

Government of India  
Ministry of Shipping  
(Ports Wing)

No. PD-13/21/2016-PPP Cell

Dated 17<sup>th</sup> May, 2016

**Subject: Review of Model Concession Agreement for Port Sector Projects**

The Draft Model Concession Agreement (MCA) for Port Sector PPP projects has been hosted on the website of the Ministry of Shipping ([shipping.nic.in](http://shipping.nic.in)). Concerned parties/stakeholders are requested to send their comments on the draft MCA by 30.06.2016 on the address given below. Soft copy may also kindly be mailed to:

**[ak.saran@nic.in](mailto:ak.saran@nic.in)**



(A.K. Saran)  
Deputy Secretary to the Govt. of India  
Tel: 011 - 23714714

**MODEL CONCESSION AGREEMENT**

FOR

**PRIVATE SECTOR PROJECTS**

IN

**MAJOR PORTS**

**Department of Shipping  
(Ports Wing)  
Ministry of Shipping, Road Transport & Highways  
Government of India**

(27.04.2016)

**CONCESSION AGREEMENT**

**BETWEEN**

**BOARD OF TRUSTEES FOR ..... PORT (THE CONCESSIONING  
AUTHORITY)**

**AND**

**..... LTD.  
(THE CONCESSIONAIRE)**

**FOR**

.....  
.....

**(PROJECT TITLE)**

**DATED .....**

## CONCESSION AGREEMENT

### TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>ARTICLE 1</b> .....                                       | <b>10</b> |
| <b>DEFINITIONS AND INTERPRETATION</b> .....                  | <b>10</b> |
| 1.1    DEFINITIONS .....                                     | 10        |
| 1.2    OTHER REFERENCES .....                                | 24        |
| 1.3    INTERPRETATIONS .....                                 | 25        |
| 1.4    MEASUREMENTS AND ARITHMETIC CONVENTIONS .....         | 28        |
| 1.5    AMBIGUITIES AND DISCREPANCIES.....                    | 28        |
| <b>ARTICLE 2</b> .....                                       | <b>29</b> |
| <b>CONCESSION AND PORT ASSETS</b> .....                      | <b>29</b> |
| 2.1    CONCESSION .....                                      | 29        |
| 2.2    CONCESSION PERIOD.....                                | 29        |
| 2.3    ACCEPTANCE OF THE CONCESSION .....                    | 31        |
| 2.4    PORT’S ASSETS .....                                   | 31        |
| 2.5    USE OF PORT’S ASSETS.....                             | 32        |
| 2.6    INFORMATION ABOUT PROJECT SITE AND PORT’S ASSETS..... | 32        |
| 2.7    ACCEPTANCE OF THE PORT ASSETS .....                   | 33        |
| 2.8    PEACEFUL OCCUPATION.....                              | 33        |
| <b>ARTICLE 3</b> .....                                       | <b>34</b> |
| <b>CONDITIONS PRECEDENT</b> .....                            | <b>34</b> |
| 3.1    CONDITIONS PRECEDENT:.....                            | 34        |
| <b>ARTICLE 4</b> .....                                       | <b>38</b> |
| <b>PERFORMANCE GUARANTEE</b> .....                           | <b>38</b> |
| 4.1    PERFORMANCE GUARANTEE.....                            | 38        |
| <b>ARTICLE 5</b> .....                                       | <b>39</b> |
| <b>INDEPENDENT ENGINEER</b> .....                            | <b>39</b> |
| 5.1    INDEPENDENT ENGINEER.....                             | 39        |
| 5.2    INDEPENDENT ENGINEER(Operati on Perriod).....         | 40        |
| <b>ARTICLE 6</b> .....                                       | <b>41</b> |
| <b>PROJECT IMPLEMENTATION</b> .....                          | <b>41</b> |
| 6.1    PREPARATION OF DESIGNS AND DRAWINGS .....             | 41        |
| 6.2    REVIEW OF THE DESIGNS AND DRAWINGS .....              | 41        |
| 6.3    CONSTRUCTION PHASE .....                              | 42        |
| 6.4    OBLIGATIONS OF THE CONCESSIONAIRE.....                | 43        |
| 6.5    OBLIGATIONS OF THE CONCESSIONING AUTHORITY .....      | 45        |
| 6.6    SUSPENSION OF WORKS .....                             | 46        |
| 6.7    ISSUE OF COMPLETION CERTIFICATE .....                 | 46        |
| 6.8    CHANGE OF SCOPE .....                                 | 48        |
| 6.9    LIQUIDATED DAMAGES.....                               | 51        |
| <b>ARTICLE 7</b> .....                                       | <b>53</b> |
| <b>OPERATIONS &amp; MAINTENANCE</b> .....                    | <b>53</b> |
| 7.1    (a) Obligations of the Concessionaire.....            | 53        |
| (b) Rights of Concessionaire .....                           | 60        |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|   |           |
|---|-----------|
| (c) Obligations of the Concessioneing Authority .....             | 61        |
| 7.2 UTILITIES AND SERVICES .....                                  | 63        |
| 7.3 LIABILITY FOR SHORTFALL IN PERFORMANCE .....                  | 64        |
| <b>ARTICLE 8 .....</b>  | <b>65</b> |
| <b>TARIFF .....</b>   | <b>65</b> |
| 8.1 APPLICABLE TARIFF GUIDELINES.....                             | 65        |
| 8.2 LEVY AND RECOVERY OF THE TARIFF .....                         | 65        |
| 8.3 COLLECTION OF CESSSES AND CHARGES .....                       | 65        |
| <b>ARTICLE 9 .....</b>  | <b>67</b> |
| <b>PAYMENTS TO THE CONCESSIONING AUTHORITY .....</b>              | <b>67</b> |
| 9.1 LICENSE FEE .....   | 67        |
| 9.2 PAYMENTS OF ROYALTY .....                                     | 67        |
| 9.3 UTILITIES OR SERVICES.....                                    | 68        |
| 9.4 CERTIFIED ACCOUNTS .....                                      | 69        |
| 9.5 ESCROW ACCOUNT.....   | 70        |
| <b>ARTICLE 10 .....</b>   | <b>73</b> |
| <b>ASSETS: OWNERSHIP AND PERMITTED CHARGE .....</b>               | <b>73</b> |
| 10.1 OWNERSHIP OF ASSETS.....                                     | 73        |
| (a) Land and Water Area .....                                     | 73        |
| (b) Assets created or provided by the Concessionaire .....        | 73        |
| 10.2 PERMITTED CHARGE ON ASSETS.....                              | 74        |
| <b>ARTICLE 11 .....</b>   | <b>75</b> |
| <b>SHAREHOLDING .....</b>   | <b>75</b> |
| 11.1 OWNERSHIP STRUCTURE .....                                    | 75        |
| 11.2 SHAREHOLDING .....   | 75        |
| 11.3 CONSTITUENT DOCUMENTS.....                                   | 76        |
| <b>ARTICLE 12 .....</b>   | <b>78</b> |
| <b>GENERAL RIGHTS, DUTIES AND OBLIGATIONS.....</b>                | <b>78</b> |
| 12.1 OF THE CONCESSIONAIRE .....                                  | 78        |
| (a) Applicable Permits .....                                      | 78        |
| (b) Taxes & duties .....  | 78        |
| (c) Insurance .....   | 78        |
| (d) Indemnification .....   | 81        |
| (e) Assignability .....   | 82        |
| (f) Engagement of Contractors.....                                | 82        |
| (g) Condition Survey .....  | 84        |
| 12.2 OF THE CONCESSIONING AUTHORITY.....                          | 85        |
| (a) Assistance in obtaining Approvals, Permits and Licenses ..... | 85        |
| (b) Taxes and Duties .....  | 85        |
| (c) Competing Facilities.....                                     | 85        |
| (d) General rights of inspection and verification .....           | 86        |
| 12.3 OF THE CONCESSIONING AUTHORITY AND THE CONCESSIONAIRE .....  | 86        |
| (a) Monitoring Arrangement.....                                   | 86        |
| (c) Compliance with Laws and Regulations.....                     | 86        |
| (d) Rights to Documents.....                                      | 86        |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|   |            |
|---|------------|
| <b>ARTICLE 13</b> .....   | <b>88</b>  |
| <b>CHANGE IN LAW</b> .....  | <b>88</b>  |
| 13.1 CHANGE IN LAW .....  | 88         |
| 13.2 THE CONCESSIONAIRE'S REMEDY .....                                | 89         |
| <b>ARTICLE 14</b> .....   | <b>92</b>  |
| <b>FORCE MAJEURE</b> .....  | <b>92</b>  |
| 14.1 FORCE MAJEURE EVENT .....  | 92         |
| 14.2 NON-POLITICAL EVENTS .....                                       | 93         |
| 14.3 POLITICAL EVENTS .....   | 93         |
| 14.4 OTHER EVENTS .....   | 94         |
| 14.5 NOTICE OF FORCE MAJEURE EVENT .....                              | 95         |
| 14.6 PERIOD OF FORCE MAJEURE .....                                    | 96         |
| 14.7 RESUMPTION OF PERFORMANCE .....                                  | 96         |
| 14.8 PERFORMANCE EXCUSED .....  | 96         |
| 14.9 COSTS, REVISED TIMETABLE .....                                   | 97         |
| (a) Costs .....   | 97         |
| (b) Extension of time/period .....                                    | 97         |
| 14.10 TERMINATION DUE TO FORCE MAJEURE EVENT .....                    | 97         |
| <b>ARTICLE 15</b> .....   | <b>98</b>  |
| <b>EVENTS OF DEFAULT</b> .....  | <b>98</b>  |
| 15.1 EVENTS OF DEFAULT .....  | 98         |
| (a) The Concessionaire Event of Default .....                         | 100        |
| (b) The Concessioning Authority Event of Default .....                | 101        |
| 15.2 PARTIES RIGHTS .....   | 102        |
| 15.3 CONSULTATION NOTICE .....  | 102        |
| 15.4 REMEDIAL PROCESS .....   | 102        |
| 15.5 OBLIGATIONS DURING REMEDIAL PERIOD .....                         | 103        |
| 15.6 REVOCATION OF CONSULTATION NOTICE .....                          | 103        |
| 15.7 TERMINATION DUE TO EVENTS OF DEFAULT .....                       | 103        |
| 15.8 CONCESSIONING AUTHORITY'S RIGHTS OF STEP-IN .....                | 104        |
| <b>ARTICLE 16</b> .....   | <b>105</b> |
| <b>TERMINATION OF THE CONCESSION/AGREEMENT</b> .....                  | <b>105</b> |
| 16.1 TERMINATION PROCEDURE .....                                      | 105        |
| 16.2 OBLIGATIONS DURING TERMINATION PERIOD .....                      | 105        |
| 16.3 REQUISITION .....  | 105        |
| 16.4 CONDITION SURVEY .....   | 106        |
| 16.5 CONSEQUENCES OF TERMINATION .....                                | 107        |
| <b>ARTICLE 17</b> .....   | <b>109</b> |
| <b>COMPENSATION</b> .....   | <b>109</b> |
| 17.1 COMPENSATION .....   | 109        |
| (a) Termination due to Force Majeure Event .....                      | 109        |
| (b) Termination due to Concessionaire Event of Default .....          | 109        |
| (c) Termination due to Concessioning Authority Event of Default ..... | 110        |
| 17.2 NO COMPENSATION ON EXPIRY OF CONCESSION PERIOD .....             | 110        |
| 17.3 TRANSFER FEE AND CHARGES .....                                   | 110        |
| 17.4 PAYMENT OF COMPENSATION TO LENDERS .....                         | 111        |
| 17.5 DELAYED PAYMENT OF COMPENSATION .....                            | 112        |
| 17.6 DELAYED TRANSFER OF ASSETS .....                                 | 112        |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|   |   |            |
|---|---|------------|
| 17.7  | REMEDIES CUMULATIVE.....  | 113        |
| <b>ARTICLE 18 .....</b>                                 |   | <b>114</b> |
| <b>TRANSFER ON EXPIRY OF THE CONCESSION PERIOD.....</b> |   | <b>114</b> |
| 18.1  | GENERAL SCOPE OF TRANSFER/PAYMENT.....                              | 114        |
| 18.2  | CONCESSIONAIRE’S OBLIGATIONS .....                                  | 114        |
| 18.3  | CONCESSIONING AUTHORITY’S OBLIGATIONS .....                         | 115        |
| 18.4  | RISK.....   | 116        |
| <b>ARTICLE 19 .....</b>                                 |   | <b>117</b> |
| <b>DISPUTE RESOLUTION .....</b>                         |   | <b>117</b> |
| 19.1  | AMICABLE SETTLEMENT .....   | 117        |
| 19.2  | ASSISTANCE OF EXPERT-.....  | 117        |
| 19.3  | ARBITRATION.....  | 117        |
| (a)   | Arbitrators .....   | 117        |
| (b)   | Place of Arbitration .....  | 118        |
| (c)   | English Language .....  | 118        |
| (d)   | Procedure.....  | 118        |
| (e)   | Enforcement of Award .....  | 118        |
| (f)   | Fees and Expenses .....   | 119        |
| (g)   | Performance during Arbitration .....                                | 119        |
| <b>ARTICLE 20 .....</b>                                 |   | <b>120</b> |
| <b>REPRESENTATIONS AND WARRANTIES .....</b>             |   | <b>120</b> |
| 20.1  | REPRESENTATIONS AND WARRANTIES OF THE CONCESSIONAIRE .....          | 120        |
| 20.2  | REPRESENTATIONS AND WARRANTIES OF THE CONCESSIONING AUTHORITY ..... | 122        |
| 20.3  | DISCLOSURE .....  | 123        |
| <b>ARTICLE 21 .....</b>                                 |   | <b>124</b> |
| <b>MISCELLANEOUS PROVISIONS .....</b>                   |   | <b>124</b> |
| 21.1  | DATUM .....   | 124        |
| 21.2  | SURVIVAL OF OBLIGATIONS .....                                       | 124        |
| 21.3  | ARTICLES TO SURVIVE TERMINATION.....                                | 124        |
| 21.4  | JOINT RESPONSIBILITY.....   | 124        |
| 21.5  | SEVERAL OBLIGATIONS .....   | 125        |
| 21.6  | SEVERABILITY .....  | 125        |
| 21.7  | NOTICES .....   | 125        |
| 21.8  | WAIVER .....  | 126        |
| 21.9  | AMENDMENTS, MODIFICATIONS OR ALTERATIONS .....                      | 126        |
| 21.10   | GOVERNING LAW .....   | 127        |
| 21.11   | ENTIRE AGREEMENT.....   | 127        |
| <b>APPENDIX 1 .....</b>                                 |   | <b>128</b> |
|   | PROJECT SITE .....  | 128        |
| <b>APPENDIX 2 .....</b>                                 |   | <b>129</b> |
|   | PORT’S ASSETS .....   | 129        |
| <b>APPENDIX 3 .....</b>                                 |   | <b>130</b> |
|   | SUBSTITUTION AGREEMENT .....  | 130        |
| <b>APPENDIX 4 .....</b>                                 |   | <b>145</b> |
|   | SCOPE OF WORK .....   | 145        |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|   |            |
|---|------------|
| <b>APPENDIX 5</b> .....   | <b>164</b> |
| PROJECT SCHEDULE .....  | 164        |
| <b>APPENDIX 6</b> .....   | <b>165</b> |
| DESIGNS AND DRAWINGS .....  | 165        |
| <b>APPENDIX 7</b> .....   | <b>166</b> |
| TERMS OF REFERENCE FOR INDEPENDENT ENGINEER .....                                       | 166        |
| <b>APPENDIX 8</b> .....   | <b>171</b> |
| PERMITS AND CLEARANCES PROCURED BY THE CONCESSIONAIRE/ CONCESSIONING<br>AUTHORITY ..... | 171        |
| <b>APPENDIX 9</b> .....   | <b>172</b> |
| PERFORMANCE GUARANTEE .....   | 172        |
| <b>APPENDIX 10</b> .....  | <b>177</b> |
| CERTIFICATES .....  | 177        |
| <b>APPENDIX 11</b> .....  | <b>179</b> |
| PERSONNEL AND LABOUR REQUIREMENTS .....   | 179        |
| <b>APPENDIX 12</b> .....  | <b>180</b> |
| TARIFFS .....   | 180        |
| <b>APPENDIX 13</b> .....  | <b>181</b> |
| RATES APPLICABLE IN RESPECT OF LAND, UTILITIES AND SERVICES .....                       | 181        |
| <b>APPENDIX 14</b> .....  | <b>182</b> |
| MINIMUM GUARANTEED REVENUE .....  | 182        |
| <b>APPENDIX 15</b> .....  | <b>183</b> |
| PERFORMANCE STANDARDS .....   | 183        |
| <b>APPENDIX 16</b> .....  | <b>190</b> |
| ESCROW AGREEMENT .....  | 190        |
| <b>APPENDIX 17</b> .....  | <b>209</b> |
| BASE CASE FINANCIAL MODEL .....   | 209        |
| <b>APPENDIX 18</b> .....  | <b>210</b> |
| MONITORING ARRANGEMENT .....  | 210        |
| <b>APPENDIX 19</b> .....  | <b>211</b> |
| TRIPARTITE AGGREETMENT .....  | 211        |



CONCESSION AGREEMENT

**THIS CONCESSION AGREEMENT** is made at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_

BETWEEN:

1. **BOARD OF TRUSTEES** for \_\_\_\_\_ PORT, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963 and having its Administrative Office at \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, hereinafter referred to as **“the Concessioneing Authority”** (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns);

AND

2. \_\_\_\_\_ **LIMITED**, a company registered under the Companies Act, 1956, and having its registered office at \_\_\_\_\_  
\_\_\_\_\_  
hereinafter referred to as **“the Concessionaire”** (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns).

WHEREAS:

- (A) The Concessioneing Authority is desirous of implementing a Project (as defined hereinafter) for \_\_\_\_\_<sup>1</sup>  
through private sector participation;
- (B) In or about \_\_\_\_\_, the Concessioneing Authority invited applications

<sup>1</sup> To provide in brief the nature of the facilities e.g. Container handling/bulk cargo/liquid cargo/others.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

from the interested parties in accordance with the Request for Qualification (as defined hereinafter), to shortlist competent parties that can subsequently bid for the Project;

- (C) In response to the invitation referred to in recital 'B' above, the Concessioneing Authority received applications from various parties including the application dated \_\_\_\_\_ submitted by the Applicant/ Consortium in accordance with the Request for Qualification;
- (D) The Concessioneing Authority, after evaluating all the applications, shortlisted \_\_\_\_\_ number of applicants including the Applicant/Consortium and invited proposals from them in accordance with the Request for Proposal (as defined hereinafter), for implementing the Project;
- (E) In response to the Request for Proposal, the Concessioneing Authority received proposals from the shortlisted applicants including the one submitted by the Applicant/Consortium;
- (F) The Concessioneing Authority, after evaluating all the proposals received by it from the shortlisted applicants, accepted the proposal referred to in recital "E" above submitted by the Applicant/Consortium and communicated its acceptance to the Applicant/Consortium vide Letter of Intent for Award of Concession dated \_\_\_\_\_;
- (G) The Applicant/Consortium has/have incorporated the Concessionaire as a special purpose company in India, under the /Companies Act,2013 to implement the Project;
- (H) Following the issue of the Letter of Intent for Award of Concession, the Concessioneing Authority has agreed to grant the Concession to the Concessionaire to implement the Project on the terms, conditions and covenants hereinafter set forth in this Agreement.

**NOW, THIS AGREEMENT WITNESSETH AS FOLLOWS:**

**ARTICLE 1**

**DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In this Agreement, unless the context otherwise requires the following terms shall have the following meanings assigned/ascribed thereto: -

**“Additional Auditor”** has the meaning ascribed to it in Article 9.4.

**“Additional Cost”** means the additional capital expenditure which the Concessionaire has or would be required to incur and which has arisen as a result of Change in Law.

**“Affiliate”** means, with respect to any Party and/or with respect to the Applicant and/or with respect to any member of Consortium, any other Person directly or indirectly controlling, controlled by or under common control with such Party, Applicant and/or member of Consortium. For the purposes of this definition, the term “control” (including with correlative meaning, the terms “controlled by” and “under common control with”) as applied to any Party or Applicant or a member of Consortium, means the possession, directly or indirectly, of the power to direct or cause the direction of the management of that Party or Applicant or a member of Consortium whether through ownership of 50 (fifty) % or more of the voting securities, by contract, or otherwise.

**“Agreement”** means this agreement as of date hereof, including Appendices 1 through 17 as may be amended, supplemented or modified in accordance with the provisions hereof.

**“Appendix”** means the schedules, supplements or documents, appended to this Agreement.

**“Applicable Laws”** means all laws in force and effect as of the date hereof and

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

which may be promulgated or brought into force and effect hereinafter in India, including statutes, rules, regulations, directions, bye-laws, notifications, ordinances and judgments having force of law, or any final interpretation by a Court of Law having jurisdiction over the matter in question as may be in force and effect during the subsistence of this Agreement.

**“Applicable Permits”** means any and all permissions, clearances, licenses, authorizations, consents, no-objections, approvals and exemptions under or pursuant to any of the Applicable Laws or from any Government Authority required in connection with the Project and for undertaking, performing or discharging the obligations contemplated by this Agreement or any other Transaction Document.

**“Applicable Tariff Guidelines”** shall have the same meaning ascribed to it in Article 8.1.

**“Applicant”** means [●]<sup>2</sup>.

**“Bid”** means the proposal and the entire set of documents submitted by the Applicant and/or the Consortium in response to the RFQ and the RFP.

**“Bid Security”** means the bank guarantee [●] dated [●] furnished by the Applicant/Consortium alongwith its Bid.

**“Board”** means the Board of Trustees for the Port of [●].

**“Book Value”** means the aggregate written down value as on the date of issue of the Termination Notice in the books of the Concessionaire of (i) the tangible assets (including capital works in progress) forming part of, fixed or attached to the ground, created, installed or provided by the Concessionaire and comprised in Project Facilities and Services, and

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<sup>2</sup> The name and registered office address of the single applicant to be inserted.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

(ii) the moveable assets including cargo handling equipment belonging to the Concessionaire, in accordance with Indian Accounting Standards using depreciation rates as set forth in the (Indian) Companies Act, 1956, as applicable from time to time.

**“Change in Law”** shall have the meaning set out under Article 13.1 of this Agreement.

**“Change of Scope”** shall have the meaning assigned to it under Article 6.8(a).

**“Change of Scope Notice”** shall have the meaning assigned to it under Article 6.8(b).

**“Completion Certificate”** shall have the meaning assigned to it under Article 6.3.

**“Concession”** means the Concession granted by the Concessions Authority to the Concessionaire in accordance with the provisions of Article 2.1 of this Agreement for implementing the Project and providing Project Facilities and Services.

**“Concessions Authority Event of Default”** shall have the meaning as set out under Article 15.1(b).

**“Concessionaire Event of Default”** shall have the meaning as set out under Article 15.1 (a).

**“Concession Period”** means the period of the Concession specified in Article 2.2 of this Agreement.

**“Conditions Precedent”** shall mean the conditions prescribed in Article 3 of this Agreement.

**“Consortium”** means the consortium consisting of (i) XXXX, (ii) YYYY, and (iii) ZZZZ formed, to implement the Project.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

**“Construction Phase”** means the period from the Date of Award of Concession to the Date of Commercial Operation.

**“Construction Works”** means all works, equipments and things necessary to complete the Project and provide the Project Facilities and Services in accordance with this Agreement.

**“Construction Standards”** means the construction standards set out in the annexure to Appendix 4.

**“Consultation Notice”** has the meaning ascribed to it in Article 15.3.

**“Contractor”** means a <sup>3</sup>Person with whom the Concessionaire has entered into/ may enter into a contract relating to the execution of any works and /or operation and maintenance of the Project Facilities and Services, including the Management Contractor.

**“Date of Award of Concession”** means the date when the Conditions Precedent have either been satisfied or waived by the Party other than the Party responsible for satisfying the same.

**“<sup>4</sup>Date of Commercial Operation”** means the date on which the Concessionaire receives the Completion Certificate in accordance with the provisions of this Agreement/ MPT Act.

**“Day”** means the 24 (twenty four) hour period beginning and ending at 12:00 midnight Indian Standard Time.

**“Debt Due”** means the aggregate of the following sums representing the amounts advanced by the Lenders towards Total Project Cost, expressed in Indian rupees as may be outstanding and payable to the Lenders under the Financing Documents on the Transfer Date:

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<sup>3</sup> If requested by the Concessionaire, to facilitate custom duty exemptions available to the contractors for certain projects, the names of the persons engaged as Contractors may be specified.

<sup>4</sup> In case of Projects which do not entail any construction/augmentation of Facilities this will be the Date of Award of Concession.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (a) the principal amount of the debt including any subordinated debt provided by the Lenders under the Financing Documents for financing the Project (“**the Principal**”) but excluding (i) working capital loans; (ii) any part of the Principal that had fallen due for repayment six months prior to the Transfer Date, if the Transfer Date is related to expiry of the Concession Period or any part of the Principal that had fallen due before the Termination Notice, if the Transfer Date is related to termination prior to the expiry of the Concession Period; and (iii) any debt that has been rescheduled or refinanced, unless such repayment had been rescheduled or refinancing made with the prior consent of Concessioneing Authority; and
- (b) all accrued interest, financing fees and charges payable on or in respect of the debt referred to in sub-clause (a) above upto the Transfer Date but excluding (i) any interest, fees or charges that had fallen due six months prior to the Transfer Date, and (ii) penal interest or charges, payable under the Financing Documents to any Lender.

“**Designs and Drawings**” means the designs and drawings, and other technical information submitted by the Concessionaire from time to time and reviewed by the Independent Engineer in accordance with the provisions of this Agreement.

“**Encumbrance**” means any encumbrance such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations and shall include without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Project Site/Port’s Assets/Project Facilities and Services.

“**EPC Contract**” means the contract entered into by the Concessionaire with one or more Contractors interalia for the purpose of design, engineering, procurement of equipment and materials (including by import thereof) and construction of the Project in accordance with the provisions of this Agreement.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

**“Environmental Law”** means any statute, rule, regulation, ordinance, code, guideline or policy having the force of law, in each case, applicable to the Project now or hereafter in effect and any applicable judicial or administrative interpretation, pronouncement, order, decree or judgment, relating to the environment, health and safety.

**“Equity”** means the paid up share capital of the Concessionaire representing the equity component of the Total Project Cost, as capitalized in the books of the Concessionaire and duly certified by the Statutory Auditors.

**“Equity Documents”** means collectively the documents evidencing subscription to Equity to the extent of equity component of cost of the Project.

**“Equity IRR”** means [ the rate of return to the Concessionaire from the Project during the term of his agreement ].

**“Escrow Account”** shall have the meaning assigned to it under Article 9.5.

**“Escrow Agreement”** means the agreement to be executed *inter alia* between the Concessionaire, the Concessions Authority and the Lenders/Lenders representative substantially in the format set out in Appendix 16 hereto.

**“Estimated Project Cost”** means the sum of Rs. [●] (Rupees [●] only) being the cost of the Project as estimated by the Concessions Authority and disclosed in the Request for Proposal.

**“Event of Default”** shall have the meaning assigned to it under Article 15.1.

**“Exclusivity Period”** shall have the meaning ascribed to it in Article 12.2(c).

**“Expert”** means any person, body or organization of repute with recognized technical/ professional expertise in respect of any field, matter or subject relevant for the purpose of this Agreement.



## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

**“Financial Assistance”** means all funded and non-funded credit assistance including but not limited to loans, advances, lease assistance and guarantees required for the Project.

**“Financial Close”** means the date on which the Financing Documents providing for Financial Assistance by the Lenders, Equity Documents and the documents in respect of debt, if any, committed by the Applicant/Consortium have become effective and the Concessionaire has access to such Financial Assistance.

**“Financial Year”** means any twelve month period commencing from 1<sup>st</sup> April and ending on 31<sup>st</sup> March.

**“Financing Documents”** means, collectively, the documents executed in favour of or entered into with the Lenders, by the Concessionaire in respect of the Financial Assistance relating to the financing (including any re-financing) of the Total Project Cost and includes any document providing security for the Financial Assistance.

**“Financing Plan”** means the base case financial model adopted by Concessionaire with the approval of the Senior Lenders and approved by the Concessions Authority in accordance with Article 3.1(a)(viii), setting forth the capital and operating cost of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior lenders, and includes a detailed description of the assumptions and parameters used for making calculation and projections therein including inter alia the Estimated Project Cost, License Fee and Royalty payable to the Concessions Authority annual estimated Gross Revenue, equity contribution, cargo handling projections estimated by Concessionaire, discounted net present value of the cash flows, Equity IRR, debt equity ratio and debt service coverage ratio, as set out in Appendix 17.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

**“Force Majeure Event”** shall have the meaning ascribed to it in Article 14.1 of this Agreement.

**“GoI”** means the Government of India.

**“Good Industry Practice”** means the exercise of that degree of skill, diligence and prudence and those practices, methods, specifications and standards of equipment, safety and performance, as may change from time to time and which would reasonably and ordinarily be expected to be used by a skilled and experienced operator engaged in construction, operation and maintenance of facilities, equipment or systems of the type and size similar to the Project Facilities and Services.

**“Government Authority”** means GoI, any state government or any governmental department, commission, board, body, bureau, agency, authority, instrumentality, administrative body, at central, state, or local level, having jurisdiction over the Concessionaire, the Port’s Assets, the Project Facilities and Services or any portion thereof, but shall not include the Concessions Authority.

**“Gross Revenue”** means all the revenues chargeable by the Concessionaire from the Project /Project Facilities and Services as define in Clause 9.2(b).

**“Independent Engineer”** means a Person appointed in accordance with Article 5.1 for supervision and monitoring of compliance by the Concessionaire with the Scope of Work, more particularly to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Appendix 7.

**“Indian Accounting Standards”** means the Indian accounting standards issued by the Institute of Chartered Accountants of India.

**“Indian Ports Association”** means the Apex body of Major Ports of India registered under Societies Registration Act.

**“Insurance Cover”** shall have the meaning ascribed to it in Article 12.1(c)(ii).

**“License Fee”** shall have the meaning assigned to it under Article 9.1(a).

**“Management Contract”**<sup>5</sup> means the contract between the Concessionaire and the Management Contractor, in respect of obligations of the Management Contractor in respect of the Project in accordance with the Request for Proposal.

**“Management Contractor”** means [●]<sup>6</sup>.

**“Management Control”** means the possession, directly or indirectly of the power to direct or cause the direction of the management and policies of the Concessionaire, whether through the ownership of voting securities, by contract or otherwise or the power to elect or appoint more than 50% (fifty percent) of the directors, managers, partners or other individuals exercising similar authority with respect to the Concessionaire.

**“Material Adverse Effect”** means material adverse effect on (a) the ability of either Party to exercise any of their rights or perform/discharge any of their duties/obligations under and in accordance with the provisions of this Agreement and/or (b) the legality, validity, binding nature or enforceability of this Agreement.

**“Milestone Dates”** means the dates for completion of specified Project activities as contained in the Project Schedule.

**“Minimum Guaranteed Revenue”** shall have the meaning ascribed to it in Article 7.1(a)(xii).

**“Month”** means the calendar month as per the Gregorian calendar. **“MPT Act”** means The Major Port Trusts Act, 1963 as amended, supplemented, re-enacted or replaced from time to time.

**“Non Political Event”** means the Force Majeure Events set out in Article 14.2.

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<sup>5</sup> This definition may be included only in cases where such a contract is envisaged.

<sup>6</sup> This definition and the usage will be retained depending on the bids i.e. where the consortium meets the technical criteria on the strength of its management contractor who is not a member of the consortium. In such instances the management contractor would need to be identifiable in the contract.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

**“O&M Contract”** means the contract, if any, entered into by the Concessionaire for the operation and maintenance of the Project in accordance with the provisions of this Agreement and shall include the Management Contract.

**“Operations Phase”** means the period from the Date of Commercial Operation to the expiry/termination of the Concession Period.

**“Operations and Maintenance Standards”** means the minimum standards of operations and maintenance set out in the annexure to Appendix 4 with regards the Project Facilities and Services.

**“Other Events”** means the Force Majeure Events set out in Article 14.4.

**“Party”** means either the Concessions Authority or the Concessionaire as the context may require or admit and **“Parties”** means both Concessions Authority and Concessionaire.

**“Performance Standards”** means the minimum standards of performance set out in Appendix 15 with regards the Project Facilities and Services.

**“Performance Guarantee”** shall mean the bank guarantee(s)/letter(s) of credit procured by the Concessionaire for the benefit of the Concessions Authority guaranteeing the performance of the obligations of the Concessionaire hereunder in the manner specified in Article 4.1.

**“Person”** means any individual, company, corporation, partnership, joint venture, trust, unincorporated organization, government or governmental authority or agency or any other legal entity.

**“Political Event”** means the Force Majeure Events set out in Article 14.3.

**“Port’s Assets”** means the assets set out in Appendix 2, belonging to the Concessions Authority.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

**“Port Limits”** means [●].

**“Project”** means the design, finance, construction, operation, maintenance, and marketing and providing of the Project Facilities and Services in accordance with the provisions of this Agreement.

**“Project Capacity”** means the capacity of the Project Facilities and Services to handle [● units] of [*cargo*]<sup>7</sup> per annum.

**“Project Contracts”** means collectively this Agreement, the EPC Contract, O&M Contract and any other material contract (other than the Financing Documents, the Escrow Agreement, the Substitution Agreement or any commercial agreement with the users) entered into or may hereafter be entered into by the Concessionaire in connection with the Project and Project Facilities and Services.<sup>8</sup>

**“Project Facilities and Services”** means the facilities and services as set out under the Scope of Work, to be provided by the Concessionaire during the Concession Period, in accordance with this Agreement.

**“Project Schedule”** means the Appendix 5 hereto.

**“Project Site”** means the area demarcated in Appendix 1 including the waterfront, existing berth, land together with buildings, structures if any and easement rights thereto that may be given to the Concessionaire and all other assets comprised therein on which the Concessionaire is authorized to develop and operate the Project Facilities and Services as set forth in this Agreement. This shall also include additional land, utilities and services allowed by Port in terms of Article 7.1 (c)(iii), wherever applicable.

**“Provisional Certificate”** shall have the meaning assigned to it under Article 6.7 (d).

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<sup>7</sup> This definition will need to be customized depending on the Project.

<sup>8</sup> This definition may be assessed on a case-to-case basis and accordingly, the relevant documents may be inserted

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

“**Punch List**” shall have the meaning assigned to it under Article 6.7 (d).

“**Quarter**” means a period of 3 (three) Months.

“**Remedial Period**” has the meaning ascribed to it in Article 15.4.

“**Request for Proposal**” or “**RFP**” means the Request for Proposal dated [●] issued by the Concessioneing Authority to the applicants shortlisted pursuant to the Request for Qualification and includes any addendum / clarifications issued in respect thereof by the Concessioneing Authority.

“**Request for Qualification**” or “**RFQ**” means the Request for Qualification dated [●] issued by the Concessioneing Authority inviting applications in accordance therewith for shortlisting the competent applicants that can subsequently bid for the Project, and includes any addendum / clarifications issued in respect thereof by the Concessioneing Authority.

“**Requisition**” has the meaning ascribed to it in Article 16.3.

“**Royalty**” means the revenue share payable by the Concessionaire to the Concessioneing Authority, pursuant to Article 9.2 hereof.

“**Safety Standards**” means the minimum standards of safety set out in the annexure to Appendix 4 with regards the Project/Project Facilities and Services.

“**Scale of Rates**” means the scale of rates alongwith the statement of conditions with respect thereto framed and notified by TAMP or such other competent authority under the provisions of MPT Act, as applicable.

“**Scheduled Project Completion Date**” means [●]<sup>9</sup>.

“**Scope of Work**” means the minimum requirements as to the construction, operation and maintenance of the Project and provision of Project Facilities and Services set out in Appendix 4.

“**Selectee**” has the meaning ascribed to it in Article 15.4(b).

<sup>9</sup> The date would be fixed depending on the Project and in case of phase wise project development be linked to expected completion of the first phase of development.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

“**Senior lenders**” means the financial institutions, banks, funds and agents of trustees of debentures who have agreed to guarantee or provide finance to the concessionaire under any of the Financing Documents for meeting cost of all or any part of the Project and who hold pari passu charge on the concession granted by this Agreement

“**Special Audit**” shall have the meaning assigned to it under Article 9.4.

“**Statutory Auditors**” means a firm of chartered accountants appointed in terms of Section 224 of the Companies Act, 1956 and acting as the statutory auditors of the Concessionaire.

“**Substitution Agreement**” means the agreement substantially in the form set out at Appendix 3, to be entered into between the Concessions Authority, the Concessionaire and the Lenders.

“**Supporting Project Infrastructure**”<sup>10</sup> means:

- (a) maritime access channels;
- (b) port entrance;
- (c) protective works including breakwaters, shore protection;
- (d) sea locks;
- (e) access to port for inland transport (including roads, bridges and tunnels);
- (f) rail connections between hinterland and port;
- (g) inland waterways within port area;

and shall include such other facilities as may be specified by the Concessions Authority as supporting infrastructure provided/to be provided for the Project.

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<sup>10</sup> This definition would need to be used/modified depending on the commitments made by the Concessions Authority at the time of bidding of the specific Project. This may either be a Conditions Precedent or ongoing obligation.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

“**TAMP**” means Tariff Authority for Major Ports established under the MPT Act.

“**Tariff**” means the applicable rate(s) as per Scale of Rates that may be charged by the Concessionaire for and in respect of providing the Project Facilities and Services.

“**Tariff Notification**” means the notifications no. [ ] setting out inter alia the Tariff and shall include any amendments, revisions or replacements thereof carried out in accordance with the Applicable Tariff Guidelines.

“**Ten Year G Sec**” means the 10 Year G Sec rate published by Reserve Bank of India prevailing as on the date of a payment due from which the computation of interest is required to be made under the Agreement.

“**Termination Notice**” means the termination notice issued pursuant to Article 16.1 hereof.

“**Termination Period**” shall have the meaning as set out under Article 16.1 hereof.

“**Tests**” shall have the meaning assigned to it under Article 6.7 (a) hereof.

“**The Port**” means \_\_\_\_\_ Port.

“**Total Project Cost**” means the lowest of ;

- a) The capital cost of the Project, as set forth in the financing documents
- b) actual capital cost of the Project upon completion of Port Terminal and
- c) a sum of Rs. [ \*\*\*\*\* crores (Rupees \*\*\*\*\* crores)] \*

(\*) equal to cost of Project approved by Project Approving Authority updated for change in WPI till compliance of “Conditions Precedent” by Concessioneering Authority.



## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

“**Transfer**” means to transfer, sell, assign, pledge, hypothecate, create a security interest in or other encumbrance on, place in trust (voting or otherwise), transfer by operation of law or in any other way dispose of, whether or not voluntarily, the legal or beneficial interest in the equity shares of the Concessionaire.

“**Transfer Date**” means the date of expiry or termination as the case may be, of the Concession Period in accordance with the terms of this Agreement.

“**Transaction Documents**” means collectively the Project Contracts and the Financing Documents.

“**Uninsurable**” means (i) Insurance Cover is not available to the Concessionaire in respect of the specific risk in relation to the Project and/or the Project Facilities, in the worldwide insurance market (subject to due care and diligence by the Concessionaire); or (ii) the terms and conditions on which Insurance Cover is available to the Concessionaire in respect of such risk in the worldwide insurance market, are not fit for the intended purpose of the risk that is sought to be mitigated; or (iii) the premium payable on the Insurance Cover for insuring that risk is at such level that the risk is generally not insured in accordance with good industry practices followed in the relevant industry.

### 1.2 Other References

In this Agreement:

“**BIS**” means Bureau of Indian Standards.

“**BS**” means British Standard.

“**CISF**” means Central Industrial Security Force.

“**DIN**” means German Industrial Standard.

“**FEM**” means Federation of Equipment Manufacturers.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

“**IS**” means Indian Standard.

“**ISO**” means International Standards Organization.

“**IEC**” means International Electro Technical Commission.

“**IMDG**” means International Maritime Dangerous Goods.

“**IMO**” means International Maritime Organization.

“**km**” means Kilometre, the unit of length.

“**kWh**” means Kilowatt-hour, the unit of electrical energy.

“**KVA**” means Kilovolt-Ampere, the unit of power.

“**m**” means Metre, the unit of length.

“**mm**” means Millimetre, the unit of length.

“**MT**” means Metric Tonne, the unit of weight.

“**MVA**” means Mega Volt Ampere, the unit of power.

“**MSIHC**” means Manufacture Storage and Input of Hazardous Chemicals.

“**OISD**” means Oil Industry Safety Directorate.

“**VAT**” means Value Added Tax.

### 1.3 Interpretations

This Agreement constitutes the entire understanding between the Parties regarding the Project and supersedes all previous written and/or oral representations and/or arrangements regarding the Project. If there is any aspect of the Project not covered by any of the provisions of this Agreement, then and only in that event, reference may be made by the Parties to the bid documents,

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

*inter alia* including the RFP and RFQ documents, issued by the Concessioneing Authority and also including addendums, clarifications given in writing in the pre-bid meetings and the submissions of the Concessionaire and the bid submitted by the Concessionaire but not otherwise. In case of any contradictions in the terms of this Agreement and any such other bid documents as referred to above, the terms of this Agreement shall prevail.

In this Agreement unless the context otherwise requires:

- (a) any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- (b) the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal entity);
- (c) the table of contents and any headings in this Agreement are for ease of reference only and shall not affect the construction or interpretation of this Agreement;
- (d) the words “include” and “including” are to be construed without limitation;
- (e) references to “construction” include investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction;
- (f) any reference to any period of time shall mean a reference to that according to Indian Standard Time;

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (g) any reference to day shall mean a reference to a calendar day;
- (h) any reference to month shall mean a reference to a calendar month;
- (i) “Recital”, “Article” and “Appendix” shall refer, except where the context otherwise requires, to Articles of and any Appendix to this Agreement. The Appendices to this Agreement shall form an integral part and parcel of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (j) any reference at any time to any agreement, deed, instrument, license or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or novated at the time of such reference;
- (k) any agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer and/or a Statutory Auditor shall be valid and effectual only if it is in writing under the hands of duly authorized representative of such Party or the Independent Engineer and/or Statutory Auditor, as the case may be, in this behalf and not otherwise;
- (l) unless otherwise stated, any reference to any period commencing “from” a specified day or date and “till” or “until” a specified day or date shall include both such days or dates;
- (m) unless otherwise specified, any interest to be calculated and payable under this Agreement shall accrue on a Monthly basis and from the respective due dates as provided for in this Agreement; and
- (n) any word or expression used in this Agreement, unless defined or construed in this Agreement, shall be construed as per the definition given in General Clauses Act, 1897 failing which it shall bear the

ordinary English meaning.

**1.4 Measurements and Arithmetic Conventions**

All measurements and calculations shall be in metric system and calculations done to 2 decimal places, with the third digit of 5 or above being rounded up and below 5 being rounded down.

**1.5 Ambiguities and Discrepancies**

In case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (a) between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;
- (b) between the dimension scaled from the Design and Drawings and its specific written dimension, the latter shall prevail;
- (c) between any value written in numerals and that in words, the latter shall prevail;  
and
- (d) between the provisions of this Agreement and any other documents forming part of this Agreement, the former shall prevail.

## ARTICLE 2

### CONCESSION AND PORT ASSETS

#### 2.1 Concession

In consideration of the Concessionaire agreeing to pay to the Concessions Authority (a) the License Fee and (b) Royalty, and performing its obligations as set out in this Agreement, the Concessions Authority hereby grants to the Concessionaire, subject to the provisions of this Agreement, an exclusive license for designing, engineering, financing, constructing, equipping, operating, maintaining, replacing the Project Facilities and Services as per Scope of Work.

#### 2.2 Concession Period

The Concession hereby granted is for a period of [●]<sup>11</sup> years commencing from Date of Award of Concession during which the Concessionaire is authorized and obliged to implement the Project and to provide Project Facilities and Services as per Scope of work in accordance with the provisions hereof.

Provided that: -

##### (a) Effect of variations in traffic growth

- i. The Authority and the Concessionaire acknowledge that traffic equivalent to 70% (seventy per cent) of the Capacity of the Project is estimated to be [----- (----) MTs/TEUs] per annum (the “**Target Traffic**”), and hereby agree that for determining the modifications to the Concession Period under this Article 2.2 (a), the actual traffic handled by the Project shall be derived by computing the annual average of the traffic for a period of 15 (fifteen) years from COD (the “**Actual Average Traffic**”).
- ii. In the event that the Actual Average Traffic shall have fallen short of the Target Traffic by more than 20% (twenty per cent) thereof or exceeded the Target Traffic by more than 20% (twenty per cent) thereof, the

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<sup>11</sup> Maximum period of 30 years.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Concession Period shall be deemed to be modified in accordance with Clause 2.2. For the avoidance of doubt, in the event of any Dispute relating to Actual Average Traffic, the Dispute Resolution Procedure shall apply.

### **iii. Modification in the Concession Period**

Subject to the provisions of Clause 2.2(a) (ii) , in the event that the average of Actual Average Traffic for a period of 15 (fifteen) years from COD shall have fallen short of the Target Traffic by more than 20% (Twenty percent), then for every slab of 2% (two per cent) shortfall over and above threshold of 20% (twenty percent) as compared to the Target Traffic, the Concession Period shall, subject to payment of Concession Fee in accordance with this Agreement, be increased by one year; provided that such increase in Concession Period shall not in any case exceed 10 (ten) years. For the avoidance of doubt, and by way of illustration, it is agreed that in the event of a shortfall of 25% ( twenty five per cent) in Target Traffic, the Concession Period shall be increased by 2 (two) years.

Subject to the provisions of Clause 2.2(a) (ii), in the event Actual Average Traffic shall have exceeded the Target Traffic, then for every slab 2% (two per cent) over and above threshold of 20% (Twenty percent) excess as compared to the Target Traffic, the Concession Period shall be reduced by one year; provided that such reduction in Concession Period shall not in any case exceed 3 (three) years. For the avoidance of doubt and by way of illustration, it is agreed that in the event of an excess of 25% (Twenty Five per cent) in Target Traffic, the Concession Period shall be reduced by two years:

Provided further that in lieu of a reduction in Concession Period under this Clause 2.2 (a) (iii), the Concessionaire may elect to pay a further premium

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

equal to 10% (ten per cent) of the Gross Revenue in the respective years, and upon notice given to this effect by the Concessionaire no later than 2 (two) years prior to the Transfer Date contemplated under this Clause 2.2(a), the Authority shall waive the reduction in Concession Period hereunder and recover the Concession Fee and the aforesaid premium for the period waived hereunder.

- (b) in the event of the Concession being extended by the Concessioneing Authority beyond the said period of [●] years in accordance with the provisions of this Agreement, the Concession Period shall include the period by which the Concession is so extended, and
- (c) in the event of an early termination/determination of the Concession/ this Agreement by either Party in accordance with the provisions hereof, the Concession Period shall mean and be limited to the period commencing from the Date of Award of Concession and ending with the date of termination/ determination of the Concession/this Agreement.

### **2.3 Acceptance of the Concession**

The Concessionaire hereby accepts the Concession and agrees and undertakes to implement the Project and to provide Project Facilities and Services in accordance with the provisions of this Agreement. Subject to and in accordance with the provisions of this Agreement and Applicable Laws and Applicable Permits, the Concessionaire shall at its costs, charges, expenses and risk including but not limited to foreign exchange variation risk if any, conceptualize, design, engineer, finance, construct, equip, operate, maintain and replace the Project/ Project Facilities and Services.

### **2.4 Port's Assets**

- (a) In consideration of the Concessionaire agreeing to perform and discharge its obligations as set forth in this Agreement, the Concessioneing



## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Authority hereby grants to the Concessionaire, the exclusive right to enter upon, occupy and use the Project Site and Port's Assets for the purpose of implementing the Project and provision of Project Facilities and Services pursuant thereto in accordance with this Agreement.

- (b) The Concessionaire shall at its costs, charges and expenses make such development and improvements in the Project Site and Port's Assets as may be necessary or appropriate for implementing the Project and providing Project Facilities and Services in accordance with the Agreement, Applicable Laws and Applicable Permits.

### **2.5 Use of Port's Assets**

The Concessionaire shall not without the prior written consent or approval of the Concessions Authority use the Project Site and the Port's Assets for any purpose other than for the purposes of the Project/the Project Facilities and Services and purposes incidental thereto as permitted under this Agreement or as may otherwise be approved by the Concessions Authority.

### **2.6 Information about Project Site and Port's Assets**

The information about the Project Site and Port's Assets as set out in Appendix 1 and Appendix 2 respectively is provided by the Concessions Authority in good faith and with due regard to the matters for which such information is required by the Concessionaire. The Concessions Authority agrees to provide to the Concessionaire, upon a reasonable request, any further information relating to the Project Site and Port Assets, which the Concessions Authority may now possess or may hereafter come to possess, as may be relevant to the implementation of the Project. Subject to this, the Concessions Authority makes no representation and gives no warranty to the Concessionaire in respect of the condition of the Port Assets or the Project Site.

**2.7 Acceptance of the Port Assets**

The Concessionaire accepts possession of the Port's Assets and Project Site on 'as is where is' basis and confirms having:

- (a) inspected the Project Site/Port's Assets, including the berths and all structures thereat and its surroundings;
- (b) satisfied itself as to the nature of the climatic, hydrological and general physical conditions of the Project Site/Port's Assets, the nature of the ground and subsoil, the form and nature of the Project Site/Port's Assets, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement; and
- (c) obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect the Concessionaire and its rights and obligations under or pursuant to this Agreement.

**2.8 Peaceful Occupation**

The Concessions Authority warrants that the Concessionaire shall, subject to complying with the terms and conditions of this Agreement, remain in occupation of the Project Site and Port's Assets during the Concession Period. In the event the Concessionaire is obstructed by any Person claiming any right, title or interest in or over the Project Site and Port's Assets or any part thereof or in the event of any enforcement action including any attachment, distraint, appointment of receiver or liquidator being initiated by any Person claiming to have charge on the Project Site and Port's Assets or any part thereof pursuant to Section 78 of the MPT Act, the Concessions Authority shall, if called upon by the Concessionaire, defend such claims and proceedings.

ARTICLE 3

CONDITIONS PRECEDENT

3.1 Conditions Precedent

The award of the Concession shall be subject to the satisfaction or waiver of the following conditions precedent (the “**Conditions Precedent**”):

- (a) The following Conditions Precedent shall be satisfied by the Concessionaire:
  - (i) Furnishing of the Performance Guarantee as stipulated in Article 4.1 hereof;
  - (ii) Furnishing of copies (certified as true copies by a director of the Concessionaire) of the constituent documents of the Concessionaire;
  - (iii) Furnishing of all resolutions adopted by the Board of Directors of the Concessionaire (certified as true copies by a director of the Concessionaire) authorizing the execution, delivery and performance by the Concessionaire of each of the Transaction Documents;
  - (iv) Opening the Escrow Account and executing the Escrow Agreement;
  - (v) Undertaking to furnish a copy of the Management Contract;<sup>12</sup>
  - (vi) Furnishing a certificate from its principal officer/director on the
  - (vii) shareholding pattern of the Concessionaire;
  - (viii) Obtaining approval of Authority of its Financing Plan and Financing Documents for the Project and demonstrating Financial Close.
  - (ix) Furnishing its Financing Plan and Financing Documents for the Project and demonstrating Financial Close.
  - (x) Procuring and furnishing the following confirmations, in original, from the Applicant/members of Consortium:

<sup>12</sup> To be retained where relevant i.e. where on the strength of the Management Contract the consortium has qualified technically.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (a) it/they shall at all times comply with the provisions of Article 11.2 in respect of their shareholding in the Concessionaire;
  - (b) it/they has/have the financial standing and resources to fund /raise finances for undertaking and implementing the Project in accordance with this Agreement;
  - (c) the Applicant is/each of the member of the Consortium is duly organized and validly existing under the laws of the jurisdiction of its incorporation, and has requested the Concessioneing Authority to enter into this Agreement with the Concessionaire and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (xi) Furnishing to the Concessioneing Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability hereof; and
- (xii) [Obtaining Applicable Permits as may be required for commencement of Construction Works as set out in Appendix 8].
- (b) The following Conditions Precedent shall be satisfied by the Concessioneing Authority:
- (i) procurement of the clearances required for the Project<sup>13</sup>, as set out in Appendix 8;
  - (ii) handing over physical possession of the Project Site<sup>14</sup> and/or the Port's Assets for the purposes of the Project after receipt of performance guarantee / security from the concessionaire with the provision that license fee, service tax etc shall be paid by concessionaire from the date of handing over.

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<sup>13</sup> These would constitute clearances for Project Site including the clearance from MoEF and in principle clearances for the Project. On a project specific basis, this may also include consent for establishment

<sup>14</sup> Where the Project Site is proposed to be handed over in a phased manner, this provision may be edited to specify only the property, if any that is required to be handed over prior to the commencement of construction.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

(iii) [provision of or putting in place arrangements for the provision of Supporting Project Infrastructure by the Concessioneing Authority.]<sup>15</sup>

- 3.2** The aforesaid Conditions Precedent shall be complied with within [180 (One Hundred and eighty )]<sup>16</sup> Days of the date of the Agreement. For the purpose of compliance of Financial Close obligation by the Concessionaire, Financial close shall be deemed to be achieved, if the conditions pending for achieving financial close are only those which are required to be fulfilled by the Concessioneing Authority under Article 3.1(b) . Each Party shall promptly inform the other Party in writing when the Conditions Precedent for which it is responsible have been satisfied.
- 3.3** Any of the Conditions Precedent set forth in Articles 3.1(a) may be waived fully or partially by the Concessioneing Authority at any time in its sole discretion or the Concessioneing Authority may grant additional time for compliance with these conditions and the Concessionaire shall be bound to ensure compliance within such additional time as may be specified by the Concessioneing Authority. Any of the Conditions Precedent set forth in Articles 3.1 (b) may be waived fully or partially by the Concessionaire at any time in its sole discretion.
- 3.4** If the Concessionaire has fulfilled all the Conditions Precedent under Article 3.1(a) including the furnishing of the Bank Guarantee and has not waived or extended the time under Clause 3.3 above, and if the Concessioneing Authority has failed to fulfil the Conditions Precedent to be fulfilled by it under Article 3.1(b) (and which are within the power of the Concessioneing Authority), the Concessioneing Authority shall liable to pay liquidated damages in a sum calculated at the rate of 0.1% (zero point one percent) of the Performance Guarantee for each day's delay until fulfilment of the Conditions Precedent subject to a maximum of 5% (five percent) of the figure mentioned in the

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<sup>15</sup> This may be retained, omitted or modified based on the Project.

<sup>16</sup> This will vary depending on the nature of Conditions Precedent and the Project.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Performance Guarantee furnished by the Concessionaire. In such event, having regard to the quantum of damages, the time for the performance shall be deemed to have been extended by the number of days for which the liquidated damages is paid and if, after the extended period the Concessioneing Authority is still not in a position to comply with the Conditions Precedent, then the agreement shall be liable to be terminated as provided for in Clause 3.6 below;

**3.5** If the Concessioneing Authority has fulfilled all the Conditions Precedent under Article 3.1(b) and has not waived or extended the time under Clause 3.3 above, and if the Concessionaire has failed to fulfil the Conditions Precedent to be fulfilled by it under Article 3.1(a) (and which are within the power of the Concessionaire), the Concessionaire shall be liable to pay liquidated damages in a sum calculated at the rate of 0.1% (zero point one percent) of the Performance Guarantee for each day's delay until fulfillment of the Conditions Precedent subject to a maximum of 5% (five percent) of the figure mentioned in the Performance Guarantee furnished by the Concessionaire. In such event, having regard to the quantum of damages, the time for the performance shall be deemed to have been extended by the number of days for which the liquidated damages is paid and if, after the extended period the Concessionaire is still not in a position to comply with the Conditions Precedent, then the agreement shall be liable to be terminated as provided for in Clause 3.6 below;

**3.6** In the event that the Conditions Precedents are not complied with within the time (including the extended time, if any) in terms of the aforesaid Articles 3.2 to 3.5, this Agreement shall be liable to be terminated. If such termination is on account of failure of the Concessionaire to comply with the Conditions Precedent, the Bid Security shall stand forfeited. If such termination is on account of failure of the Concessioneing Authority, the Concessioneing Authority shall be obliged to return the Bid Security/Performance Guarantee. It is clarified that except for the payment as stipulated in the foregoing Article 3.4 and 3.5 and forfeiture in this Article 3.6, each party hereto shall have no claims against the other for costs, damages, compensation or otherwise.

## ARTICLE 4

### PERFORMANCE GUARANTEE

#### 4.1 Performance Guarantee

The Concessionaire shall for due performance of its obligations during the Construction Phase provide to Concessions Authority an unconditional and irrevocable bank guarantee, in favour of the Concessions Authority encashable and enforceable at [●]<sup>17</sup> substantially in the form set forth in Appendix 9 or an irrevocable revolving letter of credit in the form acceptable to the Concessions Authority (the “**Performance Guarantee**”). The Performance Guarantee shall be for a sum of Rs. [●] (Rupees [●] only)<sup>18</sup>. Till such time the Concessionaire provides to Concessions Authority the Performance Guarantee pursuant hereto, the Bid Security shall remain in full force and effect. The Performance Guarantee, if in the form of a bank guarantee shall be valid for an initial period of 1 (one) year and shall be renewed 30 (thirty) Days prior to expiry of each year, for an additional term of 1 (one) year. It is clarified that the Concessionaire shall be liable to restore the Performance Guarantee to the full amount in case of part encashment of the same by the Concessions Authority. This shall be done within 30 (thirty) Days of any such part encashment. The Performance Guarantee, if in the form of a letter of credit shall be irrevocable and replenished from time to time such that an amount of Rs. [●] (Rupees [●] only)<sup>19</sup> is available in immediate cash to the Concessions Authority for the entire period of the Construction Phase. The Performance Guarantee furnished under this provision shall be valid until expiry of 6 (six) months from the Date of Commercial Operations. Failure of the Concessionaire to provide a valid Performance Guarantee and/or restore and maintain the Performance Guarantee in accordance with this Article shall entitle the Concessions Authority to forthwith terminate this Agreement and also if relevant, to forfeit the Bid Security.

<sup>17</sup> Place where the performance guarantee shall be enforced and sums thereunder paid

<sup>18</sup> Equivalent to 5% of the Estimated Project Cost.

<sup>19</sup> Same as 18 above.

**ARTICLE 5**

**INDEPENDENT ENGINEER**

**5.1 Independent Engineer (Construction Period)**

- (a) The Independent Engineer shall be selected out of the panel prepared for the purpose by the Authority/Indian Ports Association. The Concessions Authority shall in the procurement documents<sup>20</sup> published by it, set out in reasonable detail the scope of work as indicated in Appendix 7 and shortlist bidders based on their technical capability. The Concessions Authority shall within 30 (thirty) Days of the date of this Agreement forward to the Concessionaire a list consisting of the names accompanied by their respective profile in brief of Persons so shortlisted. If within 15 (fifteen) Days of forwarding the list, the Concessions Authority does not receive any objection from the Concessionaire with reasons therefor, the Concessions Authority shall call for a financial bid from the shortlisted Persons and select the Independent Engineer ordinarily based on the lowest fee quote. Any objection raised by the Concessionaire shall be considered by the Concessions Authority and Persons against whom such objections are raised will at the discretion of the Concessions Authority, which discretion shall be used with the highest degree of prudence and fairness, be disqualified prior to seeking a financial bid.
- (b) The Independent Engineer selected pursuant to the aforesaid process shall be appointed for a period commencing from the Date of Award of Concession to [the date of expiry of 6 (six) months from the Date of Commercial Operations]. The scope of work of the Independent Engineer shall be substantially as set out in Appendix 7. Work of certification of Performance Parameters as stipulated in this Agreement shall be done by Indian Ports Association during the remaining concession period (During the Operations period).

<sup>20</sup> The Concessions Authority shall to the extent possible use standard bidding documents prescribed by the Ministry of Finance for appointment of consultants and make available the relevant documents to the Concessionaire.



**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

- (c) The costs and expenses of the Independent Engineer and Indian Ports Association shall be borne by the Concessions Authority and Concessionaire, equally.
- (d) If the Concessions Authority either on its own or on a report of the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties in a fair, appropriate and diligent manner, the Concessions Authority may after giving the Independent Engineer due opportunity of being heard, terminate the appointment of the Independent Engineer and appoint another firm in its place in accordance with the preceding clause (a) above.
- (e) If either Party disputes any advice, instruction or decision of the Independent Engineer, the dispute shall be resolved in accordance with the dispute resolution procedure set out in Article 19.

**ARTICLE 6**

**PROJECT IMPLEMENTATION**

**6.1 Preparation of Designs and Drawings**

The Concessionaire shall at its cost, charges and expenses, prepare the Designs and Drawings in conformity with the Scope of Work.

**6.2 Review of the Designs and Drawings**

- (a) The Concessionaire shall submit the Designs and Drawings as set out in Appendix 6 for the review of the Independent Engineer. Simultaneously, the Concessionaire shall also provide the Concessions Authority with a set of the Designs and Drawings.
- (b) The Independent Engineer shall review the Designs and Drawings submitted by the Concessionaire and provide its comments/observations and suggestions on the same including the comments/observations of the Concessions Authority in respect thereof within 21 (twenty one) Days from the date of the receipt of such Designs and Drawings.
- (c) In the event that the Independent Engineer/ Concessions Authority has observed that the Designs and Drawings are not in conformity with the Scope of Work , the Concessionaire shall promptly and without any undue delay revise and resubmit the Designs and Drawings or satisfy the Independent Engineer/ Concessions Authority with regards its compliance.
- (d) If the Independent Engineer /Concessions Authority does not make any observation/comments with respect to the Designs and Drawings submitted to it by the Concessionaire within 21 (twenty one) Days of the submission, it shall be deemed that the Independent Engineer/ Concessions Authority has no suggestions to make with respect to the Designs and Drawings and the Concessionaire shall be entitled to

proceed with the Project accordingly.

- (e) The Concessionaire shall not be entitled to any extension of time for completing construction or any other relief on account of delay caused due to providing any clarification or in resubmitting the Designs and Drawings. Provided however the Concessioneing Authority at its sole discretion may suitably extend the Construction Phase or provide other relief to compensate for any such delay not attributable to the Concessionaire.
- (f) The Concessionaire shall not change any Designs and Drawings reviewed by the Independent Engineer / Concessioneing Authority under this Agreement, without submitting such revised Designs and Drawings for the review of the Independent Engineer / Concessioneing Authority.

### **6.3 Construction Phase<sup>21</sup>**

- (a) The Concessionaire shall promptly commence and complete the works, including installation of equipment in accordance with the Project Schedule and shall also obtain from the Independent Engineer a certificate as to completion of construction of Project Facilities and Services in accordance with the provisions of this Agreement (“**Completion Certificate**”) not later than [●] Months from the date of commencement of the Concession Period.
- (b) Concessionaire shall be entitled to approach Concessioneing Authority for permission to use the assets handed over to it by Concessioneing Authority, for handling cargo during the period

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<sup>21</sup> This provision would need to be modified in case the Project is being developed phase wise or the Project is a brownfield project where existing facilities which have been handed over are required to be operated during the Construction Phase

between handing over of assets and achievement of Commercial Operation date which shall be allowed as per terms and conditions given in RFP subject to no extension of construction period on this account.

#### **6.4 Obligations of the Concessionaire**

Without prejudice to the generality of Article 6.3 and in addition to any of its other obligations under this Agreement, during the Construction Phase, the Concessionaire shall:

- (a) arrange for, in a timely manner all necessary financial and other resources required for construction and installation of the Project Facilities and Services.
- (b) engage professionally competent Persons for project management and construction and ensure that all works are carried out in compliance with the Construction Standards;
- (c) give written notice to the Concessioneing Authority within 7 (seven) Days of any material modification or change to any of the Financing Documents and/or any Equity Documents and shall simultaneously therewith also furnish copies of such modified/ amended documents to the Concessioneing Authority. Provided no such modification/amendment will be made if it in any manner whatsoever has the effect of imposing an additional financial obligation or increasing the financial obligation of the Concessioneing Authority in addition to that contemplated under the Financing Documents provided on Financial Close, without the prior written consent of the Concessioneing Authority. For avoidance of doubt any such modifications/amendments made without the prior written consent of the Concessioneing Authority will not be enforceable against the Concessioneing Authority;
- (d) obtain Applicable Permits, comply with Applicable Laws and Applicable Permits and give priority to safety in its construction and planning activities in order to protect life, health, property and environment;

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (e) provide to the representative(s) of the Concessions Authority, at reasonable times and upon prior intimation, access to the Project Site to review progress in construction and to ascertain compliance with any of the requirements of this Agreement. Provided that non-inspection by the Concessions Authority of any works shall not, in relation to such works,
  - (i) amount to any consent or approval by the Concessions Authority nor shall the same be deemed to be waiver of any of the rights of the Concessions Authority under this Agreement; and (ii) release or discharge the Concessionaire from its obligations or liabilities under this Agreement in respect of such work;
- (f) provide monthly reports on the progress of Construction Works or such other relevant information as may be required by the Independent Engineer;
- (g) promptly carry out at its cost such further works as may be necessary to remove any defects or deficiencies observed by the Independent Engineer and ensure timely completion of construction of the Project / the Project Facilities and Services in all respects in accordance with the provisions of this Agreement; and
- (h) to ensure safe and timely construction and completion of the Project/Project Facilities and Services, the Concessionaire may, at its cost, interrupt and divert/create barriers on the flow of water or on the road or port traffic, adjacent to the Project Site if such interruption and diversion is imperative for the efficient progress of Construction Works and conforms to Good Industry Practice; provided that such interruption and diversion shall be undertaken by the Concessionaire only with the prior written approval of the Independent Engineer which approval shall not be unreasonably withheld. For the avoidance of doubt, it is agreed that the Concessionaire shall at all times be responsible for ensuring safe operation of Construction Works and shall remove the interruption or diversion within the period specified by the Independent Engineer.

**6.5 Obligations of the Concessions Authority**

In addition to any of its other obligations under this Agreement, during the Construction Phase, the Concessions Authority shall:

- (a) in matters falling within its authority, grant, the Applicable Permits, approvals and consents as may be required by the Concessionaire and on a best efforts basis assist the Concessionaire in obtaining all other Applicable Permits as may be required by the Concessionaire;
- (b) make available all records of sub-soil investigations carried out on its behalf in the Port's Assets, if requested by the Concessionaire. It is clarified that the Concessionaire shall be solely responsible for determining the adequacy or otherwise of such investigations and will not in reliance of such records, be entitled to claim any relief under this Agreement;
- (c) upon satisfaction as to completion and receipt of Completion Certificate issued by the Independent Engineer promptly obtain approval of the Collector of Customs, publish requisite notifications in the Official Gazette and declare the Project Facilities and Services as ready for operation in accordance with the provisions of Section 37 of the MPT Act;
- (d) upon written request from the Concessionaire, assist the Concessionaire, on a best effort basis, in obtaining immigration clearances, employment permits and residential premises for any foreign personnel engaged or employed by the Concessionaire in connection with the implementation of the Project; and
- (e) subject to the Concessionaire / Contractor complying with the requirements under the Applicable Laws including but not limited to

payment of customs and any other duty, assist the Concessionaire or Contractor, on a best effort basis, to import into India all items of equipment and materials required for the Project.

**6.6 Suspension of Works**

- (a) Upon recommendation of the Independent Engineer to this effect, the Concessioneing Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Concessioneing Authority, such work is not in accordance with the Construction Standards / Safety Standards.
- (b) The Concessionaire shall, pursuant to the notice under the foregoing provision suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Concessioneing Authority and thereupon represent to the Concessioneing Authority / Independent Engineer, the remedial measures to remedy the defects notified. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Concessioneing Authority recommending whether or not the suspension hereunder may be revoked. Any dispute as regards the suspension of works or the remedial measures proposed, if cannot resolved within 30 (thirty) Days of the suspension or proposal of the remedial measures, shall be submitted for dispute resolution in accordance with Article 19 hereof.

**6.7 Issue of Completion Certificate**

- (a) At least 60 (sixty) Days prior to the likely completion of the Project, the Concessionaire shall notify the Independent Engineer of the date when it

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

intends to commence commercial operations. The Independent Engineer shall then proceed to inspect the Construction Works with the intention of issuing the Completion Certificate and determine and notify to the Concessionaire the schedule and manner of the tests as are specified in Appendix 7 that it shall carry out to ensure that the Project meets with the Construction Standards (“**the Tests**”). The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the Concessions Authority who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) Days notice to the Independent Engineer;

- (b) Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the Concessions Authority copies of all Test data including detailed Test results;
- (c) Upon completion of Construction Works and the Independent Engineer determining all the Tests to be successful, it shall forthwith issue to the Concessionaire and the Concessions Authority a Completion Certificate substantially in the form set forth in Appendix 10;
- (d) The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Appendix 10 (the “**Provisional Certificate**”) if the Tests are successful and the Project can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. The Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the “**Punch List**”) to be completed by the Concessionaire within a stipulated time. Provided, notwithstanding the



foregoing, no such Provisional Certificate will be issued pending notifications in the Official Gazette by the Collector of Customs. All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) Days of the date of issue of the Provisional Certificate or such other extended period that the Concessions Authority may in its sole discretion determine, failing which the Provisional Certificate shall lose its validity and the Concessions Authority shall be entitled to terminate this Agreement;

- (e) Without prejudice to the foregoing, if the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons solely attributable to the Concessions Authority, the Concessions Authority may, in its discretion, reduce the scope of Project and require the Concessionaire to pay 80% (eighty percent) of the sum saved due to such reduction of scope. Upon such payment to the Concessions Authority, the obligations of the Concessionaire in respect of such works shall be deemed to have been fulfilled.

## **6.8 Change of Scope**

- (a) The Concessions Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the scope of the Project as contemplated by this Agreement (“**Change of Scope**”). Provided no such Change of Scope shall be made in the Construction Phase if it is in the reasonable judgment of the parties hereto likely to delay the completion of the Project such that the Project cannot be completed on the Scheduled Project Completion Date. Provided further, the cost of implementing a single Change of Scope shall not exceed a sum corresponding to [5% (five percent)] of the Estimated Project Cost and during the Concession Period the cumulative cost of implementing orders pertaining to Change of Scope shall not exceed a sum corresponding to [20% (twenty percent)] of the Estimated Project Cost ;

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

- (b) If the Concessioneing Authority determines that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the **“Change of Scope Notice”**);
- (c) Upon receipt of a Change of Scope Notice, the Concessionaire shall, provide to the Concessioneing Authority, the following:
  - (i) the adverse impact, if any, which the Change of Scope is likely to have on the Project; and
  - (ii) the cost to be incurred by the Concessionaire for and in respect of such Change of Scope;
- (d) Upon receipt of the foregoing information, the Concessioneing Authority shall, if it decides to proceed with the Change of Scope, convey its agreement or otherwise of the assessment of the Concessionaire. If the Concessionaire does not notify any adverse impact of a Change of Scope notified under the Change of Scope Notice within 30 (thirty) Days of the date thereof and/or the Concessioneing Authority does not disagree with the cost assessment of the Concessionaire, the Concessioneing Authority shall issue an order requiring the Concessionaire to proceed with the implementation of such Change of Scope. If an adverse impact is notified by the Concessionaire and/or the Concessioneing Authority disagrees with the cost assessment, the Parties shall in good faith modify the Change of Scope envisaged so as to remove the adverse impact/agree to the cost implication for carrying out the Change of Scope within a period of 30 (thirty) Days of notification of the adverse impact/cost. In the event that the Parties are unable to mutually agree to a Change of Scope and/or the cost of implementing the same, they may seek intervention of an Expert

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

to resolve the differences and upon the final determination of the desired Change of Scope and its cost implication, the Concessioneing Authority may issue an order to implement the Change of Scope;

- (e) The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply mutatis mutandis to the works undertaken by the Concessionaire in respect of a Change of Scope;
- (f) Within 7 (seven) Days of an order for Change of Scope being issued, the Concessioneing Authority shall make an advance payment to the Concessionaire of a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder. The Concessionaire shall, after commencement of work, present to the Concessioneing Authority bills for payment in respect of the works in progress or completed works, as the case may be, supported by such documentation as is reasonably sufficient for the Concessioneing Authority to determine the accuracy thereof. Within 30 (thirty) Days of receipt of such bills, the Concessioneing Authority shall disburse to the Concessionaire net of Prorata advance payment, such amounts as are certified by the Statutory Auditors as being expended by the Concessionaire for and in respect of implementing Construction Works or procuring equipments following an order for a Change of Scope;
- (g) Notwithstanding anything to the contrary contained in this Article 6.8, the Concessioneing Authority may, after giving the Change of Scope Notice to the Concessionaire and considering its reply thereto, decide to seek competitive bids for carrying out the works envisaged in a Change of Scope; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Concessioneing Authority, and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten percent) thereof; and

- (h) If during the pendency of the Agreement, the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved Project Facilities and Services, it shall by notice in writing request the Concessions Authority to consider such Change of Scope. The Concessionaire may implement the Project and provide Project Facilities and Services in accordance with the Change of Scope as may be approved in writing by the Concessions Authority and all the provisions of this Article 6 for the Project Implementation shall mutatis mutandis apply. Provided, it is clarified that the provisions contained in Article 6.8 (f) and (g) shall not apply to a Change of Scope required by the Concessionaire.

### 6.9 Liquidated Damages

Subject to any of the provisions of this Agreement providing for extension of time for performance or excuse from performance, as the case may be, of any of the obligations of the Concessionaire under this Agreement, the Concessionaire shall pay to the Concessions Authority liquidated damages at the rate of [0.1% (zero point one percent)] of the Performance Guarantee for every Day of delay in fulfilling the specified obligations on or before a Milestone Date including a delay in obtaining the Completion Certificate or the Provisional Certificate on or before the Scheduled Project Completion Date. Provided such liquidated damages shall not in aggregate exceed 5% (five percent) of the Estimated Project Cost and unless the delay is in obtaining of the Completion Certificate or the Provisional Certificate, shall not be payable for less than 15 (fifteen) Days of delay from a Milestone Date, in fulfilling a specified obligation. The Parties agree that the liquidated damages as provided are a genuine pre-estimate of the damages the Concessions Authority is likely to suffer and are not by way of a

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

penalty. In case the aggregate delay exceeds 180 (one hundred and eighty) Days or the aggregate liquidated damages paid and/or payable under this provision exceeds the specified limit of 5% (five percent) of the Estimated Project Cost, the Concessioneing Authority shall be entitled to terminate this Agreement and the consequences of termination as laid down in Article 16.5 shall follow. The Concessioneing Authority may, at its discretion recover any amounts with respect to liquidated damages from the Performance Guarantee.

**ARTICLE 7**

**OPERATIONS & MAINTENANCE**

**7.1 (a) Obligations of the Concessionaire**

In addition to any of its other obligations under this Agreement, the Concessionaire shall manage, operate, maintain and repair the Project Facilities and Services, entirely at its cost, charges, expenses and risk in accordance with the provisions of this Agreement. The Concessionaire's obligations under this Article 7.1 shall include but shall not be limited to the following:

**(i) Berth and Terminal Operations:**

The Concessionaire shall:

- (a) promptly commence operations upon the Project Facilities and Services being declared by the Concessioneing Authority as ready for operations;
- (b) make efforts to maximise cargo handled so as to achieve optimal utilization of the Project Facilities and Services;
- (c) ensure compliance of the Project Facilities and Services at least as per the Scope of Work.;
- (d) be free to deploy higher capacity equipment/facilities, etc. and induct new technology for improved productivity and/or improved utilization of Project assets;
- (e) ensure that the Project Facilities and Services shall adhere to the Operations and Maintenance Standards and Safety Standards and there is safe, smooth and uninterrupted flow of traffic normal operating conditions;

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (f) minimise disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Facilities and Services by providing a rapid and effective response and maintaining liaison with emergency services of the Concessions Authority or other agencies;
- (g) make available all necessary financial, technical, technological, managerial and other resources for operation, maintenance, repair and replacement of the Project Facilities and Services in a timely manner;
- (h) ensure maintenance of proper and accurate record/data/accounts relating to operations of the Project Facilities and Services and the revenue earned therefrom;
- (i) obtain, maintain and comply with Applicable Permits and comply with the Applicable Laws including those relating but not limited to dock side safety, health, environment and labour;
- (j) subject to the provisions of this Agreement, perform, undertake or provide, in connection with the Project, all services which the Concessions Authority is authorized to perform, undertake or provide under the provisions of the MPT Act; and
  - (l) prevent, with the assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Project Facilities and Services.

### **(ii) Repairs and Maintenance**

The Concessionaire shall at its own cost:

- (a) repair as necessary and maintain the Project Facilities and Services or any part thereof in accordance with the Scope

of Work and for this purpose carry out routine preventive measures and maintenance of the Project Facilities and Services including resurveying of pavement, repair structures and repair and refurbish equipments; and

- (b) maintain the Project Facilities and Services in accordance with the provisions of this Agreement and Good Industry Practice with the objective of providing adequate service standards and ensuring that the Project Facilities and Services to be transferred to the Concessioning Authority upon expiry of the Concession Period are in good condition, normal wear and tear excepted.

**(iii) Replacement of Equipment**

The Concessionaire shall at its cost, plan for replacement of the equipment well ahead of the time when the utility thereof is reasonably expected to expire and replace the equipment in accordance with Good Industry Practice so as to ensure that the Project facilities and Services commensurate with the Scope of Work, at all times during the Concession Period.



**(iv) Repairs, Replacement or Restoration**

The Concessionaire shall at its own costs, promptly and diligently repair, replace or restore any of the Project Facilities and Services or part thereof which may be lost, damaged, or destroyed for any reason whatsoever.

**(v) Removal / Replacement of Assets**

Except as provided/authorized under this Agreement the Concessionaire shall not, without the prior written intimation to the Concessions Authority, remove or replace any assets comprised in the Project Facilities and Services. Such notice shall contain the exact details of the assets that the Concessionaire intends to remove and/or replace, its reasons for doing so and the likely period for replacement.

**(vi) Payments to the Concessions Authority**

The Concessionaire shall make/ensure payments to the Concessions Authority as per Article 9.

**(vii) Access for Inspection**

The Concessionaire shall be obliged to extend all co-operation to Experts appointed by the Concessions Authority for purposes of verifying that the Project/the Project Facilities and Services are operated and maintained in compliance with the Performance Standards and adhere to the Operations and Maintenance Standards and Safety Standards. Such verification shall be made annually. Additionally, the Concessionaire shall upon prior intimation by the Concessions Authority provide the authorized representatives of the Concessions Authority access to the Port's Assets/the Project Facilities and Services for inspection and review of operations and also to ascertain compliance with any of the requirements under this Agreement. Without prejudice to the generality of this provision, it is

agreed that the Concessionaire shall in particular extend all co-operation and information required by the Experts appointed by the Concessions Authority for conducting a safety audit and verifying that the Project/Project Facilities and Services are in strict compliance with the Safety Standards.

**(viii) Reports<sup>22</sup>**

The Concessionaire shall provide to the Concessions Authority, Monthly reports on cargo traffic, unit gross output/ discharge rates at berth, daily output rated per vessel, Tariff earned and collected in respect of Project Facilities and Services and effective working time to waiting within 15 (fifteen) Days following the end of each Month, and any other information relating to operations which the Concessions Authority may require from time to time. If so desired by the Concessions Authority, the Concessionaire shall provide the reports in prescribed formats and in electronic form so as to provide online access to the Concessions Authority and its representatives.

**(ix) Computer System and Network**

The Concessionaire shall install, operate and maintain such computer system and network (such as Electronic Data Interchange and Port Community System) and follow such protocol as the Concessions Authority may specify from time to time.

**(x) Security Arrangements**

The Concessionaire may make his own arrangements for security in the Project Site/Port Assets and with respect to the Project provided the Concessionaire shall abide by the security regulations/ procedures prescribed by the Concessions Authority or a Government Authority from time to time. It shall also conform to and assist the Concessions Authority or any authority

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<sup>22</sup> This provision may be modified depending on the Performance Standards stipulated on a project specific basis so as to ensure that the reports received by the Concessions Authority will enable it to effectively evaluate performance.

responsible therefor in conforming to the International Ship and Port facility Security Code (“ISPS Code”) and such other codes/requirements of International Maritime Organization as may be applicable to India from time to time.

**(xi) Employment of Personnel**

The Concessionaire shall employ qualified and skilled personnel required to operate the Project Facilities and Services. The terms of employment may be as deemed fit by the Concessionaire and the Concessionaire shall comply with all Applicable Laws and bear all costs in this regard. Without prejudice to the generality of this provision, all requisite approvals for employment of personnel of foreign origin or nationality shall be obtained by the Concessionaire prior to engaging such personnel. Failure to obtain approval will not amount to a Force Majeure Event. All employees shall always remain the Concessionaire’s responsibility.

Further, the Concessionaire shall comply with the requirements of employing the existing personnel/ labour as agreed to and set out in Appendix 11<sup>23</sup>. All labour law compliances shall be that of the Concessionaire alone.

**(xii) Minimum Guaranteed Revenue<sup>24</sup>**

The Concessionaire hereby unconditionally guarantees the Concessioning Authority annual revenue of the levels set out in Appendix 14 (“Minimum Guaranteed Revenue”) and agrees that except as provided in this Agreement, it shall not be entitled to any relaxation of its guarantee in this respect. The level of revenue given in Appendix 14 shall be revised every year to an extent of 60% of the variation in the Wholesale Price Index (WPI). In the event of non-achievement of Minimum Guaranteed Revenue during a particular year, Concessioning Authority shall be entitled to use the idle capacity as per following terms and conditions; **[Terms and conditions to be specified ]**

<sup>23</sup> The specific terms agreed in respect of a particular project regarding employment of existing port personnel (as included in the bid documents) would need to be set out in Appendix 11.

<sup>24</sup> To be stipulated only in cases where a fully functional facility is being handed over to the Concessionaire or in case where a new facility is handed over, adjacent to an existing one and a fair assessment of expectations from such new facility can be made.

**(xiii) Indemnity Against Claims for Loss of Goods**

Notwithstanding anything contained in the MPT Act or any other law for the time being in force, the Concessionaire shall be responsible for meeting any claim, action, suit or proceeding (the “**Action**”) by any third party alleging the loss, destruction or deterioration of goods of which charge has been taken by the Concessionaire and indemnify, save and hold harmless the Concessioneing Authority, its officers, employees, agents and representatives (the “**Indemnitees**”) against all claims which may be asserted against or suffered and legal fees and costs incurred and which relate to any such goods, provided that notice of the Action received by the Indemnatee(s) shall be forwarded to the Concessionaire expeditiously and in any case within [●] Days of the receipt thereof by any of the Indemnitees. Provided further that the Indemnitees shall have the right but not the obligation, to contest, defend and litigate any Action by any third party alleged or asserted against any of such Indemnitees in respect of, resulting from, related to or arising out of any matter for which it is to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Concessionaire. If the Concessionaire acknowledges in writing its obligation to indemnify the Indemnitees in respect of loss to the full extent, the Concessionaire shall be entitled, at its option, to assume and control the defence of such Action at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnitees and reimburses to them for the reasonable cost and expenses incurred by them prior to the assumption of such defence by the Concessionaire. In such case the Indemnitees shall not be entitled to settle or compromise any Action without the prior written consent of the Concessionaire, which consent shall not be unreasonably withheld or delayed. This indemnity shall survive termination of this Agreement.

**(xiv) Maintenance of Complaint Portal**

- (a) The concessionaire shall maintain a “Complaint Portal” on its website which shall be available to all users of the Project

Facilities and Services who shall be duly informed about availability of the provision for lodging of complaints. The Complaint Portal will also be linked to the Concessions Authority website with a alert system for real time access to the complaints.

(b) Concessionaire shall submit a reply to the complainant within thirty days from the date of receipt with a copy to Authority and maintain a proof of reply.

(c) Concessionaire shall duly comply with the advice of the Concessions Authority as to further appropriate action on the complaint for a just and fair redressal of the grievance.

**(b) Rights of Concessionaire**

**(i) Refinancing of Debts**

The Concessionaire in accordance with the provisions of this Agreement and the provisions of the Draft Tripartite Agreement (Appendix-19) may issue bonds to refinance the debts raised and utilized by it from Senior Lenders for the financing the project for which Concessions Authority shall enter into Tripartite Agreement as per the Draft Tripartite Agreement annexed at Appendix-19.

**(ii) Preferential and Priority Berthing**

Normally, except for the priority and preferential berthing that may be authorized in terms of guidelines issued by the Government from time to time, the Concessionaire shall manage and operate the Project Facilities and Services on a first come - first serve, common-user basis, open to any and all shipping lines, importers, exporters, shippers, consignees and receivers, and refrain from indulging in any unfair or discriminatory practice against any user or potential user thereof. However, if there is a requirement to offer preferential or priority berthing to any one or more

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

shipping lines or vessel owners/operators to optimize the use of the Project Facilities and Services, it shall be done in accordance with the priority berthing norms agreed between Concessionaire and Authority.

### **(iii) Unclaimed cargo**

The Concessionaire may at its cost:

- (a) after obtaining prior written approval of the Commissioner of Customs or other competent Government Authority and in accordance with the provisions of Applicable Law, destroy or dispose off by way of public auction and/or tender, any unclaimed cargo, the charge of which has been taken by Concessionaire under or pursuant to this Agreement, and always subject to provisions of MPT Act and other laws in this regard.
- (b) institute proceedings for recovery of unrealized charges, if any, in its name and/or defend any claim made in respect of such cargo by consignee/owners. The Concessioneing Authority agrees to provide all reasonable assistance necessary in this regard to the Concessionaire.

### **(c) Obligations of the Concessioneing Authority**

In addition to any of its other obligations in this Agreement, the Concessioneing Authority shall arrange for and provide the following:

#### **(i) Marine and Port Services**

The Concessioneing Authority shall provide/ cause to be provided, to the Concessionaire, the following services:

- (a) scheduling the entry, berthing and sailing of the vessels, pilotage and towage on a non-discriminatory basis subject to priority berthing norms and the sailing schedule as determined by the Deputy Conservator of the Port depending on individual ship characteristics and tidal conditions;

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (b) maintenance of the entrance channel draft at [●]m;
- (c) waterside safety and safety of navigation;
- (d) maintenance of the dredged draft alongside the berth at [●]m;
- (e) carry out capital or maintenance dredging operations, if any that may be required to ensure the draft to be provided or maintained at the levels agreed under this Agreement, with minimum inconvenience to or dislocation of the Project Facilities and Services;
- (f) provision and maintenance of all general port infrastructure other than those covered under the Concession, necessary for management, operation and maintenance of the Project Facilities and Services;
- (g) provide for/put in place arrangements for provision of Supporting Project Infrastructure other than those covered under the Concession;<sup>25</sup>
- (h) assist the Concessionaire in securing the assistance of CISF or the relevant Government Authority as may be necessary to prosecute any persons for any offence committed by them within the Project Site ; and
- (i) evolve mutually acceptable mechanism for sharing of common costs by existing and future terminal operators.

### **(ii) Approvals**

The Concessions Authority shall promptly grant approvals/consents sought by the Concessionaire as required under this Agreement subject to the Concessionaire having complied with all Applicable Laws/requirements in this regard.

<sup>25</sup>To be retained as applicable.

**(iii) Additional Land, Utilities and facilities.**

In the event of land, utilities and facilities are found to be insufficient by the Concessionaire for the providing services as per the scope of work at any time during the concession period, the Concessionaire may approach the Concessions Authority for providing additional land, utilities and facilities. Concessions Authority on being approached by Concessionaire shall consider, subject to availability and provide additional land, utilities and facilities if consider necessary for providing project facilities as per scope of work.

**7.2 Utilities and Services<sup>26</sup>**

The Concessions Authority shall during the Concession Period provide access to the Concessionaire to all infrastructure facilities and utilities including water, electricity and telecommunication facilities necessary for the implementation, operations and maintenance of the Project/ Project Facilities and Services in accordance with this Agreement, at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers availing substantially equivalent facilities and utilities. Provided unless otherwise agreed to by the Concessions Authority:

- (a) the power made available shall be as received by the Concessions Authority from [•] (*Name of Electricity Board or other source*). The take off point for electricity shall be from the sub station at [•];
- (b) the water made available shall be as received by the Concessions Authority from [•] (*Name the Source*). The take off point for water shall be the nearest available water line;
- (c) the Concessionaire shall, at its cost, and to the satisfaction of the Concessions Authority, install meters to measure the consumption of power and water. The Concessions Authority does not warranty the

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<sup>26</sup> To be retained as applicable.



reliability, quality and quantity of water and power and shall not be liable in any manner for the shortage in or non-supply of these utilities;

- (d) The Concessionaire may, at its cost, make alternate arrangements for power including but not limited to installation of generators, subject to obtaining Applicable Permits, if any, therefor.

### **7.3 Liability for shortfall in performance**

In the event the Concessions Authority, whether from the review of reports submitted by the Concessionaire in accordance with the provisions of this Agreement or otherwise, observes that the Project/Project Facilities and Services do not comply with the Performance Standards or fall short of the Performance Standards, the Concessions Authority shall calculate the amount of liquidated damages payable by the Concessionaire in accordance with Appendix 15 of this Agreement and demand the Concessionaire by a notice in writing to pay the same within 30 (thirty) Days and on failure of the Concessionaire to pay the same recover the amount from the Concessionaire. Provided that on receipt of the demand the Concessionaire may make a written representation to the Concessions Authority which shall be considered by the Concessions Authority on merits and the Concessions Authority may waive the liquidated damages in part or full, if it is satisfied that the Concessionaire has been carrying out its obligations diligently and efficiently and the shortfall to be waived was on account of reasons beyond the control of the Concessionaire.

It is clarified that this provision does not prejudice the rights of the Concessions Authority upon a Concessionaire Event of Default as set out in Article 15 including the Concessions Authority's right to terminate this Agreement which shall remain unaffected.

**ARTICLE 8**

**TARIFF**

**8.1 Applicable Tariff Guidelines**

Applicable Tariff Guidelines means the guidelines for determination of tariff for projects at Major Ports in vogue on the date the Concession Agreement is signed. However, in the event the said tariff guidelines are either amended, revised or replaced by a fresh set of tariff guidelines at any time during the Concession Period, such amended, revised or fresh set of tariff guidelines, as the case may be, shall be the Applicable Tariff Guidelines, provided the Concessionaire exercises an option to recover Tariff under such amended, revised or fresh set of tariff guidelines within a period of 30 days from the date of its publication in the Official Gazette.

**8.2 Levy and Recovery of the Tariff**

The Concessionaire shall be entitled to recover Tariff from the users of the Project Facilities and Services as per the Tariff Notification, an extract of which is set out in Appendix 12. The Tariffs shall be revised in the manner set out in the Applicable Tariff Guidelines and duly notified by the TAMP under Sections 48, 49 and 50 of the MPT Act or such other competent authority under the Applicable Laws. The Tariff Notification prescribes the maximum Tariff that can be levied by the Concessionaire and the Concessionaire may charge lower than the rates prescribed.. The Concessionaire shall, subject to Article 8.3 hereunder, deposit all Tariff and other receipts in relation to the Project Facilities and Services in the Escrow Account and shall not make any such deposits to any other account either of the Concessionaire or of any other person.

**8.3 Collection of Cesses and Charges**

The Concessionaire shall collect all cesses and charges including infrastructure cess, if any levied on the users as may be requested by the Concessions Authority, on behalf of the Concessions Authority and remit the same to the

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Concessions Authority. Provided, the Concessionaire shall be duly authorized by the Concessions Authority or such other authority as may be competent in this regard, for the purpose of such collection.

## ARTICLE 9

### PAYMENTS TO THE CONCESSIONING AUTHORITY

#### 9.1 License Fee

- (a) The Concessionaire shall, as consideration for the use, in its capacity as a bare licensee of the Project Site and the equipment comprised in the Port's Assets, made available in accordance with Article 2.4<sup>27</sup>, pay to the Concessioning Authority the sum of Rs [●] (Rupees [●] Only) (as specified in the bid documents) (the "**License Fee**"). Such amount shall be paid by the Concessionaire \_\_\_\_\_ (as agreed upon in lump sum or in half yearly / yearly installments<sup>28</sup>). Where the fees is paid on a half yearly/yearly basis, it shall also contain an escalation as may be stipulated by the Concessioning Authority upfront but periodic review of SOR, if any, will not be applicable.
- (b) Any delay in payment of the amount in the preceding clause (a) shall entail payment of interest @ 10 Year GSec plus 6% (Six percent) per annum on the amount outstanding.

#### 9.2 Payments of Royalty

- (a) The Concessionaire shall pay to the Concessioning Authority Royalty per Month equivalent to [●] % ([●] percent) of the Gross Revenue chargeable by the Concessionaire ("the **Royalty**").
- (b) Gross Revenue shall be computed on the basis of the maximum Tariffs leviable for and in respect of the Project Facilities and Services provided during the relevant period of computation. It is clarified that discounts and deferrals, if any offered by the Concessionaire to the users or amounts if any not collected by the Concessionaire for any reason whatsoever in respect of the Project Facilities and Services, shall be ignored for the purpose of Gross Revenue. Further, in computing the Gross Revenue, income from

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<sup>27&28</sup>This may need to be edited depending on the Project.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

storage charges, interest, sale of assets, amounts received by the Concessionaire by way of damages from third parties (excepting damages received from the users on account of demurrage or such other related charges in respect of the Project Facilities and Services), taxes and cesses in respect to the Project Facilities and Services, if any collected and paid to any Government Authority shall also be ignored.

Provided, that if the discount allowed is more than 10% of ceiling rate, Concessionaire shall be entitled to approach Authority to consider and approve discount(s) on ceiling tariffs for project services for the purpose of recovery of revenue share on the approved discounted tariff. The discounts, if any shall be with the approval of the Board of the Port. The approved discount shall be duly notified for information of users of Project facilities and the concessionaire shall pay revenue share on such discounted tariff ceilings.

- (c) Royalty for each Month shall be paid on or before the seventh Day of the immediately succeeding Month.
- (d) The payment of Royalty shall commence from the Month in which the Concessionaire commences to provide any Project Facilities and Services, and shall be irrespective of Date of Commercial Operation.
- (e) Royalty amounts remaining unpaid on respective due dates would carry interest @ 10 year GSec plus 6% (Six percent) per annum from the due date till the date of payment or realization thereof.

### **9.3 Utilities or Services**

The Concessionaire shall also pay rent or other charges for any land (other than the Project Site/Project Assets) or additional utilities or services, made available by the Concessions Authority to the Concessionaire in accordance with Article 7.1(iii) as per the terms, conditions and covenants including on payment of rates specified by the Concessions Authority. Such rates shall be equal to 1.25 times the Scale of Rates as may be notified by the competent authority in respect

thereof from (the present rates applicable in respect of land, utilities and services are set out in Appendix 13).

#### **9.4 Certified Accounts**

During the subsistence of this Agreement, the Concessionaire shall maintain all documents and supporting evidences for its financial statements including agreements and documents with respect to all capital and debt raised by the Concessionaire, capital and revenue expenses towards the Project, ship/vessel/user wise information, and, as relevant, the details of cargo handled by category, tariffs charged and the amount of rates received. The Concessionaire shall submit to the Concessions Authority a financial statement of the Gross Revenue for every 6 (six) monthly period ending 30<sup>th</sup> September and 31<sup>st</sup> March every year, duly certified by its Statutory Auditors. The certificate must be furnished within 30 (thirty) Days of the end of each such period.

The Concessions Authority shall, at its own cost, have the option to appoint another firm of chartered accountants duly licensed to practice in India (the “**Additional Auditor**”) to conduct a special audit of the Gross Revenue and the financial statements, documents and supporting evidences thereto as may be mandated by the Concessions Authority and report to the Concessions Authority such information as may be desired by the Concessions Authority for any period and the Gross Revenue (“**Special Audit**”).

In the event that the Gross Revenue reported by the Additional Auditor is higher than that reported by the Statutory Auditor, the auditors shall meet to resolve such differences and if they are unable to resolve the same the Concessionaire shall pay Royalty on the Gross Revenue reported by the Additional Auditor. The Concessionaire shall also pay interest @ 10 year GSec plus 6% - (Six percent) on the difference between the Royalty paid by the Concessionaire based on the Gross Revenue reported by the Statutory Auditor and that payable by the

Concessionaire based on the Gross Revenue reported by the Additional Auditor for the intervening period between the payment of the Royalties as above. Further the Concessionaire shall reimburse all costs, charges and expenses related to the Special Audit. Without prejudice to the aforesaid, if the difference between the Gross Revenue reported by the Additional Auditor and that reported by the Statutory Auditor is higher than [5]% (five percent), the Concessions Authority shall at its sole discretion have the right to require a Special Audit for the entire outstanding tenure of the Concession.

#### **9.5 Escrow Account**

The Concessionaire shall maintain an escrow account with a bank approved by the Lenders (“**Escrow Account**”), during the subsistence of this Agreement and enter into an agreement substantially in the format prescribed in Appendix 16 with such bank to ensure that all proceeds for financing the Project and all revenues and other receipts arising from the Project and under any agreements, including this Agreement received by the Concessionaire are deposited into such Escrow Account. Provided, the Concessionaire shall not deposit any amounts including the cesses and duties collected by it from the users on behalf of the Concessions Authority or such other authority in accordance with Article 8.2 hereof or pursuant to any other instructions in respect thereof in the Escrow Account and shall deposit the same in a separate account dedicated for the same and maintained by it in trust for the Concessions Authority or such other authority.

(a) Withdrawals and appropriations during the Concession Period, at any relevant time, from the Escrow Account shall be in the following order of priority<sup>29</sup> :

- (i) for all taxes due and payable by the Concessionaire;
- (ii) towards payment of License Fee;
- (iii) all construction/implementation expenses relating to the Project/Project Facilities and Services, subject to limits if any set out under the Financing Documents;

<sup>29</sup> This provision would be discussed at the pre-bid stage and any reasonable requests of the bidders and the lenders would be taken into account with respect to the priority.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (iv) all expenses relating to operations and management of the Project/Project Facilities and Services, subject to limits if any set out under the Financing Documents;
- (v) towards its debt service obligations under the Financing Documents;
- (vi) towards payment of Royalty and other sums payable to the Concessioneing Authority and liquidated damages, if any;
- (vii) towards any reserve requirements in accordance with the Financing Documents;

and the Concessionaire shall be at liberty to withdraw any sums outstanding in the Escrow Account after all the aforesaid payments due in any Quarter have been made and/or adequate reserves have been created in respect thereof for that Quarter. Provided, upon issuance of Termination Notice and/or suspension of the Concessionaire in accordance with the provisions of this Agreement, withdrawal from the Escrow Account shall be made only in accordance with the written instructions of the Concessioneing Authority and the Lenders.

- (b) All amounts standing to the credit of the Escrow Account at the end of the Concession Period including amounts credited to the Escrow Account towards compensation payable in accordance with Article 17 shall be appropriated in the following order of priority:
  - (i) towards taxes and statutory dues payable by the Concessionaire;
  - (ii) compensation to Lenders in terms of the Financing Documents towards discharge of the Concessionaire's liability under such Financing Documents;
  - (iii) all amounts due to the Concessioneing Authority and amounts payable towards transfer of the Project Facilities and Services by the Concessionaire in accordance with this Agreement;

and the Concessionaire shall be at liberty to withdraw any sums outstanding in the Escrow Account after all the aforesaid payments due



**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

have been made and/or adequate reserves have been created in respect thereof to the satisfaction of the Lenders and the Concessions Authority.

**ARTICLE 10**

**ASSETS: OWNERSHIP AND PERMITTED CHARGE**

**10.1 Ownership of Assets**

**(a) Land and Water Area**

The ownership of the Project Site and Port's Assets shall always remain vested with the Concessioneing Authority. The rights of the Concessionaire in the Project Site and Port's Assets shall only be that of a bare licensee of such assets and the Concessionaire shall neither assign, transfer, sublet, create any charge or Encumbrance, nor shall the Concessionaire create or permit creation of any third party rights whatsoever, on whole or any part of the Port's Assets or Project Site. Further, any such rights of the Concessionaire shall always be subject to existing rights of way. It is expressly agreed that the Concessionaire's rights in the Project Site and/or the Port's Assets shall cease without the need for any action to be taken by the Concessioneing Authority upon the termination of this Agreement for any reason whatsoever.

**(b) Assets created or provided by the Concessionaire**

The ownership of all infrastructure assets, buildings, structures, berths, wharfs, equipment and other immovable and movable assets constructed, installed, located, created or provided by the Concessionaire at the Project Site and/or in the Port's Assets pursuant to this Agreement shall, until expiry of this Agreement or transfer to the Concessioneing Authority on Termination in accordance with this Agreement, be with the Concessionaire. However, such ownership of buildings etc. erected by the Concessionaire at the Project Site shall not be construed as and shall not confer any rights in the Project Site or other Port's Assets upon the Concessionaire, save as that of a bare licensee as provided for in this Agreement.

**10.2 Permitted Charge on Assets**

The Concessionaire shall be entitled to create a charge on its rights, title and interest in the assets referred to in Article 10.1(b) in favour of Lenders for securing the Financial Assistance provided or agreed to be provided by them under the Financing Documents. Provided, any such charge shall not be effective before Financial Close and shall not continue for a period exceeding the Concession Period.

Provided further, that such charge shall not be for the Project Site nor encumber the Project Site and/or the Port's Assets.

Provided further, in the event of termination of this Agreement, the said charge shall stand extinguished upon payment of compensation by the Concessioneing Authority to the Lenders, to the extent they are entitled to receive the same in accordance with the provisions of this Agreement.

ARTICLE 11

SHAREHOLDING

11.1 Ownership Structure

The Applicant/Consortium has caused the Concessionaire to be incorporated as a special purpose company to implement, operate and maintain the Project/Project Facilities and Services in accordance with this Agreement. The shareholding pattern of Concessionaire/each member of the Consortium in the Concessionaire is [●].

11.2 Shareholding

The Concessionaire shall ensure that the Applicant/ members of the Consortium maintain Management Control at least until expiry of the Exclusivity Period<sup>30</sup> as also maintain their equity holding in the Concessionaire such that<sup>31</sup>:

- (a) The Applicant/members of the Consortium legally and beneficially hold not less than 51% (fifty one percent) of its paid up equity capital until 3 (three) years after Date of Commercial Operations and not less than 26% (twenty six percent) thereafter for another three years period, provided that the concessionaire shall be entitled to approach the Concessioneing Authority to waive the equity holding requirement of 26% during the period after three years of CoD, if performance parameters have been achieved during the three year period after CoD. On expiry of the aforesaid share holding period, lead member shall be entitled to approach Authority proposing a new consortium. Authority shall consider and approve it subject to the consortium meeting the eligibility criteria as prescribed in Bid Document for the Project. ; and
- (b) M/s [●] (“**Lead Member**”) of the Consortium (original or new as the case may be) legally and beneficially holds at any time not less than 50% (fifty percent) of the Consortium’s holding in the paid up equity capital of the Concessionaire.

<sup>30</sup> Where there is no Exclusivity Period prescribed, this would be expiry of 3 years from the Date of Commercial Operations.

<sup>31</sup>This provision would be edited depending on whether the bidder is a single applicant or a Consortium. Sub Article (b) will be omitted in case the bidder is a single Applicant.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Notwithstanding the aforesaid, any Transfer of shareholding in the Concessionaire and/or direct or indirect change in the Management Control of the Concessionaire, including by way of a restructuring or amalgamation, shall only be with the prior written approval of the Concessions Authority which consent shall not be withheld except (i) for reasons of national security; or (ii) [if the Person proposed for assuming such Management Control would by virtue of the restrictions imposed under the Applicable Law or the conditions of bidding (including restrictions to avoid anti-competitive and monopolistic practice) and/or public policy be disqualified from undertaking the Project.]

Provided, nothing contained in this Article shall preclude or prevent pledge of shares in the Concessionaire in favour of Lenders as security for the Financial Assistance subject to the enforcement and consequent Transfer thereof only with the prior written consent of the Concessions Authority as stated hereinbefore and in accordance with the Financing Documents.

### **11.3 Constituent Documents**

The Concessionaire shall ensure that its articles of association adequately reflect the aforesaid and the relevant commitments, obligations and responsibilities of the Applicant/Consortium.

In particular, the articles of association and the memorandum of association of the Concessionaire shall be amended within 3 (three) months of the Date of Award of Concession to include the terms and conditions regarding the composition of share-holding and management stipulated in this Agreement; and terms and conditions related to changes in the share-holding pattern stipulated in this Agreement. The Concessionaire shall submit the amended articles of association and the memorandum of association to the Concessions Authority as soon as may be reasonably possible.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Any subsequent change in the articles of association or the memorandum of association which alter the provisions required by this Article shall require the prior approval of the Concessions Authority and the articles of association and memorandum of association of the Concessionaire shall include a specific provision to this effect.

**ARTICLE 12**

**GENERAL RIGHTS, DUTIES AND OBLIGATIONS**

**12.1 Of the Concessionaire**

**(a) Applicable Permits**

The Concessionaire shall at all times during the Concession Period maintain and comply with the Applicable Permits.

**(b) Taxes & duties**

The Concessionaire shall during the Concession Period pay on account of / in respect of Project Assets in a timely manner all taxes, duties, levies, VAT, cess and charges including but not limited to income tax, sales tax, excise duty, customs duty, service tax and octroi that may be levied, claimed or demanded from time to time by any Government Authority including any increase therein effected from time to time from any Government Authority, in respect of the Project/ the Project Facilities and Services. In case of nonpayment, Concessioneing Authority may pay the amount after giving 30 days notice to concessionaire and seek the reimbursement from concessionaire in due course.

**(c) Insurance**

**(i) Insurance Requirement**

The Concessionaire shall, at its cost and expense, purchase and maintain insurances as are prudent, including but not limited to the following:

- (a) builder's all risk insurance;
- (b) loss, damage or destruction of the Project Facilities and Services, at replacement value;
- (c) comprehensive third party liability insurance including

injury or death to personnel of the Concessioneing Authority and others who may enter the Project Site or the Port's Assets;

- (d) workmen's compensation insurance;
- (e) marine cum storage cum erection insurance; and
- (f) any other insurance that may be necessary to protect the Concessionaire, its employees and its assets and the Concessioneing Authority, its employees and agents engaged in or connected to the Project and the Project Site and Port Assets (against loss, damage or destruction at replacement value) including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (e).

**(ii) Insurance Cover & Insurance Companies**

The Concessionaire shall insure all insurable assets comprised in the Port's Assets and/or the Project Facilities and Services and all insurable risks associated with the Project to the extent advisable in accordance with Good Industry Practice ("**Insurance Cover**").

**(iii) Evidence of Insurance Cover**

The Concessionaire shall, from time to time, provide to the Concessioneing Authority copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Concessionaire in accordance with this Agreement.

**(iv) Application of Insurance Proceeds**

Subject to the provisions of the Financing Documents, all moneys received under insurance policies shall be promptly applied by the



Concessionaire towards repair or renovation or restoration or substitution of the Port Assets and the Project Facilities and Services or any part thereof which may have been damaged or destroyed and in respect of which the claim is lodged. The Concessionaire may designate the Lenders as the loss payees under the insurance policies/assign the insurance policies in their favour as security for the Financial Assistance. The Concessionaire shall carry out such repair or renovation or restoration or substitution to the extent possible in such manner that the Project Facilities and Services or any part thereof, shall, after such repair or renovation or restoration or substitution be as far as possible in the same condition as they were before such damage or destruction, normal wear and tear excepted.

**(v) Validity of the Insurance Cover**

The Concessionaire shall pay the premium payable on such insurance policy(ies) so as to keep the policy(ies) in force and valid throughout the Concession Period and furnish copies of the same to the Concessions Authority. Each insurance policy shall provide that the same shall not be cancelled or terminated unless 10 (ten) Days' clear notice of cancellation is provided to Concessions Authority in writing. If at any time the Concessionaire fails to purchase and maintain in full force and effect any and all of the insurances required under this Agreement, the Concessions Authority may at its option purchase and maintain such insurance and all sums incurred by the Concessions Authority therefor shall be reimbursed with interest @ 10 year GSec plus 6% - (six percent) per annum by the Concessionaire forthwith on demand, failing which the same shall be recovered by the Concessions Authority by exercising right of set off or otherwise.

**(vi) Waiver of Subrogation**

All insurance policies procured in terms of the provisions hereof shall include a waiver of any right of subrogation of the insurers there under against, inter alia, the Concessioneing Authority and its assigns and successors and their respective subsidiaries, affiliates, employees and of any right of the insurers of any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

**(d) Indemnification**

The Concessionaire shall during the pendency of this Agreement and thereafter until all claims and demands in respect to the acts and omissions during the period of the Agreement as described hereunder are duly settled, indemnify and keep indemnified and otherwise save harmless, the Concessioneing Authority, its agents and employees, from and against all claims, demands made against and/or loss caused and/or damages suffered and/or cost, charges/expenses incurred to and/or penalty levied and/or any claim due to injury to or death of any person and/or loss or damage caused or suffered to property owned or belonging to the Concessioneing Authority, its agents and employees or third party as a result of any acts, deeds or thing done or omitted to be done by the Concessionaire or as a result of failure on the part of the Concessionaire to perform any of its obligations under this Agreement or on the Concessionaire committing breach of any of the terms and conditions of this Agreement or on the failure of the Concessionaire to perform any of its duties and/or obligations including statutory duties or as a consequence of any notice, action, suit or proceedings, given, initiated, filed or commenced by consignee or owner of goods or vessel owner/agent or its employees or any third party or Government Authority or as a result of any failure or negligence or default of the Concessionaire or its Contractor(s),

sub-contractor(s), or employees, servants, agents of such Contractor(s) and/or sub-contractor(s) and/or invitees as the case may be, in connection with or arising out of this Agreement and/or arising out of or, in connection with the Concessionaire's use and occupation of the Project Site or Port's Assets and/or construction, operation and maintenance of the Project Facilities and Services.

**(e) Assignability**

Except as otherwise provided in this Agreement, the Concessionaire shall not assign its rights, title or interest in this Agreement in favour of any Persons without prior written consent of the Concessions Authority.

Provided the Concessionaire may assign its rights, interests and benefits under this Agreement to the Lenders as security for the Financial Assistance. Provided further nothing contained in this Article shall:

- (i) absolve the Concessionaire from its responsibilities to perform/discharge any of its obligations under and in accordance with the provisions of this Agreement; and
- (ii) authorize or be deemed to authorize the Lenders to operate the Project Facilities and Services themselves and any such assignment to operate shall be in terms of the Substitution Agreement.

**(f) Engagement of Contractors**

The Concessionaire shall engage the Management Contractor and execute the Management Contract, thereby entrusting the Management Contractor with the responsibilities of operating and managing the Project Facilities and Services in the manner envisaged under the Request for Proposal.<sup>32</sup> A copy of the Management Contract shall be provided to the Concessions Authority and the same shall not be amended, substituted or revoked

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<sup>32</sup> This may be added in cases where the project has been awarded on the strength of the management contractor.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

without the prior written consent of the Concessioneing Authority.

The Concessionaire may engage any Person possessing the requisite skill, expertise and capability for designing, engineering, procurement and construction of civil/mechanical/electrical engineering structures/equipment, and/or operation and maintenance of the Project Facilities and Services.

Provided:

- (i) the Concessionaire shall at all times be solely responsible for all its obligations under this Agreement notwithstanding any such engagement and anything contained in any Project Contracts or any other agreement, and no default under any Project Contract or agreement shall excuse the Concessionaire from its obligations or liability hereunder and the Concessionaire shall at all times be solely responsible for non performance or for any defect, deficiency or delay in the construction and erection and/or installation of the structures/equipment or any part thereof and for the operation and maintenance of the Project/the Project Facilities and Services in accordance with the provisions of this Agreement;
- (ii) the Concessionaire should have obtained, if required, security clearance for the Contractor the Concessionaire intends to engage;
- (iii) the Concessionaire shall ensure that the Project Contracts contain provisions that entitle the Concessioneing Authority to step into such contract in its sole discretion in substitution of the Concessionaire in the event of termination or suspension of this Agreement; and
- (iv) any contract that it enters with an Affiliate in respect of the Project shall be on an arms length basis.

**(g) Condition Survey**

- (i) The Concessionaire agrees that at least 6 (six)<sup>33</sup> Months prior to the expiry by efflux of time of the Concession Period, it shall, cause to be conducted at its cost by an Expert appointed by the Parties by mutual consent, a condition survey and an inventory of the entire Project Facilities and Services. If, as a result of such survey, the Expert shall observe/notice that the Port's Assets and/or the Project Facilities and Services or any part thereof have/has not been operated and maintained in accordance with the requirements therefor under this Agreement (normal wear and tear excepted) the Concessionaire shall, at its cost and expenses, take all necessary steps to put the same in good working condition well before the Transfer Date. In the event the Concessionaire fails to comply with this provision, the Concessioneing Authority may itself cause the condition survey and inventory of the Port's Assets and Project Facilities and Services to be conducted and remove any defect or deficiency. The Concessioneing Authority shall be promptly reimbursed by the Concessionaire for the costs incurred in conducting such survey and preparation of inventory as also in putting the Project Facilities and Services in a good working condition.
- (ii) The Concessionaire shall as security for performance of its obligation in the preceding sub-article (i), provide/submit to the Concessioneing Authority a guarantee issued by a scheduled bank in India for a sum of Rs [●]<sup>34</sup> (Rupees ● Only) 2 (two) years prior to the expiry of the Concession Period. In the event of Concessionaire's failure to provide such guarantee, the same shall be deemed to be a Concessionaire Event of Default and the Concessioneing Authority shall accordingly be entitled to terminate this Agreement in accordance with Article 15.

<sup>33</sup>This period could vary depending on the Project/Concession so as to ensure adequate time for both the survey and restoration of assets. <sup>34</sup> 3-5% of the Estimated Project Cost recommended.

## 12.2 Of the Concessioneing Authority

### (a) Assistance in obtaining Approvals, Permits and Licenses

The Concessioneing Authority shall, at the written request of the Concessionaire, but without guarantees and/or without assuming any responsibility in that behalf, issue recommendatory letters and make best efforts to assist the Concessionaire in obtaining all the Applicable Permits including renewals thereof. Provided that, nothing contained in this Article shall relieve the Concessionaire of its obligations under this Agreement to obtain the Applicable Permits and to keep them in force and effect throughout the Concession Period.

### (b) Taxes and Duties

Any levy or levies including increase therein of taxes, duties, cess and the hike, on account of/in respect of Port's Assets payable to the State Government or any statutory authority shall be met and paid by the Concessioneing Authority. In case of nonpayment, Concessionaire may pay the amount after giving 30 days notice to Concessioneing Authority and seek reimbursement from the Concessioneing Authority in due course

### (c) Competing Facilities<sup>35</sup>

The Concessioneing Authority shall not operationalise any additional facility within Port Limits for handling \_\_\_\_\_ (specify cargo) either on its own or through any other Person until the earlier of (i) 3 (three ) years from the Scheduled Project Completion Date; or (ii) the average annual volume of cargo handled at the Project Facilities and Services reaches a level of 70% (seventy percent) of Project Capacity for 2 (two) consecutive years (“**Exclusivity Period**”). Provided, this restriction shall not apply to the additional facility envisaged at [●].<sup>36</sup>

<sup>35</sup>This provision may be retained on a project specific basis i.e. only for projects which in the reasonable judgement of the Concessioneing Authority would not be viable without such exclusivity.

<sup>36</sup>Details of additional facility planned within Port Limits and disclosed in the RFP.

**(d) General rights of inspection and verification**

The Concessions Authority may during the pendency of the Agreement itself or by appointment of Experts verify the performance of obligations of the Concessionaire as set out in this Agreement.

**12.3 Of the Concessions Authority and the Concessionaire**

**(a) Monitoring Arrangement**

The parties shall furnish to each other periodical status reports relating to key milestones and obligations as per Appendix 18 “Monitoring Arrangement”

**(b) Compliance with Laws and Regulations**

The Parties shall perform their respective obligations under this Agreement in accordance with the Applicable Laws and Applicable Permits.

**(c) Rights to Documents**

**(i) Concessions Authority’s Documents**

Documents and computer programs or copies thereof, if any, provided by the Concessions Authority to the Concessionaire, shall always remain the property of the Concessions Authority. Such documents, computer programs and/or copies shall not be used by the Concessionaire for the purposes other than for the Project. Such documents, computer programs and/or copies thereof shall, unless otherwise agreed upon by the Concessions Authority, be returned by the Concessionaire to the Concessions Authority on the Transfer Date.

**(ii) Concessionaire’s Documents**

Documents and computer programs provided by the Concessionaire, or which are developed (and owned by the Concessionaire) for operation and/or maintenance of the Project /the Project Facilities and Services shall be handed over by the Concessionaire to the Concessions Authority free of cost on the Transfer Date.

**(iii) Confidentiality**

All confidential information and documents (whether financial, technical or otherwise) provided by either Party to the other shall not, unless compelled by law or the process of a Government Authority, be disclosed to any Person without the consent of the other Party with the exception of providing such information to legal advisors/auditors of the concerned party on a need-to-know basis. This covenant shall survive the Concession Period.

**(iv) Obligation to Cooperate**

The Parties shall mutually cooperate with each other in order to achieve the objectives of this Agreement.

**(v) Substitution Agreement**

The Substitution Agreement envisaged by Appendix 3 hereunder, will/may be executed within 30 (thirty) Days' of notice by the Concessionaire to the Concessions Authority of the Lenders' readiness to execute the same.



**ARTICLE 13**

**CHANGE IN LAW**

**13.1 Change in Law**

“**Change in Law**” means any of the following events which has a Material Adverse Effect:

- (a) adoption, promulgation, modification, reinterpretation or repeal after the date of this Agreement by any Government Authority of any statute, rule, ordinance, regulation or order, treaty, convention, directive, guideline, policy having force of law; or
- (b) the imposition by any Government Authority of any material condition (other than a condition which has been imposed as a consequence of a violation by the Concessionaire of any Applicable Permit) in connection with the issuance, renewal or modification of any Applicable Permits after the date of this Agreement which renders the performance by the Concessionaire of any of the terms of this Agreement impossible or unviable; or
- (c) any Applicable Permit previously granted, ceasing to remain in full force and effect for reasons other than breach/violation by or the negligence of the Concessionaire or if granted for a limited period, being renewed on terms different from those previously stipulated.
- (d) the imposition of any new Direct Tax
- (e) A change in the interpretation or application of any Indian Law by the judgement of a court of record which has become final and binding in place of such interpretation or application of law by a court of record prior to the bid due date

### 13.2 The Concessionaire's Remedy

- (a) In the event of Change in Law the Concessionaire may propose to the Concessions Authority modifications to the relevant terms of this Agreement which are reasonable and intended to mitigate the effect of the Change in Law. Thereupon, the Parties shall, in good faith, negotiate and agree upon suitable changes in the terms of this Agreement including extension of the Concession Period, so as to place the Concessionaire in substantially the same legal and financial position as it were prior to such Change in Law. i.e Protecting Project IRR as per Financing Plan. Provided however, that if the resultant Material Adverse Effect is such that this Agreement is frustrated or is rendered illegal or impossible of performance, the Change in Law shall be deemed to be a Political Event, whereupon the provisions with respect thereto shall apply.
- (b) In the alternative to the aforesaid, subject to the Concessionaire taking necessary measures to mitigate the impact or the likely impact of Change in Law on the Project, if as a direct consequence of a Change in Law, the Concessionaire is obliged to incur Additional Cost in any accounting year, any such Additional Cost above a sum of Rs. [●]<sup>37</sup> million may at the option of the Concessions Authority be borne by the Concessions Authority. It is clarified that Additional Cost upto Rs. [●] (Rupees [●] only) in any accounting year shall be borne by the Concessionaire;
- (c) Upon occurrence of a Change in Law, the Concessionaire shall notify the Concessions Authority, of the following:
- (i) the particulars, nature and the impact of Change in Law on the Project;

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<sup>37</sup> This should be at least 5 to 7% of the estimated project cost.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (ii) in sufficient detail, the estimate of the Additional Cost likely to be incurred by the Concessionaire on account of the Change in Law; and
  - (iii) the measures, which the Concessionaire has taken or proposes to take to mitigate the impact of Change in Law, including in particular, minimising the Additional Cost.
- (d) Upon receipt of the notice of Change in Law issued by the Concessionaire pursuant to the preceding sub-article(c), the Concessioneing Authority and the Concessionaire shall hold discussions and take all such steps as may be necessary including determination/certification by an Expert, appointed by the Parties by mutual consent, of the Additional Cost and to determine the quantum of the Additional Cost to be incurred.
- (e) If it is determined that the only material impact of a Change in Law is Additional Cost and the Concessioneing Authority opts to compensate the same in accordance with the preceding sub-article (b), the Concessionaire shall not be entitled to any other remedy nor shall seek any alterations to the Agreement and the Concessioneing Authority shall, within 30 (thirty) Days from the date of determination of quantum of Additional Cost to be borne by the Concessioneing Authority in accordance with sub-article (b) above, compensate the Concessionaire in either of the following ways:
  - (i) by lump-sum reimbursement of such Additional Cost to the Concessionaire;
  - (ii) reimbursement of the such Additional Cost to the Concessionaire, in not exceeding four half yearly installments, subject to payment of interest at 10 Year GSEC + 6% - (Six percent) on the amount the payment of which is deferred.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Notwithstanding the aforesaid, if in terms of Good Industry Practice, the event constituting a Change in Law could be insured, the Concessionaire shall not be entitled to any remedy under this Article 13.2;

If as a result of Change in Law, the Concessionaire incurs a reduction in costs or other financial gain or benefit in connection with its development or operation of the Project, the aggregate financial effect of which exceeds Rs. [●] (Rupees [●] only) in any Financial Year, the Concessionaire shall notify the Concessioneing Authority and pay to the Concessioneing Authority an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such cost reduction, increase in return or other financial gain or benefit as aforesaid. Without prejudice to the aforesaid, the Concessioneing Authority may, by notice in writing require the Concessionaire to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such cost reduction, increase in return or other gain or benefit.

The Concessionaire shall make payment of such compensation within sixty (60) Days of the said financial benefit. If the Concessionaire shall dispute the quantum of such compensation claim of the Concessioneing Authority, the same shall be finally settled in accordance with the dispute resolution mechanism contained in Article 19 herein.

**ARTICLE 14**

**FORCE MAJEURE**

**14.1 Force Majeure Event**

As used in this Agreement, Force Majeure Event means the occurrence of any of the Non-Political Events, the Political Events or the Other Events in India, set out in Articles 14.2, 14.3 and 14.4 respectively including the impact/consequence thereof which :

- (a) is beyond the control of the Party claiming to be affected thereby (the “**Affected Party**”);
- (b) prevents the Affected Party from performing or discharging its obligations under this Agreement; and
- (c) the Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.

**14.2 Non-Political Events**

Any of the following events which prevent the Affected Party from performing any of its obligations for a continuous period of not less than 7 (seven) Days from the date of its occurrence, shall constitute a Non-Political Event:

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Project Site and by reasons not attributable to the Concessionaire or the Contractor or any of the employees or agents of the Concessionaire or the Contractor);

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them), and not being an Other Event set forth in Article 14.4, labour disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Concessionaire or the Contractor;
- (c) any failure or delay of a Contractor caused by any of the Non-Political Events, for which no offsetting compensation is payable to the Concessionaire or on behalf of the Contractor;
- (d) the discovery of geological conditions, toxic contamination or archeological remains on the Project Site that could not reasonably have been expected to be discovered through a site inspection; or
- (e) any event or circumstance of a nature analogous to any of the foregoing.

### 14.3 Political Events

Any of the following events shall constitute Political Event:

- (a) Change in Law for which no relief is provided under the provisions of Article 13, resulting in Material Adverse Effect;
- (b) action of a Government Authority having Material Adverse Effect including but not limited to (i) acts of expropriation, compulsory acquisition or takeover by any Government Authority of the Project/Project Facilities and Services or any part thereof or of the Concessionaire's or the Contractor's rights under any of the Project Contracts, and (ii) any unlawful, unauthorized or without jurisdiction refusal to issue or to renew or the revocation of any Applicable Permits, in each case, for reasons other than the Concessionaire's or the Contractor's breach or failure in complying with the Scope of Work , Applicable Laws, Applicable Permits, any judgment or order of a Governmental

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

Agency or of any contract by which the Concessionaire or the Contractor as the case may be is bound;

- (c) early determination of this Agreement by the Concessions Authority for reasons of national emergency, national security or the public interest;
- (d) any failure or delay of a Contractor caused by any of the aforementioned Political Events, for which no offsetting compensation is payable to the Concessionaire by or on behalf of the Contractor; or
- (e) any event or circumstance of a nature analogous to any of the foregoing.

### 14.4 Other Events

Any of the following events which prevents the Affected Party from performing any of its obligations under this Agreement for a continuous period of not less than 7 (seven) Days from the date of its occurrence, shall constitute the Other Event:

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- (b) industry wide or State wide strikes or industrial action;
- (c) any civil commotion, boycott or political agitation which prevents collection of Fee by the Concessionaire;
- (d) any judgment or order of a court of competent jurisdiction or statutory authority in India made against the Concessionaire or the Contractor in any proceedings which is non-collusive and duly prosecuted by the Concessionaire; and any judgment or order of a court of competent jurisdiction or statutory authority in India made against the Concessionaire or the Contractor in any proceedings which is non-collusive and duly

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

prosecuted by the Concessionaire other than relating to proceedings (i) pursuant to failure of the Concessionaire to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement or (iv) with respect to exercise of any of its rights under this Agreement by the Concessioneing Authority; or

- (e) any event which becomes Uninsurable subsequent to execution of Agreement.
- (f) any event or circumstance of a nature analogous to any of the foregoing.

### 14.5 Notice of Force Majeure Event

- (a) The Affected Party shall give written notice to the other Party in writing of the occurrence of any of the Force Majeure Event (the “**Notice**”) as soon as the same arises or as soon as reasonably practicable and in any event within 7 (seven) Days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the adverse effect it has or is likely to have on the performance of its obligations under this Agreement.
- (b) The Notice shall inter-alia include full particulars of:
  - (i) the nature, time of occurrence and extent of the Force Majeure Event with evidence in respect thereof;
  - (ii) the duration or estimated duration and the effect or probable effect which such Force Majeure Event has or will have on the Affected Party’s ability to perform its obligations or any of them under this Agreement;
  - (iii) the measures which the Affected Party has taken or proposes to take, to alleviate the impact of the Force Majeure Event or to mitigate the damage; and
  - (iv) any other relevant information.



- (c) So long as the Affected Party continues to claim to be affected by a Force Majeure Event, it shall provide the other Party with periodic (fortnightly/monthly) written reports containing the information called for by Article 14.5(b) and such other information as the other Party may reasonably request.

**14.6 Period of Force Majeure**

Period of Force Majeure shall mean the period from the time of occurrence specified in the Notice given by the Affected Party in respect of the Force Majeure Event until the earlier of:

- (a) expiry of the period during which the Affected Party is excused from performance of its obligations in accordance with Article 14.7; or
- (b) termination of this Agreement pursuant to Article 14.10 hereof.

**14.7 Resumption of Performance**

During the period of Force Majeure, the Affected Party shall in consultation with the other Party, make all reasonable efforts to limit or mitigate the effects of the Force Majeure Event on the performance of its obligations under this Agreement. The Affected Party shall also make efforts to resume performance of its obligations under this Agreement as soon as possible and upon resumption shall notify the other Party of the same in writing. The other Party shall afford all reasonable assistance to the Affected Party in this regard.

**14.8 Performance Excused**

The Affected Party, to the extent rendered unable to perform its obligations or part thereof under this Agreement as a consequence of the Force Majeure Event shall be excused from performance of the obligations. Provided that, the excuse from performance shall be of no greater scope and of no longer duration than is

reasonably warranted by the Force Majeure Event. Provided further, nothing contained herein shall absolve the Affected Party from any payment obligations accrued prior to the occurrence of the underlying Force Majeure Event.

**14.9 Costs, Revised Timetable**

**(a) Costs**

Each Party shall bear its costs, if any, incurred as a consequence of the Force Majeure Event.

**(b) Extension of time/period**

The Affected Party shall be granted by the other Party, extension of time specified in this Agreement for the performance of any obligation by such period not exceeding the period during which the relative performance was affected by the Force Majeure Event. Such extension may include extension of the Concession Period by the Concessions Authority in appropriate cases if permissible under Applicable Law.

**14.10 Termination Due to Force Majeure Event**

If the period of Force Majeure continues or is in the reasonable judgment of the Parties likely to continue beyond a period of 120 (one hundred and twenty) Days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 (one hundred and twenty ) Days be entitled to terminate the Agreement in which event, the provisions of Articles 16 and 17 shall, to the extent expressly made applicable, apply.

**ARTICLE 15**

**EVENTS OF DEFAULT**

**15.1 Events of Default**

Event of Default means the Concessionaire Event of Default or the Concessions Authority Event of Default or both as the context may admit or require.

**(a) The Concessionaire Event of Default**

The Concessionaire Event of Default means any of the following events unless such an event has occurred as a consequence of the Concessions Authority Event of Default or a Force Majeure Event:

- (i) the Concessionaire's failure to perform or discharge any of its obligations in accordance with the provisions of this Agreement;
- (ii) construction at the Project Site is abandoned for a more than 90 (ninety) Days during the Construction Phase;
- (iii) a delay of more than 180 (one hundred and eighty) Days from any Milestone Date in achieving any of the performance obligations set forth for the relevant Milestone Date or the Date of Commercial Operations is delayed for more than 180 (one hundred and eighty) Days from the Scheduled Project Completion Date;
- (iv) Delay in payment of Royalty for 2 (two) consecutive Months or more than (5) (five) times in the aggregate during the Concession Period;
- (v) the Concessionaire's failure to perform or discharge any of its obligations under any other Project Contract, which has or is likely to affect the Project/the Project Facilities and Services, materially;

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (vi) Failure to enter into Operation and Maintenance (O&M) contract before date of commercial operation and a default under the Management Contract, which has or is likely to affect the Project/the Project Facilities and Services, materially;<sup>38</sup>
- (vii) <sup>39</sup>the Concessionaire fails to achieve Minimum Guaranteed Revenue for a consecutive period of 3 (three) years. [Provided, the Concessionaire shall not be deemed to be in default if such non achievement is due to a substantial change in economic policies including the policy regarding import/export of a particular commodity as a result of which the throughput could not be achieved;]
- (viii) any representation made or warranties given by the Concessionaire under this Agreement is found to be false or misleading;
- (ix) the Concessionaire passing a resolution for voluntary winding up;
- (x) appointment of a provisional liquidator, administrator, trustee or receiver of the whole or substantially whole of the undertaking of the Concessionaire by a court of competent jurisdiction in proceedings for winding up or any other legal proceedings;
- (xi) occurrence of default under the Financing Documents pursuant to which the Lenders exercise their rights to substitute the Concessionaire in accordance with the provisions of the Substitution Agreement;
- (xii) levy of an execution or distraint on the Concessionaire's assets which has or is likely to have Material Adverse Effect and/or affect the Project/Project Facilities and Services, materially and such execution or distraint remaining in force for a period exceeding 90

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<sup>38</sup>This would be case specific.

<sup>39</sup>Should be applicable only for single commodity bulk cargo terminals. This would be added only where Minimum Guaranteed Revenue is specified. The bracketed portion would be project specific.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

( ninety) Days;

- (xiii) the Performance Guarantee is not maintained in terms of the provisions hereof;
- (xiv) the Concessionaire abandons or expresses its intention to revoke/terminate this Agreement without being entitled to do so as is expressly provided in the Agreement;
- (xv) a change in shareholding such that the beneficial interest of the Applicant/Consortium in the Concessionaire reduces below the limits set in Article 11.2 and/or Management Control of the Concessionaire has occurred in contravention of the provisions of Article 11 hereof;
- (xvi) amalgamation of the Concessionaire with any other company or reconstruction or transfer of the whole or part of the Concessionaire's undertaking [other than transfer of assets in the ordinary course of business] in contravention with the provisions of Article 11 hereof; and
- (xvii) the Concessionaire engaging or knowingly allowing any of its employees, agents, Contractor or representative to engage in any activity prohibited under this Agreement and/or by law or which constitutes a breach of the Agreement or breach of or an offence under any law, in the course of any activity undertaken pursuant to this Agreement.

### **(b) The Concessions Authority Event of Default**

- (i) the Concessions Authority's failure to perform or discharge its obligations in accordance with the provisions of this Agreement unless such failure has occurred as a consequence of any Concessionaire Event of Default or a Force Majeure Event.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

- (ii) any representation made or warranties given by the Concessioneing Authority under this Agreement is found to be false or misleading.
- (iii) appointment of a provisional liquidator, administrator or receiver of the whole or part of the Port's Assets in any legal proceedings initiated against the Concessioneing Authority (unless such proceedings are initiated as a consequence of any Concessioneaire Event of Default).
- (iv) levy of an execution or destraint on the Port's Assets in any proceedings against the Concessioneing Authority (unless such proceedings are initiated as a consequence of any Concessioneaire Event of Default) which has or is likely to have Material Adverse Effect and such execution or destraint remaining in force for a period exceeding 90 (ninety) Days.

### **15.2 Parties Rights**

- (a) Upon the occurrence of the Concessioneaire Event of Default, the Concessioneing Authority shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.
- (b) Upon the occurrence of the Concessioneing Authority Event of Default, the Concessioneaire shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.

Provided that before proceeding to terminate this Agreement, the Party entitled to do so shall give due consideration and shall have due regard to the nature of the underlying Event of Default, its implication on the performance of the respective obligations of Parties under this Agreement and the circumstances in which the same has occurred.

### 15.3 Consultation Notice

Either Party exercising its right under Article 15.2, shall issue to the other Party a notice in writing specifying in reasonable detail the underlying Event of Default(s) and proposing consultation amongst the Parties and the Lenders to consider possible measures of curing or otherwise dealing with the underlying Event of Default (“**Consultation Notice**”).

### 15.4 Remedial Process

Following the issue of Consultation Notice by either Party, within a period not exceeding 90 (ninety) Days or such extended period as the Parties may agree (“**Remedial Period**”) the Parties shall, in consultation with the Lenders, endeavour to arrive at an agreement as to the manner of rectifying or remedying the underlying Event of Default. Without prejudice to this, if the underlying event is a Concessionaire Event of Default, the Concessions Authority shall in consultation with the Lenders endeavour to arrive at an agreement as to one or more of the following measures and/or such other measures as may be considered appropriate by them in the attendant circumstances:

- (a) the change of management or control/ownership of the Concessionaire;
- (b) the replacement of the Concessionaire by a new operator (“**Selectee**”) proposed by the Lenders (in terms of the Substitution Agreement), and the specific terms and conditions of such replacement which shall include :
  - (i) the criteria for selection of the Selectee;
  - (ii) the transfer of rights and obligations of the Concessionaire surviving under this Agreement to the Selectee;
  - (iii) handing over/ transfer of the Project Site, the Port’s Assets and the Project Facilities and Services to the Selectee;

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

- (iv) acceptance by the Selectee of the outstanding obligations of the Concessionaire under the Financing Documents and preserving Lenders' charge on the Concessionaire's assets;
- (v) acceptance by the Selectee of any amounts due to the Concessioning Authority from the Concessionaire under this Agreement; and
- (vi) payment of consideration for the Concessionaire's assets comprised in the Project Facilities and Services and the manner of appropriation thereof.

### **15.5 Obligations during Remedial Period**

During the Remedial Period, the Parties shall continue to perform their respective obligations under this Agreement which can be performed, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

### **15.6 Revocation of Consultation Notice**

If during the Remedial Period the underlying Event of Default is cured or waived or the Parties and the Lenders agree upon any of the measures set out in Article 15.4, the Consultation Notice shall be withdrawn in writing by the Party who has issued the same.

### **15.7 Termination due to Events of Default**

If before the expiry of the Remedial Period, the underlying Event of Default is neither cured nor waived nor the Parties and the Lenders have agreed upon any of the measures in accordance with Article 15.4, the Party who has issued the Consultation Notice shall have the right to terminate this Agreement, in which event, the provisions of Article 16 and 17 shall, to the extent expressly made applicable, apply.



**15.8 Concessioning Authority's Rights of Step-in**

Upon a Termination Notice being issued due to a Concessionaire Event of Default, the Concessioning Authority may, at its discretion:

- (a) re-enter upon and take possession and control of Project Site/Project Facilities and Services forthwith;
- (b) prohibit the Concessionaire and any Person claiming through or under the Concessionaire from entering upon/dealing with the Project Facilities and Services;
- (c) step in and succeed upon election by Concessioning Authority without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Contracts as the Concessioning Authority may in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project Contracts.

Provided, that in such circumstances, the Concessioning Authority shall assume the obligations of the Concessionaire with respect to the Lenders during such Remedial Period out of the current revenues. Provided further, the Concessionaire acknowledges that any payments made by the Concessioning Authority during the Remedial Period shall be adjusted against compensation payable by the Concessioning Authority to the Concessionaire in terms of the provisions of this Agreement.

**ARTICLE 16**

**TERMINATION OF THE CONCESSION/AGREEMENT**

**16.1 Termination Procedure**

The Party entitled to terminate this Agreement either on account of a Force Majeure Event or on account of an Event of Default having Material Adverse Effect shall do so by issue of a notice in writing (“**Termination Notice**”) to the other Party and simultaneously deliver a copy thereof to the Lenders. The Termination Notice shall be of not less than 90 (ninety) Days and not ordinarily be more than 180 (one hundred and eighty) Days, (“**Termination Period**”) and at the expiry of the Termination Period, this Agreement shall stand terminated without any further notice.

**16.2 Obligations during Termination Period**

During Termination Period, the Parties shall, subject where applicable to the provisions of this Article 16, continue to perform such of their respective obligations under this Agreement which are capable of being performed with the object, as far as possible, of ensuring continued availability of the Project Facilities and Services to the users, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

**16.3 Requisition**

Except where the Termination Notice is issued prior to Financial Close being achieved by the Concessionaire, when the Concession has not come into effect the Concessionaire has no right hereunder and no compensation is payable by the Concessions Authority, upon issue or receipt as the case may be of Termination Notice, either as a consequence of a Force Majeure Event or as a consequence of an Event of Default, or otherwise 6 (six) months prior to the expiry of the Concession Period, the Concessions Authority shall by a notice in writing (“**Requisition**”) call upon the Concessionaire to furnish the following information

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

to enable the Concessions Authority to estimate the likely compensation payable by the Concessions Authority to the Concessionaire and/or to finalise the items of Concessionaire's assets comprised in the Project Facilities and Services to be handed over to/taken over by the Concessions Authority.

- (a) except in cases where no Financial Close has been achieved, the particulars of Debt Due supported by Lenders' certificate;
- (b) data or records [to be specified by Concessions Authority] regarding the operation and maintenance of the Project Facilities and Services;
- (c) specifications regarding the Concessionaire's assets comprised in the Project Facilities and Services; and
- (d) any other information or records [to be specified by Concessions Authority at its discretion] regarding Concessionaire, its business, the Project/Project Facilities and Services, assets and liabilities.

The Concessionaire shall within a period of 30 (thirty) Days of receipt of Requisition furnish the particulars called for by the Concessions Authority.

### 16.4 Condition Survey

- (a) The Concessionaire agrees that on the service of a Termination Notice or at least 6 (six) months prior to the expiry of the Concession Period, as the case may be, it shall conduct or cause to be conducted under the Concessions Authority's supervision, a condition survey of the Project Facilities and Services including the Project Site and/or the Port's Assets to ascertain the condition thereof, verifying compliance with the Concessionaire's obligations under this Agreement and to prepare an inventory of the assets comprised in the Project Facilities and Services. During this period, the designated key personnel of the Concessions Authority shall be associated with the operations of the Project Facilities and Services (except when the same is impossible due to a Force Majeure

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Event) in order to facilitate smooth take over of the same by the Concessioning Authority on the Transfer Date.

- (b) If, as a result of the condition survey, the Concessioning Authority shall observe/notice that the Project Site and/or the Port's Assets and/or the Project Facilities and Services or any part thereof have/has not been operated and maintained in accordance with the requirements therefor under this Agreement (normal wear and tear excepted) the Concessionaire shall, at its cost and expenses, take all necessary steps to put the same in good working conditions well before the Transfer Date.
- (c) In the event the Concessionaire fails to comply with the provisions of this Agreement, the Concessioning Authority may itself cause the condition survey and inventory of Port's Assets and the Project Facilities and Services to be conducted. The Concessioning Authority shall be compensated by the Concessionaire for any costs incurred in conducting such survey and preparation of inventory as also in putting the Project Facilities and Services in good working condition.

### **16.5 Consequences of Termination**

Without prejudice to any other consequences or requirements under this Agreement or under any law:

- (a) the Concessionaire shall transfer all the assets and rights upon expiry of the Concession Period by efflux of time or termination of the Agreement due to a Force Majeure Event or on account of an Event of Default in accordance with Article 18;
- (b) the Concessioning Authority shall be entitled to encash any subsisting bank guarantee(s) provided by the Concessionaire against any amounts owing to the Concessioning Authority by the Concessionaire.

Notwithstanding anything contained in this Agreement, except for ensuring the

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

deposit of the compensation payable to the Concessionaire in accordance with Article 17 in the Escrow Account, the Concessions Authority shall not, as a consequence of termination or otherwise, have any obligation whatsoever to any third party including but not limited to obligations as to compensation for loss of employment, continuance or regularization of employment, absorption or re-employment on any ground, in relation to any person in the employment of or engaged by the Concessionaire in connection with the Project, and the handback of the Project Site/Port Assets/Project Facilities & Services by the Concessionaire to the Concessions Authority shall be free from any such obligation.

**ARTICLE 17**

**COMPENSATION**

**17.1 Compensation**

**(a) Termination due to Force Majeure Event**

- (i) If the termination is due to a Non Political Event, compensation payable to the Concessionaire shall be the lower of the Book Value or the Debt Due LESS any amount due to the Concessioneing Authority by the Concessionaire under this Agreement LESS all insurance claims received or admitted.
- (ii) If the termination is due to a Other Event compensation payable to the Concessionaire shall be the higher of the Book Value or the Debt Due LESS any amount due to the Concessioneing Authority by the Concessionaire under this Agreement LESS all insurance claims received or admitted. Provided, the Book Value or the Debt Due, as the case may be shall not exceed the Total Project Cost.
- (iii) If termination is due to a Political Event, compensation payable to the Concessionaire shall be the same as that stipulated for termination due to a Concessioneing Authority Event of Default under Article 17.1 (c).

Provided, no compensation shall be payable to the Concessionaire if the Concessionaire fails to maintain Insurance Cover as contemplated under Article 12 of this Agreement.

**(b) Termination due to Concessionaire Event of Default**

If the termination is after the Date of Commercial Operation, due to a Concessionaire Event of Default, the compensation payable by the Concessioneing Authority to the Concessionaire shall be the lowest of:

- (i) the Book Value;
- (ii) 90% (ninety percent) of Debt Due;
- (iii) the Total Project Cost;

Provided, no compensation shall be payable to the Concessionaire if the Concessionaire fails to maintain Insurance Cover as contemplated under Article 12 of this Agreement.

**(c) Termination due to Concessioneing Authority Event of Default**

If the termination is due to a Concessioneing Authority Event of Default, the compensation payable by the Concessioneing Authority shall be equal to the aggregate of (i) Debt Due plus (ii) 150% (one hundred and fifty percent) Equity.

**17.2 No Compensation on Expiry of Concession Period**

In the event of expiry of Concession by efflux of time (the Concession having run its full course), the Concessionaire shall hand over/ transfer peaceful possession of the Project Site, Port's Assets and the Project Facilities and Services free of cost and Encumbrance.

**17.3 Transfer Fee and Charges**

Transfer costs, stamp duties, notary fees and taxes, if applicable, for the transfer of the Project Facilities and Services consequent to the expiry or termination of this Agreement shall be borne by:

- (a) the Concessionaire in the event of expiry of Concession Period or termination due to a Concessionaire Event of Default;
- (b) the Concessioneing Authority in the event of termination due to an

Concessioneing Authority Event of Default or Political Event; and

- (c) by both parties equally in case of termination due to Change in Law or Non Political Event or Other Event.

#### **17.4 Payment of Compensation to Lenders**

The Concessionaire hereby irrevocably authorises the Concessioneing Authority to pay to the Lenders or at their instruction to any designated bank account in India the compensation payable to the Concessionaire. The Concessionaire confirms that upon such payment being made, the Concessioneing Authority shall stand duly discharged of its obligations regarding payment of compensation under this Agreement and the charge created by the Concessionaire in favour of the Lenders on any of its assets taken over by the Concessioneing Authority shall stand satisfied and all such assets shall on and from the Transfer Date be free from such charge. The Concessionaire further confirms that payment of compensation by Concessioneing Authority in accordance with this Article 17.4 shall be a valid discharge to the Concessioneing Authority in respect of Concessioneing Authority's obligation regarding payment of compensation to the Concessionaire under this Agreement.

Provided notwithstanding anything inconsistent contained in this Agreement, the Concessionaire/the Lenders as the case may be shall be entitled to remove at its/their cost all such moveables which are not taken over by the Concessioneing Authority and to deal with the same in accordance with their respective rights under law.

Provided further, if there are no amounts outstanding under the Financing Documents and a certificate to that effect issued by the Lenders is furnished by the Concessionaire to the Concessioneing Authority, the compensation shall be paid by the Concessioneing Authority to the Concessionaire directly.



**17.5 Delayed Payment of Compensation**

If for any reasons, other than those attributable to the Concessionaire, the Concessioneing Authority fails to pay the compensation on the Transfer Date, the Concessioneing Authority shall be liable to pay interest@ 10 year GSEC plus 6%(six percent) per annum thereon from the Transfer Date till payment thereof. Provided, nothing contained in this Article shall be deemed to authorise any delay in payment of compensation in accordance with this Agreement.

**17.6 Delayed Transfer of Assets**

If for any reasons other than those attributable to the Concessioneing Authority the Concessionaire fails to transfer assets, rights and contracts on the Transfer Date in accordance with Article 16.5 read with Article 18, there shall be no suspension of the operation and maintenance of the Project Facilities and Services and the Concessionaire shall, as a trustee of the Concessioneing Authority, (a) continue to operate and maintain the Project Facilities and Services or such of them, as directed by Concessioneing Authority until completion of the relative transfer formalities and (b) account for and pay to the Concessioneing Authority the Gross Revenue minus operating costs and statutory dues, from such operations. In the event of failure to do so, the Concessionaire shall be liable to pay to the Concessioneing Authority, for every Day of delay, liquidated damages computed at the rate of the average daily profits earned during the 3 (three) years immediately preceding the Transfer Date. Parties confirm that this is a true and correct estimate of damages and not in the nature of a penalty. Provided nothing contained in this Article 17.6 shall be deemed or construed to authorise delay in completion of formalities of transfer of assets, rights and contracts by the Concessionaire to the Concessioneing Authority in accordance with the requirements thereof under this Agreement.

In case the transfer of assets by the Concessionaire to the Concessioneing Authority is delayed for reasons attributable to the Concessioneing Authority, the Concessionaire shall nonetheless continue to operate the Project Facilities and Services but as agent of the Concessioneing Authority. Provided however, the

Concessionaire shall be liable to pay Royalty in accordance with Article 9.2.

**17.7 Remedies Cumulative**

The exercise of right by either Party to terminate this Agreement, as provided herein, shall not preclude, such Party from availing any other rights or remedies that may be available to it under law. All remedies available to the Parties shall be cumulative and the exercise or failure thereof of one or more remedies by any Party shall not limit or preclude the exercise of or constitute a waiver of any other remedies by such Party.

**ARTICLE 18**

**TRANSFER ON EXPIRY OF THE CONCESSION PERIOD**

**18.1 General Scope of Transfer/Payment**

The Parties shall perform/discharge their respective obligations to be performed or discharged under the provisions of this Agreement on the Transfer Date in entirety. Without prejudice to the generality of this provision and the provisions of Article 16, the transactions to be consummated and the formalities to be completed by the Parties on the Transfer Date shall be as set out in Articles 18.2 and 18.3.

**18.2 Concessionaire's Obligations**

The Concessionaire shall;

- (a) hand over peaceful possession of the Project Site, Port's Assets, the Project and the Project Facilities and Services free of Encumbrance;
- (b) transfer all its rights, titles and interests in the assets comprised in the Project Facilities and Services which are required to be transferred to the Concessioning Authority in accordance with this Agreement and execute such deeds and documents as may be necessary for the purpose and complete all legal or other formalities required in this regard;
- (c) hand over to the Concessioning Authority all documents including as built drawings, manuals and records relating to operation and maintenance of the Project Facilities and Services;
- (d) transfer technology and up-to-date know-how relating to operation and maintenance of the Port's Assets and/or the Project Facilities and Services;
- (e) transfer or cause to be transferred to the Concessioning Authority any

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Project Contracts which are (i) valid and subsisting; (ii) capable of being transferred to the Concessions Authority; and (iii) those the Concessions Authority has chosen to take over, and cancel or cause to be cancelled such Project Contracts not transferred to the Concessions Authority. For this purpose, the Concessionaire shall ensure that all Project Contracts are assignable in favor of the Concessions Authority without any further action on part of the respective counterparties. The Concessionaire shall entirely at its cost, terminate all such Project Contracts which are not transferred/assigned and/or are not required to be transferred/assigned to the Concessions Authority;

- (f) at its cost, transfer to the Concessions Authority all such Applicable Permits which the Concessions Authority may require and which can be legally transferred. Provided if the termination is on account of Concessions Authority Event of Default the cost of such transfer shall be borne/ reimbursed by the Concessions Authority;
- (g) at its cost, remove within 90 (ninety) days from expiry of the Concession Period, from the Project Site/Port's Assets, any moveable assets that are not taken over by or not to be transferred to the Concessions Authority in terms of the provisions of this Agreement.

### **18.3 Concessions Authority's Obligations**

Except in the event of expiry of the Concession by efflux of time, the Concessions Authority shall pay compensation payable to the Concessionaire in accordance with Article 17.1 of this Agreement, to the Lenders, or deposit the same in the Escrow Account or on the written instructions of the Lenders to any designated bank account in India, or to the Concessionaire, as the case may be. The Concessionaire confirms that upon such payment being made, the Concessions Authority shall stand duly discharged of its obligations regarding payment of compensation under this Agreement and the charge created by the Concessionaire in favour of the Lenders on any of the assets shall stand satisfied and all such assets shall on and from the Transfer Date be free from such charge.

The Concessionaire further confirms that payment of compensation by Concessioning Authority in accordance with this Article 18.3 shall be a valid discharge to the Concessioning Authority in respect of Concessioning Authority's obligation regarding payment of compensation to the Concessionaire under this Agreement.

**18.4 Risk**

Until transfer in accordance with this Article 18, the Port's Assets and the Project Facilities and Services shall remain at the sole risk of the Concessionaire except for any loss or damage caused to or suffered by the Concessionaire due to any act or omission or negligence on the part of the Concessioning Authority under this Agreement.

**ARTICLE 19**

**DISPUTE RESOLUTION**

**19.1 Amicable Settlement**

If any dispute or difference or claims of any kind arises between the Concessioneing Authority and the Concessionaire in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, or the rights, duties or liabilities of any Party under this Agreement, whether before or after the termination of this Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them.

**19.2 Assistance of Expert**

The Parties may, in appropriate cases agree to refer the matter to an expert appointed by them with mutual consent. The expert may be any person, body or organization of repute with recognized expertise in the relevant field/ matter The cost of obtaining the service of the expert shall be shared equally.

**19.3 Arbitration**

**(a) Arbitrators**

Failing amicable settlement and/or settlement with the assistance of expert as defined in 19.2 above appointed by the Parties by mutual consent, the dispute or differences or claims as the case may be, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. Unless the Parties mutually agree otherwise, within 30 (thirty) Days of invocation of the arbitration as mentioned below, the rules of arbitration prescribed by the International Centre for Alternative Dispute Resolution, New Delhi shall apply to the arbitration. The arbitration shall be by a panel of three Arbitrators, one to be appointed by each Party and the third, who shall act

as presiding arbitrator, to be appointed by the two arbitrators appointed by the Parties. The arbitration shall be invoked by one party issuing to the other a notice in writing invoking the arbitration and appointing an Arbitrator. Upon receipt of the notice, the other Party shall appoint the second Arbitrator. The two Arbitrators so appointed shall appoint the third Arbitrator who shall act as the 'Presiding Arbitrator'. If the other Party fails to appoint a second Arbitrator within 30 (thirty) Days from the receipt of the request to do so, then the Arbitrator so appointed by the first party shall adjudicate the disputes as 'Sole Arbitrator'.

**(b) Place of Arbitration**

The place of arbitration shall be the headquarters of the Concessions Authority in India.

**(c) English Language**

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

**(d) Procedure**

The procedure to be followed within the arbitration, including appointment of arbitrator/arbitral tribunal, the rules of evidence which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

**(e) Enforcement of Award**

Any decision or award resulting from arbitration shall be final and binding upon the Parties. The Parties hereto agree that the arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and that a judgment upon the arbitral award may be entered in any court having jurisdiction thereof.

**(f) Fees and Expenses**

The fees and expenses of the arbitrators and all other expenses of the arbitration shall be initially borne and paid equally by respective Parties subject to determination by the arbitrators. The arbitrators may provide in the arbitral award for the reimbursement to the successful party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by the Party.

**(g) Performance during Arbitration**

Pending the submission of and/or decision on a dispute, difference or claim or until the arbitral award is published, the Parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.



**ARTICLE 20**

**REPRESENTATIONS AND WARRANTIES**

**20.1 Representations and Warranties of the Concessionaire**

The Concessionaire represents and warrants to the Concessioneing Authority that:

- (a) it is duly organised, validly existing and in good standing under the laws of India and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (b) it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- (c) it has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- (d) this Agreement constitutes the legal, valid and binding obligation of the Concessionaire, enforceable against it in accordance with the terms hereof;
- (e) there are no actions, suits or proceedings pending or to its best knowledge, threatened against or affecting it before any court, administrative body or arbitral tribunal which might materially and adversely affect its ability to meet or perform any of its obligations under this Agreement;
- (f) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its memorandum of association and articles of association or any Applicable Laws or any

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;

- (h) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Authority which may result in any Material Adverse Effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (i) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a Material Adverse Effect on its ability to perform its obligations under this Agreement;
- (j) all its rights and interests in the Project/Project Facilities and Services shall pass to and vest in the Concessions Authority on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Concessions Authority, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- (k) no representation or warranty by it contained herein or in any other document furnished by it to the Concessions Authority including the Bid or to any Government Authority in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (l) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Concessions Authority in connection therewith;

- (m) agrees that the execution, delivery and performance by it of this Agreement and all other agreements, contracts, documents and writings relating to this Agreement constitute private and commercial acts and not public or governmental acts; and
- (n) consents generally in respect of the enforcement of any judgement against it in any proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings.

### **20.2 Representations and Warranties of the Concessions Authority**

The Concessions Authority represents and warrants to the Concessionaire that:

- (a) it is duly organised, validly existing and in good standing under the laws of India;
- (b) it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- (c) it has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- (d) this Agreement constitutes the legal, valid and binding obligation of the Concessions Authority, enforceable against it in accordance with the terms hereof; and
- (e) there are no actions, suits or proceedings pending or to its best knowledge, threatened against or affecting it before any court, administrative body or arbitral tribunal which might materially and adversely affect its ability to meet or perform any of its obligations under this Agreement.

**20.3 Disclosure**

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any obligation of either Party under this Agreement.

**ARTICLE 21**

**MISCELLANEOUS PROVISIONS**

**21.1 Datum**

The datum to which all levels shall be referred for the purpose of the Project is the Chart Datum (0.000) which is \_\_\_\_\_ m below mean sea level.

**21.2 Survival of Obligations**

Any cause of action which may have occurred in favour of either Party or any right which is vested in either Party under any of the provisions of this Agreement during the Concession Period as the case may be as a result of any act, omission, deed, matter or thing done or omitted to be done by either Party before the expiry of the Concession Period by efflux of time or otherwise in accordance with the provisions of this Agreement shall survive the expiry of the Concession Period/ termination of this Agreement.

**21.3 Articles to survive Termination**

The provisions of Articles 16 to 21 shall, to the fullest extent necessary to give effect thereto, survive the Concession Period/the termination of this Agreement and the obligations of Parties to be performed/discharged following the termination/early determination of this Agreement shall accordingly be performed/discharged by the Parties.

**21.4 Joint Responsibility**

In the event that any damage is caused partly due to the negligence or default or omission on the part of the Concessions Authority and partly due to the negligence or default or omission on the part of the Concessionaire, each Party shall be liable to the other Party only in the proportion to its respective degree of negligence or default or omission, as the case may be.

**21.5 Several Obligations**

Nothing contained in this Agreement shall be construed to create an association, trust, partnership, agency or joint venture among the Parties and Parties shall be liable to perform their respective duties and discharge their respective liabilities or obligations in accordance with the provisions of this Agreement.

**21.6 Severability**

If for any reason whatsoever any provision or any part(s) of this Agreement is held or shall be declared to be void or illegal or invalid under present or future laws or regulations effective and applicable during the Concession Period, by any competent arbitral tribunal or court, and if such provisions shall be fully separable and this Concession shall be constructed as if such provision or such part(s) of this Agreement never comprised part of this Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such void or illegal or invalid provision or by its severance from this Agreement.

**21.7 Notices**

Unless otherwise stated, notices to be given under this Agreement including but not limited to a notice of waiver of any term or related or breach of any term of this Agreement shall be 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 Concessions Authority:

CHAIRMAN

\_\_\_\_\_PORT

\_\_\_\_\_

\_\_\_\_\_

Fax No: \_\_\_\_\_

Email: \_\_\_\_\_

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

The Concessionaire:

The MANAGING DIRECTOR

\_\_\_\_\_Ltd

\_\_\_\_\_

\_\_\_\_\_

Fax No. \_\_\_\_\_

Email: \_\_\_\_\_

or such other address, telex number, or facsimile number as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication 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 communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

**21.8 Waiver**

No waiver of any term or condition or of the breach thereof by any Party shall be valid unless expressed in writing and signed by such Party and communicated by such Party to the other Party in accordance with the provisions of Article 21.7 of this Agreement. A waiver by any Party of any term or condition or breach thereof in a given case shall not be deemed or construed as a general waiver of such term or condition or the breach in the future or waiver of any other terms or conditions or breach of this Agreement.

**21.9 Amendments, Modifications or Alterations.**

No amendments, modifications or alterations of or any additions to the terms and conditions of this Agreement shall be valid unless the same be in writing and agreed to by the Parties.

**21.10 Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of the Republic of India and courts having territorial jurisdiction over the Project shall have jurisdiction over all matters relating to or arising out of this Agreement.

**21.11 Entire Agreement**

This Agreement and the Appendices together constitute a complete and exclusive statement of the terms of the agreement between the Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement unless specifically retained in this Agreement and the Appendices, by reference or otherwise, are abrogated and withdrawn.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have caused this Agreement on the dates indicated next to their signatures below:

Common Seal of the Concessions Authority is affixed pursuant to its resolution dated \_\_\_\_\_ of the Board in the presence of Mr. \_\_\_\_\_ who has signed this Agreement in token thereof.

Signed and Delivered by the Concessionaire by the hand of its authorized representative Mr. \_\_\_\_\_ pursuant to Resolution dated \_\_\_\_\_ of its Board of Directors.



**APPENDIX 1**

**PROJECT SITE**

[Description of Project Site will be included here]

**APPENDIX 2**

**PORT'S ASSETS**

[The Port's Assets handed over will be given]

**APPENDIX 3**

**SUBSTITUTION AGREEMENT**

**THIS SUBSTITUTION AGREEMENT** is entered into on this the ----- day of -----  
----- (Month) ---- (Year) at -----.

AMONGST,

THE \_\_\_\_\_ TRUST, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963 and having its Administrative Office at \_\_\_\_\_ (hereinafter referred to as “**the Concessioneing Authority**”) which expression shall, unless repugnant to the context or meaning thereof include its administrators, successors or assigns.

AND

M/s. XXXX Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at ----- hereinafter referred to as “**the Concessionaire**” (which expression shall unless repugnant to the context or meaning thereof include its successors and assigns),

AND

YYYY (Financial Institution/ Bank) having its Registered Office/Head Office at -----  
----- hereinafter referred to as “**the Lender**”.

OR

ZZZZ (Financial Institution/Bank) having its Registered Office/Head Office at-----  
----- acting for and on behalf of the Lenders listed in Schedule A hereto (hereinafter referred as “**the Lender’s Representative**”.

WHEREAS,

- a) The Concessioneing Authority for implementing a Project envisaging \_\_\_\_\_ by private sector participation (hereinafter referred to as “**the Project**”), has by the Concession Agreement dated ----- entered into between the Concessioneing Authority and the Concessionaire (hereinafter referred to as “**the Concession Agreement**”) has granted to the Concessionaire the Concession to implement the Project in terms of the provisions set out thereunder;
- b) With a view to facilitate financing of the Project by the Concessionaire, the Concessioneing Authority and the Concessionaire have agreed to enter into Substitution Agreement being these presents with the Lender/s/Lenders’ Representative.

**NOW, THEREFORE, THIS AGREEMENT WITNESSETH AS FOLLOWS:**

## **ARTICLE 1**

### **DEFINITIONS AND INTERPRETATION**

#### **1.1 Definitions**

In this Agreement the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereafter respectively assigned to them.

“**Agreement**” means this agreement and includes any amendment or modification made to this agreement in accordance with the provisions hereof.

“**Financial Assistance**” means the financial assistance set forth in **Schedule A** hereto, agreed to be provided by the Lender(s) to the Concessionaire for financing the Project.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

“**Financial Default**” means occurrence of a material breach of the terms and conditions of the Financing Documents or a continuous default in servicing debt thereunder by the Concessionaire for a minimum period of 3 (three) months.

“**Lender(s)**” means the financial institutions/banks whose name(s) and addresses are set out in Schedule A hereto and shall include the financial institutions/banks who may replace the same by way of a refinance/subrogation, as may be notified by the Lenders’ Representative to the Concessionaire, from time to time.

“**Residual Concession Period**” means the period which shall be the remainder of the Concession Period computed from the date of issuance of Termination Notice in terms of Article 16.1 of the Concession Agreement.

“**Selectee**” means a Person proposed by the Lender/Lender’s Representative pursuant to this Agreement and approved by the Concessions Authority for substituting the Concessionaire for the residual Concession Period, in accordance with the provisions of this Agreement.

“**Suspension Period**” means the Termination Period as defined in Article 16 of the Concession Agreement at the end of which all formalities connected with substitution of the Concessionaire by the Selectee including handing over of Project Site/Project Facilities and Services, in accordance with this Agreement are completed and the substitution has become effective.

- 1.2 Capitalized terms used in this Agreement but not defined shall have the meaning assigned to them respectively in the Concession Agreement.

## ARTICLE 2

### ASSIGNMENT

#### 2.1 Assignment of rights and title

The Concessionaire hereby agrees to assign its rights, title and interest in the Concession to, and in favour of, the Lenders pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Lenders under the Financing Documents.

## ARTICLE 3

### SUBSTITUTION OF THE CONCESSIONAIRE

#### 3.1 Rights of substitution

3.1.1 Pursuant to the rights, title and interest assigned under Clause 2.1, the Lenders shall be entitled to substitute the Concessionaire by a Selectee under and in accordance with the provisions of this Agreement and the Concession Agreement.

3.1.2 The Concessions Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Selectee selected by the Lenders in accordance with this Agreement (For the avoidance of doubt, the Lenders shall not be entitled to operate and maintain the Project/Project Facilities and Services).

#### 3.2 Substitution upon occurrence of Financial Default

3.2.1 Upon occurrence of a Financial Default, the Lenders/Lenders' Representative may issue a notice to the Concessionaire (the "**Notice of Financial Default**") along with particulars thereof, and send a copy to the Concessions Authority for its information and record. A Notice of Financial Default under this Clause 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

- 3.2.2 Upon issue of a Notice of Financial Default hereunder, the Lenders/Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Documents, substitute the Concessionaire by a Selectee in accordance with the provisions of this Agreement.
- 3.2.3 At any time after the Lenders/Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Concessions Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project/Project Facilities and Services, and upon receipt of such notice, the Concessions Authority shall suspend the rights of the Concessionaire. Provided, such suspension shall be revoked upon substitution of the Concessionaire by a Selectee, and in the event such substitution is not completed within 180 (one hundred and eighty) Days from the date of such suspension, the Concessions Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders/Lenders' Representative and the Concessionaire, the Concessions Authority may extend the aforesaid period of 180 (one hundred and eighty) Days by a period not exceeding 90 (ninety) Days.

### **3.3 Substitution upon occurrence of Concessionaire Default**

- 3.3.1 Upon occurrence of a Concessionaire Default, the Concessions Authority shall by a notice inform the Lenders/Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) Days time to the Lenders/Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Selectee.
- 3.3.2 In the event that the Lenders/Lenders' Representative makes a representation to the Concessions Authority within the period of 15 (fifteen) Days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Selectee, the Lenders/Lenders' Representative shall be

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

entitled to undertake and complete the substitution of the Concessionaire by a Selectee in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) Days from the date of such representation, and the Concessions Authority shall either withhold termination and/or suspend the rights of the Concessionaire for the aforesaid period of 180 (one hundred and eighty) Days; provided that upon written request from the Lenders/Lenders' Representative and the Concessionaire, the Concessions Authority shall extend the aforesaid period of 180 (one hundred and eighty) Days by a period not exceeding 90 (ninety) Days.

### **3.4 Procedure for substitution**

3.4.1 The Concessions Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Concessions Authority under Clause 3.3.2, as the case may be, the Lenders/Lenders' Representative may, without prejudice to any of the other rights or remedies of the Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders from potential Selectees for substituting the Concessionaire and taking on the rights and obligations under the Concession Agreement. 3.4.2 To be eligible for substitution in place of the Concessionaire, the Selectee shall be required to fulfil the eligibility criteria that were laid down by the Concessions Authority for shortlisting the bidders for award of the Concession; provided that the Lenders/Lenders' Representative may represent to the Concessions Authority that all or any of such criteria may be waived in the interest of the Project, and if the Concessions Authority determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibility criteria.

3.4.3 Upon selection of a Selectee, the Lenders/Lenders' Representative shall request the Concessions Authority to:

(a) accede to transfer to the Selectee the rights and obligations of the



## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Concessionaire under the Concession Agreement; and

- (b) novate the Concession Agreement to the Selectee such that the Selectee replaces the Concessionaire and becomes entitled/obligated to all the rights and obligations of the Concessionaire, for the residual Concession Period.

3.4.4 If the Concessions Authority has any objection to the transfer of Concession in favour of the Selectee in accordance with this Agreement, it shall within 7 (seven) Days from the date of proposal made by the Lenders/Lenders' Representative, give a reasoned order after hearing the Lenders/Lenders' Representative. If no such objection is raised by the Concessions Authority, the Selectee shall be deemed to have been accepted. The Concessions Authority thereupon shall novate the Concession Agreement within 7 (seven) Days of its acceptance/deemed acceptance of the Selectee; provided that in the event of such objection by the Concessions Authority, the Lenders' Representative may propose another Selectee whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Selectee in place of the Concessionaire.

### **3.5 Selection to be binding**

The decision of the Lenders/Lenders' Representative and the Concessions Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Lenders or the Concessions Authority taken pursuant to this Agreement including the transfer/novation of the Concession Agreement in favour of the Selectee. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets comprised in the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Lenders/Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Concessions Authority and the Concessionaire shall have

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

no right or remedy to prevent, obstruct or restrain the Concessioneing Authority or the Lenders/Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders/Lenders' Representative.

## ARTICLE 4

### TRANSACTION DOCUMENTS

#### 4.1 Substitution of Selectee in Transaction Documents

The Concessionaire shall ensure and procure that each Transaction Documents contains provisions that entitle the Selectee to step into such Transaction Documents, in its discretion, in place and substitution of the Concessionaire in the event of such Selectee assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

## ARTICLE 5

### TERMINATION OF CONCESSION AGREEMENT

#### 5.1 Termination upon occurrence of Financial Default

At any time after issue of a Notice of Financial Default, the Lenders/Lenders' Representative may by a notice in writing require the Concessions Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Concessions Authority shall terminate the Concession in accordance with the Concession Agreement.

#### 5.2 Termination when no Selectee is selected

In the event that no Selectee acceptable to the Concessions Authority is selected and recommended by the Lenders/Lenders' Representative within the period of 180 (one hundred and eighty) Days or any extension thereof as set forth in Clause 3.3.2, the Concessions Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

#### 5.3 Realisation of Debt Due

The Concessions Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders are entitled to receive from the Concessionaire, without any further reference to or

consent of the Concessionaire, the Debt Due upon termination of the Concession Agreement.

## **ARTICLE 6**

### **DURATION OF THE AGREEMENT**

#### **6.1 Duration of the Agreement**

6.1.1 This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

- (a) Termination of the Agreement; or
- (b) no sum remains to be advanced, or is outstanding to the Lenders, under the Financing Documents.

## **ARTICLE 7**

### **INDEMNITY**

#### **7.1 General indemnity**

7.1.1 The Concessionaire will indemnify, defend and hold the Concessioneing Authority and the Lenders/Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

7.1.2 The Concessioneing Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Concessioneing Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the

Concessionaire's obligations under the Concession Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of its lawful functions by the Concessions Authority.

- 7.1.3 The Lenders/Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Lenders/Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders/Lenders' Representative.

## **7.2 Notice and contest of claims**

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 7.1 or in respect of which it is entitled to reimbursement (the **"Indemnified Party"**), it shall notify the other Party responsible for indemnifying such claim hereunder (the **"Indemnifying Party"**) within 15 (fifteen) Days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

**ARTICLE 8**

**GENERAL**

**8.1 General**

- (i) The Parties hereto expressly represent and warrant that they are duly empowered to sign and execute this Agreement.
- (ii) Notices under this Agreement shall be sent to the Addresses first hereinabove mentioned. Any change in the address of any Party shall be duly notified by registered post acknowledgement due and delivered to the other parties.
- (iii) The expressions “Concessions Authority”, the “Concessionaire”, the “Lender” and the “Lenders’ Representative”, “Selectee” herein used shall unless there be anything repugnant to the subject or context include the respective successors and assigns.
- (iv) This Agreement shall not be affected by reorganisation of any Lender, the Concessionaire or Concessions Authority, “Selectee” and the successor in interest of the Lender or Concessions Authority shall have the benefit of this Agreement.
- (v) Failing amicable settlement and/or settlement with the assistance of Expert, the dispute or differences or claims as the case may be, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three Arbitrators, one each to be appointed by the Concessions Authority and the Lenders/Lender’s Representative and the third to be appointed by the two arbitrators. If any Party entitled to do so, fails to appoint a second Arbitrator within 30 (thirty) Days of from the receipt of the request for such appointment, then the single Arbitrator appointed in accordance with this provision shall adjudicate the disputes as Sole Arbitrator.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (vi) This Agreement and rights and obligations of the Parties hereunder shall remain in full force and effect pending the Award in any arbitration proceeding hereunder. The courts having territorial jurisdiction over the Project alone shall have jurisdiction over all matters arising out of or relating to the arbitration agreement contained herein or proceedings arising out of or relating to the arbitration proceedings thereunder.
- (vii) The consultation, recommendation or approval of the Lenders' Representative under this Agreement shall always be deemed as consultation, recommendation or approval of every concerned Lender and each such Lender shall be bound by the same.
- (viii) This Agreement shall be in addition to and shall not be in derogation of the terms of the Financing Documents.
- (ix) The Concessionaire agrees and acknowledges that it shall not be necessary for the Lender(s) or the Lenders' Representative to enforce or exhaust any other remedy available to them before invoking the provisions of this Agreement.
- (x) No amendment, variation or modification to this Agreement shall be valid and effectual unless made in writing and executed by the duly authorized representatives of all the Parties hereto.
- (xi) All stamp duties or other imposts and charges as are applicable on this Agreement or on amendment of the Concession Agreement or execution of fresh Concession Agreement for the purpose of substitution as aforesaid, irrespective of the Lenders making such payment for the time being, shall be borne by and be to the account of the Concessionaire.
- (xii) The Parties hereby expressly agree that for the purpose of giving full and proper effect to this Agreement, the Concession Agreement and this Agreement shall be read together and construed harmoniously. The terms

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

of this Agreement shall prevail in the event of any inconsistency with the Concession Agreement.

**SCHEDULE A  
PARTICULARS OF FINANCIAL ASSISTANCE.**

| <b>Name and Address of the Lender</b> | <b>Nature and Amount of Financing Assistance</b> |
|---------------------------------------|--|
|                                       |  |
|                                       |  |
|                                       |  |
|                                       |  |

IN WITNESS WHEREOF THE PARTIES HERETO HAVE SET THEIR HANDS  
HEREUNTO ON THE DAY, MONTH AND YEAR HEREINABOVE MENTIONED.

SIGNED AND DELIVERED ON BEHALF OF  
-----LIMITED

BY : \_\_\_\_\_

Name :

Title :

SIGNED AND DELIVERED ON BEHALF OF  
GOVERNMENT OF INDIA

BY : \_\_\_\_\_

Name :

Title :



**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

SIGNED AND DELIVERED ON BEHALF OF  
----- ON BEHALF OF THE  
LENDERS SETFORTH IN SCHEDULE I BY :

\_\_\_\_\_  
Name :

**APPENDIX 4**  
**SCOPE OF WORK**

[This Appendix shall contain the key project requirements and the Construction Standards, Operations and Maintenance Standards and Safety Standards. The indicative standards and norms in this regard have been set out in the annexure.]

Project Facilities and Services:

A brief description of Project Facilities and Services shall be provided. Also certain key project facilities shall be set out, for example:

(i) Berth length

On the Date of Commercial Operations berth length not less than [●] meters shall be provided.

(ii) Equipment

On the Date of Commercial Operations, the berth shall be equipped with equipment with capacity to handle [\_\_\_\_\_] cargo.

(iii) Others

The personnel and other related facilities should be capable of handling [●] cargo in accordance with the Performance Standards set out in Appendix 15.

**Annexure**

**CONSTRUCTION STANDARDS, OPERATIONS AND MAINTENANCE  
STANDARDS AND SAFETY STANDARDS**

[Indicative and minimum standards and norms for various kinds of projects are prescribed herein. Concessioneing Authority may modify these and customize them to suit the Scope of Work .]

**A. General**

The Concessionaire shall execute the project by completing civil works as per the Scope of Work and provide appropriate equipment for cargo handling and other support facilities for proper and efficient functioning.

The Concessionaire shall carry out Construction Works, etc duly complying with the provisions of all relevant latest Indian Standards and in case certain item of works not covered by the Indian Standards, provisions of ISO/IEC/OISD standards, etc shall be complied.

The construction of civil works, facilities, erection & commissioning of lifting appliances, equipment and machinery and their layout shall ensure that during cargo operations these facilities meet the required provisions of the Dock Workers Safety Health & Welfare Act, 1986 and the relevant Regulations 1990.

The Concessionaire shall meet the requirements of Management Quality System (IS/ISO – 9001: 2000) and shall also obtain accreditation for operations at the terminal. In addition, the Concessionaire shall comply with all relevant statutory regulations, codes, practices and guidelines.

It is not intended to specify herein all the relevant standards required to complete the Project. Such of those standards considered more pertinent are listed in this Annexure.

**B. Civil Construction Work**

**B. 1. Dry Bulk, Break Bulk & Container Terminals**

The civil construction work may comprise variety of works such as dredging, reclamation, construction of breakwaters, berths, development of back-up area for storage of cargo/containers, approach roads, railways sidings, operational buildings/offices, maintenance workshop, drainage, water supply, environmental protection works and other amenities. The Concessionaire is required to undertake all tests required as per IS/ ISO/IEC standards to ensure that the construction work carried out by him meets not only the functional requirements of the project but also conforms to the required quality as per the standards. In addition, the Concessionaire shall also comply with the provisions of specifications published by the Indian Road Congress, RDSO of Ministry of Railways and provisions of Shore Protection Manual (CERC) of US Army Corps of Engineers, as may be pertinent to the Project. In respect of implementing the Project, the Concessionaire shall refer to and as relevant comply with the design and construction standards specified in the following paragraphs.

***Indian Standards for Construction of Ports and Harbours***

IS 4651 – Part – 1 – 1974 Code of practice for planning and design of ports and harbours: Part 1 Site investigation

IS 4651–Part 2–1989 Code of practice for planning and design of ports and harbours Part 2 Earth pressure

IS 4651-Part III-1974 Code of practice for planning and design of ports and harbours: Part III: Loading

IS 4651- Part 4 -1989 Code of practice for planning and design of ports and harbours: Part 4: General Design consideration.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                        |   |
|------------------------|---|
| IS 4651-Part 5-1980:   | Code of practice for planning and design of ports and harbours Part:5 Layout and functional requirements          |
| IS 7314: 1974          | Glossary of terms relating to port and harbour engineering  |
| IS 9527: Part 1: 1981  | Code of practice for design and construction of port and harbour structures: Part 1 Concrete monoliths            |
| IS 9527: Part 3:: 1983 | Code of practice for design and construction of port and harbour structure: Part 3 Sheet pile walls               |
| IS 9527: Part 4: 1980  | Code of practice for design and construction of port and harbour structure: Part 4 Cellular Sheet pile structures |
| IS 9527: Part 6: 1989  | Code of practice for design and construction of port and harbour structures: Part 6 Block work                    |
| IS 10020: Part 4: 1981 | Recommendations for design and construction of port and harbour components Part 4 Slipways.                       |
| IS 9556: 1980          | Code of Practice for design and construction of diaphragm walls   |

*Indian Standards for Foundation Work*

- IS 2911: Part 1:Sec 1:1979 Code of practice for design and construction of pile foundations Part 1 Concrete piles, Section 1, Driven cast in-situ concrete piles
- IS 2911: Part 1: Sec 2:1979 Code of practice for design and construction of pile foundations: Part 1 Concrete piles, Section 2 Bored cast in-situ piles
- IS 2911: Part 1:Sec 3:1979 Code of practice for design and construction of pile foundations: Part 1 Concrete piles, Section 3 Driven pre-cast concrete piles
- IS 2911: Part1: Sec 4:1984 Code of practice for design and construction of pile foundations. Part 1 Concrete piles, Section 4 Bored pre-cast concrete piles
- IS 2911: Part 2: 1980 Code of practice for design and construction of pile foundations: Part 2 Timber piles
- IS 2911: Part 3: 1980 Code of practice for design and construction of pile foundations: Part 3 Under reamed piles.
- IS 2911: Part 4: 1985 Code of practice for design and construction of pile foundations: Part 4 Load test on piles
- IS 2950: Part 1: 1981 Code of practice for design and construction of raft foundations – Part I: Design
- IS 2974: Part 1: 1982 Code of practice for design and construction of Machine Foundations- Part 1: Foundation for Reciprocating Type Machines.
- IS 2974: Part 2: 1980 Code of practice for design and construction of machine foundations. Para 2 Foundations for impact type machine (hammer foundations)

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                       |   |
|-----------------------|---|
| IS 2974: Para 3: 1992 | Code of practice for design and construction of machine foundations for rotary type machines (medium and high frequency)  |
| IS 2974.: 1979:       | Code of practice for design and construction of machine foundations: Part 4 Foundations for rotary type machines of low frequency.  |
| IS 2974: Part 5: 1987 | Code of practice for design and construction of machine foundations Part 5 Foundations for impact machines other than hammers (forging and stamping press, pig breaker drop crusher and jolter) |
| IS 1080: 1985         | Code of Practice for design and construction of shallow foundations on soils (other than raft, ring and shell).   |
| IS 13094: 1992        | Guidelines for Selection of ground improvement techniques for foundation in weak soils.   |

### *Indian Standards for Structural Design*

|                           |   |
|---------------------------|---|
| IS 875(Part I to V): 1987 | Code of Practice for design loads (other than earthquake) for buildings – dead loads, imposed loads, wind loads, snow loads, special loads and load combinations. |
| IS 456: 2000              | Code of Practice for plain and reinforced concrete.   |
| IS: 800: 1984             | Code of practice for general construction in steel  |
| IS: 801: 1975             | Code of practice for use of cold formed light gauge steel structural members in general building construction.  |
| IS: 803: 1976             | Code of practice for Design fabrication and Erection of vertical mild steel cylindrical welded oil storage tanks.   |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                       |  |
|-----------------------|--|
| IS 1893: Part 1: 2002 | Criteria for Earthquake Resistant Design of Structures<br>Part I – General Provision and Buildings                         |
| IS 1893: Part 4: 2005 | Criteria for earth quake resistant design of structures<br>–Part 4- Industrial Structures including Stack-like Structures. |
| IS 4326: 1993         | Code of Practice for Earth Quake Resistant design and construction of buildings.   |

### **B-2 Bulk Liquid Terminals and Tank Farms**

In addition to complying to the requirement of relevant specifications mentioned above, in respect of port terminals meant for handling bulk liquids such as crude, POL, hazardous chemicals, LPG, LNG, etc., the concessionaire shall also comply with the requirements of IMO Standards, MSIHC Rules 1989, IMDG Codes, OISD Standards & Guidelines, Petroleum Rules and Act, Explosives Act and statutory requirements.

### **C. Cargo Handling Equipment**

#### **C-1 General**

The concessionaire in accordance with relevant standards shall provide the type and capacity of equipment required for handling the specified cargo/containers. The equipment shall generally conform to the following standards and code of practices.

#### **C-2 Electric Cranes - Wharf and Gantry Cranes**

The crane and its mechanisms shall be designed and constructed in compliance with the latest editions and amendments of the following standards and codes of practice. Standards equivalent or higher in BS, JIS, FEM, DIN, ISO, IEC are also acceptable.



*Structures and Mechanism*

- IS 807: 2006                      Design, erection and testing (Structural Portion)  
of Cranes and Hoists – Code of Practice.  
BS 5400 – Part 10 Steel concrete and  
composite bridges  
- Code of practice for fatigue
- IS 4137 - 1985                      Specification for heavy duty electric overhead  
traveling and special cranes for use in steel works

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

### ***Material***

IS 800: 1984 Code of Practice for general construction in steel

IS 2062: 2006 Hot rolled low medium and high tensile Structural Steel

IS 2644: 1994 High tensile steel castings

IS 2266: 2002 Steel Wire Ropes for General Engineering Purposes-specification

IS 3177: 1999 Code of Practice for Electric Overhead Traveling Cranes and Gantry Cranes other than Steel Work Cranes

### Electricals

IEC standards

IEE – regulations for the electrical equipment of buildings

BS 4999 / FEM 3rd edition Booklet 4 - Motors

BS 171, BS 3941, BS 3938 - Transformers

BS 99 - Fuses

### ***Welding***

IS 7307: Part 1: 1974 Approval test for welding procedures Part 1 Fusion welding of steel.

IS 7310: Part 1: 1974 Approval test for Welders working to approved welding procedures – Part 1: Fusion welding of Steel.

### ***Painting***

BS 5493 Code of practice for protective coating of iron and steel structures against corrosion

Swedish Standard Sa 2,5 or SIS ST3, SIS 055900 surface preparation

**General**

IS 13367:Part 1: 1992 Safe use of Cranes - Code of Practice Part 1 General

**Classification of Crane**

**Structures**

|                        |                               |
|------------------------|-------------------------------|
| Class of utilization:  | U8 (4 Million loading cycles) |
| State of loading:      | Q3                            |
| Group classification:  | A8                            |
| Impact factor:         | 1.4                           |
| Duty factor:           | 0.9                           |
| Nominal load spectrum: | 0.8 of rated capacity factor  |

**Mechanism**

Class of Utilization State of Loading Group Classification

|            |    |    |    |
|------------|----|----|----|
| Hoist      | T8 | L3 | M8 |
| Traverse   | T8 | L3 | M8 |
| Travel     | T5 | L2 | M5 |
| Boom hoist | T3 | L3 | M4 |

The wharf cranes shall be designed for Stability as per BS 2573 Part I & II.

**C-3 Mobile Equipment**

|                          |   |
|--------------------------|---|
| IS 4357: 2004            | Methods for Stability Testing of Fork Lift Trucks                                     |
| IS 4573: 1982            | Specification for Power Driven Mobile Cranes  |
| IS 13473: Part 2:1992/   | Cranes - Vocabulary Part 2 Mobile cranes ISO 4306-1985                                |
| IS 13558: Part 2:1995/   | Cranes - Controls - Layout and Characteristics – Part ISO 7752 –2- 1986 Mobile Cranes |
| IS 13834 : Part 2: 1993/ | Cranes - Classification: Part 2 Mobile cranes ISO 4301 – 2 :1985                      |
| IS 13870: Part 2: 1993/  | Cranes and Lifting Appliances - Selection of Wire                                     |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                         |  |
|-------------------------|--|
|                         | ISO 4308 : 1988 Ropes - Part 2: Mobile Cranes -<br>Coefficient of utilization  |
| IS 14469: 1997/         | Mobile Cranes - Determination of Stability ISO<br>4305 - 1991  |
| IS 14474: Part 1: 1997/ | Mobile Cranes - Experimental Determination of<br>Crane ISO 11662-1 :1995 Performance – Part 1 :<br>Tipping Loads and Radii |
| IS 3173: 1965           | Specification for High pressure connections for fuel<br>injection equipment for diesel engines                             |

### **C-4 Conveyors for Bulk Handling** *Conveyors*

|                      |   |
|----------------------|---|
| IS 4776:Part I: 1977 | Specification for Troughed Belt Conveyors- Part I<br>Troughed Belt Conveyors for Surface Installation |
|----------------------|---|

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                      |  |
|----------------------|--|
| IS 8597 – 1977       | Flat Belt Conveyors  |
| IS 11592 – 2000      | Code of practice for selection and design of Belt Conveyors  |
| IS 7465 – 1974       | Portable and Mobile troughed Belt Conveyor   |
| IS 7155:Part 1: 1986 | Code of recommended practice for conveyor safety : Part 1 General Information                              |
| IS 7155:Part 2: 1986 | Code of recommended practice for conveyor safety : Part 2 General Safety requirement                       |
| IS 7155:Part 3: 1986 | Code of recommended practice for conveyor safety : Part 3 Belt Conveyors and feeders                       |
| IS 7155:Part 4: 1990 | Code of recommended practice for conveyor safety : Part 4 Vibrating Conveyor/feeder                        |
| IS 7155:Part 5: 1990 | Code of recommended practice for conveyor safety : Part 5 Apron Conveyor/Apron Feeder                      |
| IS 7155:Part 6: 1990 | Code of recommended practice for conveyor safety : Part 6 Selection, Training and Supervision of Operators |
| IS 7155:Part 7: 1990 | Code of recommended practice for conveyor safety : Part 7 Inspection and Maintenance                       |
| IS 7155:Part 8: 1994 | Code of recommended practice for conveyor safety : Part 8 Flight Conveyors (scraper conveyors)             |

### *Idlers and Pulleys*

|                 |                           |
|-----------------|---------------------------|
| IS 8598 – 1987  | Idlers and Idlers Sets    |
| IS 8531 – 1986  | Pulleys for Conveyors     |
| IS 11507 – 1985 | Synchronous Drive Pulleys |

*Conveyor Belts*

|                           |                             |
|---------------------------|-----------------------------|
| IS 1891(Part I & II)-1978 | Rubber Conveyor Belting     |
| IS 1891 – 1988            | Amendment to above conveyor |
| IS 22131 Part I 1980      | Steel Cord Conveyor Belting |

**D. Electrical**

|                               |   |
|-------------------------------|---|
| IS 325: 1996                  | Three-phase induction motors  |
| IS 900: 1992                  | Code of practice for installation and maintenance of induction motors   |
| IS 1231: 1974                 | Dimensions of Three-phase Foot-mounted Induction Motors   |
| IS 2223: 1983                 | Dimensions of flange mounted ac induction motors  |
| IS 3682: 1966                 | Flame-proof ac motors for use in mines  |
| IS 3842: Part 2 : 1966        | Application guide for electrical relays for ac systems: -Part 2 Over current relays for generators and motors |
| IS 4029: 1967                 | Guide for testing three-phase induction motors  |
| IS 8151: 1976                 | Single-speed three-phase induction motors for driving lifts   |
| IS 8789: 1996                 | Values of performance characteristics for three-phase induction motors  |
| IS 9628: 1980                 | Three-phase induction motors with type of protection 'n'  |
| IS 10242: Part 3 : Sec 1:1983 | Electrical installations in ships: Part 3 Equipment, Sec 1 Generators and motors                              |
| IS 12615: 2004                | Energy Efficient Induction Motors - Three Phase Squirrel Cage   |
| IS 13529: 1992                | Guide on Effects of Unbalanced Voltages on the Performance of Three-Phase Cage Induction Motors               |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                          |   |
|--------------------------|---|
| IS 13555: 1993           | Guide for Selection and Application of 3-Phase A. C. Induction Motors for Different Types of Driven Equipment   |
| IS 14122: 1994           | Built in thermal protection for electric motors rated up to 660 V ac  |
| IS 14377: 1996           | Specification for Three-phase Induction Motors for Fans Used in Air-conditioning and Ventilation  |
| IS 15429: 2004           | Storage, Installation and Maintenance of DC Motors - Code of Practice   |
| IS 3043: 1987            | Code of practice for earthing   |
| IS 3151: 1982            | Earthing transformers   |
| IS 5553(Part 6) 1991     | Reactor Parts – Earthing of Transformers  |
| IS 9921: Part 1: 1981    | Specification for Alternating Current Disconnections (Isolators) and Earthing Switches for Voltages above 1 000 V - Part I: General and Definitions                                   |
| IS 9921: Part 2: 1982    | Alternating current disconnections (isolators) and earthing switches for voltages above 1000 V: Part 2 Rating   |
| IS 9921: Part III : 1982 | Specification for Alternating Current Disconnections (Isolators) and Earthing Switches for Voltages above 1000 V - Part III: Design and Construction                                  |
| IS 9921: Part 4: 1985    | Specification for Alternating Current Disconnections (isolators) and Earthing Switches for Voltages Above 1000 V - Part 4: Type Tests and Routine Tests                               |
| IS 9921: Part 5: 1985    | Specification for Alternating Current Disconnections (Isolators) and Earthing Switches for Voltages Above 1000 v - Part 5: Information to be given with Tenders, Enquiries and Orders |
| IS 12776: 2002           | Galvanized Strand for Earthing – Specification  |

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

|                         |   |
|-------------------------|---|
| IS 14981: 2001          | Live Working - Earthing or Earthing and Short-Circuiting Equipment Using Lances as a Short-Circuiting Device-Lance Earthing                                 |
| IS 13947: Part 2 : 1993 | Specification for Low-voltage Switchgear and Control gear - Part 2 : Circuit Breakers   |
| IS 14658: 1999          | High Voltage Alternating Current Circuit Breakers - Guide for Short-circuit and Switching Test Procedures for Metal-enclosed and Dead Tank Circuit Breakers |
| IS 8828: 1996           | Electrical Accessories - Circuit Breakers for Over Current Protection for Household and Similar Installations   |
| IS 2309: 1989           | Code of Practice for Protection of allied structure against lightning   |
| IS 732                  | IS 732: 1989 Code of Practice for Electric wiring installation  |
| IS 694: 1990            | PVC insulated Cables for working voltages upto and including 1100V  |
| IS 1554 (Part 1):1988   | PVC insulated (Heavy Duty) electric cables : Part 1 for working voltages upto and including 1100 V  |
| IS 1554 (Part 2) : 1988 | PVC insulated (Heavy Duty) electric cables : Part 2 for working volages from 3.3 kV upto and including 11 kV  |
| IS 7098 (Part 1) : 1988 | Cross linked Polyethelene insulated PVC sheathed cables Part 1 for working voltages upto and including 1100 V   |
| IS 7098 (Part 2) : 1985 | Cross linked Polyethelene insulated PVC sheathed cables Part 2 for working voltages from 3.3 kV upto and including 33 kV                                    |
| IS 7098 (Part 3) : 1988 | Cross linked Polyethelene insulated PVC sheathed cables Part 3 for working voltages from 66 kV upto and including 220 kV                                    |



## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

IS 10118 (Part 1) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears :  
Part 1 General

IS 10118 (Part 2) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears: Part  
2 Selection

IS 10118 (Part 3) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears: Part  
3 Installation

IS 10118 (Part 4) : 1982 Code of Practice for selection, installation & maintenance of switchgears and Control gears: Part  
4 Maintenance

For all other equipment not covered in the above standards, equivalent or higher standards in BS, JIS, FEM, DIN, ISO, IEC, are acceptable.

### **E. Operations & Maintenance Standards:**

#### **Repairs, Maintenance and Replacement**

The Concessionaire at it's own cost promptly and diligently maintain, replace or restore any of the project facilities or part thereof which may be lost, damaged, destroyed or worn out.

The Concessionaire shall abide by the operations and maintenance plan as outlined in the approved DPR.

While carrying out the repairing, maintaining and replacing the project facilities, the Concessionaire acknowledges and accepts that it is holding and maintaining the concession or assets, project facilities in trust for eventual transfer to the Concessioneing Authority on termination of the agreement and therefore, will not do any act as a result of which the value of Port Assets and Project Facilities and Services is diminished.

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

The Concessionaire shall, at all times during the Concession Period, at its own risk, cost, charges and expenses, performance and pay for maintenance repairs, renewals and replacement of various type of assets and equipment in the concessionaire premises and /or the project or any parts thereof, whether due to use and operations or due to deterioration of materials and /or parts, so that on the expiry or termination of Concession, the same shall except normal wear and tear be in good working condition as it were at the time of commencement of the Concession.

While carrying out the repair, maintenance and replacement of the project facilities, the Concessionaire shall carry out the work in accordance with the manufacturer's recommendations and the relevant latest Indian Standards or in its absence ISO/OISD Standards. In the event that the concessionaire, by necessity or otherwise need to follow any other country standard and it shall be equal or superior to the standard specified above.

The repairs and maintenance shall generally conform to the following specifications.

### **E.1 Maintenance Standards**

|                         |   |
|-------------------------|---|
| ISO 4308-1-2003         | Maintenance of lifting appliances   |
| ISO 4309-2004           | Cranes wire rope care, maintenance and discard                                |
| IS 13367: Part 1 : 1992 | Safe use of cranes – Code of Practice Part 1<br>General                       |
| BS 7121-2-2003          | Code of Practice for safe use of cranes,<br>inspection, testing & examination |
| BS 7121-4-1997          | Code of Practice for safe use of cranes<br>(Lorry Loaders)                    |
| BS 7121-5-2006          | Code of Practice for safe use of cranes<br>(Tower Cranes)                     |

**E.2 Painting**

|                         |   |
|-------------------------|---|
| IS 144 : 1950           | Ready mixed paint, brushing, petrol resisting, air-drying, for interior painting of tanks and container, red oxide (colour unspecified)                 |
| IS 145 : 1950           | Ready mixed paint, slushing, petrol resisting, air-drying for interior painting of tanks and containers, red oxide (colour unspecified)                 |
| IS 146 : 1950           | Specification for ready mixed paint, brushing, petrol resisting, stoving, for interior painting of tanks and containers, red oxide (colour unspecified) |
| IS 147 : 1950           | Specification for ready mixed paint, slushing, petrol resisting, stoving, for interior painting of tanks and containers, red oxide (colour unspecified) |
| IS 164 : 1981           | Specification for Ready mixed paint for road marking (first revision)   |
| IS 1419 : 1989          | Antifouling paint, brushing for ship`s bottom and hulls-Specification (second revision)   |
| IS 6714 : 1989          | Ready mixed paint, finishing, non-slip, deck – Specification (first revision)   |
| IS 6948 : 1973          | Specification for Ready mixed paint, undercoat, synthetic for ships   |
| IS 6951 : 1973          | Specification for Ready mixed paint, finishing, exterior for ships  |
| IS 1477 : Part I : 1971 | Code of Practice for Painting of Ferrous Metals in Buildings - Part I : Pretreatment  |
| IS 1477 : Part 2 : 1971 | Code of practice for painting of ferrous metals in buildings: Part2 Painting  |
| IS 9954 : 1981          | Pictorial Surface Preparation Standards for Painting of Steel Surfaces  |

**F. Safety Standards**

The Concessionaire shall ensure compliance with the safety standards set out under Applicable Law/international conventions, as relevant, from time to time including those required under the following :

1. Dock Workers (Safety, Health and Welfare) Act, 1986 & Regulations framed thereunder of 1990.
2. The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.
3. The Petroleum Act, 1934 along with the Petroleum Rules, 2002.
4. OISD – Guidelines – 156 (Oil Industry Safety Directorate): Fire Protection Facilities for Port Oil Terminals.
5. The Explosives Act, 1884 alongwith The Explosive Substance Act, 1983 & The Explosive Rules, 1983
6. Guidelines by Fire Advisor, CCE & DG FASLI, Government of India
7. National Fire Codes (National Fire Protection Association – USA)
8. Drill Manual for the Fire Services of India.
9. International Safety Guide for Oil Tankers & Terminals.
10. ISPS (International Ship & Port Facility Security) Code (2003 Edition)
11. MARPOL CONVENTION
12. International Maritime Dangerous Goods Code

[Besides the above, the Concessioning Authority may prescribe standards specific to the port/project]

**APPENDIX 5**

**PROJECT SCHEDULE**

(Project Specific – key milestones shall be specified by the Concessioneing Authority for example milestone dates for completion of Construction Works including installation of equipments etc. These should be easily identifiable and measurable. Following is an indicative table.)

| <b>Milestone date</b>                     | <b>Activity/level of completion of project</b>          |
|---|---|
| [●] Days from Date of Award of Concession | [25% of Construction Works should have been completed]  |
| [●] Days from Date of Award of Concession | [50% of Construction Works should have been completed]  |
| [●] Days from Date of Award of Concession | [100% of Construction Works should have been completed] |

**APPENDIX 6**

**DESIGNS AND DRAWINGS**

(Concessioning Authority to stipulate the Designs and Drawings that the Concessionaire will be expected to submit for review by the Independent Engineer as per the Scope of Work)

**APPENDIX 7**

**TERMS OF REFERENCE FOR INDEPENDENT ENGINEER**

[This Appendix shall stipulate the terms of reference for the Independent Engineer which shall include the scope of work (review of design and drawings, notification of objection thereto, inspection of Construction Works and Tests to be carried out, notification of shortfalls if any, issue of completion certificate, seeking of approval from collector of customs for the purpose of operationalising the facilities and services) which shall include the manner and timeliness of the reports of the Independent Engineer to be submitted while performing the services within the scope of work. Following is an indicative scope of work of the Independent Engineer. The scope would be revised to include such other functions as are required to be undertaken pursuant to specific provisions of the Agreement.]

**1. Role and functions of the Independent Engineer**

The Independent Engineer is expected to play a positive and independent role in discharging its functions, thereby facilitating the smooth implementation of the Project. The role and functions of the Independent Engineer shall include the following:

- (i) review of the Designs and Drawings;
- (ii) review, inspection and monitoring of Construction Works;
- (iii) conducting Tests on completion of construction and issuing Completion/ Provisional Certificate;
- (iv) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- (v) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (vi) assisting the Parties in resolution of disputes as regards the Designs & drawings; and
- (vii) undertaking all other duties and functions as envisaged under the Agreement.

**2. Review of Designs and Drawings**

- (i) The Independent Engineer shall undertake a detailed review of the Designs & Drawings to be furnished by the Concessionaire along with supporting data, including, if relevant the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites, topographical surveys and traffic surveys. The Independent Engineer shall complete such review and send its comments in accordance with the Agreement. In particular, such comments shall specify the conformity or otherwise of such Designs & Drawings with the Scope of Work , Construction Standards and Safety Standards.
- (ii) The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments. The Independent Engineer shall take into account comments and suggestions of the Concessioning Authority, if any while furnishing the comments.
- (iii) The Independent Engineer shall review the monthly progress reports as regards the Construction Works.
- (iv) The Independent Engineer shall inspect the Construction Works once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out a report of such inspection (the **“Inspection Report”**) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Construction Standards and Safety Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses,



## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

defects or deficiencies observed by it in the Construction Works.

- (v) The Independent Engineer may inspect the Construction Works more than once in a month if any lapses, defects or deficiencies require such inspections.
- (vi) For determining that the Construction Works conform to Construction Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- (vii) The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.
- (viii) In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that such remedial works have brought the Construction Works into conformity with the Construction Standards.
- (ix) In the event that the Concessionaire fails to adhere to the Project Schedule and complete the Construction Works on the specified Milestone Dates, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Project is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) Days the steps proposed to be taken to expedite progress, and the period within which the Project shall be completed. Upon receipt of a report from the Concessionaire, the

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

Independent Engineer shall review the same and send its comments to the Concessioning Authority and the Concessionaire forthwith.

- (x) If at any time during the Construction Period, the Independent Engineer determines that it is not safe to carry on Construction Works for any reason whatsoever including if the Concessionaire has not made adequate arrangements for the safety of workers or other third parties or that any work is being carried out in a manner that threatens such safety, it shall make a recommendation to the Concessioning Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- (xi) Upon remedial measures being taken by the Concessionaire for securing the safety of suspended works, the Independent Engineer shall inspect the safety measures for adequacy and recommend whether or not such suspension may be revoked by the Concessioning Authority.
- (xii) If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of time for completion, to which the Concessionaire is reasonably entitled, and shall notify the Concessioning Authority and the Concessionaire of the same.
- (xiii) The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in the Appendix hereto and issue a Completion Certificate or Provisional Certificate, as the case may be, in accordance with the provisions of the Agreement.

**Annexure**

**Tests**

[Depending on the parameters of the Project/Construction Requirements, the Tests shall be as per Good Industry Practice shall be stipulated on a project specific basis and listed in this Annexure.]

**APPENDIX 8**

**PERMITS AND CLEARANCES PROCURED BY THE  
CONCESSIONAIRE/ CONCESSIONING AUTHORITY**

- A. [Applicable Permits to be obtained by the Concessionaire before commencement of Construction Works.]
  
- B. [Such permits and clearances under Environmental Law/other Applicable Laws as will be procured by the Concessioning Authority before the commencement of the Project, to be specified by the Concessioning Authority.]

APPENDIX 9

PERFORMANCE GUARANTEE

(PROFORMA OF BANK GUARANTEE)<sup>40</sup>

THIS DEED OF GUARANTEE executed on this the ---- day of ----- at ----- by -----  
----- (Name of the Bank) having its Head/Registered office at -----  
----- hereinafter referred to as “**the Guarantor**” which expression shall unless it be repugnant to the subject or context thereof include its successors and assigns;

In favour of

THE \_\_\_\_\_ TRUST, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963 and having its Administrative Office at \_\_\_\_\_ (hereinafter referred to as “**the Board**” or “**the Concessing Authority**”) which expression shall, unless repugnant to the context or meaning thereof include its administrators, successors or assigns.

WHEREAS

a) The Board, vide its Request for Proposal dated [●] (“**the RFP**”) invited duly short listed bidders to implement a project envisaging

\_\_\_\_\_  
\_\_\_\_\_ (more particularly described in Appendix 1 and hereinafter referred to as “**the Project**”);

b) After evaluation of the bids received in response to the RFP, the Board accepted the bid of the consortium comprising of \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ (“**the Consortium**”) OR the Board accepted the bid of \_\_\_\_\_ Ltd. (“**the Applicant**”) and issued the Letter of Intent No \_\_\_\_\_ dated

<sup>40</sup> To be issued by a Scheduled Bank in India.

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

\_\_\_\_\_ (“**LOI**”) to the Consortium/Applicant requiring, inter alia, the execution of the Concession Agreement, (“**the Concession Agreement**”) the draft whereof was provided in the RFP;

- c) Pursuant to the LOI the Applicant/Consortium has promoted and incorporated a special purpose company \_\_\_\_\_ (“**the Concessionaire**”), to enter into the Concession Agreement for undertaking, inter alia, the work with respect to the Project referred to in Recital (a) above and to perform and discharge all its obligations thereunder.
- d) In terms of the LOI and the Concession Agreement, the Concessionaire is required to furnish to the Board, a Performance Guarantee being an unconditional and irrevocable Bank Guarantee from a Scheduled Bank for a sum of Rs. [●] (Rupees [●] only) as security for due and punctual performance/discharge of its obligations under the Concession Agreement during the Construction Phase,
- e) At the request of the Concessionaire, and for valid consideration the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Concessionaire of its obligations under the Concession Agreement during the Construction Phase.

**NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:**

- 1. Capitalized terms used herein but not defined shall have the meaning assigned to them respectively in the Concession Agreement.
- 2. The Guarantor hereby irrevocably and unconditionally guarantees the due execution and punctual performance by M/s. \_\_\_\_\_ (“**the Concessionaire**”) of all its obligations under the Concession Agreement during the Construction Phase.
- 3. The Guarantor shall, without demur or protest, pay to the Board sums not exceeding in aggregate Rs.[●] (Rupees [●] only) within five (5) calendar Days of receipt of a written demand therefor from the Board stating that the

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

Concessionaire has failed to meet its performance obligations under the Concession Agreement during the Construction Phase. The Guarantor shall not go into the veracity of any breach or failure on the part of the Concessionaire or validity of demand so made by the Board and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Concessionaire or any other Person before any court, tribunal, expert, arbitrator or similar proceedings. The Guarantor's obligations hereunder shall subsist until all such demands of the Board are duly met and discharged in accordance with the provisions hereof. Any such demand made on the Guarantor by the Board shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Guarantor under this Agreement. The Concessions Authority shall at all times at its sole discretion have the absolute and unconditional right to call upon the Guarantor to pay the amount under the Guarantee.

4. In order to give effect to this Guarantee, the Board shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Concession Agreement or other documents or by the extension of time for performance granted by the Board or postponement/non exercise/ delayed exercise of any of its rights by the Board or any indulgence shown by the Board to the Concessionaire and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non exercise or delayed exercise by the Board of any of the Board's rights or any indulgence shown by the Board; provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.
5. This Guarantee shall be unconditional and irrevocable and shall remain in full force and effect until Scheduled Project Completion Date and for a period of twelve months thereafter unless discharged/released earlier by the Board in accordance with the provisions of the Concession Agreement. The Guarantor's liability in aggregate shall be limited to a sum of Rs. [●] (Rupees [●] only).

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

6. This Guarantee shall not be affected by any change in the constitution or winding up, insolvency, bankruptcy, dissolution or liquidation of the Concessionaire/ the Guarantor or any absorption, merger or amalgamation of the Concessionaire/the Guarantor with any other Person.
7. Any payment made hereunder shall be made free and clear of, and without deduction for or on account of taxes, levies, imposts, duties, charges, fees, deductions, or withholding of any nature whatsoever.
8. The Guarantor hereby irrevocably and unconditionally undertakes, agrees and acknowledges that its obligations as a Guarantor hereunder:
  - a. shall not be affected by the existence of or release or variation of any other guarantee or security for any of the obligations of the Concessionaire under the Concession Agreement;
  - b. shall not be affected by any failure by the Concessioneing Authority to perform any of its obligations under the Agreement;
  - c. shall not be affected by any failure or delay in payment of any fee or other amount payable to the Guarantor in respect hereof;
  - d. shall not be affected by any exercise or non-exercise of any right, remedy, power or privilege of any person under or in respect of any payment obligations of the Concessionaire under the Concession Agreement;
  - e. shall not be affected by any failure, omission or delay on the Concessioneing Authority's part to enforce, assert or to exercise any right, power or remedy conferred on the Concessioneing Authority in this Guarantee;
  - f. shall not be affected by any act, omission, matter or thing which, but for



**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

this clause would reduce, release or prejudice the Guarantor from any of the obligations under this Guarantee or prejudice or diminish the obligations in whole or in part.

9. The obligations, covenants, agreements and duties herein shall not be subject to any counterclaims, cross claims, set offs, deductions, withholdings, diminutions, abatements, recoupments, suspensions, deferments, reductions or defence for any reason whatsoever and the Guarantor, shall have no right to terminate this Guarantee or to be released, relieved or discharged from any of its obligations, covenants, agreements and duties hereunder for any reason whatsoever.
10. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorized to execute this Guarantee pursuant to the power granted under \_\_\_\_\_.
11. This Guarantee shall be governed by and construed in accordance with the laws of India. The Guarantor hereby irrevocably submits to the exclusive jurisdiction of the Court of \_\_\_\_\_ for the purposes of any suit, action, or other proceeding arising out of this Guarantee, or the subject matter hereof, brought by the Concessioneing Authority or its successors or assigns. To the extent permitted by Applicable Law, the Guarantor or its successors or assigns hereby waive, and shall not assert, by way of motion, as defence, or otherwise, in any such suit, action, or proceeding any claim that such suit, action, or proceedings is brought in an inconvenient forum, or that the value of such suit, action, or proceeding is improper, or that the subject matter hereof may not be enforced in or by such court.

**IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS  
HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE  
WRITTEN.**

SIGNED AND DELIVERED by  
\_\_\_\_\_ Bank by the  
hand of Shri \_\_\_\_\_ its  
\_\_\_\_\_ and authorized official.

**APPENDIX 10**

**CERTIFICATES**

**COMPLETION CERTIFICATE**

1. I, [●] (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Agreement dated [●], for the [●] Project on build, operate and transfer (BOT) basis, through [(Name of Concessionaire)], hereby certify that the Tests specified in Article [●] and Schedule-[●] of the Agreement have been successfully undertaken to determine compliance of the Project with the provisions of the Agreement, and I am satisfied that the Project can be safely and reliably placed in commercial service of the users thereof.
2. It is certified that, in terms of the aforesaid Agreement, all works forming part of the Project have been completed, and the Project is hereby declared fit for entry into commercial operation on this the [●] day of [●] 20[●].

SIGNED, SEALED AND  
DELIVERED For and on behalf of  
the INDEPENDENT ENGINEER by:

(Signature)

(Name)

(Designation)

(Address)

**PROVISIONAL CERTIFICATE**

1. I, [[●] (Name of the Independent Engineer)], acting as Independent Engineer, under and in accordance with the Agreement dated [●], for the Project on build, operate and transfer (BOT) basis through [● (Name of Concessionaire)], hereby certify that the Tests specified in Article [●] and Schedule-[●] of the Agreement have been undertaken to determine compliance of the Project with the provisions of the Agreement.
  
2. Construction Works that were found to be incomplete and/or deficient have been specified in the Punch List appended to the Provisional Certificate, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. [Some of the incomplete works have been delayed as a result of reasons attributable to the Concessioneing Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire,] I am satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project, pending completion thereof.
  
3. In view of the foregoing, I am satisfied that the Project can be safely and reliably placed in commercial service of the users thereof, and in terms of the Agreement, the Project is hereby provisionally declared fit for entry into commercial operation on this the [●] day of [●] 20[●].

|   |   |
|---|---|
| <p>ACCEPTED, SIGNED, SEALED AND DELIVERED For and on behalf of CONCESSIONAIRE by:</p> <p>(Signature)</p> <p>(Name and Designation)</p> <p>(Address)</p> | <p>SIGNED, SEALED AND DELIVERED For and on behalf of INDEPENDENT ENGINEER by:</p> <p>(Signature)</p> <p>(Name and Designation)</p> <p>(Address)</p> |
|---|---|

**APPENDIX 11**

**PERSONNEL AND LABOUR REQUIREMENTS**

## APPENDIX 12

### TARIFFS

“The Concessionaire may charge fees for the Project Facilities and services provided in accordance with the Tariff Notification no.[ ] published by TAMP or such other competent authority under the Applicable Laws. As a ready reference, the relevant extract of the Tariff Notification is as under :

The aforesaid Tariff caps shall be revised every year based on a variation in the Wholesale Price Index (“WPI”). Such revision shall be based on indexation against 60% (sixty percent) of the variation in the WPI for a relevant year beginning 1<sup>st</sup> January and ending 31<sup>st</sup> December.

**APPENDIX 13**

**RATES APPLICABLE IN RESPECT OF LAND, UTILITIES AND SERVICES**

(Scale of Rates)

**APPENDIX 14**

**MINIMUM GUARANTEED REVENUE**

## APPENDIX 15

### PERFORMANCE STANDARDS

[This Appendix will prescribe project-specific minimum Performance Standards. The Performance Standards prescribed in this Appendix will assess productivity of the terminal/berth etc. as also the manner in which the assessment of compliance/shortfall in compliance will be made. The Performance Standards given below are indicative. Ports will have to develop Performance Standards for each specific project. These Performance Standards can be drawn from the specific design parameters as prescribed in the feasibility report and circulated to the selected bidders as well as the operational requirements and will be firmed up at the RFP stage for each project. Further, the dynamics in handling of export and import cargoes being different, distinction in the Performance Standards between import and export cargoes should be made. The guidelines for formulating the Performance Standards along with the indicative standards and norms are given below which may be customized as per the requirements of the Project. Weightages in case of shortfall in meeting the prescribed minimum standards in respect of each of the performance standards shall be assigned by the Concessioneering Authority keeping in view the project-specific operational requirements.]

#### **Performance Standards**

##### **1. Gross Berth Output**

The parameter deals with the productivity of the terminal (Gross Berth Output) for different types of cargo. In case of dry and break-bulk cargo, the capability of the terminal (mechanization, method of handling) and parcel size will determine the Gross Berth Output. Higher terminal capability and greater parcel size will lead to high productivity.

The Gross Berth Output shall be calculated as the total cargo handled (either loaded/unloaded) from the ship during a month divided by the time spent by the ship at



## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

the terminal number of working days of ships in that month at that terminal. While determining the number of working days from the ship hours, the berth allowance of [●] hours shall be subtracted from the total hours.

In the case of containers the crane rate shall be measured by dividing total number of TEUs lifted on/off from ships by the elapsed crane time. The elapsed crane time is the total allocated crane hours less operational and non-operational delays.

The indicative norms for Gross Berth Output for different categories of cargo are as follows:

| <b>Cargo Category</b>  | <b>Indicative Norms</b> |
|--|-------------------------|
| <b>Container</b>   |                         |
| ( Main line vessel)  | [25 moves per hour]     |
| ( Feeder vessel)   | [17 moves per hour]     |
| <b>Iron Ore - Import / Export (Mechanized)</b>                             |                         |
| For terminals capable of handling more than 100,000MT parcel size          | [60,000T/day]           |
| For terminals capable of handling less than 100,000MT parcel size.         |                         |
| a) 65,000-100,000  | [30,000T/day]           |
| b) 30,000- 65,000  | [20,000T/day]           |
| c)< 30,000   | [10,000T/day]           |
| <b>Coking Coal - Import (Mechanized)</b>                                   |                         |
| For terminals capable of handling more than 100,000 MT parcel size         | [50,000T/day]           |
| For terminals capable of handling between 65,000 MT-100,000MT parcel size. | [40,000T/day]           |
| For terminals capable of handling between 30,000MT-65,000MT parcel size.   | [30,000T/day]           |

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

|  |                |
|--|----------------|
| For terminals capable of handling less than 30,000MT parcel size         | [15,000T/day]  |
| <b>Thermal coal – Import / Export (Mechanized)</b>                       |                |
| For terminals capable of handling more than 100,000 MT parcel size.      | [50,000T/day]  |
| For terminals capable of handling more than 65,000 MT parcel size.       | [45,000 T/day] |
| For terminals capable of handling between 30,000-65,000 MT parcel size   | [30,000T/day]  |
| For terminals capable of handling less than 30,000MT parcel size.        | [10,000T/day]  |
| <b>Non-coking coal - Import (Mechanized)</b>                             |                |
| For terminals capable of handling more than 100,000 MT parcel size       | [40,000T/day]  |
| For terminals capable of handling more than 65,000 MT parcel size.       | [30,000T/day]  |
| For terminals capable of handling between 30,000MT-65,000MT parcel size. | [25,000T/day]  |
| For terminals capable of handling less than 30,000MT parcel size         | [10,000T/day]  |
| <b>Coke – Import</b>   |                |
| For terminals capable of handling more than 30,000 MT parcel size.       | [10,000T/day]  |
| For terminals capable of handling less than 30,000MT parcel size         | [7,000T/day]   |
| <b>Mixed Dry bulk cargo (Fertilizer and Food grains)</b>                 |                |
| For terminals capable of handling more than 30,000 MT parcel size.       | [12,500 T/day] |
| For terminals capable of handling up to 30,000 MT parcel size.           | [7,500 T/day]  |

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

|  |                               |
|--|-------------------------------|
| <b>Mixed dry bulk cargo terminal handling B.F slag, Field spar, Limonite sand etc.</b> | [7,500 T/day]                 |
| <b>Break Bulk</b><br>Steel and bagged cargo<br>Others                                  | [4000 T/day ]<br>[2500 T/day] |
| <b>Liquid Bulk</b>   |                               |
| Crude  | [5000 T/H]                    |
| POL Products   |                               |
| White  | [1000T/H]                     |
| Black  | [700T/H]                      |
| LPG/LNG  | [400 T/H]                     |
| Other Liquids  | [250T/H]                      |

Weightage in case of a shortfall in meeting the prescribed performance standard - [●]

**2. Transit Storage Dwell Time:**

**(a) Containers:**

The Transit Storage Dwell Time for a container shall mean the total time for which the container remains in the terminal. The Transit Storage Dwell Time for containers shall be calculated as an average and shall be the sum of the transit storage of each container handled during the month at that terminal divided by the number of containers. To further clarify, the date and time a container is discharged from the vessel till the said container leaves the out - gate of the Terminal, is the total transit storage time for import box. In case of export the time and date from which the container enters the terminal till the time and date it is loaded on to a vessel will be the storage time. The details of time of discharge, gate-in, gate-out and loading need to be maintained in respect of each container including ICD containers.

Unclaimed cargo or any cargo that has been detained by the customs or any Government Authority may be excluded.

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

**(b) Bulk Cargo:**

The Transit Storage Dwell Time for coal/coke/mixed dry bulk cargo/liquid cargo shall be calculated, as half of average parcel size of above cargo vessels in a month divided by average disposal of cargo from the port per day as per the following methodology:

$$\text{Average disposal of Cargo per day (A)} = \frac{\text{OB+Received/Despatched-CB}}{\text{No. of days}}$$

OB = Opening Balance, CB = Closing Balance.

$$\text{Average Parcel Sizes (B)} = \frac{\text{P1+P2+ .....+Pn}}{\text{n(no. of parcels)}}$$

P1,P2 ..... Pn are parcel size of each vessel in a month.

$$\text{Transit Storage Time for Bulk Cargo} = 0.5 (B/A)$$

**(c) Break-bulk cargo:**

The Transit Storage Dwell Time of Break Bulk cargo shall be calculated in the same manner as calculated for container in the terminal. The Transit Storage Dwell Time for Break Bulk Cargo is the sum of time of each unit of cargo that remains in the Port in a month divided by the number of cargo units handled during that month in the terminal. To further clarify, the time the break bulk cargo remains in the port will commence from the date and time of landing till the date and time of exit from the Port in case of import and for export from the date and time the cargo entered the Port area till the date and time of the shipment.

|  |  |
|--|--|
| <b>Transit Storage Dwell Time</b>                      |  |
| <b>- Import</b>  |  |
| a) Container (at terminal)                             | [ 5 days]  |
| b) Coal /Coke and other dry bulk cargo (at stack yard) | [30 days after date of completion of vessel's discharging operation] |
| c) Break bulk ( at stack yard)                         | [10 days after date of completion of vessel's discharging operation] |
| <b>- Export</b>  |  |
| a) Container (at terminal)                             | [3 days]   |

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

|   |       |  |
|---|-------|--|
| b) Iron Ore & other dry bulk<br>( at stackyard) | cargo | [20 days upto commencement of<br>ship loading operation] |
| c) Break bulk cargo                             |       | [10 days upto commencement of<br>ship loading operation] |

Weightage in case of a shortfall in meeting the prescribed performance standard - [●]

**3. Turn around Time for receipt/delivery operation:**

The Turn around Time for receipt/delivery operation shall be the sum of time taken for loading/unloading of cargo divided by the number of trucks/trailers/rakes deployed, as the case may be, in a month. Further, in case the truck/trailer/rake does both unloading and loading operations on a single entry into the terminal, the time allocated shall be doubled for those trucks/trailers/rakes.

|  |            |
|--|------------|
| a. (i) Truck for conventional cargo( Single operation) | [4 hours]  |
| (ii) Truck for conventional cargo ( Double operation)  | [8 hours]  |
| b. (i) Trailer for container (single operation)        | [2 hours]  |
| (ii)Trailer for container(double operation)            | [4 hours]  |
| c. (i) Rake for ICD container( Single operation)       | [6 hours]  |
| (ii) Rake for ICD container (Double operation)         | [12 hours] |
| d. (i) Rake for dry bulk cargo (Single operation)      | [10 hours] |
| (ii) Rake for dry bulk cargo(Double operation)         | [18 hours] |

Weightage in case of a shortfall in meeting the prescribed performance standard - [●]

**Performance Evaluation and calculation of liquidated damages:**

Performance evaluation shall be made on a quarterly review of the reports furnished by the Concessionaire and/or the records of the Concessionaire and/or by an enquiry by the Concessioning Authority. The Concessionaire shall be liable to pay liquidated damages determined at the rate of [1% (one per cent) of the Gross Revenue of the respective

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

quarter for every shortfall of 10% (ten per cent)] in the average performance which shall be assessed in the following manner.

Each Performance Standard is calculated as an average in the manner indicated above. The actual average performance vis-à-vis a standard will be evaluated against the prescribed standard. The shortfall will be computed as a percentage of the prescribed standard. The shortfall in respect of each performance standard will have a weightage assigned to it. The overall shortfall in average performance shall be assessed as the aggregate of the weighted shortfalls in respect of each of the performance standards. For example, if there is a shortfall in Gross Berth Output by  $x\%$ , Transit Storage Dwell Time by  $y\%$  and Turn round time for receipt/delivery operations by  $z\%$  and the weightage assigned to such shortfalls is 0.7, 0.2 and 0.1 respectively, then the overall shortfall in average performance will be  $(0.7x + 0.2y + 0.1z)\%$ .

APPENDIX 16

ESCROW AGREEMENT

**THIS ESCROW AGREEMENT** is entered into on this the [●] day of [●] 20[●].

**AMONGST**

1. [● LIMITED], a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at [●] (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
2. [● (name and particulars of Lenders' Representative)] and having its registered office at [●] acting for and on behalf of the Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders' Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
3. [● (name and particulars of the Escrow Bank)] and having its registered office at [●] (hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
4. BOARD OF TRUSTEES for \_\_\_\_\_ PORT, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963 and having its Administrative Office at \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, hereinafter referred to as “**the Concessions Authority**” (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns);

**WHEREAS:**

- (A) The Concessioneing Authority has entered into a Concession Agreement dated [●] with the Concessionaire (the “**Concession Agreement**”) for undertaking the Project (as defined in the Concession Agreement) on build, operate and transfer (BOT) basis. The Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Documents.
- (B) The Concession Agreement requires the Concessionaire to establish an Escrow Account, *inter alia*, on the terms and conditions stated therein.

NOW IT IS HEREBY AGREED as follows:

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“**Agreement**” means this Escrow Agreement and any amendment thereto made in accordance with the provisions contained herein;

“**Budget**” means the budget for construction/implementation expenses relating to the Project/Project Facilities and Services and O&M Expenses submitted by the Concessionaire in accordance with the provisions contained herein;

“**Concession Agreement**” means the Concession Agreement referred to in Recital (A) above and shall include any amendments made thereto in accordance with the provisions contained in this behalf therein;

“**Escrow Account**” means an escrow account established in terms of and under this Agreement, and shall include any sub accounts thereof;

“**Escrow Default**” shall have the meaning ascribed thereto in Clause 6.1;

“**Lenders' Representative**” means the person referred to as the Lenders' Representative in the foregoing Recitals;



“**Parties**” means the parties to this Agreement collectively and “**Party**” shall mean any of the Parties to this Agreement individually;

“**Payment Date**” means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment; and

“**Quarter**” means, any three month period from 1<sup>st</sup> April to 30<sup>th</sup> June, 1<sup>st</sup> July to 30<sup>th</sup> September, 1<sup>st</sup> October to 31<sup>st</sup> December or 1<sup>st</sup> January to 31<sup>st</sup> March.

## **1.2 Interpretation**

- 1.2.1 References to Lenders' Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders' Representative, acting for and on behalf of Lenders.
- 1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- 1.2.3 References to Articles are, unless stated otherwise, references to Articles of this Agreement.
- 1.2.4 The rules of interpretation stated in Articles 1.3, 1.4 and 1.5 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

## **2. ESCROW ACCOUNT**

### **2.1 Escrow Bank to act as trustee**

- 2.1.1 The Concessionaire hereby settles in trust with the Escrow Bank a sum of Rs. 100 (Rupees Hundred Only) appoints the Escrow Bank to act as trustee for the Concessioning Authority, the Lenders, the Lenders' Representative and the Concessionaire in connection herewith and authorises the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights,

powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

- 2.1.2 The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Concessioneing Authority, the Lenders, the Lenders' Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Concessioneing Authority, the Lenders/Lenders' Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as third party beneficiaries under this Agreement.

## **2.2 Acceptance of Escrow Bank**

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Lenders or the Concessioneing Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for the benefit of, and as agent for, the Concessioneing Authority, the Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

## **2.3 Establishment and operation of Escrow Account**

- 2.3.1 Within 30 (thirty) Days from the date of this Agreement, and in any case prior to the Date of Award of Concession, the Concessionaire shall open and establish the Escrow Account with the [(name of Branch)] Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.
- 2.3.2 The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

- 2.3.3 The Concessionaire shall submit to the Escrow Bank a Budget within 7 (seven) Days of the commencement of each Financial Year. Till the pendency of the financing Documents, such Budget shall be approved by the Lenders/Lenders Representative and thereafter by the Concessioneing Authority.
- 2.3.4 The Escrow Bank and the Concessionaire shall, after consultation with the Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

**2.4 Escrow Bank's fee**

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the operating and maintaining expenses and shall be appropriated from the Escrow Account in accordance with Article 4.1.1 (c).

**2.5 Rights of the parties**

The rights of the Concessioneing Authority, the Lenders (through the Lenders' Representative) and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Concessioneing Authority, the Lenders' and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

**2.6 Substitution of the Concessionaire**

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Selectee, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Selectee is a Party hereto and the Selectee shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Selectee.

### **3 DEPOSITS INTO ESCROW ACCOUNT**

#### **3.1 Deposits by the Concessionaire**

The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- (a) all monies received in relation to the Project from any source, including the Lenders;
- (b) all funds received by the Concessionaire from its share-holders, in any manner or form;
- (c) all Fee levied and collected by the Concessionaire;
- (d) any other revenues from or in respect of the Project/Project Facilities and Services accruing to the Concessionaire including termination payments; and
- (e) all proceeds received pursuant to any insurance claims.

For avoidance of doubt, all amounts received by the Concessionaire in respect of the Project/Project Facilities and Services excepting any amounts in respect of cesses and duties collected by it from the users on behalf of the Concessioning Authority or such other authority in accordance with the Concession Agreement or pursuant to any other instructions in respect thereof shall be deposited in the Escrow Account.

### **4. WITHDRAWALS FROM ESCROW ACCOUNT**

#### **4.1 Withdrawals during Concession Period**

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments in a month :

- (a) all taxes due and payable by the Concessionaire;

## Proposed Draft Model Concession Agreement for PPP projects in Major Ports

- (b) towards License Fee;
- (c) all construction/implementation expenses relating to the Project/Project Facilities and Services, in accordance with the Budget and subject to limits if any set out under the Financing Documents;
- (d) all expenses relating to operations and management of the Project/Project Facilities and Services, in accordance with the Budget and subject to limits if any set out under the Financing Documents;
- (e) towards its debt service obligations under the Financing Documents;
- (f) towards Royalty and other sums payable to the Concessioneing Authority and liquidated damages, if any;
- (g) towards any reserve requirements in accordance with the Financing Documents;

and the Concessionaire shall be at liberty to withdraw any sums outstanding in the escrow account after all the aforesaid payments due in any Quarter have been made and/or adequate reserves have been created in respect thereof for that Quarter.

- 4.1.2 Not later than 60 (sixty) Days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Article 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

### **4.2 Withdrawals upon end of Concession Period**

All amounts standing to the credit of the Escrow Account at the end of the Concession Period including amounts credited to the Escrow Account towards compensation payable in accordance with Article 17 of the Concession Agreement shall be appropriated in the following order of priority:

- (i) towards taxes and statutory dues payable by the Concessionaire;
- (ii) compensation to Lenders in terms of the Financing Documents towards discharge of the Concessionaire's liability under such Financing Documents;
- (iii) all amounts due to the Concessioneing Authority and amounts payable towards transfer of the Project Facilities and Services by the Concessionaire in accordance with this Agreement;

and the Concessionaire shall be at liberty to withdraw any sums outstanding in the Escrow Account after all the aforesaid payments due have been made and/or adequate reserves have been created in respect thereof to the satisfaction of the Lenders and the Concessioneing Authority and the Escrow Agent has received a confirmation of final settlement by the Lenders and/or Concessioneing Authority.

#### **4.3 Application of insurance proceeds**

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilised for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project/Project facilities and Services, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Documents.

#### **4.4 Withdrawals during Suspension**

Notwithstanding anything to the contrary contained in this Agreement, in case the Escrow Bank receives a notice in writing from the Concession Authority that the rights of the Concessionaire are suspended in accordance with the Concession Agreement or a Termination Notice is issued, the Escrow Bank shall until such notice is withdrawn, act only on the instructions of the Concessioneing Authority.

**5. OBLIGATIONS OF THE ESCROW BANK**

**5.1 Segregation of funds**

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds and property of the Escrow Bank.

**5.2 Notification of balances**

7 (seven) business Days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account as at the close of business on the immediately preceding business day.

**5.3 Communications and notices**

In discharge of its duties and obligations hereunder, the Escrow Bank:

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;
- (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
- (c) shall, within 5 (five) business Days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- (d) shall, within 5 (five) business Days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

**5.4 No set off**

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

**5.5 Regulatory approvals**

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

**6 ESCROW DEFAULT**

**6.1 Escrow Default**

6.1.1 Following events shall constitute an event of default by the Concessionaire (an **“Escrow Default”**) unless such event of default has occurred as a result of Force Majeure or any act or omission of the Concessions Authority or the Lenders' Representative:

- (a) the Concessionaire commits breach of this Agreement by failing to deposit /cause the deposit of any receipts into the Escrow Account;
- (b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement; or
- (c) the Concessionaire commits or causes any other breach of the provisions of this Agreement.

6.1.2 Upon occurrence of an Escrow Default, the consequences thereof shall be dealt



with under and in accordance with the provisions of the Concession Agreement.

## **7. TERMINATION OF ESCROW AGREEMENT**

### **7.1 Duration of the Escrow Agreement**

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or financial assistance received by it from the Lenders, or any of its obligations to the Concessions Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

### **7.2 Substitution of Escrow Bank**

The Concessionaire may, by not less than 45 (forty five) Days prior notice to the Escrow Bank, the Concessions Authority and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and arrangements are made satisfactory to the Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

### **7.3 Closure of Escrow Account**

The Escrow Bank shall, at the request of the Concessionaire and the Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Documents including the payments specified in Article 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

**8. SUPPLEMENTARY ESCROW AGREEMENT**

**8.1 Supplementary escrow agreement**

The Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Escrow Account, creation of sub-accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Lenders, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of Financing Documents, procedures relating to operation of the Escrow Account and withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow agreement, the provisions of this Agreement shall prevail.

**9. INDEMNITY**

**9.1 General indemnity**

9.1.1 The Concessionaire will indemnify, defend and hold the Concessioneing Authority, Escrow Bank and the Lenders, acting through the Lenders' Representative, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

9.1.2 The Concessioneing Authority will indemnify, defend and hold the, Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Concessioneing Authority to fulfil any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Concessioneing Authority, its officers, servants and agents.

9.1.3 The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfil its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

**9.2 Notice and contest of claims**

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 9.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) Days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

**10. MISCELLANEOUS PROVISIONS**

**10.1 Governing law and jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at [●] shall have jurisdiction over all matters arising out of or relating to this Agreement.

**10.2 Waiver of sovereign immunity**

The Concessioning Authority unconditionally and irrevocably:

(a) agrees that the execution, delivery and performance by it of this

## **Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

Agreement constitute commercial acts done and performed for commercial purpose;

- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Concessions Authority with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

### **10.3 Priority of agreements**

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

### **10.4 Alteration of terms**

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

### **10.5 Waiver**

10.5.1 Waiver by any Party of a default by another Party in the observance and

performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (b) shall not affect the validity or enforceability of this Agreement in any manner.

10.5.2 Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

#### **10.6 No third party beneficiaries**

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

#### **10.7 Survival**

##### **10.7.1 Termination of this Agreement:**

- (a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

10.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

**10.8 Severability**

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

**10.9 Successors and assigns**

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

**10.10 Notices**

Unless otherwise stated, notices to be given under this Agreement including but not limited to a notice of waiver of any term or related or breach of any term of this Agreement shall be 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 Concessioneing Authority:

CHAIRMAN

\_\_\_\_\_PORT

\_\_\_\_\_

\_\_\_\_\_

Fax No: \_\_\_\_\_

Email: \_\_\_\_\_

**Proposed Draft Model Concession Agreement for PPP projects in Major Ports**

The Concessionaire:

The MANAGING DIRECTOR

\_\_\_\_\_Ltd  
\_\_\_\_\_  
\_\_\_\_\_

Fax No. \_\_\_\_\_

Email: \_\_\_\_\_

The Lenders/Lenders representative:

\_\_\_\_\_Ltd  
\_\_\_\_\_  
\_\_\_\_\_

Fax No. \_\_\_\_\_

Email: \_\_\_\_\_

The Escrow Bank:

\_\_\_\_\_Ltd  
\_\_\_\_\_  
\_\_\_\_\_

Fax No. \_\_\_\_\_

Email: \_\_\_\_\_

or such other address, telex number, or facsimile number as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication 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 communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

**10.11 Language**

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

**10.12 Authorised representatives**

Each of the Parties shall, by notice in writing, designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

**10.13 Original Document**

This Agreement may be executed in four counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

**IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED  
THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.**

SIGNED, SEALED AND DELIVERED

For and on behalf of CONCESSIONAIRE by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of LENDERS by the Lenders'

Representative: (Signature)

(Name)



(Designation)

(Address) (Fax No.)

SIGNED, SEALED AND DELIVERED For and on behalf of ESCROW BANK by:

(Signature)

(Name)

(Designation)

(Address) (Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of Concessioning Authority by: (Signature)

(Name)

(Designation)

(Address) (Fax No.)

In the presence of:

1.

2.

## APPENDIX 17

### [ BASE CASE FINANCIAL MODEL (BCFM) ]

[ Note: The model BCFM would be developed with the appropriate inputs from the financial and technical consultants. However such Financing Plan would need to be customized based on each project and its requirements. Such model Financing Plan would essentially include;

- (i) Estimated Project Cost,
- (ii) License Fee and Royalty payable to the Concessioneing Authority,
- (iii) annual estimated Gross Revenue,
- (iv) equity contribution,
- (v) cargo handling projections estimated by Concessionaire,
- (vi) discounted net present value of the cash flows,
- (vii) Equity IRR,
- (viii) debt equity ratio, and
- (ix) debt service ratio.

Such Financing Plan would be submitted by the concessionaire **and got approved by the Concessioneing Authority** at the time of Financial Close.]

Note: Such format of the Financing Plan shall also identify the respective threshold limit of the above parameters and the basis of further projections and the detailed requirements that would need to be stratified with respect to each line item.

**APPENDIX 18**

**MONITORING ARRANGMENT**

APPENDIX 19

MODEL TRIPARTITE AGREEMENT

(FOR PORTS PROJECTS)

BETWEEN PROJECT AUTHORITY, CONCESSIONAIRE AND

INFRASTRUCTURE DEBT FUND

This Tripartite Agreement<sup>1</sup> is made at [New Delhi] on the \*\*\*\*\*<sup>2</sup> day of \*\*\*\*\*,

20\*\* by and between

(i) [BOARD OF TRUSTEES for [\*] PORT<sup>3</sup>, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963], and having its principal administrative office at [\*]

(hereinafter referred to as the “**Concessioneing Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

(ii) The [\*\*\*\*\* Infrastructure Debt Fund], a company registered under the Companies Act, 1956, acting through \*\*\*\*\*, and having its registered office at \*\*\*\*\* (hereinafter referred to as the “**Debt Fund**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

And

(iii) [\*\*\*\*\* Limited], a company registered under the Companies Act, 1956, acting through \*\*\*\*\*, duly authorised by the resolution

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<sup>1</sup> This Tripartite Agreement is based on the Model Concession Agreements for PRIVATE SECTOR PROJECTS in MAJOR PORTS . Provisions referring to specific clauses of these MCAs may be suitably modified to reflect the provisions of the respective concession agreements, but without altering the allocation of risks.

<sup>2</sup> Words enclosed in square parenthesis and all asterisks may be substituted as per Project-specific requirements.

<sup>3</sup> **For Ennore Port:** The Ennore Port Limited, a company registered under the Companies Act, 1956, acting through \*\*\*\*\*, and having its registered office at \*\*\*\*\* (hereinafter referred to as **the “the Concessioneing Authority”** which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

passed at the meeting of its Board of Directors held on \*\*\*\*\*,  
and having its registered office at \*\*\*\*\* (hereinafter referred to as the  
“**Concessionaire**” which expression shall, unless repugnant to the context or  
meaning thereof, include its administrators, successors and assigns)

**WHEREAS:**

- (A) The Concessioneing Authority and the Concessionaire had entered into a Concession Agreement (as defined hereinafter), a true copy of which is annexed hereto and marked as Annex-I, for development of \*\*\*\*\* (the “**Project**”);
- (B) The Project entered into commercial operation or any substitute thereof on \*\*\*\*\* (the “**Date of Commercial Operation**”) in accordance with the provisions of the Concession Agreement;
- (C) Following the occurrence of the Date of Commercial Operation, the Concessionaire has been operating the Project in accordance with the terms and conditions of the Concession Agreement;
- (D) The Concessionaire had raised debt from the Lenders for financing the Project and had utilised the same for the purposes of the Project under the Concession Agreement;
- (E) The Concessionaire has been discharging its debt service obligations, including the repayment of principal and interest, in accordance with the provisions of the Financing Documents;

(F) The debt service obligations have not been rescheduled, waived or postponed in any manner during the past one year from the date hereof, and the Concessionaire is not in default of its debt service obligations under the Financing Documents; and

(G) The Concessionaire has decided to refinance all or part of its outstanding debt and has requested the Debt Fund to invest in its bonds, the proceeds of which shall be paid to the Lenders as specified in Schedule-I.

**Now, therefore, the Parties hereby agree and this agreement witnessed - as follows:**

## **1. DEFINITIONS AND INTERPRETATIONS**

1.1 For the purposes of this Agreement, the following terms shall have the meaning hereinafter respectively assigned to them:

“**[Actual Project Cost]**” means an amount of Rupees \*\*\*\*\* crore, as determined in accordance with the provisions of the Concession Agreement;

“**Agreement**” means this Tripartite Agreement, and amendments if any thereto;

“**Bonds**” means the securities issued by the Concessionaire in consideration of the amounts paid for the investment thereof;

“**Concession Agreement**” means the executed Concession Agreement dated [date on which the Concession Agreement has been signed] for the Project, entered into between the Concessioning Authority and the Concessionaire,

and shall include all Schedules thereof and any amendments thereto made in accordance with the provisions contained in this behalf therein;

“**Financing Documents**” means financing documents under the Concession Agreement and documents executed on the date [...date of signing of the financing documents] for the Project and shall include all Schedules thereof and any amendments thereto made in accordance with the provisions contained in this behalf therein.

“**Lenders**” means any Persons based in India or abroad providing Financial Assistance under the Financing Documents and includes a trustee for the holders of debentures/ or other debt instruments issued by the Concessionaire to finance the Project.

“**Lenders’ Representative**” shall have the same meaning as ascribed to it in the Financing Document, provided that, this would include the Trustees for any bonds issued by the Concessionaire. In absence of one such person/ entity having the authority to sign, Lenders Representative shall mean all the Lenders, and/or the Trustees for any bonds issued by the Concessionaire.

“**Major Ports**” means a port notified by the Central Government in the Official Gazette or a port that is declared as a Major Port through the Major Ports Act, 1963<sup>4</sup>

“**Parties**” means the parties to this Agreement collectively and “**Party**” shall mean any of the parties to this Agreement individually;

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<sup>4</sup> All Major Ports except Ennore Port, are regulated by their respective Port Trusts. The major port trusts' are autonomous bodies managed by a board of trustees under the overall control of the Central Government through the Ministry of Shipping. All major ports are covered under the Major Port Trust Act (MPTA), 1963 except Ennore Port, which it is a limited company and registered under the Companies Act, 1956.

1.2 The words and expressions beginning with or in capital letters used in this Agreement and not defined herein but defined in the Concession Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Concession Agreement.

### 1.3 Interpretation

1.3.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof, or any rules, regulations, bylaws or notifications thereunder, shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;
- (c) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (d) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to



increase liabilities or obligations of the Debt Fund hereunder or pursuant hereto in any manner whatsoever;

(e) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party in this behalf and not otherwise;

(f) the Recitals and Annexes to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement; and

(g) time shall be of the essence in the performance of the Parties' respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence.

1.3.2 Any word or expression used in this Agreement shall, be construed as per the definition given in the General Clauses Act, 1897 failing which it shall bear the ordinary English meaning.

## **2. ISSUE OF BONDS**

2.1 The Parties agree that the Concessionaire may, in accordance with the provisions of this Agreement, issue Bonds for the amounts subscribed by the Debt Fund; provided that the total value of such Bonds shall not exceed 94% (ninety four percent) of compensation payment from the Concessions Authority on day of signing this Tripartite Agreement

(as specified in Schedule II); [provided further that the Concessionaire may, with prior written approval of the Concessions Authority, which approval the Concessions Authority may in its sole discretion deny, issue additional Bonds for a total value not exceeding the balance of the said compensation payable]<sup>5</sup>.

2.2 Upon investment in Bonds pursuant to Paragraph 2.1, the Debt Fund shall be deemed to be a Lender and shall thereupon be entitled to all the rights and privileges of a Lender under the Concession Agreement.

2.3 The tenor of the Bonds, in accordance with the provisions of this Agreement shall be such that at least 50% (fifty per cent) and 75% (seventy five per cent) of the total nominal value thereof shall be fully redeemed by the Concessionaire no later than the expiry of 75% (seventy five per cent) and 85% (eighty five per cent) of the Concession Period respectively and the balance, if any, shall be redeemed no later than 2 (two) years prior to the expiry of the Concession Period.

2.4 Subject to the clause 2.3 of this Agreement, the tenure, rate of interest and other commercial terms of the Bonds shall be determined by mutual agreement between the Debt Fund and the Concessionaire.

2.5 The Bonds shall be in such denomination as the Debt Fund and the Concessionaire may determine, but not less than Rs [10,000 (Rupees ten thousand)] in any case.

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<sup>5</sup> All portions enclosed in square parenthesis in paragraph 2.1,3.5 and 4.1 of this Agreement may be omitted by the Concessions Authority if it does not wish to extend the cover hereunder beyond limits specified in line with the Model Concession Agreement for Ports Sector.

2.6 Subject to the provisions of Paragraph 4.1, the Debt Fund and the Concessionaire may, with prior written approval of the Concessioneing Authority, which approval the Concessioneing Authority may in its sole discretion deny, allocate and bear the foreign exchange risks for and in respect of any foreign-exchange denominated Bonds, in such manner as they may mutually agree.[ For the avoidance of doubt, the Parties expressly agree that if the foreign exchange risk for any or all Bonds is borne by the Concessionaire, The compensation to be made by the Concessioneing Authority for and in respect of such Bonds shall be adjusted to cover the variation between the nominal value of Bonds and the actual amount payable to the Debt Fund, such that the liability of the Concessionaire for redemption of the Bonds hereunder is fully discharged by the Concessioneing Authority.]

2.7 The Parties expressly agree and confirm that repayment of the principal and interest in respect of the Bonds shall have a prior charge over the Lenders on appropriation of compensation under Article [9, 16 and 17] of the Concession Agreement, and only the balance remaining shall be paid to the other Lenders.

2.8 Any delay in the repayment of the principal or interest for and in respect of the Bonds shall attract interest at a rate of 3% (three per cent) above the rate of interest applicable for the Bonds.

2.9 The Parties agree and confirm that upon execution of this Agreement, the Debt Fund shall, acting through the Lenders' Representatives, be deemed to be a party to the Escrow Agreement and the Substitution Agreement for the Project, and all rights, privileges and

obligations of the Lenders shall also vest in the Debt Fund. The Parties further agree and confirm that the provisions of the Concession Agreement and all other agreements, including the Escrow Agreement, Substitution Agreement and Financing Documents, shall be read and construed so as to give effect to the provisions of this Agreement, but without increasing any financial obligations and/ or liabilities of the Concessions Authority under the Concession Agreement.

2.10 By counter-signing the Tripartite Agreement, the Lenders' Representative, acting on behalf of the Lenders agrees, confirms and undertakes that the *pari passu* rights, title or interest of the Lenders in compensation, to the extent such rights, title or interest are provided in the Concession Agreement, Substitution Agreement, Escrow Agreement, Financing Documents or any other agreement, shall be subordinate to the rights, title or interest created by the Bonds in favour of the Debt Fund, and accordingly, the compensation shall be applied first for the redemption of Bonds and only the balance remaining, if any, shall be paid into the Escrow Account for meeting other obligations<sup>6</sup>, including the balance Debt Due. For the avoidance of doubt, the Parties expressly agree that the Debt Fund may, in its discretion, exercise all the rights and privileges of the Lenders' Representative under the Concession Agreement, Substitution Agreement, Escrow Agreement and this Agreement. The Parties further agree that save and except the application of compensation for redemption of Bonds in pursuance of this Agreement and subject to the provisions of Paragraph 2.7, the Lenders shall have *pari passu* charge on the revenues of the

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<sup>6</sup> It is hereby clarified that statutory dues shall have priority over the rights of all lenders including the Debt Fund

Concessionaire in accordance with the provisions of the Concession Agreement.

2.11 The Debt Fund may, by notice to the Parties, transfer all or any Bonds to any other person, and upon such transfer, the rights and obligations of the Debt Fund shall vest in such person. Provided that no such notice shall be required for transfer of Bonds if they have been listed in any recognized Stock Exchange and such transfer is in accordance with the regulations of the Stock Exchange.

2.12 Notwithstanding anything to the contrary contained in this Agreement, the Debt Fund may have the option to extend a term loan to the Concessionaire for an amount not exceeding 50% (fifty per cent) of its total exposure to the Concessionaire and the provisions of this Agreement shall apply *mutatis mutandis* to such term loan as if it were a Bond.

### **3. REDEMPTION OF BONDS**

3.1 The Concessionaire agrees and undertakes that upon completion of the tenor of the Bonds, it shall redeem the same by making full and complete payment of the outstanding principle and the interest thereon.

3.2 Notwithstanding anything to the contrary in this Agreement, the Debt Fund may by notice require the Concessionaire to redeem upto 10% (ten per cent) of the value of the Bonds in any financial year and upon notice in this behalf, the Concessionaire shall redeem such Bonds no later than 120 (one hundred and twenty) days from the date of receipt of such notice.

3.3 The Parties expressly agree that the Debt Fund and the Concessionaire may at any time by mutual agreement undertake early redemption of the Bonds and upon full redemption thereof, this Agreement shall cease to be in force.

3.4 The Parties expressly agree and confirm that in terms of Article [15, 16 and 17] of the Concession Agreement, the Concessions Authority has covenanted that in the event of termination of the Concession Agreement, the Concessions Authority shall pay compensation in accordance with the provisions of the Concession Agreement, which shall be applied for redemption of the Bonds in accordance with the provisions of this Agreement. The Parties further agree and confirm that upon termination on account of a Concessionaire Event of Default or Concessions Authority Event of Default, the Concessions Authority shall pay compensation in accordance with the provisions of the Concession Agreement.

3.5 The Parties agree and confirm that in the event of default in Debt Service by the Concessionaire, the Lenders shall have the right to enforce termination of the Concession Agreement in terms of Clause [15.1(a)(xi)] and [17] of the Concession Agreement, which *inter alia* requires the Concessions Authority to pay compensation in accordance with the provisions of the Concession Agreement. [The Parties further agree that in the event the Concessions Authority approves the issuance of additional Bonds under the provisions of Paragraph 2.1 of this Agreement, the liability of the Concessions Authority shall, notwithstanding the provisions of the Concession Agreement, extend to an amount equal to 100% of the compensation in Concessionaire Event of Default.]

3.6 The Concessions Authority agrees and undertakes that upon receipt of a notice under and in accordance with the provisions of Clause [3.2] of the Substitution

Agreement, it shall, no later than 15 (fifteen) days from the date of receipt of such notice, issue a notice to the Concessionaire requiring it to cure the Financial Default and in the event the default is not cured before the expiry of the Remedial Period specified in Clause [15.4] of the Concession Agreement, a Concessionaire Default shall have occurred and the Concessions Authority shall issue the Termination Notice forthwith, but no later than 15 (fifteen) days from the date of occurrence of Concessionaire Default, and shall make compensation no later than 15 (fifteen) days from the date of Termination Notice. The Parties expressly agree that the timelines specified in the Paragraph 3.6 of this Agreement are not in modification of the Concession Agreement but only in elaboration thereof.

3.7 The Parties expressly agree and confirm that the rights of the Debt Fund and the Lenders' Representative to enforce termination of the Concession Agreement in accordance with Paragraph 3.6 may be exercised individually or jointly, as the case may be, by the Debt Fund and/or the Lenders' Representative.

3.8 The Parties expressly agree that the Concessions Authority shall, instead of depositing the compensation in the Escrow Account of the Project, redeem the Bonds by making payments due and payable to the Debt Fund, and the balance, if any, shall be paid into the Escrow Account. The Parties further agree that the provisions hereof shall in no way be construed to increase the financial liability of the Concessions Authority for and in respect of the compensation [save and except as provided in Paragraph 3.5 for and in respect of the additional bonds specified therein].

3.9 The Parties agree and confirm that the amounts, if any, paid by the Concessioneing Authority for redemption of Bonds and the balance compensation, if any, paid as per the Concession Agreement into the Escrow Account shall be deemed to be a valid discharge of its obligations to make compensation under and in accordance with the Concession Agreement.

#### **4. FEES**

4.1 The Debt Fund shall pay to the Concessioneing Authority, 0.05%<sup>7</sup> (zero point zero five per cent) per annum of the outstanding debt financed by the IDF, by way of a guarantee fee in consideration of the obligations of the Concessioneing Authority hereunder; [provided that the guarantee fee shall be 1% (one per cent) in respect of Bonds for which the foreign exchange risk is to be borne by the Concessionaire] [provided further that the guarantee fee for and in respect of the additional Bonds specified in Paragraph 2.1 shall be 3% (three per cent) per annum of the nominal value thereof].

4.2 The guarantee fee specified in Paragraph 4.1 shall be due and payable annually before commencement of the financial year to which it relates. In the event of delay in payment of the guarantee fee, the Debt Fund shall pay interest at the rate of 14% (fourteen per cent) per annum, to be computed on a daily basis and compounded every month for the period of delay; provided, however, that if such delay exceeds the period of 180 (one hundred and eighty) days this Agreement shall cease to be in force, and upon termination of the Concession Agreement at any time thereafter, the Concessioneing Authority's obligation to pay the compensation to the Debt Fund shall be deemed to be reduced by 20% (twenty per cent) thereof.

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<sup>7</sup> This fee percentage shall be reviewed after three years or earlier, if required, by the IMG under Secretary (EA) as approved by the Cabinet.



## 5. REPRESENTATIONS AND WARRANTIES

5.1 Each of the Parties represent, warrant and confirm the following:

- (a) This Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and obligations enforceable against it in accordance with its terms;
- (b) the execution, delivery and performance of this Agreement will not conflict with or result in a breach or constitute default under or accelerate performance required by any of the terms of Memorandum and Articles of Association of any Party or any applicable law or any covenant, contract, arrangement or understanding, or any decree or order of any court to which it is a party or by which it or any of its properties or assets is bound or affected;
- (c) all information provided by the Party is true and accurate in all material respect;
- (d) there are no actions, suits, proceedings or investigations pending or to its knowledge threatened against it at law or in equity before any court or any other judicial, quasi judicial or other authority or body, the outcome of which may result in a material breach of this Agreement;
- (e) the Party has complied with all Applicable Laws and Applicable Permits in all material respects;
- (f) the Concessionaire is not in a material breach of the Concession Agreement or of any Project Contracts or Financing Documents; and

(g) no representation or warranty contained herein or in the Concession Agreement or any other document furnished by the Party contains or will contain any untrue or misleading statement of material facts or omits or will omit to state a material fact necessary to make such representation or warranty not misleading.

5.2 In the event of any occurrence or circumstance coming to the knowledge of the Party making any representation hereunder which renders any of its aforesaid representations or warranties untrue or incorrect at any time during the subsistence of this Agreement, such Party shall immediately notify the other Parties hereto about the same. Such notification shall not have the effect of remedying any such representation or warranty that has been found to be incorrect or untrue.

## **2. ARBITRATION**

6.1 Any Dispute which is not resolved amicably by conciliation shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Paragraph 6.2 of this Agreement. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

6.2 In the event of a dispute between two Parties, there shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules. In the event of a dispute involving all the Parties, a single arbitrator shall be appointed in accordance with the Rules.

6.3 The arbitrators shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Paragraph 6 shall be final and binding on the Parties as from the date it is made, and the Parties agree and undertake to carry out such Award without delay.

6.4 The Parties agree that an Award may be enforced against the Concessionaire, the Concessions Authority and/or the Debt Fund, as the case may be, and their respective assets wherever situated.

6.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

## **7. COMING INTO FORCE AND DURATION OF THE AGREEMENT**

This Agreement shall come into force and effect on the date hereof and shall remain in force until the redemption of all Bonds.

IN WITNESS WHEREOF, this Agreement has been executed on the day and year first above written.

For and on behalf of the Concessions **Authority**

Signature :

Name :

Designation :

For and on behalf of the **Debt Fund**

Signature :

Name :

Designation :

For and on behalf of the **Concessionaire**

Signature :

Name :

Designation :

Agreed, Accepted, Countersigned and Witnessed by the Lenders'  
Representatives for and on behalf of **Lenders** by

Signature :

Name :

Designation :

**SCHEDULE-I***(Refer Recital G)*

| <b>S.No.</b> | <b>Name of Lenders/Bond holders' Trustee with address</b> | <b>Amount to be refinanced IDF by way of Bonds/Loan (Rs. in crore)</b> | <b>Remarks, if any</b> |
|--------------|---|--|------------------------|
| 1.           |   |  |                        |
| 2.           |   |  |                        |
| 3.           |   |  |                        |
| 4.           |   |  |                        |
| 5.           |   |  |                        |
| 6.           |   |  |                        |
| 7.           |   |  |                        |
| 8.           |   |  |                        |
| 9.           |   |  |                        |
| 10.          |   |  |                        |

**SCHEDULE-II***(Quantum of compensation)*

As per the definition in the Concession Agreement, the quantum of (i) Book Value, (ii) Debt Due and (iii) Actual Project Cost as on the date of execution of this Agreement, and at the end of each financial year until the end of the concession period is mentioned in the table below:

(Rs. In Crores)

| <b>Date</b> | <b>Book Value</b> | <b>Debt Due</b> | <b>Actual Project Cost</b> | <b>Amount of Compensation<sup>8</sup></b> |
|-------------|-------------------|-----------------|----------------------------|---|
| 1           |                   |                 |                            |   |
| 2           |                   |                 |                            |   |
| 3           |                   |                 |                            |   |
| 4           |                   |                 |                            |   |
| 5           |                   |                 |                            |   |
| 6           |                   |                 |                            |   |
| 7           |                   |                 |                            |   |
| 8           |                   |                 |                            |   |

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<sup>8</sup>On Termination due to Concessionaire Event of Default after the Date of Commercial Operation, the compensation payable by the Concessioneing Authority (as per 17.1 (b) of the Model Concession Agreement for Private Sector Projects in Major Ports), shall be the lowest of (i) [Book Value (ii) 90% of Debt Due and (iii) the Actual Project Cost )

**ANNEX-1**

(Refer Recital A)

[Attach True Copy of the Concession Agreement]

