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CONCESSION AGREEMENT

Comment [ID1]: This Concession Agreement was drafted for a Civil law Jurisdiction.

BETWEEN

[PORT]
acting on behalf and duly authorized by the Government Of _____

Comment [ID2]: At this stage it may be thought that
(a) the enabling legislation or order will need to be reviewed to see if the Port can bind Government;
(b) The recitals refer to delegation of powers by Government to the Port and therefore a review of the civil law should reveal as to whether Government will need to either be a party to the agreement or enter into a separate agreement with the Company in order for Government to be bound into the terms of this agreement.
However when one reaches the end of the Agreement there is a place for execution by Government but no explanation is given as to why.

AND

[THE COMPANY]

RELATING TO

Various parts of the PORT OF _____

MADE AT [LOCATION]
DATED

CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT (hereinafter referred to as "this Agreement") is made this [] day of []

BETWEEN

[PORT] a state owned company with its principal office at [] represented by [responsible officer] duly authorized by the Government of _____ to enter into this Agreement under Order [_____]

AND

The Company, a newly created joint stock company registered in _____ under n° _____, having its principal office at [_____] represented by [responsible officer]; (hereinafter referred to as "the Company").

WHEREAS

- A. The Government is desirous of promoting investment and participation by the private sector in the development of the port situated at _____
- B. Pursuant to [LEGISLATION], the Government has delegated the right to The Company to use, operate and develop part of the State public domain consisting of land, buildings, superstructure, infrastructure and equipment situated on the Port of _____ with all public service obligations related thereto ;
- C. As per [LEGISLATION] and provided it is duly authorized to do so by [RELEVANT MINISTRIES], The Company can grant concession rights relating to the Port of _____ to entities with established expertise ;
- D. Such authorizations have been requested by The Company from the relevant Government bodies, and the issue thereof is a condition precedent to the validity of the present Agreement ;
- E. [LEGISLATION] has established the general terms and conditions under which concessions may be granted relating to ports and railways within _____; International tender offers have been launched for the concession of certain parts of Port of _____ and the railway of _____, the

Comment [ID3]: It is likely that this should refer to Conceding Authority rather than the Company because it is the Conceding Authority which initially holds the rights to the port and it then holds a competition for a private sector entity to run the port.

Comment [ID4]: The concept and extent of public service obligations will need to be considered so that the Company clearly understands what it is taking on. Under some civil laws the concept of public service obligations can confer upon a concessionaire certain benefits such as adjustments to payments if the cost to perform those obligations should escalate and/or there may be a requirement to compensate a concessionaire on termination of the Concession for any reason. Other issues may include whether the contract falls under administrative law and therefore disputes have to be dealt with by a special court e.g., conseil d'etat. Therefore these issues should be fully determined during any feasibility study before the project is put out to tender.

Comment [ID5]: See comment 3 above.

Comment [ID6]: Probably meant to be a reference to Conceding Authority.

joint sections and marshaling yard, and the workshop ("the Invitation to Tenders");

- F. In response to the Invitation to Tender, the Investors (as defined below) submitted to the Conceding Authority an offer for the Project dated [] ;
- G. The Investors as defined below have formed a consortium and have incorporated a _____ company which submitted an offer to the Invitation to Tender for the Project ;
- H. As a result of such International Invitations to Tender for the _____ Revitalization Project, the purpose of this Agreement is to grant to the Company the exclusive right to finance, rehabilitate, operate, manage, maintain, develop and optimize certain parts of the site of the Port of _____ described hereinafter in Annex 1 and 12 thereto as "the Perimeter", for a duration of [15] years under the terms and conditions described in this Agreement, provided that all identified obligations are fulfilled.

Comment [ID7]: The whole question of landward surface access should be considered in the feasibility study before the project is put out to tender. Where surface access includes rail then there needs to be clear demarcation lines between the port concessionaire's responsibility and rights and those of the railway company (or in the case envisaged by this agreement, the rail concessionaire).

Comment [ID8]: As all capitalized terms should be defined the use of the expression " as defined below" seems unnecessary.

Comment [ID9]: Arguably they have incorporated " the Company"

Comment [ID10]: This is somewhat curious wording but may be as a consequence of translation from the language of the host country. The expression "identified obligations seems to go further than the Conditions Precedent. The grant of rights happens following the meeting of the Conditions Precedent so the grant itself is not subject to the proviso that the obligations are fulfilled and clearly the termination provisions govern the termination of this Agreement so the proviso the " all obligations are fulfilled " does not reflect what is in the Agreement.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless the subject or context otherwise requires, the following definitions shall apply:

"Applicable Regulations" means all laws, decrees, rules, administrative circulars and regulations applicable to the Port, all operations and services in the Port, whether applicable at the time of execution of this Agreement or at anytime during the Concession Period, whether of the Regulatory Authority or of municipal, national, regional origin, or by application of any international treaty or convention to which the State is a party;

"Approvals" means all approvals, licenses or consents as are referred to in Annex 3 as well as any other approvals, licenses or consents, including employment permits for foreign employees which may be required from any Government Authority in connection with the Project ;

"Bid Bond" means the bond provided by the Investors to guarantee the terms of the Tender;

"The Port" means the company _____ with its principal office at _____, its successors and permitted assignees;

Comment [ID11]: As a consequence of translation the definitions may not all appear in alphabetical order. It is open to debate whether the definitions in English should be in alphabetical order to aid comprehension or whether it is better to leave them in the original order so as to be able to construe the original wording against the English.

Comment [ID12]: This is an interesting concept. The bid bond provides financial security from a third party that the Investors will enter into an agreement based on their bid. If there are negotiations that improve the Public Sector's position as against its position under the bid then arguably the issuer of the bid bond will no longer be bound as the terms of the original bid no longer apply and having negotiated an improved position it is unlikely that the Public Sector would wish to enforce the original bid.

Comment [ID13]: This is confusing. The Port is a physical location with assets and the Agreement refers to the Conceding Authority as the counterparty to the Company. Query therefore why the same entity has two definitions particularly as sometimes in the Agreement the reference to Port does mean the physical location rather than a company.

"Port Equipment" means all equipment which belongs to Port and which is or could be brought into the Perimeter;

"Code of Operations" means the rules for the operation of the Port which shall be applicable within the Perimeter, such rules to inter alia regulate the relations between the Company and users of the Port. Such Code of Operations shall have to be prepared by the Company and shall have to be approved by the Conceding Authority and the Regulatory Authority in accordance with Clause 12.7;

"Commencement Date" means the date of the signature of the Concession Agreement in accordance with Clause 5.2;

"The Company" means the company established under the laws of _____ having its principal office at _____ its successors and permitted assignees, which has been incorporated by the Investors as defined below, and which is being granted the Concession Rights under this Agreement;

"Company Assets" means assets financed and/or created by the Company;

"Concessionaire Event of Default" means an event as described in Clause 21.1;

"Conceding Authority" means Port as duly authorized by the Government and any relevant Government bodies related thereto, its respective successors and permitted assignees;

"Concession Assets" means all assets of the Port included in the Perimeter and on which a right of concession is granted to the Company under this Agreement and which are described in Annex 1 and 12;

"Concession Fees" means the fees to be paid by the Company to the Conceding Authority and made up of the Entry Fee and the Performance Fee in accordance with Clause 2.5;

"Concession Period" means the period set out in Clause 2.3 or as may be extended pursuant to this Agreement;

"Concession Rights" means the rights granted to the Company pursuant to Clause 2.1;

"Date of Entry into Force" means the date determined in accordance with Clause 5;

"Design Criteria" means the technical criteria for the design of the Rehabilitation Works set out in Part I of Annex 5;

"Design Review Procedure" means the procedure for the review and approval by the Conceding Authority of the Company's designs and proposed design changes as set out in Part II of Annex 5;

Comment [ID14]: This is quite widely drawn and may give rise to confusion if the concession is for part of an existing port because presumably there will be equipment on the parts of the port not subject to the agreement which could be bought on to the Perimeter. It would be better to have a better approach to the identification of Port Equipment even though it is likely that at the time of entering into the Agreement the Public Sector may not have a comprehensive asset register. Clause 5 provides that the assets are to be listed and the either leased or sold. It may be better to link the definition to the list to be prepared.

Comment [ID15]: Clause 12.7 does not say what happens if there is no agreement. It may be that legislation reveals what is to happen but the private sector will be concerned if it is unable to run the Port as envisaged in its bid.

Comment [ID16]: Unfortunately it does not. It is actually the date of completion of the Transition program and the date on which under Clause 5.4 the Entry fee has been received by the Conceding Authority.

Comment [ID17]: Slightly inconsistent with the defined term "Company" although the concept of "Concession" is applied throughout the Agreement even if the term "Concessionaire" is confusingly used later in the Agreement even though not defined.

"Detailed Design" means the detailed construction design for the Rehabilitation Works approved [by the Conceding Authority/Qualified Engineer] in accordance with the provisions of Clause 8;

"Development Plan" means the forecasts of traffic activity and transportation development studies resulting in asset developments and investments related to the Port capacity and development thereof through the improvement of services and equipment, the development of such infrastructure and equipment, the improvement of land access to the Port (rail and roads) as well as maritime access. Such Development Plan to be made periodically pursuant to 2.2.2(c);

"Development Works" means works other than those in core activity and which are associated with public services, pursuant to clause 15;

"Entry Fee" means the fee to be paid by the Company to the Port as described in Clause 2.5.1;

"Escrow Account" means the account to be opened on application of Clause 2.5;

"Escrow Agent" means the agent to operate on the Escrow Account;

"Escrow Agreement" means the agreement to be entered between the Conceding Authority, the Escrow Agent and the Company as per Clause 2.5;

"Force Majeure" means the events referred to in Clause 20.1;

"Free Possession" means the right to occupy and use the Perimeter and to take the benefit of the Rights of Way for the purposes of this Agreement without undue interference from any other person or entity and subject to the definition of the Perimeter, as per Clause 6 herein;

"Government" means the Government of _____;

"Government Authority" means any _____ ministry, department, agency, directorate, public authority, body or other person having jurisdiction in _____ with respect to the Company or the Project;

"Handback Assets" means all assets which are covered by the present Concession whether existing at the time of this Agreement or built or constructed by the Company as Development Works and to be returned to the Conceding Authority under Clause 18;

"Handback Bond" means the performance guarantee provided by the Company pursuant to Clause 18.1;

"Handback Date" means the last day of the Concession Period;

"Investors" means the companies, joint venture or consortium members which

submitted the successful Tender, their successors and permitted assignees;

"Maintenance and Performance Bond" means the performance guarantee provided by the Company pursuant to Clause 12.2;

"Maintenance and Performance Indicators" means all figures rates and descriptions as described in Annex 7;

"Maintenance Standards" means the operating and maintenance requirements and standards set out in Annex 7;

"Materials" means all materials and movable equipment which the Company may bring on the Perimeter in order to carry out its obligations under this Agreement;

"[CURRENCY]" means the lawful currency of [COUNTRY];

"Ministry" means the Ministry of Transport and Communications of _____;

"Notice of Approval" refers to the certificate issued by the Conceding Authority pursuant to Clause 5;

"Notice of Intention to Terminate" means a notice issued in accordance with Clause 21.3;

"Notice of Termination" means a notice issued in accordance with Clause 21.5;

"Ordinance" means the [_____] to be issued by the Government for approval of this Agreement;

"Performance Fee" means the fee to be paid by the Company to **Port** as described in Clause 2.5.2;

Comment [ID18]: See comment 3 above.

"Perimeter" means the area of land and any building, fixture, installation and non movable assets with rights attached thereto, to the exclusion of Port's Equipment and which are situated on the map attached hereto in Annex 1, and listed in Appendix 12 ;

Comment [ID19]: Expression "perimeter" is probably a translation issue and may also be compounded by use of the term "Port" as a company.

"Port" means the whole site of the port of _____ including all lands, superstructure and infrastructure, as per map in Annex 1;

"Project" means the rehabilitation, management, operation and maintenance of the Port in accordance with this Agreement;

"Prudent Industry Practice" means the practices, methods and acts engaged in or approved by a significant portion of the international port operation and maintenance industry for facilities similar to the Perimeter that, from time to time, in the exercise of a reasonable judgment in light of the facts known or that reasonably should be known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with applicable laws,

regulations, and the requirements of reliability, safety, environmental protection, economy and expedition. With respect to the Perimeter, Prudent Industry Practice shall include, but shall not be limited to, taking reasonable steps to ensure that:

1. Adequate materials, resources and supplies, are available to meet the needs of the operation of the Perimeter under normal conditions and reasonably anticipated abnormal conditions.
2. Sufficient operating personnel are available and are adequately experienced and trained to operate the Perimeter properly, efficiently and within the relevant guidelines and specifications issued by the manufacturer of any equipment or machinery used by them and are capable of responding to emergency conditions.
3. Preventive, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation, and are performed by knowledgeable, trained and experienced personnel utilizing proper equipment, tools, and procedures.
4. Such internationally admitted guidelines for quality services and productivity rates in port and cargo handling operations are respected and followed; such guidelines to include without limitation, the CNUCED Guidelines; the European Norm E.A.U. 1990.
5. All Applicable Regulations are applied by the Company.

"Qualified Auditor" means any internationally recognized accounting/auditor firm established in _____ which shall be nominated by the Conceding Authority and shall not be the same as the Company Auditor;

"Qualified Engineer" means the independent consulting engineer(s) appointed by the Conceding Authority pursuant to Clause 7;

"Railway" means separately and collectively, the three following rail lines [_____];

"Railway Concessionaire" means the successful bidder to the international tender which was launched simultaneously with the Tender, but concerning the railways of [_____];

"Regulatory Authority" means the administrative body responsible for supervising the performance of the Company's obligations under the present Agreement as referred to in Clause 4;

"Rehabilitation Bond" means the performance guarantee provided by the Company pursuant to Clause 2.6.2(a);

"Rehabilitation Completion Certificate" means the certificate issued in accordance

Comment [ID20]: Again this may be a translation issue. It is reasonable to expect a tsunami but it should unless very mild be treated under "force majeure". It would be better therefore to link in this definition to force majeure or to delete the reference to " reasonably anticipated abnormal conditions."

Comment [ID21]: This is quite wide and may give rise to confusion where there are differing approaches to standards between guides.

Comment [ID22]: Need to ensure that carve out for changes in law in the agreement is not negated by this requirement. In many International Agreements the obligation to comply with regulations is additional to prudent practice and the Agreement then deals specifically with change in law.

Comment [ID23]: Probably better to refer to an Auditor of international repute as not sure what organization would be responsible for internationally recognizing an accountancy firm.

with Clause 10.3;

"Rehabilitation Contracts" means the agreements entered into between the Company and the Rehabilitation Contractors for the performance of the Rehabilitation Works;

"Rehabilitation Contractors" mean the persons selected and appointed by the Company as contractors to carry out the Rehabilitation Works under the terms of the Rehabilitation Contracts, their successors and permitted assignees;

"Rehabilitation Schedule" means the schedule set out in Clause 9.2;

"Rehabilitation Works" means the works concerning the reconstruction, repair and improvement of the assets which are to be carried out under the Design Criteria under the control of the Qualified Engineer, as described in Annex 4 as well as any associated facilities which are within the Perimeter ;

"Rights of Way" means rights of passage over or under, and of access and egress to and from, the Site and any part or parts thereof for the purpose of constructing, operating and maintaining the Port ;

"State" means the _____, its successors and permitted assignees;

"Suspension" means suspensions as defined Clause 21;

"Tender Offers" means the tender offers prepared and submitted by the Investors to the Conceding Authority on [tender receipt date] for the Project;

"Transition Period" means the period described in Clause 5.3 hereinafter;

"Transition Period Agreement" means the agreement to be concluded as per Clause 5.3;

"Unforeseeable Change of Circumstances" is defined in Clause 20.2;

"Utilities" means water, sewerage, electricity, gas and telecommunications;

"USD" means the lawful currency of the United States of America.

1.2 Interpretation

- 1.2.1 The Annexes to this Agreement shall form an integral part hereof and references to Annexes shall be to Annexes to this Agreement unless otherwise stated.
- 1.2.2 The headings of Clauses to this Agreement and the Table of Contents are inserted for convenience of reference only and shall not in any way affect the interpretation of this Agreement.

Comment [ID24]: This list is quite short and regard should be had to the civil law to see provisions relating to interpretation. If these provisions do not exist or are quite light then consideration should be given to extending the list= male, female and neuter, singular and plural, which documents rule over which other documents in the case of ambiguity or conflict between the two sets of documents etc.

- 1.2.3 References to any party or person referred to in this Agreement include references to its respective successors and permitted assignees.
- 1.2.4 The words "include", "includes", and "including" shall at all times be construed as if followed by the words "without limitation".
- 1.2.5 References to days, weeks, months and years are references to days, weeks, months and years of the Gregorian calendar.

2. RIGHTS AND OBLIGATIONS OF THE CONCESSIONAIRE

2.1 Grant of the Concession Rights

- 2.1.1 Subject to the terms of this Agreement, the Conceding Authority grants to the Concessionaire the exclusive right to finance, rehabilitate, manage, operate, maintain, develop and optimize the Perimeter and the right to carry out any Development Works until the end of the Concession Period at the Company's own cost and risk and without recourse to Conceding Authority credits or guarantees.

Comment [ID25]: possibly a translation issue as the reference should be to "the Company"

Under the terms of this Agreement, the Company shall be responsible for:

- (a) negotiating terms and conditions of all necessary contracts with suppliers and commercial services providers, including electricity, communications, etc.;
- (b) establishing salary policy;
- (c) Establishing and harmonizing a tariff policy in accordance with Clause 13 in conjunction with the Railway Concessionaire(s), being understood that both parties should mutually agree upon the terms and conditions of their cooperation in establishing tariffs policy and publish such tariffs.

Comment [ID26]: This could give rise to difficulties particularly as it is not known how many rail concessionaires there will be. What happens if Company and Rail Concessionaires are unable to reach agreement. Are there provisions under local legislation to deal with this and what happens if the Company incurs additional expenditure or reduction of revenue as a consequence.

- 2.1.2 The Concessionaire shall not subcontract or sub concede parts of its rights and obligations to any third party without the written prior approval of the Conceding Authority.

2.2 Obligations of the Company as Concessionaire

Subject to the terms of this Agreement, the Company accepts

responsibility for the financing, rehabilitation, management, operation, maintenance development and optimization of the Perimeter and the performance of any Development Works it thinks useful for its mission until the end of the Concession Period at the Company's own cost and risk and without recourse to Conceding Authority's credits or guarantees.

The Company shall in particular have the following obligations:

2.2.1 General Obligations of the Company

- (a) to rehabilitate, maintain, renew, develop, commercialize and optimize the public infrastructure and fixed superstructure conceded by the Conceding Authority to the Company or installed by the Company in accordance with this Agreement ;
- (b) to provide or procure the provision of harbor services for vessels (anchorage, tugging, pilotage, water, bunkering) ;
- (c) to ensure the management of the harbor included in the Perimeter;
- (d) to maintain a convenient and safe access across the Perimeter for vessels, goods and persons between the sea and the hinterland ;
- (e) to proceed with all the necessary investments to carry out its obligations under this Agreement ;
- (f) to comply with all Applicable Regulations ;
- (g) to use the services of an international corporate auditor firm established in _____ to maintain audited consolidated accounts of the Company according to _____ law and usual international standards ;
- (h) to publish tariffs, rates and terms of services applicable in the Perimeter.
- (i) to publish on a regular basis and at least yearly such audited consolidated accounts, and keep them at the disposal of the Conceding Authority and of the Regulatory Authority, with the first yearly accounts to be issued on [_____]

2.2.2 Technical Obligations of the Company

In accordance with sound professional practice and in strict compliance with Applicable Regulations and safety standards in [_____], as well as instructions issued by the Regulatory Authority, the Company undertakes to :

Comment [ID27]: This appears to be very wide and it would be necessary to check whether the scope of instructions which could be issued by the Regulatory Authority is constrained by law. Again the issue will be risk of increase in cost or reduction in revenue.

- (a) carry out the Rehabilitation Works defined in Annex 4 ; provide free access to the Perimeter and to any part thereof to the Qualified Engineer in order for him to carry out his mission and cooperate in good faith with any representative or agent of the Conceding Authority and Company ;
- (b) properly operate and maintain its infrastructure and equipment contained in the Perimeter according to Maintenance and Performance Indicators and Maintenance Standards ;
- (c) prepare, propose and implement a Development Plan to be agreed with the Conceding Authority and the Regulatory Authority according to the Design Criteria ;
- (d) make sure that, within one year as from the Commencement Date of this Agreement and until its termination, adequate and regular dredging at 9m 40 (nine meters and forty centimeters) is carried out in order to maintain depth and a 100 (one hundred) meters width necessary for navigation and safe maneuvering in the access channels , basins and inner harbor. For the first 12 months after the Commencement Date, the Company shall bear the dredging costs up to a quantity of one million (1,000,000) cubic meter of dredged of slime/ooze, and that any cost resulting from dredging beyond such quantity shall be borne by the Conceding Authority, and that any such excess cost will be first deducted from the variable portion of the Performance Fee to be paid by the Company ;
- (e) make sure that a 24 hour marking and buoys system is installed, restored and properly maintained for access channels to the Perimeter.

2.2.3 Obligations of the Company vis-à-vis Users

- (a) the Company will have an obligation to provide and ensure that all users have an equal right to access and use of the Perimeter, and shall ensure that the Perimeter is operated and maintained safely in accordance with all Applicable Regulations ;
- (b) the Company shall prepare and keep updated in accordance with instructions issued by the Regulatory Authority, a Code of Operations of the Perimeter governing the relationship between the Company and its users and suppliers ;
- (c) The Company shall set up and publish a tariffs codification system for port dues for ships and cargo in line with Clause 2.1.1(c).

Comment [ID28]: This is very tough if the term Commencement Date as appears in the Definitions is to apply, as it means the period to agree the assets and whether they are to be bought or leased is at the risk of the Company .The Date of Entry into Force does not come into existence until the Conditions Precedent have been met and it is unlikely that Lenders will advance funds to the Company until that date is achieved so if the Company did want to start dredging earlier so as to obtain the benefit of the first year it would do so entirely at its own risk. Lenders may also be concerned about the need to reach agreement with railway concessionaires dependant upon how important rail versus road links are and there is no certainty that the railway concessionaires will be appointed within that first year let alone that agreement would be reached as required However if the definition of Commencement Date is as appears in Clause 5.4 then the position is different but as recovery by the Company from the Conceding Authority is through deductions from the variable portion of the Performance Fee, firstly if the Lenders are in place there may need to be substantial standby funds and secondly if they are not in place this increases the contingent equity contribution. required.

Comment [ID29]: Depending upon the nature of the port it may be that classes of users should have equal rights. Not much use allowing passenger vessels the same rights as cargo vessels and the different classes of cargo, bulk, container etc will have different requirements. Rights of users should be subject to payment of harbour and other dues but this may be provided for in legislation..

2.3 Concession Period

Subject to the extension and termination provisions in this Agreement, the Concession Period shall be for a period of 15 years as from the Commencement Date of this Agreement.

2.4 Extension of the Concession Period

- 2.4.1 Without prejudice to any extension of the Concession Period to which the Concessionaire might otherwise be entitled pursuant to the terms of this Agreement, the Concession Period may be extended by mutual agreement of the parties upon such terms as may be agreed between the Conceding Authority and the Company in the light of the continuing feasibility of the Project, the rate of return to both the Conceding Authority and the Company, and the interests of the users and the Company's shareholders.
- 2.4.2 Where the Concessionaire wishes to extend the Concessionaire Period, it shall submit a request to the Conceding Authority with a prior written notice of 60 months before expiration of this Agreement and the Conceding Authority shall respond in writing at least 36 months before expiration of this Agreement.
- 2.4.3 After such request by the Concessionaire, the Conceding Authority shall, subject to the necessary approval of the Regulatory Authority, establish technical, administrative, economical and financial conditions for such extension.

2.5 Concession Fees - Financial Obligations of the Concessionaire

In consideration for the granting of the Concession Rights, the Concessionaire shall pay to the Conceding Authority the Concession Fees in installments made up of the Entry Fee and an annual Performance Fee, as follows.

2.5.1 Entry Fee

2.5.1.1 The Entry Fee shall be USD [_____].

2.5.1.2 Upon receipt of the Notice of Approval by the Conceding Authority, the Concessionaire shall transfer to an Escrow Account opened into the name of the Conceding Authority as defined in Annex 13, the amount of the Entry Fee.

2.5.1.3 Upon confirmation of the reception of the Entry Fee on the Escrow Account, the Concessionaire and the Conceding Authority shall sign the Concession Agreement within 3 business days, which will materialize the date of Entry into Force of this Agreement.

Comment [ID30]: The effect of this would mean that these provisions and the Conditions Precedent of the Agreement have effect before the Agreement is signed.

2.5.1.4 Upon issue of the Request for Take-Over by the Concessionaire, the Conceding Authority shall issue a Certificate of Commencement and will require the Company to release the money in the above mentioned Escrow Account. The Commencement Date will be 3 business days after the issue of the Certificate of Commencement.

Comment [ID31]: Neither the Request for Take Over or Take Over are defined terms. The procedure is set out in Clause 5.4.

2.5.2 Performance Fee

From the Commencement Date, and until the termination of this Agreement, the Concessionaire shall pay to the Conceding Authority an annual Performance Fee to be computed as follows:

- a fixed portion of USD[to be proposed by bidders] payable in advance on a quarterly basis, with a grace period for the first year of operations, and reevaluated each year on the basis of US inflation by using the official Consumer Price Index published by the US Department of Trade.
- a variable portion equivalent to 10 % (ten per cent) of the annual turnover of the Company, computed as follows (the "Annual Company's Turnover") and payable on a semester basis, at the end of each semester.

For the purposes of calculating this variable portion of the Performance Fee, in any given year, the "Annual Company Turnover" shall be:

- (a) the aggregate invoiced turnover (including circulation and sales taxes) generated by activities of any kind whatsoever which are carried out within the Perimeter, whether or not such activities result from the actions of the Company or any of its sub concessionaires, subsidiaries, subcontractors, agents or assignees, with the following qualification;
- (b) as for the contracts already existing on the Perimeter as defined in Annex 1 and 12, which have been concluded by the Conceding Authority with private parties and which are under performance and until they are terminated or modified, the invoiced which will be considered as invoiced of the Company shall only be the existing revenues/income derived by the Conceding Authority from such contractual parties.

2.6 Other Financial Obligations of the Company

- 2.6.1 The Company shall provide and secure all the financing required for the Rehabilitation Works to achieve the Maintenance and Performance indicators within 3 years.
- 2.6.2 The Company shall deliver to the Conceding Authority the following:
- (a) a Rehabilitation Bond of a net amount of USD [] and with a maturity of 3 years to guarantee the proper and timely performance of the Rehabilitation Works ;
 - (b) a Maintenance and Performance Bond of USD [] as per Clause 12.2 to ensure that Maintenance and Performance targets are met, and whose value will be adjusted every five years to take into account inflation effect ;
 - (c) a handback bond of an amount which will be equivalent to USD [AMOUNT] in constant terms, and with a maturity in accordance with Clause 18.12.2, to guarantee performance of the Company's handback obligations under this Agreement Clause.
- 2.6.3 The Company shall obtain and keep appropriate civil and accident insurance coverage as per Clause 17 and more generally such insurance coverage which shall be compatible with the Company's responsibilities toward the Conceding Authority, users and third parties.

2.7 Exclusivity of the Concession

- 2.7.1 The Conceding Authority hereby agrees that in the Perimeter, and subject to the provisions of other agreements which are still in force on the Perimeter as listed in Annex 15, the Company will have and enjoy the Concession Rights on an exclusive basis throughout the Concession Period and the Conceding Authority shall ensure that, save as provided in this Agreement, no part of the Concession Rights shall be granted to any other party prior to termination of this Agreement.
- 2.7.2 However, the Conceding Authority shall not assume any responsibility for any possible economic measures, the commissioning any new railway or road system or any other actions in the Perimeter that might directly or indirectly imply alteration to volume of traffic passing through the Perimeter.

Comment [ID32]: The Conceding Authority is stated to be acting for Government. It is therefore quite harsh that the Government could introduce constraints on landward surface access which could increase cost or decrease revenue without having any liability but due diligence might reveal as to whether there are any protections in domestic legislation.

2.8 Detailed List of the Company's Obligations - Sanctions for Defaults

- 2.8.1 A detailed list of the Company's obligations according to which the Company shall meet the minimum standards of quality of services to be rendered to users is included in the Maintenance and Performance Indicators and Maintenance Standards as described in Annex 7.
- 2.8.2 Any default by the Company under the obligations listed in Annex 14 shall allow the Regulatory Authority to take appropriate sanctions as follows:
- 2.8.2.1 Any default under Annex 14 and established by the Regulatory Authority shall be notified to the Company.
- 2.8.2.2 The Regulatory Authority shall warn or fine the Company, depending upon the event of default and respective sanction, in accordance with the nature of the sanction, directly or through document in the form of delivery notice.
- 2.8.2.3 The Company shall have 15 (fifteen) days to pay such penalties.
- 2.8.2.4 Failure to pay the penalties hereafter defined in due time shall result in an additional 10 % increase of the amount of the penalty, plus interest of 1 % per month.
- 2.8.2.5 In case of recurrent failure for 120 (one hundred and twenty) days the penalty amount shall be doubled.
- 2.8.2.6 Payment of the penalty shall not discharge the Company of remedying the relevant failure/default, nor shall it discharge it of any civil or criminal liability.
- 2.8.2.7 Recurrent default under its obligations of this Agreement may be cause for termination of the Concession by the Conceding Authority.
- 2.8.2.8 The Company shall have the right to request from the Conceding Authority and Regulatory Authority that the penalties applied be reconsidered, after the payment of the respective penalties, within a maximum of 30 (thirty) days from the date of penalty receipt.
- 2.8.2.9 Should the Conceding Authority/Regulatory Authority fail to answer the request within 60 (sixty) days, the amount paid shall be returned to the Company.

Comment [ID33]: Domestic legislation and other law should be reviewed to see if a penalty is enforceable. An alternative approach to increasing the amount by 10% if there is a delay in payment would be to give a discount on the higher amount (original penalty plus 10%) if payment is made within a particular period of time.

Comment [ID34]: See note 35.

- 2.8.2.10 The Company shall be warned in case of default under any obligation pertaining to GROUP I as described below and corresponding to Annex 14, section 1 to 3.
- 2.8.2.11 The Company shall be warned and/or imposed a penalty in case of default under any obligation pertaining to GROUP II as described below and corresponding to Annex 14 section 4 to 18.
- 2.8.2.12 The Company shall be imposed a penalty in case of default under any obligation pertaining to GROUP III as described and corresponding to Annex 14, section 19 to 25.
- 2.8.2.13 for recurrent default of the obligations classified in GROUP I, the Company shall be liable to the penalty, established for GROUP II.
- 2.8.2.14 for recurrent default of the obligations classified in GROUP II, the Company shall be liable to the penalty, established for GROUP III.
- 2.8.2.15 the penalties per incident shall be as follows:
- [. GROUP II: [] USD.]
 [. GROUP III: [] USD.]

3. THE CONCEDED AUTHORITY'S OBLIGATIONS AND RIGHTS

3.1 Obligations of the Conceding Authority

The Conceding Authority shall:

- (a) ensure that the Company can take possession of the Railway Perimeter and have free access to it ;
- (b) Declare of public utility for Concession purposes, assets considered necessary to the Concession and listed in Annex 12.

3.2 Rights of the Conceding Authority

The Conceding Authority shall have the right to:

- (a) regulate and monitor the services rendered under Concession ;
- (b) intervene in order to guarantee the adequate rendering services, whenever necessary ;
- (c) be entitled to terminate the Concession Rights in the cases provided for this Agreement ;

Comment [ID35]: There is a risk of confusion as there are two authorities responsible for regulating performance namely the Regulator and the Conceding Authority. It would be appropriate to check what the remedies of the regulator would be under legislation to ensure that the Company is not subject to double jeopardy.

- (d) verify compliance with regulatory conditions for the services and the clauses herein ;
- (e) make its best efforts to see that good quality service is carried out by the Company ; monitor users' requests and complaints;
- (f) check reasonableness of Company's practices,
- (g) collect and publish data related to the activity of the [_____] Port,
- (h) Stimulate increase of quality, production, and environment protection.

Comment [ID36]: There is an issue as to what happens if there is an increase in cost or reduction in income as a consequence of the imposition of higher standards e.g. environmental standards.

4. **THE REGULATORY AUTHORITY**

The Regulatory Authority shall be an administrative body which is referred to in [RELEVANT LEGISLATION]. Before the setting into place of such Regulatory Authority and until the day it is operational, the Ministry shall carry out its functions and prerogatives.

The role of the Regulatory Authority is to monitor and supervise the proper and adequate performance by the Company in carrying out its obligations under this Agreement, including without being limited to, the fulfillment of all Applicable Regulations, Maintenance and Performance Indicators.

5. **COMMENCEMENT**

5.1 **Conditions Precedent**

The following shall be conditions precedent to the issue of the Notice of Approval:

- a. Initialing of this Agreement by the Company and the Conceding Authority ;
- b. Grant of the Approvals required to be obtained prior to the Date of Entry into Force from the Relevant Authorities ;
- c. Delivery to the Company of a legal opinion by the Conceding Authority's legal adviser in the form set out in Part I of Annex 11 ;
- d. Delivery to the Conceding Authority of a legal opinion by the Company's legal adviser in the form set out in Part II of Annex 11 ;

- e. Subscription and realization of sufficient share capital to allow the Company to carry out its obligations under this Agreement,
- f. Delivery by the Company to the Conceding Authority of the Rehabilitation Bond in order to guarantee the proper and timely performance of the Rehabilitation Works, issued by a financial institution acceptable to the Conceding Authority, substantially in the form set out in Annex 6, in an amount of [] and valid until the later of (a) twelve (12) months after [Final] Rehabilitation Completion, and (b) the provision of the Maintenance and Performance Bond ;
- g. Establishment of the Inventory of Port's Equipment to be leased or bought by the Company, and initialing of the resulting contracts to be put in Appendix 2.
- h. Delivery of Insurance Certificate in accordance with Clause 17.

5.2 Satisfaction of Conditions Precedent, Date of Entry into Force

- 5.2.1 The Company and the Conceding Authority shall use their best efforts to procure the satisfaction of the conditions precedent specified in Clause 5.1 as soon as practicable. Upon satisfaction of such conditions, the Conceding Authority shall issue a Notice of Approval.
- 5.2.2 Upon reception of the Notice of Approval, the Company shall transfer the value of the Entry Fee on the Escrow Account pursuant to Clause 2.5.1.2.
- 5.2.3 Following provision of the Rehabilitation Bond in accordance with Clause 5.1(f), unless there is any accrued liability under the Bid Bond, the Conceding Authority shall undertake with due expedition such action as the Company may reasonably request to assist the Company in procuring the release of so much of the Bid Bond as remains outstanding.
- 5.2.4 If the conditions specified in Clause 5.1 are not fulfilled or 'waived by mutual agreement of the parties within [six] months of the date of this Agreement, either party may terminate this Agreement immediately by notice and neither party shall be liable to the other for any damages or losses in respect thereof except that the Conceding Authority shall be entitled to draw the Bid Bond (or the equivalent amount of the Rehabilitation Bond if provided) if the non-fulfillment of the conditions precedent was due to the Company's failure to use its best endeavors or to proceed in accordance with the Tender.
- 5.2.5 Within three (3) business days after confirmation of the reception of the Entry Fee by the Conceding Authority on the above mentioned

Comment [ID37]: There are requirements on the Company to interface with the railway Concessionaire(s) and yet there is no requirement for the Railway Concessionaire(s) to have been appointed. The Agreement does not really cover what is to happen if the Railway Concessionaire(s) have not been appointed.

Escrow Account, the Company and the Conceding Authority shall sign the Concession Agreement.

5.3 Transition Period

Upon signature of the Concession Agreement which materializes the date of Entry into Force of this Agreement, the Company and the Conceding Authority shall agree within ten (10) days of a Transition Period Agreement, which will address inter alia the following issues:

- a. Conditions and calendar of transfer of site, equipment and personnel included within the Perimeter;
- b. Establishment of inventories; sales of various materials or utilities by the Conceding Authority to the Company;
- c. Administrative procedures and approvals;
- d. Transfer of utility contracts to the Company;
- e. Transfer of personnel;

5.4 Takeover Procedures

- 5.4.1 Upon satisfactory completion of the above Transition Period program, the Company may issue to the Conceding Authority a Request for Take Over.
- 5.4.2 Upon reception of this Request, the Conceding Authority shall issue a Certificate of Commencement which will confirm the transfer of free possession of the Perimeter.
- 5.4.3 Upon reception of the Certificate of Commencement, the Company shall, pursuant to Clause 2.5.1.4, transfer the Entry Fee to the Conceding Authority within three (3) business days.
- 5.4.4 The Commencement Date of this Agreement will start upon confirmation of the transfer of the Entry Fee by the Conceding Authority. Starting from this date, the Company will be fully responsible for all operations within the agreed Perimeter.

6. TRANSFER OF FREE POSSESSION OF THE PERIMETER

6.1 Acquisition of Free Possession

- 6.1.1 Subject to the definition of the Perimeter as set forth in this Agreement, specially regarding the rights which were granted by Port

concerning certain terminals and equipment, the Conceding Authority shall be responsible for obtaining at its own cost Free Possession of the Perimeter (in its conditions as at the date of this Agreement) and of the Rights of Way.

- 6.1.2 Subject to the terms of definition of the Perimeter as set forth in this Agreement, specially regarding the rights which were granted by the Port concerning certain terminals and equipment in the Perimeter, the Conceding Authority declares that it is entitled to all Rights of Way and use of the Perimeter so as to be in a position to grant the Company its Concession Rights as per this Agreement.
- 6.1.3 The Conceding Authority shall not dispose of or grant or agree to dispose of or to grant any present or future right(s) or interest(s) in any part of the Perimeter, and shall keep the same free from any liens or encumbrances, that might have a materially adverse effect on the Company's enjoyment of the Concession Rights during the Concession period.

6.2 Delivery Dates[land Site Packages]

The Conceding Authority shall deliver Free Possession of the Perimeter (or the relevant parts thereof) and shall grant the Rights of Way to the Company not later than 3 business days after the Commencement Date.

6.3 The Conceding Authority to Certify Free Possession

Subject to the provisions of this Agreement, the Conceding Authority shall certify the delivery to the Company of Free Possession of the Perimeter [(or the relevant parts thereof)] together with the necessary Rights of Way, by delivery [on each occasion] of a certificate to that effect, and shall indemnify and hold the Company harmless against all claims, costs, actions, liabilities and expenses sustained or incurred by the Company as a result of any failure by the Conceding Authority to perform its obligations under this Clause 6.

7. QUALIFIED ENGINEER

7.1 Appointment of a Qualified Engineer

- 7.1.1 The Qualified Engineer may be appointed by the Conceding Authority.

Comment [ID38]: Bearing in mind that the Qualified Engineer issues the Rehabilitation Certificate this should be a mandatory appointment and provision should be included for appointment of a replacement if the Qualified Engineer is unwilling or unable to act.

7.1.2 The fees and expenses of the Qualified Engineer shall not be borne by the Company, if the Perimeter is not to be transferred all at the same time.

7.2 Role of the Qualified Engineer

7.2.1 The Qualified Engineer shall act as an independent and objective reporter to the Conceding Authority and the Regulatory Authority on the progress and condition of the Rehabilitation Works, the operation, and maintenance, development of the Perimeter and optimization of the services performed in the Perimeter and on any other matters relating to the Project.

7.2.2 The parties hereby undertake to each other that they shall grant the Qualified Engineer such access to the Perimeter and Port, the Rehabilitation Works and any other place or information relating to the Project as he may reasonably require in order to carry out his obligations. The Company shall not at any time seek to influence his independence and objectivity. The aforesaid undertakings shall survive the termination of this Agreement.

7.2.3 In accordance with Clause 10.3 the Qualified Engineer shall issue to the Conceding Authority the Rehabilitation Completion Certificate in case the Company has fulfilled its obligations. Such certificate is then given to the Company by the Qualified Engineer which may use it to obtain the waiving and cancellation of the Rehabilitation Bond by recovering the original from the Conceding Authority.

Comment [ID39]: Clause 11.2 envisages that the Conceding Authority will issue the Certificate along with the Qualified Engineer so some confusion here.

Comment [ID40]: Subsequently under Clause 10.3 there is clear obligation on the Conceding Authority to procure the release of the Rehabilitation Bond on receipt of the Rehabilitation Completion Certificate.

8. DESIGN

8.1 Design Criteria

The Company shall prepare a preliminary design for the Rehabilitation Works and Development Works in accordance with the Design Criteria mentioned in Appendix 5. The Company shall prepare the Detailed Design on the basis of the preliminary design approved by the Conceding Authority.

8.2 Approval of Design

The Company shall not commence or permit the commencement of construction of any part of the Rehabilitation Works until the preliminary design and the detailed design has been approved by the Conceding Authority on the basis of the report of Qualified Engineer in accordance with the Design Review Procedure.

8.3 Changes to Design

The Company may at any time propose changes to the Design Criteria, preliminary design and/or detailed design if such changes will expedite the rehabilitation, reduce the cost of rehabilitation, operation or maintenance, or improve the quality of the Project. However, the Company shall not make any such changes without first obtaining the written approval of the Conceding Authority in accordance with the Design Review Procedure.

8.4 Responsibility for Design

The Company shall be solely responsible for any deficiency in the design of the Rehabilitation Works. The failure of the Conceding Authority to object to any stage of the design or any changes thereto or any approval by the Conceding Authority shall not be construed as a waiver by the Conceding Authority of any of its rights under this Agreement or in any way relieve the Company of its obligations hereunder.

9. REHABILITATION AND DEVELOPMENT WORKS

9.1 Principal Obligation of the Company

The Company undertakes, at its own cost and risk, to carry out or to procure the performance of the Rehabilitation Works and Development Works in accordance with the Design Criteria, the Rehabilitation Schedule and the provisions of this Agreement and meet the minimum quality of services under the Maintenance and Performance Standards according to Clause 9.2.

9.2 Rehabilitation Schedule

- 9.2.1 The Company shall carry out the Rehabilitation Works as required in Clause 9.1 herein above within 3 (three) years as from Entry into Force: [_____]

Comment [ID41]: "Entry into Force" is not a defined term although "Date of Entry into Force" is.

The foregoing Milestone Dates may be revised in the event of Force Majeure in accordance with the provisions of Clause 20 or as a result of delay caused by a breach of this Agreement by the Conceding Authority or by mutual agreement of the parties.

- 9.2.2 These Rehabilitation Works shall be done in the Rehabilitation Schedule as described in Annex 4.

9.3 Rehabilitation and Development Contractors

- 9.3.1 The Company shall freely enter into any contract with any third party for the performance of the Rehabilitation Works and Development Works or any part thereof.
- 9.3.2 The appointment of any Rehabilitation Contractors or any third party to undertake any part of the Rehabilitation Works and Development Works shall not relieve the Company from its obligations under this Agreement.

9.4 Clearance of Site

- 9.4.1 The Company shall be responsible, at its own cost for removal of all structures, buildings and other impediments hindering the performance of the Rehabilitation Works on the relevant part(s) of the Perimeter and the Rights of Way and on any land provided by the Conceding Authority to the Company in respect of which Rights of Way are granted hereunder.
- 9.4.2 The Company shall be responsible for the costs of any diversions to and rerouting of roads on Perimeter which it deems to be necessary for the Rehabilitation Works.
- 9.4.3 The Company shall act in cooperation with the Railway Concessionaire for its obligations of Clearance of site.

9.5 Archaeological Finds

- 9.5.1 The Company hereby acknowledges that any fossils, coins, articles of value or antiquity and structures and other remains or things of geological or archaeological interest present on the Perimeter or Rights of Way are and shall remain the property of the Conceding Authority. In the event of the discovery of any such items the Company shall immediately inform the Conceding Authority and shall:
- a. if the items discovered are movable, allow the Conceding Authority, at the Conceding Authority's cost, to enter the Perimeter and effect their removal ; or
 - b. If the items are immovable allow the Conceding Authority, at its own cost, to effect such investigation as the Conceding Authority may reasonably require.
- 9.5.2 All costs arising from such protective measures shall be borne by the Conceding Authority, and the Conceding Authority shall grant such

extension of time and reimburse the Company for such increase in costs as is required to put the Company in the same economic position as it would have been in had the relevant measure not been necessary, provided that the obligation of the Conceding Authority under this Clause is subject to the obligation of the Company to use its best endeavors at all times to avoid or minimize such delays and increases in costs.

9.6 Unforeseeable Man-Made Environmental Hazards

9.6.1 The Company shall be deemed to have investigated and satisfied itself, prior to entering into this Agreement, as to all matters affecting the Perimeter, including all underwater and underground conditions, dumpsites, shipwrecks, chemical deposits, munitions, mines, defects, climatic conditions and any other potential obstacles to the Rehabilitation Works. Accordingly, the Company shall not be entitled inter alia under Clause 9.6.2 to any extension of time or any payment from the Conceding Authority in respect of such matters which either were or should reasonably have been foreseen by the Company on or prior to the date of this Agreement.

9.6.2 Subject to Clause 9.6.1 and under the express condition that such following obligation shall terminate one year as from the Entry into Force of this Agreement the Conceding Authority shall defend, indemnify and hold the Company harmless from and against all liabilities, damages, losses, expenses and claims caused by the existence on or affecting the Perimeter at the date of signature of this Agreement of any dangerous dumpsites, shipwrecks, hazardous chemical contamination or deposit, munitions, mines, or other man-made environmental hazards. In the event of discovery, prior to Rehabilitation Completion, of any such hazards which, in the opinion of the Company, necessitate an extension of time and/or an increase in costs, the Company shall give notice of the same to the Conceding Authority and to the Qualified Engineer together with all supporting information. The Conceding Authority shall grant such extension of time and reimburse the Company for such increase in costs as in the opinion of the Conceding Authority is required to put the Company in the same economic position as it would have been in had the relevant hazard not existed, provided that the Company shall use its best endeavors at all times to avoid or minimize such delays and increases in costs.

9.7 Information Relating to the Rehabilitation Works

9.7.1 The Company shall furnish to the Conceding Authority and Regulatory Authority all such reports and other such information as the Conceding

Comment [ID42]: This is confusing. The whole purpose of Clause 9.2 is to extend to the Company certain protection in the event certain hazards exist. In a jurisdiction where there has been military activities or there have been previous industrial activities it is reasonable to foresee that there might be hazardous materials although the extent and exact nature of those materials may not be known.

Authority and Regulatory Authority may reasonably request from time to time for the purpose of ensuring that the performance of the Rehabilitation Works and Development Works by the Company is in compliance with the Company's obligations hereunder including the compliance with:

- (a) Applicable Regulations and generally applicable standards, rules and regulations ;
- (b) the key technical specifications used for the Rehabilitation Works and Development Works ; and

9.7.2 Upon [Final] Rehabilitation Completion, the Company shall supply the Qualified Engineer, the Regulatory Authority and the Conceding Authority with copies of all as-built drawings and such other technical and design information relating to the completed Rehabilitation Works as they may reasonably request.

9.8 Ownership and Inventory of the Perimeter

9.8.1 Subject to the following Clause 9.8.2, the parties hereby agree that legal title to the Perimeter or any part thereof, including the Rehabilitation Works and, Development Works subject to Clause 15.1 hereinafter, shall be held by the Conceding Authority at all times.

All Materials or equipment to be brought to the Perimeter by the Company shall be deemed to remain the property of the Company as and when they are brought on to the Perimeter.

9.8.2 Prior to the Commencement Date, the Conceding Authority and the Company shall draw up inventories of the infrastructure, superstructure and associated assets and facilities which form part of the Perimeter as follows. The Company shall ensure that the inventories are kept up-to-date throughout the Concession Period and shall periodically keep the Conceding Authority informed. The following inventories shall be made by the Conceding Authority and the Company:

9.8.2.1 An inventory of the existing infrastructure and superstructure located within the Perimeter area and on which legal ownership title is held by the Conceding Authority;

9.8.2.2 Two inventories of the conceded infrastructure and superstructure shall be (have been) made:

Comment [ID43]: It would be better to have a clear understanding of what is intended. If it is intended that certain movables which could be construed as equipment should be installed by the Company and be part of the Port then clear provision should be made for the transfer of those assets to the Conceding Authority unless the domestic law already provides for this. Where plant and equipment may need to be repaired off site or replaced provision should be made as to how this should be effected.

- a. one before the Entry into Force of this Agreement ;
- b. One before the Commencement Date of this Agreement.

9.8.2.3 An inventory of all equipment located within the Perimeter and which is the property of the Conceding Authority as of the date of Entry into Force of this Agreement. Such inventory shall make the distinction between:

- a. equipment owned by the Conceding Authority and which it will use as a contribution in kind by the Conceding Authority to pay out its share in the capital stock of the Company, being understood that the ownership of this equipment is transferred to the Company ;
- b. equipment owned by the Conceding Authority and which is to be sold to the Company ;
- c. equipment owned by the Conceding Authority and which is to be leased to the Company ;
- d. Equipment owned by the Conceding Authority and which is to be removed by the Conceding Authority from the area of the Perimeter or which is to be left on the Perimeter at a designated area under conditions to be agreed upon.

9.8.3 Inventory of Development Works

An inventory of all Development Works which would be built, constructed or brought by the Company on the Perimeter shall be made by the Company and shall be kept updated.

Comment [ID44]: There would be a logic in having an asset register (and better still an asset condition register) for the Rehabilitation Works in addition to an asset register for the development Works.

10. INSPECTION AND [FINAL] REHABILITATION COMPLETION

10.1 Inspection

When the Company considers the Rehabilitation Works [(or any section thereof)] have been completed in accordance with this Agreement, the Company shall give notice thereof in writing to the Qualified Engineer and the Conceding Authority. Within 14 days of receipt of such notice the Conceding Authority, the Company and the Qualified Engineer, shall inspect the Rehabilitation Works [(or the relevant section thereof)].

10.2 Works Necessary

If the Conceding Authority is not satisfied that the Rehabilitation Works [(or relevant section thereof)] have been completed in

accordance with this Agreement, the Conceding Authority shall give notice to that effect to the Company stating its reasons and identifying the work to be carried out. On receipt of such notice the Company shall take such steps as are necessary properly to complete the Rehabilitation Works [(or relevant section thereof)] and shall submit a further notice in accordance with Clause 10.1.

10.3 Rehabilitation Completion Certificate

If the Conceding Authority is satisfied that the Rehabilitation Works [(or relevant section thereof)] have been completed in accordance with this Agreement, the Conceding Authority shall immediately issue together with the Qualified Engineer the Rehabilitation Completion Certificate.

10.4 Final Rehabilitation Completion

Final Rehabilitation Completion shall be deemed to occur on the date of issue of the Rehabilitation Completion Certificate for the last section of the Rehabilitation Works to be completed.

11. DELAY IN [FINAL] REHABILITATION COMPLETION

11.1 Delay due to the Company

11.1.1 If Final Rehabilitation Completion is not achieved by the Target Rehabilitation Completion date set out in the Rehabilitation Schedule for any reason other than a breach of this Agreement by the Conceding Authority or by Force Majeure, the Conceding Authority shall be entitled to claim from the Company and receive damages without prejudice to the Conceding Authority's right to terminate this Agreement under Clause 21.

11.1.2 For the payment of such liquidated damages, the Conceding Authority shall be entitled to draw on the Rehabilitation Bond until the Rehabilitation Bond has been fully drawn down after which the Company shall have no further obligation to the Conceding Authority in respect of delay in [Final] Rehabilitation Completion.

11.2 Release of the Rehabilitation Bond

Following the later of (a) the receipt by the Conceding Authority of the Maintenance and Performance Bond in accordance with Clause 12.2, and (b) twelve (12) months after [Final] Rehabilitation

Comment [ID45]: Whilst this sub-clause refers to liquidated damages the earlier sub-clause does not. An alternative approach to liquidated damages might be not to allow an uplift in charges to users until the Rehabilitation Works have been completed. The problem with liquidated damages is that a contingency will have to be built in somewhere and users will be paying for the contingency even though the payment goes to the Conceding Authority.

Completion, unless there is any accrued liability under the Rehabilitation Bond the Conceding Authority shall undertake with due expedition such action as the Company may reasonably request to assist the Company in procuring the release of so much of the Rehabilitation Bond as remains outstanding.

12. OPERATION AND MAINTENANCE

12.1 Principal Obligation of the company

The Company shall be responsible for the management, operation, maintenance, repair, development and optimization of the Perimeter throughout the Concession Period, at its own cost and risk. The Company shall ensure that throughout the Concession Period the Perimeter is at all times suitable for use by the public and is operated and maintained safely and in accordance with all Applicable Regulations, all Maintenance and Performance standards to be approved by the Regulatory Authority, Prudent Industry Practice principles, the Code of Operations of the Port.

12.2 Maintenance and Performance Bond

No later than twelve (12) months after Rehabilitation Completion, the Company shall deliver the Maintenance and Performance Bond to the Conceding Authority to guarantee the proper and timely performance of the Company's obligations in relation to the operation and maintenance of the Perimeter and achievement of respective indicators set in Appendix 7, issued by a financial institution acceptable to the Conceding Authority, substantially in the form set out at Annex 6, in an amount of US dollars[_____] and valid until the provision of the Handback Bond in accordance with Clause 18.

12.3 Operation and Maintenance Contractors

The appointment of any operator or any other third party to undertake operation or maintenance of the Perimeter shall not relieve the Company from its obligations hereunder.

12.4 Public Service Authorities

The public police and coastguard service and the measures necessary in order to ensure the protection of persons and property in the Port and Perimeter shall be undertaken by the appropriate Government Authorities at their own cost and in consultation with the Company. These

Authorities shall ensure that the level of law enforcement in the Perimeter is consistent with prevailing [_____] laws and practice.

12.5 **Inspection and Maintenance**

- 12.5.1 Within six months (6 months) of the Commencement Date, the Company shall prepare a manual for inspection and maintenance of the Perimeter which shall be such as to meet Applicable Regulations on safety and which shall include procedures and schedules for carrying out periodical and annual inspections, routine preventive maintenance, heavy repair maintenance and annual maintenance, and for adjusting and improving the inspection and maintenance program. In drafting such manual, the Company shall give due consideration to the usual standards and practices which are applicable on an international basis and particularly in the State's neighboring countries, as well as per application of [_____] Transport and Communications Commissions rules. The Company shall provide a copy of such manual to the Regulatory Authority [and the Qualified Engineer if appointed] and shall incorporate [their/its] reasonable comments. Thereafter such manual shall not be modified without the prior approval of the Regulatory Authority, which approval shall not be unreasonably withheld.
- 12.5.2 After the Entry into Force and until the end of the Concession Period, the Regulatory Authority may inspect the Perimeter from time to time to ensure that the Company's obligations in respect of such operation and maintenance are being discharged in accordance with the terms of this Agreement.
- 12.5.3 If any inspection by the Regulatory Authority reveals that the Perimeter is not being maintained in accordance with this Agreement, the Regulatory Authority shall give notice to the Company of the default and specifying:
- (a) the works required to rectify the default ; and
 - (b) A reasonable period of time (having regard to the nature of the default and the extent of the works required) in which the Company is to make good the default at its own cost.
- 12.5.4 If, at any time, the Regulatory Authority serves notice under Clause 12.5.3 and the Company fails to rectify the default within the time period specified, then the Conceding Authority or the Regulatory Authority may (without prejudice to the any other right or remedy available to the Conceding Authority or the Regulatory Authority) itself take such steps as necessary to rectify the default or engage

a third party to take such steps. The Company shall reimburse the Conceding Authority or the Regulatory Authority for all reasonable costs so incurred and failing proper and timely reimbursement the Conceding Authority or the Regulatory Authority shall be entitled to draw on the Maintenance and Performance Bond to cover such expense to the full amount of the Maintenance and Performance Bond.

The notices and penalties to be imposed on the Company in case of event of default are described in Clause 2.8 and Annex 14.

12.6 Availability of the Perimeter

12.6.1 During the Concession Period, the Company shall ensure that the Perimeter is available and open to users and that the service offered to the public at the Perimeter is convenient and safe at all times in all weather conditions. The Company shall not be considered in breach of its obligations under this Clause 12.6 to the extent that all or any part of the Perimeter is not available to users as a result of : (i) Force Majeure ; (ii) a breach of this Agreement by the Conceding Authority; (iii) measures taken in accordance with this Agreement to ensure the safety of the Perimeter (including maintenance) ; or (iv) compliance with a request of the Conceding Authority, or any Government Authority, the effect of which is to close all or part of the Perimeter. Notwithstanding the foregoing, the Company shall keep all unaffected parts of the Perimeter that can be safely operated open to users at all times.

12.6.2 Subject to the provisions of this Agreement, the Company shall be free to organize the services provided to users of the Perimeter taking into account the market demand for and commercial viability of such services which the Company shall be entitled to evaluate at its own discretion.

12.6.3 The Company shall provide its services to users in order of priority based on the order of receipt of the requests for service from the users, provided that the Company may enter into agreements to accord greater priority to regular users, and subject always to the requirements of safety at the discretion of the Company under the control of the police and coastguard at the Perimeter. The Company shall keep a register of the requests for service received from users and shall make available such registers to the Conceding Authority and to the public on reasonable request.

12.7 Code of Operations

- 12.7.1 No later than six (6) months after the Entry into Force the Company shall have prepared and shall have submitted to the Conceding and Regulatory Authorities rules a "Code of Operations" . The entry into effect of the Code of Operations shall be subject to the prior written approval of the Regulatory Authority which shall not be unreasonably withheld. The Company shall be entitled to modify the Code of Operations during the Concession Period, provided that the entry into effect of any modification shall be subject to the prior written approval of the Regulatory Authority which shall not be unreasonably withheld.
- 12.7.2 Until issuance of such Code of Operations the existing legal framework shall apply.
- 12.7.3 The Company shall give users of the Port due notice of the Code of Operations and at least fourteen (14) days notice of any modification thereto.

12.8 Safety and Emergency Measures

- 12.8.1 The Company shall manage, operate, maintain and repair the Perimeter so as to improve the safety of the services provided at the Perimeter and of the equipment located therein.
- 12.8.2 Notwithstanding any other provision of this Agreement the Regulatory Authority shall have the right to close the Perimeter or any parts thereof, or take any other measure if, in the Regulatory Authority's opinion, such closure or measure is necessary in an emergency case for the protection of the public.

12.9 Operating Reports

- 12.9.1 Every three (3) months the Company shall submit to the Conceding Authority and the Regulatory Authority a report in the format to be agreed upon between the Conceding Authority and the Company:
[Perimeter activity details required by the Conceding Authority such as volume of activity, loading and unloading times etc.].
- 12.9.2 In case there is a decrease in traffic/activity from one year compared to the other, the Company shall immediately inform the Regulatory Authority and Conceding Authority, and it shall give all detailed comments, and explanations thereof.

12.10 Loan of Perimeter Equipment and Personnel to Users

If the Company hires-out equipment and personnel to users pursuant this Agreement, the Company shall ensure that:

- a. the users engage sufficient personnel to allow the safe and proper use of the equipment ; and
- b. the equipment is only used for the purposes for which it is intended; and
- c. The user is made responsible for any improper use and adequately insured.

12.11 Perimeter Equipment

The Company shall be entitled to hire-out or sell any of its own equipment within the Perimeter provided that the Company shall obtain the prior written approval of the Conceding Authority for:

- (a) any contract of hire of its equipment to any third party with a duration in excess of [one year] ; and
- (b) For any sale of its own equipment to any third party for a value above [_____] USD.

In addition, in the case of any sale of its own equipment to any third party, the Company shall offer the Conceding Authority a first right of refusal. Accordingly, such equipment may only be sold to third parties provided that the Company has first given notice of the terms of the intended sale to the Conceding Authority and provided that the Conceding Authority has not offered to purchase the equipment on identical terms within [thirty (30)] days after receipt of such notice.

12.12 Personnel

12.12.1 The Company shall first select its national staff from existing Port employees. To avoid any doubt, the existing employees of Port for the Port will remain with Port unless they are invited to be employed by the Company and accept to join the Company. In such case their earnings and benefits should not be reduced compared to their previous situation.

12.12.2 The Company must select its employees during the Transition Period and must notify the Conceding Authority of names and

identity of the persons who will have been selected.

12.12.3 The personnel selection procedure shall be made in accordance with conditions to be agreed upon between the selected bidders to the Tender, the Company and the Conceding Authority to be included as Annex 16 to the present Agreement.

12.12.4 The Company shall comply with the Labor and Tax legislation in respect of the personnel employed by it, including for the employees recruited from Port.

12.13 National Services, Goods and Labor

12.13.1 The Company shall use national services and goods whenever they are competitive in terms of quality, service, relevant expertise, delivery schedule and price, and shall insure that its contractors and sub-contractors observe this provision. The Company shall include national contractors in invitations for competitive bidding for contracts if they produce services and goods of the kind and quality required and shall require their contractors to do the same with respect to sub-contracts. When evaluating bids for contracts generally, the Company shall take into account the extent to which the bidders use national services and goods. The Company shall be responsible for the observation of these provisions by its contractors and their subcontractors.

12.13.2 With the exception of the minimum of foreign specialists required, competent national labor shall be employed for the construction, operation and maintenance of the Project. The Company shall comply with national labor laws and respect the rights of the workers. The Company shall be responsible for compliance with this provision by its contractors and their sub-contractors.

12.14 Warehousing and Storage of Goods

Warehouses, terminals and storage yards shall be kept locked and secure outside normal working hours and access thereto shall be restricted to properly authorized persons, such as police officers, guards, customs or immigration authorities and coastguard.

The Company shall carry out a visual inspection and such other measures as may be necessary to ensure that goods stored in warehouses at the Perimeter conform to the applicable health and safety standards and all Applicable Regulations and shall be

entitled to refuse to store goods which do not so conform.

The Company shall take appropriate measures to avoid cross-contamination of goods stored in warehouses and terminals.

12.15 Claims Register

The Company shall maintain a record of claims and complaints received from users of the Perimeter. The Company shall make available such register to the Regulatory Authority and to the public on reasonable request.

13. TARIFFS FOR COMMERCIAL SERVICES

13.1 Company's Entitlement to Collect Tariffs

13.1.1 The Company shall be entitled to charge and collect payment of port dues and tariffs in consideration for the services supplied by the Company related to cargo and passenger transportation services on the Perimeter, in accordance with the terms of this Agreement.

13.1.2 All expenses relating to tariffs collection shall be borne by the Company.

13.1.3 The Company may set and collect tariffs for auxiliary operations and may adjust such tariffs.

13.2 Tariffs Levels

13.2.1 The tariffs charged by the Company for any service shall at all times be sufficient to cover the long-term costs to the Company in providing the services, except in the case of a promotional offer which is intended to increase the profitability of the Perimeter and which is available for a limited period of time.

13.2.2 Subject to the foregoing, the Company shall be free to set and revise the tariffs charged for its services in order to take into account the costs it incurs and/or the situation of the transportation market. The tariffs may include reductions intended to increase traffic, improve the conditions of use and should improve the profitability of the Perimeter.

13.2.3 On foreign ships and transit traffic, the Company shall be allowed to charge and collect tariffs in foreign currencies such as USD.

On domestic ships carrying out domestic transportation through the

Perimeter facilities and services, the tariffs shall be charged and collected in national currency.

13.2.4 For maritime services the tariffs will be subject to the approval of the Regulatory Authority.

13.3 Notice of Changes in Tariffs

The Company shall provide clients with at least fourteen (14) days notice of any changes to tariffs levels during the Concession Period.

13.4 Users Exempt from tariffs

Officers and agents of the ambulance, firefighters, police, coastguard and customs services as well as of the armed forces when performing their public duties shall be exempt from the obligation to pay tariffs for using the facilities and services of the Perimeter.

14. GENERAL OBLIGATIONS OF THE PARTIES

14.1 Compliance With and Changes in Laws and Regulations

Both parties shall at all times observe and comply with all Applicable Regulations in carrying out their obligations under this Agreement. Both parties shall be deemed at all times to have full knowledge of the relevant laws and regulations of [_____]

14.2 No Interference by the Conceding Authority or Government Authorities

14.2.1 Subject to the provisions of this Agreement, the Conceding Authority undertakes not to do, and to ensure that no Government Authority does, anything which materially prevents or adversely affects the Company's ability to perform its obligations under this Agreement or the operation of or free access for users to the Perimeter or the collection by the Company of tariffs from users of the Perimeter save as may be necessary on the grounds of national security, public safety or for the discharge and performance of its duties under any Applicable Regulations.

14.2.2 If any operation or action is to be carried out by the Conceding Authority or its designee on the grounds of national security, public safety or for the discharge and performance of its duties under any

applicable law, which will materially prevent or adversely affect the Company's ability to perform its obligations under this Agreement or the operation of or free access of clients for the Perimeter or the collection by the Company of tariffs from clients of the Perimeter, the Conceding Authority shall ensure that, except in the case of an emergency, written notice thereof is first given to the Company a reasonable period of time in advance so that such persons shall discuss with the Conceding Authority and the Company the method of carrying out such operations or action to ensure the least practicable disruption to the Company within the limits imposed by the prevailing requirements of national security, public safety or law. Nevertheless, if any such action by the Conceding Authority or its designee does cause delay to the Rehabilitation Works, the Rehabilitation Completion and the Concession Period shall be extended by an appropriate time period as determined by the Regulatory Authority or its Qualified Engineer.

14.3 Environmental Protection

In the performance of its obligations under this Agreement the Company shall ensure that appropriate measures are taken to protect the environment of and around the Site from pollution, noise and other results of its operations in accordance with any Applicable Regulations.

14.4 Utilities

14.4.1 The Company shall pay for Utilities at the normal commercial rates.

14.4.2 The Company shall, at its own cost and risk, be responsible for the clearance, relocation and diversion of all Utilities on the Perimeter affecting the Rehabilitation Works or necessary to operate and maintain the Perimeter.

14.5 The Conceding Authority May Enter Perimeter

The Conceding Authority and the Regulatory Authority or any designated representative thereof may from time to time (subject and without prejudice to Clauses 14.2 and 20.1) enter any part of the Perimeter in order to:

- (a) ascertain whether the Rehabilitation Works are to become unsafe or dangerous ; or
- (b) Observe tests of materials, equipment or plant carried out, with the Qualified Engineer if they so elect.

14.6 Safety and Security on Perimeter

14.6.1 The Company shall ensure that its operations on the Perimeter comply with all applicable health and safety standards under national law and generally all Applicable Regulations.

14.6.2 The Company shall be responsible for taking all necessary security measures on the Perimeter, including measures to exclude unauthorized access to the Rehabilitation Works and construction of the Developments Works. The Company's security agents shall wear or carry proof of identity and function when performing their duties.

14.7 Taxes

14.7.1 The Company shall pay all taxes, customs duties and charges in accordance with all applicable laws and regulations of [_____], unless it benefits from privileges applied and obtained from the Relevant Authorities.

14.8 Approvals

The Company shall at its own cost make all necessary applications and carry out all other necessary acts at the requisite time and in requisite form to obtain and maintain such Approvals as may be necessary for the Company to perform its obligations under this Agreement and the Development Plan.

14.9 Company's Responsibility for its Contractors

For avoidance of doubt, the Company shall be responsible for the acts or omissions of any Rehabilitation Contractor if any and all its other sub-contractors, their employees and agents, as if such acts and omissions were the acts and omissions of the Company.

15. DEVELOPMENT WORKS

15.1 Developments Works

15.1.1 The Company's objective would be to exploit public port system, all other business activities being forbidden unless these activities are associated with public services and have previous authorization from the Conceding Authority such as:

- (i) use of areas for installation of data, voice, text, image and other type of transmission system,

- (ii) commercial exploitation of property,
- (iii) technical consulting services,
- (iv) installation and exploitation of intermodal terminals,
- (v) Exploitation of real estate projects.

The Company and the Conceding Authority may establish for each case the amount payable by the Company to the Conceding Authority depending on the nature and profitability of the activity.

- 15.1.2 Subject to the terms and conditions hereinafter, the Company may, with the prior written approval of the Conceding Authority and Regulatory Authority, build, construct or install, a Development Work.

The Conceding Authority and Regulatory Authority shall not unreasonably withhold their approval of any Development Work which is proposed by the Company.

The approval of a Development Work shall be refused if such Development Work would in the opinion of the Conceding Authority:

- (a) have a materially adverse effect on the safety of the Perimeter or the environment ;
- (b) be contrary to [_____] Applicable Regulations ;

- 15.1.3 After obtaining the approval by the Conceding Authority and the Regulatory Authority, the Company shall be responsible for financing, designing, constructing, operating and maintaining any Development Work in accordance with Prudent Industry Practice and Applicable Regulations.

15.2 Regime of Developments Works

- (a) any Development Work made, constructed, built or installed by the Company on the Perimeter shall be the property of the Company for the Concession Period so that it may amortize its cost for tax purposes in the case where the construction of such Development Works is in accordance with the Development Plan ; upon Expiration or Termination of the Concession Period, such Development Works shall be sold by the Company to the Conceding Authority which undertakes to purchase it at the book value upon such date as determined by the Qualified Auditor;
- (b) any Development Works which may be made, constructed, built or installed by the Company on the Perimeter with the necessary

Comment [ID46]: This seems to rely on property prices going down. As the port should be dynamic there may be a need for those servicing the needs of users or the users themselves having premises in the Perimeter. As the port business will continue after the end of the Concession some carry over arrangements should be in place with provisions to avoid high premiums and low rentals being charged by the Company.

prior approval from the Conceding and Regulatory Authorities, but which are not in accordance with the Development Plan, shall remain the property of the Conceding Authority, and although it may be operated by the Company, such Development Works, as property belonging to the Conceding Authority shall, at the sole discretion of the Conceding Authority, be either returned by the Company in good maintenance conditions and without any cost to the Conceding Authority upon expiration or termination of the Concession Period, or destroyed upon request of the Conceding Authority at the Company's cost so that the Perimeter will be placed in the same situation as it was before the construction of such Development Works as far as such Development Works is concerned.

Comment [ID47]: Probably would have to be transferred first particularly if the law relating to real estate allowed a strata title.

15.3 Land, Building, Construction owned by the Conceding Authority or Port's Equipment on the Perimeter

The Conceding Authority shall retain access to any land, building, construction or equipment which would be contained within the geographical area of the Perimeter but which does not belong to such conceded Perimeter. The Conceding Authority shall maintain such property in good working in order.

16. OPERATION, ORGANIZATION AND SHAREHOLDING OF THE COMPANY

16.1 Attached as Annex 10 is a list of the initial shareholders in the Company showing their respective percentage interests. Subject to the following provisions, the Company shall not change those percentage interests without the prior consent of the Conceding Authority which shall not be unreasonably withheld. The Company shall make appropriate provisions in its articles of association to ensure that appropriate legends appear on all share certificates of the Company to put prospective purchasers on notice of the restrictions on the transferability of such shares and shall not register or give effect to any transfer of shares that are not in compliance with such restrictions. No shareholder in the Company holding class B shares shall transfer any shares owned by it until Rehabilitation Works are completed:

- (a) a transfer required by the laws of [_____] or by order of a court, tribunal or governmental authority with appropriate jurisdiction;
- (b) a transfer to which the Conceding Authority has given its prior written approval, which approval shall not be

unreasonably withheld and shall be deemed to be given unless it is denied in writing within thirty (30) days of the Conceding Authority having received a written request therefore.

- (c) after completion of the Rehabilitation Works, transfer can only be made if CFM does not exercise its preemptive right followed by the other existing shareholders.

16.2 Financial Statements and Reporting

The Company shall carry on its business and affairs with due diligence and efficiency and in accordance with sound international financial and commercial standards and practices and shall fully account for all aspects of its business by preparing financial statements and delivering them to the Conceding Authority and the Regulatory Authority as follows:

- (a) at the end of each financial year, the Company shall prepare and submit to the Conceding Authority the Company's balance sheet, a profit and loss account and a statement of cash flow drawn up in accordance with generally accepted international accounting practices and applicable [_____] corporate law and certified by qualified corporate auditors registered in [_____];
- (b) the Company shall prepare and submit to the Conceding Authority and to the Regulatory Authority a quarterly statement of the Company's revenues and disbursements, expected trends for the next quarter, progress concerning current investment and proposed additional investments ;
- (c) the Company shall prepare for submission to the Conceding Authority and Regulatory Authority such other information on the financial position of the Company as the Conceding Authority and the Regulatory Authority may from time to time reasonably request to monitor compliance with the Applicable Regulations and with this Agreement.

At the end of each financial year the Conceding Authority shall be entitled to appoint, at its own expense, its own qualified auditor to verify the information provided by the Company pursuant to Clause 16.2 and the Company shall provide all reasonable assistance to such auditor.

17. INSURANCE

17.1 Scope of Insurance

From the Entry into Force of this Agreement and until the end of the Concession Period, the Company shall at its own cost obtain and

Comment [ID48]: There are no provisions dealing with the non-availability of insurance on the commercial market either at all or at reasonable, commercial premiums.

maintain in force insurance coverage relating to the Project for the amounts and on the terms set out in Annex 8.

17.2 Application of Proceeds

- 17.2.1 The Company shall ensure that the Conceding Authority shall be named as additional insured under the policies covering third party liability and that such insurance shall cover the actions of officers and employees of the Conceding Authority.
- 17.2.2 The Company shall apply or will procure the application of the proceeds of any claims under the property all risks insurance policies in the first instance to the repair or restoration of any damage to the Project or any other insured property of the Company.
- 17.2.3 The Company shall apply or will procure the application of the proceeds of any claims under the delay in completion or business interruption insurance policies in the first instance to the payment of any debt service obligations due and not paid.
- 17.2.4 The Company shall apply or will procure the application of the proceeds of any claim under the third party liability insurance to the person entitled to the indemnity.

Comment [ID49]: These provisions are quite light in detail. One might expect to see the usual provisions dealing with a Broker's letter to give warning of non-availability of insurance cover, change in conditions etc. In addition provisions should cover non-vitiation as regards the Competent Authority in the event of incorrect information or incorrect procedures being the fault of the Company.

17.3 Best Available Terms

The Company shall maintain the aforementioned insurance on the best terms available in the international insurance market with reliable insurers of adequate financial strength and experience.

17.4 Certificates of Insurance

Prior to the relevant inception dates thereof, the Company shall cause its insurers or agents to provide the Conceding Authority with certificates of insurance evidencing the policies and endorsements listed above. Failure by the Company to obtain the insurance coverage or certificates of insurance required by this Clause 17 shall not in any way relieve or limit the Company's obligations and liabilities under any provision of this Agreement. If the Company shall fail to procure or maintain any insurance required pursuant to this Clause 17, then the Conceding Authority shall have the right to procure such insurance in accordance with the requirements of this Clause 17 and the Company shall reimburse the Conceding Authority for the costs of the same forthwith.

18. HANDBACK

18.1 Handback Date

On the Handback Date, the Company shall transfer to the Conceding Authority all and any of its rights, title and interests in the Perimeter, including Development Works.

18.2 Handback Bond

18.2.1 No later than [twelve (12)] months before the anticipated Handback Date, the Company shall, in order to guarantee the proper and timely performance of its obligations under this Clause 18, deliver the Handback Bond to the Conceding Authority, issued by a financial institution acceptable to the Conceding Authority, substantially in the form set out in Annex 6, in an amount of USD 1,000,000 (one million) and valid until its release in accordance with Clause 18.12.2.

18.2.2 Following receipt of the Handback Bond, unless there is any accrued liability under the Maintenance and Performance Bond, the Conceding Authority shall undertake with due expedition such action as the Company may reasonably request to assist the Company in procuring the release of so much of the Maintenance and Performance Bond as remains outstanding.

18.3 Inspection prior to Handback

Twelve (12) months before the anticipated Handback Date, the parties and the Qualified Engineer shall carry out a joint inspection of the Perimeter. Within twenty eight (28) days of such inspection the Conceding Authority shall issue the Company with a list of works which need to be carried out as the case may be, in order to ensure that the Perimeter complies with the Handback Requirements on the Handback Date. The failure by the Conceding Authority or the Qualified Engineer to detect any defect or item shall not relieve the Company of its obligation under Clause 18.2.

18.4 Handback Procedure

Six (6) months prior to the anticipated Handback Date the parties shall meet and agree on detailed procedures for the handback of the Perimeter and shall draw up an inventory of the items to be included in the scope of handback under Clause 18.5.

18.5 Scope of Handback

On the Handback Date, the Company shall transfer to the Conceding Authority or its designee, free and clear of all debts, liens, encumbrances, mortgages, security interests, environmental contamination and claims of whatever kind or nature other than encumbrances of a routine nature that do not materially adversely affect the value of the Perimeter or interfere with its operation, all of the Company's rights, title and interest to the Handback Assets as defined herein including but not limited to all rebuilt and repaired, and all of its right to use, possess and have access to the Perimeter and the Rights of Way. The Company shall also deliver to the Conceding Authority on the Handback Date all operation and maintenance manuals, design drawings and other information as may reasonably be necessary, or as may be requested by the Conceding Authority to enable it or its designee to continue operation of the Perimeter.

18.6 Transfer of Insurance and Contractor Warranties

The Company shall assign to the Conceding Authority or its designee on the Handback Date all unexpired guarantees and warranties from its sub-contractors and suppliers and all insurance policies.

18.7 Technology Transfer

On the Handback Date, the Company shall transfer and assign or cause to be transferred and assigned to the Conceding Authority or its designee all technology and know-how relevant to the operation and maintenance of the Perimeter as may be necessary to enable the Conceding Authority or its designee to continue to operation of the Perimeter.

Comment [ID50]: Modern port operations require sophisticated management techniques which are usually computer based and proprietary. This aspect should be clearly dealt with by way of a licence to use for say a year and support to negotiate a continuing licence on terms no less favourable than offered to other users.

18.8 Training Conceding Authority Personnel

The Company shall arrange for adequate training to be provided for personnel designated by the Conceding Authority or the Regulatory Authority or its designee as necessary to ensure the independent operation of the Perimeter by the Conceding Authority or their designee in accordance with the training program to be agreed upon [see training program as proposed by bidders in Annex 9]. As part of the handback procedure, the Company, the Conceding Authority and/or the Regulatory Authority shall conduct a joint test program to confirm that the designated personnel have been properly trained in accordance with this Agreement.

18.9 Cancellation of Contracts, Assignment

Subject to Articles 18.6 and 18.7 if required by the Conceding Authority, any operation and maintenance contract, equipment contracts, supply contracts and all other contracts entered into by the Company and subsisting at the time of the transfer shall be canceled by the Company and the Conceding Authority shall not be liable for any cancellation costs arising thereby and shall be indemnified and held harmless by the Company in respect of the same. Otherwise the Company shall endeavor to assign such contracts to the Conceding Authority or its nominee.

18.10 Removal of Objects Owned by the Company

The Company shall, at its own cost, remove all objects owned by the Company which are not included within the scope of the handback from the Perimeter within thirty (30) days after the Handback Date.

18.11 Effect of Handback

From the Handback Date the rights and obligations of the Company under this Agreement shall terminate, except for the Company's rights and obligations under Clause 18.12 and any other obligations which expressly survive termination pursuant to this Agreement.

18.12 Remedy of Defects after the Handback Date

- 18.12.1 If on the Handback Date, the Company has not completed the works which need to be carried out pursuant to Clause 18.3 or does not comply in all respects with the Handback Requirements then, on receipt of notice from the Conceding Authority specifying the defect and requiring the Company to remedy the same within a reasonable time, the Company shall remedy the defect accordingly at its own cost. If the Company fails or refuses to correct the defect within a reasonable time then the Conceding Authority shall be entitled to remedy the defect itself or engage a third party to do so. In such case the Company shall reimburse the Conceding Authority for the reasonable costs incurred within thirty (30) days of a request for payment from the Conceding Authority failing which the Conceding Authority shall be entitled to draw on the Handback Bond.

1 8.12.2 Following the later of (a) the Handback Date and (b) the satisfaction of the Company's obligations under Clause 18.3, unless there is any accrued liability under the Handback Bond, the Conceding Authority shall undertake with due expedition such action as the Company may reasonably request to assist the Company in procuring the release of so much of the Handback Bond as remains outstanding.

19. CONFIDENTIALITY

19.1 Confidentiality Obligation

Each of the parties, their employees, contractors, consultants and agents, shall hold in confidence all documents and other information (including this Agreement) whether technical or commercial supplied to it by or on behalf of the other party relating to the financing, design, construction, insurance, operation, maintenance and management of the Perimeter in the course of this Agreement, and shall not publish or otherwise disclose or use the same for its own purposes otherwise than as may be required by the Applicable Regulations in [] or to perform its obligations under this Agreement. This Clause 19 shall not apply to information:

- (a) already in the public domain otherwise than by breach of this Agreement ;
- (b) already in the possession of the receiving party before it was received from the other party in the course of this Agreement and which was not obtained under any obligation of confidentiality ; or
- (c) obtained from a third party who is free to divulge the same and which was not obtained under any obligation of confidentiality.

19.2 Survival of Obligations

The parties' obligations under this Clause 19 shall survive until three years after termination of this Agreement.

20. FORCE MAJEURE AND UNFORESEEN CHANGE OF CIRCUMSTANCES

20.1 Force Majeure

20.1.1 Definition of Force Majeure

- a. For the purpose of this Agreement, "Force Majeure" means an event which is beyond the reasonable control of a Party, and which makes a Party's performance of its obligations hereunder impossible or so impracticable as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent), confiscation by government agencies;
- b. Force Majeure shall not include (i) any event which is caused by the negligence or intentional action of a Party or such Party's Sub consultants or agents or employees, nor (ii) any event which a diligent Party could reasonably have been expected to both (A) take into account at the time of the conclusion of this Agreement and (B) avoid or overcome in the carrying out of its obligations hereunder
- c. Force Majeure shall not include insufficiency of funds or failure to make any payment required hereunder.

20.1.2 No Breach of Contract

The failure of a Party to fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

20.1.3 Measures to be taken

- a. A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfill its obligations hereunder with a minimum of delay ;

- b. A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in event not later than fourteen (14) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible ;
- c. The Parties shall take all reasonable measures to minimize the consequences of any event of Force Majeure.

20.1.4 Extension of Time

Any period within which a Party shall, pursuant to this Agreement, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

20.1.5 Consultation

No later than thirty (30) days after a Party, as the result of an event of Force Majeure, has become unable to perform a material portion of its obligations, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances.

20.1.6 Termination

Upon the occurrence of such Force Majeure the parties shall enter into discussions to reach a mutually satisfactory agreement. If the parties fail to reach a mutually satisfactory solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

20.2 Unforeseeable Change of Circumstances

- 20.2.1 The rights and obligations of the parties set out in this Agreement represent the parties' positions relative to each other on the basis of the circumstances existing at the date hereof and on the basis of the common view the parties have of the way those circumstances shall develop until the end of the Concession Period. The parties agree and acknowledge that neither seeks to benefit unduly from any unforeseen development of circumstances that actually occurs. Accordingly, if, after the date of this Agreement, a change of circumstances occurs which is beyond the control of either party, which does not constitute Force Majeure, which could not have been foreseen by either party at the date hereof and which shall over the term of the Concession Period materially upsets the economic balance

of this Agreement such as it exists at the date hereof (an "Unforeseeable Change of Circumstances"), the parties shall, upon notice given by either of them, enter into discussions to agree on the measures necessary to restore that economic balance.

20.2.2 If the parties have failed to reach a mutually solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

21. **TERMINATION - SUSPENSION**

21.1 Apart from events arising from Force Majeure or Unforeseeable Change of Circumstances, the Agreement may only be terminated in the following cases:

21.1.1 Termination by the Conceding Authority for Company Event of Default

Each of the following, if not cured within the time period permitted, be a Company Event of Default which shall entitle the Conceding Authority to issue a Notice of Intention to Terminate immediately:

- a. the commencement of any action for the dissolution or liquidation of the Company except for the purposes of amalgamation or reconstruction on terms approved in advance by the Conceding Authority in writing ;
- b. the occurrence of a material breach by the Company of its obligations under this Agreement which has continued **unsolved** for thirty (30) days or more after notice thereof has been given to it by the Conceding Authority ;
- c. repeated failure of the Company to make timely payment of the Concession Fees or any part thereof either on the due date or within thirty (30) days of receipt of a written notice from the Conceding Authority issued after the due date and demanding payment ;
- d. the Company failing to bring about [Final] Rehabilitation Completion within [three hundred and sixty-five (365)] days of Target [Final] Rehabilitation Completion ;
- e. the Company abandoning the Perimeter for a period of seven (7) days without the prior written consent of the Conceding Authority ;

Comment [ID51]: Unsolved is rather broad. It may be better to have more traditional provisions which allows for notification of default and a programme for rectification. A failure to produce a programme or to carry out rectification in accordance with the programme would give rise to termination.

- f. any representation or warranty made by the Company in this Agreement proving to have been materially incorrect when made such that the Company's ability to perform its obligations under this Agreement is materially adversely affected ; or
- g. if the Company becomes insolvent or bankrupt, or goes into liquidation or receivership whether compulsory or voluntary.

21.1.2 Termination by the Company for Conceding Authority Event of Default

Each of the following, if not cured within the time period permitted, be a Conceding Authority Event of Default which shall entitle the Company to issue a Notice of Intention to Terminate immediately:

- a. a material breach by the Conceding Authority of any of its obligations under this Agreement which has continued unsolved for thirty (30) days or more after notice thereof has been given to it by the Company specifying the breach and requiring the Conceding Authority to remedy the same ; or
- b. Any representation or warranty made by the Conceding Authority in this Agreement proving to have been materially incorrect when made such that the Conceding Authority's ability to perform its obligations under this Agreement is materially adversely affected.

21.2 Other Causes of Termination

This Agreement may also be terminated in the following cases:

21.2.1 Expiry of Term

This Agreement shall expire when the Concession Period expires.

21.2.2 Recuperation b^y the Conceding Party

A decision to terminate this Agreement for recuperation of the Perimeter by the Conceding Authority in public interest may be taken at any time after a period of five (5) years as from its Commencement Date.

21.2.3 Renunciation

Renunciation of this Agreement may be done by the Company only after a period of 5 years after the Commencement Date. In such case the Company shall inform the Conceding Authority in writing at least 6 months in advance.

21.3 Notice of Intention to Terminate

Any notice of intention to terminate shall specify the reasons: Force Majeure, Unforeseeable Change of Circumstances, Company Event of Default, or Conceding Authority Event of Default, or other causes, as applicable. Following the issuing of the Notice of Intention to terminate the parties shall enter into discussions to agree on mutually satisfactory terms on which to continue this Agreement.

21.4 Notice of Termination

If, within [ninety (90)] days of the date of any Notice of Intention to Terminate, the parties have not reached a mutually satisfactory solution, either party may issue a notice to that effect to the other party (a "Notice of Termination"), whereupon this Agreement shall terminate immediately.

21.5 Suspension

21.6.1 In case of gross misconduct, substantial or repeated breach of its obligations by the Company in the opinion of the Regulatory Authority, the present Agreement shall be suspended for a period as determined by the Regulatory Authority, provided that such period shall not last for more than six (6) months, period beyond which the Conceding Authority may decide to terminate this Agreement.

21.6.2 Consequence of Suspension

The Company shall remain liable for any damage to the Perimeter which would occur during period of Suspension and shall keep and maintain the conceded assets and rights in good working and exploitation conditions and particularly, all insurance policies will be maintained.

It is expressly provided that:

- (a) any such suspension(s) period(s) shall not allow any corresponding additional period to the Concession Period
- (b) in case of such suspension, the Regulatory Authority shall determine terms and conditions which the Company shall have to respect.

22. CONSEQUENCES OF TERMINATION

22.1 End of Rights and Obligations

Upon termination of this Agreement, the parties shall have no further rights or obligations hereunder except for rights and obligations which arose prior to such termination and those which expressly survive termination pursuant to this Agreement.

The obligations under this Clause 22 shall survive the termination of this Agreement.

22.2 Transfer of Rights and Assets

Forthwith on termination of this Agreement pursuant to the provisions of Clause 21:

- a. the Company shall not remove from the Perimeter any part of its infrastructure or any item which is the property of the Conceding Authority.
- b. the Company shall relinquish any right to use, possess or have access to the Perimeter ;
- c. if such termination occurs prior to [Final] Rehabilitation Completion, the Company shall transfer to the Conceding Authority free of charge such part of the Rehabilitation Works as has been carried out, and if the Conceding Authority so elects the Rehabilitation Contracts shall be novated to the Conceding Authority and all Materials on the Perimeter shall remain available to the Conceding Authority for the purposes of completing the Rehabilitation Works ;
- d. if the Conceding Authority so elects, the Conceding Authority may purchase from the Company at their value in its books and free of any security interest all assets, materials, plant, machinery, equipment, vehicles, spare parts and other movable property owned by the Company in connection with the Rehabilitation Works, the Development Works or the operation of the Port ;
- e. if the Conceding Authority so elects the Operation and Maintenance Contract, and any other sub-contract necessary for the operation and maintenance of the Port, shall be novated to the Conceding Authority;

- f. The Company shall deliver to the Conceding Authority all as-built drawings, maintenance manuals, and quality assurance programs relating to the Port.

22.3 Compensation Amounts

22.3.1 Force majeure and unavoidable change of circumstances The Conceding Authority shall:

- (a) Pay to the Company a compensation amount equivalent to the investments in infrastructure and superstructure as well as Development Works as authorized by the Conceding Authority after deducting depreciation proportional to the period until the contract is terminated. The valuation of infrastructure and superstructure works shall be at the book value recorded by the Company. Movable property would be dealt as in 22.2 (c).
- (b) The following amounts shall be deducted :
- (i) the difference, in the case of shortfall, that may exist between the execution of the guarantee in force and the costs necessary for the repair of the infrastructure and superstructure to the minimum standards specified in annex 7;
- (ii) All other outstanding payments.

Comment [ID52]: Without details of the financial projections forming part of the feasibility study by the Conceding Authority it is difficult to indicate whether the approach is reasonable. There is a risk that the simplistic approach may not meet the requirements of lenders to the Company. The entitlement to compensation for renunciation could mean that if the Company thought it would have the Concession terminated it could "jump before it was pushed" and avoid the termination penalty and in addition could adversely affect the Government's budget if it had to find compensation where it had no control over the situation.

22.3.2 Company event of default

The Conceding Authority shall:

- (a) Pay to the Company a compensation amount equivalent to the investments in infrastructure and superstructure as well as Development Works as authorized by the Conceding Authority after deducting depreciation proportional to the period until the contract is terminated. The valuation of infrastructure and superstructure works shall be at the book value recorded by the Company. Movable property would be dealt as in 22.2 (c).
- (b) The following amounts shall be deducted :
- (i) the difference, in the case of shortfall, that may exist between the execution of the guarantee in force and the costs necessary for the repair of the infrastructure and superstructure to the minimum standards specified in annex 7;

Comment [ID53]: This is a bit fierce particularly if there has been an uninsurable event.

- (ii) the difference, in the case of shortfall, that may exist between the execution of the guarantee in force and the expense incurred by the Conceding Authority to replace the Company plus the loss of income until this can be arranged for a maximum period of 6 months. The loss of income would be on the basis of what could reasonably be expected on the basis of the audited accounts for the last five years of the concession period.
- (iii) an amount equivalent to five percent (5 %) of the average value of the Company Annual Turnover over the last 3 years as a penalty ;
- (iii) all other outstanding payments

Comment [ID54]: What happens if less than 5 years and presumably the reference is to the previous five years.

22.3.3 Conceding Authority event of default

The conditions established in the case of 22.2.3.1 shall apply together with a compensation for the loss of income for a maximum period of 6 months/years. The loss of income would be on the basis of what could reasonably be expected on the basis of the audited accounts for the last five years of the concession period.

22.3.4 Renunciation

The conditions established in the case of Company Event of Default (22.3.2) shall apply except for the penalty of five percent (5 %)

22.3.5 Recuperation

The conditions established in the case of 22.2.3.1 shall apply together with a compensation for the loss of income for a maximum period of 6 months/years. The loss of income would be on the basis of what could reasonably be expected on the basis of the audited accounts for the last five years of the concession period.

22.3.6 Expiry of term

The conditions established in the case of 22.2.3.1 shall apply.

22.4 Use of Certain Insurance Proceeds

Whenever this Agreement is terminated and in case the Company was obligated to pay compensation to the Conceding Authority pursuant to Clause 22.3 and insurance proceeds are available in connection with the insurance policies to which the Company is entitled or should be entitled pursuant to this Agreement, such proceeds shall, if not

applied in accordance with Clause 17.2, be applied in the following order of priority:

- a. to the payment of all indebtedness secured by the Company ;
- b. then to reduce the compensation amount, if any, payable by the Conceding Authority to the Company ; and
- c. Then to the Company.

23. LIABILITY AND INDEMNIFICATION

23.1 Cross Indemnity

Each party shall indemnify, defend and hold harmless the other party from and against, all liabilities, damages, losses, expenses and claims of any nature whatsoever for personal injury and for damage to or loss of any property arising out of or in any way connected with the indemnifying party's performance of this Agreement except to the extent that such personal injury, damage or loss is attributable to a negligent or intentional act or omission of the party seeking to be indemnified.

Comment [ID55]: The Agreement is light on how claims from third parties should be handled/settled.

23.2 Environmental Damage

The Company shall be liable for, and shall defend, indemnify and hold the Conceding Authority harmless from and against, all liabilities, damages, losses, expenses and claims caused by environmental contamination from the construction, operation and maintenance of the Project, except when such losses, expenses or claims are solely attributable to the negligent or intentional act or omission of the Conceding Authority or to the very existence of the Port itself.

23.3 Joint Responsibility

In the event that any loss or damage referred to in Clause 23.1 or 23.2 is caused only in part by the negligent or intentional act or omission of the Conceding Authority and in part by the act or omission of the Company, each party shall be liable to the other only in proportion to its relative degree of fault.

23.4 Liability for Information Provided by the Conceding Authority

The Conceding Authority makes no warranty in respect of and shall not be held liable for the accuracy of any information, drawings, designs or other documents of whatever nature relating to the Project provided by the Conceding Authority.

23.5 Survival

The obligations under Clauses 23.1, 23.2, and 23.3 above shall survive termination of this Agreement.

24. ASSIGNMENT OF THIS AGREEMENT

24.1 Assignment by the Conceding Authority

The Conceding Authority shall be free to assign or transfer all or any part of its rights or obligations under the Agreement, it being understood that the Conceding Authority is free to carry out its obligations under this Agreement through the Regulatory Authority.

Comment [ID56]: The private sector are likely to require that the Government continues to be bound following any assignment.

24.2 Assignment by the Company

The Company shall not without the prior written consent of the Conceding Authority, transfer all or any of its obligations under this Agreement. The Company shall not create or allow to be created any security interest, lien, mortgage or encumbrance in respect of its rights and interests under this Agreement without the prior written consent of the Conceding Authority.

25. DISPUTE RESOLUTION

25.1 Amicable Settlement

If any dispute arises in connection with this Agreement, either party may give notice to the other party of the same, whereupon the parties shall meet promptly and in good faith attempt to reach an amicable settlement.

25.2 Mediation Committee

25.2.1 In the event that the parties do not resolve a dispute, controversy or claim in accordance with Clause 25.1 within [fifteen (15)] days of notice of the dispute being given, then either party may refer the dispute to a Mediation Committee.

25.2.2 The Mediation Committee shall be composed of 7 (seven) members:

- 3 (three) appointed by the Company
- 2 (two) by the Conceding Authority
- 2 (two) by the Perimeter users

- 25.2.3 The party who initially issued the notice of intention to refer the matter to the Mediation Committee shall within ten (10) days of such notice submit to the Mediation Committee and to the other party the following written documents:
- a. a description of the dispute ;
 - b. a statement of that party's position;
 - c. Copies of relevant documentary evidence in support.
- 25.2.4 Within ten (10) days of receipt of the above documents, the other party shall submit:
- a. a description of the dispute ;
 - b. a statement of that party's position ;
 - c. Copies of relevant documentary evidence in support.
- 25.2.5 The Mediation Committee may call for such further documentary evidence and/or interview such persons as they deem necessary in order to reach their decision.
- 25.2.6 The Mediation Committee shall reach a majority decision and give notice to the parties of their decision within twenty (20) days of receipt of the documents provided under Clause 25.2.4. The decision of the Mediation Committee shall be binding unless one party issues a notice of intention to refer the matter to arbitration in accordance with Clause 25.3.
- 25.2.7 The costs of the engaging the members of the Mediation Committee shall be borne equally by the Parties and each Party shall bear its own costs of preparing the materials for and making presentations to the Mediation Committee.

25.3 Arbitration

All disputes arising in connection with this Agreement, which are not settled in accordance with Clauses 25.1 or 25.2, shall be, according to the provisions of the [here insert law]. In case of international arbitration the language of the arbitration proceedings shall be [here insert language] and the place of the arbitration shall be Geneva, Switzerland [or other neutral location].

25.4 Waiver of Sovereign Immunity

To the extent that the Conceding Authority may in any jurisdiction claim for it or its assets or revenues immunity from suit, execution, attachment or other legal process, the Conceding Authority hereby agrees not to claim and hereby irrevocably waives such immunity to the full extent permitted by the laws of such jurisdiction.

25.5 Survival

The dispute resolution provisions contained in this Clause 25 shall survive termination of this Agreement.

26. MISCELLANEOUS PROVISIONS

26.1 Representations and Warranties

Each party hereby represents and warrants that:

- (a) It is duly existing pursuant to the laws and regulations of [_____];
- (b) It carries on its business in accordance with the applicable laws and regulations of [_____] and, to that party's knowledge, there are no proceedings pending or threatened for the bankruptcy, dissolution of that party such as would materially adversely affect that party's performance of its obligations under this Agreement ;
- (c) It is fully entitled to enter into this Agreement and authorized to and capable of performing its obligations hereunder;
- (d) It is fully entitled and capable of entering into the dispute resolution procedures under Clause 25 and the decisions, awards and pursuant remedies contemplated hereunder shall be valid and enforceable against that party.

26.2 Primacy of the Concession Agreement

This Agreement shall govern all aspects of, and all contractual relationships relating to, the Project as between the parties. The Company shall ensure that the provisions of all agreements relating to the Project are consistent with the terms hereof. In the event of conflict between this Agreement and any agreement on a matter affecting the parties, including all questions of interpretation, this Agreement shall prevail.

26.3 Variations in Writing

All additions, amendments and variations to this Agreement shall be binding only if in writing and signed by duly authorized representatives of each of the parties.

26.4 Entire Agreement

This Agreement, including the Annexes attached hereto, represents the entire agreement between the parties in relation to the subject matter thereof and supersedes any or all previous agreements or arrangements, whether oral or written, between the parties in respect of the Project, the Port and the Concession Rights or the other contents of this Agreement.

26.5 Separability

If any part or parts of this Agreement are agreed by the parties or declared by any competent tribunal to be invalid, the other parts shall remain valid and enforceable.

26.6 Non-Waiver

None of the provisions of this Agreement shall be deemed waived by either party except when such waiver is given in writing. The failure by either party to insist upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future.

26.7 Interest

Any party in default of payment of any amount due hereunder shall pay interest thereon at [a rate calculated as 2 % above the [Base Rate]]. Such interest shall be computed on a daily basis (on the basis of a 365 day year) from and including the day after the due date payment until but excluding the date when the relevant amount together with accrued interest is fully paid by the defaulting party.

26.8 Notices

Unless otherwise stated, notices to be given under this Agreement shall be in [English], in writing and shall be given by hand delivery, recognized international courier, mail, telex or facsimile transmission and delivered or transmitted to the parties at their respective addresses set forth below :

The Conceding Authority:

[Name]

[Address]

Attention:

Telex:

Fax:

The Minister of [_____] an behalf of the State:

[Name]

[Address]

Attention:

Telex:

Fax:

The Company:

[Name]

[Address]

Attention:

Telex:

Fax:

or such other address, attention, telex number, or facsimile number as may be notified by that party to the other party from time to time, and shall be deemed to have been made or delivered (i) in the case of any communications made by letter, when delivered by hand, by recognized international courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communications made by telex or facsimile, when transmitted properly addresses to such telex number or facsimile number.

26.9 Applicable Law

This Agreement shall be governed by the laws of [_____].

26.10 Language

This Agreement is made in the [_____] and English language. In the event of differences between the two, the [_____] language version shall prevail.

IN WITNESS WHEREOF, this Agreement has been executed by duly authorized representative of the parties hereto on the day, month and year first above written.

[SEAL] PORT

Attest:

By:
Name:
Title:

[SEAL] **THE GOVERNMENT OF [_____]**

Attest:
By:
Name:
Title:

[SEAL] **[NAME OF COMPANY]**

Attest:
By:

SAMPLE

ANNEX TO CONCESSION AGREEMENT (PORT)

SAMPLE

ANNEX 1

THE PERIMETER

Drawing of the different Perimeters of the Port and Rail Concessions: see map attached.

SAMPLE

ANNEX 2

PORT EQUIPMENT

(The detailed list of equipment is in the Data Room)

[Models of Sale and Lease Agreement attached. To be used and filled in by the Bidders, related to Port equipment.]

MODEL OF CONTRACT FOR SALE OF EQUIPMENT

BETWEEN THE UNDERSIGNED:

Port, hereinafter called the « seller », on the one hand,

AND:

[the concession holder], hereinafter called the « buyer », on the other hand,

WHEREAS:

The seller and the buyer are also bound by a Concession Agreement signed on the _____ (hereinafter called « the Concession Agreement ») concerning the Port of [_____], and this lease contract is in accordance with article X of the Concession Agreement stipulating a special contract for the equipment.

IT HAS BEEN AGREED AS FOLLOWS:

ARTICLE 1 - OBJECT OF THE CONTRACT

The seller sell to the buyer who accepts the equipment described under article 3 below, under the conditions stipulated hereafter. This contract comes into force the same day as the Concession Agreement.

ARTICLE 2 - DESCRIPTION OF ACQUIRED EQUIPMENT

See appendix.

ARTICLE 3 - DELIVERY OF EQUIPMENT

The equipment is delivered to the place of the buyer at the time the contract comes into force and this date is considered the date at which the equipment has been taken over with respect to liability and insurance policy.

ARTICLE 4 - STATEMENTS

A statement of the condition of the equipment is cross-produced and signed by the parties or their authorized representative at the moment the equipment is taken over by the buyer as specified under article 5 above. This statement shall be as clear and precise as possible and be conform to the buyer selection.

This procedure will also apply when returning the equipment at the end of the lease.

ARTICLE 5 - TERMS OF PAYMENT

See in appendix breakdown of prices.

ARTICLE 6 - APPLICABLE LAW

CONTRACT FOR LEASING OF EQUIPMENT

BETWEEN THE UNDERSIGNED:

Port, hereinafter called the « lessor », on the one hand,
AND:

(The concession holder), hereinafter called the « lessee », on the other hand,

WHEREAS:

The lessor and the lessee are also bound by a concession agreement signed on the (hereinafter called « the concession agreement ») concerning the Port of [_____], and this lease contract is in accordance with article X of the Concession Agreement stipulating a special contract for the equipment.

IT HAS BEEN AGREED AS FOLLOWS:

ARTICLE 1 - OBJECT OF THE CONTRACT

The lessor leases to the lessee who accepts the equipment described under article 3 below, under the conditions stipulated hereafter.

ARTICLE 2 - DURATION AND ENFORCEMENT OF THE CONTRACT

The lease duration for each equipment unit is indicated in appendix. The contract can be renewed by express agreement of the parties. It comes into force the same day as the Concession Agreement.

ARTICLE 3 - DESCRIPTION OF LEASED EQUIPMENT

The safety rules applicable to this equipment have to be complied with by the lessee are those ruling for concession agreements and especially those stipulated under article 6 of the relevant Concession Agreement.

ARTICLE 4 - UTILIZATION OF LEASED EQUIPMENT

The equipment is exclusively intended for the operation of the Port of [_____] Concession.

The lessee will see to it that the equipment is used only by skilled and careful staff who has been specialized in its use and authorized according to the regulations in force. The lessee is liable for the errors committed by his staff in the utilization of said equipment and the lessor is relieved of responsibility in this case.

ARTICLE 5 - DELIVERY OF EQUIPMENT

The equipment is delivered to the place of the lessee at the time the contract comes into force and this date is considered the date at which the equipment has been taken over with respect to liability and insurance policy.

ARTICLE 6 - STATEMENTS

A statement of the condition of the equipment is cross-produced and signed by the parties or their authorized representative at the moment the equipment is taken over by the lessee as specified under article 5 above. This statement shall be as clear and precise as possible and be conform to the lessee selection.

This procedure will also apply when returning the equipment at the end of the lease.

ARTICLE 7 - GUARANTEE OF THE OWNER'S RIGHTS

For the whole duration of the contract, the equipment remains the owner's property. The lessee shall not transfer, pledge or lodge the equipment as security to third parties, or dispose of it in any other way. However, the lessee can sub-lease the equipment.

Should a third party claim to have rights over this stock, for instance through seizure under legal process, the lessee would ask for an injunction against it and would immediately inform the lessor so that the latter might protect his rights.

ARTICLE 8 - EQUIPMENT MAINTENANCE

The lessee shall keep the equipment leased in good condition and repair it as necessary; he shall use it under normal conditions and as per the instructions given in the technical documentation. The expenses resulting from utilization not conform to these instructions or from faulty maintenance shall be borne by the lessee.

The initial maintenance rules are those in force at the Port of [_____]. However, the lessee is free to develop a different maintenance policy provided the usual requirements regarding this type of stock, especially those relating to safety, are complied with.

ARTICLE 9 - LIABILITY AND INSURANCE

From the date of taking over as indicated under article 6 until the stock is returned to the lessor at the end of the lease, the lessee is liable for damages caused by the stock to persons or property.

He also assumes the risks of loss and of total/partial deterioration of the equipment.

In order to cover this dual liability, the lessee agrees to take out a third party insurance and an insurance covering damage to equipment with an insurance company, and to justify the existence of the insurance policy and payment of insurance premiums to the lessor at any moment.

ARTICLE 10 - PRICE AND MISCELLANEOUS

The lease price (or fee) is shown in the table in appendix.

The survey and possible stamp and registration expenses shall be borne by the lessee.

ARTICLE 11 - TERMS OF PAYMENT

The fee is payable every month, on the first day of the period considered. The fee may not be paid by the lessee in case of compensation as stipulated under article 14 below.

ARTICLE 12 - RETURN OF EQUIPMENT

When the equipment is returned at the end of the leasing period, account shall be taken of normal wear provided the lessee has carried out standard maintenance operations in conformity to the rules and practices of the trade during its utilization period. A statement will be produced as indicated under article 6 above.

ARTICLE 13 - SANCTIONS FOR NON-FULFILMENT

This contract will be terminated if one of the parties fails to fulfill any of its obligations, especially as regards maintenance of the equipment and payment of the fee in advance, by mere notification of the other, 60 days after a recorded delivery letter has been sent to the failing party without needing to appeal to the court.

However, when the non-fulfillment results from a disagreement on the scope of the contribution of any of the parties, as stipulated under articles 8 and 12, these parties shall first refer to the procedure of arbitration in accordance with article 15 below.

Termination of the contract entails immediate return of the equipment by the lessee.

ARTICLE 14 - CONNECTION BETWEEN THE CONCESSION AGREEMENT AND THIS CONTRACT

Unless otherwise indicated, this contract and the Concession Agreement are independent. However, as stipulated under article of the Concession Agreement, in the case of a defaulting concession holder, the leasing contract can be cancelled at Port's request.

Conversely, in case of a fault attributable to Port, the leasing contract can be cancelled at the concession holder's request.

Also, in case of delay in the payment by Port of its contribution to non-commercial obligations, the lessee can compensate the fee due under this contract with the amounts due by Port under non-commercial obligations, should said delay exceed 60 days after formal notice.

ARTICLE 15 - ARBITRATION

In case of disagreement on the scope or fulfillment of their obligations arising from this contract, the parties undertake to refer to an expert appointed by mutual agreement.

In case of dispute, each of the parties will appoint an expert and the two experts thus appointed will nominate a third expert or, failing this, the third expert will be nominated according to the rules of appointment and conciliation of the International Chamber of Commerce of Paris.

The expert, or the group of three experts, is authorized by the parties to decide as a compounder, and said decisions shall not be questioned.

ANNEX 3

NOTICE OF APPROVAL

[Copy of the Notice of Approval to be issued by Port before the date of Entry into Force.] To be issued by Port in due course. (it is quoted in Clause 1.1)

SAMPLE

ANNEX 4

REHABILITATION WORKS

part I - List of Rehabilitation Works

part II - Rehabilitation Schedule

[to be proposed by the Bidders]

SAMPLE

ANNEX 5

DESIGN CRITERIA AND DESIGN REVIEW PROCEDURE

SAMPLE

ANNEX 6

FORM OF BONDS

(It is quoted in Clause 18.1.1 Rehabilitation Bond, Maintenance and Performance Bond and 2.6.2 Handback Bond)

[See model attached]

Required amounts: USD [AMOUNT] for Rehabilitation Bond, USD [AMOUNT] for Maintenance and Performance Bond, USD [AMOUNT] for Handback Bond.

FORM OF REHABILITATION BOND

For the benefit of:[Beneficiary's name and address]

We, [Bank's name and address], are aware that the Government of [_____] through [_____] (hereinafter referred to as the « Conceding Authority ») has executed a concession agreement (the « Concession Agreement ») with [insert Company's name] (the « Concessionaire ») for the operation, maintenance, financing and development of the Port of[_____]. We have been informed that the Concessionaire has undertaken to perform rehabilitation works in accordance with the terms of the Concession Agreement.

Furthermore, we understand that, by the terms of the article 2.6.2 (a) of the Concession Agreement, the Concessionaire must provide a Rehabilitation Bond for the amount of US [__]

Guarantee. At the request of the Bidder, we hereby independently and irrevocably undertake to pay you any sum you may request up to a maximum amount of US\$[_____] upon your first demand in the event the Concessionaire does not fulfill its rehabilitation obligations under the Concession Agreement without your consent.

1. Request for Payment. Any demand for payment must be sent to us in writing to the following address expressly stating:

(i) The amount due and (ii) stating that:

1. the Concessionaire is in breach of his rehabilitation obligations(s) under the Concession Agreement, and

2. The respect in which the Concessionaire is in breach as per article 11.1.2 of the Concession Agreement and such claim and statement shall be accepted as conclusive evidence that the amount claimed is due to you under this guarantee.

2. Authorized Signatories. Claims and statements as aforesaid must bear the confirmation of your Bankers that the signatories thereon are authorized so to sign.

3. Duration. This guarantee shall come into force on [Commencement Date], (the « Effective Date ») being the date of signature of the Concession Agreement, and will expire at close of banking hours at this office three (3) years after such Effective Date (the « Expiry Date »), or until the Rehabilitation Bond is released by the Conceding Authority according to article 11.2 of the Concession Agreement, whichever is earlier.

4. Limitation of Liability. Our liability is limited to the sum of US [_____] and your claim hereunder must be received in writing at this office before the Expiry Date. After such Expiry Date, no demand for payment will be honored by us. Whether or not this undertaking has been returned to us.

5. Termination. Upon the Expiry Date this guarantee shall become null and void, whether returned to us for cancellation or not and any claim or statement received after the Expiry Date shall be ineffective.

6. No Transfer or Assignment. This guarantee is personal to yourselves and is not transferable or assignable.

7. Applicable Law. This guarantee is subject to the Uniform Rules of the International Chamber of Commerce for Demand Guarantees (ICC publication n° 458). Any question not settled by these Rules will be submitted to law.

8. Dispute Settlement. Any dispute related to the validity, interpretation or enforceability of this guarantee will be subject to the jurisdiction of the competent courts of [_____].

Date:

Authorized Signature(s)

FORM OF MAINTENANCE AND PERFORMANCE BOND

For the benefit of: [Beneficiary's name and address]

We, [Bank's name and address], are aware that [insert Company's name] (hereinafter referred to as the «Concessionaire») has signed a concession agreement (the « Concession Agreement ») with [_____] (hereinafter referred to as the « Conceding Authority ») concerning the operation, maintenance, financing and development of the Port of [_____] through the concession of port assets.

Furthermore, we understand that, by the terms of the article 2.6.2 (b) Concession Agreement the Concessionaire must provide a Maintenance and Performance Bond for the amount of US\$ [___] to guarantee the proper and timely performance of the Concessionaire's obligations under the Concession Agreement in relation to the operation and maintenance of the perimeter and achievement of indicators set forth in the Concession Agreement and its Annex 7.

1. **Guarantee.** At the request of the Concessionaire, we hereby independently and irrevocably undertake to pay you any sum you may request up to a maximum amount of US\$ [_____] upon your first demand in the event of the Concessionaire failing to fulfill its maintenance and performance obligation(s) under the Agreement before expiry of this guarantee without your consent.

2. **Request for Payment.** Any demand for payment must be sent to us in writing to the following address expressly stating:

(i) The amount due and (ii) stating that:

1. the Concessionaire is in repeated breach of his maintenance and performance obligations(s) under the Concession Agreement, and

2. the respect in which the Concessionaire is in breach as per article 12.5.4 of the Concession Agreement, and such claim and statement shall be accepted as conclusive evidence that the amount claimed is due to you under this guarantee.

3. **Authorized Signatories.** Claims and statements as aforesaid must bear the confirmation of your Bankers that the signatories thereon are authorized so to sign.

4. **Duration.** This guarantee shall come into force on the date of signature of this Maintenance and Performance Bond as per article 12.2 of the Concession Agreement, and will expire at close of banking hours at this office on the date of

the issuance of the Handback Bond (the « Expiry Date ») mentioned in article 18 of the Concession Agreement.

5. Limitation of Liability. Our liability is limited to the sum of US and your claim hereunder must be received in writing at this office before the Expiry Date. After such Expiry Date, no demand for payment will be honored by us, whether or not this undertaking has been returned to us.
6. Termination. Upon the Expiry Date this guarantee shall become null and void, whether returned to us for cancellation or not and any claim or statement received after the Expiry Date shall be ineffective.
7. No Transfer or Assignment. This guarantee is personal to ourselves and is not transferable or assignable.
8. Applicable Law. This guarantee is subject to the Uniform Rules of the International Chamber of Commerce for Demand Guarantees (ICC publication n° 458). Any question not settled by these Rules will be submitted to law.
9. Dispute Settlement. Any dispute related to the validity, interpretation or enforceability of this guarantee will be subject to the jurisdiction of the competent courts of [_____]

Date:
Authorized Signature(s)

FORM OF HANDBACK BOND

For the benefit of:[Beneficiary's name and address]

We, [Bank's name and address], are aware that the Government of the Republic of [_____] through (hereinafter referred to as the « Conceding Authority ») has executed a concession agreement (the « Concession Agreement ») with [insert Company's name] (the « Concessionaire ») for the operation, maintenance, financing and development of the Port of [_____]. We have been informed that the Concessionaire has undertaken to handback to the Conceding Authority all rights, title and interest in the conceded assets and development works.

Furthermore, we understand that, by the terms of the article 2.6.2 (c) of the Concession Agreement, the Concessionaire must provide a Handback Bond for the amount of US\$[_____].

1. Guarantee. At the request of the Bidder, we hereby independently and irrevocably undertake to pay you any sum you may request up to a maximum amount of US\$[_____] upon your first demand in the event that the Concessionaire does not fulfill its handback obligations under the Concession Agreement without your consent.

2. Request for Payment. Any demand for payment must be sent to us in writing to the following address expressly stating:

(i) The amount due and (ii) stating that:

1. the Concessionaire is in repeated breach of his handback obligations(s) under the Concession Agreement, and has not correct the defect, and

2. The respect in which the Concessionaire is in breach as per article 18.12.1 of the Concession Agreement and such claim and statement shall be accepted as conclusive evidence that the amount claimed is due to you under this guarantee.

3. Authorized Signatories. Claims and statements as aforesaid must bear the confirmation of your Bankers that the signatories thereon are authorized so to sign.

4. Duration. This guarantee shall come into force on [Commencement Date] (the « Effective Date »), being the date of issuance which shall be no later than twelve (12) months before the termination of the Concession Agreement as per article 18.2 of the Concession Agreement, and will expire at close of banking hours at this office 180 days after the Effective Date (the «Expiry Date »).

5. Limitation of Liability. Our liability is limited to the sum of US\$[_____] and your claim hereunder must be received in writing at this office before the Expiry Date. After such Expiry Date, no demand for payment will be honored by us, whether or not this undertaking has been returned to us.

6. Termination. Upon the Expiry Date this guarantee shall become null and void, whether returned to us for cancellation or not and any claim or statement received after the Expiry Date shall be ineffective.

7. No Transfer or Assignment. This guarantee is personal to yourselves and is not transferable or assignable.

8. Applicable Law. This guarantee is subject to the Uniform Rules of the International Chamber of Commerce for Demand Guarantees (ICC publication n° 458). Any question not settled by these Rules will be submitted to law.

10. Dispute Settlement. Any dispute related to the validity, interpretation or enforceability of this guarantee will be subject to the jurisdiction of the competent courts of []

Date:

Authorized Signature(s)

SAMPLE

ANNEX 7

MAINTENANCE AND PERFORMANCE INDICATORS

MAINTENANCE STANDARDS

[The document attached, plus additional indicators and standards to be proposed by the Bidders, shall be discussed before the Agreement is signed.]

A/ MAINTENANCE STANDARDS

I. Hand over of port facilities

The port facilities (berth, fender, cranes, etc.) handed over to the Concessionaire will be in good condition and must be handed back to the Conceding Authority at the end of the contract in good condition and working order, allowing for normal wear and tear, but not for misuse or lack of maintenance.

A. The condition of the infrastructure and the equipment at the end over must be checked and confirmed in writing by the Concessionaire and the Conceding Authority in a joint inventory. The Concessionaire undertakes, in co-operation with the Conceding Authority, to check the infrastructure and equipment without any delay when taking over from the Conceding Authority.

The Concessionaire has to maintain and repair all terminal facilities including equipment used and quay wall, fenders, coping, bollards, electrical supply mains and fit at water mains, safety equipment available in the facilities and all infra-structure related to the facilities.

II. Preventive maintenance is to be prepared by the Concessionaire and the status of its implementation and execution is to be reported regularly to the Conceding Authority.

III. Maintenance of berth shall include (but is not limited to the following) preventative and periodical maintenance such as:

- Filling of any hole caused by stevedoring operations by asphalt material immediately upon concurrence of such holes under port maintenance department's supervision,
- Maintenance of related installation at each berth (such as lighting

poles to replace, damaged lamps and painting of poles by any anticorrosion materials).

- IV. The Concessionaire has to maintain, repair and move (if necessary for operational purposes), all facilities, boundary fences and security gates.
- V. Maintenance of handling equipment
 - A. Maintenance and repair of all cargo handling equipment used shall be carried out by the Concessionaire with the highest standards. All spare parts and consumables, including fuel, grease and oil, required for operation, maintenance and repair of these equipment during the full contract period including painting, will be at the Concessionaire's expense.
 - B. The Concessionaire is required to have on hand at date of operation commencement and at all times, stocks of appropriate quantities of spare parts and consumables, all of which must be in good condition for the operation, maintenance, overhaul and repair of all the equipment used by him.
 - C. The Concessionaire, at his own expense, shall have a general survey, performed for all cranes and conveyors by an internationally recognized survey organization. The first survey to be performed not later than six month from commencement of contract, thereafter at annual intervals. At the end of the contract period a final handover survey is to be performed. The survey reports will be submitted to and become the property of the Conceding Authority.
 - D. The Concessionaire is required to keep a record for each item of plant and equipment showing the following:
 - down time for repair and maintenance,
 - equipment running hours,
 - man-hours and the cost of each appliance,
 - other relevant information as specified by the Conceding Authority,
 - The actual value of the spare parts and consumables for each machine or equipment. These records will be submitted to the Conceding Authority at the end of each month.
 - E. Equipment to be provided by the Concessionaire must be new and has to be repaired and maintained by him and at his cost.

- VI. All operation, maintenance repair and minor construction work shall be pre-planned. The Concessionaire shall establish a work control centre for scheduling daily activities, minor installations and construction, preventive maintenance service orders and expediting of needed materials, spares equipment and tools. All works shall be scheduled to minimize interference with normal cargo operation.
- VII. The Concessionaire has to make sure of all safety and security aspects available in the facilities i.e. must be ready to any emergency especially those related to security of operating the equipment under the abnormal condition
- VIII. Waste
- A. the Concessionaire shall arrange to obtain and maintain at all works areas adequate waste disposal, toilet facilities and potable water. In addition, the Concessionaire shall comply with all laws, standards, codes and regulations relating to sanitation at the port.
- The Concessionaire shall not release, or permit to release into the air, the sea or another body or onto the ground or in the vicinity of the city, any noxious effluent or substance harmful to human, animal or plant life.
- In the event of Concessionaire failure in any of such steps, the Conceding Authority shall carry out the same through another Concessionaire at the Concessionaire's account.
- XI. The Concessionaire will supply all necessary plans marking layouts, traffic lanes and storage areas paint and will maintain the line marking on the paved areas, floors of all sheds, etc.
- XII. The Concessionaire will provide the necessary watchmen and guard services.

B/ MAINTENANCE INDICATORS

The following rates shall be respected by the concessionaire:

- Minimal rate of availability for cranes: 80%
- Maximal rate of failure for cranes: 3%

C/ PERFORMANCE INDICATORS

For the berths that will be operated by the concessionaire, the minimum ratio of efficiency will be:

- bagging: 50 tons per hour and per gang
- ferrochrome: 200 tons per hour per gang
- steel: 70 tons per hour per gang

D/ OTHER REGULATION APPLICABLE

The following international regulation and convention will be applied in the framework of the concessionaire contract.

1. Maritime safety

From IMO Codes and guides relative to the safe transport and handling of dangerous cargoes in port areas:

- International Convention for the Safety of life at Sea (SOLAS), 1974, as amended, and earlier SOLAS conventions where applicable
- MARPOL 73/78, as amended
- International Maritime Dangerous Goods Code (IMDG Code) and IMDG Code supplement (includes EmS, MFAG, BC Code, IMO/ILO Guidelines for Packing Cargoes in Freight Containers or Vehicles, Recommendations on the Safe Use of Pesticides in Ships and Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High Level Radioactive Wastes in Flasks on Board Ships (INF Codes))
- International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) and earlier Code (BCH Code) where applicable.

ANNEX 8

INSURANCE

- a. Third Party liability insurance
- b. Property All Risk Insurance
- c. Other insurance in accordance with [_____] law

(It is quoted in Clause 17.1 - Scope of Insurance)

[Bidders to present a draft of their proposed Insurance Contract]

ANNEX 9

TRAINING PROGRAM

[To be provided by bidders]

SAMPLE

ANNEX 10

LIST OF INITIAL SHAREHOLDERS IN THE COMPANY

[To be provided by bidders]

A shares: Port

B Shares (Bidder) [to be indicated by the Bidders]

C shares: to be filled in due course by the Government

ANNEX 11

FORMS OF LEGAL OPINIONS

PART I

Form of Legal Opinion to be provided by the Company to the Conceding

Authority

Confirming (among other things) that the Company is duly incorporated and existing under [_____] law, that there are no proceedings pending, or to the best of its knowledge, threatened for the liquidation of the Company, and that this Agreement and all other agreements entered into by the Company in connection with the Project have been duly authorized, executed and delivered by it and constitutes its legal, valid and binding obligations;

PART II

Form of Legal Opinion to be provided by the Conceding Authority to the Company to be provided in due course after the Decree is issued.

ANNEX 12

ASSETS COVERED BY THE CONCESSION

In Preamble (I)

- Tangible assets covered under the Concession:

[]

- Non-tangible assets covered under the Concession:

. Port's rights on the existing concessions and leases- see also appendix 15

. Clients' database and relevant contractual documents

any contract which result in granting the rights to lease or use land, building or equipment of the Port, which may have been concluded by the Port or its subsidiaries with terminal(s) operators, cargo operators or forwarding or freight agents, provided that all such contracts will prior to the date of the present Agreement, have been either terminated by Port at Port's cost, or contractually amended in such a way that the Company has become the payee agent of Port for said contracts, with due notification of such termination or amendments to all contracting parties and to the Company, in order for the Company to :

- either have free possession of all land, buildings and equipments covered by such contracts
- or for those contracts which will have not been terminated,
- so that the Company shall be legally entitled to receive all proceeds, fees or royalties thereof in lieu and place of [] or its subsidiaries other contracts (suppliers, etc.)

- With the exclusion of the following non operating assets:

- Port School,
- Sport complexes,
- Residential accommodation
- Administrative offices complexes
- Ogres

For the avoidance of any doubt the following terminal are not in the Perimeter of the Port Concession: [_____]

ANNEX 13

MODEL OF ESCROW AGREEMENT

AMONG:

THE GOVERNMENT OF [_____], acting through the Ministry of [_____] and « Port, represented by (hereinafter referred to as the «Conceding Authority»)

AND

[_____] , a public limited company established under the laws of the Republic of [_____] , whose registered office is located at [_____] , represented by [_____] (hereinafter referred to as «PLC»)

AND

[_____] , a banking institution established under the laws of [_____] whose registered office is located at [_____] , represented by [_____] (hereinafter referred to as the « Escrow Agent »)

WITNESSETH

WHEREAS, pursuant to a concession agreement dated [_____] (hereinafter referred to as the « Concession Agreement ») and signed by and between [_____] , as the conceding authority and PLC, as the concessionaire, the Conceding Authority has granted to PLC a long term concession for the management, operation, financing and development of the Port of [_____] according to the terms and subject to the conditions therein contained.

WHEREAS, in accordance with the terms of the Concession Agreement, PLC shall pay to the Conceding Authority the sum of US\$ [_____] as an Initial Entry Fee as defined therein.

WHEREAS, the Parties hereto agree that, such Initial Entry Fee shall be deposited and held in escrow under the terms and conditions defined herein.

WHEREAS, the Parties hereto desire to establish among themselves the appropriate escrow mechanisms aimed at implementing the Concession Agreement in respect of the Initial Entry Fee payable by PLC provided for hereunder.

NOW THEREFORE, THE PARTIES HAVE AGREED AS FOLLOWS:

1. Definitions

In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:

- i. «Banking Day» a day (excluding Saturday and Sunday) on which banks are open for business in [_____]
- ii. «Deposit Date» means the date of the signature of the Concession Agreement;
- iii. «Escrow Account» means the interest bearing account designated [Account Name] maintained at [_____], being account number
- iv. «Escrow Amount» means the sum of US\$ [_____] payable by PLC to the Conceding Authority as an Initial Entry Fee (as defined in the Concession Agreement);
- v. «Escrow Period» means the period commencing on the Deposit Date and terminating on either (i) the date on which funds in the Escrow Account are transferred to the Conceding Authority pursuant to a Proper Instruction; (ii) the date of termination as notified to the Escrow Agent by the Conceding Authority and PLC;
- vi. «Parties» means the named parties to this Agreement and « Party » means any one of them;
- vii. «Concession Agreement» means the agreement dated [_____] entered into between the Conceding Authority and PLC relating to the concession of the Port of [_____];
- viii. «Proper Instruction» means written instructions duly executed by each of the Conceding Authority and PLC to give instructions for the purposes of this Agreement;
- ix. «Release Date» means the date on which the Conceding Authority and PLC have agreed to release the funds in escrow or if such a date is not a Banking Day the next Banking Day immediately following such date;
- x. «US\$» means United States dollars;

Save as otherwise provided in this Agreement or where the context otherwise requires, terms defined and expressions used in the Concession Agreement shall have the same meaning in this Agreement.

2. Appointment of Escrow Agent

The Conceding Authority and PLC hereby appoint the Escrow Agent to serve as escrow agent hereunder and the Escrow Agent hereby accepts such appointment.

3. Deposit and Payments

- i. Subject to the provisions of the Concession Agreement, on the Deposit Date, PLC shall deposit the Escrow Amount into the Escrow Account and PLC shall forthwith upon deposit notify the Escrow Agent in writing thereof.
- ii. Promptly upon, and in any event not later than 5:00 p.m. ([_____] time) on the next Banking Day after receipt of the deposit, the Escrow Agent shall deliver to the Conceding Authority and PLC written confirmation of the receipt of the Escrow Amount.
- iii. The Parties agree that during the Escrow Period the Escrow Account shall be administered in accordance with the provisions of this Agreement.
- iv. On the Release Date, the Conceding Authority and PLC shall deliver to the Escrow Agent a Proper Instruction for the transfer of the Escrow Amount substantially in the form of Schedule One duly executed by both of them.
- v. Promptly upon receipt, and in any event not later than 5:00 ([_____] time) on the next Banking Day thereafter, of a Proper Instruction in accordance with subsection (iv) above, the Escrow Agent shall pay from the Escrow Account to the Conceding Authority the sum specified therein (together with all interest accrued thereon) in accordance with the said Proper Instruction.
- vi. The Conceding Authority and PLC hereby acknowledge and agree that the transfer of funds or delivery of documents by the Escrow Agent in accordance with a Proper Instruction received by it in accordance with this article shall constitute (and be deemed to constitute) a full and complete discharge of, and with effect from the time of such transfer or delivery each Party hereby release the Escrow Agent from, the duties and obligations of the Escrow Agent in relation to the funds.
- vii. (vii) If at any time following a payment of any amount from the Escrow Account in accordance with the provisions of this Agreement

there remains a credit balance in the Escrow Account, such credit balance shall be retained in the Escrow Account until such time as the Escrow Agent receives Proper Instruction of PLC and the Conceding Authority at which time the said surplus shall be paid to the Party and in the manner specified in the said Payment Instruction.

- viii. All payments by any Party under this Agreement will be made free and clear of and without deduction or withholding for or on account of any present or future taxes or duties of whatever nature unless deduction or withholding of such taxes or duties is required by any applicable law.

4. Resignation of the Escrow Agent

The Escrow Agent may resign hereunder by giving written notice thereof to the Conceding Authority and PLC; provided, however that the Escrow Agent shall have designated a successor Escrow Agent approved by the Conceding Authority and PLC, which approval shall not be unreasonably withheld, and until such successor Escrow Agent shall have accepted such designation and agreed to be bound by the provisions of this Agreement. Such resignation shall then take effect upon the date specified in such notice, whereupon all duties of the resigning Escrow Agent shall cease.

5. Duties of the Escrow Agent

(i) The Escrow Agent shall have no obligations, duties or responsibilities to any person in respect hereof except those expressly set forth herein. The duties of the Escrow Agent hereunder shall be mechanical and administrative in nature and nothing in this Agreement, express or implied, is intended to or shall be construed so as to impose upon either of them any obligation except as expressly set forth herein.

(ii) The Escrow Agent hereby covenants and undertakes to the other Parties that it shall:

- a. hold the Escrow Amount as agent for the Conceding Authority and PLC in accordance with the terms of this Agreement;
- b. comply in all respects with all Proper Instructions with respect to the Escrow Amount and the Escrow Account received from the Conceding Authority and PLC in accordance with this Agreement;
- c. hold and maintain the Escrow Account solely for the purposes of this Agreement and separately from, and shall not combine or co-mingle, the Escrow Account with any other moneys held to its account or held by it to the account of a third party;

- d. prepare and deliver to the Conceding Authority and PLC quarterly statements in respect of the Escrow Account;
 - e. waive (and does hereby waive) any and all rights of set-off, deduction or claim, other than agreed fees and expenses payable to it pursuant to Article 9 which, but for this article, it has or may have or be entitled to exercise in relation to the Escrow Amount or the Escrow Account; and
 - f. refrain from deducting from the Escrow Account amounts in respect of any fees or charges which would otherwise from time to time be deducted from the Escrow Account.
- (iii) The Escrow Agent hereby represents and warrants to the Parties that it has obtained all registrations, licenses, consents and approvals required for it to perform lawfully its obligations hereunder.

6. **Termination**

This Agreement shall terminate automatically once the Escrow Agent has disbursed the amounts in the Escrow Account in the manner specified in Article 3 above.

7. **Liability of Escrow Agent**

(i) Notwithstanding any other provision of this Agreement, neither the Escrow Agent nor its directors, officers or employees or representatives shall be liable for: (a) acts or defaults of any agent employed in good faith by them; (b) acts or defaults of any person to whom shall have been delegated the execution or exercise of all or any of the duties conferred on them, provided that such delegation shall have been made in good faith; (c) any mistake or omission made in good faith; save and except in each case liability in relation to negligence, willful default or fraud on the part of the Escrow Agent, its directors, officers, employees ,and/or representatives.

(ii) The Escrow Agent shall not be liable for any losses, damages or other liabilities of the Parties, including without limitation any losses from the dishonor or uncollectibility of any check deposited with the Escrow Agent by PLC.

(iii) The Escrow Agent shall not be required to institute legal proceedings of any kind.

8. Indemnification

- (i) The Conceding Authority and PLC jointly and severally shall indemnify, defend and hold the Escrow Agent harmless from and against any and all claims, demands, costs, liabilities and expenses, including reasonable counsels fees, which may be asserted against it or to which it may be exposed or which it may incur by reason of its execution or the performance of this Agreement, unless such claims, demands, cost, liabilities or expenses are based upon the negligence, willful default, fraud or bad faith of the Escrow Agent.
- (ii) The indemnity provided herein shall survive termination of this Agreement.

9. Fees and Expenses

The Conceding Authority and PLC shall bear and pay in equal shares the fees and expenses of the Escrow Agent in accordance with such terms as the Conceding Authority and PLC shall agree with the Escrow Agent.

10. Notices

- (i) Each notice, demand or other communication given or made under this Agreement, and any document required by this Agreement to be delivered to a Party, shall be in writing and delivered or sent to the relevant Party at its address set out below (or to such other address as the addressee has by five Banking Days' prior written notice specified to the other Party):
To the Conceding Authority: To PLC:
To the Escrow Agent:
- (ii) Any notice, demand or other communication so addressed to the Conceding Authority or PLC, and any documents required by this Agreement to be delivered to the Conceding Authority or PLC, shall be deemed to have been delivered when actually delivered to the relevant address, provided that, if the date of such delivery is not a Banking Day, such document, notice, demand or other communication shall be deemed to have been delivered on the next following Banking Day.

11. Miscellaneous

- (i) This Agreement shall not be assignable.

(ii) This Agreement constitutes the whole Agreement between the Parties relating to the subject matter hereof and it is expressly declared that no amendments or variations to this Agreement shall be effective unless made in writing and duly executed by the Parties;

12. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of [____]

13. Settlement of Disputes

(i) Any disputes arising from this Agreement, including without limitation any dispute relating to the validity, interpretation or performance hereof, shall be finally settled by three arbitrators appointed in accordance with the provisions of the Rules of Arbitration of the International Chamber of Commerce (« ICC Rules »). All arbitration cost (including legal fees and related costs and taxes in respect thereof) shall be borne by the unsuccessful Party (notwithstanding any provisions to the contrary contained in the ICC Rules). The arbitration proceeding shall take place in [____] and the language of the arbitration shall be English.

(ii) Each Party hereto undertakes to comply without delay with any arbitral award referred to in this article, failing which any Party may request enforcement of the same from any competent court and may pursue any appropriate remedy for its enforcement.

(iii) Made in 3 original copies EXECUTED at [____] on

Signed for and on behalf of Conceding Authority

By:

Name:

Authorized signatory

Signed for and on behalf of PLC

By:

Name:

Authorized signatory

Signed for and on behalf of Escrow Agent

By:

Name:

Authorized signatory

SCHEDULE ONE

Date: []
From: Conceding Authority PIC
To: Escrow Agent
Attention:

Escrow Agreement dated [], (the « Agreement »)
Escrow Account Name: f l (the « Escrow Account »)
Pursuant to Article 3 of the Agreement, we hereby instruct and request you to effect the following funds transfer for value on [date] transfer the sum of USD [] from the Escrow Account to the account of the Conceding Authority at [Full name and address of bank] account number [].

Signed for and on behalf of Conceding Authority
By:
Name:
Authorized signatory

Signed for and on behalf of PLC
By:
Name:
Authorized signatory

ANNEX 14

THE COMPANY CONCESSIONAIRE'S OBLIGATIONS

The Company Concessionaire's obligations

- 1) Keep updated inventory and records of assets linked with the service under Concession;
- 2) Inform the Regulatory Authority and users about service management;
- 3) Maintain training program, aimed at permanently striving for better service quality and efficiency;
- 4) Keep technical and administrative staff, of its own or third parties, legally enrolled and in sufficient number for the services rendered;
- 5) Adopt the necessary measures and actions to prevent or eliminate damages to the environment caused by the Company, as established by specific law and the recommendations of the Regulatory Authority related to the service exploitation;
- 6) Comply with the rules and regulations applicable to relevant services;
- 7) Replace goods and equipment linked to the services under Concession, as well as the acquisition of new assets, in order to ensure adequate services rendered;
- 8) Pay indemnities due for necessary constructions, services and activities of exploitation of the services under this Concession;
- 9) Keep civil and accident insurance, compatible with its responsibilities towards the Regulatory Authority, users and third-parties;
- 10) Safeguard the integrity of assets linked with the services under Concession, as established by specific technical rules, keeping them in perfect conditions of use and maintenance, until their transfer to the Regulatory Authority or new Concessionaire;
- 11) Publish annual reports, with financial statements, expressing the accounts for services under concession, as well as provide information to competent public agencies within the limits established by such public agencies;

- 12) Provide the Regulatory Authority, on an annual basis, information about triennial plan for operations security and other development goals from the date of signature of this Agreement. Such plans must indicate projects, their costs and implementation schedule, demonstrating investments during the previous year. The first plan should be presented within one hundred and twenty (120) days, from the signature of this Agreement;
- 13) Give to agents/employees of the Regulatory Authority and Conceding Authority, free access to works, equipment and installations included in the concession scope, as well as authorization to examine all charts, tables, accounting records and other documents and information systems maintained by the Company, regarding the services under Concession;
- 14) Comply with international treaties, agreements and acts, in relation to the services under Concession;
- 15) Keep secure and safe operating conditions for the services under Concession to be rendered, in accordance with rules in force;
- 16) Maintain the continuity of services under concession, unless in case of emergency halts caused by unforeseen situations, with immediately notification to the Regulatory Authority;
- 17) Render adequate service to the users, without any kind of discrimination and economic abuse of power, meeting regularity, continuity, efficiency, security, for the services rendered, and adequacy in the tariffs;
- 18) Carry out necessary public services obligations imposed by the Regulatory Authority;
- 19) Record in Normative Share Book, for the registered shares pertaining to the shareholding of the Concessionaire, the following term : *"These shares should not be encumbered, or transferred without the prior agreement in writing of the Conceding Authority"*;
- 20) Inform the Regulatory Authority of any contemplated substantial change in the shareholding of any shareholder of the Company, prior to such change;
- 21) Submit for previous approval of the Regulatory Authority any agreement with shareholders and their amendments, as well as any changes in the shareholding;

- 22) Avoid recording in the Share Register any encumbrance, concession or transfer of share linked to the shareholding of the Concessionaire, without prevision agreement in writing from the Regulatory Authority, within the duration of the Concession;
- 23) Provide all necessary resources for the exploitation of the Concession, at its exclusive account and risk.
- 24) Fulfill performance and maintenance indicators indicated in Annex 7. 25) Implement Maintenance standards indicated in Annex 7.

SAMPLE

ANNEX 15

ASSIGNED AGREEMENTS

[List of contracts assigned to PLC by Port]

(as per Clause 2.7.1)

SAMPLE

ANNEX 16

**CONDITIONS AND PROCEDURE
FOR PERSONNEL SELECTION**

[To be agreed upon between the parties during the Negotiation Phase]

SAMPLE