

**TERMINAL OPERATOR AGREEMENT FOR A MULTI-PURPOSE
TERMINAL TO HANDLE AGRICULTURAL DRY BULK AND OTHER
COMPATIBLE CARGO AT THE PORT OF DURBAN**

Between

**TRANSNET NATIONAL PORTS AUTHORITY, an operating division of
TRANSNET SOC Ltd**

(Registration number 1990/000900/30)

And

[INSERT NAME]

(Registration number [insert company registration number])

NOTE TO BIDDERS

- All bidders are to note the provisions of the RFP and are reminded to submit “marked up” versions of the negotiable clauses of the TOA. Bidders must note that the marked-up TOA will serve as a guide for purposes of negotiation of the TOA.
- As the Terminal Operator Agreement has been drafted in general terms, TNPA reserves the right to amend or vary any of the terms of this Terminal Operator Agreement to ensure alignment with the preferred Bidders Business Case and the commercial risk allocation between the TNPA and the Preferred Bidder.
- The Financiers Direct Agreement will be negotiated and agreed between the 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 Terminal Operator Agreement will be revised to ensure consistency between Terminal Operator Agreement and the Financiers Direct Finance Agreement.
- TNPA shall not in any way be bound to the terms and conditions provided for in this draft TOA and TNPA reserves the right to vary and negotiate the final terms with the Preferred Bidder.

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PART I – GENERAL PROVISIONS

1. Definitions and Interpretation

1.1. 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. **"Act"** means the National Ports Act, 12 of 2005, as amended from time to time;
- 1.1.2. **"Actual Operations Commencement Date"** means the date of commencement of the operation of the Terminal as stated in the TNPA Commencement Notice issued by TNPA in accordance with clause 25.10 (*Approval to Provide Services*);
- 1.1.3. **"Agreement"** means this Terminal Operator Agreement and its Schedules, as amended, extended, replaced, and varied from time to time;
- 1.1.4. **"Associated Agreements"** means the Construction Agreement, Operations Agreement, Constitutional Documents, and any other agreements entered into by the Terminal Operator in respect of the Project (other than the Financing Agreements) that TNPA may designate as falling within this clause 1.1.4;
- 1.1.5. **"Annual Report"** means the annual report which is required to be prepared and submitted by the Terminal Operator in accordance with clause 28 (*Reporting Requirements*);
- 1.1.6. **"Base Case Financial Model"** means the base case financial model for the Project, as set out in the Business Plan, and any updates thereto which are to be agreed to between the Parties, and which are to be annexed to this Agreement as Schedule 3 (*Base Case Financial Model*) once so agreed;
- 1.1.7. **"B-BBEE"** means broad-based black economic empowerment;
- 1.1.8. **"B-BBEE Act"** means the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended from time to time;
- 1.1.9. **"B-BBEE Codes"** means the applicable generic and/or sector B-BBEE Codes of Good Practice, published under Government Gazette No. 36928, on 10 October 2013, in terms of section 9 (1) of the B-BBEE Act, as may be amended from time to time;

- 1.1.10. **"B-BBEE Commitments"** means the Terminal Operator's B-BBEE improvement plan which is annexed to this Agreement as Schedule 13 (*B-BBEE Contributor Level Commitment*);
- 1.1.11. **"Berth/s"** means berth 4 and berth 5 situated at Maydon Wharf in the Port of Durban, to which the Terminal Operator shall have access on a common user basis;
- 1.1.12. **"Bid Response"** means the bid response submitted by the Terminal Operator, in respect of which response, the Terminal Operator has been appointed to enter into this Agreement;
- 1.1.13. **"Black People"** means a generic term defined in the B-BBEE Act to mean natural persons who are Africans, Coloureds and Indians:
- 1.1.13.1. who are citizens of the Republic of South Africa by birth or descent; or
 - 1.1.13.2. who became citizens of the Republic of South Africa by naturalisation
 - 1.1.13.3. before 27 April 1994; or
 - 1.1.13.4. on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;
- 1.1.14. **"Black Ownership"** means the effective ownership of shares by Black People, which shall be determined with reference to the B-BBEE Codes and evidenced by way of a B-BBEE verification certificate;
- 1.1.15. **"Black Ownership Commitments"** means the Black Ownership commitments of the Terminal Operator for the duration of the Concession Period as set out in Schedule 14 (*Black Ownership Commitments*);
- 1.1.16. **"Business Day"** means any day other than a Saturday, Sunday or gazetted national public holiday in South Africa;
- 1.1.17. **"Business Plan"** means the business plan relating to the financing, design, construction, operation and maintenance of the Terminal in the Port of Durban, any revisions and amendments thereto in terms of this Agreement which is annexed to this Agreement as Schedule 2 (*Business Plan*);
- 1.1.18. **"Cargo"** means Agricultural Dry Bulk Cargo and Compatible Cargo, as fully described in Schedule 27 (*Agricultural Dry Bulk Cargo and Compatible Cargo*);
- 1.1.19. **"Certifications"** means the following certifications or certifications that are equivalent to the
- Certifications listed below:
- 1.1.19.1. ISO 14001;

1.1.19.2. BS OHSAS 18001;

1.1.19.3. ISO 9001; and

1.1.19.4. NOSA 1 – 2 Star or Equivalent.

1.1.20. **"Change in Control"** means any change whatsoever in Control whether effected directly and/or indirectly;

1.1.21. **"Change in Law"** means 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:

1.1.21.1. as a bill in a form substantially similar to the Law enacted pursuant to such publication; or

1.1.21.2. as an act but has not been brought into effect;

1.1.22. **"Companies Act"** means the Companies Act, 71 of 2008, as may be amended from time to time;

1.1.23. **"Compensation Date"** means:

1.1.23.1. if clause 52 (*Termination Amount for TNPA Default*) applies, the date on which TNPA pays the amount set out in the clause;

1.1.23.2. if clause 48.3 (*Invalidation in terms of section 67 of the Act*) applies, the date on which TNPA pays the amount set out in the clause;

1.1.24. **"Compensation Event"** means any breach by TNPA of any of its obligations under this Agreement (save for any breach that constitutes TNPA default) or any rule or policy of TNPA (or which TNPA is subject to), which is directly connected to this Agreement, to the extent in each case that the breach is not caused or contributed to by the Terminal Operator or any of its Subcontractors, and any other event that is designated in this Agreement to be dealt with in accordance with clause 38 (*Consequences of a Compensation Event*);

1.1.25. **"Completion Certificate"** means the certificate to be issued by the Terminal Operator's professionally registered engineers in terms of clause 25.4 (*Completion of Construction Works*) upon the completion of the Construction Works;

1.1.26. **"Concession"** means the concession rights granted by TNPA to the Terminal Operator in terms of section 56 of the Act, to undertake the Project;

1.1.27. **"Concession Fee"** means the fee payable by the Terminal Operator to TNPA, in consideration for the right to carry out the Project and to operate and maintain the Terminal for the Concession Period, which fee shall be determined by TNPA (in South

African Rand) based on a fixed escalation per annum and shall be paid monthly, commencing on the Effective Date, and as provided for under clause 5 (*Concession Fee*);

- 1.1.28. **"Concession Period"** means, a period of 25 (twenty-five) Contract Years commencing on the Actual Operations Commencement Date, during which the Terminal Operator is granted the right to undertake the Project in terms of this Terminal Operator Agreement or such period as this Agreement shall be extended;
- 1.1.29. **"Confidential Information"** means any and all:
- 1.1.29.1. information relating to the design of the Terminal and any Intellectual Property Rights of the Terminal Operator;
- 1.1.29.2. information in respect of or relating to the Base Case Financial Model as well as such model and each Updated Financial Model; and
- 1.1.29.3. 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;
- 1.1.29.4. all information and documentation the Terminal Operator is required to submit to TNPA in terms of clause 29 (*Financial Accounts, Reports, Inspection and Reporting of changes*);
- 1.1.29.5. all marketing material and documentation, and information that the terminal operator is required to submit to TNPA in terms of clause 27.4 (*Marketing*);
- 1.1.29.6. all information in respect of the Tariffs to be applied by the Terminal Operator and provided to TNPA in terms of clause 36 (*Default Interest*) of this Agreement.
- 1.1.29.7. all information TNPA request the Terminal Operator to provide in terms of clause 63.4 (*Information and Audit Access*);
- 1.1.30. **"Consents"** means any consent, registration, clearance, filing, agreement, notarisation, certificate, licence, approval, ruling, permit, authority, or any exemption from the aforesaid, by, with or from any Responsible Authority in terms of the Laws, which the Terminal Operator is required to hold from time to time in respect of the Project, including the Environmental Authorisations and Safety Authorisations;
- 1.1.31. **"Construction Agreement"** means each and every written agreement to be entered into between the Terminal Operator or its authorised agent and the Construction Contractor or ceded and/or transferred to the Terminal Operator in respect of any of the Construction Works, which agreement shall, be annexed hereto as Schedule 6 (*Construction Agreement*);

- 1.1.32. **"Construction Completion"** means the final execution of the Construction Works that are required for the operation of the Terminal in respect of at least the Services;
- 1.1.33. **"Construction Contractor"** means the contractor appointed as the construction contractor by the Terminal Operator or its authorised agent in the Construction Agreement in force at the relevant time and any replacement or successor-in-title of such contractor;
- 1.1.34. **"Construction Documents"** means all documents, drawings, data, reports, specifications and other information (whether in printed form or electronic form) produced in respect of the Construction Works,
- 1.1.35. **"Construction Period"** means the period commencing on the Effective Date and terminating on the issue of the Completion Certificate;
- 1.1.36. **"Construction Performance Guarantee"** means the performance guarantee to be issued by a financial institution, on behalf of the Construction Contractor in respect of the Construction Works in favour of the Terminal Operator, which shall be annexed to this Agreement as Schedule 15 (*Construction Performance Guarantee*);
- 1.1.37. **"Construction Works"** means the construction, installation, equipping, testing and commissioning of the Terminal Infrastructure and the Terminal Equipment required to provide at least the Services in accordance with the D&C Specifications and the Detailed Design;
- 1.1.38. **"Construction Works Programme"** means the programme for the Construction Works which is annexed to this Agreement as Schedule 6 (*Construction Agreement*);
- 1.1.39. **"Contract Year"** means a period of 12 (twelve) consecutive calendar months, commencing on the Effective Date
- 1.1.40. **"Control"** means 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;
- 1.1.41. **"Corrupt Act"** means any conduct that constitutes an offence under the Prevention and Combatting of Corrupt Activities Act 12 of 2004, including but not limited to:
- 1.1.41.1. offering, giving or agreeing to give 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:
- 1.1.41.2. 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

- 1.1.41.3. 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;
- 1.1.41.4. 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 Terminal 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;
- 1.1.41.5. committing any offence in connection with this Agreement:
- 1.1.41.5.1. under any Law from time to time dealing with bribery, corruption or extortion;
 - 1.1.41.5.2. under any Law creating offences in respect of fraudulent acts; or
 - 1.1.41.5.3. 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
 - 1.1.41.5.4. defrauding or attempting to defraud or conspiring to defraud TNPA or any other public body in relation to this Agreement;
- 1.1.42. **"CPI"** means the consumer price index published from time to time by Statistics SA in Statistical Release P0141.1, provided that if, after the Signature Date:
- 1.1.42.1. such index ceases to be published; or
 - 1.1.42.2. the Terminal Operator and TNPA agree or, failing agreement, if it is determined pursuant to clause 62.7 (*Fast-track Dispute Resolution*) that, due to a change in circumstances, the index is no longer representative;
 - 1.1.42.3. 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 62.7 (*Fast-track Dispute Resolution*) as being a fair and reasonable replacement index;
- 1.1.43. **"Day"** means any period of 24 (twenty-four) hours that starts at 00h01 and ends at 24h00;
- 1.1.44. **"D&C Specifications"** means the design and construction specifications submitted with the Bid Response and subsequently approved in terms of clause 25 (*Design and Construction*) and which will be annexed hereto as Schedule 5 (*D&C Specifications*) on approval thereof by the Parties.

- 1.1.45. **"Debt"** means, at any date, all amounts due and payable by the Terminal Operator to any Lender/s that are outstanding under the Financing Agreements at that date, including, but not limited to, the principal debt, breakage costs, hedging costs and interest (including default interest); excluding Shareholder Loans;
- 1.1.46. **"Decommission"** means all work as may be required to be done following upon or in connection with the "closure" of the Terminal Infrastructure as defined in terms of the Environmental Impact Assessment Regulations, promulgated in terms of NEMA, to take the Terminal Infrastructure out of active service permanently and to dismantle, uplift and remove the Terminal Infrastructure, in each case to the extent that it cannot be recommissioned, and **"Decommissioning"** shall bear the same meaning;
- 1.1.47. **"Decommissioning Costs"** means the costs of decommissioning the Terminal Infrastructure;
- 1.1.48. **"Decommissioning Period"** means the period reasonably required by the Terminal Operator to Decommission the Terminal Infrastructure and which period shall be subject to, and informed by, any requirements imposed by TNPA upon the Terminal Operator
- 1.1.49. **"Detailed Design"** means the detailed design for the Construction Works, which is to be submitted by the Terminal Operator after the Signature Date and approved by TNPA, in accordance with clause 25.1 (*Performance of the Detailed Design*);
- 1.1.50. **"Distributions"** means, whether in cash or in kind, any:
- 1.1.50.1. dividend or other distribution of share capital;
 - 1.1.50.2. reduction of share capital, stated capital, any capital redemption fund or any share premium account;
 - 1.1.50.3. cancellation, conversion, redemption, or re-purchase of shares or any other variation whatsoever in share capital;
 - 1.1.50.4. payment in respect of the shareholder loans (whether of principal, interest, breakage costs, or otherwise);
 - 1.1.50.5. 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 arms-length basis or otherwise on reasonable commercial terms to any shareholders or their Related Parties in respect of the Project; or
 - 1.1.50.6. any release of any contingent liability of any of the Terminal Operator's shareholders or their Related Parties in respect of their financial obligations to the Terminal 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.

- 1.1.51. **"Effective Date"** means the first Business Day following the date on which the last of the Suspensive Conditions is fulfilled, or if capable of being waived, has been waived;
- 1.1.52. **"Encumbrance"** means any encumbrance, lien, charge, hypothec, pledge, mortgage, title retention agreement, security interest of any nature, adverse claim, exception, reservation, easement, right of occupation, any matter capable of registration against title, option, right of pre-emption, right of first refusal, privilege or contract to create any of the foregoing; and variations of the word, including **"Encumber"** and **"Encumbered"**, shall have corresponding meanings;
- 1.1.53. **"Environment"** means the surroundings within which humans exist and that are made up of:
- 1.1.53.1. the land, water and atmosphere of the earth;
 - 1.1.53.2. micro-organisms, plant and animal life;
 - 1.1.53.3. any part or combination of clauses 1.1.50.1 and 1.1.50.2 and the interrelationships among and between them; and
 - 1.1.53.4. the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;
- 1.1.54. **"Environmental Authorisations"** means any authorisations, licences, permissions or consents required to be held by the Terminal Operator from any Responsible Authority in compliance with the Environmental Laws in order to undertake the Project;
- 1.1.55. **"Environmental Laws"** means 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 Terminal Operator at the date of this Agreement whose purpose is:
- 1.1.55.1. to protect, or prevent pollution of, or to remedy damage to the Environment;
 - 1.1.55.2. to protect or prevent or compensate harm to human health and safety; or
 - 1.1.55.3. to regulate emissions, discharges, or releases of Hazardous Substances into the Environment, or
 - 1.1.55.4. to regulate the use, treatment, storage, burial, disposal, transport, or handling of Hazardous Substances,
 - 1.1.55.5. 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 the force of law and are binding either on or both of TNPA and the Terminal

Operator at the date of this Agreement;

- 1.1.56. **"Environmental Management Plan"** means 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 undertaken by or on behalf of, the Terminal Operator and based on TNPA's environmental policy and any Environmental Authorisations issued in respect of the Project and in terms of the Environmental Laws;
- 1.1.57. **"Equipment"** means the movable assets in the Terminal, including cargo handling equipment, the current composition of which is attached as Schedule [insert number];
- 1.1.58. **"Equity"** means any shares issued in the authorised share capital of the Terminal Operator, any share premium on such issued shares, any debentures issued by the Terminal Operator, and any loans to the Terminal Operator by its shareholders or debenture-holders;
- 1.1.59. **"Equity IRR"** means the projected blended rate of return to the Terminal 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;
- 1.1.60. **"Estimated Project Value"** means the amount determined in accordance with clause 51.3 (*no retendering procedure*) that a third party would pay to TNPA as the market value of the New Terminal Operator Agreement;
- 1.1.61. **"Exempt Refinancing"** means any Refinancing:
- 1.1.61.1. that effects any sale or cession of the Equity or securitization of the rights attaching to the Equity, provided that the exemption contemplated in clause 37 (Refinancing) in relation to any such transaction shall not limit the application of clause 16 (Changes in the Terminal Operator);
 - 1.1.61.2. 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;
 - 1.1.61.3. that arises solely from a change in taxation or accounting treatment;
 - 1.1.61.4. 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;

- 1.1.61.5. 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;
- 1.1.62. **"Expert"** has the meaning ascribed to it in clause 61 (*Expert Determination*) of this Agreement;
- 1.1.63. **"Expiry Date"** means the last day of the Operations Period;
- 1.1.64. **"Final Maintenance Guarantee"** means the final maintenance guarantee to be issued by a financial institution on behalf of the Terminal Operator, which shall be substantially in the form of the guarantee annexed to this Agreement as Schedule 18 (*Final Maintenance Guarantee*);
- 1.1.65. **"Finance Agreements"** means the agreements entered into by the Terminal Operator and the Lenders (amongst others) in respect of the provision of Debt arrangements (excluding any hedging arrangements in respect of any exposure of the Terminal Operator to any foreign currencies and any fluctuations of the Rand against any foreign currencies) and guarantee facilities provided to the Terminal Operator for the purpose of financing the Terminal 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 (*Terminal Operator's Operational Plan*) and shall be on terms to TNPA's satisfaction;
- 1.1.66. **"Finance Direct Agreement or FDA"** means the agreement to be entered into between the TNPA, the Terminal Operator and the Lenders (if applicable);
- 1.1.67. **"Financial Close"** means the date on which the last of the Suspensive Conditions (if applicable) in the Finance Agreement/s are fulfilled or waived, and the Project funding, made available in accordance with the terms of the Finance Agreements, becomes unconditional and available such that the first drawdown under the Finance Agreement/s can be made;
- 1.1.61. **"Force Majeure"** has the meaning ascribed to it in clause 39 (*Force Majeure*);
- 1.1.62. **"Force Majeure Event"** means any event of Force Majeure;
- 1.1.63. **"Gross Annual Turnover"** shall mean the total income received by the Terminal Operator and derived from the Terminal Operator services as more fully described in Schedule 4 (*Scope of Services*) and shall include the revenue generated from Stevedoring Services provided by the Terminal Operator at the Terminal in a financial year of the terminal operator and derived from the operation of the Terminal.

- 1.1.64. **“Handover Date”** means, following the termination or Expiry of this Agreement, the date of transfer of the Terminal Infrastructure from the Terminal Operator to the TNPA, alternatively, to the Substitute Entity, as shall be applicable;
- 1.1.65. **“Harbour Master”** refers to an official of TNPA duly appointed for the Port as the final authority in respect of all matters relating to pilotage, navigation, navigational aids, dredging, and all matters relating to the movement of vessels within port limits;
- 1.1.66. **“Hazardous Substances”** means:
- 1.1.66.1. 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
 - 1.1.66.2. 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 Responsible Authority or in terms of any Environmental Laws;
- 1.1.67. **“Highest Compliant Tender Price”** means the price offered by the Tenderer (if any) with the highest tender price and, if no Tenders are received, zero;
- 1.1.68. **“IFRS”** means the International Financial Reporting Standards;
- 1.1.69. **“IMDG Code”** means the International Maritime Dangerous Goods Code, published by the International Maritime Organisation;
- 1.1.70. **“Incorporation Documents”** means the Terminal 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 Terminal Operator and any documents or agreements in respect of any debentures issued by the Terminal Operator, all of which are attached to this Agreement as per Schedule 22 (Incorporation Documents);
- 1.1.71. **“Independent Certifier”** means the person appointed from time to time jointly by TNPA and the Terminal Operator as the independent certifier in respect of the Project, and whose duties are specified in this Agreement under clause 24 (Independent Certifier), the Construction Agreement, the Operations Agreement and the Independent Certifier Agreement, the last of which agreements is attached to this Agreement as Schedule 29 (*Independent Certifier Agreement*);

- 1.1.72. **"Independent Expert"** shall mean:
- 1.1.72.1. an accountant of not less than 10 (ten) years of 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: Eastern Cape Region, if the matter relates primarily to a financial matter; or
- 1.1.72.2. an attorney or advocate of not less than 10 (ten) years of 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 Cape Law Society, if the matter relates primarily to a legal matter; or
- 1.1.72.3. an engineer of not less than 10 (ten) years of 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;
- 1.1.72.4. a relevant Terminal manager of not less than 10 (ten) years of professional experience agreed to between the Parties and failing agreement nominated (at the request of either Party) by the secretariat for the time being of the International Association of Ports and Harbours, if the matter relates primarily to a port facilities management matter; or
- 1.1.72.5. any other suitable expert agreed to between the Parties and failing agreement nominated (at the request of any Party) by TNPA, for any other matter that arises between the Parties in relation to this Agreement;
- 1.1.73. **"Intellectual Property Rights"** means 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;
- 1.1.74. **"Insurance"** means the project insurance that the Terminal Operator is required to purchase and maintain in terms of clause 14 (*Project Insurance*);
- 1.1.75. **"International Best Practice"** in relation to the design, construction, equipping and commissioning of the Terminal, and in relation to the provision of the Operation and Maintenance and the Services, a reasonable and prudent operator that exercises 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 Terminal similar to the Terminal or the same type of business as the

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

- 1.1.76. **"ISPS Code"** means the International Ship and Port Terminal 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;
- 1.1.77. **"IPMS"** means TNPA's Integrated Port Management System, which is TNPA's online internet Terminal where Port Users can execute certain instructions to TNPA, such as vessel management, vessel arrival notification, changes to estimated times of arrival, marines services requests, berth planning, vessel traffic services, dry dock, change of agent requests, supplementary services, security permit application and incident reporting;
- 1.1.78. **"Key Performance Areas"** means the key performance areas that the Terminal Operator shall be required to meet for the Operating Term, which has been agreed upon by TNPA and the Terminal Operator and is set out in clause 25 (Design and Construction), 27 (Operation and Maintenance) and Schedule 20 (*Terminal Operator Performance Standards*) of this Agreement;
- 1.1.79. **"Laws"** means means 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 the Republic of South Africa or by the TNPA or the municipality in which the Port is located, and **"Law"** shall have a corresponding meaning;
- 1.1.80. **"Legislation"** means 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;
- 1.1.81. **"Lender"** means any funder who provides Debt or loan facilities to the Terminal Operator (other than providers of Equity) in respect of the Project, and **"Lenders"** shall have a corresponding meaning;
- 1.1.82. **"Long Stop Date"** means the last Business Day of the 6th (sixth) month after the Scheduled Operations Commencement Date (as that date may be amended from time to time in terms of this Agreement) being the date by which the services must have commenced failing which TNPA shall be entitled to terminate this Agreement in accordance with the provisions in clause 42 (Terminal Operator Default);
- 1.1.83. **"Losses"** means losses, damages, liabilities, claims, actions, proceedings, demands, costs, charges or expenses of any nature in respect of the Project;

- 1.1.84. **"Maintenance Plan"** means the plan setting out the planned maintenance activities to be conducted by the Terminal Operator in respect of the Terminal Equipment and Terminal Infrastructure, which is to be provided by the Terminal Operator to the TNPA within 4 (four) months of the Actual Operations Commencement Date and shall thereafter form part of Schedule 28 (*Operating Specifications*) to the Agreement;
- 1.1.85. **"Maximum Payment"** means, in respect of a month or part thereof, the maximum interest and capital payment to the Lenders payable during that month;
- 1.1.86. **"Member"** means, in relation to the Terminal Operator, any legal entity and or natural person which will become a Shareholder (either itself or through an intermediary entity) once the Terminal Operator is incorporated to undertake the Project, and if the Terminal Operator has already been incorporated, then any Shareholder;
- 1.1.87. **"NEMA"** means the National Environmental Management Act No. 107 of 1998;
- 1.1.88. **"New Terminal Operator Agreement"** means 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 Actual Operations Commencement Date, then the Scheduled Operations Commencement Date shall be extended by a period to allow the Successor Terminal Operator to achieve Operation Commencement on or before the extended Scheduled Operations Commencement Date;
 - 1.1.88.2. any penalties accrued in terms of Schedule 12 (*Empowerment Penalties*)
 - 1.1.88.3. and or warning notices shall be cancelled;
 - 1.1.88.4. the term of such contract shall be a period equal to the period from the Termination Date until the Expiry Date; and
 - 1.1.88.5. any other amendments, which do not adversely affect the Terminal Operator;
- 1.1.89. **"Operating Performance Guarantee"** means the irrevocable, on-demand performance guarantee to be issued by a financial institution on behalf of the Terminal Operator, substantially in the form of the guarantee annexed to this Agreement as per Schedule 16 (*Operating Performance Guarantee*) for an amount as agreed between the Parties;
- 1.1.90. **"Operating Rights"** means all rights and obligations conferred and imposed on the Terminal 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**” means the specifications and standards in accordance with which the Services are to be provided, the Operation and Maintenance conducted and the Terminal is to be maintained and upgraded, all of which are detailed in Schedule 28 (*Operating Specifications*), which Schedule shall be compiled by the Terminal Operator and provided to TNPA within 4 (four) months of the Actual Operations Commencement Date and thereafter incorporated into this Agreement;
- 1.1.92. **“Operating Term”** means the period of 25 (twenty-five) years commencing on the Actual Operations Commencement Date until Expiry or early termination of this Agreement;
- 1.1.93. **“Operational Plan”** means the operational plan, specifications, and standards in accordance with which the Services are to be provided, the Operation and Maintenance conducted, and the Terminal is to be maintained and upgraded, all of which are detailed in Schedule 7 (*Terminal Operator’s Operational Plan*);
- 1.1.94. **“Operation and Maintenance”** means all operation and maintenance activities and obligations of the Terminal Operator in respect of the Terminal that is required in order to provide the Services and for the operation and maintenance of the Terminal Infrastructure and Terminal Equipment in good order and condition including where applicable, in accordance with OEM (original equipment manufacturer) requirements of, in accordance with the requirements of this Agreement, the Operational Plan and International Best Practice and the terms **“Operate”** and **“Maintain”** shall have corresponding meanings;
- 1.1.95. **“Operations Agreement”** means the agreement to be entered into between the Terminal Operator and the Operator in respect of the Operation and Maintenance of the Terminal, which agreement shall be submitted by the Terminal Operator to TNPA and attached to this Agreement as Schedule 26 (*Operations Agreement*);
- 1.1.96. **“Operations Certificate”** means the certificate to be issued by the Independent Certifier in terms of clause 29.2 (*Right of inspection*) as the date on which the Operating Term may commence;
- 1.1.97. **“Operations Commencement”** means the commencement of the Services subsequent to the issue of the Operations Certificate in accordance with clause 25.10 (*approval to provide services*);
- 1.1.98. **“Operations Guarantee”** means the bank guarantee to be issued by a financial institution on behalf of the Operator in favour of the Terminal Operator, substantially in the form of the guarantee attached to this Agreement as Schedule 17 and the terms of which are to be to the satisfaction of TNPA;
- 1.1.99. **“Operations Period”** means the period commencing on the Scheduled Operations Commencement Date, alternatively, the Actual Operations Commencement Date and

terminating on the Expiry Date or the Termination Date;

- 1.1.100. **"Operator"** means the person who is appointed as the Operation and Maintenance contractor by the Terminal Operator in the Operations Agreement and any replacement or successor-in-title of such person;
- 1.1.100. **"Parties"** means TNPA and the Terminal Operator, and **"Party"** shall mean either of them as the context may require;
- 1.1.101. **"Payment Expert"** means a chartered accountant of not less than 10 (ten) years of professional experience or investment banker as agreed to between the Parties, and failing agreement, nominated (at the request of either Party) by the Regional Executive for the time being of the South African Institute of Chartered Accountants: Eastern Region, if the matter relates primarily to a financial matter or financial management matter;
- 1.1.102. **"Performance Guarantees"** refers collectively to the Construction Performance Guarantee, the Operating Performance Guarantee, the Operations Guarantee, and the Final Maintenance Guarantee;
- 1.1.103. **"Permitted Borrowing"** means, at any time after the Signature Date, any advance made to the Terminal Operator under the Finance Agreements for the purposes specified therein;
- 1.1.104. **"PFMA"** means the Public Finance Management Act, 1 of 1999, as amended;
- 1.1.105. **"Port"** means the Port Durban, as promulgated in terms of the Act, and situated in the KwaZulu-Natal province of South Africa;
- 1.1.106. **"Port Infrastructure"** means the basic common use structures of the Port, 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;
- 1.1.107. **"Port Regulations"** means the port regulations made in terms of section 80(1) of the Act;
- 1.1.108. **"Port Rules"** means the port rules made in terms of section 80(2) of the Act;
- 1.1.109. **"Port Terminal Security Officer"** means a security officer appointed by the Terminal Operator in accordance with the provisions of the ISPS Code and the certificate issued in terms of the ISPS Code in respect of the Terminal;
- 1.1.110. **"Port Users"** means any Person, organisation and/or agency, other than the Terminal Operator, utilizing the facilities of the Port and/or conducting business within the Port limits, including shipping lines, vessel agents, licensed operators, operators of other terminals within the Port and any Subcontractor and/or any third parties authorised to

conduct business on behalf of any such "Port User";

- 1.1.112. **"Project"** means the Concession granted in favour of the Terminal Operator to design, finance, construct, operate and maintain, and eventually handover the Terminal after 25 (twenty-five) years at the Port for the purpose of providing the Services in accordance with the terms of this Agreement;
- 1.1.113. **"Project Deliverables"** means the principal rights and obligations of the Terminal Operator, including those specified in clause 4.3 (*Obligations of the Terminal Operator*) of this Agreement and the Key Performance Areas;
- 1.1.114. **"Project Documents"** means all drawings, data, books, reports, documents, software, source codes and manuals, Construction Documents and other information, that the Terminal Operator has or has been using and which are necessary for the Construction Works and/or continuing Operation and Maintenance;
- 1.1.115. **"Project Site"** means the site on which the Project will be undertaken as demarcated on Schedule 1 (*Project Site*);
- 1.1.116. **"Provisional Operations Certificate"** means 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"** means 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. **"Quarter"** or **"Quarterly"** means a three-month period commencing on 1 April annually and occurring every three months thereafter;
- 1.1.119. **"Rand"** or **"R"** or **"ZAR"** means the lawful currency of South Africa;
- 1.1.120. **"Real Base Case Project IRR"** means the real pre-Tax Project internal rate of return as set out in the Base Case Financial Model;
- 1.1.121. **"Rectification Costs"** means, 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;

1.1.122. **"Refinancing"** means at any time after the Signature Date:

- 1.1.122.1. any material amendment, assignment, novation, replacement, or supplementing of any of the Finance Agreements and or the Incorporation Documents, whether independently or in combination with any connected arrangements;
- 1.1.122.2. 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 Incorporation Documents;
- 1.1.122.3. 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 Terminal Operator's other contracts, revenues or the Terminal; and or
- 1.1.122.4. any other arrangements having any of the effects in clauses 1.1.122.1 to 1.1.122.3 (inclusive);

1.1.123. **"Refinancing Gain"** means in relation to any Refinancing (other than an Exempt Refinancing), an amount equal to the greater of nil and $(A - B) - C$, where:

- 1.1.123.1. 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;
- 1.1.123.2. 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
- 1.1.123.3. 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 $[\bullet]\%$);

1.1.124. **"Related Party"** means a person who:

- 1.1.124.1. directly, or indirectly through one or more intermediaries, controls, or is controlled by, a person who acquires and holds, at least 5% (five per centum) Equity in the Terminal Operator;
- 1.1.124.2. is under common control with any person who acquires or holds at least 5% (five per centum) Equity in the Terminal Operator; or

- 1.1.124.3. any person who acquires or holds at least 5% (five per cent) Equity in the Terminal 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;

- 1.1.125. "**Related Party Transaction**" means any transaction relating in any way directly or indirectly to the Project in which the Terminal Operator or any Subcontractor of the Terminal 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 Terminal Operator), but excluding the Finance Agreements;

- 1.1.126. "**Responsible Authority**" means any ministry or department, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, institution, entity, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question. A Responsible Authority shall not include any Utility operator or provider;

- 1.1.127. "**Relief Event**" means the occurrence of a combination, or any one-off, the following events or circumstances:

1.1.127.1. an event of TNPA Default;

1.1.127.2. Unforeseeable Conduct;

1.1.127.3. Compensation Event;

1.1.127.4. Change in Law;

1.1.127.5. Invalidation in terms of s 67 of the Act; and/or

1.1.127.6. the resulting impact of any act (which includes a failure to act) of negligence or wilful misconduct on the part of TNPA, its employees, contractors, agents or any person acting on its behalf;

unless any of the events listed in clauses 1.1.127.1 to 1.1.127.6 inclusive arises (directly or indirectly) as a result of any negligence, willful act, omission or default of the Terminal Operator or any Subcontractor;

- 1.1.128. **"Safety Authorisations"** means any consents, licenses, authorisations, permissions or approvals required to be obtained by the Terminal Operator from any Responsible Authority required in terms of any health and safety Law for the Project;
- 1.1.129. **"Schedules"** means the schedules to this Agreement, as amended, replaced and varied from time to time;
- 1.1.130. **"Scheduled Operations Commencement Date"** means the date which is specified in the Construction Works Programme as the Day after the date on which the Completion Certificate is scheduled to be issued and the Services are due to commence;
- 1.1.131. **"Services"** means the services to be provided by the Terminal Operator as set out in Schedule 4 (Scope of Services);
- 1.1.132. **"Senior Debt"** means the amount owed to the Lenders and/or the hedging counterparties (as the case may be), subject to clause 35 (*Foreign Exchange Risk*), and calculated at the relevant date by deducting from the aggregate of the items listed at clause 1.1.132.1 the amount described in clause 1.1.132.2, determined as set out below and (save in the case of manifest error) as certified to TNPA by the Agent:
- 1.1.132.1. all outstanding amounts owing by the Terminal Operator to the Lenders and the hedging counterparties under the Finance Agreements including, without limitation:
- a) the principal amounts owing by the Terminal Operator to the Lenders under the Finance Agreements;
 - b) amounts necessary to discharge the Terminal Operator's obligations under hedging agreements, subject to clause 35 (*Foreign Exchange Risk*);
 - c) interest, fees, commissions, liabilities, expenses and costs (including breakage costs) payable by the Terminal 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 Concession Fee 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 Concession Fee under any lease before its normal maturity);
 - d) any amounts payable by the Terminal Operator to the Lenders and under hedging agreements by virtue of market disruption provisions, increased

costs, stamp duties and indemnities;

1.1.132.2. the aggregate of:

- a) any net amounts payable to the Terminal Operator under the hedging agreements; and
- b) to the extent that they have not been applied towards reducing the amount in clause 1.1.132.1 above before the date of payment pursuant to clause 56 (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 Terminal Operator over which the Lenders (or the Agent) have enforced their security; but
- c) 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;

1.1.133. **"Signature Date"** means the date on which this Agreement has been signed by both Parties and, if signed on different dates, the last of such dates;

1.1.134. **"South Africa"** means the Republic of South Africa;

1.1.135. **"Subcontractors"** means any subcontractor of the Terminal Operator, who has contracted directly with the Terminal Operator in respect of the Project including the Contractor/s;

1.1.136. **"Substitute Entity"** means a person duly and properly appointed to be the new terminal operator in the place and stead of the Terminal Operator in terms of the Finance Direct Agreement;

1.1.137. **"Successor Terminal Operator"** means 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 Terminal Operator;

1.1.138. **"Suitable Substitute Terminal Operator"** person approved by TNPA as:

1.1.138.1. having the appropriate technical and financial ability to perform the rights and obligations of the Terminal 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 subcontracts) to perform the obligations of the Terminal Operator under this Agreement; and

1.1.138.4. having the same, or more favourable policies to ensure that there is no reduction in B-BBEE;

1.1.139. **"Supplier Economic Development Plan"** means the Terminal Operator's Supplier Development Plan to be annexed to this Agreement as Schedule 11 (*Supplier Development Plan and Supplier Development Value Summary Worksheet*) hereto;

1.1.140. **"Target Completion Date"** means the date by which Construction Completion is intended to occur, which date is specified in the Construction Works Programme;

1.1.141. **"Tax"** means VAT, any tax, levy, impost, duty, or other charge or withholding of a similar nature (including any related penalty or interest);

1.1.142. **"Terminal"** means the facilities to be established on the Project Site comprising the Terminal Infrastructure and the Terminal Equipment, from which the Terminal Operator will provide the Services;

1.1.143. **"Terminal Equipment"** means the movable assets, including equipment and machinery (whether affixed to the Project Site or not) that are required in order to operate the Terminal and provide the Services;

1.1.144. **"Terminal Infrastructure"** means the land-based structures, including storage facilities, loading facilities, Terminal buildings, sheds, surfacing and all other fixed and movable improvements to the Project Site or adjacent to the Project Site, that are required in order to provide the Services as well as the internal network for the provision of water, lights, power, sewerage and similar services within the Project Site boundaries, all of which shall be designed and Constructed in accordance with the Detailed Design and the D&C Specifications;

1.1.145. **"Terminal Operator"** means [*Insert Name*];

1.1.146. **"Terminal Operator Financial Year"** means the period from [*insert date from and to*] of the next year and every such period thereafter;

1.1.147. **"Terminal Operator Performance Standards"** means the minimum performance standards specified in Schedule 20 (*Terminal Operator Performance Standards*) which shall take account of and be based upon the Business Plan and which shall include performance targets in respect of the provision of Services at the Terminal expressed as volumes throughput targets;

1.1.148. **"Termination Amount"** means the amount payable on termination of this Agreement in terms of Part VI;

1.1.149. **"Termination Calculation Expert"** means an accountant of not less than 10 (ten) years of 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: KwaZulu-Natal, if the matter relates primarily to a financial matter;

- 1.1.150. **"Termination Date"** means any date on which this Agreement is terminated in accordance with its terms, other than by way of effluxion of time;
- 1.1.151. **"TNPA"** means the Transnet National Ports Authority, an operating division of Transnet;
- 1.1.152. **"TNPA Policies"** means TNPA policies, operating manuals, operating conditions, and rules as set out in Schedule 23 (*TNPA Policies*);
- 1.1.153. **"TNPA Financial Year"** means the financial year of TNPA, which runs from 1 April to 31 March annually;
- 1.1.154. **"Transnet"** means Transnet SOC Ltd, registration number 1990/000900/30, as incorporated pursuant to the Legal Succession to the South African Transport Services Act, 9 of 1980;
- 1.1.155. **"Uninsurable"** means in relation to a risk, means either that:
- 1.1.155.1. the required insurance is no longer available in the worldwide insurance market from reputable insurers; or
 - 1.1.155.2. if the required insurance is available, the insurance premium payable for ensuring 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;
- 1.1.156. **"Updated Financial Model"** means the Base Case Financial Model as may be reviewed, amended, and updated from time to time;
- 1.1.157. **"Utilities"** means all facilities serving the Port and all Port Users such as water, electricity, sewage, gas, and telecommunications and where appropriate include the relevant provider thereof;
- 1.1.158. **"VAT"** means the value-added tax levied in terms of the Value Added Tax Act No.89 of 1999; and
- 1.2. In this Agreement, unless inconsistent with the context, words referring to:
- 1.2.1. one gender includes a reference to the other genders;
 - 1.2.2. the singular includes the plural and vice versa;

1.2.3. natural persons include juristic persons and vice versa.

- 1.3. When a number of Days is 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.
- 1.4. The words "**include**", "**including**" and "**in particular**" shall not be construed as being by way of limitation, illustration, or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words. The words "other" and "otherwise" shall not be construed so as to be limited or defined by any preceding words where a wider construction is reasonably possible.
- 1.5. Any Schedules to this Agreement shall be deemed to form part of this Agreement. Those Schedules that are not available as at the Signature Date shall be annexed to this Agreement as soon as they have been signed by the delegated representatives of the Parties and will form an integral 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.
- 1.6. 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.
- 1.7. 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.
- 1.8. 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.
- 1.9. 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.
- 1.10. Titles of clauses and Schedules of and to this Agreement are inserted for purposes of convenience only and shall not be used in respect of or in any way affect the interpretation of any provision of this Agreement.
- 1.11. A reference in this Agreement to a Person shall be a reference to such Person's permitted successor, transferee, cessionary and/or delegatee.
- 1.12. 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.

- 1.13. Where this Agreement requires that the waiver, consent, approval or permission of TNPA is to be obtained:
- 1.13.1. such waiver, consent, approval or permission shall at all times be required to be obtained by the Terminal Operator prior to undertaking or failing to undertake the course of action to which such waiver, consent, approval or permission pertains; and
 - 1.13.2. the granting or withholding of such waiver, consent, approval or permission shall not be valid unless it is issued in writing by TNPA.
- 1.14. The terms “**holding company**” and “**subsidiary**” shall have the meanings ascribed to them in the Companies Act.
- 1.15. The term “**Person**” shall mean a natural person, partnership, firm, corporation, joint stock company, trust, unincorporated association, joint venture, government body, limited liability company, close corporation, any sphere of government (including national, provincial, regional and local government, or organ of state) or any other legal entity which is considered a legal entity under the laws of South Africa or the country in which such an entity has been formed.
- 1.16. References in this Agreement to TNPA and the Terminal Operator shall include their respective authorised agents and representatives, successors, and permitted assignees.
- 1.17. Any provision of this Agreement that contemplates or provides for the performance of an obligation or compliance with a provision of this Agreement subsequent to any termination of this Agreement shall survive termination of this Agreement and shall continue in force and effect for the period contemplated in the said provision.
- 1.18. Termination 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. 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.
- 1.19. The *eiusdem generis* rule and the *contra proferentem* rule shall not be applicable to this Agreement.

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

- 2.2. TNPA requires the Terminal Operator to finance, design, construct, Operate, and Maintain the multi-purpose Terminal for Agricultural Dry Bulk and other Compatible Cargo at Maydon Wharf precinct for a period of 25 (twenty-five) years and thereafter transfer the Terminal to TNPA in accordance with the terms of this Agreement.
- 2.3. TNPA accordingly wishes to appoint the Terminal Operator to undertake the Project and in Terminal Operator wishes to accept this appointment on the terms and conditions as recorded in this Agreement.
- 2.4. Accordingly, the Parties have been duly authorised to enter into this Agreement on the terms and conditions recorded in this Agreement.

3. Commencement, Duration, and Concession Period

3.1. Commencement and Duration

Subject to clause 3.2 (*Suspensive Conditions*), this Agreement shall commence on the Signature Date and shall endure until the earlier of the Termination Date or the Expiry Date.

3.2. Suspensive Conditions

- 3.2.1. Save for this clause 3.2 (*Suspensive Conditions*) and clauses 1 (*Definitions and Interpretation*), 2 (*Introduction*), 3 (*Commencement, Duration and Concession Period*), 4 (*Appointment of Terminal Operator and Grant Of Rights*), 7 (*Indemnity*), 9 (*Contracts*), 10 (*Environmental Compliance*), 12 (*Access to Documents, Copyright and Related Matters*), 15 (*Port Users and Port Rules*), 16 (*Changes in the Terminal Operator*), 17 (*TNPA's Assistance and Rights and Limitation on Liability*), 19 (*Provision of the Port*), 20 (*Project Site*), 22 (*Health and Safety*), 25 (*Design and Construction*), 27 (*Operation and Maintenance*), 28 (*Reporting Requirements*), 38 (*Consequences of a Compensation Event*), 39 (*Force Majeure*), Part VI (*Termination*), 62 (*Dispute Resolution*), 62.7 (*Fast-Track Dispute Resolution*), 64 (*Confidentiality*), 65.1 (*Addresses*), 65.4 (*Entire Agreement*), 65.8 (*Variation, Cancellation and Waiver*), 65.11 (*Cession*), 65.13 (*Applicable Law*), 65.15 (*Jurisdiction of South African Courts*), 65.10 (*Invalidity and Severability*), 65.17 (*Costs*) and 65.18 (*Counterparts*), which shall be of immediate force and effect, subject to the fulfilment of the following suspensive conditions:

- 3.2.1.1. the Terminal Operator obtaining all necessary Environmental Authorisations and/or Consents for the commencement of the Construction Works and the Operation and Maintenance of the Terminal;
- 3.2.1.2. the Terminal Operator concluding the relevant agreements with the Construction Contractor and such agreements have become unconditional except to the extent that they are conditional on this Agreement becoming unconditional and legally effective;

- 3.2.1.3. the Construction Agreement, the Construction Works Programme, the Detailed Design and D&C Specifications have been approved by the Independent Certifier;
- 3.2.1.4. the Terminal Operator achieving Financial Close and providing written confirmation thereof to TNPA (as confirmed in writing by the Lender/s).

3.2.2. The Suspensive Conditions, or any of one of them, may be waived by the Terminal Operator giving written notice of such waiver to the TNPA.

3.2.3. Each Party must:

- 3.2.3.1. use its reasonable commercial endeavours to procure the fulfilment of all the Suspensive Conditions as soon as possible after the Signature Date; and
- 3.2.3.2. disclose in writing to the other Party anything which will or is likely to prevent any of the Suspensive Conditions from being satisfied, as soon as it becomes aware of such matter.

3.2.4. No Party shall have any claim against any other Party pursuant to the non-fulfilment of a Suspensive Condition in clause 3.2.1, save where a Party (the "Guilty Party") has breached the terms of this clause 3.2 (*Suspensive Conditions*) and/or has deliberately frustrated the fulfilment of such condition or intentionally caused that condition not to be fulfilled, in which event the Guilty Party shall be liable to the other Party for such damages as such other Party may have suffered thereby.

3.3. **Duration of the Concession Period**

3.3.1. This Agreement shall commence on the Signature Date and, subject to the fulfilment of the Suspensive Conditions, shall continue for a period of 25 (twenty-five) years from the Scheduled Operations Commencement Date, alternatively, the Actual Operations Commencement Date (whichever occurs first) unless terminated earlier in accordance with its terms.

3.3.2. The Construction Period shall commence on the Effective Date and shall terminate on the issue of the Completion Certificate.

3.3.3. The Operations Period shall commence on the Scheduled Operations Commencement Date, alternatively, the Actual Operations Commencement Date (whichever occurs first).

4. **Appointment of Terminal Operator and Grant of Rights**

4.1. **Grant of Rights**

4.1.1. TNPA hereby grants the Concession in favour of the Terminal Operator to undertake

the Project on the terms and conditions contained in this Agreement. The Terminal Operator accepts such appointment on the terms and conditions contained in this Agreement.

- 4.1.2. In undertaking the Project, the Terminal Operator shall be required to provide the Services as more fully described in Schedule 4 (*Scope of Services*) annexed hereto.

4.2. **Exclusivity of Rights**

- 4.2.1. Subject to the provisions of this Agreement and with effect from the Signature Date, the Terminal Operator is hereby granted the exclusive Operating Rights to provide the Services until the Expiry or earlier Termination of this Agreement in accordance with its terms.

- 4.2.2. The Terminal Operator shall be entitled to use the Port Infrastructure that is within the Project Site and shall also be entitled to use, on a common user basis Berths and the quays adjacent thereto.

- 4.2.3. The Terminal Operator is granted exclusive Operating Rights to provide the Services, subject to Part VI of this Agreement.

- 4.2.4 The Terminal Operator will accordingly in the exercise of its Operating Rights, and to the extent required by Law, be obliged to:

- 4.2.4.1 not unreasonably discriminate, in its tariff structure or in its trading conditions (including but not limited to all commercial terms and conditions) between various users or potential users of the Terminal Infrastructure and the loading facilities except for objectively justifiable and identifiable differences;

- 4.2.4.2 afford all Terminal users who require access to uncommitted capacity at the Terminal the right to use the Terminal in accordance with the Terminal Operator's access and allocation mechanism which mechanism must be developed in accordance with applicable Laws; and

- 4.2.4.3 not engage in any other form of anti-competitive behaviour (which may constitute a breach of applicable Laws) in exercising its Operating Rights.

4.3. **Obligations of the Terminal Operator**

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

- 4.3.2. This Agreement shall not be interpreted as granting the Terminal Operator any rights

or imposing any obligations or duties on TNPA or any Responsible Authority, except as expressly and specifically stated in this Agreement.

- 4.3.3. No instructions or approvals given by TNPA or any Responsible Authority in accordance with the Law and this Agreement in respect of any aspect of the Project or the Terminal unless expressly stated in writing, affect, alleviate, excuse or provide relief from the Terminal Operator's duties, obligations, liabilities and responsibilities under this Agreement and in respect of the Project, save for such relief as provided for in Clause 40 (*Unforeseeable Conduct*), and Clause 49 (*No Better No Worse*).
- 4.3.4. The Terminal Operator shall provide the Services in accordance with the terms of this Agreement for the duration of the Operations Period.
- 4.3.5. The Terminal Operator shall in providing the Services, comply at all times with, the Operational Plan and the Terminal Operator Performance Standards and the provisions of this Agreement.
- 4.3.6. The Terminal shall be used, managed and operated on a common-user basis, meaning that the Terminal Operator shall provide reasonable equality of access to the Terminal to Terminal users and potential Terminal users wishing to utilise the Services of the Terminal subject to capacity availability and shall not unreasonably discriminate, in its tariff structure or in its trading conditions, between various users or potential users of the Terminal.
- 4.3.7. Without limiting the obligations of the Terminal Operator as specified in this Agreement or imposed by Law, the Terminal Operator shall, subject to available capacity:
 - 4.3.7.1. provide reliable, secure, and efficient Services to all Port Users wishing to use any or all of the Services;
 - 4.3.7.2. ensure that the provision of any Services as envisaged above does not hinder or otherwise unreasonably interfere with any other activities or Services undertaken or conducted at the Port by TNPA, any other Port User or any other Person;
 - 4.3.7.3. obtain, maintain and renew all documents and all Consents necessary to Operate and Maintain the Terminal and to render the Services and perform the activities and discharge the obligations contained in clause 4.5 (*General Rights and Obligations of the Terminal Operator*) and this clause 4.3 (*Obligations of the Operator to provide the Services*) and in this Agreement;
 - 4.3.7.4. ensure that any Contractors, Subcontractors, agents, and service providers used by it require a license in terms of the Act, such persons are duly licensed;
 - 4.3.7.5. provide, maintain or replace, according to International Best Practice, all

operating and other equipment necessary for the efficient operation of the Terminal; and

- 4.3.7.6. promote and foster positive customer relations and actively market and promote the Terminal and the Services to potential customers and Port Users.

4.4. **Subcontracting**

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

4.5. **General Rights and Obligations of the Terminal Operator**

4.5.1. **Use of Terminal and Project Site, No Alienation or Encumbrance, and Site Condition**

- 4.5.1.1. The Terminal shall be used solely for the purpose of providing Services and carrying out tasks and activities that are reasonably necessary for and incidental to the provision of those Services, in accordance with this Agreement (including the terms, conditions, exclusions, limitations and restrictions contained in Schedule 4 (*Scope of Services*), and for the exercise by the Terminal Operator of its rights and the fulfilment of its obligations under this Agreement, and for no other purpose whatsoever, unless the prior written consent of TNPA has been obtained, which consent may not be unreasonably withheld.
- 4.5.1.2. The Terminal Operator shall not sell, dispose of, or otherwise alienate or encumber the whole or any portion of the Project Site or the Terminal (except the Terminal Equipment) in any manner whatsoever.
- 4.5.1.3. The Terminal Operator shall not use the Terminal for residential purposes or as sleeping quarters, except if the Terminal Operator elects to provide accommodation facilities as part of the Services or if TNPA authorises (in writing) the use of a portion of the Terminal as sleeping quarters for operational or

security purposes.

- 4.5.1.4. The Terminal Operator shall not do or cause anything to be done that may cause a nuisance to TNPA or any other Port User or the occupants of adjoining properties.
- 4.5.1.5. The Terminal Operator shall not do anything that materially detracts from the appearance or safe Operation and Maintenance of the Terminal, the Terminal Infrastructure, or the Terminal Equipment.
- 4.5.1.6. The Terminal Operator acknowledges and agrees that the Terminal Operator has inspected the Project Site and has satisfied itself fully as to the location, condition, geotechnical characteristics and features, zoning, ownership, existing Encumbrances, nature and extent of the Project Site as well as any and all Consents already granted to or held by TNPA in respect of the Project Site. The Terminal Operator expressly records and agrees that TNPA does not warrant the suitability or otherwise of the Project Site, buildings, infrastructure and improvements thereon for purposes of undertaking the Construction, Operation and/or Maintenance of the Terminal or for purposes of providing the Services and that the Terminal Operator shall have no claims whatsoever against TNPA in respect of the location, condition, geotechnical characteristics and features, zoning, ownership, existing Encumbrances, defects, nature and extent of the Project Site, buildings, infrastructure and improvements thereon as well as any and all Consents already granted to or held by TNPA in respect of the Project Site.
- 4.5.1.7. Without limiting the other obligations of the Terminal Operator as specified in this Agreement or imposed by Law, the Terminal Operator shall be obliged, in respect of the Terminal, to:
 - 4.5.1.7.1. provide reliable, secure and efficient Services and facilities to Terminal users;
 - 4.5.1.7.2. obtain, maintain and renew all documents, permits or other authorisations necessary to operate the Terminal, render the Services and perform the activities referred to in this clause 4.5.1
 - 4.5.1.7.3. ensure that if any Subcontractors, agents and service providers used by it require a licence in terms of the Act, such persons are duly licensed;
 - 4.5.1.7.4. provide, maintain or replace, according to International Best Practice and using its best endeavours, Terminal Equipment and all operating and other equipment necessary for the efficient operation of the Terminal;

- 4.5.1.7.5. procure, install and operate communication, control and administrative systems necessary for the efficient operation of the Terminal;
 - 4.5.1.7.6. promote customer relations and market the Terminal to potential customers;
 - 4.5.1.7.7. to the extent that the relevant service at the Terminal is not the responsibility of TNPA, be responsible for the disposal of garbage and waste generated within the Project Site and garbage and waste generated by Cargo carriers visiting the Terminal;
 - 4.5.1.7.8. keep the Terminal in a clean, orderly and sanitary condition;
 - 4.5.1.7.9. comply with all applicable provisions of the Act, the Port Rules, the Regulations and any directives issued in terms of the Act;
 - 4.5.1.7.10. comply with the requirements of SAMSA, including any applicable legislation and codes relating to safe working practices;
 - 4.5.1.7.11. comply with the ISPS Code and the IMDG Code in relation to ship security and dangerous goods, respectively; and
 - 4.5.1.7.12. comply with all other applicable Legislation and generally conduct its activities and operations in accordance with the Law.
- 4.5.1.8. The Terminal Operator shall take all reasonable steps to prevent the spilling, leaking of Cargo and/or any other matter at the Port or into the Port's water. The Terminal Operator shall:
- 4.5.1.8.1. immediately notify TNPA if any Cargo and or any other matter is spilled, leaked or dropped in the water as a result of the provision of the Services or the conduct of its Terminal users, including, but not limited to, employees, agents, service providers or Subcontractors; and
 - 4.5.1.8.2. in accordance with International Best Practice, immediately take steps to recover such Cargo or otherwise deal with same to prevent the contamination of the Environment.
- 4.5.1.9. If the Terminal Operator fails to recover any spilt Cargo, for which the Terminal Operator is responsible and where the Terminal Operator is obliged to do so in accordance with the Law or otherwise in accordance with any directive issued to it by a Responsible Authority and/or any other matter as envisaged above, within a reasonable period of time (alternatively, in accordance with the instructions of the Harbour Master at the Port, if applicable) acting in accordance with International Best Practice, then TNPA may take whatever steps that are

necessary to recover the Cargo, and/or any other matter in question and to claim the reasonable costs of taking such steps from the Terminal Operator (subject to TNPA being limited to only recover from the Terminal Operator such costs incurred by TNPA pursuant to the taking of any steps which the Terminal Operator failed to take, and which the Terminal Operator was obliged to take).

4.5.2. **Construction of the Terminal**

4.5.2.1. The Terminal Operator shall undertake the Construction Works (including the design, procurement, construction, installation, commissioning and testing of the Terminal Infrastructure and the Terminal Equipment) in respect of the Terminal, which shall include the following:

4.5.2.1.1. the Construction and installation of all Terminal Infrastructure in accordance with the Detailed Designs, the D&C Specifications (Schedule 5), International Best Practices and the terms and conditions of this Agreement, including but not limited to:

4.5.2.1.1.1. all infrastructure required to provide the Services;

4.5.2.1.1.2. basic services infrastructure within the Project Site in respect of water, electricity, sewerage and stormwater reticulation;

4.5.2.1.1.3. hard surfacing;

4.5.2.1.1.4. restrooms;

4.5.2.1.1.5. roads and parking areas;

4.5.2.1.1.6. lighting (i.e. high mast) enabling 24/7 operations;

4.5.2.1.1.7. perimeter fencing and entrance gate/s where applicable;

4.5.2.1.1.8. security kiosk/s where applicable;

4.5.2.1.1.9. firefighting capability as required (based on the type and volume of products handled at the Terminal);

4.5.2.1.1.10. electrical sub-station/s linked to maximum demand;

4.5.2.1.1.11. appropriate signage;

4.5.2.1.2. the procurement, installation, testing and commissioning of all

Terminal Equipment in accordance with the Detailed Designs, the D&C Specifications (Schedule 5), International Best Practice and the terms and conditions of this Agreement;

4.5.2.1.3. subject to obtaining the prior written approval of TNPA, the construction and alterations to the quayside for the installation of the Terminal Infrastructure;

4.5.2.1.4. any other construction activities necessary in accordance with the Detailed Designs and the D&C Specifications (Schedule 5).

4.5.2.2. Without limiting the other obligations of the Terminal Operator in this Agreement or which are imposed on it by Law, the Terminal Operator shall:

4.5.2.2.1. bear full responsibility to apply for and obtain the required Environmental Authorisations and all other Consents which may be required to enable it to undertake the Construction Works (including the design, finance, procurement, construction, installation, commissioning and testing of the Terminal Infrastructure, the Maintenance of the Terminal, and the provision of the Services (as envisaged above); and

4.5.2.2.2. ensure that if any of its Contractors or Subcontractors, agents and service providers require a licence in terms of the Act, such Persons shall be duly licensed at all times.

4.6. **Terminal Operator's Replacement, Repair, Operation and Maintenance Obligations**

4.6.1. The Terminal, the Terminal Infrastructure, the Terminal Equipment, the Project Site, and any other equipment that is necessary for the safe and efficient Operation and Maintenance of the Terminal shall be Operated and Maintained by the Terminal Operator at its own cost, and kept in good working order and condition and in a safe operating condition and in accordance with the Operational Plan and the Terminal Operator Performance Standards and International Best Practice as well as all applicable Laws, any applicable national standards, specifications and codes of practice which are generally applied in South Africa in relation to such Operation and Maintenance.

4.6.2. The Terminal Operator shall be responsible for repairs, renewals and replacement of the Terminal Infrastructure and the Terminal Equipment as is necessary for the continued and efficient operation of the Terminal.

4.6.3. The Terminal Operator shall procure, install, commission, test, Operate and Maintain appropriate communications, safety, control and administrative systems and equipment as are necessary for the safe and proper use, Operation and Maintenance of the Terminal in accordance with the Detailed Designs, the Operational Plan, and the Terminal Operator

Performance Standards, the IPMS and International Best Practice.

- 4.6.4. The Terminal Operator shall, to the extent that the relevant Service at the Terminal is not provided by the relevant local authority in the ordinary course as envisaged in clause 20.4, be responsible, at its own cost, for the disposal of garbage and waste, including garbage and waste generated by vessels visiting the Terminal and by the Terminal itself.
- 4.6.5. The Terminal Operator shall attend to the removal of intrusive vegetation, including regular control and removal of grass, noxious and other weeds and other plants and vegetation on the Project Site (save for any landscaped gardens which may be provided for in the Detailed Design).
- 4.6.6. The Terminal Operator shall, in the Operation and Maintenance of the Terminal, comply with all other applicable Laws (including all labour related Laws) the Port Rules, the Port Regulations, TNPA Policies, and any directives issued in terms of the Act.
- 4.6.7. The Terminal Operator shall conduct annual inspections of the Terminal Infrastructure and Terminal Equipment and must incorporate the outcome of each such annual inspection in the Annual Report as provided for in clause 28 (*Reporting Requirements*) hereof. The Terminal Operator shall provide TNPA with a maintenance programme for the Terminal Infrastructure and a maintenance and replacement programme for the Terminal Equipment, in accordance with clause 28 (*Reporting Requirements*).

4.7. **Erection of Improvements and Extension of Terminal Infrastructure**

- 4.7.1. The Terminal Operator shall be entitled to make or cause to be made in the Terminal or in respect of the Terminal Infrastructure such improvements, alterations, additions and/or extensions as may be necessary or appropriate for the provision of the Services and/or the Operation and Maintenance of the Terminal at the Project Site, provided that any such improvements, alterations, additions and/or extensions which are not envisaged or provided for in the Detailed Designs and/or the Construction Works Programme shall only be undertaken by or on behalf of the Terminal Operator after it has submitted the plans, designs and specifications thereof to TNPA and has obtained the prior written approval of TNPA which approval may not be unreasonably withheld.
- 4.7.2. Unless otherwise agreed in writing by the Parties or otherwise expressly provided for in this Agreement, all improvements, alterations, additions and/or extensions envisaged in clause 4.7.1 shall be undertaken by the Terminal Operator at its own cost and TNPA shall not be liable to compensate the Terminal Operator for improvements, alterations, additions and/or extensions which are effected by the Terminal (including the Terminal Infrastructure) whether or not such improvements, alterations, additions and/or extensions are effected pursuant to and with the prior approval of TNPA in terms of clause 4.7.1 and the value of any such and all such improvements, alterations, additions and/or extensions shall not be deducted from or set-off by the Terminal Operator against, or otherwise form the substance

of a counterclaim by the Terminal Operator or in any other manner whatsoever affect or detract from any amounts which are or may become payable by the Terminal Operator to TNPA in terms of this Agreement.

4.8. Roadways, Surfaces and Access to and Egress from the Terminal

- 4.8.1. The Terminal Operator shall not load vehicles (including as a car or truck or tracked or wheeled equipment) in any area within the Port, other than in the Terminal, unless with TNPA's prior written consent or with permission from another Person legally in control of the area, is obtained.
- 4.8.2. The Terminal Operator shall, at its own cost, Operate and Maintain in good order and condition, all existing roads within the Project Site. The Terminal Operator shall construct, Operate and Maintain in good order and condition all roadways and surfaces as may be required within the Terminal for the provision of the Services and the performance of the activities and obligations contemplated in this Agreement. For the avoidance of doubt, the road running through the Project Site, as shown in Schedule 1, shall remain common user and shall not be construed as forming part of the Project Site.
- 4.8.3. The roadways and surfaces shall be constructed, Operated and Maintained in accordance with all applicable Laws, the Detailed Designs and the Operational Plan and in accordance with a standard that complies with the permissible axle loads for the types and volumes of Cargo and traffic which will use the roads that are envisaged in the Business Plan, Operational Plan and the Detailed Designs.
- 4.8.4. The Terminal Operator shall ensure that all vehicles entering and exiting the Terminal shall be organized to minimise traffic congestion, the parking of vehicles and any queuing outside the Project Site. To the extent that the weighing of vehicles entering and exiting the Terminal in order to load or unload cargo is required by any Law, the Terminal Operator must check the weight of vehicles entering and exiting the Terminal.
- 4.8.5. TNPA's duly authorised employees and contractors shall have the right of access to the Terminal for purposes of performing TNPA's functions, provided that TNPA shall ensure that its employees and contractors comply with all reasonable safety and security stipulations, environmental and Project Site rules of the Terminal Operator whilst in the Terminal.
- 4.8.6. All other Persons, vehicles and Port Users shall have access to the Terminal and may use the roadways and the surfaces in the Terminal in the manner reasonably determined by the Terminal Operator in order to conduct normal legal business related to the Operation of the Terminal, provided that in the use of such roadways such Persons, vehicles and Port Users shall not unnecessarily interfere with or impede the activities of the Terminal Operator and shall comply with all the safety and security stipulations, environmental and Project Site rules of the Terminal Operator.

4.8.7. The Terminal Operator may not impose any fee for admission to the Terminal.

4.9. **Spillage**

4.9.1. The Terminal Operator shall take all reasonable steps to prevent the spilling or dropping of Cargo and/or any other matter into the Port's water. The Terminal Operator shall:

4.9.1.1. immediately notify TNPA if any Cargo and/or any other matter is spilled or dropped in the water as a result of its operation of the Terminal or the conduct of its employees, agents, service providers, Contractors, Subcontractors or Persons responsible for the vessels calling at the Terminal; and

4.9.1.2. immediately take steps to recover, remove and/or clean such Cargo or any other matter out of the Port's water.

4.9.2. If the Terminal Operator fails to recover, remove and/or clean any spilled Cargo or any other matter out of the Port's water as envisaged above, TNPA may take whatever steps are necessary to recover, remove and/or clean the Cargo or any other matter out of the Port's water and claim the reasonable costs of taking such steps from the Terminal Operator.

4.10. **General Safety and Security in the Terminal**

4.10.1. Without detracting from the provisions of clauses 22 (*Health and Safety*) and 23 (*Security*), the Terminal Operator shall be responsible for the safety and security of the Terminal and for all Persons and assets therein, including Cargo, and the implementation of and adherence to the ISPS Code and accordingly, the Terminal Operator shall:

4.10.1.1. as part of the security plan envisaged in clause 23 (*Security*), monitor and control all Cargo, vehicles and people entering and leaving the Terminal as part of the Terminal security plan, and ensure that security communications are always readily available;

4.10.1.2. comply with all applicable provisions of the Act, the Regulations, the Port Rules, prevailing security and safety requirements of TNPA (including requirements relating to access to and egress from the Project Site), and any directives that may be issued in terms of the Act, from time to time;

4.10.1.3. comply with the requirements and directions of the Ports Regulator;

4.10.1.4. comply with the provisions and requirements of the South African Maritime Safety Authority ("**SAMSA**"), including any applicable legislation and codes relating to safe working practices;

4.10.1.5. 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 Maritime Security Regulations 2004, adopted under the Merchant Shipping Act No

57 of 1951; and

- 4.10.1.6. comply with the IMDG Code being the guideline for the safe transportation of dangerous goods by sea.

4.11. Personnel, Contractors, and Subcontractors

- 4.11.1. The Terminal Operator as well as its Contractors and Subcontractors shall at all times employ or engage sufficient and suitably qualified and competent personnel to enable it to efficiently provide the Services and Operate and Maintain the Terminal, as envisaged in this Agreement.
- 4.11.2. The Terminal Operator shall implement all measures as are required by the relevant applicable Laws and/or as may be reasonably necessary to ensure the safety of its employees and those of its Contractors and Subcontractors, and shall provide them or ensure they are provided, free of charge, with any necessary personal protective clothing and equipment and shall ensure that its Contractors and Subcontractors do likewise.
- 4.11.3. The Terminal Operator accepts full responsibility for the training of staff and shall ensure that all its employees are properly trained for the work they are undertaking and are familiar with safety and security requirements that apply to the Terminal, are familiar with the Terminal's security plan and protocols as well as, to the extent applicable, the Port's security rules. The Terminal Operator shall ensure that its Contractors and Subcontractors do likewise.
- 4.11.4. TNPA may require the Terminal Operator to remove any employee, agent, representative, Contractors or Subcontractor, or any of their respective employees, agents or representatives, from the Terminal or to prevent such employees, agents or representatives, Contractors or other Subcontractors from entering the Terminal, if any such employees, agents or representatives, Contractors or Subcontractors engage in any conduct which might threaten public health or the safety or security of the Port or other Port Users.

5. Concession Fee

- 5.1. The Terminal Operator shall pay TNPA a Concession Fee in respect of the Terminal, as follows:
- 5.1.1. the sum of R[insert amount] per square meter, per month (excluding VAT), which amount shall be paid monthly in advance on or before the first day of each and every month for the duration of the Construction Period;
- 5.1.2. the sum of R[insert amount] per square meter, per month (excluding VAT), which amount shall be paid monthly in advance on or before the first day of each and every month for the duration Operating Term;

- 5.2. During the first year of the Operating Term, the monthly Concession Fee shall be the amount as set out in clause 5.1.2.
- 5.3. Subject to clause 5.1, upon the annual anniversary of the commencement of the Operating Term, the monthly Concession Fee payable by the Terminal Operator shall be reviewed and or escalated annually, in accordance with the following principles:
- 5.3.1. with effect from the first anniversary of the Actual Operations Commencement Date, the monthly Concession Fee payable for the next five (5) year period shall be a market-related Concession Fee and escalation determined in accordance with clause 5.3.3 onwards;
- 5.3.2. for each subsequent five (5) year period thereafter, the Concession Fee payable shall be a market-related Concession Fee and escalation determined in accordance with the remaining provisions of this clause;
- 5.3.3. no later than six (6) months prior to the expiry of the first year of the Operating Term (per clause 5.3.1 above) and no later than six (6) months prior to the expiry of each subsequent discrete five (5) year period thereafter, the Parties shall meet in order to endeavour to agree the Concession Fee and the annual escalation that shall apply in respect of the subsequent five (5) year period;
- 5.3.4. should the Parties not be able to agree upon the Concession Fee and escalation rate in terms of clause 5.3.3 above, the Concession Fee and escalation rate shall be determined by a registered TNPA approved Valuer (or such other Valuer as Transnet may appoint) and a Valuer that the Terminal Operator may appoint;
- 5.3.5. in the event that the two Valuers referred to in clause 5.3.4 fail to reach agreement within a period of fourteen (14) days from the date of referral thereto, the Concession Fee and escalation rate shall be determined by an expert Valuer mutually agreed upon by the Parties (**"External Valuer"**);
- 5.3.6. in the event that Parties fail to agree on an External Valuer within ten (10) days after the expiry of the said fourteen (14) day period, the dispute shall be referred to the Chairman of the South African Council for the Property Valuers Profession who shall appoint a Valuer of at least ten (10) years standing for the purpose of determining the Concession Fee and escalation rate (**"SAIV Valuer"**);
- 5.3.7. forthwith following the appointment of the External Valuer, or the SAIV Valuer, as the case may be, each Party shall submit a written Concession Fee estimate to such Valuer, together with any information supporting such estimate;
- 5.3.8. the External Valuer or SAIV Valuer, as the case may be, will act as an expert (and not as an arbitrator) and, within thirty (30) days after being appointed, will determine the Concession Fee and the escalation rate for the Project Site for the relevant Concession Fee review period, which determination shall be reduced to writing and shall be final and

binding on the parties;

5.3.9. the costs of the External Valuer or the SAIV Valuer, as the case may be, shall be borne equally by the Parties; and

5.3.10. notwithstanding anything to the contrary contained in this Agreement, pending the determination of the Concession Fee and the escalation rate applicable for the Concession Fee review period in question, the Terminal Operator shall continue to pay the Concession Fee equal to the Concession Fee which prevailed in the month immediately prior to the dispute referred to in clause 5.3.4 until such determination is made. Thereafter:

5.3.10.1. the Terminal Operator shall on demand pay any additional amount it would have had to pay in respect of the period from the date of the dispute arising to the end of the month during which the determination is made; alternatively

5.3.10.2. in circumstances where the determination results in the Terminal Operator having paid an amount in excess of what it should have paid in respect of the period from the date of the dispute arising to the end of the month during which the determination is made, the TNPA shall undertake one of the following actions (to be determined at its election within thirty (30) days of the date of the determination) it shall either reimburse the Terminal Operator the amount of the overpayment (by way of one lump sum payment), alternatively, the overpayment shall be offset against the upcoming monthly Concession Fee/s to be paid by the Terminal Operator.

5.3.11. The Terminal Operator shall not be entitled to set-off against the Terminal Operator Guarantee, alternatively, the Terminal Operator Deposit (as applicable), any amount owed to TNPA in terms of or arising out of this Agreement;

5.3.12. TNPA shall invoice the Terminal Operator for the monthly Concession Fee in question, no later than the 25th (twenty-fifth) day of the prior Month and, subject to having received a timeous invoice, the Terminal Operator shall make payment on or before the 7th (seventh) day of the following month in question;

5.3.13. Except if the Parties otherwise agree in writing, all payments shall be made in Rand and all payments to be made in terms of this Agreement by one Party to the other shall be made in full without set-off or counterclaim in immediately available funds, free of bank exchange or any other charges or deductions, electronically into the Party's designated account, namely:

5.3.13.1. TNPA Designated Account:

5.3.13.2. Terminal Operator Designated:

5.3.14. Save for any amounts in dispute, TNPA shall be entitled in its sole and absolute discretion,

on prior written notice to the Terminal Operator, to appropriate or re-appropriate any amounts received from the Terminal Operator towards the payment of any other amounts owing by the Terminal Operator to it, however, under no circumstances shall such appropriation or re-appropriation result in the Terminal Operator being requested by TNPA to pay an amount/invoice in respect of which it has already made payment.

5.3.15. Subject to the terms of this Agreement, the Terminal Operator shall not be liable to make payment of the Concession Fee for such period that the Terminal Operator is prevented or hindered (whether in whole or in part) from carrying out the Construction Works, alternatively, providing the Services, as a direct result of a Relief Event or a Force Majeure Event.

5.3.16. In circumstances where the Terminal Operator is only partially prevented or hindered from carrying out the Construction Works, alternatively, providing the Services in the circumstances set forth in clause 5.3.16 above, then the Concession Fee shall be reduced proportionally to the extent of the hindrance suffered or experienced by the Terminal Operator.

5.3.17. The Concession Fee is payable irrespective of the performance and volume handled at the Terminal.

5.4. **Concession Fee Guarantee**

5.4.1. The Terminal Operator shall, no later than the Signature Date, furnish to TNPA a written, irrevocable, unconditional and on-demand bank guarantee in an amount equal to **[insert number]** months Concession Fees as payable during the first year, excluding VAT thereon (the “**Concession Fee Guarantee**”) as security for the payment of any and all Concession Fees due and payable by the Terminal Operator in terms of this Agreement.

5.4.2. The Concession Fee Guarantee shall be in favour of TNPA and shall have a term no shorter than the full duration of this Agreement and any renewal or extension thereof. The Terminal Operator shall be required annually within thirty (30) days after expiry of the anniversary of the Signature Date, to increase the amount of the Concession Fee Guarantee to such amount as is equal, at the relevant time, to an amount of **[insert number]** months Concession Fees, excluding VAT thereon.

5.4.3. TNPA shall have the right to apply the whole or portion of the Concession Fee Guarantee towards the payment of any Concession Fees due and owing by the Terminal Operator when any such amount has not been paid within fifteen (15) Business Days of written notice requesting such payment that is due and payable. If any portion or the whole of the Concession Fee Guarantee is so applied, the Terminal Operator undertakes, within thirty (30) days of receipt of the request from TNPA, to reinstate the amount of the Concession Fee Guarantee to the original amount.

- 5.4.4. The rights and claims to the Concession Fee Guarantee shall be retained by TNPA until the termination of this Agreement, the handover of the Terminal by the Terminal Operator and the complete discharge by the Terminal Operator of all its Concession Fee payment obligations under the Agreement whereafter, the rights and claims to such amount (or the remaining balance thereof in the event that the whole or portion thereof has been applied by TNPA in terms of clause 5.4.2) shall then be returned to the Terminal Operator.

6. Ownership and Transfer of the Project Site and the Terminal Infrastructure

- 6.1. The Terminal Operator agrees and acknowledges that the ownership of the Project Site, the buildings and all properties existing at the Project Site on Signature Date shall at all times vest in TNPA and nothing in this Agreement shall be construed as transferring ownership to the Terminal Operator.
- 6.2. The Parties agree that ownership of the Terminal Infrastructure shall vest in TNPA upon the issue of the Completion Certificate.
- 6.3. The Terminal Operator agrees and acknowledges that it shall transfer the Terminal Equipment at the end of the Concession Period on such terms and conditions as may be agreed to in writing between the Parties.
- 6.4. At least 2 (two) Years prior to the expiry of the Operations Period, TNPA shall notify the Terminal Operator whether it is required to remove all or some of the Terminal Infrastructure. Should TNPA notify the Terminal Operator to remove all or some of the Terminal Infrastructure, the Terminal Operator shall remove all or the selected Terminal Infrastructure on or before handover of the Project Site and the Terminal Infrastructure, if applicable or within such period determined by TNPA.
- 6.5. Subject to the rights of the Lenders (including but not limited to any security interests held by the Lenders in respect of the Terminal Equipment) and the terms of the Finance Direct Agreement, the Terminal Operator grants to the TNPA the first option (the “**TNPA Option**”) to purchase the Terminal Equipment owned by the Terminal Operator on the following terms and conditions:
- 6.5.1. TNPA shall exercise the TNPA Option by providing written notice to the Terminal Operator no later than:
- 6.5.1.1. two (2) years prior to the Expiry Date, or such alternate date agreed to in writing between the Parties; alternatively,
- 6.5.1.2. if the date set out in clause 6.5.1.1 has not already passed, at any time between the date on which notice of termination of this Agreement is given by either Party to the other in terms of this Agreement and the Termination Date,

- 6.5.2. failing the above, TNPA shall be deemed not to have exercised the TNPA Option which shall have lapsed and shall no longer be capable of being exercised;
- 6.5.3. where TNPA has timeously exercised the TNPA Option, the purchase price for the Terminal Equipment shall be its fair value as agreed by the Terminal Operator and TNPA and, failing agreement and payment of 50% (fifty percent) of such agreed amount (the "Downpayment") by TNPA to the Terminal Operator within ninety (90) Business Days of the written notice;
- 6.6. In circumstances where TNPA has failed or is deemed to have failed, to exercise the TNPA Option, the Terminal Operator shall use its best endeavours to remove the Terminal Equipment (or such part thereof not purchased by TNPA) from the Project Site within 6 (six) months of the Expiry Date, alternatively, the Termination Date (as applicable) save for such Terminal Equipment which the Terminal Operator elects to not remove and subject to the Terminal Operator having received TNPA's written consent for such non-removal.
- 6.7. Ownership and risk in respect of the Terminal Equipment shall pass to TNPA upon payment of the purchase price in respect of the Terminal Equipment in full and the handover of the purchased Terminal Equipment to TNPA, from which point:
- 6.7.1. the Terminal Operator shall bear no liability in connection with the Terminal Equipment, howsoever arising; and
- 6.7.2. TNPA shall indemnify the Terminal Operator in respect of any Losses incurred by the Terminal Operator in connection with Terminal Equipment;
- 6.8. Where TNPA fails to make payment of the total outstanding purchase price for the Terminal Equipment, then unless otherwise as may be agreed by the Parties in writing, ownership of the Terminal Equipment shall not pass to TNPA.
- 6.9. Upon the termination for any reason or Expiry of the Operations Period, the Terminal Operator will be required to:
- 6.9.1. give free and vacant possession of the Terminal, the Project Site, the Terminal Infrastructure and subject to clause 6.3, the Terminal Equipment to TNPA;
- 6.9.2. hand over all associated manuals, licenses, warranties, certificates and documents in respect of the Terminal Infrastructure and the Terminal Equipment, if applicable;
- 6.9.3. leave the Project Site in a safe, clean and orderly condition, in accordance with the terms and conditions of this Agreement, subject to fair wear and tear.
- 6.10. Subject to clause 6.3 the Terminal Operator shall not be entitled to payment of any monies in connection with such handover referred to in clause 6.4.

7. Indemnity

7.1. Subject to clauses 7.3 and 7.5, the Terminal Operator shall fully and effectively indemnify and hold TNPA harmless in respect of all Losses suffered or incurred by TNPA which arise in connection with the breach of this Agreement or the applicable Laws by the Terminal Operator, or which the Terminal Operator is legally liable for, including, without limitation to the generality of the foregoing, any Losses which may be incurred or suffered by TNPA in respect of personal injury (including injury resulting in death) occurring at the Project Site.

7.2. Furthermore, the Terminal Operator shall fully and effectively indemnify and hold TNPA harmless against:

7.2.1. Liability in respect of any claims or loss of or damage to property, whether movable or immovable, of third parties or persons; and

7.2.2. Liability in respect of the death of or injury to any employee of TNPA, the Terminal Operator, or any third party or person;

resulting in whole or in part from the use of the Terminal by the Terminal Operator or as a result of the Terminal Operator's non-compliance to this Agreement and/or to any applicable legislation or government directive.

7.3. This Clause 7 (*Indemnity*) shall not apply to:

7.3.1. any Losses to the extent that they arise directly from the gross negligent conduct of the TNPA; and

7.3.2. Losses to the extent that TNPA is reasonably able to mitigate such Losses.

7.4. If the Terminal 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 Terminal Operator:

7.4.1. 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

7.4.2. if the figure resulting under clause 7.4.1 above is greater than the amount paid by the Terminal Operator to TNPA in respect of the Losses, such lesser amount that has been paid by the Terminal Operator to TNPA.

7.5. The Terminal Operator shall indemnify TNPA in respect of all Losses relating to the use or infringement or alleged use or infringement by the Terminal Operator of TNPA's Intellectual Property Rights.

- 7.6. Except as expressly provided in this Agreement, the Terminal Operator shall not make any claim against TNPA in respect of any Losses sustained by the Terminal Operator by reason of or arising out of and/or in any way connected with the performance of this Agreement.
- 7.7. For the avoidance of doubt, this clause 7 (*Indemnity*) shall take effect without prejudice to the Terminal Operator's obligations under the other provisions of this Agreement.
- 7.8. TNPA agrees that it will forthwith notify the Terminal Operator of any claim or any matter or circumstances which comes to its attention and which may give rise to a claim by TNPA against the Terminal Operator under this Agreement pursuant to this clause 7 (*Indemnity*), as follows:
- 7.8.1. TNPA shall at all times after such notification, disclose in writing to the Terminal Operator all information and documents relating to such claim and the matter giving rise thereto and will allow the Terminal Operator to see all files and records relating to same and take copies of all relevant documents; and
- 7.8.2. TNPA will take such action as the Terminal Operator may reasonably request at the Terminal 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 Terminal Operator's consent, which consent shall not be unreasonably withheld or delayed. The Terminal Operator shall procure that its Subcontractors shall provide identical undertakings to TNPA, alternatively;
- 7.8.3. if the Parties agree thereto, TNPA will permit the Terminal Operator to assume control of the claim and TNPA shall take such action as the Terminal Operator may reasonably request at the Terminal 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 Terminal Operator's prior written consent, which consent shall not be unreasonably withheld or delayed.
- 7.9. A Party shall forthwith notify the other Party upon becoming aware of any claim which is to be brought against the other Party, or any matter which may give rise to a claim, and such notification will include reasonable details in respect of the claim and the nature of the claim.
- 7.10. Neither Party shall be entitled to be compensated more than once in respect of the same Loss/claim.

8. Compliance with D&C Specifications and Operational Plan

- 8.1. The Terminal Operator shall comply with and shall ensure that its Subcontractors comply with, the D&C Specifications and the Detailed Designs in respect of the Construction Works and the Operational Plan in respect of the Operation and Maintenance at all times.

8.2. The Terminal Operator warrants that the Project and/or the Construction Works shall be carried out in conformity with the Construction Works Programme, the D&C Specifications, the Detailed Designs and the Operational Plan using equipment and materials, which are of suitable quality for the purposes and uses intended and are free of defects and deficiencies, to the reasonable satisfaction of Independent Certifier.

8.3. The Terminal 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 Responsible Authority or TNPA in respect of this Agreement shall be facilitated, carried-out, applied for or requested promptly by the Terminal Operator.

9. Contracts

9.1. The Terminal Operator shall enter into the Associated Agreements, and such other contracts as are necessary to ensure the timeous and proper completion and undertaking of the Project in accordance with the D&C Specifications, the Detailed Designs and the Operational Plan. The Terminal Operator shall satisfy itself that the terms of such agreements fully describe the rights, obligations, risk allocation and protection of the Terminal Operator's rights. None of TNPA, or its officers, employees or representatives shall have any contractual liability whatsoever to the Terminal Operator arising from the Associated Agreements except as provided in or arising from this Agreement.

9.2. The Terminal Operator shall notify TNPA in the event that it decides to:

- 9.2.1. amend, replace or cancel any term of the Associated Agreements and Finance Agreements;
- 9.2.2. terminate any of the Associated Agreements and/or Finance Agreements;
- 9.2.3. replace the Construction Contractor and/or the Operator;
- 9.2.4. enter into a new Construction Agreement and/or Operations Agreement; or
- 9.2.5. consent to the cession, delegation or novation of any Associated Agreement.

9.3. TNPA shall be required to advise the Terminal Operator within 5 (five) Business Days after receiving such notification if it has any objections to the Terminal Operator's decision, failing which TNPA shall be deemed to have no objection to any of the decisions referred to in clause 9.2.

10. Environmental Compliance

10.1. The Terminal Operator shall comply with the Environmental Authorisations that it obtains, including any Environmental Authorisation issued in terms of NEMA and Environmental Impact Assessment ("EIA") for the duration of the Concession Period. The Terminal Operator indemnifies TNPA in respect of all Losses incurred by it or any third party as a

result of a failure to comply with the Environmental Authorisations, EIA or Environmental Laws.

- 10.2. The Terminal Operator is responsible for and shall obtain all Consents that are required in respect of the Project (including all Environmental Authorisations) and shall comply with all such Consents.
- 10.3. The Terminal 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, Schedule 8 (*Environmental Management Plan*) and Schedule 9 (*Waste Management Plan*). The Terminal Operator shall comply with all Environmental Authorisations obtained by and in respect of the Project Site and the Terminal, Schedule 8 (*Environmental Management Plan*) in respect of the Project Site and the Terminal at all times and Schedule 9 (*Waste Management Plan*).
- 10.4. If the Terminal Operator fails to comply promptly with any of the obligations imposed under this clause 10, 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 caused by the Terminal Operator in carrying out the Project, and to recover all reasonable costs incurred by TNPA from the Terminal Operator.
- 10.5. Upon written request by TNPA, the Terminal Operator shall conduct an environmental site assessment at the Terminal Operator's expense and within the period specified by TNPA, in respect of all the Works conducted at the Project Site.
- 10.6. Such environmental site assessment shall:
- 10.6.1. 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, activities and operations conducted on the Project Site;
 - 10.6.2. be conducted by an independent environmental assessment practitioner;
 - 10.6.3. form part of the Terminal Operator's EMP; and
 - 10.6.4. inform the Terminal Operator's Environmental Management System ("**EMS**"); and
 - 10.6.5. comply with any other reasonable requirements stipulated for such an assessment by TNPA.
- 10.7. Within a period of 3 (three) months of the Target Completion Date, the Terminal Operator shall submit, for the approval of TNPA, the EMP which shall comply with the NEMA and TNPA's written requirements (which requirements shall be provided to the Terminal Operator). The EMP and EMS shall be developed, updated and implemented by the Terminal Operator for the Construction Period of this Agreement. On or before the Actual

Operations Commencement Date, the Terminal Operator must develop a further Operational Environmental Management Plan ("**OEMP**") that will be implemented during the Operations Period. The EMP, OEMP and EMS shall be binding upon the Terminal Operator.

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

10.9. The Terminal Operator, as required by Law, shall comply with:

- 10.9.1. all the requirements of SAMSA in relation to the waterside environment;
- 10.9.2. all the conditions in respect of the Project Site, if the Project Site is declared as a protected natural environment or a special nature reserve;
- 10.9.3. all the conditions in any authorisations or exemptions from the Responsible Authority in respect of the Project Site or the Terminal;
- 10.9.4. TNPA 's requirements for regular waste removal, including waste originating from cleaning or loading of vehicles or wagons as per Schedule 9 (*Waste Management Plan*);
- 10.9.5. all the conditions in environmental permits, consents, licences, certificates, authorisations, orders and exemptions from the Responsible Authority in respect of the Terminal; and
- 10.9.6. all applicable statutory requirements related to the environment including NEMA, the National Water Act, 36 of 1998, the Air Quality Act, 39 of 2004 and the Biodiversity Act, 10 of 2004, as well as any other environmental legislation enacted or promulgated before or after the Effective Date.

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

- 10.10.1. ensuring that the Construction Works and Operation and Maintenance are performed in accordance with the D&C Specifications, the Operational Plan, the Business Plan and the Environmental Laws; and
- 10.10.2. monitoring and ensuring the implementation and effectiveness of mitigation measures and other requirements and targets set forth in the D&C Specifications, Operational Plan, the Business Plan and the Environmental Laws.

- 10.11. The conditional authorisations and/or environmental requirements to be fulfilled by the Terminal Operator during the Construction Period in terms of the EMP, and during the Operations Period, the OEMP, are set out in Schedule 8 (*Environmental Management Plan*) of this Agreement.
- 10.12. The Parties shall review the EMP at the start of each Contract Year in order to ascertain whether that EMP needs to be amended or replaced. If the Parties are unable to agree whether the EMP should be amended or replaced or on the contents of such amendment or replacement, then such dispute shall be referred to the independent environmental monitor for determination in terms of clause 50 (*Expert Determination*). The decision of such independent environmental monitor shall, in the absence of manifest error or fraud, be final and binding on the Parties.
- 10.13. The Terminal Operator shall, upon the request of TNPA and within a reasonable period of such request, provide TNPA with certified copies of:
- 10.13.1. all Environmental Authorisations obtained regarding the Construction Works and Services it provides at the Project Site, and, where the permissions are renewable, in each instance a certified copy of a new or updated permission;
 - 10.13.2. any measurements undertaken for emissions, effluent, stormwater quality and material safety data sheet for hazardous substances, which it is obliged to submit to a Responsible Authority; and
 - 10.13.3. prepare and submit quarterly reports in respect of any environmental matters that may arise or require attention.
- 10.14. The Terminal Operator may, as required by Law, not by any means cause significant pollution or degradation of the environment and shall:
- 10.14.1. provide TNPA, within a reasonable period, with copies of any notices and directives issued by a Responsible Authority to the Terminal Operator to take steps to address pollution or negative impact on the environment;
 - 10.14.2. provide TNPA with copies of any report, including an emergency report, submitted by the Terminal Operator to a Responsible Authority regarding pollution or negative impacts on the environment;
 - 10.14.3. take all reasonable measures as envisaged by the applicable Environmental Laws, including NEMA and the National Water Act to investigate, assess and evaluate the impact of its activities on the environment of the Port and the water resources on or below the Port;
 - 10.14.4. if the Construction Works or Services directly or indirectly cause any pollution, environmental degradation or negative impact on the Environment, the Terminal

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 Responsible Authority; and

- 10.14.5. take every reasonable precaution to prevent the spillage of Cargo and/or other material (including fuel and waste) from vessels, vehicles, cargo handling equipment, Terminal Infrastructure and Terminal Equipment that occur in the course of the provision of the Services at or related to the Terminal and take immediate steps to mitigate and remedy any spillage to the satisfaction of SAMSA, TNPA and any other Responsible Authority, at the Terminal Operator's expense.
- 10.15. If the Terminal Operator fails to comply promptly with any of the obligations imposed under this clause 10 (*Environmental Compliance*), 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 Terminal Operator.
- 10.16. Upon the cancellation or termination of this Agreement, the Terminal Operator shall be obliged, at its own cost, to clean-up, remove and rehabilitate any pollution, environmental degradation or environmental impact that may have occurred during its operation of the Terminal in accordance with the provisions of the Environmental Laws and the Authority's instructions.
- 10.17. The Terminal Operator shall procure that its employees, agents and sub-contractors comply fully at all times with all of the Terminal Operator's obligations as specified in this clause 10 (*Environmental Compliance*) and the Terminal Operator shall be responsible for any breach or non-compliance by its employees, agents and sub-contractors of any such obligations.
- 10.18. Should TNPA, in writing, determine that the Terminal shall be decommissioned upon cancellation or termination of this Agreement, the Terminal Operator shall develop and submit a Decommissioning-EMP to TNPA and the Responsible Authority for implementation during the decommissioning phase in terms of the Decommissioning-EMP guidelines. The Decommissioning-EMP shall be required to be approved by TNPA and the Responsible Authority in order for the duly approved Decommissioning-EMP to be submitted to TNPA within a period of 6 (six) months after termination.

11. Empowerment Obligations

- 11.1. The Terminal Operator shall comply with its obligations and commitments as set out in the Schedule 13 (*B-BBEE Commitments*), Schedule 14 (*Black Ownership Commitments*) and Schedule 11 (*Supplier Development Plan and Supplier Development Value Summary*

Worksheet) for the duration of this Agreement.

- 11.2. The Terminal Operator shall provide an annual report to the TNPA on the extent to which the Terminal Operator's undertakings contained in this clause 11 (Empowerment Obligations) and Schedules 13 (*B-BBEE Contributor Level Commitment*) and 14 (*Black Ownership Commitments*) have been met, as well as documenting other achievements in supplier development in Schedule 11 (*Supplier Development Plan and Supplier Development Value Summary Worksheet*).
- 11.3. If the Terminal Operator fails to achieve the specific and quantifiable targets detailed in Schedule 13 (*B-BBEE Contributor Level Commitment*) and 14 (*Black Ownership Commitments*) within the relevant periods, the Terminal Operator shall pay the Empowerment Penalties detailed in Schedule 12 (*Empowerment Penalties*).
- 11.4. If the Terminal Operator fails to achieve the specific and quantifiable targets detailed in Schedule 13 (*B-BBEE Contributor Level Commitment*) and Schedule 14 (*Black Ownership Commitments*) for 3 (three) consecutive years TNPA shall be entitled to exercise its rights in accordance with the provisions of clause 42 (*Terminal Operator Default*).
- 11.5. The Terminal Operator shall within 30 (thirty) Days of the commencement of each Contract Year, or such other date as determined by TNPA, provide TNPA with a certificate of accreditation from an accredited verification agency verifying the Terminal Operator's B-BBEE Contributor Status Level.
- 11.6. The Terminal Operator shall ensure that for the duration of the Concession Period, it holds a valid certificate of accreditation from an accredited verification agency verifying the Terminal Operator's Contributor Status Level.
- 11.7. The Terminal Operator further undertakes to:
 - 11.7.1. promote job creation, job retention, and skills development and undertake such further supplier development initiatives as set out in its Supplier Development Plan, which is to be annexed hereto as in Schedule 11 (*Supplier Development Plan and Value Summary Worksheet*) of this Agreement;
 - 11.7.2. maintain its Contributor Status Level as set out in its B-BBEE improvement plan which is annexed hereto as Schedule 13 (*B-BBEE Contributor Level Commitment*); and
 - 11.7.3. improve its level of Black Ownership as set out in the Black Ownership Commitment Schedule, which is to be annexed hereto as in Schedule 14 (*Black Ownership Commitment*) of this Agreement.
- 11.8. The actual performance of the Terminal Operator against its targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE improvement plan and the Supplier Development Plan will be reviewed annually by TNPA, following the completion of each

Contract Year. TNPA shall provide the Terminal Operator with a list of all the information which it reasonably requires the Terminal Operator to provide in respect of each Contract Year by no later than 40 (forty) Business Days before the end of each Contract Year.

- 11.9. Subject to the rights of TNPA to terminate this Agreement under clause 42 (*Terminal Operator Default*), following receipt of the Annual Report, TNPA shall review compliance by the Terminal Operator with the targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE improvement plan and the Supplier Development Plan in respect of the preceding Contract Year.
- 11.10. In order to conduct the annual review, the information requested by TNPA in terms of clause 11.8 shall be submitted by the Terminal Operator in writing in terms of clause 28.1.2 and shall form part of the Annual Report.
- 11.11. TNPA shall communicate its initial comments and any requests for additional information within 15 (fifteen) Business Days after the information has been supplied by the Terminal Operator in terms of clause 12.8 read with clause 28.1.2 and will take into consideration any response by the Terminal Operator to these initial comments, provided that such response is submitted within 10 (ten) Business Days of the date when the Terminal Operator receives TNPA's initial comments and/or requests as envisaged above. If TNPA intends to make a negative finding regarding any aspect of the performance of the Terminal Operator in respect of its empowerment obligations, it shall give reasonable notice of its intention to do so to the Terminal Operator and representatives of TNPA and the Terminal Operator shall meet to discuss the proposed finding before a final decision is made.
- 11.12. When, in the opinion of the Terminal Operator, events or circumstances occur which may impact negatively the achievement of its targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE improvement plan and/or the Supplier Development Plan, the Terminal Operator shall notify TNPA in writing within 10 (ten) Business Days of the Terminal Operator reasonably becoming aware of the occurrence and its possible impact and both the Terminal Operator and TNPA shall document the details of the occurrence of such events or circumstances. The targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE improvement plan and/or the Supplier Development Plan, as applicable, may be adjusted or reduced in accordance with such terms as the Parties may agree, should the Terminal Operator be prevented or delayed in performing its obligations by reason of a Force Majeure event.
- 11.13. Furthermore, the targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE improvement plan and/or the Supplier Development Plan, as applicable, may be reviewed and amended by agreement between the Parties, in the case of any other event or circumstance demonstrably beyond the reasonable control of the Terminal Operator, which had a material, negative impact on the achievement of the targets or commitments by the Terminal Operator.

- 11.14. If the Terminal Operator fails to achieve compliance with the targets and commitments in the B- BBEE improvement plan, the Black Ownership Commitments and the Supplier Development Plan, as determined in accordance with Schedule 12 (*Empowerment Penalties*) and fails to remedy such non-compliance within a period of 6 (six) months from date of written notice by TNPA to the Terminal Operator and/or such failure is not attributable to any action, inaction or breach by TNPA of its obligations under this Agreement nor due to Force Majeure nor due to any other event or circumstance demonstrably beyond the reasonable control of the Terminal Operator (a "**Failure**") TNPA shall be entitled to impose the penalties envisaged in Schedule 12 (*Empowerment Penalties*) in respect of such Failure. Notwithstanding the foregoing, the Terminal Operator may provide TNPA with a written notification setting out the reasons for their Failure resulting from any other event or circumstance demonstrably beyond the reasonable control of the Terminal Operator for TNPA to consider, in good faith, the necessity of imposing penalties envisaged in Schedule 12 (*Empowerment Penalties*) in this regard.
- 11.15. Where a Failure occurs, the Terminal Operator shall as part of the Annual Report envisaged in clause 28 (*Reporting Requirements*), submit a written remedial plan to TNPA, which shall detail the remedial steps that the Terminal Operator will take and the period required to effect those steps starting during the Contract Year immediately following the imposition of a penalty, in order to remedy the Failure and to achieve compliance to its B-BBEE improvement plan, Black Ownership Commitments and Supplier Development Plans referred to in Schedule 12 (*Empowerment Penalties*).
- 11.16. If the Terminal Operator: (i) fails to comply with clause 11.2; and/or (ii) incurs a Failure and associated penalties; and/or (iii) fails to submit a remedial plan in terms of clause 11.15; and/or (iv) fails to comply with a remedial plan submitted in terms of clause 11.15; (v) fails to comply with the targets in the Black Ownership Commitment Schedule, TNPA shall be entitled to exercise its rights in accordance with the provisions of clause 42 (*Terminal Operator Default*).
- 11.17. The provisions of clauses 27.5.10 and 27.5.11 shall apply equally to the imposition and recovery of penalties by TNPA in terms of this clause 11 (*Empowerment Obligations*).
- 11.18. The Parties agree that in the event that any penalties are incurred in terms of this clause 11 (*Empowerment Obligations*) are determined to be a penalty in terms of the Conventional Penalties Act, 1962, TNPA shall be entitled to claim liquidated damages from the Terminal Operator *in lieu* of the relevant penalty, in an amount equal to such penalty.

12. Access to documents, copyright and related matters

- 12.1. The Terminal Operator shall, at no cost to TNPA, at any time make available to TNPA, upon request by TNPA, all documents which are or were acquired or brought into existence by the Terminal Operator for the purpose of or in connection with the Project or supplied to

the Terminal Operator from other parties to the Associated Agreements save for such documents which the Terminal Operator is not legally obliged to provide in terms of the Law.

- 12.2. The Terminal Operator shall use its best endeavours to procure that all software, source codes, manuals, programmes and documentation shall be provided to the Terminal Operator by the Operator upon termination of each Operating Contract. The Terminal Operator shall be granted a perpetual non-exclusive royalty-free licence to use same for the continued Operation and Maintenance of the Terminal, which licence shall be transferred to a Substitute Entity or to a third party for continuing the Operation, Maintenance and or upgrade of the Terminal in accordance with the provisions of the Operations Agreement in force at that time.
- 12.3. Copyright owned by the Terminal Operator in all Project Documents which are or were brought into existence by the Terminal Operator for the purpose of or in connection with the Project, specific to this Project, shall be transferred free of any cost to TNPA on termination of this Agreement or Expiry Date, whichever is the earlier.
- 12.4. Any Copyright owned by the Terminal Operator in any other document that has not been acquired or brought into existence for the purpose of or in connection with the Project and which the Terminal Operator has acquired from other operations prior to the commencement of this Terminal Operator Agreement shall remain the property of the Terminal Operator who shall not be obliged to transfer such Copyright on termination of this Agreement.
- 12.5. Copyright and all other Intellectual Property Rights in the Detailed Designs, the D&C Specifications, the Operational Plan and other similar documents issued or developed by the Terminal Operator and provided to TNPA in terms of this Agreement, to the extent that the Terminal Operator is the owner of the Copyright in any such documents and such documents have been acquired or brought into existence for the purpose of or in connection with the Project, shall vest in and be the sole property of TNPA and, to the extent necessary, shall be ceded, assigned and made over to TNPA. The Terminal Operator may at its cost (and shall allow other parties to the Associated Agreements) copy, use and communicate any such document for the purposes of the respective Associated Agreements. The Terminal Operator shall not (and shall ensure that other parties to the Associated Agreements), 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.
- 12.6. In addition to and without limiting the foregoing, the Terminal Operator shall deliver the Construction Documents, Operational Plans and standard operating manuals and procedures and to the extent that the Terminal Operator is the owner of the copyright in any such documents, or the Terminal Operator is otherwise lawfully able or entitled to do so, transfer the copyright in such documents to TNPA on the earlier of the termination of

this Agreement.

12.7. The Terminal Operator undertakes, as at Termination of this Agreement, to:

- 12.7.1. deliver to TNPA the "as built drawings" showing all alterations made to the Terminal Infrastructure since the Actual Operations Commencement Date;
- 12.7.2. deliver to TNPA, the historical operating data and plans of the Terminal, its furniture, fittings and Terminal Equipment in a format acceptable to TNPA, provided that any reformatting shall be carried out at TNPA's cost;
- 12.7.3. 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 Terminal Operator in terms of this Agreement and used in the Terminal are assigned, or otherwise transferred, to TNPA;
- 12.7.4. deliver to TNPA the information referred to in clause 29 (*Financial Accounts, Reports, Inspection and Reporting of changes*), except where such documents are required by Law to be retained by the Terminal Operator, in which case complete copies shall be delivered to TNPA.

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

12.9. Unless otherwise agreed to by TNPA, and except as provided for in this Agreement or the Associated Agreements, the Terminal Operator and other parties to the Associated Agreements shall have no other interest or benefit in or to receive any other remuneration in connection with the Terminal or any part thereof. Nothing in this clause shall prevent the Terminal Operator from enforcing their rights under this Agreement.

13. Performance Guarantees

13.1. Delivery of Performance Guarantees

- 13.1.1. The Terminal Operator shall obtain, at its own cost, the unconditional and on-demand

Performance Guarantees referred to in this clause 13 (*Performance Guarantees*), in such a form as mutually agreed between TNPA and the Terminal Operator.

13.2. Construction Performance Guarantee

- 13.2.1. The Terminal Operator shall, no later than 30 (thirty) days after the Effective Date obtain the Construction Performance Guarantee in favour of the Terminal Operator from the Construction Contractor as at the Effective Date to the value as may be agreed to with the Construction Contractor and which shall remain in place until and upon the issue of the Completion Certificate by the Independent Certifier upon completion of Construction Works as contemplated in clause 25.4 (*Completion of Construction Works*) to secure the performance by the Construction Contractor of its obligations in terms of the Construction Agreement.
- 13.2.2. The Terminal Operator shall cede and assign all right, title and interest in and to the Construction Performance Guarantee to and in favour of TNPA upon early termination of this Agreement prior to the completion of the construction, to give effect to TNPA's enforcement rights as set out in clause 13.8 (*Enforcement Action*) below.
- 13.2.3. The Construction Performance Guarantee shall be substantially in the form of the guarantee annexed to this Agreement as Schedule 15 (*Construction Performance Guarantee*).
- 13.2.4. The Construction Performance Guarantee shall be valid from the Effective Date until the issuing of the Completion Certificate signifying the completion of construction of the Terminal and shall be returned to the Construction Contractor within 14 (fourteen) Days after the issuing of the Completion Certificate.

13.3. Operating Performance Guarantee

- 13.3.1. The Terminal Operator shall be obliged, as and when directed by TNPA to do so, to submit to TNPA an Operating Performance Guarantee annually, within 30 (thirty) days of the commencement of each Financial Year of the Terminal Operator, the first of which shall be presented on Signature Date. The Operating Performance Guarantee shall guarantee payment of, on presentation thereof, a sum of money equal to 50% (fifty per centum) of the maximum payable penalty, determined with reference to the Terminal Operator's non-achievement of the Terminal Operator Performance Standards for that year as per Schedule 25 (*Penalty and Incentive Cascade Formula*), as security for the achievement of the agreed Terminal Operator Performance Standards. Each year's Operating Performance Guarantee shall be substantially in the form of the guarantee attached to this Agreement as Schedule 16 (*Operating Performance Guarantee*).
- 13.3.2. For the avoidance of doubt, the Operating Performance Guarantee shall be provided by the Terminal Operator in respect of each Contract Year after the commencement of

Operations so that the amount to be guaranteed by such Operation Performance Guarantee for each successive year of the Operating Term takes into account any changes to the Terminal Operators Performance Standards. The Operating Performance 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 Operating Performance Guarantee was provided.

13.3.3. Each Operating Performance Guarantee shall be valid from its commencement until 3 (three) months after the expiry of the Contract Year in respect of which such guarantee was provided and shall be returned to the Terminal Operator within 14 (fourteen) Days after such later date.

13.3.4. Prior to calling up such Operating Performance Guarantee, TNPA shall give notice to the Terminal Operator of its intention to do so and shall afford the Terminal Operator an opportunity to provide reasons motivating for TNPA not to exercise its rights in terms of this clause, within 30 (thirty) days of receipt of such notice, which reasons shall include but not be limited to the following:

13.3.4.1. consistent application of the requirement for the submission of Terminal Operator Performance Guarantees;

13.3.4.2. changes in market conditions and the broader global economic environment;

13.3.4.3. TNPA failing to meet its obligations in maintaining the promulgated drafts for the Port; and

13.3.4.4. Force Majeure events;

13.3.5. TNPA, will within a reasonable period thereafter make a determination in respect of the calling up of such guarantee, which determination shall be final and any dispute relating thereto shall be dealt with in terms of clause 63 (*Dispute Resolution*).

13.3.6. Notwithstanding any dispute being declared in respect hereof, the Operating Performance Guarantee shall be honoured and payable immediately. In the event of the dispute being resolved in favour of the Terminal Operator, TNPA shall refund the Terminal Operator the full value of the Operating Performance Guarantee, plus interest at the rate prescribed in clause 34 (*Default Interest*) on the amount refunded from the date on which TNPA presented the Operating Performance Guarantee until the refund is received by the Terminal Operator, both days included.

13.4. **Operations Guarantee**

13.4.1. The Terminal Operator shall obtain the Operations Guarantee (Schedule 17), which shall be an on-demand guarantee in favour of the Terminal Operator from the Operator in an initial value of equal to [●] % for the Contract Year in which such guarantee is to

be furnished. The Operations Guarantee shall be required in order to secure the performance by each Operator of its obligations in terms of each Operations Agreement.

13.4.2. An Operations Guarantee shall be provided by the Terminal Operator in respect of each Contract Year after the issue of the Completion Certificate so that the amount to be guaranteed by such Operations Guarantee for each successive year of the Operating Term takes into account any fluctuations in CPI. The Operations 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.

13.4.3. Each Operations 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 Terminal Operator within 14 (fourteen) Days after such later date.

13.5. **Final Maintenance Guarantee**

13.5.1. The Terminal Operator shall obtain a Final Maintenance Guarantee in favour of TNPA in an amount equal to the aggregate amount expended by the Operator on Operation and Maintenance (as reported by the Terminal 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 23 (twenty-three) of the Operating Term to the end of Contract Year 25 (twenty-five) of the Operating Term, and in any event not less than 20% (twenty percent) of the average annual gross revenues for Contract Years 23 (twenty-three), 24 (twenty-four) and 25 (twenty-five) (all inclusive) of the Operating Term.

13.5.2. The Final Maintenance Guarantee shall be an unconditional on-demand bank guarantee which is substantially in the form of the guarantee annexed to this Agreement as per Schedule 18 (*Final Maintenance Guarantee*).

13.5.3. The Final Maintenance Guarantee shall be submitted to TNPA no later than 12 (twelve) months prior to the Expiry Date and remain valid until the Expiry Date. The Final Maintenance Guarantee shall be released to the Terminal Operator once the Terminal Operator has taken reasonable steps to satisfy TNPA that it has attended to the maintenance of the Terminal, the Terminal Infrastructure and the Terminal Equipment, if applicable, so as to render the Terminal fully operational following the Operations Period subject to fair wear and tear and that the Terminal Operator has complied with its maintenance obligations in respect of the Terminal as detailed in the Operational Plan.

- 13.5.4. In the event that TNPA is reasonably satisfied that the Terminal Operator is maintaining the Terminal in accordance with its annual maintenance plans, it shall be entitled to waive its right to call for the submission of such a Final Maintenance Guarantee.

13.6. **Terminal Operator's Obligations Incorporated into Associated Agreements**

- 13.6.1. The Terminal Operator shall ensure, where possible, that the Construction Contractor incurs the same obligations to the Terminal Operator under the Construction Agreement, as the Terminal Operator has imposed upon it in terms of this Agreement in respect of the Construction Works and, to the extent applicable to the Construction Contractor, in respect of Operation and Maintenance.
- 13.6.2. The Performance Guarantee shall also secure the obligations of the Construction Contractor under the Associated Agreements in favour of the Terminal Operator.

13.7. **Cession of Performance Guarantees**

- 13.7.1. It is recorded that as security for the performance by the Terminal Operator of its obligations to the Lenders in respect of the Finance Agreements, the Terminal Operator shall cede to and in favour of the Lenders all its right, title and interest in and to the Construction Performance Guarantee and the Operating Performance Guarantee.
- 13.7.2. As security for the performance by the Terminal Operator of its obligations to TNPA in terms of this Agreement, the Terminal Operator shall irrevocably cede 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 Terminal 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 Terminal Operator's obligations to such Lender under the Finance Agreements.

13.8. **Enforcement Action**

- 13.8.1. The Performance Guarantees shall secure the Terminal Operator's performance of its obligations to TNPA in respect of the Construction Works, Operations and Maintenance, and may be called on by TNPA to the extent provided for therein and in terms of this Agreement as a result of a breach by the Terminal 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 Terminal Operator of its obligations.
- 13.8.2. Prior to enforcing any such Performance Guarantee as aforesaid, TNPA shall give notice to the Terminal Operator, informing the Terminal 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

45 (*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 amounts guaranteed therein, in respect of any such breach by the Terminal Operator.

14. Project Insurance

14.1. General obligations

14.1.1. The Terminal Operator shall obtain and maintain, at its own expense, with a reputable insurance company, insurance cover against:

14.1.1.1. Losses, damages or destruction of the Terminal at the Port. Such insurance shall be:

14.1.1.1.1. for not less than the full replacement value of all the improvements effected to the Existing Buildings by the Terminal Operator; and

14.1.1.1.2. 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 Terminal, public and third-party liability, business interruption, all risks and any other risk which is insurable in the local South African insurance market consequent upon the damage to destruction of the Terminal;

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

14.1.2. The Terminal Operator shall, by no later than the Signature Date, take out and shall thereafter maintain or procure the maintenance of the insurances described in Schedule 19 (*Project Insurance*) and any other insurances as may be required by Law. These insurances must be taken out and become fully effective in each case not later than the date on which the relevant risk commences.

14.1.3. 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 powers) 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.

14.1.4. The insurances referred to in clauses 14.1.1 and 14.1.2 shall:

14.1.4.1. name the Terminal Operator as co-insured with any other party maintaining the insurance;

14.1.4.2. provide for non-vitiation protection in respect of any claim made by TNPA as co-insured in respect of the insurances detailed in Schedule 19 (*Project Insurance*).

If non-vitiation protection is unavailable when any such insurance policy is first placed, then the Terminal Operator shall procure that an insurance assessor 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 Terminal Operator to procure such protection, and the costs thereof shall be borne by the Terminal Operator;

- 14.1.4.3. contain a clause waiving the insurers' subrogation rights against TNPA, its employees, and agents;
- 14.1.4.4. provide for 90 (ninety) Days prior written notice of their cancellation, non-renewal or amendment to be given to TNPA; and
- 14.1.4.5. provide for payment of any proceeds to be made by insurers in accordance with clause 14.3 (*Reinstatement*).
- 14.1.5. All the costs relating to the insurance policies, including the insurance premiums, shall be paid by the Terminal Operator.
- 14.1.6. The Terminal Operator shall comply with all the terms and conditions embodied in the insurance policies contemplated in this provision.
- 14.1.7. The Terminal Operator shall, upon request by TNPA and within 30 (thirty) Days or such a shorter period as reasonably directed by TNPA:
 - 14.1.7.1. provide underwriters' certificates confirming that the relevant cover is in place and the terms and conditions applicable to such cover at the Property Management offices of TNPA in the Port and thereafter annually before the anniversary date of the Effective Date;
 - 14.1.7.2. provide TNPA with satisfactory evidence that all the insurance premiums and amounts due and payable under all insurance policies have been paid and that the insurances covering the Terminal are in full force and effect in accordance with the requirements of this clause 14.1 (*General Obligations*);
 - 14.1.7.3. shall be responsible for the administration of all claims and payments of the relevant inner deductible in respect of any claim instituted;
 - 14.1.7.4. 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.
- 14.1.8. Renewal certificates in relation to the insurances referred to in clauses 14.1.1 and 14.1.2 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.

14.1.9. If the Terminal Operator is in breach of clause 14.1.1 or 14.1.2, TNPA shall notify the Terminal Operator of such breach and their intention to procure the insurance. The Terminal Operator must respond within 14 (fourteen) days of the receipt of such notification. Should the Terminal Operator fail to respond within this period TNPA shall procure and maintain, at the sole cost and expense of the Terminal Operator, the insurances referred to in this provision as required by Schedule 19 (*Project Insurance*). In this event, the Terminal Operator shall be obligated to reimburse TNPA with any or all of the insurance premiums disbursed by TNPA on behalf of the Terminal Operator within a period of 14 (fourteen) Days of receiving a written notice from TNPA to do so together with a tax invoice for such premiums.

14.1.10. The Terminal Operator shall give TNPA notification within 5 (five) Days after any claim in excess of R5 000 000.00 (five million rands) under any of the insurance policies referred to in this clause 14.1 (*General Obligations*) accompanied by full details of the incident giving rise to the claim.

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

14.1.12. The proceeds from the insurance cover referred to in clause 14.1.1 above shall be utilised towards the repairing and/or the re-construction of the Terminal and the equipment with the end view of having them restored to their condition immediately prior to the event which occasioned the loss, destruction or damage.

14.2. **Uninsurable Risks**

14.2.1. If a risk usually covered by the Project Insurances in Schedule 19 (*Project Insurance*) becomes Uninsurable or is Uninsurable as at the Effective Date, then the Terminal Operator shall notify TNPA within 14 (fourteen) Days of becoming aware of that risk becoming or being Uninsurable. If both Parties agree, or it is determined in accordance with clause 62.7 (*fast-track dispute resolution*) that:

14.2.1.1. such risk is indeed Uninsurable;

14.2.1.2. such risk being Uninsurable is not caused by the actions or omissions of the Terminal Operator or a Subcontractor; and

14.2.1.3. 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).

- 14.2.2. The Terminal Operator shall bear the onus of proving the circumstances in clause 14.2.1;
- 14.2.3. If the requirements of clause 14.2.2 are met and it has been agreed or determined that the risk is Uninsurable, this Agreement shall continue in force and effect with the Uninsurable Risk being mitigated by the Parties in accordance with any agreement concluded in terms of clause 14.2.1.
- 14.2.4. On the materialization of such risk, but only if such risk is still Uninsurable, TNPA shall, at TNPA's option, either pay to the Terminal Operator:
- 14.2.4.1. 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; or
- 14.2.4.2. an amount equal to the amount set out in clause 53 (*Termination amount for invalidation in terms of Section 67 of the Act*), and this Agreement will terminate.

14.3. **Reinstatement**

- 14.3.1. Subject to clause 14.4 (*economic test*), all insurance proceeds received under any policy referred to in Part X or in section I of Part Y of Schedule 19 (*Project Insurance*) ("**Material Damage Policies**") shall be applied to repair, reinstate and replace each part or parts of the Terminal in respect of which the proceeds were received.
- 14.3.2. 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 R1 000 000.00 (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 Terminal Operator's rights in the Joint Insurance Account.
- 14.3.3. 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 R1 000 000.00 (one million rands):
- 14.3.3.1. the Terminal 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 Terminal 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, in accordance with clause 14.3.3.2 below. The Reinstatement Plan shall set out:
- 14.3.3.1.1. if the Construction 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

- 14.3.3.1.2. 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 62.7 (*fast-track dispute resolution*); and

- 14.3.3.2. If TNPA is satisfied that the Reinstatement Plan will enable the Terminal Operator to comply with clause 14.3.4 below within a reasonable time scale:

- 14.3.3.2.1. the Reinstatement Plan shall be adopted;
- 14.3.3.2.2. the Terminal Operator shall enter into contractual arrangements to effect the Reinstatement Works with the Person identified in the Reinstatement Plan agreed to by TNPA;
- 14.3.3.2.3. prior to the termination of this Agreement, any amount standing to the credit of the Joint Insurance Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by the Terminal Operator to the extent required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in this clause 14.3.3.1 above and to meet any other reasonable costs and expenses incurred by the Terminal Operator for the sole purpose of undertaking the Reinstatement Works. Following the termination of this Agreement, except where the Reinstatement Works have been completed (in which case the Terminal Operator may retain such amounts), the Terminal Operator shall pay TNPA the amounts standing to the credit of the Joint Insurance Account for the purposes of funding the Reinstatement Works;
- 14.3.3.2.4. TNPA agrees and undertakes that, subject to compliance by the Terminal Operator with its obligations under this clause 14.3 (*Reinstatement*), and provided that the Terminal Operator procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in clause 14.3.3 above, it shall not exercise any right which it might otherwise have had to terminate this Agreement

by virtue of the event which gave rise to the claim for the Relevant Proceeds; and

14.3.3.2.5. after the Reinstatement Plan has been implemented to the reasonable satisfaction of TNPA and in accordance with clause 14.3.4 below, TNPA shall permit withdrawal by the Terminal Operator of any Relevant Proceeds then held in the Joint Insurance Account that has not been paid under clause 14.3.3 above, in respect of the Relevant Incident, together with any interest accrued on the Relevant Proceeds.

14.3.4. Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Project asset forming part of the Construction Works, the Terminal Operator shall carry out the Reinstatement Works or procure that the work is carried out in accordance with the D&C Specifications so that on completion of the Reinstatement Works, such works meet and fulfil the requirements of this Agreement in respect of the Construction Works.

14.4. **Economic Test¹**

14.4.1. If all or substantially all of the Terminal 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 Terminal Operator) are equal to or greater than the amount required to repair or reinstate the Terminal, then the Terminal Operator shall calculate the loan life cover ratio (on the assumption that the Terminal is repaired or reinstated in accordance with this Agreement).

14.4.2. If the calculation referred to in clause 14.4.1 above shows that the loan life cover ratio is greater than or equal to the event of default level² then the Terminal Operator shall be subject to the reinstatement procedure set out in clause 14.3 (*reinstatement*).

14.4.3. If the calculation referred to in clause 14.4.1 above shows that the loan life cover ratio is less than the event of default level, then an amount equal to the lesser of:

14.4.3.1. the insurance proceeds; and

14.4.3.2. the Senior Debt,

shall be released from the Joint Insurance Account to the Terminal Operator and such release shall constitute a complete discharge of all and any liability on the part of the TNPA in respect of the damage caused to the Terminal and the damaged Terminal but shall not discharge the Terminal Operator from the Operation and Maintenance and or the Construction works or from performing in accordance with the Agreement. For the

¹ To be deleted if there is not any third-party loan finance.

² That is the loan life cover ratio as provided in the Financing Agreements, below which an event of default will be triggered under the Financing Agreements entitling the Lenders to accelerate the debt

avoidance of doubt, should this Agreement subsequently and as a result of the damage done to the Terminal, terminate as a result of a Terminal Operator Default, the TNPA shall not have any additional liability in terms of clause 51 (*Termination Amount on Terminal Operator Default*).

15. Port Users and Port Rules

15.1. The Terminal 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 Construction Works, the Operation and Maintenance and the Services:

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

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

16. Changes in the Terminal Operator

16.1. The Terminal Operator shall notify TNPA forthwith on becoming aware of any material change in the legal or beneficial ownership from time to time of the Terminal Operator in so far as it may constitute the transfer, cession or assignment of the Terminal Operator's rights granted in terms of this Agreement and shall provide TNPA with any information which TNPA may reasonably require (and which the Terminal Operator is reasonably able to provide) relating thereto.

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

16.2.1. any change in the Control of the Terminal Operator where the Terminal Operator is no longer able to make any decisions in respect of the management and operation of the Terminal (or any company of which the Terminal Operator is a subsidiary and which company has the sole business of holding Equity in the Terminal Operator), 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 in Control has or is reasonably likely to have a material adverse effect on the basis upon which the Terminal Operator was appointed to be the preferred party to design, construct, equip, operate and maintain the Terminal or undertake the Construction Works, provide Operation and Maintenance or the Services;

16.2.2. any change in Control of the Terminal Operator or any change in the way in which the Terminal Operator is managed that results in or is reasonably likely to result in non-compliance with Schedule 11(*Supplier Development Plan and Supplier Development Value Summary Worksheet*) at any time prior to the expiry of the Operating Term;

16.3. TNPA shall not unreasonably refuse its consent to any change in Control of the Terminal Operator which is intended to produce compliance with the Black Ownership Commitment Schedule (*Schedule 14*) and the B-BBEE Improvement Plan. 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.

17. TNPA's Assistance and Rights and Limitations on Liability

17.1. Except as otherwise provided in this Agreement, TNPA shall:

17.1.1. apply its best endeavours to assist the Terminal Operator in its dealings with any Responsible Authority in connection with implementing the Project in accordance with the terms and conditions set forth herein; and

17.1.2. make every reasonable effort to assist the Terminal Operator to obtain those Consents necessary for the Construction Works and Operation and Maintenance or Services, provided that TNPA shall not be liable or responsible for any failure of the Terminal Operator to obtain any such Consents. If the Terminal Operator fails to obtain any such Consents, the Terminal Operator and TNPA shall agree, in good faith, on a mutually acceptable solution within a reasonable time period of the Terminal Operator failing to obtain such Consents, failing which the matter shall be dealt with in accordance with clause 62 (*Dispute Resolution*).

17.2. Nothing in this Agreement shall preclude or in any manner limit the rights of TNPA or any other Responsible Authority from granting such further or other concessions as it, in its sole discretion deems fit, nor shall the Terminal Operator have any claim against TNPA or any other Responsible Authority arising from the grant of such further or other concessions, in any other port in South Africa, provided that such concession is granted in accordance with the Act or any other relevant and applicable law.

17.3. TNPA shall not be liable to the Terminal Operator for the volume of demand for the Services and it shall be the responsibility of the Terminal Operator to adequately market the Terminal and the Services.

17.4. 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.

17.5. Notwithstanding anything else contained in this Agreement, the Terminal Operator shall not

in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against TNPA or their respective officers, employees, agents and/or representatives on grounds that any information, whether obtained from or made available by TNPA 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, save for such information which it is obliged to make available in terms of the Act and Port Rules.

- 17.6. 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.

18. TNPA Step-in

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

- 18.2. If pursuant to this clause 18 (*TNPA Step-in*), TNPA wishes to take action, it shall as soon as possible after reaching its determination to do so notify the Terminal Operator in writing of:

- 18.2.1. the action it wishes to take;
- 18.2.2. its reasons for taking such actions;
- 18.2.3. the date when it wishes to commence such action;
- 18.2.4. the time period (the "**TNPA Step-in Period**") which it reasonably believes will be necessary for such action and which must be a fixed period; and
- 18.2.5. to the extent practicable, the effect of such action on the Terminal Operator on its obligations to perform the Operation and Maintenance and Construction Works, and/or Services during the TNPA Step-in Period.

- 18.3. Following the service of such notice, TNPA shall take such action as notified under clause 18.2 and any ancillary action as it reasonably believes is necessary (the "**Required Action**") and the Terminal Operator shall give all reasonable assistance to TNPA in the conduct of such Required Action.

- 18.4. If the Terminal 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 Terminal Operator from

providing any part of the Project:

- 18.4.1. the Terminal Operator shall be relieved from such obligations; and
- 18.4.2. in respect of the time period over which such Required Action is conducted and provided that the Terminal 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 Terminal Operator an amount of monies that is equal to the revenue that the updated Base Case Financial Model projects to have been earned by the Terminal Operator at the time of and during the period of the Required Action if the Terminal Operator was fulfilling all its obligations in respect of the Project that are affected by the Required Action over such period.

18.5. If the Required Action is taken as a result of a breach by the Terminal 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 Terminal Operator from providing any part of the Project:

- 18.5.1. the Terminal Operator shall be relieved of its obligations in respect of such part; and
- 18.5.2. the Terminal 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 Terminal Operator Default, then TNPA will be entitled to serve a notice in terms of clause 44 (*TNPA 's option*) requiring the Terminal Operator to remedy the Terminal Operator Default or to put forward a remedial programme.

PART II – PROVISION OF THE PROJECT SITE AND THE PORT

19. Provision of the Port

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

20. The Project Site

- 20.1. As provided for in clause 6.1 TNPA, shall remain the owner of the Project Site for the duration of this Agreement. The Terminal 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.
- 20.2. The Terminal 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. The Terminal Operator also acknowledges that the Lenders do not have and shall not have any rights of title, ownership, lien, leasehold or any other rights in respect of the Project Site by virtue of providing funding to the Terminal Operator in respect of the Project.

- 20.3. The Terminal Operator shall, for the duration of this Agreement, have the right to use and occupy the Project Site, commencing on the Effective Date.
- 20.4. In addition to the payment of Concession Fee in terms of clause 5 (*Concession Fees*), the Terminal Operator accepts responsibility for the payment of all municipal services and Utilities provided in respect of the Project Site, such as rates, taxes, charges, levies, assessments or any equivalent taxation which may at any time be levied by a Responsible 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 5.1 or in connection with the disposal of its interest in the Project Site used by the Terminal 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 Terminal Operator. All amounts payable by the Terminal Operator in terms of this clause 20.4, shall be paid monthly within 30 (thirty) days of being issued with an invoice from TNPA.
- 20.5. If TNPA is obliged by the Responsible Authority to make payments referred to in clause 20.4, as a result of which TNPA makes such payments on behalf of the Terminal Operator, TNPA shall notify the Terminal Operator in writing about such payments and following such notice, the Terminal 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.
- 20.6. TNPA shall use its reasonable endeavours to ensure that no other Port Users negatively affect the use by the Terminal Operator of the Project Site. The Terminal 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.
- 20.7. TNPA shall have the right to enter into and inspect the Project Site and the Terminal at reasonable times and on reasonable notice so as to enable it to inspect the Project Site and the Terminal, to fulfil its obligations of maintenance and oversight in respect of the Port and to fulfil its obligations as the ports authority of South Africa.
- 20.8. The Terminal Operator shall use the Project Site solely for the uses and purposes contemplated in this Agreement in respect of the Project.
- 20.9. The Terminal 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.

20.10. The Terminal 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.

20.11. The Terminal Operator shall, subject to TNPA's approval, provide for:

20.11.1. the clearance of the Project Site;

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

20.11.3. the clearance, relocation and diversion of all Utilities on the Project Site,

from the date the Project Site is delivered to the Terminal Operator and which are necessary for the execution of the Project.

20.12. The Terminal Operator shall, at its cost, apply for all Consents required for the clearance of the Project Site.

20.13. The Terminal Operator shall continue to be bound by and shall honour any existing agreements between TNPA and any Person, which grants access or wayleaves to the Project Site. The Terminal 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 Terminal Operator's reasonable request to modify and/or cancel any such agreements.

20.14. TNPA shall make available to the Terminal Operator that, to the extent that it is able to do so, all of the agreements referred to in clause 20.13.

21. Key Personnel and Removal of Personnel

21.1. The Terminal Operator shall at all times ensure that it and its Subcontractors have 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 Terminal Operator shall ensure that the key personnel positions are always filled as soon as reasonably possible.

21.2. The Terminal Operator shall implement all measures as are required by Law and/or as may be reasonably necessary to ensure the safety of its employees and/or Subcontractors and shall provide them or ensure that they are provided, free of charge, with any necessary

personal protective clothing and equipment.

21.3. The Terminal Operator accepts full responsibility for the training of staff and shall ensure that all its employees and Subcontractors are properly trained for the work they are undertaking and are familiar with safety and security requirements that apply to the Terminal.

21.4. TNPA may require the Terminal Operator to remove any employee or other personnel of the Terminal Operator or any Subcontractor from the Project Site and the Terminal 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 Terminal Operator shall immediately comply and replace such employee or personnel with suitable appropriately qualified and experienced replacements, subject to applicable Law.

22. Health and Safety

22.1. Within 3 (three) months of the Actual Operations Commencement Date, the Terminal Operator shall, at its cost, complete a comprehensive risk assessment of its business, in respect of all areas of the Terminal, 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 (one) month of completing the assessment.

22.2. The Terminal Operator shall be responsible for:

22.2.1. the implementation of and adherence to the IMDG Code and its regulations;

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

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

22.2.4. 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 immoveable property in accordance with Law and the further written requirements of TNPA, pursuant to its statutory obligations under the Act.

22.3. The Terminal Operator may not keep or store any hazardous or flammable substances unless:

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

22.3.2. it has obtained the prior written approval of TNPA; and

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

22.4. In addition to the general Port water network provided by TNPA, the Terminal 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.

22.5. TNPA may, from time to time, require the Terminal Operator, by notice in writing, to provide and install, at the Terminal 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 Terminal Operator shall, when so required, comply with the requirements set forth in such notice within the time period specified in the notice.

22.6. The Terminal Operator shall be required to ensure that it avails and/or procures appropriate and suitably qualified emergency response personnel to manage emergencies in the Terminal and shall submit, at the request of TNPA, all and any emergency response plans it has prepared in respect of the Terminal.

22.7. The Terminal Operator shall be obliged to submit a written report to TNPA in respect of any incident, industrial accident or disaster which occurs in the Terminal where any employee of the Terminal Operator or its Subcontractors has been injured or died, within 24 (twenty-four) hours of the occurrence of such incident, industrial accident or disaster.

23. Security

23.1. The Terminal Operator shall ensure that the Terminal is operated and managed in compliance with the ISPS Code and that it is maintained at that standard (and repaired as necessary) during the term of this Agreement.

23.2. The Terminal 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 Terminal Operator shall be responsible for the security of the Project Site and for all persons and movables therein, including cargoes, and the implementation of and adherence to the ISPS Code.

23.3. The Terminal Operator shall submit to TNPA, within 3 (three) months of the Actual Operations Commencement Date, a Project Site security assessment and develop a Project Site security plan for security levels 1 (one), 2 (two) and 3 (three) corresponding with normal, medium and high threat situations as described in the ISPS Code. The security plan shall indicate the operational, system and physical security measures the Terminal Operator will take to ensure that it normally operates at security level 1 (one). The security plan shall also indicate the additional or intensified, security measures the Terminal Operator will take when instructed to do so by TNPA to move to and operate at security

level 2 (two), and to operate at security level 3 (three). The Terminal Operator will nominate a Port Terminal Security Officer, organise regular security drills and at all times provide the necessary security equipment on the Project Site.

- 23.4. As part of the Project Site security plan the Terminal Operator shall monitor and control all Cargo, vehicles and people entering and leaving the Project Site (including persons appointed to act on behalf of the Terminal Operator in the Project Site) and ensure that security communications are always readily available.

PART III – DESIGN AND CONSTRUCTION, OPERATION AND MAINTENANCE

24. Independent Certifier

24.1. Appointment of Independent Certifier

- 24.1.1. TNPA and the Terminal Operator, acting jointly, shall appoint the Independent Certifier for the duration of the Construction Period and any other period during the Operating Term as may be agreed upon between them. In this regard, it is recorded that TNPA, the Terminal Operator and the Independent Certifier shall enter into the Independent Certifier Agreement as soon as reasonably practicable after the Signature Date, but not later than the Effective Date. The Independent Certifier Agreement shall be substantially in the form of the agreement attached to this Agreement as Schedule 29.
- 24.1.2. TNPA shall propose a person for appointment as the Independent Certifier for approval by the Terminal Operator and the Lenders.
- 24.1.3. If TNPA, the Terminal Operator and the Lenders are unable to agree on the person to be appointed as the Independent Certifier:
- 24.1.3.1. TNPA, the Terminal Operator and the Lenders shall each nominate 2 (two) persons ("Nominees") for the position of Independent Certifier;
- 24.1.3.2. TNPA shall submit the names of the Nominees together with their resumes to the chairperson for the time being of the South African Institute of Civil Engineers ("SAICE") or its successors in title;
- 24.1.3.3. the said chairperson of the SAICE shall appoint the Independent Certifier from amongst the Nominees; and
- 24.1.3.4. such decision of the chairperson of the SAICE shall be final and binding on the Parties.
- 24.1.4. The Independent Certifier will report directly to TNPA and the Terminal Operator. The fees and disbursements of the Independent Certifier incurred in connection with the Project shall be paid by TNPA and the Terminal Operator in equal proportions except as otherwise provided in the Independent Certifier Agreement or as otherwise agreed

between TNPA, the Terminal Operator and the Lenders.

- 24.1.5. If, at any time during the Operating Term, there is no person appointed as the Independent Certifier for any purposes set forth in this Agreement, TNPA and the Terminal Operator shall appoint such an Independent Certifier in accordance with the provisions of this clause 24 (*Independent Certifier*).
- 24.1.6. It is recorded that the Parties have appointed [insert name] as the initial Independent Certifier. In appointing a person to act as the Independent Certifier in the future, the Parties shall comply with TNPA's B-BBEE policy and requirements in terms of the RFP as detailed in Schedule 10 (*Terminal Operator's B-BBEE Contributor Level Certificate*) as at the Signature Date.
- 24.1.7. If the Independent Certifier, acting reasonably, is not satisfied with the Detailed Designs, the Independent Certifier shall notify the Terminal Operator and TNPA of the reasons for its dissatisfaction within 5 (five) Business Days after the review referred to in clause 25.1.1, specifying those elements of the Detailed Design with which the Independent Certifier, acting reasonably, is dissatisfied.
- 24.1.8. Within 5 (five) Business Days of the Independent Certifier having expressed dissatisfaction with the detailed designs, the Terminal Operator shall attend to such the areas of concern raised by the Independent Certifier and re-submit the amended Detailed Design for review by the Independent Certifier (the "Second Review").
- 24.1.9. If, after the Second Review, the Independent Certifier, acting reasonably, is still not satisfied with the Detailed Designs, the Independent Certifier shall notify the Terminal Operator and TNPA of the reasons for its dissatisfaction within 5 (five) Business Days after the Second Review, specifying those elements of the Detailed Design with which the Independent Certifier, acting reasonably, is still dissatisfied by the Terminal Operator. The Independent Certifier and the Parties will arrange a meeting and endeavour to reach a mutual agreement on the correction of the areas of concern raised by the Independent Certifier.
- 24.1.10. Once the Detailed Design has been approved by the Independent Certifier, it shall be deemed to have been approved by TNPA.
- 24.1.11. The Terminal Operator shall perform or procure the performance of the Detailed Design in accordance with the Detailed Design Procedure and the D&C Specifications.

24.2. Performance of the duties of the Independent Certifier

- 24.2.1. The Terminal Operator shall provide the Independent Certifier with a copy of this Agreement and shall, to the extent available to the Terminal Operator, provide the Independent Certifier with the requisite information and documentation in order to enable the Independent Certifier to discharge its duties and or obligations. This

information includes, but is not limited to, the following:

- 24.2.1.1. copies of working drawings, Schedules and specifications prepared by the Terminal Operator and its Subcontractors sufficient to demonstrate compliance of the Terminal Operator and Subcontractor against the requirements of this Agreement;
 - 24.2.1.2. copies of the Terminal Operator's correspondence relating to the Terminal or building control matters;
 - 24.2.1.3. copies of the Terminal Operator's commission reports;
 - 24.2.1.4. copies of the operating and maintenance manual;
 - 24.2.1.5. a copy of the health and safety plan of the Terminal Operator; and
 - 24.2.1.6. any other information that the Independent Certifier reasonably requires in order to fulfil its duties and responsibilities.
- 24.2.2. The Independent Certifier shall be required to perform the duties set forth in this Agreement and in the Independent Certifier Agreement.
- 24.2.3. The TNPA and the Terminal Operator shall be entitled to consult with the Independent Certifier on any matter relating to the Project. The TNPA and or the Terminal Operator may request the Independent Certifier to deliver and issue an opinion, instruction, certificate or valuation, or other determination as applicable with respect to all technical matters relating to the Project, in accordance with the provisions of and as contemplated in this Agreement. The Parties agree to comply with such decisions of the Independent Certifier until and unless otherwise determined pursuant to clause 62 (*Dispute Resolution*).
- 24.2.4. The Independent Certifier's duties shall include, but shall not be limited to, the review, inspection, testing, approval and certification of the Construction Contractor's work to ensure proper performance and completion of the Construction Works in accordance with this Agreement, the Construction Agreement and the Independent Certifier Agreement. The Independent Certifier's duties may also include the review, analysis, audit, inspection and testing of the Operator's work to ensure proper Operation and Maintenance in accordance with the terms of this Agreement, the Operations Agreement and the Independent Certifier Agreement.
- 24.2.5. Nothing in this clause shall alter the rights and obligations of the Parties under this Agreement nor prevent the Parties from challenging any opinion, instruction, determination, certification or valuation of the Independent Certifier in accordance with clause Error! Reference source not found. (*Dispute Resolution*), provided that the Parties shall comply with such decisions by the Independent Certifier until and unless

otherwise determined pursuant to clause Error! Reference source not found. (*Dispute Resolution*).

- 24.2.6. If any determination, which the Independent Certifier is required to make in terms of this Agreement or the Independent Certifier Agreement, involves an evaluation or assessment of any matter outside the Independent Certifier's field of expertise as Independent Certifier, the Independent Certifier shall rely on independent expert advice in making such evaluation or assessment.

25. Design and Construction

25.1. Performance of the Detailed Design

- 25.1.1. The Terminal Operator shall submit the Construction Agreement, the Construction Works Programme, the draft Detailed Design and the D&C Specifications to TNPA within 4 (four) months of the Effective Date for review and approval by TNPA, which approval or otherwise shall be provided within 30 (thirty) Days of such submission.
- 25.1.2. The Terminal Operator acknowledges and agrees that:
- 25.1.2.1. the terms and conditions of the Construction Agreement shall be aligned with the provisions of this Agreement and the Construction Works Programme, the Detailed Design and D&C Specifications as approved by TNPA in terms of this clause 25.1 (*Performance of the Detailed Design*) shall be annexed to and form part of the Construction Agreement;
- 25.1.2.2. the Detailed Design and the D&C Specifications for the Terminal, amended in terms of the Business Plan and as depicted in Schedule 5 (*D&C Specifications*) of this Agreement, shall not substantially deviate from the preliminary designs submitted by the Preferred bidder with its Bid Response.
- 25.1.3. TNPA, acting reasonably, shall review and, if satisfied, shall approve the Construction Agreement, the Construction Works Programme, the draft Detailed Design and the D&C Specifications. If TNPA, acting reasonably, is not satisfied with the Construction Agreement, the Construction Works Programme, the draft Detailed Design and/or the D&C Specifications, TNPA shall notify the Terminal Operator of the reasons for its dissatisfaction within 5 (five) Business Days after the review referred to in clause 25.1.1, specifying those elements of the Construction Agreement, the Construction Works Programme, the draft Detailed Design and/or the D&C Specifications, as applicable with which TNPA, acting reasonably, is dissatisfied.
- 25.1.4. Within 5 (five) Business Days of TNPA having expressed dissatisfaction with the Detailed Designs, the Terminal Operator shall attend to such areas of concern raised by TNPA and re-submit the amended Construction Agreement, the amended Construction Works Programme, the amended draft Detailed Design and/or the

amended D&C Specifications, as applicable for review by TNPA (the "**Second Review**").

- 25.1.5. If, after the Second Review, TNPA, acting reasonably, is still not satisfied with the Construction Agreement, the Construction Works Programme, the draft Detailed Design and/or the D&C Specifications, TNPA shall notify the Terminal Operator of the reasons for its dissatisfaction within 5 (five) Business Days after the Second Review, specifying those elements of the Construction Agreement, the Construction Works Programme, the draft Detailed Design and/or the D&C Specifications, as applicable, with which TNPA, acting reasonably, is still dissatisfied. TNPA and the Terminal Operator shall arrange a meeting and endeavour to reach mutual agreement on the correction of the areas of concern raised by TNPA.
- 25.1.6. The Terminal Operator shall perform or procure the performance of the Construction Works in accordance with the Construction Agreement, the Construction Works Programme, the Detailed Design and the D&C Specifications as approved by TNPA.
- 25.1.7. All reviews undertaken in this clause 25.1 as a result of TNPA's dissatisfaction as contemplated from clause 25.1.4 above shall be undertaken at the Terminal Operator's cost to the extent that the Terminal Operator is responsible for that dissatisfaction and shall not constitute any form of a variation or change in scope.
- 25.1.8. The Terminal Operator shall at TNPA's written request, provide TNPA with the information listed in clauses 25.1.8.1 to 25.1.8.8 below, to enable TNPA to discharge its duties and/or obligations in terms of this clause. Such information and documentation include, but is not limited to, the following:
- 25.1.8.1. copies of working drawings, schedules and specifications prepared by the Terminal Operator and its Contractors and/or Subcontractors (as applicable), sufficient to demonstrate compliance of the Terminal Operator and its Contractors and/or Subcontractors (as applicable) with the requirements of this Agreement;
 - 25.1.8.2. copies of the Terminal Operator's correspondence relating to the Terminal or building control matters;
 - 25.1.8.3. copies of the Terminal Operator's commissioning reports;
 - 25.1.8.4. if applicable, copies of the Annual Reports submitted by the Terminal Operator in terms of this Agreement;
 - 25.1.8.5. copies of the Construction Agreement, the Construction Works Programme, the draft Detailed Design and the D&C Specifications;
 - 25.1.8.6. copies of the Terminal Operator's Operating and Maintenance manuals as well as the Operational Plan;

- 25.1.8.7. a copy of the health and safety plan of the Terminal Operator; and
- 25.1.8.8. any other information that TNPA reasonably requires in order to fulfil its duties and responsibilities.

25.2. Execution of Construction Works

- 25.2.1. The Terminal Operator remains accountable for and shall perform or procure the performance of the Construction Works in accordance with the provisions of this Agreement, the Construction Works Programme, the D&C Specifications and the Detailed Design.
- 25.2.2. The Terminal Operator shall bear sole responsibility for the procurement of all construction materials in accordance with the approved Detailed Design, the adequacy of the design and compliance with the D&C Specifications and the Detailed Design.
- 25.2.3. The Terminal Operator may submit to TNPA proposals for modifications by the Terminal Operator to the design, which, in the Terminal Operator's opinion, would improve the quality or safety of the Terminal provided that any such modifications and any related amendments to the Construction Agreement, the Construction Works Programme, the Detailed Design and/or the D&C Specifications, shall only be effected if approved in writing by TNPA.
- 25.2.4. The location, design and construction of any points of access to and/or egress from the Project Site both during construction and afterwards shall be in accordance with the D&C Specifications and the Detailed Design or otherwise be subject to the prior consent of TNPA and the Terminal Operator.

25.3. Commencement of Construction Works

The Terminal Operator shall be entitled to commence construction of the Construction Works at any time after the Effective Date.

25.4. Completion of Construction Works

- 25.4.1. Completion of the Construction Works shall be effected not later than the Target Completion Date unless such date is extended in terms of this Agreement.
- 25.4.2. Upon the Construction Contractor giving notice to the Terminal Operator in terms of the relevant Construction Agreement of the anticipated date of completion of the Construction Works, the Terminal Operator shall promptly and, in any event within 7 (seven) Days after receipt of such notice, notify TNPA of such anticipated date, provided that such notice shall be given not less than 20 (twenty) Days before such anticipated date.
- 25.4.3. TNPA shall from time to time inspect the Construction Works on the date of Construction Completion or as soon as reasonably practicable thereafter, but in any event within 7 (seven)

Days after such date.

- 25.4.4. If the Independent Certifier is reasonably of the opinion that completion of the Construction Works has taken place, the Independent Certifier shall forthwith issue the Completion Certificate.
- 25.4.5. If the Independent Certifier is not satisfied that completion as set out in clause 25.4.4 has occurred, the Independent Certifier shall notify the Terminal Operator and the TNPA of such failure to attain completion of the Construction Works within 5 (five) Business Days after the inspection referred to in clause 25.4.3 specifying those elements of the Terminal or other conditions that remain to be satisfied by the Terminal Operator.
- 25.4.6. The issuing of a Completion Certificate shall not be withheld or delayed notwithstanding that minor items have yet to be completed and or attended to and such outstanding items shall be reflected in a Snagging List (as defined in clause 25.4.8).
- 25.4.7. The Independent Certifier shall issue a Completion Certificate within 5 (five) Business Days after the completion, to the Independent Certifier's satisfaction, of the Construction Works specified in the notice contemplated in clause 25.4.5 and the satisfaction of any other conditions specified.
- 25.4.8. The Independent Certifier shall identify in a list ("**Snagging List**") appended to the Completion Certificate any unfulfilled obligations of the Terminal Operator ("**Unfulfilled Obligations**"), which the Terminal Operator has undertaken to complete in respect of the Construction Works and the time within such Unfulfilled Obligations are to be completed or certify that there are no Unfulfilled Obligations in respect of the Construction Works. The Terminal Operator shall attend to such Unfulfilled Obligations within the time specified in the Snagging List.

25.5. **Archeological Matters**

- 25.5.1. All fossils, coins, articles of value or antiquity, structures and other remains or things of geological or archaeological interest or burial sites discovered on the Site ("Archaeological Articles") shall (as between the Parties) be the property of the TNPA. The Terminal Operator shall take all reasonable precautions to prevent its agents, representatives and employees, labour or other persons from removing or damaging any such Archaeological Articles.
- 25.5.2. The Terminal Operator shall, immediately upon discovery of such Archaeological Articles, advise the TNPA and the Independent Certifier, who shall issue instructions for dealing with it, accordingly.
- 25.5.3. If the Terminal Operator has suffered a delay in the execution of its rights or obligations in terms of this Agreement as a result of having followed the Independent Certifier's instructions as contemplated in clause 25.5.1 or any obtaining the Consents required

in respect of such Archaeological Articles and their removal or preservation, the Terminal Operator shall be granted an extension to the Target Completion Date and or the Scheduled Operations Commencement Date, equivalent to the delay suffered in suspending the Construction Works complying with any instructions of the Independent Certifier and the Terminal Operator shall be entitled to compensation for any Losses caused as a result of the discovery of such Archaeological Articles.

25.6. Utilities and Utility Wayleaves

- 25.6.1. TNPA shall provide Utilities between the port boundary and the Terminal provided that, for the avoidance of doubt, TNPA shall not be liable or responsible for any Utilities at the Terminal, including the removal and disposal of waste.
- 25.6.2. TNPA shall have the right to approve the establishment on or over and or relocation from the Port Site, at the request of any public or private Utility, of Utility wayleaves including, but not limited to, power pylons or lines, water or gas pipes and telecommunication lines or pylons.
- 25.6.3. If such establishment and or relocation has delayed the Construction Works or the Scheduled Operations Commencement Date or adversely affected the normal course of Operation and Maintenance, the Terminal Operator shall be granted an extension to the Target Completion Date and or the Scheduled Operations Commencement Date, equivalent to the delay suffered in suspending the Construction Works and the Terminal Operator shall be entitled to compensation for any Losses caused as a result of the establishment and or relocation.

25.7. Information relating to the Project and the Construction Works

- 25.7.1. The Terminal Operator shall furnish to TNPA or any of its duly authorised representatives, all such reports and other such information in relation to the Project and the Construction Works as the TNPA may reasonably request from time to time.
- 25.7.2. The Terminal Operator shall cause the Construction Contractor to provide directly to TNPA copies of the reports of the Construction Contractor as set forth in this Agreement and the relevant Construction Agreement.
- 25.7.3. Upon completion of any part of the Construction Works, the Terminal Operator shall supply TNPA with the Construction Documents, copies of all "as-built" drawings and such other technical and design information and completion records relating to the finished Construction Works as TNPA may reasonably request.

25.8. Disruption to Port and Port Users

- 25.8.1. The Terminal Operator shall ensure that none of the Construction Works causes any disruption to existing Port Users nor to activities on adjoining land except to the extent

that such disruption cannot reasonably be avoided as a result of any Construction Works being carried out. Where disruption cannot reasonably be avoided, the Terminal Operator shall ensure that appropriate traffic and other appropriate management measures are implemented to minimise the effect of any such disruption on Port Users.

25.9. Commissioning

- 25.9.1. Upon the mechanical and structural completion of the Construction Works, and the correction of any required deficiencies prior to start-up of the Terminal Infrastructure and the introduction of Cargo for testing purposes, the Terminal Operator shall commence with the cold and hot commissioning of the Terminal Infrastructure.
- 25.9.2. During the hot commissioning process, and notwithstanding the TNPA Commencement Notice having not yet been delivered in accordance with clause 25.10.2, the Terminal Operator shall be entitled to deliver Cargo to the Terminal for testing purposes and shall be entitled to charge fees concerning such Services.
- 25.9.3. TNPA undertakes to provide any assistance reasonably required by the Terminal Operator to facilitate and complete the hot and cold commissioning of the Terminal Infrastructure.
- 25.9.4. Upon the Target Completion Date, if the Terminal Operator has reached structural and mechanical completion of the Construction Works but is still undertaking the commissioning of the Terminal Infrastructure, the Terminal Operator shall not be in breach of the Agreement and shall be deemed to have achieved Construction Completion by the Target Completion Date.

25.10. Approval to Provide Services

- 25.10.1. Following the completion of the commissioning process and the issue of the Taking Over Certificate by the Terminal Operator (and subject to the Lender's Technical Advisor confirming its written acceptance of the issue thereof), the Terminal Operator will notify TNPA, in writing, (along with the provision of the Taking Over Certificate and the Lenders Technical Advisor confirmation) that it has completed the Construction Works (the "Taking-Over Notice").
- 25.10.2. Subject to clause 25.10.4, within 3 (three) Business Days of receipt of the Taking-Over Notice, TNPA shall grant written approval to the Terminal Operator to provide the Services and shall, at the same time, announce the Terminal open and that the Terminal Operator is authorised to charge and collect fees in respect of the Services with effect from the date of issue of TNPA's written notice (the "TNPA Commencement Notice").
- 25.10.3. Subject to clause 25.10.2, prior to receipt of the TNPA Commencement Notice, the Terminal Operator shall not operate the Terminal or charge or collect fees in respect

of the Services.

25.10.4. TNPA shall not issue the TNPA Commencement Notice until such date that:

25.10.4.1. the Port Manager has issued the Terminal Operator with a formal written notice confirming that the construction works, and commissioning where required, in respect of the TNPA Infrastructure are complete, such notice to be accompanied by the taking over certificate (or such like document) received by the contractor responsible for such works; and

25.10.4.2. the TNPA Infrastructure has been constructed such that the Terminal Operator is able to provide the Services in full without any hindrance and in compliance with all applicable Laws.

25.10.5. In circumstances where the Terminal Operator has delivered the Taking-Over Notice to TNPA and, for reasons not attributable to the Terminal Operator:

25.10.5.1. the Port Manager fails to issue the notice required in sub-clause 25.10.4.1 above within 2 (two) Business Days of delivery by the Terminal Operator of the Taking-Over Notice to TNPA;

25.10.5.2. the TNPA Infrastructure is not yet constructed in accordance with sub-clause 25.10.4.2 above; and/or

25.10.5.3. TNPA fails to issue the TNPA Commencement Notice within 3 (three) Business Days of TNPA's receipt of the Taking-Over Notice,

TNPA indemnifies the Terminal Operator for any reasonably incurred and properly evidenced, Losses, including loss of revenue, suffered, incurred, or sustained by the Terminal Operator as a direct or indirect result thereof.

26. Operations Commencement

26.1. The Terminal Operator shall with effect from the Actual Operations Commencement Date, commence the provision of the Services and shall perform or procure the performance of Operation and Maintenance of the Terminal in accordance with the Operational Plan.

26.2. Within 30 (thirty) Days after the Actual Operations Commencement Date, TNPA shall announce the Terminal open.

27. Operation and Maintenance

27.1. Obligation to Operate and Maintain

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

27.2. Standards of Operation and Maintenance

27.2.1. Generally, the Operation and Maintenance of the Terminal shall be carried out in accordance with the Law and in conformity with the standard of care and workmanship prescribed in the Operational Plan original equipment manufacturers' standard, 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 specifications of such equipment.

27.2.2. The Terminal Operator shall submit an annual maintenance programme for the Terminal in respect of Terminal Infrastructure and Terminal Equipment in accordance with Schedule 24 (*Annual Reporting Schedule*).

27.2.3. Any changes to the annual maintenance programme, after such programme has been submitted to TNPA as contemplated in clause 27.2.2 shall require the prior approval of TNPA, which approval shall not be unreasonably withheld.

27.3. **Management**

27.3.1. The Terminal Operator shall ensure that, subject to the other provisions of this Agreement, the Terminal is open to provide the Services and that the use of the Terminal and provision of the Services are convenient and safe at all times as may be agreed with its customers and (for the avoidance of doubt) where it is feasible and practical open 24 (twenty-four) hours of each Day.

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

27.3.3. The Terminal Operator shall otherwise manage the Terminal and all vessels using the Terminal in accordance with the Act, the Port Rules, the Operation and Maintenance Manuals and the Operational Plan.

27.3.4. The Terminal Operator shall at all times exercise its rights in respect of the Operation and Maintenance of the Terminal strictly in compliance with the provisions of this Agreement and applicable Law.

27.4. **Marketing**

27.4.1. The Terminal Operator shall actively market the Terminal and the Services. The Terminal Operator shall make available 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 Terminal and the Services, within 30 (thirty) days of receipt of a request for such information from TNPA and specifically undertakes not to market any Services it is not expressly entitled to provide in terms of this Agreement and Schedule 4 (*Scope of Services*) or any of the services provided by TNPA and provided that it does not contain any information which is not otherwise in the public domain, without TNPA's written consent,

which consent shall not be unreasonably withheld.

- 27.4.2. TNPA shall actively market the Port and shall not in any way be obliged to specifically market the Terminal or the Services provided by the Terminal Operator and shall make available all information, materials, documents and any other data it intends to use available to the Terminal Operator within 30 (thirty) Days of the receipt of a request for such information by the Terminal Operator.

27.5. **Terminal Operator Performance and Penalties**

- 27.5.1. The Terminal Operator shall use its best efforts to promote and develop the Terminal and the provision of Services, in order to achieve optimum utilisation of the Terminal and Port Infrastructure and in a manner, which is consistent with sound business practices, the Business Plan and International Best Practice.

- 27.5.2. The Terminal Operator shall, from the third anniversary of the Actual Operations Commencement Date, meet the minimum performance standards to be determined by TNPA, after consultation with the Terminal Operator, and notified to the Terminal Operator in writing at least 1 (one) year prior to such anniversary, such minimum performance standards to thereafter be annexed to this Agreement as Schedule 20 (*Terminal Operator Performance Standards*) of this Agreement.

- 27.5.3. The Parties shall meet annually, within 30 (thirty) days of the commencement of any contract year of this agreement, to review and where necessary agree to any changes and/or other amendments to the Terminal Operator Performance Standards provided that any changes to the Terminal Operator Performance Standards shall only become effective when the parties' agreements to those changes are recorded in writing and signed by both parties.

- 27.5.4. The actual performance of the Terminal Operator will be reviewed quarterly by TNPA against the Terminal Operator Performance Standards. TNPA will provide the Terminal Operator with a list of all of the information which it reasonably requires the Terminal Operator to provide for each Quarter no later than 10 (ten) Business Days before the beginning of that Quarter.

- 27.5.5. In order to conduct the Quarterly review, the Terminal Operator shall provide TNPA, within 10 (ten) Business Days after the end of each Quarter, with all information that TNPA requires to assess the Terminal Operator's performance in that Quarter.

27.5.6. 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 Terminal Operator in terms of clause 27.5.5 and will take into consideration any response by the Terminal 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 Terminal Operator, it shall give reasonable notice of its intention to do so to the Terminal Operator and representatives of TNPA and the Terminal Operator shall meet to discuss and develop a reasonable performance improvement plan or a performance remediation strategy, in terms of which:

27.5.6.1. a plan of action with appropriate timelines shall be implemented by the Terminal Operator without delay, and

27.5.6.2. the results thereof be submitted within the set timelines to TNPA for review and final decision and/or outcome.

27.5.7. When, in the opinion of the Terminal Operator, circumstances occur which may impact negatively on its achievement of its Terminal Operator Performance Standards, the Terminal Operator shall notify TNPA in writing within 10 (ten) Business Days of the occurrence and both the Terminal Operator and TNPA shall document the details of the occurrence. The Terminal Operator Performance Standards may be relaxed in accordance with such terms as the Parties may agree, should the Terminal Operator be prevented or delayed in performing its obligations by reason of a Force Majeure, changes in market conditions, TNPA failing to meet its obligations in maintaining the promulgated drafts for the Port. The Terminal Operator Performance Standards may be reviewed and amended, by agreement between the Parties, in the case of any other event or circumstance demonstrably beyond the control of the Terminal Operator, which had a material, negative impact on the achievement of the Terminal Operator Performance Standards by the Terminal Operator.

27.5.8. Subject to the rights of TNPA to terminate this Agreement under clause 42 (*Terminal Operator Default*), following receipt of the Annual Report, TNPA shall review compliance by the Terminal Operator with the Terminal Operator Performance Standards in respect of the preceding Contract Year.

27.5.9. In this clause, "**Performance Penalties and Incentives**" shall mean penalties payable by the Terminal Operator to the TNPA for a failure to meet or comply with the minimum performance standards and incentives payable to the Terminal Operator by the TNPA where the minimum performance standards are achieved. The performance standards as set out in Schedule 20 of this Agreement shall continue to apply and remain binding on the parties.

- 27.5.10. If the Terminal Operator achieves the minimum performance standards as agreed for the Assessment Period, TNPA will notify the Terminal Operator of their entitlement to an Incentive applicable to it as shall be determined in accordance with the cascade formula contained in Schedule 25 (*Penalty and Incentive Cascade Formula*).
- 27.5.11. Subject to the rights of TNPA to terminate this Agreement under clause 42 (Terminal Operator Default), if the Terminal Operator fails to achieve the terminal operator performance standards set out in Schedule 20 (*Terminal Operator Performance Standards*) at the conclusion of the year under assessment (the “**Assessment Period**”), and such failure is not attributable to any action, inaction or breach by the TNPA of its obligations under this Agreement (“**Failure**”), the TNPA will notify the Terminal Operator of such Failure and the manner in which the Penalty, as determined in accordance with the cascade formula in Schedule 25 (*Penalty and Incentive Cascade Formula*), shall be imposed. Any monies due to TNPA or due by TNPA pursuant to the provisions of this clause shall be payable over a period of 12 (twelve months) after TNPA has certified (as the case may be) that the Terminal Operator is liable or is entitled (as the case may be) to such payment.
- 27.5.12. Any monies due to TNPA or due by TNPA pursuant to the provisions of this clause shall be payable over a period of 12 (twelve) months after TNPA has certified (as the case may be) that the Terminal Operator is liable or is entitled (as the case may be) to such payment.
- 27.5.13. TNPA shall be entitled to set-off any amounts payable as aforesaid against any monies due or which may become due to the Terminal Operator under this Agreement or against any Performance Guarantee provided that, should the Terminal Operator notify TNPA with appropriate supporting information that the Terminal Operator has not committed the breach complained of and that no such right to set-off or deduct penalties has arisen.
- 27.5.14. Any penalty amount payable in terms of this Agreement shall be due and payable within the period specified by the TNPA in writing.
- 27.5.15. In the instance that a dispute arises under this clause, either Party shall approach an “**Independent Expert**” (a person with appropriate expertise) to determine whether TNPA shall be entitled to the aforesaid penalties, the costs of whom shall be borne by the Party that refers the dispute and whose determination shall be final and binding. The payment or set-off of such penalties shall not relieve the Terminal Operator from any liability or any of its obligations under this Agreement.
- 27.5.16. The Terminal Operator hereby acknowledges and agrees that TNPA’s methodology for the implementation of Terminal Operator Performance Standards and the related penalties are subject to continuous review and are subject to change. The Terminal Operator and TNPA agree to re-negotiate in good faith the provisions of this clause and related penalties should these require amendment.

28. Reporting Requirements

- 28.1. The Terminal Operator shall within 3 (three) Months after the end of each Contract Year (the “**Review Year**”), submit to TNPA an annual report (the “**Annual Report**”) which shall set out a detailed written account of the following matters:
- 28.1.1. the Operation and Maintenance of the Terminal in respect of the relevant Review Year including the Terminal Operator’s compliance with the Operational Plan, the maintenance plan envisaged in clause 27.2.2 and the Performance Standards;
 - 28.1.2. the extent to which the Terminal Operator’s undertakings contained in clause 11 (*Empowerment Obligations*) have been met, as well as documenting any other achievements in promoting empowerment initiatives;
 - 28.1.3. the quality and level of the Services provided by the Terminal Operator at the Terminal during the relevant Review Year;
 - 28.1.4. the Terminal Operator’s compliance with the terms of this Agreement, the Act and the Regulations;
 - 28.1.5. the Terminal Operator’s compliance in respect of any Occupational, Health and Safety legislation;
 - 28.1.6. steps taken by the Terminal Operator to eliminate anti-competitive and discriminatory practices; and
 - 28.1.7. the quality and level of performance with regard to such environmental criteria and social responsibility requirements as may have been set by TNPA during or prior to the relevant Review Year or required by other national legislation;
- 28.2. The Annual Report shall be provided in the format set out in Schedule 24 (*Annual Reporting*), and shall address the matters set out above and shall also include detailed information in respect of the following:
- 28.2.1. such statistical information relating to its operations as may reasonably be required by TNPA; statistics on the number, type and size of vessels serviced at the Project Site; and statistics on the number of trucks handled at the Project Site interface with land transport and cargo dwell time statistics;
 - 28.2.2. its cargo forecast for the remainder of the Operations Period, or such other shorter period as may be specified, in a form determined by TNPA from time to time; and

- 28.2.3. future development and acquisition plans, including any required or proposed new Terminal Equipment, relating to the Terminal or any Service provided at the Terminal.
- 28.3. The Terminal Operator shall, if requested by TNPA in writing, submit to TNPA an executive summary of the Annual Report, excluding any Confidential Information and/or any information not required to be provided by the Terminal Operator, which summary shall not be disclosed without the written consent of the Terminal Operator unless such disclosure is provided for in clause 64 (*Confidentiality*).
- 28.4. Reports in respect of all cargo exported, landed and shipped must be provided to TNPA by the Terminal Operator on a per vessel basis, 72 (seventy-two) hours subsequent to the vessel having entered the Port.
- 28.5. TNPA may require the Terminal Operator, at the Terminal Operator's cost, to submit such additional information as may be reasonably necessary to explain or amplify any Annual Report or other report or information submitted by the Terminal Operator in terms of clause 28.1 above.
- 28.6. The Terminal Operator must, within 24 (twenty-four) hours of its occurrence or discovery, inform TNPA of:
- 28.6.1. any industrial dispute between the Terminal Operator and its employees;
 - 28.6.2. any industrial accident or disaster involving any employee or agent of the Terminal Operator or any injury on duty or fatality;
 - 28.6.3. any occurrence of fire within the Project Site;
 - 28.6.4. any theft or pilferage within the Project Site or any theft or pilferage involving any cargo in the Terminal Operator's possession or control;
 - 28.6.5. any proceedings or claim instituted or made against the Terminal Operator which could materially affect its ability to perform any obligation or to comply with any term or condition of this Agreement; and
 - 28.6.6. 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 Terminal Operator shall arrange at its own expense and cost for an accounting and cost

control system consistent with IFRS and for the appointment as auditors of a firm of independent accountants, for the Terminal.

29.1.2. The Terminal Operator shall keep all its financial books and records, for the Terminal at all times within South Africa. The management accounts for the Terminal Operator and the Terminal Operator's financial statements will be kept in Rand. The Terminal Operator's audited management accounts for the Terminal and its financial statements and the reports of such accountants shall be provided to TNPA as specified in clause 29.3.1.1.

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

29.2. **Right of Inspection**

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

29.3. **Periodic Reports**

29.3.1. Together with its Annual Report, the Terminal Operator shall furnish TNPA, with:

29.3.1.1. 3 (three) copies of the Terminal Operator's audited financial statements and audited management accounts for the Terminal, in respect of the preceding Contract Year (which are consistent with the books of accounts and prepared in accordance with IFRS), together with an audit report thereon, all in accordance with the requirements of the Laws and regulations pertaining to accounting;

29.3.1.2. a copy of any management letter or other communication sent by the auditors to the Terminal Operator or its management in relation to the Terminal Operator's financial,

accounting and other systems, management and accounts; and

29.3.1.3. a reconciliation of the relevant Contract Year's profit and loss account and the budget for the relevant Contract Year, and an analysis thereof.

29.3.2. The Terminal 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:

29.3.2.1. 3 (three) copies of the Terminal Operator's complete audited management accounts in respect of the Terminal for such Quarterly period (which are consistent with its books of account and prepared in accordance with IFRS), 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 Terminal Operator, all in accordance with the requirements of the Laws and regulations pertaining to accounting;

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

29.3.2.3. a list of each of its creditors to which the Terminal Operator owes a sum in excess of [*insert amount*] including the amounts due to each of them;

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

29.3.2.5. a report on the implementation and progress of the Project, containing such information as TNPA may reasonably require and disclosing any factors of which the Terminal 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

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

29.3.3. The Terminal 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 Contract Year, together with an analysis thereof.

29.3.4. The Terminal 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 Terminal Operator shall immediately report to TNPA details of the following events:

- 29.3.5.1. any charge, lien or attachment imposed on the Terminal Infrastructure, the Terminal Equipment and/or any of the Terminal Operator's property and any seizure thereof which charge, lien, attachment or seizure will have a material adverse effect on the ability of the Terminal Operator to Operate and Maintain the Terminal and/or to perform its obligations under this Agreement;
- 29.3.5.2. any transaction in respect of the shares of the Terminal Operator of which the Terminal Operator is aware;
- 29.3.5.3. any default under any Financing Agreement, the circumstances thereof and possible results as viewed by the Terminal Operator; and
- 29.3.5.4. any matter the Terminal 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 Terminal Operator.

29.3.6. The Terminal Operator shall provide a monthly written report to TNPA with respect to the matters specified in the Detailed Design, D&C Specifications and Operational Plan to be reported relating to the 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 Terminal 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 Terminal Operator, the Terminal Operator shall deliver all such records (or where such records are required by legislation to remain with the Terminal Operator or the Terminal 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 Terminal Operator at any reasonable time. All costs of retaining such records in safe storage and delivering the same shall be borne by the Terminal Operator.

29.5. **Reporting of changes**

29.5.1. The Terminal Operator shall not without the prior consent of TNPA:

- 29.5.1.1. make or allow any change in or to its corporate structure, the Constitutional

Documents or its financial year end;

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

29.5.1.3. save for the Associated Agreements, enter into any agreement or series of agreements which contemplates or could involve one or more payments by or to the Terminal Operator in the aggregate in excess of the equivalent of R **[insert amount]**

29.5.1.4. enter into any Related Party Transaction;

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

29.5.1.6. make any change in the insurance policies contemplated in clause 14 (*Project Insurance*).

29.5.2. The Terminal Operator shall notify TNPA of any claim brought or threatened which is reasonably likely to have a material effect on the Terminal 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 Terminal Operator and TNPA, and/or their representatives may, at their own risk, enter upon the Terminal (or any other site or property used by the Terminal Operator for the purposes of the Project) to inspect the Construction Works, the Terminal and Operation and Maintenance, and to monitor compliance by the Terminal Operator with its obligations under this Agreement.

30.2. The 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 Terminal Operator, enter upon any property used by the Terminal Operator as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.

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

31. Authority Changes

31.1. TNPA shall have the right to require changes to be made to the D&C Specifications and the Operational Plan in accordance with this clause ("**Authority Change**"), in which event

TNPA shall serve notice thereof ("**Authority Notice of Change**") on the Terminal Operator. Such Authority Changes shall always provide for any variation of the Terminal 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 Terminal Operator to calculate and provide the estimated revised costs of the Project in accordance with clause 31.3 ("**Estimate**");

31.2.2. require the Terminal Operator to provide TNPA, within such period as determined by TNPA, (which period shall not be less than 30 (thirty) Days after receipt by the Terminal 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 Terminal Operator shall deliver the **Estimate** to TNPA. The Estimate shall include the opinion of the Terminal Operator on:

31.3.1. any impact on the completion of the Construction Works;

31.3.2. any impact on the performance of the Terminal Operator's rights or obligations under this Agreement and any impact on the Terminal Operator's obligations to third parties;

31.3.3. any amendment required to this Agreement and/or any Associated Agreement as a result of the Authority Change to avoid such Authority Change resulting in a breach of any of the other terms of this Agreement;

31.3.4. any estimated revised Project costs that result from the Authority Change;

31.3.5. any capital expenditure that is required or no longer required as a result of the Authority Change; and

31.3.6. the proposed method of certification of any construction or operational aspects of the Terminal Operator's obligations under this Agreement required by the Authority Change if not covered by the procedures set forth in the D&C Specifications, and Operation and Maintenance.

31.4. As soon as practicable after TNPA receives the Estimate, TNPA shall assess the Estimate and where necessary the Parties shall discuss and agree on the issues set out in the Estimate. In such discussions, TNPA may modify the Authority Notice of Change, in which case the Terminal Operator shall, as soon as practicable and in any event within such period as determined by TNPA (which period shall not be less than 30 (thirty) Days after receipt by the Terminal 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 Terminal Operator shall use its reasonable endeavours to obtain funding for the whole of the estimated capital expenditure, on terms satisfactory to the Terminal Operator.
- 31.8. If the Terminal 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 Terminal 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 Terminal 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 31.9, then the Terminal Operator shall be entitled to compensation as set forth in clause 38 (*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 Terminal Operator the reasonable costs of providing the Estimate.

PART IV – FINANCIAL PROVISIONS

32. Fees in respect of Services

- 32.1. The Terminal Operator shall have the exclusive right and obligation for its benefit and risk to levy and collect tariffs in respect of the Services, with effect from the Actual Operations Commencement Date.
- 32.2. None of the TNPA or any other Responsible 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. No later than 3 (three) months before the Scheduled Operations Commencement Date, the Terminal Operator shall submit to TNPA the initial tariff rates which it intends to charge in respect of the Services with effect from the Actual Operations Commencement Date.
- 32.4. The Terminal Operator must submit to TNPA annually from the Actual Operations Commencement Date, any adjustments to tariff rates which the Terminal Operator intends to implement and that are in accordance with any applicable statutes.
- 32.5. All costs and expenses related to and arising from the charging and collection of tariffs shall be borne by the Terminal Operator.

33. Marine Services

- 33.1. Marine services shall be provided by the TNPA in accordance with the agreed service between the shipping agent and the harbour master at the Port, and marine services charges will be payable by the vessel owners to the shipping agent to cover the charges for pilotage, tugs or craft assistance, berthing services, running of ships lines and vessel tracking systems. The marine services tariffs shall be charged in accordance with the Act and TNPA's berthing and marine resource policies and procedures, as may be revised from time to time.

34. Port Dues

- 34.1. Port dues shall be levied by the 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.

35. Foreign exchange risk

- 35.1. To the extent that the Terminal 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 Terminal Operator shall not enter into 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 any amounts payable by TNPA to the Terminal Operator on the Termination of this Agreement.

36. Default Interest

- 36.1. 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 2% (two per centum).

37. Refinancing

- 37.1. The Terminal Operator agrees that it shall not be entitled to undertake any refinancing or re-arrangement of its Debt or Equity at any time during the Operating Term unless it has notified TNPA in writing prior to taking any steps to implement any proposed Refinancing.
- 37.2. Such notice shall contain:
- 37.2.1. 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;
 - 37.2.2. a copy of the proposed financial model relating to such Refinancing (if any) and the basis for the assumptions used in that financial model;
 - 37.2.3. the reasons for such Refinancing; and
 - 37.2.4. any other information that may be reasonably necessary to enable TNPA to assess such Refinancing having regard to the provisions of this clause 37 (*Refinancing*).
- 37.3. The Terminal Operator shall procure that no Refinancing (other than an Exempt Refinancing) is implemented without the prior written approval of TNPA.
- 37.4. For the avoidance of any doubt, the notification and approval requirements set forth in this clause 37 (*Refinancing*) does not apply to any Permitted Borrowing.

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

38. Consequences of a Compensation Event

- 38.1. If, as a direct result of the occurrence of a Compensation Event:
- 38.1.1. the Terminal Operator is unable to complete the Construction Works before the Target Completion Date or to provide the Services on or before the Actual Operations Commencement Date;
 - 38.1.2. materially and adversely affects the ability of the Terminal Operator to perform any of its obligations under this Agreement; and
 - 38.1.3. the Terminal Operator incurs costs in relation to clause 38.1.1 or loses revenue in relation to clause 38.1.2;

then the Terminal Operator shall be entitled to apply for relief from its obligations and/or claim compensation from TNPA in terms of this clause.

- 38.2. To obtain relief or claim compensation, the Terminal Operator must:
- 38.2.1. 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 incurring of costs or loss of revenue, give to TNPA a notice of its intention to claim relief in terms of this clause 38;

38.2.2. within 10 (ten) Days of receipt by TNPA of the notice referred to in clause 38.2.1 above, give full details of the Compensation Event and the relief claimed in terms of this clause; and

38.2.3. demonstrate to the reasonable satisfaction of TNPA that:

38.2.3.1. the Terminal 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;

38.2.3.2. the Compensation Event directly caused the delay to the Target Completion Date or the Scheduled Operations Commencement Date or the need for relief from other obligations under the Agreement;

38.2.3.3. 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 Terminal Operator acting in accordance with International Best Practice; and

38.2.3.4. the Terminal Operator is using reasonable endeavours to perform its obligations under the Agreement.

38.2.4. If the Terminal Operator has complied with its obligations under clause 38.2 above, then:

38.2.4.1. If the Terminal Operator is unable to complete the Construction Works by the Target Completion Date, then the Target Completion Date and/or 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;

38.2.4.2. if the Terminal Operator is unable to provide the Services by the Scheduled Operations Commencement Date, 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 the delay;

38.2.4.3. if the Terminal Operator is unable to comply with its obligations under this Agreement:

38.2.4.3.1. TNPA shall not be entitled to exercise its rights to terminate this Agreement under clause **Error! Reference source not found.2** (*Terminal Operator Default*);

38.2.4.3.2. the Operating Term shall be extended to place the Terminal

Operator in the position of no better no worse, taking into account the likely effect of the Compensation Event;

38.2.5. if the Terminal Operator incurs costs:

38.2.5.1. on or before the Target Completion Date or the Scheduled Operations Commencement Date;

38.2.5.2. as a result of capital expenditure being incurred by the Terminal 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 Terminal Operator supported by all relevant information;

38.2.6. if the Terminal Operator loses revenue, the Operating Term shall be extended to place the Terminal Operator in the position of no better no worse, taking into account the likely effect of the Compensation Event.

38.3. If the information required by clause 38.2 above is provided after the dates referred to in that clause, then the Terminal Operator shall not be entitled to any relief during the period for which the information is delayed.

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

38.5. If a Compensation Event continues for a period in excess of 90 (ninety) Days, the Parties shall meet in order to find a mutually satisfactory solution for dealing with such prolonged Compensation Event.

38.6. If the Parties cannot agree on the extent of the relief required, or TNPA disagrees that a Compensation Event has occurred or that the Terminal Operator is entitled to any extension of the Target Completion Date and/or the Scheduled Operations Commencement Date and/or relief from other obligations under this Agreement, the Parties shall resolve the matter in accordance with clause 62.7 (*fast-track dispute resolution*).

39. Force Majeure

39.1. For purposes of this Agreement, "**Force Majeure**" means any act, event or circumstance or any combination of acts, events or circumstances which is:

39.1.1. beyond the reasonable control of the Affected Party;

- 39.1.2. is without fault or negligence on the part of the Affected Party and is not the direct or indirect result of a breach by the Affected Party of any of its obligations under any Project Documents;
- 39.1.3. could not have been (including by reasonable anticipation) avoided or overcome by the Affected Party, acting in accordance with the standards of a Reasonable and Prudent Operator; and
- 39.1.4. prevents, hinders or delays the Affected Party in its performance of all (or part) of its obligations under this Agreement.

39.2. Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in subclauses 39.1.1 to 39.1.4 above:

- 39.2.1. lightning, fire, earthquake, tsunami, drought, unusual flood, storm, cyclone, typhoon, tornado or other natural calamity or act of God;
- 39.2.2. pandemic, epidemic or plague and any instruction, regulation, directive, legislation or the like issued by a Responsible Authority in response to such acts, events or circumstances;
- 39.2.3. accidents and explosions;
- 39.2.4. acts of war whether declared or not, invasion, armed conflict, act of foreign enemy or blockade in each case occurring within or involving the Republic of South Africa;
- 39.2.5. acts of rebellion, riot, civil commotion, act or campaign of terrorism, or sabotage of a political nature, in each case occurring within the Republic of South Africa and/or directly involving South Africa; or
- 39.2.6. nuclear contamination unless the Terminal Operator and/or any Subcontractor is the source or cause of the contamination; or
- 39.2.7. chemical or biological contamination of the Construction Works and/or the Terminal Infrastructure and the Terminal Equipment and or the Project Site from any of the events referred to in clause 39.1.1 above, which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement.

39.3. Subject to clause 39.4, 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.

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

- 39.4.1. 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

39.4.2. 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 39.4.1.

39.5. 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.

39.6. 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 39.3, 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.

39.7. If, following the issue of any notice referred to in clause 39.5, 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.

39.8. The Parties shall endeavour to agree to any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Clause 62 (*Dispute Resolution*) shall not apply to a failure of TNPA and the Terminal Operator to reach an agreement pursuant to this clause 39.8, and this Agreement shall terminate in terms of clause 48.4 (*Termination for Force Majeure*) if no such agreement is reached.

39.9. Provided that the Terminal Operator has complied with the requirements of this clause 39, if the Terminal Operator's performance of all (or part) of its obligations under this Agreement is prevented, hindered or delayed by a Force Majeure event:

39.9.1. occurring prior to the Scheduled Operations Commencement Date, then the Scheduled Operations Commencement Date shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed by the Force Majeure Event;

39.9.2. occurring after the Scheduled Operations Commencement Date but prior to the Actual Operations Commencement Date, then the Long Stop Date shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed by the Force Majeure event; and

39.9.3. during any twelve (12) month period commencing on 1 April, where the period by which the Terminal Operator's performance of all (or part) of its obligations under this

Agreement has been prevented, hindered or delayed by one or more Force Majeure events (each of which events lasts twenty-four (24) hours or longer) for a period in excess of thirty (30) days in such twelve (12) month period, the Expiry Date shall be extended to such date as shall place the Terminal Operator in the same overall economic position (after taking into account any other relief and compensation to which the Terminal Operator may be entitled pursuant to any other provisions of this Agreement for the acts, events or circumstances constituting Force Majeure) as the Terminal Operator would have been in but for the Force Majeure Events which have prevented, hindered or delayed the Terminal Operator's performance, provided further that the aggregate extensions to the Expiry Date under this clause 39.9.3 shall not result in the Expiry Date falling more than forty (40) years after the Scheduled Operations Commencement Date]. The Terminal Operator shall not be entitled to enforce this clause 39.9.3 pursuant to any Force Majeure Event in respect of which it is entitled to bring a claim under any insurance policy or would have been so entitled had it been in compliance with clause 14 (*Project Insurance*).

39.10. The Affected Party shall use all reasonable efforts to mitigate, rectify and overcome the effects of such Force Majeure event and to minimise the effect on the Project and shall give the other Party regular reports on the progress of the mitigation measures.

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

40. Unforeseeable Conduct

40.1. Should any Unforeseeable Conduct occur which materially and adversely affects the general economic position of the Terminal Operator, the Terminal Operator shall be entitled to such compensation and or relief from the TNPA as shall place the Terminal Operator in the same overall economic position as the Terminal Operator would have been in but for such Unforeseeable Conduct, which relief shall include, but not limited to:

40.1.1. upon the Unforeseeable Conduct occurring prior to the Scheduled Operations Commencement Date, then the Construction Period, and consequently the Scheduled Operations Commencement Date, shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed as a result of the Unforeseeable Conduct;

40.1.2. occurring after the Scheduled Operations Commencement Date, but prior to the Actual Operations Commencement Date, then the Long Stop Date and the Operating Term shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed by the Unforeseeable Conduct;

40.1.3. occurring after the Actual Operations Commencement Date, then the Operating Term shall be extended by a period equal to the period by which the Terminal Operator's

performance is prevented, hindered or delayed by the Unforeseeable Conduct and so as to place the Terminal Operator in the same overall economic position;

40.1.4. notwithstanding the date of its occurrence, compensation for such Losses as incurred by the Terminal Operator as a result of the Unforeseeable Conduct.

40.2. 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 Terminal Operator.

40.3. 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 Terminal 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 62.7 (*fast-track dispute resolution*).

40.4. Without in any way limiting the rights of the Terminal Operator, or the obligations of the TNPA, as set out above, both Parties shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct.

41. Change in Law

41.1. If any Change in Law occurs after the Effective Date, which requires the Terminal Operator to incur any additional Capital Expenditure or Operating Expenditure, then the Terminal Operator shall be entitled to an extension of the Operating Term as shall place the Terminal Operator in the same overall economic position as it would have been in but for such Change in Law, provided that the total extension of the Operating Term shall not exceed ~~ten (10) years~~, and the Terminal Operator shall be entitled to relief from such other obligations to the extent that it is unable to perform or fulfil such obligations as a result of the Change in Law.

41.2. The provisions of this clause 41 shall not apply in respect of any Change in Law which:

41.2.1. was foreseen or could reasonably have been foreseen by the Terminal Operator on or before the Effective Date as being reasonably likely to occur and to impact the Project; and

41.2.2. relates to any changes in the rates, effect, application, implementation, enforcement or interpretation of any tax of any nature (including income, capital gains and value-added taxes), custom duties, dues, levies, stamp duty, excise fees or charges; or

41.2.3. arises as a direct or indirect result of any appeal or review being lodged against any

amendment to any of the Consents issued in terms of any Environmental Laws; or

41.2.4. arises as a direct or indirect result of the Terminal Operator's failure to obtain the conversion of its provisional air emissions licence into a final air emissions licence, in terms of the Environmental Laws, due to its failure to comply with the terms and conditions of the provisional air emissions licence; or

41.2.5. arises as a direct or indirect result of any Responsible Authority imposing additional conditions on the Terminal Operator in terms of any Consents issued in terms of any Environmental Laws, pursuant to a review by the Responsible Authority of the Terminal Operator's provisional or final air emissions licence or waste management licence; or

41.2.6. arises as a direct or indirect result of the Responsible Authority declaring the area in which the Project Site is situated as an air pollution priority area and imposing additional requirements on the Terminal Operator in terms of its air emissions licence to align with the air quality management plan for that area.

41.3. The Terminal Operator shall use all reasonable endeavours to minimise and mitigate the effects of any Change in Law on the Terminal Operator.

41.4. The Terminal Operator shall not be entitled to claim both Unforeseeable Conduct and Change in Law or a combination of Unforeseeable Conduct and Change in Law in respect of the same event or circumstance or the same series of events or circumstances.

41.5. Any Change in Law which constitutes Unforeseeable Conduct shall be dealt with in terms of clause 40 (*Unforeseeable Conduct*).

PART VI – TERMINATION

42. Terminal Operator Default

42.1. Definition

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

42.1.1. any act of insolvency, composition or compromise with or for the benefit of creditors generally (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act) being entered into by or in relation to the Terminal Operator and excludes any changes in the Terminal Operator which are effected in accordance with the provisions of clause 16 (*Changes in the Terminal Operator*);

42.1.2. 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 Terminal Operator (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory) other than as a consequence of the restructure of the Terminal Operator's

group which is effected in accordance with the provisions of clause 16 (*Changes in the Terminal Operator*);

- 42.1.3. the Terminal Operator ceasing to carry on business;
- 42.1.4. 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 Terminal Operator (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory) other than as a consequence of a restructuring of the Terminal Operator's group effected in accordance with the provisions of clause 16 (*Changes in the Terminal Operator*);
- 42.1.5. the Terminal Operator fails to complete the Construction Works on or before the Target Completion Date (other than as a consequence of a material breach by TNPA of its material obligations under this Agreement);
- 42.1.6. the Terminal Operator fails to commence providing the Services on or before the Scheduled Operations Commencement Date (other than as a consequence of a material breach by TNPA of its material obligations under this Agreement);
- 42.1.7. the Terminal Operator commits a material breach of any of its material obligations under this Agreement and under the Finance Direct Agreement;
- 42.1.8. any of the warranties in clause 60 (*Terminal Operator Warranties and Undertakings*) fails, at any time during the existence of this Agreement, to be true and correct in all material respects and the Terminal Operator fails to remedy, cure or correct that untruth and incorrectness within a period of one hundred and twenty (120) days of such warranty failing to be true and correct in all material respects
- 42.1.9. the Terminal Operator abandons the Construction Works (other than as a consequence of a material breach by TNPA of its material obligations under this Agreement);
- 42.1.10. the Terminal Operator ceases to provide all or a substantial part of the Services in accordance with this Agreement, (other than as a consequence of a material breach by TNPA of its material obligations under this Agreement);
- 42.1.11. the Terminal Operator failing to meet its Empowerment Obligations as provided for in clause 11 and Schedule 13 (*B-BBEE Contributor Level Commitment*), Schedule 14 (*Black Ownership Commitments*) and Schedule 11 (*Supplier Development Plan and Value Summary Worksheet*),
- 42.1.12. the Terminal Operator failing to meet the minimum Terminal Operator Performance Standards as agreed to annually for 3 (three) consecutive years as provided for in Schedule 25 (*Performance Penalties*);
- 42.1.13. the Terminal Operator failing to comply with any provision of clause 16 (*Changes in*

the Terminal Operator);

42.1.14. the Terminal Operator fails to pay any sum or sums due to TNPA under this Agreement (which sums are not bona fide in dispute) which, and such failure continues for 20 (twenty) Business Days from receipt by the Terminal Operator of a notice of nonpayment from TNPA;

42.1.15. the Terminal Operator failing to maintain any required insurance in terms of clause 14 (*Project Insurance*); and

42.1.16. any material breach of any material provision of this Agreement has occurred more than once and:

42.1.16.1. TNPA has given an initial warning notice to the Terminal 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

42.1.16.2. TNPA has issued a second and final warning notice following the persistence or recurrence of that breach within a 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 Terminal Operator.

43. Notification

43.1. The Terminal Operator shall notify TNPA of the occurrence, and provide details, of any Terminal 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 Terminal Operator Default, in either case promptly upon the Terminal Operator becoming aware of its occurrence.

44. TNPA's Options

44.1. On the occurrence of a Terminal Operator Default, or within a reasonable time after TNPA becomes aware of the same, TNPA may:

45.1.1 in the case of the Terminal Operator Default referred to in clauses 42.1.1, 42.1.2, 42.1.3, 42.1.4, 42.1.8 terminate this Agreement in its entirety by notice in writing having immediate effect;

45.1.2 in the case of any other Terminal Operator Default referred to in clauses 42.1.5, 42.1.6, 42.1.7, 42.1.9, 42.1.10, 42.1.11, 42.1.12, 42.1.13, 42.1.14, 42.1.15, 42.1.16 serve notice of default on the Terminal Operator requiring the Terminal Operator at the Terminal Operator's option to either:

45.1.2.1 to remedy the Terminal Operator Default referred to in such notice of default (if the same is continuing) within 30 (thirty) Business Days after the Terminal Operator

receives such notice of default; or

- 45.1.2.2 to put forward within 20 (twenty) Business Days after such notice of default a reasonable programme for remedying the Terminal Operator Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Terminal Operator Default is proposed to be remedied.

45. Remedy Provisions

- 45.1. Where the Terminal Operator puts forward a programme for remedying a Terminal Operator Default, TNPA shall have 15 (fifteen) Business Days from receipt of the same within which to notify the Terminal 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 Terminal Operator that it does not accept the programme, the Parties shall endeavour within the following 14 (fourteen) Business Days to agree on any necessary amendments to the programme put forward. If following the necessary discussions and amendments, the programme is still not acceptable to TNPA then either party may refer the programme for resolution in accordance with clause 62.7 (*fast-track dispute resolution*).

- 45.2. If:

- 45.2.1. the Terminal Operator Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice; or

- 45.2.2. where the Terminal Operator puts forward a programme which has been accepted by TNPA or has been determined to be reasonable and the Terminal 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

- 45.2.3. any programme put forward by the Terminal Operator is rejected by TNPA as not being reasonable, and the dispute resolution procedure does not find against that rejection,

- 45.2.4. then TNPA may terminate this Agreement in its entirety by written notice to the Terminal Operator with immediate effect, provided that if the Terminal 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 Terminal 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 62.7 (*fast-track dispute resolution*).

46. TNPA 's Costs

- 46.1. The Terminal Operator shall reimburse TNPA with all costs incurred by TNPA in exercising any of its rights in terms of clause 42 (*Terminal Operator Default*) (including, without limitation, any relevant increased administrative expenses).
- 46.2. 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 Terminal Operator (or to take any action other than termination of this Agreement).

47. Lender's Step in

- 47.1. Upon the occurrence of a Terminal Operator Default, as defined in clause 42 (*Terminal Operator Default*) and for so long as such Terminal Operator Default persists the Lenders, if applicable, shall be entitled to exercise their rights to step in under the Finance Direct Agreement.

48. TNPA Default

- 48.1. Definition "**TNPA Default**" means any one of the following events:
- 48.1.1. an expropriation or requisition of a material part of the Terminal, or all or a material part of the Terminal being removed from the possession of the Terminal Operator by TNPA so as to substantially prevent the Terminal Operator from the Operation and Maintenance of the Terminal and/or performing the Services or any of them, other than in terms of this Agreement;
- 48.1.2. 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 the aggregate exceeds the sum of R [*insert amount*] and such failure continues for 20 (twenty) Business Days from receipt by TNPA of a notice of non-payment from the Terminal Operator;
- 48.1.3. a breach by TNPA of its obligations under this Agreement which substantially frustrates or renders it impossible for the Terminal Operator to perform its obligations under this Agreement for a continuous period of 15 (Fifteen) Days.

48.2. Termination for TNPA Default

- 48.2.1. On the occurrence of TNPA Default, or within 60 (sixty) Days after the Terminal Operator becomes aware of same, the Terminal 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, unless otherwise in dispute, the Terminal Operator may serve a further notice on TNPA terminating this Agreement with immediate effect.

48.2.2. The rights of the Terminal Operator (to terminate or otherwise) under this clause are in addition (and without prejudice) to any other right that the Terminal Operator may have in law to claim the amount of loss or damages suffered by the Terminal Operator on account of the acts or omissions of TNPA (or to take any action other than termination of this Agreement).

48.2.3. The Terminal 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.

48.3. **Invalidation in terms of section 67 of the Act**

48.3.1. In the event that it is necessary to change the use to which the Terminal is put in order to improve the safety, security, efficiency and effectiveness of the operations of the Port in accordance with section 67(1)(a) and section 67(1)(b) of the Act, 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 Terminal Operator Agreement is invalid from the date stipulated in that directive.

48.4. **Termination for Force Majeure**

If in the circumstances referred to in clause 39 (*Force Majeure*), the Parties have failed to reach agreement on any modification to this Agreement pursuant to that clause within 90 (ninety) 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 an 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.

49. **No Better and No Worse**

49.1. The Parties agree that on the happening of any of the events or circumstances listed in clause 49.2 (the "**Occurrence**"), the Terminal Operator shall, as soon as is reasonably possible, but in any event within 15 (fifteen) Business Days of the happening of the event or circumstance, put forward to TNPA one or more proposals regarding how to address the impact of such event or circumstance ("**Proposals**"). Each of the Proposals must have the intention and effect of placing the Terminal Operator in a No Better and No Worse position following the Occurrence, including by way of an extension of the Operational Period.

49.2. The Occurrences are:

49.2.1. Force Majeure, as dealt with in clause 39;

- 49.2.2. Unforeseeable Conduct, as dealt with in clause 40;
- 49.2.3. the reinstatement of the Terminal, as dealt with in clause 14.3; and
- 49.2.4. If there is more than one Proposal, the Parties, acting reasonably, shall endeavour to reach an agreement as to which of the Proposals to adopt and implement, and in relation to any Proposal TNPA shall be entitled to request reasonable substantiation as to the manner in which the Proposal will place the Terminal Operator in a No Better and No Worse position. If there is more than one Proposal and the Parties are unable to reach agreement within a period of 30 (thirty) Business Days as to which Proposal to adopt, the Terminal Operator shall elect in its sole discretion which of the Proposals to adopt, and TNPA shall extend the Operating Term by the period which has been demonstrated by the Terminal Operator in that proposal to place it in a No Better and No Worse position.

49.3. Any reference in this Agreement to “**No Better and No Worse**” or to leave the Terminal Operator in a “No Better and No Worse” position shall be construed by reference to the Terminal Operator’s:

- 49.3.1. rights, duties and liabilities discharged or to be discharged and/or costs and expenses under or arising pursuant to the performance of this Agreement and any Associated Agreement to which it is party; and
- 49.3.2. ability to perform its obligations and exercise its rights in terms of this Agreement and any Associated Agreement to which it is party,

so as to ensure that:

- 49.3.3. the Terminal Operator will be left in a position on termination of this Agreement by effluxion of time, including any Extension Period, which is No Better and No Worse position than it would have been had the Occurrence not occurred (calculated by reference to the Base Case Financial Model);
- 49.3.4. the ability of the Terminal Operator to meet its obligations or to exercise its rights from time to time in terms of this Agreement are not adversely affected or improved as a consequence of the Occurrence.

49.4. For the avoidance of doubt, this Agreement may be amended to fulfil the principles detailed in this clause 49 (*No Better No Worse*) including any amendments necessary to extend the Operating Term.

50. Effects of Termination

50.1. Termination

- 50.1.1. Except as otherwise provided in any other provision of this Agreement, on service of a

notice of termination, this Agreement shall only terminate in accordance with the provisions of this clause 50 (*Effects of Termination*).

50.2. Continued effect - no waiver

50.2.1. 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.

50.3. Continued performance

50.3.1. Subject to any exercise by TNPA of its rights to perform, or to procure a third party to perform, the obligations of the Terminal 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 50 (*Effects of Termination*).

50.4. Transfer of the Terminal to TNPA, Associated Agreements and other assets

50.4.1. On the expiry or termination of this Agreement or, where applicable, the service of a notice of termination in accordance with this Agreement for any reason:

50.4.1.1. if that occurs prior to the Target Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to TNPA, the Terminal Operator shall transfer to, and there shall vest in, TNPA such part of the Construction Works and/or the Terminal Infrastructure as shall have been constructed and such unencumbered items of the fixed plant and equipment as shall have been procured by the Terminal Operator for the execution of the Project and which the Terminal Operator agrees to sell to TNPA, and if TNPA so elects: all plant and all materials on or near to the Project Site and intended for the Project shall remain available to TNPA for the purposes of completing the Construction Works, subject to payment of the Terminal Operator's costs thereof; and

50.4.1.2. the construction plant shall remain available to TNPA for the purposes of completing the Construction Works, subject to payment of the Terminal Operator's reasonable costs and further provided that TNPA shall, to the extent necessary assume all risk previously borne by the Terminal Operator in respect thereof and indemnifies the Terminal Operator accordingly.

50.4.2. If TNPA so elects, the Terminal Operator shall procure that any of the Associated Agreements specified by TNPA are assigned to TNPA or any third party nominated by it, provided that where termination occurs under clause 48 (*TNPA Default*), the consent of the relevant Subcontractors shall be required. Where TNPA does not so elect, or any Subcontractor whose consent is required refuses that consent, the Terminal Operator shall procure that all relevant Associated Agreements automatically terminate when this Agreement terminates.

50.4.3. On service of a notice of termination in accordance with this Agreement for any reason, the Terminal Operator shall:

50.4.3.1. engage TNPA with the view to facilitating the handover of the Terminal on such further terms and conditions as may be agreed to in writing between the Parties, failing which the Terminal Operator shall handover the Terminal to TNPA on payment of appropriate Compensation as provided for in Part VII of this Agreement;

50.4.3.2. where possible on such further terms and conditions as may be agreed to in writing between the Parties, 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 Terminal required by TNPA in connection with the Project and the Services;

50.4.3.3. where possible, on such further terms and conditions as may be agreed to in writing between the Parties, procure that any Intellectual Property Rights shall be provided and transferred to TNPA.

50.4.3.4. deliver to TNPA (as far as not already delivered to TNPA) one complete set of:

50.4.3.4.1. as-built drawings showing all alterations made to the Terminal Infrastructure since the Actual Operation Commencement Date of the Terminal;

50.4.3.4.2. Maintenance, Operation and training manuals for the Terminal; and

50.4.3.4.3. the historical operating data and plans of the Terminal, its furniture, fittings and Equipment in a format acceptable to TNPA, provided that any reformatting shall be carried out at TNPA's cost;

50.4.3.5. 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 the Terminal Operator under this Agreement and included in the Terminal are assigned, or otherwise transferred, to TNPA;

50.4.3.6. deliver to TNPA the information referred to in the clause 29 (*Financial Accounts*,

Reports, inspection and reporting of changes), except where such documents are required by Law to be retained by the Terminal Operator or any Subcontractor concerned, in which case complete copies shall be delivered to TNPA; and

- 50.4.3.7. ensure that provision is made in all contracts relating to the Operation and Maintenance of the Terminal, excluding commercial contracts concluded between the Terminal Operator and its customers, that TNPA will be in a position to exercise its rights, and the Terminal Operator will be in a position to comply with its obligations, under clause 50.4.2.

50.5. **Termination**

- 50.5.1. On completion of the transfer required by clause 50.4 (*transfer to TNPA of Terminal, 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 50.7 (*Continuing Obligations*), all rights and obligations of TNPA and the Terminal Operator under this Agreement shall cease and be of no further force and effect.

50.6. **Transitional arrangements**

- 50.6.1. On the termination of this Agreement for any reason, for at least 30 (thirty) Days both before and after that expiry or any earlier termination, the Terminal Operator shall have the following duties:

- 50.6.1.1. the Terminal Operator shall cooperate 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;

- 50.6.1.2. the Terminal Operator shall as soon as practicable remove from the Project Site all property not required by TNPA pursuant to clause 50.4 (*transfer to TNPA of the Terminal, 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 Terminal Operator, save where the Termination is occasioned by Terminal Operator Default in which event TNPA shall not be obliged to pay such proceeds to the Terminal Operator;

- 50.6.1.3. the Terminal Operator shall, by no later than the expiry or the date of any earlier termination of this Agreement becoming effective, deliver to TNPA:

- 50.6.1.3.1. any keys, remote access apparatus and computer access cards to the Terminal; and
- 50.6.1.3.2. without prejudice to clause 12 (*Access to documents, copyright and related matters*), any copyright licenses for any computer programmes (or licenses to use the same) necessary for the operation of the Terminal (but excluding computer programmes which have been developed or acquired by the Terminal Operator for its own use and not solely for the purposes of provision of any of the Services at the Terminal or the assignment or transfer of which is otherwise restricted); and
- 50.6.1.4. as soon as practicable vacate the Project Site and (without prejudice to the rest of this clause 50 (*Effects of Termination*)) shall leave the Project Site and the Terminal in the same condition as described in the Completion Certificate as at the Actual Operations Commencement Date, fair wear and tear excepted, for the continued operation of the Terminal.
- 50.6.2. 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 earlier termination of this Agreement, the Terminal Operator shall co-operate with TNPA fully in such tender process including (without limitation) by:
- 50.6.2.1. providing any information which TNPA may reasonably require to conduct such tender excluding any information which is commercially sensitive to the Terminal Operator (and, for the purpose of this sub-clause, commercially sensitive shall mean information which would if disclosed to a competitor of the Terminal Operator give that competitor a competitive advantage over the Terminal Operator and thereby prejudice the business of the Terminal Operator, but shall exclude any information dealing with employment matters); and
- 50.6.2.2. assisting TNPA by providing all (or any) participants in such tender process with access to the Project Site and the Terminal provided that any such access is requested by TNPA in writing at least 2 (two) Business Days before such access is required and further provided that all such access is subject to the Terminal Operator's usual site rules and exercised during the Terminal Operator's usual business hours.
- 50.6.3. In the event that TNPA requires the Terminal Operator to continue to assist for any further period, over and above a period of at least 30 (thirty) days both before and after that expiry or any earlier termination, TNPA and the Terminal Operator shall agree on

terms of for such continuation, failing which the Terminal Operator shall not be obliged to provide any Services or any further assistance to TNPA.

50.7. Continuing Obligations

50.7.1. Save as otherwise expressly provided in this Agreement:

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

50.7.1.2. termination of this Agreement shall not affect the continuing rights and obligations of the Terminal Operator and TNPA under clauses 1 (*Definitions and Interpretation*), 7 (*Indemnity*), 60 (*Terminal Operator's warranties and undertakings*), 10 (*Environmental Compliance*), 12 (*Access to documents, copyright and related matters*), 13.1 (*Delivery of Performance Guarantees*), 13.6 (*TNPA's Assistance and Rights and Limitations on Liability*), 50.6 (*Transitional Arrangements*), 50.7 (*Continuing Obligations*), 59 (*Corrupt Acts and fraud*), 61 (*Expert Determination*), 62 (*Dispute Resolution*), and 63.4 (*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.

50.7.2. The continuing obligations referred to in this clause 50.7 shall extinguish on the conclusion of the handover of the Terminal to the satisfaction of both the Terminal Operator and TNPA.

51. Termination Amount for Terminal Operator Default

51.1. Retendering Election

51.1.1. Upon the occurrence of a Terminal Operator Default and subject to clause 51.1.3 TNPA shall be entitled either to:

51.1.1.1. re-tender the provision of the Operations in accordance with clause 51.2 (*Retendering Procedure*) should TNPA, within its entire and sole discretion, deem it necessary to maintain the continuity of Operations; or

51.1.1.2. exercise its rights as provided for in clause 50.4 and 50.5 and request the Terminal Operator to vacate and hand back the Terminal and or exercise its option to purchase the Terminal Equipment from the Terminal Operator in accordance with clause 51.3 (*No Retendering Procedure*) hereof below.

51.1.2. Subject to clause 51.1.3, TNPA shall notify the Terminal Operator of its election on or before the date falling 60 (sixty) Days after delivery of the relevant termination notice.

51.1.3. TNPA shall not be entitled to elect to retender the Operations for the remaining portion of the 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 the definition of “**Substitute Entity**” in the FDA) who have pre-qualified pursuant to a request for proposals issued by the Lenders for the undertaking of the Operations for the remaining portion of the Project Term.

51.2. **Retendering Procedure**

51.2.1. If TNPA elects to retender the provision of the Services under clause 51.1 (*Retendering Election*), the provisions set out below shall apply.

51.2.2. The Terminal Operator and or its members shall be precluded from participating, whether directly or indirectly in any manner whatsoever, in the retendering procedure.

51.2.3. Whilst not the primary objective, one of the outcomes of the retendering procedure, among others, shall be to establish and (subject to clause 51.2.12) pay to the Terminal Operator and or Lender, as the case may be, the Highest Compliant Tender Price less tendering costs and other amounts owed to TNPA.

51.2.4. 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.

51.2.5. TNPA shall notify the Terminal 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.

51.2.6. The Terminal 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 12 (*Access to documents, copyright and related matters*).

51.2.7. The Terminal Operator may, at its own cost, appoint a Tender Process Monitor for the purposes of observing and reporting to the Terminal Operator and the Lenders on TNPA's compliance with the Tender Process and making representations to TNPA in respect thereof. The Tender Process Monitor will not disclose any Confidential Information to the Terminal 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 Terminal Operator and or the Lenders as to whether it considers that TNPA has acted in accordance with the Tender Process.

51.2.8. 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. In addition, the Tender Process Monitor shall be entitled to 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 Terminal Operator in the event that the Terminal Operator refers a dispute relating to the Tender Process to dispute resolution in accordance with clause 62.7 (*fast-track dispute resolution*).

51.2.9. TNPA shall, with the express written consent of the Terminal Operators, require bidders to bid on either:

51.2.9.1. the acquisition of the Terminal Equipment and any other movable assets only; and/or

51.2.9.2. the acquisition of the entire business of the Terminal as a going concern, and

in either event, as set out in 51.2.9.1 and 51.2.9.2, 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 Terminal Operator Agreement is entered into, and in either event, TNPA shall cede its right to purchase the Terminal Equipment under clause 6.

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

51.2.11. If the Terminal Operator refers a dispute relating to the Highest Compliant Tender Price to dispute resolution in accordance with clause 62 (*Dispute Resolution*), TNPA shall nevertheless be entitled to enter into a New Terminal Operator Agreement.

51.2.12. Upon receipt of payment of the Highest Compliant Tender Price and within 180 (one hundred and eighty) Days after the Adjusted Highest Compliant Tender Price has been determined, TNPA shall pay to the Terminal Operator the Adjusted Highest Compliant Tender Price.

51.2.13. The discharge by TNPA of the payment in clause 51.2.12 above shall be in full and final settlement of any and all claims and rights of the Parties as against each other for breaches and or termination of this Agreement and the Project Documents whether under contract, delict or otherwise.

51.2.14. If the Adjusted Highest Compliant Tender Price is not accepted by the Terminal Operator, TNPA shall have no obligation to make any payment to the Terminal Operator, in which event the Terminal Operator shall remain obliged to comply with the provisions of clauses 50.4 (*Transfer of the Terminal to TNPA, Associated Agreements and other assets*) and 50.5 (*Termination*) above. In these circumstances,

TNPA shall be released from all liability to the Terminal Operator for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict or otherwise.

51.2.15. TNPA may elect at any time prior to the receipt of a Tender to follow the no-retendering procedure under clause 51.3 (*No Retendering Procedure*) by notifying the Terminal Operator that this election has been made.

51.2.16. If TNPA receives a Tender but decides not to complete the Tender Process, it shall notify the Terminal Operator of this decision and exercise its rights as per the provisions of clause 50.4 (*Transfer of the Terminal to TNPA, Associated Agreements and other assets*) and 50.5 (*Termination*) and or 51.3 (*No Retendering Procedure*).

51.3. **No Retendering Procedure**

51.3.1. If either TNPA is not entitled to or elects not to retender pursuant to clause 51.1 (*Retendering Election*), then the provisions of clause 6 shall apply mutatis mutandis.

51.3.2. Save for the payment to the Terminal Operator for the Terminal Equipment, TNPA shall have no obligation to make any payment to the Terminal Operator and shall be released from all liability to the Terminal Operator for breaches and/or termination of this Agreement and any other Project Documents whether under contract, delict or otherwise.

52. Termination Amount for TNPA Default

52.1. On termination of this Agreement as a result of TNPA Default or a Relief Event (in circumstances where the Terminal Operator Relief Event in question does not provide its own remedy for the payment of an amount to the Terminal Operator upon the occurrence of such event), then TNPA shall pay the Terminal Operator an amount equal to the direct actual costs incurred or sustained by the Terminal Operator as a consequence of the termination of the Agreement. The direct actual costs will be limited to the following:

52.1.1. the value of the Terminal Infrastructure which compensation shall be determined with reference to:

52.1.1.1. the fair value of the Equity of the Terminal Operator; alternatively

52.1.1.2. the discounted cash flow of all future proceeds in respect of the Terminal attributable to the Equity Holders (excluding debt funders) for the remainder of the Project Term;

whichever is higher as at the date of termination

52.1.2. an amount equal to the Debt (to the extent applicable);

- 52.1.3. redundancy payments for employees of the Terminal Operator that have been reasonably incurred by the Terminal Operator as a direct result of the termination of this Agreement including any redundancy payments to their employees;
- 52.1.4. the market value of any other assets and rights of the Terminal Operator or the Lenders (other than those transferred to TNPA pursuant to this Agreement) less liabilities of the Terminal 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 Terminal Operator arising out of agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in connection with the Terminal Operator's obligations in relation to the Project and agreements or arrangements entered into by the Terminal 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
- 52.1.5. amounts that TNPA is entitled to set off and deduct under clause 65.12 (*Set-off*)

provided always that the Terminal Operator shall use reasonable endeavours to mitigate its liability in respect of all such amounts (such total amount payable by the TNPA to the Terminal Operator shall constitute the "Termination Amount").

53. Termination Amount for invalidation in terms of Section 67 of the Act

- 53.1. On termination of this Agreement under clause 48.3 (*Invalidation in terms of Section 67 of the Act*), TNPA shall pay to the Terminal Operator, the aggregate of:
 - 53.1.1. an amount equal to the Debt (to the extent applicable) all fees, costs, expenses, breakage costs and breakage premiums in connection with any Finance Agreement;
 - 53.1.2. all breakage costs and premia payable by the Terminal Operator to the Lenders (or the counterparties 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 Terminal Operator and the Lenders taking all reasonable steps to mitigate such costs and premia;
 - 53.1.3. redundancy payments for employees of the Terminal Operator not transferring to TNPA that have been or will be reasonably incurred by the Terminal Operator as a direct result of the termination of the Agreement;

less, to the extent it is a positive amount, the aggregate of;
 - 53.1.4. all credit balances on any bank accounts held by or on behalf of the Terminal Operator on such Termination Date;
 - 53.1.5. the value of any right of the Terminal 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;

53.1.6. all amounts payable by the Lenders (or the counterparties to the interest rate hedging arrangements provided for in the Finance Agreements) to the Terminal Operator in connection with the early termination of such hedging arrangements as a result of the prepayment of amounts outstanding under the Finance Agreements; and

53.1.7. the market value of any other assets and rights of the Terminal Operator (other than those transferred to TNPA pursuant to this Agreement) less liabilities of the Terminal 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 Terminal Operator arising out of:

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

53.1.7.2. agreements or arrangements entered into by the Terminal 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;

53.1.8. amounts which TNPA is entitled to set off in terms of clause 65.12 (*Set-off*), 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.

54. Termination Amount for termination for Force Majeure or Expiry

54.1. On termination of this Agreement in accordance with the provisions of clause 48.4 (*Termination for Force Majeure*), no payments and/or compensation will be payable by either party to the other, and neither party will have any claim against the other for any payments and or compensation upon such termination.

54.2. No compensation shall be payable by TNPA if Termination of this Agreement is through its expiry by effluxion of time.

55. Termination Amount for Corrupt Act and fraud

55.1. On termination of this Agreement in accordance with clause 59 (*Corrupt Acts and fraud*), TNPA shall, subject to clause 55.3, pay the Terminal Operator, an amount equal to:

55.1.1. the market value of any other assets and rights of the Terminal Operator (other than those transferred to TNPA pursuant to this Agreement) less the liabilities of the Terminal Operator properly incurred in connection with this Agreement, provided that

no account shall be taken of any liabilities and obligations of the Terminal Operator arising out of:

- 55.1.1.1. agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in connection with the Terminal Operator's obligations in relation to the Project; and
- 55.1.1.2. agreements or arrangements entered into by the Terminal 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;
- 55.1.1.3. less any amounts that TNPA is entitled to set off and deduct under clause 65.12 (*Set-off*).

55.2. If the aggregate of the amounts referred to above is less than zero, then, for the purposes of the calculation in this clause 55.1 the aggregate shall be deemed to be zero.

55.3. If the termination is as a result of a Corrupt Act on the part of the Terminal Operator, then the amount payable to the Terminal Operator, inclusive of shares and the like, will be zero.

56. Payment of Termination Amount

56.1. "**Notice Date**" means the date when the Termination Amount has been determined in accordance with clause 53 (*Termination amount for invalidation in terms of Section 67 of the Act*) or clause 55 (*Termination Amount for corrupt gifts and fraud*);

56.2. "**Termination Amount**" means any compensation payable by TNPA to the Terminal Operator on early termination of the Agreement under clause 53 (*Termination amount for invalidation in terms of Section 67 of the Act*) and 55 (*Termination Amount for corrupt gifts and fraud*).

56.3. "**Repayment Rate**" means the base interest rate on the together with 50% (fifty per cent) of the margin on such base interest rate.

57. Method of payment

57.1. TNPA shall pay to the Terminal Operator the Termination Amount no later than 60 (sixty) Days after the Notice Date unless it elects to pay in accordance with clause 57.2 below.

57.2. TNPA may elect to pay the Termination Amount:

57.2.1. in instalments, on the dates as may be agreed to between the parties (the "**Instalment Dates**"); or

57.2.2. as the Parties may otherwise agree.

57.3. 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 36 (*Default Interest*).

57.4. If TNPA has elected to pay in accordance with clause 57.2 above, it may (on 30 (thirty) Days prior written notice to the Terminal Operator) elect to pay any outstanding element of the Termination Amount in full.

57.5. If TNPA fails to make a payment to the Terminal Operator in accordance with clause 57 (*Method of Payment*) or clauses 57.2 and 57.3 above, the Terminal Operator may issue a notice to TNPA declaring any unpaid and outstanding element of the Termination Amount to be immediately due and payable.

57.6. TNPA shall be entitled to set off against any Termination Amount, any monies which are due and payable by the Terminal Operator at the time for payment of the Termination Amount.

58. Payment Expert Calculations

58.1. If any calculation or valuation is required to be made for the purposes of determining an amount payable by the TNPA to the Terminal Operator pursuant to clause 57.1, the same shall be made by the Payment Expert appointed by the Parties and the Lenders or, in the absence of agreement within [fifteen (15)] Business Days, by the President of the South African Institute of Chartered Accountants

58.2. The Terminal Operator and the TNPA shall ensure that the Payment Expert is appointed within [fifteen (15)] Business Days of delivery by the Terminal Operator of the second notice in terms of clause 49.2. The Payment Expert shall have [fifteen (15)] Business Days to calculate the amount payable by the TNPA to the Terminal Operator pursuant to this clause 58 (*Payment Expert Calculations*).

58.3. Upon determination of the amount payable by the TNPA to the Terminal Operator pursuant to this clause 58 (*Payment Expert Calculations*), the Terminal Operator shall be entitled to issue a written demand to the TNPA for payment of such amount.

58.4. In making any determination pursuant to this clause 58.2 (*Payment Expert Calculations*), the Payment Expert shall act as an expert and not an arbitrator.

PART VIII – PROCEDURAL ISSUES

59. Corrupt Acts and fraud

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

59.2. If the Terminal 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 59.2.1 to 59.2.6 below:

- 59.2.1. If the Corrupt Act is committed in relation to the Project or this Agreement by the Terminal Operator, any Shareholder, any director of the Terminal Operator, any director of any Shareholder, or any employee of the Terminal Operator or any Shareholder acting under the authority of or with the knowledge of a director of the Terminal 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 Terminal Operator;
- 59.2.2. If the Corrupt Act is committed in relation to the Project or this Agreement by an employee of the Terminal Operator or of any Shareholder acting of his or her own accord, then in any such case, TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate unless within 10 (ten) Business Days of the Terminal 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;
- 59.2.3. If the Corrupt Act is committed in relation to the Project or this Agreement 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 Terminal Operator of termination and this Agreement will terminate unless within 60 (sixty) Business Days of its receipt of such notice the Terminal Operator terminates the relevant Subcontract and procures the performance of the relevant part of the Project Deliverables by another Person, where relevant;
- 59.2.4. if the Corrupt Act is committed in relation to the Project or this Agreement by an employee of a Subcontractor acting of his or her own accord, then TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate unless within 10 (ten) Business Days of its receipt of such notice the Terminal 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;
- 59.2.5. if the Corrupt Act is committed in relation to the Project or this Agreement 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 the TNPA may give written notice of termination to the Terminal Operator and this Agreement will terminate unless, within [eighty (80)] Business Days of its receipt of such notice, the Terminal Operator procures the termination of such Lender's involvement in the Project (in any capacity whatsoever including, without limitation, as Lender under the Financing Agreements) and provides the TNPA with satisfactory proof that such Lender's entire participation in the Debt and in any undrawn financial commitments under the Financing Agreements have been assumed by any other financial institution (including any one

or more of the remaining Lenders) or any of the Shareholders, whether by means of Equity contributions or otherwise;

59.2.6. if the Corrupt Act is committed by any other Person not specified in clauses 59.2.1 to 59.2.5. above but involved in the Project as a Subcontractor or supplier to any Subcontractor or to the Terminal Operator, then TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate unless within 40 (forty) Business Days the Terminal 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

59.2.7. any notice of termination under this clause 59.2 shall specify:

59.2.7.1. the nature of the Corrupt Act;

59.2.7.2. the identity of the party or parties who TNPA believes have committed the Corrupt Act; and

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

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

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

59.3.2. any direct losses sustained by TNPA in consequence of any breach of this clause by the Terminal Operator.

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

59.5. The Terminal Operator shall notify TNPA of the occurrence (and details) of any Corrupt Act promptly upon the Terminal Operator becoming aware of its occurrence.

60. Terminal Operator Warranties and Undertakings

60.1. Terminal Operator's General Undertakings

60.1.1. As between the Parties and save as otherwise expressly provided for in this Agreement, at all times during the Operating Term, the Terminal Operator shall exercise its rights and perform all of its obligations as provided for in this Agreement, at its sole cost and risk and in compliance with the requirements of:

60.1.1.1. applicable Laws;

- 60.1.1.2. the Consents;
- 60.1.1.3. the terms and conditions of this Agreement;
- 60.1.1.4. the standards of a Reasonable and Prudent Operator; and
- 60.1.1.5. relevant manufacturers' guidelines and instructions.

60.1.2. The Terminal Operator agrees and undertakes that, as between the Terminal Operator and TNPA that:

- 60.1.2.1. the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge, all environmental and or health and safety obligations in relation to the Terminal and the Project Site pursuant to and in accordance with the applicable Consents and Environmental Laws;
- 60.1.2.2. the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations in relation to any contamination of the Terminal which has arisen as a direct result of the provision of the Services by the Terminal Operator pursuant to and in accordance with the applicable Consents and Laws;
- 60.1.2.3. the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations pursuant to any remediation order issued by any Responsible Authority pursuant to and in accordance with the applicable Consents and Environmental Laws in respect of any contamination of the Terminal and the Project Site, which has arisen as a direct result of the carrying out of the Services by the Terminal Operator;
- 60.1.2.4. the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations pursuant to any obligations or requirements to decommission the Terminal Infrastructure at the end of its life, pursuant to and in accordance with the applicable Consents and Laws;
- 60.1.2.5. if any consequence arises pursuant to any circumstance, event or situation detailed in clause 60.1.2, the Terminal Operator shall be liable for and bear the full responsibility of and consequences for such circumstance, event or situation, and the TNPA shall not bear any liability, responsibility or consequence for or of such circumstance, event or situation, including any consequential Terminal Operator Default, unless, and then to such extent, such consequence arises as a result of a Terminal Operator Relief Event and/or any negligent act or omission

on the part of TNPA, alternatively on the part of any person appointed by TNPA or acting on behalf of TNPA, in which event TNPA shall be liable, and will bear responsibility, for such circumstance, event or situation;

60.1.2.6. TNPA has no obligations of any nature to monitor compliance with or to enforce the terms and conditions of any of the Consents, remediation orders or directives held by and issued to the Terminal Operator or any person acting on its behalf (save to the extent that they place specific obligations on the part of TNPA);

60.1.2.7. if the Terminal Operator fails to comply with any of its obligations under clause 60.1.2, it alone shall be liable for and bear the full responsibility of and consequences for such failure, and TNPA shall not bear any liability, responsibility or consequence for or of such failure, unless, and then to such extent, such failure arises as a result of a Terminal Operator Default and/or any negligent act or omission on the part of TNPA, alternatively on the part of any person appointed by TNPA or acting on behalf of TNPA, in which event TNPA shall be liable, and will bear responsibility, for any liability, responsibility or consequence of such failure; and

60.1.2.8. the Terminal Operator indemnifies and shall hold harmless, upon demand, TNPA against any claims, damages, losses, expenses and any other consequences of or arising out of the Terminal Operator's failure to comply with this clause 60.1.2 (unless, and then to such extent, that such failure arises as a result of a Terminal Operator Default).

60.1.3. The Terminal Operator shall ensure that the Independent Certifier shall, in the exercise of its duties for the duration of this Agreement, owe a duty of care to the TNPA and that the TNPA shall be entitled to receive copies of all notices, reports and any other documentation issued to the Terminal Operator by the Independent Certifier and or issued by the Terminal Operator to the Independent Certifier in terms of such agreement.

60.1.4. The provisions of clause 60.1.2 shall remain in full force and effect after the Termination Date.

60.2. Terminal Operator Warranties

60.2.1. The Terminal Operator represents and warrants to the TNPA as on the Effective Date and on each day thereafter during the Operating Term (unless the contrary is indicated in the relevant provision) that:

60.2.1.1. the Terminal Operator is a limited liability company, duly incorporated and validly

existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement, the Associated Agreements, the Financing Agreements and the Project Documents;

- 60.2.1.2. the Terminal Operator has the sole purpose, object and business of undertaking the Project and providing Services;
 - 60.2.1.3. its obligations under this Agreement are legal, valid, binding and enforceable against it, in accordance with the terms of this Agreement;
 - 60.2.1.4. once the Financing Agreements have been executed, it has been duly executed on proper authority and is in full force and effect;
 - 60.2.1.5. once the Associated Agreements have been executed, it has been duly executed on proper authority and is in full force and effect;
 - 60.2.1.6. as at the Effective Date, the execution and performance of any of the Associated Agreements, Project Documents or Financing Agreements do not and will not contravene any provision of the memorandum of incorporation of the Terminal Operator or any order or other decision of any Responsible Authority or arbitrator that is binding on the Terminal Operator;
 - 60.2.1.7. all Consents (whether provisional or final) required by the Terminal Operator and its Subcontractors for the conduct of the Project are in full force and effect as at the Effective Date, save for any Consents which are not required under the Laws to be obtained by the Effective Date, provided that:
 - 60.2.1.8. the Terminal Operator warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent will not be granted on reasonable terms by the time the Terminal Operator, its Subcontractors or suppliers are required to obtain such Consent; and
 - 60.2.1.9. the Terminal Operator knows of no reason why any provisional Consents issued to it in terms of the Environmental Laws will not be converted into final Consents in order for it to be permitted to commence the Project Deliverables.
- 60.2.2. the Terminal Operator and its Subcontractors have, at all times during the Operating Term, all Consents required to enable them to fulfil their obligations in terms of this Agreement, the Associated Agreements and have complied in all material or relevant respects, with such Consents and the Laws applicable to the Terminal Operator and its Subcontractors;
- 60.2.3. the Terminal Operator shall inform the TNPA of any cancellations, amendments, disputes, penalisations and or revocations in respect of any Consents, which result in the Terminal Operator being unable to comply with the Agreement, within ten (10)

Business Days of becoming aware of such occurrence. If any such cancellation, amendment, dispute, penalisation and or revocation takes place, the Terminal Operator shall within fifteen (15) Business Days of the receipt of the notification thereof by the TNPA, provide the TNPA with a detailed plan explaining how the Terminal Operator will deal with the issue so as to ensure that it does not cause any interruptions to the provision of the Services, and the TNPA shall, in its sole discretion, be entitled to decide whether or not to accept such plan;

60.2.4. no litigation, arbitration, investigation or administrative proceeding is in progress as at the Effective Date or, to the best of the knowledge of the Terminal Operator as at the Effective Date (having made all reasonable enquiries), threatened against it which is likely to have a material adverse effect on the ability of the Terminal Operator to conduct the Project;

60.2.5. as at the Effective Date only, no proceedings or any other steps have been taken or, to the best of the knowledge of the Terminal Operator (having made all reasonable enquiries), are threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final), business rescue or deregistration of Terminal Operator or for the appointment of a liquidator, judicial manager business rescue practitioner or similar officer over it or over any of its assets;

60.2.6. all information disclosed by or on behalf of the Terminal Operator to the TNPA at any time up to the Effective Date and, in particular, during the bid process preceding the award of this Agreement to the Terminal Operator, is true, complete and accurate in all material respects and the Terminal Operator is not aware of any material facts or circumstances not disclosed to the TNPA and which would if disclosed, be likely to have an adverse effect on the TNPA's decision (acting reasonably) to enter into this Agreement with the Terminal Operator.

60.3. **Breach of Terminal Operator Warranties**

60.3.1. If the Terminal Operator fails to comply with any of the warranties in terms of clause 60.2, then the Terminal Operator shall notify the TNPA of such non-compliance within /5 (five)/ Business Days of becoming aware thereof.

60.4. **TNPA Warranties**

60.4.1. The TNPA represents and warrants to the Terminal Operator as on the Effective Date and on each day thereafter during the Operating Term, as follows:

60.4.2. it is duly established under the laws of South Africa and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder;

60.4.3. the execution and performance of this Agreement by it has been duly authorised by

all necessary action, and its obligations hereunder constitute valid, binding and enforceable obligations;

60.4.4. it is the owner of the Project Site and is entitled to give the Terminal Operator access to the Project Site to undertake the actions as set out in this Agreement and it knows of no reason why the Terminal Operator should be prevented from carrying out the Project on the Project Site, which includes any matters arising in connection with the condition of the Project Site

60.4.5. all TNPA Consents required by the TNPA are in full force and effect as at the Effective Date, save for any Consents which are not required under the Laws to be obtained by the Effective Date, provided that:

60.4.5.1. TNPA warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such TNPA Consent will not be granted on reasonable terms by the time TNPA, its subcontractors or suppliers are required to obtain such Consent; and

60.4.5.2. TNPA knows of no reason why any provisional TNPA Consents issued to it in terms of the Environmental Laws will not be converted into final TNPA Consents in order for it to be permitted to undertake any works or actions required of TNPA in relation to the LNG Terminal and the TNPA Infrastructure;

60.4.6. TNPA shall inform the Terminal Operator of any cancellations, amendments, disputes, penalisations and or revocations in respect of any TNPA Consents, which result in the TNPA being unable to comply with the Agreement, within 10 (ten) Business Days of becoming aware of such occurrence. If any such cancellation, amendment, dispute, penalisation and or revocation takes place, TNPA shall within fifteen (15) Business Days of delivery of the notification to the Terminal Operator, provide the Terminal Operator with a plan explaining how TNPA will deal with the issue so as to ensure that it does not cause any interruptions to the provision of the Services by the Terminal Operator.

61. Expert Determination

61.1. Any dispute arising out of or in connection with this Agreement which is referred to resolution in terms of this clause 61 (*Expert Determination*) as may be agreed to between the Parties, shall be determined in accordance with the provisions of this clause 61. The dispute resolution provisions contained in this clause 61.1 shall only be used in respect of matters specifically agreed to by the Parties, 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 61 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 62 (*Dispute Resolution*). The *Expert Determination* shall be held in Durban and

the Parties shall endeavour to ensure that it is completed within 90 (ninety) Days after the appointment of such Independent Expert designated in the clause of this Agreement that provides for a dispute to be determined by an Independent Expert.

61.2. The Parties shall procure that the Independent Expert acts in accordance with the following criteria:

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

61.2.2. the Independent 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.

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

61.3.1. the Independent Expert shall have full and unrestricted powers in relation to the dispute resolution. In particular, but without limitation, the Independent 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;

61.3.2. the Independent 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;

61.3.3. the Independent 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;

61.3.4. the Independent Expert shall give his reasons for the award if so requested by either Party;

61.3.5. subject to any relevant provisions of this Agreement, the Independent Expert shall make such award as to costs as he deems appropriate. If the Independent Expert's charges and any other costs have to be paid before the Independent 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 Independent 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.

61.4. The Parties shall use their best endeavours to procure that the Independent Expert complies with the provisions of clause 61.2 and that the procedures detailed in clause 61.3 above are followed.

61.5. Nothing in this clause 61.1 shall prevent a Party from seeking relief, in respect of matters referred to dispute resolution in terms of clause 61.1 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 61.1, 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 62 (*Dispute Resolution*).

62. Dispute Resolution

62.1. Referable disputes

62.1.1. The provisions of this clause 62 (*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, including but not limited to any dispute about its interpretation, rectification or termination.

62.2. Internal referrals

62.2.1. In the event of a dispute arising between the parties, the Parties may in good faith attempt, to resolve such dispute in accordance with the following informal process:

62.2.1.1. 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; within 5 (five) days of such a dispute being declared; and

62.2.1.2. if the Parties have been unable to resolve the dispute within 5 (five) Days of referral to the persons specified in clause 62.2.1.1, either Party may, to refer the dispute for a decision by the chief executive officer of TNPA and the chief executive officer or equivalent officer of the Terminal Operator.

62.2.2. In attempting to resolve the dispute in accordance with the provisions of this clause 62.2 (*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 the necessity for formal proceedings.

62.2.3. Any dispute which has not been resolved by the representatives contemplated in clause 62.2.1 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.

62.3. Performance to continue

No reference of any dispute to any resolution process in terms of this clause 62 (*Dispute Resolution*) shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

62.4. Litigation

62.4.1. Save where any dispute has been expressly referred for determination in terms of clause 62.7 (*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.

62.4.2. Neither Party is limited to institute proceedings before the High to resolve the dispute. If the informal resolution of any dispute has failed, then the dispute may be referred to arbitration by either Party in accordance with the principles below:

62.4.2.1. any dispute arising from or in connection with this Agreement may be finally resolved by arbitration in accordance with the Rules of the Association of Arbitrators (Southern Africa) or its successor current at the date of the dispute arising;

62.4.2.2. where the dispute is for a sum of less than R5 million (five million Rand) and does not relate to the potential termination of this Agreement, the dispute shall be heard before a single arbitrator and the arbitrator will be a person mutually agreed on or, in the absence of agreement, appointed by the Association of Arbitrators (Southern Africa) or its successor, subject to the provisos that:

62.4.2.2.1. articles 3 and 4 of the Rules relating to the issuing of a notice of arbitration and response will not be prerequisites to the making of the appointment; and

62.4.2.2.2. the arbitrator so appointed must be a practising senior counsel, a retired judge or an attorney with 10 to 15 years of experience in practice.

62.4.2.3. where the dispute is for a sum exceeding R5 million (five million Rand) and/or relates to the potential termination of this Agreement, the dispute shall be heard before 3 (three) arbitrators, and each Party shall be responsible for the appointment of 1 (one) arbitrator and the 3rd (third) arbitrator will be a person mutually agreed on or, in the absence of agreement, appointed by the Association of Arbitrators (Southern Africa) or its successor, subject to the provisos that:

62.4.2.3.1. articles 3 and 4 of the Rules relating the issuing of a notice of

arbitration and response will not be prerequisites to the making of the appointment; and

62.4.2.3.2. the arbitrator so appointed must be a practising senior counsel, a retired judge or an attorney with at least 15 years of experience in practice.

62.4.2.4. Subject to the provisions in clauses 62.4.2.1, 62.4.2.2 and 62.4.2.3, the arbitration proceedings will be conducted in accordance with the provisions of the Arbitration Act, 1965, or its successor.

62.4.2.5. A written notice by a Party to the other Party that a dispute be submitted to arbitration will be deemed to be a legal process for the purposes of interrupting extinctive prescription.

62.4.3. Notwithstanding anything to the contrary set out herein, no provision of this Agreement shall prevent any Party from approaching a court of law for urgent relief.

62.5. Interlocutory proceedings

62.5.1. 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.

62.6. Suspension of prescription

62.6.1. 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 a dispute for resolution in terms of clause 62.2.1. and shall resume running from the date the resolution thereof fails and if any other subsequent proceedings are instituted in respect of that dispute, time shall again cease to run from the date of service of the relevant summons or notice of motion.

62.7. Fast-track dispute resolution

62.7.1. Disputes arising in respect of the provisions of clauses 1.1.42. (CPI), 14.2 (*Uninsurable Risk*) 38 (*Consequences of Compensation Event*) and 45 (*Remedy Provisions*) must be expressly referred for determination pursuant to this clause 62.7 (*fast-track dispute resolution*) shall be determined by the relevant Independent Expert.

- 62.7.2. 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.
- 62.7.3. 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.
- 62.7.4. 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.
- 62.7.5. The Independent Expert shall provide both Parties with his or her written decision on the dispute, within 20 (twenty) Business Days after the dispute is referred to him (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.
- 62.7.6. The Independent Expert's costs of dealing with any dispute referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 62.7.7. 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.
- 62.7.8. 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.

62.7.9. 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.

62.7.10. 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 negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.

62.7.11. Should any Party fail to cooperate 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:

62.7.11.1. 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

62.7.11.2. 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 costs *de bonis propriis* as those expressions are understood in the Uniform Rules of Court.

62.7.12. 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.

63. Liabilities

63.1. Direct Losses

63.1.1. The Parties' liability to each other in respect of any claim that arises pursuant to this Agreement, whether under delict or contract, shall be as detailed in this Agreement,

and no Party shall have any additional liability to the other Party in respect of such claim.

63.1.2. Notwithstanding anything contained to the contrary in this Agreement, neither Party shall be liable to the other Party for any Special Loss suffered by such other Party as a result of any act or omission by the first Party.

63.1.3. Save as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any losses, liabilities, expenses, damages, costs and claims (including Claims) suffered or claimed which arise out of, under or in connection with any alleged breach of any statutory duty or delictual act or omission or otherwise.

63.2. Mitigation

63.2.1. The Parties shall comply with their common law duties to mitigate any losses, liabilities, expenses, damages, costs and claims (including Claims) they may have pursuant to this Agreement.

63.3. Survival of clause 63

63.3.1. The provisions of this clause 62 (*Dispute Resolution*):

63.8.1.1 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;

63.8.1.2 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.

63.4. Information and Audit Access

63.4.1. As and when required by TNPA, the Terminal Operator shall provide to TNPA such information, documents, records and the like in the possession of, or available to, the Terminal Operator (and to this end the Terminal 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 Terminal Operator has included or shall include, relevant terms in all Project Documents to this effect) as may reasonably be requested and clearly specified by TNPA in writing for the purpose of complying with any of its statutory reporting obligations including where pursuant to the PFMA or the Auditor-General Act, 1995.

63.4.2. Without limiting the generality of the foregoing, the Terminal Operator shall, at TNPA's cost:

- 63.4.2.1. 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 Responsible Authority, including reports and returns regarding the physical condition of any building occupied by TNPA, health and safety, national security, and environmental safety; and
- 63.4.2.2. note and facilitate TNPA's compliance with the Promotion of Access to Information Act, 2000 if TNPA is required to provide information to any Person pursuant to that Act, provided that this obligation does not constitute a waiver by the Terminal Operator of any of its rights to refuse to provide information requested under the Promotion of Access to Information Act.

64. Confidentiality

- 64.1. The Parties undertake that during the operation of, and after the expiration, termination or cancellation of, this Agreement for any reason, they will keep confidential all Confidential Information and:
- 64.1.1. Any other information which a Party ("**Disclosing Party**") communicates to the other Party ("**Recipient**") and which is stated to be or by its nature is intended to be confidential;
- 64.1.2. all and any other information of the same confidential nature concerning the business of the Disclosing Party which comes to the knowledge of the Recipient whilst it is engaged in negotiating the terms of this Agreement or after conclusion thereof, including:
- 64.1.2.1. details of the Disclosing Party's financial structures and operating results;
- 64.1.2.2. details of the Disclosing Party's strategic objectives and planning;
- 64.1.2.3. other than instances where any information is disclosed to equity funders and/or such other persons in the process of obtaining other forms of capital.
- 64.2. If the Recipient is uncertain as to whether any information is to be treated as confidential in terms of this clause 64 (*Confidentiality*), it shall be obliged to treat it as such until written clearance is obtained from the Disclosing Party.
- 64.3. Each Party undertakes, subject to clause 64.4, not to disclose Confidential Information and any information which is to be kept confidential in terms of this clause 64 (*Confidentiality*), nor to use such information for its own or anyone else's benefit.
- 64.4. Notwithstanding the provisions of clause 64.3, the Recipient shall be entitled to disclose any information to be kept confidential if and to the extent only that the disclosure is *bona*

fide and necessary for the purposes of carrying out its duties in terms of this Agreement provided that TNPA may not disclose any Confidential Information to any other division of Transnet or any director, officer, employee or agent of any such division, including but not limited to Transnet Port Terminals, without the Terminal Operator's prior written consent on each occasion.

64.5. The obligation of confidentiality placed on the Parties in terms of this clause 64 (*Confidentiality*) shall cease to apply to the Recipient in respect of any information which:

64.5.1. is or becomes generally available to the public other than by the negligence or default of the Recipient or by the breach of this Agreement by the Recipient;

64.5.2. the Disclosing Party confirms in writing is disclosed on a non-confidential basis;

64.5.3. has lawfully become known by or come into the possession of the Recipient on a non-confidential basis from a source other than the Disclosing Party having the legal right to disclose same, provided that such knowledge or possession is evidenced by the written records of the Recipient existing at the Commencement Date; or

64.5.4. is disclosed pursuant to a requirement or request by operation of law, regulation or court order, to the extent of compliance with such requirement or request only and not for any other purpose, provided that:

64.5.4.1. the onus shall at all times rest on the Recipient to establish that information falls within the exclusions set out in clauses 64.5.4.1 to 64.5.4.3 (both inclusive);

64.5.4.2. information will not be deemed to be within the foregoing exclusions merely because such information is embraced by more general information in the public domain or in the Recipient's possession; and

64.5.4.3. any combination of features will not be deemed to be within the foregoing exclusions merely because individual features are in the public domain or in the Recipient's possession, but only if the combination itself and its principle of operation are in the public domain or in the Recipient's possession.

64.6. In the event that the Recipient is required to disclose confidential information of the Disclosing Party as contemplated in clause 64.5.4, the Recipient will:

64.6.1. advise the Disclosing Party thereof in writing prior to disclosure, if possible;

64.6.2. take such steps to limit the disclosure to the minimum extent required to satisfy such requirement and to the extent that it lawfully and reasonably can;

- 64.6.3. afford the Disclosing Party a reasonable opportunity, if possible, to intervene in the proceedings;
- 64.6.4. comply with the Disclosing Party's reasonable requests as to the manner and terms of any such disclosure; and
- 64.6.5. notify the Disclosing Party of the recipient of, and the form and extent of, any such disclosure or announcement before such disclosure is made and where such notice is not possible, immediately thereafter.

64.7. The provisions of this clause 64 (*Confidentiality*) shall not prohibit the disclosure by the Terminal Operator to any providers of equity of such general information as may reasonably be required by such providers of equity for purposes of providing funding to the Project, provided that: disclosure by the Terminal Operator in such circumstances shall however be subject to the Terminal Operator ensuring by way of suitable confidentiality undertakings that any such information used by providers of equity only for the above purposes and that providers of equity similarly keep such information confidential.

65. Miscellaneous Matters

65.1. Addresses

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

65.1.1.1. in the case of TNPA:

postal address : Port of Durban

P.O. Box 1024

Durban, 4001

physical address : Queens Warehouse

237 Mahatma Gandhi
Road Durban, 4001

attention : The Port Manager

e-mail address : **[insert email address]**

65.1.1.2. in the case of the Terminal Operator:

postal address : **[insert postal address]**

physical address : **[insert physical address]**

attention : **[insert designated person]**

e-mail address : **[insert email address]**

65.1.2. 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:

65.1.2.1. if delivered by hand during ordinary business hours, to its physical address in clause 66.1. when so delivered

65.1.2.2. if delivered by courier, when so delivered by the courier and subject to proof of receipt; and

65.1.2.3. if delivered by e-mail, upon the following Business Day (unless a confirmation of receipt is received earlier) and subject to no non-delivery receipt being received by the sender.

65.1.3. Notwithstanding anything to the contrary herein, a written legal notice or process actually received by a Party shall be an adequate written notice or process, notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

65.1.4. A Party may change that Party's physical or postal addresses for this purpose to another physical or postal address, as the case may be, in South Africa (and not in any other country) or its contact details, by giving at least fifteen (15) days prior notice in writing to the other Party.

65.2. **Certificate of indebtedness**

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

65.2.1.1. any monies owing by the Terminal Operator to TNPA under this Agreement;

65.2.1.2. any obligations owing by the Terminal Operator to TNPA under this Agreement; and

65.2.1.3. the due date for payment of such monies or for performance of such obligations; shall be *prima facie* proof thereof.

65.3. **No Partnership or Agency**

- 65.3.1. This Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement. Neither Party shall have, nor represent that it has, any authority to make any commitments on the other Party's behalf.

65.4. Entire Agreement

- 65.4.1. 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.
- 65.4.2. If there is a conflict between the terms of this Agreement and those of any Schedule, the terms of this Agreement shall prevail.

65.5. Rights and remedies

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

65.6. Further undertakings

- 65.6.1. TNPA and the Terminal 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 necessary to implement or give effect to this Agreement and the transactions contemplated therein.

65.7. No Representations

- 65.7.1. 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.

65.8. Variation, Cancellation and Waiver

- 65.8.1. 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.
- 65.8.2. The 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.

65.9. Indulgences

- 65.9.1. 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.

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

65.9.2.1. 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 has expressly elected in writing not to exercise the right. If the Aggrieved Party 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

65.9.2.2. shall not be estopped (i.e. 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.

65.10. **Invalidity and Severability**

65.10.1. 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.

65.11. **Cession**

65.11.1. Neither party is permitted to cede, assign or delegate its rights and/or its obligations in terms of this Agreement without the prior written consent of the other party. Any assignment, delegation or cession without such consent shall be of no force and effect.

65.12. **Set-off**

65.12.1. Either Party shall be entitled to set off against monies owed by them to the other Party in terms of this Agreement, monies that the Party owes to them in terms of this Agreement and as agreed to by both parties.

65.13. **Applicable law**

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

65.14. **Language**

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

65.15. Jurisdiction of South African Courts

65.15.1. Subject to clauses 61 (*Expert Determination*) and 62 (*Dispute Resolution*), the Parties consent to the exclusive jurisdiction of the KwaZulu-Natal High Court of South Africa, for any proceedings arising out of or in connection with the Project and this Agreement.

65.16. Lender's Benefits

65.16.1. 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 the TNPA accepting and undertaking to fulfil any obligations imposed upon them by this Agreement.

65.17. Costs

The costs of and incidental to the preparation of this Agreement shall be borne by TNPA, provided that each Party shall bear its own costs of negotiating and concluding this Agreement.

65.18. Counterparts

This Agreement may be executed in more than one counterparts, each of which together shall constitute one and the same instrument.

Signed at _____ on _____ 2025

For: Transnet National Port Authority

Signature: _____

Name: **[Insert Name]**

Chief Executive, duly authorised and warranting such authority

Date: _____

Place: _____

Witness: _____

Witness: _____

Signed at _____ on _____ 2025

For: Terminal Operator

Signature: _____

Name: **[Insert Name]**

Chief Executive, duly authorised and warranting such authority

Date: _____

Place: _____

Witness: _____

Witness: _____

Schedule 1: Project Site

(To be provided by TNPA on or before the Signature Date)

Draft not for Signature

Schedule 2: Business Plan

(To be provided by the Terminal Operator)

Draft not for Signature

Schedule 3: Base Case Financial Model

(To be provided by the Terminal Operator)

Draft not for Signature

Schedule 4: Scope Of Services

- 1.1. The Terminal Operator may manage and operate the Terminal, as a Multi-Purpose Terminal, for the purpose of providing the following services:
 - 1.1.1. loading and stowage of Cargo onto vessels and off-loading and breaking out of Cargo from vessels;
 - 1.1.2. loading and trimming of Cargo onto vessels and breaking out and off-loading of Cargo from vessels and taking any measures necessary to ensure the ship's stability and cleanliness;
 - 1.1.3. the transfer of Cargo to a storage area or directly onto a truck or wagon and the transport of Cargo within the Terminal, including transport by way of pipeline, conveyor, vehicles or mechanical equipment;
 - 1.1.4. transshipment/re-shipment of Cargo either via the quay or directly from ship-to-ship, provided that one of the ships is contiguous with the quay;
 - 1.1.5. the stacking and or un-stacking onto/from open or covered stockpiles or the storage in vertical or horizontal silos of Cargo;
 - 1.1.6. the temporary storage of Cargo on open or covered stockpiles or in silos or in transit sheds or open storage yards provided that appropriate steps agreed upon with TNPA, are taken to reduce dust nuisance, contamination, and other forms of damage to port infrastructure, other cargoes, and the environment;
 - 1.1.7. organisation of the collection and delivery of Cargo, including the loading and discharge of trucks and rail wagons, and other arrangements necessary for the receipt for shipment and the delivery to, and the unloading and loading of, Vehicles, barges and railway wagons;
 - 1.1.8. the transfer of Cargo within the Terminal area and or their transfer between terminals if requested, including cargo transfers for customs inspection purposes.
 - 1.1.9. working of Cargo in the holds or on the deck of a vessel when such vessel is being loaded or unloaded;
 - 1.1.10. loading of Cargo onto conventional vessels and off-loading of Cargo from conventional vessels;
 - 1.1.11. the storage of Cargo ;
 - 1.1.12. the stacking and unstacking of Cargo ;
 - 1.1.13. the receipt for shipment and the delivery of Cargo ;
 - 1.1.14. the transfer of Cargo within the Terminal, and the transfer of Cargo between terminals if requested, including Cargo or cargo transfers from customs inspection purposes; and
 - 1.1.15. anything reasonably necessary or incidental thereto.
- 1.2. The provision of services in clause 1.1 includes engaging in the following activities:

- 1.2.1. tallying and sorting of Cargo ;
- 1.2.2. sampling, inspection and testing of Cargoes for quality control purposes, on behalf of both shippers / consignees and any Competent Authority, including checking on the condition of Cargo on discharge and before loading as well as on receipt for shipment and before delivery on inland transport means;
- 1.2.3. palletization and other forms of unitization of Cargo;
- 1.2.4. checking the condition of the ship's holds before loading;
- 1.2.5. lighterage services for general cargo vessels;
- 1.2.6. lashing, tommying and securing of the Cargo;
- 1.2.7. sweeping of the vessel's holds after discharge;
- 1.2.8. spill collection and disposal;
- 1.2.9. strapping of the Cargo after loading;
- 1.2.10. opening and closing of hatches;
- 1.2.11. shifting and re-stowing of Cargo in conventional, unitised and neo-bulk form;
- 1.2.12. checking the silo bins before new Cargo are received;
- 1.2.13. weighing, grading, sampling, sorting and repacking of Cargo ;
- 1.2.14. monitoring and control of stockpiles, including measures to protect stored Cargoes from weather, combustion, explosion and other forms of damage;
- 1.2.15. compaction, blending, crushing and screening of Cargo ;
- 1.2.16. cargo fumigation, washing and drying and sorting and grading services;
- 1.2.17. weighing of trucks, wagons and Cargo;
- 1.2.18. dust extraction and control;
- 1.2.19. ship and yard planning, including ship stowage planning;
- 1.2.20. preparing ship turnout reports;
- 1.2.21. preparation of all necessary documentation associated with the shipment of Cargo and their inland transport to and from the Terminal;
- 1.2.22. inventory control of equipment, Cargo , chassis and other assets on the Terminal;
- 1.2.23. communication with and reporting to TNPA, shipping lines, agents and other users including transport providers and cargo interests;
- 1.2.24. transit storage of Cargo in conventional, unitised, neo-bulk and containers form;
- 1.2.25. storage of empty units (pallets, bins, chassis, containers);
- 1.2.26. all other transit shed, yard and activities internal to the Terminal; and

- 1.2.27. any other activities associated with Cargo which are approved in writing by TNPA;
- 1.2.28. providing plug points and carrying out temperature checks on reefer or temperature-controlled Cargo ;
- 1.2.29. checking the condition of the Cargo ;
- 1.2.30. preparing equipment interchange reports;
- 1.2.31. ship-to-shore transfer operations;
- 1.2.32. working with Cargo in the holds or on the deck of a vessel when such vessel is being loaded or unloaded;
- 1.2.33. allocation and sequencing of Cargo; and
- 1.2.34. documentary controls.
- 1.3. Without limiting the other obligations of the Terminal Operator as specified in this Licence or imposed by Law, the Terminal Operator shall be obliged to:
 - 1.3.1. provide reliable, secure and efficient services and facilities to port users;
 - 1.3.2. obtain, maintain and renew all licences, permits or other authorisations necessary to operate the Terminal and render the services and perform the activities referred to in clauses 1.1 and 1.2, respectively;
 - 1.3.3. ensure that if any sub-contractors, agents and service providers used by it require a licence in terms of the Act, such persons are duly licensed;
 - 1.3.4. provide, maintain or replace, according to Good Industry Practice, all operating and other equipment necessary for the efficient operation of the Terminal;
 - 1.3.5. procure, install and operate communication, control and administrative systems necessary for the efficient operation of the Terminal;
 - 1.3.6. promote customer relations and market the Terminal to potential customers;
 - 1.3.7. to the extent that the relevant service at the Terminal is not provided by TNPA, be responsible for the disposal of garbage and waste, including garbage and waste generated by vessels visiting the Terminal;
 - 1.3.8. keep the Terminal in a clean, orderly and sanitary condition;
 - 1.3.9. comply with all applicable provisions of the Act, the Port Rules, the Regulations and any directives issued in terms of the Act;
 - 1.3.10. comply with TNPA's policies and guidelines, as amended or supplemented from time to time;
 - 1.3.11. comply with TNPA's occupational health and safety requirements, as amended or supplemented from time to time, including the Occupational Health and Safety Regulations contained in Annexure
 - 1.3.12. comply with such other requirements as TNPA may from time to time determine as being necessary for the safe, orderly and efficient functioning of the Port; and
 - 1.3.13. comply with all other applicable legislation and generally conduct its activities and operations in accordance with the Law.

- 1.4. The policies, guidelines and requirements referred to in clauses 1.3.10, 1.3.11 and 1.3.12 shall be published on TNPA's website.
- 1.5. The Terminal Operator may not:
 - 1.5.1. use the Terminal for residential purposes or as sleeping quarters, save that TNPA may in writing authorise a portion of the Terminal to be used as sleeping quarters for on-duty security guards;
 - 1.5.2. permit the growth upon the Terminal of noxious weeds;
 - 1.5.3. do or cause anything to be done that may cause a nuisance or an inconvenience to TNPA or to any other port service provider or the occupants of adjoining properties;
 - 1.5.4. do anything that materially detracts from the appearance of the Terminal; or
 - 1.5.5. park Vehicles or load Vehicles in any area within the Port, other than in the Terminal, unless with TNPA's prior written consent or with permission from another person legally in control of the area, which shall not be unreasonably withheld or delayed;
- 1.6. The Terminal Operator shall take all reasonable steps to prevent the spilling or dropping of cargo, any lashing materials and/or any other matter into the Port's water. The Terminal Operator shall:
 - 1.6.1. immediately notify TNPA if any cargo, lashing materials and/or any other matter are spilled or dropped in the water as a result of its operation of the Terminal or the conduct of its agents, service providers, sub-contractors or persons responsible for the vessels calling at the Terminal; and
 - 1.6.2. immediately take steps to recover such cargo, lashing materials or any other matter.
- 1.7. If the Terminal Operator fails to recover any spilled cargo, lashing materials or any other matter as envisaged in clause 1.6.2, within a reasonable period, TNPA may take whatever steps are necessary to recover the Cargo, lashing materials or any other matter and to claim the costs of the steps taken from the Terminal Operator.

Schedule 5: D&C Specifications

(The Terminal Operator's Design & Construction Specifications to be submitted within 8 (eight) months
from the date of signature of the Terminal Operator Agreement)

Draft not for Signature

Schedule 6: Construction Agreement

(The Construction Agreement concluded between the Terminal Operator and its construction contractor will be annexed to the Terminal Operator Agreement within 9 (nine) months from the date of signature of the Terminal Operator Agreement)

Draft not for Signature

Schedule 7: Terminal Operator's Operational Plan

(To be provided by the Terminal Operator before the Scheduled Operations Commencement Date)

Draft not for Signature

Schedule 8: Environmental Management Plan

(To be provided by the Terminal Operator on or before the Effective Date)

Draft not for Signature

Schedule 9: Port Of Durban Waste Management Plan

(To be provided by TNPA before the Signature Date)

Draft not for Signature

**Schedule 10: Terminal Operator's B-BBEE Contributor
Level Certificate**

(To be provided by the Terminal Operator prior to the Signature Date)

Draft not for Signature

Schedule 11: Supplier Development Plan and Supplier Development Value Summary Worksheet

(To be completed and provided by the Terminal Operator prior to the Signature Date)

Draft not for Signature

Schedule 12: Empowerment Penalties

Penalties

1. Interpretation and Definitions

For purposes of this Schedule 12, the following words and expressions shall bear the meanings ascribed to them hereunder and other terms which appear in initial upper case shall bear the meanings ascribed to them in the Agreement to which this 3 is annexed:

- 1.1 **"Failure"** - means: (i) a failure by the Terminal Operator to achieve compliance with the targets and commitments contained in the B-BBEE Contributor Level Commitment (Schedule 13), the Black Ownership Commitments (Schedule 14), the Supplier Development Plan and Supplier Development Value Summaries (Schedule 11).
- 1.2 **"Penalty"** - means the sum of money the Terminal Operator shall pay to TNPA as determined in accordance with the Scoring Models.
- 1.3 **"Penalty Period"** - means in respect of:
- 1.3.1 The B-BBEE Level Commitments shall be at the end of the 5th (fifth) Contract year or any subsequent 5th (fifth) Contract Year;
- 1.3.2 The Black Ownership Commitments shall be at the end of the 5th (fifth) Contract year and any subsequent 5th (fifth) Contract Year;
- 1.3.3 The Supplier Development Value Summary (Development Phase) at the end of the 2nd (Second) Contract Year;
- 1.3.4 The Supplier Development Value Summary (Operational Phase) at the end of the 5th (fifth) Contract Year and any subsequent 5th (fifth) Contract Year;
- 1.4 **"Achieved Performance"** - means in respect of a Penalty Period, the combined actual performance achieved by the Terminal Operator

during such Penalty Period, in relation to the commitments set out in the B-BBEE Contributor Level Commitment (Schedule 13), the Black Ownership Commitments (Schedule 14), the Supplier Development Plan and Supplier Development Value Summaries (Schedule 11).

- 1.5 **“Scoring Models”** - means the scoring model which is contained in clause 2 of this Schedule 12;
- 1.6 **“Success”-** means: (i) the achievement of compliance with the targets and commitments contained in the B-BBEE Contributor Level Commitment (Schedule 13), the Black Ownership Commitments (Schedule 14), the Supplier Development Plan and Supplier Development Value Summaries (Schedule 11).

Empowerment Penalties

2. Penalties in respect of a Failure by the Terminal Operator in respect of the targets and commitments contained in the B-BBEE Contributor Level Commitment (Schedule 13), the Black Ownership Commitments (Schedule 14), the Supplier Development Plan and Supplier Development Value Summaries (Schedule 11) and the agreed Terminal Operator Performance Standards (Schedule 20) shall be calculated as follows:

- 2.1.1 For each Penalty Period, the Terminal Operator shall be required to submit documentation demonstrating its performance in terms of the targets and commitments contained in the Schedules referred to in clause 2 above. Such documentation shall include the following:

2.1.1.1 a valid certificate of accreditation from an accredited verification agency verifying the Terminal Operator’s updated B-BBEE status as per the B-BBEE Act; and

2.1.1.2 a valid certificate of accreditation from an accredited verification agency verifying the Terminal Operators update in terms of Black Ownership

2.1.1.3 a detailed report setting out all expenditures incurred by the Terminal Operator in respect of the commitments contained in the Supplier Development Plan, including in particular tracking against the target set out in the Supplier Development Value Summary Worksheet of the Scoring Model all of which shall be independently certified in writing by the independent external auditors of the Terminal Operator.

2.1.1.4 a detailed report setting out the Terminal Operators' performance in respect of

the agreed Terminal Operator Performance Standards.

- 2.1.2 The empowerment penalties for a particular period shall be up to a maximum of 3% (three per cent) of the gross annual revenue of the Terminal for the 5th (fifth) Contract Year only.
- 2.1.3 The empowerment penalties to be incurred in respect of any Contract Year shall be calculated relative to the extent of the Failure that is incurred by the Terminal Operator.
- 2.1.4 No empowerment penalties shall be payable in respect of any Penalty Period where the Terminal Operator incurs a Failure as set out in the first column as set out in table 2.1.7.1 and 2.1.7.2 below.
- 2.1.5 The maximum empowerment Penalties that shall be payable in respect of any Penalty Period where the Terminal Operator incurs a Failure as set out in Table 2.1.7.1 and 2.1.7.2 below.
- 2.1.6 The achievement of the Supplier Development targets as set out in the Supplier Development Value Summaries shall be determined by determining the percentage Failure and or Success for each contract year of the 5 (five) year penalty period and dividing it by 5 (five) to arrive at an average percentage Failure and or Success
- 2.1.7 The empowerment Penalty payable in respect of any Penalty Period where the Terminal Operator incurs a Failure, shall be calculated based on the table below:

2.1.7.1. BBBEE Level

Nature and Extent of the Failure	BBBEE Level 3 and or 4	BBBEE Level 5	BBBEE Level 6	BBBEE Level 7	BBBEE Level 8
Penalty Payable (% of Gross Annual Turnover for the Penalty Period)	0	1.5%	2%	2.5 %	3%

2.1.7.1. Black Ownership & Supplier Development Commitments

Nature and Extent of the Failure	Less than 10 %	>10% - <25%	>25% - <35%	>35% - <50%	> 50%
Penalty Payable (% of gross annual turnover for the Penalty Period)	0	1.5%	2%	2.5 %	3%

Schedule 13: B-BBEE Contributor Level Commitments

B-BBEE Contributor Level Commitments

1. The Terminal Operator undertakes to maintain and increase over the Project term, its BB-BEE Contributor Level, as follows:

Year 1 Level 2 Contributor Level;

Year 5: Level 1 Contributor

Level; Year 10: Level 1 Contributor

Level; and

2. The Terminal Operator acknowledges that a failure to adhere to or achieve the commitments set out in clause 1 of this Schedule 13 shall constitute a breach of the Terminal Operator Agreement.

Schedule 14: Black Ownership Commitments

2. The Terminal Operator undertakes that its Black Ownership Percentage shall not be reduced, will be maintained and increase over the Project term as follows:

Year 1:	25%	Black Ownership;
Year 5:	35%	Black Ownership;
Year 10:	45%	Black Ownership; and

3. The Terminal Operator acknowledges that a failure to adhere to or achieve the commitments set out in clause 1 of this Schedule 14 shall constitute a breach of the Terminal Operator Agreement.

SIGNATURE OF WITNESS

SIGNATURE OF THE TERMINAL OPERATOR

Schedule 15: Construction Performance Guarantee

To be provided to the [●] (Registration No. [●]) and its successors-in-title (the "**Terminal Operator**").

WHEREAS:

- A. The Terminal Operator has entered into a terminal operator agreement for the finance, design, construction, equipping, Operation and Maintenance of the Multi-Purpose Terminal at the Port of Durban (the "**TOA**") with Transnet National Ports Authority (Registration No. 1990/000900/30) (the "**TNPA**");
- B. under the provisions of clause 14.2 of the TOA, [●] (Registration No. [●]) ("**Construction Contractor**") is required to cause this guarantee (the "**Guarantee**") to be issued to the Terminal Operator; and
- C. we being [*insert name of bank*] have agreed to provide you such Guarantee.

We, the undersigned

_____ and _____
(Name) (Name)

acting herein as

_____ and _____
(Position) (Position)

of [*insert name of bank*] (the "**Bank**")

being duly authorised to sign and incur obligations in the name of the Bank hereby irrevocably and unconditionally guarantee and undertake on behalf of the Bank that: -

3. the Bank shall pay amounts not exceeding R[*insert amount*] in aggregate (the "**Maximum Amount**") without delay, objection or argument, to the Terminal Operator on receipt by the Bank of the first written demand of the Terminal Operator being received at the Bank's counter situated at [*insert address*], attention [*insert name*], in a certificate in the form attached hereto as Annexure A (*Form of Certificate*), signed by an authorised representative of the Terminal Operator and the [*Independent Engineer*], declaring that the amount is due and payable and, certifying that the Terminal Operator is entitled to draw on this Guarantee pursuant to the provisions of clause 14.4 of the TOA (the "**Certificate**").

4. the Terminal Operator may make partial and/or multiple demands under this Guarantee provided that the aggregate amounts paid under this Guarantee shall not exceed the Maximum Amount. The Maximum amount shall not exceed:

- 4.1 R[●]¹, as at the Effective Date until the issue of the Completion Certificate; and
- 4.2 R[●]² upon completion of the Construction Works until the expiry of the Completion Defects Rectification Period,

less the sum of (i) the aggregate of all amounts already paid by the Bank under this Guarantee and (ii) the aggregate of all amounts for which demands have been made under this Guarantee but which have not yet been paid at that time;

5. the demand for payment together with this Guarantee and the Certificate shall constitute *prima facie* proof of the Bank's indebtedness hereunder for the purposes of any proceedings including but not limited to provisional sentence proceedings instituted against the Bank in any court of law having jurisdiction;
6. neither the failure of the Terminal Operator to enforce strict or substantial compliance by the Construction Contractor with its obligations nor any act, conduct, or omission by the Terminal Operator prejudicial to the interests of the Bank including, without limitation, the granting of time or any other indulgence to the Construction Contractor or any other person or by amendment to or variation or waiver of terms of the TOA or any related document (the "**Underlying Documents**") will discharge the Bank from any liability under this Guarantee. For the avoidance of doubt, the Bank's liability under this Guarantee will not be discharged notwithstanding the winding up, dissolution or judicial management of the Construction Contractor or any other person and the Guarantee shall be honoured regardless of the invalidity, illegality or unenforceability of the TOA;
7. this Guarantee shall: –
- 7.1 remain in full force and effect from the date hereof, and shall expire automatically, whether or not returned to the Bank or the Construction Contractor, on the earlier of: –

7.1.1 expiry of the Completion Defects Rectification Period; or

7.1.2 upon a substitution thereof by another guarantee to the satisfaction of the Terminal Operator; or

7.1.3 the date when the Bank has paid to the Terminal Operator an amount which is equal

¹ The value of [●]% of the aggregate construction price.

² [●] % upon the issue of the Completion Certificate.

to, or amounts which in aggregate equal the Maximum Amount;

- 7.2 exist independently of the TOA or any amendment, variation or novation thereof;
 - 7.3 not be ceded, assigned or otherwise transferred by the Terminal Operator, or otherwise dealt with in any manner whatsoever by the Terminal Operator (save for the purposes and in the manner referred to above and in the TOA);
 - 7.4 be returned to the Bank on its expiry in accordance with paragraph 4.1 above; and
 - 7.5 be governed by the laws of the Republic of South Africa;
8. the Bank shall make any payment demanded under this Guarantee free of deduction, withholding or set-off of any kind. If the Bank is required by law to make payments subject to the deduction or withholding of tax, it will make such further payments as are necessary to ensure that the amounts paid to the Terminal Operator equal the amounts that would have been paid to the Terminal Operator had no such deduction or withholding been made or been required to be made.

Addresses and Notices

- 8.1 The parties hereto choose *domicilium citandi et executandi* for all purposes of and in connection with this Guarantee as follows:

8.1.1 if to the Terminal

Operator, at: Address:

Postal address:

Facsimile number:

Email address:

marked for the attention of **[insert details]**

8.1.2 if to the

Bank, at: Address:

Postal address:

Facsimile number:

Email address:

marked for the attention of **[insert details]**

- 8.2 Either party hereto shall be entitled to change its *domicilium* from time to time, provided that any new *domicilium* selected by it shall be a physical address in the Republic of South Africa, and any such change shall only be effective upon receipt of notice in writing by the other party of such change.
- 8.3 All notices, demands, communications or payments intended for any party shall be made or given at such party's *domicilium* for the time being.
- 8.4 Any notice required or permitted to be given under this Guarantee shall be valid and effective only if in writing.
- 8.5 A notice sent by one party to the other party shall be deemed to be received: –
- 8.5.1 on the same day, if delivered by hand; and
- 8.5.2 on the same day of transmission, if sent by electronic mail or telefax with a receipt confirming completion of transmission and confirmed by post.
- 8.6 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.
- 8.7 Words and phrases not defined herein shall have the meanings ascribed to them in the TOA unless the context otherwise requires.

Signed at _____ on _____ 2024.

Witness: for the Terminal Operator

.....
duly authorised

Signed at _____ on _____ 2024.

Witness: for the Bank

.....
duly authorised

Schedule 16: Operating Performance Guarantee

[To be issued by the Bank on its letterhead]

To:

[•]

("TNPA"); and

1. This Performance Bank Guarantee is given by:

1.1 [•], ("**the Bank**"), (which expression shall include its permitted successors and assigns) a company duly incorporated and registered under the laws of South Africa whose registered office is at [•]; and

1.2 in favour of the [•] (Registration No. [•]) ("**Terminal Operator**") (which expression shall include its permitted successors and assigns), a company duly incorporated and registered under the laws of South Africa, with its registered address at [•].

2. Whereas:

2.1 the Terminal Operator, which expression shall include any affiliate being a permitted successor and/or assign under the TOA), entered into a contract with the Transnet National Ports Authority (Registration No. 1990/000900/30) ("**TNPA**") for the finance, design, construction, equipping, Operation and Maintenance of the cruise terminal at the Port of Durban ("**the TOA**") on [insert date];

2.2 [•] (Registration No. [•]) ("**Operator**") is obliged by the terms of the TOA to procure and provide this Performance Bank Guarantee to the Terminal Operator;

2.3 the Bank has been requested by the Operator to provide, and has agreed to provide, a Performance Bank Guarantee on the terms and conditions set out herein.

3. **Performance Bank Guarantee a Primary Obligation**

The Bank acknowledges that:

3.1 any reference in this Performance Bank Guarantee to the TOA is made for the purpose of convenience only and shall not be construed as creating an accessory obligation or a surety ship; and

3.2 its obligations under this Performance Bank Guarantee are restricted to the payment of money.

4. **Maximum Sum**

The Bank irrevocably and unconditionally agrees and undertakes to pay the Terminal Operator any amount up to an aggregate of [●] [(enter amount in words)] ("**the Maximum Sum**"), on demand by the Terminal Operator in accordance with the terms of this Performance Bank Guarantee, provided that, there shall be no maximum applicable to the amount payable in relation to any rights or remedies which the Terminal Operator may have arising from any breach by the Bank of the terms of this Performance Bank Guarantee.

5. **Procedure for Calling the Performance Bank Guarantee**

- 5.1. The Terminal Operator, may from time to time make a written demand to the Bank stating that the Operator has failed to perform or observe any of its duties and/or obligations arising under or in connection with the TOA or any related document and/or has committed a breach of any provision and/or has failed to fulfil any warranty or indemnity set out in the TOA and/or has failed to satisfy any of its liabilities under or in connection with the TOA and/or insolvency, or analogous proceedings have been brought in respect of the Operator ("**Demand**").
- 5.2. The Bank irrevocably and unconditionally agrees and undertakes within 2 (two) business days from receipt of a Demand, to pay the amount demanded in accordance with clause 6 below, provided that the amount demanded together with the amount(s) of any previous payment(s) by the Bank under this Performance Bank Guarantee does not in the aggregate exceed the Maximum Sum.

6. **Payment under the Performance Bank Guarantee**

- 6.1. Sums payable under this Performance Bank Guarantee shall be paid to the Terminal Operator in full, free of any present or future taxes, levies, duties, charges, fees or withholdings and without any deduction, restriction, conditions, withholding, set-off or counterclaim whatsoever.
- 6.2. If the Bank is compelled by law to make any deduction or withholding, the Bank will gross up the payment so that the net sum received by the Terminal Operator will be equal to the full amount which the Terminal Operator would have received had no such deduction or withholding been made.
- 6.3. Any Demand made in accordance with clause 9 shall constitute proof that the sum stated in such Demand is properly due and payable to the Terminal Operator under this Performance Bank Guarantee.

- 6.4. The Bank shall have no right and shall not be under any duty or responsibility to enquire into the reason or circumstances of any Demand, the respective rights and/or obligations and/or liabilities of any party under the TOA and/or the Security Assignment, the authenticity of any Demand or the authority of the persons signing any Demand.
- 6.5. The Bank will make payment of all amounts under this Performance Bank Guarantee into the account named Compensation Proceeds Account held by the Terminal Operator at [●] (as "**Account Bank**") (account number [●]), or such other account as may be nominated in writing by the Terminal Operator.

Continuity and Discharge of the Performance Bank Guarantee

- 6.6. The Bank confirms that:
- 6.6.1. its obligations under this Performance Bank Guarantee shall be unconditional and irrevocable;
 - 6.6.2. this Performance Bank Guarantee shall remain in full force and effect until [●] whereupon this Performance Bank Guarantee shall cease to have effect save in connection with any Demand notified to the Bank on or prior to the said date;
 - 6.6.3. any release, discharge or settlement between the Bank and the Terminal Operator shall be conditional upon no security, disposition or payment to the Terminal Operator being void, set aside or ordered to be refunded pursuant to any enactment or law relating to bankruptcy, liquidation, administration or insolvency and, should any of these events occur (i.e. security, disposition or payment is/are void, set aside or ordered to be refunded pursuant to any enactment or law relating to bankruptcy, liquidation, administration or insolvency), the Terminal Operator shall be entitled to enforce this Performance Bank Guarantee (after all payments ordered to be refunded under this Performance Bank Guarantee, if any, are effectively refunded to the Bank) subsequently as if such release, discharge or settlement had not occurred and any payment had not been made.
- 6.7. For the avoidance of any doubt this Performance Bank Guarantee shall, without any exception, lose any effectiveness and validity at its expiry date as stated in sub-clause 12.1.2.

7. Costs and Expenses

All charges of the Bank related to the issuance or performance of this Performance Bank Guarantee (including, but not limited to, the negotiation, payment, extension or transfer hereof) shall be borne by the Operator and under no circumstances shall be charged to the Terminal Operator.

8. Notices

8.1. Any demand, notice or communication hereunder shall be in writing and shall be made to the Bank at the address set out below (or such other address in [•] as may from time to time be notified in writing by the Bank to the Terminal Operator, such notification to be delivered by courier), for all purposes of and in connection with this Performance Bank Guarantee:

Electronic address : [•] [insert SWIFT address for purposes of electronic presentation]

Physical address : [•]

Attention : [•]

8.2. The demand or notice shall be delivered by hand, by courier or electronically via SWIFT and shall be deemed to be received upon actual receipt by the Bank.

9. Governing Law

The law which shall govern this Performance Bank Guarantee and any other non-contractual obligations connected with it and under which this Performance Bank Guarantee or any other non-contractual obligations connected with it are to be construed is the law of the Republic of South Africa.

10. Jurisdiction

10.1. The Bank hereby irrevocably and unconditionally consents to the exclusive jurisdiction of the courts of South Africa (or any successor to that division) in regard to all matters arising from this Performance Bank Guarantee.

10.2. The choice of governing law of this Performance Bank Guarantee will be recognised and enforced against the Bank in its jurisdiction of incorporation.

10.3. Any judgment obtained in South Africa in relation to the Performance Bank Guarantee will be recognised and enforced against the Bank in its jurisdiction of incorporation.

Signed at on 2025.

Witness: (for the Terminal Operator)

.....

.....

duly authorised

Signed at on 2024.

Witness: (for the Bank)

.....

.....

duly authorised

Schedule 17: Operations Bank Guarantee

[To be issued by the Bank on its letterhead]

To:

[•]

("TNPA"); and

1. This Operations Bank Guarantee is given by:

- 1.1. [•], ("**the Bank**"), (which expression shall include its permitted successors and assigns) a company duly incorporated and registered under the laws of South Africa whose registered office is at [•]; and
- 1.2. in favour of the [•] (Registration No. [•]) ("**Terminal Operator**") (which expression shall include its permitted successors and assigns), a company duly incorporated and registered under the laws of South Africa, with its registered address at [•].

2. Whereas:

- 2.1. the Terminal Operator, which expression shall include any affiliate being a permitted successor and/or assign under the TOA), entered into a contract with the Transnet National Ports Authority (Registration No. 1990/000900/30) ("**TNPA**") for the finance, design, construction, equipping, Operation and Maintenance of the cruise terminal at the Port of Durban ("**the TOA**") on [insert date];
- 2.2. [•] (Registration No. [•]) ("**Operator**") is obliged by the terms of the TOA to procure and provide this Operations Bank Guarantee to the Terminal Operator;
- 2.3. the Bank has been requested by the Operator to provide, and has agreed to provide, an Operations Bank Guarantee on the terms and conditions set out herein.

3. **Operations Bank Guarantee a Primary Obligation**

The Bank acknowledges that:

- 3.1. any reference in this Operations Bank Guarantee to the TOA is made for the purpose of convenience only and shall not be construed as creating an accessory obligation or a suretyship; and
- 3.2. its obligations under this Operations Bank Guarantee are restricted to the payment of money.

4. **Maximum Sum**

The Bank irrevocably and unconditionally agrees and undertakes to pay the Terminal Operator any amount up to an aggregate of [•] [(enter amount in words)] ("**the Maximum Sum**"), on demand by the Terminal Operator in accordance with the terms of this Operations Bank Guarantee, provided that there shall be no maximum applicable to the amount payable in relation to any rights or remedies which the Terminal Operator may have arising from any breach by the Bank of the terms of this Operations Bank Guarantee.

5. **Procedure for Calling the Operations Bank Guarantee**

5.1. The Terminal Operator, may from time to time, make a written demand to the Bank stating that the Terminal Operator has failed to perform or observe any of its duties and/or obligations arising under or in connection with the TOA or any related document and/or has committed a breach of any provision and/or has failed to fulfil any warranty or indemnity set out in the TOA and/or has failed to satisfy any of its liabilities under or in connection with the TOA and/or insolvency or analogous proceedings have been brought in respect of the Terminal Operator ("**Demand**").

5.2. The Bank irrevocably and unconditionally agrees and undertakes within 2 (two) business days from receipt of a Demand, to pay the amount demanded in accordance with clause 7 below, provided that the amount demanded together with the amount(s) of any previous payment(s) by the Bank under this Operations Bank Guarantee does not in the aggregate exceed the Maximum Sum.

6. **Assignment**

6.1. The Bank acknowledges that the Terminal Operator has unconditionally assigned, or will unconditionally assign (the "**Security Assignment**") all of its rights, title and interest in and to this Operations Bank Guarantee to the Lenders. This Operations Bank Guarantee shall be for the benefit of and shall be enforceable by the Terminal Operator, the Lender and/or the Security Agent and their respective successors-in-title in accordance with the provisions of this Operations Bank Guarantee. The Security Assignment shall not, in the aggregate, create or impose upon the Bank any more onerous obligations in favour of the Terminal Operator, the Lenders and/or the Security Agent (whether individually or cumulatively) than the Bank would otherwise be responsible for under this Operations Bank Guarantee and in particular in respect of any obligation to make any payments in excess of the Maximum Sum, or in respect of Demands received after a Reduction Event, the Reduced Maximum Sum.

- 6.2. The Bank irrevocably and unconditionally consents to the Security Assignment and the granting of the security interest and to any splitting of claims that may arise therefrom.
- 6.3. The Bank may not assign its rights and/or delegate any of its obligations under this Operations Bank Guarantee to any other person.
- 6.4. For purposes of this Operations Bank Guarantee, "**Lender**" means [●] its successors and assigns, and any additional lender that may provide financing in respect of the Project from time to time and "**Lenders**" shall have a corresponding meaning. "**Security Agent**" means [●] and its successors and assigns from time to time.

7. **Payment under the Operations Bank Guarantee**

- 7.1. Sums payable under this Operations Bank Guarantee shall be paid to the Terminal Operator in full, free of any present or future taxes, levies, duties, charges, fees or withholdings and without any deduction, restriction, conditions, withholding, set-off or counterclaim whatsoever.
- 7.2. If the Bank is compelled by law to make any deduction or withholding, the Bank will gross up the payment so that the net sum received by the Terminal Operator will be equal to the full amount which the Terminal Operator would have received had no such deduction or withholding been made.
- 7.3. Any Demand made in accordance with clause 10 shall constitute proof that the sum stated in such Demand is properly due and payable to the Terminal Operator under this Operations Bank Guarantee.
- 7.4. The Bank shall have no right and shall not be under any duty or responsibility to enquire into the reason or circumstances of any Demand, the respective rights and/or obligations and/or liabilities of any party under the TOA and/or the Security Assignment, the authenticity of any Demand or the authority of the persons signing any Demand.
- 7.5. The Bank will make payment of all amounts under this Operations Bank Guarantee into the account named Compensation Proceeds Account held by the Terminal Operator at [●] (as "**Account Bank**") (account number [●]), or such other account as may be nominated in writing by the Terminal Operator.

8. **Continuity and Discharge of the Operations Bank Guarantee**

- 8.1. The Bank confirms that:
- 8.1.1. its obligations under this Operations Bank Guarantee shall be unconditional and irrevocable;

8.1.2. this Operations Bank Guarantee shall remain in full force and effect until [●] whereupon this Performance Bank Guarantee shall cease to have effect save in connection with any Demand notified to the Bank on or prior to the said date;

8.1.3. any release, discharge or settlement between the Bank and the Terminal Operator shall be conditional upon no security, disposition or payment to the Terminal Operator being void, set aside or ordered to be refunded pursuant to any enactment or law relating to bankruptcy, liquidation, administration or insolvency and should any of these events occur (i.e. security, disposition or payment is/are void, set aside or ordered to be refunded pursuant to any enactment or law relating to bankruptcy, liquidation, administration or insolvency), the Terminal Operator shall be entitled to enforce this Operations Bank Guarantee (after all payments ordered to be refunded under this Operations Bank Guarantee, if any, are effectively refunded to the Bank) subsequently as if such release, discharge or settlement had not occurred and any payment had not been made.

8.2. For the avoidance of any doubt this Operations Bank Guarantee shall, without any exception, lose any effectiveness and validity at its expiry date.

9. **Costs and Expenses**

All charges of the Bank related to the issuance or performance of this Operations Bank Guarantee (including, but not limited to, the negotiation, payment, extension or transfer hereof) shall be borne by the Operator and under no circumstances shall be charged to the Terminal Operator.

10. **Notices**

10.1. Any demand, notice or communication hereunder shall be in writing and shall be made to the Bank at the address set out below (or such other address in [●] as may from time to time be notified in writing by the Bank to the Terminal Operator, such notification to be delivered by courier), for all purposes of and in connection with this Operations Bank Guarantee:

Electronic address : [●] [insert SWIFT address for purposes of electronic presentation]

Physical address : [●]

Attention : [●]

10.2. The demand or notice shall be delivered by hand, by courier or electronically via SWIFT and shall be deemed to be received upon actual receipt by the Bank.

11. **Governing Law**

The law which shall govern this Operations Bank Guarantee and any other non-contractual obligations connected with it and under which this Operations Bank Guarantee or any other non-contractual obligations connected with it are to be construed is the law of the Republic of South Africa.

12. Jurisdiction

12.1. The Bank hereby irrevocably and unconditionally consents to the exclusive jurisdiction of the courts of South Africa (or any successor to that division) in regard to all matters arising from this Operations Bank Guarantee.

12.2. The choice of governing law of this Operations Bank Guarantee will be recognised and enforced against the Bank in its jurisdiction of incorporation.

12.3. Any judgment obtained in South Africa in relation to the Operations Bank Guarantee will be recognised and enforced against the Bank in its jurisdiction of incorporation.

Signed at _____ on _____ 2024.

Witness: _____ **for the Terminal Operator**

.....
_____ **duly authorised**

Signed at _____ on _____ 2024.

Witness: _____ **for the Bank**

.....
_____ **duly authorised**

Schedule 18: Final Maintenance Guarantee

To be provided to the [●] (Registration No. [●]) and its successors-in-title (the "**Terminal Operator**").

WHEREAS:

- A. The Terminal Operator has entered into a terminal operator agreement for the finance, design, construction, equipping, Operation and Maintenance of the cruise terminal at the Port of Durban (the "**TOA**") with Transnet National Ports Authority (Registration No. 1990/000900/30) (the "**TNPA**");
- B. under the provisions of clause 14.4 of the TOA, [●] (Registration No. [●]) ("**Operator**") is required to cause this guarantee (the "**Guarantee**") to be issued to the Terminal Operator; and
- C. we being [*insert name of bank*] have agreed to provide you such Guarantee.

We, the undersigned

_____ and _____
(Name) (Name)

acting herein as

_____ and _____
(Position) (Position)

of [*insert name of bank*] (the "**Bank**")

being duly authorised to sign and incur obligations in the name of the Bank hereby irrevocably and unconditionally guarantee and undertake on behalf of the Bank that: -

1. the Bank shall pay amounts not exceeding R[*insert amount*] in aggregate (the "**Maximum Amount**") without delay, objection or argument, to the Terminal Operator on receipt by the Bank of the first written demand of the Terminal Operator being received at the Bank's counter situated at [*insert address*], attention [*insert name*], in a certificate in the form attached hereto as Annexure A (*Form of Certificate*), signed by an authorised representative of the Terminal Operator and the [Maintenance Surveyor], declaring that the amount is due and payable and, certifying that the Terminal Operator is entitled to draw on this Guarantee pursuant to the provisions of clause 14.4 of the TOA (the "**Certificate**"). The Terminal Operator may make partial and/or multiple demands under this Guarantee provided that the aggregate

amounts paid under this Guarantee shall not exceed the Maximum Amount;

2. the demand for payment together with this Guarantee and the Certificate shall constitute *prima facie* proof of the Bank's indebtedness hereunder for the purposes of any proceedings including but not limited to provisional sentence proceedings instituted against the Bank in any court of law having jurisdiction;
3. neither the failure of the Terminal Operator to enforce strict or substantial compliance by the Operator with its obligations nor any act, conduct, or omission by the Terminal Operator prejudicial to the interests of the Bank including, without limitation, the granting of time or any other indulgence to the Operator or any other person or by amendment to or variation or waiver of terms of the TOA or any related document (the "**Underlying Documents**") will discharge the Bank from any liability under this Guarantee. For the avoidance of doubt, the Bank's liability under this Guarantee will not be discharged notwithstanding the winding up, dissolution or judicial management of the Operator or any other person and the Guarantee shall be honoured regardless of the invalidity, illegality or unenforceability of the Underlying Documents;
4. this Guarantee shall: –
 - 4.1 remain in full force and effect from the date hereof, and shall expire automatically, whether or not returned to the Bank or the Operator, on the earlier of: –
 - 4.1.1 15 (fifteen) months from the date of issue; or
 - 4.1.2 upon a substitution thereof by another guarantee to the satisfaction of the Terminal Operator; or
 - 4.1.3 the date when the Bank has paid to the Terminal Operator an amount which is equal to, or amounts which in aggregate equal the Maximum Amount;
 - 4.2 exist independently of the TOA or any amendment, variation or novation thereof;
 - 4.3 not be ceded, assigned or otherwise transferred by the Terminal Operator, or otherwise dealt with in any manner whatsoever by the Terminal Operator (save for the purposes and in the manner referred to above and in the TOA);
 - 4.4 be returned to the Bank on its expiry in accordance with paragraph 4.1 above; and
 - 4.5 be governed by the laws of the Republic of South Africa;

5. the Bank shall make any payment demanded under this Guarantee free of deduction, withholding or set-off of any kind. If the Bank is required by law to make payments subject to the deduction or withholding of tax, it will make such further payments as are necessary to ensure that the amounts paid to the Terminal Operator equal the amounts that would have been paid to the Terminal Operator had no such deduction or withholding been made or been required to be made.

6. **Addresses and Notices:**

6.1 The parties hereto choose *domicilium citandi et executandi* for all purposes of and in connection with this Guarantee as follows:

6.1.1 if to the Terminal

Operator, at: Address:

Postal address:

Facsimile number:

Email address:

marked for the attention of **[insert details]**

6.1.2 if to the

Bank, at: Address:

Postal address:

Facsimile number:

Email address:

marked for the attention of **[insert details]**

6.2 Either party hereto shall be entitled to change its *domicilium* from time to time, provided that any new *domicilium* selected by it shall be a physical address in the Republic of South Africa, and any such change shall only be effective upon receipt of notice in writing by the other party of such change.

6.3 All notices, demands, communications or payments intended for any party shall be made or given

at such party's domicilium for the time being.

6.4 Any notice required or permitted to be given under this Guarantee shall be valid and effective only if in writing.

6.5 A notice sent by one party to the other party shall be deemed to be received: –

6.5.1 on the same day, if delivered by hand; and

6.5.2 on the same day of transmission, if sent by electronic mail or telefax with a receipt confirming completion of transmission and confirmed by post.

6.6 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

7. Words and phrases not defined herein shall have the meanings ascribed to them in the TOA unless the context otherwise requires.

Signed at on 2024.

Witness: for the Terminal Operator

.....

duly authorised

Signed at on 2024.

Witness: for the Bank

..... **duly authorised**

Schedule 19: Project Insurance

Part X

List of insurance required during the Construction Period

During the period commencing on the Signature Date and ending on the Actual Operations Commencement Date, the Terminal Operator must maintain the following Project Insurance in respect of the Project Site and Terminal³:

1. Construction All-Risk's Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

2. Third Party Liability Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

3. Loss of Anticipated Revenue/Project Delay Insurance for works

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]

³ Bidders will propose the respective levels of insurance cover, including the details of the risks covered, all material exclusions, any endorsements, amounts covered, deductibles, and the earliest date on which the insurance becomes effective...

Extensions:	[•]
-------------	-----

4. Employers Liability Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

5. Motor Vehicle Third Party Liability Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

6. Professional Indemnity Insurance for works

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

7. Sasria Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]

Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

8. **Public Liability Insurance**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

Draft not for Signature

Part Y

List of insurance required during the Operation and Maintenance Period

The Project Insurances in Part Y of Schedule 19

shall be effective from Actual Operations Commencement Date (but only to the extent that such insurances have not been effected already during the Construction stage by the Terminal Operator) and maintained in force and renewed as required for the duration of the Operation and Maintenance Period⁴:

1. Assets All - Risk's Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

2. Business Interruption Consequential Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

3. Third Party Liability Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]

⁴ Bidders will propose the respective levels of insurance cover, including the details of the risks covered, all material exclusions, any endorsements, amounts covered, deductibles and the earliest date on which the insurances become effective.

Extensions:	[•]
-------------	-----

4. Employers Liability Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

5. Motor Vehicle Third Party Liability Insurance

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

6. Professional Indemnity Insurance for works

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

7. Equipment Insurance

Cover:	[•]
Insured Parties:	[•]

Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

8. **Sasria Insurance**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

Schedule 20: Terminal Operator Performance Standards

TOPS DEFINITION OF MEASURES AND CALCULATIONS

Measure	Definition	Calculation		Exclusions
Rail turnaround time	The average service time of trains arriving and departing the terminal expressed in hours	Total of (yard time out - yard time in) / total number of trains for the period	Terminals using Rail	Rolling stock in holding in rail yards Force majeure (Weather delays) External power supply failures
Cargo dwell time in terminal	The average period that cargo stays within the terminal between the times of arrival to loading and vessel discharge until terminal gate exit expressed in hours or days. Imports, exports and transshipments to be indicated separately	Total dwell time per container, ton, KI or units / Total units through the system for the period	All commodities except Liquid Bulk	Commercial arrangements borne in mind
	For liquid bulk terminals the average dwell time is to be the tank turn days.	Tank turn = volume for the period divided by tank capacity. Tank turn days (which should be the average dwell time) = Available days divided by tank turn.	Liquid Bulk Terminals	Planned outage days.
Terminal throughput	Total cargo handled (imported, exported and transhipped) by the terminal over a given period expressed in tons, KI, TEU's or units	Total of imports + exports + transshipments handled by the terminal over a given period.	All Terminals	Volume of refinery product stored in port is not regarded as import or export cargo but included in capacity

TOPS DEFINITION OF MEASURES AND CALCULATIONS

NB: These may apply differentially as per the nature of the terminal operations

Measure	Definition	Calculation	Applicable	Exclusions
Terminal berthing delays	The average delay per vessel as a direct result of the terminal expressed in hours	Total of all (vessel actual berthing time - vessel planned berthing time) / total number of vessels delayed for a given period. The allowance of 30 minutes is to be considered as a buffer, thus any delay that is less than 30 minutes won't be considered as a delay.	Terminals with dedicated berths only	Force majeure (Weather delays) Surge, under currents External power supply failures
Berth Productivity	Total volume handled during the total time vessel is on berth expressed in tons/hour, KI/hour, Moves/hour, Units/hour	Total volume for a given period (in tons, KI, units or containers) / Total time vessel is on berth. Total time vessel is on berth is the sum for all vessels during the month (last rope untied – first rope tied)	Terminals with dedicated berths only	Force majeure (Weather delays)
Ship Working Hour	Total volume handled during the total productive working hours for the vessel expressed in tons/hour, KI/hour, Moves/hour or units/hour.	Total volume for a given period (in tons, KI, units or containers) / Total vessel productive. Total vessel productive time is the sum for all vessels during the month (last swing or cargo move) – (first swing or cargo move)	All terminals	Surge, under currents External power supply failures
Truck turnaround time	The average service time of road haulers within the terminal expressed in minutes or hours	Total of (gate time out - gate time in) / total number of haulers for the period	Terminals using road trucks	Force majeure (Weather delays) External power supply failures
Truck queuing outside Terminal	The truck congestion on public roads outside the terminal resulting from unmanaged truck arrival patterns. Average waiting time for trucks outside terminal expressed in minutes or hours	Total of all (truck gate in time minus truck arrival in queue) / number of trucks per sample	Terminals using road trucks	Trucks not en-route to terminal or without firm delivery / upliftment order External power supply failures

Schedule 21: Construction Programme

(To be provided by the Terminal Operator on or before the Effective Date)

Draft not for Signature

Schedule 22: Incorporation Documents

(To be provided by the Terminal Operator prior to the Signature Date)

Draft not for Signature

Schedule 23: TNPA Policies, Manuals And Operating Conditions

(To be provided by TNPA on or before the Signature Date)

Draft not for Signature

Schedule 24: Annual Reporting

1. Supplier Development and B-BBEE

1.1. Report on the Empowerment obligations as per clause 12 (*Empowerment Obligations*) and as detailed in the schedule [7B] for the past Contract Year m in line with Schedule 14(*Black Ownership Commitment Schedule*), B-BBEE Improvement Plan and Supplier Development Plan as provided in the Bid Response including:

1.1.1. The updated B-BBEE status and the relevant sector scorecard rating

1.1.2. The Annual Report on outcomes against commitments in the Supplier Development Plan, which is to be independently verified by an agency that has been pre-approved by TNPA.

1.2. Planning for the upcoming Contract Year m+1 and where this differs from the B-BBEE Improvement plan and Supplier Development Plan submitted in the Bid Response;

1.3. Remedial plan in case of under-performance as reported in item [1a] to be submitted and approved by TNPA within [2] (two) weeks (**Note: to be adjusted in line with changes in Section [32] Reporting**).

2. Operations

2.1. Report for the past Contract Year m on the actual operational performance in view of the Terminal Operator Performance Standards and available in Schedule 16 and as monitored in Section 27.5 (Terminal Operator Performance) and with regards all material aspects of the Operational Plan, including but not limited to (**Note: to be adjusted as appropriate by Signature Date**).

2.1.1. Information per vessel calling at the Terminal:

2.1.1.1. Number of vessels;

2.1.1.2. Name of vessels;

2.1.1.3. Deadweight Tonnage (DWT);

- 2.1.1.4. Gross Register Tonnage (GRT);
- 2.1.1.5. Net Register Tonnage (NRT);
- 2.1.1.6. Gross Tonnage (GT);
- 2.1.1.7. Net Tonnage (NT);
- 2.1.1.8. Cargo:
 - 2.1.1.8.1. Containers:
 - 2.1.1.8.1.1. Number of Containers;
 - 2.1.1.8.1.2. Container Type Breakdown (20ft vs 40ft, full vs empty, reefers, etc.)
 - 2.1.1.8.1.3. Number of TEU;
 - 2.1.1.8.1.4. Number of tonnes;
 - 2.1.1.8.1.5. Type of cargo in containers.
 - 2.1.1.8.2. General Cargo:
 - 2.1.1.8.2.1. Total tonnage handled;
 - 2.1.1.8.2.2. Type of goods handled (e.g. steel pipes, coils);
 - 2.1.1.8.2.3. Way of handling (e.g. big bags, jumbo bags).
 - 2.1.1.8.3. Other cargo:
 - 2.1.1.8.3.1. Total tonnage handled;
 - 2.1.1.8.3.2. Type of goods handled (e.g. steel pipes, coils);
 - 2.1.1.8.3.3. Way of handling (e.g. big bags, jumbo bags).
- 2.1.1.9. Time at quay;

- 2.1.1.10. Time handled per cargo of vessel;
- 2.1.1.11. Average moves/crane/hour (time handled cargo of vessel);
- 2.1.1.12. Home/Destination cargo (Import/Export);
- 2.1.2. Storage information:
 - 2.1.2.1. Dwell time per container;
 - 2.1.2.2. Dwell time per ton of bulk good.
- 2.1.3. Information on hinterland transport:
 - 2.1.3.1. Number of trains handled;
 - 2.1.3.2. Number of TEU or tons of goods per train;
 - 2.1.3.3. Number of trucks handled;
 - 2.1.3.4. Number of TEU or tons of goods per truck.
- 2.2. The Operational Plan for the upcoming Contract Year m+1
 - 2.2.1. Expected number of vessels;
 - 2.2.2. Expected throughput;
 - 2.2.2.1. Type of cargo;
 - 2.2.2.2. Home/Destination cargo (Import/Export);
 - 2.2.3. Anticipated productivity
 - 2.2.3.1. Time handled per cargo of vessel;
 - 2.2.3.2. Average moves/crane/hour (time handled cargo of vessel);
 - 2.2.4. Operating and maintenance programme
- 2.3. A remedial plan in case of under-performance as reported in item [2a] to be submitted and

approved by TNPA within [2] (two) weeks (**Note: to be adjusted in line with changes in Section [32] Reporting**).

3. **Financial**

- 3.1. Report for the past Contract Year on the financial performance of the Terminal with regards all material aspects of the Business Plan (at the exception of the chapters covered in the Operational Plan);
- 3.2. The Rental Certificate audited by the Operator's auditor;
- 3.3. Planning for the upcoming Contract Year supporting the Gross Annual Turnover for such Contract Year
- 3.4. Audited IFRS financial accounts if available
- 3.5. Remedial plan in case of under-performance as reported in item [3a] to be submitted and approved by TNPA

Schedule 25: Penalty And Incentive Cascade Formula

(To be provided by TNPA on or before the Signature Date)

Draft not for Signature

Schedule 26: Operations Agreement

[To be provided by the Terminal Operator on or before the Effective Date]

Draft not for Signature

Schedule 27: Agricultural Dry Bulk Cargo and Compatible Cargo

[to be provided by TNPA]

Draft not for Signature

Schedule 28: Operating Specifications

[To be provided by the Terminal Operator]

Draft not for Signature

Schedule 29: Independent Certifier Agreement

[To be provided by the Terminal Operator to TNPA upon
conclusion with the Construction Contractor]

Draft not for Signature