

Volume-II of the Final Report is the Model Agreement for development of a dry port project under PPP mode in Asia-Pacific region.

The Agreement was made under a United Nations Development Account project entitled “Building capacity and facilitating private sector involvement for infrastructure development for less developed countries in the Asia-Pacific region”, which focuses on four selected countries and is implemented by the Transport Division, ESCAP.

# Model Agreement

Development of a Dry Port  
under PPP mode



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The report has been prepared with the support of a consultant and the opinions, figures and estimates set forth in this paper are his sole responsibility, and should not necessarily be considered as reflecting the views or carrying the endorsement of the United Nations.

This publication has been issued without formal editing

# **Development, Operation and Management Agreement**

Between

\_\_\_\_\_ [Name of the Authority]

And

\_\_\_\_\_ [Name of the SPC]

For

Development of \_\_\_\_\_  
[Name of the Dry Port] under PPP Mode

\_\_\_\_\_ [...], 20\_\_ [...]

# Development, Operation and Management Agreement

This Development, Operation and Management Agreement (the "Agreement") made on the \_\_\_\_ day of \_\_\_\_\_ [...], 20\_\_ [...].

## BY AND BETWEEN:

The \_\_\_\_\_ acting through its \_\_\_\_\_ (hereinafter referred to as the "**AUTHORITY**", which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns) of the FIRST PART;

## AND

\_\_\_\_\_, a special purpose company incorporated under \_\_\_\_\_ [Name of the relevant laws of country of its origin], having its registered office at \_\_\_\_\_ (hereinafter referred to as the "**SPC**", which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns) of the SECOND PART.

AUTHORITY and SPC are hereinafter collectively referred to as "**Parties**" and individually as "**Party**".

## WHEREAS:

- A. AUTHORITY is \_\_\_\_\_ [... {Entity established under relevant laws of country of its incorporation}], which is responsible for the development, operation and management of Dry Ports.
- B. AUTHORITY is desirous of undertaking development of a Dry Port (as defined herein) through the SPC and for this purpose intends to lease the premises constituting the Dry Port Site (as defined herein), in accordance with the terms and conditions set forth herein.
- C. SPC is a company established by the private partners/selected bidder, inter-alia with the objectives of developing, designing, constructing, upgrading, modernizing, financing, operating and managing the Dry Port (as defined herein) subject to and in accordance with terms of this Agreement.
- D. SPC is desirous and agreeable to undertake the tasks of developing, designing, constructing, upgrading, modernizing, financing, operating and managing the Dry Port (as defined herein) on and subject to the terms and conditions set forth herein.

**NOW THEREFORE**, in consideration of the respective covenants and agreements set forth in this Agreement, sufficiency and adequacy of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## 1. DEFINITIONS AND INTERPRETATION

### 1.1. Definitions

In this Agreement, unless the context otherwise requires:

**“Applicable Law”** means any and all applicable laws including rules, direction, regulations and notifications made thereunder and judgments of the highest court of jurisdiction of Authority as may be in force and effect in \_\_\_\_\_ [Year], during the subsistence of this Agreement.

**“Bid Bond”** shall mean the bank guarantee of \_\_\_\_\_ [...] Million \_\_\_\_\_ [...] from a reputed commercial bank of \_\_\_\_\_ [...] submitted by the selected bidder [single entity or Consortium Members] as part of his proposal or under the bid documents to the AUTHORITY during the competitive bidding procedure undertaken by AUTHORITY for the purposes of the selection of the private partners/selected bidder, in the prescribed format.

**“Business Plan”** means the business plan submitted by the selected bidder as a part of his proposal/bid documents to AUTHORITY. Business plan sets out the way the Dry Port project shall be developed, operated and managed during the Term. It includes financial projections for the project including but not limited to detailed demand estimates, cash flow projections and net present value and internal rate of return calculations.

**“Change in Control”** shall mean transfer, directly or indirectly, of voting and/or economic interest in the SPC so that the ownership of the selected bidder/Consortium Members in the SPC falls below 51% of the total voting and economic shareholding of the SPC; or, transfer of power to direct or cause the direction of management and policy decisions of the SPC, or of power to control the composition of Board of Directors of SPC; whether through ownership of voting securities, by contract, management agreement, voting agreement or otherwise.

**“Clearance”** means any consent, license, approval, permit, ruling, exemption, no objection certificate or other authorization or permission of whatsoever nature which is required to be obtained from and/or granted by any Governmental Authority and any other governmental, quasi-governmental, administrative, judicial, public or statutory body, ministry, department, instrumentality, agency, authority, board, bureau, corporation entrusted with, and carrying out, any statutory functions(s) or commission, required from time to time in connection with the performance of obligations hereunder.

**“Change in Law”** means the occurrence of any of the following (other than in respect of any tax laws or any environmental laws)<sup>1</sup> after the last date of submission of bid by Selected Bidder during the competitive bidding process initiated by the AUTHORITY (the “Bid Date”);

- (a) the modification, amendment, variation, alteration or repeal of any existing \_\_\_\_\_ Law or the enactment of any new \_\_\_\_\_ Law;
- (b) the commencement of any \_\_\_\_\_ Law, which has not yet come into effect prior to the Bid Date;
- (c) a change in the interpretation, application or enforcement of any \_\_\_\_\_ Law by the highest court of \_\_\_\_\_;
- (d) after the date of grant of any Clearance a change in the terms and conditions attaching to such Clearance or the attachment of any new terms or conditions or such Clearance ceasing in part

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<sup>1</sup> AUTHORITY may decide to incorporate tax laws and environmental laws under Change in Law definition

or in whole to remain in full force and effect otherwise than on account of any action or inaction of the SPC;

Provided however that the creation or introduction of a Regulatory Authority (including the framing of rules and regulations in relation thereto or thereunder) having jurisdiction over the Dry Port shall not constitute a Change in Law. Provided further an event, the adverse effect of which has been insured against or could have been insured against in accordance with Good Industry Practice, shall not constitute Change in Law.

**“Conditions Precedent”** shall mean collectively the AUTHORITY Conditions Precedent, the SPC Conditions Precedent and the Common Conditions Precedent.

**“Commercial Operation Date”** shall have the meaning ascribed thereto in Clause 8.9 hereof.

**“Completion Certificate”** shall have the meaning ascribed thereto in Clause 8.9 hereof.

**“Development Plan”** shall mean a plan prepared for all Dry Port Asset development or groupings of developments which sets out the detail of the proposed development along with the functional specification, design, drawings, costs, financing plan, timetable for construction and capital budget, and capacity enhancement plan to meet service requirement of the users and expected future container and cargo volume. *The Development Plan is to be based on the Business Plan submitted by the Selected Bidder as part of his Bid, Master Plan and the project requirements of development of Mandatory Capital Works by Scheduled COD, and provisions of Mandatory Dry Port Services.*

**“Debt”** means the quantum of outstanding principal, interest thereon, financial charges, payable to Lenders as of Transfer Date, in respect of financial assistance provided by the Lenders on an arms-length basis by way of loans, guarantees (to the extent invoked), subscription to non-convertible debentures, subscription to convertible debentures (to the extent not converted into equity) and other debt instruments secured by a first charge (including parri passu charge) including loan agreements, notes, bonds and other debt instruments, security agreements, and other documents relating to the financing of capital expenditure for the development of the Dry Port Assets pursuant to the terms hereof. It is clarified that the following shall not constitute Debt: (i) debt repayments (principal, interest, levies, charges, penal charges, penalties and/or damages) payable prior to Transfer Date, on which the SPC has defaulted; (ii) any working capital facilities relating to Dry Port Assets; (iii) Sub-ordinate Debt.

**“Development Standards and Requirements”** mean the standards and requirements set forth in Schedule 7 hereof.

**“Dispute”** shall mean any dispute, difference, question or controversy between the Parties arising out of, in connection with or in relation to this Agreement.

**“Dry Port Assets”** shall mean the Mandatory Capital Works and other assets/facilities that are developed by SPC in accordance with terms hereof for provision of services to the users of the Dry Port.

**“Effective Date”** means the date on which the Conditions Precedent have been satisfied or waived according to the terms hereof.

**“Equity Support”** shall have the meaning ascribed thereto in Clause 14.2.1 hereto.

**“Encumbrance”** means any mortgage, right of way, pledge, equitable interest, prior assignment, conditional sales contract, hypothecation, right of others, claim, security interest, title retention agreement, voting trust agreement, interest, option, lien, charge, easement, encroachment or other condition, commitment, restriction or limitation of any nature whatsoever, including any restriction on use, voting, transfer, receipt of income or exercise of any other attribute of ownership. The word “Encumber” shall be construed accordingly.

**“Entity”** means any person, body corporate, trust, partnership firm or other association of persons/ individuals whether registered or not.

**“Environment and Audit Report”** means the report covering the status of the environmental condition at the Dry Port Site prepared by an independent expert in accordance with Article 2.5 hereof.

**“Environmental Management Strategy”** shall mean the plan required to be produced by the SPC under the provisions of Article 2.5 hereof setting out the strategy and actions planned to address matters identified in the Environmental Audit Report.

**“Escrow Account”** shall mean the escrow account established pursuant to under the Escrow Agreement.

**“Escrow Agreement”** shall mean the escrow agreement to be entered into between the AUTHORITY, the SPC and a bank in the form set forth in Schedule 12 hereof.

**“Equity”** shall mean the paid-up share capital of the SPC and shall include any Sub-ordinate Debt advanced by shareholders of the SPC to the SPC, provided that the Lenders’ or their agent classifies such Sub-ordinate Debt as equity and conveys the same by a written notice to the AUTHORITY; provided however that notwithstanding the foregoing, any amounts that have been infused in the SPC as paid-up share capital or Subordinate Debt would not be classified as ‘Equity’ to the extent that such amounts do not relate to Dry Port Assets . It is clarified that the Equity shall not include the Equity Support [if granted to the SPC].

**“Expert”** shall mean an industry expert appointed by AUTHORITY in accordance with terms hereof, for monitoring compliance by SPC during Operation Period with the Operation and Maintenance Standards and Requirements and other related obligations.

**“Financing Documents”** means the documents executed by the SPC for raising Debt.

**“Financial Close”** shall mean that the condition precedents to the availability and drawdown of funds under the Financing Documents have been fulfilled and the funds are ready and available for draw down by exercise of power by SPC exercisable at the discretion of the SPC.

**“Force Majeure”** shall mean events as described in Article 16.1.

**“Good Industry Practice”** means the exercise of that degree of skill, diligence efficiency, reliability and prudence and those practices, methods, specifications and standards of equipment, safety, services and performance, as may change from time to time and which would reasonably and ordinarily be expected to be used by a skilled and experienced international operator / contractor engaged in designing, construction, operation and maintenance of a world class international Dry Port of a capacity similar to the capacity of the Dry Port.

**“Governmental Authority”** means the \_\_\_\_\_ and provincial, state or local government in \_\_\_\_\_ and any political subdivision thereof.

**“Group Entity”** with respect to a specified Entity, means any other Entity directly or indirectly controlling, controlled by or under common control with such specified Entity; provided however, that, for purposes of this definition, the terms “controlling”, “controlled by” or “under common control with” mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an Entity, whether through the ownership of voting securities, by contract or otherwise, or the power to elect or appoint at least 50% of the directors, managers, partners or other individuals exercising similar authority with respect to such Entity.

**“Independent Auditor”** shall mean a Chartered Accountancy Firm appointed in accordance with Article 11.2 hereof;

**“Independent Engineer”** shall mean the independent engineer appointed in accordance with Article 8.5.8 hereof.

**“Infrastructure Support”** shall have the meaning assigned thereto in Article 6.1.1 hereof.

**“Long Stop Date”** shall have the meaning ascribed in Clause 8.2.3 hereof

**“Lease Deed”** shall mean the lease deed to be entered into between the Parties for the Demised Premises (as defined therein) as enclosed in Schedule 4 hereof.

**“Lenders”** means the financing institutions, banks, multilateral funding agencies and similar bodies undertaking lending business or their trustees/ agents including their successors and assignees, who have agreed to guarantee or provide finance to the SPC under any of the Financing Documents for meeting costs of all or any part of the development of the Transfer Assets as per the terms hereof.

**“Mandatory Capital Works”** means the development projects described in Schedule 5 hereof.

**“Master Plan”** means the master plan for the development of the Dry Port, evolved and prepared by the relevant Government authority, which sets out the plans for the staged development of the full area covering the Dry Port.

**“Material Adverse Effect”** shall mean a material adverse effect on the business, condition (financial or otherwise), liabilities, assets, operations (or the results of operations) or prospects of the SPC or the Dry Port solely to the extent materially frustrating or impairing either Party's ability to perform, discharge, receive and/or assume the respective obligations, undertakings, rights and benefits ascribed to such Party pursuant to the express terms under this Agreement.

**“Mandatory Dry Port Services”** shall mean the minimum services that SPC is required to provide under this Agreement, as particularly listed out at Schedule 6.

**“Net Present Value”** with respect to any asset, shall mean the discounted value as estimated on the date of valuation, by the valuer(s) appointed by Parties in accordance with terms hereof.

**“Operations and Maintenance Standards and Requirements”** means the standards set forth in Schedule 8.



**“Operation Period”** shall mean the period commencing from Commercial Operation date and up to Transfer Date.

**“Performance Bond”** shall mean an unconditional and irrevocable bank guarantee enforceable and encashable at \_\_\_\_\_ of a value and validity set forth in Article 8.6 hereof in the form attached herewith as Schedule 10.

**“Project Agreements”** shall mean the following agreements:

1. This Agreement;
2. The Lease Deed;
3. Substitution Agreement; and
4. Escrow Agreement.

and Project Agreement shall mean any one of them.

**“Reserved Activities”** shall mean ensuring customs service’s personnel deployment and related formalities, security assistance at the Dry Port, in respect of Infrastructure Support, Health, Meteorology, plant and animal quarantine and other statutory or sovereign functions, as required under Applicable Law for enabling the SPC to perform its obligations set out herein.

**“Revenue”** means all pre-tax gross revenue of SPC accruing in any form from the Dry Port including any receipt, fees, accrual, long term security deposit etc., but excluding the following: (a) payments made by SPC, if any, for the activities undertaken by relevant Government Authorities or payments received by SPC for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to third party service providers; (b) insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to SPC from sale of any capital assets or items; (d) payments and/or monies collected by SPC for and on behalf of any governmental authorities under Applicable Law.

**“Scheduled COD”** shall have the meaning as ascribed thereto under Clause \_\_\_\_ [...].

**“Substitution Agreement”** shall mean the agreement to be entered into between AUTHORITY, SPC and the Lenders in the form set forth in Schedule 13 hereof.

**“Surplus Account”** shall have the meaning assigned thereto in the Escrow Agreement.

**“Selected Bidder”** shall mean the entity identified under competitive bidding process for award of the Dry Port project, and who are the promoters/initial shareholders of the SPC.

**“Sub-ordinate Debt”** shall mean any debt advanced to the SPC by the shareholders of SPC.

**“Term”** shall have the meaning assigned thereto in Article 18 hereof.

**“Transfer Date”** shall mean the date on which SPC transfers possession (and in respect of such assets that are not owned by AUTHORITY, ownership and possession) of the Dry Port Assets, as the case may be, to AUTHORITY or its nominee in accordance with the terms hereof, which shall be the date of termination as per the relevant notice of termination issued by SPC or AUTHORITY, as the case may be, or the date of expiry of this Agreement.

**“Year”** shall mean a period of 12 consecutive months ending on March 31 of any year; provided however that the first Year shall mean the period commencing on the Effective Date and ending on the immediately succeeding March 31 and the last Year shall mean the period commencing April 1 and ending on the date of expiry or termination hereof.

## 1.2. Interpretation

In this Agreement, unless the context otherwise requires:

- i. A reference to the singular shall include a reference to the plural and vice- versa; and a reference to any gender shall include a reference to the other gender.
- ii. A reference to any Article, Clause, Appendix, Schedule, Attachment or Annex shall be to an Article, Clause, Appendix, Schedule, Attachment or Annex of this Agreement.
- iii. The Appendices, Schedules, Attachments and Annexes form an integral part of this Agreement. In the event of any conflict between any provision of the Articles and any provision of the Appendices, Schedules, Attachments or Annexes, the provision of the Articles shall prevail.
- iv. Reference to any law or regulation having the force of law includes a reference to that law or regulation as from time to time amended, modified, supplemented extended or re-enacted.
- v. Any reference to time shall, except where the context otherwise requires, be construed as a reference to the time in \_\_\_\_\_. Any reference to the calendar shall be construed as reference to the Gregorian calendar.
- vi. The headings of the Articles, Clauses, Appendices, Schedules, Attachments and Annexes in this Agreement are inserted for convenience of reference only and shall not affect the meaning or interpretation of this Agreement.
- vii. The words “include” or “including” shall be deemed to be followed by “without limitation” or “but not limited to” whether or not they are followed by such phrases.
- viii. Unless the context otherwise requires, any period of time referred to shall be deemed to expire at the end of the last date of such period.
- ix. If any provision in Article 1 is a substantive provision conferring rights or imposing obligations on any Party, effect shall be given to it as if it were a substantive provision in the body of this Agreement;
- x. The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply;
- xi. All references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, modified, substituted, notated or assigned from time to time.

## 2. SCOPE OF CONCESSION

### 2.1. Grant of Concession

- 2.1.1. AUTHORITY hereby grants to the SPC, the exclusive right and authority during the Term to undertake the development, design, financing, construction, operation and maintenance of Mandatory Capital Works at the Dry Port and to perform services and activities constituting Mandatory Dry Port Services, (but excluding Reserved Activities) and such other services as are approved by AUTHORITY under Development Plan and/or thereafter approved from time to time during Term, and to ensure and procure secure and smooth flow of containers, cargoes and vehicles within and through the dry port and to make provision for expansion of capacity, as appropriate, taking into account the modes of transport served, the requirements of the users of the Dry Port and expected future container and cargo volumes. The SPC hereby agrees to undertake the functions of development, design, construction, modernization, finance, operation, maintenance and management of the Dry Port and at all times keep in good repair and operating condition the Dry Port and to perform services and activities as aforesaid, in accordance with the terms and conditions of this Agreement (the “**Concession**”).
- 2.1.2. Without prejudice to the aforesaid, AUTHORITY recognizes the exclusive right or obligations (as the case may be) of the SPC during the Term, in accordance with the terms and conditions of this Agreement, to:
- i. develop, finance, design, construct, modernize, operate, maintain, use and regulate the use by third parties of the Dry Port in accordance with terms hereof;
  - ii. enjoy complete and uninterrupted possession and control of the Dry Port Site and the Mandatory Capital Works for the purpose of providing Mandatory Dry Port Services and other related services as approved by AUTHORITY;
  - iii. provide such other services (besides Mandatory Dry Port Services) to Dry Port users as are approved under Development Plan and/or thereafter approved from time to time during Term, by AUTHORITY in writing; and to develop, design, finance, operate and maintain the facilities required for provision of the Mandatory Dry Port Services and additional services as envisaged herein;
  - iv. determine, demand, collect, retain and appropriate charges from the users of the Dry Port in accordance with Article 12 hereto;
  - v. contract and/or sub contract with third parties to undertake functions on behalf of the SPC, and sub-lease and/or license the part(s) of the Dry Port Assets in accordance with Article 8.5.7; and
  - vi. develop, operate and maintain the Dry Port as per Development Plan and terms hereof and upgrade it, from time to time during the Term with adequate capacity and layout to ensure provision of Mandatory Dry Port Services and other services as opted for by SPC and approved by AUTHORITY, to increased number of users, and to allow for the secure and smooth flow of containers, cargoes and vehicles within and through the Dry Port and to make provision for expansion of capacity, as appropriate, taking into account the modes of transport served, the requirement of the users of the Dry Port and expected future container and cargo volumes.

### 2.2. Sole Purpose of the SPC

- 2.2.1. The SPC having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the SPC or any of its subsidiaries shall not, except with the previous written consent of AUTHORITY, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein.

**2.2.2. Mandatory Dry Port Services**

Subject to the foregoing and the Applicable Law, SPC shall undertake/provide Mandatory Dry Port Services at the Dry Port Site. SPC may seek to undertake/provide other related services at the Dry Port Site as are approved under Development Plan and/or thereafter approved by AUTHORITY in writing, from time to time during Term.

Notwithstanding anything contained in this Agreement, the SPC shall not undertake any activities at the Dry Port Site other than Mandatory Dry Port Services or other services as approved by AUTHORITY in accordance with term hereof.

**2.3. SPC Ownership Structure**

- (a) The Parties hereto agree that the Selected Bidder [single entity or Consortium Members] shall not during the period commencing from date of this Agreement until expiry of two years from the Commercial Operation Date, change the initial shareholding of the SPC, so as to effect or cause to be effected any Change of Control of the SPC as it exists on the date of execution of this Agreement.
- (b) The Selected Bidder may upon expiry of two years from the commercial operation date, may change its shareholding to effect or cause Change of Control.
- (c) Notwithstanding the foregoing, the following shall apply to any transfer of shareholding of Selected Bidder in the SPC:
  - i. The SPC and/or the Selected Bidder shall not make or cause to be made, a change in the shareholding of the SPC that adversely affects the ability of the SPC to carry out its obligations under this Agreement. The SPC and Selected Bidder shall ensure that the foregoing shareholding obligations are duly incorporated in the charter documents of the SPC.
  - ii. All transfers of shares in the SPC at any time shall be subject to the relevant security and probity clearance requirements set forth by AUTHORITY, and AUTHORITY shall not unreasonably withhold any permission in this regard.

**2.4. Agreement to grant lease interest**

- 2.4.1. In consideration of the lease rent, this Agreement and the covenants and warranties on the part of the SPC herein, the AUTHORITY, in accordance with the Applicable Laws and the terms and conditions set forth herein, hereby, agrees to demise to the SPC under the Lease Deed, commencing from the Effective Date, all the land (along with any buildings, constructions or immovable assets, if any, thereon) which is described, delineated and shown in the Schedule 4 hereto, on an “as is where is basis” free from all Encumbrances thereto, (hereinafter “Demised Premises”) to hold the said Demised Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Demised Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the term hereof for the purposes permitted under this Agreement.

- 2.4.2. It is expressly clarified that the leasehold rights agreed to be granted hereunder shall terminate forthwith upon the expiry or early termination of this Agreement for any reason. It is further clearly understood and recorded between parties that, the lease rent shall be payable as per the rates determined under the Lease Deed.

**2.5. Environment Audit and Report**

- i. The SPC shall, within three months of the Effective Date procure that an independent expert [appointed in consultation with and acceptable to AUTHORITY] undertakes a full environmental audit of the Dry Port and provide a copy of such audit to AUTHORITY.

- ii. Based on the information from the environmental audit, the SPC shall, within a further three months produce an environment management strategy (“Environmental Management Strategy”) for the Dry Port, which sets out strategies and actions to manage the environmental condition of the Dry Port and an environmental monitoring program that assesses over time the environmental condition of the Dry Port.
- iii. The SPC shall review annually, progress under the Environmental Management Strategy and will from time to time update the said Environmental Management Strategy. The SPC shall provide annual reports in relation to progress under the Environmental Management Strategy to AUTHORITY.
- iv. Prior to the termination of this Agreement, the SPC shall procure that an appropriate and qualified independent expert [approved by AUTHORITY] undertakes a further environmental audit of the Dry Port. SPC shall ensure that at termination the environmental condition of the Dry Port meets all statutory and regulatory requirements.

### 3. CONDITIONS PRECEDENT

#### 3.1. Conditions Precedent

##### 3.1.1. Conditions Precedent to be satisfied by the AUTHORITY

The obligations of the SPC hereunder are subject to the satisfaction by the AUTHORITY of the following conditions precedent ("AUTHORITY Conditions Precedent") unless any such condition has been waived by the SPC as hereinafter provided:

- i. AUTHORITY shall have executed and delivered to the SPC a counterpart of the Escrow Agreement.
- ii. AUTHORITY shall have executed and delivered to the SPC a counterpart of the Lease Deed. Provided however that the Parties agree that AUTHORITY shall execute the Lease Deed only after all other conditions precedent mentioned in this Chapter 3 have been fulfilled.
- iii. AUTHORITY shall have appointed the Independent Engineer in accordance with terms hereof.
- iv. AUTHORITY shall have reviewed the Development Plan and approved the same with or without modifications decided by AUHTORITY in its sole discretion.
- v. AUTHORITY shall have executed Substitution Agreement upon SPC notifying AUTHORITY of SPC's and Lenders' readiness to execute the same.

##### 3.1.2. Conditions Precedent to be satisfied by SPC

The obligations of the AUTHORITY hereunder are subject to the satisfaction by SPC of the following conditions precedent ("SPC Conditions Precedent") unless any such condition has been waived by the AUTHORITY as hereinafter provided:

- i. The SPC shall deliver to the AUTHORITY the original copy of the Performance Bond (in accordance with Article 8.6).
- ii. The SPC shall have executed and delivered to the AUTHORITY counterpart of the Escrow Agreement.
- iii. The SPC shall have received all Clearances requisite for undertaking development, operation and management of the Dry Port by the SPC. AUTHORITY shall use all reasonable endeavors to grant such Clearances as are within its power to grant, as soon as possible, subject to receipt of the relevant application duly completed and in full compliance with Applicable Law
- iv. The SPC shall have in accordance with clause 8.3 hereof, prepared, submitted the Development Plan to the AUTHORITY and promptly incorporated comments/modifications as advised by AUTHORITY to procure AUTHORITY's approval thereon; in accordance with term of this Agreement.
- v. The SPC shall have executed and delivered to the AUTHORITY a counter part of the Lease Deed.
- vi. The SPC shall have achieved Financial Close with Lenders in accordance with Financing Documents, and provided to the AUTHORITY the duly certified copy of the Financing Documents along with all relevant details/documents including the Financial Model agreed with Lenders.

- 3.2. The SPC and AUTHORITY shall take reasonable steps to ensure expeditious fulfillment of the SPC Conditions Precedent and the AUTHORITY Conditions Precedent respectively.

**3.3. Non-fulfilment of Conditions Precedent**

In the event that any of the conditions set forth in Articles 3.1.1, or 3.1.2 have not been fulfilled within 06 months from the date of this Agreement, or such later date as may be mutually agreed by the Parties (subject to payment of 0.1% of Bid Bond amount for each day of extension beyond 06 months); the SPC (in case of non- fulfilment of any of the AUTHORITY Conditions Precedent), or the AUTHORITY (in case of non- fulfilment of any of the SPC Conditions Precedent) may terminate this Agreement.

Provided however that in the event this Agreement is terminated by AUTHORITY for non- fulfilment of the SPC Conditions Precedent, the AUTHORITY shall be entitled to encash the Bid Bond or Performance Bond (as the case may be) whichever is available.

Provided further that upon any such termination, each Party shall return to the other Party, any monies (other than the termination payments mentioned above) received from such Party prior to such termination.

Neither Party shall be entitled to terminate this Agreement for non-fulfillment of the SPC Conditions Precedent, or the AUTHORITY Conditions Precedent, as the case may be, to the extent that such non-fulfillment is the result and/or consequence of an event of Force Majeure.

**3.4. Notwithstanding anything contained herein, it is expressly understood by the Parties that prior to Effective Date, AUTHORITY shall provide to the SPC reasonable and immediate access to the Dry Port in order to enable the SPC to prepare the required Development Plan.**

## 4. REPRESENTATIONS AND WARRANTIES

### 4.1. Representations and Warranties by SPC

The SPC hereby represents and warrants to the AUTHORITY that on the date hereof and as on the Effective Date:

- (a) the SPC is incorporated under the laws of \_\_\_\_\_ [...] and has been properly constituted and is in continuous existence since incorporation;
- (b) the SPC has the corporate power and authority and has taken all corporate actions necessary to execute and deliver validly and to exercise its rights and perform its obligations validly under this Agreement;
- (c) the obligations of the SPC under this Agreement will be legally valid, binding and enforceable obligations against the SPC in accordance with the terms hereof;
- (d) no proceedings against the SPC are pending or threatened, and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (e) the SPC is a special purpose company incorporated only for the purpose of developing, designing, constructing, upgrading, financing, operating and maintaining the Dry Port;
- (f) Neither Selected Bidder nor any of the Consortium Members have intentionally withheld from the AUTHORITY, any material information or material document, whose non-disclosure would have a material adverse effect or would have adversely affected the evaluation or acceptance of the Selected Bidder or the bid submitted by the Selected Bidder;

### 4.2. Representations and Warranties by AUTHORITY

AUTHORITY hereby represents and warrants to the SPC that on the date hereof and as on the Effective Date:

- (a) the AUTHORITY has the right, power and authority and has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) the AUTHORITY has the right, power and authority to procure development and operation of the Dry Port;
- (c) the AUTHORITY has not intentionally withheld from the Selected Bidder, any material information or material document, whose non-disclosure would have a Material Adverse Effect;
- (d) the obligations of AUTHORITY under this Agreement will be legally valid, binding and enforceable obligations against AUTHORITY in accordance with the terms hereof;
- (e) it has good and valid title to the Demised Premises, and has power and authority to grant a lease interest in respect thereto to the SPC;
- (f) upon the SPC paying the lease rent and performing the covenants herein and under Lease Deed, AUTHORITY shall not at any time during the term hereof, interfere with peaceful enjoyment of the Demised Premises by SPC, in accordance hereof; and
- (g) AUTHORITY shall on best endeavor basis initiate institutional, administrative and regulatory frameworks that are favorable to the development and smooth operation of the Dry Port, including procedures for regulatory inspection and the execution of applicable customs control and formalities in line with the national laws and regulations.

### 4.3. Disclosure

In the event at any time after the date hereof, any event or circumstance comes to the attention of either Party that renders any of its abovementioned representations or warranties untrue or incorrect, then such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of releasing any obligation of either Party under this Agreement.



## **5. TRANSFER OF RIGHTS ON EFFECTIVE DATE**

### **5.1. Transfer of Rights in relation to Dry Port on Effective Date**

Upon satisfaction or waiver, as the case may be, of the Conditions Precedent, on and from the Effective Date, the rights and obligations associated with the development, design, financing, operation and management of the Dry Port would stand transferred to the SPC, who shall be solely responsible and liable for the development of Mandatory Capital Works and performance of all Mandatory Dry Port Services and all other AUTHORITY approved activities and services at the Dry Port (other than Reserved Activities).

## 6. INFRASTRUCTURE SUPPORT BY THE AUTHORITY

### 6.1. Infrastructure Support

AUTHORITY shall commencing from the Commercial Operation Date, and thereafter during the Term hereof make available to the SPC, the following infrastructure facilities and perform or cause to be performed the below specified functions/activities at the Dry Port Site in the manner and subject to the terms provided herein (such support is hereinafter referred to as “**Infrastructure Support**”) and more particularly in Schedule 11 hereof. The Infrastructure Support shall include the following facilities and functions to be provided by the AUTHORITY at the Dry Port Site:

- i. Development, provision and operation and maintenance of Railway Infrastructure including Railway lines, coaches, shunting facilities, rail siding facilities/activities for smooth inter modal movement of cargoes.
- ii. Deployment of the adequate number of the Custom personnel for performing the administrative and regulatory customs function and formality required at the Dry Port.
- iii. Developing the External and Internal Road Networks as per the Lay Out plan and operating and maintaining the same.
- iv. Providing Water Supply Network and Electric Supply Systems as per the Lay Out plan and operating and maintaining the same.
- v. Developing Sewerage and Drainage Network as per the Lay Out plan
- vi. Developing, laying down and operating and maintaining the Telecommunication Infrastructure and Internet Connectivity as per the Lay Out plan.
- vii. Developing, operating and maintaining street lights as per the Lay Out plan.
- viii. Zonal Landscaping and development of Green/Open area as per the Lay Out plan.

The SPC shall, in lieu of usage of infrastructure facilities/utilities, pay to the AUTHORITY such charges as are determined by AUTHORITY or the relevant agency providing such facilities/ services.

## 7. ACCEPTANCE OF SITE/DISCLAIMER

### 7.1. Acceptance of Site

- 7.1.1. (i) For the purposes of this Agreement, the SPC shall be deemed to have:
- (a) inspected the Dry Port, and the Dry Port Site including the Supporting Infrastructure thereat and its surroundings;
  - (b) satisfied itself as to the nature of the climatic, hydrological and general physical conditions of the Dry Port, the nature of the ground and subsoil, the form and nature of the Dry Port, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement;
  - (c) satisfied itself as to the means of communication with, access to the Dry Port it may require or as may be otherwise necessary for the performance of its obligations under this Agreement; and
  - (d) obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect the SPC and its rights and obligations hereunder and its other rights and obligations under or pursuant to this Agreement.
- (ii) SPC expressly acknowledges that it shall have no recourse against the AUTHORITY in the event of any mistake made or misapprehension harbored by the SPC in relation to any of the foregoing provisions of Article 7.1.1 (i) and the AUTHORITY hereby expressly disclaims any liability in respect thereof.
- 7.1.2. SPC acknowledges that prior to the execution of this Agreement, it has, after a complete and careful examination, made an independent evaluation of the Dry Port as a whole and has determined the nature and extent of the difficulties, up-gradations, inputs, costs, time, resources, risks and hazards that are likely to arise or may be faced by it in the course of the performance of its obligations under this Agreement and the extent and manner of development required. SPC further acknowledges that it shall have no recourse against the AUTHORITY if it is, at a later date, found that the Demised Premises or any Supporting Infrastructure thereon, is/are deficient in any manner whatsoever. If a deficiency is found, the SPC hereby acknowledges and agrees that it shall, at its own cost and at no cost to the AUTHORITY, take all appropriate measures to remedy the same.
- 7.1.3. SPC acknowledges and hereby accepts the difficulties, up-gradations, inputs, costs, time, resources, risks and hazards associated with the performance of its obligations hereunder and hereby agrees that AUTHORITY shall not be liable for the same in any manner whatsoever to SPC, other than as expressly provided in this Agreement.
- 7.1.4. The SPC shall not be entitled to make any claim against the AUTHORITY or any Government Authority whether for rescission, in damages or otherwise on the grounds of any misunderstanding or misapprehension in respect of incorrect or insufficient information given to it by any Entity, whether or not in the employment of the AUTHORITY or any Government Authority, nor, unless expressly provided otherwise in this Agreement, shall the SPC be relieved from any obligations or risks imposed on or undertaken by it in relation to the works or otherwise on any such ground or on the ground that it did not or could not foresee any matter which may, in fact, affect or have affected the performance of its obligations hereunder.
- 7.1.5. It is clarified that all fossils, antiquities, structures and/or other remains or things either of archaeological or of particular geological interest discovered at the Dry Port Site or in the course of carrying out any work shall not be the property of the SPC and SPC shall have no right or interest in such fossils, antiquities and structures.

7.2. **Deemed Knowledge and Disclaimer**

- 7.2.1. Subject to the provisions of this Agreement, the SPC shall be fully and exclusively responsible for, and shall bear the financial, technical, commercial, legal and other risks in relation to the design, financing, constructing, commissioning, maintaining, operation, management and development of the Dry Port and all its other rights and obligations under or pursuant to this Agreement regardless of whatever risks, contingencies, circumstances and/or hazards may be encountered (foreseen or not foreseen) and notwithstanding any change(s) in any of such risks, contingencies, circumstances and/or hazards on exceptional grounds or otherwise and whether foreseen or not foreseen and none of the SPC shall have any right whether express or implied to bring any claim against, or to recover any compensation or other amount from, the AUTHORITY, and/or any of their agencies other than in respect of those matters in respect of which express provision is made in this Agreement.

## **8. CONSTRUCTION/DEVELOPMENT, OPERATION AND MANAGEMENT**

### **8.1. General Obligations**

- i. SPC shall at all times comply with Applicable Law in the development, design, construction, financing, operation and management of the Dry Port subject to and in accordance with the terms hereof. SPC shall develop, design, construct, upgrade, modernize, manage, operate and maintain and keep in good operating repair and condition the Dry Port, in accordance with Good Industry Practice and Development Standards and Requirements; and Operation and Maintenance Standards and Requirements and renew, replace and upgrade to the extent reasonably necessary during the project life cycle.
- ii. SPC shall at all times, obtain and maintain all Clearances, including registrations, licenses and permits including immigration, temporary residence, work and exit permits, which are required by Applicable Law for the performance of its obligations hereunder.
- iii. The SPC will develop, design, construct, operate, maintain and manage the Dry Port during the Term with regard to safety precautions, fire protection, security, transportation, delivery of goods, materials, plant and equipment, control of pollution, maintenance of competent personnel and labor and industrial relations and general Dry Port Services including, without limitation, access to and on the Dry Port, allocation of space for contractors' and sub-contractors' offices and compounds and the restriction of access to the Dry Port to authorized entities only, ensuring at all times smooth operation of the Dry Port. The SPC will prepare and issue a manual of rules and regulations relating to the Dry Port. The SPC shall provide such manual to the AUTHORITY who may require SPC to make reasonably appropriate modifications in the said manual.
- iv. The SPC will ensure that all materials, equipment, machinery etc. installed and/or used at the Dry Port including the constructions or repair of the Dry Port will be of sound and merchantable quality, that all workmanship shall be in accordance with Good Industry Practices applicable at the time of installation, construction or repair and that each part of the construction will be fit for the purpose for which it is required, as particularly stated in the Development Plan.
- v. Neither the submission of any drawing or document including Development Plan under or pursuant to any provision of this Agreement or otherwise, nor its approval or disapproval, nor the raising of queries on, or the making of objections to or the making of comments, suggestions or recommendations on the same by the AUTHORITY shall prejudice or affect any of the SPC's obligations or liabilities in relation to design and construction, which shall not be relieved, absolved or otherwise modified in any respect.
- vi. The SPC shall pay all taxes, levies, import/export duties, fees (including any license fees) and other charges, dues, assessments or outgoings payable in respect of the Demised Premises or the structures to be constructed thereon or in respect of the materials stored therein which may be levied by any Governmental Authority and any other governmental, quasi-governmental, administrative, judicial, public or statutory body, ministry, department, instrumentality, agency, authority, board, bureau, corporation entrusted with, and carrying out, any statutory functions(s) or commission.

## 8.2. **Mandatory Capital Works**

- 8.2.1. The SPC shall construct the Mandatory Capital Works in accordance with the approved Development Plan, project requirements and subject to and in accordance with terms and conditions set out herein. The SPC shall, latest by \_\_\_\_\_ [...] ("**Scheduled COD**"), commence, carry out and complete all the Mandatory Capital Works set out under Schedule 5, by completing the work items at the respective times set forth under the Development Plan, in accordance with the terms and conditions set forth therein and herein.
- 8.2.2. In the event that the SPC delays in completion of construction of a Mandatory Capital Works in accordance with terms hereof, and as per the respective time set forth under the Development Plan, then, AUTHORITY shall have the right to levy liquidated damages on the SPC equivalent to 0.5% (zero decimal five percent) of the Performance Bond, for each week (or part thereof) of delay in completion of construction of such Mandatory Capital Work(s) as per the respective Development Standards and Requirement; provided that in event the liquidated damages in any Year during construction period exceeds an amount equivalent to 10% of the Performance Bond, then this Agreement shall become liable for termination at the election of AUTHORITY. The SPC shall provide monthly report to the Independent Engineer on the progress of the construction or such other relevant information as may be required by the Independent Engineer, and the Independent Engineer shall carry periodic independent tests/verification to verify that the development at the Dry Port (or any portion thereof) is as per the timelines set out under the Development Plan and the respective Development Standard and Requirement.
- 8.2.3. Notwithstanding the foregoing:
- i. In the event the completion of construction of a particular Mandatory Capital Work has been delayed and liquidated damages for such delay have been levied and paid according to Article 8.2.2 above, and the Mandatory Capital Works has, notwithstanding the delay in commencement in construction of one or more or such works, been completed by the Scheduled COD, then the liquidated damages that have been paid for delay in commencement of construction shall be returned by AUTHORITY to SPC without any interest.
  - ii. In case the construction of the Dry Port Assets is not completed in accordance with terms hereof, by Scheduled COD, the AUTHORITY may in its sole discretion grant extensions not exceeding 120 days from Scheduled COD (such date falling after 120 days from Scheduled COD referred to as "**Long Stop Date**"), against payment of liquidated damages at the aforesaid rate, after which the Agreement shall become liable for termination on account of SPC's event of default.

## 8.3. **Development Plan**

- 8.3.1. The SPC shall prepare a Development Plan for the Dry Port setting out the proposed development of the Mandatory Capital Works and provision of the Mandatory Dry Port Services along with other additional services and corresponding facilities that the SPC intends to develop operate and maintain during the Term with a view to ensure that Dry Port is developed with adequate capacity and layout to allow for the secure, speedy and smooth flow of containers, cargoes and vehicles. The Development Plan shall inter-alia include traffic forecasts for the Term and link all planned major development to these forecasts. The SPC shall prepare and submit the Development Plan for approval of the AUTHORITY within 60 days of the date of execution of the Agreement. The AUHTORITY shall either itself or through an industry expert appointed by it for this purpose, undertake review of the Development Plan and be entitled to require the SPC to modify or amend the Development Plan in order to comply with the requirement of the Master Plan, Development Standards and Requirements, Operation and Maintenance Standards and Requirements; and with

a view to ensure that Dry Port is developed with adequate capacity and layout to allow for the secure, speedy and smooth flow of containers, cargoes and vehicles, and to make provision for expansion of capacity, as appropriate, taking into account the modes of transport served, the requirements of the users of the Dry Port and expected future container and cargo volumes.

The SPC shall pursuant to AUTHORITY's review, promptly and in any case within 15 days of written notice of such change, incorporate all comments/observations/modifications conveyed by AUTHORITY, in respect of the Development Plan, to the satisfaction of the AUTHORITY and re-submit the same for AUTHORITY's approval so as to procure AUTHORITY's approval prior to expiry of 06 months from date of this Agreement, which approval AUTHORITY shall not unreasonably withhold if SPC complies with the directions.

Notwithstanding anything to the contrary contained in this Agreement, the Parties hereby acknowledge and agree that nothing in this Article 8.3 shall be deemed to be an approval by AUTHORITY of any Development Plan (or any part thereof) submitted by the SPC in accordance with the aforesaid provisions, including but not limited to any minimum projected traffic/cargo volume. It is expressly agreed that it shall be sole responsibility and obligation of the SPC to ensure that the final Development Plan is in full compliance with the requirements of this Agreement and nothing in this Agreement shall, in any way, absolve the SPC of its obligation to ensure that the final Development Plan is in accordance with the provisions of this Agreement.

- 8.3.2. The Development Plan for the Dry Port must be consistent with the Business Plan, Master Plan and Applicable Laws and must incorporate the Mandatory Capital Works and Mandatory Dry Port Services and additional services [if any]. Any significant deviations from the Business Plan must be fully explained. The Development Plan shall be made pursuant to full consultation with all major stakeholders, including but not limited to users, Shipping lines and related Government authority. The Development Plan must demonstrate that it is consistent with the quality and service performance standards as set out in this Agreement.

#### 8.4. Insurance

i. Insurance during Term

During the Term, SPC shall effect and maintain at its own cost, at all times the insurances required under the Financing Documents and such additional insurances as SPC may reasonably consider necessary or prudent in accordance with Good Industry Practice. The insurance policies so procured shall mention AUTHORITY as co-insured.

ii. Policies

Within 15 (fifteen) days of receiving any insurance policy certificate in respect of insurances required to be obtained and maintained under Article 8.4(i), SPC shall furnish to AUTHORITY, copies of such policy certificates, copies of the insurance policies and evidence that the insurance premia have been paid in respect of such insurance. No insurance shall be cancelled, modified or allowed to expire or lapse until the expiration of at least forty-five (45) days' notice of such cancellation, modification or non-renewal, has been provided by SPC to AUTHORITY.

iii. Remedy for failure to insure

If SPC shall fail to effect and keep in force all insurances for which it is responsible pursuant hereto, AUTHORITY shall have the option to keep in force any such insurances, and pay such premia and recover the costs thereof from SPC.

iv. Application of Insurance Proceeds

Subject to the Escrow Agreement, all insurance claims received by SPC shall be applied for reconstruction of the Dry Port except for (i) insurance proceeds unrelated to physical damage; and (ii) insurance proceeds relating to business interruption, loss of profit or delay in startup.

Subject to the restriction on application of insurance proceeds, the Lenders may be loss payees under all such policies of insurance.

## **8.5. Contracts, Leases and Licenses**

### **i. Sub-Contracting, Sub-leasing and Licensing**

- (a) Any activity may be sub-contracted by the SPC, provided always that notwithstanding the sub-contract, the SPC retains overall management, responsibility, obligation and liability in relation to the sub-contracted Dry Port service. Any such subcontracting shall not relieve the SPC from any of its obligations in respect of the provision of such Dry Port services under this Agreement. It is clarified that SPC shall remain liable and responsible for any acts, omissions or defaults of any sub-contractor, and shall indemnify AUTHORITY in respect thereof. Provided however that any sub-contract involving foreign manpower or materials shall be subject to the political sensitivities of Government.
- (b) AUTHORITY hereby recognizes the right of SPC to sub-lease and license any part (but not whole) of the Dry Port Assets [excluding the Dry Port Site] to third parties for the purpose of performance of its obligations hereunder.
- (c) Before entering into contracts or granting any sub-lease or license, the SPC will inform AUTHORITY of the counter-party or parties to every contract, sub-lessee or licensee (as the case may be) and their shareholding pattern.
- (d) Without prejudice to the foregoing, every contract entered into by the SPC shall be on an arms-length basis, and shall contain an express provision allowing the transfer of the rights and obligations of the SPC under such contract to the AUTHORITY in the event of termination or expiry hereof. Every contract (including any sub-lease or license arrangement) entered into by the SPC shall contain an express provision recognizing the right of the AUTHORITY to acquire the assets in the manner provided herein, and contain an undertaking by the counter-party(ies), licensee/ sub-lessees, or owners of the relevant asset, as the case may be to transfer the relevant Asset upon the exercise of such right by AUTHORITY.
- (e) SPC shall ensure that any sub-contract, license or sub-lease granted in relation to the Dry Port expires on the expiry or earlier termination of this Agreement.

### **ii. Management and Control**

- (a) Notwithstanding anything contained in Article 8.5 (i) above, under no circumstances shall the SPC sub-contract the overall operation and management of the Dry Port and the SPC shall at all times exercise and be responsible for overall management control and supervision of the Dry Port through its senior management staff, irrespective of any sub-contracting of activities and/or services. Further, the SPC shall at all times, prior to entering into any such sub-contract mandatorily procure AUTHORITY's approval on the terms and conditions [including the payment] of such sub contract.



The SPC shall further under no circumstance sub-lease or license the whole or any part(s) of the Dry Port Site through any device, arrangement or mechanism, directly or indirectly.

#### 8.6. Independent Engineer and Expert

- i. Appointment of Independent Engineer and Expert
  - (a) A reputable concern of Independent Engineer shall be appointed for the purpose of determining and ensuring compliance with planning approvals and standards with respect to Dry Port development and performing the duties mentioned in Schedule 9 hereof.
  - (b) The procedure of the appointment of the Independent Engineer shall be as follows: AUTHORITY shall nominate a panel of six (6) engineers with expertise in Dry Port development supervision of direct relevance to the needs of the assignment, with no conflict of interest to the SPC. The SPC shall have the right to object to one or more of such nominees but not in any circumstance exceeding three (3) nominees. AUTHORITY shall appoint any one of the nominees to whom SPC has not objected, as the Independent Engineer.
  - (c) AUTHORITY shall bear all costs of, including costs associated with the appointment of, the Independent Engineer.
  - (d) AUTHORITY shall, six months prior to completion of construction of Dry Port Assets, appoint an Industry expert ("**Expert**") at its own cost, as per the aforesaid procedure (as followed for selection of Independent Engineer) to undertake and ensure that the operation and maintenance of the Dry Port Assets comply with Operation and Maintenance Standards and Requirements and other safety and security and quality related obligations as set out under the O&M Plan, Quality Assurance Plan, Environment Management Strategy, Good Industry Practices and Applicable Laws.

#### 8.7. Complaints Register

- i. SPC shall maintain a public relations office at the Dry Port where it shall keep a register (the "**Complaint Register**") with access at all times for recording of complaints by any person (the "**Complainant**"). Immediately, after a complaint is registered, SPC shall give a receipt to the Complainant stating the date and complaint number. Details of any complaint that remains unaddressed after 30 days of lodgment thereof shall be immediately uploaded on the SPC website (without disclosing the name or details of the complainant).
- ii. The Complaint Register can either be in hard copy form or electronic form. It shall have appropriate columns including the complaint number, date, name and address of the Complainant, substance of the complaint and the action taken by SPC. Information relating to the availability of and access to the Complaint Register shall be prominently displayed by SPC at the Dry Port. SPC shall inspect the Complaint Register every day and take prompt and reasonable action for redressal of each complaint. The action taken shall be briefly noted in the Complaint Register and a reply stating the particulars thereof shall be sent by SPC to the Complainant under a certificate of posting or by fax with confirmation of transmission.

#### 8.8. **Performance Bond**

- (a) The SPC shall furnish a Performance Bond in the form of a bank guarantee from a reputed scheduled commercial bank in \_\_\_\_\_ with a minimum validity of 12 months at a time for an amount of \_\_\_\_/- (\_\_\_\_) escalating at the \_\_\_\_ annually after first anniversary of Effective Date.
- (b) Upon submission of the Performance Bond, AUTHORITY shall return/ release the Bid Bond. The Performance Bond shall be rolled over periodically in each year, and shall be renewed three (3) months prior to its expiry so as to keep it valid and subsisting in full force and effect at all times during the Term and thereafter up to a period until expiry of six months from the Term.
- (c) The whole or part of the Performance Bond shall be encashable, inter alia, in the following situations:
  - i. Non completion of the Mandatory Capital Works within the agreed time frame set out under the Development Plan;
  - ii. Non-compliance with Development Standards and Requirements, Development Plan, Master Plan or Applicable Laws, subject to and in accordance with the terms hereof;
  - iii. Failure to provide adequate insurance in accordance with the terms set forth in this Agreement (except where such insurance has been obtained by AUTHORITY and AUTHORITY has been indemnified in respect of the cost thereof);
  - iv. Failure to comply with Operation and Maintenance Standards and Requirements.
  - v. Failure to pay any liquidated damages hereunder for one (1) month after the same become due and payable; and
  - vi. Failure to transfer and handover the Dry Port Assets in good operating condition, upon expiry or earlier termination of the Agreement, as per terms of this Agreement.
  - vii. Any other material breach / non-performance of / under this Agreement.
- (d) In the event any portion of the Performance Bond is encashed pursuant to sub-clause (c) of this Article 8.8 then immediately following such encashment, the SPC shall replenish the Performance Bond. In the event the Performance Bond is not replenished within three (3) months of its encashment, the AUTHORITY shall have the right to encash the entire Performance Bond.
- (e) Any delay in invocation or non-invocation of the encashment of the Performance Bond shall not be construed as a condonation of the breach or default or waiver of the right to invoke or encash the Performance Bond in the future.

#### 8.9. **Certification of Works by Independent Engineer**

Any certification of the completion of Mandatory Capital Works and / or facilities to be constructed under the Development Plan in accordance with terms hereof, which is necessary for determining compliance by the SPC of its obligations under this Agreement shall be performed by the Independent Engineer. The Independent Engineer shall in accordance with terms hereof be obliged to complete its certification as soon as reasonably practicable after being requested to do so by SPC and / or AUTHORITY. Upon and from date ("**Commercial Operation Date**") of issue of completion certificate ("**Completion Certificate**") by Independent Engineer in respect of Mandatory Capital Works in accordance with terms hereof, the SPC shall be entitled to levy, demand, collect and appropriate user charges/Tariff from the users of the Dry Port and be obligated to operate and maintain the Dry Port during Operation Period, subject to and in accordance with Applicable Laws and terms and conditions hereof.

8.10. **O&M Plan and Quality Assurance Plan**

The SPC shall no later than 90 (ninety) days prior to the Scheduled COD, in consultation with the Expert, evolve an operation and maintenance plan (“**O&M Plan**”), quality assurance plan (“**Quality Assurance Plan**”) and repair and maintenance manual (the “**Maintenance Manual**”) for the operation and maintenance of the Dry Port Assets as per Operation and Maintenance Standards and Requirements, and regular and preventive maintenance of the Dry Port in conformity with the specifications and standards, maintenance requirements, safety requirements and Good Industry Practice, and shall provide copy thereof to the Authority and to the Expert. The O&M Plan, Quality Assurance Plan and Maintenance Manual shall be revised and updated periodically and all updations to be promptly communicated to AUTHORITY.

Without prejudice to the provisions of this clause, the Maintenance Manual shall, in particular, include provisions for maintenance of project equipment and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the project equipment, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

## 9. OPERATION AND MAINTENANCE

### 9.1. Obligations of the SPC

In addition to any of its other obligations under this Agreement, the SPC shall manage, operate, maintain and repair the Dry Port Assets and Mandatory Dry Port Services and other approved services, entirely at its cost, charges, expenses and risk in accordance with the provisions of this Agreement. The SPC's obligations under this Article 9 shall include but shall not be limited to the following:

#### i. Dry Port Operations:

The SPC shall:

- (a) promptly commence operations of the Dry Port Assets and performance of Mandatory Dry Port Services and other approved services, that are declared by the Authority in terms hereof as ready for commercial operations, and ensure compliance thereof with the Operation and Maintenance Standards and Requirements, Good Industry Practices, O&M Plan, Quality Assurance Plan, Maintenance Manual and Applicable Laws
- (b) make efforts to maximize cargo handled so as to achieve optimal utilization of the Dry Port facilities and services;
- (c) ensure that the operation and maintenance of the Dry Port Assets is as Operation and Maintenance Standards and Requirements, Good Industry Practices, O&M Plan, Quality Assurance Plan and Applicable Laws;
- (d) ensure that the Dry Port Assets and services shall adhere to the Operations and Maintenance Standards and Requirements and safety standards and there is safe, smooth and uninterrupted flow of traffic and cargo volumes;
- (e) minimize disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Dry Port facilities and services by providing a rapid and effective response and maintaining liaison with emergency services of the AUTHORITY or other agencies;
- (f) make available all necessary financial, technical, technological, managerial and other resources for operation, maintenance, repair and replacement of the Dry Port facilities and services in a timely manner;
- (g) manage and operate the Dry Port and related services on a first come - first serve, common-user basis, open to any and all shipping lines, importers, exporters, shippers, consignees and receivers, and refrain from indulging in any unfair or discriminatory practice against any user or potential user thereof;
- (h) ensure maintenance of proper and accurate record/data/accounts relating to operations of the Dry Port facilities and services and the revenue earned therefrom; and
- (i) prevent, with the assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Dry Port facilities and services.

#### ii. Repairs and Maintenance

The SPC shall at its own cost:

- (a) repair as necessary and maintain the Dry Port facilities and services or any part thereof, to keep it functional and operative at the levels set out in the Operation and Maintenance Standards and Requirements, and as per the O&M Plan, Maintenance Manual and Quality Assurance Plan; and
- (b) maintain the Dry Port facilities and services in accordance with the provisions of this Agreement and Good Industry Practice with the objective of providing adequate service standards and ensuring that the Dry Port Assets and facilities to be transferred

to the Authority upon expiry of the Term are in good condition, normal wear and tear excepted.

iii. Replacement of Equipment

The SPC shall at its cost, and as per Maintenance Manual, plan for and undertake replacement of the equipment well ahead of the time when the utility thereof is reasonably expected to expire and replace the equipment in accordance with Good Industry Practice so as to ensure that the Dry Port facilities and services commensurate with the Operation and Maintenance Standards and Requirements, at all times during the Term.

iv. Replacement or Restoration

The SPC shall at its own costs, promptly and diligently repair, replace or restore any of the Dry Port facilities and services or part thereof which may be lost, damaged, or destroyed for any reason whatsoever.

v. Access for Inspection

The SPC shall be obliged to extend all co-operations to Expert appointed by the AUTHORITY for purposes of verifying that the Dry Port facilities and services are operated and maintained in compliance with the Operations and Maintenance Standards and Requirements, O&M Plan, Quality Assurance Plan, Maintenance Manual and safety standards. Such verification shall be made at any reasonable time at the discretion of the AUTHORITY. Additionally, the SPC shall upon prior intimation by the AUTHORITY provide the authorized representatives of the AUTHORITY access to the Dry Port facilities and services for inspection and review of operations and also to ascertain compliance with any of the requirements under this Agreement. Without prejudice to the generality of this provision, it is agreed that the SPC shall in particular extend all co-operation and information required by the Expert appointed by the Authority for conducting a safety audit and verifying that the Dry Port facilities and services are in strict compliance with the safety standards and other Operation and Maintenance Standards and Requirements.

vi. Reports

The SPC shall provide to the AUTHORITY, monthly reports on cargo traffic, unit gross output efficiency, Tariff earned and collected in respect of Dry Port facilities and services, within 15 (fifteen) Days following the end of each Month, and any other information relating to operations which the AUTHORITY may require from time to time. If so desired by the AUTHORITY, the SPC shall provide the reports in prescribed formats and in electronic form so as to provide online access to the AUTHORITY and its representatives.

vii. Liquidated Damages

In the event the AUTHORITY, whether from the review of reports submitted by the SPC and/or the inspection and reporting of the Expert [appointed by AUHTORITY] in accordance with the provisions of this Agreement or otherwise, observes that the Mandatory Dry Port Services do not comply with the Operation and Maintenance Standards and Requirements, O&M Plan, Quality Assurance Plan or fall short thereof, the AUTHORITY shall calculate and levy the amount of liquidated damages payable by the SPC in accordance with Appendix 8 of this Agreement and demand the SPC by a notice in writing to pay the same within one month and on failure of the SPC to pay the same recover the amount from the by way of forfeiture of relevant amount from the Performance Bond in which case the relevant provisions for replenishment of Performance Bond shall apply.

It is clarified that this provision does not prejudice the rights of the AUTHORITY upon a SPC Event of Default as set out herein including the AUTHORITY'S right to terminate this Agreement which shall remain unaffected.

viii. Indemnity Against Claims for Loss of Goods/Cargo

Notwithstanding anything contained in any law for the time being in force, the SPC shall be responsible for meeting any claim, action, suit or proceeding (the "**Action**") by any third party alleging the loss, destruction or deterioration of goods of which charge has been taken by the SPC and indemnify, save and hold harmless the AUTHORITY, its officers, employees, agents and representatives (the "**Indemnitees**") against all claims which may be asserted against or suffered and legal fees and costs incurred and which relate to any such goods, provided that notice of the Action received by the Indemnitee(s) shall be forwarded to the SPC expeditiously and in any case within 10 Days of the receipt thereof by any of the Indemnitees. Provided further that the Indemnitees shall have the right but not the obligation, to contest, defend and litigate any Action by any third party alleged or asserted against any of such Indemnitees in respect of, resulting from, related to or arising out of any matter for which it is to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the SPC. If the SPC acknowledges in writing its obligation to indemnify the Indemnitees in respect of loss to the full extent, the SPC shall be entitled, at its option, to assume and control the defence of such Action at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnitees and reimburses to them for the reasonable cost and expenses incurred by them prior to the assumption of such defense by the SPC. This indemnity shall survive termination of this Agreement.

## 10. MONITORING AND INFORMATION

10.1. The SPC shall grant to the Expert such access to the Dry Port and records and data maintained by SPC or on its behalf, as the Expert would require to supervise, monitor and ensure that the services provided at Dry Port Asset comply with the Operation and Maintenance Standards and Requirements, O&M Plan, Quality Assurance Plan and other terms of this Agreement. In addition to the above, the SPC shall, submit the following reports to the AUTHORITY [with a copy to Expert] on a regular basis:

- (a) Monthly activity report (traffic, cargo movement etc.)
- (b) Reports on various indicators of performance measurement as specified in this Agreement
- (c) Quarterly financial accounts
- (d) Latest update of Development Plan, O&M Plan, Quality Assurance Plan and Maintenance Manual
- (e) Such other reports/ information (or analysis thereof) in relation to the Dry Port operations that AUTHORITY may request from time to time.

### 10.2. Maintenance of Records

- (a) The SPC shall maintain accurate, up-to-date and complete financial records in accordance with the requirements of Applicable Laws and this Agreement.
- (b) The SPC shall maintain accurate, up-to-date and complete records relating to the operation and maintenance of assets, and the Dry Port. Such requirements may reasonably (but not retrospectively) be amended from time to time by the AUTHORITY in order to take account of changed circumstances.
- (c) The SPC shall make available, and, if reasonably requested by the AUTHORITY, provide copies of, on reasonable notice by the AUTHORITY and at reasonable times, the records referred to in Article 10 for inspection by the AUTHORITY and/or Expert. The AUTHORITY shall be entitled to appoint one or more authorized representatives to check and take copies of any such records. The SPC shall provide the AUTHORITY and/or Expert with such further information, explanations and other assistance as may be reasonably required by the AUTHORITY or Expert or any of its authorized representatives for the purpose of checking any of such record.

### 10.3. Provision of Accounts

- (a) The SPC shall, at the end of its relevant accounting reference period, deliver to the AUTHORITY as soon as reasonably practical after they are available but no later than the expiry of the period provided under the relevant Applicable Laws for the finalization of the audited accounts, beginning with the first accounting reference period and throughout the Term, copies of the relevant reporting documents [annual report, audited profit and loss account, balance sheet and cash flow statement for the SPC (as applicable)] filed with relevant Government authority under Applicable Laws, at the end of and for that accounting reference period, together with copies of all related director's and auditor's reports.
- (b) All accounts may also be maintained in the electronic form.

### 10.4. Changes in Operation

The SPC shall inform the AUTHORITY of any material change or proposed material change in the conduct or condition of the Dry Port operation, as soon as reasonably practicable prior to (or, if it is not reasonably practicable prior to, as soon as reasonably practicable after the occurrence of) any such change, (including the termination of any key contracts, any litigation or other dispute which

may have a Material Adverse Effect on the Dry Port operation and any material change in or restructuring of the capitalization or financing of the SPC).

**10.5. Rights of Inspection**

The AUTHORITY and its representatives including the Expert shall be permitted to inspect at any time but with reasonable prior intimation any part of the Dry Port Site or any of the assets at the Dry Port and undertake any survey or other check in order to monitor compliance with the SPC's obligations under this Agreement, or check the quality of service performance by the SPC, or for any other reason whatsoever, for which purpose the SPC shall grant such access or procure the grant of such access (including to or from third parties) as they shall reasonably require in connection therewith, provided that such persons shall not interfere with the performance of the relevant works or give any instruction in relation thereto or interfere with the carrying on of the Dry Port services. If any such exercise reveals that the SPC has not complied in any material respect with its obligations under this Agreement, the costs of any such inspection shall be borne by the SPC.

**10.6. Remedial Measures**

The SPC shall promptly and in any case within the timelines set out under this Agreement repair or rectify the defects or deficiencies, if any, identified and reported by the Expert and furnish a report in respect thereof to the Expert and the AUTHORITY.

The Expert shall require the SPC to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Dry Port asset into compliance with the maintenance requirements and the procedure set forth in this clause shall be repeated until the Dry Port conforms to the maintenance requirements. In the event that remedial measures are not completed by the SPC in conformity with the provisions of this Agreement, the AUTHORITY shall be entitled to recover damages from the SPC and shall be without prejudice to AUTHORITY's right to terminate this Agreement.

**10.7. Notification of Disputes**

The SPC shall notify the AUTHORITY of any dispute that arises or is threatened against the SPC and/or the Dry Port, the adverse outcome of which might have a Material Adverse Effect on the SPC or the Dry Port, or any of the Dry Port services.

**10.8. Information Warranty**

**10.8.1.** The SPC hereby warrants to the AUTHORITY that:

- (a) each set of audited accounts provided/to be provided by the SPC under this Agreement are and will be a true and fair state of the financial affairs and condition of the SPC as for the period for which such accounts relate;
- (b) each of Development Plan and O&M Plan, Maintenance Manual and Quality Assurance Plan is and will be prepared in good faith with proper care and diligence and represents/ will represent fair, reasonable and complete information, estimates and forecasts and has no/ would have no material omissions; and
- (c) all other information provided to the AUTHORITY under this Agreement is true, accurate and complete in all material respects.

**10.9. Overriding Powers of AUTHORITY**

- i. If in the reasonable opinion of the AUTHORITY, the SPC is in material breach of its obligations under this Agreement and, in particular, the Operation and Maintenance Standards and Requirements, and such breach is causing or likely to cause material



hardship or danger to the users, the AUTHORITY may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the SPC to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.

- ii. In the event that the SPC, upon notice under Clause (i) above, fails to rectify or remove any hardship or danger within a reasonable period, the AUTHORITY may exercise overriding powers under this clause and take over the performance of any or all the obligations of the SPC to the extent deemed necessary by it for rectifying or removing such hardship or danger; provided that the exercise of such overriding powers by the AUTHORITY shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the AUTHORITY in discharge of its obligations hereunder shall be recovered from the SPC in accordance with the provisions for liquidated damages specified herein.
- iii. In the event of a national emergency, or civil commotion or any other event or circumstances adversely affecting the users, the AUTHORITY may take over the performance of any or all the obligations of the SPC to the extent deemed necessary by it or as directed by the Government, and exercise such control over the Dry Port or give such directions to the SPC as may be deemed necessary; provided that the exercise of such overriding powers by the AUTHORITY shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise such overriding powers by the AUTHORITY.

## 11. FEES PAYABLE TO THE AUTHORITY

- 11.1. In consideration of the aforementioned grant of Concession, the SPC hereby agrees to make the following payments to the AUTHORITY in the manner and at the times mentioned hereunder.

11.1.1. **Upfront Fee<sup>2</sup>**

The SPC shall pay to the AUTHORITY an upfront fee (the “Upfront Fee”) of \_\_\_\_\_ (\_\_\_\_\_ only) on or before the Effective Date. It is mutually agreed that this Upfront Fee is non-refundable (except on account of termination of this Agreement in accordance with Article 3.3 hereof) and payable only once during the Term of this Agreement.

11.1.2. **Annual Fee<sup>3</sup>**

The SPC shall also pay to the AUTHORITY an annual fee (“AF”) for each Year during the Term of this Agreement of the amount set forth below:

AF= \_\_\_\_[...] % of the projected Revenue for the said Year; where projected Revenue for each Year shall be as set forth in the Business Plan submitted as part of its Bid.

The AF for each Year shall be payable in accordance with terms hereof on basis of actual revenue for the said Year; provided for the purpose of payment of AF, the AF in each Year shall be payable, based on projected Revenue for that Year, in twelve equated monthly instalment, each such monthly installment (hereinafter referred to as “MAF”) to be paid on the first day of each calendar month. Payment of the AF to the AUTHORITY in terms hereof shall be adjusted/reconciled in accordance with terms hereof, at the end of each quarter taking into consideration difference between the actual Revenue and the projected Revenue as per terms and conditions set forth in this clause \_\_\_\_[...]. For the avoidance of doubt, it is hereby clarified that the MAF shall be calculated as per formula set out below:

$$\text{MAF} = (1/12) \times \text{AF quoted for relevant Year in Business Plan}$$

The SPC shall from time to time {cause the Escrow Bank to}<sup>4</sup> make payment of the MAF to AUTHORITY in advance on or prior to the 7<sup>th</sup> day of each month by cheque drawn in favour of AUTHORITY or by electronic transfer to AUTHORITY’s bank account, if directed so by AUTHORITY. If AUTHORITY does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at \_\_\_\_ [...] % p.a. Notwithstanding anything contained herein, the SPC shall at all times be liable to pay the MAF in advance on or prior to the 7<sup>th</sup> day of each month.

In the event that in any quarter the actual Revenue exceeds the projected Revenue, then SPC shall pay to AUTHORITY the additional AF attributable to such difference between the actual quarterly Revenue and the projected quarterly Revenue within 15 days of the commencement of the next quarter; and (ii) in the event that the projected Revenue in any quarter exceeds the actual Revenue, then AUTHORITY shall pay by way of adjustment to SPC such portion of the AF received in earlier quarter, as is attributable to the difference between the projected Revenue and

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<sup>2</sup> Upfront fee may be considered in case project viability permits

<sup>3</sup> In case of Grant being provided as Bid Parameter and bidder selected on its election to seek grant, this clause to be deleted and Grant clause to be retained.

<sup>4</sup> To be deleted in case Escrow Account not considered as required.

the actual Revenue by way of an adjustment against the AF payable by the SPC to AUTHORITY in the current quarter; provided further that in the event the actual Revenue in any quarter is greater than the projected Revenue of such quarter, the SPC shall pay to AUTHORITY interest for difference between the actual Revenue and the projected Revenue at the rate of \_\_\_\_ [...], to be levied for the period commencing from the first day of relevant quarter until date of actual payment.

The applicable Revenue used for final verification/reconciliation of the AF shall be the Revenue of the SPC as certified by the Independent Auditor every quarter.

#### 11.2. **Independent Auditor**

##### i. Appointment of Independent Auditor

- (a) An Independent Auditor shall be appointed for the purposes mentioned herein.
- (b) The procedure of the appointment of the Independent Auditor shall be as follows:  
AUTHORITY shall nominate a panel of six (6) Chartered Accountancy Firms to the SPC. The SPC shall have the right to object to one or more of such nominees but not in any circumstance exceeding three (3) nominees. AUTHORITY shall appoint any one of the nominees to whom SPC has not objected, as the Independent Auditor.
- (c) AUTHORITY shall bear all costs of, including costs associated with the appointment of, the Independent Auditor.

##### ii. Appointment of Independent Auditor

#### 11.3. **Right of Inspection**

The AUTHORITY and its representatives shall be permitted to inspect at any reasonable time the books, records and other material kept by or on behalf of the SPC in order to check or audit any information (including the calculation of Revenue) supplied to the AUTHORITY under this Agreement. The SPC shall make available to the AUTHORITY and its representatives such information and grant such access or procure the grant of such access (including to or from third parties) as they shall reasonably require in connection therewith. If any such exercise reveals that information previously supplied to the AUTHORITY was in any material respect inaccurate on the basis of information available to the SPC at the time, the costs of any such exercise shall be borne by the SPC.

## 12. TARIFF

### 12.1. **Tariff**

- 12.1.1. On and from the date of certification by Independent Engineer of completion of the Mandatory Capital Works in accordance with terms hereof, and till the Transfer Date, the SPC shall, subject to Applicable Laws, have the sole and exclusive right to demand, collect and appropriate Tariff from the users, as per prevailing market rates.
- 12.1.2. The SPC acknowledges and agrees that upon payment of fee/charges, any user shall be entitled to use the Dry Port and the SPC shall not place, or cause to be placed, any restriction on such use, except to the extent specified in any Applicable Law, Clearances or the provisions of this Agreement.
- 12.1.3. The SPC shall collect all cesses and charges, if any levied on the users as may be requested by the AUTHORITY, on behalf of the AUTHORITY and remit the same to the Authority. Provided, the SPC shall be duly authorized by the AUTHORITY or such other authority as may be competent in this regard, for the purpose of such collection.
- 12.1.4. The SPC shall, subject to any related Applicable Laws, create and launch its website and shall publish all the applicable rates/fees/charges on the SPC's website at least 30 days before levying such fees/charges from the users of the Dry Port.

## 13. FINANCING ARRANGEMENTS

### 13.1. Financing Arrangements and Security

- (a) It is expressly understood that the SPC shall arrange for financing and/or meeting all financing requirements through suitable debt and equity contributions in order to comply with its obligations hereunder including development of the Dry Port pursuant to the Development Plan.
- (b) Security
  - i. This Agreement shall not be assigned by the SPC. Provided however that the Lenders may be given a right of substitution by execution of the Substitution Agreement. Provided further that at any given time, the AUTHORITY shall enter into only one (1) Substitution Agreement with one (1) lenders' agent; such lenders' agent being an agent for one consortium of Lenders. The Lenders shall be free to modify the composition of the consortium of Lenders.
  - ii. The SPC shall neither create nor permit to subsist any Encumbrance or title defect over or otherwise transfer or dispose of all or any of its rights in the whole or any part(s) of the Dry Port Site.
  - iii. Lenders may exercise the rights of step in or substitution as provided in the Substitution Agreement provided that the person substituting the SPC shall be deemed to be the SPC under this Agreement and shall enjoy all rights and be responsible for all obligations under this Agreement as if it were the SPC.
  - iv. Notwithstanding anything to the contrary contained in this Agreement, it is clarified that AUTHORITY may assign any of its rights and benefits and / or obligations under this Agreement with 30 days prior written notice to the SPC.
  - v. It is clarified that for the purpose of securing its borrowings for the purpose of the Dry Port, SPC may encumber any Dry Port assets [other than Dry Port Site] that it is not prohibited from encumbering under the foregoing sections of this Agreement.

Provided however that the SPC may create a charge over its Revenue in favour of the escrow agent appointed under the terms of the Escrow Agreement, to be disbursed by such escrow agent as provided in the Escrow Agreement. AUTHORITY has the right to require the SPC to create a charge over its Revenue in favour of the escrow agent (to be held by such escrow agent for and on behalf of the Lenders and the AUTHORITY) appointed under the terms of the Escrow Agreement, to be disbursed by such escrow agent as provided in the Escrow Agreement.

### 13.2. Refinancing

Subject to the rights created in favour of Lenders and with prior written consent of AUTHORITY, which AUTHORITY shall not unreasonably deny, the SPC shall have the right to vary the term of the Financing Documents, provided that under no circumstances shall any such variation increase the financial liability of the AUTHORITY under this Agreement or any Project Agreement to which AUHTORITY is party in connection with any financing obtained by the SPC.

## 14. GRANT

### 14.1. **Grant<sup>5</sup> – Equity Support**

- 14.1.1. The Authority agrees to provide to the SPC cash support by way of an outright grant equal to the sum set forth in the Bid, namely, \_\_\_\_\_ (\_\_\_\_\_ only), in accordance with the provisions of this Article 14.1 (the “Grant”).
- 14.1.2. The Grant shall be disbursed to the SPC by way of Equity Support in accordance with the provisions of Clause 14.2.

### 14.2. **Equity Support**

- 14.2.1. Subject to the conditions specified in this Clause 14.2, the Grant shall be credited to the Escrow Account and shall be applied by the SPC for meeting the capital cost of Mandatory Capital Works (the “**Equity Support**”).
- 14.2.2. The Equity Support shall not exceed the sum specified in the Bid and as accepted by the Authority, but shall in no case be greater than 20% (twenty per cent) of the capital cost of Mandatory Capital Works.
- 14.2.3. Equity Support shall be due and payable to the SPC after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Lenders under the Financing Documents. The Authority shall disburse each tranche of the Equity Support as and when due, but no later than 15 (fifteen) days of receiving a request from the SPC along with necessary particulars.
- 14.2.4. In the event of occurrence of a SPC default, disbursement of Equity Support shall be suspended till such SPC default has been cured by the SPC.

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<sup>5</sup> This Chapter shall be retained in case selected bidder quotes Grant or else it has to be deleted.

## 15. DISPUTES

### 15.1. Disputes

#### 15.1.1. Amicable Settlement

The Parties shall use their respective reasonable endeavors to settle any Dispute amicably. If a Dispute is not resolved within sixty (60) days after written notice of a Dispute by one Party to the other Party then the provisions of Article 15.2 shall apply.

### 15.2. Arbitration under UNCITRAL Rules

15.2.1. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in \_\_\_\_\_ [...] in accordance with the UNCITRAL Arbitration Rules for the time being in force; provided however to the extent parties cannot derogate from applicable local laws in force and effect, such local laws shall apply.

15.2.2. This Article 15.2 shall survive the termination or expiry of this Agreement.

15.2.3. The governing law of the arbitration shall be the substantive laws of \_\_\_\_\_ [...].

### 15.3. Continue performance

While any Dispute under this Agreement is pending, including the commencement and pendency of any Dispute referred to arbitration, the Parties shall continue to perform all of their respective obligations under this Agreement without prejudice to the final determination in accordance with the provisions under this Article 15.

## 16. FORCE MAJEURE

### 16.1. Force Majeure

- 16.1.1. The SPC, or AUTHORITY, as the case may be, shall be entitled to suspend or excuse performance of its respective obligations under this Agreement to the extent that AUTHORITY or SPC, as the case may be, is unable to render such performance by an event of Force Majeure (a "**Force Majeure**").
- 16.1.2. In this Agreement, "**Force Majeure**" means any event or circumstance or a combination of events and circumstances, which satisfies all the following conditions:
- (a) materially and adversely affects the performance of an obligation;
  - (b) are beyond the reasonable control of the affected Party;
  - (c) such Party could not have prevented or reasonably overcome with the exercise of Good Industry Practice or reasonable skill and care;
  - (d) do not result from the negligence or misconduct of such Party or the failure of such Party to perform its obligations hereunder; and
  - (e) (or any consequence of which), have an effect described in Article 16.1.1.
- 16.1.3. "Force Majeure" includes the following events and/ or circumstances to the extent that they, or their consequences satisfy the requirements set forth in Article 16.1.1 and Article 16.1.2:
- i. war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy in each case involving or directly affecting \_\_\_\_ [...];
  - ii. revolution, riot, insurrection or other civil commotion, act of terrorism or sabotage in each case within \_\_\_\_\_;
  - iii. nuclear explosion, radioactive or chemical contamination or ionizing radiation directly affecting the Dry Port, unless the source or cause of the explosion, contamination, radiation or hazardous thing is brought to or near the Dry Port by the SPC or any affiliate of the SPC or any contractor or sub-contractor of the SPC or any such affiliate or any of their respective employees, servants or agents;
  - iv. strikes, working to rule, go-slows and/or lockouts which are in each case widespread, nationwide or political;
  - v. any effect of the natural elements, including lightning, fire, earthquake, unprecedented rains, tidal wave, flood, storm, cyclone, typhoon or tornado, within \_\_\_\_ [...];
  - vi. explosion (other than a nuclear explosion or an explosion resulting from an act of war) within \_\_\_\_\_ [...];
  - vii. epidemic or plague within \_\_\_\_\_; and
  - viii. any event or circumstances of a nature analogous to any events set forth in paragraphs (i) to (viii) of this Article 16.1.3 above within \_\_\_\_\_.
- 16.1.4. Procedure for Force Majeure
- (a) If a Party claims relief on account of a Force Majeure event, then the Party claiming to be affected by the Force Majeure event shall, immediately on becoming aware of the Force Majeure event, give notice of and describe in detail: (i) the Force Majeure event(s) that has occurred; (ii) the obligation(s) affected as described in Article 16.1; (iii) the dates of commencement and estimated cessation of such event of Force Majeure and (iv) the manner in which the Force Majeure event(s) affect the Party's obligation(s) under this Agreement. No Party shall be able to suspend or excuse the non-performance of its obligations hereunder unless such Party has given the notice specified above.



- (b) The affected Party shall have the right to suspend the performance of the obligation(s) affected as described in Article 16.1, upon delivery of the notice of the occurrence of a Force Majeure event in accordance with sub- clause (a) above.
- (c) The time for performance by the affected Party of any obligation or compliance by the affected Party with any time limit affected by Force Majeure, and for the exercise of any right affected thereby, shall be extended by the period during which such Force Majeure continues and by such additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure.
- (d) The Party receiving the claim for relief under Force Majeure shall, if it wishes to dispute the claim, give a written notice of dispute to the Party making the claim within 15 days of receiving the notice of claim. If the notice of claim is not contested within 15 days as stated above, all the Parties to this Agreement shall be deemed to have accepted the validity of the claim. If any Party disputes a claim, the Parties shall follow the procedures set forth in Article 15.

16.1.5. Mitigation

The Party claiming to be affected by an event of Force Majeure shall take all reasonable steps to prevent, reduce to a minimum and mitigate the effect of such event of Force Majeure.

16.1.6. Termination Due to Force Majeure

- (a) If Force Majeure event continues for more than 365 days either Party shall have the right to terminate this Agreement by giving a notice of termination in respect thereof.
- (b) In the event of any such termination, AUTHORITY shall:-
  - i. Take back the possession of the Dry Port Site and acquire all of SPC's rights, title and interests in and to the Dry Port Assets in the manner set out in Article 19, on payment within 6 months of Transfer Date of 100% of Debt and Equity [LESS Insurance Cover] in respect of the Dry Port Assets as recorded in the books of the SPC, as determined in accordance with Article 19.6; and
  - ii. Return to the SPC, the Performance Bond.

## 17. EVENT OF DEFAULT

### 17.1. **AUTHORITY Event of Default**

Each of the following events or circumstances, to the extent not caused by a default of the SPC or Force Majeure, shall be considered for the purposes of this Agreement as events of default of the AUTHORITY ("**AUTHORITY Event of Default**") which, if not cured within the time period permitted, shall provide the SPC the right to terminate this Agreement in accordance with Article 17.3:

- (a) any breach of its obligations under this Agreement which has a Material Adverse Effect and such breach is not remedied within 60 days of receipt of written notice from the SPC specifying such breach and requiring the AUTHORITY to remedy the same; provided that if such breach cannot be cured within a period of 60 days after such notice with the exercise of reasonable diligence, then such 60-day period shall be extended for an additional period of 30 days so long as AUTHORITY is exercising reasonable diligence to cure such breach;
- (b) a breach of any representation or warranty by AUTHORITY which materially adversely affects the SPC's ability to perform its obligations under this Agreement and such breach, if capable of being remedied, is not remedied within 60 days of receipt of written notice from the SPC specifying such breach and requiring the AUTHORITY to remedy the same; and
- (c) AUTHORITY does not provide the Infrastructure Support and/or suspends the due performance of its obligations in respect of Infrastructure Support for a period exceeding 30 consecutive days.
- (d) Expropriation or compulsory acquisition by Government/AUTHORITY of the Dry Port Assets or part thereof

### 17.2. **SPC Event of Default**

Each of the following events or circumstances, to the extent not caused by a default of the AUTHORITY or Force Majeure shall be considered for the purposes of this Agreement as events of default of the SPC ("**SPC Event of Default**") which, if not cured within the time period permitted, shall provide the AUTHORITY the right to terminate this Agreement in accordance with Article 17.3:

- (a) any material breach by the SPC of its obligations under this Agreement and such breach is not remedied within 60 days of receipt of written notice from the AUTHORITY specifying such breach and requiring the SPC to remedy the same; provided that if such breach cannot be cured within a period of 60 days after such notice with the exercise of reasonable diligence, then such 60-day period shall be extended for an additional period of 30 days so long as SPC is exercising reasonable diligence to cure such breach;
- (b) a breach of any representation or warranty by the SPC which materially adversely affects the AUTHORITY's ability to perform its obligations under this Agreement and such breach, if capable of being remedied, is not remedied within 30 days of receipt of written notice from the AUTHORITY specifying such breach and requiring the SPC to remedy the same;
- (c) suspension by the SPC of the performance of the obligations under this Agreement for a period exceeding 30 consecutive days (except during the subsistence of an event of Force Majeure);
- (d) failure by the SPC to operate and maintain the Dry Port in accordance with the Applicable Laws, Operation and Maintenance Standards and Requirements, O&M Plan, Quality Assurance Plan or maintenance Manual, and such breach is not remedied within 30 days set

out in the written notice from the AUTHORITY specifying such breach and requiring the SPC to remedy the same;

- (e) non-achievement of completion of construction of Mandatory Capital Works by the Long Stop Date or such later date as AUTHORITY may agree to in its sole discretion;
- (f) breach of obligations under the Agreement resulting in liquidated damages levied in respect of such breach, reaching the prescribed threshold in accordance with terms hereof;
- (g) continued breach of obligations under Development Standards and Requirements for period of 6 months following the date when Independent Engineer first notifies the SPC in this regard;
- (h) SPC, directly or indirectly, undertakes or performs either itself or through, its agency, sub-lease, license or otherwise, any activity other than activities provided for/ envisaged hereunder, and such breach is not remedied within 30 days of receipt of written notice from the AUTHORITY specifying such breach and requiring the SPC to remedy the same ;
- (i) material default by the SPC under any provisions of the Financing Documents, except to the extent that the Lenders are: (a) willing to excuse such default as certified by a written notice to the AUTHORITY; or (b) give the SPC an opportunity to cure it;
- (j) failure of SPC to maintain insurance(s) in respect of the Dry Port in accordance with Article 8.5.6, which failure is not remedied within a period of 60 days from the date of such failure;
- (k) failure by the SPC to make any payment due hereunder within 30 days of the due date in respect thereof;
- (l) any breach of the obligation of SPC to deposit all Revenue in the Escrow Account, which breach is not cured within 7 days of receipt of notice from AUTHORITY;
- (m) non-adherence, violation, non-compliance, or breach of the Development Plan, Master Plan which breach is not remedied within a period of 60 days from the date of such breach;
- (n) any Change in Control in violation of terms of this Agreement;
- (o) the SPC is ordered to be wound up by a court; the SPC files a petition for voluntary winding up; or levy of an execution or restraint on the SPC's assets; or appointment of a provisional liquidator, administrator, trustee or receiver of the whole or substantially whole of the undertaking of SPC by a court of competent jurisdiction; and
- (p) failure to replenish the Performance Bond to its full amount within three (3) months after encashment of the entire Performance Bond pursuant to Article 8.6 (d) hereof.

### **17.3. Consequences of Default**

#### **17.3.1. Termination Notice**

- (a) In the event of a SPC Event of Default occurring AUTHORITY shall have the right to submit a notice of its intention to terminate this Agreement ("Notice of Intention to Terminate"). Immediately upon the issue by AUTHORITY of the Notice of Intention to Terminate, the Lenders shall have the right to nominate an Entity to replace the SPC and perform the SPC's obligations hereunder (the "Substitute Entity"). The SPC shall procure that Lenders shall notify AUTHORITY about whether they are exercising their right of substitution within sixty (60) days of receipt of Notice of Intention to Terminate, or the Lenders' Notice of Default (as defined in

the Substitution Agreement). Any such Substitute Entity shall have the legal, financial and technical capability reasonably necessary to perform the obligations of the SPC in accordance with the terms of this Agreement.

(b) Any such Substitute Entity shall be nominated in accordance with the procedure as set out in the Substitution Agreement.

(c) In the event:

- i. Lenders have chosen not to exercise their right of substitution, or
- ii. a Substitute Entity has not been nominated by the Lenders within time period set forth in the Substitution Agreement; or
- iii. a nominated Substitute Entity/ alternate Substitute Entity has not been approved by AUTHORITY within the time period set forth in the Substitution Agreement; or
- iv. a selected Substitute Entity has not been able to remedy the breach of the SPC leading to the Notice of Intention to Terminate within time period set forth in the Substitution Agreement.

then AUTHORITY or any entity designated by it shall have the right, but shall not be required, to issue a notice to SPC terminating this Agreement. In the event of AUTHORITY exercising such right of termination, AUTHORITY shall:

- i. Take back the possession of the Dry Port Site and acquire all of SPC's rights, title and interests in and to the Dry Port Assets in the manner set out in Article 19, on payment within 6 months of Transfer Date of 100% of Debt in respect of the Dry Port Assets as recorded in the books of the SPC, as determined in accordance with Article 19.6. and forfeit the Performance Bond

17.3.2. In the event of a AUTHORITY Event of Default occurring, SPC shall have the right to notify AUTHORITY that such an event has occurred and (if it is capable of remedy) requiring the remedy of the same within a cure period of 3 months. If, following the end of the period stated in such notice the event giving rise to the AUTHORITY Event of Default has not been remedied, SPC shall have the right, but shall not be required, to submit a notice of its intention to terminate this Agreement, within 30 days of which, SPC shall have the right, but shall not be required, to issue a notice to AUTHORITY terminating this Agreement. In the event of SPC exercising such right of termination, AUTHORITY shall:

- (a) Take back the possession of the Dry Port Site and acquire all of SPC's rights, title and interests in and to the Dry Port Assets in the manner set out in Article 19, on payment within 6 months of Transfer Date,
  - i. 100% of the Debt relating to Dry Port Assets, as determined in accordance with Article 19.6; and,
  - ii. Net Present Value of future Equity cash flow for unexpired period as projected in base case Financial Model agreed with Lenders and submitted to AUTHORITY in accordance with terms hereof, and as determined in accordance with Article 19.6.

(b) Return the Performance Bond to SPC.

## 18. TERM AND EXPIRY

### 18.1. Term and Expiry

- (a) Unless terminated earlier in accordance with Article 17.3 or Article 16.1.6, or by mutual agreement between the Parties in writing, this Agreement shall continue in full force and effect from commencement of the Effective Date (except for Chapters 1, 3, 15, which will be binding on the Parties as from the date of execution hereof) until the \_\_\_\_ [...] anniversary ("Term") of the Effective Date.
- (b) Unless terminated earlier, the Agreement shall expire on the \_\_\_\_[...]anniversary of the Effective Date, and upon expiry of the Agreement, AUTHORITY or its nominee shall be entitled to acquire all of SPC's rights, title and interests in and to the Dry Port Assets against \_\_\_\_ [...] One; and SPC shall accordingly be obliged to undertake and conclude all acts, deeds, things required to conclude such transfer of Dry Port Assets in good working condition, in favour of AUTHORITY, failing which the Performance Bond shall be liable for forfeiture, and such forfeiture shall be without any prejudice to AUTHORITY's rights and remedies provided hereunder or in law or equity.

## 19. TRANSFER PROVISIONS

### 19.1. Transfer of Dry Port Assets

- 19.1.1. Upon termination of this Agreement or its expiry in accordance with terms hereof, the AUTHORITY shall be entitled to, and correspondingly SPC shall be obligated to transfer on Transfer Date, to AUTHORITY, all of SPC's rights, interest and title in the Dry Port Assets, including the following, subject to and in accordance with terms of this Agreement:
- i. all movable property, stocks, materials, equipment's and spares relatable to Dry Port Assets shall be transferred to AUTHORITY or its nominee, clear of any Encumbrances and with good title;
  - ii. all immovable property, assets, structures, buildings, edifices, ways, walls, compounds relatable to Dry Port Assets shall be transferred to AUTHORITY or its nominee, clear of any Encumbrances and with good title;
  - iii. the rights and obligations under or pursuant to all contracts relatable to Dry Port Assets and other arrangements entered into in accordance with the provisions of this Agreement between SPC and any third party shall (in consideration of AUTHORITY's assumption of the obligations under or pursuant to the contracts and other arrangements) be vested in AUTHORITY or its nominee, clear of any Encumbrance and with good title; and
  - iv. Notwithstanding anything contained in Article 19.1.1 (iii), prior to any transfer of the Dry Port Assets, AUTHORITY shall have the right to conduct a due diligence of the contracts and agreements, the rights and obligations of which it is assuming and shall not be bound to assume the rights and obligations of contracts that, in the sole opinion of AUTHORITY are unreasonably onerous, and would be considered onerous at the time that the contracts were entered into. In relation to all such contracts that are not transferred to AUTHORITY, no third Entity, including the counter-party of such contract shall have any right, license title, interest, benefit, claim or demand against or over any Dry Port Asset and such Dry Port Asset shall be transferred to AUTHORITY or its nominee, clear of any Encumbrance and with good title.
- 19.1.2. Furthermore, notwithstanding anything contained in this Article 19.1, no liability (accrued or contingent) of SPC or relating to the Dry Port Asset arising on account of actions or inactions prior to the Transfer Date shall be assumed or transferred to AUTHORITY or its nominees.
- 19.1.3. Without prejudice to the foregoing, SPC agrees to indemnify and keep indemnified the AUTHORITY from and against all actions, proceedings, losses, damages, liabilities, claims, costs and expenses whatsoever which may be sustained or suffered by the AUTHORITY as a result of any actions or omissions of the SPC prior to the transfer of the Transfer Assets. It is expressly understood by the Parties that this Article shall survive the termination or expiry of this Agreement.
- ### 19.2. Hand Back of Dry Port Site
- 19.2.1. Without prejudice to AUTHORITY's rights, entitlements, privileges as set out herein, upon earlier termination or expiry of this Agreement, the AUTHORITY shall take over and SPC's shall be obligated to handover the possession of the Dry Port Site free of any Encumbrances, without any delay, cavil, recourse or protest of any kind whatsoever.

- 19.2.2. Without prejudice to the foregoing, SPC agrees to indemnify and keep indemnified the AUTHORITY from and against all actions, proceedings, losses, damages, liabilities, claims, costs and expenses whatsoever which may be sustained or suffered by the AUTHORITY as a result of any actions or omissions of the SPC prior to the transfer of Dry Port Site. It is expressly understood by the Parties that this Article shall survive the termination or expiry of this Agreement.
- 19.3. **Dry Port Assets to be transferred in Good Working Condition**  
SPC shall in accordance with Good Industry Practice ensure that all property, assets, rights and other items (constituting Dry Port Assets and Dry Port Site) which are vested in or transferred to AUTHORITY in accordance with terms hereof, shall be in good working order and in a good state of repair and that the Dry Port Assets and Dry Port Site is transferred to AUTHORITY as a going concern in good operating order. For this purpose, the AUTHORITY shall appoint an Industry expert to conduct an audit of the assets being transferred. In the event any of assets which are vested in or transferred to AUTHORITY are not fit for purpose/ in a good state of repair/ as would be expected of an international world class Dry Port, as certified by such expert, then the cost or capital expenditure required to be incurred to bring it to good state of repair of all such assets shall be payable by the SPC to the AUTHORITY, and the same in case of earlier termination, may be deducted from any Transfer Payment payable by AUTHORITY to SPC in accordance with term hereof; and in case of expiry by way of encashment of relevant amount from the Performance Bond.
- 19.4. **Payment of Transfer Amounts**  
(a) Commencing from Transfer Date [in case of earlier termination], AUTHORITY shall procure an audit of the books of SPC by two independent valuers, one each to be appointed by the AUTHORITY and SPC, out of a panel of five reputed valuers suggested by AUTHORITY. The said panel of two valuers thus appointed shall determine, the Debt, the subscribed and paid-up Equity capital of the SPC, Net Present Value of the future equity cash flow projected in the base case cash flow projections, as the case may be, of the relevant assets that are being transferred.  
(b) Following such audit, and the determination of the relevant transfer payment by the two independent valuer(s), the AUTHORITY shall make the relevant transfer payment ("Transfer Payments") to the SPC. The Transfer Payments shall be made as soon as possible after the audit, but at any rate, within 6 (six) months from the Transfer Date.  
(c) In case of transfer of Dry Port Site and assets, pursuant to and upon expiry of the Agreement, the provisions of clause 18.1(b), 19.1, 19.2 and 19.3 shall be applicable.
- 19.5. Transfer costs and taxes, if applicable, for the transfer of the Dry Port Assets consequent to termination of this Agreement shall be borne by:  
(a) the SPC in the event of termination due to a SPC Event of Default or Force Majeure; and  
(b) the AUTHORITY in the event of termination due to an AUTHORITY Event of Default or following expiry hereof.
- 19.6. It is clarified that any payment for transfer of Dry Port Assets to be made by AUTHORITY under this Agreement, shall be reduced by and adjusted for, (i) any amounts due and payable by the SPC to the AUTHORITY; (ii) any insurance monies received by SPC or due and payable to SPC in respect of claims (for the relevant Dry Port Assets being transferred) made and received or receivable since the occurrence of the AUTHORITY Event of Default/ SPC's Event of Default/ event of Force Majeure which led to termination of this Agreement, as the case may be.

## 20. CHANGE IN LAW

### 20.1. Change in Law

- i. The SPC hereby undertakes and confirms that it shall, in accordance with Applicable Law, take best efforts to mitigate the adverse effect of a Change in Law, including obtaining and maintaining, throughout the Term, such insurances for and/or in relation to the Dry Port Assets and Mandatory Dry Port Services, as considered prudent in accordance with Good Industry Practice.
- ii. If as a result of Change in Law, the SPC suffers an increase in costs or reduction in net after tax return or other financial burden, loss, liability or damage in connection with its development or operation of Dry Port Assets and performance of services thereat, the aggregate financial effect of which exceeds \_\_\_\_\_ million in any financial year, the SPC may notify AUTHORITY and propose amendments to the Agreement so as to put the SPC in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden, loss, liability or damage as aforesaid (the "Amendment Notice"). The Amendment Notice shall be accompanied by such supporting documents and evidences in order to assist AUHTORITY to evaluate such claim. In this regard, the SPC further undertakes to provide any and all such assistance as AUHTORITY may require for evaluating the claim.
- iii. AUHTORITY, upon receiving the Amendment Notice by the SPC evaluate the veracity of the subject matter including by way of appointing an industry expert to assist it; and post such evaluation if AUHTORITY determines that such reported adverse effect on account of change in law exists, then use its reasonable efforts to make the necessary amendments to the Agreement within ninety (90) days of receiving the Amendment Notice, or convey to SPC in the event it is not possible to make suitable amendments to the Agreement. In such event where required amendment cannot be made AUHTORITY shall consider paying an amount that would put the SPC in the same financial position it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden, loss, liability or damage as aforesaid..
- iv. AUTHORITY shall make payment of said compensation and if SPC shall dispute the adequacy of quantum of such compensation, the same shall be finally settled in accordance with the dispute resolution mechanism contained herein.
- v. If as a result of Change in Law, the SPC incurs a reduction in costs or increase in net after tax return or other financial gain or benefit in connection with its development or operation of Mandatory Dry Port services and Dry Port Assets, the aggregate financial effect of which exceeds \_\_\_\_\_ million in any financial year, the SPC shall notify AUHTORITY and pay to AUHTORITY an amount that would put the SPC in the same financial position it would have occupied had there been no such Change in Law resulting in such cost reduction, increase in return or other financial gain or benefit as aforesaid.
- vi. The SPC shall make payment of such compensation within sixty (60) days of the said financial benefit. Provided however that the AUHTORITY may by notice in writing require the SPC to pay an amount that would put the SPC in the same financial position it would have occupied had there been no such Change in Law resulting in such cost reduction, increase in return or other gain or benefit. If the SPC shall dispute the quantum of such compensation claim of AUTHORITY, the same shall be finally settled in accordance with the dispute resolution mechanism contained herein.



- 20.2. {For avoidance of doubt, it is clarified that in event SPC suffers any increase in costs or reduction in net after tax return or other financial burden, loss, liability or damage in connection with its development or operation of Dry Port Assets and performance of services thereat, on account of change in tax laws and/or environmental laws, the SPC shall bear the cost or benefit, as the case may be, of the same without any liability in this regard to the AUTHORITY.}<sup>6</sup>

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<sup>6</sup> This Clause should be deleted if the AUTHORITY decided to consider tax laws and environmental laws under the Change in Law definition

## 21. GENERAL

### 21.1. Indemnification

- 21.1.1. The SPC hereby agrees and undertakes that from the Effective Date and during the Term and thereafter, it shall indemnify and keep indemnified and otherwise save harmless, AUTHORITY, its agents and employees, from and against all claims, demands made against and/ or loss caused and/ or damages suffered and/ or cost, charges/ expenses incurred or put to and/ or penalty levied and/ or any claim due to injury to or death of any person and/ or loss or damage caused or suffered to property owned or belonging to AUTHORITY, its agents and employees or third party as a result of any acts, deeds or thing done or omitted to be done by SPC or as a result of failure on the part of SPC to perform any of its obligations under this Agreement or on the SPC committing breach of any of the terms and conditions of this Agreement or on the failure of the SPC to perform any of its statutory duty and/ or obligations or failure or negligence on the part of SPC to comply with any statutory provisions or as a consequence of any notice, show cause notice, action, suit or proceedings, given, initiated, filed or commenced by any third party or Government authority or as a result of any failure or negligence or default of SPC or its contractor(s) and/ or sub-contractors and/ or invitees as the case may be, in connection with or arising out of this Agreement and/ or arising out of or in connection with SPC's use and occupation of Dry Port Site and/ or Dry Port and/ or the provision of services on the Dry Port in terms hereof.
- 21.1.2. It is expressly understood by the Parties that this Article shall survive the termination or expiry hereof.
- 21.1.3. AUTHORITY hereby agrees and undertakes that during the Term it shall indemnify and keep indemnified and otherwise save harmless, SPC its agents and employees, from and against all claims, demands made against and/ or loss caused and/ or damages suffered and/ or cost, charges/ expenses incurred or put to and/ or penalty levied and/ or any claim due to any actions or omission of AUTHORITY in relation to the Infrastructure Support as set out to be provided under this Agreement. Provided however that the AUTHORITY shall not be liable for any claim which is less than \_\_\_\_ million and their aggregate liability for all valid claims agreed or determined (excluding related interest and enforcement costs) shall not exceed \_\_\_\_ million.
- 21.1.4. It is hereby expressly agreed that AUTHORITY shall not be liable to indemnify SPC, its agents or employees, in respect of any claims, demands made against and/ or loss caused and/ or damages suffered and/ or cost, charges/ expenses incurred or put to and/ or penalty levied and/ or any claim due to any actions or omission of AUTHORITY other than gross negligence and willful default by AUTHORITY, its employees, agents and sub-contractors in relation to the Infrastructure Support provided to the Dry Port after the Effective Date.

### 21.2. Miscellaneous

- 21.2.1. Amendments
- No amendment or waiver of any provision of this Agreement, nor consent to any departure by any of the Parties therefrom, shall in any event be effective unless the same shall be in writing and signed by the Parties hereto and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it is given.

21.2.2. Agreement to Override Other Agreements; Conflicts

- (a) This Agreement supersedes all previous agreements or arrangements between the Parties, including any memoranda of understanding entered into in respect of the contents hereof and represents the entire understanding between the Parties in relation thereto.
- (b) In the event of a conflict between the terms of this Agreement and those of any other Project Agreement, the terms of this Agreement shall prevail.

21.2.3. No Waiver; Remedies

No failure on the part of any Party to exercise, and no delay in exercising, any right, power or privilege hereunder shall operate as a waiver thereof or a consent thereto; nor shall any single or partial exercise of any such right, power or privilege preclude any other of further exercise thereof or the exercise of any other right, power or privilege. The remedies herein provided are cumulative and not exclusive of any remedies provided by applicable law.

21.2.4. Severance of Terms

If any provisions of this Agreement are declared to be invalid, unenforceable or illegal by any competent arbitral tribunal or court, such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions of this Agreement which shall continue in full force and effect and in such event, the Parties shall endeavor in good faith to forthwith agree upon a legally enforceable substitute provision as will most closely correspond to the legal and economic contents of the unenforceable provision.

21.2.5. Language

All notices, certificates, correspondence or other communications under or in connection with this Agreement, any other Project Agreement or the Project shall be in English

21.2.6. Notices

Any notice to be given hereunder shall be in writing and shall either be delivered personally or sent by registered post, telex, facsimile transmission, electronic mail or other means of telecommunication in permanent written form. The addresses and numbers for service of notice shall be given to the parties at their respective addresses set forth below:

In case of SPC:

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In case of AUTHORITY:

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or such other address, telex number, or facsimile number as may be notified by that Party to any other Party from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, by recognized international courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number. In case any Party changes its address, communication numbers, or directed attention as set forth above, it shall notify the other Parties in writing prior to the adoption thereof.

21.2.7. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of \_\_\_\_\_ [...].

21.2.8. Original Document

This Agreement is made in two (2) original copies, each having the same contents and the Parties have read and thoroughly understand the contents hereof and have hereby affixed their respective signatures and seals before witnesses.

21.2.9. Confidentiality

Neither the SPC nor the AUTHORITY shall, unless otherwise agreed (which agreement may be on such general or specific terms as the parties may determine), disclose to any third party (other than its directors, officers, employees, consultants, lenders, agents, or the selectee under the Substitution Agreement, to the extent required or incidental to the performance of its obligations under the Project Agreements) any information which is the property of the other party to this Agreement or which otherwise relates to its business, secrets, dealings, transactions or affairs unless, and to the extent that, such disclosure:

- (a) is reasonably required for the exercise or performance by either Party of its rights or obligations under this Agreement; or
- (b) is required pursuant to any relevant statutory or regulatory requirements or duties or any relevant terms of the Applicable Laws or in the public interest; or
- (c) relates to information which is already in the public domain, other than as a result of breach of this Article by the party seeking to make such disclosure;

Provided that, in the case of any disclosure in accordance herewith, the Party disclosing such information shall, so far as reasonably practicable, impose on the third party receiving such information such obligations as may be appropriate to maintain its confidentiality.

21.2.10. Assignment

(a) By SPC

Save and except otherwise permitted by this Agreement, the SPC shall not assign, transfer, mortgage, charge, sub-let, deal with, sub-contract, sub-license or otherwise grant rights in or over all or any of the rights, or all or any of its obligations or liabilities under this Agreement.

(b) By AUTHORITY

Without thereby implying any restriction on the AUTHORITY otherwise assigning, transferring, dealing with or granting rights in or over all or any of its rights or obligations under this Agreement, it is expressly recognized that, without requiring the consent of the SPC:

- i. the AUTHORITY may assign the benefit of or create any other encumbrance upon all or any of its rights hereunder; and
- ii. the AUTHORITY may assign and transfer all or any of its rights and obligations under this Agreement subject to the AUTHORITY guaranteeing to procure full and complete observance and performance of all such obligations by the assignee (such guarantee to be in a form reasonably acceptable to the SPC).

21.2.11. Waiver of Immunity

AUTHORITY hereby agrees that the execution, delivery and performance by it of this Agreement constitute private and commercial acts rather than public or governmental acts and accordingly, no immunity from proceedings brought against it or its assets in relation to this Agreement shall be claimed on the ground that the execution, delivery and performance by it of this Agreement constitute public or governmental acts.

21.2.12. Time is of the Essence

Time shall be of the essence of this Agreement, both as regards the dates, periods or times of day mentioned and as regards any dates, periods or times of day, which may be substituted for them in accordance with this Agreement.

21.2.13. Name of the Dry Port

SPC shall throughout the Term retain (consistent with Applicable Laws) \_\_\_\_\_ Dry Port as the name of the Dry Port. The name of the Dry Port shall be modified and / or changed, as instructed by AUTHORITY only.

The SPC may, with the consent of the AUTHORITY, which consent shall not be unreasonably withheld, display its name and sign at an appropriate place at the Dry Port.

**IN WITNESS WHEREOF** this Agreement has been executed by the duly authorized representatives of the Parties hereto on the day and year first above written.

For and on behalf of <b>AUTHORITY</b> :	Witnessed by:
Signed by _____	
For and on behalf of <b>SPC</b> :	Witnessed by:
Signed by _____	

## **SCHEDULE 1: LEASE AREA (DRY PORT SITE)**

## **SCHEDULE 2: BUSINESS PLAN (As submitted in the Bid)**

The development, operation and maintenance of the Dry Port will at all times be in compliance with the following:



### **SCHEDULE 3: DEVELOPMENT PLAN**

## **SCHEDULE 4: LEASE DEED**

## **SCHEDULE 5: MANDATORY CAPITAL WORKS**

## **SCHEDULE 6: MANDATORY DRY PORT SERVICES**

## **SCHEDULE 7: DEVELOPMENT STANDARDS AND REQUIREMENTS**

### **1. Function**

[The basic functions of Dry Port shall include the handling, storage and regulatory inspection of goods moving in international trade and the execution of applicable customs control and formalities.

Additional functions of Dry Port may include, but are not limited to:

- (a) Receipt and dispatch;
- (b) Consolidation and distribution;
- (c) Warehousing;
- (d) Trans-shipment.

### **2. Infrastructure, equipment and facilities**

Dry Port shall have following infrastructure, equipment and manpower commensurate with existing and expected freight volumes in accordance with applicable laws, regulations and practices:

- (a) A secure area with a gate for dedicated entrance and exit;
- (b) Covered and open storage areas separated for import, export and transshipment, and for perishable goods, high-value cargoes and dangerous cargoes, including hazardous substances;
- (c) Warehousing facilities, which may include customs bonded warehousing facilities;
- (d) Customs supervision, control, inspection and storage facilities;
- (e) Appropriate cargo and container-handling equipment;
- (f) Internal service roads and pavement for use in the operation and stacking area;
- (g) Vehicle holding areas with adequate parking space for freight vehicles;
- (h) An administrative building for customs, freight forwarders, shippers, customs brokers, banks and other related agencies;
- (i) Information and communications systems, which include electronic data interchange systems, scanners and vehicle-weighing equipment;
- (j) A container, vehicle and equipment repair yard, if necessary]<sup>7</sup>

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<sup>7</sup> Only exclusive and indicative; Should be replaced depending upon the Project requirement

## **SCHEDULE 8: O&M STANDARDS AND REQUIREMENTS**

## **SCHEDULE 9: TOR FOR INDEPENDENT ENGINEER & EXPERT**

## **SCHEDULE 10: PERFORMANCE BOND**



## **SCHEDULE 11: INFRASTRUCTURE SUPPORT**

## **SCHEDULE 12: ESCROW AGREEMENT**

### **ESCROW ACCOUNT AGREEMENT**

THIS ESCROW ACCOUNT AGREEMENT (the "Agreement") is made on the \_\_\_\_ day of \_\_\_\_ [...], 20\_\_ [...] at \_\_\_\_\_.

#### **BY AND AMONGST:**

1. \_\_\_\_\_, a \_\_\_\_\_ Bank, with its registered office at \_\_\_\_\_ (hereinafter referred to as the "Escrow Bank" which expression shall, unless it be repugnant to the subject or context thereof, include its successors and permitted assigns) of the FIRST PART;
2. \_\_\_\_\_, a company incorporated under the \_\_\_\_\_ and having its registered office at \_\_\_\_\_ (hereinafter referred to as the "Company" or the "SPC", which expression shall, unless it be repugnant to the subject or context thereof, include its successors and permitted assigns) of the SECOND PART; and
3. The \_\_\_\_\_, having its principal office at \_\_\_\_\_, acting through its \_\_\_\_\_ (hereinafter referred to as "AUTHORITY", which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns) of the THIRD PART.

The Escrow Bank, the SPC and AUTHORITY are hereinafter collectively referred to as the "Parties" and individually as the "Party".

#### **WHEREAS:**

- (a) AUTHORITY is an \_\_\_\_\_, responsible for the development, management, operation and maintenance of Dry Ports in \_\_\_\_\_.
- (b) The SPC is a \_\_\_\_\_, established, inter-alia with the objectives of promoting, establishing, developing, designing, managing, financing, operating and maintaining the Dry Port (as defined herein).
- (c) AUTHORITY and the SPC have entered into a Development, Operation and Management Agreement dated \_\_\_\_\_ (hereinafter referred to as "Development Agreement"), whereby AUTHORITY has granted to the SPC the right to undertake the Project (as defined hereunder), and the SPC has agreed to undertake the Project on the terms and conditions contained therein.
- (d) Under the terms of the Development Agreement, it has been stipulated that all Receivables (as defined hereunder) of the SPC shall be deposited by the SPC into an escrow account and disseminated therefrom in a particular priority order.
- (e) This Agreement sets forth the detailed mandates, terms and conditions and operating procedures for such escrow account.

NOW, THEREFORE, in consideration of the premises contained herein, the Parties hereto agree as follows:

**1. Definitions**

- 1.1. For the purposes of this Agreement, unless the context otherwise requires, capitalized terms shall have the meaning set forth hereunder.

**"AUTHORITY Fee & Lease Rent"** for any Month, shall mean the amounts payable by the SPC to the AUTHORITY under the terms of the Development Agreement and Lease Deed, as certified by the AUTHORITY in a certificate to be submitted by the AUTHORITY to the Escrow Bank by the 1<sup>st</sup> of the preceding Month and as revised by AUTHORITY during the course of the preceding Month.

**"Authorized Investments"** means investment in securities \_\_\_\_\_ or fixed deposits in banks with at least \_\_\_\_\_.

**"Beneficial Parties"** means collectively the SPC, and AUTHORITY and "Beneficial Party" refers individually to each of them.

**"Business Day"** means any day of the week (excluding \_\_\_\_ and public holidays) on which banks in \_\_\_\_\_ are generally open for business.

**"Dispute"** shall mean any dispute, difference, question or controversy between the Parties arising out of, in connection with or in relation to this Agreement.

**"Event of Default"** shall mean an event of default of the SPC under the Development Agreement, as certified by the AUTHORITY in a written notice in this regard to the Escrow Bank.

**"Month"** shall mean a calendar month.

**"Priority Cash-flow Application"** shall have the meaning ascribed to the term in Section 3.5(B)(a) hereunder.

**"Project"** means the development, design, construction, financing, operation and maintenance and management of the Dry Port.

**"Receivables"** means any and all cash flows and cash realizations of the SPC accruing from or in relation to the Dry Port from any source, including all proceeds from any draw-downs under its loan agreements, any equity funding received by the SPC, refund of taxes, any and all monies due or to become due to the SPC from any source including from any performance bonds, letters of credit and instruments of a similar nature and proceeds from any insurance contracts.

**"Statutory Dues"** for any Month, shall mean the Tax liability of the SPC for such Month, as certified by a third party tax consultant in a certificate to be procured and submitted by the Company to the Escrow Bank by the 1<sup>st</sup> day of the preceding Month, and as revised by such third party tax consultant during the course of the preceding Month.

**"Tax"** shall mean the taxes, duties, charges, cess, levies and other such analogous payments due under Applicable Law.

Other capitalized terms used herein (and not defined herein) but defined under the Development Agreement shall have the meaning ascribed to the term under the Development Agreement.

- 1.2. In this Agreement, unless the context otherwise requires, the rules of interpretation and construction as mentioned in Article 1.2 of the Development Agreement shall apply.

## **2. Establishment of Escrow Account and Declaration of Trust**

### **2.1. Establishment of the Accounts**

The SPC and the Escrow Bank confirm that the Escrow Bank has established, in the name of the SPC at the Escrow Bank's \_\_\_\_\_ branch, an account titled the "Escrow Account". The Escrow Account shall have the following sub accounts, maintained, controlled and operated by the Escrow Bank for the purposes of this Agreement, namely:

- (a) a sub account maintained, controlled and operated by the Escrow Bank, titled the "Receivables Account";
- (b) a sub account maintained, controlled and operated by the Escrow Bank, titled the "Proceeds Account" which shall have the following sub accounts:
  - i. a sub-account maintained, controlled and operated by the Escrow Bank, titled the "Statutory Dues Account;
  - ii. a sub-account maintained, controlled and operated by the Escrow Bank, titled the "AUTHORITY Fee & Lease Rent Account; and
  - iii. a sub-account maintained, controlled and operated by the Escrow Bank, titled the "Surplus Account".

### **2.2. Declaration of Trust**

The SPC hereby settles in trust with the Escrow Bank a sum of \_\_\_\_\_ for the benefit of the Beneficial Parties. The SPC further declares that all the legal right, title and interest in and to the trust, the Receivables, the Escrow Account, the monies therein and the Authorized Investments including any document of title in relation thereto made from the Escrow Account shall be vested in the Escrow Bank and held for the benefit of the Beneficial Parties in accordance with the terms of this Agreement and their respective interests are provided for herein. The Escrow Bank hereby accepts the abovementioned amount of \_\_\_\_\_ in the trust hereby declared upon the terms and conditions set forth in this Agreement and acknowledges that any amounts deposited in the Escrow Account from time to time shall be held in trust for the benefit of the Beneficial Parties in accordance with the terms and conditions of this Agreement. No Entity other than the Beneficial Parties shall have any rights hereunder as the beneficiaries of or as third party beneficiaries under this Agreement.

### **2.3. General Right of Withdrawal**

The Escrow Bank shall not make any transfer or withdrawal other than in accordance with this Agreement, unless the Escrow Bank has received the prior written instructions of the Beneficial Parties authorizing such use.

## **3. The Escrow Account**

The Escrow Account shall comprise of the following sub-accounts:

### **3.1. Receivables Account**

#### **(a) Deposits to the Receivables Account**

The SPC hereby undertakes that it shall deposit into the Receivables Account all its Receivables immediately upon receipt thereof. [The AUHTORITY shall, in case of Grant, disburse the Grant amount by depositing the same in Escrow Account]

#### **(b) Withdrawals from the Receivables Account**

Immediately on receipt of monies into the Receivables Account, the Escrow Bank shall withdraw such monies and deposit the same into the Proceeds Account.

3.2. Proceeds Account

The Proceeds Account shall be established by the Escrow Bank at its \_\_\_\_\_ branch in the name of the SPC.

A. Deposits into the Proceeds Account

- i. The Escrow Bank shall in accordance with Section 3.1 of this Agreement, immediately on such deposit, transfer monies deposited in the Receivables Account, into the Proceeds Account.

B. Withdrawals from the Proceeds Account

- (a) As long as there is no Event of Default, on any date, the Escrow Bank shall withdraw amounts deposited in the Proceeds Account only towards the following purposes and in the following order of priority (hereinafter the "Priority Cash-flow Application"):

- i. to pay amounts into the Statutory Dues Account such that by no later than the last day of any Month the amounts so transferred in that Month are equal to the monthly Statutory Dues for the following Month.
- ii. to pay amounts into the AUTHORITY Fee & Lease Rent Account such that by no later than the last day of any Month the amounts so transferred in that Month are equal to the monthly AUTHORITY Fee & Lease Rent for the following Month.
- iii. to pay amounts other than AUTHORITY Fee, if any, payable by the SPC to AUTHORITY under the Development Agreement, as notified in writing by AUTHORITY to the Escrow Bank.
- iv. to pay any and all balance amounts into the Surplus Account.

- (b) It is hereby expressly clarified that if, in any Month, the funds available in the Proceeds Account for transfer to any sub-account in accordance with Section 3.2(B)(a) are insufficient to pay the amount required to be paid in each of the sub-accounts in accordance with Section 3.2(B)(a), then the Escrow Bank shall transfer funds to the relevant sub-account in accordance with the Priority Cash-flow Application.

3.3. Statutory Dues Account

The Statutory Dues Account shall be established by the Escrow Bank at \_\_\_\_\_ in the name of the SPC.

A. Withdrawals from the Statutory Dues Account

On the deposit of any amounts in the Statutory Dues Account in accordance with Section 3.2(B)(a)(i), the Escrow Bank shall withdraw amounts from the Statutory Dues Account as are required by the Company to make payments of Statutory Dues as required under Applicable Law.

3.4. AUTHORITY Fee & Lease Rent Account

The AUTHORITY Fee Account shall be established by the Escrow Bank at \_\_\_\_\_ in the name of SPC.

A. Withdrawals from the AUTHORITY Fee & Lease Rent Account

On the deposit of any amounts in the AUTHORITY Fee & Lease Rent Account in accordance with Section 3.2(B)(a)(ii), the Escrow Bank shall withdraw amounts from the AUTHORITY Fee & Lease Rent Account as are required by the AUTHORITY.

3.5. Surplus Account

The Surplus Account shall be established by the Escrow Bank in the name of the SPC.

A. Withdrawals from the Surplus Account

The Escrow Bank shall pay, from time to time, to the SPC, within three (3) days of receiving directions in this regard from the SPC, such amounts from the Surplus Account as the SPC may direct. Provided however, in the event of the Escrow Bank receiving directions from the Lenders or their agent/ trustee, then the Escrow Bank shall follow the instructions of the Lenders (or their agents/ trustee) in relation to the Surplus Account and amounts therein.

**4. Authorized Investments**

4.1. Power to Invest

- i. So long as the Escrow Bank is not notified of an Event of Default, the Escrow Bank shall, from the amounts standing to the credit of the Escrow Account (and any sub-accounts thereunder), invest in Authorized Investments as provided in this Agreement ("Permitted Investment") and in each case with respect to those amounts next anticipated to be transferred or withdrawn, the Permitted Investment in relation thereof, shall have a scheduled maturity no later than such next anticipated cash withdrawal or transfer from such Account in accordance with this Agreement.
- ii. Upon the occurrence and during the continuance of an Event of Default, investment of such funds and reinvestment shall be made in Authorized Investments with the consent of AUTHORITY.

**5. Escrow Bank provisions**

5.1. Escrow Bank and the Beneficial Parties

- (a) The Beneficial Parties hereby appoint the Escrow Bank for benefit of the Beneficial Parties in connection herewith, and authorize the Escrow Bank to exercise such rights, powers, authorities and discretions as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretions as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.
- (b) The SPC hereby agree to pay to the Escrow Bank, fees of \_\_\_\_\_ per \_\_\_\_\_ as consideration for acting as the Escrow Bank hereunder.

5.2. Obligations of the Escrow Bank

The Escrow Bank:

- (a) undertakes to perform only such duties as are specifically set forth to be performed in this Agreement, in accordance with the terms and conditions contained herein, and further undertakes to act in good faith and without negligence;
- (b) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Company upon a certificate signed by or on behalf of the Company;

- (c) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or documents believed by it to be authentic;
- (d) shall, within five (5) Business Days after receipt, deliver a copy to AUTHORITY of any notice or document received by the Escrow Bank (in its capacity as the Escrow Bank) from the Company or any other Entity;
- (e) shall, within five (5) Business Days after receipt, deliver a copy to the Company of any notice or document received by the Escrow Bank (in its capacity as the Escrow Bank) from AUTHORITY or any Entity in connection herewith; and
- (f) shall within seven (7) Business Days prior to any date on which any payment is due to a Beneficial Party in accordance with the terms and conditions of this Agreement, provide notice to AUTHORITY of any anticipated shortfall in the Escrow Account (or any account thereunder) for making any payments due in accordance with the terms and conditions of this Agreement.

## **6. Term and Termination**

- 6.1. This Agreement shall, unless terminated earlier by the mutual consent of the Parties or otherwise in accordance with the provisions of this Section by written notice from the Beneficial Parties to the Escrow Bank, remain in full force and effect for the duration of the Development Agreement.
- 6.2. AUTHORITY may, after consultation with the SPC, at any time may remove the Escrow Bank, with or without cause, and appoint a successor Escrow Bank by written notice of such action to the SPC, the Escrow Bank and the successor Escrow Bank.

Provided however that AUTHORITY shall not be required to consult with the SPC (as required above) if an Event of Default has occurred and is subsisting.

- 6.3. If, at any time, the Escrow Bank or any of its associates, shall become a Beneficial Party and after such time there is an Event of Default, the Escrow Bank shall resign as Escrow Bank immediately upon the occurrence of such Event of Default, if in the sole judgment of the other Beneficial Parties (which, for this purpose, shall not include the Escrow Bank), there shall be, or be reasonably likely that there will arise, any conflict in or impediment to the Escrow Bank's performance as Escrow Bank under this Agreement.
- 6.4. The Escrow Bank shall be entitled to terminate its services under this Agreement if the SPC/AUTHORITY fails to comply with any of its material obligations owed to the Escrow Bank under this Agreement and fails to remedy the failure within sixty (60) days after receipt of notice thereof from the Escrow Bank to the SPC, provided however, AUTHORITY has arranged for the appointment of a successor Escrow Bank and arrangements are made for the transfer of amounts deposited in the Escrow Account (including any sub-accounts thereof) to new accounts established with successor Escrow Bank.
- 6.5. (i) Any successor Escrow Bank appointed as provided in accordance with this Section 6 shall execute, acknowledge and deliver to, and for the benefit of, the Beneficial Parties and to its predecessor Escrow Bank an instrument accepting such appointment, and thereupon the resignation or removal of the predecessor Escrow Bank shall become effective and such successor Escrow Bank, without any further act, deed or conveyance, shall become vested with

all the rights, powers, duties and obligations of its predecessor hereunder, as if it was originally named as Escrow Bank;

(ii) provided that on the written request of the Beneficial Parties or of the successor Escrow Bank, the Escrow Bank ceasing to act shall take such steps or actions as are required of it by the Beneficial Parties, including without limitation the execution and delivery of an instrument or instruments transferring and assigning to such successor Escrow Bank (without obligation to indemnify such successor) all the rights and powers of the Escrow Bank so ceasing to act, delivery to the Beneficial Parties all documents, instruments, etc. relating to its obligations under this Agreement.

(iii) Upon the reasonable request of any such successor Escrow Bank, the Beneficial Parties shall execute any and all instruments in writing in order more fully and certainly to vest in and confer to such successor Escrow Bank all such rights and powers.

6.6. Any corporation into which the Escrow Bank may be merged or converted or with which it may be consolidated or any corporation resulting from any merger, conversion or consolidation to which the Escrow Bank shall be a party, or any corporation succeeding to the corporate Escrow Bank's rights or business or either, shall, subject to approval of AUTHORITY, be the successor of the Escrow Bank with all rights, benefits, obligations and duties as were originally available and provided for to the transferor Escrow Bank in relation to the merger, conversion or consolidation proceedings or process.

#### 6.7. Books and Records

6.7.1. The Escrow Bank shall be responsible for maintaining a correct and complete record of all transactions, deposits, withdrawals or transfer of funds relating to the Escrow Account (and all sub-accounts thereof).

6.7.2. AUTHORITY shall have unrestricted access to review such books and records of the Escrow Bank in relation to the Escrow Account subject to restrictions in law. The Company irrevocably grants AUTHORITY access to review the books and records of the Escrow Account and irrevocably waives any right of confidentiality, which may exist in respect of such books and records.

#### 6.8. Determination of Amount and Events

(a) The Escrow Bank shall be entitled to rely as to the following matters exclusively upon the following documents (insofar as the same are delivered to the Escrow Bank):

i. with respect to occurrences of Events of Default, the relevant notice of AUTHORITY of an Event of Default.

(b) The Escrow Bank may with the consent of AUTHORITY for all purposes rely on a certificate, signed by an authorized officer of the SPC as to any fact or matter, the manner of ascertainment of which, is not specifically provided for herein.

#### 6.9. Statement of Authorized Investments

Upon the request of AUTHORITY, and in any event, not later than five (5) Business Days after the end of any calendar Month, the Escrow Bank shall deliver to the Beneficial Parties a schedule of investments acquired or disposed of during that Month in such detail as AUTHORITY may reasonably require.



6.10. Confidentiality

The Escrow Bank agrees to keep all information ("Information") (including the terms and conditions of this Agreement and/or any and all of the Project Agreements) made available (whether before or after the date of this Agreement) by any of the Parties to the Escrow Bank concerning the SPC or the Project, confidential, and hereby undertakes and covenants not to communicate any Information, or allow any Information to be communicated to any third party unless:

- (a) in connection with any proceedings arising out of or in connection with this Agreement to the extent that such party may consider it necessary to protect its interest or the interests of the Escrow Bank; or
- (b) required to do so by an order of a court of competent jurisdiction whether or not in pursuance of any procedure for discovering documents; or
- (c) pursuant to any Applicable Law in accordance with which such party is required to act; or
- (d) to its auditors for the purposes of enabling the auditors to complete an audit of the Escrow Bank or to its legal advisers when seeking bona fide legal advice in connection with this Agreement; or
- (e) in circumstances where the relevant Information has been published or announced by the Company and/or any other Beneficial Party in conditions free from confidentiality or has otherwise entered the public domain without default on the part of the relevant Party; or
- (f) the Information was obtained by such Escrow Bank from an independent or third party source who was not in breach of any confidentiality obligations with the Beneficial Parties.

6.11. Not Acting in Individual Capacity

In accepting the trusts hereby created, the Escrow Bank acts solely in its capacity as an Escrow Bank and not in its individual capacity and all Entities having any claim against the Escrow Bank by reason of the transactions contemplated by the Project Agreements shall look only to the Company for payment or satisfaction thereof, save and except as provided in this Agreement, other than as a result of its willful misconduct or gross negligence.

6.12. Indemnity

The SPC shall indemnify the Escrow Bank for any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses, claims or disbursements of any kind or nature whatsoever which may be imposed upon, incurred by or asserted against the Escrow Bank in any way in connection with or arising out of the negotiation, preservation or enforcement of any rights under, or in carrying out its duties under this Agreement (other than those incurred on account of gross negligence or willful default on the part of the Escrow Bank).

**7. Representations and warranties of the Escrow Bank and the Company**

Each of the Escrow Bank and the SPC represent and warrant that it is duly organized and validly existing under the laws of \_\_\_\_ with power to enter into this Agreement and to exercise its rights and perform its obligations hereunder and has taken all corporate and other actions required for the execution of this Agreement and the performance of its obligations hereunder. The Escrow Bank represents and warrants that it shall hold all funds in the Escrow Account in trust for the benefit of the Beneficial Parties in accordance with the provisions of this Agreement and further represents and warrants that it has obtained all approvals, permits and other clearances required for the execution of this Agreement and the performance of its obligations hereunder.

## **8. Miscellaneous**

### **8.1. Restriction on Assignment**

Save as provided in Section 6, the SPC and the Escrow Bank, shall not assign or transfer any part of their respective rights or obligations under this Agreement without the prior consent of AUTHORITY. It is expressly agreed between the Parties that nothing in this Section 8.1 shall prevent AUTHORITY from assigning, novating or transferring its rights, benefits and obligations under this Agreement to any Entity.

### **8.2. Notices**

8.2.1. All notices shall be sent to a Party hereto at its address and contact number specified in Schedule A appended hereto, or at such other address and contact number as is designated by such Party in a written notice to the other Parties hereto.

8.2.2. All such notices and communications shall be effective (i) if sent by telex, when sent (with the correct answerback), (ii) if sent by telecopier, when sent (on receipt of a confirmation to the correct telecopier number), (iii) if sent by person, when delivered, (iv) if sent by courier, (a) one Business Day after deposit with an overnight courier if for inland delivery and (b) five Business Days after deposit with an international courier if for overseas delivery and (c) if sent by registered letter when the registered letter would, in the ordinary course of post, be delivered whether actually delivered or not.

8.2.3. An original of each notice and communication sent by telex or telecopy shall be dispatched by person, overnight courier (if for inland delivery) or international courier (if for overseas delivery) and, if such person or courier service is not available, by registered airmail (or, if for inland delivery, registered first class mail) with postage prepaid, provided that the effective date of any such notice shall be determined in accordance with Section 8.2.2, as the case may be, without regard to the dispatch of such original.

### **8.3. No Waivers; Remedies**

No failure on the part of any Party to exercise, and no delay in exercising, any right, power or privilege hereunder shall operate as a waiver thereof or a consent thereto; nor shall any single or partial exercise of any such right, power or privilege preclude any other of further exercise thereof or the exercise of any other right, power or privilege. The remedies herein provided are cumulative and not exclusive of any remedies provided by Applicable Law.

### **8.4. Severability**

Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of prohibition or unenforceability but that shall not invalidate the remaining provisions of this Agreement or affect such provision in any other jurisdiction.

### **8.5. Amendments or Waiver**

No amendment or waiver of any provision of this Agreement, nor consent to any departure by any of the Parties therefrom, shall in any event be effective unless the same shall be in writing and signed by the Parties hereto and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

### **8.6. Governing Law**

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

8.7. Dispute Settlement

The Dispute Resolution provisions as set out under Development Agreement shall apply and be deemed to be incorporated here by reference.

8.8. Regulatory Approvals

The Company shall procure and shall thereafter maintain and comply with all regulatory approvals required for it to establish and operate the Escrow Account.

8.9. Notification of Balances

Within seven (7) days following the end of each calendar Month, the Escrow Bank shall notify AUTHORITY of the respective balances in the Escrow Account (including balances in each of the sub-accounts thereunder) as on the last Business Day (of the Month).

8.10. Additional Rights

Any rights conferred on the Parties pursuant to this Agreement shall be in addition to and not in substitution for or in derogation of any other rights and remedies which the Parties may at any time have under the Project Agreements or otherwise.

**IN WITNESS WHEREOF** the SPC has caused its Common Seal to be affixed hereto and to a duplicate hereof on the date first above written and the Escrow Bank and AUTHORITY have caused the same to be executed by the hand of an authorized official.

\_\_\_\_\_ [AUTHORITY]

\_\_\_\_\_ [SPC]

\_\_\_\_\_ [ESCROW BANK]

\_\_\_\_\_ [LENDERS]

## **SCHEDULE 13: SUBSTITUTION AGREEMENT**

### **SUBSTITUTION AGREEMENT**

THIS SUBSTITUTION AGREEMENT (the "Agreement") is made on the \_\_\_\_ day of \_\_\_\_\_ [...], 20\_\_ [...] at \_\_\_\_\_.

#### **BY AND BETWEEN:**

1. The \_\_\_\_\_, having its principal office at \_\_\_\_\_, acting through its \_\_\_\_\_ (hereinafter referred to as "AUTHORITY", which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns) of the FIRST PART; and
2. \_\_\_\_\_, a company incorporated under the \_\_\_\_\_ and having its registered office at \_\_\_\_\_ (hereinafter referred to as the "Company" or the "SPC", which expression shall, unless it be repugnant to the subject or context thereof, include its successors and permitted assigns) of the SECOND PART;

AND

3. \_\_\_\_\_ having its registered office at \_\_\_\_\_ in its capacity as Lenders Agent acting for and on behalf of the Lenders listed in Schedule 1 hereto and such Lenders' successors and assigns in terms of the Financing Documents (hereinafter referred to as the "Lenders Agent", which expression shall, unless repugnant to the context or meaning thereof, include the trustee or the trustees for the time being) of the THIRD PART.

AUTHORITY, the SPC and the Lenders Agent are hereinafter collectively referred to as the "Parties" and individually are hereinafter referred to as "Party".

#### **WHEREAS:**

- (a) AUTHORITY is an \_\_\_\_\_, responsible for the development, management, operation and maintenance of Dry Ports in \_\_\_\_\_.
- (b) The SPC is a \_\_\_\_\_, established, inter-alia with the objectives of promoting, establishing, developing, designing, managing, financing, operating and maintaining the Dry Port (as defined herein).
- (c) AUTHORITY and the SPC have entered into a Development, Operation and Management Agreement dated \_\_\_\_\_ (hereinafter referred to as "Development Agreement"), whereby AUTHORITY has granted to the SPC the right to undertake the Project (as defined hereunder), and the SPC has agreed to undertake the Project on the terms and conditions contained therein.
- (d) With a view to help facilitate obtaining of financing for development of Transfer Assets at the Dry Port by the SPC so as to enable the SPC to operate, maintain, develop, design, construct, upgrade, modernize, finance and manage the Dry Port Assets at the Dry Port pursuant to and in accordance with the Development Agreement, the Parties have agreed that on certain defaults by the SPC, the Lenders shall have the right to substitute the SPC by a Selectee on the terms, and subject to the conditions and covenants mentioned herein below.

NOW, THEREFORE, in consideration of the premises contained herein, the Parties hereto agree as follows:

## **1. Definitions and Interpretation**

### **1.1. Definitions**

For the purpose of this Agreement, the following terms shall have the meaning hereinafter respectively assigned to them:

**“Financing Documents”** means the documents executed by the SPC for raising Debt, from time to time.

**“Financing Event of Default”** means occurrence of any of the following events:

- i. A default in payment by the SPC to all or any of the Lenders under the Financing Documents of any six installments (in case the installments are payable monthly) and two installment (in case the installments are payable quarterly), either of principal or interest or both, or any other amounts, due and payable by it in accordance with the Financing Documents.
- ii. Any event of default under or breach of any of the terms of any of the Financing Documents which in the sole opinion of the Lenders Agent is material or major and which may seriously affect the ability of the SPC to meet its payment obligations to the Lenders under the Financing Documents.

**“SPC Event of Default”** shall have the meaning assigned thereto in the Development Agreement.

**“Lenders”** shall mean the lenders listed in Schedule 1 hereto and such Lenders’ successors and assigns in terms of the Financing Documents.

**“Lenders Certificate”** shall have the meaning ascribed thereto in Article 2.2(b).

**“Lenders Dues”** means the aggregate of all monies owed by the SPC to the Lenders under the Financing Documents and all accrued interest, additional interest, liquidated damages, commitment fees, commission, prepayment premium, costs, charges and other monies.

**“Lenders Notice of Default”** shall have the meaning ascribed thereto in Article 2.2(a).

**“New Entity”** means an entity proposed by the Lenders in a Proposal.

**“Notice of Intention to Terminate”** shall have the meaning assigned thereto in the Development Agreement.

**“Proposal”** shall have the meaning ascribed thereto in Article 3.1(iii).

**“Selectee”** means, subject to Article 3.3, a New Entity proposed by the Lenders pursuant to this Agreement and approved by AUTHORITY in accordance with this Agreement for substituting the SPC under the Development Agreement.

**“Substitution”** is the process of replacement of a Selectee in place of the SPC by undertaking the following activities:

- i. grant to the Selectee the right to operate, maintain, develop, design, construct, upgrade, modernize, finance and manage the Dry Port under and in accordance with on the terms and conditions set forth in the Development Agreement for the remainder of the Term, by the novation of the Development Agreement in favour of the Selectee;

- ii. grant to the Selectee a leasehold interest over the Dry Port Site together with all assets, buildings, fixtures, runways, all or any singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Dry Port Site for the remainder of the Term by the novation of the Lease Deed in favour of the Selectee;
- iii. novation of any other agreements needing to be novated for the purpose of operating the Dry Port in favour of the Selectee; and
- iv. the execution of a new Substitution Agreement with the Selectee for the residual period of Term on the same terms and conditions as hereof;
- v. transfer by the SPC of all assets owned by the SPC to the Selectee;
- vi. grant by the AUTHORITY to the Selectee of all approvals, clearances and permissions within the AUTHORITY's power and necessary for operating the Dry Port in accordance with the Development Agreement, provided duly completed application in accordance with Applicable Law is submitted to the AUTHORITY.

**"Substitution Notice"** means the notice given by the Lenders Agent pursuant to Article 2.2 (d) of this Agreement.

- 1.2. The words and expressions beginning with or in capital letters used in this Agreement not defined herein and defined in the Development Agreement, shall have, unless repugnant to the context, the meaning respectively assigned to them in the Development Agreement.
- 1.3. Interpretation  
In this Agreement, unless the context otherwise requires, the interpretation rules as mentioned in Article 1.2 of the Development Agreement shall apply.

## **2. Substitution of the SPC by a Selectee**

- 2.1. In accordance with the terms hereof and upon the occurrence of the events specified herein, AUTHORITY hereby irrevocably agrees to substitute the SPC by a Selectee (selected by the Lenders and approved by AUTHORITY in accordance with the provisions of this Agreement) by way of Substitution for the purpose of securing the payment of the Lenders Dues.
- 2.2. (a) The Lenders Agent may notify by a notice in writing to the SPC, with a copy thereof simultaneously to AUTHORITY, about the occurrence of a Financing Event of Default and requiring the SPC to remedy and cure such default within 30 (thirty) days from the date of delivery of such notice (the "Lenders' Notice of Default"). The Lenders' Notice of Default shall be accompanied by the Lenders Certificate (as defined hereinafter). Provided however that in the event the Lenders Agent elects to issue a Lenders Notice of Default, than a copy thereof shall be given to AUTHORITY.  
  
(b) The "Lenders Certificate" is a certificate under the hands of an authorized officer of the Lenders Agent certifying
  - i. the occurrence of an Financing Event of Default; and
  - ii. the value of Lenders Dues.

The Lenders Certificate shall be conclusive evidence of the occurrence of such Financing Event of Default in so far as the AUTHORITY is concerned. Such Concerned Lenders Certificate shall be final, conclusive and binding upon the AUTHORITY for the purposes of occurrence of Financing Event of Default only, but not in relation to the Lenders Dues or quantum of Debt.

(c) In the event of a SPC Event of Default leading to issuance of Notice of Intention to Terminate by AUTHORITY under the Development Agreement, the AUTHORITY shall issue a copy thereof to Lender's immediately upon issue of such notice give a copy of the same to the Lender's

(d) The Lenders shall be entitled to nominate a third party for the purposes of Substitution:

- i. If after sixty (60) days from the date of delivery of the Lenders' Notice of Default, the Financing Event of Default has not been cured, or remedied or revoked in accordance with the Financing Documents; or
- ii. Immediately upon issue of Notice of Intention to Terminate by the AUTHORITY to the SPC.

The Lenders shall notify to AUTHORITY about whether they are exercising their right of substitution within sixty (60) days of receipt of Notice of Intention to Terminate, or issuance of the Lenders' Notice of Default, as the case may be.

In such event, the Lenders Agent may, without prejudice to any other right or remedy available to the Lenders under the Financing Document, notify AUTHORITY and the SPC on behalf of all the Lenders about the Lenders decision to invite, negotiate and procure offers, either through private negotiations or public auction or process of tendering from third parties for the purposes of Substitution, subject to the prior written approval of such third party by AUTHORITY, which approval the AUTHORITY may refuse or delay only on the grounds set out in Article 2.3 below (the "Substitution Notice").

2.3. The Lenders Agent and AUTHORITY shall apply the following criteria in the selection of a third party for the purposes of Substitution and the AUTHORITY shall be entitled to refuse or delay its approval only in the event that it is not satisfied, acting reasonably, that the following criteria will be satisfied by the third party following Substitution:

- i. the third party shall be capable of discharging the duties, obligations and liabilities of the SPC under the Development Agreement and shall have appropriate financial and legal capability;
- ii. the third party shall provide security/ comfort to the satisfaction of Lenders for repayment of the Lenders Dues;
- iii. the third party shall have the capability and shall unconditionally consent to assume the liability for the payment and discharge of dues of the SPC to AUTHORITY under and in accordance with the Development Agreement;
- iv. the third party shall have the experience and technical capability parameters as set forth in the Development Agreement or prescribed by AUTHORITY during the process of selection of the SPC or at any time thereafter in respect of the SPC;
- v. the third party shall have not been in material breach of any agreement between the third party and AUTHORITY;
- vi. the third party satisfies the relevant security and probity clearance requirements set forth by AUTHORITY during the competitive bidding procedure undertaken by AUTHORITY for the purposes of the selection of the selected bidder in the SPC, or other analogous applicable requirements under Applicable Law, if any; and
- vii. any other appropriate circumstance, whereby continuity in the performance of the SPC's obligations under the Development Agreement is maintained and the security in favour of Lenders under the Financing Documents is preserved.
- viii. considering its political sensitivities, the Government of \_\_\_\_\_ approves the third party.

### **3. Modalities for Substitution**

3.1. The following modalities shall be applicable to any replacement of the SPC by the Selectee pursuant to this Agreement:

- i. The Lenders Agent may invite, negotiate or procure offers either through private negotiations or public auction or process of tender or otherwise for the purposes of Substitution;
- ii. The Lenders Agent shall on behalf of the Lenders propose to AUTHORITY pursuant to sub-clause (iii) below, the name of a New Entity for acceptance and shall apply as necessary to AUTHORITY for undertaking Substitution.
- iii. The Lenders Agent on behalf of the Lenders shall be entitled, within a period of one hundred and eighty (180) days from the date of delivery to AUTHORITY of the Substitution Notice pursuant to Article 2.2 (d) above, to select and propose to AUTHORITY for its approval a New Entity (the "Proposal"). The Proposal of the Lenders Agent pursuant to this sub-clause (iii) shall contain the particulars and information in respect of the New Entity, the Lenders Dues and other data and information, all as prescribed in Schedule 2 hereto. Without prejudice to the foregoing, the Lenders Agent agrees and undertakes to provide to AUTHORITY such further and other information and such clarifications in respect of any data, particulars or information furnished by the Lenders Agent (the "Additional Information") as AUTHORITY may reasonably require provided that such request(s) is/ are made by AUTHORITY within 30 days of receipt of the Proposal/ Additional Information. AUTHORITY shall convey its approval or otherwise of such Proposal, within 30 (thirty) days of the later of (a) the date of receipt of the Proposal by AUTHORITY, or (b) the date when last of the Additional Information is received by AUTHORITY. Provided however that if within 30 (thirty) days of receipt of the Proposal, or the Additional Information as the case may be the AUTHORITY has not responded thereto, with its approval/ disapproval or with a request for further information, then the Proposal and the New Entity shall be deemed to have been approved. AUTHORITY shall be under an obligation to give reasons for rejection of any Proposal. Provided however that the AUTHORITY may only withhold its approval of the Proposal on grounds that the New Entity does not meet any of the criteria specified in Article 2.3 (i) – (vii). It is expressly agreed that the Proposal shall be accompanied by an unconditional undertaking of the New Entity that it shall upon approval by AUTHORITY of the Proposal execute necessary documentation to effectuate the Substitution and shall be liable for and shall assume, discharge and pay the Lenders Dues in such manner as may be acceptable to the Lenders. Upon approval of the Proposal the New Entity proposed shall become the Selectee hereunder.

Provided however that in the event the AUTHORITY does not approve of the Proposal, then subject to Articles 3.3 and 3.4 below, the Lenders Agent shall, within 30 (thirty) days of receipt of AUTHORITY's disapproval, use its reasonable endeavours to present another Proposal in respect of another New Entity and the procedure maintained in this Article 3.1(iii) shall be repeated until the expiry of the 120 days period in Article 3.3 below.

- iv. AUTHORITY shall, upon its satisfaction of the eligibility of the Selectee, on request by the Lenders Agent and in accordance with the provisions of this Agreement and subject to the provisions of sub-clause (v) below proceed to undertake the Substitution.



- v. The Substitution shall be subject to the Selectee obtaining requisite Government approvals, clearances and permission necessary for operating the Dry Port under and in accordance with the Development Agreement.
  - vi. The decision of the Lenders and AUTHORITY in the selection of the Selectee shall be final and binding on the SPC and shall be deemed to have been made with the concurrence of the SPC but without prejudice to the SPC's rights under the Project Agreements and under Applicable Law. The SPC hereby expressly waives all rights to object to or challenge such selection of the Selectee on any ground whatsoever.
  - vii. All actions of the Lenders Agent hereunder shall be deemed to be on and behalf of, expressly authorized by, the Lenders, and be binding upon them. The Lenders Agent hereby confirms that he is authorized to receive payment of compensation, payment to cure default and any other payments, consideration for transfer in accordance with the Substitution Notice and the Financing Documents and give valid discharge on behalf of all Lenders.
- 3.2. The SPC hereby irrevocably agrees and waives any right to challenge the Lender's decision to apply to AUTHORITY for Substitution as aforesaid and neither the SPC nor AUTHORITY shall be entitled to prevent the Lenders Agent from proceeding to seek such a Substitution of the SPC by Selectee as hereinbefore provided.
- 3.3. Notwithstanding anything contained in Article 3.1 above, where no suitable New Entity as acceptable to AUTHORITY can be found by the Lenders Agent within a period of one hundred and twenty (120) days from receipt of the first Proposal under Article 3.1, then AUTHORITY shall have the right to propose a nominee for the purposes of Substitution.
- 3.4. (i) If AUTHORITY proposes to substitute the SPC by any other person ("AUTHORITY Nominee"), it shall take into account the criteria specified in Article 2.3 and the Lender's Dues while considering offers from such persons and shall include a suitable condition as agreed to by the Lenders Agent on behalf of the Lenders for payment or takeover of such dues by such AUTHORITY Nominee to the extent agreed by the Lenders Agent in the event of a Substitution by such AUTHORITY Nominee. The AUTHORITY Nominee shall similarly be bound to execute all necessary documentation to effectuate Substitution.
- (ii) Notwithstanding anything contained in Article 3.3 and this Article 3.4, AUTHORITY shall not be required to take over at any time during the currency of or, upon termination or expiry of the Development Agreement for any reason whatsoever, the liabilities representing the Lender's Dues, save and except to the extent of Transfer Payments due and payable upon such termination/ expiry under the Development Agreement. In such an event AUTHORITY's obligation shall be limited to assumption of such liabilities and payments of dues as AUTHORITY has agreed to under the Development Agreement.
- 3.5. Nothing contained herein shall mean or be interpreted as provision of any guarantee or surety by AUTHORITY and it is expressly agreed that AUTHORITY has not provided any surety, guarantee or counter guarantee, whether directly or indirectly, for the recovery of any portion of the Lenders Dues.
- 3.6. In the event of a Substitution, an additional cure period of one hundred and eight (180) days shall be provided to enable the Selectee/AUTHORITY Nominee to cure any breach or default subsisting on the day of such Substitution.

It is clarified that if the nature of the default would take a longer time to remedy, the Selectee must agree on an appropriate timetable and remedy program with AUTHORITY. The remedy period will then be extended to match that timetable.

- 3.7. If the Selectee fails to cure such breach or default or make such payment of the Lenders Dues within such period, then the Lenders Agent shall have the right by providing a notice to require AUTHORITY to terminate the Development Agreement and require the termination value to be determined under Article 17.3.1 (c) of the Development Agreement.
- 3.8. The Parties herein expressly agree to execute such agreements as may be necessary to give effect to the Substitution as contemplated herein.

#### **4. Rights of AUTHORITY**

- 4.1. The Lenders' Agent and the SPC expressly agree that upon the issuance of a Lenders' Notice of Default or Notice of Intention to Terminate and the applicable cure period for the same has expired without the notice/s being withdrawn/cured, notwithstanding the process of Substitution having been initiated as provided in Article 2 herein, the AUTHORITY shall have the right but not the obligation to take over the operation and maintenance of the Dry Port and operate and maintain the same in accordance with Good Industry Practice, at the risk and cost of the SPC until operation pursuant to Substitution under this Agreement or curing of such event of default, whichever is earlier.
- 4.2. The Lenders' Agent recognizes that AUTHORITY shall be entitled to issue a Notice of Intention to Terminate in accordance with the terms of the Development Agreement.
- 4.3. The Parties hereby expressly agree that nothing contained in this Agreement shall restrict the ability of AUTHORITY to exercise any of its rights under any of the Project Agreements.

#### **5. Lenders Right to receive Termination Payments**

- 5.1. AUTHORITY and SPC hereby agree, and confirm that without prejudice to any other right or remedy, AUTHORITY shall deposit all termination payment/Transfer Payments under the Development Agreement into the Escrow Account and the Lenders shall be entitled to receive the same without any further reference to or consent of the SPC towards the satisfaction of and to the extent of the Lenders Dues. The Lenders and AUTHORITY shall be entitled to appropriation amongst themselves in the proportion of amounts due to them as Lenders Dues and under the Development Agreement respectively any consideration received for the Substitution as hereinabove provided from the Selectee. Any excess amounts after the payment for amounts due to the Lenders and AUTHORITY shall be paid to the SPC.
- 5.2. The SPC hereby nominates, constitutes and appoints the Lenders Agent as its constituted attorney for doing all acts, deeds and things as may be required to be done for the substitution of the SPC by the Selectee pursuant hereto and for receiving consideration for discharge of the Lenders' Dues pursuant to Article 5.1 above.
- 5.3. The SPC hereby expressly authorizes payment of sums by AUTHORITY on account of Transfer Payments into the Escrow Account and the Lenders Agent to draw the same therefrom for and on behalf of the Lenders notwithstanding the pendency of any dispute or objection or claim that the SPC may have against the Lenders and/or AUTHORITY. The deposit by AUTHORITY into the

Escrow Account and payment to the Lenders directly or through the Lenders Agent in accordance with this Agreement, made or caused to be made by AUTHORITY shall constitute a valid discharge of its obligation of the payment thereof to the SPC. All such payments shall stand charged to the Lenders under the Financing Documents and shall be receivable by the Lenders Agent from the Escrow Account on behalf of the Lenders to the exclusion of any receiver or liquidator appointed.

## **6. General**

- 6.1. The Parties hereto expressly represent and warrant that they are duly empowered to sign and execute this Agreement and the Lenders Agent is duly and fully authorized by each of the Lenders to enter into this Agreement on their behalf.
- 6.2. Notices under this Agreement shall be sent to the Addresses first hereinabove mentioned. Any change in the address of any Party shall be duly notified by a registered post acknowledgement due and delivered to the other Parties.
- 6.3. The expressions "AUTHORITY", the "SPC", the "Lenders" and the "Lenders Agent" herein used shall unless there be anything repugnant to the subject or context include their respective successors, legal representatives, administrators and permitted assigns.
- 6.4. This Agreement shall not be affected by reorganization of any Lender, Lenders Agent or AUTHORITY and the successor in interest of such Lender, Lenders Agent or AUTHORITY shall have the benefit of this Agreement.
- 6.5. No amendment, variation or modification to this Agreement shall be valid and effectual unless made in writing and executed by the duly authorized representatives of all the Parties hereto.
- 6.6. All stamp duties or other imposts and charges as are applicable on this Agreement or on amendment of the Development Agreement or execution of new Development Agreement for the purpose of Substitution as aforesaid shall be borne by and be to the account of the Selectee. In the event of the Lenders making such payment for the time being, it shall be deemed to be a part of the Lenders Dues.
- 6.7. The Parties hereby expressly agree that for the purpose of giving full and proper effect to this Agreement, the Development Agreement and this Agreement shall be read together and construed harmoniously. The terms of the Development Agreement shall prevail in the event of any inconsistency with this Agreement.
- 6.8. The consultation, recommendation or approval of the Lenders Agent under this Agreement shall always be taken as consultation, recommendation or approval of every concerned Lender and each such Lender shall be bound by the same and hereby waives its right to question or dispute the same.
- 6.9. As between the SPC and the Lenders, this Agreement shall be in addition to and shall not be in derogation of the terms of the Financing Documents.
- 6.10. It shall not be necessary for the Lenders or the Lenders Agent to enforce or exhaust any other remedy available to them before invoking the provisions of this Agreement.

- 6.11. This Agreement shall be governed by and construed in accordance with \_\_\_\_\_law and, subject to Article 6.13 below, the courts at \_\_\_\_ shall have jurisdiction over all matters arising out of or relating to this Agreement
- 6.12. All Disputes arising under this Agreement, shall be settled as per UNCITRAL Rules in force and effect. The venue of arbitration shall be \_\_\_\_\_. This Article 6.13 shall survive the termination or expiry of this Agreement. The governing law of the arbitration shall be the substantive laws of \_\_\_\_\_.

**IN WITNESS WHEREOF** the Parties hereto have set their hands hereunto on the Day, Month, and Year hereinabove mentioned.

SIGNED AND DELIVERED ON BEHALF OF AUTHORITY

BY: \_\_\_\_\_  
Name:  
Title:

SIGNED AND DELIVERED ON BEHALF OF THE SPC

BY: \_\_\_\_\_  
Name:  
Title:

SIGNED AND DELIVERED ON BEHALF OF LENDERS AGENT

BY: \_\_\_\_\_  
Name:  
Title:

**SCHEDULE 1**  
**LENDERS**

**[List to be provided as per the Financing Documents when signed]**

**SCHEDULE 2**  
**INFORMATION AND DETAILS IN RESPECT OF THE SELECTEE**  
**[insert]**

**SCHEDULE A  
NOTICE TO PARTIES**

**THE SPC**

Name of Party:

Address:

Tele No:

Fax No:

Attention:

**ESCROW BANK**

Name of Party:

Address:

Tele No:

Fax No:

Attention:

**AUTHORITY**

Name of Party:

Address:

Tele No:

Fax No:

Attention: