

CONCESSION AGREEMENT

BETWEEN

TAMIL NADU MARITIME BOARD  
(THE CONCESSIONING AUTHORITY)

AND

---

(THE CONCESSIONAIRE)

FOR

MARKETING, OPERATION & MAINTENANCE  
OF  
CUDDALORE PORT FOR A PERIOD OF 30 YEARS

DATED \_\_\_\_\_

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## CONCESSION AGREEMENT

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

BETWEEN:

1. **Tamil Nadu Maritime Board**, Government of Tamil Nadu, a Statutory Board constituted under Tamil Nadu Maritime Board Act 1995 (4 of 1996) and having its Administrative Office at No. 171, South Kesavaperumal Puram, Off Greenways Road, Raja Annamalaipuram, Chennai - 600 028, hereinafter referred to as “**the Concessional Authority**” (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns) of One Part;

AND

2. \_\_\_\_\_, a special purpose company incorporated under the Companies Act, 2013, with Corporate Identity Number (CIN) \_\_\_\_\_ and having its registered office at \_\_\_\_\_, represented by its \_\_\_\_\_ authorized vide Board Resolution dated \_\_\_\_\_ hereinafter referred to as the “**Concessionaire**” (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Second Part;

AND

3. \_\_\_\_\_ <name of Selected Bidder> having its registered office at \_\_\_\_\_ represented by its \_\_\_\_\_ authorized vide <Board Resolution/ Power of Attorney dated \_\_\_\_\_> hereinafter referred to as the “**Selected Bidder**” (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Third Part;

or

{The consortium of (i) M/s .....[...] having its registered office at \_\_\_\_\_, and (ii) M/s ..... [...] having its registered office at \_\_\_\_\_, in their capacity as the confirming party to this Agreement duly represented through M/s \_\_\_\_\_, the Lead Member of the consortium, through its Authorized signatory Mr./Ms. \_\_\_\_\_, authorized vide <Board Resolution/ Power of Attorney dated \_\_\_\_\_> hereinafter referred to as the “**Selected Bidder**” (which expression shall, unless the context otherwise requires, include its successors) of the Third Part}

The Authority, Concessionaire and Successful Bidder individually referred to as “Party” and jointly as “Parties”

WHEREAS:

- A. The Concessioneing Authority is desirous of selecting a port operator for marketing, operation & maintenance of the Cuddalore Port in Cuddalore District, Tamil Nadu for a period of 30 years;
- B. The Concessioneing Authority vide Tender No. \_\_\_\_\_ dated \_\_\_\_\_ invited applications from the interested parties for marketing, operation & maintenance of the Cuddalore Port;
- C. In response to the invitation referred to in recital ‘B’ above, the Concessioneing Authority received the application dated \_\_\_\_\_ submitted by the Applicant in accordance with the tender.
- D. The Concessioneing Authority, after evaluating the Proposal received by it from the Applicant, accepted the Proposal referred to in recital “C” above submitted by the Applicant and communicated its acceptance to the Applicant vide Letter of Intent for Award of Concession dated \_\_\_\_\_;
- E. The Applicant has incorporated the Concessionaire as a special purpose company in India, under the Companies Act, 2013 to implement the Project;
- F. 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 take over the assets created and carry out the marketing, operation & maintenance of the Cuddalore Port 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: -

“**Access Channel (or Entrance Channel)**” means the Entrance navigable channel duly dredged, maintained and marked for the purpose of the project.

“**Additional Auditor**” has the meaning ascribed to it in Article 7.3.

“**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 4 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 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.

“**Applicant**” means M/s \_\_\_\_\_.

“**Application**” means the Proposal and the entire set of documents submitted by the Applicant and in response to the Tender.

“**Barge**” means a flat bottom boat/ vessel for transporting freight / cargo including powered or unpowered and towed or pushed by other craft.

“**Board**” means Tamil Nadu Maritime Board.

“**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, which in the reasonable judgement of an Expert are capable of being put to use/utilized by the Concessioning Authority, and (ii) the moveable assets including cargo handling equipment belonging to the Concessionaire.

“**Captive Use**” means the use of the Barge jetty by way of captive facilities for import /export /transportation under the Captive use policy of the Government of India.

“**Change in Law**” shall have the meaning set out under Article 12.1 of this Agreement.

“**Charges**” includes all fees and charges payable by the Concessionaire to the Concessioning Authority, pursuant to Article 7 hereof.

“**Concession**” means the Concession granted by the Concessioning Authority to the Concessionaire in accordance with the provisions of Article 3.1 of this Agreement for implementing the Project and providing Project Facilities and Services.

“**Concessioning Authority Event of Default**” shall have the meaning as set out under Article 14.1 (b).

“**Concessionaire Event of Default**” shall have the meaning as set out under Article 14.1 (a).

“**Concession Period**” means the period of the Concession specified in Article 3.2 of this Agreement.

“**Conditions Precedent**” shall mean the conditions prescribed in Article 4 of this Agreement.

“**Consultation Notice**” has the meaning ascribed to it in Article 14.3.

“**Contractor**” means a 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.

“**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.

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

“**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.

“**EMD**” means earnest money deposit of Rs.3,00,00,000 /- (Rupees Three Crore Only) submitted by Applicant along with Proposal.

“**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.

“**Escrow Account**” shall have the meaning assigned to it under Article 7.4.

“**Escrow Agreement**” means the agreement to be executed inter alia between the Concessionaire, Escrow Bank and the Concessions Authority.

**“Event of Default”** shall have the meaning assigned to it under Article 14.1.

**“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.

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

**“Force Majeure Event”** shall have the meaning ascribed to it in Article 13.1 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”** shall have the meaning assigned to it under Article 7.1(g).

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

**“Insurance Cover”** shall have the meaning ascribed to it in Article 11.1(c) (ii).

**“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.

**“Minimum Guaranteed Cargo”** shall have the meaning ascribed to it in Article 6.17

**“Month”** means the calendar month as per the Gregorian calendar.

**“Non Political Event”** means the Force Majeure Events set out in Article 13.2.

**“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 and Maintenance Standards”** means the minimum standards of operations and maintenance set out in the Appendix 3 with regards the Project Facilities and Services.

**“Other Events”** means the Force Majeure Events set out in Article 13.4.

**“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 Guarantee”** shall mean the bank guarantee(s) 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 5.1.

**“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 13.3.

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

**“Project”** means the Marketing, Operation, Management, & Maintenance of port facilities and allied facilities at Cuddalore Port, in accordance with the provisions of this Agreement.

**“Project Capacity”** means the capacity of the Project Facilities and Services to handle 5.68 million tonnes of cargo per annum.

**“Project Contracts”** means collectively this Agreement, O&M Contract and any other material contract (other than the Escrow 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.

**“Project Facilities and Services”** means the facilities and services provided by the Concessioning Authority during the Concession Period, in accordance with this Agreement.

**“Project Requirements”** means the minimum requirements as to the operation and maintenance of the Project and provision of Project Facilities and Services set out in Appendix 3.

**“Project Site”** means the area demarcated in Appendix 1 including the waterfront, 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 operate the Project Facilities and Services as set forth in this Agreement.

**“Proposal”** means the application and the entire set of documents submitted by the Applicant in response to the Request for Proposal.

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

**“Remedial Period”** has the meaning ascribed to it in Article 14.4.

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

**“Safety Standards”** means the minimum standards of safety set out in the Appendix 3 with regards the Project/Project Facilities and Services.

**“Scale of Rates”** means the scale of rates along with the statement of conditions with respect thereto framed from time to time and notified by Tamil Nadu Maritime Board or such other competent authority under the provisions of Indian Ports Act, as applicable.

**“Special Audit”** shall have the meaning assigned to it under Article 7.3.

**“Statutory Auditors”** means a firm of chartered accountants appointed in terms of Section 138 of the Companies Act, 2013 and acting as the statutory auditors of the Concessionaire.

**“Supporting Project Infrastructure”** means:

- (a) maritime access channels;
- (b) port entrance;

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

**“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 for other users.

**“Tender”** means the Tender dated \_\_\_\_\_ vide ref no. \_\_\_\_\_, issued by the Concessions Authority inviting Applications/Proposals in accordance therewith for selection of Applicant, and includes any addendum / clarifications issued in respect thereof by the Concessions Authority.

**“Termination Notice”** means the termination notice issued pursuant to Article 15.1 hereof.

**“Termination Period”** shall have the meaning as set out under Article 15.1 hereof.

**“The Port”** means Cuddalore Port.

**“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.

## **1.2. 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 Application documents, inter alia including the Tender, issued by the Concessions Authority and also including addendums, clarifications given in writing and the submissions of the Concessionaire

and the Application submitted by the Concessionaire but not otherwise. In case of any contradictions in the terms of this Agreement and any such other Application 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. any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- f. any reference to day shall mean a reference to a calendar day;
- g. any reference to month shall mean a reference to a calendar month;
- h. “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;
- i. 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;
- j. any agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party 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 and/or Statutory Auditor, as the case may be, in this behalf and not otherwise;

- k. 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;
- l. 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
- m. 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.

### **1.3. 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.

### **1.4. 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**

### **SCOPE OF THE PROJECT**

#### **2.1. Scope of the Project**

The scope of the Project (the “Scope of the Project”) shall mean and include, during the Concession Period:

- a. Undertake marketing, operation and maintenance of the Port in accordance with the provisions of this Agreement and in conformity with the Standards set forth in Appendix 3; and
- b. Performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

## **ARTICLE 3**

### **CONCESSION AND PORT ASSETS**

#### **3.1 Concession**

In consideration of the Concessionaire agreeing to pay to the Concessions Authority the Charges, 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 marketing, operating, maintaining, replacing the Project/ Project Facilities and Services, installation of new equipments, construction of additional wharf / facilities, Construction of Godown / Office Space.

#### **3.2 Concession Period**

The Concession hereby granted is for a period of 30 years commencing from the date of commencement of commercial operation of port during which the Concessionaire is authorized and obliged to provide the Services in accordance with the provisions hereof.

Provided that: -

- a. in the event of the Concession being extended by the Concessions Authority beyond the said period of 30 years in accordance with the provisions of this Agreement, the Concession Period shall include the period by which the Concession is so extended, and
- b. 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.

#### **3.3 Acceptance of the Concession**

The Concessionaire hereby accepts the Concession and agrees and undertakes to provide 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, equip, operate, maintain and replace the Project/ Project Facilities and Services.

### **3.4 Port's Assets**

- a. In consideration of the Concessionaire agreeing to perform and discharge its obligations as set forth in this Agreement, the Concessioneing Authority hereby grants to the Concessionaire, the exclusive right to enter upon, occupy and use the Project Site (111.72 acres, as given in Appendix 1) 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. The list of assets are given in Appendix 2.
- 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.

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

The Concessionaire shall not without the prior written consent or approval of the Concessioneing 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 Concessioneing Authority.

### **3.6 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 Concessioneing Authority in good faith and with due regard to the matters for which such information is required by the Concessionaire. The Concessioneing Authority agrees to provide to the Concessionaire, upon a reasonable request, any further information relating to the Project Site and Port Assets, which the Concessioneing Authority may now possess or may hereafter come to possess, as may be relevant to the implementation of the Project. Subject to this, the Concessioneing Authority makes no representation and gives no warranty to the Concessionaire in respect of the condition of the Port Assets or the Project Site.

### **3.7 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 there at 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.

### **3.8 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, the Concessions Authority shall, if called upon by the Concessionaire, defend such claims and proceedings.

## ARTICLE 4

### CONDITIONS PRECEDENT

#### 4.1. 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 5.1 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. Furnishing a certificate from its principal officer/director on the shareholding pattern of the Concessionaire;
  - vi. Procuring and furnishing the following confirmations, in original, from the Applicant:
- b. it/they shall at all times comply with the provisions of Article 9.2 in respect of their shareholding in the Concessionaire;
- c. it/they has/have the financial standing and resources to fund /raise finances for undertaking and implementing the Project in accordance with this Agreement;
- d. the Applicant 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;

- i. 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

- ii. Obtaining Applicable Permits as may be required for operation and maintenance of port.

e. The following Conditions Precedent shall be satisfied by the Concessioneing Authority:

- f. handing over physical possession of the Project Site and/or the Port's Assets for the purposes of the Project;

4.2. The aforesaid Conditions Precedent shall be complied with within 90 (ninety) Days of the date of the Agreement. Each Party shall promptly inform the other Party in writing when the Conditions Precedent for which it is responsible have been satisfied.

4.3. Any of the Conditions Precedent set forth in Articles 4.1(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 4.1 (b) may be waived fully or partially by the Concessionaire at any time in its sole discretion.

4.4. If the Concessionaire has fulfilled all the Conditions Precedent under Article 4.1(a) including the furnishing of the Bank Guarantee and has not waived or extended the time under Article 4.3 above, and if the Concessioneing Authority has failed to fulfil the Conditions Precedent to be fulfilled by it under Article 4.1(b) (and which are within the power of the Concessioneing Authority), the Concessioneing Authority 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 fulfilment 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 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 Article 4.6 below;

- 4.5. If the Concessing Authority has fulfilled all the Conditions Precedent under Article 4.1(b) and has not waived or extended the time under Article 4.3 above, and if the Concessionaire has failed to fulfil the Conditions Precedent to be fulfilled by it under Article 4.1(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 Article 4.6 below;
- 4.6. 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 4.2 to 4.5, 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 Performance Guarantee shall stand forfeited. If such termination is on account of failure of the Concessing Authority, the Concessing Authority shall be obliged to return the Performance Guarantee. It is clarified that except for the payment as stipulated in the foregoing Article 4.4 and 4.5 and forfeiture in this Article 4.6, each party hereto shall have no claims against the other for costs, damages, compensation or otherwise.

## **ARTICLE 5**

### **PERFORMANCE GUARANTEE**

#### **5.1 Performance Guarantee**

The Concessionaire shall for due performance of its obligations during the Operation and Maintenance Phase provide to Concessions Authority an unconditional and irrevocable bank guarantee, in favour of the Concessions Authority encashable and enforceable at Chennai (the "Performance Guarantee"). The Performance Guarantee shall be for a sum of ₹8,00,00,000/ (Rupees Eight Crore only). Till such time the Concessionaire provides to Concessions Authority the Performance Guarantee pursuant hereto, the EMD 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 3 (Three) years and shall be renewed 30 (thirty) Days prior to expiry of each year, for an additional term of 3 (Three) years until completion of the concession period. 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. Failure of the Concessionaire to 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 Performance Guarantee.

5.2 Upon completion of the concession period, Performance Guarantee will be released, after certifying by the concerned authority that there are no dues to be paid to the Concessions Authority after completion of concession period and smooth transfer of the work to the next incumbent.



## **ARTICLE 6**

### **OPERATIONS & MAINTENANCE**

#### **6.1 Operation & Maintenance**

In addition to any of its other obligations under this Agreement, the Concessionaire shall market, 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 6 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 maximize cargo handled so as to achieve optimal utilization of the Project Facilities and Services.
- c. Be free to deploy higher capacity equipment/facilities/ technology, etc. and induct new technology and carry out value engineering for improved productivity and/or improved utilization and/or cost saving of Project assets during the concession period.
- d. 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.
- e. Minimize 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 Concessioneing Authority or other agencies.
- f. 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.

- g. Ensure maintenance of proper and accurate record/data/accounts relating to operations of the Project Facilities and Services and the revenue earned there from.
- h. 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.
- i. Prevent, with the assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Project Facilities and Services.
- j. Responsible for loading, discharging and storage of cargo & containers and other subsidiary services related to cargo operation.
- k. Ensuring safety and proper delivery of goods and containers with due compliance of applicable laws (e.g. the laws of free zones, special economic zones and customs administrations).
- l. The Concessionaire is obliged to observe best practice regarding loading, unloading and storing of goods at port facilities and Comply with the specified norms for the discharge and loading of goods, container, and loading and unloading from trucks during the concession period and should comply with the obligations of the international conventions for safety and protection of goods and the containers containing dangerous goods (IMDG CODE), Convention on Safe Containers (CSC), (ISPS CODE) and other related codes and conventions for handling operations.
- m. The Concessionaire shall ensure compliance with the safety standards set out under Applicable Law/international conventions, as relevant, from time to time. Ensuring compliance to Quality, Environmental, Occupational Health, Safety and ISPS codes as may be prevailing from time to time and should comply with all related standards, conventions, codes and executive guidelines approved by the Ports and Maritime Organization, Government of India which are related to Health, Safety and Environment (HSE), firefighting, security, information technology, repair of superstructures and infrastructures.
- n. The bidder has to undertake periodic maintenance dredging to maintain the sea bed level of (-) 9.0 m CD.

## 6.2 Repairs and Maintenance

The Concessionaire at its 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 at its own cost:

- a. Repair as necessary and maintain the Project Facilities and Services or any part thereof 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 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.
- c. 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 Concessioning 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.
- d. 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.
- e. 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.

### **6.3 Installation of Desalination and ETP Plant**

As mandated in Environmental Clearance, the Concessionaire at his cost should install a 100 KLD desalination plant to meet the water requirements and as per TNPCB norms, the Concessionaire at his cost should setup an ETP plant. After the completion of the concession period, the facilities created should be handed over to the Concessions Authority without any compensation.

### **6.4 Installation of Equipments**

The Concessionaire is permitted to install necessary equipments required for the regular operation of the port at his cost with prior intimation to the Concessions Authority. At the end of the Concession period, the Concessionaire shall have the option of taking back the equipment's or transfer to the Concessions Authority at the value fixed by the Concessions Authority.

### **6.5 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.

### **6.6 Removal / Replacement of Assets**

Except as provided/authorized, 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.

### **6.7 Creation of Additional wharf / facilities**

- a. The Concessionaire shall create additional wharf / other facilities such as ship repairs etc. at his cost with the prior approval of the Concessions Authority. After the completion of the concession period, the facilities created should be handed over to the Concessions Authority without any compensation.
- b. If the facility is used for handling of cargo, the prevailing cargo charges applicable to the existing facility shall be paid to the Concessions Authority. If the facility is used for

other purposes such as ship repairs etc., a separate income sharing approved by the Concessioneing Authority shall be paid.

### **6.8 Construction of Godown / Office Space**

The Concessionaire shall construct godown, office space or any other facilities that may be required for effective and efficient operation of the port at his cost with prior approval of the Concessioneing Authority. After the completion of the concession period, the facilities created should be handed over to the Concessioneing Authority without any compensation. There shall be sufficient space in the office to accommodate at least 6 officers and staff of Concessioneing Authority.

### **6.9 Utilities and Services**

The Concessionaire may, at its cost, make alternate arrangements for power including but not limited to installation of generators, sewage and water subject to obtaining Applicable permits, if any.

### **6.10 Approval of Master Plan**

- a. The Concessionaire shall prepare and submit the master plan for all the port related infrastructure facilities to be developed within 60 days from the date of this agreement.
- b. The Concessioneing Authority will review and give its approval within 15 days from the date of submission of complete details. Any delay shall be treated as “Deemed Approved”.
- c. For projects which are planned at a later stage by the Concessionaire, separate approval can be taken subsequently from the Concessioneing Authority. For taking up the projects under the approved master plan, the Concessionaire need to only inform the Concessioneing Authority.

### **6.11 Payments to Concessioneing Authority**

The Concessionaire shall make/ensure payments to the Concessioneing Authority as per Article 7.

## **6.12 Access for Inspection**

- a. The Concessioneing Authority at its cost will appoint an Independent Engineer to access the cost of the assets to be created, compliance etc. during the agreement period.
- b. The Concessionaire shall be obliged to extend all co-operation to Experts appointed by the Concessioneing 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.
- c. Additionally, the Concessionaire shall upon prior intimation by the Concessioneing Authority provide the authorized representatives of the Concessioneing 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 Terms of Contract.
- d. 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 Concessioneing Authority for conducting a safety audit and verifying that the Project/Project Facilities and Services are in strict compliance with the Safety Standards.

## **6.13 Submission of monthly reports**

The Concessionaire shall provide the Concessioneing Authority, Monthly reports on cargo traffic, unit gross output/ discharge rates at berth, daily output rated per vessel, revenue generated and effective working time to waiting within 7 (seven) days following the end of each Month, and any other information relating to operations which the Concessioneing Authority may require from time to time. If so desired by the Concessioneing Authority, the Concessionaire shall provide the reports in prescribed formats and in electronic form so as to provide online access to the Concessioneing Authority and its representatives.

## **6.14 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 specified by the Concessioneing Authority from time to time. In addition, the Concessionaire shall takeover, maintain the wireless system, upgrade it as per rules and maintain it at their cost during the Concession period.

## 6.15 Security Arrangements

- a. The Concessionaire should 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.
- b. The Concessionaire shall obtain Statement of Compliance (SoC) 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.

## 6.16 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. All labour law compliances shall be that of the Concessionaire alone. As far as possible, preference shall be given for personnel belonging to Cuddalore district.

## 6.17 Minimum Guaranteed Throughput (MGT)

The Concessionaire should achieve the Minimum Guaranteed Throughput (MGT) per annum set out as below and it shall not be entitled to any relaxation of its guarantee in this respect:

<b>Years</b>	<b>Minimum Guaranteed Throughput (Tonnes)</b>	<b>Years</b>	<b>Minimum Guaranteed Throughput (Tonnes)</b>
1	3.00 lakh	16	35.00 lakh
2	4.50 lakh	17	35.00 lakh
3	6.75 lakh	18	35.00 lakh
4	10.13 lakh	19	35.00 lakh
5	15.19 lakh	20	35.00 lakh
6	22.78 lakh	21	35.00 lakh
7	35.00 lakh	22	35.00 lakh
8	35.00 lakh	23	35.00 lakh
9	35.00 lakh	24	35.00 lakh

10	35.00 lakh	25	35.00 lakh
11	35.00 lakh	26	35.00 lakh
12	35.00 lakh	27	35.00 lakh
13	35.00 lakh	28	35.00 lakh
14	35.00 lakh	29	35.00 lakh
15	35.00 lakh	30	35.00 lakh

For the purpose of estimating Throughput, one loaded TEU will be considered at 12.00 MT and one empty TEU will be considered at 2.00 MT.

Failure to comply with the same will result in levying of penalty.

### **6.18 Indemnity Against Claims for Loss of Goods**

Notwithstanding anything contained in the Indian Ports 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 Indemnitee(s) shall be forwarded to the Concessionaire expeditiously and in any case within 5 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.



## **6.19 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 shall also be linked to the Concessions Authority’s website with an alert system for real time access to the complaints.
- b. Concessionaire shall take action for just and fair redressal of the grievance and submit a reply to the complainant within thirty days from the date of receipt with a copy to the Concessions Authority and maintain a proof of reply.
- c. If the Concessionaire fails to address the grievance and the complaint makes a reference to the Concessions Authority, it will issue directions which shall be complied by the Concessionaire.
- d. Any information sought by the Concessions Authority at any point of time during the concession period should be shared by the Concessionaire immediately.

## **6.20 Rights of Concessionaire**

### **i. Preferential and Priority Berthing**

- a. 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 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 the Concessions Authority.
- b. The Concessionaire shall permit the vessels of Navy, Coast Guard and other vessels as specified by the Concessions Authority to use the port on priority basis without affecting the commercial operations of the port.

**ii. Unclaimed cargo**

The Concessionaire may at his 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 Indian Ports 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.

**6.21 Penalty for shortfall in performance**

In the event the Concessioneing Authority, whether from the review of reports submitted by the Concessionaire 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 Concessioneing Authority shall calculate the amount of penalty payable by the Concessionaire in accordance with Article 7.5 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 Concessioneing Authority which shall be considered by Concessioneing Authority on merits and the Concessioneing Authority may waive the penalty 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.

**6.22 Levy and Recovery of the Tariff**

The Concessionaire shall be entitled to recover Tariff from the users of the Project Facilities for the port services rendered. Further, it shall be entitled to fix its own tariff for various services provided in the Port in accordance with applicable Indian laws.

## ARTICLE 7

### PAYMENTS TO THE CONCESSIONING AUTHORITY

#### 7.1 Payment Terms

- a. The Concessionaire shall pay the Concessioning Authority the license fee for land as below:

At the time of signing of Concession Agreement (A)	₹1.90 crores
A + 12 months	₹1.14 crores
A + 24 months	₹1.14 crores
A + 36 months	₹1.14 crores
A + 48 months	₹1.14 crores
A + 60 months	₹1.14 crores
A + 72 months	₹1.14 crores
A + 84 months	₹1.14 crores
A + 96 months	₹1.14 crores
A + 108 months	₹1.14 crores
A + 120 months	₹1.14 crores
A + 132 months	₹1.14 crores
A + 144 months	₹1.14 crores
A + 156 months	₹1.14 crores
A + 168 months	₹1.14 crores
A + 180 months	₹1.14 crores

- b. The Concessionaire shall pay the Concessioning Authority on monthly basis the amount whichever is higher among the following:
1. Cargo handled per month X Approved cargo charges
  2.  $(MGT / 12) \times$  Approved cargo charges
  3. 7% of the Gross Revenue
- c. The cargo charges for every month has to be remitted before 5<sup>th</sup> of the succeeding month. If 5<sup>th</sup> is a banking holiday in the geographical region, the amount has to be remitted on the next working day.
- d. An escalation of 15% on the cargo charges will be considered after completion of every three financial years and the bidder is bound to pay the same to TNMB (i.e.) An increase of 15% on the cargo charges approved for the first year will be

considered for the fourth year and 15% increase of the fourth year rate will be considered for seventh year and so on. For the purpose of same, the start of financial year (i.e) 1st of April will be considered as the start of a year.

- e. A mobilization period of 12 months from the date of signing of this agreement shall be permitted to mobilize the resources for commencing port operations. No extension shall be given beyond this period. During mobilization period, the Concessionaire shall not be liable to pay the Concessioneing Authority any amount as per Article 7.1 (b).
- f. If the closure of financial year is more than 90 days from the date of completion of mobilization period, the same will be treated as a full financial year for the purpose of applying increase in cargo charges.
- g. Gross Revenue means and includes, Gross income generated from the operation of the port or any other service in respect of vessels and cargo as audited by audit firms approved by Accountant General including but not limited to berth hire, pilotage, tug assistance fee, hire charges for flotilla, towage, stevedoring, wharfage, transshipment, lighterage, intraport transportation, demurrage, storage, cargo handling including stuffing and destuffing of containers, hire of floating crafts, railway services and all other revenues from services within port except port dues and interest income whether collected or not by the Concessioneing Authority and its assignees or sub-contractors or sub-licensees. It is clarified that discounts, if any offered by the Concessionaire to the users for any reason whatsoever in respect of the Project Facilities and Services, shall be ignored for the purpose of Gross Revenue.
- h. Upon completion of the concession period, Performance Guarantee will be released, after certifying by the concerned authority that there are no dues to be paid to the Concessioneing Authority after completion of concession period and smooth transfer of the work to the next incumbent.
- i. The Concessioneing Authority also reserves the right to recover any dues from the Concessionaire, which is found on later date, during audit/excess payment, after final settlement is made to them. The Concessionaire is liable to pay such dues to the Concessioneing Authority immediately on demand, without raising any dispute/protest.

## **7.2 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 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.

## **7.3 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, Charges payable to the Concessions Authority etc. The Concessionaire should submit to the Concessions Authority a financial statement of the Gross Revenue for every 6 (six) monthly period ending 30th September and 31st 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 (“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 the Charges reported by the Additional Auditor. The Concessionaire shall also pay interest @12% (twelve percent) on the difference amount for the intervening period. 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.

## 7.4 Escrow Account

- a. The Concessionaire shall maintain an escrow account with a bank approved by the Concessioneing Authority (“Escrow Account”), during the subsistence of this Agreement and enter into an agreement substantially in the format prescribed with such bank to ensure that all revenues and other receipts arising from the Project and under any agreements, including this Agreement and all proceeds received pursuant to any insurance claims 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 Concessioneing Authority or such other authority in accordance with Article 7.2 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 Concessioneing Authority or such other authority.
- b. Withdrawals and appropriations during the Concession Period, at any relevant time, from the Escrow Account shall be in the following order of priority:
  - i. for all taxes due and payable by the Concessionaire;
  - ii. towards payment of Charges and other sums payable to the Concessioneing Authority and liquidated damages, if any;
  - iii. all expenses relating to operations and management of the Project/Project Facilities and Services;
  - iv. towards its debt service obligations;
  - v. towards any reserve requirements;

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 the tender, withdrawal from the Escrow Account shall be made only in accordance with the written instructions of the Concessioneing Authority.

- c. 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 16 shall be appropriated in the following order of priority:

- i. towards taxes and statutory dues payable by the Concessionaire;
- ii. all amounts due to the Concessioneing Authority;

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 Concessioneing Authority.

## **7.5 Penalty**

- a. Failure to pay the amount committed to the Concessioneing Authority within the respective due dates would carry interest @ 24% per annum from the due date until the date of payment or realization thereof.
- b. If the Annual Minimum Guaranteed Throughput is not achieved, the Competent Authority will constitute a committee to analyze the reasons for the shortfall. If any lapses on the Concessionaire is found, the Competent Authority reserves the right to levy penalty for an amount equivalent to 100% of the approved cargo charges for the year under review on the shortfall quantity.
- c. Failure to achieve Minimum Guaranteed Throughput for a consecutive period of 3 years will lead to termination of this Agreement and forfeiture of Performance Guarantee.

## **ARTICLE 8**

### **ASSET OWNERSHIP**

#### **8.1. Ownership of Assets**

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, mortgage 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.

#### **8.2. 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 the concession period 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 tender and will be dealt with as per Article 6.3, 6.4, 6.7, 6.8.



## ARTICLE 9

### SHAREHOLDING

#### 9.1. Ownership Structure

The Applicant has caused the Concessionaire to be incorporated as a special purpose company to operate and maintain the Project/Project Facilities and Services in accordance with this Agreement. The shareholding pattern of Concessionaire is

S.No.	Share Holder's Name	No. of Shares	Percentage
1			
2			
<b>Total Share Holding of the Concessionaire</b>			<b>100.00%</b>

#### 9.2. Shareholding

Any change in ownership / shareholding pattern shall be permitted only after the 2<sup>nd</sup> (second) anniversary of the date of commercial operation of the Port. Further, the Concessionaire shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Article 11.1.f and that the Applicant/ members of the Consortium, hold not less than 51% (fifty-one percent) of its issued and paid up Equity till the end of the Concession Period; In case of consortium each member of the consortium on whose strength the project was awarded must hold at least 20% of the issued and paid up Equity till the end of the Concession Period.

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.

### **9.3. 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 Concessing Authority as soon as may be reasonably possible.

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 Concessing Authority and the articles of association and memorandum of association of the Concessionaire shall include a specific provision to this effect.

## **ARTICLE 10**

### **GENERAL CONDITIONS**

#### **10.1. General Conditions**

- a. Concessioneing Authority reserves the right to relax or waive or amend any of the conditions.
- b. Sub-assign, pledging, mortgaging of the project site and facilities is not permitted.
- c. The Concessioneing Authority shall lease other areas in its possession (i.e. area other than the project site specified in Appendix 1) to some other activity and the Concessionaire shall have no right to object the right of Concessioneing Authority or their authorized agency.
- d. Concessioneing Authority or its authorized representative is at their liberty to visit the site for monitoring and inspection at any time during the concession period. Any mid-course correction advised by Concessioneing Authority shall be duly incorporated.
- e. If on account of non-compliance with the provisions of any laws, Concessioneing Authority is called upon to make any payment to or in respect of his employees, the Concessionaire shall be liable and pay Concessioneing Authority all such amounts. No liability whatsoever shall attach to Concessioneing Authority on account of or any failure on the part of the Concessionaire to observe these regulations.
- f. Any liability arising out of any litigation (including those in consumer courts) due to any act of agencies/personnel shall be directly borne by the Concessionaire including all compensation/damage/expenses/fines, the concerned Concessionaire personnel shall attend the court as and when required.
- g. Concessioneing Authority will have no responsibility in case of any loss is caused to any life or property due to accident, fire or any other reasons. The selected Concessionaire is required to take appropriate safety and insurance measures to safeguard against any loss to human life.
- h. Concessioneing Authority will have no liability on account of any omission or commission of regulatory/statutory requirement by the Concessionaire.
- i. Concessioneing Authority shall not be accountable either directly or indirectly to the lenders of the Concessionaire at any point of time.
- j. Concessioneing Authority shall not be made a party to any litigation by or on behalf of the Concessionaire.

- k. The Concessionaire shall abide by all statutory national and international laws as applicable for marketing, operation and maintenance of port.
- l. All infrastructure requirements for obtaining statutory approval towards commencement of port operation shall be carried out by the Concessionaire.
- m. The Conservancy of the port shall vest with Concessions Authority and port dues and surcharge on port dues shall be directly payable to Concessions Authority as per the scale of rates of Concessions Authority. Port entry and clearance will be issued by the Concessions Authority on receipt of no dues certificate from the port operator.
- n. The merchant overtime fees shall be directly payable to TNMB as per the scale of rates of TNMB.
- o. Any further maintenance of channel and channel depth is the responsibility of the Concessionaire.
- p. The Concessionaire will indemnify, defend and hold harmless the Concessions Authority from and against, and in respect to, any and all losses, expenses, costs, obligations, liabilities and damages, including interest, penalties and attorney's fees and expenses, that the Concessionaire may incur as a result of any negligent or willful acts or omissions of the Concessionaire.
- q. All statutory dues and taxes including municipal taxes, renewal fees for Consent to Operate (CTO) to TNPCB should be paid by the Concessionaire during the concession period.
- r. The movement of Harbour crafts from Cuddalore Port to Marine Terminal Facility of Chemplast Cuddalore Vinyls Limited located within Cuddalore port limits shall not be interrupted for men and materials movement. Fishing vessels movement in and out of the channel for livelihood shall be allowed without hindrance.
- s. Any notice regarding any problems, to the Concessionaire shall be deemed to be sufficiently served, if given in writing at his usual or last known place of business.
- t. In the course of discussion and instruction Concessions Authority may disclose information of confidential and proprietary nature relating to the port, knowhow, to the Concessionaire. Such information shall be considered as confidential.

## **ARTICLE 11**

### **GENERAL RIGHTS, DUTIES AND OBLIGATIONS**

#### **11.1. Of the Concessionaire**

##### **a. Applicable Permits**

- a. The Concessionaire shall at all times during the Concession Period maintain and comply with the Applicable Permits.
- b. The Concessionaire shall obtain all approvals for statutory approvals for safe and peaceful operation of port / facilities.
- c. The Concessionaire shall obtain all statutory approvals for creation of additional wharf / facilities, godown, office space etc.

##### **b. Taxes & duties**

The Concessionaire shall during the Concession Period pay in a timely manner all taxes, duties, levies, cess and charges including but not limited to income tax, GST, customs duty, etc. 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.

##### **c. Insurance**

###### **i. Insurance Requirement**

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

- a. loss, damage or destruction of the Project Facilities and Services, at replacement value;
- b. comprehensive third party liability insurance including injury or death to personnel of the Concessioning Authority and others who may enter the Project Site or the Port's Assets;
- c. workmen's compensation insurance;
- d. marine cum storage cum erection insurance; and

- e. 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 (d).

## **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**

All money 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 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 Concessioneing 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 the Concessing 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, the Concessing Authority may at its option purchase and maintain such insurance and all sums incurred by the Concessing Authority shall be reimbursed with interest @ 18% per annum by the Concessionaire forthwith on demand, failing which the same shall be recovered by the Concessing 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 Concessing 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 Concessing 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 Concessing 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 operation and maintenance of the Project Facilities and Services.

**e. Engagement of Contractors**

The Concessionaire may engage any Person possessing the requisite skill, expertise and capability for 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 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 requisite security clearance if required 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.

**f. Change in Ownership**

The Concessionaire shall not undertake or permit any Change in Ownership, except with the prior written approval of the Authority.

Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that:

- i. all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of 25% (twenty five per cent) or more of the total Equity of the Concessionaire; or



- ii. acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him:

shall constitute a Change in Ownership requiring prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavor to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause:

1. the expression “acquirer”, “control” and “person acting in concert” shall have the meaning ascribed thereto in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
2. the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the Concessionaire; and
3. power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situated in India or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of any company, directly or indirectly whether situated in India or abroad, having ultimate control of 25% (twenty five per cent) or more of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

**g. Condition Survey**

The Concessionaire agrees that at least 6 (six) 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 therefore under this Agreement (normal wear and tear accepted) 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.

**11.2. 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 clause 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. General rights of inspection and verification**

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

### **11.3. Of the Concessioneing Authority and the Concessionaire**

#### **a. Compliance with Laws and Regulations**

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

#### **b. Rights to Documents**

##### **i. The Concessioneing Authority's Documents**

Documents and computer programs or copies thereof, if any, provided by the Concessioneing Authority to the Concessionaire, shall always remain the property of the Concessioneing 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 Concessioneing Authority, be returned by the Concessionaire to the Concessioneing 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 Concessioneing 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.

## ARTICLE 12

### CHANGE IN LAW

#### 12.1. Change in Law

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

- i. 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
- ii. 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
- iii. 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.

Provided any (i) imposition of new taxes, duties, cess and the like and/or the increase in taxes, duties, cess and the like effected from time to time by any Government Authority, and/or (ii) imposition of standards and condition of operations, maintenance and safety arising out of a new or revised Environmental Law; and/or (iii) imposition of standards and terms of employment and working conditions of labourers and workmen; and/or (iii) any rules or regulations stipulated by Concessioneing Authority or other regulatory authority having jurisdiction over the Project in respect of the standards of service shall not constitute a Change in Law.

#### 12.2. The Concessionaire’s Remedy

- i. In the event of Change in Law the Concessionaire may propose to Concessioneing 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. 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.

- ii. Upon occurrence of a Change in Law, the Concessionaire shall notify Concessioneing Authority, of the following:
  1. The particulars, nature and the impact of Change in Law on the Project;
  2. In sufficient detail, the estimate of the Additional Cost likely to be incurred by the Concessionaire on account of the Change in Law; and
  3. The measures, which the Concessionaire has taken or proposes to take to mitigate the impact of Change in Law, including in particular, minimizing the Additional Cost.
  
- iii. Upon receipt of the notice of Change in Law issued by the Concessionaire pursuant to the preceding sub-article (b), 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.
  
- iv. 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 Article 12.2;

## ARTICLE 13

### FORCE MAJEURE

#### 13.1. Force Majeure Event

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 Article 13.2, 13.3 and 13.4 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.

#### 13.2. 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, 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);
- 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 13.4, 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 archaeological 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.

### **13.3. 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 12, 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 Project Requirements, Applicable Laws, Applicable Permits, any judgment or order of a Governmental 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 Concessioneing 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.

### **13.4. 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 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 Concessioneing Authority; or
- e. any event or circumstance of a nature analogous to any of the foregoing.

### **13.5. 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 13.5 (b) and such other information as the other Party may reasonably request.

### **13.6. 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 13.7 or
- b. termination of this Agreement pursuant to Article 13.10 hereof.

### **13.7. 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. 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.

### **13.8. 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.

### **13.9. 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 Concessioning Authority in appropriate cases if permissible under Applicable Law.

### **13.10. 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 Article 15 and Article 16 shall, to the extent expressly made applicable, apply.

## ARTICLE 14

### EVENTS OF DEFAULT

#### 14.1. 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. Delay in payments to the Concessions Authority for 2 (two) consecutive Months or more than (5) (five) times in the aggregate during the Concession Period;
- iii. 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;
- iv. the Concessionaire fails to achieve Minimum Guaranteed Cargo 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;
- v. any representation made or warranties given by the Concessionaire under this Agreement is found to be false or misleading;
- vi. the Concessionaire passing a resolution for voluntary winding up;
- vii. 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;

- viii. 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 ( ninety) Days;
- ix. the Security Deposit / Performance Guarantee is not maintained in terms of the provisions hereof;
- x. the Concessionaire abandons or expresses its intention to revoke/terminate this Agreement without being entitled to do so as is expressly provided in this Agreement;
- xi. a change in shareholding such that the beneficial interest of the Applicant in the Concessionaire reduces below the limits set in Article 9.2 and/or Management Control of the Concessionaire has occurred in contravention of the provisions of Article 9 hereof;
- xii. 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 9 hereof; and
- xiii. 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 this 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.
- ii. any representation made or warranties given by the Concessions 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 Concessing Authority (unless such proceedings are initiated as a consequence of any Concessionaire Event of Default).
- iv. levy of an execution or restraint on the Port's Assets in any proceedings against the Concessing Authority (unless such proceedings are initiated as a consequence of any Concessionaire Event of Default) which has or is likely to have Material Adverse Effect and such execution or restraint remaining in force for a period exceeding 90 (ninety) Days.

#### **14.2. Parties Rights**

- i. Upon the occurrence of the Concessionaire Event of Default, the Concessing Authority shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.
- ii. Upon the occurrence of the Concessing Authority Event of Default, the Concessionaire 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.

#### **14.3. Consultation Notice**

Either Party exercising its right under Article 14.2, 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 to consider possible measures of curing or otherwise dealing with the underlying Event of Default ("Consultation Notice").

#### **14.4. 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, 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 Concessioneing Authority shall 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:

- i. the change of management or control/ownership of the Concessionaire;
- ii. the replacement of the Concessionaire by a new operator (“Selectee”)

#### **14.5. 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.

#### **14.6. Revocation of Consultation Notice**

If during the Remedial Period the underlying Event of Default is cured or waived or the Parties agree upon any of the measures set out in Article 14.4, the Consultation Notice shall be withdrawn in writing by the Party who has issued the same.

#### **14.7. 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 have agreed upon any of the measures in accordance with Article 14.4, the Party who has issued the Consultation Notice shall have the right to terminate this Agreement, in which event, the provisions of Article 15 and Article 16 shall, to the extent expressly made applicable, apply.

#### **14.8. The Concessioneing Authority ’s Rights of Step-in**

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

- i. re-enter upon and take possession and control of Project Site/Project Facilities and Services forthwith;
- ii. prohibit the Concessionaire and any Person claiming through or under the Concessionaire from entering upon/dealing with the Project Facilities and Services;

- iii. step in and succeed upon selection by the Concessioneing 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 Concessioneing Authority may in its discretion deem appropriate with effect from the date of communication of such selection to the counter party to the relative Project Contracts.

## **ARTICLE 15**

### **TERMINATION OF THE CONCESSION/AGREEMENT**

#### **15.1. 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 shall do so by issue of a notice in writing (“Termination Notice”) to the other Party. 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.

#### **15.2. Obligations during Termination Period**

During Termination Period, the Parties shall subject where applicable to the provisions of this Article 15, 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.

#### **15.3. Requisition**

The Concessionaire has no right 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 a Concessionaire 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 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. Data or records including test certificates, survey reports, inspection reports, records of maintenance, statutory certificates issued regarding the operation and maintenance of the Project Facilities and Services;



- b. Specifications regarding the Concessionaire's assets comprised in the Project Facilities and Services; and
- c. Cargo traffic, daily output of jetty or any other information or records regarding Concessionaire, its business, the Project/Project Facilities and Services, assets and liabilities.
- d. The Concessionaire shall within a period of 30 (thirty) Days of receipt of Requisition, furnish the particulars called for by the Concessing Authority.

#### **15.4. 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 Concessing 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 Concessing Authority shall be associated with the operations of the Project Facilities and Services (except when the same is impossible due to a Force Majeure Event) in order to facilitate smooth takeover of the same by the Concessing Authority on the Transfer Date.
- b. If, as a result of the condition survey, the Concessing 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 thereof 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 Concessing Authority may itself cause the condition survey and inventory of Port's Assets and the Project Facilities and Services to be conducted. the Concessing 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.

## **15.5. 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 this Agreement due to a Force Majeure Event or on account of an Event of Default in accordance with Article 18;
- b. the Concessions Authority shall be entitled to encash any subsisting bank guarantee(s) provided by the Concessionaire against any amounts owing to Concessions Authority by the Concessionaire.

Notwithstanding anything contained in this Agreement, except for ensuring the deposit of the compensation payable to the Concessionaire in accordance with Article 16 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 reemployment 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 16**

### **COMPENSATION**

#### **16.1. Compensation**

- i. Termination due to Force Majeure Event

If the termination is due to a Force Majeure Event no compensation shall be payable by either parties. The Concessionaire shall take back the movable assets and other assets created shall be dealt with as in Article 6.3, 6.4, 6.7, 6.8.

- ii. Termination due to Concessionaire Event of Default

If the termination is due to a Concessionaire Event of Default, the Performance Guarantee amount remitted by the Concessionaire will be forfeited.

- iii. Termination due to Concessioneing Authority Event of Default

If the termination is due to Concessioneing Authority Event of Default, the book value of the additional immovable assets if any created will be paid by Concessioneing Authority and the cost of movable assets shall be paid as per Article 6.4. No other compensation shall be payable.

#### **16.2. 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.

#### **16.3. 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:

- i. the Concessionaire in the event of expiry of Concession Period or termination due to a Concessionaire Event of Default;

- ii. Concessioneing Authority in the event of termination due to Concessioneing Authority Event of Default or Political Event; and
- iii. by both parties equally in case of termination due to Change in Law or Non Political Event or Other Event.

#### **16.4. Delayed Payment of Compensation**

If for any reasons, other than those attributable to the Concessioneire, Concessioneing Authority fails to pay the compensation on the Transfer Date, Concessioneing Authority shall be liable to pay interest @12% per annum thereon from the Transfer Date till payment thereof. Provided, nothing contained in this clause shall be deemed to authorise any delay in payment of compensation in accordance with this Agreement.

#### **16.5. Delayed Transfer of Assets**

If for any reasons other than those attributable to Concessioneing Authority the Concessioneire fails to transfer assets, rights and contracts on the Transfer Date in accordance with Article 15.5 read with Article 18, there shall be no suspension of the operation and maintenance of the Project Facilities and Services and the Concessioneire shall, as a trustee of 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 Concessioneing Authority the Gross Revenue minus operating costs and statutory dues, from such operations. In the event of failure to do so, the Concessioneire shall be liable to pay to 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 clause shall be deemed or construed to authorise delay in completion of formalities of transfer of assets, rights and contracts by the Concessioneire to Concessioneing Authority in accordance with the requirements thereof under this Agreement.

In case the transfer of assets by the Concessioneire to Concessioneing Authority is delayed for reasons attributable to Concessioneing Authority, the Concessioneire shall nonetheless continue to operate the Project Facilities and Services but as agent of Concessioneing Authority. Provided however, the Concessioneire shall be liable to pay Fees and Charges in accordance with Article 7.

## **16.6. 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 17**

### **ASSIGNMENT AND CHARGES**

#### **17.1. Restrictions on assignment and charges**

- i. Subject to Article 17.2, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.
- ii. Subject to the provisions of Article 17.2, the Concessionaire shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Concessionaire is a party, except with prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

#### **17.2. Permitted assignment and charges**

The restraints set forth in Article 17.1 shall not apply to:

- i. liens arising by operation of law in the ordinary course of business of the Project;
- ii. Liens or encumbrances required by any Applicable Law.

#### **17.3. Assignment by the Authority**

Notwithstanding anything to the contrary contained in this Agreement, the Authority may, after giving 60 (sixty) days' notice to the Concessionaire, assign and/ or transfer any of its rights and benefits and/or obligations under this Agreement to an assignee who is, in the reasonable opinion of the Authority, capable of fulfilling all of the Authority's then outstanding obligations under this Agreement.

## **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 15, the transactions to be consummated and the formalities to be completed by the Parties on the Transfer Date shall be as set out in Article 18.2 and 18.3.

#### **18.2. Concessionaire's Obligations**

The Concessionaire shall;

- iii. hand over peaceful possession of the Project Site, Port's Assets, the Project and the Project Facilities and Services free of Encumbrance;
- iv. 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 Concessions 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;
- v. hand over to the Concessions Authority all documents including built drawings if any, manuals and records relating to operation and maintenance of the Project Facilities and Services;
- vi. 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;
- vii. transfer or cause to be transferred to the Concessions Authority any 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;

- viii. 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 the Concessions Authority Event of Default the cost of such transfer shall be borne/ reimbursed by the Concessions Authority;
- ix. 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 16 to the Concessionaire. 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.

The Concessionaire further confirms that payment of compensation by the Concessions Authority in accordance with this Article 16 shall be a valid discharge to the Concessions Authority in respect of the Concessions 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 Concessions Authority under this Agreement.



## **ARTICLE 19**

### **DISPUTE RESOLUTION**

#### **19.1. Dispute Resolution Board**

A Dispute Resolution Board (DRB) shall be formed in order to resolve the disputes that may arise during the currency of this Agreement. The members of the DRB shall be nominated by the Concessions Authority and the Concessionaire. If any party is not satisfied with the decision of DRB, the issue shall be referred for Arbitration.

#### **19.2. Arbitration**

- a. The issues not resolved by DRB shall be referred for arbitration. The arbitrator shall be selected by the Concessionaire from the panel of arbitrators approved by the Concessions Authority within 15 days from the date of receipt of the letter from the Concessions Authority along with the panel. If there is no reply from the Concessionaire within 15 days, the Concessions Authority shall choose any of the arbitrators from the panel of arbitrators referred to above. The remuneration for the arbitrator and other expenses shall be shared equally by the Concessions Authority and the Concessionaire.
- b. The venue of the Arbitration shall be at the Head office of the Concessions Authority at Chennai. The decision of the Arbitrator shall be final and binding on both the parties to the Arbitration.
- c. The Arbitrator may with the mutual consent of the parties, extend the time for making the award. The award to be passed by the Arbitrator is enforceable in the Court at Chennai city only.
- d. The fees for arbitrator shall be paid as per schedule 4 of Arbitration and Conciliation Act, 1996.

## ARTICLE 20

### REPRESENTATIONS AND WARRANTIES

#### 20.1. Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to the Concessions 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 authorize 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 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 vest in the Concessioneing 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 Concessioneing 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 Concessioneing 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 the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Concessioneing 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 Concessioneing Authority**

The Concessioneing Authority represents and warrants to the Concessioneaire 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 Concessioneing 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. 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.

#### **21.2. Articles to survive Termination**

The provisions of Articles 15 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.

#### **21.3. 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.

#### **21.4. 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.

#### **21.5. 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.

## **21.6. 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:

VICE CHAIRMAN & CHIEF EXECUTIVE OFFICER

TAMIL NADU MARITIME BOARD  
NO. 171, SOUTH KESAVAPERUMAL PURAM  
OFF GREENWAYS ROAD,  
RAJA ANNAMALAIPURAM  
CHENNAI - 600 028

The Concessionaire:

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.

### **21.7. 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 21.6 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.

### **21.8. 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.

### **21.9. 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.

### **21.10. Jurisdiction of the Court**

Any dispute arising out of non-fulfilment of any of the terms and conditions of this Agreement or any other dispute arising out of the arbitration award will be subject to the jurisdiction of the Courts in the City of Chennai only.

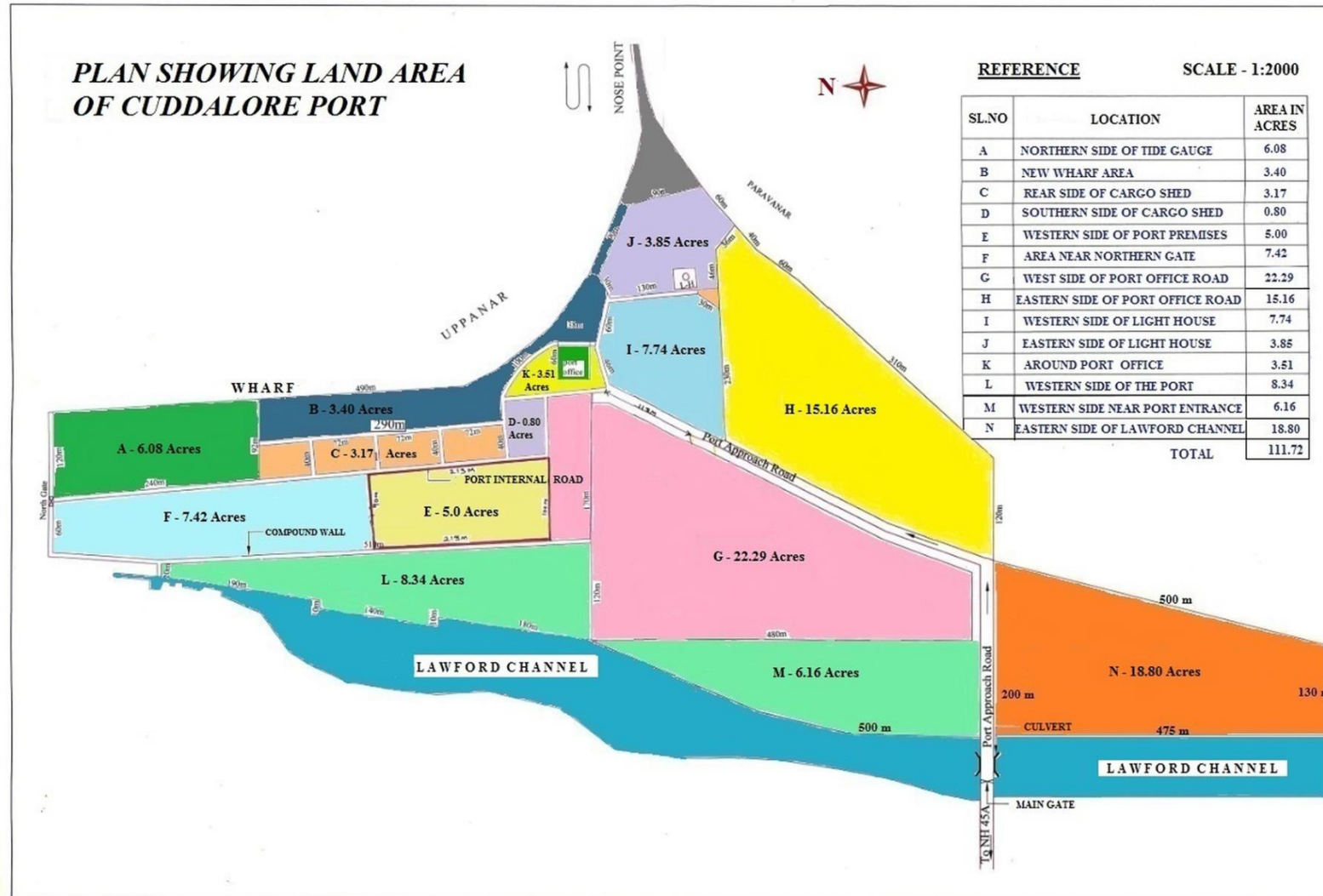
### **21.11. Entire Agreement**

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:

**APPENDIX 1  
PROJECT SITE**





**APPENDIX 2**  
**PORT'S ASSETS**

<b>S.No.</b>	<b>Name Of Structure</b>	<b>Year of Construction</b>	<b>Area/ Length</b>	<b>Book Value</b>
<b>(1)</b>	<b>Existing Infrastructure</b>			(In Rupees)
1	Port Office building for Administrative Officer and Toilet block for staff	1976	360 M <sup>2</sup>	2,38,500
2	Cargo Shed No.1	1982	725 M <sup>2</sup>	5,50,000
3	Cargo Shed No.2	1983	725 M <sup>2</sup>	6,72,510
4	Cargo Shed No.3	1985	725 M <sup>2</sup>	8,65,655
5	Old Wharf	1986	205 M	30,00,000
			Sub-Total	<b>53,26,665</b>
<b>(2)</b>	<b>New Infrastructure</b>			
1	North and South Breakwater	2015-16	North Side= 130 m South Side = 210 m	10,05,00,000
2	Extension of both North and South Breakwater	2020 -21	North Side= 215 m South Side = 420 m	41,87,09,648
3	Wharf -I	2020 -21	120 X 21 m	30,33,66,000
4	Wharf -II	2020 -21	120 X 21 m	30,39,56,940
5	Captial Dredging (Channel Depth:9-10 metres)	2020 -21	1873476 Cum	46,79,19,365
			Sub-Total	<b>159,44,51,953</b>
<b>GRAND D TOTAL</b>				<b>159,97,78,618</b>

**APPENDIX 3**  
**PROJECT REQUIREMENTS**

**1 Operations & Maintenance Standards:**

Repairs, Maintenance and Replacement

The Concessionaire at its 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.

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 Concessions 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.

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.

**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 General

BS 7121-2-2003	Code of Practice for safe use of cranes, inspection, testing & examination
BS 7121-4-1997	Code of Practice for safe use of cranes (Lorry Loaders)
BS 7121-5-2006	Code of Practice for safe use of cranes (Tower Cranes)

## 2 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 along with 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 as amended)
11. SOLAS / MARPOL CONVENTION as amended
12. International Maritime Dangerous Goods Code
13. Certification by Navigational Safety in Ports Committee (NSPC)

## **APPENDIX 4**

### **CARGO CHARGES**

Cargo Charges approved by TNMB