaire shall not be entitled to receive, by virtue of this Concession Contract, any financial assistance or payment, including, without limitation, any grants, guarantees, incentives or subsidies from the State, the Implementing Authority or any Relevant Authority. The Implementing Authority's contribution is subject to the fulfilment or waiver of all the requirements set out in Clause 24. For the avoidance of doubt, the provisions of this Clause do not apply in relation to the Concessionaire's or Lender's rights (as the case may be) under the Deed of Suretyship or which arise as a result of a breach of this Concession Contract by the Implementing Authority or by operation of law.

5. IMPLEMENTING AUTHORITY'S UNDERTAKINGS

5.1 Implementing Authority Assistance

Except as otherwise provided in this Concession Contract, the Implementing Authority shall:

5.1.1 give reasonable assistance to the Concessionaire in its dealings with the Relevant Authorities in connection with implementing the Project in accordance with the terms and conditions set forth herein;

5.1.2 make every reasonable effort to assist the Concessionaire to obtain those permits and approvals necessary (other than the Environmental Approval) for the Construction Works and Operation and Maintenance of the Highway, provided, however, the Implementing Authority shall bear no liability for any failure of the Concessionaire to obtain any permit or approval required for the project. Where the Concessionaire fails, other than through its negligence or default, to obtain any such permit, the Implementing Authority and the Concessionaire shall discuss mutually acceptable solutions to overcome that failure.

5.2 Traffic Reduction

The Implementing Authority shall have no liability to the Concessionaire for any reduction in traffic using the Highway, except as provided for in Clauses 17, 18 or 19.

5.3 Liability/Disclaimer

5.3.1 Except as expressly stated in Clause 7.9, no warranties, representations or undertakings are given by the Implementing Authority as to the accuracy or

completeness of any information provided by the Implementing Authority or any Relevant Authority. Neither the Implementing Authority nor any individual member thereof, nor its advisers, shall be under any liability for any act, error, misrepresentation, misstatement or omission of the Implementing Authority or any Relevant Authority in relation to such information except as expressly stated in Clause 7.9.

- 5.3.2 Except as expressly stated in this Concession Contract, the Implementing Authority shall have no liability to the Concessionaire arising out of any review of and/or comments on any document submitted to the Implementing Authority under this Concession Contract.

5.4 Implementing Authority Competence

- 5.4.1 The Implementing Authority hereby represents and warrants that the Implementing Authority has been duly empowered and authorised to implement the Project and to enter into and perform its obligations under this Concession Contract.

- 5.4.2 All decisions, determinations, instructions, inspections, examinations, tests, consents, approvals, certifications, expressions of satisfaction, acceptances, agreements, exercises of discretion (whether sole or otherwise), nominations or similar acts of the Implementing Authority shall be given, made and done in writing, and if given, made and done by the Chief Executive Officer (or such other person or persons as he or she may notify to the Concessionaire for such purpose from time to time) may be relied upon by the Concessionaire and the Lenders.

5.5 Entering onto Land by the Concessionaire

- 5.5.1 Subject to Clause 5.6.2, the Concessionaire and its staff and their authorised agents and contractors, shall be considered to have been duly authorised in writing by the Implementing Authority in terms of section 43(1) of the Act to enter upon such land as may be necessary for any investigation, survey or other act necessary for the purposes of the Project.

- 5.5.2 Where the Concessionaire enters land pursuant to Clause 5.5.1, the Concessionaire shall promptly notify the proprietor or person in charge of the relevant land prior to such entry and inform such person of the reason for the Concessionaire's presence. The Concessionaire, its staff and their authorised agents and contractors shall not represent or commit the Implementing Authority or the State in any way with regard to such entry and the Concessionaire shall indemnify the Implementing Authority and the State for all costs and liabilities incurred by the Implementing Authority and the State in legal proceedings or compensation to owners or users of the property as a result of any violation of the laws, rules or regulations governing the conduct of persons entering such land for such purposes. The Concessionaire shall repair or pay compensation to the owners or users of such property for any damage caused by the exercise of the power conferred under Clause 5.5.1.

6. INDEPENDENT ENGINEER

6.1 Appointment of the Independent Engineer

6.1.1 The Implementing Authority and the Concessionaire shall procure that an Independent Engineer is appointed at all times during the Concession Period. In that respect, the Implementing Authority and the Concessionaire agree to enter into the Independent Engineer's Agreement on or prior to the Effective Date. It is acknowledged that the identity of the Independent Engineer may be changed from time to time by agreement between the Parties. The Independent Engineer will report directly to the Implementing Authority and the Concessionaire, and the costs of the Independent Engineer will be paid by the Implementing Authority and the Concessionaire, in the manner set forth in the Independent Engineer's Agreement.

6.1.2 Where the Implementing Authority and the Concessionaire fail to agree on the Person to be appointed as Independent Engineer under Clause 6.1.1, the Implementing Authority and the Concessionaire shall each nominate up to two Persons who shall each submit a tender for the position of Independent Engineer. Such tenders shall be evaluated by a committee comprising an equal number of representatives of the Implementing Authority and the Concessionaire. If, following such process, the Implementing Authority and the Concessionaire fail to agree on any aspect of the evaluation process or a Person to be appointed Independent Engineer, the Independent Engineer shall be appointed at the request of either Party by a majority decision of a panel consisting of one independent expert engineer appointed by each of the Implementing Authority and the Concessionaire and an independent engineer expert chosen by the two panel members previously appointed by the Implementing Authority and the Concessionaire.

6.2 Performance of the Duties of the Independent Engineer

6.2.1 The Independent Engineer shall be required to perform the duties set forth herein, in the Independent Engineer's Agreement, in the Construction Contracts and in the Operation and Maintenance Contracts. The Parties shall require the Independent Engineer to act impartially and within the terms of the relevant contract when exercising its discretion and discharging its professional duty .

6.2.2 The Implementing Authority, the Concessionaire and the Lenders shall be entitled to consult with the Independent Engineer on any matter relating to the Project and may request that the Independent Engineer deliver and issue an opinion, instruction, certificate, valuation or other determination, as applicable with respect to all technical matters relating to the Project. As provided in Clause 6.2.6, the Parties shall comply with such decisions of the Independent Engineer.

6.2.3 The scope of services of the Independent Engineer shall include but not be limited to review, inspection, testing and certification in accordance with the Independent Engineer's Agreement of each Contractor's work to ensure proper performance and completion of the Preliminary Design, Detailed Design and the Construction Works in accordance with the terms of this Concession Contract and the relevant Construction Contracts. The scope of services of the Independent Engineer shall also include but not be limited to review, inspection and testing in accordance with

the Independent Engineer's Agreement of the Concessionaire's work to ensure the Operation and Maintenance is carried out in accordance with the terms of this Concession Contract and the relevant Operation and Maintenance Contract.

- 6.2.4 Wherever under this Concession Contract a determination is required to be made by the Independent Engineer with respect to any request of the Concessionaire for extension of time, the Independent Engineer shall make such determination save that, in the event of any request of the Concessionaire for extension of the Concession Period, the Implementing Authority shall make such determination taking into account any recommendation by the Independent Engineer.
- 6.2.5 Whenever under this Concession Contract a determination is required to be made with respect to any request of the Concessionaire for compensation for monetary relief and/or increased costs, the Independent Engineer shall, subject to Clause 21.4, make such determination; however, where a determination is to be made with respect to any request of the Concessionaire for loss of or delay in receipt of revenues or profits or for acceleration costs, the Concessionaire shall, subject to Clause 21.4, submit such request to the Independent Engineer with a copy to the Implementing Authority, and, upon submission of such request, the Independent Engineer shall as soon as reasonably practicable make recommendations thereon to the Implementing Authority with a copy to the Concessionaire. The Implementing Authority shall, within 21 (twenty one) days of its receipt of such recommendations, have the right to concur with such recommendations or suggest alternative remedies to the Concessionaire. Should the Implementing Authority, within the 21 day period referred to above, either concur with or not respond to the Independent Engineer's recommendations, such recommendations shall become the Independent Engineer's decision. Should the Concessionaire agree with any alternative remedies proposed by the Implementing Authority, such agreement shall be final and binding on the Parties. Should the Concessionaire not so agree, the Independent Engineer shall at the request of either Party, make a determination in respect of the Concessionaire's initial request for loss of or delay in receipt of revenues or profits or for acceleration costs in accordance with this Concession Contract.
- 6.2.6 Nothing in this Clause shall alter the rights and obligations of the Parties under this Concession Contract nor prevent the Parties from challenging any opinion, instruction, determination, certification or evaluation of the Independent Engineer in accordance with Clause 21.2, provided that the Parties shall comply with such decisions by the Independent Engineer until and unless otherwise determined pursuant to Clause 21.
- 6.2.7 If any determination which is required to be made by the Independent Engineer in terms of this Concession Contract involves the evaluation or assessment of any matter outside the Independent Engineer's field of expertise as Independent Engineer, the Independent Engineer shall insofar as practicable rely on independent expert advice in making such evaluation or assessment.
- 6.2.8 If the Implementing Authority or the Concessionaire questions any determination or instruction of an assistant of the Independent Engineer, the Implementing Authority or the Concessionaire may within 7 (seven) Business Days of receipt of such

determination or instruction, refer the matter to the Independent Engineer, who shall confirm, reverse or vary such determination or instruction.

- 6.2.9 The Concessionaire shall ensure that the Independent Engineer is timeously provided with copies of all information received from any Contractor or O&M Contractor in relation to the Project, insofar as such information relates to the functions of the Independent Engineer.

7. ACQUISITION AND DELIVERY OF SITE

7.1 Site Acquisition

- 7.1.1 Subject to the Concessionaire complying with the provisions of this Clause 7.1, the Implementing Authority will have possession of each part of the Site identified in Annexure III (including Rights of Way relating to such part of the Site) at the date for delivery of that part of the Site as specified in Annexure III.

- 7.1.2 In respect of each part of the Site identified in Annexure III as not being in the possession of the Implementing Authority as at the date of this Concession Contract, the Concessionaire shall, 150 (one hundred and fifty) days prior to the date on which the Concessionaire is scheduled to commence construction on that part of the Site as stipulated in Annexure I, supply the Implementing Authority with the required expropriation diagrams, copies of title deeds, information regarding landowners, bondholders, servitude holders and the like to enable the Implementing Authority to:

- (a) acquire the relevant portions of each affected property as Road Reserve; and
- (b) obtain the relevant Rights of Way as specified in Annexure III or as agreed by the Parties.

- 7.1.3 If the Concessionaire reasonably requires any land in addition to the Site identified in Annexure III for the purposes of the Project (including temporary rights to use land (including surface rights) which is required for the mining of gravel, stone, sand, clay, water and any other materials or substance required for the Construction Works or the purposes of the Project but excluding in all cases the acquisition of mining permits or any other such permit or commercial rights in respect of such land), the Concessionaire shall provide the Implementing Authority with details of the relevant land or rights required and a detailed explanation of why such land or rights are required. The Implementing Authority and the Concessionaire shall meet to discuss the Concessionaire's requirement and following agreement of the relevant land or rights to be acquired and the terms on which such land or rights shall be acquired (it being acknowledged that the Concessionaire shall bear the costs of acquiring such additional land (including temporary rights) other than where such additional land is to form part of the Road Reserve or is the location of a toll plaza agreed with the Implementing Authority) the Concessionaire shall deliver to the Implementing Authority the documents for acquisition specified in Clause 7.1.2 within the time agreed by the Parties. The Implementing Authority shall acquire and

deliver the agreed [and or rights at the times agreed by the Parties or, failing agreement, as determined by the Implementing Authority.

7.2 Site Obligations

7.2.1 Subject to Clauses 7.1 and 7.2.2 to 7.2.5, the Implementing Authority shall deliver vacant possession and use of the Site to the Concessionaire on the dates specified in the delivery schedule set forth in Annexure III and otherwise as required by Clauses 7.1.2, 7.1.3 and 13.4, and shall thereafter ensure that the Concessionaire continues to be entitled to such access to the Site as is necessary for the Concessionaire to perform its obligations under this Concession Contract, and to enjoy the Concession Rights, from the date of delivery to the termination or expiry of this Concession Contract.

7.2.2 Subject as provided in Clauses 7.2.4 and 7.2.5, if the Implementing Authority fails to deliver vacant possession of any part of the Site:

- (a) by the dates specified in Annexure III or Clauses 7.1.2 or 7.1.3 for that part of the Site in respect of the Initial Construction Works; or
- (b) by the dates specified in the Additional Construction Works Programme or Clauses 7.1.2 or 7.1.3 in respect of any Additional Construction Works,

and that delay causes a delay in carrying out of any Construction Works or any Opening Date or Tolling Date, the Concessionaire shall (except where the delay is caused by an act or omission of the Concessionaire) be entitled to an extension of the Time for Completion of the relevant Construction Works and (provided such failure continues for 28 (twenty eight) days or more) to compensation from the Implementing Authority for all increased costs and/or loss of revenue, if any, incurred by the Concessionaire as a result of such delay after such 28 (twenty eight) day period.

7.2.3 The Concessionaire shall give written notice of any claim under Clause 7.2.2 to the Independent Engineer with a copy to be provided to the Implementing Authority. Upon receipt of such notice, the Implementing Authority shall be entitled to propose to the Concessionaire, and the Concessionaire shall be entitled to accept, alternative remedies, including an extension to the Concession Period. upon receipt of such notice and failing any such agreement between the parties as to alternative remedies, the Independent Engineer shall, subject to Clauses 6 and 21.4, make a determination with respect to:-

- (a) any extension of the Time for Completion of the relevant Construction Works to which the Concessionaire is entitled; and/or
- (b) any monetary compensation to which the Concessionaire is entitled.

7.2.4 The Concessionaire acknowledges that delivery of the Site without vacant possession within the deadlines set forth in Clause 7.2.1 shall not be deemed a breach of the Implementing Authority's obligations in accordance with such Clause provided it does not impinge on the ability of the Concessionaire, without materially

increasing its costs, to undertake the Construction Works as required or interfere with the construction programme for such works.

- 7.2.5 The Concessionaire will use all reasonable efforts to rearrange the construction programme in order to minimise, mitigate and otherwise avoid any delay and increased costs that would otherwise result from any failure by the Implementing Authority to comply with its obligations under Clause 7.2.1 and will require the relevant Contractor to co-operate in that regard.

7.3 Clearance of Site

- 7.3.1 The Concessionaire shall be responsible, at its own cost and risk (subject to Clause 7.2), for:

- (a) the clearance of the Site,
- (b) with the prior approval of the Implementing Authority, any diversions to and re-routing of roads not forming part of the Highway; and
- (c) with the prior approval of the Implementing Authority, the clearance, relocation and diversion of all Utilities at the Site which are required to implement the Project,

from the date on which possession of the Site or that portion of the Site is delivered to the Concessionaire.

- 7.3.2 The Concessionaire shall make the necessary applications to the Relevant Authorities for any and all approvals or authorisations required for the clearance of the Site and for the relocation and diversion of Utilities and where the Concessionaire is unable within a reasonable period to obtain any such approval or authorisation the Implementing Authority shall use its reasonable efforts to assist in the obtaining of such approval or authorisation.

- 7.3.3 Where the Concessionaire is required to relocate or divert Unknown Utilities, the Concessionaire shall be entitled, to such extension to the Time for Completion of the relevant Construction Works as the Independent Engineer considers to be appropriate in the circumstances. The Concessionaire shall give notice of any such claim to the Independent Engineer with a copy thereof to the Implementing Authority.

7.4 Assistance

Each Party shall use reasonable endeavours in assisting the other Party in complying with its obligations under this Clause 7.

7.5 Archaeological Matters and National Monuments

- 7.5.1 All fossils, coins, articles of value or antiquity, and structures and other remains or things of geological or archaeological interest or burial sites discovered on the Site shall (as between the Parties) be the property of the Implementing Authority. The

Concessionaire shall take reasonable precautions to prevent its staff, labour or other Persons from removing or damaging any such article or thing. The Concessionaire shall, immediately upon discovery of such article or thing, advise the Implementing Authority and the Independent Engineer, who shall issue instructions for dealing with it.

7.5.2 The Concessionaire shall be entitled to an extension of the Time for Completion of the relevant Construction Works and/or compensation from the Implementing Authority for all increased costs and/or loss of revenue incurred or delay in receipt of revenue suffered by the Concessionaire and/or a relief from penalties under Clause 11.9.2 (b), (c) and (d) as a result of having followed the instructions of the Independent Engineer issued pursuant to Clause 7.5.1. The Concessionaire shall give notice to the Independent Engineer of any claim under this Clause with a copy to the Implementing Authority. After receipt of such notice, the Independent Engineer shall proceed to determine:

- (a) any extension of the Time for Completion of the relevant Construction Works to which the Concessionaire is entitled; and/or
- (b) any monetary compensation to which the Concessionaire is entitled; and/or
- (c) any relief from penalties under Clause 11.9.2(b), (c) and (d) to which the Concessionaire is entitled.

7.5.3 Subject to complying with its obligations under Clause 7.5.1, the Concessionaire shall be required to minimise and mitigate, and to procure that its sub-contractors minimise and mitigate, to the maximum extent reasonably possible the consequences of any such discovery as is referred to in this Clause.

7.6 Physical Conditions

7.6.1 Subject as otherwise expressly provided in this Concession Contract, the Concessionaire shall bear all risks and costs with regard to:

- (a) any weather conditions, including, without limitation, floods;
- (b) any pollution, contamination or other damage to the Site or the Highway or any defect in the Highway (in any such case whenever caused and whether or not known to the Implementing Authority or any Relevant Authority);
- (c) the physical conditions or obstructions on the Site (both above ground and subsurface and whether artificial or not) whether foreseen or unforeseen which are encountered during Construction Works or otherwise.

7.6.2 The Concessionaire shall indemnify and keep indemnified the Implementing Authority during the Concession Period and thereafter against any costs, loss or expense incurred by the Implementing Authority arising out of or in connection with:

- (a) the conservation of the Environment of the Site and the area impacted by the Project during the Concession Period;

- (b) rectifying any pollution, contamination or damage on the Site which occurs prior to the end of the Concession Period; or
- (c) any cost, loss or expense resulting from claims by third parties for damage to the Environment which has occurred, or has resulted from any act or omission, prior to the end of the Concession Period.

7.7 Protester Action

Where at any time following delivery of vacant possession and use of the Site to the Concessionaire pursuant to Clause 7.2, the Highway or any part thereof so delivered, is subjected to protester action (for the purpose of this Clause 7.7 "protestor action" means action of any nature by a person or persons protesting against the implementation of all or any part of the Project including without limitation the undertaking of any Construction Works or the imposition of or increase in tolls on the Highway but excludes any industrial action by employees of the Concessionaire or of any of its sub-contractors) which has not resulted or arisen from any default or negligence on the part of the Concessionaire or any of its sub-contractors:

- 7.7.1 the Concessionaire shall take all reasonable steps to minimise and mitigate the effect of such protester action on the performance of the Concessionaire's obligations under this Concession Contract;
- 7.7.2 where such protester action continues for a period in excess of 7 (seven) days, the Concessionaire shall be entitled to delay the Construction Commencement of any Initial Construction Works affected and/or to such extension of the Time for Completion of any Construction Works affected by such protester action as the Independent Engineer determines is appropriate; and
- 7.7.3 subject as provided in Clause 7.7.1, the Concessionaire shall be excused from penalties under Clause 11 in respect of the performance of its Operation and Maintenance obligations to the extent that such performance is prevented by such protester action.

The Concessionaire shall not be entitled to any monetary compensation from the Implementing Authority nor (except as specified in Clauses 7.7.1 to 7.7.3) to any other relief as a result of or in consequence of any such protester action.

7.8 Utility Way-Leaves

The Implementing Authority has the right to approve the establishment on or relocation from the Site, at the request of any public or private Utility, of Utility way-leaves, including but not limited to power pylons or lines, water or gas pipes and telecommunication pylons or lines. The Concessionaire shall be entitled to an extension of the Time for Completion of the relevant Construction Works and/or compensation from the Implementing Authority for all increased costs and/or loss of revenue incurred or delay in receipt of revenue suffered by the Concessionaire and/or relief from penalties under Clause 11.9.2(b), (c) and (d) in the event that such

establishment or relocation has delayed or increased the cost of carrying out of any Construction Works or delayed any Opening Date or any Tolling Date, or adversely affected the normal course of the Operation and Maintenance of the Highway. The Concessionaire shall give notice to the Independent Engineer of any claim under this Clause with a copy to the Implementing Authority. Following receipt of such notice, the Independent Engineer shall make a determination, subject to Clauses 6.2 and 21.4, with respect to:

- 7.8.1 any delay in the Construction Commencement of any Initial Construction Works affected and/or any extension of the Time for Completion to which the Concessionaire is entitled; and/or
- 7.8.2 any monetary compensation to which the Concessionaire is entitled; and/or
- 7.8.3 any relief from penalties under Clause 11.9.2 (b), (c) or (d) to which the Concessionaire is entitled.

For the avoidance of doubt, the provisions of this Clause 7.8 shall not apply in relation to those Utilities diversions and relocations referred to in Clause 7.3.

7.9 Existing Access and Way-Leaves

- 7.9.1 The Concessionaire will continue to be bound by and will honour any existing agreements between the Implementing Authority and Persons which grant access or way-leaves. or similar rights to the Site. The Implementing Authority shall, on the reasonable request of the Concessionaire, enforce any rights that the Implementing Authority may have against any person under any agreement conferring access or way leaves or similar rights in relation to the Site.
- 7.9.2 The Concessionaire may also request the Implementing Authority to effect any necessary modifications or cancellations of such agreements, such request to be made timeously in order to avoid any delay or additional cost. The Implementing Authority shall comply timeously with the Concessionaire's request to modify and/or cancel such agreements provided:
 - (a) Implementing Authority has the right to modify or cancel such agreements; and
 - (b) the Concessionaire indemnifies the Implementing Authority for all costs incurred or to be incurred in modifying or cancelling such agreements.
- 7.9.3 The Implementing Authority warrants to the Concessionaire that, to the best of its knowledge, all of such existing agreements are listed in Annexure III and that the Implementing Authority has provided the Concessionaire with true and complete copies of such agreements.
- 7.9.4 The Concessionaire shall be entitled to an extension of the Time for Completion of the relevant Construction Works and/or compensation from the Implementing Authority for all increased costs and/or loss of revenue incurred or delay in receipt of revenue suffered by the Concessionaire and/or a relief from penalties under Clause

11.9.2 (b), (c) and (d) in the event that Annexure III contains any incorrect or incomplete information relating to existing agreements by the Implementing Authority, provided that:

- (a) such information being incorrect or incomplete has resulted in a delay to, or increase in the cost of, carrying out the Construction Works or a delay to any Opening Date or any Tolling Date, or materially adversely affected the ability of the Concessionaire to comply with any of its obligations to Operate and Maintain the Highway; and
- (b) the correct or complete information was not contained within any publicly available records and the relevant access, wayleave or other similar right was not apparent from an inspection and/or survey of the Site.

7.9.5 The Concessionaire shall give notice to the Independent Engineer of any claim under this Clause with a copy to the Implementing Authority. Following receipt of such notice, the Independent Engineer shall make a determination, subject to Clauses 6.2 and 21.4, with respect to:

- (a) any extension of the Time for Completion to which the Concessionaire is entitled; and/or
- (b) any monetary compensation to which the Concessionaire is entitled; and/or
- (c) any relief from penalties under Clause 11.9.2 (b), (c) and (d) to which the Concessionaire is entitled.

7.10 Concessionaire Without Ownership Interest in the Land

7.10.1 Subject to Clauses 7.10.2 and 7.2.1, the Concessionaire has, and will have, no title to, or ownership interest in, or liens, or leasehold rights or any other rights in the land on which the Highway and the Associated Facilities are or are to be constructed pursuant to this Concession Contract. Title to such land will be held by the Implementing Authority.

7.10.2 The Concessionaire has no and will have no rights with respect to the airspace above, or the area below the surface of, the Site or the land on which the Highway and any Associated Facilities are or are to be constructed, except insofar as is necessary to exercise the rights conferred by this Concession Contract or to perform its obligations hereunder, all in accordance with the terms of this Concession Contract. The Implementing Authority reserves unto itself the right to grant to third parties and/or to the Concessionaire rights with respect to the airspace and the area below the surface, provided that the granting of such rights does not conflict with the rights of the Concessionaire referred to in this Clause 7.10.2 and in exercising such rights it shall ensure that third parties respect this Concession Contract and the rights of the Concessionaire thereunder. It is acknowledged by the Implementing Authority that the Concessionaire has the right to use sub-soil and top soil from the Site for the purposes of the Project. For the avoidance of doubt, the provisions of this Clause 7.10.2 do not confer any airspace or sub-surface rights on the

Concessionaire for the purpose of carrying out Developments, the terms on which Developments are to be carried out being governed by Clause 12.

7.11 Damage to or Destruction of the Highway

7.11.1 Subject to the provisions of this Concession Contract including, without limitation, Clauses 7.10.2 and 18, upon delivery of vacant possession and use of the Site or any portion thereof to the Concessionaire pursuant to Clause 7.2, the Highway or such portion thereof shall be at the sole risk of and be under the care, custody and control of the Concessionaire and should the Highway or any portion thereof be damaged or destroyed at any time during the Concession Period, the Concessionaire shall, within a reasonable period of time, at its own cost and expense, repair, rebuild or replace the same so that after such repairing, rebuilding or replacing, the Highway shall be substantially the same as prior to such damage or destruction.

7.11.2 The Implementing Authority shall bear the cost of rectifying any damage to the Highway arising from the actions of its officers, employees, servants, agents or other sub-contractors except to the extent that the cost of rectifying such damage is or should have been recoverable under the insurance policies to be maintained by the Concessionaire pursuant to Clause 15.

8. CONSTRUCTION WORKS

8.1 Design and Construction

8.1.1 The Concessionaire shall, prior to the Effective Date, undertake or procure the Preliminary Design in accordance with the Preliminary Design approval procedure specified in, and otherwise in accordance with, the Engineering Requirements and shall thereafter undertake or procure the Detailed Design in accordance with the Preliminary Design and the Detailed Design Procedure.

8.1.2 The Concessionaire shall undertake or procure all Construction Works in accordance with the Engineering Requirements, the Detailed Design and to meet the requirements of this Concession Contract, in so far as they relate to the Construction Works, and, subject thereto, in accordance with Good Industry Practice. The Concessionaire bears sole responsibility for the procurement of all construction materials; the adequacy of the design in terms of road quality and safety, the Implementing Authority's Requirements and compliance with this Concession Contract and any applicable law or legally binding requirement in the [host country].

8.1.3 If the Implementing Authority requires:

- (a) any suspension of any Construction Works;
- (b) any variation to the Construction Works or any new construction works;
- (c) any change to the Preliminary Design after it has been approved by the Implementing Authority;

- (d) any change to the Detailed Design,

the Concessionaire shall, respectively, suspend the relevant Construction Works or procure the relevant construction works in accordance with such variation or with the Preliminary Design or the Detailed Design as modified by such changes.

The Concessionaire shall be entitled to an extension of time and/or compensation from the Implementing Authority for all reasonable increased costs and/or loss of revenue and/or delay in receipt of revenue and/or relief from penalties under Clause 11.9.3 if any such suspension (except for a suspension required as a result of illegal actions or omissions or breach of this Concession Contract by the Concessionaire) or change (except for such change required as a result of and in order to correct an error in the Concessionaire's performance of its design obligations):

- (i) delays the Effective Date, Construction Commencement, any Construction Completion or any Opening Date(s) or any Tolling Date; or
- (ii) causes an increase in costs of Construction Works or Operation and Maintenance or loss of or delay in receipt of revenues.

If the Implementing Authority withdraws its requirement for any such change prior to its implementation, the Concessionaire shall be entitled to recover from the Implementing Authority its reasonable costs incurred in preparing or procuring detailed costings and design prior to such withdrawal.

8.1.4 The Concessionaire shall give notice of any claim under Clause 8.1.3 to the Independent Engineer with a copy to the Implementing Authority. Following receipt of such notice, the Independent Engineer shall make a determination, subject to Clauses 6.2 and 21.4, with respect to:

- (a) any extension of the Effective Date, any date for Construction Commencement, any Time for Completion, any Opening Date or any Tolling Date to which the Concessionaire is entitled; and/or
- (b) any monetary compensation to which the Concessionaire is entitled; and/or
- (c) any relief from penalties under Clause 11.9.3 to which the Concessionaire is entitled.

The Concessionaire shall be required to minimise, mitigate or avoid, and to procure that its subcontractors and any other relevant third parties minimise, mitigate or avoid to the maximum extent reasonably possible any such delay and/or increased costs and/or reduction in revenues as are referred to in this Clause 8.1.

8.1.5 The location, design and construction of any points of access to and/or egress from the Highway both during construction and afterwards shall be in accordance with the Implementing Authority's Requirements or otherwise be subject to the prior written consent of the Implementing Authority.

8.2 Commencement

Subject and without prejudice to the Implementing Authority's obligations under Clause 7.2, the Concessionaire shall be entitled to commence construction of the Initial Construction Works at any time after the Effective Date provided that Construction Commencement of the Initial Construction Works shall be effected not later than 40 Business Days after the Effective Date.

8.3 Completion

Construction Completion of the Initial Construction Works on any Highway Section shall be effected not later than the dates specified in Annexure I in respect of that Highway Section except as such dates may be otherwise extended pursuant to this Concession Contract.

8.4 Environmental Regulations

8.4.1 The Concessionaire shall, at its cost, comply with the Environmental Requirements of Annexure IV.

8.4.2 The Implementing Authority shall use all reasonable endeavours in assisting the Concessionaire to obtain any environmental permits required by the Concessionaire to perform the Project and its obligations under this Concession Contract provided, however, that the Implementing Authority shall bear no liability for any failure of the Concessionaire to obtain such permits.

8.4.3 In performing the Project and its functions under this Concession Contract, the Concessionaire shall take all necessary steps to ensure that appropriate pollution control and other environmental protection measures are taken by itself and its agents, servants, employees and sub-contractors in accordance with any applicable laws or regulations.

8.5 Access to the Site and Facilities

The Implementing Authority or any of its designated representatives may from time to time, enter any part of the Site but, in respect of those parts of the Site on which Construction Works are being carried out, only at reasonable times and on reasonable prior notice to the Concessionaire and the relevant Contractor provided that the Implementing Authority or its designated representative must comply with the reasonable safety requirements of the Concessionaire or Contractor which generally apply. The Concessionaire shall provide the Independent Engineer with adequate office space and facilities at the Site in accordance with the requirements of the Independent Engineer's Agreement and shall provide copies of all information and reports which are furnished to the Implementing Authority also to the Independent Engineer. The Concessionaire and the Implementing Authority shall co-operate fully with the Independent Engineer in the performance of its duties.

8.6 Information Relating to the Construction Works

- 8.6.1 The Concessionaire shall furnish to the Implementing Authority or any of its designated representatives all such reports and other information relating to Construction Works as the Implementing Authority may reasonably request from time to time.
- 8.6.2 The Concessionaire shall provide to the Implementing Authority copies of the monthly and quarterly construction progress reports in the form set out in Annexure XVII and the payment reports of the Contractor and all reports relating to quality assurance and design and construction verification.
- 8.6.3 Upon Construction Completion and at any time thereafter upon request, the Concessionaire shall supply the Implementing Authority with copies of all as-built drawings and other technical and design information, completion records and all other Construction Documents relating to the finished Construction Works.

8.7 Disruption to Existing Traffic

The Concessionaire shall ensure that the Construction Works do not cause any disruption to existing traffic nor to activities on adjoining land except to the extent that such disruption cannot reasonably be avoided as a result of such Construction Works being carried out. Where disruption cannot reasonably be avoided, the Concessionaire shall ensure that appropriate traffic management measures are implemented to minimise the effect of any such disruption on road users or adjoining land holders.

9. COMMISSIONING

9.1 Concessionaire to Operate and Maintain

The Concessionaire shall with effect from delivery to it of vacant possession of each part of the Site pursuant to Clause 7.2:

- 9.1.1 commence or procure the commencement of Operation and Maintenance of such part of the Site; and
- 9.1.2 ensure that the relevant Highway Sections located or partially located within such parts of the Site satisfy the Implementing Authority's Requirements.

The Concessionaire may only charge and collect tolls in accordance with Clause 10.

9.2 Inspection of Construction Works

- 9.2.1 Upon the Contractor giving notice to the Concessionaire of the anticipated completion of any Construction Works to be carried out in respect of any Highway Section and its Associated Facilities, the Concessionaire shall forthwith notify the Implementing Authority and the Independent Engineer thereof in writing provided that such notice shall be given to the Implementing Authority not more than 15 Business Days and not less than 5 Business Days prior to the anticipated date of

Construction Completion of the relevant Construction Works (the "Completion Notice").

- 9.2.2 The Independent Engineer and the Implementing Authority, in conjunction with the Concessionaire, shall, as soon as reasonably practicable after the anticipated Construction Completion date specified in the Completion Notice but in any event within 5 (five) Business Days of such anticipated Construction Completion date, inspect such Construction Works to verify whether the Construction Works have been completed in accordance with the Implementing Authority's Requirements except for minor omissions or minor defects which do not adversely affect the continuous and expeditious passage of vehicles over the relevant Highway Section, the safety of road users or the ability of the Concessionaire to perform its obligations under this Concession Contract in respect of such Highway Section (the "Snagging Items").
- 9.2.3 If, in the reasonable opinion of the Independent Engineer, the relevant Construction Works have been completed to the level specified in Clause 9.2.2, the Independent engineer shall, within 5 Business Days of such inspection, issue a Taking Over Certificate in respect of such Construction Works. Such certificate shall state the date on which the Construction Works were so completed and the Snagging Items that the Concessionaire must complete and/or rectify before all of its obligations in respect of such Construction Works are satisfied.
- 9.2.4 If the Independent Engineer is not of the opinion that the Construction Works have been completed to the level specified in Clause 9.2.2, the Independent Engineer shall within 5 Business Days of such inspection notify the Implementing Authority and the Concessionaire of that fact and shall specify in such notice all the work which is required to be carried out by the Concessionaire before he will issue a Taking Over Certificate. The Independent Engineer shall issue a Taking Over Certificate in accordance with Clause 9.2.3 within 5 Business Days of completion (to his satisfaction) of the works specified in such notice.
- 9.2.5 The Independent Engineer shall, within 5 Business Days of being notified by the Concessionaire that the Snagging Items have been completed and/or rectified (as appropriate), inspect the Construction Works and, if the Independent Engineer is reasonably satisfied that the Concessionaire has completed and/or rectified (as appropriate) the Snagging Items, shall issue within 5 Business Days of such inspection a Performance Certificate. Such certificate shall state the date on which the Snagging Items are completed and/or rectified.

9.3 Approval to Open Highway Sections

Following the issue of a Taking Over Certificate under Clause 9.2 in respect of a Highway Section, the Implementing Authority shall grant the approval to the Concessionaire to operate each such Highway Section and shall announce that such Highway Section is open to traffic at the same time. The date of such approval and announcement shall be the "Opening Date" of such Highway Section. Such approval shall be granted without delay when the Taking Over Certificate with respect to the relevant portion of the Highway and relevant Associated Facilities has

been issued and the relevant portion of the Section is connected to other parts of the International and National Trunk Road network and reliably operable.

10. TOLLS

10.1 Right to Charge and Collect Tolls

The Concessionaire shall have the exclusive right and obligation during the Concession Period to charge, collect and keep for its account tolls from vehicles utilising the Highway in accordance with the terms and conditions hereof as part of the Concession Rights in respect of the Toll Plazas, from the date of Construction Completion in respect of the Initial Construction Works to be undertaken on Highway Sectionsinclusive, provided the Concessionaire fulfils all its obligations under paragraphs 4.6 and 5 of Annexure XV in respect of the relevant Toll Tariffs.

10.2 Concessionaire Responsible for Tolling System

The Concessionaire shall have absolute responsibility for the installation, operation and maintenance of the tolling system. The Implementing Authority will not incur or assume any liability in connection with any defect or deficiency of the tolling system.

10.3 Initial Tolls

Subject as provided in Clause 10.10, the Concessionaire shall apply the Toll Tariffs specified in Annexure XV at the toll plaza for each of the standard vehicle classifications also as specified in Annexure XV.

10.4 Revisions to the Highway Tolls

10.4.1 The Toll Tariff shall be adjusted in accordance with the provisions of Annexure XV. Subject to the Concessionaire complying with its obligations under Annexure XV, the Implementing Authority shall ensure that the Toll Tariffs are published at such time so as to enable the adjusted tolls to be charged with effect from the requisite date under this Concession Contract.

10.4.2 If there is any failure or refusal by the [highways ministry] to sanction, or any delay by the [highways ministry] in sanctioning, the Base Toll Tariffs or any increase in the Toll Tariffs required by the operation of this Concession Contract other than as a result of default or negligence on the part of the Concessionaire, the Implementing Authority shall reimburse the Concessionaire by an amount that will place the Concessionaire in the same economic position that the Concessionaire would have been in but for such failure, refusal or delay.

10.5 Toll Collection Expenses

All toll collection expenses shall be borne by the Concessionaire.

10.6 Currency of Tolls

Tolls shall be collected in Local Currency and US dollars.

10.7 Certain Vehicles Exempt from Tolls

The Concessionaire shall exempt from the obligation to pay tolls any such vehicles as are set out in Annexure XV or other vehicles exempted by law as the Implementing Authority may advise the Concessionaire in writing from time to time, provided that any change to vehicles exempted by law as it or they exist at the date of signature of this Concession Contract shall, if such change has material adverse revenue consequences for the Concessionaire, be deemed to be Material Adverse Government Action for the purposes of Clause 17.

10.8 Refusal to Pay

The Concessionaire or the relevant O&M Contractor will be required to apply the passage refusal, run-through and non-payment transaction procedures, as specified in the Standard Specification for Operation and Maintenance of Toll Facilities referred to in the Engineering Requirements. The Concessionaire or its representative, respectively, shall undertake, at its sole cost, expense and responsibility all necessary civil or criminal legal measures required in order to enforce the payment of the requisite tolls; and exercise at its sole cost, expense and responsibility its other authorities in connection with any refusal by any Person to pay tolls.

10.9 Tolling System

10.9.1 The tolling system for the Highway shall be in accordance with the Standard Specification for Operations and Maintenance: General, Standard Specification for Operations and Maintenance: Electrical and Mechanical Equipment, Standard Specification for Operations and Maintenance: Toll System and Emergency Communications System and Standard Specification for Operations and Maintenance: Electronic Toll Collection referred to in the Engineering Requirements.

10.9.2 The Concessionaire shall, in the case of sub-paragraph (i) below ensure and, in the case of sub-paragraphs (ii) and (iii) below, use its best endeavours to ensure that any electronic toll collection system utilised on the Highway:

- (i) is designed, constructed and operated in a manner that is consistent with and conforms to the Standard Specification for Operation and Maintenance: Electronic Toll Collection;
- (ii) is designed, constructed and operated in a manner that allows users of the Highway to utilise electronic toll collection systems installed on highways and other roads elsewhere in Kenya and that allows users of such other electronic toll collection systems to utilise the electronic toll collection system installed on the Highway; and

- (iii) conforms with the protocols applicable to settlement of payments between electronic toll collection systems in Kenya as may be in place from time to time.

10.10 Toll Concessions and Discounts

The Concessionaire shall be entitled to grant concessions and discounts to users of the Highway at its discretion in accordance with Annexure XV. The Concessionaire shall, however, grant the minimum concessions and discount to special local and frequent user groups, as indicated in Annexure XV.

11. OPERATION AND MAINTENANCE

11.1 Ownership of the Highway

The Parties hereby agree and acknowledge that ownership of the Highway and Associated Facilities shall be vested in the Implementing Authority.

11.2 Operation and Maintenance by the Concessionaire

11.2.1 The Concessionaire shall be obliged during the Concession Period to undertake Operation and Maintenance of the Highway or any Section thereof and of all related Construction Works and Developments undertaken by the Concessionaire, provided that the Concessionaire shall have no obligation to operate or maintain the Associated Facilities after the Taking Over Certificate pertaining to the Highway or such Section thereof has been issued.

11.2.2 The Concessionaire shall furnish the Implementing Authority with a monthly report in respect of the matters specified in Annexure XII or as otherwise reasonably notified by the Implementing Authority. Such report shall be in an agreed format.

11.3 Standards of Operation and Maintenance

Operation and Maintenance shall be carried out in accordance with the laws, regulations and standards having the force of law of the State, in conformity with the Engineering Requirements and Good Industry Practice and using equipment and materials which are of suitable quality for the purposes and uses intended and free of defects and deficiencies and in accordance with the Engineering Requirements and the Operation and Maintenance Manuals. Operation and Maintenance Manuals shall be prepared by the Concessionaire, by not later than 14 (fourteen) days after the Effective Date, based on the foregoing and shall be amended as such laws, regulations and standards change from time to time. Any manual for Operation and Maintenance procedures and activities relating thereto and any changes to it which may be made by the Concessionaire from time to time thereafter shall be subject to the other provisions of this Concession Contract and the prior written approval of the Implementing Authority.

11.4 Inspection by the Implementing Authority

- 11.4.1 The Implementing Authority and/or the Independent Engineer may at any time during the Concession Period inspect the Highway and Associated Facilities to ensure that the Concessionaire's obligations in respect of Operation and Maintenance are being discharged in accordance with the terms of this Concession Contract.
- 11.4.2 If the Concessionaire has failed to Operate and Maintain the Highway in accordance with the terms hereof, the Implementing Authority may, in addition to the provisions provided in Clause 11.6, give notice thereof and, if any such failure is not remedied within 14 (fourteen) Business Days or any longer period reasonably determined by the Independent Engineer, the Implementing Authority shall be entitled to remedy such failure, either itself or through a third party, (and shall have access to the Site for such purpose) at the expense of the Concessionaire which shall promptly make payment to the Implementing Authority for its costs, expenses and other damages suffered or incurred in connection with such remedial acts. The Implementing Authority shall be entitled to draw on the Operation and Maintenance Bond delivered pursuant to this Concession Contract to the extent of the costs, expenses and any other damages referred to in this Clause 11.4.2 if the Concessionaire fails to perform its obligations under this Clause 11.4.

11.5 Third Party Contract

- 11.5.1 The Concessionaire may use a third party or third parties to carry out all or part of its Operation and Maintenance obligations under this Concession Contract. The terms of any such sub-contract shall, in all material respects, reflect the provisions of the Operation and Maintenance Contract and be subject to the prior written approval of the Implementing Authority, provided that the engagement of a third party shall not release the Concessionaire from any of its obligations hereunder. Should the Concessionaire not engage an O&M Contractor for all or part of such obligations, the obligations and duties of the O&M Contractor set forth in the Operation and Maintenance Contract shall apply to the Concessionaire. All powers, rights and duties of the Independent Engineer with respect to the O&M Contractor shall apply, mutatis mutandis, to the Concessionaire.
- 11.5.2 Without prejudice to any other provisions hereof, in the event of any breach by any O&M Contractor of its material obligations under its Operation and Maintenance Contract which is not remedied within the applicable remedy period, the Concessionaire shall, if the O&M Contractor then fails to remedy such breach within such further reasonable period as may be specified by the Implementing Authority (such period to be in no circumstances longer than 7 (seven) days) and, if the Implementing Authority so requests, terminate the relevant Operation and Maintenance Contract and prior to such termination, designate another Person as a replacement O&M Contractor with the prior written consent of the Implementing Authority.

11.6 Operation and Maintenance Bond

- 11.6.1 Prior to the Effective Date, the Concessionaire shall deliver to the Implementing Authority an Operation and Maintenance Bond in an amount of (.....) in prices from a bank acceptable to the Implementing Authority in the form set forth in Annexure IX hereto. The Bond shall be reinstated in full and its amount adjusted annually in accordance with Clause 1.5 on each anniversary of the Effective Date. The Operation and Maintenance Bond shall remain in force for the duration of this Concession Contract.
- 11.6.2 If the Concessionaire fails on demand to pay any amount due to the Implementing Authority arising from any failure referred to in Clause 11.4.2, arising by way of any penalties payable by the Concessionaire pursuant to Clause 11.9 or arising from the termination of this Concession Contract under Clause 19.1 or as a result of a default by the Concessionaire in relation to the Operation and Maintenance of the Highway or arising from the Implementing Authority incurring any expense pursuant to the exercise of its rights under Clause 11.9.4, the Implementing Authority shall be entitled to call on and shall apply the proceeds of such Bond to the rectification of such failure, payment of such penalties or to compensate the Implementing Authority where this Concession Contract is so terminated under Clause 19.1. In such event the Implementing Authority shall be entitled to call on the full amount of the Bond and apply the proceeds in its sole discretion. If the Concessionaire fails to replace any Operation and Maintenance Bond by a date which is not less than 7 days prior to its expiry, the Implementing Authority shall, without prejudice to any other right which it may have under this Concession Contract, be entitled to call on such Operation and Maintenance Bond in full and retain the proceeds thereof as security for the performance of the Concessionaire's obligations hereunder pending receipt of the replacement Operation and Maintenance Bond for the Concessionaire.

11.7 Final Maintenance Bond

- 11.7.1 The Implementing Authority may require the Concessionaire to deliver a Final Maintenance Bond to the Implementing Authority valid for three years issued by a bank acceptable to the Implementing Authority at any time during the three year period prior to the expiry of the Concession Period in the form set forth in Annexure X hereto, or otherwise in a form satisfactory to the Implementing Authority.
- 11.7.2 The Final Maintenance Bond shall be issued in an amount which is equivalent to three times the average yearly amount expended by the Concessionaire on the maintenance of the Highway (including carrying out Rehabilitation Works) (as reported by the Concessionaire to the Implementing Authority under Clause 16.3) in the period of time from the Effective Date to the year in which the Final Maintenance Bond is delivered, adjusted for actual and prospective inflation and in any event not less than [15% (fifteen percent)] of average actual annual Gross Toll Revenue for the Highway in the immediately preceding three calendar years.
- 11.7.3 The Implementing Authority shall be entitled to call on the Final Maintenance Bond where the Concessionaire fails to comply with its obligations under Clause 3.10 or pursuant to Clause 19.1.4 and to apply the proceeds in its sole discretion.

11.8 Modifications during Concession Period

- 11.8.1 Modifications to the Highway shall be subject to the prior written consent and procedures of the Implementing Authority.
- 11.8.2 Any such modifications to the Highway accomplished during the Concession Period shall be subject to the provisions set forth in this Clause 11.
- 11.8.3 The Concessionaire shall not construct any additional exit or entry points on the Highway without the consent of the Implementing Authority. Where at any time during the Concession Period the Implementing Authority requires additional exit or entry points to be constructed on the Highway or modifies any Implementing Authority Requirements, such modification shall be deemed to be a variation of the Construction Works by the Implementing Authority for the purpose of Clause 8.1.3.

11.9 Traffic and Penalties

- 11.9.1 During the Concession Period, the Concessionaire shall ensure that, subject to the other provisions of this Concession Contract the Highway is open to traffic at all times and that the traffic flow along the Highway is convenient and safe at all times.
- 11.9.2 (a) If the Concessionaire fails to perform any of the obligations specified in sub-clauses (i) to (iv) below, the Implementing Authority, or its representative, shall notify the Concessionaire and the Lenders of such failure and, if the Concessionaire shall fail to rectify such failure to the satisfaction of the Independent Engineer within the reasonable period specified for such rectification in such notice, the Concessionaire shall pay to the Implementing Authority for such default the penalties specified in relation to that failure as follows:
- (i) if the Concessionaire fails to adhere to the traffic management processing standards as set forth in Annexure III and as more particularly specified in the Operation and Maintenance Manuals, it shall pay a penalty per day during which such breach persists representing 2.5% (two and a half per cent) of the Daily Gross Toll Revenue for the Highway Section in respect of which such failure occurred;
 - (ii) if the Concessionaire fails to report electronic problems timeously or to cause the electromechanical equipment to be properly maintained, the Concessionaire shall pay a penalty per day during which such breach persists representing 2% (two per cent) of the Daily Gross Toll Revenue for the Highway Section in respect of which such failure occurred;
 - (iii) for any failure to keep the roadside and toll facility in good order and state of cleanliness, the Concessionaire shall pay a penalty per day during which such breach persists representing an amount equal to 3% (three per cent) of the Daily Gross Toll Revenue for the Highway Section in respect of which such failure occurred;

- (iv) if the Concessionaire fails to produce the required reports specified in the Operation and Maintenance Contract, the Concessionaire shall pay a penalty per day during which such breach persists representing 2% (two per cent) of the Daily Gross Toll Revenue for the Highway Section in respect of which such failure occurred;
 - (b) If the Independent Engineer issues a First Non-Conformance Notice to the Concessionaire pursuant to Clause 4.5.3 of Annexure II, the Concessionaire shall pay to the Implementing Authority the penalty calculated pursuant to clause 4.5.3.5 of Annexure II;
 - (c) If the Independent Engineer issues a Second Non-Conformance Notice to the Concessionaire pursuant to clause 4.5.4 of Annexure II, the Concessionaire shall pay to the Implementing Authority the penalty calculated pursuant to clause 4.5.4.1(b) of Annexure II;
 - (d) If the Independent Engineer issues a Third Non-Conformance Notice to the Concessionaire pursuant to clause 4.5.5 of Annexure II, the Concessionaire shall pay to the Implementing Authority a further penalty calculated pursuant to clause 4.5.4.1 (b) of Annexure II.
- 11.9.3 The term "**Daily Gross Toll Revenue**" in this Clause 11.9 is the average daily Gross Toll Revenue relating to the Highway Section in respect of which such failure occurred for the three months prior to the month in which the failure occurs. The Independent Engineer shall determine the Daily Gross Toll Revenue using such information as the Independent Engineer finds appropriate and such determination of the Independent Engineer, acting as an expert, shall be final and binding on the Parties, except in the case of manifest error. The penalties provided for in this Clause 11.9 shall, unless otherwise stated, be calculated for each day or portion thereof during which such failure continues, commencing from the first day of such failure.
- 11.9.4 If the Concessionaire has not remedied a default specified in this Clause 11.9 within the period allowed in this Clause, the Implementing Authority shall be entitled to remedy any such failure (and shall have access to the Site for such purpose) and the Concessionaire shall reimburse the Implementing Authority on demand for all work and expenses which it incurs as a result of or in connection with such remedial action.
- 11.9.5 The maximum aggregate amount of the penalties payable by the Concessionaire under this Clause 11.9 in respect of any month during the Concession Period shall not exceed the sum of $\lambda\%$ (λ per cent) of the Gross Toll Revenue from the Highway for such month.
- 11.9.6 The Implementing Authority accepts and acknowledges that, save as provided in Clause 11.9.4, it shall not be entitled to seek damages for any failure of the Concessionaire for which there is a specified penalty under this Clause 11.9. The provisions of this Clause 11.9 are, however, without prejudice to the Implementing Authority's rights to claim damages for any other breach or default of this

Concession Contract or to exercise any other rights available to it at law or under this Concession Contract (including without limitation under Clause 19.1) arising as a result of any failure of the Concessionaire as referred to in this Clause 11.9.

11.10 Regulations, Traffic Management, Rescue Operation

- 11.10.1 The Concessionaire shall be responsible for ensuring proper traffic management on the Highway (including without limitation in accordance with the Engineering Requirements) and that the requirements of applicable State law and regulations are satisfied with respect thereto.
- 11.10.2 The Concessionaire shall not be responsible for the enforcement of traffic laws nor for the provision of emergency medical (except as specified in the Engineering Requirements) or fire services as regards vehicles or persons using the Highway.
- 11.10.3 The Concessionaire shall be obliged to remove, subject to applicable laws, any broken down vehicles from the Highway.
- 11.10.4 The Concessionaire shall ensure that an effective liaison system is established and maintained between the Concessionaire, the relevant O & M Contractors and the relevant police and emergency services regarding the operation of the road and shall provide details thereof to the Implementing Authority.
- 11.10.5 The Concessionaire shall take all reasonable steps in the performance of its obligations hereunder to prevent the occurrence of any environmental or security hazards.

11.11 Overloading

- 11.11.1 The Implementing Authority and the Concessionaire shall jointly determine and implement a strategy to combat the overloading of vehicles on the Highway.
- 11.11.2 The Concessionaire shall provide in motion weighing stations for use on the Highway provided that the cost of these stations shall not exceed λ (in October 2001 prices) in aggregate.
- 11.11.3 The Implementing Authority and the Concessionaire shall comply with their respective obligations contained in Annexure XXIV.

[Note: tenderers are requested to propose an overloading strategy addressing the following:

- (a) the method by which overloading will be monitored; and***
- (b) the mechanism proposed for enforcing the laws relating to overloaded vehicles.***

The Implementing Authority will use its reasonable efforts to assist the Concessionaire to procure law enforcement but will not be responsible for monitoring overloading or enforcing the law.]

12. DEVELOPMENTS

- 12.1 The Concessionaire shall be entitled to undertake Developments or to nominate other Persons to undertake Developments upon such terms and conditions as it may agree with such other persons, subject to the prior approval of the Implementing Authority. Where the Implementing Authority approves of a Development, it shall grant such right or interest in land comprised within the Road Reserve for the Highway to the Person undertaking such Development as such Person may reasonably require.
- 12.2 Should the Concessionaire fail to initiate any specific Developments or undertake any specific Development to the reasonable satisfaction of the Implementing Authority, the Implementing Authority shall, after giving the Concessionaire the right to first refusal, be entitled to grant the right to undertake such Developments to third parties. The Implementing Authority shall not grant such rights in respect of any proposed Development if it shall materially interfere with the operation or use of the Highway or materially conflict with the Development rights granted to the Concessionaire.
- 12.3 Any cost or expense (including administration costs) in connection with any Development undertaken by the Concessionaire shall be borne solely by the Concessionaire. Except as provided in Clauses 12.1 and 12.2, the Implementing Authority shall not incur or assume any liability in connection with any Development initiated by the Concessionaire.

13. ADDITIONAL CONSTRUCTION WORKS

13.1 Timing of Upgrade Works

The Concessionaire shall, subject to the remaining provisions of this Clause 13, ensure that all relevant Upgrade Works that are required to be carried out in respect of a Highway Section in accordance with the Engineering Requirements are completed within 6 (six) months from the end of the month in which the capacity thresholds for such Highway Section as specified in Annexure II is exceeded.

13.2 Timing of other Additional Construction Works

Where the performance criteria specified in Annexure II require Additional Construction Works (other than Upgrade Works) to be carried out on a Highway Section, the Concessionaire shall, subject to the remaining provisions of this Clause 13, ensure that all requisite Additional Construction Works are completed not later than 6 (six) months after the relevant performance criteria so require.

13.3 Additional Construction Works Programme

- 13.3.1 The Implementing Authority and the Concessionaire shall consult at least once every 12 (twelve) months after the Effective Date regarding the Additional Construction Works to be accomplished within the forthcoming 36 (thirty six) months as indicated in the Additional Construction Works Programme. The Concessionaire

shall ensure that any such Additional Construction Works Programme is consistent with and shall enable the Concessionaire to comply with its obligations regarding the completion of the relevant Construction Works under this Concession Contract. Any Additional Construction Works Programme revised following such consultation shall replace the Additional Construction Works Programme in force immediately prior to such agreement.

- 13.3.2 In addition to the consultations referred to in Clause 13.3.1, the Concessionaire and the Implementing Authority shall consult quarterly regarding the then current forecast dates ("Trigger Dates") when the capacity thresholds for a Highway Section specified in Annexure II will be exceeded for the purposes of Clause 13.1. The Additional Construction Works Programme shall be amended by the Concessionaire so as to ensure that it is consistent with and shall enable the Concessionaire to comply with its obligations regarding the completion of the relevant Upgrade Works in accordance with the requirements of Clause 13.1, having regard to the then current forecasts of the Trigger Dates.

13.4 Conditions applying to Additional Construction Works

Subject to the exceptions set forth in this Clause 13.4 or except where otherwise expressly specified in this Concession Contract, the provisions governing the performance of the Initial Construction Works shall apply mutatis mutandis to the performance of the Additional Construction Works:

- 13.4.1 those parts of the Site which are necessary for the construction, and subsequent Operation and Maintenance of, the Additional Construction Works, and which have not been previously delivered to the Concessionaire, will be delivered to the Concessionaire in accordance with the delivery schedule to be agreed by the Implementing Authority and the Concessionaire and which will form part of the Additional Construction Works Programme provided always that (other than in respect of land to be provided by the Implementing Authority pursuant to Clauses 7.1.2 or 7.1.3) the Implementing Authority shall be obliged to agree any reasonable delivery schedule which is consistent with the construction programme that the Concessionaire agrees with the relevant Contractor in relation to such Additional Construction Works;
- 13.4.2 the dates for commencement of the Additional Construction Works shall be as set out in the relevant Additional Construction Works Programme; and
- 13.4.3 unless otherwise agreed by the Implementing Authority, if the Concessionaire fails to comply with Clause 13.1 or 13.2 in respect of any Additional Construction Works, the Concessionaire shall pay to the Implementing Authority a sum equal to 0.125 per cent of the Contract Price for such Additional Construction Works per day as a penalty for such default for every day or part of a day which shall elapse between the Time for Completion for such Additional Construction Works under Clause 13.1 or 13.2 (as the case may be) and the date stated in the Taking Over Certificate for such Works, provided that the maximum aggregate amount payable by the Concessionaire to the Implementing Authority for a delay in completing any Additional Construction Works shall not exceed a sum equal to ten per cent of the Contract Price for such Additional Construction Works.

14. LIABILITY WITH RESPECT TO USERS AND THIRD PARTIES

14.1 Concessionaire Indemnification

14.1.1 Subject as provided in Clause 14.1.3, the Concessionaire shall indemnify the Implementing Authority against, and hold the Implementing Authority harmless from and shall otherwise be responsible to third parties for, any third party claim, liability, loss or cost of any kind whatsoever incurred by the Implementing Authority which arises on or after the date of signature of this Concession Contract (including any claim against the Implementing Authority by a Relevant Authority) as a result of any act or omission of the Concessionaire and/or any Responsible Persons (including, without limitation, any default or failure by the Concessionaire to comply with any of its obligations under this Concession Contract).

14.1.2 Without limiting the generality of the foregoing, the Concessionaire shall, subject as provided in Clause 14.1.3, indemnify the Implementing Authority against all losses and claims in respect of:-

- (a) death or injury to any person; or
- (b) loss of or damage to any property,

which may arise out of or in consequence of any act or omission of the Concessionaire and/or any Responsible Persons and against all claims, proceedings, liabilities, costs, charges and expenses whatsoever incurred or suffered by the Implementing Authority in respect thereof or in relation thereto.

14.1.3 It is acknowledged and agreed by the Implementing Authority that the provisions of this Clause 14.1 do not apply:

- (a) to costs, expenses and liabilities incurred by the Implementing Authority in discharging its obligations under this Concession Contract (including without limitation under Clause 7.4) except to the extent that any such cost, expense or liability arises as a result of any negligence or default on the part of the Concessionaire or any Responsible Person;
- (b) in respect of the right of the Implementing Authority to enter into this Concession Contract and to perform its obligations hereunder;
- (c) in respect of the acts or omissions of any Responsible Person otherwise than in relation to the Project;
- (d) in respect of discharging its obligations to pay the Concessionaire Default sum under Clause 19.1.4 or the Implementing Authority Default Compensation Sum under Clause 19; or
- (e) to the extent that any such cost, expense, loss or liability arises as a result of any negligence, default, breach or breach of statutory duty on the part of the

Implementing Authority or any Relevant Authority or any of their respective sub-contractors, agents, servants, officers or employees.

- 14.1.4 For the purposes of this Clause 14.1 "Responsible Persons" means any sub-contractor, agent, servant, officer or employee of the Concessionaire.

14.2 Defence against Indemnified Claims and Actions

If any legal action is brought or claim is made against the Implementing Authority and the Implementing Authority is entitled to be indemnified pursuant to Clause 14.1, the Concessionaire shall be entitled at its own expense to defend, have conduct of, or settle any such action or claim and the Implementing Authority shall notify the Concessionaire promptly of any such claims or any such threatened claims and take such action as the Concessionaire reasonably directs. The Implementing Authority shall be entitled to engage its own legal counsel and the Concessionaire shall co-ordinate its defence with the Implementing Authority. If the Concessionaire fails to defend, deal with or negotiate any such action or claim diligently, the Implementing Authority may, after first giving the Concessionaire reasonable notice to so act, settle such action or claim without the consent of the Concessionaire and without relieving the Concessionaire of the obligation to indemnify the Implementing Authority as provided in Clause 14.1.

15. INSURANCE

15.1 Construction

During the period of any Construction Works, the Concessionaire shall to the reasonable satisfaction of the Implementing Authority maintain or shall procure that the Contractor maintains insurance for the part of the Highway and Associated Facilities and its other insurable properties affected by those Construction Works in the minimum sums and on the terms more fully set out in Part B of Annexure XVIII, including, without limitation, construction all risks insurance, third party liability insurance, employer's liability insurance and, where appropriate, consequential loss/completion delay insurance.

15.2 Operation

During the period starting at the delivery of the Site or any portion thereof and ending on the date of the termination or expiry of this Concession Contract, the Concessionaire shall, to the reasonable satisfaction of the Implementing Authority and to the extent Clause 15.1 does not apply thereto, maintain or procure maintenance of insurance on the Highway and its other insurable properties in the minimum sums and on the terms set out in Part C of Annexure XVIII, including, without limitation, assets all risk insurance, including business interruption insurance, third party liability insurance and employer's liability insurance.

15.3 Covenants Relating to Insurance

- 15.3.1 The Concessionaire shall provide the insurance policies set forth in Clauses 15.1 and 15.2 for the benefit of the Concessionaire and, where specified in Annexure

XVIII, all relevant Contractors, O&M Contractors and consultants engaged in the Construction Works and Operation and Maintenance.

- 15.3.2 The Concessionaire will maintain the insurance contemplated by, and (except as provided in Clause 15.5) in the minimum sums specified in, Annexure XVIII.
- 15.3.3 The Implementing Authority, its officials, officers and employees, together with the Lenders, shall be named as additional insureds where specified in Annexure XVIII, under the policies referred to in Clauses 15.1 and 15.2. The Concessionaire shall provide the Implementing Authority with certified copies of the certificates of all such insurance and shall periodically review the extent and adequacy of the coverage provided by such insurance in the context of this Clause 15 and then prevailing conditions in the [host country].
- 15.3.4 The proceeds of any claims under the construction all risks insurance policies referred to in Clause 15.1 and under the assets all risks insurance policies referred to in Clause 15.2 hereof shall be deposited into an account in the joint names of the Implementing Authority and the Concessionaire and shall be applied to the repair or restoration of the Highway.
- 15.3.5 If the Concessionaire is unable to obtain insurance in the sums or on the terms required by Clauses 15.1 and 15.2 either at all or, in the case of the policies specified in paragraphs 5 and 6 of Part B of Annexure XVIII and paragraphs 12, 13 and 14 of Part C of Annexure XVIII, at a reasonable commercial rate, it shall immediately notify the Implementing Authority of any material areas of change in the terms or level of the insurance cover and shall:
- (a) in the case of the policies specified in paragraphs 5 and 6 of Part B of Annexure XVIII and paragraphs 12, 13 and 14 of Part C of Annexure XVIII, maintain in force such insurance cover as is available at a reasonable commercial rate; and
 - (b) restore the terms and level of cover to the required levels as soon as such become available and, in the case of the policies specified in paragraphs 5 and 6 of Part B of Annexure XVIII and paragraphs 12, 13 and 14 of Part C of Annexure XVIII, only when they become available, at a reasonable commercial rate.
- 15.3.6 Should the Implementing Authority and the Concessionaire disagree with respect to what is "a reasonable commercial rate" in Clause 15.3.5 or Clause 15.3.7, either Party may request the other Party to agree within 7 Business Days on an independent insurance expert to make a determination in that regard. Should the Parties be unable to agree on the identity of such expert within 7 Business Days of the second Party being so requested, such expert shall be chosen by the President of the Institute of Chartered Accountants from among those leading international insurance brokers that are, at that time, active in the Kenyan market to make such determination. The expert shall act as an expert and not as an arbitrator and the determination by such expert shall be final and binding on the Parties.

15.3.7 If the Concessionaire is able to obtain insurances required by Clause 15.1 and 15.2 (excluding for the purposes of this Clause the policies specified in paragraphs 5 and 6 of Part B of Annexure XVIII and paragraphs 12, 13 and 14 of Part C of Annexure XVIII) but not at a reasonable commercial rate and, as a result, the Concessionaire fails to take out any such insurance in breach of its obligations under this Clause 15, the Implementing Authority shall act reasonably in determining whether to exercise its right to terminate this Concession Contract pursuant to Clause 19.1.1 for such failure having regard to, amongst other things :

- (i) the likelihood of the events covered by such insurance occurring;
- (ii) the likely financial loss that could be suffered if any such events were to occur;
- (iii) the steps being taken by the Concessionaire to mitigate the potential consequences of the event occurring; and
- (iv) the nature of the insurance market including the levels and types of insurance available.

For the avoidance of doubt, the failure of the Concessionaire to obtain such insurances in the sums required will not result in the event being an Uninsurable Event.

15.4 Terms of Insurance

The Concessionaire shall maintain the aforementioned insurances in accordance with Part A of Annexure XVIII.

16. FINANCIAL ACCOUNTS AND REPORTS: MANAGEMENT

16.1 Appointment of Auditors

The Concessionaire shall arrange at its own expense for an accounting and cost control system consistent with Generally Accepted Accounting Principles and for the appointment as its auditors of a firm of internationally recognised independent accountants. The accounts of the Concessionaire will be kept in Kenyan Local Currency. The Concessionaire shall keep all such books and records for 15 years and at all times within the [host country]. Such accounts and the reports of such accountants shall be provided to the Implementing Authority. The Implementing Authority may meet with the Concessionaire's auditors regarding the Concessionaire's accounts and operations from time to time. The Implementing Authority may also conduct or require that officers of the appropriate State departments or a firm of independent accountants conduct reasonable additional audits of the Concessionaire, such audits to be carried out at the Implementing Authority's expense save where any such audit reveals material irregularities in which case the cost of such audit shall be borne by the Concessionaire.

16.2 Right of Inspection

The Concessionaire shall furnish to the Implementing Authority any information the Implementing Authority may reasonably request and shall permit representatives of the Implementing Authority to visit the Construction Works, the Highway and any of the other offices where the business of the Concessionaire is conducted and to have access to its books of accounts and records, designs, drawings and all other data assembled in connection with the Project and shall cause each O&M Contractor to make such information, books of accounts and records, drawings and other data relating to the Operation and Maintenance of the Highway available to the Implementing Authority.

16.3 Periodic Reports

16.3.1 The Concessionaire shall furnish to the Implementing Authority as soon as practicable but in any event not later than [120] days after the end of each fiscal year:

- (a) [three] copies of the Concessionaire's complete financial statements for such fiscal year (which are consistent with the books of accounts and prepared in accordance with Generally Accepted Accounting Principles and consistently applied), together with an audit report thereon, all in accordance with the requirements of the laws and regulations pertaining to accounting;
- (b) a copy of any management letter or other communication sent by the auditors to the Concessionaire or to its management in relation to the Concessionaire's financial, accounting and other systems, management and accounts;
- (c) an annual report by the auditors certifying that, based on its said financial accounting and other systems, management and accounts, the Concessionaire was in compliance with its financial obligations under the Loan Agreements as at the end of the relevant fiscal year or, as the case may be, detailing any non-compliance therewith;
- (d) a reconciliation of the current year's profit and loss account and the budget for the year, and an analysis thereof; and
- (e) an annual report by the auditors certifying that the computation of the Highway Usage Fee for the preceding year was correctly calculated in terms of Annexure XVI.

16.3.2 The Concessionaire shall furnish to the Implementing Authority as soon as practicable, but in any event no later than [75 (seventy-five)] days after the end of each quarterly period of each fiscal year (except for the last quarterly period of each fiscal year):

- (a) three copies of the Concessionaire's complete financial statements for such quarterly period (which are consistent with its books of account and prepared in accordance with Generally Accepted Accounting Principles and

consistently applied), including in each such report a balance sheet, an income statement and a statement of cash flows as at the end of and for such period, and for the period from the beginning of such year to the close of such quarterly period, certified by an officer of the Concessionaire, all in accordance with the requirements of the laws and regulations pertaining to accounting;

- (b) a report on any factors materially and adversely affecting or which might materially and adversely affect the Concessionaire's business and operation or its financial condition;
- (c) a list of its Lenders and creditors to which the Concessionaire owes a sum in excess of the equivalent of .. (.....) (in prices) including the amounts due to each of them;
- (d) a statement describing in reasonable detail any Related Party Transaction to which the Concessionaire is a party during the respective period;
- (e) a report on the implementation and progress of the Project, containing such information as the Implementing Authority may reasonably require and disclosing any factors of which the Concessionaire is aware which materially and adversely affect, or which would be otherwise likely materially and adversely to affect, the carrying out of the Project; and
- (f) a statement identifying the capital costs, construction costs and Operation and Maintenance costs during the respective period.

16.3.3 The Concessionaire shall furnish to the Implementing Authority as soon as practicable, but in any event no later than 30 (thirty) days prior to the end of each fiscal year, the projected profit and loss account and the budget for the following year, together with an analysis thereof .

16.3.4 The Concessionaire shall furnish to the Implementing Authority as soon as practicable, but in any event no later than the end of each quarterly period of each fiscal year, the projected cash flow for the following quarterly period, together with an analysis thereof.

16.3.5 The Concessionaire shall immediately report to the Implementing Authority details of the following events:

- (a) any charge, lien or attachment imposed on any of the Concessionaire's property in breach of Clause 3.7, and any seizure thereof which charge, lien, attachment or seizure will have a material adverse effect on the ability of the Concessionaire to perform its obligations under this Concession Contract;
- (b) any transaction in respect of the shares of the Concessionaire of which the Concessionaire is aware;
- (c) any default under any Loan Agreement, the circumstances thereof and possible results as viewed by the Concessionaire; and

- (d) any matter which might influence the validity of this Concession Contract or any matter that constitutes a material breach, including without limitation, any possible termination event, the circumstances thereof, and possible results as viewed by the Concessionaire.

16.3.6 The Concessionaire shall provide a monthly written report to the Implementing Authority with respect to the matters required in the Engineering Requirements to be reported relating to toll collection operations.

16.4 Delivery of Records

For a period of not more than [120] ([one hundred and twenty]) days following the termination of this Concession Contract for whatever reason, the Concessionaire shall retain in safe storage all such records as are referred to in Clause 8.7 and all records relating to Operation and Maintenance, which were in existence at the date of termination. Upon expiry of such [120] ([one hundred and twenty]) day period or such earlier date as may be requested by the Implementing Authority, the Concessionaire shall deliver all such records (or where such records are required by legislation to remain with the Concessionaire or the Concessionaire's shareholders, copies thereof) to the Implementing Authority or to its order in such manner and at such location as the Implementing Authority shall specify. The costs of retaining such records in safe storage and delivering the same shall be borne by the Concessionaire.

16.5 Management of Concessionaire

16.5.1 The Concessionaire shall at all times ensure that it has sufficient suitable appropriately qualified personnel to undertake the responsibilities vested in the Concessionaire hereunder and that such personnel shall be located in the [host country]. Without limiting the generality of the foregoing, the Concessionaire shall ensure that the Key Personnel positions are always filled as soon as reasonably possible.

16.5.2 The Implementing Authority may require the Concessionaire to remove any employee or other personnel of the Concessionaire, or any Contractor or O&M Contractor, from the Site if, in the reasonable opinion of the Implementing Authority, such employee or personnel are incompetent or misconduct themselves and the Concessionaire shall immediately comply and replace such employee or personnel with suitable appropriately qualified and competent replacements, within the constraints of applicable labour legislation.

16.6 Reporting of Changes

16.6.1 The Concessionaire shall report to the Implementing Authority [35] ([thirty-five]) days prior to its entering into effect:

- (a) any change in its corporate documents or the Shareholders' Agreement or in its fiscal year;

- (b) any contract or series of contracts to be executed by the Concessionaire which contemplates or could involve one or more payments by or to the Concessionaire in the aggregate in excess of the equivalent of (.....million Local Currency) (in prices);
- (c) any contract to be executed by the Concessionaire that constitutes a Related Party Transaction;
- (d) any contract or other arrangement to be entered into by the Concessionaire not in the ordinary course of business; and
- (e) any change in the insurance policies contemplated in Annexure XVIII.

16.6.2 The Concessionaire shall report to the Implementing Authority 14 (fourteen) days prior to its entering into effect any change in the constitution of its Board of Directors or its Key Personnel, any material change in the Concessionaire's organisational structure, or any other material change which might affect the fulfilment of the Concessionaire's obligations under this Concession Contract which, in any such case, is effected voluntarily by the Concessionaire.

16.6.3 The Concessionaire shall report to the Implementing Authority as soon as possible after the occurrence of the relevant event:

- (a) any change of the nature referred to in Clause 16.6.2 other than as a result of a voluntary act of the Concessionaire; and
- (b) any claim brought or threatened under this Concession Contract or any Associated Agreement which is reasonably likely to have a material effect on the Concessionaire or on its ability to perform its obligations hereunder or any event of default under the Loan Agreements.

17. MATERIAL ADVERSE GOVERNMENTAL ACTION

17.1 Consequences of Material Adverse Governmental Action

Should any Material Adverse Governmental Action occur, the Concessionaire shall be entitled to such extension of time and/or monetary relief from the Implementing Authority as shall place the Concessionaire in the same economic position that the Concessionaire would have been in but for such action. The Concessionaire shall give written notice to the Implementing Authority containing reasonable particulars of such actions and its likely economic consequences to the Concessionaire.

The Implementing Authority shall have [60] ([sixty]) days from the date of receipt of such notice to effect a remedy for the situation which restores the general economic position of the Concessionaire to that which it would have been in if such Material Adverse Governmental Action had not occurred. If the Implementing Authority does not effect such a remedy within such period, the Implementing Authority and the Concessionaire shall consult within 10 (ten) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. In the event that a mutually satisfactory resolution has not been reached within such

10 (ten) Business Day consultation period, the matter may be referred by the Concessionaire to the Independent Engineer, who subject to Clause 6.2, shall determine having regard to the circumstances any appropriate extension of time and/or monetary relief required. The Concessionaire shall be required to minimise or mitigate the effect of any Material Adverse Governmental Action. For the avoidance of doubt, the provisions of this Clause 17.1 shall not apply if this Concession Contract has been terminated pursuant to Clause 19.2.1 (c).

17.2 Definition of Material Adverse Governmental Action

A "Material Adverse Governmental Action" shall occur if:

17.2.1 the State, the Implementing Authority or any other Relevant Authority either (i) takes any action of any nature whatsoever, including without limitation the introduction, application, or change of any law, decree, order, regulation, or bylaw having the force of law after the date of this Concession Contract or (ii) fails to carry out its obligations as prescribed by law, and

(a) such action or failure directly affects:

(i) the Concessionaire (or any of its Contractors or O&M Contractors) in performing their function under the relevant sub-contracts; or

(ii) the Concessionaire (or any of the aforesaid) and any other toll road concessionaires (or any of the aforesaid).

and only incidentally affects other Persons; or

(b) such action or failure renders the performance by the Concessionaire or the Implementing Authority of any or all of the obligations under this Concession Contract illegal, void or unenforceable; or

17.2.2 the State or any Relevant Authority takes or omits to take any action of any nature whatsoever, which, if such action had been taken or omitted by the Implementing Authority, would have constituted a material breach of this Concession Contract,

and in the case of either Clause 17.2.1 or Clause 17.2.2, such action, failure or omission, as the case may be, materially adversely affects or is likely to materially adversely affect the economic position of the Concessionaire.

17.3 Acts or Omissions of Concessionaire

A Material Adverse Governmental Action shall not be deemed to have occurred under circumstances where action, failure or omission of the State or any Relevant Authority is in direct response to any act or omission on the part of the Concessionaire which is illegal (other than an act or omission rendered illegal by virtue of such action by the State or any Relevant Authority) or in violation of agreements to which the Concessionaire is a party and is for the purpose of properly enforcing compliance therewith or remedying the consequences of such act or omission.

17.4 Changes in Taxes

An increase in taxes of general application which does not discriminate against the Concessionaire or the Concessionaire and any other toll road concessionaires, or the Concessionaire and any other Persons holding concessions from the public sector, shall not be deemed to be a Material Adverse Governmental Action.

17.5 Acts Deemed Not to be Material Adverse Governmental Action

A Material Adverse Governmental Action shall not be deemed to have occurred if such action, failure or omission by the Implementing Authority, State or any Relevant Authority is required:

- 17.5.1 as a result of an event of Force Majeure and is reasonably proportionate thereto;
- 17.5.2 for the proper discharge and performance by the Implementing Authority, the State or such Relevant Authority of its statutory duties; or
- 17.5.3 on the grounds of national security or public safety and such action, failure or omission is reasonable in relation thereto;

but only if such action, failure or omission is not taken under legislation which:-

- (a) comes into force after the date hereof; and
- (b) is legislation which itself constitutes a Material Adverse Governmental Action,

and provided further that any such action, failure or omission may, where it does not constitute Material Adverse Governmental Action, constitute Force Majeure for the purposes of Clause 18.

17.6 No Breach of Concession Contract

If the performance by the Concessionaire of any obligation under this Concession Contract is prevented or adversely affected by reason of any Material Adverse Governmental Action, the Concessionaire shall not be considered to be in breach of such obligation to the extent the Concessionaire is so prevented or adversely affected.

18. FORCE MAJEURE

18.1 Force Majeure Defined

"Force Majeure" shall mean any event beyond the reasonable control of the Party claiming the occurrence of Force Majeure:

- (a) the occurrence of which could not have been reasonably foreseen at the date of execution of this Concession Contract; and

- (b) includes, but is not limited to, war whether declared or not, revolution, riot, strikes or other protestor action (except strikes or protestor action by or affecting employees of (i) the Concessionaire, (ii) the Contractor or any other Person undertaking any part of the Construction Works and (iii) any O&M Contractor or any other Person undertaking any part of the Operation and Maintenance of the Highway, which strike(s) or protestor action are not part of or directly related to any more widespread or general strike or other industrial action and excluding any protestor action as defined in Clause 7.8), insurrection, civil commotion, invasion, armed conflict, hostile act of foreign enemy, act of terrorism, sabotage, radiation or chemical contamination, ionising radiation, Act of God, plague or other serious epidemic; and
- (c) which:
 - (i) causes material physical damage or destruction to all or any portion of the Highway, including, without limitation, its toll collecting facilities or functions; or
 - (ii) materially delays the scheduled Time for Completion of all or any portion of the Highway; or
 - (iii) materially interrupts the full and regular operation of all or any portion of the Highway, including, without limitation, its toll collecting facilities or functions,

provided that any event covered by Clauses 7.6 and 7.7 (other than, in the case of Clause 7.7, floods of a scale that occur not more frequently than once in every [100] years) or which constitutes a Material Adverse Governmental Action shall not be events of Force Majeure.

18.2 Notice of Force Majeure

Each Party shall promptly notify the other and the Independent Engineer of the occurrence of a perceived event of Force Majeure and when such event has ceased. The Independent Engineer will determine whether the perceived event of Force Majeure is an event of Force Majeure.

18.3 Continuation of Performance

18.3.1 Each Party shall take all reasonable steps to prevent, limit and minimise the effect of events of Force Majeure on the performance of its obligations under this Concession Contract.

18.3.2 Decisions concerning Force Majeure and the application of this Clause 18 shall be directed toward the completion of construction of the Highway and the continued Operation and Maintenance of the Highway for the full duration of the Concession Period. In this regard the Concessionaire shall, to the maximum extent possible, continue to construct or operate (as the case may be) the Highway during the occurrence of any event of Force Majeure, and shall also notify the Independent

Engineer of any proposals, including any reasonable alternative means for performance, but shall not effect such proposals without the consent of the Independent Engineer.

18.3.3 In the event of any delay to Construction Works caused by an event of Force Majeure the period of time for completion of such Works under this Concession Contract shall be extended by the Independent Engineer by a time period necessary to take account of the effects of such Force Majeure.

18.3.4 Subject to Clauses 18.2, 18.3.1 and 18.4, any Party affected by the occurrence of the Force Majeure shall be excused from performance of its obligations under this Concession Contract to the extent that it is unable to perform those obligations as a result of such Force Majeure and neither Party shall be entitled to:

- (a) terminate this Concession Contract on account of such occurrence other than in accordance with the terms and conditions of Clause 18.5; and/or
- (b) claim damages, penalties or other compensation from the other party or call on any bond provided pursuant to this Concession Contract as a result of such failure to perform.

18.4 Insured Events of Force Majeure

To the extent that the consequences of an event of Force Majeure fall within the terms of the insurance cover required by Clauses 15.1 and 15.2, then the Concessionaire shall forthwith make the appropriate claims thereunder and shall apply the proceeds as required by Clause 15.3.4.

18.5 Consequences of Force Majeure

18.5.1 If the Parties agree or it is determined under Clause 18.2 that an event of Force Majeure has occurred, the Implementing Authority and the Concessionaire shall promptly consult to agree a mutually satisfactory resolution to the changed circumstances resulting from the event of Force Majeure.

18.5.2 If an event of Force Majeure (or its consequences) shall continue for a continuous period of 182 or more days (but only, in the case of Clause 18.1 (c), if the relevant event of Force Majeure interrupts, damages, destroys or delays (as the case may be) a material portion of the Highway for such period) and the Parties have not reached a mutually satisfactory resolution to the changed circumstances and the effect of the Force Majeure is continuing, this Concession Contract may, upon 28 days prior notice:

- (a) be terminated by the Implementing Authority; or
- (b) where:
 - (i) the event of Force Majeure is an Uninsurable Event;
 - (ii) any amount is outstanding under the Lending Agreements; and

- (iii) the losses and/or damages suffered by the Concessionaire as a result of such event exceed the aggregate of (1) the amount of any insurance cover which the Concessionaire has in respect of such event of Force Majeure, and (2) the other cash balances of the Concessionaire which are available to apply in remedying the consequences of such event of Force Majeure,

be terminated by the Concessionaire.

18.6 No Relief from Compliance

The foregoing provisions of Clause 18 shall not excuse or release the Party claiming Force Majeure from obligations due or performable, or compliance required, under this Concession Contract prior to the above-mentioned failures or delays in performance due to the occurrence of Force Majeure, or payment obligations to any party or obligations not affected by the event of Force Majeure. A Party excused from performance by the occurrence of Force Majeure shall continue its performance under this Concession Contract when the effects of the event of Force Majeure are removed.

19. TERMINATION

19.1 Termination by Implementing Authority

19.1.1 Subject to Clauses 19.1.2 and 19.1.3, the Implementing Authority shall have the right to terminate this Concession Contract upon the occurrence of any of the following events:

- (a) the granting of any judgement (which is not subject to appeal or, if it is, such appeal is not diligently pursued), or the passing of any resolution, for the dissolution and/or judicial management and/or liquidation of the Concessionaire (except for the purposes of amalgamation or reconstruction on terms approved in advance by the Implementing Authority in writing);
- (b) the Concessionaire commences voluntary liquidation proceedings;
- (c) an aggregate of (..... million Local Currency) (in prices) or the equivalent indebtedness of the Concessionaire shall become due and payable prior to its stated maturity due to an event of default under the Loan Agreements;
- (d) the Equity contributions of the shareholders of the Concessionaire are not made in the amounts and at the times required by the Equity Subscription Agreements;
- (e) the Concessionaire fails to report Related Party Transactions in accordance with this Concession Contract or if the Concessionaire enters into any Related Party Transaction otherwise than in compliance with Clause 3.6;

- (f) subject to Clause 8.9.3, the Concessionaire commits a material breach of this Concession Contract (other than a breach of Annexure XV) including, but not limited to, a material breach of its obligations to perform the Operation and Maintenance of the Highway, as provided for herein;
 - (g) the Concessionaire fails to complete any Construction Works by the applicable Long Stop Date;
 - (h) the Concessionaire fails to complete any Construction Works by the applicable Time for Completion provided that such failure shall not constitute an event of default under this Clause 19.1.1 (h) during such period as the Contractor is obliged to pay penalties to the Concessionaire as a result of the delay in the relevant Construction Works under the Construction Contract.
 - (i) the penalties incurred by the Concessionaire under Clause 11.9 exceed the monthly cap specified in Clause 11.9 for 3 (three) successive months and such monthly cap is exceeded in any of the 3 (three) succeeding months thereafter.
- 19.1.2 The Implementing Authority shall, prior to any termination of this Concession Contract under this Clause 19.1, send a written notice to the Concessionaire and the Lenders notifying them of the event giving rise to its right to terminate and stipulating that the notice is given in terms of this sub-clause and requesting the Concessionaire to remedy the event giving rise to such right of termination within the Remedy Period; provided, however, that no Remedy Period shall be required for the events described in Clauses 19.1.1.(a), 19.1.1.(b), 19.1.1.(c), 19.1.1.(g),19.1.1.(h),or 19.1.1(i).
- 19.1.3 If, following notice by the Implementing Authority pursuant to Clause 19.1.2, the relevant events are not remedied by the Concessionaire by the expiry of the Remedy Period or the relevant event does not require a Remedy Period, and neither the Implementing Authority nor the Lenders have appointed a Substituted Entity pursuant to Clause 20.4 or Clause 20.5 after the expiration of the time allowed therefor, the Implementing Authority shall terminate this Concession Contract forthwith by notice in writing to the Concessionaire and the Lenders,
- 19.1.4 Upon any termination pursuant to this Clause 19.1, the following provisions shall apply:
- (a) if termination is effected before the Effective Date, the Implementing Authority shall be entitled to demand the Resolutive Conditions Bond in full and the Concessionaire shall reimburse the Implementing Authority for all its costs and expenses incurred since the signature of this Concession Contract and the Implementing Authority shall be entitled to pursue any other remedies, including the recovery of any other damages suffered by the Implementing Authority as a result of the default of the Concessionaire that gave rise to such termination, which may be available to the Implementing Authority at law;

- (b) if termination is effected after the Effective Date, the Implementing Authority shall be entitled to claim reimbursement from the Concessionaire for all loss or damage recoverable by law which is suffered by the Implementing Authority as a result of such termination and where termination has resulted from the performance or non-performance of Operation and Maintenance, to call on the Operation and Maintenance Bond and the Final Maintenance Bond, in order to recover any such loss or damages.

19.1.5 Should the Implementing Authority or the Lenders appoint a Substituted Entity pursuant to Clauses 20.4.1 or 20.5.1, respectively, then:

- (a) as between the Parties, this Concession Contract (other than Clauses 19, 20, 21 and 22) shall cease to have effect subject to all rights and obligations of the Parties existing prior to such appointment of a Substituted Entity;
- (b) as between the Parties, the Concession Rights shall terminate, subject to this Clause 19.1.5;
- (c) such rights as the Concessionaire may have over the Site, the Highway, the Associated Facilities and the Developments, and all other immovable property thereon shall terminate;
- (d) the Concessionaire shall forthwith relinquish any interest in any immovable property on the Site or constituting part of the Highway, the Associated Facilities and the Developments in favour of the Implementing Authority and shall convey such immovable property free of all liens, charges, claims or encumbrances of any kind, such immovable property to be ceded by the Implementing Authority to the Substituted Entity;
- (e) subject to Clauses 3.8 and 3.9, the Concessionaire shall deliver all Project Documentation to the Implementing Authority, such Project Documentation to be delivered by the Implementing Authority to the Substituted Entity; and
- (f) all movable property of the Concessionaire including, without limitation, all toll equipment, shall be transferred to the Implementing Authority together with all requisite licences which shall be royalty-free to enable the Implementing Authority to continue to use the tolling equipment, such movable property and licences to be transferred by the Implementing Authority to the Substituted Entity.

For the avoidance of doubt, references in paragraphs (a) to (f) above to "Parties" and "Concessionaire" shall not include the Substituted Entity to be appointed pursuant to Clauses 20.4.1 or 20.5.1 or if the Concessionaire has previously been replaced by a Substituted Entity, the term "Concessionaire" shall not include the new Substituted Entity which is to replace such Substituted Entity previously appointed.

19.1.6 Should the Implementing Authority or the Lenders have the right to appoint a Substituted Entity pursuant to Clauses 20.4.1 and 20.5.1 respectively, then if the Implementing Authority serves notice on the Lenders and the Concessionaire under Clause 20.4.2, the Implementing Authority shall have the right to enter and take

immediate day to day operational control of the Highway and all contracts and arrangements related to Construction Works and Operation and Maintenance activities provided that the reasonable costs and expenses of the Implementing Authority shall be deducted from any toll revenues received during the period for which the Implementing Authority has such operational control (which revenues shall otherwise be for the account of the Concessionaire and paid at the direction of the Lenders). In the event of the cession and delegation of this Concession Contract to a Substituted Entity pursuant to Clause 20.7 the Implementing Authority shall relinquish such operational control to such Substituted Entity within a time to be agreed with such Substituted Entity .

19.2 Termination by Concessionaire

19.2.1 The Concessionaire shall have the right to terminate this Concession Contract if:

- (a) the Implementing Authority commits a material breach in respect of the performance of any of its material obligations hereunder or is in material breach of the warranty given by it under Clause 23.2.2;
- (b) any part(s) of the Site and/or the Highway are compulsorily acquired or expropriated from the Concessionaire by the State, which results in a material impairment of the Concession Rights;
- (c) any Material Adverse Governmental Action:-
 - (i) renders the exercise by the Concessionaire of any of its material rights hereunder, or the performance by the Implementing Authority of any of its material obligations hereunder, illegal, void or unenforceable; or
 - (ii) is of the nature referred to in Clause 17.2.2 and is not or cannot be remedied within the 60 day period referred to in Clause 17.1 and cannot be adequately compensated in terms of Clause 17.1 ; or
- (d) the assets or rights or a major portion thereof of the Concessionaire are nationalised or expropriated.

19.2.2 The Concessionaire shall, before exercising its rights to terminate this Concession Contract pursuant to Clause 19.2, give written notice to the Implementing Authority requiring the Implementing Authority to remedy the event referred to in Clause 19.2.1. If said event is not remedied before the expiry of the Remedy Period, the Concessionaire may, upon expiry of the Remedy Period, terminate this Concession Contract.

19.2.3 If this Concession Contract is terminated pursuant to this Clause 19.2 after the Effective Date, the Implementing Authority shall pay to the Concessionaire an amount (the "Implementing Authority Default Compensation Sum") equal to the aggregate of:-

- (a) the Expected Equity Value at the date of termination (taking no account of the event which gave rise to such termination or of such termination); and
- (b) all amounts properly due and payable under any contracts (including without limitation employment contracts) entered into by the Concessionaire in connection with the Project, for the purpose of discharging its obligations under this Concession Contract, prior to the date of such termination (including amounts arising as a result of such termination) provided always that such contracts have been entered into on bona fide arm's length terms (it being acknowledged for the purposes of this sub-clause only that all Associated Agreements, the form of which have been approved by the Implementing Authority, have been entered into on bona fide arm's length terms),

together with interest on the net amount specified in paragraphs (a) and (b) above from the date of termination to the due date for payment as specified in Clause 19.2.4.

- 19.2.4 The amount payable by the Implementing Authority under Clause 19.2.3 shall accrue interest at the rate specified in Clause 19.4.4 from the date of termination to the due date for payment as specified in Clause 19.4.2 and be paid on the due date for payment under Clause 19.4.2.

19.3 Effect of Termination

- 19.3.1 On the expiry or termination of this Concession Contract and/or the Concession Period for whatever reason and without prejudice to any rights of the Parties hereto (subject as herein provided):

- (a) this Concession Contract (other than the Clauses referred to in Clause 22.14) shall cease to have effect, but without prejudice to all rights and obligations of the Parties which:
 - (i) have accrued prior to or upon, but remain undischarged as at, the date of termination; or
 - (ii) arise as a consequence of such termination,
 except to the extent that such rights and obligations are included in any compensation payable and actually paid as a result of such termination whether under this Concession Contract or under the. Deed of Suretyship;
- (b) the Concession Rights shall terminate, subject to this Clause 19.3.1;
- (c) such rights as the Concessionaire may have over the Site, the Highway, the Associated Facilities and the Developments, and all other immovable property thereon shall terminate;
- (d) the Concessionaire shall forthwith relinquish any interest in any immovable property on the Site or constituting part of the Highway, Associated Facilities

and Developments in favour of the Implementing Authority and shall convey such immovable property free of all liens, charges, claims or encumbrances of any kind to the Implementing Authority;

- (e) subject to Clauses 3.8 and 3.9, the Concessionaire shall deliver all Project Documentation to the Implementing Authority;
- (f) the Concessionaire shall comply with its obligations under Clauses 3.9.3 and 3.10; and
- (g) all movable property of the Concessionaire which is required for or integral to the continuing operation and maintenance of the Highway (including without limitation all toll equipment) shall be transferred to the Implementing Authority free of all liens, charges, claims or encumbrances of any kind together with all requisite licences (other than licences of software which are freely commercially available) which shall be royalty free to enable the Implementing Authority to continue to use the tolling equipment.

19.3.2 Upon termination of this Concession Contract, the Implementing Authority shall have the right to:

- (a) enter and take immediate operational control of the Highway and all related Construction Works; and
- (b) select and substitute a new concessionaire for the Concessionaire.

19.3.3 Upon termination of this Concession Contract, the Implementing Authority shall be entitled, and the Operation and Maintenance Contracts shall so provide, to require the O&M Contractors (subject to the Implementing Authority assuming the obligations of the Concessionaire under such contract with effect from the date of such termination) to continue to operate and maintain the Highway for a period of six months from the date of such termination on the terms and conditions specified in the Operation and Maintenance Contracts or such longer time - as shall be agreed with each O&M Contractor. The Operation and Maintenance Contracts shall provide that in the absence of such agreement the Implementing Authority shall be entitled to purchase all the property of the O&M Contractor at fair market value.

19.4 Payment Procedure

19.4.1 Except as otherwise provided for expressly in this Concession Contract, whenever under this Concession Contract an amount is required to be paid by any Party, such Party shall make the same available to the other Party within 7 (seven) Business Days of demand to such account with such bank in the [host country] as the other Party may have specified for this purpose.

19.4.2 Where the Implementing Authority is required to pay an amount to the Concessionaire by operation of Clause 19.2.3, the Implementing Authority shall make such payment on the earlier of:

- (a) the date which is 7 (seven) Business Days after the relevant amount to be paid by the Implementing Authority has either been agreed by the Parties or determined pursuant to Clause 21.2 and the Implementing Authority has obtained the requisite funding to make such payment; and
 - (b) the first anniversary of the date of termination of this Concession Contract.
- 19.4.3 Without prejudice to any other right or remedy, each Party shall be entitled to receive interest on an amount due under this Concession Contract, calculated from the due date for payment of such amount as referred to in Clause 19.4.1 or 19.4.2 (as the case may be or such other date as may be expressly provided for in this Concession Contract) to the date of payment of such amount, at the rate referred to in Clause 19.4.4. Interest which has accrued on an amount due under this Concession Contract shall be paid on the same date as payment of such amount.
- 19.4.4 For the purposes of Clause 19.4.3 interest shall accrue at a rate of 2 percent above the publicly quoted basic rate of interest (expressed as a per centum per annum, compounded monthly in arrears and calculated on a 365 day year) from time to time published by one of the Reference Banks nominated by the Concessionaire to the Implementing Authority in writing for such purpose (or, failing such nomination, one of the Reference Banks nominated by the Implementing Authority to the Concessionaire in writing) as being its prime overdraft rate, as certified by any manager of such bank. Such interest shall be computed on a daily basis from the due date of payment until the relevant amount together with accrued interest is fully paid by the defaulting Party .
- 19.4.5 All payments to be made pursuant to this Clause 19 shall be made in Local Currency.
- 19.5 Release of Security Interest**

All security interests granted to the Lenders as envisaged by Clause 20.3 in respect of the Highway or any part thereof shall be released forthwith upon the termination of this Concession Contract for whatever reason.
- 19.6 Other Rights and Remedies**

No Party shall have any rights or remedies against any other Party arising on termination, save for the rights and remedies specified in this Concession Contract.
- 19.7 Calculations**
 - 19.7.1 If any calculation is required to be made for the purposes of determining an amount payable by one Party to the other pursuant to Clauses 19.1 or 19.2, the same shall be made by an internationally recognised firm of accountants (the "Independent Expert") appointed by the Parties and the Lenders or, in the absence of agreement, by the President of the Kenyan Institute of Chartered Accountants.
 - 19.7.2 Each calculation to be made by the Independent Expert shall use the latest Financial Model prepared prior to the date of termination of this Concession

Contract. The Concessionaire will not alter the methodology employed in such Financial Model from that employed in the Financial Base Case without the prior consent of the Implementing Authority, such consent not to be unreasonably withheld or delayed. In preparing any calculation for the purpose of this Clause 19.7.1, the Independent Expert shall:

- (a) use the input parameters contained in such Financial Model, unless either Party objects to any such parameter as not properly reflecting the most likely outcome for the matter which is the subject of the input parameter concerned, in which case the Independent Expert, acting reasonably and after having taken appropriate specialist and technical advice and considered the representations of the Parties, if any, shall be entitled to amend the input parameter concerned to reflect the most likely outcome; and
- (b) determine Target IRR for the Equity according to the following formula:

$$\text{Target IRR} = [(1 + \text{Original IRR}) \times (1 + f)] - 1$$

Where:

Original IRR = the overall expected real post tax return attributable to Equity as reflected in the Financial Base Case; and

f = the average anticipated rate of CPI, contained in the projections set out in such Financial Model;

- (c) calculate Expected Equity Value by discounting the relevant financial projections contained in such Financial Model utilising Target IRR as the discount rate.

19.7.3 In making any determination pursuant to this Clause 19.7, the Independent Expert shall act as an expert and not an arbitrator .

19.8 Gross Up

Where the Concessionaire is required to pay Tax on any amount paid to it by the Implementing Authority under Clause 19.2.3 (a) and (b) and/or the Implementing Authority is obliged to make any deduction by way of withholding from such amount, the Implementing Authority shall make such additional payment to the Concessionaire as is required to ensure that the net amount received and retained by the Concessionaire after such Tax and/or withholding is equal to the amount which the Implementing Authority is obliged to pay to the Concessionaire under clause 19.2.3 (a) and (b) prior to the application of any such Tax or withholding.

20. ASSIGNMENT AND SUBSTITUTED ENTITY

20.1 Assignment by the Concessionaire

The Concessionaire may not, without the prior written consent of the Implementing Authority, cede, assign or transfer or otherwise dispose of:

- 20.1.1 this Concession Contract or any Associated Agreement;
 - 20.1.2 any of its rights or obligations thereunder or;
 - 20.1.3 any of its assets except in the ordinary course of business,
- save in each case, in order to give effect to any agreement creating a security interest therein in accordance with Clause 20.3 or Clause 20.7.

20.2 Dissolution of the Implementing Authority

The Implementing Authority may not, at any time, cede, delegate, assign, sub-contract or otherwise dispose of, in whole or in part, its rights and obligations under this Concession Contract except to an assignee which has:

- (a) the legal capacity, power and authority to become a party to and perform the obligations of the Implementing Authority under this Concession Contract; and
- (b) to the reasonable satisfaction of the Lenders and the Concessionaire, the technical competence, financial standing and resources to enable it to perform its obligations, including payment of all sums due to the Concessionaire.

20.3 Creation of Security

The Concessionaire may, to the extent permitted by the Loan Agreements, cede, assign or create security over its rights and interests:

- 20.3.1 under or pursuant to this Concession Contract; or
- 20.3.2 in, over or to any claims and/or contingent and/or future claims by the Concessionaire under this Concession Contract; and/or
- 20.3.3 under or pursuant to any Associated Agreement; and/or
- 20.3.4 in, over or to any cash, receivables or other assets as may be required in accordance with the terms of the Loan Agreements.

The holder of any security created under this Clause 20.3 shall not be prevented or impeded by the Implementing Authority from enforcing such security in accordance with its terms, but the exercise of any such security shall be subject to the provisions of the laws of the [host country].

20.4 Substituted Entity Nominated by the Implementing Authority

- 20.4.1 In the event of the Implementing Authority being entitled to terminate this Concession Contract pursuant to Clause 19.1.1 and having given notice to the Concessionaire and Lenders pursuant to Clause 19.1.2, the Implementing Authority

shall have the right to nominate a Substituted Entity pursuant to Clause 20.4.2 if the Concessionaire does not remedy the event as provided in Clause 19.1.2 or, if no Remedy Period is required pursuant to Clause 19.1.2, on the happening of the event entitling termination and the giving of notice under Clause 19.1.2.

20.4.2 If the Implementing Authority wishes to nominate a Substituted Entity pursuant to Clause 20.4.1, the Implementing Authority shall so notify the Lenders and the Concessionaire within 14 (fourteen) Business Days of the expiry of the Remedy Period or of the event of termination if no Remedy Period is required and:

- (a) such proposed Substituted Entity shall be required, within 91 (ninety one) days of that notice, to provide evidence satisfactory to the Lenders that:
 - (i) it is legally and validly constituted and has the capability to enter into such agreements as may be reasonably required to give effect to the substitution;
 - (ii) it has the financial and technical capability sufficient to perform and assume the obligations of the Concessionaire under this Concession Contract and the Loan Agreements;
 - (iii) it has the financial capability to pay any damages or other sums outstanding which the Implementing Authority is entitled to receive from the Concessionaire before or at the time of such substitution;
- (b) the Lenders shall, within 28 (twenty eight) days of receipt of such evidence, inform the Implementing Authority of their acceptance or not of the substitution, which acceptance shall not be withheld if the conditions set forth in Clause 20.4.2(a) have been satisfied.

20.4.3 If the Implementing Authority does not wish or is not able to nominate a Substituted Entity pursuant to Clauses 20.4.1 and 20.4.2, it shall so notify the Lenders and the Concessionaire within 14 (fourteen) Business Days of the expiry of the Remedy Period or of the event of termination if no Remedy Period is required. If the Implementing Authority fails to give notice under Clauses 20.4.2 or 20.4.3 within the time periods specified under such Clauses, it shall be deemed to have given notice under this Clause 20.4.3.

20.5 Substituted Entity Appointed by Lenders

20.5.1 Either following:

- (a) the declaration of the occurrence of an event of default and an acceleration of the amount outstanding under the Loan Agreements; or
- (b) the Implementing Authority giving notice or deemed notice under Clause 20.4.3, or the Implementing Authority giving notice under Clause 20.4.2 and no substitution is effected within a further 147 (one hundred and forty seven) Days thereafter;

the Lenders shall have the right to give notice to the Implementing Authority of their intent to nominate a Substituted Entity.

20.5.2 If Clause 20.5.1(a) applies, the Implementing Authority shall within 14 (fourteen) Business Days of receipt of the notice referred to in Clause 20.5.1 advise the Lenders whether the Implementing Authority wishes to nominate a Substituted Entity itself and, if so, the provisions of Clause 20.4.2 shall be applicable. If the Implementing Authority advises that it does not wish to nominate a Substituted Entity or fails to advise the Lenders within such period or, if Clause 20.5.1 (b) applies, then the Lenders may proceed pursuant to Clause 20.5.3.

20.5.3 If the Lenders elect to nominate a Substituted Entity following notice by the Implementing Authority under Clause 20.4.3 that it does not wish to nominate a Substituted Entity or it does not nominate a Substituted Entity pursuant to the second sentence of Clause 20.5.2, they shall so notify the Implementing Authority within 14 (fourteen) Business Days of such notice or failure to notify or if the Lenders elect to nominate a Substituted Entity following the expiry of the said period for substitution referred to in Clause 20.5.1 (b), they shall notify the Implementing Authority within 14 (fourteen) Business Days of such expiry and:

- (a) such Substituted Entity may be required, upon the written request of the Implementing Authority, to provide the Implementing Authority within 28 (twenty-eight) days of such request with all relevant information concerning itself, including without limitation, all such information as was required from the original Concessionaire prior to the execution of this Concession Contract, such information to be satisfactory to the Implementing Authority;
- (b) such Substituted Entity shall be required within 91 (ninety-one) days of the notice by the Lenders pursuant to Clause 20.5.3 to provide evidence satisfactory to the Implementing Authority that:
 - (i) it is legally and validly constituted and has the capability to enter into such agreements as may be reasonably required to give effect to the substitution;
 - (ii) it has the financial and technical capability sufficient to perform and assume the obligations of the Concessionaire under this Concession Contract and the Loan Agreements;
 - (iii) it has the financial capability to pay any damages or other sums outstanding which the Implementing Authority is entitled to receive from the Concessionaire before or at the time of such substitution; and
- (c) the Implementing Authority shall, within 28 (twenty-eight) days of receipt of such evidence inform the Lenders of their acceptance or not of the substitution, which acceptance shall not be withheld if the conditions set forth in Clause 20.5.3 have been satisfied.

20.5.4 Should the Lenders, pursuant to Clause 20.5.3, notify the Implementing Authority that they wish to nominate a Substituted Entity and no agreement is entered into with a Substituted Entity within a further 28 (twenty eight) Business Days of the notice of acceptance in terms of Clause 20.5.3(c), then the Implementing Authority shall be entitled to terminate forthwith this Concession Contract pursuant to Clause 19.1.

20.6 Cession and Delegation to a Substituted Entity

Immediately following the acceptance by the Lenders pursuant to Clause 20.4.2(b), or by the Implementing Authority pursuant to Clause 20.5.3(c), of the nomination of the Substituted Entity, this Concession Contract shall be ceded and delegated to such Substituted Entity and, where the Substituted Entity has been nominated and appointed by the Implementing Authority, the Implementing Authority shall procure that the Substituted Entity assumes all the liabilities of the Concessionaire under the Loan Agreements as at the date of substitution.

21. GOVERNING LAW AND RESOLUTION OF DISPUTES

22.1 Governing Law

This Concession Contract shall be governed by the laws of the [host country].

22.2 Resolution of Disputes

21.2.1 If a dispute of any kind whatsoever arises between the Implementing Authority and the Concessionaire in connection with or arising out of this Concession Contract, including, but not limited to, any dispute as to any opinion, instruction, determination, certification or valuation of the Independent Engineer, then an attempt shall be made by the Parties to settle such dispute amicably and either party may send the other party a written invitation to conciliation under UNCITRAL (as hereinafter defined) Conciliation Rules. If the Parties are unable to agree on a conciliator either Party may apply toto assist the Parties in appointing a conciliator .

21.2.2 If the dispute is not resolved by means of the conciliation procedure within thirty days after entering into such process, or at such earlier time as the Parties may agree, the chief executive officer of the Implementing Authority and the chief executive officer of the Concessionaire shall in that respect meet and endeavour to resolve issues between them. The joint and unanimous written decision of such chief executive officers of the Parties shall be final and binding upon the Parties but if they do not meet or are unable to agree within 60 (sixty) days of the reference to them then the matter may be referred to arbitration pursuant to Clause 21.2.3.

21.2.3 Any such dispute which cannot be settled pursuant to Clauses 21.2.1 and 21.2.2 of this Concession Contract within 90 (ninety) days after receipt by one Party of the other Party's request to do so may be submitted by either Party to arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules in force on the date of this Concession Contract for a decision which shall be final and binding. Such arbitration shall be conducted in [LOCATION]. In the event of

a conflict between the UNCITRAL Arbitration Rules and the terms of this Concession Contract, the terms of this Concession Contract shall govern.

- 21.2.4 The appointing authority shall be the Secretary General of the ICC International Court of Arbitration. The arbitration shall be conducted in the English language before a panel of three arbitrators. The Implementing Authority and the Concessionaire shall each select one arbitrator within 30 (thirty) days after commencement of the arbitration and, within such 30 (thirty) day period, each Party shall notify the appointing authority and request that the appointing authority appoint such arbitrator. The arbitrators as hereinabove selected shall select in consultation with the Parties the third arbitrator who shall act as president of the arbitral panel within 30 (thirty) days from the date of appointment of the second of the two arbitrators. If no decision as to the third arbitrator is made within such period, then upon written request of either Party, the president of the arbitral panel shall be selected by the appointing authority. The arbitral panel shall have the power to join such other party or parties to the arbitration, to consolidate the arbitration with any arbitration between such other party or parties and either or both of the Parties or between such other parties, or to hold concurrent hearings of the arbitration between the Parties and any other such arbitration.
- 21.2.5 Any Party shall be entitled to apply for any arbitration award pursuant to this Concession Contract to be made an order of court.
- 21.2.6 Notwithstanding any contrary provision in this Concession Contract, either Party shall have the right to approach the [host country] otherwise having jurisdiction for urgent or interim relief.

22.3 Obligations During Arbitration

Pending any attempt at amicable settlement or any award of an arbitral panel, the Concessionaire shall, and shall cause the Contractors and O&M Contractors to, continue to perform their respective obligations hereunder unless otherwise instructed in writing by the Implementing Authority. Pending any such settlement or award, the Implementing Authority shall continue to perform its obligations under this Concession Contract.

22.4 Claim

Where the Concessionaire intends to claim any extension of time and/or additional payment or other compensation pursuant to or relating to this Concession Contract and from whatsoever cause arising (other than compensation following termination), it shall give notice of its intention to the Implementing Authority, with a copy to the Independent Engineer, within 30 (thirty) Business Days after the event giving rise to the claim has first arisen or should reasonably have come to the knowledge of the Concessionaire whichever is the later. Such claim shall be accompanied by such documentation and contemporaneous records as are appropriate to substantiate the same within 30 (thirty) Business Days after the date of the notice of intention to claim, save that if the Concessionaire cannot submit all relevant details within that period, the Concessionaire shall submit interim details at intervals of not more than 30 (thirty) days from the date of the notice of intention of the Concessionaire to

apply for an extension of time and/or additional payment or other relief and shall submit full and final supporting details of its application by such date as may be determined by the Independent Engineer as appropriate and reasonable having regard to the nature and consequences of the event giving rise to such claim. If the Concessionaire fails to comply with the requirements of this Clause, it shall not be entitled to any extension of time, additional payment, compensation or other relief in respect of the relevant cause.

22. MISCELLANEOUS PROVISIONS

22.1 Pre-existing Defects

The Implementing Authority hereby cedes, assigns and transfers to the Concessionaire all rights and claims which the Implementing Authority may be entitled to pursue in relation to unfulfilled obligations and latent defects in connection with any construction or maintenance on the Highway which was carried out prior to the Effective Date whether or not they manifest themselves after the Effective Date. The Implementing Authority shall give the Concessionaire reasonable assistance with regard to information in relation thereto. If the rights or claims cannot be ceded, assigned and transferred, the Implementing Authority shall pursue those rights or claims at the request, direction, risk and expense of the Concessionaire, for the benefit and account of the Concessionaire.

22.2 Primacy of this Concession Contract

22.2.1 This Concession Contract shall govern all aspects of, and all contractual relationships relating to, the Project as between the Parties. In the event of conflict between this Concession Contract and any Associated Agreement on a matter affecting the Parties, including all questions of interpretation, this Concession Contract shall prevail.

22.2.2 The Annexures attached hereto shall be deemed a part of this Concession Contract and shall have binding effect. If the content of any of the Annexures is in conflict with the content of this Concession Contract, the content of this Concession Contract shall prevail.

22.3 Confidentiality

Each Party shall, subject to applicable law, keep in confidence all information, data or other records provided that nothing in this Clause 22.3 shall limit the Implementing Authority's right to use such documents and information in circumstances where this Concession Contract has been terminated in accordance with Clause 19 or a Substituted Entity's right to use such documents and information or the Lenders' rights to information required under any Loan Agreements. In each case such rights will only be used in connection with the operation and maintenance of the Highway.

22.4 Variations in Writing

All additions, amendments and variations to this Concession Contract shall be binding only if in writing and signed by duly authorised representatives of each of the Parties.

22.5 Entire Agreement

This Concession Contract, including the Annexures attached thereto, represents the entire agreement between the Parties in relation to the subject matter thereof and supersedes the Invitation to Tender, the tender for the Project submitted by the Consortium, and any or all previous agreements or arrangements, whether oral or written, between the Parties in respect of the Project, the Highway and the Concession Rights or the other contents of this Concession Contract. No representations, warranties or other terms and conditions of whatever nature not contained or recorded herein have been made or agreed to.

22.6 No Waiver

No waiver by either Party of any default or variation by the other in the performance of any of the provisions of this Concession Contract shall operate or be construed as a waiver of any other or further default or variation whether of a like or different character, or shall be effective, unless in writing duly executed by an authorised representative of such Party .

22.7 Time and Indulgence

Any time or other indulgence allowed by one Party to the other in which to perform its duties and obligations hereunder or to remedy any breach hereof shall not be, and shall not be construed as, a waiver by the Party giving such time or indulgence of any of its rights hereunder, except to the extent of such time or indulgence.

22.8 No Third Party Beneficiaries

Save as provided in Clause 26, this Concession Contract is made exclusively for the benefit of the Implementing Authority and the Concessionaire and no third party shall have any rights hereunder or be deemed to be a beneficiary hereof except as may be expressly provided herein.

22.9 Language

This Concession Contract shall be drawn up and construed in the English language.

22.10 Notices

22.10.1 Any notice or correspondence to be given under this Concession Contract shall be in writing in English unless otherwise agreed and shall be delivered personally or sent by registered or certified mail, return receipt requested, or sent by fax followed by the original delivered by hand or sent by registered or certified mail, return receipt requested, save that any notice required pursuant to Clause 17, 18 or 19 shall be

delivered by hand to the physical address of the Party to whom such notice is being given and such Party shall sign a receipt for such notice.

22.10.2 The addresses for Notices and the domicilia citandi et executandi are as follows:

Implementing Authority: Chief Executive Officer
[insert details]

Concessionaire: Chief Executive Officer
[insert details]

Independent Engineer: As notified to the Parties from time to time by the Independent Engineer

Lenders: **[insert details]**

Either Party, the Lenders or the Independent Engineer may change its nominated address and domicilium citandi et executandi to another physical address in [host country] by prior notice to the other Party, the Lenders and the Independent Engineer.

22.11 Severability

If anyone or more of the covenants, agreements, provisions or terms of this Concession Contract shall be held wholly or partly invalid, illegal or unenforceable for any reason whatsoever, then those covenants, agreements, provisions or terms shall be deemed severable from the remaining covenants, agreements, provisions or terms of this Concession Contract and shall in no way affect the validity, legality or enforceability of this Concession Contract. The Parties shall meet as soon as possible and negotiate in good faith upon a replacement provision that is legally valid and that achieves as nearly as possible the objective of this Concession Contract and produces an equivalent economic effect.

22.12 Representatives

22.12.1 The Concessionaire shall be represented by λ , or such other representative as shall from time to time be notified to the Implementing Authority.

22.12.2 The representatives of the Implementing Authority shall be λ , or such other representative as shall from time to time be notified to the Concessionaire.

22.13 Financial Base Case and Associated Agreements

The Parties shall, on the date of Financial Closing:

- (a) replace Annexure XIV (Financial Base Case) with project forecasts prepared by the Concessionaire and in the form approved by the Lenders and the Implementing Authority for the purposes of Financial Closing, which forecasts are substantially in the form of the financial model contained in Annexure XIV and are prepared using the methodology and assumptions

contained therein and amended to incorporate the final terms of the Loan Agreements as at the date of Financial Closing;

- (b) update Annexure XXIII (Associated Agreements) to incorporate the complete list of Loan Agreements approved by the Implementing Authority and entered into as at Financial Closing.

22.14 Provisions Surviving Termination

Notwithstanding the termination of this Concession Contract for any reason, including the expiry of the Concession Period, the Parties shall continue to be bound by the following provisions which shall remain in full force and effect:

- 22.14.1 Clause 1, Clauses 3.8 to 3.13 (inclusive), Clause 11.6, Clause 11, 7 Clauses 19.1.4 to 19.1.7 (inclusive), Clause 19.2.3 to 19.7 (inclusive), Clause 21, Clause 22, Clause 24.3 and Clause 26.
- 22.14.2 Clause 14, but only to the extent that:
 - (a) the act or omission that gave rise to the claim, liability, loss or cost occurred prior to the expiry or termination of this Concession Contract; and
 - (b) such act or omission has not been taken into account in the calculation of the compensation payable on such termination pursuant to the provisions of Clause 19 or the Deed of Suretyship.

23. REPRESENTATIONS AND WARRANTIES

23.1 Representations and Warranties by the Concessionaire

The Concessionaire hereby represents and warrants to the Implementing Authority as follows:

- 23.1.1 The Concessionaire is a company duly organised under the laws of the [host country] with all requisite corporate power to carry out its obligations under this Concession Contract and to execute and deliver this Concession Contract, and acknowledges that, except as the Implementing Authority may otherwise agree in writing, its sole purpose is to implement the project. A true and complete copy of the documents constituting the Shareholders' Agreement and the Concessionaire's Certificate of Incorporation, Memorandum of Association and Articles of Association certified by the duly authorised representative of the Concessionaire, as in effect on the date hereto, is attached as Annexures XXI and XIX.
- 23.1.2 The Concessionaire is currently comprised of the Shareholders specified in Annexure XVII.
- 23.1.3 This Concession Contract has been duly authorised by all necessary corporate action, is legally valid and binding upon itself and does not require approval in any form in order to give full effect thereto; provided, however, that this Concession Contract is subject to the fulfilment of all the conditions set forth in Clause 24.

- 23.1.4 The Concessionaire is not prevented or restrained legally, commercially or otherwise from entering into and undertaking the provisions of this Concession Contract in accordance with its terms.
- 23.1.5 The Concessionaire has fully familiarised itself with all aspects of the Project and has all the knowledge, experience, ability (particularly financial ability) to carry out the Project in accordance with the terms of this Concession Contract and all relevant laws and regulations.
- 23.1.6 The Concessionaire has reviewed and checked as an expert the Site and its surroundings, and the physical condition of the Site and its surroundings and is fully familiar with the terms of all relevant laws and regulations including without limitation all laws and regulations relating to the Highways and toll roads and its rights and obligations thereunder and hereunder, and pursuant to such review the Concessionaire finds the Site suitable for the fulfilment of its obligations and undertakings under this Concession Contract, including without limitation, the completion of the design and construction of the Highway, the Associated Facilities and the Project. The Concessionaire further acknowledges its willingness to enter into this Concession Contract with full awareness of, among other things, the rights and obligations derived from the physical and legal status of the Site and the Highway, the provisions of this Concession Contract and its ability to fulfil all of its obligations under this Concession Contract adequately and in a timely manner.
- 23.1.7 The Concessionaire has conducted a full inquiry and has satisfied itself, and accordingly accepts responsibility for the fact that the execution of the Project or any part thereof shall not involve any infringement of any patent or trade secret or know how or copyright belonging to any third party.
- 23.1.8 The Concessionaire has evaluated all factors that may reasonably be deemed to affect the carrying out of its obligations under this Concession Contract, including geological conditions, technical risks, traffic risks, and any other risk involved herein, and such other conditions that may reasonably be deemed to affect the progress or completion of the Project in accordance with the terms of this Concession Contract.
- 23.1.9 All representations, warranties, information and data of the Concessionaire contained in any written statement (including financial statements), certificate, exhibit or schedule or any other document delivered pursuant to the pre-qualification questionnaire, Invitation to Tender, or in connection with this Concession Contract, shall be true and correct in all material respects as of the date hereof .

23.2 Representations and Warranties of the Implementing Authority

The Implementing Authority hereby represents and warrants to the Concessionaire as follows:

- 23.2.1 In executing this Concession Contract for the purposes of accepting the benefits hereof and the granting of the Concession Rights, λ is acting for and on behalf of the Implementing Authority and in accordance with law.

23.2.2 The Implementing Authority is duly established under the law of the State and this Concession Contract is legally valid and binding upon the Implementing Authority and enforceable in accordance with its terms.

24. EFFECTIVENESS

24.1 Effectiveness Prior to Effective Date

During the period between the signature of this Concession Contract and the Effective Date the provisions of this Concession Contract shall be in full force and effect, save where otherwise mentioned by the said provisions or required by the context.

24.2 Resolutive Conditions

24.2.1 The following shall be satisfied after signature hereof:

- (a) [signature by the Concessionaire and the Contractor of the Initial Construction Works Contract in the form approved by the Implementing Authority;]
- (b) [signature by the Concessionaire and the relevant O&M Contractors of the Initial Operation and Maintenance Contract in the form approved by the Implementing Authority;]
- (c) execution by the parties thereto (other than the Implementing Authority) of the other Associated Agreements specified in Annexure XXIII hereto, in each case in a form satisfactory to the Implementing Authority;
- (d) submission to the Implementing Authority of details of the management and organisation structure of the Concessionaire, satisfactory to the Implementing Authority;
- (e) issuance of a legal opinion by a practising attorney addressed to the Implementing Authority in a form satisfactory to the Implementing Authority, affirming compliance by the Concessionaire of the matters set forth in Annexure XXII;
- (f) delivery by the Concessionaire of an Operation and Maintenance Bond in the form of Annexure IX;
- (g) achievement of Financial Closing (other than any condition precedent relating to the unconditionality of this Concession Contract or any other condition precedent of a continuing nature, the satisfaction of which can only be determined on the date of first drawdown under the Loan Agreements);
- (h) if the Contractor or any O&M Contractor is a joint venture (or consortium), the delivery by such entity(ies) of two notarially certified copies of the joint venture (or consortium) agreement to the Implementing Authority and the Independent Engineer;

- (i) delivery by the Concessionaire to the Implementing Authority of a broker's note confirming that the insurance policies required in terms of Clause 15 and as set out in Annexure XVIII have been effected;
- (j) signature by the shareholders of the Concessionaire of the documents constituting the Shareholders' Agreement in a form satisfactory to the Implementing Authority;
- (k) completion by the Concessionaire of the Preliminary Design in respect of the Initial Construction Works as approved by the Implementing Authority;
- (l) declaration of the Highway as a toll road in terms of the Act; and
- (m) execution by the Implementing Authority of the Deed of Suretyship.

24.2.2 The Implementing Authority undertakes to procure the satisfaction of the conditions specified in Clauses 24.2.1(l), and 24.2.1(m) within 42 (forty-two) days of the satisfaction of the conditions referred to in Clauses 24.2.1 (a) to (k).

24.3 Failure to Meet Resolutive Conditions

24.3.1 Unless the parties otherwise agree in writing, if the conditions specified in Clause 24.2.1 (a) to (k) are not fulfilled within 90 (ninety days) of the date hereof, this Concession Contract shall terminate and the obligations of each Party shall be determined pursuant to Clauses 19.1.4(a), Clause 19.3.1 (a), (b) and (e) and this Clause 24.3.1 (as appropriate). Where this Concession Contract has terminated as aforesaid, the Implementing Authority shall be entitled to claim under the Resolutive Conditions Bond if the Concessionaire has failed to satisfy any of the conditions set forth in Clauses 24.2.1 (a), 24.2.1 (b), 24.2.1 (c), 24.2.1 (d), 24.2.1 (f), 24.2.1 (i), 24.2.1 (j) or 24.2.1 (k) or has failed to use its best endeavours to satisfy any of the conditions set forth in Clauses 24.2.1 (e) and 24.2.1 (g) and 24.2.1 (h), provided also that the Implementing Authority shall be entitled to call up the Resolutive Conditions Bond if Financial Closing is not achieved by reason of failure of the Shareholders to sign the Equity Subscription Agreements. If the Implementing Authority has failed to comply with its obligations under Clause 24.2.2, the Concessionaire shall be entitled to terminate this Concession Contract in which event the Implementing Authority shall reimburse the Concessionaire for all its reasonable costs and expenses incurred in relation to the Project since the date of this Concession Contract.

24.3.2 If the conditions specified in Clause 24.2.1 (a) to (k) are not fulfilled within 90 days of the date hereof, the Concessionaire may, prior to the expiry of the 90 (ninety) day period referred to above, give notice of its intention to extend the validity of the Resolutive Conditions Bond for an additional period of 90 (ninety) days, in which event:

- (a) if the Implementing Authority acknowledges that it is not entitled, or does not intend, to call on the Resolutive Conditions Bond and the Concessionaire extends the validity of the Resolutive Conditions Bond, prior to its expiry, as

aforesaid, then this Concession Contract shall only be terminated if the conditions set forth in Clause 24.2.1 (a) to (k) are not met within 180 (one hundred and eighty) days of the date hereof; or

- (b) if the Concessionaire does not extend the validity of the Resolutive Conditions Bond prior to its expiry or the Implementing Authority acknowledges that it is entitled and intends to call on the Resolutive Conditions Bond, then this Concession Contract shall be terminated on the expiry of the said period of 90 (ninety) days.

24.3.3 If the Concessionaire believes that the conditions specified in Clause 24.2.1 (a) to (k) will not be fulfilled within 90 (ninety) days of the date hereof, and that the Implementing Authority will be entitled to call on the Resolutive Conditions Bond pursuant to Clause 24.3.1, then the Concessionaire may not later than the expiry of the 90 (ninety) day period referred to above, deliver a new resolutive conditions bond to replace the Resolutive Conditions Bond, such new bond to be on the same terms and subject to the same conditions as the Resolutive Conditions Bond, except that such new bond shall be in an amount of million (..... million Local Currency) in prices and shall have a validity period that expires 91 (ninety-one) days after the expiry date of the Resolutive Conditions Bond that it replaces.

Where the Concessionaire delivers a new resolutive conditions bond that meets the requirements of this Clause 24.3.3:

- (a) unless the Parties agree otherwise in writing, this Concession Contract shall be terminated if the conditions specified in Clause 24.2.1 (a) to (k) are not fulfilled within 180 (one hundred and eighty) days of the date of signature of this Concession Contract;
- (b) the Implementing Authority shall otherwise be entitled to call on such new bond in the same circumstances as it would have been able to call the Resolutive Conditions Bond; and
- (c) the rights and obligations of each Party shall be determined pursuant to Clause 19.

25. RESOLUTIVE CONDITIONS BOND

Upon the signature of this Concession Contract, the Concessionaire shall provide to the Implementing Authority the security for fulfilment of the conditions set forth in Clause 24.2.1 in the form of a Resolutive Conditions Bond as prescribed in Annexure XI.

26. STIPULATIONS FOR THE BENEFIT OF THE LENDERS

The Parties agree that the provisions of this Concession Contract that refer to the Lenders comprise stipulations for the benefit of the Lenders and that the Lenders may at any time accept such stipulations in their favour provided that they accept the obligations imposed upon them in terms of this Concession Contract. The

Implementing Authority and the Lenders respectively shall have no obligations to each other under this Concession Contract in respect of the content thereof save for such obligations that are expressly provided for herein. The Parties further agree that they shall not amend the provision of this Concession Contract that are for the benefit of the Lenders without prior approval of the Lenders.

Execution on behalf of the Implementing Authority:

DONE AND SIGNED at _____ this _____ day of _____

Duly authorised hereto

Duly authorised thereto

Witnesses:

Witnesses:

1. _____

1. _____

2. _____

2. _____

Execution on behalf of the Concessionaire:

DONE AND SIGNED at _____ this _____ day of _____

Duly authorised hereto

Duly authorised thereto

Witnesses:

Witnesses:

1. _____

1. _____

2. _____

2. _____