

**FACILITY OPERATOR AGREEMENT FOR THE FUNDING, DESIGN, DEVELOPMENT, OPERATION, MAINTENANCE AND TRANSFER OF A CONTAINER HANDLING FACILITY FOR A PERIOD OF TWENTY-FIVE (25) YEARS IN THE BAYVUE PRECINCT AT THE PORT OF RICHARDS BAY**

between

**TRANSNET NATIONAL PORTS AUTHORITY, a division of TRANSNET SOC LIMITED**  
**(registration number 1990/000900/06)**

and

***[NAME OF FACILITY OPERATOR TO BE INSERTED]***  
**(registration number [●])**

**Note to Bidders:**

1. Bidder's' attention is drawn to the provisions of the RFP and are reminded to submit "marked-up" versions of the negotiable clauses of this Facility Operator Agreement.
2. As the Facility Operator Agreement has been drafted in general terms, TNPA reserves the right to correct, amend or vary any of the terms of this Facility Operator Agreement to ensure alignment with the preferred Bidders Business Case and the commercial risk allocation between TNPA and the Preferred Bidder based on the Bidders mark ups thereto.
3. **Schedule 7** (Financiers Direct Agreement) will be negotiated and agreed upon between TNPA, the Preferred Bidder and the Lenders of the Preferred Bidder should third-party finance be provided to undertake the project. This Financiers Direct Finance Agreement and the negotiable clauses of the Facility Operator Agreement will be revised to ensure consistency between Facility Operator Agreement and the Financiers Direct Finance Agreement.

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## PART I – GENERAL PROVISIONS

### Definitions and Interpretation

In this Agreement and its Schedules, the following terms shall, unless inconsistent with the context in which they appear, have the following meanings and cognate expressions shall bear corresponding meanings:

- |         |  |   |   |
|---------|--|---|---|
| 1.1.1   | <b>"the Act"</b>                             | - | the National Ports Act, 12 of 20  |
| 1.1.2   | <b>"Actual Operations Commencement Date"</b> | - | the date of Operations Commencement as stated in the Operations Certificate issued by the Independent Certifier in accordance with clause 29.3 (approval to provide services)   |
| 1.1.3   | <b>"Adjusted Debt"</b>                       | - | <b>[●]</b> percent of the Senior Debt less, to the extent it is a positive amount, the aggregate of:  |
| 1.1.3.1 |  |   | the Tender Costs;   |
| 1.1.3.2 |  |   | all credit balances on any bank accounts held by or on behalf of the Facility Operator on the Termination Date;   |
| 1.1.3.3 |  |   | the value of any right of the Facility Operator or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and of any such proceeds actually received by them (save where such credit balances or proceeds are paid to TNPA and or are to be applied in reinstatement); |
| 1.1.3.4 |  |   | sums due and payable from the Subcontractors and any other third parties;   |
| 1.1.3.5 |  |   | all amounts payable by the Lenders (or the counterparties to the interest rate or exchange rate hedging arrangements provided for in the  |

Finance Agreements) to the Facility Operator in connection with the early termination of such hedging arrangements as a result of prepayment of amounts outstanding under the Finance Agreements;

1.1.3.6

the market value of any other assets and rights of the Facility Operator or the Lenders (other than those transferred to TNPA pursuant to this Agreement and, in the case of the Lenders, those assets and rights that do not relate to the Project) less the liabilities of the Facility Operator or the Lenders properly incurred in carrying out its obligations under this Agreement as at the Termination Date or such later date as the assets and rights can be realised, provided that no account shall be taken of any liabilities and obligations of the Facility Operator arising out of:

1.1.3.6.1 agreements or arrangements entered into by the Facility Operator to the extent that such agreements or arrangements were not entered into in connection with the Facility Operator's obligations in relation to the Project; and

1.1.3.6.2 agreements or arrangements entered into by the Facility Operator to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

1.1.3.6.3 amounts that TNPA is entitled to set off or deduct under (*set-off*),

- 1.1.4 **"Adjusted Estimated Project Value"** - the Estimated Project Value of this Agreement less the aggregate of:
- 1.1.3.1 the Calculation Costs; and
- 1.1.3.2 amounts that TNPA is entitled to set off or deduct under **clause 58.11** (*set-off*),
- plus the aggregate of:
- 1.1.3.3 all credit balances on any bank accounts held by or on behalf of the Facility Operator on the date that the Estimated Project Value of this Agreement is calculated; and
- 1.1.3.4 any insurance proceeds, and other undisputed amounts owing to the Facility Operator (and which the Facility Operator is entitled to retain), to the extent not included in clause 1.1.3.3.
- to the extent that:
- 1.1.3.5 the amounts in clauses 1.1.3.3 and 1.1.3.4 have not been directly taken into account in calculating the Estimated Project Value; and
- 1.1.3.6 TNPA has received such amounts in accordance with this Agreement;
- 1.1.4 **"Adjusted Highest Compliant Tender Price"** - the Highest Compliant Tender Price less, to the extent it is positive amount, the aggregate of:
- 1.1.4.1 the Tender Costs; and
- 1.1.4.2 amounts that TNPA is entitled to set off or deduct under clause **Error! Reference source not found.** (*set-off*),

plus the aggregate of:

1.1.4.3 all credit balances on any bank accounts held by or on behalf of the Facility Operator on the date that the highest-priced Tender is received; and

1.1.4.4 any insurance proceeds and other amounts owing to the Facility Operator (and which the Facility Operator is entitled to retain);

to the extent that:

1.1.4.5 the amounts in clauses 1.1.1.3 and 1.1.1.4 have not been directly taken into account in the Highest Compliant Tender Price; and

1.1.4.6 TNPA is entitled to such amounts in accordance with this Agreement

1.1.1.1 the Tender Costs; and

1.1.1.2 amounts that TNPA is entitled to set off or deduct under clause 58.11 (*set-off*),

plus the aggregate of:

1.1.1.3 all credit balances on any bank accounts held by or on behalf of the Facility Operator on the date that the highest-priced Tender is received; and

1.1.1.4 any insurance proceeds and other amounts owing to the Facility Operator (and which the Facility Operator is entitled to retain).

to the extent that:

- 1.1.1.4.1 the amounts in clauses 1.1.1.3 and 1.1.1.4 have not been directly taken into account in the Adjusted Highest Compliant Tender Price; and
- 1.1.1.4.2 TNPA is entitled to such amounts in accordance with this Agreement;
- 1.1.5 **"Agents/the Agent"** - the agent bank appointed by the Lenders as their agent;
- 1.1.6 **"this Agreement"** - this Facility Operator Agreement and its schedules, as amended, extended, replaced and varied from time to time;
- 1.1.7 **"Annual Average Growth"** - the average increase in the value of an investment, portfolio, asset, or cash stream over a period of time;
- 1.1.8 **"Associated Agreement"** - the Construction Agreement, Operations Agreement, the Constitutional Documents and any other agreements entered into by the Facility Operator in respect of the Project (other than the Finance Agreements) that TNPA may designate as falling within this clause 1.1.10;
- 1.1.9 **"Authority Change"** - has the meaning ascribed to it in clause 31 (*Authority Changes*);
- 1.1.10 **"Base Case Financial Model"** - the base case financial model for the Project, which is attached to this Agreement as Schedule 6 and which has been agreed by TNPA, the Facility Operator and the Lenders;
- 1.1.11 **"B-BBEE"** - Broad-Based Black Economic Empowerment;
- 1.1.12 **"BEE Entities"** - Black Economic Empowerment Entities that are wholly owned by previously disadvantaged individuals;

- 1.1.13 **"B-BBEE Improvement Plan"** - the B-BBEE Improvement Plan submitted by the Facility Operator that is annexed to this Agreement as **Error! Reference source not found.** (*B-BBEE Improvement Plan*)
- 1.1.14 **"Berth"** - means the berth 606 or any other berth that TNPA deems suitable to support the Container Handling Facility Annexure;
- 1.1.15 **"Business Day"** - any day that is not a Saturday, Sunday or official public holiday in South Africa;
- 1.1.16 **"Calculation Costs"** - the total of all costs forecast to be incurred by TNPA as a result of termination, which shall be calculated and discounted at the Termination Date Discount Rate, such costs to include (without double counting):
- 1.1.16.1 a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
- 1.1.16.2 the costs of the Services forecast to be incurred by TNPA to the standard required; and
- 1.1.16.3 any rectification costs required to deliver the Services to the standard required (including any costs forecast to be incurred by TNPA to complete development work and additional operating costs required to restore operating services standards),
- 1.1.16.4 in each case such costs to be forecast at a level that will deliver the Services in

accordance with the output specifications;

- 1.1.17 **"Cargo"** - any Cargo that is Containerised and that is not excluded in in **Error! Reference source not found.** (*Scope of Services*);
- 1.1.18 **"Change in Control"** - any change whatsoever in Control whether effected directly or indirectly;
- 1.1.19 **"Change in Law"** - the coming into effect, after the Effective Date, of any Law, or any amendment or variation to any Law, other than any Law that on or before the Effective Date, has been published:
  - 1.1.19.1 in the bill in a form substantially similar to the Law enacted pursuant to such publication; or
  - 1.1.19.2 as an Act but has not been brought into effect;
- 1.1.20 **"Companies Act"** - the Companies Act, 71 of 2008, as amended;
- 1.1.21 **"Compensation Date"** - either:
  - 1.1.21.1 if clause 48.2 (*retendering procedure*) applies, the earlier of:
    - 1.1.21.1.1 the date that the New Facility Operator Agreement is entered into; and
    - 1.1.21.1.2 the date on which TNPA pays the Adjusted Highest Compliant Tender Price or the Remaining Projected Cash Flows, as the case may be, to the Facility Operator; or

- 1.1.21.1.3 if clause 48.3 (*no retendering procedure*) applies, the date that the Adjusted Estimated Project Value of this Agreement has been agreed or determined;
- 1.1.21.2 if clause 49 (*Termination Amount for TNPA Default*) applies, the date on which TNPA pays the Adjusted Debt, to the Facility Operator;
- 1.1.22 "**Compensation Event**" - any breach by TNPA of any of its obligations under this Agreement (save for any breach that constitutes TNPA default), to the extent in each case that the breach is not caused or contributed to by the Facility Operator or any of its Subcontractors, and any other event that is designated in this Agreement to be dealt with in accordance with clause 40 (*Consequences of a Compensation Event*);
- 1.1.23 "**Completion Certificate**" - the certificate to be issued by the Independent Certifier in terms of clause **Error! Reference source not found.** (*completion of Construction Works*) upon the completion of the Construction Works;
- 1.1.24 "**Confidential Information**" - any and all:  
1.1.24.1 information relating to the design of the Facility or to any Intellectual Property Rights of the Facility Operator;
- 1.1.24.2 information in respect of or relating to the Base Case Financial Model as well as such model and each Updated Financial Model; and



- 1.1.24.3 other information which relates to the undertaking or finances of any of the Parties and which is identified by the Party releasing such information as being confidential and the release of which is made in connection with this Agreement;
- 1.1.25 **"Consents"** - any consent, registration, filing, agreement, notarisation, certificate, licence, approval, permit, authority, or any exemption from the aforesaid, by, with or from any Relevant Authority, which is required from time to time in respect of the Project or to be held by the Facility Operator or which has any impact (whether direct or indirect) on the Project or the Facility Operator;
- 1.1.26 **"Constitution"** - the Constitution of the Republic of South Africa Act, 108 of 1996;
- 1.1.27 **"Constitutional Documents"** - the Facility Operator's memorandum of incorporation and registration certificate, as well as the shareholders' agreement, equity subscription agreements and equity guarantees entered into and provided in respect of the Facility Operator and any documents or agreements in respect of any debentures issued by the Facility Operator, all of which are attached to this Agreement as Schedule 3 and the terms all of which are to be to the satisfaction of the TNP;
- 1.1.28 **"Construction Agreement"** - each and every written agreement to be entered into between the Facility Operator and the Construction Contractor in respect of any of the Construction Works, which agreement

shall, in respect of the Construction Works, be in substantially the same form and content as the agreement attached hereto as **Schedule 4**;

- 1.1.29 **“Construction Completion”** - the execution of the Construction Works that are required for the use of the Facility and for the Services to be provided in safety;
- 1.1.30 **“Construction Contractor”** - the person who is appointed as the construction contractor by the Facility Operator in the Construction Agreement in force at the relevant time and any replacement or successor-in-title of such person
- 1.1.31 **“Construction Documents”** - all documents, drawings, data, reports, specifications and other information (whether in printed form or in electronic form) produced in respect of the Construction Works;
- 1.1.32 **“Construction Period”** - the period commencing on the Effective Date and terminating on the issue of the Completion Certificate, and shall not be for a period longer than 18 (eighteen) to 24 (twenty-four) months, *unless otherwise agreed*;
- 1.1.33 **“Construction Performance Guarantee”** - the performance guarantee to be issued by a financial institution, of whom TNPA approves on behalf of the Construction Contractor in respect of the Construction Works in favour of the Facility Operator, substantially in the form of the guarantee attached to this Agreement as Schedule 14 and which is to be on terms to the satisfaction of TNPA;

- 1.1.34 **“Construction Works”** - the construction works and any other design, construction, equipping and commissioning of and in respect of the Terminal Facility pursuant to the Operating Rights but excluding the Operation and Maintenance;
- 1.1.35 **“Containers”** - the 6, 12 and 13.7 meters containers conforming to ISO standards as prescribed by the International Organisation for Standardisation. Any reference in this Agreement to Cargo includes Containers, excluding IMDG cargo, which may not be handled at the Facility except those that have been granted written authority by TNPA;
- 1.1.36 **“Container Handling Facility”** - the land area within the Facility boundary that is demarcated in Schedule 1;
- 1.1.37 **"Contract Year"** - each period of 12 (twelve) consecutive calendar months, commencing on the Effective Date and thereafter commencing on the anniversary of the Effective Date;
- 1.1.38 **"Control"** - in relation to any entity, the ability directly or indirectly to direct or cause the direction of the votes attaching to the majority of its issued shares or interests carrying voting rights, or to appoint or remove or cause the appointment or removal of the majority of the board of directors;
- 1.1.39 **"Corrupt Act"** - any conduct that constitutes an offence under the Prevention and Combatting of Corrupt Activities Act 12 of 2004, including, but not limited to:

1.1.39.1 offering, giving or agreeing to give to TNPA or any other organ of state or to any person employed by or on behalf of TNPA or any other organ of state any gift or consideration of any kind as an inducement or reward:

1.1.39.1.1 for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with TNPA or any other organ of state;  
or

1.1.39.1.2 for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with TNPA or any other organ of state;

1.1.39.2 entering into this Agreement or any other contract with TNPA or any other organ of state in connection with which commission has been paid or has been agreed to be paid by the Facility Operator or on its behalf, or to its knowledge, unless before this Agreement is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment of such commission have been disclosed in writing to TNPA;

1.1.39.3 committing any offence in connection with this Agreement:

1.1.39.3.1 under any law from time to time dealing with bribery, corruption or extortion;

1.1.39.3.2 under any law creating offences in respect of fraudulent acts; or

- 1.1.39.3.3 at common law, in respect of fraudulent acts in relation to this Agreement or any other contract with TNPA or any other public body; or
- 1.1.39.3.4 defrauding or attempting to defraud or conspiring to defraud TNPA or any other public body in relation to this Agreement.
- 1.1.40 "CPI"
- the consumer price index excluding interest on mortgage bonds, for metropolitan and other urban areas (Base 2000=100) published from time to time by Statistics SA in Statistical Release P0141.1, provided that if, after the Signature Date:
    - 1.1.40.1 such index ceases to be published; or
    - 1.1.40.2 the Facility Operator and TNPA agree or, failing agreement, if it is determined pursuant to clause 56.7 (*fast-track dispute resolution*) that, due to a change in circumstances, the index is no longer representative,
- 2 then, from the date that the index was last published, the Parties shall use such other index as agreed between them or, failing agreement, as determined pursuant to clause 56.7 (*fast-track dispute resolution*) as being a fair and reasonable replacement index;
- 1.1.41 "Day"
- any period of 24 (twenty four) hours that starts at 00h01 and ends at 24h00;
- 1.1.42 "D&C Specifications"
- the design and construction specifications detailed in **Schedule 1**;
- 1.1.43 "Debt"
- means, at any date, all amounts due and payable by the Seller that are outstanding

- under the Financing Agreements at that date, excluding Shareholder Loans or interest thereon and all default interest;
- 1.1.44 **“Decommissioning Costs”** - the costs of decommissioning the Facilities upon the termination of this Agreement, whether prematurely or due to the effluxion of time, which costs must, at a minimum, include the costs of undertaking the following:
- 1.1.44.1 the rehabilitation of any adverse environmental impacts of the listed or specified activities detailed in the environmental consents;
- 1.1.44.2 the rehabilitation of any impacts such as pollution, waste or hazardous material pursuant to making the Facility available and the handling of containerised cargo;
- 1.1.44.3 the removal and disposal of waste, including any waste associated with any storage technologies;
- 1.1.44.4 securing, making safe, decommissioning, isolation and closure of the Facility and supporting infrastructure;
- 1.1.44.5 remediation of latent or residual environmental impacts which become identifiable pursuant to the Consents;
- 1.1.44.6 demolition and removal of buildings, structures, plant, equipment and other objects including subsurface, foundations and services;

- 1.1.44.7 consideration and management of the heritage requirements of each Facility;
- 1.1.44.8 compliance with all Laws applicable to the decommissioning, demolition or rehabilitation process;
- 1.1.44.9 obtaining all necessary permits or approvals for decommissioning, demolition, remediation and rehabilitation; and/or
- 1.1.44.10 remediation of any other negative environmental impacts;
- 1.1.45 **"Deemed New Facility Operator Agreement"**
- a contract on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:
- 1.1.45.1 if this Agreement is terminated prior to the Operations Date, then the Operations Date shall be extended by a period to allow a New Facility Operator to achieve Operations;
- 1.1.45.2 any penalties accrued in terms of **Schedule 11** shall be cancelled; and
- 1.1.45.3 the term of such contract shall be for a period equal to the term from the Termination Date to the Expiry Date;
- 1.1.46 **"Detailed Designs"**
- the detailed design for the Construction Works, which is to be prepared by the Facility Operator and reviewed and approved by the Independent Certifier, in terms of **clause Error! Reference source not found.** (*performance of*

- Preliminary Design and Detailed Design*) and the Detailed Design Procedure;
- 1.1.47 **Detailed Designs Procedure**” - the procedure in respect of the preparation and approval of the Detailed Design that is contained in the D&C Specifications;
- 1.1.48 **Direct Finance Agreement**” - the Direct Finance Agreement to be entered into between TNPA, the Facility Operator and the Lenders, which shall be substantially in the form and substance of the agreement attached to this Agreement as **Schedule 7**;
- 1.1.49 **"Distributions"** - whether in cash or in kind, any:
- 1.1.49.1 dividend or other distribution of share capital;
- 1.1.49.2 reduction of share capital, stated capital, any capital redemption fund or any share premium account;
- 1.1.49.3 cancellation, conversion, redemption or repurchase of shares or any other variation whatsoever in share capital;
- 1.1.49.4 payment in respect of the shareholder loans (whether of principal, interest, breakage costs or otherwise);
- 1.1.49.5 payment, loan or other financial assistance, transfer of rights or other assets or receipt of any other benefit to the extent put in place after the Signature Date and not in the ordinary course of business, on an arm’s-length basis or otherwise on reasonable commercial terms to any shareholders or their Related Parties in respect of the Project; or



- 1.1.49.6 any release of any contingent liability of any of the Facility Operator's shareholders or their Related Parties in respect of their financial obligations to the Facility Operator and or the Lenders, including any security company or trust holding any security in respect of the Finance Agreements for the benefit of the Lenders;
- 1.1.50 **"Effective Date"** - the first Business Day following on the day of the Signature Date;
- 1.1.51 **"Environment"** - the surroundings within which humans exist and that are made up of:
- 1.1.51.1 the land, water and atmosphere of the earth;
- 1.1.51.2 micro-organisms, plant and animal life;
- 1.1.51.3 any part or combination of 1.1.51.1 and 1.1.51.2 and the interrelationships among and between them; and
- 1.1.51.4 the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;
- 1.1.52 **"Environmental Authorisations" or "Environmental Consents"** - any authorisations or consents to be obtained from the Relevant Authority in compliance with the Environmental Laws in order to perform the Project Deliverables;
- 1.1.53 **"Environmental Laws"** all applicable laws (including general remedies and duties of care), statutes, regulations, statutory guidance notes and final and binding court and other tribunal decisions of any

relevant jurisdiction in force and binding on the Facility Operator at the date of this Agreement whose purpose is:

1.1.53.1 to protect, or prevent pollution of, or to remedy damage to the Environment;

1.1.53.2 to protect or prevent or compensate harm to human health and safety; or

1.1.53.3 to regulate emissions, discharges, or releases of Hazardous Substances into the Environment, or to regulate the use, treatment, storage, burial, disposal, transport or handling of Hazardous Substances,

and all by laws, codes, regulations, decrees or orders issued or promulgated or approved thereunder for such purposes to the extent that the same have force of law and are binding either or both of TNPA and the Facility Operator at the date of this Agreement;

1.1.54 **"Environmental Management Plan"**

- the environmental management plan and system prepared in respect of the Project for the monitoring and management of environmental issues raised as a result of the Environmental Impact Assessment and based on TNPA's environmental policy and any Environmental Consents issued in respect of the Project pursuant to the Environment and the Environmental Laws;

1.1.55 **"Equipment"**

- the moveable assets in the Facility, including cargo handling equipment, the current

- composition of which is attached Schedule ***[insert]***;
- 1.1.56 "Equity" - any shares issued in the authorised share capital of the Facility Operator , any share premium on such issued shares, any debentures issued by the Facility Operator and any loans to the Facility Operator by its shareholders or debenture-holders;
- 1.1.57 "Equity IRR" - the projected blended rate of return to the Facility Operator's shareholders and their Related Parties over the full Operating Term, having regard to Distributions made and forecast to be made and as detailed in the Base Case Financial Model;
- 1.1.58 "Estimated Project Value" - the amount determined in accordance with **clause 48.3** (*no retendering procedure*) that a third party would pay to TNPA as the market value of the Deemed New Facility Operator Agreement;
- 1.1.59 "Exempt Refinancing" - any Refinancing:
- 1.1.59.1 that effects any sale or cession of the Equity or securitisation of the rights attaching to the Equity, provided that the exemption contemplated in **clause 35** (*Refinancing*) in relation to any such transaction shall not limit the application of **clause 18** (*Shareholding in the Facility Operator*);
- 1.1.59.2 required to raise the nominal post tax Equity IRR calculated immediately prior to the Refinancing (having regard to the Updated

Financial Model, as updated to that time) to the nominal post tax Equity IRR at the Signature Date (having regard to the Base Case Financial Model, being [●]%), except if such Refinancing may increase the amounts payable by TNPA on termination of the Agreement; or

1.1.59.3 that was taken account of fully in the calculation of the Unitary Payment;

1.1.59.4 that arises solely from a change in taxation or accounting treatment;

1.1.59.5 that comprises waivers, approvals and similar actions arising in the day-to-day administration of breaches of warranties or representations or other provisions or late or non-provision of required information under any of the subcontracts;

1.1.59.6 that effects any syndication, sell-down, cession or grant of any rights of participation or security by any Lender (or any agent acting on its behalf, or any security company or trust holding any security in respect of the Senior Debt for the benefit of the Lenders) of or in relation to any of its rights under any of the Finance Agreements in favour of any Qualifying Financial Institution, which is not already connected in any way to the Project;

1.1.60 "Expert" - has the meaning ascribed to it in **clause 55** (*Expert Determination*) of this Agreement;

1.1.61 "Expiry Date" - the expiry date of this Agreement;

- 1.1.62 **"the Facility"**
- the container terminal facilities at the Port of Richards Bay, the Facility, **the Private Siding**, the Terminal Infrastructure and all other fixed and movable improvements to the Project Site and all plant, Equipment and machinery (whether or not affixed to the Project Site and including the **2 (two) gantry cranes**) provided on and adjacent to the Project Site in order to provide the Services,;
- [the definition of "Facility" will need to be amended to refer to the specific facilities that are to be provided by the Operator. This definition will also have to take into account exactly which parts of the Facility are already constructed, and which parts still need to be constructed]*
- 1.1.63 **"FDA"**
- Finance Direct Agreement to be entered into between TNPA, the Facility Operator and the Lenders, which shall be substantially in the form and substance of the agreement attached to this Agreement as **Schedule 8**;
- 1.1.64 **"Final Maintenance Guarantee"**
- the final maintenance guarantee to be issued by a financial institution (of whom TNPA approves) in favour of TNPA on behalf of the Facility Operator, which shall be substantially in the form of the guarantee attached to this Agreement as Schedule 17 and shall be on terms to TNPA's satisfaction;
- 1.1.65 **"Finance Agreements"**
- the agreements entered into by the Facility Operator and the Lenders (amongst others) in respect of the provision of loan facilities, credit

facilities, hedging arrangements (~~(~~excluding any hedging arrangements in respect of any exposure of the Facility Operator to any foreign currencies and any fluctuations of the Rand against any foreign currencies~~)~~) and guarantee facilities provided to the Facility Operator for the purpose of financing the Facility Operator's obligations in respect of the Project and under this Agreement, and any security documents in relation to such financing, all of which are substantially in the forms attached to this Agreement as **Schedule 7** and shall be on terms to TNPA's satisfaction;

- 1.1.66 **"Financial Model"** - means the financial base case for the Project as reflected in the computer model to be attached to this Agreement on an electronic storage device that can be used to store data, as provided for in **Schedule 5** (*Financial Model*), which model incorporates the forecast cash flow statements of the Seller including all expenditure, revenues, taxation and financing of the Construction, Operation and Maintenance of the Facility together with the income statements and balance sheets for the Seller over the Term, and details of all assumptions, calculations and methodology used in the compilation thereof
- 1.1.67 **"Force Majeure"** - has the meaning ascribed to it in **clause 41** (*Force Majeure*);
- 1.1.68 **"Force Majeure Event"** - any event of Force Majeure;
- 1.1.69 **"Hazardous Substances"** - means:

- 1.1.69.1 any petroleum or petroleum products, radioactive materials, asbestos in any form, urea formaldehyde foam insulation, transformers or other equipment that contain dielectric fluid containing regulated levels of polychlorinated biphenyls (PCBs) and radon gas; and
- 1.1.69.2 any pollutants, contaminants, pesticides, chemicals, materials or other substances (including any special, dangerous or toxic wastes) defined as or included in the definition of “pollutant,” “hazardous substances,” “hazardous wastes,” “hazardous materials,” “extremely hazardous wastes,” “restricted hazardous wastes,” “toxic substances,” “toxic pollutants,” or other words of similar import, by any Relevant Authority;
- 1.1.70 **Highest Compliant Tender Price**
- the price offered by the Tenderer (if any) with the highest tender price and, if no Tenders are received, zero;
- 1.1.71 **"IMDG Code"**
- the International Maritime Dangerous Goods Code published by the International Maritime Organisation;
- 1.1.72 **"IFRS"**
- means the International Financial Reporting Standards;
- 1.1.73 **"Independent Certifier"**
- the person appointed by the Facility Operator in respect of the Project, and whose duties are specified in this Agreement under clause [insert clause number] (*Independent Certifier*), the Construction Agreement, the Operations

Agreement and the Independent Certifier Agreement;

**1.1.74 "Independent Certifier**

**Agreement"**

- the agreement entitled the "Independent Certifier Agreement", entered into on or about the Effective Date, between the Facility Operator and the Independent Certifier;

**1.1.75 "Independent Expert"**

- shall mean:

**1.1.75.1**

an accountant of not less than 10 (ten) years professional experience or investment banker agreed to between the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants: Northern Region, if the matter relates primarily to a financial matter; or

**1.1.75.2**

an attorney or advocate of not less than 10 (ten) years professional experience agreed to between the Parties, and failing agreement nominated (at the request of either Party) by the Chairman for the time being of the Law Society of the Northern Provinces, if the matter relates primarily to a legal matter; or

**1.1.75.3**

an engineer of not less than 10 (ten) years professional experience agreed to between the Parties and failing agreement nominated (at the request of either Party) by the President for the time being of the Engineering Council of South Africa, if the matter relates primarily to an engineering matter; or



1.1.75.4

[a port facilities manager of not less than 10 (ten) years professional experience agreed to between the Parties and failing agreement nominated (at the request of any Party) by the President for the time being of South African Facilities Management Association, if the matter relates primarily to a port facilities management matter;]

1.1.76 "Intellectual Property Rights"

- all registered or unregistered trademarks, service marks, patents, design rights (whether the aforementioned rights are registered, unregistered or formed pending applications), utility models, applications for any of the foregoing, copyrights (including copyright in any software programmes, data and documents), database rights, the *sui generis* rights of extraction relating to databases and any similar or analogous rights to any of the above, whether arising or granted under the Laws or any other jurisdiction;

1.1.77 "Insurance"

- the project insurance that the Facility Operator is required to purchase and maintain in terms of **clause 16** (*Project Insurance*);

1.1.78 "International Best Practice"

- in relation to the commissioning of the Facility, and in relation to the provision of the Operation and Maintenance and the Services, the exercise of that degree of skill, diligence, prudence, foresight and operating practice that would reasonably and ordinarily be expected from a skilled and experienced person engaged in providing a facility similar to the

Facility or the same type of business as the Services (irrespective of whether or not that facility or that business is conducted by or on behalf of any organ of State), under the same or similar circumstances;

1.1.79 **"ISPS Code"**

- means the International Ship and Port Facility Security Code as referred to in the Merchant Shipping (Maritime Security) Regulations, 2004 published under Government Notice R751 in Government Gazette 26488 of 21 June 2004;

1.1.80 **"Laws"**

- the Constitution, the common law, Legislation, and all judicial decisions and any notifications or other similar directives made pursuant thereto that have the force of law, issued by any executive, legislative, judicial or administrative entity in South Africa or by TNPA or the municipality in which the Port is located;

1.1.81 **"Legislation"**

- all applicable statutes, statutory instruments, by-laws, regulations, orders, rules, executive orders and other secondary, provincial or local legislation, treaties, directives and codes of practice having the force of law in South Africa;

1.1.82 **"Lenders"**

- any or all of the persons (other than providers of Equity) which provide loan facilities, credit facilities or guarantee facilities to the Facility Operator or enters into hedging arrangements with the Facility Operator (other than hedging arrangements in respect of the Facility Operator's exposure to any foreign currencies and any fluctuations of the Rand against any

foreign currencies)] in respect of the Project, in terms of the Finance Agreements;

- 1.1.83 **"Losses"** - losses, damages, liabilities, claims, actions, proceedings, demands, costs, charges or expenses of any nature in respect of the Project;
- 1.1.84 **"Management Agreement"** - means the operation and management agreement entered into between the Facility Operator and the Management Company on or by the Effective Date
- 1.1.85 **"Management Company"** - *[insert name of management company]*
- 1.1.86 **"Maximum Payment"** - in respect of a month or part thereof, the maximum interest and capital payment to the Lenders payable during that month;
- 1.1.87 **"Member"** - in relation to any Respondent, any legal entity and or natural person which will become a Shareholder (either itself or through an intermediary entity) once the Project Company is incorporated to undertake the Project, and if the Project Company has already been incorporated, then any Shareholder;
- 1.1.88 **"New Facility Operator Agreement"** - a contract on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:
  - 1.1.88.1 if this Agreement is terminated prior to the Operations Date, then the Scheduled Operations Date shall be extended by a period to allow the Successor Facility Operator to achieve Operations Commencement on or

- before the extended Scheduled Operations Date;
- 1.1.88.2 any penalties accrued in terms of **Schedule 11** and or warning notices shall be cancelled;
- 1.1.88.3 the term of such contract shall be a period equal to the period from the **[Termination Date]** until the Expiry Date; and
- 1.1.88.4 any other amendments, which do not adversely affect the Facility Operator;
- 1.1.89 **"Operating Performance Guarantee"**
- the performance guarantee to be issued by a financial institution (of whom TNPA approves) on behalf of the Operator in favour of the Facility Operator, substantially in the form of the guarantee attached to this Agreement as **Schedule 16** and the terms of which are to be to the satisfaction of TNPA;
- 1.1.90 **"Operating Rights"**
- all the rights and obligations conferred and imposed on the Facility Operator in terms of and pursuant to this Agreement in respect of and for the purposes of carrying out the Project;
- 1.1.91 **"Operating Specifications"**
- the specifications and standards in accordance with which the Services are to be provided, the Operation and Maintenance conducted and the Facility is to be maintained and upgraded, all of which are detailed in **Schedule 2**;

- 1.1.92 "Operating Term" - the period for which the Operating Rights are granted to the Facility Operator, which period is as detailed in **clause 4** (*Duration of this Agreement*);
- 1.1.93 "Operation and Maintenance" - all operation and maintenance activities in respect of the Project, that are requirement in order to provide the Services and for the operation and maintenance of the Facility, in accordance with the requirements of Schedule **[•]** of this Agreement, the Operating Specifications and International Best Practice;
- 1.1.94 "Operations Agreement" - the agreement to be entered into between the Facility Operator and the Operator in respect of the Operation and Maintenance of the Facility, which agreement shall be in substantially the same form and content as the agreement attached as **Schedule 5**;
- 1.1.95 "Operations Certificate" - the certificate to be issued by the Independent Certifier in terms of **clause Error! Reference source not found.** (*inspection*) as the date on which the Operating Term may commence;
- 1.1.96 "Operations Commencement" - the commencement of the Services subsequent to the Operations Date;
- 1.1.97 "Operations Date" - the date, following the issue of the relevant notice and licence by TNPA, on which the Facility Operator shall be entitled to provide the Services;

- 1.1.98 "**Operations Period**" - the period from the Operations Date until the end of the Operating Term;
- 1.1.99 "**Operator**" - the person who is appointed as the Operation and Maintenance contractor by the Facility Operator in the Operations Agreement, and any replacement or successor-in-title of such person;
- 1.1.100 "**Parties**" - TNPA and the Facility Operator;
- 1.1.101 "**Payment Expert**" - a chartered accountant of not less than 10 (ten) years professional experience or investment banker as agreed to between the Parties, and failing agreement, nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants, if the matter relates primarily to a financial matter or financial management matter;
- 1.1.102 "**Performance Guarantees**" - the Operating Performance Guarantee and the Final Maintenance Guarantee;
- 1.1.103 "**Permitted Borrowing**" - at any time after the Signature Date, any advance made to the Facility Operator under the Finance Agreements for the purposes specified therein;
- 1.1.104 "**PFMA**" - the Public Finance Management Act, 1 of 1999;
- 1.1.105 "**the Port**" - the Port of Richards Bay, which been established in terms of the Act and which is situated in Richards Bay in the KwaZulu-Natal province of South Africa;

- 1.1.106 **"Port Facility Security Officer"** - a security officer responsible for the day-to-day security of the port facility where they are employed;
- 1.1.107 **"Port Infrastructure"** - the basic common use structures of the Port of Richards Bay, including the Berths, breakwaters, seawalls, channels, basins, quay walls, jetties, roads, railways and infrastructure used for the provision of water, lights, power, sewage and similar services, other than the Terminal Infrastructure;
- 1.1.108 **"Port Rules"** - any rules, by-laws, regulations and delegated legislation issued from time to time in respect of the operate of the Port specifically or ports in South Africa generally and or in respect of the behaviour, conduct and manner of conducting business of users of the Port specifically or ports in South Africa generally;
- 1.1.109 **"Port Users"** - any other person, organisation and or agency utilizing the facilities of the Port and or conducting business within the Port limits, including shipping lines, vessel agents, licenced operators, operators of other terminals within the Port and any Subcontractor and or any third parties authorised to conduct business on behalf of any Port User;
- 1.1.110 **"Private Siding"** - a railway line in private use which is connected to TNPA's railway lines by means of an agreed turnout, as well as any associated shunting yard, marshalling yard, the siding and siding extension or any section of railway line which

provides access between TNPA's railway lines and the Terminal, as described in Schedule [●]; *[Parties to confirm whether the Facility Operator will be required to obtain a safety permit issued in terms of the National Railway Safety Regulator Act 16 of 2002.]*

- 1.1.111 "Project" - the finance, Operation and Maintenance of the Facility at the Port of Richards Bay and to provide the Services, as detailed in this Agreement;
- 1.1.112 "Project Company" - *[insert name of the project company];*
- 1.1.113 "Project Deliverables" - the principal rights and obligations of the Facility Operator, as specified in Schedule [●] of this Agreement;
- 1.1.114 "Project Documents" - all drawings, data, books, reports, documents, software, source codes and manuals and other information, which the Facility Operator, and or Operator has or have been using and which are necessary for the continuing Operation and Maintenance;
- 1.1.115 "Project Site" - the site detailed in **Schedule 12**, which includes the Facility and the Port Infrastructure, provided by TNPA to the Facility Operator for use in respect of the Project;
- 1.1.116 "Provisional Operations Certificate" - the certificate to be issued by the Independent Certifier prior to Construction Completion when, in the reasonable opinion of the Independent Certifier, Construction Completion is likely to be achieved by the



Construction Contractor by the date specified in the certificate;

1.1.117 **"Qualifying Financial Institution"**

- a bank as defined in section 1 of the Banks Act, 1990, any pension fund or provident fund registered in terms of the Pension Funds Act, 1956, any unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981, any long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 or any short-term insurer being a person registered or deemed (in terms of the Short Term Insurance Act, 1998) to be registered as a short-term insurer in that statute, or any financial institution that is established outside of South Africa in accordance with legislation in the place of its establishment, which legislation is analogous with any of the aforementioned legislation;

1.1.118 **"Rand" or "R"**

- the lawful currency of South Africa;

1.1.119 **"Rectification Costs"**

- for the purposes of any Termination Date that occurs during the Operations Period, an amount equal to the reasonable and proper costs incurred by TNPA in ensuring that the Services are available;

1.1.120 **"Refinancing"**

- at any time after the Signature Date:

1.1.120.1

any material amendment, assignment, novation, replacement or supplementing of any of the Finance Agreements and or the Constitutional Documents, whether independently or in combination with any connected arrangements;

- 1.1.120.2 the exercise of any right or grant of any waiver, indulgence or approval under any of the Finance Agreements (other than a Permitted Borrowing) and or the Constitutional Documents;
- 1.1.120.3 the disposition or encumbering (by whatever means) of any rights under any of the Finance Agreements and or the Constitutional Documents or the creation or granting of any other benefit or interest in any of the Finance Agreements and or the Constitutional Documents or any of the Facility Operator's other contracts, revenues or the Facility; and or
- 1.1.120.4 any other arrangements having any of the effects in clauses 1.1.120.1 to 1.1.120.3 (inclusive);
- 1.1.121 **"Refinancing Gain"** - in relation to any Refinancing (other than an Exempt Refinancing), an amount equal to the greater of nil and  $[(A - B) - C]$ , where:
- 1.1.121.1 A = the net present value of the Distributions forecast immediately prior to such Refinancing (having regard to the Updated Financial Model, as updated to that time), taking into account the effect of the Refinancing, to be made over the remaining Operating Term;
- 1.1.121.2 B = the net present value of the Distributions forecast immediately prior to such Refinancing (having regard to the Updated Financial Model, as updated to that time), not taking into account the effect of the Refinancing, to be made over the remaining Operating Term; and

- 1.1.121.3 C = any adjustment required to raise the nominal post tax Equity IRR calculated immediately prior to such Refinancing (having regard to the Updated Financial Model, as updated to that time) to the nominal post tax Equity IRR as at the Signature Date (having regard to the Base Case Financial Model, such IRR being  $[●]P\%$ );
- 1.1.122 "Related Party" - a person who:
- 1.1.122.1 directly, or indirectly through one or more intermediaries, controls, or is controlled by, a person who holds, at least 5% Equity in the Facility Operator;
- 1.1.122.2 is under common control with any person who holds at least 5% Equity in the Facility Operator; or
- 1.1.122.3 any person who holds at least 5% Equity in the Facility Operator,
- where "**control**" in respect of any person means the power to direct the management and policies of such person, whether through the holding of voting rights or the ability to nominate and or appoint a majority of the directors or through any contractual arrangement (whether at Law or pursuant to a contractual arrangement) and the term "controlled" has a cognitive meaning;
- 1.1.123 "Related Party Transaction" - any transaction relating in any way directly or indirectly to the Project in which the Facility Operator or any Subcontractor of the Facility

Operator leases, transfers or otherwise disposes of any of its properties or assets to, or purchases any property or assets from, or enters into any contract, agreement, understanding, loan, advance or guarantee with, or for the benefit of, a Related Party (other than the Facility Operator), but excluding the Finance Agreements;

- 1.1.124 **"Relevant Authority"** - National and or Provincial legislature, any agency, local authority, department, inspectorate, minister, ministry, official or public or statutory person (whether autonomous or not) having jurisdiction over any or all of the Parties or the subject matter of this Agreement. A Relevant Authority shall not include any Utility operator or provider;
- 1.1.125 **"Relief Event"** - any of the following:
- 1.1.125.1 fire, explosion, tempest, flood, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, drought, cyclone, riot and civil commotion (including protestor action), or act of sabotage, or pressure waves caused by devices travelling at supersonic speed;
- 1.1.125.2 (without limiting the obligations of the Facility Operator regarding service level specifications) failure by any Relevant Authority, Utility or other like body to carry out works or provide services;
- 1.1.125.3 accidental loss or damage to the Facilities;

- 1.1.125.4 off-site failure or shortage of power, fuel or transport;
- 1.1.125.5 blockade or embargo which does not constitute a Force Majeure Event;
- 1.1.125.6 the discovery of any heritage objects or resources or conditions on the Project Site that could not reasonably have been foreseen or discovered by proper due diligence, by the Facility Operator;
- 1.1.125.7 [~~any~~ delay in obtaining any Consent, other than due to any act, omission or delay by the Facility Operator]; or
- 1.1.125.8 any official or unofficial strike, lockout, go slow or other such labour disputes generally affecting the shipping or port industries or a significant sector of either of them,  
  
unless any of the events listed in clauses 1.1.125.1 to 1.1.125.8 inclusive arises (directly or indirectly) as a result of any negligence, wilful act or default of the Facility Operator or any Subcontractor;
- 1.1.126 **"Remaining Projected Cash Flows"** - the net present value of the projected cash flows for the remaining period, calculated based on the average of the Facility Operator's actual cash flows for the previous 5 years multiplied by the number of remaining years of the Project Term, adjusted by the Average Annual Growth based on such previous 5 years;

- 1.1.127 "Rental"-the **[fixed]** fee payable by the Facility Operator to TNPA, in respect of the rights to use the Project Site, which fee shall be determined by TNPA per square meter (in South African Rand) based on a fixed escalation of 9% **[per annum]** and shall be paid **[monthly]**, commencing on the **[Effective Date]**
- 1.1.128 "Schedules" - the schedules to this Agreement, as amended, replaced and varied from time to time;
- 1.1.129 "Scheduled Operations Commencement Date" - 30 (thirty) Business Days following the date of the Signature Date, which is the date provision of which the Services are required to have commenced;
- 1.1.130 "Senior Debt" - the amount owed to the Lenders and or the hedging counterparties (as the case may be), subject to **clause 37 (Foreign Exchange Risk)**, and calculated at the relevant date by deducting from the aggregate of the items listed at clause 1.1.130.1 the amount described in clause 1.1.130.1.2, determined as set out below and (save in the case of manifest error) as certified to TNPA by the Agent:
- 1.1.130.1 all outstanding amounts owing by the Facility Operator to the Lenders and the hedging counterparties under the Finance Agreements including, without limitation:
- 1.1.130.1.1 the principal amounts owing by the Facility Operator to the Lenders under the Finance Agreements;

1.1.130.1.2 amounts necessary to discharge the Facility Operator's obligations under hedging agreements, subject to clause 37 (*Foreign Exchange Risk*);

1.1.130.1.3 interest, fees, commissions, liabilities, expenses and costs (including breakage costs) payable by the Facility Operator to the Lenders under the Finance Agreements and under hedging agreements (excluding, for any Finance Agreement other than any hedging agreement, fees or other mandatory additional payments required to be paid exclusively in respect of the early repayment of the principal of any loan or guarantee or the early payment of rental under any lease before its normal maturity or compensation for the loss of future interest from the date of early repayment of the principal of any loan or guarantee or the early payment of rental under any lease before its normal maturity);

1.1.130.1.4 any amounts payable by the Facility Operator to the Lenders and under hedging agreements by virtue of market disruption provisions, increased costs, stamp duties and indemnities;

1.1.130.2 the aggregate of:

1.1.130.2.1 any net amounts payable to the Facility Operator under the hedging agreements; and

1.1.130.2.2

to the extent that they have not been applied towards reducing the amount in **clause 1.1.130.1.1** above before the date of payment pursuant to **clause 53** (*Payment of Termination Amount*), an amount equal to the aggregate of all credit balances on any bank accounts held by or on behalf of the Facility Operator over which the Lenders (or the Agent) have enforced their security; but

1.1.130.2.3

excluding any compensation in respect of additional tax liabilities arising solely as a result of early termination, other disposal or variation of finance leases or other debt instruments;

1.1.131 "**Services**"

- the provision of services at the Facility in respect of the [loading and unloading of containers from vessels berthed in the Port for that purpose and the storage of such containers until removed from the Facility, the transshipment of containers, the loading of containers onto vehicles and rail wagons and services related thereto], which services are more fully described in and are to be provided in accordance with the specifications and standards detailed in Operating Specifications;

1.1.132 "**Signature Date**"

- the date on which this Agreement has been signed by both Parties and, if signed on different dates, the last of such dates;

1.1.133 "**South Africa**"

- the Republic of South Africa;

1.1.134 "**Subcontract**"

- the operation subcontract;



- 1.1.135 **"Subcontractors"** - any subcontractor of the Facility Operator, who has contracted directly with the Facility Operator in respect of the Project;
- 1.1.136 **"Substitute Entity"** -a person duly and properly appointed to be the new Facility Operator in the place and stead of the Facility Operator in terms of the FDA;
- 1.1.137 **"Successor Facility Operator"** - any person who has been appointed in terms of Part VI to take over the Operation and Maintenance and provide the Services in the place of the Facility Operator;
- 1.1.138 **"Suitable Substitute Facility Operator"** - a person approved by TNPA as:
- 1.1.138.1 having the appropriate technical and financial ability to perform the rights and obligations of the Facility Operator under this Agreement;
- 1.1.138.2 employing persons having the appropriate qualifications, experience and technical competence;
- 1.1.138.3 having sufficient resources available to it (including financial resources and sub contracts) to perform the obligations of the Facility Operator under this Agreement; and
- 1.1.138.4 having the same, or more favourable policies to ensure that there is no reduction in BBBEE.
- 1.1.139 **"Supplier Development Plan"** - the Facility Operator's Supplier Development Plan as set forth in **Schedule 10B** hereto;

- 1.1.140 **"Target Completion Date"** - the date by which Construction Completion is, at the Signature Date, intended to occur, which date is specified in **Schedule 22**;
- 1.1.141 **"Tax"** - VAT, any tax, levy, impost, duty or other charge or withholding of a similar nature (including any related penalty or interest);
- 1.1.142 **"Tender"** - any tender submitted by a Tenderer that meets the qualification criteria notified under clause 48.2 (*retendering procedure*);
- 1.1.143 **"Tenderer"** - a tenderer who is a Suitable Substitute Facility Operator having submitted a Tender that complies with the requirements of the Request for Proposal issued by TNPA in relation to the New Facility Operator Agreement;
- 1.1.144 **"Tender Costs"** - the reasonable and proper costs of TNPA incurred in carrying out the Tender Process;
- 1.1.145 **"Tender Process"** - the process by which TNPA requests tenders from any parties interested in entering into a New Facility Operator Agreement, evaluates the responses from those interested parties and negotiates the conclusion of a New Facility Operator Agreement with a Successor Facility Operator, in accordance with **clause 48.2** (*retendering procedure*);
- 1.1.146 **"Tender Process Monitor"** - a third party appointed by the Facility Operator under **clause 48.2** (*retendering procedure*).
- 1.1.147 **"Terminal Infrastructure"** - the land-based structures, including the storage facilities, terminal buildings, sheds, workshops, substations, surfacing and the

internal network for the provision of water, lights, power, sewerage and similar services within the Terminal boundaries demarcated in Schedule [●];

- 1.1.148 "Termination Amount" - the amount payable on termination of this Agreement in terms of Part VI;
- 1.1.149 "Termination Calculation Expert" - an accountant of not less than *[insert]* years professional experience or investment banker agreed to between the Parties, and failing agreement, nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants, if the matter relates primarily to a financial matter;
- 1.1.150 "Termination Date" - any dates on which this Agreement is terminated in accordance with its terms, other than by way of effluxion of time;
- 1.1.151 "Termination Date Discount Rate" - a discount rate expressed as:
- 1.1.151.1 
$$\frac{1}{[(1 + \text{Real Base Case Project IRR} + \text{Bond B} - \text{Bond A})^i (1 + i) - 1]}$$
- where:
- 1.1.151.2 "i" is the agreed assumed forecast rate of increase in the South African Reserve Bank's prevailing long-term inflation target;
- 1.1.151.3 "Bond A" is the real yield to maturity on a benchmark government bond instrument of the same or closest possible maturity as the

average life of the Debt as at the Signature Date;

1.1.151.4 "Bond B" is the real yield to maturity on a benchmark government bond instrument of the same or closest possible maturity as the average life of the Debt as at the Termination Date; and

1.1.151.5 "Real Base Case Project IRR" means the real pre-tax Project internal rate of return as set out in the Financial Model;

1.1.152 "TNPA" - the Transnet National Ports Authority of South Africa, an operational division of Transnet;

1.1.153 "Transnet" - Transnet SOC Limited, registration number 1990/000900/06, as incorporated pursuant to the Legal Succession to the South African Transport Services Act, 9 of 1980;

1.1.154 "Unforeseeable Conduct" - such conduct shall occur if, after the Signature Date, TNPA or any Relevant Authority takes any action (including the introduction, application, or change of any law, regulation, by-law or order having the force of law) or fails to carry out its obligations as prescribed by law:

1.1.154.1 the principal effect of which is directly borne by:

1.1.154.1.1 the Project and not other similar transactions;

1.1.154.1.2 the Facility Operator and not other persons; or

- 1.1.154.1.3 parties undertaking port terminal operations and not other persons;
- 1.1.154.2 in respect of which the Facility Operator is not entitled to any other relief pursuant to any other provisions of this Agreement;
- 1.1.154.3 which was not foreseen by the Facility Operator on or before the Signature Date; and
- 1.1.154.4 which could not reasonably have been foreseen by any person in the position of the Facility Operator on or before the Signature Date;
- provided that:
- 1.1.154.5 Unforeseeable Conduct shall be deemed not to have occurred under circumstances where any action or omission of TNPA or Relevant Authority is in direct response to any act or omission of the Facility Operator which is illegal (other than an act or omission rendered illegal by virtue of such conduct of TNPA or Relevant Authority) or in violation of agreements to which the Facility Operator is a party;
- 1.1.154.6 an increase in taxes of general application which does not discriminate against TNPA or against TNPA and other parties undertaking similar transactions shall be deemed not to be Unforeseeable Conduct; and
- 1.1.154.7 Unforeseeable Conduct shall be deemed not to have occurred if such conduct by TNPA or any Relevant Authority is required as a result of an

- event of Force Majeure and is reasonably proportionate thereto;
- 1.1.155 **"Updated Financial Model"** - the Base Case Financial Model as amended and updated from time to time in terms of the FDA;
- 1.1.156 **"Upfront Fee"** - the upfront fee payable by the Facility Operator to TNPA in respect of the granting of the Operating Rights to the Facility Operator;
- 1.1.157 **"Uninsurable"** - in relation to a risk, means either that:
- 1.1.157.1 the required insurance is no longer available in the worldwide insurance market from reputable insurers; or
- 1.1.157.2 if the required insurance is available, the insurance premium payable for insuring that risk has increased to such a level that the risk is not generally being insured against in the South African insurance market on commercially acceptable terms;
- 1.1.158 **"Utilities"** - all facilities serving the public and Port Users such as water, electricity, sewage, gas and telecommunications and where appropriate includes the relevant provider thereof.

1.2 In this Agreement, unless inconsistent with the context, words referring to:

1.1.1 one gender include a reference to the other genders;

1.1.2 the singular includes the plural and vice versa;

1.1.3 natural persons include juristic persons and vice versa.

- 1.2 When a number of days as prescribed in this Agreement, such number shall be calculated including the first and excluding the last day, unless the last day falls on a day that is not a Business Day, in which case, the last day shall be the first succeeding day which is a Business Day.
- 1.3 Any Schedules to this Agreement shall be deemed to form part of this Agreement. If there is a conflict between the provisions of a Schedule and the provisions of this Agreement, the provisions of this Agreement shall prevail.
- 1.4 Any reference to legislation, a statute, a statutory instrument or a standard in this Agreement shall be a reference to such legislation, statute, statutory instrument or standard as amended, replaced, varied or re-enacted from time to time.
- 1.5 Words and expressions defined in any sub-clause shall, for the purpose of the clause of which that sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause.
- 1.6 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive clause in the body of the agreement, notwithstanding that it is only contained in the interpretation clause.
- 1.7 Any reference in this Agreement to another agreement shall be to such agreement as amended, supplemented, varied, novated or replaced from time to time in accordance with its terms and conditions.
- 1.8 Titles of clauses and schedules of and to this Agreement are inserted for the sake of convenience only and shall not be used in respect of or in any way affect the interpretation of any provision of this Agreement.
- 1.9 A reference in this agreement to any person shall be a reference to such person's permitted successor, transferee, cessionary and or delegatee.
- 1.10 Any reference in this Agreement to the Updated Financial Model shall, unless the context requires otherwise, be a reference to such document as most recently updated, amended or replaced and approved by TNPA, in accordance with the terms of this Agreement.

- 1.11 Where this Agreement requires that the waiver, consent, approval or permission of TNPA is to be obtained:
- 1.11.1 such waiver, consent, approval or permission shall at all times be required to be obtained by the Facility Operator prior to undertaking or failing to undertake the course of action to which such waiver, consent, approval or permission pertains; and
- 1.11.2 the granting or withholding of such waiver, consent, approval or permission shall not be valid unless it is issued in writing by TNPA.
- 1.12 The terms "**holding company**" and "**subsidiary**" shall have the meanings ascribed to them in the Companies Act.
- 1.13 References in this Agreement to TNPA, the Facility Operator, the Independent Certifier, the Agent and the Lenders shall include their respective authorised agents and representatives.
- 1.14 Any provision of this Agreement that contemplates or provides for performance of an obligation or compliance with a provision of this Agreement subsequent to any termination or expiry of this Agreement shall survive and termination or expiry of this Agreement and shall continue in force and effect for the period contemplated in said provision.
- 1.15 Termination or expiry of this Agreement shall not affect and shall be without prejudice to the accrued rights, obligations, claims, duties and liabilities of either Party which such accrued rights, obligations, claims, duties and liabilities arose prior to such termination or expiry. For the avoidance of doubt, such rights, claims and liabilities shall include any rights of a Party in respect of an antecedent breach or non-performance by either Party of any of the terms or conditions of this Agreement.
- 1.16 The *eiusdem generis* rule and the *contra proferentem* rule shall not be applicable to this Agreement.
- 1.17 Unless inconsistent with or otherwise indicated by the context, references in this Agreement to amounts "**in [●] 2012 prices**" means that such amounts are stated in [●] 2012 values and shall, for the purposes of this Agreement, be escalated on the



Effective Date and on each anniversary thereof thereafter in accordance with the following formula:

$$EA = CA \cdot \frac{CPI_x}{CPI_y}$$

where:

- $EA$  = the escalated amount;
- $CA$  = the amount specified in this Agreement in [●] 2012 prices;
- $CPI_x$  = CPI for, in the case of the Effective Date, the third month prior to the Effective Date, and, in the case of each subsequent anniversary thereof, the third month prior to such subsequent anniversary; and
- $CPI_y$  = CPI for [December 2012].

***[Note: the dates detailed in clause 1.18 are all dependent on when the preferred bidder is announced and will be amended to refer to the month in which the preferred bidder is announced.]***

## 2 Introduction

- 2.1 In terms of the Act, TNPA exercises authority, power, control and responsibility in respect of commercial ports of South Africa, including the Port. In addition, certain powers, capacity and authority have been conferred on TNPA, as a division of Transnet, in respect of the Port by the Establishment Act.
- 2.2 TNPA wishes to procure the finance Operation and Maintenance of a container terminal at the Port. TNPA requires said container terminal to be equipped and then operated and maintained, all in accordance with International Best Practice.
- 2.3 In terms of section 56 of the Act, TNPA wishes to appoint the Facility Operator and the Facility Operator wishes to be appointed to undertake the Project on the terms and conditions of this Agreement.

2.4 Accordingly, the Parties wish to enter into a Facility Operator Agreement on the terms and conditions detailed in this Agreement.

### **3 Appointment of Facility Operator and grant of rights**

#### **3.1 grant of rights**

TNPA hereby appoints the Facility Operator to undertake the Project on the terms and conditions contained in this Agreement. The Facility Operator accepts such appointment on the terms and conditions contained in this Agreement.

#### **3.2 exclusivity of rights**

3.2.1 Subject to the provisions of this Agreement, the Operating Rights are granted exclusively to the Facility Operator from the Signature Date until the termination or expiry of this Agreement in accordance with its terms.

3.2.2 The Facility Operator shall also be entitled to use the Port Infrastructure for the purposes of the Project in accordance with the Port Rules, subject to the use thereof by any other Port Users in accordance with the Port Rules.

#### **3.3 Facility Operator's obligations**

3.3.1 The Facility Operator shall undertake the Project at its own cost and risk in accordance with the terms of this Agreement. TNPA shall not, and no Relevant Authority will, provide any guarantee, subsidy, grant or any financial support of any nature to the Facility Operator or in respect of the Project.

3.3.2 This Agreement shall not be interpreted as granting the Facility Operator any rights or imposing any obligations or duties on TNPA or any Relevant Authority, except as expressly and specifically stated in this Agreement.

3.3.3 No instructions or approvals given by TNPA or any Relevant Authority in accordance with the Law and this Agreement in respect of any aspect of the Project or the Facility will affect, alleviate, excuse or provide relief from the Facility Operator's duties, obligations, liabilities and responsibilities under this Agreement and in respect of the Project.

### **3.4 sub-contracting**

- 3.4.1 Regardless of the fact that this Agreement permits or requires the Facility Operator to appoint third parties to perform part of the Project, such appointment shall not relieve or excuse the Facility Operator of any duty, obligation, liability or responsibility under this Agreement and in respect of the Project.
- 3.4.2 The Facility Operator shall be responsible for the management and supervision of any third parties appointed by it to perform any part of the Project. The Facility Operator shall be and shall remain, at all times, fully responsible and liable for the actions and omissions (whether negligent, wilful or intentional) of all such third parties and of the agents, representatives and employees of such third parties, whether such third parties are employed directly or indirectly by the Facility Operator.
- 3.4.3 Nothing in this Agreement is intended to create or should be interpreted as creating any privity of contract between TNPA and any third parties appointed by the Facility Operator to perform any part of the Project. The Facility Operator shall ensure that a provision to this effect is inserted into every contract entered into by it with such a third party.

## **4 Duration of this Agreement**

The Operating Term shall commence on the Scheduled Operations Commencement Date and shall be for a fixed period of 25 years.

## **5 Concession Fee**

- 5.1 The Facility Operator shall pay to TNPA, as consideration for the granting of the Concession, an annual Concession Fee in respect of each Contract Year of the Concession Period, which amount shall be determined in accordance with the Concession Fee Formula, as defined below.

- 5.2 Subject to the Quarterly Payments envisaged in clause 5.5 the Concession Fee shall be due annually in arrears within 120 (one hundred and twenty) days of the end of each Contract Year (the “**Concession Fee Payment Date**”).
- 5.3 The formula for calculating the Concession Fee shall be the formula set out in **Error! Reference source not found.** (*Concession Fee Offer Schedule*) and is informed by and read with the Concession Fee Offer Schedule which is also contained in **Error! Reference source not found.** (*Calculations*).
- 5.4 In respect of each Contract Year, the annual Concession Fee shall escalate in accordance with CPI.
- 5.5 The Parties agree that not later than 7 (seven) days after the commencement of each Quarter (the “**Quarterly Payment Date**”) the Facility Operator shall effect a Quarterly payment in respect of the Concession Fee (the “**Quarterly Payment**”). The Quarterly Payment shall be calculated in accordance with the corresponding formula contained in **Error! Reference source not found.** (*Calculations*) (the “**Quarterly Payment Formula**”) and be supported by an audit certificate issued by an independent firm of auditors registered and practising in South Africa in the form set out in **Error! Reference source not found.** (*Calculations*) (the “**Quarterly Payment Certificate**”) which shall be submitted by the Facility Operator not later than 6 (six) weeks before the commencement of each Contract Year to TNPA. Once submitted to TNPA, the Parties shall meet with a view to reviewing and agreeing upon the Quarterly Payment Certificate 4 (four) weeks before the commencement of each Contract Year.
- 5.6 No later than 90 (ninety) days after each Contract Year, the Facility Operator shall submit its calculation of the Concession Fee that is due in respect of the preceding Contract Year in accordance with the Concession Fee Formula (as informed by the Concession Fee Formula Schedule) together with a calculation of the aggregate of the actual revenues earned by the Facility Operator in respect of the Facility during the preceding Contract Year (the “**Aggregate Revenue Amount**”) as and as reported by the Facility Operator as part of the Annual Report in **clause Error! Reference source not found.** (*Reporting Requirements*) and together with a written reconciliation of the Concession Fee, the Aggregate Revenue Amount, and the Quarterly Payments that were paid by the Facility Operator during the preceding

Contract Year which reconciliation shall specify whether any amount (the “**Reconciliation Payment**”) is due and payable by the Facility Operator to TNPA as calculated in accordance with the corresponding formula contained **Error! Reference source not found.** (Calculations) (the “Reconciliation Payment Formula”). The Aggregate Revenue Amount together with the reconciliation and the Reconciliation Payment shall be supported by an audit certificate issued by an independent international firm of auditors registered and practising in South Africa in the form set out in **Error! Reference source not found.** (Calculations) (the “Concession Fee Certificate”).

- 5.7 If the revenue earned by the Facility Operator in respect of a given Contract Year and reflected in the audited financial statements submitted by the Facility Operator in the Annual Reports differ materially from the revenues reported in the Annual Report and/or the Concession Fee Certificate, then irrespective of whether the inaccuracy in the Concession Fee Certificate was made innocently, negligently or deliberately by the Facility Operator its personnel, auditors or advisors of the independent firm of auditors that issued the Concession Fee Certificate the Facility Operator, shall pay the shortfall to TNPA on demand.
- 5.8 In addition and if the inaccuracy in the revenues in the Concession Fee Certificate was caused due to gross negligence or wilfully by the Facility Operator or its personnel, auditors or advisors, the Facility Operator shall pay TNPA an additional penalty amount equivalent to 25% (twenty-five *per centum*) of such shortfall in addition to the payment of the shortfall in terms of **clause 5.7** which penalty shall be payable on demand.
- 5.9 If the inaccuracy has resulted in an overpayment by the Facility Operator to TNPA, TNPA shall be entitled to set-off such overpayment, held in credit by TNPA on behalf of the Facility Operator, against any other amounts owing by the Facility Operator to TNPA or, if no such amounts are owing, TNPA shall refund the shortfall forthwith to the Facility Operator.
- 5.10 In the event of a dispute, in respect of a Quarterly Payment, the Concession Fee and/or the Reconciliation Payment, such dispute shall be referred and determined by an Independent Expert in terms **clause Error! Reference source not found.** (*Independent Expert*).

5.11 The Facility Operator shall effect payment of the Quarterly Payment and the Reconciliation Payment and any other amounts which may owed to TNPA in terms of or arising out of this Agreement, without any delay, withholding, counterclaim, deduction or set-off whatsoever including any set-off against the bank guarantee referred to in **clause Error! Reference source not found.**

5.12 Except if TNPA otherwise agrees in writing, all payments shall be made in Rand.

5.13 All payments to be made in terms of this Agreement by the Facility Operator to TNPA shall be made in immediately available funds, free of bank exchange or any other charges or deductions, electronically into the following bank account: **[insert bank details]**.

5.14 TNPA shall be entitled in its sole and absolute discretion to appropriate or re-appropriate any amounts received from the Facility Operator towards the payment of any other amounts owing by the Facility Operator to it.

## **6 Audit by TNPA**

6.1 The Facility Operator shall permit TNPA's auditors (the "**Auditors**") at all reasonable times, on request from TNPA, to inspect and take extracts from the books, records and statements of the Facility Operator and of any other Person conducting business on or from the Facility. The Facility Operator must make its books, records and statements available to the Auditors and must provide explanations reasonably requested by the Auditors.

6.2 At its option, TNPA may cause, at any reasonable time, upon 48 (forty-eight) hours' prior written notice to the Facility Operator, a complete audit to be done by the Auditors, of the Facility Operator's entire business affairs and records in relation to their operations on the premises for the period covered by any Concession Fee Certificate or other certificate issued by the Facility Operator's auditors as set out in **clause 6.1** above and the Facility Operator shall furnish the Auditors with all such information, documents and things as may be reasonably required by them for purposes of such audit, immediately upon request therefor.

6.3 TNPA shall, in the exercise of its rights in terms of **clauses 6.1 and 6.2** above, take all reasonable steps to prevent inconvenience to the Facility Operator or disruption of

their businesses, and TNPA undertakes to the Facility Operator that TNPA and its employees or other representatives will at all times, treat all information and documents obtained from the Facility Operator as confidential.

6.4 The Facility Operator shall, if an audit by the Auditors reveals that the Revenue Certificate or the Facility Operator's auditors' certificate referred to in **clause 5.6**, was inaccurate or in the Facility Operator's auditors' certificate referred to in **clause 5.6**, pay the cost of such audit by the Auditors to TNPA and, to the extent that such amounts have not already been paid to TNPA under **clause 6.1**, the following:

6.4.1 the shortfall; and

6.4.2 a penalty equivalent to 25% (twenty-five per cent) of such shortfall, if the inaccuracy was caused due to gross negligence or wilfully by the Facility Operator, its accountant or its auditors.

6.5 The provisions of **clause 6** shall apply mutatis mutandis, provided that such overpayment by the Facility Operator has not already been set-off or refunded to the Facility Operator by TNPA under **clause 5.9**.

## **7 Ownership and return of the Project Site and the Facility**

7.1 The Facility Operator agrees and acknowledges that TNPA is and shall at all times be the owner of the Project Site.

7.2 The Facility Operator agrees and acknowledges that TNPA shall be the owner of the Facility. ***[if any leasing structures are to be permitted in the financing of the Facility, then this provision will have to be amended to reflect that the lessors are the owners of certain of the equipment and if there will be Subcontractor assets, then this provision should indicate that at early termination or expiry of this Agreement such Assets shall not be transferred to TNPA.]***

7.3 Upon the termination for any reason or expiry of the Operating Rights and or this Agreement, the Facility Operator shall deliver and give vacant possession of the Facility, the Project Site and any other assets or facilities owned by or if not owned by, in the possession of, the Facility Operator, free of charges, liens, claims or encumbrances of any nature whatsoever and free of any liabilities, and in accordance

with the standards and requirements detailed in the Operating Specifications, to TNPA. The Facility Operator shall not be entitled to payment of any monies in connection with delivery.

## 8 Indemnity

8.1 Subject to **clauses 8.2 and 8.4**, the Facility Operator shall fully and effectively indemnify and hold TNPA or any Port User harmless in respect of all Losses suffered or incurred by TNPA, or any Port User which arise in connection with the breach of this Agreement or the Laws by the Facility Operator, including, without limitation to the generality of the foregoing, any Losses which may be incurred or suffered by TNPA, or any Port User, in respect of personal injury (including injury resulting in death).

8.2 **Clause 8.1** shall not apply to:

8.2.1 any Losses to the extent that they arise directly from the wilful default of TNPA or the relevant Port User;

8.2.2 Losses to the extent that TNPA is reasonably able to mitigate such Losses or the relevant Port User.

8.3 If the Facility Operator pays to TNPA an amount in respect of Losses and TNPA subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise howsoever) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Losses, TNPA shall forthwith repay to the Facility Operator:

8.3.1 an amount equal to the sum recovered or the value of the savings or benefit obtained, less any reasonable costs and expenses incurred by TNPA in recovering the same; or

8.3.2 if the figure resulting under **clause 8.3.1** above is greater than the amount paid by the Facility Operator to TNPA in respect of the Losses, such lesser amount that has been paid by the Facility Operator to TNPA.



- 8.4 The Facility Operator shall indemnify TNPA in respect of all losses relating to the use or infringement or alleged use or infringement by the Facility Operator of Intellectual Property Rights.
- 8.5 Except as expressly provided in this Agreement, the Facility Operator shall not make any claim against TNPA or any Port User in respect of any Losses sustained by the Facility Operator by reason of or arising out of or in any way connected with the performance of this Agreement.
- 8.6 For the avoidance of doubt, this **clause 8 (Indemnity)** shall take effect without prejudice to the Facility Operator's obligations under the other provisions of this Agreement.
- 8.7 TNPA agrees that it will forthwith notify the Facility Operator of any claim or any matter or thing which comes to its attention and which may give rise to a claim by TNPA against the Facility Operator under this Agreement pursuant to this **clause 8 (Indemnity)**, as follows:
- 8.7.1 TNPA will at all times after such notification, disclose in writing to the Facility Operator all information and documents relating to such claim and the matter giving rise thereto and will allow the Facility Operator to see appropriate files and records relating to the same and take copies of all relevant documents.
- 8.7.2 TNPA will take such action as the Facility Operator may reasonably request at the Facility Operator's expense to avoid disputes, settle, compromise, defend or appeal against such claim and TNPA will take no steps to avoid disputes, settle, compromise, defend or appeal against such claim without the Facility Operator's consent, which consent shall not be unreasonably withheld or delayed. The Facility Operator shall procure that its Subcontractors shall provide identical undertakings to TNPA.

## **9 Facility Operator's warranties and undertakings**

### **9.1 registration**

- 9.1.1 The Facility Operator shall be incorporated in South Africa in accordance with the provisions of the Companies Act. The Facility Operator shall remain validly

incorporated and registered in accordance with the provisions of the Companies Act for the entire Operating Term.

9.1.2 The Facility Operator shall not amend, restate, supplement or otherwise modify the Constitutional Documents, unless otherwise expressly agreed to by TNPA.

## **9.2 single purpose company with no subsidiaries**

9.2.1 The Facility Operator shall be a single purpose company with the sole purpose of implementing the Project, except as TNPA may otherwise expressly agree. The Facility Operator shall not assume any liability other than in connection with the Project. The Constitutional Documents of the Facility Operator shall include a provision to such effect.

9.2.2 The Facility Operator shall have no subsidiaries throughout the Operating Term except with the prior express consent of TNPA.

## **9.3 compliance with Laws**

9.3.1 The Facility Operator shall comply with the Laws applicable to it and the Project in all respects and shall obtain all Consents that are required in respect of it and all and any aspects or parts of the Project, in accordance with Laws.

9.3.2 TNPA shall use its reasonable endeavours to assist the Facility Operator to obtain such Consents as may be required to enable the Facility Operator to execute the Project, provided that TNPA shall bear no liability or responsibility for any failure of the Facility Operator to obtain such Consents save as provided in this Agreement

## **9.4 Related Party Transactions**

9.4.1 Unless otherwise agreed to by TNPA and without prejudice to the provisions of clause 9.4.3, the Facility Operator shall not enter into any Related Party Transactions, other than Related Party Transactions which are no less favourable to the Facility Operator than those that could have been obtained in a comparable arm's length transaction by the Facility Operator with a person who is not a Related Party.

9.4.2 TNPA shall have the right to review the basis for all costs charged, directly or indirectly, to the Facility Operator under a Related Party Transaction. The Facility Operator shall give prior notice to TNPA of any Related Party Transaction, together with all relevant details relating thereto.

9.4.3 TNPA acknowledges that the Operations Agreement are regarded as Related Party Transactions which are no less favourable to the Facility Operator than the ones that could have been obtained in comparable arm's length transactions by the Facility Operator with persons which are not Related Parties, provided that, on the dates of signing of the Operations Agreement, the contract price and the remuneration payable to the Operator, respectively, do not exceed the relevant amount indicated in the Base Case Financial Model.

#### **9.5 limitation on financial indebtedness**

9.5.1 The Facility Operator shall not incur, assume or permit to exist any indebtedness including guarantees issued to third parties, the creation of charges, pledges or other encumbrances over its assets and or shares and, in general, any claims and rights otherwise than:

9.5.1.1 in accordance with the Associated Agreements or the Finance Agreements;  
or

9.5.1.2 in the ordinary and normal course of business; or

9.5.1.3 with the prior consent of TNPA.

#### **10 Compliance with Operating Specifications**

10.1 The Facility Operator shall comply with, and shall ensure that its Subcontractors comply with the Operating Specifications in respect of the Operation and Maintenance at all times.

10.2 The Facility Operator warrants that the Project shall be carried out in conformity with the Operating Specifications using equipment and materials, which are of suitable quality for the purposes and uses intended and are free of defects and deficiencies.

All such work shall be undertaken in accordance with the Operating Specifications to the reasonable satisfaction of the Independent Certifier.

10.3 The Facility Operator shall ensure that any decision, determination, instruction, inspection, examination, testing, consent, approval, expression of satisfaction, acceptance, agreement, exercise of discretion (whether sole or otherwise) or similar act by any Relevant Authority or the Independent Certifier in respect of this Agreement or the Associated Agreements shall be applied for or requested promptly by the Facility Operator.

## 11 Contracts

11.1 The Facility Operator shall enter into the Associated Agreements, the Finance Agreements and such other contracts as are necessary to ensure the timeous and proper undertaking of the Project in accordance with the Operating Specifications. The Facility Operator shall satisfy itself that the terms of such agreements fully describe the rights, obligations, risk allocation and protection of the Facility Operator's rights. None of TNPA, any other Relevant Authority or their respective officers, employees, agents and or representatives shall have any liability whatsoever to the Facility Operator arising from the Associated Agreements and or the Finance Agreements except as provided in or arising from this Agreement.

11.2 The Facility Operator shall not:

11.2.1 amend, replace or cancel any term of the Associated Agreements or the Finance Agreements;

11.2.2 terminate any of the Associated Agreements or the Finance Agreements;

11.2.3 replace the Operator;

11.2.4 enter into a new Operations Agreement;

11.2.5 consent to the cession, delegation or novation of any Associated Agreement, without the prior written consent of TNPA.

## 12 Environmental Compliance

12.1 The Facility Operator shall obtain all Consents that are required in respect of the Project in terms of any Environmental Laws and shall comply with such Consents. TNPA shall use its reasonable endeavours to assist the Facility Operator to obtain such Environmental Consents, heritage Consents and other Consents as may be required to enable the Facility Operator to execute the Project, provided that TNPA shall bear no liability or responsibility for any failure of the Facility Operator to obtain such Consents save as provided in this Agreement.

12.2 The Facility Operator shall take all necessary steps to ensure that appropriate pollution control and other environmental protection measures are taken in accordance with the Environmental Laws. The Facility Operator shall comply with the Environmental Management Plan at all times.

12.3 Upon written request by TNPA, the Facility Operator shall conduct an environmental site assessment, at the Facility Operator's expense and within the period specified by TNPA, in respect of all the works conducted at the Port.

12.4 Such environmental site assessment shall:

12.4.1 include a systematic identification and evaluation of any potential impacts of any current or proposed work on the environment, this includes biophysical, biological, social, cultural, economic, aesthetic and technological aspects, to such an extent that those aspects are relevant to the works conducted at the Port;

12.4.2 be conducted by an independent environmental assessment practitioner;

12.4.3 form part of the Facility Operator's Environmental Management Plan (the "**EMP**") and inform the Facility Operator's Environmental Management System (the "**EMS**"); and

12.4.4 comply with any other reasonable requirements stipulated for such an assessment by TNPA.

12.5 Within a period of 3 (three) months of the **[Operations Date]**, the Facility Operator shall submit, for the approval of TNPA, the EMP which shall comply with National

Environmental Management Act, 107 of 1998 ("**NEMA**") and TNPA's written requirements (which requirements shall be provided to the Facility Operator). The EMP and EMS shall be developed and implemented by the Facility Operator for the duration of this Agreement. The EMP and EMS shall be binding upon the Facility Operator. ***[the Container Facility Operator Licence provides that the EMP and EMS shall be developed and implemented for the duration of the Licence].***

12.6 TNPA shall have the right at all times to conduct audits of the Facility Operator's compliance with the EMP and the EMS. If, and where TNPA is of reasonable belief that there is non-compliance, inefficiency or inadequacy, then TNPA may require that the Facility Operator rectify such non-compliance, inefficiency or inadequacy, without any delays, to the reasonable satisfaction of TNPA.

12.7 The Facility Operator, as required by law, shall comply with:

12.7.1 all the requirements of the South African Maritime Safety Authority (the "**SAMSA**") in relation to the environment;

12.7.2 all the requirements of the National Ports Act, well as the Port Rules promulgated thereunder, in relation to the protection of environments within port limits;

12.7.3 all the conditions laid down in respect of the Facility, if the Facility is declared as a protected natural environment or a special nature reserve;

12.7.4 TNPA's requirements for the regular waste removal, including waste originating from cleaning or loading of vehicles or wagons;

12.7.5 all the conditions in environmental permits, consents, licences, certificates, authorisations, orders and exemptions from the Relevant Authority in respect of the Facility; and

12.7.6 all applicable statutory requirements related to the environment including NEMA, the National Water Act, 36 of 1998 ("**Water Act**"), the Air Quality Act, 39 of 2004 and the Biodiversity Act, 10 of 2004, and any other environmental legislation enacted or promulgated before or after the Effective Date.

12.8 TNPA shall appoint, at the Facility Operator's reasonable cost, and with the prior approval of the Facility Operator, which shall not be unreasonably withheld, an independent environmental monitor who shall be responsible for:

12.8.1 ensuring that the Operation and Maintenance are performed in accordance with the Operating Specifications and the Environmental Laws; and

12.8.2 monitoring and ensuring the implementation and effectiveness of mitigation measures and other requirements and targets set forth in the Operating Specifications and the Environmental Laws.

12.9 During the Operation and Maintenance of the Port, and in terms of the Operational Environmental Management Programme (the "**OEMP**"), there are conditional authorisations and or environmental requirements to be fulfilled by the Parties. Such authorisations are set out in Schedule 9 of this Agreement.

12.10 The Parties shall review the Environmental Management Plan at the start of each Contract Year in order to ascertain whether that plan needs to be amended or replaced. If the Parties are unable to agree whether the Environmental Management Plan should be amended or replaced or on the contents of such amendment or replacement, then such dispute shall be referred to the monitor detailed in clause 12.8 for determination in terms of **clause 55** (*Expert Determination*). The decision of such monitor shall, in the absence of manifest error or fraud, be final and binding on the Parties.

12.11 The Facility Operator shall, upon the request of TNPA and within a reasonable period of such request, provide TNPA with certified copies of:

12.11.1 all environmental permissions obtained regarding the works and services it provides at the Port, and, where the permissions are renewable, in each instance a certified copy of a new or updated permission; and

12.11.2 any measurements undertaken of emissions, effluent, storm water quality and material safety data sheet for hazardous substances, which it is, obliged to submit to a Relevant Authority.

12.12 The Facility Operator may, as required by Law, not by any means cause significant pollution or degradation of the environment and shall:

- 12.12.1 provide TNPA within a reasonable period with certified copies of any notices and directives issued by a Relevant Authority to the Facility Operator to take steps to address pollution or negative impact on the environment;
- 12.12.2 provide TNPA with certified copies of any report, including an emergency report, submitted by the Facility Operator to a Relevant Authority regarding pollution or negative impacts on the environment;
- 12.12.3 take all reasonable measures as envisaged by applicable Environmental Laws, including NEMA and the Water Act, to investigate, assess and evaluate the impact of its activities on the environment of the Port and on the water resources on or below the Port;
- 12.12.4 if the Facility Operator's works and services directly or indirectly cause any significant pollution, environmental degradation or negative impact on the environment, which is not authorised by TNPA or a Relevant Authority, the Facility Operator shall, at its own costs, undertake efficient and effective means of combating, mitigating, cleaning, collecting and or disposing of all pollutants, or of otherwise addressing the environmental damages or other negative impact with the appropriate remedial and or rehabilitative measures, to the satisfaction of TNPA and any Relevant Authority; and
- 12.12.5 take every reasonable precaution to prevent the spillage of cargoes and or other material (including fuel and waste) from vessels, vehicles, cargo handling equipment and Facility Infrastructure, and take immediate steps to mitigate and remedy any spillage to the satisfaction of SAMSA and TNPA, at the Facility Operator's expense.
- 12.13 If the Facility Operator fails to comply promptly with any of the obligations imposed under this clause, TNPA shall be entitled to immediately take whatever steps necessary to combat, mitigate and remedy any such pollution, environmental degradation or other impact on the environment, and to recover all reasonable costs incurred by TNPA from the Facility Operator.
- 12.14 Should TNPA, in writing, determine that the Port shall be decommissioned upon cancellation or termination of this Agreement, the Facility Operator shall develop and submit a Decommissioning-EMP to TNPA and the Relevant Authority for



implementation during the decommissioning phase in terms of the Decommissioning-EMP guidelines, which guidelines shall be provided to the Facility Operator by TNPA. The Decommissioning-EMP shall be required to be approved by TNPA and all applicable Relevant Authorities in order for the duly approved Decommissioning-EMP to be submitted to TNPA within a period of 6 (six) months after termination.

### **13 Empowerment Obligations**

13.1 The Facility Operator shall comply with the B-BBEE obligations specified in **Schedule 10A** and the Supplier Development Plan in **Schedule 10B** of this Agreement for the duration of this Agreement.

13.2 [The Facility Operator shall provide an annual report to TNPA on the extent to which the Facility Operator's undertakings contained in this clause 13 (*Empowerment Obligations*) and **Schedules 10A and 10B** have been met, as well as documenting other achievements in promoting the empowerment of the BEE Entities. The Facility Operator shall, on an annual basis and by the date determined by TNPA, provide TNPA with a certificate of accreditation from an accredited verification agency verifying the Facility Operator's B-BEEE status.]

13.3 If the Facility Operator fails to achieve the specific and quantifiable targets detailed in **Schedule 10A and Schedule 10B** within the relevant periods, the Facility Operator shall pay the Penalties detailed in **Schedule 11** in respect of the specific targets, to TNPA in accordance with Schedule 11.

### **14 Access to documents, copyright and related matters**

14.1 The Facility Operator shall, at no cost to TNPA or any other Relevant Authority, at any time make available to TNPA and or such Relevant Authority, as the case may be, upon request by any of them, all documents which are or were acquired or brought into existence by the Facility Operator for the purpose of or in connection with the Project or supplied to the Facility Operator from other parties to the Associated Agreements and or the Finance Agreements.

14.2 The Facility Operator shall use its best endeavours to procure that all software, source codes and manuals, programmes and documentation shall be provided to the Facility Operator by the Operator upon termination of each Operating Contract and

that the Facility Operator shall be granted a perpetual non-exclusive, royalty-free licence to use the same for the continued Operation and Maintenance of the Facility, which licence shall be transferred to a Substitute Entity or to a third party for continuing the Operation, Maintenance and or upgrade of the Facility in accordance with the provisions of the Operating Contract in force at that time.

14.3 Copyright owned by the Facility Operator, or Operator in all Project Documents shall be transferred free of any cost to TNPA on termination of this Agreement or expiry of the Operating Term, whichever is the earlier.

14.4 Copyright in the Operating Specifications and other documents issued by TNPA or the Facility Operator, to the extent that the Facility Operator is the owner of the copyright in any such documents, shall be the property of TNPA and, to the extent necessary, shall be ceded, assigned and made over to TNPA. The Facility Operator may at its cost (and shall allow other parties to the Associated Agreements and the Lenders and prospective Lenders at their cost to), copy, use and communicate any such document for the purposes of the respective Associated Agreements and Finance Agreements. The Facility Operator shall not (and shall ensure that other parties to the Associated Agreements, the Lenders and prospective Lenders shall not), without TNPA's consent, use, copy or communicate to a third party such documents, except as strictly necessary for the purposes of the Associated Agreements and the Finance Agreements. In addition to and without limiting the foregoing, the Facility Operator shall deliver the Documents and, to the extent that the Facility Operator is the owner of the copyright in any such documents or the Facility Operator is otherwise lawfully able or entitled to do so, transfer the copyright in such documents to TNPA on the earlier of:

14.4.1 the termination of this Agreement; or

14.4.2 if the appointment of a Substitute Entity and provided that such documents have or such copyright has not already been delivered or transferred to TNPA, as the case may be, upon the appointment of such Substitute Entity.

14.5 Upon termination of this Agreement due to Facility Operator Default, the Facility Operator shall, upon request by TNPA, provide copies of or access to TNPA in respect of, or to any other Relevant Authority designated by TNPA , the Project

Documents, which access and copies shall be at no cost to TNPA or such Relevant Authority, and shall be for their use in relation to the Operation and Maintenance before the appointment of a Substitute Entity, if any. The Facility Operator further agrees, upon expiry of the Operating Term or termination of this Agreement for whatsoever cause, to ensure the transfer of ownership of the Project Document (to the extent owned by the Facility Operator, or Operator) to TNPA. The Facility Operator shall procure that TNPA is legally entitled to use such Project Documentation and any other information which is not owned by the Facility Operator, Operator and which is necessary for the continued Operation and Maintenance.

14.6 Save in the course of the proper discharge of its duties hereunder, the Facility Operator shall not, and shall ensure that other parties to the Associated Agreements and the Finance Agreements shall not, during the Operating Term or at any time thereafter, disclose to any person (other than to the Lenders or prospective Lenders) or otherwise make use of any information relating to the Project, TNPA or the Facility Operator (including, but without limitation, information relating to the Operation and Maintenance, the contents of any documents, including any legal agreements, prepared by or on behalf of the Facility Operator or to which the Facility Operator is a party), save for such information that is or comes into the public domain (other than through the default of the Facility Operator or other parties to the Associated Agreements or the Finance Agreements), other than with the prior approval of TNPA. Nothing contained in this clause shall preclude the Facility Operator from using such information in enforcing its rights against TNPA or any other person.

14.7 Unless otherwise agreed to by TNPA, and except as provided for in this Agreement or the Associated Agreements, the Facility Operator and other parties to the Associated Agreements shall have no other interest or benefit in or to not receive any other remuneration in connection with the Project or any part thereof. The Facility Operator shall not (and shall ensure that other parties, excluding the Lenders acting in their capacity as lenders, to the Associated Agreements shall not) be engaged in any activity which might conflict with the interests of TNPA under this Agreement or the Associated Agreements, unless such activity is carried out pursuant to the enforcement of its rights thereunder. Nothing in this clause shall prevent the Facility Operator or the Lenders from enforcing their rights under this Agreement, the Associated Agreements, the FDA or the Finance Agreements.

## 15 Performance Guarantees

### 15.1 delivery of Performance Guarantees

The Facility Operator shall obtain, at its own cost, from a bank or a financial institution approved by TNPA, the Performance Guarantees referred to below in this clause 15 (*Performance Guarantees*), in the form of an on demand guarantee in the format, amount and currencies specified below or in a form mutually agreed between TNPA and the Facility Operator. Where applicable, the Facility Operator shall cede or assign its right, title and interest thereunder and alternatively, where applicable, shall deliver them, to TNPA on or before the dates specified below.

### 15.2 Operation Performance Guarantee

- 15.2.1 The Facility Operator shall obtain the Operating Performance Guarantee, which shall be an on demand guarantee in favour of the Facility Operator, from the Operator in an initial amount of R[***insert amount in millions***] (in [***insert month and year***] prices) to secure the performance by each Operator of its obligations in terms of each Operating Contract.
- 15.2.2 Each Operation Performance Guarantee shall be substantially in the form of the guarantee attached to this Agreement as Schedule 16.
- 15.2.3 An Operation Performance Guarantee shall be provided by the Facility Operator in respect of each Contract Year after the issue of the Taking Over Certificate so that the amount to be guaranteed by such Operation Performance Guarantee for each successive year of the Operating Term takes into account any fluctuations in CPI. The Operation Guarantees for the second and successive Contract Years shall be provided not later than 14 (fourteen) days before the expiry of the Contract Year in respect of which such Guarantee was provided.
- 15.2.4 Each Operation Performance Guarantee shall be valid from its commencement until 14 (fourteen) days after the expiry of the Contract Year in respect of which such Guarantee was provided and shall be returned to the Facility Operator within 14 (fourteen) days after such later date.

### 15.3 Final Maintenance Guarantee

15.3.1 The Facility Operator shall obtain a Final Maintenance Guarantee in favour of the Facility Operator from the Operator in an amount equal to the aggregate amount expended by the Operator on Operation and Maintenance (as reported by the Facility Operator to TNPA in accordance with clause 29 (*Financial Accounts, Reports, inspection and reporting of changes*)) in the period of time from the commencement of Contract Year [17 (seventeen)] of the Operating Term to the end of Contract Year [20 (twenty)] of the Operating Term, and in any event not less than [15%] of the average annual gross revenues for Contract Years [17 (seventeen), 18 (eighteen) and 19 (nineteen)] (all inclusive) of the Operating Term. ***[the actual years must be determined with reference to the actual term of the concession and the base percentage must be determined with the projected revenue of the Project and what guarantee level the Project can bear financially.]***

15.3.2 The Final Maintenance Guarantee shall be substantially in the form of the guarantee attached to this Agreement as Schedule 17.

15.3.3 The Final Maintenance Guarantee shall be valid from the commencement of Contract Year [17 (seventeen)] of the Operating Term until 90 (ninety) Business Days after the expiry or earlier termination of this Agreement. The Final Maintenance Guarantee shall be returned to the Facility Operator upon the expiry of the Operating Term, subject to TNPA's right to call such guarantee in respect of any obligations of the Facility Operator in respect of maintenance of the Facility as detailed in the Operating Specifications that have not been performed in full or to TNPA's satisfaction.

### 15.4 Facility Operator's obligations incorporated into Associated Agreements

15.4.1 The Facility Operator shall ensure that the Operator incurs the same obligations to the Facility Operator under each Operations Agreement, respectively, as the Facility Operator has imposed upon it in terms of this Agreement in respect of the Operation and Maintenance.

15.4.2 The Performance Guarantees shall also secure the obligations of the Contractor and the Operator under the Associated Agreements in favour of the Facility Operator.

#### **15.5 cession of Performance Guarantees**

15.5.1 It is recorded that the Facility Operator has ceded to and in favour of the Lenders, as security for the performance by the Facility Operator of its obligations to the Lenders in respect of the Finance Agreements, all its right, title and interest in and to each Operation Guarantee. The Facility Operator hereby irrevocably cedes all reversionary interests in the Operation Guarantee (which it may have after the aforesaid cession to the Lenders) to and in favour of TNPA, as security for the Facility Operator's obligations to TNPA in terms of this Agreement.

15.5.2 As security for the performance by the Facility Operator of its obligations to TNPA in terms of this Agreement, the Facility Operator hereby irrevocably cedes *in securitatem debiti* to and in favour of TNPA all its right, title and interest in and to the Final Maintenance Guarantee, with effect from the date such guarantee is executed. The Facility Operator shall be entitled, but not obliged, to cede any reversionary interest in the Final Maintenance Guarantee (which it may have after the aforesaid cession to TNPA) to and in favour of any Lender as security for the Facility Operator's obligations to such Lender under the Finance Agreements.

#### **15.6 enforcement action**

15.6.1 Pursuant to the cession of the Facility Operator's right, title and interest, or any reversionary interest, (as the case may be) in and to the Performance Guarantees as contemplated in clause 15.5 (*cession of Performance Guarantees*), such Performance Guarantees shall secure the Facility Operator's performance of its obligations to TNPA in respect of the Operation and Maintenance and may be called on by TNPA to the extent of any losses, costs, damages or expenses suffered or incurred by TNPA as a result of a breach by the Facility Operator of the aforesaid obligations including, but not

limited to, compensation to TNPA for any actions taken by TNPA as a result of such breach by the Facility Operator of its obligations.

15.6.2 Prior to enforcing any such Performance Guarantee as aforesaid, TNPA shall give notice to the Facility Operator, informing the Facility Operator of the breach giving rise to the right, on the part of TNPA, to enforce the Performance Guarantee. If such breach is not remedied within the stipulated remedy period (as contemplated in clause 43.4 (*remedy provisions*)), and subject to the terms and conditions contained in the relevant or applicable Performance Guarantee, TNPA may enforce the applicable Performance Guarantee for an amount equal to any cost, losses, damages or expenses incurred by TNPA in respect of any such breach by the Facility Operator.

## 16 Project Insurance

### 16.1 general obligations

***[there will be 2 parts in **Schedule 18** that list insurance policies. Part [x] will list the insurances required in respect of Operation and Maintenance and part [y] will list the insurances in respect of which non-vitiation cover is required and in respect of which the Uninsurable risks regime is applicable]***

16.1.1 The Facility Operator shall obtain and maintain, at its own expense, with a reputable insurance company, insurance cover against:

16.1.1.1 Losses, damages or destruction of the Facility at the Port. Such insurances shall be:

16.1.1.1.1 for not less than the full replacements value of the Facility; and

16.1.1.1.2 against any risk or fire, lightning, explosions, storms, floods, earthquake, riots (this includes political riots), strikes (protected and unprotected strikes) and malicious damage to the Facility, public and third party liability, business interruption as well as all risks cover against any other risk selected by TNPA which is insurable in the local South African insurance market consequent upon the damage to or destruction of the Facility.

16.1.1.2 Environmental risks, including sudden and accidental environmental risks and, if so required by TNPA in writing, long-term gradual pollution risks.

16.1.2 The Facility Operator shall with effect from the Operations Date (or earlier if the relevant risks commence before that date) take out and maintain or procure the maintenance of the insurances described in Part [x] of Schedule 18 and any other insurances as may be required by law.

16.1.3 No Party to this Agreement shall take any action or fail to take any action, or (in so far as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.

16.1.4 The insurances referred to in clauses 16.1.1 and 16.1.2 shall:

16.1.4.1 name the Facility Operator as co-insured with any other party maintaining the insurance;

16.1.4.2 provide for non-vitiation protection in respect of any claim made by TNPA as co-insured in respect of the insurances detailed in Part [y] of Schedule 18. If non-vitiation protection is unavailable when any such insurance policy is first placed, then the Facility Operator shall procure that a suitable advisor investigates whether any non-vitiation protection subsequently becomes available prior to each renewal of the policy and provides written confirmation promptly upon the renewal thereof as to the unavailability thereof to TNPA. If any non-vitiation protection subsequently becomes available, then TNPA shall be entitled to require the Facility Operator to procure such protection and the costs thereof shall be borne by the Facility Operator;

16.1.4.3 contain a clause waiving the insurers' subrogation rights against TNPA, its employees and agents;

16.1.4.4 provide for [90 (ninety)] days prior written notice of their cancellation, non-renewal or amendment to be given to TNPA; and



- 16.1.4.5 provide for payment of any proceeds to be made by insurers in accordance with clause 16.3 (*reinstatement*).
- 16.1.5 The insurances referred to in clauses 16.1.1 and 16.1.2 shall name TNPA as a co-insured for its separate interest in the Project.
- 16.1.6 All the costs relating to the insurance policies, including the insurance premiums, shall be paid by the Facility Operator.
- 16.1.7 The Facility Operator shall comply with all the terms and conditions embodied in the insurance policies contemplated in this provision.
- 16.1.8 The Facility Operator shall, upon request by TNPA and within 30 (thirty) days or such a shorter period as reasonably directed by TNPA:
- 16.1.8.1 provide certified copies of all insurance policies referred to in clauses 16.1.1 and 16.1.2 (together with any other information reasonably requested by TNPA relating to such insurance policies) at the property management offices of TNPA and thereafter annually before the anniversary date of the Effective Date. TNPA shall be entitled to inspect the certified copies of all the insurance policies during ordinary business hours; and
- 16.1.8.2 provide TNPA with satisfactory evidence that all the insurances premiums, and amounts due and payable under all insurance policies have been paid and that the insurances covering the Facility are in full force and effect in accordance with the requirements of this clause 16.1 (*general obligations*).
- 16.1.8.3 shall be responsible for the administration of all claims and payments of the relevant inner deductible in respect of any claim instituted; and
- 16.1.8.4 provide TNPA with payment of the full insurance claim settlement in respect of any of TNPA's facilities or assets that have been written off.
- 16.1.9 Renewal certificates in relation to the insurances referred to in clauses 16.1.1 and 16.1.2 shall be obtained as and when the policies in respect of such insurances have been renewed and copies of the renewal certificates (certified

in a manner acceptable to TNPA) shall be forwarded to TNPA as soon as possible but in any event at least 10 (ten) days before the renewal date.

16.1.10 If the Facility Operator is in breach of clause 16.1.1 or 16.1.2 , TNPA may procure and maintain, at the sole cost and expense of the Facility Operator, the insurances referred to in this provision to the extent that TNPA deems it necessary. In this event, the Facility Operator shall be obligated to reimburse TNPA with any or all of the insurance premiums disbursed by TNPA on behalf of the Facility Operator within a period of 14 (fourteen) days of receiving a written notice from TNPA to do so.

16.1.11 The Facility Operator shall give TNPA notification within **[5 (five)]** days after any claim in excess of R**[insert appropriate amount]** under any of the insurance policies referred to in this clause 16.1 (*general obligations*) accompanied by full details of the incident giving rise to the claim. **[the amount to which this provision relates is determined with reference to the aggregate value of the Project and to the financial risks taken by TNPA in respect of the Project.]**

16.1.12 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Facility Operator of its liabilities and obligations under this Agreement.

16.1.13 The proceeds from the insurance cover referred to in clause 16.1.1 above shall be utilised towards the repairing and or the re-construction of the Facility, and the Equipment with the end view of having them restored to their condition immediately prior to the event which occasioned the loss or damages.

## 16.2 Uninsurable risks

16.2.1 If a risk usually covered by the Project Insurances in Part **[y]** of Schedule 18, becomes Uninsurable, then the Facility Operator shall notify TNPA within **[3 (three)]** days of that risk becoming Uninsurable.

16.2.2 If both Parties agree, or it is determined in accordance with **clause 56.7** (*fast-track dispute resolution*), that:

16.2.2.1 such risk is Uninsurable;

16.2.2.2 such risk being Uninsurable is not caused by the actions or omissions of the Facility Operator or a Subcontractor; and

16.2.2.3 other service providers carrying on businesses similar to the Project would cease to operate their business as a result of such Uninsurability,

then the Parties shall meet to discuss the means by which such risk should be managed (including by way of self-insurance by either Party).

16.2.3 The Facility Operator shall bear the onus of proving the circumstances in **clauses 16.2.2.1 and 16.2.2.2**.

16.2.4 If the requirements of **clauses 16.2.2.1 and 16.2.2.2** are satisfied, then the Agreement shall continue in full force and effect, and the Facility Operator shall, at the start of each Contract Year, place those monies that it no longer uses to pay insurance premiums in respect of the relevant insurance into an account in the joint names of TNPA and the Facility Operator, which account shall be called the "**Premium Reserve Account**". The Lenders shall not be entitled to take security on the Premium Reserve Account.

16.2.5 On the materialization of such risk, but only if such risk is still Uninsurable, TNPA shall, at TNPA's option, either pay to the Facility Operator:

16.2.5.1 an amount equal to the insurance proceeds that would have been payable had the relevant risk continued to be insurable and this Agreement will continue, less the proceeds in or that ought to be in the Premium Reserve Account; or

16.2.5.2 an amount equal to the amount set out in clause 50 (*Termination Amount for invalidation in terms of Section 67 of the Act*) less the proceeds in or that ought to be in the Premium Reserve Account, and this Agreement will terminate.

### 16.3 reinstatement

16.3.1 Subject to clause 16.4 (*economic test*), all insurance proceeds received under any policy referred to in Part **[x]** of Schedule 18 ("**Material Damage Policies**") shall be applied to repair, reinstate and replace each part or parts of the Facility

in respect of which the proceeds were received. ***[the policies to which this provision applies are the policies in respect of the physical reinstatement of any part of the Facility following damage to it]***

16.3.2 All insurance proceeds paid under any Material Damage Policy in respect of a single event (or a series of related events) in an amount in excess of R***[minimum level]*** (in ***[month and year]*** prices) shall be paid into a bank account to be opened in the name of both Parties (the "**Joint Insurance Account**"). The Lenders shall not be entitled to take security over the Facility Operator's rights in the Joint Insurance Account. ***[the relevant amount must be determined with reference to the value of the Project]***

16.3.3 Subject to clause 16.4 (*economic test*), where a claim is made or proceeds of insurance are received or are receivable under any Material Damage Policy in respect of a single event (or a series of related events) (the "**Relevant Incident**") in an amount in excess of R***[the same figure as in clause 16.3.2 above]*** (in ***[month and year]*** prices):

16.3.3.1 the Facility Operator shall deliver, as soon as practicable and in any event within ***[30 (thirty)]*** days after the making of the claim, a plan prepared by the Facility Operator for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the assets which are the subject of the relevant claim or claims. The Reinstatement Plan shall set out:

16.3.3.1.1 if the Contractor is not going to undertake the Reinstatement Works, then the identity of the person proposed to undertake the Reinstatement Works. The prior written agreement of TNPA shall be required in respect of the person to be appointed to undertake the Reinstatement Works; and

16.3.3.1.2 the proposed terms and timetable upon which the Reinstatement Works are to be undertaken (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written agreement of TNPA,

provided that if the Parties fail to reach any such agreement, then the dispute shall be referred for resolution in accordance with **clause 56.7** (*fast-track dispute resolution*).

#### 16.4 economic test

16.4.1 If all or substantially all of the Facility is destroyed or substantially destroyed in a single event or series of related events and the insurance proceeds (when taken together with any other funds available to the Facility Operator) are equal to or greater than the amount required to repair or reinstate the Facility, then the Facility Operator shall calculate the **[loan life cover ratio]** (on the assumption that the Facility is repaired or reinstated in accordance with this Agreement). ***[loan life cover ratio will be the relevant defined terms in the Finance Agreements.]***

16.4.2 If the calculation referred to in clause 16.4.1 above shows that the **[loan life cover ratio]** is greater than or equal to the **[event of default level]**, then the Facility Operator shall be subject to the reinstatement procedure set out in clause 16.3 (*reinstatement*).

16.4.3 If the calculation referred to in clause 16.4.1 above shows that the **[loan life cover ratio]** is less than the **[event of default level]**, then an amount equal to the lesser of:

16.4.3.1 the insurance proceeds; and

16.4.3.2 the Senior Debt,

shall be released from the Joint Insurance Account to the Facility Operator and such release shall constitute a complete discharge of all and any liability on the part of TNPA in respect of the damage caused to the Facility and the damaged Facility but shall not discharge the Facility Operator from the Operation and Maintenance or from performing the Services in accordance with the Agreement. For the avoidance of doubt, should this Agreement subsequently and as a result of the damage done to the Facility, terminate for Facility Operator Default, TNPA shall not have any additional liability in terms of clause 48 (*Termination Amount on Facility Operator Default*).

## 17 Port Users and Port Rules

The Facility Operator shall fulfil its obligations, duties and responsibilities under this Agreement and in particular (without limitation) its duties in respect of the provision of the Operation and Maintenance and the Services:

17.1 so as not to interfere with the use of the Port, its facilities and the Port Infrastructure by other Port Users; and

17.2 in compliance at all times with the Act and the Port Rules.

## 18 Shareholding in the Facility Operator

18.1 The Facility Operator shall notify TNPA forthwith on becoming aware of any change in the legal or beneficial ownership from time to time of the Facility Operator, and shall provide TNPA with any information which TNPA may reasonably require (and which the Facility Operator is reasonably able to provide) relating to any person, which from time to time has acquired, or which it is aware proposes to acquire, a legal or beneficial interest in the Facility Operator.

18.2 The Facility Operator shall obtain TNPA's written consent (which consent shall not be unreasonably withheld or delayed) prior to any material change in the ownership of the Facility Operator (other than where the Lenders exercise their rights to take a transfer of the shares in the Facility Operator, in terms of any document conferring security over any of the shares of the Facility Operator). TNPA shall notify the Facility Operator whether it consents to the transfer of ownership within 20 (twenty) Business Days, provided TNPA shall not unreasonably withhold or delay its consent. In this clause "**material change of ownership**" shall mean:

18.2.1 any Change in Control in any or all of the shares in the Facility Operator (or any company of which the Facility Operator is a subsidiary and which company has the sole business of holding Equity in the Facility Operator), within ~~5~~ (five) years] from the date hereof, provided that, without limitation to the generality of TNPA's right to refuse consent, TNPA shall be entitled to withhold its consents if it considers, in its reasonable opinion, that the proposed change has or is reasonably likely to have a material adverse effect on the basis upon which the

Facility Operator was appointed to be the preferred party to operate and maintain the Facility or provide Operation and Maintenance or the Services;

18.2.2 any Change in ownership or Control in any or all of the shares in the Facility Operator (or any company of which the Facility Operator is a subsidiary and which company has the sole business of holding Equity in the Facility Operator) or any change in the way in which the Facility Operator is managed which results in or is reasonably likely to result in non-compliance with Schedule 10B at any time prior to the expiry of the Operating Term;

18.2.3 any change to the ownership of (including without limitation the right to exercise any rights in relation to) the shares of the Facility Operator, with the direct or indirect result of a change of ownership of 50% or more of such shares in aggregate over any period of 24 (twenty four) calendar months; or

18.2.4 any change in the composition of the directors of the Facility Operator or the voting powers of the directors of the Facility Operator with the result that **[●]**% or more of such votes held by the directors are no longer be held by them.

18.3 TNPA shall not unreasonably refuse its consent to any change of ownership of the Facility Operator which is intended to produce compliance with **Schedule 10B**. Any dispute as to whether TNPA is acting unreasonably in refusing its consent to such transfer shall be resolved in accordance with the dispute resolution procedure.

## **19 TNPA's Assistance and Rights and Limitations on Liability**

19.1 Except as otherwise provided in this Agreement, TNPA shall;

19.1.1 assist the Facility Operator in its dealings with any Relevant Authority in connection with implementing the Project in accordance with the terms and conditions set forth herein; and

19.1.2 make every reasonable effort to assist the Facility Operator to obtain those Consents necessary for Operation and Maintenance, provided that TNPA shall not be liable or responsible for any failure of the Facility Operator to obtain any such Consents. If the Facility Operator fails to obtain any such Consents, the Facility Operator shall discuss with TNPA mutually acceptable solutions.

19.2 Nothing in this Agreement shall preclude or in any manner limit the rights of TNPA or any other Relevant Authority from granting such further or other concessions as it in its sole discretion deems fit, nor shall the Facility Operator have any claim against TNPA or any other Relevant Authority arising from the grant of such further or other concessions, provided that TNPA agrees and undertakes for the duration of the Operating Term that, subject to Part VI of this Agreement, it will not itself, nor will it grant a concession or similar right to any person to, operate a facility substantially similar to the Facility at the Port.

19.3 TNPA shall not be liable to the Facility Operator for the volume of demand for the Services.

19.4 No warranties, representations or undertakings are given as to the accuracy or completeness of any information provided by TNPA and or its advisors. None of TNPA nor its advisors shall be liable for any error, misrepresentation or omission in any such information.

19.5 Notwithstanding anything else contained in this Agreement, the Facility Operator shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against TNPA or any other Relevant Authority and or their respective officers, employees, agents and or representatives on grounds that any information, whether obtained from or made available by TNPA or any such other Relevant Authority and or their respective officers, employees, agents and or representatives or otherwise is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

19.6 Where in this Agreement any power, duty, function or discretion is given or is to be carried out or exercised by TNPA, such power, duty, function or discretion may be carried out or exercised by any person nominated by TNPA.

## **20 TNPA Step-in**

20.1 TNPA may be authorised by the Minister of Public Enterprises, with the concurrence of the Minister of Transport, to take any action in connection with the Operation and Maintenance and or the Services of the Port because a serious and urgent risk arises to the health or safety of persons or property, or to the environment, or to national



and public safety and or to discharge a statutory duty, then TNPA shall be entitled to take action in accordance with the following provisions.

20.2 If pursuant to this clause 20.2, TNPA wishes to take action, it shall as soon as possible after reaching its determination to do so notify the Facility Operator in writing of:

20.2.1 the action it wishes to take;

20.2.2 its reasons for taking such actions;

20.2.3 the date when it wishes to commence such action;

20.2.4 the time period (the "**Step-in Period**") which it reasonably believes will be necessary for such action and which must be a fixed period; and

20.2.5 to the extent practicable, the effect of such action on the Facility Operator on its obligations to perform the Operation and Maintenance and or Services during Step-in Period.

20.3 Following the service of such notice, TNPA shall take such action as notified under clause 20.2 and any ancillary action as it reasonably believes is necessary (the "**Required Action**") and the Facility Operator shall give all reasonable assistance to TNPA in the conduct of such Required Action.

20.4 If the Facility Operator is not in breach of its obligations in terms of this Agreement in respect of which the Required Action is proposed to be taken, then for so long as and to the extent that the Required Action is taken, and this prevents the Facility Operator from providing any part of the Project:

20.4.1 the Facility Operator shall be relieved from such obligations; and

20.4.2 in respect of the time period over which such Required Action is conducted and provided that the Facility Operator provides TNPA with such reasonable assistance as TNPA may need in the conduct of such Required Action (such assistance, however, to be at the expense of TNPA to the extent of any incremental costs), TNPA shall pay to the Facility Operator an amount of monies that is equal to the revenue that the Base Case Financial Model projects to have been earned by the Facility Operator at the time of and during

the period of the Required Action if the Facility Operator was fulfilling all its obligations in respect of the Project that are affected by the Required Action over such period.

20.5 If the Required Action is taken as a result of a breach by the Facility Operator of any of its obligations under this Agreement, then for so long as and to the extent that such Required Action is taken and this prevents the Facility Operator from providing any part of the Project:

20.5.1 the Facility Operator shall be relieved of its obligations in respect of such part; and

20.5.2 the Facility Operator shall owe TNPA an amount equal to TNPA's costs of taking such Required Action,

provided that, if by the expiry of the Step-in Period, the breach still subsists and if it constitutes a Facility Operator Default, then TNPA will be entitled to serve a notice in terms of clause 43.3 (*TNPA's option*) requiring the Facility Operator to remedy the Facility Operator Default or to put forward a remedial programme. ***[The Emergency Situations provisions, as detailed in the section 57, are incorporated under this clause, TNPA Step-in, in the TOA]***

## **PART II – PROVISION OF THE PROJECT SITE AND THE PORT**

### **21 Provision of the Port**

TNPA shall provide the Port and shall manage and maintain the Port, in accordance with the Laws that are applicable to such provision, management and maintenance from time to time and in accordance with the Act and other applicable Laws.

### **22 Project Site**

22.1 TNPA shall be the owner of the Project Site for the duration of this Agreement. The Facility Operator acknowledges the ownership rights of TNPA in respect of the Project Site on which the Port is constructed and shall not in any way challenge or procure that any person challenges or assists any other person to challenge, such ownership rights and title of TNPA.

22.2 The Facility Operator acknowledges that it does not have and shall not have any rights of title, ownership, lien, leasehold or any other rights in respect of the Project Site, other than the rights of occupation and use as detailed in this Agreement.

22.3 The Facility Operator shall, for the term of this Agreement, have the right to use and occupy the Project Site, commencing on the Effective Date.

22.4 [The Facility Operator shall, in respect of its rights of use of the Project Site, pay to TNPA the amount of **[R prevailing rate]** per square metre per month (excluding rates and taxes referred to in clause 22.6). All amounts payable by the Facility Operator in terms of this clause 22.4, shall be paid monthly in advance, by no later than the 7<sup>th</sup> day of each month, commencing on the Effective Date.]

22.5 The amount payable by the Facility Operator in terms of clause 22.4 may be escalated in accordance with the following principles:

22.5.1 the Parties shall meet in order to agree on the escalation that shall apply in respect of the subsequent Contract Year taking into account the value of the land on which the Project Site is situated;

22.5.2 should the Parties fail to reach an agreement on any escalation referred to in clause 22.5.1, the matter shall be referred to an independent valuer registered with the South African Institute of Valuers who, in the absence of agreement between the Parties, shall be appointed by the President of the South African Institute of Valuers (or any successor entity), for determination in terms of clause 56.7(*fast-track dispute resolution*). Any decision of the independent valuer shall, in the absence of manifest error or fraud, be final and binding on the Parties.

22.6 The Facility Operator accepts responsibility for the payment of rates, taxes, charges, levies, assessments or any equivalent taxation which may at any time be levied by a Relevant Authority upon or in connection with the Project Site, in respect of the period covered by this Agreement, other than any taxes imposed in relation to the receipt by TNPA of the payment detailed in clause 22.4 or in connection with its disposal of its interest in the Project Site used by the Facility Operator or in relation to any other amounts received by or accrued to TNPA as a result of or in connection with this Agreement or the Project Site used by the Facility Operator.

22.7 The Facility Operator may object to any rates valuation made by any Relevant Authority of the Project Site used by the Facility Operator or the Project Site of which they form part. The Facility Operator shall be liable for all costs in prosecuting any such objection and the Facility Operator shall be entitled to any benefit accruing as a result of a successful objection.

22.8 If TNPA is obliged by the Relevant Authority to make payments referred to in clause 22.6, as a result of which TNPA makes such payments on behalf of the Facility Operator, TNPA shall notify the Facility Operator in writing about such payments and following such notice the Facility Operator shall, within 30 (thirty) days after being called upon to do so, refund to TNPA such payments as TNPA may have made in respect of the rates, taxes, charges, levies, assessments or equivalent taxes levied.

22.9 TNPA shall use its reasonable endeavours to ensure that no other Port Users negatively affect the use by the Facility Operator of the Project Site. The Facility Operator shall not negatively affect the use of the Port by TNPA and the other Port Users, other than the Project Site and then only to the extent detailed in this Agreement.

22.10 TNPA shall have the right to enter into and inspect the Project Site and the Facility at reasonable times and on reasonable notice so as to enable it to inspect the Project Site and the Facility, to fulfil its obligations of maintenance in respect of the Port and to fulfil its obligations as the port authority of South Africa.

22.11 The Facility Operator shall use the Project Site solely for the uses and purposes contemplated in this Agreement in respect of the Project.

22.12 The Facility Operator shall be responsible for maintaining the Project Site in good condition, fair wear and tear excepted, at no cost to TNPA or any other Port User. TNPA shall maintain or shall use its reasonable endeavours to procure that other Port Users maintain the Port, other than the Project Site, in good condition, fair wear and tear excepted, at the cost of TNPA or the relevant Port User. The Parties shall meet and discuss any intended maintenance or repair activities so as to ensure that such activities are conducted in a manner that minimises any interference with the operations of the other Party.

22.13 The Facility Operator shall not be able to transfer any of its rights in respect of the Project Site or the use thereof to any other person without the prior written consent of TNPA, save for any transfer to the Lenders, in accordance with clause 43.6 (*Lender's step-in*), which shall take place in accordance with the provisions of the FDA.

22.14 The Facility Operator shall, subject to TNPA's approval, provide for:

22.14.1 the clearance of the Project Site;

22.14.2 any diversions to and re-routing of roads not forming part of the Project Site;  
and

22.14.3 the clearance, relocation and diversion of all Utilities on the Project Site,  
  
from the date the Project Site is delivered to the Facility Operator and which are necessary for the execution of the Project.

22.15 The Facility Operator shall, at its cost, apply for all Consents required for the clearance of the Site.

22.16 The Facility Operator shall continue to be bound by and shall honour any existing agreements between TNPA and any person, which grant access or way-leaves to the Project Site. The Facility Operator may, however, apply to TNPA for any necessary modifications or cancellations of such agreements, such application to be made timeously in order to avoid any delay or additional cost. To the extent that TNPA has the right to modify or cancel such agreements, it shall comply timeously with the Facility Operator's reasonable request to modify and or cancel any such agreements.

22.17 TNPA warrants to the Facility Operator that, to the best of its knowledge, all of agreements referred to in clause 22.16 are listed in **Schedule 19** and that TNPA has provided the Facility Operator with true and complete copies of such agreements.

## **23 Key Personnel and Removal of Personnel**

23.1 The Facility Operator shall at all times ensure that it has sufficient suitable and appropriately qualified and experienced personnel to undertake the Project and that such personnel shall be located in South Africa. Without limiting the generality of the

foregoing, the Facility Operator shall ensure that the key personnel positions are always filled as soon as reasonably possible.

23.2 The Facility Operator shall implement all measures as are required by Law and or as may be reasonably necessary to ensure the safety of its employees or Sub-contractors, and shall provide them or ensure that they are provided, free of charge, with any necessary personal protective clothing and equipment.

23.3 The Facility Operator accepts full responsibility for the training of staff and shall ensure that all its employees and Sub-contractors are properly trained for the work they are undertaking, and are familiar with safety, health and security requirements that apply to the Facility.

23.4 TNPA may require the Facility Operator to remove any employee or other personnel of the Facility Operator or any Subcontractor from the Project Site and the Facility Operator shall do so (subject to applicable law) if in the reasonable opinion of TNPA such employee or personnel engages in any conduct which might reasonably result in a breach of any provision of this Agreement or threaten public health, safety or security, and the Facility Operator shall immediately comply and replace such employee or personnel with suitable appropriately qualified and experienced replacements, subject to applicable law.

## **24 [Health and Safety**

24.1 Within 3 Months of the Operations Date, the Facility Operator shall, at its cost, complete a comprehensive risk assessment of its business, in respect of all areas of the Project Site, and the services or processes it intends to undertake, in accordance with the requirements of the Occupational Health and Safety Act No 85 of 1993, and shall provide TNPA with a full report on its risk assessment so undertaken within 1 Month of completing the assessment.

24.2 The Facility Operator shall be responsible for:

24.2.1 the implementation of and adherence to the IMDG Code and its regulations;

24.2.2 compliance with the Occupational Health and Safety Act No 85 of 1993 and regulations promulgated in terms of that Act;

24.2.3 procuring and implementing systems and services for the prevention, monitoring, detection and extinguishment of fires or explosions; and

24.2.4 maintaining a working environment which is safe and designed to minimise the risk of injury or illness to any person present on the Project Site and to minimise the risk of loss or damage to cargoes, vessels or other moveable and immovable property in accordance with Law and the further written requirements of TNPA.

24.3 The Facility Operator may not keep or store on the any hazardous or flammable substances unless:

24.3.1 it reasonably requires such hazardous or flammable substances to be kept or stored to enable it to conduct its business on the Project Site;

24.3.2 it has obtained the prior written approval of TNPA; and

24.3.3 it complies with the applicable Law in respect of hazardous substances in general and that specific hazardous substance in particular.

24.4 In addition to the general Port water network provided by TNPA, the Facility Operator shall provide, at its own cost, such fire water network, facilities or equipment, or other protective measures, that are, in TNPA's reasonable opinion, necessary in order to provide effective fire protection installations and water supply to the Project Site.

24.5 TNPA may, from time to time, require the Facility Operator, by notice in writing, to provide and install, at the Facility Operator's cost, such further devices, appliances and installations as TNPA may reasonably consider necessary to minimise the risk of any fire occurring or to prevent the spread of any fire which may occur. The Facility Operator shall, when so required, comply with the requirements set forth in such notice within the time period specified in the notice. ***][these provisions are included and required as part of the section 57 licencing provisions]***

## 25 **[Security**

25.1 The Facility Operator must ensure that the perimeter of the Project Site is fenced with security fencing of a standard reasonably acceptable to TNPA and which is in

compliance with the ISPS Code, and that such fencing is maintained at that standard (and repaired as necessary) during the term of this Agreement.

25.2 The Facility Operator shall comply in all material respects with the provisions of the International Maritime Organisation Convention of Safety and Security at Sea, the ISPS Code, and the Facility Operator shall be responsible for the security of the Project Site and for all persons and movables therein, including cargoes, and for the implementation of and adherence to the ISPS Code.

25.3 The Facility Operator shall submit to TNPA, within 1 (one) Month of the Operations Date, a Project Site security assessment and develop a Project Site security plan for security levels 1, 2 and 3, corresponding with normal, medium and high threat situations. The plan shall indicate the operational and physical security measures the Facility Operator will take to ensure that it normally operates at security level 1. The plan shall also indicate the additional, or intensified, security measures the Facility Operator will take when instructed to do so by TNPA, to move to and operate at security level 2, and to operate at security level 3. The Facility Operator will nominate a Port Facility Security Officer, organise regular security drills and at all times provide the necessary security equipment on the Project Site.

25.4 As part of the Project Site security plan the Facility Operator shall monitor and control all cargo, vehicles and people entering and leaving the Project Site and ensure that security communications are always readily available.] ***[these provisions are included and required as part of the section 57 licencing provisions]***

## **PART III –OPERATION AND MAINTENANCE**

### **26 Commissioning**

#### **26.1 commencement of Operation and Maintenance**

The Facility Operator shall perform or procure the performance of Operation and Maintenance in accordance with the Operating Specifications.

#### **26.2 approval to provide Services**

26.2.1 TNPA shall, subject to and in accordance with the provisions of the Act, grant approval to the Facility Operator to provide the Services and shall at the same



time announce the Facility open and that the Facility Operator is authorised to charge and collect fees in respect of the Services and issue all notices required by law to be issued, with effect from the date that the Facility Operator [established to the reasonable satisfaction of TNPA that it is able to provide the Services]. The date specified by TNPA in the relevant notice issued in respect of such approval, as the date upon which the aforesaid approval and authorisation comes into operation or takes effect, shall be the Operations Date.

26.2.2 Notwithstanding but without prejudice to the provisions of clause 26.2.1, the Facility Operator shall not operate the Facility or charge or collect fees in respect of the Service until TNPA has issued the notice in terms of clause **27.3.1**.

## **27 Operation and Maintenance**

### **27.1 obligation to Operate and Maintain**

During the Operations Period, the Facility Operator shall be obliged to undertake Operation and Maintenance subject to and in accordance with the terms of this Agreement.

### **27.2 standards of Operation and Maintenance**

27.2.1 Operation and Maintenance shall be carried out in accordance with the Law and in conformity with the standard of care and workmanship prescribed in the Operating Specification, using equipment and materials which are of suitable quality for the purposes and uses intended and free of defects and deficiencies, and in accordance with the Operating Specifications.

27.2.2 The Facility Operator shall prepare Operation and Maintenance manuals based on the Operating Specifications and shall submit such manuals to TNPA for approval. Once TNPA has approved such manuals, the manuals shall be the "**Operation and Maintenance Manuals**".

27.2.3 Any changes to the Operation and Maintenance Manuals, after such manuals have been approved by TNPA as contemplated in clause 27.2.2, shall require the prior approval of TNPA.

### **27.3 management**

27.3.1 The Facility Operator shall ensure that, subject to the other provisions of this Agreement, the Facility is open to provide the Services and that the use of the Facility and provision of the Services are convenient and safe at all times and (for the avoidance of doubt) 24 (twenty four) hours of each day.

27.3.2 The Facility Operator shall take all reasonable steps in the performance of its obligations hereunder in such a way so as to prevent the occurrence of any Environmental or health and safety hazards.

27.3.3 The Facility Operator shall otherwise manage the Facility and all vessels using the Facility in accordance with the Act, the Port Rules, the Operation and Maintenance Manuals and the Operating Specifications.

27.3.4 The Facility Operator shall at all times exercise the Operating Rights strictly in compliance with the provisions of this Agreement and applicable Law.

### **27.4 marketing**

27.4.1 The Facility Operator shall actively market the Facility and the Services internationally. The Facility Operator shall submit all information, materials, documents and any other data that it intends to use in respect of its marketing campaign in respect of the marketing of the Facility and the Services to TNPA for approval prior to its use thereof.

27.4.2 Within 30 (thirty) days of the receipt by TNPA of the information, materials, documents and other data detailed in clause 27.4.1, TNPA shall either grant or withhold its consent in respect of the use thereof in the marketing of the Facility and the Services. If TNPA withholds its consent, it will provide its written reasons for such withholding at the time that it notifies the Facility Operator that it is withholding its consent. If TNPA has withheld its consent in respect of any such information, materials, documents or other data, the Facility Operator shall not be entitled to use it in the marketing of the Facility and the Services.

## 27.5 [volumes and occupancy]

27.5.1 The Facility Operator projects that the following volumes of containers are moved and that the following number of movements are made by each gantry crane, all in the following periods:

***[the specific requirements and performance measures of this clause shall be considered and concluded between the Facility Operator and TNPA's Port Operations department. However, for the purposes of this clause basic projections must be disclosed]***

27.5.2 The Facility Operator shall use its [best] endeavours to ensure that the volumes of containers detailed in clause 27.5.1 are made up as follows:

27.5.2.1 at least [●] % are [transshipment] containers;

27.5.2.2 not more than [●] % is diverted from other ports in South Africa;

27.5.2.3 [●] % are volumes that did not previously exist in the port system of South Africa;

27.5.3 For the avoidance of doubt, the Operating Performance Guarantee shall also be given in respect of and cover the Facility Operator's obligations in terms of this clause 27.5 (*volumes and occupancy*).

## 27.6 [Performance Measures]

27.6.1 The Facility Operator will use its best efforts to promote and develop the container throughput and container-related business of the Project Site, in order to achieve optimum utilisation and in a way which is consistent with sound business practices.

27.6.2 Without limiting the generality of clause 27.6.1, but subject to clause 27.6.7 below, the Facility Operator shall, from the first anniversary of the Operation Date, meet the minimum performance standards to be determined by TNPA, after consultation with the Facility Operator, and notified to the Facility Operator in writing at least 3 (three) Months prior to such anniversary.

- 27.6.3 The minimum performance standards determined in terms of clause 27.6.2 shall be reviewed by TNPA on an annual basis after consultation with the Facility Operator, and new minimum performance standards shall be determined by TNPA and notified in writing to the Facility Operator prior to expiry of the year in which such review is conducted. ***[TNPA will advise of the parameters of the minimum performance standards mentioned in this clause, and also to provide a reasonable time period within which the Facility Operator will be required to comply]***
- 27.6.4 The performance of the Facility Operator will be reviewed quarterly by TNPA.
- 27.6.5 In order to conduct the quarterly review, the Facility Operator shall provide TNPA, within 10 (ten) Business Days after the end of each Quarter, with all information that is, in the reasonable opinion of TNPA, necessary to conduct the review. ***[TNPA will specify what information must be provided by the Facility Operator]***
- 27.6.6 TNPA shall communicate its initial comments and any requests for additional information within 10 (ten) Business Days after the information has been supplied by the Facility Operator in terms of clause 27.6.5, and will take into consideration any response by the Facility Operator to these initial comments, provided that this response is submitted within 10 (ten) Business Days of the initial comments. If TNPA intends to make a negative finding regarding any aspect of the performance of the Facility Operator, it shall give reasonable notice of its intention to do so to the Facility Operator and representatives of TNPA and the Facility Operator shall meet to discuss the proposed finding before a final decision is made.
- 27.6.7 When, in the opinion of the Facility Operator, circumstances occur which may impact negatively on its achievement of its performance targets, the Facility Operator shall notify TNPA in writing within 10 (ten) Business Days of the occurrence and both the Facility Operator and TNPA shall document the details of the occurrence. Every performance standard shall be relaxed should the Facility Operator be prevented or delayed in performing its obligations by reason of a Force Majeure event.

27.6.8 Subject to the provisions of **clause 41**, if the Facility Operator fails to achieve any of the minimum performance standards for any 2 (two) consecutive years (i.e. for 2 (two) years in a row), the Facility Operator shall pay to TNPA a penalty. The formula for the calculation of such penalty shall be determined by TNPA, after consultation with the Facility Operator, and notified in writing to the Facility Operator at least 3 (three) Months prior to the first anniversary of the Operations Date.

27.6.9 Any penalty amount payable in terms of this Agreement shall be due and payable within the period specified by TNPA in writing. ***[these provisions are included and required as part of the Terminal Operator Performance Standards and the section 57 licencing provisions. TNPA reserves the right to implement the Penalty and Incentive Guideline, as and when it becomes accepted for implementation by the Ports Regulator of South Africa]***

## **28 [Reporting Requirements**

28.1 The Facility Operator shall within 3 (three) Months after the end of the Facility Operator's Financial Year, submit to TNPA a report of its Operation and Maintenance during that financial year, including:

28.1.1 the quality and level of service in the financial year under review;

28.1.2 its compliance with the terms of this Agreement, the Act and the Regulations;

28.1.3 steps taken to eliminate anti-competitive and discriminatory practices; and

28.1.4 the quality and level of performance with regard to such environmental criteria and social responsibility requirements as may be set by TNPA or required by other national legislation.

28.2 On an annual basis the Facility Operator shall submit to TNPA:

28.2.1 such statistical information relating to its operations as may reasonably be required by TNPA, including but not limited to statistics on the quantity, type and status of Containers handled at the Project Site; statistics on the number, type and size of vessels serviced at the Project Site; and statistics on the

number of wagons and trucks handled at the Project Site interface with land transport and Container dwell time statistics;

28.2.2 its cargo forecast for the remainder of the Agreement period, or such other shorter period as specified, in the form determined by TNPA; and

28.2.3 future development plans, including equipment replacement and acquisition plans, relating to the Project Site or any service provided at, or to be provided at, the Project Site.

28.3 The Facility Operator shall, if requested by TNPA in writing, submit to TNPA an information summary regarding the information in clauses 28.1 and 28.2, excluding any confidential information, and or any information not required to be provided by the Facility Operator, which summary may be disclosed to members of the public.

28.4 Outturn reports in respect of all cargo landed, shipped or transhipped, deep-sea and coastal, must be provided to TNPA by the Facility Operator on a per vessel basis, 72 hours subsequent to the vessel having completed working.

28.5 TNPA may require the Facility Operator, at the Facility Operator's cost, to submit such additional information as may be necessary to explain or amplify any report or information submitted by the Facility Operator in terms of clauses 28.1 and 28.2 above.

28.6 Any information required by TNPA must be lodged by the Facility Operator within the period and in the manner determined by TNPA.

28.7 The Facility Operator must, within 24 (twenty four) hours of its occurrence or discovery, inform TNPA of:

28.7.1 any industrial dispute between the Facility Operator and its employees;

28.7.2 any industrial accident or disaster involving any employee or agent of the Facility Operator or any injury on duty or fatality;

28.7.3 any occurrence of fire within the Project Site;

28.7.4 any theft or pilferage within the Project Site or any theft or pilferage involving any cargo in the Facility Operator's possession or control;

28.7.5 any proceedings or claim instituted or made against the Facility Operator which could materially affect its ability to perform any obligation or to comply with any term or condition of this Agreement; and

28.8 any spillage or pollution that may have an impact on the Environment.

## **29 Financial Accounts, Reports, inspection and reporting of changes**

### **29.1 financial accounts and auditors**

29.1.1 The Facility Operator shall arrange at its own expense and cost for an accounting and cost control system consistent with Generally Accepted Accounting Principles and for the appointment as auditors of a firm of independent accountants.

29.1.2 The Facility Operator shall keep all its financial books and records at all times within South Africa. The accounts of the Facility Operator will be kept in Rand. Such accounts and the reports of such accountants shall be provided to TNPA.

29.1.3 TNPA may meet with the Facility Operator's auditors regarding the Facility Operator's accounts and operations twice in a Contract Year. TNPA may also, at its own cost, require that officers of TNPA or a firm of independent accountants conduct additional audits of the Facility Operator after 10 (ten) days prior notice to the Facility Operator.

### **29.2 right of inspection**

The Facility Operator shall furnish to TNPA any information that TNPA may reasonably request and shall permit representatives of TNPA to visit the Facility and the Project Site, and any of the other offices where the business of the Facility Operator is conducted, and to have access to the Facility Operator's books of accounts and records, designs, drawings and generally to all information that is customarily available to any shareholder of the Facility Operator and in connection with the Project, and shall cause the Operator to make such information, books of accounts and records, drawings and other data relating to Operation and Maintenance, available to TNPA. The Facility Operator shall provide TNPA with full read only access to the Operator's computer for the review and monitoring of revenue collection at the Facility.

### 29.3 periodic reports

29.3.1 The Facility Operator shall furnish TNPA, as soon as practicable but in any event not later than 4 (four) calendar months after the end of each Contract Year, with:

29.3.1.13 (three) copies of the Facility Operator's complete financial statements for such financial year (which are consistent with the books of accounts and prepared in accordance with Generally Accepted Accounting Principles), together with an audit report thereon, all in accordance with the requirements of the laws and regulations pertaining to accounting;

29.3.1.2a copy of any management letter or other communication sent by the auditors to the Facility Operator or to its management in relation to the Facility Operator's financial, accounting and other systems, management and accounts;

29.3.1.3an annual report by the auditors certifying that, based on its said financial, accounting and other systems, management and accounts, the Facility Operator was in compliance with its financial obligations under the Finance Agreements and as contemplated in the Base Case Financial Model as at the end of the relevant financial year or detailing any non-compliance by the Facility Operator therewith;

29.3.1.4a reconciliation of the current year's profit and loss account and the budget for the year, and an analysis thereof.

29.3.2 The Facility Operator shall furnish TNPA, as soon as practicable but in any event no later than 45 (forty five) days after the end of each quarterly period of each Contract Year (except for the last quarterly period of each financial year), with:

29.3.2.13 (three) copies of the Facility Operator's complete financial statements for such quarterly period (which are consistent with its books of account and prepared in accordance with Generally Accepted Accounting Principles), including in each such report a balance sheet, a statement of income and a statement of cash flows as of the end of and for such period, and for the



period from the beginning of such year to the close of such quarterly period, certified by an officer of the Facility Operator, all in accordance with the requirements of the laws and regulations pertaining to accounting;

29.3.2.2a report on any factors materially and adversely affecting or which might materially and adversely affect the Facility Operator's business and operation or its financial condition;

29.3.2.3a list of each of its lenders and creditors to which the Facility Operator owes a sum in excess of R[1,000,000.00] (in **[month and year]** prices) including the amounts due to each of them;

29.3.2.4a statement describing in detail any Related Party Transaction during the respective period;

29.3.2.5a report on the implementation and progress of the Project, containing such information as TNPA may reasonably require and disclosing any factors of which the Facility Operator is aware materially and adversely affecting or which would be otherwise likely, materially and adversely to affect, the carrying out of the Project; and

29.3.2.6a statement identifying separately the capital costs, and Operation and Maintenance costs, during the respective period, for the Facility and the provision of the Services separately.

29.3.3 The Facility Operator shall furnish to TNPA as soon as practicable, but in any event no later than 35 (thirty five) days prior to the end of each Contract Year, the projected profit and loss account and the budget for the following year, together with an analysis thereof.

29.3.4 The Facility Operator shall furnish to TNPA as soon as practicable, but in any event no later than the end of each quarterly period of each Contract Year, projected cash flow for the following quarterly period, together with an analysis thereof.

29.3.5 The Facility Operator shall immediately report to TNPA details of the following events:

29.3.5.1 any charge, lien or attachment imposed on any of the Facility Operator's property and any seizure thereof which charge, lien, attachment or seizure will have a material adverse effect on the ability of the Facility Operator to perform its obligations under this Agreement;

29.3.5.2 any transaction in respect of the shares of the Facility Operator of which the Facility Operator is aware;

29.3.5.3 any default under any Finance Agreement, the circumstances thereof and possible results as viewed by the Facility Operator; and

29.3.5.4 any matter the Facility Operator is aware of, which might influence the validity of this Agreement or any matter that constitutes a material breach, including without limitation, any possible termination event, the circumstances thereof, and possible results as viewed by the Facility Operator.

29.3.6 The Facility Operator shall provide a monthly written report to TNPA with respect to the matters specified in the Operating Specifications to be reported relating to provision of the Operation and Maintenance and or the Services.

#### **29.4 delivery of records**

For a period of not more than 4 (four) months following the termination of this Agreement for whatever reason, the Facility Operator shall retain in safe custody and storage all such records as are referred to in clause 29.3 (*periodic reports*) which were in existence at the date of termination. Upon expiry of such period or such earlier date as may be agreed by TNPA and the Facility Operator, the Facility Operator shall deliver all such records (or where such records are required by legislation to remain with the Facility Operator or the Facility Operator's shareholders, copies thereof) to TNPA or to its duly authorised representative, in such manner and at such location as TNPA shall determine. TNPA shall make such records available for inspection by the Facility Operator at any reasonable time. All costs of retaining such records in safe storage and delivering the same shall be borne by the Facility Operator.

## 29.5 reporting of changes

29.5.1 The Facility perator shall not without the prior consent of TNPA:

29.5.1.1make or allow any change in or to its corporate structure, the Facility Operator Founding Documents or its financial year end;

29.5.1.2make or allow any material change in the Facility Operator's organisational structure, or any other material change which might materially adversely affect the performance of the Facility Operator's obligations under this Agreement;

29.5.1.3save for the Finance Agreements and the Associated Agreements, enter into any agreement or series of agreements which contemplates or could involve one or more payments by or to the Facility Operator in the aggregate in excess of the equivalent of R[1, 000, 000.00] (in **[month and year]** prices);

29.5.1.4enter into any Related Party Transaction;

29.5.1.5enter into any agreement or incur any liability which is not in the ordinary course of business of the Facility Operator; or

29.5.1.6make any change in the insurance policies contemplated in clause 16 (*Project Insurance*).

29.5.2 The Facility Operator shall notify TNPA of any claim brought or threatened which is reasonably likely to have a material effect on the Facility Operator or on its ability to perform its obligations under this Agreement.

## 30 Rights of Access

30.1 Subject to the reasonable safety requirements of the Facility Operator, TNPA, the Lenders, the Independent Certifier and or their representatives may, at their own risk, enter upon the Facility and the Project Site (or any other site or property used by the Facility Operator for the purposes of the Project) to inspect the Facility and Operation and Maintenance, and to monitor compliance by the Facility Operator with its obligations under this Agreement.

30.2 TNPA, the Lenders, the Independent Certifier and or their representatives may at all times, but subject to the reasonable security and safety requirements of the Facility Operator, enter upon any property used by the Facility Operator as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.

30.3 The Facility Operator shall procure that adequate facilities are made available to TNPA, the Lenders, the Independent Certifier and or their representatives and that reasonable assistance is given for the purposes of clauses 30.1 and 30.2, subject to the Facility Operator's operational requirements not being adversely affected and to reimbursement of any reasonable costs or expenses of the Facility Operator.

### **31 Authority Changes**

31.1 TNPA shall have the right to require changes to be made to the Operating Specifications in accordance with this clause ("**Authority Change**"), in which event TNPA shall serve notice thereof ("**Authority Notice of Change**") on the Facility Operator. Such Authority Changes shall always provide for any variation of the Facility Operator's obligations under this Agreement and the Associated Agreements and be technically feasible.

31.2 The Authority Notice of Change shall:

31.2.1 set out the Authority Change required in sufficient detail to enable the Facility Operator to calculate and provide the estimated revised costs of the Project in accordance with clause 31.3 ("**Estimate**");

31.2.2 require the Facility Operator to provide TNPA, within such period as determined by the Independent Certifier, (which period shall not be less than 28 (twenty eight) days after receipt by the Facility Operator of the Authority Notice of Change), with the Estimate.

31.3 As soon as practicable and in any event within the period specified in the Authority Notice of Change, the Facility Operator shall deliver the Estimate to TNPA. The Estimate shall include the opinion of the Facility Operator on:

- 31.3.1 any impact on the performance of the Facility Operator's rights or obligations under this Agreement and any impact on the Facility Operator's obligations to the Lenders;
- 31.3.2 any amendment required to this Agreement and or any Associated Agreement as a result of the Authority Change;
- 31.3.3 any estimated revised Project costs that result from the Authority Change;
- 31.3.4 any capital expenditure that is required or no longer required as a result of the Authority Change; and
- 31.3.5 the proposed method of certification of any operational aspects of the Facility Operator's obligations under this Agreement required by the Authority Change if not covered by the procedures set forth in the Operating Specifications.
- 31.4 As soon as practicable after TNPA receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. In such discussions TNPA may modify the Authority Notice of Change, in which case the Facility Operator shall, as soon as practicable and in any event within such period as determined by the Independent Certifier (which period shall not be less than 28 (twenty eight) days after receipt by the Facility Operator of such modification), notify TNPA of any consequential changes to the Estimate.
- 31.5 As soon as practicable after the contents of the Estimate have been agreed, TNPA shall:
- 31.5.1 confirm the Estimate (as modified); or
- 31.5.2 withdraw the Authority Notice of Change.
- 31.6 If TNPA does not confirm the Estimate (as modified) within 30 (thirty) days after the contents of the Estimate having been notified to it in accordance with clause 31.4 or determined pursuant to clause 31.5, then the Authority Notice of Change shall be deemed to have been withdrawn.
- 31.7 If the Estimate (as modified) involves estimated capital expenditure, then the Facility Operator shall use its reasonable endeavours to obtain funding for the whole of the

estimated capital expenditure, on terms satisfactory to the Facility Operator and the Lenders.

31.8 If the Facility Operator has used its reasonable endeavours to obtain funding for the whole of the estimated capital expenditure, but has been unable to do so within 60 (sixty) days after the date that TNPA confirmed the Estimate, then the Facility Operator shall have no obligation to carry out the Authority Change, unless TNPA agrees to pay the cost involved.

31.9 TNPA may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Facility Operator has obtained funding for part of the capital expenditure, the remaining part of the estimated capital expenditure.

31.10 If the Estimate has been confirmed by TNPA and TNPA has agreed to meet all or part of the capital expenditure pursuant to clause 31.10, then the Facility Operator shall be entitled to compensation as set forth in clause 40 (*Consequences of a Compensation Event*).

31.11 If the Authority Notice of Change is deemed to be withdrawn in terms of clause 31.6 or if TNPA has confirmed the Estimate and has agreed to meet all or part of the capital expenditure as envisaged in clause 31.10, but TNPA thereafter withdraws the Authority Notice of Change, TNPA shall pay to the Facility Operator the reasonable costs of providing the Estimate.

## **PART IV – FINANCIAL PROVISIONS**

### **32 Fees in respect of Services**

32.1 The Facility Operator shall have the exclusive right and obligation for its benefit and risk to levy and collect fees in respect of the Services, with effect from the Operations Date.

32.2 None of TNPA or any other Relevant Authority shall incur or assume any liability for or in connection with the fees charged in respect of the Services, any system used in respect of such fees or any defect or deficiency therein.

32.3 With effect from the Operations Date, the Facility Operator shall apply the initial fee rates specified in Schedule 20, until revision thereof in accordance with the provisions of **clause 32.4**.

32.4 The Facility Operator may from time to time request TNPA to approve revisions and increases to fee rates, ("**Fee Revision Request**") in accordance with **Schedule 20**.

32.5 Provided that the Facility Operator has made the Fee Revision Request at least 21 (twenty one) days before the date the revision is required to take effect and the requested revisions and increases do not individually exceed CPI, TNPA may, subject to **clause 32.7**, approve such increase.

32.6 Any revision or increase in fee rates shall be effective only from the date approved by TNPA from time to time.

32.7 TNPA shall not be obliged to approve such an increase if a Facility Operator Default has occurred and is continuing. If TNPA does not for any reason, not due or related to a Facility Operator Default, approve and prescribe any revisions and or increases to toll rates pursuant to any Fee Revision Request, such event shall constitute a Compensation Event and shall be dealt with in accordance with **clause 40** (*Consequences of a Compensation Event*).

32.8 All costs and expenses related to and arising from the charging and collection of fee shall be borne by the Facility Operator.

32.9 Fees shall be charged and collected in Rand.

### **33 Marine Services**

Marine services shall be provided by TNPA in accordance with the agreed service between the vessel agent and the harbour master at the Port, and marine services charges will be payable by the vessel owners to the vessel agent to cover for pilotage, tugs and or craft assistance, berthing services running of ships lines and vessel tracking systems. The details of the marine services tariffs as at the Signature Date are stipulated in the table in **Schedule 21**. The tariffs specified in **Schedule 21** are in **[month and year]** prices.

### 34 Port Dues

Port dues shall be levied by TNPA for its costs in providing Port protective works and dredging. The port dues will be payable by the vessel owner based on each vessel's technical characteristics. The port dues as at the Signature Date are specified in **Schedule 22** and are in **[month and year]** prices.

### 35 Refinancing

35.1 The Facility Operator shall promptly notify TNPA in writing prior to taking any steps to implement any proposed Refinancing (including any Exempt Refinancing). Such notice shall include:

35.1.1 full details of any proposed amendments to be made to or waivers granted under any of the Project Documents to give effect to such Refinancing;

35.1.2 a copy of the proposed financial model relating to such Refinancing (if any) and the basis for the assumptions used in that financial model;

35.1.3 the reasons for such Refinancing; and

35.1.4 any other information that may be reasonably necessary to enable TNPA to assess such Refinancing having regard to the provisions of this clause 35 (*Refinancing*).

35.2 The Facility Operator shall procure that no Refinancing (other than an Exempt Refinancing) is implemented without the prior written approval of TNPA.

35.3 Subject to clause 35.1, the Facility Operator may implement any Exempt Refinancing without the prior approval of TNPA.

35.4 TNPA shall be entitled to receive no less than a 50% share of the Refinancing Gain arising from any Refinancing (other than an Exempt Refinancing).

35.5 The Facility Operator shall, in proposing or proceeding with any Refinancing (other than an Exempt Refinancing), act so as not to deprive TNPA of its share of the Refinancing Gains relating thereto.



35.6 TNPA shall be entitled, on prior written notice to the Facility Operator (at any time before, during and or after any Refinancing), to audit any financial model and documentation relating to any Refinancing (including any aspect of the calculation of the Refinancing Gain).

35.7 TNPA shall have the right to elect to receive its share of any Refinancing Gain:

35.7.1 in the same manner (including as to kind and method of payment) and at the same times as the remaining share of such Refinancing Gain is distributed to the Shareholders and or their respective Related Parties entitled thereto;

35.7.2 paid out over the remainder of the Operating Term, at such times and in such amounts as TNPA may choose; or

35.7.3 as a combination of the above.

35.8 TNPA and the Facility Operator will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of TNPA's share of the Refinancing Gain (taking into account how TNPA has elected to receive its share of the Refinancing Gain under clause 35.7). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of TNPA's share, then the dispute shall be determined in accordance with **clause 56.7** (*fast-track dispute resolution*).

35.9 The Refinancing Gain shall be calculated in relation to any Refinancing (other than an Exempt Refinancing) after taking into account:

35.9.1 the reasonable and proper professional costs that each Party incurs directly in relation to such Refinancing; and

35.9.2 if TNPA's share of the Refinancing Gain is deductible in the hands of the Facility Operator for income tax purposes, the resulting tax benefits to the Facility Operator. The Facility Operator shall pay to TNPA all such costs incurred by TNPA within **[30 (thirty)]** days of any such Refinancing.

35.10 For the avoidance of any doubt, the notification and approval requirements set forth in this clause 35 (*Refinancing*) do not apply to any Permitted Borrowing.

## 36 Penalties

36.1 Subject to the rights of TNPA to terminate this Agreement and or claim damages or otherwise in respect of any Facility Operator Default, but not in addition to or in lieu of penalties, if the Facility Operator fails to perform any of its obligations under this Agreement (a "**Failure**"), the Independent Certifier shall notify TNPA and the Facility Operator of such Failure or if there is no Independent Certifier, TNPA may notify the Facility Operator of such Failure. If the Facility Operator fails to rectify such Failure, within such reasonable period of time specified by the Independent Certifier or TNPA (as the case may be) for such rectification, to the reasonable satisfaction of the Independent Certifier or TNPA (as the case may be), the latter shall notify TNPA and the Facility Operator of such Failure or TNPA may notify the Facility Operator of such Failure (if there is no Independent Certifier), and the Facility Operator shall thereupon be liable to pay to TNPA the penalties specified in relation to such Failure, as set forth in **Schedule 11**, commencing from the first day of such Failure.

36.2 Any monies due to TNPA pursuant to clause 36.1 shall be payable by the Facility Operator within 30 (thirty) days after certification by the Independent Certifier or TNPA (as the case may be) that the Facility Operator is liable for such payment to TNPA and TNPA shall be entitled to set-off any amounts payable as aforesaid against any monies due or which may become due to the Facility Operator under this Agreement or against any Performance Guarantee provided that, should the Facility Operator notify the Independent Certifier with appropriate supporting information that the Facility Operator has not committed the breach complained of and that no such right to set-off or deduct penalties has arisen, the Independent Certifier shall determine whether TNPA shall be entitled to the aforesaid penalties. The payment or set-off of such penalties shall not relieve the Facility Operator from any liability or from any of its obligations under this Agreement.

## 37 Foreign exchange risk

To the extent that the Facility Operator at any time enters into any agreement in any currency whereby the risk of currency fluctuations is hedged, TNPA shall not in any circumstances be liable for such hedging arrangements and the Facility Operator shall not enter into in any such arrangements whereby TNPA is or may become so liable.

The costs and losses arising out of such hedging arrangements shall not be included in or form part of the Termination Amount.

### 38 Default Interest

Interests shall accrue on all overdue amounts payable in terms of this Agreement at the prime overdraft interest rate charged by First National Bank, a division of First Rand Bank Limited (or should First National Bank or First Rand Bank Limited cease to exist, any other major commercial bank in South Africa) plus ~~1~~**2**% (two percent).

## PART V – RELIEF, COMPENSATION AND FORCE MAJEURE EVENTS, CHANGE OF LAW

### 39 Consequences of a Relief Event

39.1 If and to the extent that a Relief Event:

39.1.1 directly causes a delay in the Operations Date; and or

39.1.2 materially adversely affects the ability of the Facility Operator to perform any of its obligations under this Agreement,

then the Facility Operator shall be entitled to apply for relief from any rights of TNPA arising under **clause 43** (*Facility Operator Default*) and from its obligations under this Agreement.

39.2 To obtain relief, the Facility Operator must:

39.2.1 as soon as practicable, and in any event within ~~14~~**14** (fourteen) days after it became aware that the Relief Event has caused or is likely to cause delay and or materially adversely affect the ability of the Facility Operator to perform its other obligations, give to TNPA a notice of its claim for relief from its obligations under the Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;

39.2.2 within ~~10~~**10** (ten) days of receipt by TNPA of the notice referred to in clause 39.2.1 above, give full details of the relief claimed; and

39.2.3 demonstrate to the reasonable satisfaction of TNPA that:

39.2.3.1 the Facility Operator and its Subcontractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;

39.2.3.2 the Relief Event directly caused the delay to Scheduled Operations Commencement Date or the need for relief from other obligations under the Agreement;

39.2.3.3 the time lost and or relief from the obligations under the Agreement claimed could not reasonably be expected to be mitigated or recovered by the Facility Operator acting in accordance with International Best Practice, without incurring material expenditure; and

39.2.3.4 the Facility Operator is using reasonable endeavours to perform its obligations under the Agreement.

39.2.4 If the Facility Operator has complied with its obligations under clause 39.2.3 above, then:

39.2.4.1 the Scheduled Operations Commencement Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and or

39.2.4.2 TNPA shall not be entitled to exercise its rights to terminate the Agreement under **clause 43** (*Facility Operator Default*) and, subject to clause 39.3 below, shall give such other relief as has been requested by the Facility Operator.

39.3 If the information required by clause 39.2 above is provided after the dates referred to in that clause, then the Facility Operator shall not be entitled to any relief during the period for which the information is delayed.

39.4 The Facility Operator shall notify TNPA if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

39.5 If a Relief Event continues for a period in excess of 180 (one hundred and eighty) days, the Parties shall meet in order to find a mutually satisfactory solution for dealing with such prolonged Relief Event.

39.6 If the Parties cannot agree the extent of the relief required, or TNPA disagrees that a Relief Event has occurred or that the Facility Operator is entitled to any extension of the Scheduled Operations Commencement Date and or relief from other obligations under this Agreement, the Parties shall resolve the matter in accordance with **clause 56.7** (*fast-track dispute resolution*).

#### **40 Consequences of a Compensation Event**

40.1 If, as a direct result of the occurrence of a Compensation Event:

40.1.1 the Facility Operator is unable to provide the Services on or before the Scheduled Operations Commencement Date;

40.1.2 the Facility Operator is unable to comply with its obligations under this Agreement; and or

40.1.3 the Facility Operator incurs costs or loses revenue,

then the Facility Operator is entitled to apply for relief from its obligations and or claim compensation under this Agreement.

40.2 To obtain relief and or claim compensation the Facility Operator must:

40.2.1 as soon as practicable, and in any event within **[14 (fourteen)]** days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and or the Facility Operator to incur costs or lose revenue, give to TNPA a notice of its claim for an extension of time of the Target Completion Date and or the scheduled Operations Date, payment of compensation and or relief from its obligations under this Agreement;

40.2.2 within **[10 (ten)]** days of receipt by TNPA of the notice referred to in clause 40.2.2, give full details of the Compensation Event and the extension of time and or any estimated change in project costs claimed; and

40.2.3 demonstrate to the reasonable satisfaction of TNPA that:

40.2.3.1 the Compensation Event was the direct cause of the estimated change in project costs and or any delay in the achievement of the Operations Date; and

40.2.3.2 the estimated change in project costs, time lost, and or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Facility Operator acting in accordance with International Best Practice.

40.3 If the Facility Operator has complied with its obligations under clause 40.2 above, then:

40.3.1 The Scheduled Operations Commencement Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;

40.3.2 In the case of an additional cost being incurred by the Facility Operator:

40.3.2.1 on or before the Scheduled Operations Commencement Date; or

40.3.2.2 as a result of capital expenditure being incurred by the Facility Operator at any time,

TNPA shall compensate the Facility Operator for the actual estimated change in project costs as adjusted to reflect the actual costs reasonably incurred within **[60 (sixty)]** days of its receipt of a written demand by the Facility Operator supported by all relevant information;

40.3.2.3 in the case of a payment of compensation for the estimated change in the costs of the Project that does not result in capital expenditure being incurred by the Facility Operator but which reflects a change in the costs being incurred by the Facility Operator after the Operations Date, TNPA shall compensate the Facility Operator; and/or

40.3.2.4 TNPA shall give the Facility Operator such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event.

40.4 If the information is provided after the dates referred to in clause 40.2, then the Facility Operator shall not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement in respect of the period for which the information is delayed.

40.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Facility Operator's obligations under this Agreement, or TNPA disagrees that a Compensation Event has occurred (or as to its consequences), or that the Facility Operator is entitled to any relief under this clause, the Parties shall resolve the matter in accordance with **clause 56.7** (*fast-track dispute resolution*).

## 41 Force Majeure

41.1 For the purposes of this Agreement, "**Force Majeure**" means any of the following events or circumstances to the extent that they are uninsurable:

41.1.1 war, civil war, armed conflicts or terrorism; or

41.1.2 nuclear contamination unless the Facility Operator and or any Subcontractor is the source or cause of the contamination; or

41.1.3 chemical or biological contamination of the Facilities and or the Project Site from any of the events referred to in clause 41.1.1 above,

which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement.

41.2 Subject to clause 41.3, the Party claiming relief shall be relieved from liability under this Agreement to the extent that, by reason of the Force Majeure Event, it is not able to perform all or a material part of its obligations under this Agreement.

41.3 Where a Party is (or claims to be) affected by an event of Force Majeure:

41.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and

41.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure to comply with its obligations under clause 41.3.1.

41.4 The Party claiming relief shall serve written notice on the other Party within **[5 (five)]** Business Days of it becoming aware of the relevant Force Majeure Event. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.

41.5 A subsequent written notice shall be served by the Party claiming relief on the other Party within a further **[10 (ten)]** Business Days, which notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Force Majeure Event on the ability of the Party to perform, the action being taken in accordance with clause 41.3, the date of the occurrence of the Force Majeure Event and an estimate of the period of time required to overcome it and or its effects.

41.6 The Party claiming relief shall notify the other as soon as the consequences of the Force Majeure Event have ceased and when performance of its affected obligations can be resumed.

41.7 If, following the issue of any notice referred to in clause 41.5, the Party claiming relief receives or becomes aware of any further information relating to the Force Majeure Event and or any failure to perform, it shall submit such further information to the other Party as soon as reasonably possible.

41.8 The Parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. **Clause 56** (*Dispute Resolution*) shall not apply to a failure of TNPA and the Facility Operator to reach agreement pursuant to this clause 41.8, and this Agreement shall terminate in terms of **clause 45** (*Termination for Force Majeure*) if no such agreement is reached.

## **42 Unforeseeable Conduct**

42.1 Should any Unforeseeable Conduct occur which materially and adversely affects the general economic position of the Facility Operator, the Facility Operator shall be



entitled to such compensation and or relief from TNPA as shall place the Facility Operator in the same overall economic position as the Facility Operator would have been in but for such Unforeseeable Conduct.

42.2 Should any Unforeseeable Conduct occur which materially beneficially affects the general economic position of the Facility Operator, the Facility Operator shall pay the value of such benefit to TNPA so that the Facility Operator remains in the same overall economic position it would have been in had the materially beneficial Unforeseeable Conduct not occurred.

42.3 The Party claiming the occurrence of the Unforeseeable Conduct ("**Claiming Party**") shall give written notice to the other Party ("**Receiving Party**") containing reasonable particulars of such conduct and its likely economic consequences to the Facility Operator.

42.4 The Receiving Party shall have 60 (sixty) days from the date of receipt of such notice to effect a remedy for the Unforeseeable Conduct which restores the general economic position of the Facility Operator to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party does not effect such a remedy within such period, the Parties shall consult within 10 (ten) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. If a mutually satisfactory resolution has not been reached within such 10 (ten) Business Day consultation period, the matter shall be dealt with in accordance with clause 56 (*Dispute Resolution*).

42.5 In so far as the Facility Operator is the Claiming Party, it shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct.

## **PART VI – TERMINATION**

### **43 Facility Operator Default**

#### **43.1 definition**

"**Facility Operator Default**" means any of the following events or circumstances:

- 43.1.1 any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act) being entered into by or in relation to the Facility Operator;
- 43.1.2 a liquidator, business rescue practitioner or the like taking possession of or being appointed over, or any business rescue, winding-up, execution or other process being levied or enforced (and not being discharged within **[20 (twenty)]** Business Days) upon, the whole or any material part of the assets of the Facility Operator (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);
- 43.1.3 the Facility Operator ceasing to carry on business;
- 43.1.4 a resolution being passed or an order being made for the administration or the commencement of business rescue proceedings, winding-up, liquidation or dissolution of the Facility Operator (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- 43.1.5 the Facility Operator commits a breach of any of its material obligations under this Agreement;
- 43.1.6 the Facility Operator ceases to provide all or a substantial part of the Services in accordance with this Agreement (other than as a consequence of a breach by TNPA of its obligations under this Agreement);
- 43.1.7 the Facility Operator failing to comply with any provision of **clause 18** (*Shareholding in the Facility Operator*);
- 43.1.8 the Facility Operator fails to pay any sum or sums due to TNPA under this Agreement (which sums are not bona fide in dispute) which, either singly or in aggregate, exceeds **R[●]** (in **[month and year]** prices) and such failure continues for **[20 (twenty)]** Business Days from receipt by the Facility Operator of a notice of nonpayment from TNPA;
- 43.1.9 the Facility Operator failing to maintain any required insurance in terms of **clause 16** (*Project Insurance*);
- 43.1.10 an event of default under the Finance Agreements;

43.1.11 any breach of any provision of this Agreement has occurred more than once and:

43.1.11.1 TNPA has given an initial warning notice to the Facility Operator describing that breach in reasonable detail and stating that if that breach persists or recurs then TNPA may take further steps to terminate the Agreement; and

43.1.11.2 TNPA has issued a second and final warning notice following the persistence or recurrence of that breach in the period of **[90 (ninety)]** days after the initial warning notice, stating that if that breach persists or recurs within the period of **[90 (ninety)]** days after the final warning notice then TNPA may terminate the Agreement on **[30 (thirty)]** days' notice to the Facility Operator; and

43.1.12 the Facility Operator failing to commence operations by the Scheduled Operations Commencement Date.

#### **43.2 notification**

The Facility Operator shall notify TNPA of the occurrence, and provide details, of any Facility Operator Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Facility Operator Default, in either case promptly upon the Facility Operator becoming aware of its occurrence.

#### **43.3 TNPA's options**

43.3.1 On the occurrence of a Facility Operator Default, or within a reasonable time after TNPA becomes aware of the same, TNPA may:

43.3.1.1 in the case of the Facility Operator Default referred to in clauses 43.1.1, 43.1.2, 43.1.3, 43.1.4, 43.1.6, 43.1.7, 43.1.8, 43.1.9 and 43.1.10, terminate this Agreement in its entirety by notice in writing having immediate effect;

43.3.1.2 and while the same is subsisting, in the case of any other Facility Operator Default referred in clauses 43.1.5 and 43.1.11, serve notice of default on

the Facility Operator requiring the Facility Operator at the Facility Operator's option either:

43.3.1.2.1 to remedy the Facility Operator Default referred to in such notice of default (if the same is continuing) within **[30 (thirty)]** Business Days of such notice of default; or

43.3.1.2.2 to put forward within **[20 (twenty)]** Business Days of such notice of default a reasonable programme for remedying the Facility Operator Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Facility Operator Default is proposed to be remedied. The Facility Operator shall only have the option of putting forward a programme in accordance with this clause if it first notifies TNPA within **[15 (fifteen)]** Business Days of such notice of default that it proposes to do so.

#### 43.4 remedy provisions

43.4.1 Where the Facility Operator puts forward a programme in accordance with clause 43.3.1.2.2, TNPA shall have **[15 (fifteen)]** Business Days from receipt of the same within which to notify the Facility Operator that it does not accept the programme, failing which TNPA shall be deemed to have accepted the programme. TNPA shall act reasonably in rejecting the programme. Where TNPA notifies the Facility Operator that it does not accept the programme, the Parties shall endeavour within the following **[10 (ten)]** Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within **[10 (ten)]** Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Facility Operator Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either Party for resolution in accordance with **clause 56.7 (fast-track dispute resolution)**.

43.4.2 If:

43.4.2.1 the Facility Operator Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice; or

43.4.2.2 where the Facility Operator puts forward a programme which has been accepted by TNPA or has been determined to be reasonable and the Facility Operator fails to achieve any element of the programme or to complete the programme by the specified end date for the programme (as the case may be); or

43.4.2.3 any programme put forward by the Facility Operator is rejected by TNPA as not being reasonable, and the dispute resolution procedure does not find against that rejection, then TNPA may terminate this Agreement in its entirety by written notice to the Facility Operator with immediate effect, provided that if the Facility Operator's execution of the programme is adversely affected by the occurrence of a Force Majeure Event or a Relief Event then, subject to the Facility Operator complying with the mitigation and other requirements in this Agreement concerning Force Majeure Events or Relief Events (as the case may be), the time for execution of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure Event or Relief Event (as the case may be) which is agreed by the Parties or determined in accordance with clause 56.7 (*fast-track dispute resolution*).

#### **43.5 TNPA's costs**

43.5.1 The Facility Operator shall reimburse TNPA with all costs incurred by TNPA in exercising any of its rights in terms of this clause 43 (*Facility Operator Default*) (including, without limitation, any relevant increased administrative expenses).

43.5.2 TNPA shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of TNPA (to terminate or otherwise) under this clause are in addition (and without prejudice) to any other right which TNPA may have in law to claim the amount of loss or damages suffered by TNPA on account of the acts or omissions of the Facility Operator (or to take any action other than termination of this Agreement).

#### 43.6 Lenders' step-in

Upon the occurrence of a Facility Operator Default and for so long as such Facility Operator Default persists, the Lenders shall be entitled to exercise their rights to step-in under the FDA.

### 44 TNPA Default

#### 44.1 definition

" **TNPA Default**" means any one of the following events:

- 44.1.1 an expropriation or requisition of a material part of the Facility and or shares of the Facility Operator by TNPA or other Relevant Authority, or a material part of the Facility being removed from the possession of the Facility Operator by TNPA or other Relevant Authority, other than in terms of this Agreement;
- 44.1.2 a failure by TNPA to make payment of any amount or amounts that are due and payable by TNPA under this Agreement (which amounts are not bona fide in dispute) which, either singly or in aggregate exceeds the sum of R[10, 000, 000] (in [month and year] prices) and such failure continues for [20 (twenty)] Business Days from receipt by TNPA of a notice of non-payment from the Facility Operator;
- 44.1.3 a breach by TNPA of its obligations under this Agreement which substantially frustrates or renders it impossible for the Facility Operator to perform its obligations under this Agreement for a continuous period of [90 (ninety)] days.

#### 44.2 termination for TNPA Default

- 44.2.1 On the occurrence of TNPA Default, or within [60 (sixty)] days after the Facility Operator becomes aware of same, the Facility Operator may serve notice on TNPA of the occurrence (and specifying details) of such TNPA Default. If the relevant matter or circumstance has not been remedied or rectified within [30 (thirty)] Business Days of such notice, the Facility Operator may serve a further notice on TNPA terminating this Agreement with immediate effect.

44.2.2 The Facility Operator shall not exercise or purport to exercise any rights to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly provided for herein.

#### **45 Termination for Force Majeure**

If, in the circumstances referred to in **clause 41** (*Force Majeure*), the Parties have failed to reach an agreement on any modification to this Agreement pursuant to that clause within **[180 (one hundred and eighty)]** days of the date on which the Party affected serves notice on the other Party in accordance with that clause, either Party may at any time afterwards terminate this Agreement by written notice to the other Party having immediate effect, provided always that the effects of the relevant events of Force Majeure continue to prevent either Party from performing any material obligation under this Agreement.

#### **46 Invalidation in terms of Section 67 of the Act**

46.1 If it is necessary to change the use to which the Project Site or Facility is put in order to improve the safety, security, efficiency and effectiveness of the operations of the Port, and the new use is incompatible with this Agreement, TNPA may issue a directive, subject to the provisions of section 67(2)(b) of the Act, stipulating that this Facility Operator Agreement is invalid from the date stipulated in that directive.

#### **47 Effects of Termination**

##### **47.1 termination**

Notwithstanding any provision of this Agreement, on service of a notice of termination, this Agreement shall only terminate in accordance with the provisions of this clause 47 (*Effects of Termination*).

##### **47.2 continued effect - no waiver**

Notwithstanding any breach of this Agreement by either Party, and without prejudice to any other rights which the other Party may have in relation to it, the other Party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either Party to

exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

#### **47.3 continued performance**

Subject to any exercise by TNPA of its rights to perform, or to procure a third party to perform, the obligations of the Facility Operator, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement becomes effective in accordance with the provisions of this clause 47 (*Effects of Termination*).

#### **47.4 transfer to TNPA of Facility, Associated Agreements and other assets**

On the expiry or termination date of this Agreement or, where applicable, the service of a notice of termination in accordance with this Agreement for any reason or not less than **[10 (ten)]** days prior to the expiry date of this Agreement, the Facility Operator shall:

- 47.4.1 hand over to, and there shall vest in, TNPA, free from all encumbrances, the Facility which shall be in the state required in accordance with the Operating Specifications; or
- 47.4.2 shall procure that any Subcontractor shall (as the case may be), transfer to TNPA, free from any security interest full and unencumbered title in and to all or any part of the Facility required by TNPA in connection with the Project and the Services;
- 47.4.3 shall procure that any Intellectual Property Rights shall be provided to TNPA and TNPA shall be granted a perpetual nonexclusive, royalty-free license to use such Intellectual Property Rights;
- 47.4.4 deliver to TNPA (as far as not already delivered to TNPA) one complete set of:
  - 47.4.4.1 "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facility;



47.4.4.2 Maintenance, Operation and training manuals for the Facility; and

47.4.4.3 the historical operating data and plans of the Facility, its furniture, fittings and Equipment in a format acceptable to TNPA;

47.4.5 use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Facility Operator under this Agreement and included in the Facility are assigned, or otherwise transferred, to TNPA;

47.4.6 deliver to TNPA the information referred to in the **clause 28** (*Financial Accounts, Reports, inspection and reporting of changes*), except where such documents are required by Law to be retained by the Facility Operator or any Subcontractor concerned, in which case complete copies shall be delivered to TNPA; and

47.4.7 ensure that provision is made in all contracts of any description whatsoever to ensure that TNPA will be in a position to exercise its rights, and the Facility Operator will be in a position to comply with its obligations, under this clause 47.4.7.

#### **47.5 termination**

On completion of the transfer required by clause 47.4 (*transfer to TNPA of Facility, Associated Agreements and other assets*) (except in so far as any of the requirements of that clause may be waived by TNPA), this Agreement shall terminate and, save as provided in clause 47.7 (*continuing obligations*), all rights and obligations of TNPA and the Facility Operator under this Agreement shall cease and be of no further force and effect.

#### **47.6 transitional arrangements**

On the expiry of this Agreement or earlier termination of this Agreement for any reason, for a period of **[3 (three)]** months both before and after that expiry or any earlier termination, Facility Operator shall have the following duties:

47.6.1 the Facility Operator shall co-operate fully with TNPA and any person who is providing services in the nature of any of the Services or any part of the

Services, in order to achieve a smooth transfer of the manner in which TNPA obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of TNPA, the Port Users and members of the public;

47.6.2 the Facility Operator shall as soon as practicable remove from the Project Site all property not required by TNPA pursuant to clause 47.4(*transfer to TNPA of Facility, Associated Agreements and other assets*) and if it has not done so within [20 (twenty)] Business Days after any notice from TNPA requiring it to do so, TNPA may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred for the credit of the Facility Operator;

47.6.3 the Facility Operator shall, by no later than the expiry or the date of any earlier termination of this Agreement becoming effective, deliver to TNPA:

47.6.3.1 any keys, remote access apparatus and computer access cards to the Facility; and

47.6.3.2 without prejudice to clause 14 (*Access to documents, copyright and related matters*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facility (but excluding computer programmes which have been developed or acquired by the Facility Operator for its own use and not solely for the purposes of provision of any of the Services at the Facility or the assignment or transfer of which is otherwise restricted); and

47.6.3.3 the Facility Operator shall as soon as practicable vacate the Project Site and (without prejudice to the rest of this clause 47 (*Effects of Termination*)) shall leave the Project Site and the Facility in a safe, clean and orderly condition.

47.6.4 If TNPA wishes to conduct a tender process with a view to entering into a contract for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry or earlier termination of this Agreement, the Facility Operator shall co-operate with TNPA fully in such tender process including (without limitation) by:

47.6.4.1 providing any information which TNPA may reasonably require to conduct such tender excluding any information which is commercially sensitive to the Facility Operator (and, for the purpose of this sub-clause, commercially sensitive shall mean information which would if disclosed to a competitor of the Facility Operator give that competitor a competitive advantage over the Facility Operator and thereby prejudice the business of the Facility Operator but shall exclude any information dealing with employment matters); and

47.6.4.2 assisting TNPA, by providing all (or any) participants in such tender process with access to the Project Site and the Facility.

#### **47.7 continuing obligations**

Save as otherwise expressly provided in this Agreement:

47.7.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and

47.7.2 termination of this Agreement shall not affect the continuing rights and obligations of the Facility Operator and TNPA under clauses 0 (*Definitions and Interpretation*), 8 (*Indemnity*), 9 (*Facility Operator's warranties and undertakings*), 12 (*Environmental Compliance*), 14 (*Access to documents, copyright and related matters*), 15.1 (*delivery of Performance Guarantees*), , 19 (*TNPA Assistance and Rights and Limitations on Liability*), 47.6 (*transitional arrangements*), 47.7 (*continuing obligations*), 54 (*Corrupt gifts and fraud*), 55 (*Expert Determination*), 56 (*Dispute Resolution*) and 57 (*Information and audit access*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

### **48 Termination Amount on Facility Operator Default**

#### **48.1 retendering election**

48.1.1 Upon the occurrence of a Facility Operator Default and subject to clause 48.1.3, TNPA shall be entitled either to:

48.1.1.1 retender the provision of the Services in accordance with clause 48.2 (*retendering procedure*); or

48.1.1.2 require an expert determination in accordance with clause 48.3 (*no retendering procedure*).

48.1.2 Subject to clause 48.1.3, TNPA shall notify the Facility Operator of its election on or before the date falling [●] days after the Termination Date.

48.1.3 TNPA shall not be entitled to elect to retender the provision of the Services for the unexpired portion of the Project Term if the Lenders have stepped-in, and the Agent has demonstrated to TNPA that there are less than 3 (three) parties (each meeting the criteria in [●] of the definition of “**Substitute Entity**” in the FDA) who have pre-qualified pursuant to an RFQ issued by the Lenders for the provision of the Services for the unexpired portion of the Project Term, in accordance with the FDA.

#### 48.2 retendering procedure

If TNPA elects to retender the provision of the Services under clause 48.1 (*retendering election*), then the following provisions shall apply:

48.2.1 The objective of the retendering procedure, among others, shall be to establish and (subject to clause 48.2.13) pay to the Facility Operator the Highest Compliant Tender Price, as a result of the Tender Process.

48.2.2 TNPA shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.

48.2.3 TNPA shall notify the Facility Operator of the qualification criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.

48.2.4 Facility Operator authorises the release of any information that is reasonably required as part of the Tender Process by TNPA, which TNPA would otherwise

be prevented from releasing under **clause 14** (*Access to documents, copyright and related matters*).

48.2.5 The Facility Operator may, at its own cost, appoint a Tender Process Monitor for the purposes of monitoring and reporting to the Facility Operator and the Lenders on TNPA's compliance with the Tender Process and making representations to TNPA. The Tender Process Monitor will not disclose any confidential information to the Facility Operator, the Lenders or any other person (and shall provide an undertaking to TNPA to such effect as a condition of its appointment) but shall be entitled to advise the Facility Operator as to whether it considers that TNPA has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.

48.2.6 The Tender Process Monitor shall be required to enter into a confidentiality agreement with TNPA in a form acceptable to TNPA and shall be entitled to attend all meetings relating to the Tender Process, and inspect copies of the tender documentation and bids, and shall make written representations to TNPA regarding compliance with the Tender Process. The Tender Process Monitor shall be required to make all representations in a timely manner as the Tender Process proceeds. TNPA shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Facility Operator in the event that the Facility Operator refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with clause 56.7 (*fast-track dispute resolution*).

48.2.7 TNPA shall require bidders to bid on the basis that they will receive the benefit of any insurance proceeds or any outstanding claims under material damage insurance policies on the date that the New Facility Operator Agreement is entered into.

48.2.8 As soon as practicable after tenders have been received, TNPA shall (acting reasonably) evaluate the Tenders and shall notify the Facility Operator of the Adjusted Highest Compliant Tender Price.

48.2.9 If the Facility Operator refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with clause 56 (*Dispute Resolution*), TNPA shall nevertheless be entitled to enter into a New Facility Operator Agreement.

48.2.10 Within [●] Business Days after the Adjusted Highest Compliant Tender Price has been determined, TNPA shall pay to the Facility Operator, the lesser of:

48.2.10.1 the Remaining Projected Cash Flows; and

48.2.10.2 the Adjusted Highest Compliant Tender Price; less

48.2.10.3 the amount of costs incurred by TNPA to find a new Facility Operator; and

48.2.10.4 the amount of costs incurred by TNPA for the rectification of any aspects of the Terminal]

48.2.11 The discharge by TNPA of its payment obligation in clause 48.2.10 above shall be in full and final settlement of all the Facility Operator's claims and rights against TNPA for breaches and or termination of this Agreement and the Project Documents whether under contract, delict or otherwise, save for any liability of TNPA which arose prior to the Termination Date that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Remaining Projected Cash Flows (as the case may be).

48.2.12 Subject to clauses 48.2.14 and 48.2.15 below, if TNPA has not paid an amount equal to the Adjusted Highest Compliant Tender Price or the Remaining Projected Cash Flows in terms of clause 48.2.10 to the Facility Operator on or before the date falling 2 (two) years after the Termination Date then the provisions of this clause shall not apply to that termination and the provisions of **clause 48.3** (*no retendering procedure*) shall apply instead.

48.2.13 If each of the Remaining Projected Cash Flows and the Adjusted Highest Compliant Tender Price is zero or a negative number then TNPA shall have no obligation to make any payment to the Facility Operator and with effect from the time that TNPA gives notice of such determination to the Facility Operator, TNPA shall be released from all liability to the Facility Operator for breaches

and or termination of this Agreement and any other Project Document whether under contract, delict or otherwise save for any liability of TNPA which arose prior to the Termination Date that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or Remaining Projected Cash Flows.

48.2.14 TNPA may elect at any time prior to the receipt of a Tender to follow the no retendering procedure under **clause 48.3**(*no retendering procedure*) by notifying the Facility Operator that this election has been made.

48.2.15 If TNPA receives a Tender but decides not to complete the Tender Process, it shall notify the Facility Operator of this decision and pay to the Facility Operator an amount equal to the greater of the Adjusted Highest Compliant Tender Price and the Remaining Projected Cash Flows within **[•]** Business Days of such notification.

### **48.3 no retendering procedure**

If either TNPA is not entitled to retender pursuant to clause 48.1 (*retendering election*) or TNPA elects to require an expert determination by the Termination Calculation Expert in accordance with this clause 48.3 (*no retendering procedure*) then the following procedure shall apply:

48.3.1 In determining the Adjusted Estimated Project Value, the Parties shall procure that the Termination Calculation Expert will be obliged to follow the principles set out below:

48.3.1.1 all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for CPI in respect of forecast inflation between the date of calculation and the forecast payment dates as set out in this Agreement; and

48.3.1.2 the total of all future **[after tax]** revenues of the Project forecast in the Base Case Financial Model to be earned by the Facility Operator shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate.

48.3.2 If the Parties cannot agree on the Adjusted Estimated Project Value on or before the date falling 30 (thirty) days after the date on which the Termination Calculation Expert has determined such value, in accordance with this clause 48.3 (*no retendering procedure*), then the Estimated Project Value shall be determined in accordance with **clause 56** (*Dispute Resolution*).

48.3.3 TNPA shall pay to the Facility Operator an amount equal to the lesser of the Remaining Projected Cash Flows and the Adjusted Estimated Project Value on the date falling **[•]** days after the date on which the Adjusted Estimated Project Value has been agreed or determined in accordance with this clause 48.3 (*no retendering procedure*).

48.3.4 The discharge by TNPA of its obligation in clause 48.3.3 shall be in full and final settlement of all the Facility Operator's claims and rights against TNPA for breaches and or termination of this Agreement or any Project Documents whether in contract, delict, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Project Value.

#### **49 Termination Amount for TNPA Default**

49.1 On termination of this Agreement as a result of TNPA Default, TNPA shall pay the Facility Operator an amount equal to the aggregate of:

49.1.1 an amount equal to the Senior Debt and all fees, costs, penalties, expenses, breakage costs and breakage premiums in connection with any Finance Agreement;

49.1.2 **[**redundancy payments for employees of the Facility Operator that have been or will be reasonably incurred by the Facility Operator as a direct result of termination of this Agreement and amounts payable to the Operator under each Operating Agreement, respectively, as a direct result of such termination including any redundancy payments to their employees**]**; and

49.1.3 the amount of the Remaining Projected Cash Flows.

#### **50 Termination Amount for invalidation in terms of Section 67 of the Act**



*[On termination of this Agreement under clause 46 (Invalidation in terms of Section 67 of the Act), TNPA shall pay to the Facility Operator, the aggregate of:*

- 50.1 an amount equal to the Senior Debt and all fees, costs, expenses, breakage costs and breakage premiums in connection with any finance agreement;
- 50.2 all breakage costs and premia payable by the Facility Operator to the Lenders (or the counter-parties to the interest rate hedging arrangements provided for in the Finance Agreements) in connection with the early termination of such hedging arrangements as a result of the prepayment of amounts outstanding under the Finance Agreements, subject to the Facility Operator and the Lenders taking all reasonable steps to mitigate such costs and premia;
- 50.3 an amount equal to all amounts paid to the Facility Operator in respect of Equity less dividends and other distributions paid to the shareholders of the Facility Operator; and
- 50.4 redundancy payments for employees of the Facility Operator not transferring to TNPA that have been or will be reasonably incurred by the Facility Operator as a direct result of the termination of the Agreement;
- 50.5 less, to the extent it is a positive amount, the aggregate of:
  - 50.5.1 all credit balances on any bank accounts held by or on behalf of the Facility Operator on such termination date and the value of any right of the Facility Operator or its Lenders to receive insurance proceeds and of any such proceeds actually received by them (save where such insurance proceeds are paid to TNPA and or are to be applied in reinstatement) or sums due and payable from Subcontractors and any other third parties;
  - 50.5.2 all amounts payable by the Lenders (or the counter-parties to the interest rate hedging arrangements provided for in the Finance Agreements) to the Facility Operator in connection with the early termination of such hedging arrangements as a result of prepayment of amounts outstanding under the Finance Agreements; and
- 50.6 less the market value of any other assets and rights of the Facility Operator (other than those transferred to TNPA pursuant to this Agreement) less liabilities of the

Facility Operator properly incurred in carrying out its obligations under this Agreement as at the termination date or such later date as the assets can be realised provided that no account shall be taken of any liabilities and obligations of the Facility Operator arising out of:

50.6.1 agreements or arrangements entered into by the Facility Operator to the extent that such agreements or arrangements were not entered into in connection with the Facility Operator's obligations in relation to the Project; and

50.6.2 agreements or arrangements entered into by the Facility Operator to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

50.7 less amounts which TNPA is entitled to set off in terms of **clause 53.4.6**,

provided that if the aggregate of the amounts referred to above is less than zero, then, for the purposes of the calculation in this clause they shall be deemed to be zero.]

## **51 No Termination Amount for termination for Force Majeure**

On termination of this Agreement in accordance with the provisions of **clause 45** (*Termination for Force Majeure*), no payments and or compensation will be payable by TNPA to the Facility Operator and the Facility Operator will have no claim against TNPA for any payments and or compensation upon such termination.

## **52 Termination Amount for corrupt gifts and fraud**

52.1 On termination of this Agreement in accordance with **clause 54** (*Corrupt gifts and fraud*), TNPA shall, subject to clause 52.2, pay the Lenders, for and on behalf of the Facility Operator, and where there are no Lenders, shall pay the Facility Operator, an amount equal to:

52.1.1 the Senior Debt;

52.1.2 less, to the extent it is a positive amount, the aggregate, as at the Termination Date, of:

52.1.2.1 all credit balances on any bank accounts held by or on behalf of the Facility Operator on the Termination Date and the value of any right of the Facility

Operator or its Lenders to receive insurance proceeds and of any such proceeds actually received by them (save where such credit balances or insurance proceeds are paid to the and or are to be applied in reinstatement) and sums due and payable from Subcontractors and any other third parties;

52.1.2.2 all amounts payable by the Lenders (or the counter-parties to the interest rate or exchange rate hedging arrangements provided for in the Finance Agreements) to the Facility Operator in connection with the early termination of such hedging arrangements as a result of prepayment of amounts outstanding under the Finance Agreements;

52.1.2.3 the market value of any other assets and rights of the Facility Operator or the Lenders (other than those transferred to TNPA pursuant to this Agreement) less the liabilities of the Facility Operator or the Lenders properly incurred in connection with this Agreement, provided that no account shall be taken of any liabilities and obligations of the Facility Operator arising out of:

52.1.2.3.1 agreements or arrangements entered into by the Facility Operator to the extent that such agreements or arrangements were not entered into in connection with the Facility Operator's obligations in relation to the Project; and

52.1.2.3.2 agreements or arrangements entered into by the Facility Operator to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

52.1.2.4 amounts that TNPA is entitled to set off and deduct under clause 58.11 (*set-off*).

If the aggregate of the amounts referred to above is less than zero, then, for the purposes of the calculation in this clause 52.1 the aggregate shall be deemed to be zero.

52.2 If the termination is as a result of a Corrupt Act on the part of any of the Lenders, then the amount payable by TNPA shall be zero.

### 53 Payment of Termination Amount

53.1 "**Notice Date**" means the date when the Termination Amount has been determined in accordance with clause 50 (*Termination Amount for invalidation in terms of Section 67 of the Act*) or 52 (*Termination Amount for corrupt gifts and fraud*);

53.2 "**Termination Amount**" means any compensation payable by TNPA to the Facility Operator on an early termination of the Agreement under clause 50 (*Termination Amount in terms of Section 67 of the Act*) and 52 (*Termination Amount for corrupt gifts and fraud*);

53.3 "**Repayment Rate**" means the base interest rate on the Senior Debt together with 50% of the margin on such base interest rate.

#### 53.4 method of payment

53.4.1 TNPA shall pay to the Facility Operator the Termination Amount no later than **[60 (sixty)]** days after the Notice Date unless it elects to pay in accordance with clause 53.4.2 below.

53.4.2 TNPA may elect to pay the Termination Amount:

53.4.2.1 in instalments, on the dates (the "**Instalment Dates**") and in the amounts that the Facility Operator would have been required to pay principal to the Lenders (under the terms of the Finance Agreements) had the termination of this Agreement not occurred; or

53.4.2.2 as the Parties may otherwise agree.

53.4.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Amount at the default rate detailed in **clause 38** (*Default Interest*) and be payable on the next occurring Instalment Date.

53.4.4 If TNPA has elected to pay in accordance with clause 53.4.2 above, it may (on **[30 (thirty)]** days prior written notice to the Facility Operator) elect to pay any outstanding element of the Termination Amount in full on any Instalment Date.

53.4.5 If TNPA fails to make a payment to the Facility Operator in accordance with clause 53.4 (*method of payment*) or clauses 53.4.2 and 53.4.3 above, the Facility Operator may issue a notice to TNPA declaring any unpaid and outstanding element of the Termination Amount to be immediately due and payable.

53.4.6 TNPA shall be entitled to set off against any Termination Amount, any monies owed to it by the Facility Operator at the time for payment of the Termination Amount, whether such monies are due yet or not.

## **PART VII – PROCEDURAL ISSUES**

### **54 Corrupt gifts and fraud**

54.1 The Facility Operator warrants that in entering into this Agreement it has not committed any Corrupt Act.

54.2 If the Facility Operator, any Shareholder, any Subcontractor or any Affiliate of any of them (or anyone employed by or acting on behalf of any of them) commits or is reasonably suspected by TNPA of having committed any Corrupt Act, then TNPA shall be entitled to act in accordance with clauses 54.2.1 to 54.2.8 below:

54.2.1 if the Corrupt Act is committed by the Facility Operator, any Shareholder, any director of the Facility Operator, any director of any Shareholder, or any employee of the Facility Operator or of any Shareholder acting under the authority of or with the knowledge of a director of the Facility Operator or such Shareholder, as the case may be, then in any such case, TNPA may terminate this Agreement with immediate effect by giving written notice to the Facility Operator;

54.2.2 if the Corrupt Act is committed by an employee of the Facility Operator or of any Shareholder acting of his or her own accord, then in any such case, TNPA may give written notice to the Facility Operator of termination and this Agreement will terminate, unless within **[●]** Business Days of the Facility Operator's receipt of such notice that employee's involvement in the Project is terminated and (if necessary) the performance of any part of the Project

Deliverables previously performed by him or her is performed by another person;

54.2.3 if the Corrupt Act is committed by a Subcontractor, director of a Subcontractor or an employee of a Subcontractor acting under the authority or with the knowledge of a director of that Subcontractor, then in any such case, TNPA may give written notice to the Facility Operator of termination and this Agreement will terminate, unless within [●] Business Days of its receipt of such notice the Facility Operator terminates the relevant Subcontract and procures the performance of the relevant part of the Project Deliverables by another person, where relevant;

54.2.4 if the Corrupt Act is committed by an employee of a Subcontractor acting of his or her own accord, then TNPA may give notice to the Facility Operator of termination and this Agreement will terminate, unless within [●] Business Days of its receipt of such notice the Facility Operator procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Project Deliverables previously performed by that employee to be performed by another person;

54.2.5 if the Corrupt Act is committed by a Lender, a director of a Lender or any employee of a Lender acting under the authority or with the knowledge of a director of that Lender, then in any such case TNPA may give written notice to the Facility Operator of termination and this Agreement will terminate, unless within [●] Business Days of its receipt of such notice the Facility Operator procures the termination of such Lender's involvement in the Project (in any capacity whatsoever including, without limitation, as Lender under the Finance Agreements) and provides TNPA with satisfactory proof that such Lender's entire participations in the Senior Debt and in any undrawn financial commitments under the Finance Agreements have been assumed by any other Financial Institution that meets with TNPA's approval (including any one or more of the remaining Lenders);

54.2.6 if the Corrupt Act is committed by any employee of a Lender acting of his or her own accord, then TNPA may give written notice to the Facility Operator of termination and this Agreement will terminate, unless within [●] Business Days

of the Facility Operator's receipt of such notice, that employee's involvement in the Project is terminated;

54.2.7 if the Corrupt Act is committed by any other person not specified in clauses 54.2.1 to 54.2.6 above but involved in the Project as a Subcontractor or supplier to any Subcontractor or to the Facility Operator, then the may give notice to the Facility Operator of termination and this Agreement will terminate unless within **[•]** Business Days the Facility Operator procures the termination of such person's involvement in the Project and (if necessary) procures the performance of the relevant part of the Project by another person; and

54.2.8 any notice of termination under this clause 54.2 shall specify:

54.2.8.1 the nature of the Corrupt Act;

54.2.8.2 the identity of the party or parties who TNPA believes has committed the Corrupt Act; and

54.2.8.3 the date on which this Agreement will terminate in accordance with the applicable provisions of this clause.

54.3 Without prejudice to its other rights or remedies under this clause, TNPA shall be entitled to recover from the Facility Operator, the greater of:

54.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act; and

54.3.2 any direct losses sustained by TNPA in consequence of any breach of this clause by the Facility Operator.

54.4 Nothing contained in this clause shall prevent the Facility Operator from paying any proper commission or bonus to its employees within the agreed terms of their employment.

54.5 The Facility Operator shall notify TNPA of the occurrence (and details) of any Corrupt Act promptly on the Facility Operator becoming aware of its occurrence.

## 55 Expert Determination

55.1 Any dispute arising out of or in connection with this Agreement which is referred to resolution in terms of this clause 55 (*Expert Determination*) shall be determined in accordance with the provisions of this clause 55(*Expert Determination*). The dispute resolution provisions contained in this clause 55 (*Expert Determination*) shall only be used in respect of matters specifically referred to dispute resolution in terms of this clause 55 (*Expert Determination*) by this Agreement, and all other disputes arising out of or in connection with this Agreement, or the subject matter of this Agreement shall not be referred to resolution in terms of this clause 55 (*Expert Determination*) but shall be dealt with in accordance with the Law applicable to such disputes and may be the subject of dispute resolution in terms of clause 56 (*Dispute Resolution*).

55.2 The dispute resolution in terms of this clause 55 (*Expert Determination*) shall be held in Durban and the Parties shall endeavour to ensure that it is completed within 90 (ninety) days after appointment of the person designated in the clause of this Agreement that refers the relevant matter to determination under this clause 55 (such person being the "**Expert**" in this clause 55 (*Expert Determination*)).

55.3 The Parties shall procure that the Expert acts in accordance with the following criteria:

55.3.1 the Expert shall have appropriate expertise in respect of the subject matter of the dispute to be referred to him; and

55.3.2 the Expert shall be disinterested in the matter which is the subject of the dispute and shall have no interest in the outcome of the dispute.

55.4 The procedure to be followed in a dispute resolution shall be determined by the Expert at the request of either Party, with due regard to the following principles:

55.4.1 the Expert shall have full and unrestricted powers in relation to the dispute resolution. In particular, but without limitation, the Expert shall have the power of a single arbitrator appointed in terms of the Arbitration Act, 1965 and need not strictly observe the rules of evidence;

55.4.2 the Expert may not have regard to his personal knowledge of the facts, and any expert knowledge he may have, relating to the issues in dispute, but is to afford



the Parties an opportunity of challenging the knowledge which he claims to have;

55.4.3 the Expert may make such award, whether interim, provisional or final, as he considers appropriate, including without limitation ex parte awards, declaratory orders, interdicts and awards for specific performance, restitution, damages, penalties, security for costs or restitution;

55.4.4 the Expert shall give his reasons for the award, if so requested by either Party;

55.4.5 subject to any relevant provisions of this Agreement, the Expert shall make such award as to costs as he deems appropriate. If the Expert's charges and any other costs have to be paid before the Expert has made his award in respect of costs, the Parties shall pay the costs in equal amounts, and if a Party fails to pay its share, the Expert may make his award in respect of the claim and costs in the absence of that Party. It is recorded that the Parties intend that the substantially successful Party shall be awarded a full indemnity for all costs reasonably incurred by that Party and not merely the costs on the High Court or other scale.

55.5 The Parties shall use their best endeavours to procure that the Expert complies with the provisions of clause 55.3 and that the procedures detailed in clause 55.3 above are followed.

55.6 Nothing in this clause 55 (*Expert Determination*) shall prevent a Party from seeking relief, in respect of matters referred to dispute resolution in terms of clause 55 by any of this Agreement, on an urgent or interlocutory basis with a court of appropriate jurisdiction. Subject to the provisions of the clause of this Agreement that refers a dispute to determination in terms of this clause 55 (*Expert Determination*), if either Party is dissatisfied with or otherwise wishes to challenge the Expert's decision, recourse may be had to dispute resolution in terms of clause 56 (*Dispute Resolution*).

## 56 Dispute Resolution

### 56.1 referable disputes

The provisions of this clause 56 (*Dispute Resolution*) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this Agreement between the Parties.

### 56.2 internal referrals

56.2.1 If a dispute arises in relation to any aspect of this Agreement, the Parties shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process:

56.2.1.1 all disputes shall first be referred to a meeting of the liaison officers or other designated executives from each Party who are actively involved in the Project, and have sufficient authority to be able (if necessary with consultation back to their respective organisations) to resolve it; and

56.2.1.2 if the Parties have been unable to resolve the dispute within 15 (fifteen) days of referral to the persons specified in clause 56.2.1.1, either Party may refer the dispute for a decision by the chief executive officer of TNPA and the chief executive officer or equivalent officer of the Facility Operator.

56.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause **Error! Reference source not found.** (*internal referrals*), the Parties shall (and shall procure that their employees and representatives shall) use reasonable endeavours to resolve such dispute without delay by negotiations or any other informal procedure which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the dispute without necessity for formal proceedings.

56.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 56.2.2 within 15 (fifteen) days of the dispute being referred to them (or any longer period agreed between the Parties) shall be treated as a dispute in respect of which informal resolution has failed.

### 56.3 performance to continue

No reference of any dispute to any resolution process in terms of this clause shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

#### **56.4 litigation**

56.4.1 Save where any dispute has been expressly referred for determination in terms of clause 56.7 (*fast-track dispute resolution*), if informal resolution of any dispute has failed, then the dispute may be referred to litigation in the High Courts by either Party.

56.4.2 Neither Party is limited in any proceedings before the High Court to the information, evidence or arguments used in the informal attempts to resolve the dispute.

#### **56.5 interlocutory proceedings**

Notwithstanding the previous provisions of this clause either Party shall have the right to seek appropriate interdictory relief or an order of specific performance against the other in an appropriate Court having jurisdiction in South Africa.

#### **56.6 suspension of prescription**

The Parties agree that, for the purposes of the Prescription Act, 1969 time shall cease to run in respect of any dispute on the date of service of the relevant notice referring that dispute for mediation, and if any other subsequent proceedings are instituted in respect of that dispute, time shall continue to cease to run from the date of service of the relevant summons or notice of motion.

#### **56.7 fast-track dispute resolution**

56.7.1 Disputes expressly referred for determination pursuant to this clause 56.7 (*fast-track dispute resolution*) shall be determined by the relevant Independent Expert.

56.7.2 Within 5 (five) Business Days after a dispute has been referred by either Party to the appropriate Independent Expert, the Independent Expert shall require the Parties to submit in writing their respective arguments. The Independent

Expert shall, in his or her absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.

56.7.3 It shall be entirely within the power and competence of the Independent Expert to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Expert shall direct the Parties accordingly.

56.7.4 The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in South Africa) for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert can decide whether at the hearing the Parties are to give oral evidence or confine themselves to presenting their cases in writing or by some other appropriate procedure. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.

56.7.5 The Independent Expert shall provide both Parties with his or her written decision on the dispute, within 20 (twenty) Business Days of the referred (or such other period as the Parties may agree after the referral). The Independent Expert shall give his or her reasons for the award, if so requested by either Party.

56.7.6 The Independent Expert's costs of any referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear its own arising out of the referral, including its legal costs and the costs and expenses of any witnesses.

56.7.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the law. The Independent Expert need not strictly observe the principles of law and may decide the matter submitted to him or her in accordance with what he or she considers equitable in the circumstances.

56.7.8 Should the need arise for either Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the

Independent Expert shall have the same power to do so as if the matter were heard by a Judge in the High Court of South Africa, save that if by law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.

56.7.9 The proceedings shall be confidential and all information, data or documentation disclosed or delivered by either Party to the Independent Expert in consequence of or in connection with his or her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by the confidentiality provisions of this Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.

56.7.10 The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.

56.7.11 Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission prejudices the adjudication process, then the Independent Expert can either:

56.7.11.1 Give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or

56.7.11.2 Warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.

56.7.12 The Independent Expert shall be deemed not to be an arbitrator but shall render his or her decision as an expert and the provisions of the Arbitration Act,

1965 and any other law relating to arbitration shall not apply to the Independent Expert or his or her determination or the procedure by which he or she reaches his or her determination. The Independent Expert's decision shall be final and binding on the Parties.

#### **56.8 survival of clause 56**

The provisions of this clause 56 (*Dispute Resolution*):

56.8.1 constitute an irrevocable consent by the Parties to any proceedings in terms hereof and no Party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions;

56.8.2 are severable from the rest of this Agreement and shall remain in effect despite the termination of or invalidity for any reason of this Agreement.

#### **57 Information and audit access**

57.1 The Facility Operator shall provide to TNPA all information, documents, records and the like in the possession of, or available to, the Facility Operator (and to this end the Facility Operator shall use all reasonable endeavours to ensure that all such information in the possession of any counter-party to any Project Document shall be available to it and the Facility Operator has included, or shall include, relevant terms in all Project Documents to this effect) as may reasonably be requested by TNPA for the purpose of complying with any of its statutory reporting obligations including where pursuant to the PFMA or the Auditor-General Act, 1995.

57.2 Without limiting the generality of the foregoing, the Facility Operator shall:

57.2.1 provide and shall procure that its Subcontractors shall provide all such information as TNPA may reasonably require from time to time to enable TNPA to provide reports and returns as required by any Relevant, including reports and returns regarding the physical condition of any building occupied by TNPA, health and safety, national security, and environmental safety; and

57.2.2 note and facilitate TNPA's compliance with the Promotion of Access to Information Act, 2000 and the Protection of Personal Information Act, 2013, if TNPA is required to provide information to any person pursuant to that Act.

## 58 Miscellaneous matters

### 58.1 addresses

58.1.1 The Parties choose the following addresses to which notices may be given, and at which documents in legal proceedings may be served (ie their *domicilia citandi et executandi*), in connection with this Agreement :

58.1.1.1 in the case of TNPA: **[insert]**

postal address: **[insert]**

physical address: **[insert]**

current fax no: **[insert]**

attention: **[insert]**

58.1.1.2 in the case of the Facility Operator: **[insert]**

postal address: **[insert]**

physical address: **[insert]**

current fax no: **[insert]**

attention: **[insert]**

(being "**Party's addresses**")

58.1.2 Notices given to the above addresses shall be delivered by hand or courier service and shall only be deemed received by the recipient Party once signed for on its behalf.

58.1.3 A Party may change that Party's addresses for this purpose, by notice in writing to the other Party, provided that the new addresses include a physical address in South Africa.

## **58.2 certificate of indebtedness**

A certificate signed by any officer, manager or employee of TNPA, the appointment of which officer or manager or employee need not be proved, reflecting:

58.2.1 any monies owing by the Facility Operator to TNPA under this Agreement;

58.2.2 any obligations owing by the Facility Operator to TNPA under this Agreement;  
and

58.2.3 the due date for payment of such monies or for performance of such obligations;

shall be *prima facie* proof thereof.

## **58.3 entire contract**

58.3.1 This Agreement contains all the express provisions agreed on by the Parties with regard to the subject matter of this Agreement and the Project, and the Parties waive the right to rely on any alleged express provision not contained in this Agreement.

58.3.2 If there is a conflict between the terms of this Agreement and those of any Schedule, the terms of this Agreement shall prevail.

58.3.3 This Agreement and the rights and obligations of the Parties shall take effect on the Signature Date.

## **58.4 rights and remedies**

The rights and remedies of TNPA under this Agreement are cumulative, may be exercised as often as TNPA requires and are in addition to any other rights and remedies which TNPA may have under the Law.

## **58.5 further undertakings**

TNPA and the Facility Operator shall perform, or procure the performance, of all further things, and execute and deliver (or procure the execution and delivery) of



all further documents, as may be required by the Law or as may be desirable or necessary to implement or give effect to the Project, this Agreement and the transactions contemplated therein.

#### **58.6 no representations**

A Party may not rely on any representation which allegedly induced that Party to enter into this Agreement, unless the representation is recorded in this Agreement.

#### **58.7 variation, cancellation and waiver**

58.7.1 No contract varying, adding to, deleting from or cancelling this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties.

58.7.2 The expiry or termination of this Agreement shall not prejudice the rights of any Party in respect of any antecedent breach or non-performance of or in terms of this Agreement.

#### **58.8 indulgences**

58.8.1 The grant of any indulgence by a Party under this Agreement shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.

58.8.2 If any Party at any time breaches any of that Party's obligations under this Agreement, the other Party ("**the Aggrieved Party**"):

58.8.2.1 may, at any time after that breach, exercise any right that became exercisable directly or indirectly as a result of the breach, unless the Aggrieved Party have expressly elected in writing not to exercise the right. If the Aggrieved Part is willing to relinquish that right the Aggrieved Party will on request do so in writing. In particular, acceptance of late performance shall, for a reasonable period after performance, be provisional only, and the Aggrieved Party may still exercise that right during that period; and

58.8.2 shall not be estopped (ie prevented) from exercising the Aggrieved Party's rights arising out of that breach, despite the fact that the Aggrieved Party may have elected or agreed on one or more previous occasions not to exercise the rights arising out of any similar breach or breaches.

#### **58.9 invalidity and severability**

If any of the provisions of this Agreement becomes invalid, illegal or unenforceable for any reason, the validity, legality and enforceability of the remaining provisions of this Agreement shall not be impaired or affected in any way by such invalidity, illegality or unenforceability.

#### **58.10 cession**

The Facility Operator shall not be entitled to cede or transfer any rights it has under this Agreement to any other person.

#### **58.11 set-off**

Either Party shall be entitled to set-off against monies owed by them to the other Party, monies that the Party owes to them.

#### **58.12 applicable law**

This Agreement is to be interpreted and implemented in accordance with the law of South Africa.

#### **58.13 language**

All notices or communications under or in connection with the Project shall be in English.

#### **58.14 jurisdiction of South African courts**

Subject to clauses 55 (*Expert Determination*) and 56 (*Dispute Resolution*), the Parties consent to the exclusive jurisdiction of the Durban High Court of South Africa, for any proceedings arising out of or in connection with the Project and this Agreement.

**58.15 Lenders' benefits**

Any right or benefit that is conferred on the Lenders or the Agent by any provision of this Agreement may be accepted by the Lenders or the Agent (as the case may) in writing provided that the Lenders and the Agent (as the case may be) simultaneously bind themselves in favour of TNPA accepting and undertaking to fulfil any obligations imposed upon them by this Agreement.

Signed at \_\_\_\_\_ on \_\_\_\_\_ 2023

**Witness** \_\_\_\_\_ for **Transnet National Port Authority**

1. ....  
.....  
duly authorised and warranting such authority

2. ....

Signed at \_\_\_\_\_ on \_\_\_\_\_ 2023

**Witness** \_\_\_\_\_ for **[insert Facility Operator]**

1. ....  
.....  
duly authorised and warranting such authority

2. ....

**Schedule 1**

**Equipment**

*[To be provided by TNPA]*

**Schedule 2**

**Operating Specifications**

*[To be derived from the preferred bidder's bid submission]*

**Schedule 3**

**Constitutional Documents**

*[These documents will be derived from the actual constitutional documents of the Facility Operator and derived from the term sheets submitted as part of the preferred tender submission]*

**Schedule 4**

**[INSERT]**

**Schedule 5**

**Operations Agreement**

*[To be derived from the term sheet submitted as part of the preferred tender submission and prepared by the preferred bidder]*



**Schedule 6**

**Base Case Financial Model**

*[To be derived from the preferred bidder's tender submission]*

**Schedule 7**

**Finance Agreements**

*[To be prepared on the basis of the finance term sheets]*

**Schedule 8**

**FDA**

*[To be prepared by TNPA on the basis of the finance term sheets and prevailing market practice]*

## Schedule 9

### Environmental Management Plan

*[List of Conditional Environmental Requirements]*

#### 1. Interpretation and Definitions

In this Schedule 9, the following words and expressions shall bear the meanings ascribed to them hereunder:

- |  |     |   |
|--|-----|---|
| 58.16<br><b>DEA"</b>                       | ' - | the National Department of Environmental Affairs;   |
| 58.17<br><b>DWA"</b>                       | ' - | the Department of Water Affairs;  |
| 58.18<br><b>ECA"</b>                       | ' - | the Environmental Conservation Act, 73 of 1989;   |
| 58.19<br><b>EMC"</b>                       | ' - | the Environmental Monitoring Committee;   |
| 58.20<br><b>Environment"</b>               | ' - | shall have the same meaning as ascribed thereto in the Environmental Legislation;   |
| 58.21<br><b>Environmental Legislation"</b> | ' - | means all legislations relating to the Environment including, but not limited to, the National Environmental Management Act, 107 of 1998; the National Environmental Management Biodiversity Act, 10 of 2004; the National Environmental Water Act, 36 of 1998; the National Environmental Management Integrated Coastal Management Act, 24 of 2008; the National Environmental Management: Waste Act, 59 of 2008; the Marine Living Resources Act, 19 of 1998; the National Heritage Resources Act, 25 of 1999; the National |

Environmental Management Air Quality Act, 39 of 2004; and the Marine Pollution Act, 2 of 1986 (including international conventions such as the London Dumping Convention; and the MARPOL);

58.22 ' - has the same meaning ascribed to it in this Agreement;  
**Port Users"**

58.23 ' - Storm Water Management Plan;  
**SWMP"**

## 59 Introduction

59.1 This Environmental Management Plan encompassed all the Port environmental requirements contained in TNPA's environmental policies; the Port of Ngqura - Operational Security, Safety, Health and Environmental Requirements ("SHEQ Requirements"); and the OEMP.

59.2 The OEMP serves as a management programme designed and developed to address environmental requirements related to the operations of the Port. The Port Users are expected not only to develop the OEMP but also the implement it at the terminal.

## 60 Application and Scope of the EMP

60.1 The EMP is applicable to all relevant Parties, this includes TNPA, the Facility Operator, Subcontractors, and all Port Users.

60.2 The scope of the EMP is restricted in that it only applies in so far as the operation and maintenance of the Port is concerned.

## 61 General Obligations

61.1 TNPA shall be responsible for the development, implementation and monitoring of the OEMP to ensure that effective environmental practices are implemented and complied with by all Port Users, for environmental risks purposes.

61.2 The Port Users shall be responsible for ensuring that the operation works conducted in the Port, are complaint with the requirements contained in the OEMP, and any environmental obligations.

61.3 The EMC may in consultation with TNPA be responsible for conducting periodic reviews on the site to ensure that TNPA is appropriately implementing the environmental requirements and specifications contained in the OEMP.

61.4 TNPA has developed an environmental induction and training programme that provides the environmental requirements of the Port which must be complied with. It is imperative for all Port Users to complete the induction and training programme prior entry to the Port. If the Port Users fail to complete such programme, Port access permit shall not be issued.

61.5 TNPA and all Port Users shall be responsible for reporting progress with regards to the implementation of the OEMP. The Parties shall report the results of the inspection; the monitoring and audits conducted within the Ports; environmental incidents or non-conformances; public complaints lodged; and the requirements for relevant permits or licenses.

## **62 Environmental Management Requirements**

### **62.1 air quality management**

62.1.1 The sources of air pollution that is expected during the Port operation are dust, atmospheric and ship emissions from the port tenants and Port User's activities.

62.1.2 Ships shall be prohibited from producing smoke within the confines of the Port.

62.1.3 All power or electricity operated equipment used for activities within the Port limits that generate emissions shall be kept in good working condition or order. Regular inspections and emissions tests shall be undertaken.

62.1.4 The internal Port areas where dust is generated shall be stabilized using appropriate soil-binding agents (unless otherwise approved by TNPA's

environmental department). All landscape areas shall be adequately maintained.

62.1.5 The material stores within the Port confines shall be fully enclosed unless otherwise authorised by TNPA. Appropriate dust mitigation measures shall be implemented for all dust generating works inside the Port.

62.1.6 The air quality monitoring programme shall be initiated, if necessary. TNPA may require the Port Users to develop and implement air quality management plans depending on the nature of their works or activities.

## **62.2 solid and liquid waste management**

62.2.1 TNPA and all Port Users are required to adhere to the waste management practices.

62.2.2 TNPA has developed and implemented a Solid and Waste Management Plan for the operation of the Port which shall comply with the requirements of TNPA Waste Management Strategy and any reversions thereof.

62.2.3 Port Users are required to comply with the Solid and Waste Management Plan.

62.2.4 The waste storage and the disposal storage facilities shall be cautiously positioned to reduce the visual impact and shall be placed in sheltered areas where the waste will not be subject to any disturbance such as wind.

62.2.5 The volumes of solid waste produced shall be monitored and thereafter recorded. The Facility shall be monitored weekly for inappropriate waste disposal practices.

62.2.6 All waste produced shall be disposed of at licensed disposal sites. The waste storage container shall be equipped with lids or covers that are tip-proof, weatherproof and scavenger proof.

62.2.7 There shall be no burning within the confines of the Port, no on-site burials or dumping of waste.

62.2.8 TNPA shall ensure that the storm water and waste water discharged meet the required discharge quality standards and applicable requirements of this EMP.

62.2.9 Chemicals, potentially hazardous materials, oils, process effluent or wash water shall not be allowed to be discharged into storm water drainage systems.

62.2.10 A groundwater, surface water and near-shore seawater quality monitoring programmes have been implemented, these programmes shall be continual throughout the operational phase of the Port. The water quality report shall be submitted to the EMC.

62.2.11 In the event of contamination and or unsatisfactory conditions, appropriate corrective and preventative measures shall be taken.

62.2.12 All Port Users shall be required to provide detailed information on their material inputs and outputs and the Port Users shall maintain an up to date waste register.

62.2.13 Waste that cannot be re-used or recycled shall be transported off-site for appropriate disposal or recycling. All operational areas shall be provided with an adequate number of waste bins and readily accessible containers for the disposal of hazardous waste shall be provided.

62.2.14 All hazardous waste including oil and other chemicals (paints and solvents) shall be stored in enclosed areas and clearly marked. Such hazardous waste shall be disposed of at an approved hazardous landfill site and disposal manifests kept.

62.2.15 Oil and grease that is already used shall be removed from the site by an approved and authorised used oil recycling company.

62.2.16 Used oil, lubricants and cleaning materials or products, from the maintenance of the vehicles, machinery and equipment shall be collected in holding drums and removed from the site by a specialist oil recycling company for disposal at an approved and authorised hazardous waste site.

62.2.17 There shall be no spoiling of tar or bitumen products in any area inside the Port.



### **62.3 operational noise management**

62.3.1 TNPA is required to ensure that all the operations meet the requirements of the relevant noise regulations and legislation.

62.3.2 As a number of operational activities or works will generate noise, it is required that a noise control measure be implemented, such as keeping the equipment in good working condition and regularly maintaining the machinery.

62.3.3 All excessive noise generating works shall be recorded in the register of noise generating equipment.

62.3.4 Noise complaints reported shall be recorded.

62.3.5 Maintenance and service equipment shall be fitted with the required noise suppression equipment.

### **62.4 visual impact management**

62.4.1 Developments that take place inside the Port shall take the requirements of the Visual Guidelines for the Coega Industrial Development Zone into consideration. Such guideline shall be applicable to building design, colouring, signage, fencing walling and entrance gates, and lighting.

62.4.2 Landscaping and rehabilitation shall be done in accordance with the requirement outline in this EMP to allow adequate screening of the buildings, roads and parking areas.

62.4.3 Minimum lighting requirements for the Port include:

62.4.3.1 external lights shall not be allowed to shine upwards;

62.4.3.2 security and street lights shall be designed to ensure that light is directed downwards and that side spill is prevented; and

62.4.3.3 lighting shall be designed to ensure that light spill beyond property boundaries are reduced.

### **62.5 emergency preparedness and response**

- 62.5.1 TNPA and all Port Users shall establish and implement emergency preparedness and response procedures as part of the operational environmental management system of the Port.
- 62.5.2 The Procedures shall clearly define lines of authority during emergency situations and accidents, the type of response required and the communication lines to be followed.
- 62.5.3 These Procedures shall be exercised at least once a year and records shall be maintained of such drills. A register shall also be compiled and displayed in all operational areas.
- 62.5.4 TNPA and the Port Users shall ensure compliance with the requirements of relevant legislation.
- 62.5.5 Fires and smoking shall not be permitted close to any potential source of combustion. Precautions shall be taken when working with spark generating equipment close to potential source of combustion.
- 62.5.6 Spillage of flammable substances shall be cleaned immediately.

### **62.6 protection of sites of Archaeological and Paleontological importance**

- 62.6.1 Should any archaeological or paleontological artefacts or remains be discovered during the operations, all work in the vicinity of the find shall be ceased immediately and the advice of the heritage specialist should be obtained.
- 62.6.2 TNPA shall be responsible for contacting the South African Heritage Resource Agency ("**SAHRA**") unless if the responsibility is delegated to the Port Users.
- 62.6.3 TNPA and all Port Users shall be required to adhere to the specifications set out by SAHRA or the heritage specialist appointed to investigate the finds.
- 62.6.4 The archaeological material shall not be destroyed, damaged, excavated, altered, defaced or otherwise disturbed without a permit issued by a Relevant Authority (relevant heritage resources authority).

62.6.5 Any finds or potential finds shall be reported immediately to TNPA's environmental management department.

62.6.6 During operation of the Port, disturbance of graves must be avoided. All grave sites shall be clearly demarcated and included in the Coega Open Space Management Plan.

62.6.7 Should the Port User find a grave within the Port boundaries, the Port User must immediately report the find to TNPA.

### **62.7 storm water management**

62.7.1 TNPA and the Port Users shall comply with the requirements set out in SWMP, which was developed and implemented by TNPA and which took into consideration the requirements and standards of the DWA.

62.7.2 All Port Users shall be responsible for the treatment and management of storm water generated on their sites and shall ensure that discharge complies with the DWA standards.

62.7.3 Regular maintenance of all storm water manholes, sumps and related structures shall be undertaken.

62.7.4 Specific cleaning and dewatering operations shall be undertaken prior to and immediately after rainfall events.

62.7.5 Disposal of dewatering water containing waste shall be done on the approval of TNPA's environmental management department and proof of disposal shall be kept for audit purposes.

### **62.8 prevention and combating of pollution**

62.8.1 TNPA and the Port Users shall establish emergency containment procedures which shall be implemented in the event of spillage.

62.8.2 A comprehensive oil Spill Contingency Plan shall be developed and implemented which shall address containment clean-up and shall adopt the best practice techniques.

62.8.3 Port Users may not by any means pollute or negatively impact the environment or the site and or areas in which they operate, or any property for that matter.

62.8.4 In the event that pollution arises or negative impact occurs, which is unauthorised by TNPA and or the Relevant Authority, the Port User shall, at its own expense, provide efficient means of combating, mitigating, cleaning, collecting and disposing of all pollutants, and required remediation and rehabilitation measures to the satisfaction of TNPA and or the Relevant Authority.

#### **62.9 water quality monitoring**

The Port tenants, Facility Operators and all other Port Users may be required by TNPA to conduct site-specific or additional water (surface, fresh, storm and or ground) quality monitoring and biological monitoring where their works or activities and or operations pose a risk to the environment.

#### **62.10 marine biomonitoring**

TNPA implements a seawater quality, turbidity and biological monitoring programme to ensure that habitat quality is maintained and provide long term assessment of marine environmental health near the Port.

62.10.1 Water quality shall be monitored by the measuring of physical oceanography, several indicators of industrial pollution, and contamination by sewage.

#### **62.11 invasive alien vegetation management and eradication**

62.11.1 The removal of alien plant and weed species shall be done in accordance with the requirements in the management plan.

62.11.2 The minimum strategy for alien vegetation control inside the Port includes the initial control (which is reduction of the existing populations), follow-up control (the control of seedling), and the maintenance control (the ongoing low level control of keeping alien plant numbers to a minimum level).

## **62.12 landscaping and rehabilitation**

62.12.1 The vegetation rehabilitation plan shall be submitted to TNPA's environmental management department for approval. Such plan shall include:

62.12.1.1 seed requirements;

62.12.1.2 topsoil, mulch, fertiliser and soil stabiliser requirement and application;

62.12.1.3 landscaping and vegetation methods for each area;

62.12.1.4 list of indigenous plant species to be sourced;

62.12.1.5 vegetation establishment and maintenance requirements including irrigation for all revegetated areas; and

62.12.1.6 the use of herbicides or other substances for weed control during maintenance periods.

62.12.2 Maintenance of the rehabilitated areas shall remain the responsibility of the Port User concerned for the period of 12 months after acceptable cover has been established over all rehabilitated areas providing that acceptable cover is maintained throughout the 12 month period.

62.12.3 Control of spread of alien species, especially Acacia Cyclops shall be managed by regular monitoring of the area and removal of these seedlings.

62.12.4 The rehabilitation programme shall be flexible to allow modifications to the rehabilitation programmes such as the need to irrigate, sow more seed or fertilise.

## **62.13 open space management**

62.13.1 The Open Space Management Plan, that TNPA has developed, provides specific guidelines for the management of open spaces which shall be implemented and complied with for the duration of the Port operations.

62.13.2 TNPA and all Port Users shall take cognisance of the plan and ensure compliance with its requirements.

**62.14 protection of environmentally sensitive areas**

62.14.1 Certain areas within the confines of the Port have been identified as being Environmentally Sensitive Areas. These areas include the Dune vegetation, steep slopes which prone to erosion, the Coega River, the sites of archaeological and paleontological importance, and the Algoa Bay islands.

62.14.2 To minimise adverse impact to these areas during Port operations, the areas shall not be entered or used for any purposes unless written approval from TNPA's environmental management department has been obtained.

62.14.3 TNPA shall prevent any physical disturbance or pollution of these areas at all times.

62.14.4 These areas shall be fenced and remain fenced off for the duration of the Port operations.

**62.15 protection of Flora (plants) and Fauna (animals) species of special concern**

62.15.1 Indigenous flora and all fauna within and around the Port shall be protected.

62.15.2 All indigenous flora (protected and unprotected) should not be removed without the written permission of the landowner being obtained, failure to obtain such consent will result in prosecution.

62.15.3 Alien fauna (animals that are not indigenous) shall not be allowed inside the Port. Should such faunas be identified within the Port, they should be reported to TNPA's environmental management department.

62.15.4 Measures should be implemented to prevent the disturbance of fauna species.

**62.16 rodent control and monitoring**

62.16.1 The Port has been declared a poison-free zone and under no circumstances is poison allowed for any purpose inside the Port.

62.16.2 TNPA has developed a rodent control and monitoring plan that it and the Port Users shall comply with.

62.16.3 Only non-poisonous rodent bait shall be placed in the monitors to attract rodents. Live traps shall be set where rodent activity is detected and all exotic rodents trapped shall be removed off site.

62.16.4 A database shall be kept to record all species (indigenous and exotic) that are trapped, removed off-site and or released.

62.17 **marine mammal management and monitoring**

62.17.1 TNPA has developed and implemented a Marine Mammal Monitoring Plan which it and the Port Users shall comply with.

62.18 **blasting noise management**

62.18.1 TNPA has developed and implemented a blasting noise management plan which it and the Port Users shall comply with.

62.18.2 There shall be no underwater blasting allowed within the Port limits, without prior approval from the Relevant Authority.

62.19 **control of access to islands**

62.19.1 Access to Algoa Bay islands is prohibited.

62.19.2 Shipping lanes shall be kept away from the islands and no unauthorised visits to the islands shall be allowed.

62.19.3 Should access to the island be required, for monitoring purposes, than the necessary authorisations shall be obtained from the South African National Parks and Port Control.

62.19.4 TNPA's environmental department shall verify all authorisations and requirements prior granting access.

62.19.5 The Port Control shall report any potentially illegal or unauthorised access to the South African National Parks, the Relevant Authority and TNPA's environmental management department.

**62.20 ballast water management**

62.20.1 TNPA has developed and implemented a Ballast Water Management Plan for the duration of the Port operations in which it and the Port Users shall comply with.

**62.21 cleaning of hulls and associated vessel structures**

62.21.1 Cleaning of hulls and associated marine vessel structures release marine organisms that may be harmful to the environment and also antifouling paints are identified as a pollution risk to the marine environment. These can only be applied with permission from TNPA's environmental management department.

**62.22 management of dredging activities**

62.22.1 Appointed dredging contractors shall compile and submit a Dredge Material Management Procedure that must be submitted to TNPA's environmental management department for written approval.

62.22.2 The two identified dredging which takes place within the Port boundaries are the capital dredging (necessary to create ports, harbours etc.) and maintenance dredging (aimed at sustaining sufficient water depths for safe navigation).

62.22.3 Dredging and dredging material disposal inherently involves disturbance of existing substrates which may result in physical and ecological impacts on the environment. A specific EMP should be put in place to limit or minimise the potential environmental impacts associated with dredging.

62.22.4 In the event that dredging takes place in areas where the sediments exceed the prohibition limits, an alternative disposal site or method should be identified.

62.22.5 Disposal of material shall be carried out in such a way as to maximise the beneficial use whilst minimising the impact on the affected environment.



62.22.6 Offshore disposal of dredge material shall be carried out under the conditions set out by the relevant legislation and best practices.

62.22.7 TNPA shall obtain the required dredging permit from the necessary regulatory authority and contractors shall be required to comply with the terms and conditions of the dredging permit.

62.22.8 A suspended solids standard has been developed for dredging contracts at the Port to ensure that the environmental impact of dredging is limited. It is the contract's responsibility to ensure that the suspended solids standard is complied with.

**62.23 monitoring of beaches**

62.23.1 TNPA implements a beach monitoring and profiling programme that extends from Sundays River to Swatkops River mouths.

62.23.2 Surveying and monitoring of beach profiles at various sites along the coast in the vicinity of the Port shall be done through measurement of beach profiles at identified sites, grain size analysis of sand samples from the high, medium and low tide positions.

62.23.3 A detailed report with relevant graphs of findings shall be provided for each profiling and monitoring cycle.

**62.24 management of hazardous substances**

62.24.1 TNPA and the Port Users shall develop and implement procedures for the handling, storage, use and disposal of fuels, hazardous and poisonous substances including hydrocarbon containing materials.

62.24.2 TNPA and the Port Users shall comply with the relevant national, regional and local legislation with regards to the transport, use and disposal of hazardous materials.

62.24.3 Information on all hazardous substances shall be made available to all personnel.

- 62.24.4 Personnel handling hazardous substances shall be adequately trained and educated on proper use, handling and disposal.
- 62.24.5 Petrochemical, oils and grease shall only be stored under controlled conditions and all hydrocarbon materials shall be stored in a secured, designated area that has restricted entry and all containers shall be closed to prevent rainwater ingress.
- 62.24.6 Authorisations to store hazardous substances shall be obtained from the Relevant Authority.
- 62.24.7 Warning signs indicating the nature of the stored materials shall be clearly displayed on the storage facility or containment structure.
- 62.24.8 Bunded containment areas shall be provided for the storage of hazardous materials to prevent pollution of the surrounding environment by leaks or spillages.
- 62.24.9 Necessary precautions shall be taken to prevent fires or spills at the fuel stores. No smoking shall be allowed in the vicinity of the stores.
- 62.24.10 The Spill Contingency Plan to be developed by TNPA and the Port Users to prevent the pollution of the ground and or water resources by fuels and chemicals as a result of their activities.
- 62.24.11 The necessary materials and equipment shall be kept on site to deal with spillages of any of the materials used or stored on site.
- 62.24.12 Pumps and other machinery requiring oil, diesel, or other that are to remain in one position for longer than two days shall be placed on drip trays, which shall be emptied regularly and the contaminated materials disposed of off-site at a facility capable of and authorised to handle such waste water.

62.24.13 The Port Users shall develop and implement a procedure for bunkering activities, for the review and approval of TNPA's environmental management department.

62.24.14 Any person responsible for the distribution, sale, exportation or disposal of bunkers, or of any other related activity, shall be required to apply for a licence in terms of the Port Rules, regardless of whether such a person is responsible for physical transportation or conveying the bunkers to ships or not.

**62.25 fire control**

62.25.1 TNPA shall develop a Fire Contingency Plan for the duration of the Port operation.

62.25.2 All fire management plans shall take cognisance of biodiversity concerns and ensure compliance to the applicable legislative requirements (including the Veldt and Forest Fires Act).

**62.26 resource management**

62.26.1 TNPA and the Port Users shall incorporate resource efficient measures during Operation and Maintenance of the facilities.

62.26.2 TNPA and the Port Users are required to have programmes and procedures designed to manage aspects of resource conservation.

**63 Scientific Environmental Monitoring Programmes**

63.1 TNPA shall in terms of the requirements of the environmental authorisations implement various environmental monitoring programmes for the duration of the Port operations.

63.2 Such monitoring programmes shall include marine Biomonitoring, rodent and plague monitoring, beach monitoring, marine mammal monitoring, and ground and surface water quality monitoring.

## **64 Operation and Maintenance Environment Management Requirements**

64.1 All maintenance works or activities shall take cognisance of environmental and relevant legislation and should comply with the requirements of the OEMP.

64.2 Environmental procedures for individual works or activities shall be developed and written approval from TNPA's environmental management department shall be obtained prior to the commencement of the works.

64.3 Any activity requiring environmental authorisation must ensure that an environmental impact assessment and or applicable assessment is undertaken and a record of decision and or applicable authorisations have been obtained prior to any operations and or associated actions.

64.4 The Port Users shall supply TNPA with copies of all relevant authorisations, permits and or other applicable approvals.

64.5 All operations inside the Port boundaries shall be subject to the implementation of a Operations Environmental Programme which shall be reviewed and approved by TNPA's environmental management department.

## **65 Port User Minimum Environmental Management Requirements**

65.1 TNPA shall make a copy of the OEMP available to all Port Users.

65.2 Such Port Users shall ensure that their activities comply with the requirements specified in the OEMP.

## **66 Port Health Requirements**

66.1 TNPA and all Port Users shall comply with the applicable health and related requirements.

## **67 Evaluation and Compliance**

### **67.1 compliance monitoring and inspections**

67.1.1 The operational works shall be monitored and inspected in terms of the requirements of the OEMP and or this EMP.

67.1.2 TNPA shall inspect operational sites at least monthly, compile monthly written reports, maintain record of major incidents, conduct regular internal audits, and provide information as required during external audits which shall include the reports of internal audits conducted.

### **67.2 environmental auditing**

67.2.1 Audits conducted shall determine compliance with the OEMP and the environmental authorisations, and the Port license requirements.

67.2.2 Findings of the audits and required changes and responses to the findings shall be discussed and the implementation thereof agreed upon at scheduled meetings.

67.2.3 All inspections and audit reports shall be documented and recorded.

### **67.3 recording environmental incidents**

TNPA shall develop and implement a procedure for recording and reporting environmental incidents which shall form part of the Operational Environmental Management System of the Port.

### **67.4 environmental non-conformances**

67.5 TNPA can institute a non-conformance for any non-compliance with the environmental requirements.

67.6 The time period for mitigating a non-conformance shall be determined by the severity of the non-conformance.

67.7 All non-conformances shall be recorded in a register and made available for audit purposes.

67.8 TNPA shall be entitled to stop works or certain activities in the case of non-compliance or failure to implement corrective actions, and deal with any non-conformance in terms of the applicable mechanisms and legislation.

## **68 OEMP Review**

68.1 The OEMP and supporting documents shall be reviewed and improved when required to ensure that it adequately addresses impacts associated with the operations of the Port.

68.2 The interval for review of the OEMP shall be determined by TNPA's environmental management department.

**Schedule 10A**

**B-BBEE Requirements**

**Schedule 10B**

**Facility Operator's Supplier Development Plan**

*[To be derived from the preferred bidder's tender submission]*



**Schedule 11**

**Penalties**

*[NOTE: the penalties should be determined with reference to the financial and economic strength of the Project. The penalties applicable to each project are specifically devised for that project]*

**Schedule 12**

**Project Site**

*[Description of Project Site and map]*

**Schedule 13**

**[INSERT]**

**Schedule 14**

**[INSERT]**

**Schedule 15**

**[INSERT]**

**Schedule 16**

**Operating Performance Guarantee**

**Schedule 17**

**Final Maintenance Guarantee**

## Schedule 18

### Project Insurance

#### General

1. The Facility Operator is required, in terms of clause 15 (*Insurance*) of this Agreement to arrange appropriate and adequate insurance policies for the Project. Without prejudice to the generality of that requirement, the Facility Operator is required to arrange and maintain the Project Insurances listed in this Schedule 18 (*Project Insurances*) on the terms and with insurance companies acceptable to TNPA throughout the relevant period under this Agreement. Premiums per class of insurance must be identified.
- 69 The Facility Operator shall punctually pay all premiums in respect of all insurance policies required to be effected in terms of this Agreement and shall promptly provide TNPA with copies of all payment receipts if so requested by TNPA.
- 70 [The Facility Operator shall be at liberty to combine any or all of the Project Insurances referred to in this Schedule 18 (*Project Insurances*) respectively into one policy document.]

#### **[NOTES:**

- ***This Schedule needs to be developed between the Parties in accordance with the insurance requirements of this Agreement;***
- ***Bidders should make detailed proposals in respect of the insurance requirements of clause 15 (Insurance) of this Agreement;***
- ***Project Insurances should not include insurances which does not directly benefit the Project; and***
- ***If a Bidder considers that any of the insurances in this Schedule 18 are not required, that Bidder is required in addition to mark up requirements of this Agreement and its Schedules to state why same is not required and how that risk will be mitigated in the Project.]***



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**Schedule 18**

**Project Insurances - Part X**

**List of insurances required during the Operation and Maintenance Period**

The Project Insurances in Part X of Schedule 18 shall be effective from *[Service]* Commencement Date (but only to the extent that such insurances have not been effected already during the Construction stage by the Facility Operator) and maintained in force and renewed as required for the duration of the Operation and Maintenance Period: ***[NOTE: Bidders to propose the respective levels of insurance cover.]***

**75 ASSETS ALL - RISK'S INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

**76 BUSINESS INTERRUPTION CONSEQUENTIAL INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]

Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

### 77 THIRD PARTY LIABILITY INSURANCE

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

### 78 EMPLOYERS LIABILITY INSURANCE

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]

Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

**79 MOTOR VEHICLE THIRD PARTY LIABILITY INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

**80 PROFESSIONAL INDEMNITY INSURANCE FOR WORKS**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]

Extensions:	[•]
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***[NOTE: the above to include details regarding the risks covered all material exclusions, any endorsements, amounts covered, deductibles and the earliest date on which the insurances are to become effective.]***

**Schedule 18**

**Project Insurances - Part Y**

**List of insurances in respect of which non-vitiating cover is required**

The Project Insurances in Part Y of Schedule 18 shall include insurances in respect of which clause 16.2 (*Uninsurable risks*) regime is applicable and shall be effective from [●] Date and maintained in force and renewed as required for the duration of the Project: ***[NOTE: Bidders to propose the respective levels of insurance cover.]***

[●]

[●]

[●]



**Schedule 19**

**Access and Way Leaves**

**Schedule 20**

**Fees**

**Schedule 21**

**Marine Service charges**

**Schedule 22**

**Port Dues**

**Schedule 23**

**Royalty**

**Schedule 24**

**Programme for Operations Date**

**Schedule 25**

**Confidentiality undertaking for Network Extension bidders**

**Schedule 26**

**Attorney's Affirmation**