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ROUNDTABLE ON CONCESSIONS

Contribution from Brazil

-- Session I --

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ROUNDTABLE ON CONCESSIONS

1. *To better understand the context of your answers to the questions which follow, please summarise the overall regulatory objectives for concessions for infrastructure. What are the government's major objectives when it considers infrastructure concessions? These may well vary from sector to sector, e.g., maximize revenue or reduce subsidy, improve productivity, improve coverage, increase capacity. What are the circumstances under which concession is chosen rather than privatisation or continued public provision?*

2. By the end of the 1980s, Brazil was facing huge difficulties in its economy. The high level of public debt did not allowed the government to maintain investments and expand public services that had been – until then – mainly provided by state-owned companies. Even where public services were provided in good standards, the classic inefficiency of state-owned companies could be noticed. It was necessary to reduce government participation in the economy.

3. Due to this fact, Brazil started to review the role of the State in the economy. The result of this process was a wide privatisation plan, called National Privatisation Program (PND), that presented the principles to be observed in order to delegate public services to the private sector.

4. The main objectives were determined by the PND Law:

- to reorganize the strategic position of the State in relation to the economy and to transfer non-public activities to the private sector (e.g. the steel industry);
- to reduce the public debt;
- to allow investments to be retaken in privatised companies and sectors;
- to contribute to industrial modernisation in Brazil, by increasing their capacity to compete;
- to allow that public administration focus its efforts in activities that can not be provided properly by the private sector;
- to contribute to financial market strengthening, by offering privatised companies shares to the society.

5. Among the sectors that were included at the PND, there were a large number of infrastructure sectors, such as: telecommunications, ports, water and sanitation, electricity, gas transport and roads.

6. ***Briefly describe the overall regulatory system with respect to concessions. Is there a law on concessions?***

7. The overall regulatory system with respect to concessions in Brazil is based on the Federal Constitution, the Auctions and Public Contracts Law (no. 8666/93), the Concessions Law (no. 8987/95), and the Public Partnership Law (no. 11079/04).

8. The Federal Constitution (1988) establishes that the private sector can only provide public services through concessions and permissions, always preceded by public auctions.

9. In order to implement the privatisation plan in the early nineties, the Auctions and Public Contracts Law and the Concessions Law were approved by the Congress. In summary, what these two laws established that infrastructure services privatisation could only be done through concessions, and that a private partner could only be contracted through public auction, as determined by the Constitution. This is the rule for all concessions to Federal Government, States and Municipalities in all infrastructure sectors. Exemptions are only accepted in emergency cases, when services are interrupted and for a short and limited period of time.

10. Although both laws apply for every infrastructure sector, each sector has also a legal framework that establishes the sector regulatory agency and that establish some particularities of the concession awarding process. Some of these laws are:

- Law 9472/97 – telecommunications;
- Law 10233/01 – roads, railways, surface and water transportation;
- Law 9427/96 – electricity.

11. ***Which government bodies are involved in designing and overseeing the allocation of and operation of concessions? For example, what are the respective roles of the concessioning authority sector regulator (if any), and competition authority?***

12. In Brazil, there is a separation of function between ministries, regulatory agencies and competition authority. The role of planning and deciding if some service shall be privatised is executed by sectoral ministry (for example, Ministry of Transportation, Ministry of Telecommunications etc.). The role of designing and overseeing the allocation and operation of concessions is conducted by the sector regulatory agency.¹

13. In order to describe the role of competition authorities, first it is important to present the Brazilian Competition Policy System (BCPS). It consists of three government bodies: CADE, the Administrative Council for Economic Defense, an autonomous agency which has dispositive adjudicative authority in BCPS cases; SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in BCPS proceedings and for providing competition advocacy in regulated sectors.²

14. In summary, the role of competition authorities consists in analysing anticompetitive conducts and merger operations, and in promoting competition advocacy in regulated sectors. All sectors are submitted to CADE's jurisdiction. What may vary from sector to sector is who is responsible for analysing mergers and conducts. The general rule is that all cases are analysed by SEAE and SDE and then judged by CADE. However, in some of them, the regulatory agency may be requested to issue its opinion about the case. An exception is observed only in telecommunications, where the National Agency for Telecommunications (ANATEL) is the only responsible for sending CADE an analysis on the case (if CADE finds it necessary, it may ask SEAE and SDE to also do an analysis).

15. Competition advocacy is the most important role of the competition bodies in relation to concessions designing and it is mostly played by SEAE that acts as the Ministry of Finance representative in the different inter-ministerial groups involved in the discussion of regulatory issues. Through this participation it is possible to influence auctions and concessions designs to foster more competition in the contracting process.

16. ***Which levels of government may award concessions?***

17. The three levels of government may award concession: federal government, States and Municipalities. The general rule, based on the Federal Constitution, is that one level of government may only award concessions for the public services which it is responsible for. Following this rule, federal government is responsible for: electricity generation and transmission, telecommunications, railways and federal roads. States are responsible for gas, electricity distribution (although the regulatory agency is federal) and state roads. Municipalities are responsible for water and sewage and local roads.

18. ***Are the regulatory frameworks and institutions established in legislation, or are they established in administrative procedures or presidential decrees?***

19. The general regulatory frameworks for almost all sectors and institutions are established in legislation. Specific rules are established in administrative procedures and presidential decrees, always based and restricted by the law.

20. ***How are disputes between government and concessionaire handled?***

21. Disputes between government and concessionaire first must be solved administratively by sector regulatory agency. If both parts do not arrive to reasonable solution they may go to the Judiciary. In 2005 the possibility of arbitration was introduced in the Law of Concessions in order to allow faster solutions for both parts.

22. ***Does the general competition law apply?***

23. In Brazil, the general competition law (Law 8884/94) applies to all regulated sectors. The only exception to this general application of competition law is the banking sector, which has its competition issues solved by Brazilian Central Bank.

24. ***Does the competition authority have jurisdiction over concessionaires?***

25. The competition authority has jurisdiction over all concessionaires and companies operating in regulated sectors.

26. ***Do other bodies also have jurisdiction to enforce the competition law in these circumstances, or to circumscribe the enforcement of the competition law by the competition authority?***

27. Each regulatory agency has the power to promote competition at the regulated sector of its jurisdiction. Regulatory agencies are also responsible for competition advocacy. However, regulatory agencies do not have the power to analyze mergers or to condemn an anticompetitive behaviour. CADE is the only agency with power to judge mergers and uncompetitive behaviour. When facing an anticompetitive behaviour, the regulatory agencies must notify CADE so that it can act.

28. ***What is the role of the competition authority in the design of concessions?***

29. As already said, in Brazil, there are three competition authorities: CADE, SDE and SEAE. SEAE is the one most responsible to promote competition advocacy in regulated sectors. Usually, SEAE participates in discussions with other ministries and regulatory agencies about concessions design in order to promote competition. SEAE does not have a binding opinion, but it may influence decisions as a representative of the Ministry of Finance.

30. ***Briefly summarise the experience with infrastructure concessions. What have been the major successes and failures in infrastructure concessions in your country? (A table could be useful, with columns for year awarded, sector, whether the award was by competitive or non-competitive means, whether the concession was renegotiated subsequently, whether the project was subject to rate-of-return or to price-cap regulation or no tariff regulation, and whether there was a regulatory body with specific responsibility for that sector.)***

Year Awarded	Sector	Award by competitive or non-competitive means?	Was the concession renegotiated subsequently?	Rate-of-return, Price-cap, or no tariff regulation?	Is there a regulatory body with specific responsibility for that sector?
1994	Roads	Competitive.	Yes	Rate-of-return	Yes. ANTT (for federal roads).
1996	Railroads	Competitive.	Yes.	Price-cap.	Yes. ANTT.
1997	Ports	Competitive.	No.	Price-cap	Yes. CAP and ANTAQ.
1997	Electricity	Competitive.	Yes.	Price-cap	Yes. ANEEL.
2000	Water and sanitation	Competitive.	-	-	No.
1997	Telecommunications	Competitive	Yes.	Price-cap	Yes. ANATEL.

31. Although the Brazilian privatisation process has faced some problems, it may be considered a successful case: it reduced the participation of the State in the economy; it allowed investments to recover in the infrastructure sectors; it contributed to the reduction of public debt; and it allowed more efficiency and more competition in these sectors.

32. Obviously, the effects described above vary in intensity from sector to sector, but they can be taken as a general consequence of privatisation. One can observe that some sectors were more successful than others and this is a consequence of how each process was designed: in some sectors, privatisation occurred after the sector regulatory law had been approved by the Congress and the regulatory agency had been implemented; in others public services had already been privatised some years before the creation of a regulatory agency. In the first group, there are electricity and telecommunications, in which one can observe the best results in terms of competition and efficiency gains. All transportation sectors are in the second group, in which, though one can observe a huge progress, some regulatory changes have been studied by the government in order to improve efficiency.

33. Water and sanitation sector differs from the others, because they are not public services provided by federal government. The provision of these services is the responsibility of states and municipalities and there still is no general law regulating it, nor proper regulatory agencies. Only few companies were privatised and only few states have a regulatory agency in charge of regulation. As a result, this is probably the sector that requires more attention in terms of developing an efficient regulation nowadays.

34. ***Do the contracts for financial advisers and investment bankers to implement concession transactions align their incentives with the objective of long-term efficiency and competition in the sector(s)?***

35. In the beginning of privatisation process, contracts for financial advisers and investment bankers were concerned about auctions and business evaluation. Efficiency was not the main issue by that point, because government was worried about trying to maximize the price of the concessions. After this first stage, the government became more concerned about efficiency incentives and competition, and these started to be a main issue in concessions (as seen in telecommunications, e.g.).

36. ***Before the concessions are designed or awarded, is restructuring considered in line with the OECD Recommendation of the Council concerning Structural Separation in Regulated Industries (2001), which relates to the separation of potentially competitive activities from those which are not, as well as horizontal splitting to promote competition where it is feasible?***

37. Structural separation was considered and implemented in the two major sectors privatised (telecom and electricity). In telecom, long distance and local loop operations were already run as separate state enterprises and distinct and multiple licenses were sold in each area. In electricity, although most of the state owned enterprises already were operating in distinct areas (generation, transmission and distribution) laws were passed to move progressively from accounting to structural separation of generation, transmission and distribution.

38. ***If your country has significant experience with subsequent concessions, what particular issues arise during the re-allocation especially with respect to asymmetries between incumbents and others?***

39. Brazil has not had a case of subsequent concessions yet.

40. ***If an analyst in another country were interested in the experience of infrastructure concessions in your country, are there any books or research papers by your agency or others which provide a useful summary to which you would direct him or her?***

MOURA ROCHA, Bolívar, A Regulação da Infra-Estrutura no Brasil – Balanço e Propostas, São Paulo: IOB-Thomson, 2003

SALGADO, Lucia Helena; DA MOTTA, Ronaldo Seroa, Marcos Regulatórios no Brasil: o que foi feito e o que falta fazer, Rio de Janeiro: IPEA, 2005

SUNDFELD, Carlos Ari (org.), Direito Administrativo Econômico, São Paulo: Malheiros Editores, 2000

DI PIETRO, Maria Sylvia Zanella, Direito Regulatório: Temas Polêmicos, São Paulo: Fórum, 2004

PINHEIRO, Armando Castelar; Regulatory reform in Brazilian infrastructure - where do we stand? Rio de Janeiro: IPEA, 2003.

PINHEIRO, Armando Castelar; A experiência brasileira de privatização - o que vem a seguir?. Rio de Janeiro: BNDES, 2000.

1. Role for Competition in the Allocation of Concessions

41. ***Under what circumstances are the different means of allocating concessions employed? For example, when is competitive auction used? Competitive negotiation? Direct negotiation with a single firm? Under what circumstances have these different means been successful?***

42. According to the Federal Constitution and to the Law of Concessions, all concessions in Brazil must be allocated by auction. There is no exception.

43. ***Having in mind one or a very few specific instances where concessions were allocated by competitive auction:***

44. ***How was the auction design arrived at? That is, who designed the auction? What was the role of the competition authority in the design of the auction?***

45. In the beginning of privatisation process, auctions were designed by each sector ministry because regulatory agencies did not exist yet or were being implemented. After their implementation, they became responsible for auctions design. The competition authority has the role of exercising the competition advocacy during the design process.

46. The case of roads concession is a good example where one can see the changes in auction design process. During the first stage of federal roads' privatisation ANTT had not been created and the Ministry of Transportation was responsible for auction design. Nowadays, as the second stage of privatisation is being carried out, the regulatory agency is responsible for auction design and SEAE has an important role on trying to make auctions more competitive.

47. ***What was the auction design? E.g./ were several parts auctioned or only one? If there were several parts, were the auctions simultaneous, and how were bidders able to address the complementary or substitutability of the various parts? Was the auction sealed bid or open bid?***

48. The auction design varies from sector to sector. For federal roads, for instance, in the first privatisation stage, auctions had several bidders, but they were mainly constructors. Auctions were sealed bid, not simultaneous and there was no possibility of complementary bids.

49. To the second stage, some changes are being carried out in order to increase competition: possibility of participation of bidders other than constructors; simultaneous auctions; and possibility of complementary bids.

50. ***Was the process, in fact, competitive? If not, how, in retrospect, could the auction or award process have been made more competitive?***

51. The process is competitive, but it does not mean that some improvements do not have to be made. The number of competitors must be enlarged, by reducing restrictive requirements for participation in the auction increasing the number of bidders.

52. ***Was the contract subsequently renegotiated? If so, how long after the contract award? Who initiated the contract renegotiations and what changes resulted?***

53. Brazilian legislation establishes that renegotiation are possible, since concessions prove that they have a disequilibrium in their economic and financial situation, cause by some factor that is not in the contract. The frequency of this occurrence varies from sector to sector. Some sector laws establish that renegotiation may only occur after five years while others do not mention this. This is the case of road concessions that as a consequence have had many case of renegotiation in the beginning of their existence. In fact, renegotiations in roads concessions used to happen until the second year of contract and in some cases; it continued to happen during the years. Renegotiations were usually initiated by companies and resulted in higher tolls.

54. ***Have you investigated allegations of collusive behaviour during auctions for infrastructure concessions? What were the outcomes of those investigations?***

55. There has been no investigation of collusive behaviour during auctions in BCPS.

56. ***What is your policy regarding joint bidding in auctions for infrastructure concessions? E.g., under what circumstances would two “likely to win” bidders be forbidden to submit a single bid?***

57. There is no specific rule against joint bidding in Brazil. A company is free to associate with other companies in order to participate on auctions. The only prohibition made by the Concessions Law is that a company cannot participate in more than one consortium of companies.

58. Although no previous control of the companies in each consortium is made, BCPS analyzes if the auction winning consortium is an anticompetitive operation or not.

2. Role of Competition during the Term of Concessions

59. ***If the concession contract, decree or law include clauses related to competition, such as ensuring fair and non-discriminatory access, what are they?***

60. To illustrate law clauses related to competition, some parts of regulatory laws will be transcribed below:

61. For telecommunications, Law 9472/97 establishes that:

“Article 3. The user of telecommunication services has the right:

I - of access to telecommunications services, with standards of quality and regularity adequate to its inherent nature, anywhere within the National Territory;

II - to freedom of choice relative to his/her service provider;

III - of non discrimination as to the access and utilisation conditions of the service;”

“Article 6. The telecommunication services shall be organised based on the principle of free, wide and fair competition among all providers, having the Government to act towards promoting them, as well as to correct the effects of imperfect competition and to repress violations against economic order.”

“Article 7. General protection rules to the economic order are applicable to the telecommunications sector, when those do not conflict with this law.

Paragraph 1. The acts involving a telecommunications service provider, under public or private system, aiming at any form of economic concentration, either through merger or incorporation of companies, establishment of holding companies to control enterprises or any form of partnership conglomerate, shall be subject to controls, procedures and conditions provided in the general protection regulations to the economic order.

Paragraph 2. The acts provided in the preceding paragraph shall be submitted to the appraisal of CADE - Economic Defense Administrative Council, by means of the regulatory body.

Paragraph 3. The telecommunications service provider will be in violation of economic order when, upon entering into contracts for rendering goods and services, adopts practices which may limit, falsify or any way hinder free competition or free initiative.’

“Article 19. The Agency shall take the necessary measures to satisfy the public interest and for the development of telecommunications in Brazil, acting independently, impartially, legally, impersonally and publicly, and especially:

(...)

XIX - to exercise legal authority in connection with telecommunications, in the control, prevention, and repression of violations against the economic order, except for the authority belonging to the Economic Defense Administrative Council - CADE;”

“Article 73. The telecommunications services providers of collective interest will be entitled to the use of poles, ducts, conduits and rights of way, belonging or controlled by the telecommunications service provider or the provider of other services of public interest on a non-discriminatory manner and under fair and reasonable price conditions.

Sole Paragraph. The regulatory agency of the licensee whose means are to be utilised will be responsible for defining the conditions necessary to satisfy the provisions of this article.”

“Article 127. The regulation of the exploitation of services under the private system, shall aim at the feasibility of compliance with the laws, especially those in connection with telecommunications, as regards the economic order and consumer rights, so as to guarantee:

(...)

II - free, ample and fair competition;”

“Article 152. The provisioning of interconnection shall be made in non discriminatory manner, under adequate technical conditions, thus ensuring equal and fair prices, complying with the strict requirements to the rendering of services.”

62. For electricity, Law 9427 establishes that:

“Article 3. - In addition to duties pursuant to articles 29 and 30, Law 8987, dated February, 13, 1995, applicable to electric energy services, Aneel shall also be responsible for:

(...)

VIII - with a view to fostering effective competition among the agents and preventing the economic concentration of electricity services and related activities, establishing constraints, limits or conditions for corporations, corporate groups and shareholders in terms of obtaining and transferring concessions, permissions and authorisations, as well as monopolies and doing business among themselves;

IX - strive to ensure compliance with anti-trust laws, monitoring and overseeing the market practices of the agents in the power sector;”

63. For surface and water transportation, Law 10233/01 establishes that:

“Article 20. The objectives of the National Surface and Water Transportation Agencies are:

(...)

b) to harmonize, under public interest, the objectives of consumers, concessionaire, licensee and authorised agents, along with lessees/tenants and other delegated entities, by arbitrating conflict interests or preventing any violation of the economic order.”

“Article 31. Whenever the Regulatory Agency takes notice of any fact that can constitute a violation of the economic order, it should communicate it to the competition authorities.”

64. ***If the concession contract, decree or law, or a sector-specific law, include clauses establish regulatory institutions for the concessioned infrastructure, then please describe the institutions such as their degree of independence from the concessionaire, transparency of decision-making and technical capacity.***

65. In Brazil, the regulation of public services, in almost all sectors that have been privatised, is executed by regulatory agencies. These agencies are created by law and have the following characteristics:

- Independence from the government – regulatory agencies have their own budget;
- Autonomy – presidents and directors of regulatory agencies are chosen by the President of the Republic and must be approved by the Federal Senate. They have fixed mandates of 4 to 7 years, depending on what is established by the sector law, and cannot be dismissed.
- Transparency – regulatory agencies' rules and decisions must be preceded by public hearings and must be published, if possible, in the internet.
- Technical capacity – in the beginning, technical staff composed by those who used to work with the public services in each sector ministry before privatisation. Also some staff was hired for a short term period. During the last 2 years, agencies have been contracting technical staff through public contest (the only way that someone can work for the government in Brazil with guarantee that he/she cannot be dismissed without reason) based on technical knowledge in engineering, economics and law.

66. ***Are there rules on pricing, coverage, and quality standards for the service provided by the infrastructure and which institution enforces them?***

67. Usually there are rules on pricing, coverage and quality standards for the service provided. They are enforced by the regulatory agencies.

68. ***Are there rules on pricing and non-price terms for access to the concessioned infrastructure by non-integrated rivals and which institution enforces them?***

69. Usually there are rules on pricing and non-price terms for access by non-integrated rivals. Regulatory agencies are responsible for their enforcement and also to propose new rules if it is necessary.

70. ***Have you investigated complaints of abuse of dominance by infrastructure concessionaires? Was this abuse related to access to essential facilities? Would a line of business restriction (preventing the operator of the essential facilities from entering a vertically related market) have reduced the incentive on the concessionaire to abuse its dominance? What were the outcomes in these investigations?***

71. There have been some cases of abuse of dominance by infrastructure concessionaires investigated by BCPS. Some examples are as following:³

72. Telecommunications:

In 2001, CADE addressed an abuse of dominance claim against the Globo Group, Brazil's largest broadcast television network. Globo controlled both the Globo Channel, the prime broadcast channel in Brazil, as well as Sky TV, the most important Brazilian pay TV satellite company. The complainant was TVA Sistema de Televisão, the owner of competing satellite company DirectTV. TVA asserted that Globo wrongfully refused to license the Globo Channel to TVA for satellite broadcast. ANATEL investigated and concluded that there was no abuse of dominance because the Globo Channel was not an essential facility for satellite TV service. CADE agreed and dismissed the case, observing that TVA was a viable competitor even without

the channel and that requiring satellite TV services to share programming would reduce competition and retard incentives for innovation.

73. Railroads:

With respect to railroads, much of CADE's case activity has focussed on Companhia Vale do Rio Doce (CVRD), a large mining and steel company that were privatised in 1997. CVRD holds operating concessions for a number of freight railway lines and harbour terminal facilities that provide services both to its own mines and steel production facilities and to other customers as well. Some of the customers served by CVRD's lines are competitors in mining or steel production, a circumstance that has led to a series of cases alleging discrimination by CVRD. Where the discrimination does not involve tariffs regulated by ANTT, CADE has prime jurisdiction. One case, for example, dealt with a contract between CVRD and the Samitri Mineral Company for the transportation and export of Samitri's iron ore production. The contract barred Samitri from selling its ore in certain foreign markets and from selling any ore at prices lower than CVRD's. In its 2004 decision, CADE undertook what was in essence a joint venture analysis to conclude that the agreement was not unlawful; noting that CVRD had made a large investment to construct a dedicated rail line to Samitri's mine site, and that CVRD therefore had a legitimate interest in the exploitation of Samitri's iron ore assets...

Other pending rail sector cases involve mergers, including one 2000 transaction in which CVRD acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil. SEAE and SDE agreed that adverse effects could arise in both the iron ore and the rail service markets and proposed various remedial conditions to CADE. ANTT, in consultation with SDE, invoked its own statutory authority to issue a precautionary order imposing certain restrictions on CVRD until CADE issued a determination. In 2005, CADE determined that the transactions could proceed subject to conditions designed to forestall anticompetitive effects.

74. Ports:

Each of Brazil's seaports is controlled by a Port Authority, which grants concessions authorising private parties to operate terminals and to provide cargo handling services within the port facility. At some ports, there are also independent, privately-owned terminal facilities just outside the port boundaries. A case recently decided by CADE, known as "THC2," involved terminal handling charges assessed by terminal operators against independent warehouses. The case involved allegations that certain terminal operators raised rivals' costs by charging disproportionately more to deliver a cargo container to a warehouse located outside the terminal than they did to deliver the same container to a warehouse within the port. CADE found the price differentials to be an abuse of dominance because they constituted a significant part of storage costs and induced shippers to use the terminal operator's warehouse, thus impairing competition in the warehouse storage market.

NOTES

1. The regulatory agencies responsible for the infrastructure sectors that will be analysed in this paper (i.e. roads, railways, electricity, telecommunications, water and sanitation) are: National Agency for Telecommunications – ANATEL, National Agency for Electricity – ANEEL, National Agency for Surface Transportation – ANTT (for roads and railways) and National Agency for Water Transportation – ANTAQ (ports). There is no federal regulatory agency for water and sewage because it is a municipality competence to provide this service.
2. OECD – Competition Law and Policy in Brazil – a Peer Review, 2005.
3. Examples taken from OECD – Competition Law and Policy in Brazil – a Peer Review, 2005.