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**THE GOVERNMENT OF \_\_\_\_\_**

**AND**

**[THE CONCESSIONAIRE]**

**IMPLEMENTATION AGREEMENT**

**THIS AGREEMENT** is made and entered into on this [ ] day of [ ] [ ] at \_\_\_\_\_ in the [Country]

**BETWEEN**

**THE GOVERNMENT OF** \_\_\_\_\_, acting herein through [ ], Secretary,  
Ministry of Finance (the "**Government**");

**AND**

- (1) **[THE CONCESSIONAIRE]**, a company limited in liability and duly incorporated under the laws of [the country] and having its registered office at \_\_\_\_\_;

**RECITALS**

- (A) **THE PORTS AUTHORITY** (the "**Ports Authority**") is a body corporate established by the [country] Ports Authority Act No. \_\_\_\_\_.
- (B) The concessionaire has been duly incorporated under the Companies Act No. \_\_\_\_\_ as amended for the purpose of financing, designing, building, equipping, testing, commissioning, operating, maintaining and transferring to the Ports Authority (or its successor) certain container handling facilities at three berths to be constructed on the \_\_\_\_\_.
- (C) The Ports Authority with the authority and approval of the Government has entered into a concession agreement (the "**Concession Agreement**") with concessionaire in relation to and for the implementation of the Project as defined therein and being the project described in (B) above.
- (D) The Ports Authority with the authority and the approval of the Government has entered into the Terminal Access Agreement, the Port Services Agreement, the Inter-Terminal Operations Agreement and the Site Lease in relation to matters connected with and incidental to the implementation of the Project.
- (E) It is one of the conditions precedent to the entering into force of the Concession Agreement that the concessionaire shall enter into an Implementation Agreement with the Government in a form reasonably satisfactory to the concessionaire and the Lenders.
- (F) In consideration of concessionaire entering into the Concession Agreement with the Ports Authority at the request of the Government, the Government is willing to provide certain undertakings to concessionaire in respect of the Project, subject to and in accordance with the terms and conditions of this Implementation Agreement.

**THIS AGREEMENT WITNESSES:**

**1. INTERPRETATION, DEFINITIONS AND LANGUAGE**

**1.1 Interpretation**

Unless the context otherwise requires:

- 1.1.1 words, phrases and expressions set out in Clause 1.2 shall have the meanings given to them in such Clause 1.2;
- 1.1.2 other words, phrases and expressions used in this Agreement shall, unless otherwise defined herein, have the meanings given to them in schedule 1 (*Definitions*) of the Concession Agreement;
- 1.1.3 words importing persons or parties shall include firms and corporations and all references to persons shall include their permitted successors and assigns;
- 1.1.4 words importing the singular only also include the plural and vice versa where the context requires;
- 1.1.5 words importing the masculine shall include the feminine and neuter and vice versa;
- 1.1.6 references to a party or the parties shall be construed as references to a party or the parties to this Agreement;
- 1.1.7 the headings in this Agreement shall not be deemed part of or be taken into consideration in the interpretation or construction of this Agreement and are included for ease of reference only; and
- 1.1.8 all references to Clauses and Exhibits shall be construed as references to Clauses of, and Exhibits to, this Agreement.

**1.2 Definitions**

Except as otherwise provided herein, the following terms shall have the meanings set forth below.

"B01"                      the Board of Investment of [the country], as authorized under the BOI Act;

**"BOI Act"** the Board of Investment of [the country] Law No \_\_\_\_\_

**"BOI Agreement"** the Agreement between the BOI and [the concessionaire] pursuant to which BOI Status will be conferred on [the concessionaire]; and

**"BOI Status"** the tax incentives and concessions applicable to a Flagship Company under the BOI Act, as set forth in the BOI Agreement, to be made available to [the concessionaire] on or prior Project, all in accordance with the procedures set forth in Clause 4.9.

### 1.3 Language

1.3.1 The language of negotiation of this Agreement has been English.

1.32 This Agreement is executed in English and the English text shall prevail for all purposes of determining the intention of the parties and in any construction of this Agreement.

## 2 TERM

This Agreement will commence on the date of its execution and shall terminate in accordance with the termination provisions of Clause 8.

## 3 OBLIGATIONS OF THE CONCESSIONAIRE

### 3.1 Project

The concessionaire shall undertake and execute the Project in accordance with, and subject to, the terms and conditions of this Agreement, the Concession Agreement and the other Project Documents.

### 3.2 Amendments to the Project Documents

3.2.1 The concessionaire shall, in consultation with the Ports Authority, submit to the Government a notice identifying any amendment of the Concession Agreement or any other Project Document which will affect the obligations of the Government.

3.2.2 The concessionaire shall not effect any such amendment without obtaining the written approval of the Government unless [ ]Business Days have elapsed from the date the Government receives such notice without the concessionaire and the Ports Authority receiving a written communication from the Government rejecting the proposed amendment.

### 3.3 Governmental Consents

The concessionaire shall provide all information and supporting documentation required by any Authority under Law in any application for the grant of, or under, any Consent in connection with the implementation of the Project.

### 3.4 Security

The concessionaire shall provide and maintain perimeter fencing around the Concession Area and shall maintain its own security arrangements within the Concession Area in order to maintain the proper and orderly conduct of its operations and the general security of the Concession Area.

**Comment [ID1]:** This is also addressed in the Port Operations Agreement so the issue of double jeopardy arises in the event of failure by the Concessionaire.

## 4. OBLIGATIONS OF THE GOVERNMENT

### 4.1 Equal Treatment

The Government shall not:

- 4.1.1 impose on the concessionaire any obligations which are more onerous than those relating to any other container terminal facility in the Port; or
- 4.1.2 grant to any other container terminal facility in [the country] any rights or benefits related to the establishment or adjustment of tariffs for its services of a similar nature which are more favourable than those granted to the concessionaire in connection with the implementation of the Project.

### 4.2 Guarantee by the Government of the Ports Authority's payment obligations

4.2.1 The Government irrevocably and unconditionally guarantees the obligations of the Ports Authority to make payments on account of Termination Compensation under clause 36 of the Concession Agreement, the Transfer Price under clause 35 of the Concession Agreement and the Buy Out Price under clause 2.5 of the Concession Agreement.

**Comment [ID2]:** Through the operation of Clause 9 of this Agreement this extends to any substitute party where there is an assignment by the Port Authority of and under the Concession Agreement by the Port Authority.

4.2.2 For the purposes of Clause 4.2.1, a payment obligation (or part thereof) is deemed undisputed if:

- (a) such obligation- (or part thereof) is acknowledged by the Ports Authority to be due and payable; or
- (b) a final award requiring payment to be made by the Ports Authority in respect of such obligation (or part thereof) is rendered by an arbitral tribunal under clause 48

*(applicable law and dispute resolution)* of the Concession Agreement.

4.2.3 The obligations of the Government under this Clause 4.2 in relation to the Concession Agreement:

- (a) shall continue until all surviving obligations of the Ports Authority under the Concession Agreement have been satisfied in full; and
- (b) shall remain in full force and effect, and shall apply, irrespective of whether the terms of the Concession Agreement are valid and enforceable obligations as against the Ports Authority.

4.2.4 The Government shall make payment under the aforesaid guarantee as follows:

- (a) in the case of Termination Compensation, the Government shall make payment in two equal tranches, with the first payment payable not later than one hundred and eighty (180) days after the date of termination under and in accordance with the Concession Agreement and the second payment payable no later than three hundred and sixty (360) days;
- (b) in the case of the Transfer Price, the Government shall make payment in full on the date of Handback; and
- (c) in the case of the Buy Out Price, the Government shall make payment in full not later than ninety (90) days after the decision of the Ports Authority to exercise its Buy Out Option under clause 2.5 of the Concession Agreement, provided that if payment of the Buy Out Price is not made in full by the Ports Authority or the Government prior to the expiry of such period then the Government acknowledges that the Buy Out Option shall lapse such that the Ports Authority and the Government shall forfeit any right to acquire the Phase 1 Facilities under the said clause 2.5.

4.2.5 Interest shall be payable on outstanding balances owing to the concessionaire under Clause 4.2.4 (a) at the rate of US \$ LIBOR plus \_\_\_\_per cent per annum (\_\_\_% p.a.) and shall

accrue from the date of termination under and in accordance with the Concession Agreement until the date of actual payment.

#### **4.3 Contractual Obligations**

Subject to Law, the Government shall provide all reasonable assistance in ensuring that the Ports Authority or any other Authority fulfils its obligations under the Concession Agreement and the other Project Documents to which the Ports Authority or any other Authority is a party.

#### **4.4 Governmental Approvals**

Subject to Clause 3.3 and the obligation of the concessionaire to comply with the Law specifically applicable to the subject matter of the particular Consent, the Government shall provide all reasonable assistance to the concessionaire for the timely obtaining from the Government or any Authority of:

- 4.4.1 the Consents set forth in Exhibit B, including any amendments, renewals or extensions of any such Consent;
- 4.4.2 visas and work permits for foreign personnel properly employed by the concessionaire and its contractors or subcontractors in connection with the Project for the period such personnel are so employed;
- 4.4.3 customs clearances and approvals for the importation of all equipment, materials and spare parts necessary for the Project: and
- 4.4.4 any other related consents including any amendments, renewals or extensions thereof.

#### **4.5 Utility Services**

The Government shall take all reasonable steps to ensure that the Port of \_\_\_\_\_ is identified as a priority service area for the supply of electricity and water.

#### **4.6 Breakwater, Phase 2 Facilities and Buy Out**

- 4.6.1 It is the present intention of the Government, acting through its instrumentalities, to commission a feasibility study to determine whether to build the Breakwater in a manner which would permit development of the Phase 2 Facilities.

- 4.6.2 The Government may decide in its absolute discretion, taking into account such financial, commercial, technical and other matters as the Government deems fit, either to build or not to build the Breakwater.
- 4.6.3 The Government's decision shall be final, binding and unappealable and shall be communicated on behalf of the Government by the Ports Authority to the concessionaire in writing.
- 4.6.4 If the Government decides to build the Breakwater.
- (a) the communication referred to in Clause 4.6.3 shall set forth in reasonable details preliminary technical specifications and a time frame for the construction of the Breakwater; and
  - (b) the Government shall use its reasonable efforts to build the Breakwater within such time frame.
- 4.6.5 The Government acknowledges and agrees that the concessionaire has granted the Ports Authority the Buy Out Option under clause 2.5 of the Concession Agreement in consideration of the representation that if the Ports Authority exercises such Buy Out Option the Government will in fact take all reasonable steps to honor the representations regarding the construction of the Breakwater made to the concessionaire by the Ports Authority or the Government during the negotiations of the Terms for the Phase 2 Facilities.

#### **4.7 Exclusivity**

- 4.7.1 The Government shall ensure that its agencies, corporations, instrumentalities and organs observe the provisions of clause 4 (*Exclusivity*) of the Concession Agreement.
- 4.7.2 Without affecting the generality of Clause 4.7.1, the Government agrees that, during a period of five years from \_\_\_\_\_, it shall not directly or indirectly commence (nor grant a right to any third party to commence) the operation of new container terminals aggregating more than 500,000 TEU capacity per annum in each of:
- (a) the Port;
  - (b) any port facility outside the Existing Superstructure; or
  - (c) any other Port in the country.



To avoid doubt, the aggregate limit of 500,000 TEU per annum capacity shall apply separately (not cumulatively) to each of sub-paragraphs (a) to (c) (inclusive) above.

- 4.7.3 Nothing in this Clause 4.7 shall prevent the Government from undertaking any technical, feasibility or other studies or instituting any tender or competition or undertaking other preparatory work or negotiating or signing any agreement in relation to the operation of new container terminals or from the construction of any such terminals.

#### **4.8 Regulator**

The Government shall take all reasonable steps at its earliest convenience, but in any event by no later than\_\_\_\_\_.

- 4.8.1 to establish a legally binding regulatory framework for the pricing of services in the ports of [the country], including the pricing of services provided by the Ports Authority to the concessionaire and other operators of container terminals; and

- 4.8.2 to establish terms of reference for a Regulator to be appointed pursuant to such regulatory framework with substantially the terms set forth in Exhibit C.

#### **4.9 BOI Status**

Prior to the Phase 1 Effective Date, the Government shall take all actions necessary to ensure that the concessionaire is granted BOI Status including:

- 4.9.1 approving the grant to the concessionaire of tax incentives and concessions including those listed in Exhibit A;

- 4.9.2 causing the BOI to enter into the BOI Agreement;

- 4.9.3 ensuring that each of the Lenders or any receiver, manager and receiver, assignee or step-in operator obtain the benefits of BOI Status as mentioned above if and when any of them takes over operations of the Project; and

- 4.9.4 taking such action as may be necessary to implement the foregoing or as may be reasonably required by the concessionaire to confirm any of the above.

#### **4.10 Insurance**

The Government shall ensure that the concessionaire is free to

obtain at concessionaire's expense and, subject to Law, shall provide the concessionaire with all required approvals to enable the concessionaire to obtain insurance required in connection with the Project in a jurisdiction other than in [\_\_\_\_\_].

## **5. FORCE MAJEURE**

### **5.1 Consequences of Force Majeure**

A party (the "**Affected Party**") shall be relieved from liability (except the obligations of the Government contained in Clause 4.2 hereof) for any delay in the performance of or inability to perform an obligation under this Agreement which is directly caused by or results from Force Majeure for so long as the Force Majeure or the inability to perform continues.

### **5.2 Duty to mitigate**

The Affected Party shall use its reasonable efforts to mitigate and overcome the effects of the occurrence of Force Majeure in order to maintain or resume performance provided that no party shall be required under this provision to settle any strike or other labor dispute under terms it considers to be unfavorable to it.

### **5.3 Procedure for calling Force Majeure**

If Force Majeure occurs, the Affected Party shall notify the other as soon as reasonably practicable and in any event within seven (7) Business Days after the Affected Party has reasonably determined that the occurrence of the Force Majeure might affect its performance in a material way of:

- (a) the occurrence and nature of the Force Majeure;
- (b) its expected duration (so far as can be reasonably assessed);
- (c) the obligations which cannot be fully performed as a result; and
- (d) the proposed mitigating action.

The Affected Party shall keep the other fully informed of developments, including performance of its mitigating steps.

### **5.4 Meaning of Force Majeure**

In this Agreement, "Force Majeure" means any event or circumstance or combination of events or circumstances whenever occurring and

referred to in clauses 22.4 and 22.5 (but subject to clause 22.6) of the Concession Agreement.

## **6. CONDITIONS PRECEDENT**

The concessionaire obligations under this Agreement shall be subject to the satisfaction or waiver of the following conditions:

### **6.1 Project Documents**

All conditions precedent to the Concession Agreement shall have been either satisfied or waived by the party entitled to require satisfaction of such condition precedent

### **6.2 Attorney General's legal opinion**

The concessionaire shall have received a legal opinion from the Attorney General of the Government in a form and substance satisfactory to the concessionaire with respect to the due authority, valid existence, execution, delivery and performance of this Agreement by the Government.

## **7. LIABILITIES**

### **7.1 Consequential and Economic Loss**

Subject to Clause 4.2, neither party shall in any circumstances be liable to the other in respect of any breach of this Agreement for:

7.1.1 any loss of profit, loss of revenue, loss of contract or loss of goodwill; or 7.1.2 any indirect or consequential loss.

### **7.2 Limit of the Government's Liability**

7.2.1 The Government's liability howsoever arising under or in connection with this Agreement shall not exceed the amounts for which the Government is ultimately liable under and in accordance with the provisions of "Clause 4.2.

7.2.2 It is agreed to by and between the parties that the Government shall not be liable or responsible and shall not be called upon to underwrite or pay in any manner whatsoever all and any costs incurred by the concessionaire including but not limited to the costs of legal and other advisors in connection with the negotiation of and entering into of the Project Documents and in relation to fulfilling any of the conditions precedent

thereunder.

### 7.3 The concessionaire's responsibility for arranging financing

The concessionaire shall bear and be solely responsible at all times at its cost and risk for arranging all necessary financing including working capital to perform its obligations under the Project Documents.

**Comment [ID3]:** It is likely that lenders will want the benefit of a direct agreement with Government in relation to the obligation to guarantee termination payments and this is provided for at clause 10 below.

## 8. TERMINATION

### 8.1 Termination

Subject to Clause 8.6, this Agreement shall terminate on the expiry or early termination of the Concession Agreement or as provided in Clauses 8.2 or 8.3, provided that Clauses 4.2 and 12 shall survive any termination of this Agreement until the earlier of either the Ports Authority having made payment in full of all amounts payable by it to the concessionaire under the Concession Agreement and the other Project Documents or the Government having made payment in full of all amounts payable by it to the concessionaire under this Agreement.

### 8.2 Government's right to early termination

The Government may serve a notice of termination of this Agreement on the concessionaire if the concessionaire is in breach of any of its material obligations under this Agreement and such breach has been notified to the concessionaire and has not been remedied within a period of sixty (60) days after such notification, or such longer period as may be applicable in the event that the concessionaire is pursuing a Remedial Programme in accordance with the provisions of the Concession Agreement.

**Comment [ID4]:** As the obligations under this Agreement reflect those in the Concession Agreement there must be concern as to why Government requires a separate right to terminate.

### 8.3 The concessionaire's right to early termination

The concessionaire may serve a notice of termination of this Agreement on the Government if the Government is in breach of any of its material obligations under this Agreement and such breach has been notified to the Government and has not been remedied within a period of sixty (60) days of notification, or such longer period as the concessionaire shall reasonably allow for the remedy of such breach if the concessionaire is satisfied that the Government is diligently pursuing a cure.

### 8.4 Notices of Termination

Any notice of termination under this Agreement shall be valid only if

prominently and clearly entitled "NOTICE OF TERMINATION".

#### **8.5 Sole grounds for termination**

The provisions of this Clause 8 shall be the sole and exclusive grounds on which the parties may terminate this Agreement.

#### **8.6 Antecedent Rights**

The termination of this Agreement shall be without limitation of or prejudice to any other antecedent right, relief or remedy of a party under or in connection with this Agreement and shall be without prejudice to the accrued rights and obligations of the parties under this Agreement including without limitation the obligations of the Government under Clause 4.2 of this Agreement.

### **9. RESTRUCTURING**

9.1 The obligations of the Government under this Agreement shall survive notwithstanding:

9.1.1 any reorganization or restructuring of the port sector or the port services sector in the country; or

9.1.2 the restructuring, reorganization, re-capitalization, sale, divestiture, merger, consolidation, amalgamation, privatization, change of ownership or other similar transaction involving the Ports Authority in whole or part.

9.2 Subject to Clause 9.3, the Government shall cause the relevant entity surviving the Ports Authority or the relevant entity or entities in whom all or only some of the obligations of the Ports Authority are vested, as the case may be, to adopt and become fully liable and continue to perform the Ports Authority's obligations under and in accordance with the Concession Agreement and the other Project Documents.

9.3 In the event of change of ownership of the Ports Authority, by whatsoever means the Government shall ensure that the rights of the Ports Authority under the Concession Agreement revert to and are exercised by the Government or by an Authority.

### **10. PROJECT FINANCING**

10.1 The Government and the concessionaire acknowledge that the construction of the Phase 1 Facilities and the Passenger Berth will

require financing by the Lenders and that the Lenders will require the financing to be secured by a first lien on the Project and the other assets of the concessionaire including a collateral assignment of the Concession Agreement, the other Project Documents and this Agreement together with the rights of the concessionaire thereunder.

- 10.2 To facilitate the obtaining of such financing and notwithstanding any provisions of this Agreement to the contrary, the Government agrees during the period commencing on the date of this Agreement until the Phase 1 Effective Date to negotiate with the concessionaire regarding such changes to this Agreement and any Project Documents (and to provide all reasonable assistance in securing that the Ports Authority negotiate with the concessionaire regarding such changes in the Project Documents) as may reasonably be required by the Lenders (and having regard to the rights of the Government under or in connection with this Agreement and its sovereign capacity) so as to enable the Lenders to exercise their rights and remedies under the Financing Documents.
- 10.3 To facilitate compliance with Phase 1 Conditions Precedent, the Government is willing to enter into a direct agreement with the Lenders, provided that only one such direct agreement shall be effective at any time. The Government agrees to negotiate in good faith during the period commencing on the date of this Agreement until the Phase 1 Effective Date regarding the terms of such direct agreement as may be reasonably required by the Lenders in connection with such financing, including terms to enable the Lenders to exercise their rights and remedies under the Financing Documents.

## 11. MISCELLANEOUS

### 11.1 Notices

11.1.1 All notices to be given under this Agreement shall be in writing in the English language.

11.1.2 All certificates, notices or written instructions to be given under terms of this Agreement shall be served by sending the same by post, telefax or leaving the same at

If to the Government: [\_\_\_\_\_]

shall be copied to:  
[\_\_\_\_\_]

If to the concessionaire:  
[\_\_\_\_\_]

- 11.1.3 A party to this Agreement may change its nominated address/addresses, telefax number by prior written notice to the other party.
- 11.1.4 Notices given by post shall be deemed to have been received upon the earlier of (i) actual receipt or (ii) seven (07) days after mailing if mailed under registered cover.
- 11.1.5 Notices given by telefax shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the telefax has not been received in legible form:
- (a) within two (2) hours after sending if sent on a Business Day between 0800 hours and 1430 hours; or
  - (b) by 1000 hours on the next following Business Day if sent after 1430 hours on a Business Day and before 0800 hours on that next following Business Day.

## 11.2 Confidentiality and publicity

- 11.2.1 Subject to Clauses 11.2.2 and 11.2.3, each party shall keep confidential and shall not disclose to any third party any information provided by another party in connection with the negotiation or performance of this Agreement without the prior written consent of that other party which may not be unreasonably withheld or delayed.
- 11.2.2 This restriction shall not apply to any information which at the time of disclosure is in the public domain or thereafter becomes part of the public domain otherwise than as a consequence of a breach by a party of its obligations under this Clause 11.2.
- 11.2.3 Nothing in this Agreement shall prevent the disclosure of information:
- (a) as required by Law to the Government or any Authority or any other government or regulatory agency having jurisdiction;
  - (b) as required by lawful process;
  - (c) to the extent required by the applicable rules or regulations of any recognised stock exchange or securities regulatory body;

- (d) where reasonably necessary to effect the purposes of this Agreement; or
- (e) to a party's professional advisers and prospective or actual Lenders or prospective or actual purchasers of the Project or its assets in connection with any sale thereof by the Lenders pursuant to the exercise by the Lenders of their rights and remedies under the Financing Documents.

### 11.3 Severability

- 11.3.1 If for any reason whatsoever any provision of this Agreement is or becomes invalid, illegal or unenforceable, or is declared by any court of competent jurisdiction or any other Authority to be invalid, illegal or unenforceable or if such Authority;
- (a) refuses or formally indicates an intention to refuse authorization of, or exemption to, any of the provisions or arrangements contained in this Agreement ( in the case of a refusal either by way of outright refusal or by way of a requirement that this Agreement be amended or any of its provisions be deleted or that a party give an undertaking or accept a condition as to future conduct ); or
  - (b) formally indicates that to continue to operate any provision of this Agreement may expose the parties to sanctions under any Law or requests any party to give undertakings or to accept conditions as to future conduct in order that such party may not be subject to such sanctions;
- then in all cases, whether initially or at the end of any earlier period or period of exemptions, the parties will negotiate in good faith with a view to agreeing one or more provisions which (i) may be substituted for such invalid, unenforceable or illegal provision and (ii) are satisfactory to all relevant Authorities and produce as nearly as is practicable in all the circumstances the appropriate balance of the commercial interests of the parties.
- 11.3.2 If for any reason whatsoever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other Authority to be invalid, illegal or unenforceable, the other provisions of this Agreement shall, except for the provision that is invalid, -illegal or unenforceable, remain in full force and effect.



#### **11.4 Waiver**

No relaxation, forbearance, indulgence or delay (together "forbearance") of either party in exercising any right under this Agreement shall constitute the waiver of that right nor shall it affect the ability of that party subsequently to exercise the right or pursue any remedy nor shall that forbearance constitute a waiver of any other right.

#### **11.5 Amendments**

This Agreement may only be amended or varied in writing signed by or on behalf of each of the parties.

#### **11.6 Assignment and transfers of interests**

11.6.1 The Government may not assign or transfer all or any part of its rights, benefits or obligations hereunder.

11.6.2 the concessionaire may not sell, assign or otherwise transfer all or any of its rights, benefits or obligations hereunder without the prior written consent of the Government, such consent not to be unreasonably withheld, except that for the purpose of financing the Project the concessionaire may assign or create a security interest over its rights and interests under or pursuant to this Agreement, any Project Document, the Project, the movable property and intellectual property of the concessionaire or the revenues or any of the rights or assets of the concessionaire.

11.6.3 Any actual, attempted or purported sale, assignment or other transfer by a party of any of its rights or obligations or interests in, under or pursuant to this Agreement which does not comply with the terms of this Clause 11.6 shall be null void and of no force or effect.

#### **11.7 Several Obligations**

Except as otherwise set forth herein, the duties, obligations and liabilities of the parties are intended to be several only and nothing contained in this Agreement shall be construed to create an association, trust, partnership or joint venture among the parties and each party shall be liable individually and severally for its own obligations under this Agreement.

### **11.8 Good Faith**

The parties agree that they are each bound to act in good faith with respect to the other party in performing their respective obligations or enforcing their respective rights under this Agreement. The parties further agree that in performing such obligations or enforcing such rights, neither party shall act in a manner which would unduly burden or unfairly prejudice the rights of the other party under this Agreement.

### **11.9 Private Commercial Act**

The Government agrees that the execution, delivery and performance by it of its obligations under this Agreement shall constitute private and commercial acts of the Government rather than public or governmental acts.

### **11.10 Entirety of Agreement**

This Agreement and the Exhibits attached hereto constitute the entire agreement between the parties in relation to the Project and all prior representations, negotiations and undertakings shall be excluded from any construction of this Agreement provided that in interpreting this Agreement, the Concession Agreement and the other Project Documents may be referred to so as to clarify the intent of each of the parties to the Concession Agreement and such Project Documents.

### **11.11 Parties in Interest**

11.11.1 Subject to Clause 11.6.2:

- (a) this Agreement shall be binding upon and inure solely to the benefit of each party; and
- (b) nothing in this Agreement, express or implied, is intended to or shall confer upon any other person any rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement.

11.11.2 Neither party shall have any right, power or authority to enter into any agreement or undertaking for, or to act on behalf of, or to act as or be an agent or representative of or to otherwise bind the other party.

### **11.11 Counterparts**

This Agreement may be executed in two or more counterparts each

of which shall be considered one and the same Agreement and shall become effective when two or more counterparts have been signed by each of the parties and delivered to the other party.

## 12. DISPUTES

### 12.1 Arbitration

If any dispute, disagreement or difference arising from, out of or in connection with the provisions of this Agreement, the interpretation hereof or the rights, duties, obligations or liabilities of either party hereto or the operation, breach, termination or invalidity hereof is not amicably resolved between the parties, such dispute, disagreement or difference shall be referred by either party to arbitration for final settlement as provided in this Clause 12.1.

12.1.1 Each of the parties submits to arbitration in \_\_\_\_\_ (or such other place as the parties may agree in writing at the start of any arbitration proceeding) before a panel of three arbitrators under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**") as then in force (the "**Rules**"), as modified by this Clause 12.1. The proceedings shall be conducted and the award shall be rendered in the English language.

12.1.2 Each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint a third arbitrator. The third arbitrator shall be the chairman of the arbitral tribunal. If either party fails to appoint an arbitrator or if the two (2) party appointed arbitrators fail to agree upon a third arbitrator, then any such arbitrator shall, at either party's written request, be appointed by the Chairman of the International Court of Arbitration of the International Chamber of Commerce ("ICC") acting in accordance with the rules adopted by the ICC for selecting an arbitrator but without giving effect to the provisions of paragraph 6 of Article 10 of such rules.

12.1.3 Any award rendered by the arbitral tribunal shall be final and binding and judgment thereon may be entered in any court of competent jurisdiction. Any monetary award shall be made in reasonable time and shall be payable in US dollars free of any tax, deduction or offset and the arbitral tribunal shall be authorized in its discretion to grant pre-award and post-award interest at commercial rates. Any costs, fees or taxes incidental to enforcing the award shall, to the maximum extent

permitted by Law, be charged against the party resisting such enforcement.

- 12.1.4 The parties hereby waive and agree to exclude any rights of application or appeal to the fullest extent permitted by law in connection with any question of fact or law arising in the course of the arbitration or with respect to any award made except for actions to enforce an arbitral award.
- 12.1.5 Except as expressly provided in this Agreement, pending the award in any arbitration proceedings hereunder
- (a) this Agreement and the rights and obligations of the parties shall remain in full force and effect; and
  - (b) each of the parties shall continue to perform their respective obligations under this Agreement.
- 12.1.6 The termination of this Agreement shall not result in the termination of any arbitration proceedings pending at the time of such termination nor otherwise affect the rights and obligations of the parties under or with respect to such pending arbitration.
- 12.1.7 Any award rendered by the arbitral tribunal shall determine the extent to which the costs of the arbitration are to be borne by each of the parties.
- 12.1.8 The reference to arbitration, all proceedings in the arbitration and all documents and copies of documents or records produced on discovery or created for the purposes of the arbitration shall be confidential to the parties and the arbitrators and shall not be disclosed to any other person (other than the Lenders) without the express prior written consent of both parties, except as may be necessary to enforce the terms of any award made by the arbitral tribunal or to challenge the conduct of the arbitrators or the validity of any award in a court of competent jurisdiction (subject, however, to Clause 12.1.4).
- 12.1.9 The powers of the arbitral tribunal shall include the power to conduct proceedings in part in any place other than [\_\_\_\_\_] where the arbitrators in their sole discretion determine that it is necessary for the more effective and efficient determination of the matters before them. Subject to Clause 12.2, the arbitral tribunal shall also have the power to open up, review and revise any notice, award, compensation

(subject to the provisions of this Agreement) and expenses to or against either party, plus interest for such period (including before the date of the award) and at such rate as they decide.

- 12.1.10 The parties hereby waive any objection to or claim of immunity in respect of the enforcement of any arbitral award made by the arbitral tribunal; and each party hereto represents, warrants and affirms that it is not entitled to claim immunity in connection with any proceedings relating to an arbitration or arbitral award under this Agreement.

## 12.2 Limitation on the Government's right to dispute

Notwithstanding the foregoing, the Government shall not be entitled to dispute any amount due to the concessionaire where there has already been a resolution or determination relating to such disputed amount pursuant to the dispute resolution provisions of the Concession Agreement, as the case may be, and the Government shall be bound by such resolution or determination.

## 12.3 Consolidation of arbitral proceedings

The arbitral tribunal may consolidate an arbitration under this Agreement with any arbitration if the subject matter of the dispute in arbitration arises out of or relates in substantial part to the same set of facts or transactions.

**Comment [ID5]:** This probably will not work without agreement of all parties to reduce the tribunal to one neutral arbitrator as each party is entitled to nominate an arbitrator which would mean three arbitrators and an umpire-risk of deadlock. Alternative would be for Government and Port Authority to agree to have same arbitrator.

## 13. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the country.

**IN WITNESS WHEREOF** the parties have executed this Implementation Agreement in three originals as of the date first written above.

**EXECUTED AS AN AGREEMENT**

**SECRETARY, MINISTRY OF FINANCE** acting herein for and on behalf of

**THE GOVERNMENT OF** \_\_\_\_\_

Witnessed by:

(sign) \_\_\_\_\_

(name) \_\_\_\_\_

**The Common Seal of the concessionaire is affixed hereto in the presence of:**

(sign) \_\_\_\_\_

(name) \_\_\_\_\_

two Directors of the Company who attest the sealing thereof.

Witnessed by:

(sign) \_\_\_\_\_

(name) \_\_\_\_\_

Initialed By: [\_\_\_\_\_] [\_\_\_\_\_]

On [\_\_\_\_\_] of [\_\_\_\_],

## EXHIBIT A

### OI STATUS

Tax incentives and concessions to be made available the concessionaire as a "Flagship Company" as of the Phase 1 Effective Date shall include:

Incentives/Concessions	Period/Basis
Exemption from corporate income tax (tax holiday).	20 years reckoned from the date of [first commercial transaction following Handover].
Exemption from income tax on dividends paid to shareholders.	During tax holiday and for one year thereafter.
Income tax on emoluments of foreign employees will be assessed at 15 percent per annum.	During tax holiday. Thereafter, the then-prevailing income tax rate will apply.
Tax relief for non-resident persons or nonresident partnerships whose independent services as management consultants are provided in to the Project. Tax relief for- non-resident persons or non-resident partnerships providing architectural, engineering, quantity surveying, construction management services and such other services ancillary thereto in to the Project.. This relief will also be available to non-resident subcontractors providing services in the country (other than non-resident subcontractors tothe above-mentioned management consultants) who provide such services to the above-mentioned nonresident persons or partnerships.	Exemption from the country income tax payable, in excess of any income tax payable by them in their home country; however if no income tax is payable in the home country there will be no liability for the country income tax.
Exemption from turnover tax on fees, commissions and other charges payable to persons by the concessionaire mentioned in the immediately preceding cage	During lifetime of the concessionaire
Exemption from customs duty, turnover tax	During the period commencing on the date of the Concession

and excise duty in respect of plant, machinery, equipment, spare parts, accessories, construction materials, other materials, commercial vehicles and other project-related goods imported by the concessionaire for its project use or imported by any independent contractor engaged by the concessionaire.	Agreement for the Concession Term in accordance with the Concession Agreement.
Exemption from Exchange Control Act and authorization to open accounts with Foreign Currency Banking Units of local commercial banks.	During lifetime of the concessionaire.
Exemption from Import & Export Control Act.	During lifetime of the concessionaire.
Exemption from income tax on capital gains arising from the transfer of shares of the concessionaire.	During lifetime of the concessionaire.



## **EXHIBIT B**

### **REQUIRED GOVERNMENT CONSENTS**

#### **A. CONSENTS REQUIRED PRIOR TO PHASE 1 EFFECTIVE DATE**

1. BOI Status.
2. Environmental approvals [legal framework]

#### **B. CONSENTS (INCLUDING ONGOING CONSENTS) REQUIRED AFTER PHASE 1 EFFECTIVE DATE**

1. Issuance of visas and work permits for foreign personnel properly employed in connection with the Project by the concessionaire for the period such personnel are so employed;
2. License required under Schedule G of the Customs Ordinance to act as Customs House Agent for transacting business in relation to the entry and clearance of any ship, goods or baggage;
3. All building and construction approvals, consents, permits and licenses required by the Municipal Council and the Urban Development Authority.
4. Permits required to obtain electricity, water, sewerage and drainage facilities to the leased premises;
5. All permits and consents required for the effectiveness of the Financing
6. Documents, including in any event:
  - (a) approval from the Central Bank for the concessionaire to borrow and make payments in foreign currency; and
  - (b) approval required for the ownership by foreign persons and entities of equity in the concessionaire.

## EXHIBIT C

### TERMS OF REFERENCE FOR REGULATOR

*Draft provided by the Government subject to the approval of the concessionaire and the Lenders*

The Regulator

1. may be empowered to regulate tariff for port services as determined by the Minister,
2. in regulating tariffs, shall act in an impartial and non-discriminatory manner taking into account the tariffs set in other similar ports and the particular conditions in the country while applying sound commercial principles;
3. shall consult all relevant parties prior to regulating tariffs; in particular he shall consult the Ports Authority, shipping agents, the Treasury and the Minister,
4. may regulate tariff on application made by a relevant party or on his own initiative;
5. for the purpose of regulating tariff and for discovery of any unfair or discriminatory practices, shall have the power to investigate and make determinations as appropriate.]