

**CONCESSION AGREEMENT  
FOR THE MANAGEMENT AND OPERATION OF THE PORT OF  
EHOALA**

**Agreement no. [ \_\_\_\_\_ ] of 24 March 2006**

Considering,

Malagasy Act no. 2003-025 of 5 September 2003 on Port Statutes,

Decree no. 2004-699 of 13 July 2004 implementing Act no. 2003-025 of 5 September 2003 on Port Statutes,

Order no. 24206/2004 of 14 December 2004 approving the standard form agreement applicable to comprehensive management and operation concessions of Malagasy ports,

**BETWEEN THE UNDERSIGNED:**

**Agence Portuaire Maritime et Fluviale (A.P.M.F.)**, a public industrial and commercial entity located at Immeuble Plein Ciel, Ivandry, Antananarivo, Madagascar, set up pursuant to Decree no. 2003-659 of 5 June 2003, whose registered office is located at Immeuble Plein Ciel, Ivandry, Antananarivo, Madagascar, represented by Mr Jérôme Sambalis by virtue of an authorisation issued by the Board of Directors of the A.P.M.F. on \_\_\_\_\_ March 2006,

hereinafter referred to as the “**Concession Grantor**”

and

**Port d'Ehoala**, a limited company incorporated as a *société anonyme* under Malagasy law, having a fully subscribed and paid-up share capital of USD 100,000, whose registered office is located at Villa 3 H, lot II J 169, Ivandry, Antananarivo, Madagascar, in the process of being incorporated and registered with the Antananarivo Trade and Companies Registry, represented by Mr Guy Larin, duly authorised for the purposes hereof pursuant to minutes of proceedings dated \_\_\_\_\_ March 2006,

hereinafter referred to as the “**Concessionaire**”

party of the second part,

The Concession Grantor and the Concessionaire are jointly referred to as the “**Parties**” and each individually as a “**Party**”.

**RECITALS:**

A framework agreement (the “**Framework Agreement**”) was entered into between the Malagasy State (“**the State**”), represented by the *Office des Mines Nationales and des Industries Stratégiques* (“**OMNIS**” - the Malagasy National Mines and Strategic Industries Authority), on

the one hand, and QIT-Fer & Titane, Inc., a company incorporated under Canadian law, on the other hand. The said Framework Agreement was submitted to and approved by the National Assembly of Madagascar and the Malagasy Act no. 98-002 of 26 January 1998 ratifying the said agreement was published in the Government Gazette (*Journal Officiel*) of the Malagasy Republic on 2 March 1998.

The Framework Agreement pertains to mining research and mining, including the separation, enrichment and processing of minerals existing in the mineral-bearing sand ore of Fort-Dauphin, the exportation and sale of the minerals extracted from such sand ore as well as the re-commissioning of the mining site and the construction of the project infrastructure, and all other ancillary activities required for completion of the project (the “**Project**”).

The purpose of the Framework Agreement is *inter alia* (i) to set forth the terms and conditions applicable to completion of the Project, (ii) to specify the exceptions to the applicable laws and regulations in order to allow proper completion of the Project and (iii) to set forth a number of specific rights and obligations, both for the State and for QIT Fer & Titane Inc in light of the Project.

In accordance with the provisions of the Framework Agreement, a joint-venture undertaking, QIT Madagascar Minerals SA (“**QMM**”), was incorporated between the State, on the one hand, and QIT Fer & Titane, Inc., on the other hand, with a right for the State’s interest in QMM SA’s share capital to be maintained at 20% in accordance with the terms and conditions and subject to the limitations set forth in the Framework Agreement and the Shareholders’ Agreement executed on 2 February 1999 between the State, represented by OMNIS, and QIT Fer & Titane, Inc.

In particular, the Framework Agreement provides for the construction of a port suitable for the Project on the public domain, which the State shall make available for the Project within the framework of an occupancy agreement to be entered into between the State and QMM or an Affiliate, as this term is defined in the Framework Agreement.

The Framework Agreement provides *inter alia* that completion of the Port as well as the financing and operation thereof shall be carried out at QMM SA’s or its Affiliate’s sole expense and risk. QMM SA or the Affiliate shall have priority rights of possession over the equipment and plant required for the Project throughout the term of the Fort-Dauphin Operating Licence, as this expression is defined in Article 1 of the Framework Agreement.

Based on the environmental and socio-economic surveys conducted in accordance with the Framework Agreement, Malagasy regulations and international professional standards and practice, it was agreed, following execution of the Framework Agreement, that the harbour, initially intended for construction at the Evatra cape, would be a national-interest deep-water ore terminal and commercial harbour located on the northern spur of the tip of the Ehoala peninsula (the “**Port**”).

Since 2001, the Parties initiated negotiations in order to specify their rights and obligations within the framework of a public service concession governed by the provisions of the Framework Agreement for the construction and operation of the Port by QMM or an Affiliate for a period equal to the term of validity of the mining claims.

From 2001 to the date hereof, additional surveys were conducted to determine under which conditions the Taolagnaro area would benefit from optimal economic growth as a consequence of the existence of a deep-water harbour, an industrial and port development

zone and integrated planning for the development of an infrastructure and service complex in the area.

The conclusions of these surveys were favourable enough for the Malagasy State to decide, jointly with the World Bank and using funding from the latter, to construct an Integrated Growth Hub (IGH). This pilot Project comprises in particular the construction of a new infrastructure complex in the area in order to promote economic growth. The IGH is thus designed as one of the tools used in Madagascar to combat poverty and it forms an integral part of the national accelerated and sustainable development strategy resolved in May 2003 and set forth in the Poverty Reduction Strategy Plan (*Document de Stratégie de Réduction de la Pauvreté*).

The Project was therefore revised to adapt it to this new framework, so as to ensure that the Port and the associated industrial and port development zone become an avenue for the economic growth of the Taolagnaro area.

In accordance with (i) the Framework Agreement and (ii) the port regulations enacted by the State following execution of the Framework Agreement, the Parties have agreed to enter into this Master Concession Agreement for the management and operation of the Port. This agreement is intended both to allow the Groupe Rio Tinto to complete the Project and allow the State to take advantage of the implementation of the Project to lay the foundation for sustainable development of the Taolagnaro area within the framework of its regional growth hub invigoration policy. In light of the foregoing, QMM.SA has agreed to support its subsidiary, the concessionaire company, which could not have entered into a concession agreement alone given the extent of the works to be carried out for construction of the Port. In particular, QMM.SA made financial commitments in the form of a USD 95,000,000 shareholding in the concessionaire company and a profits outlook that may not materialise for the next two decades, or even several decades. The State has agreed to pay the Concessionaire, in the form of a non-repayable subsidy, an amount equal to twenty three million one hundred thousand (23,100,000) SDR.

It is hereby stated that the Port shall be intended for priority use as an ore terminal and that the existence thereof is the result of the implementation of the Project of which it forms part. In addition, the Parties have agreed that the Concessionaire would be awarded rights over an extended zone beyond the harbour area in the strict sense for the purposes of developing its activities outside of the bounds of the public harbour service perimeter defined in the concession agreement witnessed herein; such benefits and rights in derogation of general law shall represent a contribution on the part of the State and Concession Grantor to the attainment of the financial balance of the Concession.

The Parties acknowledge that this public-service Concession pertaining to the Port is a *sui generis* contractual relationship as each of the Parties is assuming a set of long-term undertakings in view of (i) ensuring the best promotion and operation of the said Port for the purposes of the Project, and (ii) providing a public service and ensuring the growth of industrial and port activities.

The Parties acknowledge that it is not possible to set forth detailed terms and conditions for the performance of the public service in the medium to long term and that therefore it is essential to foster and develop a strong public/private partnership in compliance with the rights and obligations assumed and the guiding principles of applicable law.

The purpose of this Concession is therefore to lay down the rules for the functioning of a proper win/win partnership and provide an appropriate environment for close cooperation and constant dialogue between the Parties.

**NOW, THEREFORE, THE PARTIES HAVE AGREED AS FOLLOWS:**

**CHAPITRE I**

**DEFINITIONS**

**ARTICLE 1 DEFINITIONS**

Without prejudice to the definitions set forth in the introductory section and recitals hereto, the capitalised terms appearing and defined hereinbelow shall, when used in the Concession Agreement and in the Particular Conditions and Appendices thereto, have the following meanings (terms defined in the singular form are ascribed the same meaning in the plural form and vice versa).

**“Financing Agreement”**: means any credit or loan agreement entered into between the Lenders and the Concessionaire for the purposes of financing all or part of the Concession works.

**“Project Agreement”**: means the agreement to be executed between the Malagasy State and the International Development Association (IDA) pertaining to the terms and conditions of State financing of a non-repayable subsidy of twenty three million one hundred thousand (23,100,000) SDR to be awarded by the Malagasy State to the Concessionaire pursuant to the loan agreement entered into between the Malagasy State and the IDA on 13 July 2005.

**“Subsidiary Agreement”**: means the agreement to be executed between the Malagasy State and the Concessionaire in respect of the terms and conditions of provision by the State to the Concessionaire of a non-repayable subsidy of twenty three million one hundred thousand (23,100,000) SDR pursuant to the loan agreement entered into between the Malagasy State and the IDA on 13 July 2005.

**“Annex Activities”**: means activities relating to the operation of the Port or that benefit from the proximity of port facilities, as listed in **Appendix 2** to the Particular Conditions, and of which the location and operation within the Concession Perimeter comply with the Master Plan for Concession Perimeter Development.

**“Affiliate”**: means a company in which a first company or the State directly or indirectly own more than fifty percent (50%) of the share capital or which directly or indirectly holds more than fifty percent (50%) of the share capital of the said first company. It also refers to any companies whose common feature is to be more than fifty percent (50%) directly or indirectly owned by Rio Tinto PLC (England), Rio Tinto Ltd (Australia) or by the respective successors and assigns of these two companies.

**“Appendix”**: means an appendix to the Concession Agreement or Particular Conditions and any amendment or supplement to the Appendices executed by the representatives of each of the Parties.

**“Authorisation”**: means any administrative instrument, such as permits (other than mining permits), import licences, administrative registration, entry or exit visas, residence permits, etc. required by the Concessionaire to perform the obligations incumbent on it pursuant to the Concession and to manage and operate the Port in accordance with the provisions of the Framework Agreement and the Concession.

**“Assets of the Concession”**: means the Assets to be Returned and the Assets for Optional Return.

**“Assets for Optional Return”**: means the assets purchased or manufactured by the Concessionaire and which, although they are useful for the operation of the Port, are not returned to the Concession Grantor upon the normal or early expiry of the Concession unless the Concession Grantor exercised its right of recovery, subject to payment to the Concessionaire of a jointly-agreed fixed compensation, or, failing agreement, of compensation set pursuant to Conciliation proceedings, or failing this, by the authority responsible for settling disputes between the Parties. The list of Assets for Optional Return appears in **Appendix 5** to the Particular Conditions ; said list is updated in accordance with the provisions of the Concession.

**“Assets to be Returned”**: means all immovable property, tangible real property and fixtures and movable property, irrespective of the value thereof, required for the public-service operation of the Port, full title to which automatically vests in the Concession Grantor upon normal or early expiry of the Concession. All of the immovable property (breakwaters, piers, wharves, wharf platforms, stores, warehouses, buildings etc.) required for the proper provision of the Public Port Service that the Concessionaire builds or causes to be built on the public domain shall mandatorily be deemed to constitute Assets to be Returned. The list of Assets to be Returned appears in **Appendix 4** to the Particular Conditions ; said list is updated in accordance with the provisions of the Concession. It is hereby agreed that the assets exclusively intended for the Project, that is the conveyor belt and the ilmenite storage premises are not Assets to be Returned.

**“Particular Conditions ”**: means the Particular Conditions of the Concession Agreement appearing in **Appendix 2** to the Concession Agreement.

**“Port Area”**: means the area indicated on the plan appended as **Appendix 1-A** to the Particular Conditions and which includes the land and water located within the Initial Concession Perimeter and all land located within the Extended Zone, the Port Area being the maximum area that the Concessionaire may use under the Concession.

**“Conciliation Board”**: has the meaning ascribed thereto in Article 19 of the Concession Agreement.

**“Concession”**: means the set of contracts comprising this Concession Agreement, the Particular Conditions thereto and the Appendices hereto and to the Particular Conditions .

**“Control”**: means control of a company within the meaning of Articles 190 and 191 of Malagasy Act no. 2003-036 of 30 January 2004 on commercial companies; and the terms “to control”, “controlled”, “controlling” shall be construed likewise.

**“Concession Agreement”**: means this concession agreement.

**“Effective Date”**: means the date on which the conditions precedent set forth in Article 10.2 of the Concession Agreement are actually met.

**“Date of Commencement of Port Operation”**: means the date as of which the Concessionaire shall commence the management and the operation of all or part of the Port infrastructure, whether such management and operation are related to the ore terminal and/or commercial activity of the Port, as such date shall be notified by the Concessionaire to the Concession Grantor in accordance with Article 10.3 of the Concession Agreement.

**“Port Decree”**: means Decree no. 2004-699 of 13 July 2004 implementing Malagasy Act no. 2003-025 of 5 September 2003 on Port Statutes.

**“Dollar”** or **“USD”**: means the currency that is legal tender in the United States of America.

**“SDR”**: means the Special Drawing Rights.

**“Environmental Studies”**: means all of the surveys and analyses conducted and taken into account for the issuance of the environmental permit granted pursuant to Order no. 13999-01 min/env on 14 December 2001.

**“Major Equilibrium”**: means the situation achieved when the Concessionaire's net aggregate result becomes positive, provided that on such date the balance of amortisation pertaining to the First Phase Works, including the Works for renewal thereof, comprising the balance of impairment depreciation, carried out in accordance with the principles set forth in Article 35 of the Particular Conditions , has been compensated by profits, all within the framework of the financing provided for in the Concession in the form of a Concessionaire's subscribed share capital of USD ninety five million (USD 95,000,000) and a twenty three million one hundred thousand (23,100,000) SDR State subsidy, payable in proportion to the expenses incurred and paid for construction of the Port.

**“Malagasy Ports Act”**: means Act no. 2003-025 on Port Statutes, dated 5 September 2003.

**“First Phase Works Main Infrastructure Project Item”**: means the dredging, breakwater, main and secondary wharf and wharf platform building works financed up to twenty three million one hundred thousand (23,100,000) SDR by the State; these works were covered by a call for tenders dated 3 October 2005, the award procedure for which is described in Appendix 7 to the Particular Conditions . The First Phase Works Main Infrastructure Project Item forms part of the First Phase Works.

**“Performance Objectives”**: means the performance objectives pertaining to the Public port Service that the Concessionaire must attain and constantly meet throughout the term of the Concession and which are listed in Appendix 8-A to the Particular Conditions .

**“Concession Perimeter”**: means the Initial Concession Perimeter, together with the land located within the Extended Zone shown in Appendix 1-B to the Particular Conditions , as such appendix exists on the date of signature of the Concession Agreement and may be modified by the Parties during the term of the Concession by the addition of land located in the Extended Zone in accordance with the provisions of Article 1.2 of the Particular Conditions . As

at the date of signature of the Concession Agreement, the Concession Perimeter is identical to the Initial Concession Perimeter.

**“Initial Concession Perimeter”**: means the physical perimeter of the Concession as at the date de signature of the Concession Agreement shown in Appendix 1-A to the Particular Conditions .

**“Operating Permit for Fort-Dauphin”**: means the mining permit granted for the purposes of the Project and issued in accordance with Article 7 of the Framework Agreement.

**“Minor Equilibrium”**: means the situation achieved when the turnover generated by the Concessionaire during a financial period is at least equal to the operating expenses incurred during the said financial period (positive EBITDA).

**“Global Layout Plan”**: means the plan showing port structures and buildings, wharf platforms and public roadways appearing in Appendix 1-C.

**“Port of Ehoala” or “Port”**: means the ore terminal and commercial port to be designed, financed, built, managed and operated by the Concessionaire pursuant to and in accordance with the provisions of the Concession.

**“Lenders”**: means any credit institution or financial institution having entered into a Financing Agreement with the Concessionaire for the purposes of financing all or part of the Assets to be Returned, it being specified that Lenders shall automatically encompass credit institutions or financial institutions involved in the financing of the Assets to be Returned deemed to constitute First Phase Works and that the credit institutions or financial institutions involved in the financing of the Assets to be Returned other than the First Phase Works shall not be considered as Lenders unless they receive specific assent from the Concession Grantor and the Concessionaire. For the purposes of Article 17 of the Concession Agreement, credit institutions or financial institutions involved in the financing of the Assets to be Returned up to an amount lower than USD ten million (USD 10,000,000) shall not be considered as Lenders.

**“Port Operating and Police Regulations”**: means all of the rules applicable to the Port, pertaining to the management of the various parties involved in the Port, the enforcement of police measures within the Port, the use of public infrastructure, including in particular the rules governing ship berthing priority, as such rules exist as at the date of the signature of the Concession Agreement or shall exist and may be supplemented or amended in future.

**“Concession Grantor’s Representative”**: means the individual appointed by the Concession Grantor during the term of the Concession to represent it or any person holding a delegation of authority from the said individual.

**“Concessionaire’s Representative”**: means the Concessionaire's director appointed by the Concessionaire during the term of the Concession to represent it or any person holding a delegation of authority from the said individual.

**“Master Plan for Concession Perimeter Development” or “Master Plan”**: means the master plan for the growth and development of the Concession Perimeter that must meet the



conditions set forth in Article 1.2.1. of the Particular Conditions , submitted by the Concessionaire to the Concession Grantor in the form of a summary preliminary draft no later than within twelve ((12) months following the Effective Date of the Concession.

**“Public Port Service”**: means all of the services that the Port Authority is under a duty to provide to Port users, as more fully described in Article 14 of the Particular Conditions .

**“Contractual Interest Rate”**: has the meaning ascribed to it in the Framework Agreement, that is the London Interbank Offered Rate (LIBOR) for three (3)-month US Dollar deposits plus three percent (3%).

**“Mean Occupancy Rate”**: means the mean occupancy rate for a wharf over one (1) year, seven days a week, twenty four hours a day.

**“Transfer”**: means any transaction the immediate or future effect of which is to transfer rights and/or obligations, such as *inter alia* an assignment, a contribution, merger, etc..

**“Works”**: means all works, including the First Phase Works, carried out by the Concessionaire within the framework of the Concession, whether construction, repair, replacement or other works, on the buildings and structures located within the Concession Perimeter.

**“First Phase Works”**: means the design and construction of the initial Port infrastructure referred to in Article 8.1 of the Particular Conditions and in **Appendix 3** to the Particular Conditions .

**“Extended Zone”**: means the plots of land located within the Port Area, shown tinted grey on **Appendix 1-A** to the Particular Conditions , on which the Concessionaire may operate or cause the operation of Annex Activities in accordance with the provisions of the Concession.

## **CHAPTER II**

### **PURPOSE, TERMS AND CONDITIONS OF THE CONCESSION**

#### **ARTICLE 2 PURPOSE OF THE CONCESSION**

##### **2.1 Purpose of the Concession**

The Concession Grantor hereby commissions the Concessionaire to perform the Public Port Service within the Concession Perimeter as defined in Article 1 of the Particular Conditions , which it accepts. The Public Port Service includes the following duties:

- the design and construction of a deep-water harbour called Port of Ehoala,
- the financing of Port design and construction works,
- the management and operation of the Port and the financing of such management and operation,

and to perform all other operations and transactions therein, in accordance with the provisions of the Framework Agreement and the provisions of the Concession.

##### **2.2 Nature of the Concession**

**2.2.1** The Concession is a comprehensive concession pursuant to which the Concessionaire manages and operates the Port, once it is built.

**2.2.2** The Parties state that the Concession represents the practical implementation of the agreements executed between the State and QIT-Fer & Titane, Inc. as set forth in the Framework Agreement. Consequently, the Parties agree that Framework Agreement shall take precedence over the Concession and that the provisions of the Framework Agreement shall prevail in the event of disagreement between the Parties as to the existence and/or the scope of their respective obligations.

#### **ARTICLE 3 : GENERAL OBLIGATIONS INCUMBENT ON THE PARTIES**

##### **3.1 General obligations incumbent on the Concessionaire**

**3.1.1** The Concessionaire shall design, build, and finance the construction of the Port provided that the State grants it the non-repayable twenty three million one hundred thousand (23,100,000) SDR subsidy. It shall manage, operate, and finance the management and operation of the Port at its sole risk as this concept is defined in applicable regulations and case law, subject to the provisions of the Concession, without any contribution on the part of the Concession Grantor or the State to the Concessionaire's expenses, its cash position, the balance of its accounts and the financing of the Concession otherwise than within the framework of the obligations assumed under this Concession and applicable law. In that

regard, it is hereby stated that the fact that the Concessionaire is controlled by QMM and that OMNIS holds an interest in QMM's share capital shall not be construed as an obligation on OMNIS to contribute to the financing of the Port infrastructures.

**3.1.2** Under the Concession, the Concessionaire shall be required to act as port authority and provide public service port operations, including handling, warehousing, storage on wharf platforms, towing, piloting and boatage. The Concessionaire shall also take part in Port development activities by means of the Annex Activities, it being specified that the Annex Activities are not included in the scope of the Public Port Service. The Concessionaire shall maintain and replace the Assets of the Concession as required in order that such assets allow it to provide the Public Port Service entrusted to it, both to Public Port Service Users and to QMM under the Project.

It is however expressly stated that the Port shall be in priority intended for bulk ore carriage in connection with the Project set up by QMM and that therefore it exists as a consequence of the Framework Agreement of which it represents a form of practical implementation.

**3.1.3** Within the framework of execution of the Works and of the operation of the Port, the Concessionaire shall take into account the Environmental Studies and shall, in light thereof, take all measures that may be necessary or required under applicable legislation so as to minimise the environmental impact of the Works.

## **3.2 General obligations incumbent on the Concession Grantor**

**3.2.1** It is hereby stated that the State contributes to the financing of the First Phase Works of the Port through the grant of a non-repayable twenty three million one hundred thousand (23,100,000) SDR subsidy, payable in proportion to the expenses incurred and paid for construction of the Port and that the performance by the Concessionaire of its obligations under the Concession is contingent on the fulfilment by the State of the said financial undertaking.

**3.2.2.** The Concession Grantor shall, as far as required, provide its support to the Concessionaire to facilitate the grant of the various Authorisations necessary for the construction or operation of the Port as set forth in Article 5 of the Particular Conditions . The Concession Grantor shall, in that respect, benefit from the State's assistance as set forth in **Appendix 13.A** to the Particular Conditions .

The Parties represent and acknowledge that any unwarranted delay in the issuance of permits and authorisations may entail negative consequences for the operation of the Port and of the Project.

**3.2.3** The Concession Grantor undertakes to meet a set of obligations set forth in this Concession to allow construction of the Port and the provision of the Public Port Service within the framework of a long-term public-private partnership, which *inter alia* takes into account risks and maladjustments in accordance with Articles 29 to 32 of the Particular Conditions .

## **ARTICLE 4 PROVISION OF PUBLIC SERVICES**

The public services incumbent on the Concessionaire under the Concession as well as the terms and conditions of provision of such services are set forth in Article 14 of the Particular Conditions .

## **ARTICLE 5 REPRESENTATIVE OF EACH OF THE PARTIES**

### **5.1 Concession Grantor's Representative**

No later than within thirty (30) calendar days following the Effective Date of the Concession, the Concession Grantor shall appoint the Concession Grantor's Representative and shall inform the Concessionaire thereof by registered mail with advice of receipt. Any change in the identity of the Concession Grantor's Representative shall entail the application of the same procedure.

The Concession Grantor may delegate to the Concession Grantor's Representative the task of verifying compliance with the provisions of the Concession Agreement and of the Particular Conditions .

The Concession Grantor's Representative must, during the Port construction phase, be sufficiently available and possess actual skills and experience in the field of port construction and, following commencement of operation of the Port, be sufficiently available and possess actual skills and experience in the field of port operation and be in a position to provide evidence of his powers and authority at the Concessionaire's mere request. The Concession Grantor's Representative may, as far as necessary, be assisted by experts and technicians of his choice. The Concessionaire must take all requisite measures to facilitate the visits and inspections of the Concession Grantor's Representative and of the experts and technicians instructed by him to carry out the relevant verifications. Prior to any inspection, the Concession Grantor's Representative shall give the Concessionaire seven (7) calendar days' notice save in case of duly substantiated emergency.

During their site inspections, the Concession Grantor's Representative and the experts and technicians instructed by him shall comply with the Port Operating and Police Regulations as well as the safety rules set by the Concessionaire with respect to entry and circulation within the Port.

The Concession Grantor's Representative and the experts and technicians instructed by him shall be required to observe strict confidentiality in respect of any information they may access or obtain during their Port site visits or during their discussions with the Concessionaire. However, they may disclose to the Concession Grantor the information they access or obtain during their Port site visits or during their discussions with the Concessionaire.

The duty of confidentiality that binds the Concession Grantor's Representative and the experts and technicians instructed by him shall be suspended in the event of a dispute between the Parties with respect to facts pertaining to the information accessed or obtained during their Port site visits or during their discussions with the Concessionaire. In that event, the Concession Grantor's Representative and the experts and technicians shall be authorised to disclose the information obtained to persons empowered to conduct Conciliation proceedings

between the Parties or empowered to resolve a dispute in respect of which Conciliation proceedings failed.

## **5.2 Concessionaire's Representative**

No later than within thirty (30) calendar days following the Effective Date of the Concession, the Concessionaire shall appoint the Concessionaire's Representative and shall inform the Concession Grantor thereof by registered mail with advice of receipt. Any change in the identity of the Concessionaire's Representative shall entail the application of the same procedure.

The Concessionaire's Representative must be sufficiently available and possess actual skills and experience in the field of port operation and be in a position to provide evidence of his powers and authority at the Concession Grantor's mere request

## **ARTICLE 6 CONCESSION GRANTED IN CONSIDERATION OF CONCESSIONAIRE'S CAPACITY**

### **6.1 Restrictions on transfers of interests in the Concessionaire's share capital**

The Parties state that the Concession is granted to the Concessionaire in consideration of its capacity of Affiliate and in light of the provisions of the Framework Agreement entered into with a view to implementation of the Project.

As a result of the foregoing, Transfers of interests in the Concessionaire's share capital or voting rights in the Concessionaire directly or indirectly between Concessionaire shareholders shall be unrestricted, provided that the Concessionaire always remains an Affiliate.

If the Concessionaire is not or ceases to be an Affiliate, it shall lose the benefit of the provisions of the Framework Agreement and, unless the Concession Grantor consents thereto, the following provisions of the Concession shall automatically be deemed to be amended as follows: the term of the Concession shall be deemed to be equal to the remaining amortisation period for the unamortised fraction as at the date of substitution of the Assets to be Returned and Article 11.1 of the Concession Agreement shall be deemed to have been automatically amended as the date of the aforementioned Transfer, so as to take into account the new term of the Concession. The Concessionaire represents and acknowledges that it may not make any claim or demand any compensation in connection with the aforementioned amendments to the Concession.

### **6.2 Concession subcontracts, terms and conditions and restrictions**

The Concessionaire shall be entitled to enter into concession subcontracts with third parties for the purposes of construction or implementation and operation of all or part of the facilities and infrastructure, activities and buildings located within the Initial Concession Perimeter, in particular for the purposes of activities pertaining to the Project. The subcontracting agreements pertaining to parts of the Concession that authorise the subcontractor to collect the same fees as those set for the Concessionaire shall be subject to the prior written approval of the Concession Grantor which shall not withhold such approval otherwise than on grounds of

insufficient guarantees on the part of the prospective subcontractor or risk of adverse effects on the public interest.

Notwithstanding any express or tacit approval on the part of the Concession Grantor, the Concessionaire shall be solely liable for its subcontractor's acts or omissions and shall be liable therefor vis-à-vis the Concession Grantor as it would be for its own acts and omissions.

**CHAPITRE II**  
**CHAPTER III**  
**FINANCIAL PROVISIONS**

**ARTICLE 7 OPERATION FEE**

**7.1 Fee payable for operation of the Public Port Service**

Each year, the Concessionaire shall contribute to the Concession Grantor's budget an annual fee for operation of the Public Port Service amounting to ten percent (10%) of gross revenues excluding taxes derived from the commercial operation of the Port, port duties and fees, as well as operating prices applied by the Concessionaire for the provision of the Public Port Service that it is bound to provide under the Concession, excluding revenues derived from the operation of the Port as regards the bulk ore carriage activities within the framework of the Project.

It is hereby agreed that in the case of gross revenues excluding taxes collected by the Concessionaire in Ariary, the fee based on the corresponding gross revenues excluding taxes shall be paid in Ariary. As regards gross revenues excluding taxes collected by the Concessionaire in USD, the fee based on the corresponding gross revenues excluding taxes shall be paid in USD.

At the end of each of the first three (3) quarters, the Concessionaire shall, subject to the presentation of a collection order, pay the Concession Grantor, as an interim payment, an amount equal to one quarter of the annual fee for operation of the Public Port Service for the last year in respect of which it was calculated. This amount shall be paid quarterly no later than prior to the first month of the following quarter. In case of failure to pay the said amount quarterly within the deadline set forth hereinabove, the said amount shall, until full payment thereof, be increased by late-payment interest at the Contractual Interest Rate.

The interim payment paid shall be deducted, excluding any late-payment interest owed, from the annual fee for operation of the Public Port Service.

The collection orders in respect of the fee for the fourth quarter of the current year (year N) and the advance for the first quarter of the following year (year N+1) shall be submitted prior to the end of the first quarter of year N+1, immediately as of receipt of the statement of contractual revenues for year N. For that purpose, the Concessionaire must, no later than prior to the end of the first quarter of year N+1, provide the Concession Grantor with a statement of contractual revenues for year N. Failing provision of the aforesaid statements within the period set forth hereinabove, the amounts of the two (2) aforementioned collection orders shall be set as lump sums by the Concession Grantor without any right on the part of the Concessionaire to raise any objection or request a reassessment thereof. After receipt of the statements of revenues, the amounts of the collection orders shall be adjusted after a penalty computed on the basis of the Contractual Interest Rate has been applied for the delay in dispatch of the statements of revenues; the said penalty shall be payable over and above late-payment penalties.

For the period between the Date of Commencement of Port Operation and 31 December of the year during which the Date of Commencement of Port Operation occurs, the Concessionaire shall compute and pay the fee owed to the Concession Grantor in respect of the said period, no later than within three (3) months following the first of January of the following year. To that

end, without prejudice to the provisions of the Concession pertaining to the information that may be disclosed by the Concessionaire to the Concession Grantor, the Concessionaire shall provide the Concession Grantor with any information that may be useful for the purposes of checking the computation of the fee amount for the aforementioned relevant period.

## **7.2 Fee owed in respect of the operation of the Annex Activities**

The Concessionaire shall contribute to the budget of the Concession Grantor a fee for operation of the Annex Activities, amounting to twenty percent (20%) of the gross profit excluding taxes derived by the Concession Grantor from the direct and/or indirect operation of the Annex Activities within the Concession Perimeter. The fee owed in respect of the operation of the Annex Activities shall be payable every six months by the Concessionaire to the Concession Grantor. To that end, the Concessionaire shall send the Concession Grantor, no later than within fifteen (15) calendar days of the end of each six-month period, payment for the fee owed in respect of the six-month period elapsed, together with any accounting statement showing the amount of the gross profit excluding taxes derived by the Concession Grantor from the Annex Activities during six-month period elapsed.

Where applicable regulations so allow, the Concessionaire shall pay the proportional share of profits in foreign currency if derived from revenues in foreign currency.

For auditing purposes, the Concessionaire shall keep analytical accounts for the Annex Activities and shall allow any auditor instructed by the Concession Grantor to carry out verifications and audits at any time subject to at least seven (7) calendar days' prior notice given to the Concessionaire. It is agreed that the Concessionaire's expenditure incurred both in connection with the operation of the Port and the operation of the Annex Activities shall be apportioned as between these two activities in proportion with the respective percentage of the Concessionaire's aggregate turnover represented by the operation of the Port and [Parties] of the auditor's assignment<sup>1</sup>. The first Party to act shall apply to the Conciliation Board in accordance with Article 19 of the Concession Agreement; such application shall have suspensive effect pending determination. Payment by the Concessionaire to the Concession Grantor of any unpaid fee, including any late-payment penalties, shall be capped at the amount, if any, that is acknowledged to be payable pursuant to the solution proposed by the Conciliation Board, which shall be immediately enforceable notwithstanding the institution of arbitration proceedings in accordance with Article 20 of the Concession Agreement, it being specified that the Conciliation Board shall not have authority to rule otherwise than on the payability of fees and late-payment interest claimed, and not on the principle and/or the methods for computation of the fees and interests owed in connection with the operation of the Annex Activities. In the event that the Concession Grantor's auditor finds that the amount of fees paid to the Concession Grantor is less than the amount of fees owed to it, the amount of unpaid fees shall be increased by fifty percent (50%) and the Concessionaire shall reimburse the Concession Grantor for the fees and costs of the auditor in respect of his aforementioned audit. In the event of a challenge by either of the [...] late [penalties] set forth in the Concession<sup>2</sup>.

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<sup>1</sup> Translator's note: the wording of the highlighted section strictly reflects the French version, from which a phrase or word appears to be missing.

<sup>2</sup> Ibid.



### **7.3 Payment of operation fees and submission of accounts**

Payment of the operation fees referred to in Articles 7.1 and 7.2. hereinabove shall take place by bank transfer to the account of the Concession Grantor as notified by the latter to the Concessionaire in accordance with the provisions of Article 22 of the Concession Agreement. Payment shall be deemed to have been made on the date on which the said transfer is recorded in the relevant bank account. Any delay in payment shall automatically entail the application of a *per diem* late-payment penalty retard based on the Contractual Interest Rate, the commencement date for application of the penalty being the date on which payment shall be received by the Concession Grantor.

At the end of the Concession, irrespective of the cause thereof, the Concessionaire and the Concession Grantor shall jointly draw up a breakdown of the fees referred to in Articles 7.1 and 7.2. hereinabove owed by the Concessionaire to the Concession Grantor until the end of the Concession, no later than within thirty (30) calendar days following the end of the Concession. Payment of the fees shall take place on the date on which this breakdown is drawn up by the Parties.

## **ARTICLE 8 PUBLIC DOMAIN OCCUPANCY FEE**

The Concession shall entail contribution to the Concession Grantor's budget of a yearly public domain occupancy fee for the land made available to the Concessionaire by the Concession Grantor.

Such public domain occupancy fee must be paid in full at the beginning of each contractual year prior to the end of the first quarter of the year upon submission of a collection order for an amount equal to the entire yearly public domain occupancy fee.

In case of extension of the Initial Concession Perimeter during a given year in accordance with the provisions of Article 1.2 of the Particular Conditions , the amount of the yearly public domain occupancy fee shall be adjusted at the end of the year during which such extension takes place, based on a new collection order. The adjustable amount of the yearly public domain occupancy fee shall be computed on a *prorata temporis* basis and must be paid by the Concessionaire to the Concession Grantor no later than within thirty (30) days of receipt of the new collection order.

In case of failure to pay the said yearly public domain occupancy fee within the aforesaid period, the amount of the public domain occupancy fee owed shall be increased by late-payment interest based on the Contractual Interest Rate, until full payment thereof.

In accordance with the provisions of Article 8.2 of the Framework Agreement, the amount of the yearly public domain occupancy fee owed by the Concessionaire to the Concession Grantor in respect of the land located within the Concession Perimeter shall not exceed the maximum amount of fixed public domain occupancy fees for an equivalent area by a public port concessionaire in Madagascar. The Parties agree to set the public domain occupancy fee at one hundred (100) Ariary per square metre per annum.

The amount of the yearly public domain occupancy fee shall be reassessed every five (5) years using the same increase factor as that applied by the Concession Grantor for reassessment of the public domain occupancy fees owed in respect of comprehensive port operation concessions in Madagascar.

Payment of the yearly public domain occupancy fee shall take place by means of a bank transfer to the account of the Concession Grantor as notified by the latter to the Concessionaire in accordance with the provisions of Article 22 of the Concession Agreement.

Payment shall be deemed to have been made on the date on which the said transfer is recorded in the relevant bank account. Any delay in payment shall automatically entail the application of a *per diem* late-payment penalty based on the Contractual Interest Rate, the commencement date for application of the penalty being the date on which payment of the public domain occupancy fee is due to the Concession Grantor.

## **ARTICLE 9 DUTIES AND TAXES**

As long as the Concessionaire has the capacity of Affiliate and during the first twenty five (25) years as of the Effective Date, the Concessionaire shall benefit from the tax treatment set forth in Article 19 of the Framework Agreement and the tax and accounting appendix thereto.

The Concessionaire shall automatically forfeit the benefit of the Framework Agreement and of the preferential tax treatment resulting therefrom, without need for any formality, as of the date on which it ceases to be an Affiliate. In that event, the ordinary tax and customs regulations shall immediately apply.

## CHAPTER IV

### TERM, EXPIRY AND TERMINATION

#### ARTICLE 10      **TERM, EFFECTIVE DATE, DATE OF PORT OPERATION AND RENDEZ-VOUS CLAUSE**

##### **10.1**    **Term of the Concession**

In accordance with Article 8.2 of the Framework Agreement and without prejudice to the provisions of Articles 6.1, 11 *et seq.* of the Concession Agreement, the term of the Concession shall at least be equal to the duration of the Operating Permit for Fort-Dauphin (initial period plus renewals).

It is hereby agreed that three (3) years prior to the end of each period of validity of the Operating Permit for Fort-Dauphin, the Concessionaire shall inform the Concession Grantor of QMM's intentions as to whether or not to renew the Operating Permit for Fort-Dauphin.

If QMM does not apply for renewal of the Operating Permit for Fort-Dauphin two (2) years prior to expiry thereof, the Concessionaire may submit to the Concession Grantor an investment programme intended to upgrade, improve or extend its facilities and infrastructure in order to improve service under the Concession. If approved by the Concession Grantor, these investments shall be witnessed in a supplemental agreement to the Concession Agreement in order, *inter alia*, to amend the corresponding Appendices of the Particular Conditions and where applicable to extend the term of the Concession. The duration of such extension shall be at least equal to the ordinary amortisation period for new investments that the Concessionaire undertakes to make; the combined length of the outstanding term as at signature of the supplemental agreement extending the Concession and of the duration of such extension shall not exceed thirty (30) years if the investment programme having given rise to the supplemental agreement provides for construction by the Concessionaire of heavy infrastructure such as jetties, piers, wharves, etc.; and fifteen (15) years otherwise. Such an extension of the Concession by way of a supplemental agreement shall not be granted more than once subject to the opinion of the Consultative Commission of Users and Operators of the Port of Ehoala.

##### **10.2**    **Effective Date**

**10.2.1** The Concession shall be effective as of the date of fulfilment of the last of all of the following conditions precedent:

- a) approval of the Concession in a Decree,
- b) signature of the Subsidiary Agreement and of the Project Agreement,
- c) signature by Malagasy Republic of a guarantee conforming to the standard form appearing in Appendix 13.A to the Particular Conditions ,
- d) signature by Qit Fer & Titane, Inc, of a guarantee conforming to the standard form appearing in Appendix 13.B to the Particular Conditions .

Each Party undertakes to use its best efforts in good faith to achieve fulfilment of the conditions precedent as soon as possible, and no later than on 31 March 2006.

**10.2.2** If beyond the abovementioned 31 March 2006 deadline, or any other deadline agreed between the Concessionaire and the Concession Grantor, the Concession is not effective by reason of non-fulfilment of the condition set forth as point (a), point (b), point (c) or point (d) hereinabove, the Parties shall meet and promptly initiate any action in view of achieving fulfilment of the relevant condition. If the relevant condition is not fulfilled within eighteen (18) months as of 31 March 2006, each Party may inform the other Party in writing that it is no longer bound by any obligation with respect to the entry into force of the Concession. However, if the failure to achieve entry into force of the Concession is attributable to default on the part of a Party with respect to its obligation to use all its efforts to fulfil any of the conditions precedent, the said Party may not claim to be released from all undertakings with regard to the entry into force of the Concession, unless the other party otherwise agrees.

### **10.3 Date of Commencement of Port Operation**

The Concessionaire undertakes to promptly inform the Concession Grantor of the Date of Commencement of Port Operation by registered mail with advice of receipt.

### **10.4 Rendez-vous clause**

The Parties agree to meet at least every five (5) years, on the initiative of either of the Parties, for the purposes of reviewing provision of the public port service and to jointly identify, in light of changes to the economic environment, any improvements and/or amendments to be made to the Concession by means of a supplemental agreement.

It is expressly agreed that the provisions of this Article 10.4 shall not affect the Concession Grantor's right to verify and monitor performance by the Concessionaire of the provisions of the Concession at any time.

## **ARTICLE 11 EARLY TERMINATION**

Early termination of the Concession may take place in the following cases:

- a) if the Parties jointly agree to terminate same,
- b) on any public interest grounds on the Concession Grantor's initiative, duly substantiated by the latter in accordance with the provisions of Article 12 hereinbelow,
- c) on the Concession Grantor's initiative in case of redemption of the Concession in accordance with the provisions of Article 13 hereinbelow,
- d) by either of the Parties in case of occurrence of a force majeure event affecting an essential obligation of the Concessionaire that may not be substituted or replaced, where the duration of such event exceeds one (1) year in accordance with the provisions of Article 29 of the Particular Conditions ,

- e) on the Concession Grantor's initiative if there are grounds for forfeiture in accordance with the provisions of Article 15 hereinbelow,
- f) on the Concession Grantor's initiative in case of cessation of business by the Concessionaire, irrespective of the cause thereof, in accordance with the provisions of Article 16 hereinbelow.

## **ARTICLE 12 : EARLY TERMINATION OF THE CONCESSION ON PUBLIC INTEREST GROUNDS**

**12.1** At any time, the Concession may be terminated by registered mail with advice of receipt by the Concession Grantor on duly substantiated public interest grounds in the absence of any breach or negligence on the part of the Concessionaire. The public interest motive relied on must be substantiated in the termination letter.

**12.2** In case of early termination of the Concession on public interest grounds, the Concession Grantor shall pay the Concessionaire:

- (i) compensation calculated with reference to the residual value of the investments that qualify as Assets to be Returned listed in **Appendix 4** to the Particular Conditions , financed by the Concessionaire within the framework of the Concession and which are not yet amortised as at the effective date of termination,
- (ii) compensation amounting to reasonable costs of carriage abroad of the Assets for Optional Return that the Concession Grantor declines to collect, with a view to the sale thereof by the Concessionaire; such compensation shall be payable only upon evidence of the carriage costs of the relevant Assets for Optional Return listed in **Appendix 5** and of the sale thereof to a third party not forming part of the Rio Tinto group,
- (iii) compensation equal to the market value of the Assets for Optional Return that the Concession Grantor elects to collect and the Concessionaire's own property that it agrees to grant to the Concession Grantor and which the latter agrees to collect, and
- (iv) eighty percent (80%) of the Concessionaire's loss of profits between the date of termination of the Concession and the end of the current unexpired contractual period.

In the event of a dispute pertaining to the amount of compensation payable to the Concessionaire, the provisions of Chapter V of the Concession Agreement shall apply.

**12.3** In case of early termination, the Concession Grantor shall be substituted in lieu of the Concessionaire for the provision of the public service, and the Concessionaire shall remain responsible for the loans and other debts assumed by it in connection with the Concession.

**12.4** The Concession Grantor shall ensure that the exportation of Ilmenite by QMM benefits from a quality of service comparable to that offered prior to termination and from prices calculated on the same bases as prior to termination.

## **ARTICLE 13 REDEMPTION OF CONCESSION**

**13.1** As of the twenty-fifth (25<sup>th</sup>) year of the Concession, the Concession Grantor shall be entitled to redeem the Concession subject to twenty four (24) months' prior notice, provided that it shows that such redemption serves the public interest.

However, such right may not be exercised unless the exportation of Ilmenite by QMM benefits from a quality of service comparable to that offered prior to redemption, and from prices calculated on the same bases as prior to redemption.

**13.2** In case of redemption, the Concessionaire shall be paid an amount to fully compensate it for the direct, current and determinable loss it suffers in connection therewith, including loss of profits.

## **ARTICLE 14 : TERMINATION ON GROUNDS OF FORCE MAJEURE**

**14.1.** In case of occurrence of a force majeure event that affects an essential obligation of the Concessionaire, either of the Parties may apply for termination in accordance with the provisions of Article 29 of the Particular Conditions .

**14.2.** If termination occurs on the initiative of the Concession Grantor, the Concessionaire shall be paid compensation equal to that set forth in Article 12.2 hereinabove, with the exception of compensation for loss of profits which shall be computed on the basis of a term capped at twenty (20) years.

**14.3.** The Concession Grantor shall ensure that the exportation of Ilmenite by QMM benefits from a quality of service comparable to that offered prior to termination, and from prices calculated on the same bases as prior to termination.

## **ARTICLE 15 FORFEITURE**

**15.1** In the event of full or partial suspension of public service by reason of actions of the Concessionaire that do not constitute a serious breach of contract, the Concession Grantor shall implement all necessary measures to ensure the provision of the service public, at the Concessionaire's risk and costs, following a formal notice served on the Concessionaire<sup>3</sup> that remains unheeded for a period of sixty (60) calendar days as of the date of initial presentation thereof. In particular, the Concession Grantor may entrust a third party with the operation of the Public Port Service granted under the Concession. In that event, the Concession Grantor shall ensure that the exportation of Ilmenite by QMM benefits from a quality of service comparable to that offered prior to forfeiture, and from prices calculated on the same bases as prior to forfeiture.

In the event that a full or partial suspension of public service by reason of actions of the Concessionaire exceeds a period of six (6) months, the Concession Grantor shall be entitled to pronounce forfeiture of the Concession.

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<sup>3</sup> Translator's note: The French version refers to the "Concession Grantor" here, but we have replaced it with the more logical term.

**15.2** Forfeiture of the Concession shall also apply in the event of a serious breach by the Concessionaire of the obligations under the Concession Agreement or the Particular Conditions .

In that event, forfeiture of the Concession shall be pronounced by the Concession Grantor after a formal notice served on the Concessionaire requiring it to remedy its breach which remains unheeded for a period of ninety (90) days as of the date of initial presentation of the formal notice. It is agreed that partial remediation of a contractual breach by the Concessionaire or remediation that does not comply with the terms of the Concession or that occurs subsequently to the aforementioned ninety (90)-day period shall be deemed to constitute failure to correct the said breach by the Concessionaire, except where the Public Port Service is unaffected thereby.

**15.3** In case of forfeiture of the Concession on grounds of suspension of service by reason of the Concessionaire's actions or non-remedied breach of its obligations under the Concession, the provision of the public service under the Concession shall be continued by using all or part of the Assets for Optional Return. In that event, the Concession Grantor and the Concessionaire shall jointly draw up an inventory and schedule of condition of the Assets for Optional Return that are required to ensure continuity of the Public Port Service, and, where applicable, remittance to the Concessionaire of such portion of the said assets as is not required for the provision of the Public Port Service.

Unless the Concession Grantor exercises its right of recovery of assets, the Assets for Optional Return used to ensure continuity of the Public Port Service shall be remitted to the Concessionaire as soon as the Concession Grantor is able to implement all measures required for normal resumption of the public service without resorting to the use of said Assets for Optional Return, no later than on the agreed expiry date of the Concession. The said assets shall then be remitted in a condition consistent with the ordinary use thereof by a reasonable professional exercising due care. Failing this, any repair and reinstatement costs shall be borne by the Concession Grantor.

**15.4** In case of forfeiture, the sole compensation awarded to the Concessionaire shall be the unamortised value of the Assets to be Returned as well as the market value of the Assets for Optional Return that the Concession Grantor elects to retain. The Concession Grantor shall ensure that the exportation of Ilmenite by QMM benefits from a quality of service comparable to that offered prior to termination, and from prices calculated on the same bases as prior to termination.

## **ARTICLE 16 WINDING UP, COURT-ORDERED LIQUIDATION OR INSOLVENCY**

The Concessionaire's court-ordered winding up or insolvency shall *ipso jure* entail termination of the Concession, on grounds of default by the Concessionaire and at its expense and risk, in accordance with the conditions applicable to termination for suspension of service by reason of the Concessionaire's actions or non-remedied breach by the Concessionaire of its obligations as set forth in Article 15 of the Concession Agreement.

## **ARTICLE 17 SUBSTITUTION IN LIEU OF CONCESSION BENEFICIARY**

Unless otherwise agreed by the Concession Grantor and unless specific exceptions set forth in the Concession apply, no entity of any legal form whatsoever shall be substituted in lieu of the Concessionaire to provide the public service under the Concession.

However, in case of insolvency, liquidation or winding up of the Concessionaire, the Lenders shall be entitled to seek the Concession Grantor's approval in respect of a proposed company to be substituted in lieu of the defaulting Concessionaire; any withholding of consent as to the such proposal must rest on grounds pertaining to the proper performance of the Public Port Service.

It is therefore agreed that until full repayment of any amount owed to them by the Concessionaire under the Financing Agreements, the Lenders shall be entitled to elect for substitution of a third party (the **Substituted Entity**) in lieu of the initial Concessionaire in accordance with the terms and conditions set forth hereinbelow in one of the following cases:

- a) decision by the Concession Grantor to implement the Concession termination procedure set forth in Article 11 hereinabove,
- b) non-performance of one or more provision(s) of the Financing Agreements, that expressly allow the Lenders to carry out substitution under the said Financing Agreements.

In the event that the Lenders seek to rely on the substitution clause, they shall give notice of their intention by registered mail with advice of receipt sent to the Concession Grantor to obtain the latter's prior consent, and may submit to the Concession Grantor for approval at least three (3) companies likely to be appointed as a Substituted Entity.

The Lenders shall, in their notices sent to the Concession Grantor, give evidence (i) of the occurrence of an event entailing substitution, (ii) that the proposed Substituted Entity is either an entity controlled by the Lenders, or a third party introduced by the Lenders and (iii) that it has adequate financial and technical capacities to continue performance of the Concession, it being specified that the fulfilment of the said criteria shall be assessed by the Concession Grantor in light of the economic, financial and technical conditions that shall apply on the date of the proposed substitution.

To that end, the memoranda and articles of association and the share ownership of the said companies as well as all technical and financial information evidencing the financial and technical capacities of the proposed companies shall then be disclosed to the Concession Grantor.

The Concession Grantor shall then notify its decision to the Lenders within a period of two (2) months as of said notice and it may refuse to approve one of the three (3) companies proposed as Substituted Entities only if the conditions set forth in sub-paragraph (iii) of the fifth paragraph of this Article 17 are not fulfilled or in the case of an objection based on public-interest grounds.

In the event that substitution is unsuccessful, termination of the Concession Agreement shall take place in accordance with the provisions of Article 15 of the Concession Agreement.

Within no more than two (2) months as of express consent by the Concession Grantor to the substitution, the Substituted Entity shall hold all of the rights and assume all of the obligations of the initial Concessionaire under the Concession. To that end, substitution shall entail the vesting of all assets and rights required for performance of the Concession in the Substituted Entity, for the entire term of the Concession. Without prejudice to the foregoing, if the



Substituted Entity is not an Affiliate, the provisions of paragraph 2 of Article 6.1 of the Concession Agreement shall apply.

## CHAPTER V

### PARTNERING– DISPUTE PREVENTION AND SETTLEMENT

#### **ARTICLE 18: PARTNERING**

The Parties acknowledge that this Concession is a contractual relationship of a particular nature as each of the parties assumes a number of long-term commitments in view of ensuring optimum promotion and operation of the Port for the Project, on the one hand, and for the operation of the Public Port Service and the Annex Activities, on the other hand. Those commitments shall be periodically adapted and optimised to the needs of users, their financial capacity and the economic growth of the Fort Dauphin region, of Madagascar and of the Indian Ocean.

In particular, they acknowledge that it is not possible to set forth detailed terms and conditions of provision of the Public Port Service in the medium to long term, and that it is therefore essential that they foster an actual public-private partnership relationship that complies with the rights granted and obligations assumed and with the guiding principles of applicable laws.

Within that framework, the Parties decided that a minimum organisational structure was required to ensure the smooth, long-term development of their partnership.

The partnering shall be structured so that the Port construction and management project derives optimum benefit from each Party's skills and know-how based on a set of common goals.

1) The definition of these specific goals, which shall always be based on the rights granted and obligations assumed under the Concession Agreement shall be agreed for the first time at a partners' meeting held within one month as of the Effective Date. This meeting shall be attended by the officers and directors of the various parties involved, it being specified that no more than five (5) persons shall represent the Concession Grantor and the State and no more than five (5) persons shall represent the Concessionaire.

Such partnering meeting shall be coordinated by a facilitator that is not an internal member of the Parties whom the latter shall jointly appoint. The said facilitator must possess recognised experience in view of the construction of a public service port under a concession in a civil-law jurisdiction.

In case of disagreement as to the identity of the facilitator fifteen (15) calendar days prior to the scheduled partners' meeting, the facilitator shall be appointed from a list of three (3) names proposed by the permanent World Bank mission in Madagascar within eight (8) days of the World Bank's proposal. In the event of further failure to appoint the facilitator, the latter shall be appointed by the permanent World Bank mission in Madagascar within fifteen (15) calendar days of the date of such failed appointment.

2) Further to the first partnering meeting, a Partnering Charter shall be jointly drawn up. In particular, it shall provide for the terms and conditions of subsequent appointment and duties of the facilitator and set up a realistic and efficient information and meeting system allowing misunderstandings, delays and additional costs to be avoided through a proper understanding of all parties' expectations as to exercise of their rights and performance of their obligations, as well as common goals.

Such Partnering Charter shall also in any event provide for a minimum number of periodic meetings at the appropriate levels between the representatives of the various teams in the facilitator's presence.

3) The periodic meetings shall be prepared so as to ensure that sources of potential misunderstandings and disputes are identified in advance and addressed at partners' meetings with an open mind in order to foster individualised and constructive professional working relationships.

Any dispute shall, prior to the initiation of any proceedings, be referred to a partners' meeting coordinated by the facilitator.

In the event that a dispute persists for more than fifteen (15) calendar days following the partners' meeting at which it was addressed, any resort to arbitration shall be contingent on the unsuccessful outcome of the Conciliation procedure set forth in Article 19 hereinbelow. Following the said period of fifteen (15) days, the first Party to act may initiate Conciliation proceedings by notice sent to the other Party and to the facilitator by registered mail, requesting that the members of the Conciliation Board be appointed.

In that event, the facilitator shall draw up and submit a report on the dispute to the Conciliation Board no later than within forty eight (48) hours as of the appointment of all members of the said Board.

## **ARTICLE 18 CONCILIATION**

### **18.1 Members of the Conciliation Board**

The Conciliation Board shall consist of three (3) members whose personal and moral qualities and experience in the execution of comparable complex projects is duly acknowledged.

Within fifteen (15) calendar days as of a referral to the Conciliation Board, each Party shall appoint one (1) member, and the two (2) members thus appointed shall jointly select the third member who shall chair the Conciliation Board. Failing agreement within fifteen (15) calendar days, the Chairman of the Conciliation Board be appointed by the legal advisor of the *Agence Multilatérale de Garantie des Investissements* (Multilateral Investment Guarantee Agency - MIGA) at the request of the first Party to act.

Each member of the Conciliation Board shall, before accepting such appointment, agree to remain available to take part in Conciliation Board sessions.

In addition, the Conciliation Board member shall disclose any conflict of interest with respect to the assumption of such duties and past dealings, and refrain from entering into any similar relationship with either of the Parties during a period of two (2) years as of the date of the last settlement proposal put forward by the Conciliation Board.

In the event of resignation, death or inability to act on the part of any of the appointed members of the Conciliation Board, a replacing member shall be appointed by applying the same procedure as that applied to the initial member. Such successor in office shall hold the same powers and be bound by the same obligations as the initial member.

The members of the Conciliation Board shall receive remuneration based on the fee tables applicable to mediators under International Chamber of Commerce regulations.

## **18.2 Conciliation procedure**

**19.2.1** Within eight (8) calendar days following the appointment of the Conciliation Board, it shall send the Parties the Conciliation Guidelines setting forth the procedural requirements to be met, and in particular the deadlines applicable to the exchange of pleadings and the conducting of hearings.

The Conciliation Guidelines shall provide for a swift and appropriate procedure, which shall not under any circumstances whatsoever exceed ninety (90) calendar days. In case of non-settlement of the dispute within the said period, as witnessed and recorded in writing by the Conciliation Board, the Parties shall be free to refer the dispute to arbitration in accordance with Article 20 of the Concession Agreement.

The Parties must approve the Conciliation Guidelines within eight (8) calendar days following receipt thereof.

**19.2.2.** In the event of an objection to the Conciliation Guidelines proposed by the Conciliation Board that is not withdrawn within fifteen (15) days, the following procedure shall automatically apply to the Conciliation process.

### a) Conciliation timetable:

As of date D, being the date on which the Conciliation Board gives notice of the Parties' disagreement as to the Guidelines, the Parties shall comply with the following procedure in view of mediation:

- No later than on D+15: each Party shall submit introductory pleadings, no more than 20 A4 pages long, with single line spacing, to the Conciliation Board and the other Party.
- No later than on D+30: the Parties or their representatives shall meet in Antananarivo, for Conciliation hearings held over a maximum period of three (3) business days.

- No later than on D+35: in the absence of signature by the Parties of a settlement agreement vested with the authority of *res judicata* as at that date, the Conciliation shall be deemed to have failed.

b) Conciliation hearings

Conciliation hearings shall be held over a maximum period of three (3) consecutive business days and shall be scheduled as follows:

- First day: this day shall be fully devoted to a joint hearing at which each Party shall be allowed no more than two (2) hours to state its position to the Conciliation Board. The Conciliation Board shall then be free to schedule discussions and arguments, as it deems appropriate.
- Second day: this day shall be entirely devoted to separate hearings not exceeding four (4) hours between the Conciliation Board and each Party. The Conciliation Board shall thus meet one Party in the morning and the other Party in the afternoon. The Conciliation Board shall have unfettered discretion to set the order in which it shall hear Parties.
- Third day: the morning shall be devoted to a plenary session at which the Conciliation Board shall, with the Parties' assistance, endeavour to achieve settlement. If the Parties fail to reach agreement at the end of such session, the Conciliation Board shall propose a settlement solution to the Parties in writing.
- If the Parties reach agreement, the afternoon shall be devoted to the drafting of the memorandum of settlement which must be signed by all Parties and members of the Conciliation Board by the end of the day.
- If the Parties fail to reach agreement, the Conciliation Board shall then draw up a record of non-settlement which shall be signed by the members of the Conciliation Board and served on the Parties by registered mail with advice of receipt and shall constitute the requisite certificate of admissibility for the first Party to act before the arbitration body.
- The Conciliation shall be deemed to be unsuccessful if all members of the Conciliation Board could not be appointed within the applicable time periods set forth hereinabove. In that event, the first Party to act must provide evidence thereof in its application for the arbitration. Under penalty of inadmissibility of the application, it must show that the failure to appoint the Conciliation Board was not attributable to its actions.

c) Representation of Parties and documents

Each Party shall be represented for the purposes of the Conciliation proceedings by no more than three (3) persons, who shall be the same for all hearings and sessions.

At least one of the said persons must be a high-level representative of each of the parties, and in any event, of a level higher than that of each Party's Port operation supervisors having taken part in the usual meetings during the course of operation of the Port.

Such representative shall hold sufficient powers and capacity to be able to settle the matters at stake, taking into account both legal and practical factors, and based on each Party's strategic interests.

Each Party shall remain free to support its stance by submitting any document already in existence or specifically drawn up in view of the hearings. Visual aids such as slides, projected images, etc. may be used.

Each Party shall have sole discretion to decide on the nature and extent of the said documents and visual aids, it being specified that any documents and visual aids shall not be viewed otherwise than during hearings.

d) Confidentiality

Conciliation hearings may not be recorded by any means whatsoever.

The Conciliation Board members and the Parties undertake to observe the strictest confidentiality in respect of the contents of Conciliation hearings and shall in particular refrain from mentioning the proceedings, in the event of failure of the Conciliation proceedings, before the arbitration tribunal.

**18.3 Nature of settlement solutions proposed by the Conciliation Board**

Unless otherwise agreed, the sole enforceable instrument in final settlement of the dispute shall be the memorandum of settlement signed by the Parties and the members of the Conciliation Board.

In derogation of the foregoing, the Parties agree that during the period of execution of the First Phase Works, the proposed settlement solutions drawn up by the Conciliation Board shall be deemed to be enforceable interim decisions, without need for acceptance by Parties, until they are overruled, as the case may be, by an arbitral award handed down in accordance with the provisions of Article 20 hereinbelow. Such proposed settlements shall be notified to the Parties by the Conciliation Board by registered mail with advice of receipt.

**ARTICLE 19 LITIGATION - ARBITRATION**

In the absence of a settlement agreement or if any of the Parties is dissatisfied with the Conciliation Board's proposed settlement solution, the dispute shall be finally resolved through arbitration at the request of the first party to act pursuant to the Rules of Arbitration of the International Chamber of Commerce by one or several arbitrators appointed in accordance with the said Rules.

The arbitration forum shall be Paris (France) and the arbitration proceedings shall be conducted in French.

Any amounts awarded under the arbitral award in connection with the Concession shall include interest as of the date of the event having given rise to the dispute, until the date of full payment.

Interest shall be computed based on the Contractual Interest Rate.

## CHAPTER VI

### MISCELLANEOUS PROVISIONS

#### ARTICLE 20 CONCESSION DOCUMENTS

The Concession documents are listed below in descending order of priority:

- a) the Concession Agreement,
- b) the Particular Conditions set forth in Appendix 1 to the Concession Agreement,
- c) Appendices 1 to 13 A and 13B to the Particular Conditions.

#### ARTICLE 21 NOTICES

For the performance of the Concession, all notices shall be sent by registered mail with advice of receipt or fax confirmed by registered mail with advice of receipt. Any notice shall be deemed to have been received on the date of first presentation of the registered letter or, if sent by fax, on the date on which the fax is sent.

##### **21.1 Notices under the Concession shall be served at the following addresses:**

- Concession Grantor:

Jérôme Sambalis  
PMF, immeuble Plein Ciel, Ivandry, Antananarivo, Madagascar  
Tel: \_\_\_\_\_  
Fax: \_\_\_\_\_

- Concessionaire:

Guy Larin  
Port d'Ehoala SA, Villa 3 H, lot II J 169, Ivandry, Antananarivo  
Tel: \_\_\_\_\_  
Fax: \_\_\_\_\_

#### ARTICLE 22 CONCESSIONAIRE'S ADDRESS FOR SERVICE

The Concessionaire states its registered office as its address for service. It shall have an office within the Port Area, open to the public during service operating hours, and appoint an agent authorised to receive all administrative notices on behalf of the Concessionaire.

### **ARTICLE 23 GOVERNING LAW**

The Concession shall be governed by and construed in accordance with Malagasy law. In the absence of relevant provisions of Malagasy legislation, the arbitration tribunal shall in priority refer to Malagasy case-law, or failing this, French case-law generally applicable to the matter, in particular in the field of administrative law, or failing this, to the general principles of law, internationally admitted practice and case-law applicable to the matter.

### **ARTICLE 24 PRINTING COSTS, STAMP DUTY AND REGISTRATION COSTS**

Printing costs, stamp duties and registration costs arising in connection with the Concession Agreement shall be borne by the Concessionaire.

### **ARTICLE 25 APPENDICES**

**Appendix 1** to the Concession Agreement, consisting of the Particular Conditions and Appendices thereto, forms an integral part of the Concession Agreement and shall have the same [contractual] value as said Agreement.

Executed in Antananarivo, on 24 March 2006 in three (3) originals including one (1) for each of the Parties and one (1) for the Malagasy Ministry of Public Works and Transport.

For **Port d'Ehoala SA**

For **Agence Portuaire Maritime et Fluviale**

\_\_\_\_\_

\_\_\_\_\_

Name: Guy Larin

Name: Jérôme Sambalis

Office held:

Office held: Managing Director



## **APPENDIX 1**

### **PARTICULAR CONDITIONS**

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