



GOVERNMENT OF KERALA

CONCESSION AGREEMENT

for

Development and Operation Of

**Vizhinjam International Deepwater Multipurpose
Seaport**

between

Government of Kerala

and

Adani Vizhinjam Port Private Limited.

August 17, 2015

CONCESSION AGREEMENT

FOR

DEVELOPMENT & OPERATION OF

VIZHINJAM INTERNATIONAL DEEPWATER

MULTIPURPOSE SEAPORT KERALA



GOVERNMENT OF KERALA
PORTS DEPARTMENT

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Part I
Preliminary

CONCESSION AGREEMENT

THIS AGREEMENT is entered into on this the 17th day of August, 2015

BETWEEN

- 1 **The Governor of Kerala**, represented by the Principal Secretary, Ports, Government of Kerala and having its principal offices at Government Secretariat, Thiruvananthapuram - 695 001, Kerala, India (hereinafter referred to as the “**Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One Part;

AND

- 2 **Adani Vizhinjam Port Private Limited**, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at Adani House, Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad – 380009, Gujarat, India (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Other Part.

WHEREAS:

- (A) The Government of Kerala had resolved to establish a port at Vizhinjam (the “**Vizhinjam Port**”) on design, build, finance, operate and transfer (the “**DBFOT**”) basis in accordance with the terms and conditions to be set forth in a concession agreement to be entered into.
- (B) The Authority had accordingly invited proposals by its Request for Qualification dated December 3, 2013 (the “**Request for Qualification**” or “**RFQ**”) for short listing of bidders for construction, operation and maintenance of the above referred port on DBFOT basis and had shortlisted certain bidders including, *inter alia*, the selected bidder.
- (C) The Authority had prescribed the technical and commercial terms and conditions, and invited bids (the “**Request for Proposals**” or “**RFP**”) from the bidders shortlisted pursuant to the RFQ for undertaking the Project.
- (D) After evaluation of the bids received, the Authority had accepted the bid of the selected bidder and issued its Letter of Award No. 1020/E1/2015/F&PD dated July 13, 2015 (hereinafter called the “**LOA**”) to the selected bidder requiring, *inter alia*, the execution of this Concession Agreement within 45 (forty five) days of the date of issue thereof.
- (E) The selected bidder has since promoted and incorporated the Concessionaire as a limited liability company under the Companies Act 2013, and has requested the Authority to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the selected bidder under the LOA, including the obligation to enter into this Concession Agreement pursuant to the LOA for undertaking the Project.
- (F) By its letter dated August 7, 2015, the Concessionaire has also joined in the said request of the selected bidder to the Authority to accept it as the entity which shall undertake and perform the obligations and exercise the rights of the selected bidder including the obligation to enter into this Concession Agreement pursuant to the LOA. The Concessionaire has further represented to the effect that it has been promoted by the selected bidder for the purposes hereof.
- (G) The Authority has agreed to the said request of the selected bidder and the Concessionaire, and has accordingly agreed to enter into this Concession Agreement with the Concessionaire for implementation of the Project on DBFOT basis, subject to and on the terms and conditions set forth hereinafter.

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

ARTICLE 1
DEFINITIONS AND INTERPRETATION

1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 49) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;
- (c) references to a “**person**” and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
- (d) references to “**vessels**” shall mean and include ships, boats, barges, catamarans, security or police boats and any other vessel used for carrying cargo or passengers by water;
- (e) the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (f) the words “**include**” and “**including**” are to be construed without limitation and shall be deemed to be followed by “**without limitation**” or “**but not limited to**” whether or not they are followed by such phrases;
- (g) references to “**construction**” or “**building**” include, unless the context otherwise requires, investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and “**construct**” or “**build**” shall be construed accordingly;

- (h) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;
- (i) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (j) any reference to day shall mean a reference to a calendar day;
- (k) any reference to a “**business day**” shall be construed as reference to a day (other than a Sunday) on which banks in the State are generally open for business;
- (l) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (m) references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- (n) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (o) the words importing singular shall include plural and vice versa;
- (p) references to any gender shall include the other and the neutral gender;
- (q) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (r) “**indebtedness**” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (s) references to the “**winding-up**”, “**dissolution**”, “**insolvency**”, or “**reorganisation**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (t) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this

Sub-clause (t) shall not operate so as to increase liabilities or obligations of the Authority hereunder or pursuant hereto in any manner whatsoever;

- (u) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;
 - (v) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
 - (w) references to Recitals, Articles, Clauses, Sub-clauses, Provisos or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses, Provisos and Schedules of or to this Agreement; reference to an Annex shall, subject to anything to the contrary specified therein, be construed as a reference to an Annex to the Schedule in which such reference occurs; and reference to a Paragraph shall, subject to anything to the contrary specified therein, be construed as a reference to a Paragraph of the Schedule or Annex, as the case may be, in which such reference appears;
 - (x) unless otherwise specified, any interest payable under this Agreement shall accrue on a monthly basis;
 - (y) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “**Damages**”); and
 - (z) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence.
- 1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Concessionaire to the Authority and/or the Independent Engineer shall be provided free of cost and in three copies, and if the Authority and/or the Independent Engineer is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.
- 1.2.3 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.
- 1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act 1897 shall not apply.

1.3 Measurements and arithmetic conventions

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

1.4 Priority of agreements, clauses and schedules

1.4.1 This Agreement, and all other agreements and documents forming part of or referred to in this agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:

- (a) this Agreement; and
- (b) all other agreements and documents forming part hereof or referred to herein,

i.e. the Agreement at (a) above shall prevail over the agreements and documents at (b) above.

1.4.2 Subject to the provisions of Clause 1.4.1, in case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;
- (b) between the Clauses of this Agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;
- (c) between any two Schedules, the Schedule relevant to the issue shall prevail;
- (d) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (e) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail; and
- (f) between any value written in numerals and that in words, the latter shall prevail.

Part II

The Concession

ARTICLE 2
SCOPE OF THE PROJECT

2.1 Scope of the Project

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

- (a) construction of a Port on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Equipment as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;
- (b) undertake Port Estate Development in accordance with the provisions of this Agreement;
- (c) operation and maintenance of the Port in accordance with the provisions of this Agreement; and
- (d) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

ARTICLE 3

GRANT OF CONCESSION

3.1 The Concession

3.1.1 Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority to construct, operate and maintain the Project (the “**Concession**”) for a period of 40 (forty) years commencing from the Appointed Date, and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein:

Provided that the Concessionaire shall, at any time no earlier than 5 (five) years, but no later than 3 (three) years prior to completion of the aforesaid Concession Period of 40 (forty) years, upon issuing a notice to this effect to the Authority, be entitled to an extension of 20 (twenty) years in the Concession Period under and in accordance with the provisions of Clause 38.4:

Provided further that at any time no earlier than 5 (five) years prior to completion of the Concession Period extended hereinabove, the Parties may, with mutual agreement, extend the Concession Period for such further period as they may determine, but not exceeding 20 (twenty) years in any case:

Provided also that in the event Capacity Augmentation is not undertaken in accordance with the provisions of this Agreement, the Concession Period shall not be extended under this Clause 3.1.1.

3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle, as the case may be, the Concessionaire to:

- (a) Right of Way, access and licence to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;
- (b) finance and construct the Port;
- (c) manage, operate and maintain the Port and regulate the use thereof by third parties;
- (d) demand, collect and appropriate Fee from vessels, vehicles and Users liable for payment of Fee for using the Port or any equipment or facility forming part thereof and refuse entry of any vessel, vehicle or person if the Fee due is not paid;
- (e) perform and fulfil all of the Concessionaire’s obligations under and in accordance with this Agreement;
- (f) save as otherwise expressly provided in this Agreement, bear and pay all costs, expenses and charges in connection with or incidental to the

performance of the obligations of the Concessionaire under this Agreement; and

- (g) neither assign, transfer or sublet or create any lien or encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Port nor transfer, lease or part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement.

3.1.3 Subject to and in accordance with the provisions of this Agreement and Applicable Laws, the Concession hereby granted shall, without prejudice to the provisions of Clause 3.1.2, entitle the Concessionaire to undertake development, operation and maintenance of the real estate specified in Schedule-A, subject to the conditions stipulated in Schedule-B and Schedule-D, and to exploit such development for commercial purposes (the “**Port Estate Development**”) with the right to sub-license any or all parts thereof by means of Project Agreements.

ARTICLE 4
CONDITIONS PRECEDENT

4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 5, 6, 7, 8, 9, 10, 24, 35, 45 and 48, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”). Provided, however, that a Party may grant waiver from satisfaction of any Condition Precedent by the other Party in accordance with the provisions of Clauses 4.1.2 or 4.1.3, as the case may be, and to the extent of such waiver, that Condition Precedent shall be deemed to be fulfilled for the purposes of this Clause 4.1.1.

4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority prior to the Appointed Date shall be deemed to have been fulfilled when the Authority shall have:

- (a) procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clauses 10.3.1 and 10.3.2; and
- (b) procured all Applicable Permits relating to environmental protection and conservation of the Site.

Provided that upon request in writing by the Authority, the Concessionaire may, in its discretion, grant extension of time, not exceeding 180 (one hundred and eighty) days, for fulfilment of any of the Conditions Precedent set forth in this Clause 4.1.2.

4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire within a period of 270 (two hundred and seventy) days from the date of this Agreement shall be deemed to have been fulfilled when the Concessionaire shall have:

- (a) provided Performance Security to the Authority;
- (b) executed and procured execution of the Escrow Agreement;
- (c) executed and procured execution of the Substitution Agreement;
- (d) procured all the Applicable Permits specified in Part-I of Schedule-E unconditionally, or if subject to conditions, then all such conditions required to be fulfilled by the date specified therein shall have been satisfied in full and such Applicable Permits are in full force and effect;

- (e) executed the Financing Agreements and delivered to the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
- (f) delivered to the Authority 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;
- (g) delivered to the Authority, confirmation of the correctness of the representations and warranties set forth in Sub clauses (k), (l) and (m) of Clause 7.1 of this Agreement; and
- (h) delivered to the Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof:

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3. For the avoidance of doubt, the Authority may, in its sole discretion, grant any waiver hereunder with such conditions as it may deem fit.

- 4.1.4 Each Party shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.
- 4.1.5 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

4.2 Damages for delay by the Authority

In the event that (i) the Authority does not procure fulfilment or waiver of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Authority shall pay to the Concessionaire Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum amount equal to the Bid Security.

4.3 Damages for delay by the Concessionaire

In the event that (i) the Concessionaire does not procure fulfilment or waiver of any or all of the Conditions Precedent set forth in Clause 4.1.3 within the period specified in that Clause, and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clause 4.1.2 or other breach of this Agreement by the Authority, or due to Force Majeure, the Concessionaire shall pay to the Authority

Damages in an amount calculated at the rate of 0.3% (zero point three per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum amount equal to the Bid Security, and upon reaching such maximum, the Authority may, in its sole discretion and subject to the provisions of Clause 9.2, terminate the Agreement. Provided that in the event of delay by the Authority in procuring fulfilment of the Conditions Precedent specified in Clause 4.1.2, no Damages shall be due or payable by the Concessionaire under this Clause 4.3 until the date on which the Authority shall have procured fulfilment of the Conditions Precedent specified in Clause 4.1.2.

4.4 Commencement of Concession Period

The date on which Financial Close is achieved and all the Conditions Precedent specified in Clause 4.1 are satisfied or waived, as the case may be, shall be the Appointed Date which shall be the date of commencement of the Concession Period. For the avoidance of doubt, the Parties agree that the Concessionaire may, upon occurrence of the Appointed Date hereunder, by notice convey the particulars thereof to the Authority, and shall thereupon be entitled to commence construction on the Project.

4.5 Deemed Termination upon delay

Without prejudice to the provisions of Clauses 4.2 and 4.3, and subject to the provisions of Clause 9.2, the Parties expressly agree that in the event the Appointed Date does not occur, for any reason whatsoever, before the 1st (first) anniversary of the date of this Agreement or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is for reasons attributable to the Concessionaire, the Performance Security of the Concessionaire shall be encashed and appropriated by the Authority as Damages thereof.

ARTICLE 5

OBLIGATIONS OF THE CONCESSIONAIRE

5.1 Obligations of the Concessionaire

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Concessionaire shall, at its own cost and expense, procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Port in accordance with the provisions of this Agreement and the Master Plan, and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Concessionaire shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 The Concessionaire shall install, operate and maintain Project Equipment sufficient for handling cargo and Containers equivalent to Daily Capacity.
- 5.1.4 Save and except as otherwise provided in this Agreement or Applicable Laws, as the case may be, the Concessionaire shall, in discharge of all its obligations under this Agreement, conform with and adhere to Good Industry Practice at all times.
- 5.1.5 The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
- (a) make, or cause to be made, necessary applications to the relevant Governmental Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits, other than those set forth in Clause 4.1.2, and obtain and keep in force and effect such Applicable Permits and maintain them in conformity with Applicable Laws;
 - (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes, know-how and systems used or incorporated into the Port;
 - (c) handle, store, discharge, deliver or dispose of, as the case may be, goods and/ or cargo in accordance with the provisions of Applicable Laws and conforming to Good Industry Practice;
 - (d) procure that the Access Channel and Entrance Channel are maintained in accordance with Good Industry Practice and offers a minimum Draught of 20.8 (twenty point eight) and 18.4 (eighteen point four) metres respectively;
 - (e) undertake such reclamation as may be necessary for discharge of its obligations under this Agreement;
 - (f) schedule and regulate the entry, berthing and sailing of vessels in a non-discriminatory manner and in accordance with Applicable Laws and Good Industry Practice;

- (g) provide or cause to be provided pilotage and towage in accordance with Good Industry Practice and on a non-discriminatory basis;
- (h) maintain and provide fire fighting services in accordance with the provisions of this Agreement and Good Industry Practice;
- (i) perform and fulfil its obligations under the Financing Agreements;
- (j) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;
- (k) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Concessionaire's obligations under this Agreement;
- (l) always act in a manner consistent with the provisions of this Agreement and not cause or fail to do any act, deed or thing, whether intentionally or otherwise, which may in any manner be violative of any of the provisions of this Agreement;
- (m) support, cooperate with and facilitate the Authority in performing its obligations under and in accordance with the provisions of this Agreement; and
- (n) transfer the Project Assets to the Authority upon Termination of this Agreement, in accordance with the provisions thereof.

5.2 Obligations relating to Project Agreements

- 5.2.1 It is expressly agreed that the Concessionaire shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the Project Agreements or any other agreement, and no default under any Project Agreement or agreement shall excuse the Concessionaire from its obligations or liability hereunder.
- 5.2.2 The Concessionaire shall submit to the Authority the drafts of all Project Agreements, or any amendments or replacements thereto, for its review and comments, and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Concessionaire within 15 (fifteen) days of the receipt of such drafts. Within 7 (seven) days of execution of any Project Agreement or amendment thereto, the Concessionaire shall submit to the Authority a true copy thereof, duly attested by a Director of the Concessionaire, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further agreed that no review and/or observation of the Authority and/or its failure to review and/or convey its observations on any document shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Authority be liable for the same in any manner whatsoever.

- 5.2.3 The Concessionaire shall not make any addition, replacement or amendments to any of the Financing Agreements without the prior written consent of the Authority if such replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Authority, and in the event that any addition, replacement or amendment is made without such consent, the Concessionaire shall not enforce such replacement or amendment nor permit enforcement thereof against the Authority. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Concessionaire.
- 5.2.4 The Concessionaire shall procure that each of the Project Agreements contains provisions that entitle the Authority to step into such agreement, in its sole discretion, in substitution of the Concessionaire in the event of Termination or Suspension (the “**Covenant**”). For the avoidance of doubt, it is expressly agreed that in the event the Authority does not exercise such rights of substitution within a period not exceeding 90 (ninety) days from the Transfer Date, the Project Agreements shall be deemed to cease to be in force and effect on the Transfer Date without any liability whatsoever on the Authority and the Covenant shall expressly provide for such eventuality. The Concessionaire expressly agrees to include the Covenant in all its Project Agreements and undertakes that it shall, in respect of each of the Project Agreements, procure and deliver to the Authority an acknowledgment and undertaking, in a form acceptable to the Authority, from the counter party(ies) of each of the Project Agreements, whereunder such counter party(ies) shall acknowledge and accept the Covenant and undertake to be bound by the same and not to seek any relief or remedy whatsoever from the Authority in the event of Termination or Suspension.
- 5.2.5 Notwithstanding anything to the contrary contained in the Agreement, the Concessionaire agrees and acknowledges that selection or replacement of an O&M Contractor and execution of the O&M Contract shall be subject to the prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such selection or contract without such prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire or its Contractors from any liability or obligation under this Agreement.

5.3 Obligations relating to Change in Ownership

- 5.3.1 The Concessionaire shall not undertake or permit any Change in Ownership, except with the prior approval of the Authority.
- 5.3.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that:

- (a) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of 25% (twenty five per cent) or more of the total Equity of the Concessionaire, or
- (b) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him

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

For the purposes of this Clause 5.3.2:

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

5.4 Obligations relating to Port Services

- 5.4.1 The Concessionaire shall provide or cause to be provided to the Users of the Port, the Port Services specified in Clause 20.3.
- 5.4.2 The Concessionaire acknowledges that the competitiveness of charges and tariffs for Port Services will have a direct impact on the business at the Port and the Concessionaire, therefore, agrees that it shall make its best endeavours to levy charges and tariffs on competitive terms based on total in-port costs vis-à-vis competing ports.

5.5 Obligations relating to berthing

- 5.5.1 Subject to Applicable Laws, the Concessionaire shall follow a policy of non-discrimination with regard to the classes or descriptions of vessel traffic that are permitted to use the Port and shall not impose limitations on vessel movements within the limits of the Port or otherwise restrict capacity at the Port.
- 5.5.2 Subject to any modifications that may be made by the Authority in accordance with Applicable Laws, the Concessionaire shall, when allocating berths or providing pilotage, towage and mooring/unmooring services, conform and comply with the provisions of Clause 20.4.

5.6 Obligations relating to employment of foreign nationals

The Concessionaire acknowledges, agrees and undertakes that employment of foreign personnel by the Concessionaire and/or its contractors and their sub-contractors shall be subject to grant of requisite regulatory permits and approvals including employment/residential visas and work permits, if any required, and the obligation to apply for and obtain the same shall and will always be of the Concessionaire and, notwithstanding anything to the contrary contained in this Agreement, refusal of or inability to obtain any such permits and approvals by the Concessionaire or any of its contractors or sub-contractors shall not constitute Force Majeure Event, and shall not in any manner excuse the Concessionaire from the performance and discharge of its obligations and liabilities under this Agreement.

5.7 Obligations relating to employment of trained personnel

The Concessionaire shall ensure that the personnel engaged by it in the performance of its obligations under this Agreement are at all times properly trained for their respective functions.

5.8 Obligations relating to non-discriminatory access

- 5.8.1 Subject to the provisions of Clause 5.8.2, the Concessionaire shall manage and operate the Port on a common user basis and provide non-discriminatory access to all vessels, vehicles, shipping lines, shippers, receivers, forwarders and other persons in accordance with the provisions of this Agreement and shall refrain from adopting any unfair or discriminatory practice against any User or potential user thereof.

5.8.2 The Concessionaire may, with prior written notice to the Authority and in accordance with Good Industry Practice, offer preferential treatment to any class or classes of vessels, shipping lines, vehicles or other persons; provided that the Concessionaire shall not, in any month occurring after the 3rd (third) anniversary of COD, handle the vessels or cargo of an Associate or any other person in whom it has a direct or indirect financial interest if such vessels or cargo exceed 50% (fifty per cent) of the total cargo or number of vessels, as the case may be, handled by it during such month; provided further that the Authority may in its discretion waive the aforesaid ceiling of 50% (fifty per cent) for a specified period if it is satisfied that adequate surplus capacity is available at other competing ports and such waiver shall not affect the Users adversely; provided also that the restrictions specified in this Clause 5.8 shall not apply during any year in which the total cargo handled at the Port is less than 65% (sixty five per cent) of its Capacity. For the avoidance of doubt, the Parties expressly agree that in the event the Concessionaire handles vessels and/or cargo in breach of the provisions of this Clause 5.8.2, it shall pay Damages to the Authority in a sum equal to the Fee payable for the excess vessels or cargo handled by it, at the rate specified in Article 27 and Schedule-Q.

5.9 Obligations relating to competition

The Concessionaire shall not, either directly or through Associates, or in any other manner acquire control or interest in the operations or services of any other port situated within a distance of 250 (two hundred and fifty) kilometres from the Port such that its share exceeds 25% (twenty five per cent) of such control or interest in the operations or services of that port. The Concessionaire shall also ensure and procure that no person who controls or operates any other port situated within a distance of 250 (two hundred and fifty) kilometres from the Port shall acquire control or interest in the operations or services of the Port such that the share of such person exceeds 25% (twenty five per cent) of such control or interest in the operations or services of the Port:

Provided that this Clause shall not apply if such share is the direct consequence of the decisions or directions of the Authority.

5.10 Obligations relating to other cargo and passenger ships

In the event the Concessionaire handles cargo or passenger ships not specified in this Agreement, it shall adhere to and observe Good Industry Practice in respect thereof.

5.11 Obligations relating to medical aid

5.11.1 For providing emergency medical aid during the Operation Period, the Concessionaire shall set up and operate a medical aid post (the “**Medical Aid Post**”) at the Port with round-the-clock ambulance services for victims of accidents on the Port.

5.11.2 The Concessionaire shall, at its cost and in accordance with the type designs prescribed for such buildings by the Authority, construct a Medical Aid post building, not later than 30 (thirty) days prior to Scheduled Completion Date. The

Medical Aid Post shall be deemed to be part of the Site and shall vest in the Authority.

5.12 Sole purpose of the Concessionaire

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

ARTICLE 6

OBLIGATIONS OF THE AUTHORITY

6.1 Obligations of the Authority

- 6.1.1 The Authority shall, at its own cost and expense undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 6.1.2 The Authority agrees to provide support to the Concessionaire and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:
- (a) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
 - (b) subject to the Concessionaire complying with Applicable Laws, issue or cause to be issued, all Applicable Permits, including environmental or forest clearances, required from any Government Instrumentality for implementation and operation of the Project;
 - (c) upon written request from the Concessionaire, provide reasonable assistance to the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
 - (d) subject to the Concessionaire complying with Applicable Laws, procure or cause to be procured, the issuance of a licence to the Concessionaire for distribution of electricity within the Port;
 - (e) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance in procuring Applicable Permits and other approvals required from any Government Instrumentality for declaration and operation of the Port as a special economic zone under the provisions of the Special Economic Zones Act, 2005 or any substitute thereof;
 - (f) appoint or procure the appointment of a person designated by the Concessionaire to discharge the duties and functions of the conservator of the Port in accordance with the provisions of the Indian Ports Act, 1908;
 - (g) procure that no barriers are erected or placed on or about the Port by any Government Instrumentality or persons claiming through or under it, except for reasons of Emergency, national security, law and order or collection of inter-state taxes;

- (h) make best endeavours to procure that no local Tax, toll or charge is levied or imposed on the use of whole or any part of the Port;
- (i) subject to and in accordance with Applicable Laws, grant to the Concessionaire the authority to regulate traffic on the Port;
- (j) assist the Concessionaire in procuring assistance of Police and Coast Guards for regulation of traffic, removal of trespassers and security on or at the Port;
- (k) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
- (l) support, cooperate with and facilitate the Concessionaire in the implementation and operation of the Project in accordance with this Agreement;
- (m) upon written request from the Concessionaire and subject to the provisions of Clause 5.6, provide reasonable assistance to the Concessionaire and any expatriate personnel of the Concessionaire or its Contractors to obtain applicable visas and work permits for discharging their respective obligations under this Agreement and the Project Agreements; and
- (n) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance in procuring the issuance of an order by the Government of India under Section 407 (3) of the Merchant Shipping Act, 1958 for exempting the application of Section 407 (1) of the Merchant Shipping Act, 1958 in respect of the transshipment of Containers to and from the Port.

6.2 Connectivity to rail and road network

- 6.2.1 Save and except as specified in this Agreement, the Authority shall, no later than the 3rd (third) anniversary of the Appointed Date, provide or cause to be provided, a traffic worthy road with 4 (four) lanes connecting the Port to the nearest National Highway, and shall augment such road as and when required in accordance with Good Industry Practice. For the avoidance of doubt, the Parties agree that the construction and operation of such road shall be undertaken by the Concessionaire as part of the Project and the cost thereof shall be included in the Total Project Cost, and shall be borne solely by the Concessionaire. The Authority agrees and undertakes to acquire, no later than the 1st (first) anniversary of the Appointed Date, the land required for such road, and to provide the Right of Way for construction of the road.
- 6.2.2 The Authority shall no later than the 6th (sixth) anniversary of the Appointed Date, provide or cause to be provided, a railway line connecting the Port to the nearest railway station on the regional railway network. For the avoidance of doubt, the Authority agrees and undertakes to acquire, no later than the 2nd (second) anniversary of the Appointed Date, the land required for construction of the railway line.

6.3 Obligations relating to Competing Ports

The Authority shall procure that during the subsistence of this Agreement, neither the Authority nor any Government Instrumentality shall, at any time before expiry of the period specified in Clause 30.1.1, commission or operate or cause to be commissioned or operated any Competing Port; provided that the restriction herein shall not apply if the average throughput exceeds 90% (ninety per cent) of the existing Capacity of the Port in any year. Upon breach of the Authority's obligations hereunder, the Concessionaire shall be entitled to the remedies specified in this Agreement, and to no other remedy.

6.4 Obligations relating to refinancing

Upon request made by the Concessionaire to this effect, the Authority shall, in conformity with any regulations or guidelines that may be notified by the Government or the Reserve Bank of India, as the case may be, permit and enable the Concessionaire to secure refinancing, in whole or in part, of the Debt Due on such terms as may be agreed upon between the Concessionaire and the entity providing such refinancing; provided, however, that the refinancing hereunder shall always be subject to the prior consent of the Authority, which consent shall not be unreasonably withheld. For the avoidance of doubt, the tenure of debt refinanced hereunder may be determined mutually between the Senior Lenders and the Concessionaire, but the repayment thereof shall be completed no later than 1 (one) year prior to expiry of the Concession Period.

ARTICLE 7

REPRESENTATIONS AND WARRANTIES

7.1 Representations and warranties of the Concessionaire

The Concessionaire represents and warrants to the Authority that:

- (a) it is duly organised and validly existing under the laws of India, and has full power and authority to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) along with its Associates, it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (d) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (e) it is subject to the laws of India, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (f) the information furnished in the Bid and as updated on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (h) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform any of its obligations under this Agreement;
- (i) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or Government Instrumentality

which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;

- (j) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;
- (k) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.3 and that the selected bidder together with its Associates, hold not less than 51% (fifty one per cent) of its issued and paid up Equity as on the date of this Agreement;
- (l) the selected bidder and its Associates have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;
- (m) the selected bidder is duly organised and validly existing under the laws of the jurisdiction of its incorporation or registration, as the case may be, and has requested the Authority to enter into this Agreement with the Concessionaire pursuant to the Letter of Award, and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (n) all its rights and interests in the Port shall pass to and vest in the Authority on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Authority, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- (o) no representation or warranty by it contained herein or in any other document furnished by it to the Authority or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (p) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority in connection therewith;
- (q) all information provided by the selected bidder in response to the Request for Qualification and Request for Proposals or otherwise, is to the best of its knowledge and belief, true and accurate in all material respects; and

- (r) all undertakings and obligations of the Concessionaire arising from the Request for Qualification and Request for Proposals or otherwise shall be binding on the Concessionaire as if they form part of this Agreement.

7.2 Representations and warranties of the Authority

The Authority represents and warrants to the Concessionaire that:

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary actions under Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under this Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (e) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on the Authority's ability to perform its obligations under this Agreement;
- (f) it has complied with Applicable Laws in all material respects; and
- (g) it has good and valid right to the Site, and has power and authority to grant a licence in respect thereto to the Concessionaire.

7.3 Disclosure

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

ARTICLE 8
DISCLAIMER

8.1 Disclaimer

- 8.1.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Request for Qualification, Request for Proposals, Scope of the Project, Specifications and Standards, Site, existing structures, local conditions, physical qualities of ground, subsoil, channel and geology, meteorological and wave related data, traffic volumes and all information provided by the Authority or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. The Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against the Authority in this regard.
- 8.1.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Concessionaire, its Associates or any person claiming through or under any of them.
- 8.1.3 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above shall not vitiate this Agreement, or render it voidable.
- 8.1.4 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 8.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error; provided, however, that a failure on part of the Authority to give any notice pursuant to this Clause 8.1.4 shall not prejudice the disclaimer of the Authority contained in Clause 8.1.1 and shall not in any manner shift to the Authority any risks assumed by the Concessionaire pursuant to this Agreement.
- 8.1.5 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Concessionaire and the Authority shall not be liable in any manner for such risks or the consequences thereof.

Part III
Development and Operations

ARTICLE 9

PERFORMANCE SECURITY

9.1 Performance Security

- 9.1.1 The Concessionaire shall, for the performance of its obligations hereunder, provide to the Authority no later than 180 (one hundred and eighty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to Rs. 120 crore (Rupees one hundred and twenty crore) in the form set forth in Schedule-F (the “**Performance Security**”). Until such time the Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security pursuant hereto, the Authority shall release the Bid Security to the Concessionaire.
- 9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 180 (one hundred and eighty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

9.2 Appropriation of Performance Security

Upon occurrence of a Concessionaire Default or failure to meet any Condition Precedent, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate from the Performance Security the amounts due to it for and in respect of such Concessionaire Default or for failure to meet any Condition Precedent. Upon such encashment and appropriation from the Performance Security, the Concessionaire shall, within 15 (fifteen) days thereof, replenish, in case of partial appropriation, to the original level of the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, failing which the Authority shall be entitled to terminate this Agreement in accordance with Article 38. Upon such replenishment or furnishing of a fresh Performance Security, as the case may be, the Concessionaire shall be entitled to an additional Cure Period of 120 (one hundred and twenty) days for remedying the Concessionaire Default or for satisfying any Condition Precedent, and in the event of the Concessionaire not curing its default or meeting such Condition Precedent within such Cure Period, the Authority shall be entitled to encash and appropriate such Performance Security as Damages, and to terminate this Agreement in accordance with Article 38.

9.3 Release of Performance Security

The Performance Security shall remain in force and effect for a period of one year from the Appointed Date, but shall be released earlier upon the Concessionaire

expending on Project construction an aggregate sum that is not less than 20% (twenty per cent) of the Total Project Cost, including Equity Support, if any; provided, however, that the Performance Security shall not be released if the Concessionaire is in breach of this Agreement. Upon request made by the Concessionaire for release of the Performance Security along with the particulars which establish satisfaction of the requirements specified in this Clause 9.3, the Authority shall release the Performance Security forthwith.

9.4 Deemed Performance Security

The Parties expressly agree that upon release of the Performance Security in accordance with the provisions of Clause 9.3, a substitute Performance Security for a like amount shall be deemed to be created under this Clause 9.4, as if it is a Performance Security under Clause 9.1 for and in respect of the entire Concession Period (the “**Deemed Performance Security**”). The Deemed Performance Security shall be unconditional and irrevocable, and shall, notwithstanding anything to the contrary contained in Clause 32.3, constitute the first and exclusive charge on an equivalent balance in the Escrow account and the payments accrued or payments due and payable subsequently, as the case may be, to the Concessionaire under this Agreement and over which the Authority shall have the first and exclusive charge and the right to appropriate any amount therefrom as if it is an appropriation from the Deemed Performance Security under Clause 9.5. For the avoidance of doubt, the Parties agree that no amounts shall be earmarked, frozen or withheld in the Escrow Account for securing payment of any potential Damages that may fall due at a subsequent date, and only the amounts which shall have become due and payable by the Concessionaire upon occurrence of Concessionaire Default shall be liable to appropriation hereunder.

9.5 Appropriation of Deemed Performance Security

Upon occurrence of a Concessionaire Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Deemed Performance Security as Damages for Concessionaire Default. For the avoidance of doubt, the Parties expressly agree that upon the Deemed Performance Security being appropriated, in whole or in part, it shall be deemed to be replenished to the extent of such appropriation.

9.6 References to Performance Security

References to Performance Security occurring in this Agreement for and in respect of any period prior to the delivery of the Performance Security by the Concessionaire to the Authority, or in respect of any period subsequent to the expiry or release thereof, as the case may be, shall be construed solely for the purposes of calculating the amount of Damages payable by the Concessionaire, and the amount so determined shall be appropriated from the Bid Security or Deemed Performance Security, as the case may be.

ARTICLE 10

RIGHT OF WAY

10.1 The Site

The site of the Port shall comprise the real estate described in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the “**Site**”). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for the Port as set forth in Schedule-A and shall include use of the Site for Port Estate Development, and in the event of Capacity Augmentation thereof, references to the Site shall be construed to include the real estate required for such Capacity Augmentation in accordance with the said Schedule. For the avoidance of doubt, the Parties agree that for and in respect of the construction and/or operation of any road by the Concessionaire in accordance with the provisions of Clause 6.2.1, references to the Site shall be construed to include the real estate required for such road.

10.2 Licence, Access and Right of Way

- 10.2.1 The Authority hereby grants to the Concessionaire access to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.
- 10.2.2 In consideration of the Concession Fee, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A hereto (the “**Licensed Premises**”), on an “as is where is” basis, free of any Encumbrances, to develop, operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.
- 10.2.3 The licence, access and Right of Way granted by this Agreement to the Concessionaire in respect of land and water channels shall always be subject to existing rights of way and the Concessionaire shall perform its obligations in a manner that the existing land and water channels or an alternative thereof are open to traffic at all times during the Construction Period.

- 10.2.4 It is expressly agreed that the licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Authority to terminate the licence, upon the Termination of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Site by the Concessionaire or its sub-licensees, the licence in respect of the Site shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.
- 10.2.5 The Concessionaire hereby appoints the Authority (acting directly or through a nominee) to be its true and lawful attorney, to execute and sign in the name of the Concessionaire a transfer or surrender of the licence granted hereunder at any time after the Concession Period has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorised officer of the Authority, and the Concessionaire consents to it being registered for this purpose.
- 10.2.6 It is expressly agreed that trees on the Site are property of the Authority except that the Concessionaire shall be entitled to exercise usufructory rights thereon during the Concession Period.

10.3 Procurement of the Site

- 10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, quay wall, cargo handling equipment, other equipment, trees and any other immovable property on or attached to the Site. Such memorandum shall have appended thereto an appendix (the “**Appendix**”) specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in 2 (two) counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.
- 10.3.2 Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 10% (ten per cent) of the total area of the Site required and necessary for the Port, and in the event Financial Close is delayed on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages as if it is a delay under the provisions of Clause 4.2. For the avoidance of doubt, the Authority acknowledges and agrees that the Appendix shall not include any land which is necessary and required for the construction of any critical element of the

Port without which the Completion Certificate or Provisional Certificate may not be granted. The Authority further acknowledges and agrees that prior to the Appointed Date, it shall have procured issuance of the statutory notification under Applicable Laws for vesting of all land comprising the Port in the Authority, save and except stray plots of land which the Parties mutually agree to exclude from such vesting prior to the Appointed Date. The Parties also acknowledge and agree that the conditions specified in this Clause 10.3.2 shall not be modified or waived by either Party.

- 10.3.3 On and after signing the memorandum referred to in Clause 10.3.1, and until the Transfer Date, the Concessionaire shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment thereon takes place, and in the event of any encroachment or occupation on any part thereof, the Concessionaire shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its cost and expenses.
- 10.3.4 The Authority shall make best efforts to procure and grant, no later than 365 (three hundred and sixty five) days from the Appointed Date, the Right of Way to the Concessionaire in respect of all land included in the Appendix, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Concessionaire, it shall pay to the Concessionaire Damages in a sum calculated at the rate of Re. 2 (Rupee two) per day for every 1 (one) square metre or part thereof, commencing from the 366th (three hundred and sixty sixth) day of the Appointed Date and until such Right of Way is procured.
- 10.3.5 Upon receiving Right of Way in respect of any land included in the Appendix, the Concessionaire shall complete the Construction Works thereon within a reasonable period to be determined by the Independent Engineer in accordance with Good Industry Practice; provided that the issue of Provisional Certificate shall not be affected or delayed on account of vacant access to any part of the Site not being granted to the Concessionaire or any construction on such part of the Site remaining incomplete on the date of Tests on account of the delay or denial of such access thereto.

10.4 Site to be free from Encumbrances

Subject to the provisions of Clause 10.3, the Site shall be made available by the Authority to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to the Authority on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties and appurtenances to the Licensed Premises shall not be deemed to be Encumbrances. It is further agreed that the Concessionaire accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Site.

10.5 Protection of Licensed Premises from Encumbrances

During the Concession Period, the Concessionaire shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Contractor or other person claiming through or under the Concessionaire to place or create any Encumbrance or security interest over all or any part of the Site or the Project Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement.

10.6 Special/temporary right of way

The Concessionaire shall bear all costs and charges for any special or temporary right of way required by it in connection with access to the Site. The Concessionaire shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Port and the performance of its obligations under this Agreement. The Authority agrees that it shall endeavour to provide such temporary facilities to the Concessionaire on best effort basis and subject to payment of such charges as it may reasonably specify.

10.7 Access to the Authority and Independent Engineer

The licence, Right of Way and right to the Site granted to the Concessionaire hereunder shall always be subject to the right of access of the Authority and the Independent Engineer and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

10.8 Geological and archaeological finds

It is expressly agreed that mining, geological or archaeological rights do not form part of the licence granted to the Concessionaire under this Agreement and the Concessionaire hereby acknowledges that it shall not have any mining rights or interest in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular geological or archaeological interest and that such rights, interest and property on or under the Site shall vest in and belong to the Authority or the concerned Government Instrumentality. The Concessionaire shall take all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the Authority forthwith of the discovery thereof and comply with such instructions as the Authority or the concerned Government Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable expenses incurred by the Concessionaire hereunder shall be reimbursed by the Authority. It is also agreed that the Authority shall procure that the instructions hereunder are issued by the concerned Government Instrumentality within a reasonable period so as to enable the Concessionaire to continue its Construction Works with such modifications as may be deemed necessary.

10.9 Additional land for Capacity Augmentation

The additional real estate required for Capacity Augmentation shall be acquired

by the Authority and granted to the Concessionaire no later than 3 (three) years prior to the Scheduled Capacity Augmentation Date and the provisions of this Article 10 shall apply, *mutatis mutandis*, to such real estate and to any other land over which Right of Way is procured and granted by the Authority to the Concessionaire at any time during the Concession Period.

ARTICLE 11
UTILITIES AND ROADS

11.1 Existing utilities

Notwithstanding anything to the contrary contained herein, the Concessionaire shall ensure that the respective entities owning the existing right of way or utilities on, under or above the Site are enabled by it to keep such utilities in continuous satisfactory use, if necessary, by providing suitable temporary or permanent diversions with the authority of the controlling body of that utility.

11.2 Shifting of obstructing utilities

11.2.1 The Concessionaire shall, subject to Applicable Laws and with assistance of the Authority, undertake shifting of any utility including electric lines, water pipes and telephone cables, to an appropriate location or alignment within or outside the Site if and only if such utility causes or shall cause a material adverse effect on the construction, operation or maintenance of the Port. The cost of such shifting shall be borne by the Authority or by the entity owning such utility, if the Authority so directs, and in the event of any delay in shifting thereof, the Concessionaire shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay on the part of the entity owning such electric lines, water pipes or telephone cables, as the case may be.

11.2.2 The Parties expressly acknowledge and agree that the Total Project Cost includes a sum of Rs. 10 cr. (Rupees ten crore) to be expended on shifting of utilities under and in accordance with the provisions of Clause 11.2.1. The Concessionaire agrees and undertakes that upon receipt of a notice from the Authority to this effect, it shall transfer the amount specified therein to the entity owning the relevant utility for meeting the expenditure on the specified shifting of utility on behalf of the Authority. The Parties further agree that any expenditure in excess of the aforesaid amount shall be borne entirely by the Authority. The Parties also agree that in the event any part of the aforesaid amount remains unspent as on COD, the Concessionaire shall transfer such unspent balance to the Authority within a period of 30 (thirty) days from COD.

11.3 New utilities

The Concessionaire shall allow, subject to such conditions as the Authority may specify, access to, and use of the Site for laying telephone lines, water pipes, electric cables or other public utilities. Where such access or use causes any financial loss to the Concessionaire, it may require the user of the Site to pay compensation or damages as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause 11.3 shall not in any manner relieve the Concessionaire of its obligation to maintain the Port in accordance with this Agreement and any damage caused by such use shall be restored forthwith.

11.4 Felling of trees

The Authority shall assist the Concessionaire in obtaining the Applicable Permits

for felling of trees to be identified by the Authority for this purpose if and only if such trees cause a material adverse effect on the construction, operation or maintenance of the Port. In the event of any delay in felling thereof for reasons beyond the control of the Concessionaire, it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the costs and expense in respect of felling of trees shall be borne by the Concessionaire and any revenues thereof shall be paid to the Authority.

ARTICLE 12

CONSTRUCTION OF THE PORT

12.1 Obligations prior to commencement of construction

Prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the Authority and the Independent Engineer its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in Schedule-G;
- (b) appoint its representative duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, Applicable Laws and Applicable Permits; and
- (d) make its own arrangements for quarrying and procurement of materials needed for the Project under and in accordance with Applicable Laws and Applicable Permits.

12.2 Interruption during Construction Period

12.2.1 During the Construction Period, the Concessionaire may, at its cost, interrupt and divert the flow of water or road traffic adjacent to the Port if such interruption and diversion is necessary for the efficient progress of Construction Works and conforms to Good Industry Practice; provided that such interruption and diversion shall be undertaken by the Concessionaire only with the prior written approval of the Independent Engineer which approval shall not be unreasonably withheld. For the avoidance of doubt, it is agreed that the Concessionaire shall at all times be responsible for ensuring safe operation of Construction Works and shall restore the interruption or diversion within the period specified by the Independent Engineer.

12.2.2 In the event of default by the Concessionaire in discharging the obligations specified in Clause 12.2.1, the Authority may levy and recover Damages equal to 0.2% (zero point two per cent) of the Performance Security for each day of default hereunder.

12.3 Master Plan for the Site

12.3.1 The Concessionaire shall at all times procure and ensure that the Port is constructed and developed in accordance with the Master Plan set forth in Schedule-A.

12.3.2 The Concessionaire may, with prior written consent of the Authority, use any area earmarked for future expansion of the Port, for other purposes incidental to or associated with the Port, until the same is required for the expansion specified in

the Master Plan, subject to the condition that only temporary structures may be constructed in such area and the use thereof shall at all times be in conformity with Applicable Laws and Good Industry Practice.

12.3.3 The Concessionaire may, at any time during the Concession Period, seek approval of the Authority for modifications in the Master Plan to improve or augment the Port Services and upon receipt of any request hereunder, the Authority shall grant approval to the extent reasonably required in pursuance of this Clause 12.3.3. For the avoidance of doubt, the Parties expressly agree that the Master Plan shall not be amended for and in respect of Port Estate Development, save and except when required to deal with the effects of Force Majeure or for providing facilities or amenities to Users without payment of any Fee or charge. The Parties further agree that in the event of any modification of the Master Plan for any reason whatsoever, the Authority shall ensure and procure that the Concessionaire is placed in the same financial position as it would have enjoyed had there been no amendment to the Master Plan resulting in any change in costs, returns or other financial burden or gains, as the case may be. For the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no amendment to the Master Plan affecting the costs, returns or other financial burden or gains, the Parties shall adopt the methodology laid down in Clause 42.3.

12.4 Drawings

In respect of the Concessionaire's obligations relating to the Drawings of the Port as set forth in Schedule-H, the following shall apply:

- (a) The Concessionaire shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, 3 (three) copies each of all Drawings to the Independent Engineer for review.
- (b) By submitting the Drawings for review to the Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the design and engineering, including the field construction criteria related thereto, are in conformity with the Scope of the Project, Specifications and Standards, Applicable Laws and Good Industry Practice.
- (c) Within 15 (fifteen) days of the receipt of the Drawings, the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Concessionaire shall not be obliged to await the observations of the Independent Engineer on the Drawings submitted pursuant hereto beyond the said 15 (fifteen) days period and may begin or continue Construction Works at its own discretion and risk.
- (d) If the aforesaid observations of the Independent Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Concessionaire and resubmitted to the Independent Engineer for review.

The Independent Engineer shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings.

- (e) No review and/or observation of the Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner.
- (f) Without prejudice to the foregoing provisions of this Clause 12.4, the Concessionaire shall submit to the Authority for review and comments, its Drawings relating to alignment of the Port, finished floor level and general arrangement drawings of the Port, and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, within 30 (thirty) days of the receipt of such Drawings. The provisions of this Clause 12.4 shall apply *mutatis mutandis* to the review and comments hereunder.
- (g) Within 90 (ninety) days of COD, the Concessionaire shall furnish to the Authority and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in its editable digital format or in such other medium and manner as may be acceptable to the Authority, reflecting the Port as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Port and setback lines, if any, of the buildings and structures forming part of Project Equipment.

12.5 Completion of the Port

12.5.1 On or after the Appointed Date, the Concessionaire shall undertake construction of the Port as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D. The 1,460th (one thousand four hundred and sixtieth) day from the Appointed Date shall be the scheduled date for completion of the Port (the “**Scheduled Completion Date**”) and the Concessionaire agrees and undertakes that the Port shall be completed on or before the Scheduled Completion Date. For the avoidance of doubt, it is agreed that the Project Completion Schedule and Scheduled Completion Date shall not apply to Port Estate Development.

12.5.2 The Concessionaire shall construct the Port in accordance with the Project Completion Schedule set forth in Schedule-G. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Project Milestone in Schedule-G, unless such failure has occurred due to Force Majeure or for reasons attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until such Project Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Completion Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-G shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-G has been amended as above; provided further that in the event COD is achieved on or before the Scheduled Completion Date, the Damages paid under

this Clause 12.5.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.5.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

12.5.3 In the event that the Port is not completed and COD does not occur within 270 (two hundred and seventy) days from the Scheduled Completion Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the Authority shall be entitled to terminate this Agreement.

12.6 Construction of Funded Works

12.6.1 The Authority acknowledges, agrees and undertakes that it shall, in accordance with the provisions of this Clause 12.6, reimburse the capital costs incurred by the Concessionaire for and in respect of the construction works referred to in Clause 12.6.2 (the “**Funded Works**”).

12.6.2 The Parties acknowledge and agree that the lump sum costs of all construction works comprising Funded Works, as specified in Schedule-B, shall be deemed to be Rs. 1,463 crore (Rupees one thousand four hundred and sixty three crore). The Parties further agree that the amount specified hereinabove shall be modified to the extent of variation in WPI occurring between the Bid Date and the Appointed Date, and the amount so revised shall be due and payable to the Concessionaire. The Parties also acknowledge that the aforesaid costs of Funded Works have not been included in the figure specified in the definition of Total Project Cost.

12.6.3 The Concessionaire acknowledges and agrees that the capital cost of each of the Funded Works shall be deemed to be equal to the lump sum amount specified in Schedule-B and the aggregate thereof shall not exceed the amount specified in Clause 12.6.2. The Concessionaire further agrees and undertakes that any expenditure in excess thereof shall, save and except where such excess is on account of Force Majeure, Change of Scope or Change in Law, as the case may, be borne entirely and solely by the Concessionaire. For the avoidance of doubt, the Parties expressly agree that any additional costs incurred by the Concessionaire on account of Force Majeure, Change of Scope or Change in Law, as the case may be, shall be reimbursed forthwith by the Authority.

12.6.4 Without prejudice to the provisions of Clauses 12.6.2 and 12.6.3, the Authority shall pay to the Concessionaire, in 4 (four) equal instalments, the lump sum amount due and payable for each of the Funded Works, upon receiving certification from the Independent Engineer stating that the Concessionaire has completed about 30% (thirty per cent), 60% (sixty per cent), 80% (eighty per cent) and 100% (one hundred per cent) of the respective Funded Works. For the avoidance of doubt, the Parties agree that the provisions of this Clause 12.6 shall be applied individually, and not collectively, to each of the Funded Works.

12.6.5 All Funded Works shall be constructed by the Concessionaire as if they are Construction Works forming part of the Project, and the provisions of this Agreement shall apply *mutatis mutandis* to such Funded Works, save and except as otherwise provided in this Clause 12.6.

- 12.6.6 The User Fee, payable in accordance with the provisions of this Agreement, for and in respect of Funded Works shall be levied, collected and appropriated by the Concessionaire in lieu of its obligations relating to operation, maintenance, defect liability and other functions.
- 12.6.7 The Concessionaire may, for and in respect of Funded Works, require the Authority to provide a mobilisation advance by way of loan (the “**Mobilisation Advance**”) which shall carry interest at the Bank Rate notified by the Reserve Bank of India from time to time and calculated at annual rests.
- 12.6.8 The Mobilisation Advance shall be equal to 20% (twenty per cent) of the amount specified in Clause 12.6.2, and shall be disbursed in 2 (two) equal instalments upon the Concessionaire furnishing a bank guarantee, substantially in the form specified at Schedule-F, for an amount equal to 115% (one hundred and fifteen per cent) of such advance. The 1st (first) instalment shall be disbursed by the Authority upon demand to be made by the Concessionaire at any time after the Appointed Date and the 2nd (second) instalment shall be disbursed after the Concessionaire has expended at least 20% (twenty per cent) of the Equity. One half of the Mobilisation Advance shall be adjusted against the 3rd (third) instalment due and payable under the provisions of Clause 12.6.4 and the balance alongwith accrued interest shall be adjusted against the last instalment due and payable thereunder. For the avoidance of doubt, any interest remaining unpaid hereunder shall be paid by the Concessionaire no later than COD.
- 12.6.9 In the event of Termination occurring prior to completion of Funded Works, the Authority shall pay to the Concessionaire a sum equal to: (a) 75% (seventy five per cent) of the fair value of the Funded Works undertaken until the Transfer Date if such Termination occurs on account of a Concessionaire Default or a Non-Political Event, or (b) 110% (one hundred and ten per cent) of such fair value if Termination occurs on account of an Authority Default, a Political Event or an Indirect Political Event. The Parties expressly agree that the fair value referred to hereinabove shall be assessed and determined by the Independent Engineer. The Parties further agree that any amount paid by the Authority to the Concessionaire in pursuance of the provisions of Clauses 12.6.4 and 12.6.8 shall also be deducted from the amount payable hereunder.
- 12.6.10 The obligations of the Concessionaire, for and in respect of the fishing harbour forming part of Funded Works, shall be restricted to the construction thereof. For the avoidance of doubt, the Parties expressly agree that the operation and maintenance of the fishing harbour shall, at all times, be undertaken by the Authority. The Parties further agree that the Concessionaire shall be responsible and liable for and in respect of all defects and deficiencies in the construction of the fishing harbour which may be detected within a period of 2 (two) years from COD, and it shall have the obligation to repair and rectify, at its own cost, all such defects and deficiencies as may be determined by the Independent Engineer.

12.7 Additional Port Terminals

- 12.7.1 The Concessionaire may, in accordance with Applicable Laws, Specifications and Standards and Maintenance Requirements, construct, install and operate additional

berths and terminals which are in addition to the existing Port but not forming part of Capacity Augmentation (the “**Additional Port Terminals**”) and may demand and appropriate User Fee from the Users in accordance with the provisions of this Agreement.

- 12.7.2 The User Fee for Additional Port Terminals constructed hereunder shall be determined in accordance with the provisions of Article 27.
- 12.7.3 Additional Port Terminals constructed under the provisions of this Clause 12.7 shall be eligible for Termination Payment under the provisions of Article 38. Provided, however, that the Total Project Cost shall be deemed to have increased by the same proportion that the capacity of Additional Port Terminals bear to the existing Project.
- 12.7.4 All provisions of this Agreement shall apply *mutatis mutandis* to such Additional Port Terminals.

12.8 Capacity Augmentation

- 12.8.1 The Concessionaire shall undertake Capacity Augmentation as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D, so that the Project shall have Capacity Augmentation on or before the earlier of (a) the 30th (thirtieth) anniversary of the Appointed Date and (b) the 5th (fifth) anniversary of the close of the Accounting Year in which the throughput has, for a continuous period of 3 (three) Accounting Years, exceeded 75% (seventy five per cent) of the existing Capacity of the Port (the “**Scheduled Capacity Augmentation Date**”). For the avoidance of doubt, the Parties agree that the Concessionaire may, in its discretion, undertake Capacity Augmentation in phases, as specified in Schedule-B and Schedule-C.
- 12.8.2 The provisions of this Agreement shall apply, *mutatis mutandis*, to Capacity Augmentation, save and except where express provisions to the contrary have been made for Capacity Augmentation.
- 12.8.3 Notwithstanding anything to the contrary contained in this Agreement, in the event of a Competing Port being commissioned or operated prior to the Scheduled Capacity Augmentation Date, the Concessionaire shall be deemed to be relieved of its obligation to undertake Capacity Augmentation under this Agreement.

12.9 Termination due to failure to complete Capacity Augmentation

In the event that Capacity Augmentation is not completed on or before the 30th (thirtieth) anniversary of the Appointed Date, the Concession Period shall, notwithstanding anything to the contrary contained in this Agreement, be deemed to be 40 (forty) years and accordingly such 40th (fortieth) anniversary shall be the Transfer Date. Provided, however, that the provisions of this Clause 12.9 shall not apply in the event that the Concessionaire is relieved of its obligation to undertake Capacity Augmentation in accordance with the provisions of Clause 12.8.3.

ARTICLE 13

MONITORING OF CONSTRUCTION

13.1 Monthly progress reports

During the Construction Period, the Concessionaire shall, no later than 7 (seven) days after the close of each month, furnish to the Authority and the Independent Engineer a monthly report on progress of the Construction Works and shall promptly give such other relevant information as may be required by the Independent Engineer.

13.2 Inspection

During the Construction Period, the Independent Engineer shall inspect the Port at least once a month and make a report of such inspection (the “**Inspection Report**”) stating in reasonable detail the defects or deficiencies, if any, with particular reference to the Project Completion Schedule, Scope of the Project and Specifications and Standards. It shall send a copy of the Inspection Report to the Authority and the Concessionaire within 7 (seven) days of such inspection and upon receipt thereof, the Concessionaire shall rectify and remedy the defects or deficiencies, if any, stated in the Inspection Report. Such inspection or submission of Inspection Report by the Independent Engineer shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever. For the avoidance of doubt, the Parties expressly agree that the functions of the Independent Engineer under this Article 13 shall not include Port Estate Development.

13.3 Tests

- 13.3.1 For determining that the Construction Works conform to the Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out or cause to be carried out Tests, at such time and frequency and in such manner as may be specified by the Independent Engineer from time to time, in accordance with Good Industry Practice for quality assurance. The size of sample for such tests shall, to the extent possible, not exceed 10% (ten per cent) of the quantity and/or number of tests normally required to be undertaken for the construction works of the Authority implemented through their contractors. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the tests in accordance with the instructions of the Independent Engineer and furnish the results thereof to the Independent Engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire. Provided, however, that the Independent Engineer may, instead of carrying out the tests specified hereunder, at its option decide to witness, or participate in, any of the tests to be undertaken by the Concessionaire for its own quality assurance in accordance with Good Industry Practice, and in such an event, the Concessionaire shall cooperate with, and provide the necessary assistance, to the Independent Engineer for discharging its functions hereunder. For the avoidance of doubt, the costs to be incurred on any test which is undertaken for determining the

rectification of any defect or deficiency in construction shall be borne solely by the Concessionaire.

13.3.2 In the event that results of any tests conducted under this Clause 13.3 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Independent Engineer in this behalf. The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests to determine that such remedial measures have brought the Construction Works into compliance with the Specifications and Standards, and the procedure set forth in this Clause 13.3 shall be repeated until such Construction Works conform to the Specifications and Standards. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 13.3 shall be undertaken in addition to and independent of the tests that shall be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Concessionaire to the Independent Engineer forthwith.

13.4 Delays during construction

Without prejudice to the provisions of Clause 12.5.2, if the Concessionaire does not achieve any of the Project Milestones or the Independent Engineer shall have reasonably determined that the rate of progress of Construction Works is such that the Port is not likely to be completed by the Scheduled Completion Date, it shall notify the Concessionaire to this effect, and the Concessionaire shall, within 15 (fifteen) days of such notice, by a communication inform the Independent Engineer in reasonable detail about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.

13.5 Suspension of unsafe Construction Works

13.5.1 Upon recommendation of the Independent Engineer to this effect, the Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Authority, such work threatens the safety of the Users. Provided, however, that in case of an emergency, the Authority may *suo moto* issue the notice referred to hereinabove.

13.5.2 The Concessionaire shall, pursuant to the notice under Clause 13.5.1, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Authority and thereupon carry out remedial measures to secure the safety of suspended works and the Users. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the Authority shall either revoke such suspension or instruct the Concessionaire to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 13.5 shall be repeated until the suspension hereunder is revoked.

13.5.3 Subject to the provisions of Clause 35.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the

period of suspension (the “**Preservation Costs**”) shall be borne by the Concessionaire; provided that if the suspension has occurred as a result of any breach of this Agreement by the Authority, the Preservation Costs shall be borne by the Authority.

13.5.4 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the Concessionaire is reasonably entitled, and shall notify the Authority accordingly whereupon the Authority shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer. In the event that the Scheduled Completion Date is extended pursuant hereto, the Concession Period shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Completion Date.

13.6 Video recording

During the Construction Period, the Concessionaire shall provide to the Authority for every calendar quarter, a video recording, which will be compiled into a 3 (three)-hour digital video disc or any substitute thereof, covering the status and progress of Construction Works in that quarter. The first such video recording shall be provided to the Authority within 7 (seven) days of the Appointed Date and thereafter, no later than 15 (fifteen) days after the close of each quarter.

ARTICLE 14

COMPLETION CERTIFICATE

14.1 Tests

14.1.1 No later than 30 (thirty) days prior to the likely completion of the Port, the Concessionaire shall notify the Independent Engineer of its intent to subject the Port to Tests. The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the Authority who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) days notice to the Independent Engineer, and in the event the Independent Engineer delays the Tests hereunder, the Authority shall impose exemplary penalties on the Independent Engineer and shall ensure that Tests are completed in time either by the Independent Engineer or any substitute thereof. For the avoidance of doubt, it is agreed that the provisions of this Article 14 shall not apply to Port Estate Development.

14.1.2 All Tests shall be conducted in accordance with Schedule-I at the cost and expense of the Concessionaire. The Independent Engineer shall observe, monitor and review the results of the Tests to determine compliance of the Port with Specifications and Standards and if it is reasonably anticipated or determined by the Independent Engineer during the course of any Test that the performance of the Port or any part thereof does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Concessionaire to remedy and rectify the defects or deficiencies. Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the Authority copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Independent Engineer may require the Concessionaire to carry out or caused to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Port with Specifications and Standards.

14.2 Completion Certificate

Upon completion of Construction Works and the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire and the Authority a certificate substantially in the form set forth in Schedule-J (the “**Completion Certificate**”).

14.3 Provisional Certificate

The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule-J (the “**Provisional Certificate**”) if the Tests are successful and the Port can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event,

the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the “**Punch List**”); provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority.

14.4 Completion of Punch List items

14.4.1 All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) days of the date of issue of the Provisional Certificate and for any delay thereafter, other than for reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to recover Damages from the Concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1% (zero point one per cent) of the Performance Security, and (b) 0.2% (zero point two per cent) of the cost of completing such items as estimated by the Independent Engineer. Subject to payment of such Damages, the Concessionaire shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Punch List items. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons solely attributable to the Authority or due to Force Majeure, the completion date thereof shall be determined by the Independent Engineer in accordance with Good Industry Practice, and such completion date shall be deemed to be the date of issue of the Provisional Certificate for the purposes of Damages, if any, payable for such item under this Clause 14.4.1.

14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate. Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constituting Force Majeure or for reasons solely attributable to the Authority, shall entitle the Authority to terminate this Agreement.

14.5 Withholding of Provisional or Completion Certificate

14.5.1 If the Independent Engineer determines that the Port or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the Authority and the Concessionaire. Upon receipt of such a report from the Independent Engineer and after conducting its own inspection, if the Authority is of the opinion that the Port is not fit and safe for commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Port and direct the Independent Engineer to withhold issuance of the Provisional Certificate or Completion Certificate, as the case may be. Upon receipt of such notice, the Concessionaire shall remedy and rectify such defects or deficiencies and thereupon Tests shall be undertaken in accordance with this Article 14. Such procedure shall be repeated as necessary until the defects or deficiencies are rectified.

14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the Authority may, at any time after receiving a report from the Independent Engineer

under that Clause, direct the Independent Engineer to issue a Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.

14.6 Rescheduling of Tests

If the Independent Engineer certifies to the Authority and the Concessionaire that it is unable to issue the Completion Certificate or Provisional Certificate, as the case may be, because of events or circumstances on account of which the Tests could not be held or had to be suspended, the Concessionaire shall be entitled to re-schedule the Tests and hold the same as soon as reasonably practicable.

ARTICLE 15

ENTRY INTO COMMERCIAL SERVICE

15.1 Commercial Operation Date (COD)

- 15.1.1 The Port shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14, and accordingly the commercial operation date of the Port shall be the date on which such Completion Certificate or the Provisional Certificate is issued (the “COD”). The Port shall enter into commercial service on COD whereupon the Concessionaire shall be entitled to demand and collect Fee in accordance with the provisions of Article 27.
- 15.1.2 In the event that the Authority prevents, or causes to be prevented, or in any manner delays the entry of the Port into commercial service after issuance of Completion Certificate or the Provisional Certificate, as the case may be, or where such delay occurs in the issuance of such certificate by the Independent Engineer for any reason attributable to the Independent Engineer or the Authority, as the case may be, the Concessionaire may declare COD and notify the Authority forthwith. In the event of any Dispute relating to the declaration of COD hereunder, the Dispute Resolution Procedure shall apply.

15.2 Damages for delay

Subject to the provisions of Clause 12.5, if COD does not occur prior to the 91st (ninety first) day after the Scheduled Completion Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the Concessionaire shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until COD is achieved.

ARTICLE 16
CHANGE OF SCOPE

16.1 Change of Scope

- 16.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement (the “**Change of Scope**”). Any such Change of Scope shall be made in accordance with the provisions of this Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Authority in accordance with Clause 16.3.
- 16.1.2 If the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved services to the Users, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefor in accordance with this Article 16 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.
- 16.1.3 Any works or services which are provided under and in accordance with this Article 16 shall form part of the Port and the provisions of this Agreement shall apply *mutatis mutandis* to such works or services.

16.2 Procedure for Change of Scope

- 16.2.1 In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the “**Change of Scope Notice**”).
- 16.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:
- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period, and
 - (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with the proposed premium/discount on such rates; provided that the cost incurred by the Concessionaire in providing such information shall be reimbursed by the Authority to the extent such cost is certified by the Independent Engineer as reasonable.

- 16.2.3 Upon receipt of information set forth in Clause 16.2.2, if the Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time and costs for implementation thereof. Upon reaching an agreement, the Authority shall issue an order (the “**Change of Scope Order**”) requiring the Concessionaire to proceed with the performance thereof. In the event that the Parties are unable to agree, the Authority may, by issuing a Change of Scope Order, require the Concessionaire to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 16.5.
- 16.2.4 The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works undertaken by the Concessionaire under this Article 16.

16.3 Payment for Change of Scope

Within 7 (seven) days of issuing a Change of Scope Order, the Authority shall make an advance payment to the Concessionaire in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Authority bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Authority to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Authority shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate deduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.

16.4 Restrictions on certain works

- 16.4.1 Notwithstanding anything to the contrary contained in this Article 16, but subject to the provisions of Clause 16.4.2, the Authority shall not require the Concessionaire to undertake any works or services if such works or services are likely to delay completion of the Port by the Scheduled Completion Date; provided that in the event that the Authority considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of the Port and issuing the Provisional Certificate.
- 16.4.2 Notwithstanding anything to the contrary contained in this Article 16, the Concessionaire shall be entitled to nullify any Change of Scope Order if it causes the cumulative costs relating to all the Change of Scope Orders to exceed 10% (ten per cent) of the Total Project Cost in any continuous period of 3 (three) years immediately preceding the date of such Change of Scope Order or if such cumulative costs exceed 25% (twenty five per cent) of the Total Project Cost at any time during the Concession Period.

16.5 Power of the Authority to undertake works

16.5.1 Notwithstanding anything to the contrary contained in Clauses 16.1.1 and 16.3, the Authority may, after giving notice to the Concessionaire and considering its reply thereto, award any works or services, contemplated under Clause 16.1.1, to any person on the basis of open competitive bidding; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority[§], and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten per cent) thereof. It is also agreed that the Concessionaire shall provide access, assistance and cooperation to the person who undertakes the works or services hereunder. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not undertake any works or services under this Clause 16.5.1 if such works or services cause a Material Adverse Effect on the Concessionaire.

16.5.2 The works undertaken in accordance with this Clause 16.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimises disruption in operation of the Port. The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works carried out under this Clause 16.5.

16.6 Reduction in Scope of the Project

16.6.1 If the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons attributable to the Authority, the Authority may, in its discretion, require the Concessionaire to pay 80% (eighty per cent) of the sum saved therefrom, and upon such payment to the Authority, the obligations of the Concessionaire in respect of such works shall be deemed to have been fulfilled. For the avoidance of doubt, it is agreed that in the event such reduction in Scope of the Project causes or will cause a reduction in net after-tax return of the Concessionaire, the Parties shall meet, as soon as reasonably practical, and agree on a full or partial waiver of the aforesaid payment of 80% (eighty per cent) so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no reduction in Scope of the Project. It is further agreed that the liability of the Authority under this Clause 16.6 shall not extend beyond waiver of the aforesaid 80% (eighty per cent). It is also agreed that in the event of a Dispute, the Dispute Resolution Procedure shall apply.

16.6.2 For determining the obligations of the Concessionaire under this Clause 16.6, the provisions of Clauses 16.1, 16.2 and 16.4 shall apply *mutatis mutandis*, and upon issue of Change of Scope Order by the Authority hereunder, the Concessionaire shall pay forthwith the sum specified therein.

[§] The Authority shall transfer 75% (seventy five percent) of the amount so received to the first ranked bidder whose bid has been matched by the Concessionaire.

ARTICLE 17

OPERATION AND MAINTENANCE

17.1 O&M obligations of the Concessionaire

17.1.1 During the Operation Period, the Concessionaire shall operate and maintain the Port in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Port to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Specifications and Standards and Good Industry Practice. The obligations of the Concessionaire hereunder shall include:

- (a) permitting safe, smooth and uninterrupted flow of traffic on the Port, including prevention of loss or damage thereto, during normal operating conditions
- (b) collecting and appropriating the Fee;
- (c) minimising disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Port by providing a rapid and effective response and maintaining liaison with emergency services of the Authority and the State;
- (d) carrying out periodic preventive maintenance of the Port;
- (e) undertaking routine maintenance including prompt repairs of cracks, joints, drains, embankments, structures, pavement markings, lighting, road signs and other traffic control devices;
- (f) undertaking major maintenance of the Port such as resurfacing of pavements, repairs to structures, and repairs and refurbishment of the equipment;
- (g) operation and maintenance of all Project Equipment diligently and efficiently and in accordance with Good Industry Practice;
- (h) preventing, with the assistance of concerned law enforcement agencies, any unauthorised use of the Port;
- (i) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on, or unauthorised entry to the Port;
- (j) protection of the environment and provision of equipment and materials therefor;
- (k) operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Port and for providing safe, smooth and uninterrupted flow of traffic on the Port;

- (l) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies; and
- (m) complying with Safety Requirements in accordance with Article 18.

17.1.2 Without prejudice to the provisions of Clause 17.1.1, the obligations of the Concessionaire shall, in respect of handling of Containers, include:

- (a) ship-to-shore transfer operations, including lifting of hatch covers and lashing or unlashings of Containers;
- (b) ship-to-ship transfer operations for and in respect of Containers;
- (c) stacking and un-stacking of Containers;
- (d) transfer of Containers within the Port;
- (e) delivery and receipt for shipment of Containers;
- (f) de-stuffing and delivery of Containers which are LCL (Less than Container Load) or receipt and stuffing of export cargo in Containers;
- (g) operation and maintenance of systems and services for the prevention, monitoring and detection of fire, including the appointment of a trained fire officer, and availability of fire alarm appliances and fire fighting equipment in accordance with Applicable Laws and Applicable Permits;
- (h) inventory control of all Containers, chassis and other assets at the Port;
- (i) operation and maintenance of communication with and reporting to shipping lines, agents and other users;
- (j) garbage and water disposal in accordance with Applicable Laws;
- (k) adherence to all applicable and relevant rules and regulations of IMO, in relation to land side operations and, in particular:
 - (i) adherence to the IMDG Code and the regulations made thereunder; and
 - (ii) adherence to the MARPOL Code and the regulations made thereunder;
- (l) transit storage of Containers;
- (m) provision of motor transport pool/chassis pool;
- (n) allocation and sequencing of Containers; and
- (o) all other matters and activities incidental to the operations of the Port.

17.1.3 The Concessionaire shall remove promptly from the Port all surplus construction machinery and materials, waste materials (including hazardous materials and waste water), rubbish and other debris (including, without limitation, accident debris) and keep the Port in a clean, tidy and orderly condition, and in conformity with Applicable Laws, Applicable Permits and Good Industry Practice. For the avoidance of doubt, it is agreed that the debris and material excavated shall be carried to and deposited at the reclaimed area within the Site.

17.1.4 The Concessionaire shall maintain, in conformity with Good Industry Practice, all stretches of approach roads or other structures situated on the Site.

17.2 Maintenance Requirements

The Concessionaire shall procure that at all times during the Operation Period, the Port conforms to the maintenance requirements set forth in Schedule-K (the “**Maintenance Requirements**”).

17.3 Maintenance Manual

17.3.1 No later than 90 (ninety) days prior to the Scheduled Completion Date, the Concessionaire shall, in consultation with the Independent Engineer, evolve a repair and maintenance manual (the “**Maintenance Manual**”) for the regular and preventive maintenance of the Port in conformity with the Specifications and Standards, Maintenance Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Authority and 2 (two) copies to the Independent Engineer. The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 17.3 shall apply, *mutatis mutandis*, to such revision. For the avoidance of doubt, the provisions of this Clause 17.3 shall not apply to Port Estate Development.

17.3.2 Without prejudice to the provisions of Clause 17.3.1, 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.

17.4 Maintenance Programme

17.4.1 On or before COD and no later than 45 (forty five) days prior to the beginning of each Accounting Year during the Operation Period, as the case may be, the Concessionaire shall provide to the Authority and the Independent Engineer, its proposed annual programme of preventive, urgent and other scheduled maintenance (the “**Maintenance Programme**”) to comply with the Maintenance Requirements, Maintenance Manual and Safety Requirements. Such Maintenance Programme shall include:

- (a) preventive maintenance schedule;
- (b) arrangements and procedures for carrying out urgent repairs;

- (c) criteria to be adopted for deciding maintenance needs;
- (d) intervals and procedures for carrying out inspection of all elements of the Port;
- (e) intervals at which the Concessionaire shall carry out periodic maintenance;
- (f) arrangements and procedures for carrying out safety related measures; and
- (g) intervals for major maintenance works and the scope thereof.

17.4.2 Within 15 (fifteen) days of receipt of the Maintenance Programme, the Independent Engineer shall review the same and convey its comments to the Concessionaire with particular reference to its conformity with the Maintenance Requirements, Maintenance Manual and Safety Requirements.

17.4.3 The Concessionaire may, modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clause 17.4.1 and 17.4.2 shall apply *mutatis mutandis* to such modifications.

17.5 Safety, vessel breakdowns and accidents

17.5.1 The Concessionaire shall ensure safe conditions for the Users, and in the event of unsafe conditions, closures, diversions, vessel breakdowns and accidents, it shall follow the relevant operating procedures including the setting up of temporary traffic lights, and removal of obstruction and debris without delay. Such procedures shall conform to the provisions of this Agreement, Applicable Laws, Applicable Permits and Good Industry Practice.

17.5.2 The Concessionaire's responsibility for rescue operations on the Port shall be limited to an initial response to any particular incident until such time as the competent authority takes charge and shall include prompt removal of vehicles or vessels or debris or any other obstruction, which may endanger or interrupt the smooth flow of traffic.

17.6 De-commissioning due to Emergency

17.6.1 If, in the reasonable opinion of the Concessionaire, there exists an Emergency which warrants de-commissioning and closure to traffic of the whole or any part of the Port, the Concessionaire shall be entitled to de-commission and close the whole or any part of the Port to traffic for so long as such Emergency and the consequences thereof warrant; provided that such de-commissioning and particulars thereof shall be notified by the Concessionaire to the Authority without any delay, and the Concessionaire shall diligently carry out and abide by any reasonable directions that the Authority may give for dealing with such Emergency.

17.6.2 The Concessionaire shall re-commission the Port or the affected part thereof as quickly as practicable after the circumstances leading to its de-commissioning and closure have ceased to exist or have so abated as to enable the Concessionaire to re-commission the Port and shall notify the Authority of the same without any delay.

17.7 Port closure

- 17.7.1 Save and except as provided in Clause 17.6, the Concessionaire shall not close any part of the Port for undertaking maintenance or repair works, not forming part of the Maintenance Programme, except with the prior written approval of the Independent Engineer. Such approval shall be sought by the Concessionaire through a written request to be made to the Independent Engineer, and a copy thereof furnished to the Authority, at least 7 (seven) days before the proposed closure and shall be accompanied by particulars thereof. Within 3 (three) days of receiving such request, the Independent Engineer shall grant permission with such modifications as it may deem reasonable and necessary in conformity with the Maintenance Manual and Maintenance Programme and a copy of such permission shall be sent to the Authority.
- 17.7.2 Upon receiving the permission pursuant to Clause 17.7.1, the Concessionaire shall be entitled to close the designated part of the Port for the period specified therein, and in the event of any delay in re-opening such part, the Concessionaire shall pay Damages to the Authority calculated at the rate of 0.5% (zero point five per cent) of the Average Daily Fee for each day of delay until the affected part has been re-opened for traffic.

17.8 Damages for breach of maintenance obligations

- 17.8.1 In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Maintenance Requirements within the period specified therein, it shall be deemed to be in breach of this Agreement and the Authority shall be entitled to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 0.5% (zero point five per cent) of Average Daily Fee, and (b) 0.1% (zero point one per cent) of the cost of such repair or rectification as estimated by the Independent Engineer. Recovery of such Damages shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.
- 17.8.2 The Damages set forth in Clause 17.8.1 may be assessed and specified forthwith by the Independent Engineer; provided that the Authority may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith and in the event that it contests such Damages, the Dispute Resolution Procedure shall apply.

17.9 Authority's right to take remedial measures

- 17.9.1 In the event the Concessionaire does not maintain and/or repair the Port or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the O&M Inspection Report or a notice in this behalf from the Authority or the Independent Engineer, as the case may be, the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire, and to recover its cost from the Concessionaire. In addition to recovery of the aforesaid cost, a sum

equal to 20% (twenty per cent) of such cost shall be paid by the Concessionaire to the Authority as Damages. For the avoidance of doubt, the right of the Authority under this Clause 17.9.1 shall be without prejudice to its rights and remedies provided under Clause 17.8.

17.9.2 The Authority shall have the right, and the Concessionaire hereby expressly grants to the Authority the right, to recover the costs and Damages specified in Clause 17.9.1 directly from the Escrow Account as if such costs and Damages were O&M Expenses, and for that purpose, the Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the Authority under this Clause 17.9.2 and debit the same to O&M Expenses.

17.10 Overriding powers of the Authority

17.10.1 If in the reasonable opinion of the Authority, the Concessionaire is in material breach of its obligations under this Agreement and, in particular, the Maintenance 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 Concessionaire to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.

17.10.2 In the event that the Concessionaire, upon notice under Clause 17.10.1, fails to rectify or remove any hardship or danger within a reasonable period, the Authority may exercise overriding powers under this Clause 17.10.2 and take over the performance of any or all the obligations of the Concessionaire 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 deemed to be O&M Expenses, and the Authority shall be entitled to recover them from the Concessionaire in accordance with the provisions of Clause 17.9 along with the Damages specified therein.

17.10.3 In the event of a national emergency, civil commotion or any other act specified in Clause 35.3, the Authority may take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it or as directed by the Government, and exercise such control over the Port or give such directions to the Concessionaire 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. For the avoidance of doubt, it is agreed that the consequences of such action shall be dealt in accordance with the provisions of Article 35. It is also agreed that the Concessionaire shall comply with such instructions as the Authority may issue in pursuance of the provisions of this Clause 17.10, and shall provide assistance and cooperation to the Authority, on a best effort basis, for performance of its obligations hereunder.

17.11 Restoration of loss or damage to Port

Save and except as otherwise expressly provided in this Agreement, in the event that the Port or any part thereof suffers any loss or damage during the Concession Period from any cause whatsoever, the Concessionaire shall, at its cost and expense, rectify and remedy such loss or damage forthwith so that the Port conforms to the provisions of this Agreement.

17.12 Modifications to the Port

The Concessionaire shall not carry out any material modifications to the Port, save and except where such modifications are necessary for the Port to operate in conformity with the Specifications and Standards, Maintenance Requirements, Good Industry Practice and Applicable Laws; provided that the Concessionaire shall notify the Independent Engineer of the proposed modifications along with particulars thereof at least 15 (fifteen) days before commencing work on such modifications and shall reasonably consider any suggestions that the Independent Engineer may make within 15 (fifteen) days of receiving the Concessionaire's proposal. For the avoidance of doubt, all modifications made hereunder shall comply with the Safety Requirements, Specifications and Standards, Applicable Laws, Good Industry Practice and the provisions of this Agreement.

17.13 Excuse from performance of obligations

The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Port is not available to traffic on account of any of the following for the duration thereof:

- (a) an event of Force Majeure;
- (b) measures taken to ensure the safe use of the Port except when unsafe conditions occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
- (c) compliance with a request from the Authority or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Port:

Provided, that any such non-availability and particulars thereof shall be notified by the Concessionaire to the Authority and the Independent Engineer without any delay:

Provided further that the Concessionaire shall keep all unaffected parts of the Port open to traffic, provided they can be operated safely.

17.14 Barriers and diversions

The Authority shall procure that during the Operation Period, no barriers are erected or placed by any Government Instrumentality on the Port except for reasons of Emergency, national security, law and order or collection of taxes. The Authority shall also make best endeavours to procure that no Government Instrumentality shall undertake or cause to be undertaken, except for reasons of

Emergency, national security or law and order, any diversions of traffic from, or closing down of approach roads to the Port that may cause a material adverse effect on the flow of traffic to and from the Port.

17.15 Advertising on the Site

The Concessionaire shall not undertake or permit any form of commercial advertising, display or hoarding at any place on the Site if such advertising, display or hoarding violates Applicable Laws including any re-enactment or amendment thereof.

17.16 O&M of Port Estate Development

The Parties expressly agree that the provisions of Article 17 shall not apply to Port Estate Development; provided, however, that the Concessionaire agrees and undertakes to maintain Port Estate Development at all times in accordance with Good Industry Practice and Applicable Laws.

17.17 Use of Port by Defence Forces

17.17.1 The Concessionaire acknowledges and agrees that the Defence Forces shall at all times have the right to use the Port and all facilities thereof, without any restriction or constraint of any nature whatsoever, on payment of compensation in accordance with Applicable Laws.

17.17.2 Without prejudice to the provisions of Clause 17.7.1, the Concessionaire's obligations to the Defence Forces in respect of usage of the Port during an Emergency shall be determined by GOI from time to time and to the extent thereof, the Concessionaire shall be relieved of its obligations to provide services to civilian users of the Port.

ARTICLE 18

SAFETY REQUIREMENTS

18.1 Safety Requirements

18.1.1 The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and conform to Good Industry Practice for securing the safety of the Users and other persons present at the Port. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety programme for providing a safe environment on or about the Port, and shall comply with the safety requirements set forth in Schedule-L (the “**Safety Requirements**”).

18.1.2 The Authority shall appoint an experienced and qualified firm or organisation (the “**Safety Consultant**”) for carrying out safety audit of the Port in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.

18.2 Expenditure on Safety Requirements

All costs and expenses arising out of or relating to Safety Requirements shall be borne by the Concessionaire to the extent such costs and expenses form part of the works and services included in the Scope of the Project, and works and services, if any, not forming part of the Scope of the Project shall be undertaken and funded in accordance with the provisions of Article 16.

ARTICLE 19

MONITORING OF OPERATION AND MAINTENANCE

19.1 Monthly status reports

19.1.1 During Operation Period, the Concessionaire shall, no later than 7 (seven) days after the close of each month, furnish to the Authority and the Independent Engineer a monthly report stating in reasonable detail the condition of the Port including its compliance or otherwise with the Maintenance Requirements, Maintenance Manual, Maintenance Programme and Safety Requirements, and shall promptly give such other relevant information as may be required by the Independent Engineer or the Authority. In particular, such report shall separately identify and state in reasonable detail the defects and deficiencies that require rectification.

19.1.2 During Operation Period, the Concessionaire shall, no later than 10 (ten) days after the close of each month, furnish a monthly management report which shall include a summary of:

- (a) key performance indicators achieved in the month, along with an analysis of reasons for failures, if any, and proposals to remedy the same;
- (b) key operational hurdles and deliverables in the succeeding month along with strategies for addressing the same and for otherwise improving the Port's operational performance;
- (c) key financial parameters for the month, as benchmarked against the monthly budget and the reasons for shortfall, if any, and proposals to remedy the same; and
- (d) a monthly budget for the succeeding month, along with strategies for improving the Port's financial performance.

19.2 Inspection

The Independent Engineer shall inspect the Port at least once a month. It shall make a report of such inspection (the "**O&M Inspection Report**") stating in reasonable detail the defects or deficiencies, if any, with particular reference to the Maintenance Requirements, Maintenance Manual, the Maintenance Programme and Safety Requirements, and send a copy thereof to the Authority and the Concessionaire within 7 (seven) days of such inspection.

19.3 Tests

For determining that the Port conforms to the Maintenance Requirements, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests specified by it in accordance with Good Industry Practice. The Concessionaire shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Independent Engineer and furnish the results of such tests forthwith to the Independent Engineer. One half of

the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire.

19.4 Remedial measures

19.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 19.3 and furnish a report in respect thereof to the Independent Engineer and the Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.

19.4.2 The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Port into compliance with the Maintenance Requirements and the procedure set forth in this Clause 19.4 shall be repeated until the Port conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Authority shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 17.8.

19.5 Monthly Fee Statement

During the Operation Period, the Concessionaire shall furnish to the Authority, within 7 (seven) days of completion of each month, a statement of Fee substantially in the form set forth in Schedule-M (the “**Monthly Fee Statement**”). The Concessionaire shall also furnish to the Authority such other information as the Authority may reasonably require, at specified intervals, in discharge of its statutory functions.

19.6 Reports of unusual occurrence

The Concessionaire shall, prior to the close of each day, send to the Authority and the Independent Engineer, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Port relating to the safety and security of the Users and Port. A weekly and monthly summary of such reports shall also be sent within three days of the closing of each week and month, as the case may be. For the purposes of this Clause 19.6, accidents and unusual occurrences on the Port shall include:

- (a) death or injury to any person;
- (b) damaged or dislodged fixed equipment;
- (c) any damage or obstruction on the Port, which results in slow down of the services being provided by the Concessionaire;
- (d) disablement of any equipment during operation;
- (e) communication failure affecting the operation of Port;

- (f) smoke or fire;
- (g) flooding of the Port; and
- (h) such other relevant information as may be required by the Authority or the Independent Engineer.

ARTICLE 20

TRAFFIC REGULATION, SERVICES AND SECURITY

20.1 Traffic regulation by the Concessionaire

- 20.1.1 The Concessionaire shall regulate the land traffic on the Port in accordance with Applicable Laws and subject to the supervision and control of the Authority or a substitute thereof empowered in this behalf under Applicable Laws.
- 20.1.2 Subject to the berthing priorities set forth in Clause 20.4.2, the Concessionaire shall, in consultation with the Authority and representatives of Users, evolve and publicise a system based on Good Industry Practice such that no person or category of persons is discriminated against or unduly favoured, as the case may be, in the allocation of slots to the vessels and vehicles visiting the Port.
- 20.1.3 Subject to the provisions of Clause 5.8 and 20.1.2, the Concessionaire shall have the right and obligation to manage, operate and regulate the services at the Port on a common user basis.

20.2 Navigation assistance

Subject to regulation of the Port in accordance with Applicable Laws and this Agreement, the Concessionaire shall, upon payment of regulated charges by the Users, provide navigation assistance round-the-clock as may be necessary in accordance with Good Industry Practice.

20.3 Obligations relating to Port Services

- 20.3.1 The Concessionaire shall provide or cause to be provided to the Users of the Port, the following port services (the “**Port Services**”) within the limits of the Port:
- (a) Vessel traffic management;
 - (b) dangerous goods control as per IMO regulations;
 - (c) provision of aids to navigation;
 - (d) pilotage;
 - (e) towage;
 - (f) mooring and unmooring;
 - (g) fire prevention and fire fighting services on water;
 - (h) anchorage facilities; and
 - (i) dredging,

subject always to such rules and regulations as may be made from time to time under Applicable Laws and the provisions of this Agreement.

20.3.2 The Concessionaire acknowledges that the competitiveness of charges and tariffs for Port Services will have a direct impact on the business at the Port and the Concessionaire, therefore, agrees that it shall make its best endeavours to levy charges and tariffs on competitive terms based on total in-port costs vis-à-vis competing ports.

20.4 Obligations relating to berthing

20.4.1 Subject to Applicable Laws, the Concessionaire shall follow a policy of non-discrimination with regard to the classes or descriptions of vessel traffic that are permitted to use the Port and shall not impose limitations on vessel movements within the limits of the Port or otherwise restrict capacity at the Port.

20.4.2 Subject to any modifications that may be made by the Authority in accordance with Applicable Laws, the Concessionaire shall, when allocating berths or providing pilotage, towage and mooring/unmooring services, take into account, in descending order and subject to a berth being available, the following:

- (i) Men of war;
- (ii) passenger vessels;
- (iii) mainline Container vessels;
- (iv) vessels carrying dangerous cargo or high security cargo (including arms and ammunition);
- (v) Container feeder vessels;
- (vi) vessels using Container facilities at conventional cargo berths;
- (vii) car carriers;
- (viii) general cargo vessels using conventional berths and bulk cement vessels;
- (ix) oil and gas tankers; and
- (x) all other types of vessels.

20.4.3 Without prejudice to the provisions of Clause 20.4.2, the Concessionaire and the Harbour Master of the Port shall carry out berth allocation in accordance with Good Industry Practice; provided, however, that the Harbour Master shall be entitled to take all such action as is necessary in relation to berth allocation during emergencies or for ensuring safety of vessels, berths and the Port generally, in accordance with Applicable Laws.

20.5 Security

20.5.1 The Authority acknowledges and agrees that unless otherwise specified in this Agreement it shall, at its own cost and expense, provide or cause to be provided land-side security and sea-side security within the limits of the custom bound and operational area of the Port for the prevention of terrorism, hijacking, sabotage

and/or similar acts or occurrences, in accordance with the International Ship and Port Facility Security Code (the “ISPS Code”); provided that the Authority and the Concessionaire may at any time mutually enter into an agreement to jointly provide security services at the Port.

- 20.5.2 The Concessionaire shall be responsible for the provision and maintenance of perimeter fencing around the Port and for the security arrangements within the Port in order to maintain orderly conduct of its business and the security thereof.
- 20.5.3 The Parties hereto expressly agree to establish, review and implement procedures as may be required from time to time under the ISPS Code.
- 20.5.4 The Concessionaire shall abide by and implement any instructions of the Authority for enhancing the security within and around the Port, and all the organisations authorised under the ISPS Code shall be entitled, if and when deemed necessary by the Authority, to deploy their security personnel in the Port. The Concessionaire shall not be entitled to any compensation for disruption of its operations or loss or damage resulting from the Authority’s actions or the actions of any organisation authorised under the ISPS Code other than those resulting from wilful or grossly negligent acts or omissions of such organisation. The Authority agrees that it shall cause the relevant organisations to take such actions as reasonably deemed necessary by them, without unduly or unreasonably disrupting the operations of the Port or interfering with the exercise of rights or fulfilment of obligations by the Concessionaire under this Agreement. The Concessionaire agrees that it shall extend its full support and cooperation to the Authority and to the other organisations authorised under the ISPS Code in the discharge of their obligations thereunder.
- 20.5.5 Subject to the rights of the Concessionaire under this Clause 20.5, the Authority shall be entitled to inspect and search all vehicles and other modes of transportation including vessels entering the Port or departing therefrom and to search or question any person entering the Port or departing therefrom, without unduly or unreasonably disrupting the operations of the Port.
- 20.5.6 The Authority agrees that it shall, at the request of the Concessionaire, procure and provide the services of security forces of the GOI and the Government on a best effort basis.
- 20.5.7 The Authority shall ensure and procure that the personnel of the Concessionaire and all its contractors, suppliers, sub-contractors and agents and the Users of the Port are allowed free ingress and egress from the limits of the Port without any unreasonable interference by the personnel of the Authority, including the security personnel employed by or on behalf of the Authority.
- 20.5.8 The Authority and the Concessionaire shall jointly make best endeavours to ensure that the security of the Port is maintained such that the level of war risk premium under hull and machinery insurance covers (if any) that is to be borne by the Users of the Port shall be at the lowest possible rate. However, neither the Authority nor the Concessionaire accept any liability whatsoever to the Users of the Port in the event that the war risk premium is not at the minimum level.

ARTICLE 21

KEY PERFORMANCE INDICATORS

21.1 Dwell times

- 21.1.1 The Concessionaire shall ensure and procure that after the 2nd (second) anniversary of COD, the dwell times specified in this Article 21 are not exceeded.
- 21.1.2 The average dwell time for handling of Containers shall not exceed 4 (four) days. The dwell time for handling of Containers shall be measured by the number of days a Container stays on the Port, after having been discharged from a vessel or vehicle, as the case may be. The average dwell time shall be the total dwell time of all Containers handled at the Port during the period of a calendar month divided by the total number of Containers during the same period.
- 21.1.3 The average dwell time for movement from the stack until reaching the inspection yard shall not exceed 18 (eighteen) hours. The dwell time for movement shall be measured by the average time between the request for movement from the stack until reaching the inspection yard. The average dwell time shall be the total dwell time of all Containers handled at the Port during the period of a calendar month divided by the total number of Containers during the same period.
- 21.1.4 The average dwell time for truck loading shall not exceed 12 (twelve) hours. The dwell time for loading shall be measured by the average time between the request for loading until the loading on truck. The average dwell time shall be the total dwell time of all Containers handled at the Port during the period of a calendar month divided by the total number of Containers during the same period.

21.2 Vessel turnaround

The average vessel turnaround time shall not exceed 16 (sixteen) hours. The vessel turnaround time shall be measured by the number of hours needed for loading, unloading, and servicing a vessel, after the vessel has berthed at the Port. The average vessel turnaround time shall be measured by the total turnaround time of all vessels handled at the Port during the period of a calendar month divided by the total number of vessels during the same period.

21.3 Berth productivity

The Concessionaire shall ensure and procure that the average berth productivity at the Port shall be 70 (seventy) Container moves per hour or more after the first anniversary of COD. Berth productivity shall be measured by the number of total Container moves per vessel (loading, unloading, and re-positioning) divided by the number of hours during which the vessel is at berth, without adjustments for equipment and labour down time. Average berth productivity shall be measured by the number of total Container moves (loading, unloading, and re-positioning) for all vessels handled at the Port during the period of a calendar month divided by the total number of hours during which all such vessels are berthed at the Port during the same period, without adjustments for equipment and labour down time.

21.4 Vehicle service time

The average vehicle service time at the Port shall not exceed 4 (four) hours. Vehicle service time shall mean the time required to collect a Container from the Port or to deliver one. It shall be calculated as the interval between the vehicle's arrival at the entry gate of the Port and its departure from the exit gate thereof. The vehicle service time shall be the total vehicle service time of all vehicles carrying Containers to or from the Port during the period of a calendar month divided by the total number of such vehicles during the same period.

21.5 Ship Handling Productivity

The ship handling productivity (the “**Ship Handling Productivity**”) shall not be more than 6 (six) hours for all vessels arriving within agreed berthing windows. Ship Handling Productivity means the average waiting time during a calendar month, expressed in hours, of the Container vessels calling at the Port, calculated from the time they arrive at the pilot station to the time the pilot completes berthing operations.

21.6 Quay crane productivity

The Concessionaire shall ensure and procure that the average quay crane productivity at the Port shall be 22 (twenty two) Container lifts per hour or more after the first anniversary of COD. Quay crane productivity for each quay side crane shall be measured by the number of total Container lifts handled by such crane when a vessel is berthed at the Port divided by the number of hours the vessel is at berth at the Port. Average quay crane productivity shall be measured by the number of total Container lifts handled by all quay side cranes for all vessels berthed at the Port during the period of a calendar month divided by the number of total hours all such vessels are berthed at the Port during the same period.

21.7 Penalty for shortfall in performance

The Concessionaire shall ensure and procure compliance of the key performance indicators specified in this Article 21 and for any shortfall in average performance during a quarter, it shall pay Damages to the Authority within 30 (thirty) days of the quarter in which the shortfall occurred. The Damages due and payable under this Clause 21.7 shall be determined at the rate of 1% (one per cent) of the operating revenue of the respective quarter for every shortfall of 10% (ten per cent) in any single performance indicator specified in this Article 21; provided, however, that the Authority may waive the Damages, in part or full, if it is satisfied that the Concessionaire has been carrying out its obligations diligently and efficiently and that the shortfall to be waived was on account of reasons beyond the control of the Concessionaire.

ARTICLE 22

TRAFFIC AND DWELL TIME REPORTS

22.1 Traffic and Dwell time Reports

The Concessionaire shall collect and tabulate data relating to the number and types of vessels and cargo using the Port and the number of trucks and rail wagons entering and leaving the Port. The Concessionaire shall also install, maintain and operate weighing platforms (weigh-in-motion type) for recording, on a sample basis, the weight of commercial goods vehicles using the Port. A statement of the vessel traffic, cargo handled, dwell time, output rates at the Port and effective working time to waiting time shall be compiled and furnished forthwith by the Concessionaire in the form and manner acceptable to the Authority.

22.2 Vessel and Cargo survey

The Authority may require the Concessionaire to conduct, during each Accounting Year, a detailed traffic survey at such frequency and on such days as the Authority may specify, provided that the cumulative period of such survey shall not exceed 15 (fifteen) days in a year. The Concessionaire shall, at its own cost, carry out or cause to be carried out, the survey in the form and manner reasonably specified by the Authority and furnish a detailed report thereof within 15 (fifteen) days thereof.

22.3 Vessel and Cargo sampling

22.3.1 For determining the actual traffic on the Port, the Authority shall be entitled to inspect the relevant records of the Concessionaire, and may, at its own cost, undertake traffic survey and sampling substantially in the manner set forth in Schedule-N at such frequency as it may deem appropriate, but in no case for less than a continuous period of 15 (fifteen) days. The Concessionaire shall provide such assistance as the Authority may reasonably require for such traffic sampling.

22.3.2 If the traffic sampling pursuant to this Clause 22.3 demonstrates that the actual traffic is more than the traffic reported by the Concessionaire, the traffic determined by the traffic sampling shall be deemed to be the traffic for purposes of this Agreement and in the event of any Dispute relating to the traffic sampling, the Dispute Resolution Procedure shall apply. For the avoidance of doubt, Realisable Fee for any comparable period shall be calculated with reference to the traffic determined hereunder.

22.4 Computer systems and network

The Concessionaire shall install, operate and maintain a computer system with round-the-clock connections to the networks of the Authority and other related entities for exchange of data and information useful or necessary for efficient and transparent regulation and management of traffic. For this purpose, it shall follow such protocol for Electronic Data Interchange (the “EDI”) as the Authority may specify.

ARTICLE 23

INDEPENDENT ENGINEER

23.1 Appointment of Independent Engineer

The Authority shall appoint a consulting engineering firm substantially in accordance with the selection criteria set forth in Schedule-O, to be the independent consultant under this Agreement (the “**Independent Engineer**”). The appointment shall be made no later than 90 (ninety) days from the date of this Agreement and shall be for a period of 3 (three) years. On expiry or termination of the aforesaid appointment, the Authority shall appoint an Independent Engineer for a further term of 3 (three) years in accordance with the provisions of Schedule-O, and such procedure shall be repeated after expiry of each appointment.

23.2 Duties and functions

23.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-P. For the avoidance of doubt, the Parties expressly agree that the functions of the Independent Engineer under this Article 23 shall not include Port Estate Development.

23.2.2 The Independent Engineer shall submit regular periodic reports (at least once every month) to the Authority in respect of its duties and functions set forth in Schedule-P.

23.2.3 A true copy of all communications sent by the Authority to the Independent Engineer and by the Independent Engineer to the Authority shall be sent forthwith by the Independent Engineer to the Concessionaire.

23.2.4 A true copy of all communications sent by the Independent Engineer to the Concessionaire and by the Concessionaire to the Independent Engineer shall be sent forthwith by the Independent Engineer to the Authority.

23.3 Remuneration

The remuneration, cost and expenses of the Independent Engineer shall be paid by the Authority and subject to the limits set forth in Schedule-O, one-half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receiving a statement of expenditure from the Authority.

23.4 Termination of appointment

23.4.1 The Authority may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 23.1.

23.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the

Authority shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 23.1.

23.5 Authorised signatories

The Authority shall require the Independent Engineer to designate and notify to the Authority and the Concessionaire up to 2 (two) persons employed in its firm to sign for and on behalf of the Independent Engineer, and any communication or document required to be signed by the Independent Engineer shall be valid and effective only if signed by any of the designated persons; provided that the Independent Engineer may, by notice in writing, substitute any of the designated persons by any of its employees.

23.6 Dispute resolution

If either Party disputes any advice, instruction, decision, direction or award of the Independent Engineer, or, as the case may be, the assertion or failure to assert jurisdiction, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

23.7 Interim arrangement

In the event that the Authority does not appoint an Independent Engineer, or the Independent Engineer so appointed has relinquished its functions or defaulted in discharge thereof, the Authority may, in the interim, designate and authorise any person to discharge the functions of the Independent Engineer in accordance with the provisions of this Agreement, save and except that such person shall not exercise any functions relating to review, comment, approval or inspection as specified in this Agreement for and in respect of the Independent Engineer, and such functions shall be discharged as and when an Independent Engineer is appointed in accordance with the provisions of this Agreement. Provided, however, that nothing contained in this Clause 23.7 shall in any manner restrict the rights of the Authority to enforce compliance of the provisions of this Agreement.

Part IV
Financial Covenants

ARTICLE 24

FINANCIAL CLOSE

24.1 Financial Close

24.1.1 The Concessionaire hereby agrees and undertakes that it shall achieve Financial Close within 270 (two hundred and seventy) days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding 90 (ninety) days, subject to payment of Damages to the Authority in a sum calculated at the rate of 0.05% (zero point zero five per cent) of the Performance Security for each day of delay; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 270 (two hundred and seventy) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder by the Concessionaire shall be in addition to the Damages, if any, due and payable under the provisions of Clause 4.3.

24.1.2 The Concessionaire shall, upon occurrence of Financial Close, notify the Authority forthwith, and shall have provided to the Authority, at least 2 (two) days prior to Financial Close, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders.

24.2 Termination due to failure to achieve Financial Close

24.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 35.6.1, in the event that Financial Close does not occur, for any reason whatsoever, within the period set forth in Clause 24.1.1 or the extended period provided thereunder, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the Parties have, by mutual consent, determined the Appointed Date to precede the Financial Close, the provisions of this Clause 24.2.1 shall not apply.

24.2.2 Upon Termination under Clause 24.2.1, the Authority shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages; provided, however, that if Financial Close has not occurred due to Force Majeure or as a result of the Authority being in default of any of its obligations under Clause 4.2, it shall, upon Termination, release the Bid Security or Performance Security, as the case may be, forthwith along with the Damages due and payable under Clause 4.2. For the avoidance of doubt, it is expressly agreed that if the Bid Security shall have been substituted by the Performance Security, the Authority shall be entitled to encash therefrom an amount equal to the Bid Security.

ARTICLE 25

GRANT

25.1 Grant

25.1.1 The Authority agrees to provide to the Concessionaire cash support by way of an outright grant equal to the sum set forth in the Bid, namely, Rs. 1,635 crores (Rupees one thousand, six hundred and thirty five crore), in accordance with the provisions of this Article 25 (the “**Grant**”).

25.1.2 The Grant shall be disbursed to the Concessionaire by way of Equity Support in accordance with the provisions of Clause 25.2, and the balance remaining, if any, shall be disbursed as O&M Support in accordance with the provisions of Clause 25.3.

25.2 Equity Support

25.2.1 Subject to the conditions specified in this Clause 25.2, the Grant shall be credited to the Escrow Account and shall be applied by the Concessionaire for meeting the Total Project Cost (the “**Equity Support**”).

25.2.2 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 150% (one hundred and fifty per cent) of the Equity, and shall be further restricted to a sum not exceeding 30% (thirty per cent) of the Total Project Cost. For the avoidance of doubt, the Total Project Cost to be reckoned for the purposes of this Clause 25.2.2 shall include Equity Support.

25.2.3 Equity Support shall be due and payable to the Concessionaire after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Senior Lenders under the Financing Agreements. 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 Concessionaire along with necessary particulars.

25.2.4 In the event of occurrence of a Concessionaire Default, disbursement of Equity Support shall be suspended till such Concessionaire Default has been cured by the Concessionaire.

25.2.5 Subject to the provisions of the Scheme of Financial Support to Public Private Partnership in Infrastructure as notified by the Central Government (the “**Scheme for Financial Assistance**”), the Authority shall, for funding the Grant specified in Clause 25.1.1, use its best endeavours and provide all reasonable support to the Concessionaire for obtaining viability gap funding under the Scheme for Financial Assistance. For the avoidance of doubt, it is expressly agreed that in the event of the Concessionaire being able to receive such viability gap funding for the Project, the same shall, for the purposes of this Agreement be deemed to be Grant by the Authority hereunder, to be disbursed in accordance with the provisions of the Scheme for Financial Assistance. It is further agreed that the Authority shall at all times discharge its obligation to disburse Grant under and in accordance with this

Article 25 whether or not funds are disbursed to the Concessionaire under the Scheme for Financial Assistance.

25.3 O&M Support

- 25.3.1 The balance of the Grant, if any, remaining after disbursement of the Equity Support shall be disbursed to the Concessionaire in accordance with Clause 25.3.2 for meeting O&M Expenses and Debt Service of the Project (the “**O&M Support**”).
- 25.3.2 The O&M Support shall be disbursed by the Authority in quarterly instalments and the first such instalment shall be released within 90 (ninety) days of COD. Each instalment shall be a sum equal to 7.5% (seven point five per cent) of the Equity Support and such instalments shall be disbursed by the Authority until the Grant is exhausted.

ARTICLE 26

CONCESSION FEE

26.1 Concession Fee

In consideration of the grant of Concession, the Concessionaire shall pay to the Authority by way of concession fee a sum of Re. 1 (Rupee one) per annum and the Premium specified in Clause 26.2 (the “**Concession Fee**”).

26.2 Premium

26.2.1 Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority for the year commencing from the 15th (fifteenth) anniversary of COD, a premium (the “**Premium**”) in the form of an additional Concession Fee equal to 1% (one per cent) of the total Realisable Fee during that year, and for each subsequent year thereafter, the Premium shall be determined by increasing the proportion of Premium to the total Realisable Fee in the respective year by an additional 1% (one per cent) as compared to the immediately preceding year. For the avoidance of doubt, and by way of illustration, the Premium for the 2nd (second) and 3rd (third) years after commencement of the payment of Premium hereunder shall be equal to 2% (two per cent) and 3% (three per cent) respectively of the total Realisable Fee for the respective years.

26.2.2 The Premium payable under Clause 26.2.1 shall be deemed to be part of the Concession Fee for the purposes of this Agreement.

26.2.3 Notwithstanding anything to the contrary contained in Clause 26.2.1, but subject to Clause 29.2.2, the Premium payable by the Concessionaire under this Article 26 shall at all times be subject to a ceiling of 40% (forty per cent) of the total Realisable Fee in the respective year.

26.3 Determination of Concession Fee

Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and undertakes that the total Realisable Fee for the purposes of computing the Concession Fee under this Article 26 shall be determined on the express understanding that in the first year following the COD, the Realisable Fee shall be deemed to be the higher of (a) the actual Fee realised by the Concessionaire and (b) Rs. 100,00,00,000 (Rupees one hundred crore); and that the Realisable Fee for computing the Concession Fee for each subsequent year shall be deemed to be the higher of (a) the actual Fee and (b) 3% (three per cent) greater than the Realisable Fee reckoned hereunder in the immediately preceding year.

26.4 Payment of Concession Fee

The Concession Fee payable under the provisions of this Article 26 shall be due and payable in monthly instalments. Within 7 (seven) days of the close of each month, the Concessionaire shall pay to the Authority against the Concession Fee, a provisional amount calculated on the basis of total Realisable Fee of the

immediately preceding month, and final settlement thereof, based on audited accounts of the Concessionaire, shall be made within 120 (one hundred and twenty) days of completion of the respective Accounting Year.

26.5 Verification of Realisable Fee

- 26.5.1 The Authority may, in order to satisfy itself that the Concessionaire is reporting its Realisable Fee honestly and faithfully, depute its representatives to the Port and the offices of the Concessionaire, and undertake such other measures and actions as it may deem necessary, to ascertain the actual Fee revenues. For the avoidance of doubt, the scope of this Clause 26.5.1 may include detection of diversion, if any, of the Concessionaire's revenues to any Associate or other person and/ or any other act or omission which may result in concealing or understating such revenues.
- 26.5.2 If the verification of Fee revenues pursuant to this Clause 26.5 demonstrates that the Realisable Fee is more than the amount reported by the Concessionaire, and if the Average Daily Fee revenue determined under this Clause 26.5 exceeds the average daily Realisable Fee reported by the Concessionaire during the preceding month by 1% (one per cent) thereof, the difference between such Fee revenue and Realisable Fee shall be multiplied by 180 (one hundred and eighty) and the product thereof shall be paid as Damages by the Concessionaire to the Authority, and in the event of any Dispute relating to Damages, the Dispute Resolution Procedure shall apply. For the avoidance of doubt, it is agreed that seasonal variations in traffic volume shall be determined by the Independent Engineer on the basis of past trends and other relevant information, and due weightage shall be assigned to such variations in computing the Realisable Fee under this Clause 26.5.2.

ARTICLE 27

USER FEE

27.1 Collection and appropriation of Fee

- 27.1.1 On and from the COD and till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fee from the Users in accordance with this Agreement and the Fee Schedule set forth in Schedule-Q; provided that for ease of payment and collection, the total amount of Fee to be paid by a User shall be rounded off to the nearest Rs. 10 (Rupees ten); provided further that the Concessionaire may determine and collect Fee at such lower rates as it may, by public notice to the Users, specify in respect of all or any category of Users.
- 27.1.2 For any goods or services not specified in the Fee Schedule, the Concessionaire shall specify the Fee not exceeding the rates prevalent from time to time in other similar ports in India and Asia.
- 27.1.3 The Concessionaire acknowledges and agrees that upon payment of Fee, any User shall be entitled to use the Port and the Concessionaire shall not place, or cause to be placed, any restriction on such use, except to the extent specified in any Applicable Law, Applicable Permit or the provisions of this Agreement.
- 27.1.4 The Concessionaire acknowledges and agrees that any User who is not liable for payment of the Fee shall be entitled to use the Port without any restrictions, except to the extent specified in any Applicable Law, Applicable Permit or the provisions of this Agreement. For the avoidance of doubt, the Concessionaire hereby acknowledges that Exempted Vessels are not liable for payment of Fee.

27.2 Revision of Fee

- 27.2.1 The Parties hereto acknowledge and agree that in accordance with the Fee Schedule, the Fee specified therein as applicable on the Bid Date (the “**Base Fee**”) shall be revised annually on April 1 in accordance with the provisions of the Fee Schedule.
- 27.2.2 The Concessionaire may at any time after the 7th (seventh) anniversary of the Appointed Date review the Fee and modify it to adjust for any significant and unforeseen event if such event has caused a material effect on the operation of the Port; provided that such review shall not be undertaken more than once in a period of 1 (one) year.
- 27.2.3 The Parties hereto expressly agree that any change in scope or other modifications in the Port that were not contemplated in this Agreement and which require a capital expenditure of Rs. 50 (Rupees fifty) crore or more shall, notwithstanding anything contained in Article 16, be eligible for revision of Fee, and in the event of such revision, the liability of the Authority under Article 16 shall be waived.
- 27.2.4 The Concessionaire hereby acknowledges and agrees that it is not entitled to any revision of Fee or other relief from the Authority or any Government

Instrumentality in any form or manner, save and except in accordance with the express provisions of this Agreement.

27.3 Determination of user charges by competition

27.3.1 If the Authority is at any time satisfied that adequate capacity of port infrastructure is available and the user charges are being determined by free competition, it may, by notification, keep the Fee Schedule in abeyance for such period and on such terms as it may specify. Provided, however, that upon expiry of 10 (ten) years from the Appointed Date, the user charges shall be determined by competition and the Fee Schedule shall remain in abeyance from the 10th (tenth) anniversary of the Appointed Date and until the Transfer Date. Provided further that in the event the Concessionaire seeks no Grant and has instead offered a Premium under and in accordance with the provisions of Article 25, the Fee Schedule shall remain in abeyance from the 7th (seventh) anniversary of the Appointed Date and until the Transfer Date.

27.3.2 Notwithstanding anything to the contrary contained in this Article 27, in the event it is determined by the Authority that the available capacity in the ports of the region is insufficient to assure the benefits of competition to Users, the Authority may by notice, specify a cap on the charges that may be levied and recovered by the Concessionaire, such cap being equivalent to 125% (one hundred and twenty five per cent) of the Fee recoverable under the provisions of Schedule-Q and such notice shall have force and effect for a period not exceeding 1 (one) year at a time.

27.4 Notice of Fee rates

27.4.1 The Concessionaire shall, from time to time, inform the Authority of the applicable rates of Fee. The Fee rates shall be communicated to the Authority by a notice to be delivered at least 15 (fifteen) days prior to the revision of Fee under and in accordance with the Fee Schedule.

27.4.2 The Concessionaire shall not revise or collect any amounts in excess of the rates of Fee payable under the Fee Schedule. In the event any excess amounts are collected by or on behalf of the Concessionaire, it shall, upon receiving a notice to this effect from the Authority, refund such excess amounts to the Authority along with Damages equal to 10% (ten per cent) thereof.

27.5 Vessel related charges

All charges levied on and payable to the Concessionaire for a vessel using the Access Channel, Entrance Channel and the harbour shall be determined by the Concessionaire from time to time in accordance with Applicable Laws.

ARTICLE 28

REVENUE SHORTFALL LOAN

28.1 Revenue Shortfall Loan

- 28.1.1 If the Realisable Fee in any Accounting Year shall fall short of the Subsistence Revenue as a result of an Indirect Political Event, a Political Event or an Authority Default, as the case may be, the Authority shall, upon request of the Concessionaire, provide a loan for meeting such shortfall (the “**Revenue Shortfall Loan**”) at an interest rate equal to 2% (two per cent) above the Bank Rate.
- 28.1.2 If the half-yearly results of the Concessionaire indicate that the shortfall referred to in Clause 28.1.1 and contemplated for an Accounting Year has arisen in respect of the first 6 (six) months thereof, the Concessionaire shall be entitled to a provisional Revenue Shortfall Loan; provided that, no later than 60 (sixty) days after the close of such Accounting Year, the Concessionaire shall either repay the provisional loan with interest or adjust it against the Revenue Shortfall Loan, if any, as may be due to it under this Clause 28.1.
- 28.1.3 The Authority shall disburse the Revenue Shortfall Loan or the provisional Revenue Shortfall Loan, as the case may be, within 30 (thirty) days of receiving a valid request from the Concessionaire along with the particulars thereof including a detailed account of the Indirect Political Event, Political Event or the Authority Default, as the case may be, and its impact on the collection of Fee.

28.2 Repayment of Revenue Shortfall Loan

A sum equal to 50% (fifty per cent) of the surplus in excess of the Subsistence Revenue, as and when it accrues, shall be earmarked for repayment of the Revenue Shortfall Loan and interest thereon, and paid by the Concessionaire to the Authority within 90 (ninety) days of the close of the Accounting Year in which such profits have been made; provided that the Concessionaire shall repay the entire Revenue Shortfall Loan and interest thereon no later than one year prior to the expiry of the Concession Period and in the event that any sum remains due or outstanding at any time during such period of one year, the Authority shall be entitled to terminate this Agreement forthwith. For the avoidance of doubt, it is agreed that the repayment of Revenue Shortfall Loan shall be in accordance with and subject to the provisions of Article 32.

ARTICLE 29

EFFECT OF VARIATIONS IN TRAFFIC GROWTH

29.1 Effect of variations in traffic growth

- 29.1.1 The Authority and the Concessionaire acknowledge that traffic equivalent to 60% (sixty per cent) of the Capacity of the Port is estimated to be 6,00,000 (six lakh) TEUs per annum (the “**Target Traffic**”), and hereby agree that for determining the modifications to the Concession Period under this Article 29, the actual traffic handled on the Port shall be derived by computing the annual average of the traffic for a period of 20 (twenty) years from COD in accordance with Clause 22.3 (the “**Actual Average Traffic**”).
- 29.1.2 In the event that the Actual Average Traffic shall have fallen short of the Target Traffic by more than 5% (five per cent) thereof or exceeded the Target Traffic by more than 5% (five per cent) thereof, the Concession Period shall be deemed to be modified in accordance with Clause 29.2. For the avoidance of doubt, in the event of any Dispute relating to Actual Average Traffic, the Dispute Resolution Procedure shall apply.

29.2 Modification in the Concession Period

- 29.2.1 Subject to the provisions of Clause 29.1.2, in the event that the average of Actual Average Traffic for a period of 20 (twenty) years from COD shall have fallen short of the Target Traffic, then for every 2% (two per cent) shortfall as compared to the Target Traffic, the Concession Period shall, subject to payment of Concession Fee in accordance with this Agreement, be increased by one year; provided that such increase in Concession Period shall not in any case exceed 10 (ten) years. For the avoidance of doubt, and by way of illustration, it is agreed that in the event of a shortfall of 10.6% (ten point six per cent) in Target Traffic, the Concession Period shall be increased by 5 (five) years.
- 29.2.2 Subject to the provisions of Clause 29.1.2, in the event Actual Average Traffic shall have exceeded the Target Traffic, then for every 2% (two per cent) excess as compared to the Target Traffic, the Concession Period shall be reduced by 6 (six) months; provided that such reduction in Concession Period shall not in any case exceed 3 (three) years. For the avoidance of doubt and by way of illustration, it is agreed that in the event of an excess of 6.7% (six point seven per cent) in Target Traffic, the Concession Period shall be reduced by 18 (eighteen) months:

Provided further that in lieu of a reduction in Concession Period under this Clause 29.2.2, the Concessionaire may elect to pay, in addition to the Concession Fee that would be due and payable if the Concession Period were not reduced hereunder, a further premium equal to 10% (ten per cent) of the Realisable Fee in the respective years, and upon notice given to this effect by the Concessionaire no later than 2 (two) years prior to the Transfer Date contemplated under this Clause 29.2.2, the Authority shall waive the reduction in Concession Period hereunder and recover the Concession Fee and the aforesaid premium for the period waived hereunder.

ARTICLE 30

COMMISSIONING OF COMPETING PORT

30.1 Restriction on commissioning of Competing Port

30.1.1 Notwithstanding anything to the contrary contained in this Agreement but subject always to Clause 30.2, the Authority shall not commission or operate, and shall procure that no Government Instrumentality shall commission or operate or cause to be commissioned or operated, a new port within 100 (one hundred) kilometres of the Port (the “**Competing Port**”) for use by traffic at any time before the 15th (fifteenth) anniversary of the Appointed Date; provided that the restriction herein shall not apply if the average throughput exceeds 90% (ninety per cent) of the existing Capacity of the Port in any year.

30.1.2 If the Authority shall be in breach of the provisions of Clause 30.1.1, the Concessionaire shall, without prejudice to its other rights and remedies under this Agreement including Termination thereof, be entitled to modification of the Concession Period under and in accordance with the provisions of Clause 30.2.

30.2 Modification in the Concession Period

30.2.1 In the event of the Authority commissioning or operating, or causing the commissioning or operation of any Competing Port, in breach of the provisions of Clause 30.1, the Concessionaire shall be entitled to an additional concession period, which shall be 3 (three) times in duration compared to the period between the commissioning or operation of the Competing Port and the 15th (fifteenth) anniversary of the Appointed Date. For the avoidance of doubt, if the Competing Port is commissioned or operated on the 14th (fourteenth) anniversary, the Concession Period shall be extended by 3 (three) years and such extension shall be independent of the modification, if any, under Article 29.

30.2.2 If the Concession Period is to be increased in accordance with the provisions of this Clause 30.2, the same shall be added to the Concession Period due to the Concessionaire under and in accordance with all other provisions of this Agreement, save and except the provisions relating to Termination.

30.3 Minimum Fee for Competing Port

The Authority agrees and undertakes to procure that the user fee to be specified for the period prior to the 15th (fifteenth) anniversary of the Appointed Date, in relation to any vessel or class of vessels using the Competing Port, shall at no time during such period be less than the User Fee prescribed for and in respect of the Port.

ARTICLE 31

PORT ESTATE DEVELOPMENT

31.1 Development of Port Estate

31.1.1 The Concessionaire shall undertake Port Estate Development on the land specified in Schedule–A, subject to the conditions stipulated in Schedule–B and Schedule–D, and to exploit such development for commercial purposes with the right to sublicense any or all parts thereof by means of Project Agreements.

31.1.2 The Concessionaire shall undertake or cause to be undertaken at its cost and in accordance with the provisions of this Agreement, Applicable Laws and Good Industry Practice, the development and maintenance of infrastructure such as roads, electric supply, water supply, sewerage and drainage systems forming part of Port Estate Development.

31.2 Operation and maintenance of Port Estate Development

The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Good Industry Practice in the operation, maintenance and management of Port Estate Development and shall make commercial use thereof subject to the provisions of this Agreement and Applicable Laws.

31.3 Costs, taxes and revenues

31.3.1 All costs, expenses, taxes, cess, fees and charges relating to Port Estate Development, other than taxes on property, shall be borne by the Concessionaire. For the avoidance of doubt, any taxes on property payable by the Authority to the extent arising out of any development undertaken by the Concessionaire, shall be paid by the Authority in accordance with Applicable Laws and reimbursed by the Concessionaire to the Authority within a period of 60 (sixty) days of receiving a notice from the Authority along with necessary particulars thereof.

31.3.2 All revenues accruing from Port Estate Development shall be appropriated by the Concessionaire in accordance with the provisions of this Agreement and Applicable Laws.

31.4 Restrictions on Floor Space Index (FSI)

Subject to the provisions of the Master Plan, the Floor Space Index (FSI) of Port Estate Development shall be the lower of 2.5 (two point five) and the limit specified by the local authorities under Applicable Laws. For the avoidance of doubt, the FSI of 2.5 (two point five) referred to hereinabove shall be computed with reference to the total area earmarked in the Master Plan as Port Estate Development, but excluding the areas reserved for roads, parks and other common facilities and amenities.

31.5 Sub-licensing of Port Estate Development

- 31.5.1 Subject to the provisions of Clause 5.2 and this Article 31, the Concessionaire may sub-license the Project Assets comprising Port Estate Development such that the period and validity of such sub-license shall not extend beyond the period specified in Clause 31.6.
- 31.5.2 Notwithstanding anything to the contrary contained in Clause 31.5.1, the Concessionaire shall not sub-license, assign or in any manner create an Encumbrance on any Project Asset forming part of Port Estate Development at any time prior to the 2nd (second) anniversary of the Appointed Date. Provided, however, that the restraint hereunder shall not apply to advertising or to any other Encumbrance created for a period not exceeding 6 (six) months. For the avoidance of doubt, the restriction imposed herein shall not apply to assignment under the Substitution Agreement.
- 31.5.3 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 31.5.2, the Concessionaire shall not sub-license, assign or in any manner create an Encumbrance on any Project Asset forming part of Port Estate Development without prior written approval of the Authority, which approval the Authority may, in its discretion, deny only if such sub-license, assignment or Encumbrance has or may have a material adverse effect on the rights and obligations of the Authority under this Agreement or Applicable Laws; provided that the provisions of this Clause 31.5.3 shall not apply where the Concessionaire grants a sub-license for a cumulative period, including any renewals thereof, not exceeding 11 (eleven) months. For the avoidance of doubt, it is agreed that if the Authority does not deny the approval required under this Clause 31.5.3 within a period of 60 (sixty) days from the date of receiving a notice along with full particulars and documents from the Concessionaire, the approval shall be deemed to have been granted to the extent such sub-license, assignment or Encumbrance, as the case may be, is in accordance with the provisions of this Agreement.
- 31.5.4 The Concessionaire agrees and undertakes that in respect of any sub-license, assignment or other Encumbrance on any Project Asset forming part of Port Estate Development, it is entitled to receive a monthly fee, charge, rent or revenue share, as the case may be, and shall not accept any other amount, whether by way of security, deposit, loan, advance or under any other head whatsoever, that exceeds the payment due to the Concessionaire for and in respect of the following year by way of fee, charge, rent or revenue share in respect of such sub-license, assignment or other Encumbrance. For the avoidance of doubt, the Concessionaire agrees to procure that the consideration payable to it for any sub-license, assignment or other Encumbrance shall accrue evenly over the Concession Period and shall be payable no less frequently than once every quarter; provided that nothing in this Article 31 shall prohibit the Concessionaire from adjusting the whole or any part of the consideration in proportion to the fluctuations in the grantee's revenues or profits over the Concession Period or from specifying an annual increase not exceeding 12% (twelve per cent) per annum in such consideration.

31.5.5 In the event of any difference or disagreement between the Parties in matters arising out of the provisions of this Clause 31.5, the Dispute Resolution Procedure shall apply.

31.6 Rights of sub-licencees after Termination

The Parties expressly acknowledge and agree that the Concessionaire may, in its discretion, grant sub-licences for Port Estate Development upto the maximum period permissible under Clause 3.1.1, which shall include the extended period specified in the first Proviso of that Clause. The Parties further agree that in the event of Termination prior to expiry of such maximum permissible period, the tenure of the sub-licences and the rights of the sub-licencees shall continue to subsist as if the sub-licences were granted by the Authority, and the Authority shall, for the remaining period of each sub-licence, be deemed to be the grantor of the sub-licence by stepping into such sub-licence in pursuance of the Covenant referred to in Clause 5.2.4. For the avoidance of doubt and by way of illustration, if the Concession Period including the extended period is 60 (sixty) years and the Concession Agreement is terminated prior to the 20th (twentieth) anniversary of the Appointed Date, the tenure of a sub-licence shall extend upto the earlier of the term specified in such sub-licence and the 60th (sixtieth) anniversary of the Appointed Date.

31.7 Compliance with Applicable Laws

The Concessionaire agrees and undertakes that it shall, in respect of Port Estate Development, at all times conform to Applicable Laws and the rules, regulations or by-laws made thereunder relating to buildings, structures, road works, open spaces, electric supply, water supply, sewerage and other like matters.

31.8 Commercial advertisement or display

The Concessionaire may undertake or cause to be undertaken commercial advertising or display on Port Estate Development in conformity with Applicable Laws and the provisions of this Agreement.

31.9 Other Business of the Concessionaire

31.9.1 The Concessionaire may, in accordance with the provisions of Applicable Laws, engage in any business for the optimum utilisation of the Project Assets, including assets created for and in respect of such business (the “**Other Business**”). For the avoidance of doubt, it is agreed that Port Estate Development undertaken by the Concessionaire in accordance with the provisions of this Agreement shall be deemed to be included in Other Business.

31.9.2 The Concessionaire shall pay to the Authority, commencing from the 7th (seventh) anniversary of COD, 10% (ten per cent) of the gross revenues, including the proceeds of any rentals, deposits, capital receipts or insurance claims, received from the Other Business in each month (the “**Revenue Share from Other Business**”). Provided, however, that in the event of any sale of goods or commodities, or provision of any services by the Concessionaire, only 10% (ten per cent) of the proceeds thereof shall be deemed to be gross revenues of the

Concessionaire for the purposes of this Clause 31.9.2, and revenue share on such gross revenues shall be payable by the Concessionaire to the Authority under this Clause 31.9.2.

31.9.3 In the event of any dispute relating to the Revenue Share from Other Business, the Dispute Resolution Procedure shall apply.

31.10 Revenue Statement

31.10.1 During the Operation Period, the Concessionaire shall furnish to the Authority, within 7 (seven) days of completion of each month, a statement of gross revenues received from Other Business, substantially in the form set forth in Schedule-R (the “**Revenue Statement for Other Business**”). The Concessionaire shall also furnish to the Authority such other information as the Authority may reasonably require, at specified intervals, in discharge of its statutory functions and exercise of its contractual rights hereunder.

31.10.2 The Concessionaire shall, for each Accounting year, consolidate the Revenue Statements for Other Business and provide 2 (two) copies thereof, duly certified by the Statutory Auditor, to the Authority within 60 (sixty) days of the close of that Accounting Year.

ARTICLE 32
ESCROW ACCOUNT

32.1 Escrow Account

32.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the “**Escrow Bank**”) in accordance with this Agreement read with the Escrow Agreement.

32.1.2 The nature and scope of the Escrow Account are fully described in the agreement (the “**Escrow Agreement**”) to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders’ Representative, which shall be substantially in the form set forth in Schedule-S.

32.2 Deposits into Escrow Account

The Concessionaire shall deposit or cause to be deposited the following inflows and receipts into the Escrow Account:

- (a) all funds constituting the Financial Package;
- (b) all Fee and any other revenues from or in respect of the Port, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and
- (c) all payments by the Authority, after deduction of any outstanding Concession Fee:

Provided that the Senior Lenders may make direct disbursements to the EPC Contractor in accordance with the express provisions contained in this behalf in the Financing Agreements.

32.3 Withdrawals during Concession Period

32.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Port, excluding Port Estate Development;
- (b) all payments relating to construction of the Port, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

- (d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (e) Concession Fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan;
- (h) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire.

32.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 32.3.1, except with the prior written approval of the Authority.

32.4 Withdrawals upon Termination

32.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall, upon Termination, be appropriated in the following order:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Port, excluding Port Estate Development;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding Concession Fee;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including Premium and repayment of Revenue Shortfall Loan;
- (e) retention and payments relating to the liability for defects and deficiencies set forth in Article 40;
- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under this Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that no appropriations shall be made under Sub-clause (j) of this Clause 32.4.1 until a Vesting Certificate has been issued by the Authority under the provisions of Article 39.

32.4.2 The provisions of this Article 32 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 32.4.1 have been discharged.

ARTICLE 33
INSURANCE

33.1 Insurance during Concession Period

The Concessionaire shall effect and maintain at its own cost, during the Construction Period and the Operation Period, such insurances for such maximum sums as may be required under the Financing Agreements, and Applicable Laws, and such insurances as may be necessary or prudent in accordance with Good Industry Practice. The Concessionaire shall also effect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the Authority as a consequence of any act or omission of the Concessionaire during the Construction Period. The Concessionaire shall procure that in each insurance policy, the Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

33.2 Insurance Cover

Without prejudice to the provisions contained in Clause 33.1, the Concessionaire shall, during the Operation Period, maintain Insurance Cover including but not limited to the following:

- (a) Loss, damage or destruction of the Project Assets, including assets handed over by the Authority to the Concessionaire, at replacement value;
- (b) comprehensive third party liability insurance including injury to or death of personnel of the Authority or others who may enter the Port;
- (c) the Concessionaire's general liability arising out of the Concession;
- (d) liability to third parties for goods or property damage;
- (e) workmen's compensation insurance; and
- (f) any other insurance that may be necessary to protect the Concessionaire and its employees, including all Force Majeure Events that are insurable at commercially reasonable premiums and not otherwise covered in items (a) to (e) above.

33.3 Notice to the Authority

No later than 45 (forty five) days prior to commencement of the Construction Period or the Operation Period, as the case may be, the Concessionaire shall by notice furnish to the Authority, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 33. Within 30 (thirty) days of receipt of such notice, the Authority may require the Concessionaire to effect and maintain such other insurances as may be necessary

pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

33.4 Evidence of Insurance Cover

All insurances obtained by the Concessionaire in accordance with this Article 33 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Concessionaire shall furnish to the Authority, notarised true copies of the certificate(s) of insurance, copies of insurance policies and premia payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty five) days after notice of such proposed cancellation, modification or non-renewal has been delivered by the Concessionaire to the Authority.

33.5 Remedy for failure to insure

If the Concessionaire shall fail to effect and keep in force all insurances for which it is responsible pursuant hereto, the Authority shall have the option to either keep in force any such insurances, and pay such premia and recover the costs thereof from the Concessionaire, or in the event of computation of a Termination Payment, treat an amount equal to the Insurance Cover as deemed to have been received by the Concessionaire.

33.6 Waiver of subrogation

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this Article 33 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the Authority, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

33.7 Concessionaire's waiver

The Concessionaire hereby further releases, assigns and waives any and all rights of subrogation or recovery against, inter alia, the Authority and its assigns, undertakings and their subsidiaries, affiliates, employees, successors, insurers and underwriters, which the Concessionaire may otherwise have or acquire in or from or in any way connected with any loss, liability or obligation covered by policies of insurance maintained or required to be maintained by the Concessionaire pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

33.8 Application of insurance proceeds

The proceeds from all insurance claims, except life and injury, shall be paid to the Concessionaire by credit to the Escrow Account and it shall, notwithstanding anything to the contrary contained in Clause 32.3, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, improvement and delivery of the Port, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

33.9 Compliance with conditions of insurance policies

The Concessionaire expressly acknowledges and undertakes to fully indemnify the Authority from and against all losses and claims arising from the Concessionaire's failure to comply with conditions imposed by the insurance policies effected in accordance with this Agreement.

ARTICLE 34

ACCOUNTS AND AUDIT

34.1 Audited accounts

- 34.1.1 The Concessionaire shall maintain books of accounts recording all its receipts (including all Realisable Fees and other revenues derived/collected by it from or on account of the Port and/or its use), income, expenditure, payments (including payments from the Escrow Account), assets and liabilities, in accordance with this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits. The Concessionaire shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statement and Profit and Loss Account, along with a report thereon by its Statutory Auditors, within 90 (ninety) days of the close of the Accounting Year to which they pertain and such audited accounts, save and except where expressly provided to the contrary, shall form the basis of payments by either Party under this Agreement. The Authority shall have the right to inspect the records of the Concessionaire during office hours and require copies of relevant extracts of books of accounts, duly certified by the Statutory Auditors, to be provided to the Authority for verification of basis of payments, and in the event of any discrepancy or error being found, the same shall be rectified and such rectified account shall form the basis of payments by either Party under this Agreement.
- 34.1.2 The Concessionaire shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the Authority its unaudited financial results in respect of the preceding quarter, in the manner and form prescribed by the Securities and Exchange Board of India for publication of quarterly results by the companies listed on a stock exchange.
- 34.1.3 On or before the thirty-first day of May each Year, the Concessionaire shall provide to the Authority, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarised information on (a) the traffic count for each category of vessels and cargo using the Port and liable for payment of Fee therefor, (b) Fee charged and received, Realisable Fee and other revenues derived from the Port, and (c) such other information as the Authority may reasonably require.

34.2 Appointment of auditors

- 34.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 5 (five) reputable firms of chartered accountants (the “**Panel of Chartered Accountants**”), such list to be prepared substantially in accordance with the criteria set forth in Schedule-T. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.
- 34.2.2 The Concessionaire may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to the Authority, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered Accountants.

34.2.3 Notwithstanding anything to the contrary contained in this Agreement, the Authority shall have the right, but not the obligation, to appoint at its cost from time to time and at anytime, another firm (the “**Additional Auditors**”) from the Panel of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.

34.2.4 In the event that the Grant exceeds 20% (twenty per cent) of the Total Project Cost, the Authority shall have the right, but not the obligation, to appoint at its cost, for the duration of the Construction Period, another firm (the “**Concurrent Auditors**”) from the Panel of Chartered Accountants to undertake concurrent audit of the Concessionaire’s accounts.

34.3 Certification of claims by Statutory Auditors

Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business including the submission of Monthly Fee Statements under Clause 19.5.

34.4 Set-off

In the event any amount is due and payable by the Authority to the Concessionaire, it may set-off any sums payable to it by the Concessionaire and pay the balance remaining. Any exercise by the Authority of its rights under this Clause 34.4 shall be without prejudice to any other rights or remedies available to it under this Agreement or otherwise.

34.5 Dispute resolution

In the event of there being any difference between the findings of the Additional Auditors or the Concurrent Auditors, as the case may be, and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the Authority by recourse to the Dispute Resolution Procedure.

Part V

Force Majeure and Termination

ARTICLE 35

FORCE MAJEURE

35.1 Force Majeure

As used in this Agreement, the expression “**Force Majeure**” or “**Force Majeure Event**” shall, save and except as expressly provided otherwise, mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 35.2, 35.3 and 35.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the “**Affected Party**”) of its obligations under this Agreement and which act or event (a) is beyond the reasonable control of the Affected Party, and (b) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (c) has Material Adverse Effect on the Affected Party.

35.2 Non-Political Event

A Non-Political Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Port for a continuous period of 24 (twenty four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Clause 35.3;
- (c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Concessionaire in any proceedings for reasons other than (i) failure of the Concessionaire to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Authority;
- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not reasonably have been expected to be discovered through a site inspection; or

- (f) any event or circumstances of a nature analogous to any of the foregoing.

35.3 Indirect Political Event

An Indirect Political Event shall mean one or more of the following acts or events:

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- (b) any political or economic upheaval, disturbance, movement, struggle or similar occurrence which could not have been anticipated or foreseen by a prudent person and which causes the construction or operation of the Project to be financially unviable or otherwise not feasible;
- (c) industry-wide or State-wide strikes or industrial action for a continuous period of 24 (twenty four) hours and exceeding an aggregate period of 7 (seven) days in an Accounting Year;
- (d) any civil commotion, boycott or political agitation which prevents collection of Fee by the Concessionaire for an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (e) failure of the Authority to permit the Concessionaire to continue the Construction Works, with or without modifications, in the event of stoppage of such works after discovery of any geological or archaeological finds or for any other reason;
- (f) any failure or delay of a Contractor to the extent caused by any Indirect Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (g) any Indirect Political Event that causes a Non-Political Event; or
- (h) any event or circumstances of a nature analogous to any of the foregoing.

35.4 Political Event

A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality:

- (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Article 42 and its effect, in financial terms, exceeds the sum specified in Clause 42.1;
- (b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their

respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;

- (d) any failure or delay of a Contractor but only to the extent caused by another Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; or
- (e) any event or circumstance of a nature analogous to any of the foregoing.

35.5 Duty to report Force Majeure Event

35.5.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 35 with evidence in support thereof;
- (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and
- (d) any other information relevant to the Affected Party's claim.

35.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

35.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 35.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

35.6 Effect of Force Majeure Event on the Concession

35.6.1 Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the period set forth in Clause 4.1 for fulfilment of Conditions Precedent and in Clause 24.1.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event.

35.6.2 At any time after the Appointed Date, if any Force Majeure Event occurs:

- (a) before COD, the Concession Period and the dates set forth in the Project Completion Schedule shall be extended by a period equal in length to the duration for which such Force Majeure Event subsists; or
- (b) after COD, whereupon the Concessionaire is unable to collect Fee despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Fee on account thereof; provided that in the event of reduction in Fee on account of partial inability or suspension, as the case may be, which causes the daily collection to decline below 90% (ninety per cent) of the Average Daily Fee, the Authority shall extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of doubt, loss of 25% (twenty five per cent) in collection of Fee as compared to the Average Daily Fee for 4 (four) days shall entitle the Concessionaire to extension of 1 (one) day in the Concession Period.

35.7 Allocation of costs arising out of Force Majeure

35.7.1 Upon occurrence of any Force Majeure Event prior to the Appointed Date, the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs thereof.

35.7.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the “**Force Majeure Costs**”) shall be allocated and paid as follows:

- (a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof;
- (b) upon occurrence of an Indirect Political Event, all Force Majeure Costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Concessionaire, and to the extent Force Majeure Costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the Authority to the Concessionaire; and
- (c) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be reimbursed by the Authority to the Concessionaire.

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent that such information is relevant.

35.7.3 Save and except as expressly provided in this Article 35, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

35.8 Termination Notice for Force Majeure Event

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 35, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

35.9 Termination Payment for Force Majeure Event

35.9.1 If Termination is on account of a Non-Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover.

35.9.2 If Termination is on account of an Indirect Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to:

- (a) Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due;
- (b) 110% (one hundred and ten per cent) of the Adjusted Equity; and
- (c) an amount equivalent to the Additional Termination Payment less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in computation of the amount payable hereunder.

35.9.3 If Termination is on account of a Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount that would be payable under Clause 38.3.2 as if it were an Authority Default.

35.10 Dispute resolution

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in

accordance with the Dispute Resolution Procedure; provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

35.11 Excuse from performance of obligations

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

35.12 Relief for Unforeseen Events

35.12.1 Upon occurrence of an unforeseen event, situation or similar circumstances not contemplated or referred to in this Agreement, and which could not have been foreseen by a prudent and diligent person (the “**Unforeseen Event**”), any Party may by notice inform the other Party of the occurrence of such Unforeseen Event with the particulars thereof and its effects on the costs, expense and revenues of the Project. Within 15 (fifteen) days of such notice, the Parties shall meet and make efforts in good faith to determine if such Unforeseen Event has occurred, and upon reaching agreement on occurrence thereof, deal with it in accordance with the provisions of this Clause 35.12.

35.12.2 Upon determination of the occurrence of an Unforeseen Event, the Parties shall make a reference to a conciliation tribunal which shall comprise one member each to be nominated by both Parties from among persons who have been Judges of a High Court and the conciliators so nominated shall choose a chairperson who has been a Judge of the Supreme Court or Chief Justice of a High Court.

35.12.3 The conciliation tribunal referred to in Clause 35.12.2 shall conduct its proceedings in accordance with the provisions of Article 45 as if it is an arbitration proceeding under that Article, save and except as provided in this Clause 35.12.

35.12.4 The conciliation tribunal referred to in this Clause 35.12 shall conduct preliminary proceedings to satisfy itself that -

- (a) an Unforeseen Event has occurred;
- (b) the effects of such Unforeseen Event cannot be mitigated without a

remedy or relief which is not contemplated in the Agreement; and

- (c) the Unforeseen Event or its effects have not been caused by any Party by any act or omission or its part,

and if the conciliation tribunal is satisfied that each of the conditions specified hereinabove is fulfilled, it shall issue an order to this effect and conduct further proceedings under this Clause 35.12.

35.12.5 Upon completion of the conciliation proceedings referred to in this Clause 35.12, the conciliation tribunal may by a reasoned order make recommendations which shall be:

- (a) based on a fair and transparent justification;
- (b) no greater in scope than is necessary for mitigating the effects of the Unforeseen Event;
- (c) of no greater duration than is necessary for mitigating the effects of the Unforeseen Event; and
- (d) quantified and restricted in terms of relief or remedy.

35.12.6 Within 15 (fifteen) days of receiving the order referred to in Clause 35.12.5, the Parties shall meet and make efforts in good faith to accept, in whole or in part, the relief or remedy recommended by the conciliation tribunal for mitigating the effects of the Unforeseen Event and to procure implementation of the Project in accordance with the provisions of this Agreement. In pursuance hereof, the Parties may enter into a Memorandum of Understanding (the “**MoU**”) setting forth the agreement reached hereunder, and the terms of such MoU shall have force and effect as if they form part of the Agreement.

ARTICLE 36

COMPENSATION FOR BREACH OF AGREEMENT

36.1 Compensation for default by the Concessionaire

Subject to the provisions of Clause 36.6, in the event of the Concessionaire being in material breach or default of this Agreement, it shall pay to the Authority by way of compensation, all direct costs suffered or incurred by the Authority as a consequence of such material breach or default, within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 36.1 for any material breach or default in respect of which Damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the Authority.

36.2 Compensation for default by the Authority

Subject to the provisions of Clause 36.6, in the event of the Authority being in material breach or default of this Agreement at any time after the Appointed Date, it shall pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material breach or default within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material breach or default but shall not include loss of Fee revenues, debt repayment obligations or other consequential losses, and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant.

36.3 Extension of Concession Period

36.3.1 Subject to the provisions of Clause 36.6, in the event that a material breach or default of this Agreement set forth in Clause 36.2 causes delay in achieving COD or leads to suspension of or reduction in the realisation of Fee, as the case may be, the Authority shall, in addition to payment of compensation under Clause 36.2, extend the Concession Period, such extension being equal in duration to the period by which COD was delayed or the collection of Fee remained suspended on account thereof, as the case may be; and in the event of reduction in collection of Fee where the daily collection is less than 90% (ninety per cent) of the Average Daily Fee, the Authority shall, in addition to payment of compensation under Clause 36.2, extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of doubt, loss of 25% (twenty five per cent) in the realisation of Fee as compared to the Average Daily Fee for 4 (four) days shall entitle the Concessionaire to extension of 1 (one) day in the Concession Period.

36.3.2 The Authority acknowledges and agrees that in the event of its failure to grant extension under and in accordance with the provisions of Clause 36.3.1, this Agreement shall, upon expiry of 40 (forty) years from the Appointed Date, be

deemed to have been terminated on account of Authority Default and the Concessionaire shall be entitled to receive Termination Payments in accordance with Article 38.

36.4 Compensation for Competing Ports

36.4.1 Subject to the provisions of Clause 36.6, in the event that a Competing Port is commissioned or operated in breach of this Agreement, the Authority shall pay to the Concessionaire, for each day of breach, compensation in a sum equal to the difference between the Average Daily Fee and the projected daily Fee (the “**Projected Fee**”) until the breach is cured by the Authority or by lapse of time. The Projected Fee hereunder shall be an amount equal to the Average Daily Fee, increased at the close of every month by 0.5% (zero point five per cent) thereof and revised in accordance with Clause 27.2. For the avoidance of doubt, the Average Daily Fee for the purposes of determining the Projected Fee under this Clause 36.4 shall be the amount so determined in respect of the Accounting Year or period, as the case may be, occurring prior to such commissioning or operation of a Competing Port and the Average Daily Fee for the purposes of computing the compensation payable under this Clause 36.4 shall be the amount as determined in respect of the Accounting Year(s) or period, as the case may be, occurring after such commissioning or operation of a Competing Port.

36.4.2 Payment of compensation under this Clause 36.4 shall be deemed to cure the breach of this Agreement so long as the Authority continues to pay compensation hereunder.

36.5 Compensation to be in addition

Compensation payable under this Article 36 shall be in addition to, and without prejudice to, the other rights and remedies of the Parties under this Agreement including Termination thereof.

36.6 Mitigation of costs and damage

The Affected Party shall make all reasonable efforts to mitigate or limit the costs and damage arising out of or as a result of breach of Agreement by the other Party.

ARTICLE 37

SUSPENSION OF CONCESSIONAIRE'S RIGHTS

37.1 Suspension upon Concessionaire Default

Upon occurrence of a Concessionaire Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (a) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect Fee, and other revenues pursuant hereto, and (b) exercise such rights itself and perform the obligations hereunder or authorise any other person to exercise or perform the same on its behalf during such suspension (the "**Suspension**"). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

37.2 Authority to act on behalf of Concessionaire

37.2.1 During the period of Suspension, the Authority shall, on behalf of the Concessionaire, collect all Fee and revenues under and in accordance with this Agreement and deposit the same in the Escrow Account. The Authority shall be entitled to make withdrawals from the Escrow Account for meeting the O&M Expenses and for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses specified in Clause 32.3.

37.2.2 During the period of Suspension hereunder, all rights and liabilities vested in the Concessionaire in accordance with the provisions of this Agreement shall continue to vest in the Concessionaire and all things done or actions taken, including expenditure incurred by the Authority for discharging the obligations of the Concessionaire under and in accordance with this Agreement and the Project Agreements, shall be deemed to have been done or taken for and on behalf of the Concessionaire and the Concessionaire undertakes to indemnify the Authority for all costs incurred during such period. The Concessionaire hereby licences and sub-licences respectively, the Authority or any other person authorised by it under Clause 37.1 to use during Suspension, all Intellectual Property belonging to or licenced to the Concessionaire with respect to the Port and its design, engineering, construction, operation and maintenance, and which is used or created by the Concessionaire in performing its obligations under the Agreement.

37.3 Revocation of Suspension

37.3.1 In the event that the Authority shall have rectified or removed the cause of Suspension within a period not exceeding 90 (ninety) days from the date of Suspension, it shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement. For the avoidance of doubt, the Parties expressly agree that the Authority may, in its discretion, revoke the Suspension at

any time, whether or not the cause of Suspension has been rectified or removed hereunder.

37.3.2 Upon the Concessionaire having cured the Concessionaire Default within a period not exceeding 90 (ninety) days from the date of Suspension, the Authority shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

37.4 Substitution of Concessionaire

At any time during the period of Suspension, the Lenders' Representative, on behalf of Senior Lenders, shall be entitled to substitute the Concessionaire under and in accordance with the Substitution Agreement, and upon receipt of notice thereunder from the Lenders' Representative, the Authority shall withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of Suspension, and any extension thereof under Clause 37.1, for enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

37.5 Termination

37.5.1 At any time during the period of Suspension under this Article 37, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 37.4, the Authority shall, within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 38 as if it is a Concessionaire Default under Clause 38.1.

37.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 37.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Default.

ARTICLE 38
TERMINATION

38.1 Termination for Concessionaire Default

38.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (the “**Concessionaire Default**”), unless the default has occurred as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include the following:

- (a) The Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 15 (fifteen) days;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to meet any Condition Precedent or cure the Concessionaire Default, as the case may be, for which whole or part of the Performance Security was appropriated, within a Cure Period of 120 (one hundred and twenty) days;
- (c) the Concessionaire does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-G and continues to be in default for 120 (one hundred and twenty) days;
- (d) the Concessionaire abandons or manifests intention to abandon the construction or operation of the Port without the prior written consent of the Authority;
- (e) COD does not occur within the period specified in Clause 12.5.3;
- (f) the Punch List items have not been completed within the period set forth in Clause 14.4.1;
- (g) the Concessionaire is in breach of the Maintenance Requirements or the Safety Requirements, as the case may be;
- (h) the Concessionaire fails to achieve or cause to be achieved any single key performance indicator specified in Article 21 for a consecutive period of 3 (three) years or for two separate periods of 2 (two) years each;
- (i) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;
- (j) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;

- (k) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the Authority to undertake Suspension or Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;
- (l) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;
- (m) the Concessionaire creates any Encumbrance in breach of this Agreement;
- (n) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (o) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (p) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (q) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- (r) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets that has a material bearing on the Project;
- (s) the Concessionaire has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;
- (t) a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by a court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:
 - (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;

- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
- (iii) each of the Project Agreements remains in full force and effect;
- (u) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false, incorrect or misleading or the Concessionaire is at any time hereafter found to be in breach thereof;
- (v) the Concessionaire submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
- (w) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement;
- (x) the Concessionaire issues a Termination Notice in violation of the provisions of this Agreement; or
- (y) the Concessionaire commits a default in complying with any other provision of this Agreement if such default causes a Material Adverse Effect on the Authority.

38.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of Clause 38.1.3.

38.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 38.1.2 to inform the Lenders' Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement:

Provided that the Lenders' Representative may, instead of exercising the Senior Lenders' right of substitution, procure that the default specified in the notice is

cured within the aforesaid period of 180 (one hundred and eighty) days, and upon such curing thereof, the Authority shall withdraw its notice referred to above and restore all the rights of the Concessionaire:

Provided further that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate.

38.2 Termination for Authority Default

38.2.1 In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the “**Authority Default**”) unless the default has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure. The defaults referred to herein shall include the following:

- (a) The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;
- (b) the Authority has failed to make any payment to the Concessionaire within the period specified in this Agreement;
- (c) the Authority fails to provide, within a period of 180 (one hundred and eighty) days from the Appointed Date, the Right of Way and other statutory clearances required for construction of the Port on at least 90% (ninety per cent) of the total area of the Port; or
- (d) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

38.2.2 Without prejudice to any other right or remedy which the Concessionaire may have under this Agreement, upon occurrence of an Authority Default, the Concessionaire shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Concessionaire shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

38.3 Termination Payment

38.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) 90% (ninety per cent) of the Debt Due less Insurance Cover; and
- (b) 70% (seventy per cent) of the amount representing the Additional Termination Payment:

Provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due.

For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD, save and except as provided in Clause 38.3.3.

38.3.2 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) Debt Due;
- (b) 150% (one hundred and fifty per cent) of the Adjusted Equity; and
- (c) 115% (one hundred and fifteen per cent) of the amount representing the Additional Termination Payment.

Provided that the Termination Payment shall not be less than an amount equal to the product of 30 (thirty) and the Realisable Fee due and payable for and in respect of the last month of the Concession Period.

38.3.3 Upon Termination on account of Concessionaire Default during the Construction Period, no Termination Payment shall be due and payable for and in respect of expenditure comprising the first 40% (forty per cent) of the Total Project Cost and in the event of expenditure exceeding such 40% (forty per cent) and forming part of Debt Due, the provisions of Clause 38.3.1 shall, to the extent applicable to Debt Due, apply in respect of the expenditure exceeding such 40% (forty per cent). For the avoidance of doubt and by way of illustration, the Parties agree that if the total expenditure incurred prior to Termination is 90% (ninety per cent) of the Total Project Cost, the expenditure eligible for computation of Termination Payment hereunder shall be 50% (fifty per cent) of the Total Project Cost and the Termination Payment due and payable in such event shall not exceed 45% (forty five per cent) of the Total Project Cost. The Parties further agree that for the purposes of this Clause 38.3.3, Total Project Cost shall mean the amount specified in Sub-clause (b) of the definition of Total Project Cost in Clause 49.1. The Parties also agree that for determining the Termination Payment under this Clause 38.3.3, the expenditure comprising the latest Project Milestone shall also be reckoned.

38.3.4 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that

Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

- 38.3.5 Upon Termination on expiry of the Concession Period by efflux of time, Termination Payment equal to the product of 30 (thirty) and the Realisable Fee recovered for and in respect of the last month of the Concession Period shall be due and payable to the Concessionaire; provided that in the event any Project Assets are acquired and installed at the Port after the 30th (thirtieth) anniversary of the Appointed Date, with prior written consent of the Authority, which consent shall not be unreasonably denied, a Termination Payment equal to 80% (eighty per cent) of the Adjusted Depreciated Value of such Project Assets shall, notwithstanding the provisions of Clause 38.5.1, be made by the Authority to the Concessionaire.
- 38.3.6 Notwithstanding anything to the contrary in this Agreement, but subject to the provisions of Clause 38.3.5, in the event any Project Assets, essential for the efficient, economic and safe operation of the Port, shall have been acquired and installed after the 30th (thirtieth) anniversary of the Appointed Date, with prior written consent of the Authority, which consent shall not be unreasonably denied, a sum equal to 80% (eighty per cent) of the Adjusted Depreciated Value thereof shall be deemed to be Debt Due for the purposes of Termination Payment.
- 38.3.7 The Concessionaire expressly agrees that Termination Payment under this Article 38 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

38.4 Extension of Concession Period

Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire may, at any time no earlier than 5 (five) years but no later than 3 (three) years prior to completion of the Concession Period, by a notice issued to the Authority in accordance with the Proviso of Clause 3.1.1, require an extension of the Concession Period as specified therein. In the event of such extension, the Termination Payment specified in Clause 38.3.5 shall not be due and payable to the Concessionaire and upon expiry of the extended Concession Period hereunder, the Port shall vest in the Authority under and in accordance with the provisions of this Agreement, and no Termination Payment shall be due and payable to the Concessionaire for and in respect of the transfer of the Port to the Authority hereunder. For the avoidance of doubt, the Parties agree that in the event an extension is not granted hereunder, the Authority shall pay to the Concessionaire the Termination Payment computed in accordance with the provisions of Clause 38.3.5 and 38.3.6. The Parties further agree that in the event of an extension hereunder, the provisions of this Agreement shall apply *mutatis mutandis* to the extended Concession Period.

38.5 Certain limitations on Termination Payment

- 38.5.1 Termination Payment, not being Additional Termination Payment, due and payable under this Agreement shall be computed with reference to the Debt Due

and Adjusted Equity, as the case may be, in accordance with the provisions of this Agreement. For the avoidance of doubt, the Parties agree that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment. The Parties further agree that in the event such disaggregation is not notified to the Authority, the Equity and Debt Due shall be arrived at by adopting the proportion between debt and equity as specified in the Financing Agreements. The Parties also agree that for the purposes of computing Termination Payment, the Debt Due shall at no time exceed 85% (eighty five per cent) of the Total Project Cost.

38.5.2 The amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. Provided, however, that the provisions of this Clause 38.5.2 shall not apply if the Concessionaire does not notify the particulars of any foreign currency loans within 60 (sixty) days of the date of conversion of such foreign currency loans into Indian currency. Provided further that all borrowings in foreign currency shall be restricted to the financing of Total Project Cost and any borrowings in excess thereof shall not qualify for computation of Termination Payment

38.5.3 Additional Termination Payment due and payable in respect of Specified Assets, not being assets forming part of Port Estate Development or Capacity Augmentation, as the case may be, which are constructed, acquired or installed after the 3rd (third) anniversary of COD but no later than the 30th (thirtieth) anniversary of the Appointed Date shall be limited to the lowest of:

- (a) Adjusted Depreciated Value thereof;
- (b) the replacement value thereof, as assessed by an Approved Valuer, who shall be selected and appointed by the Authority, within 15 (fifteen) days of Termination, for submitting his assessment within 30 (thirty) days of his appointment hereunder; and
- (c) 50% (fifty per cent) of the sum of Total Project Cost and Equity Support, if any.

38.5.4 Additional Termination Payment due and payable in respect of Port Estate Development forming part of Specified Assets shall be limited to the lowest of:

- (a) Adjusted Depreciated Value thereof;
- (b) the replacement value thereof, as assessed by an Approved Valuer, who shall be selected and appointed by the Authority, within 15 (fifteen) days of Termination, for submitting his assessment within 30 (thirty) days of his appointment hereunder; and
- (c) 40% (forty per cent) of the sum of Total Project Cost and Equity Support, if any.

38.5.5 Additional Termination Payment due and payable in respect of Capacity Augmentation forming part of Specified Assets shall be limited to the lowest of:

- (a) Adjusted Depreciated Value thereof;
- (b) the capital cost of Capacity Augmentation as approved by Senior Lenders;
- (c) the actual cost of Capacity Augmentation upon completion thereof; and
- (d) the estimated capital cost of Capacity Augmentation, as reasonably specified by the Authority, in consultation with the Independent Engineer, and prior to commencement of construction thereof.

38.6 Other rights and obligations of the Authority

Upon Termination for any reason whatsoever, the Authority shall:

- (a) take possession and control of the Port forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Port;
- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 39.1; and
- (e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.

38.7 Survival of rights

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 38.3.7, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds,

security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

ARTICLE 39

DIVESTMENT OF RIGHTS AND INTEREST

39.1 Divestment Requirements

39.1.1 Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:

- (a) notify to the Authority forthwith the location and particulars of all Project Assets;
- (b) deliver forthwith the actual or constructive possession of the Port, free and clear of all Encumbrances, save and except to the extent set forth in the Substitution Agreement;
- (c) cure all Project Assets, including the quay wall, roads, bridges, structures and equipment, of all defects and deficiencies so that the Port is compliant with the Maintenance Requirements; provided that in the event of Termination during the Construction Period, all Project Assets shall be handed over on 'as is where is' basis after bringing them to a safe condition;
- (d) deliver and transfer relevant records and reports, Intellectual Property and other licences pertaining to the Port and its design, engineering, construction, operation and maintenance, including all know how, technology programmes and manuals pertaining thereto, and complete 'as built' Drawings as on the Transfer Date. For the avoidance of doubt, the Concessionaire represents and warrants that the Intellectual Property delivered hereunder shall be adequate and complete for the design, engineering, construction, operation and maintenance of the Port and shall be assigned to the Authority free of any Encumbrance;
- (e) transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws;
- (f) execute such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting and assigning all the rights, title and interest of the Concessionaire in the Project Assets, including manufacturers' warranties in respect of any plant or equipment and the right to receive outstanding insurance claims to the extent due and payable to the Authority, absolutely unto the Authority or its nominee; and
- (g) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Concessionaire in the Port, free from all Encumbrances, absolutely unto the Authority or to its nominee.

39.1.2 Subject to the exercise by the Authority of its rights under this Agreement or under any of the Project Agreements to perform or procure the performance by a third party of any of the obligations of the Concessionaire, the Parties shall

continue to perform their obligations under this Agreement, notwithstanding the issuance of any Termination Notice, until the Termination of this Agreement becomes effective in accordance with its terms.

39.2 Inspection and cure

Not earlier than 90 (ninety) days prior to Termination but not later than 15 (fifteen) days prior to the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to a representative of the Concessionaire specifying the time, date and place of such verification and/or inspection, compliance by the Concessionaire with the Maintenance Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire's cost for this purpose. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 40 shall apply, *mutatis mutandis*, in relation to curing of defects or deficiencies under this Article 39.

39.3 Cooperation and assistance on transfer of Project

39.3.1 The Parties shall cooperate on a best effort basis and take all necessary measures, in good faith, to achieve a smooth transfer of the Project in accordance with the provisions of this Agreement so as to protect the safety of and avoid undue delay or inconvenience to the Users, other members of the public or the lawful occupiers of any part of the Site.

39.3.2 The Parties shall provide to each other, 9 (nine) months prior to the Transfer Date in the event of Termination by efflux of time and immediately in the event of either Party conveying to the other Party its intent to issue a Termination Notice, as the case may be, as much information and advice as is reasonably practicable regarding the proposed arrangements for operation of the Project following the Transfer Date. The Concessionaire shall further provide such reasonable advice and assistance as the Authority, its concessionaire or agent may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.

39.3.3 The Authority shall have the option to purchase or hire from the Concessionaire at a fair market value and free from any encumbrance all or any part of the plant and machinery used in connection with the Project but which does not form part of the assets specified in Clause 39.1.1 and is reasonably required in connection with operation of the Project. For the avoidance of doubt, in the event of dispute or difference relating to fair market value, the Dispute Resolution Procedure shall apply.

39.4 Vesting Certificate

The divestment of all rights, title and interest in the Port shall be deemed to be complete on the date when all of the Divestment Requirements have been fulfilled, and the Authority shall, without unreasonable delay, thereupon issue a certificate substantially in the form set forth in Schedule-U (the "**Vesting Certificate**"), which will have the effect of constituting evidence of divestment by the Concessionaire of all of its rights, title and interest in the Port, and their

vesting in the Authority pursuant hereto. It is expressly agreed that any defect or deficiency in the Divestment Requirements shall not in any manner be construed or interpreted as restricting the exercise of any rights by the Authority or its nominee on, or in respect of, the Port on the footing that all Divestment Requirements have been complied with by the Concessionaire.

39.5 Divestment costs etc.

39.5.1 The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Concessionaire in the Project Assets in favour of the Authority upon Termination, save and except that all stamp duties payable on any deeds or Documents executed by the Concessionaire in connection with such divestment shall be borne by the Authority.

39.5.2 In the event of any Dispute relating to matters covered by and under this Article 39, the Dispute Resolution Procedure shall apply.

ARTICLE 40

DEFECTS LIABILITY AFTER TERMINATION

40.1 Liability for defects after Termination

The Concessionaire shall be responsible for all defects and deficiencies in the Port for a period of 120 (one hundred and twenty) days after Termination, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Independent Engineer at the Port during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the Authority in this behalf, the Authority shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Port conform to the Maintenance Requirements. All costs incurred by the Authority hereunder shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the Authority shall be entitled to recover the same from the funds retained in the Escrow Account under the provisions of Clause 40.2 or from the Performance Guarantee provided thereunder. For the avoidance of doubt, the provisions of this Article 40 shall not apply if Termination occurs prior to COD.

40.2 Retention in Escrow Account

- 40.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 40.2.3, a sum equal to 5% (five per cent) of the total Realisable Fee for the year immediately preceding the Transfer Date shall be retained in the Escrow Account for a period of 120 (one hundred and twenty) days after Termination for meeting the liabilities, if any, arising out of or in connection with the provisions of Clause 40.1.
- 40.2.2 Without prejudice to the provisions of Clause 40.2.1, the Independent Engineer shall carry out an inspection of the Port at any time between 210 (two hundred and ten) and 180 (one hundred and eighty) days prior to the Termination and if it recommends that the status of the Port is such that a sum larger than the amount stipulated in Clause 40.2.1 should be retained in the Escrow Account and for a period longer than the aforesaid 120 (one hundred and twenty) days, the amount recommended by the Independent Engineer shall be retained in the Escrow Account for the period specified by it.
- 40.2.3 The Concessionaire may, for the performance of its obligations under this Article 40, provide to the Authority a guarantee from a Bank for a sum equivalent to the amount determined under Clause 40.2.1 or 40.2.2, as the case may be, and for the period specified therein, substantially in the form set forth in Schedule-F (the "Performance Guarantee"), to be modified, *mutatis mutandis*, for this purpose, and the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the required amounts from the Performance Guarantee for undertaking the repairs or rectification at the Concessionaire's risk and cost in accordance with the provisions of this Article 40. Upon furnishing of a Performance Guarantee under this Clause 40.2.3, the

retention of funds in the Escrow Account in terms of Clause 40.2.1 or 40.2.2, as the case may be, shall be dispensed with.

Part VI
Other Provisions

ARTICLE 41

ASSIGNMENT AND CHARGES

41.1 Restrictions on assignment and charges

41.1.1 Subject to Clauses 41.2 and 41.3, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

41.1.2 Subject to the provisions of Clause 41.2, the Concessionaire shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Concessionaire is a party except with prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

41.2 Permitted assignment and charges

41.2.1 The restraints set forth in Clause 41.1 shall not apply to:

- (a) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Port;
- (b) mortgages/pledges/hypothecation of goods/assets other than Project Assets and their related documents of title, arising or created in the ordinary course of business of the Port, and as security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Port. For the avoidance of doubt, the Senior Lenders would be entitled to create a lien on the Escrow Account, subject to and without prejudice to the rights of the Authority under this Agreement;
- (c) assignment of rights, interest and obligations of the Concessionaire to or in favour of the Lenders' Representative as nominee and for the benefit of the Senior Lenders, to the extent covered by and in accordance with the Substitution Agreement as security for financing provided by Senior Lenders under the Financing Agreements; and
- (d) liens or encumbrances required by any Applicable Law.

41.2.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire may, with prior consent of the Authority which consent shall not be unreasonably withheld, hypothecate any movable Project Equipment to its lenders by way of security for any loan extended by them for acquisition of such movable Project Equipment. Provided, however, that the Total Project Cost shall be deemed to be reduced by an amount equal to the nominal value of all such hypothecated Project Equipment. Provided further that upon Termination, such hypothecated Project Equipment shall not be transferred to the Authority, and the Concessionaire shall be entitled to take custody of and remove such hypothecated

Project Equipment. Provided also that the Authority may, upon payment of lenders dues to the extent of hypothecated amount, require the Concessionaire to transfer such hypothecated Project Equipment to the Authority.

41.3 Substitution Agreement

41.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire pursuant to the agreement for substitution of the Concessionaire (the "**Substitution Agreement**") to be entered into amongst the Concessionaire, the Authority and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in Schedule-V.

41.3.2 Upon substitution of the Concessionaire under and in accordance with the Substitution Agreement, the Nominated Company substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations of the Concessionaire under this Agreement as if it were the Concessionaire; provided that where the Concessionaire is in breach of this Agreement on the date of such substitution, the Authority shall by notice grant a Cure Period of 120 (one hundred and twenty) days to the Concessionaire for curing such breach.

41.4 Assignment by the Authority

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

41.5 Mortgage of Site and Project Assets

41.5.1 Notwithstanding anything to the contrary contained in this Agreement, upon request made in this behalf by the Lenders' Representative, the Authority and the Concessionaire shall jointly execute a mortgage deed (the "Mortgage Deed") forthwith for the benefit of the Senior Lenders to provide inter alia for the following:

- (a) As security for Debt Due, the Site and all Project Assets, excluding the Funded Works and the fishing harbour (the "Mortgaged Assets"), shall stand mortgaged in favour of Senior Lenders subject to the terms specified in the Mortgage Deed;
- (b) Senior Lenders shall not exercise or enforce any rights or title over the Mortgaged Assets at any time prior to the expiry of 180 (one hundred and eighty) days from the Transfer Date;
- (c) The charge created over the Mortgaged Assets shall stand released and extinguished upon the Authority making the Termination Payment in accordance with the provisions of the Agreement;

- (d) In the event that Termination Payment is not made before expiry of 180 (one hundred and eighty) days from the Transfer Date, the Senior Lenders shall have the right and entitlement to use or dispose of the Mortgaged Assets for recovery of Termination Payment, and any amounts recovered in excess of the Termination Payment shall be due and payable by the Senior Lenders to the Authority;
- (e) Upon taking over of the Mortgaged Assets by the Senior Lenders in accordance with the Mortgage Deed, the rights and title of the Senior Lenders and Concessionaire for and in respect of recovery of Termination Payment shall be deemed to be discharged and extinguished and the Termination Payment shall be deemed to have been made in full by the Authority under and in accordance with the provisions of the Agreement;
- (f) The Mortgaged Assets shall expressly exclude the Funded Works and fishing harbour; and
- (g) The Mortgage Deed shall expire and cease to have any force or effect upon the earlier of (i) repayment of Debt Due by the Concessionaire; and (ii) the 20th (twentieth) anniversary of COD.

41.5.2 Pursuant to the provisions of Clause 41.5.1, the Lender's Representative shall prepare a draft Mortgage Deed substantially in conformity with this Clause 41.5 and furnish copies to the Authority and the Concessionaire for their review and comments. The Lender's Representative shall consider such comments and send a revised draft to the Authority and the Concessionaire for negotiations in good faith. In the event such negotiations do not conclude in the form of an agreed Mortgage Deed to be executed within 60 (sixty) days of the date of furnishing the first draft hereunder, the Dispute Resolution Procedure shall apply.

ARTICLE 42
CHANGE IN LAW

42.1 Increase in costs

If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 5 crore (Rupees five crore) and 0.5% (zero point five per cent) of the Realisable Fee in any Accounting Year, the Concessionaire may so notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the amount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 42.1 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

42.2 Reduction in costs

If as a result of Change in Law, the Concessionaire benefits from a reduction in costs or increase in net after-tax return or other financial gains, the aggregate financial effect of which exceeds the higher of Rs. 5 crore (Rupees five crore) and 0.5% (zero point five per cent) of the Realisable Fee in any Accounting Year, the Authority may so notify the Concessionaire and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in decreased costs, increase in return or other financial gains as aforesaid. Upon notice by the Authority, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on such amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Authority may by notice require the Concessionaire to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Concessionaire shall pay the amount specified therein to the Authority; provided that if the Concessionaire shall dispute such claim of the Authority, the same shall be settled

in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 42.2 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

42.3 Protection of NPV

Pursuant to the provisions of Clauses 42.1 and 42.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred. For the avoidance of doubt, the Parties expressly agree that for determination of NPV, the discount rate to be used shall be equal to the weighted average rate of interest at which the Concessionaire has raised the Debt Due under its Financing Agreements.

42.4 Restriction on cash compensation

The Parties acknowledge and agree that the demand for cash compensation under this Article 42 shall be restricted to the effect of Change in Law during the respective Accounting Year and shall be made at any time after commencement of such year, but no later than one year from the close of such Accounting Year. Any demand for cash compensation payable for and in respect of any subsequent Accounting Year shall be made after the commencement of the Accounting Year to which the demand pertains, but no later than two years from the close of such Accounting Year.

42.5 No claim in the event of recovery from Users

Notwithstanding anything to the contrary contained in this Agreement, the Authority shall not in any manner be liable to reimburse to the Concessionaire any sums on account of a Change in Law if the same are recoverable from the Users.

ARTICLE 43

LIABILITY AND INDEMNITY

43.1 General indemnity

43.1.1 The Concessionaire shall indemnify, defend, save and hold harmless the Authority and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/enterprises, (the “**Authority Indemnified Persons**”) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Concessionaire of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of services by the Concessionaire to the Authority or to any User or from any negligence of the Concessionaire under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Authority Indemnified Persons.

43.1.2 The Authority shall indemnify, defend, save and hold harmless the Concessionaire against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature arising out of (a) defect in title and/or the rights of the Authority in the land comprised in the Site, and/or (b) breach by the Authority of any of its obligations under this Agreement or any related agreement, which materially and adversely affect the performance by the Concessionaire of its obligations under this Agreement, save and except that where any such claim, suit, proceeding, action, and/or demand has arisen due to a negligent act or omission, or breach of any of its obligations under any provision of this Agreement or any related agreement and/or breach of its statutory duty on the part of the Concessionaire, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Concessionaire.

43.2 Indemnity by the Concessionaire

43.2.1 Without limiting the generality of Clause 43.1, the Concessionaire shall fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;
- (b) payment of taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire’s contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its contractors which are payable by the Concessionaire or any of its contractors.

43.2.2 Without limiting the generality of the provisions of this Article 43, the Concessionaire shall fully indemnify, hold harmless and defend the Authority Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Authority Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Port, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for the Authority a licence, at no cost to the Authority, authorising continued use of the infringing work. If the Concessionaire is unable to secure such licence within a reasonable time, the Concessionaire shall, at its own expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

43.3 Notice and contest of claims

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 43 (the "**Indemnified Party**") it shall notify the other Party (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

43.4 Defence of claims

43.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 43, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the

Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

43.4.2 If the Indemnifying Party has exercised its rights under Clause 43.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

43.4.3 If the Indemnifying Party exercises its rights under Clause 43.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party;
- (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action;
- (c) the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- (d) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
 - (i) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (ii) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 43.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

43.5 No consequential claims

Notwithstanding anything to the contrary contained in this Article 43, the indemnities herein provided shall not include any claim or recovery in respect of

any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

43.6 Survival on Termination

The provisions of this Article 43 shall survive Termination.

ARTICLE 44

RIGHTS AND TITLE OVER THE SITE

44.1 Licensee rights

For the purpose of this Agreement, the Concessionaire shall have rights to the use of the Site as sole licensee subject to and in accordance with this Agreement, and to this end, it may regulate the entry and use of the Port by third parties in accordance with and subject to the provisions of this Agreement.

44.2 Access rights of the Authority and others

44.2.1 The Concessionaire shall allow free access to the Site at all times for the authorised representatives and vehicles and vessels of the Authority, Senior Lenders, and the Independent Engineer, and for the persons and vessels duly authorised by any Government Instrumentality to inspect the Port or to investigate any matter within their authority, and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.

44.2.2 The Concessionaire shall, for the purpose of operation and maintenance of any utility or road specified in Article 11, allow free access to the Site at all times for the authorised persons and vessels of the controlling body of such utility or road.

44.3 Property taxes

All property taxes on the Site shall be payable by the Authority as owner of the Site; provided, however, that any such taxes payable by the Concessionaire under Applicable Laws for use of the Site shall not be reimbursed or payable by the Authority. For the avoidance of doubt, the Parties agree that stamp duties, if any, due and payable on the grant of licence comprising this Agreement shall be paid by the Authority. Provided, however, that the Authority may require the Concessionaire to pay such stamp duties, which shall be reimbursed by the Authority to the Concessionaire within 15 (fifteen) days of receiving the demand therefor.

44.4 Restriction on sub-licensing

44.4.1 The Concessionaire shall not in any manner sub-license or otherwise part with possession of the whole or any part of the Site, save and except as may be expressly set forth in this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Port.

44.4.2 The Concessionaire may, in its discretion, sub-license any part of the Wharf, but in no case exceeding 40% (forty per cent) of the total quay length thereof. For the avoidance of doubt and by way of illustration, in case the total quay length of all berths at the Port is 2,000 m (two thousand metres), the Concessionaire shall not sub-license a quay length exceeding 800 m (eight hundred metres), in addition to

the other facilities associated therewith. Notwithstanding such sub-licensing, the Concessionaire shall, at all times, continue to be responsible and liable for all its obligations under this Agreement.

ARTICLE 45

DISPUTE RESOLUTION

45.1 Dispute resolution

45.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “**Dispute**”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 45.2.

45.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

45.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Principal Secretary of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 45.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 45.3.

45.3 Arbitration

45.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 45.2, shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 45.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The place of such arbitration shall be the capital of the State, and the language of arbitration proceedings shall be English.

45.3.2 There shall be an arbitral tribunal comprising three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

- 45.3.3 The arbitral tribunal shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Article 45 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.
- 45.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.
- 45.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

45.4 Adjudication by a tribunal

In the event of constitution of a statutory tribunal or other forum with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 45.3, be adjudicated upon by such tribunal or other forum in accordance with Applicable Laws and all references to Dispute Resolution Procedure shall be construed accordingly.

ARTICLE 46
DISCLOSURE

46.1 Disclosure of Specified Documents

The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme, the Maintenance Requirements and the Safety Requirements (hereinafter collectively referred to as the “**Specified Documents**”), free of charge, during normal business hours on all working days at the Site and Concessionaire’s Registered Office. The Concessionaire shall prominently display at a suitable place in its office and at the Site, public notices stating the availability of the Specified Documents for such inspection, and shall provide copies of the same to any person upon payment of copying charges on a ‘no profit no loss’ basis.

46.2 Disclosure of Documents relating to safety

The Concessionaire shall make available for inspection by any person copies of all Documents and data relating to safety of the Port, free of charge, during normal business hours on all working days, at the Concessionaire’s Registered Office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a ‘no profit no loss’ basis.

46.3 Withholding disclosure of Protected Documents

Notwithstanding the provisions of Clauses 46.1 and 46.2, the Authority shall be entitled to direct the Concessionaire, from time to time, to withhold the disclosure of Protected Documents (as defined hereinbelow) to any person in pursuance of the aforesaid Clauses.

Explanation:

The expression Protected Documents shall mean such of the Specified Documents or documents referred to in Clauses 46.1 and 46.2, or portions thereof, the disclosure of which the Authority is entitled to withhold under the provisions of the Right to Information Act, 2005.

ARTICLE 47

REDRESSAL OF PUBLIC GRIEVANCES

47.1 Complaints Register

- 47.1.1 The Concessionaire shall maintain a public relations office at the Site where it shall keep a register (the “**Complaint Register**”) open to public access at all times for recording of complaints by any person (the “**Complainant**”). Information relating to the availability of and access to the Complaint Register shall be prominently displayed by the Concessionaire at the Site and its offices so as to bring it to the attention of all Users.
- 47.1.2 The Complaint Register shall be securely bound and each page thereof shall be duly numbered. 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 the Concessionaire. Immediately after a complaint is registered, the Concessionaire shall give a receipt to the Complainant stating the date and complaint number.
- 47.1.3 Without prejudice to the provisions of Clauses 47.1.1 and 47.1.2, the Authority may, in consultation with the Concessionaire, specify the procedure for making complaints in electronic form and for responses thereto.

47.2 Redressal of complaints

- 47.2.1 The Concessionaire 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 the Concessionaire to the Complainant under a certificate of posting.
- 47.2.2 Within 7 (seven) days of the close of each month, the Concessionaire shall send to the Authority and to the Independent Engineer a true photocopy each of all the pages of the Complaint Register on which any entry has been recorded during the course of such month, and upon perusal thereof, the Authority may, in its discretion, advise the Concessionaire to take such further action as the Authority may deem appropriate for a fair and just redressal of any grievance. The Concessionaire shall consider such advice and inform the Authority of its decision thereon, and if the Authority is of the opinion that the Complainant is entitled to further relief, it may refer the matter to the competent forum for its disposal under the Consumer Protection Act, 1986, and advise the Complainant to pursue the complaint at his own risk and cost.

ARTICLE 48

MISCELLANEOUS

48.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts in the State shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

48.2 Waiver of immunity

Each Party unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Party with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

48.3 State Support

The Authority acknowledge and agree to make their best endeavours to procure the support of the Central Government to the extent necessary for enabling the Concessionaire to perform its obligations herein.

48.4 Depreciation

For the purposes of depreciation under Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under Applicable Laws.

48.5 Delayed payments

48.5.1 The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. Unless otherwise specified in this Agreement, in the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 4% (four per cent) above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

48.5.2 Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

48.6 Waiver

48.6.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

48.6.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

48.7 Liability for review of Documents and Drawings

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or approval by the Authority or the Independent Engineer of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Port nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, Applicable Laws and Applicable Permits; and
- (b) the Authority shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

48.8 Exclusion of implied warranties etc.

This Agreement expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by either Party not contained in a binding legal agreement executed by both Parties.

48.9 Survival

48.9.1 Termination shall:

- (a) not relieve the Concessionaire or the Authority, as the case may be, of any obligations hereunder which expressly or by implication survive Termination hereof; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

48.9.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

48.10 Entire Agreement

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Concessionaire arising from the Request for Qualification or Request for Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such.

48.11 Severability

If for any reason whatsoever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure set forth under this Agreement or otherwise.

48.12 No partnership

This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

48.13 Third parties

This Agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to this Agreement.

48.14 Successors and assigns

This Agreement shall be binding upon, and inure to the benefit of the Parties and their respective successors and permitted assigns.

48.15 Notices

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by this Agreement shall be in writing and shall:

- (a) in the case of the Concessionaire, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Concessionaire may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside the city specified in Sub-clause (b) below may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Concessionaire may from time to time designate by notice to the Authority;

Santosh Kumar Mohapatra

Designation: Director

Address: Adani Vizhinjam Port Private Limited, Adani House, Near Mithakhali Circle, Navrangpura, Ahmedabad – 380 009, Gujarat, India

Fax No: +91-79-25555024

Email: Santosh.Mohapatra@adani.com

- (b) in the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand at the address given below and be addressed to the person named below with a copy delivered to the Authority Representative or such other person as the Authority may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in the same city as the Authority, it may send such notice by

facsimile or e-mail and by registered acknowledgement due, air mail or by courier;

Name: James Varghese IAS

Designation: Principal Secretary to Government

Address: Department of Ports, Government of Kerala, Government Secretariat, Thiruvananthapuram-695001, Kerala, India

Fax No: +91-471-2320434

Email: prlsecy@lsgd.kerala.gov.in; and

- (c) any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case of facsimile or e-mail, it shall be deemed to have been delivered on the working day following the date of its delivery.

48.16 Language

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

48.17 Counterparts

This Agreement may be executed in two counterparts, each of which, when executed and delivered, shall constitute an original of this Agreement.

ARTICLE 49

DEFINITIONS

49.1 Definitions

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

“**Access Channel**” or “**Approach Channel**” means outer channel from breakwater mouth to contour depth (southwards) maintained to a Draught of 20.8 (twenty point eight) metres;

“**Accounting Year**” means the financial year commencing from the first day of April of any calendar year and ending on the thirty-first day of March of the next calendar year;

“**Additional Port Terminals**” shall have the meaning as set forth in Clause 12.7.1;

“**Additional Termination Payment**” means the amount payable upon Termination in respect of Specified Assets, if any, and Capacity Augmentation, as further limited by the provisions of Clauses 38.5.3, 38.5.4 and 38.5.5, as the case may be;

“**Adjusted Depreciated Value**” means the amount arrived at after adjusting the depreciated book value of an asset (as stated in the books of account of the Concessionaire, save and except in the case of buildings and permanent structures where the depreciated book value shall be determined by applying an annual depreciation rate of 3% (three per cent) based on the written down value method) to reflect the variation occurring in Price Index between the date of procurement thereof and the Transfer Date;

“**Adjusted Equity**” means the Equity funded in Indian Rupees and adjusted on the first day of the current month (the “**Reference Date**”), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in Price Index, and for any Reference Date occurring:

- (a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in Price Index occurring between the first day of the month of Appointed Date and the Reference Date;
- (b) from COD and until the 5th (fifth) anniversary thereof, an amount equal to the Adjusted Equity as on the COD shall be deemed to be the base (the “**Base Adjusted Equity**”) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of variation in Price Index occurring between COD and the Reference Date;
- (c) after the 5th (fifth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by 0.11% (zero point one one per cent) thereof at the commencement of each month following the 5th (fifth) anniversary of COD and the amount so arrived at shall be revised to the extent of variation in Price Index occurring between COD and the Reference Date. For the

avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Transfer Date; provided that no reduction in the Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of Price Index shall continue to be made;

and the aforesaid shall apply, *mutatis mutandis*, to the Equity funded in Indian Rupees and expended for Capacity Augmentation. For the avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Transfer Date; provided that no reduction in the Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of Price Index shall continue to be made;

“**Affected Party**” shall have the meaning as set forth in Clause 35.1;

“**Agreement**” or “**Concession Agreement**” means this Agreement, its Recitals, the Schedules hereto and any amendments thereto made in accordance with the provisions contained in this Agreement;

“**Appendix**” shall have the meaning as set forth in Clause 10.3.1;

“**Applicable Laws**” means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;

“**Applicable Permits**” means all clearances, licences, permits, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Port during the subsistence of this Agreement;

“**Appointed Date**” means the date on which Financial Close is achieved and every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Concession Period;

“**Approved Valuer**” means a firm of valuers recognised as such by the Income Tax Department and having experience of valuing at least 5 (five) properties exceeding Rs. 100 cr. (Rupees one hundred crore) each in value;

“**Associate**” or “**Affiliate**” means, in relation to either Party, a person who controls, is controlled by, or is under the common control with such Party (as used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);

“**Authority**” shall have the meaning attributed thereto in the array of Parties as set forth in the Recitals;

“**Authority Default**” shall have the meaning as set forth in Clause 38.2.1;

“**Authority Representative**” means such person or persons as may be authorised in writing by the Authority to act on its behalf under this Agreement and shall include any person or persons having authority to exercise any rights or perform and fulfil any obligations of the Authority under this Agreement;

“**Average Daily Fee**” means the amount arrived at after dividing the total Realisable Fee of the immediately preceding Accounting Year by 365 (three hundred and sixty five), and increasing the quotient thereof by 5% (five per cent);

provided that the Average Daily Fee for any period prior to completion of the first Accounting Year following COD shall be a simple average of the Fee collected every day during the period between COD and the last day of the month preceding the date on which the event requiring calculation hereof occurred, and in the event that the Fee payable by any segment of traffic has not been realised for any reason, an assessment thereof shall be made by the Independent Engineer to form part of the Average Daily Fee for such period;

“**Bank**” means a bank incorporated in India and having a minimum net worth of Rs. 1,000 crore (Rupees one thousand crore) or any other bank acceptable to Senior Lenders, but does not include a bank in which any Senior Lender has an interest;

“**Bank Rate**” means the rate of interest specified by the Reserve Bank of India from time to time in pursuance of section 49 of the Reserve Bank of India Act, 1934 or any replacement of such Bank Rate for the time being in effect;

“**Bid**” means the documents in their entirety comprised in the bid submitted by the selected bidder in response to the Request for Proposals in accordance with the provisions thereof and “**Bids**” shall mean the bids submitted by any and all pre-qualified bidders;

“**Bid Date**” means the last date on which the Bid may have been submitted in accordance with the provisions of the Request for Proposals;

“**Bid Security**” means the security provided by the Concessionaire to the Authority along with the Bid, in accordance with the Request for Proposals, and which is to remain in force until substituted by the Performance Security;

“**COD**” or “**Commercial Operation Date**” shall have the meaning as set forth in Clause 15.1;

“**CPI (IW)**” means the Consumer Price Index for Industrial Workers as published by the Labour Bureau, Government of India and shall include any index which substitutes the CPI (IW), and any reference to CPI (IW) shall, unless the context otherwise requires, be construed as a reference to the CPI (IW) published for the period ending with the preceding quarter;

“**Capacity**” means the rated capacity of the Port or any equipment, as the case may be, to handle a volume of 6,00,000 (six lakh) TEUs on COD, which shall be augmented to

10,00,000 (ten lakh) TEUs no later than the 10th (tenth) anniversary of COD; when operating continuously round the clock for a period of 335 days in a year and “**Daily Capacity**” shall mean the Capacity divided by 335;

“**Capacity Augmentation**” means the construction and completion of all works specified in Clause 12.8, read with Schedule-B and Schedule-C;

“**Change in Law**” means the occurrence of any of the following after the Bid Date:

- (a) the enactment of any new Indian law;
- (b) the repeal, modification or re-enactment of any existing Indian law;
- (c) the commencement of any Indian law which has not entered into effect until the Bid Date;
- (d) a change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the Bid Date; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Project;

“**Change in Ownership**” means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the selected bidder together with its Associates, in the total Equity to decline below (i) 51% (fifty one per cent) thereof during Construction Period and until the 1st (first) anniversary of COD, and (ii) 26% (twenty six per cent) thereof, or such lower proportion as may be permitted by the Authority during the remaining Concession Period;

provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process for the purposes of meeting the minimum conditions of eligibility or for evaluation of its application or Bid, as the case may be,) in the proportion of the equity holding of the selected bidder to the total Equity, if it occurs prior to COD shall constitute a Change in Ownership;

“**Change of Scope**” shall have the meaning as set forth in Clause 16.1.1;

“**Chart Datum**” means the level 0.6 (one point six) metre below the mean sea level;

“**Company**” means the company acting as the Concessionaire under this Agreement;

“**Competing Port**” shall have the meaning as set forth in Clause 30.1.1;

“**Completion**” or “**Project Completion**” means the construction and completion of all works included in or constituting the Port, as specified in Article 2 read with Schedule-B and Schedule-C;

“**Completion Certificate**” shall have the meaning as set forth in Clause 14.2;

“**Concession**” shall have the meaning as set forth in Clause 3.1.1;

“**Concessionaire**” shall have the meaning attributed thereto in the array of Parties as set forth in the Recitals;

“**Concession Fee**” shall have the meaning as set forth in Clause 26.1;

“**Concession Period**” means the period starting on and from the Appointed Date and ending on the Transfer Date;

“**Concessionaire Default**” shall have the meaning as set forth in Clause 38.1.1;

“**Conditions Precedent**” shall have the meaning as set forth in Clause 4.1.1;

“**Construction Period**” means the period beginning from the Appointed Date and ending on COD;

“**Construction Works**” means all works and things necessary to complete the Port in accordance with this Agreement;

“**Container**” means a container which is ordinarily used for carrying cargo;

“**Contractor**” means the person or persons, as the case may be, with whom the Concessionaire has entered into any of the EPC Contract, the O&M Contract or any other material agreement or contract for construction, operation and/or maintenance of the Port or matters incidental thereto, but does not include a person who has entered into an agreement for providing financial assistance to the Concessionaire;

“**Cure Period**” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and shall:

- (a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- (b) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and
- (c) not in any way be extended by any period of Suspension under this Agreement;

provided that if the cure of any breach by the Concessionaire requires any reasonable action by the Concessionaire that must be approved by the Authority or the Independent Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Authority or the Independent Engineer to accord their approval;

“**DBFOT**” or “**Design, Build, Finance, Operate and Transfer**” shall have the meaning as set forth in Recital (A);

“**Damages**” shall have the meaning as set forth in Sub-clause (y) of Clause 1.2.1;

“**Debt Due**” means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:

- (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the “principal”) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
- (b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and
- (c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall for the purposes of this agreement be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

provided further that the Debt Due, on or after COD, shall in no case exceed 85% (eighty five per cent) of the Total Project Cost;

“**Debt Service**” means the sum of all payments on account of principal, interest, financing fees and charges due and payable in an Accounting Year to the Senior Lenders for and in respect of Debt Due under the Financing Agreements;

“**Defence Forces**” mean the Indian army, navy or air force and includes paramilitary forces engaged in the defence of India;

“**Development Period**” means the period from the date of this Agreement until the Appointed Date;

“**Dispute**” shall have the meaning as set forth in Clause 45.1.1;

“**Dispute Resolution Procedure**” means the procedure for resolution of Disputes as set forth in Article 45;

“**Divestment Requirements**” means the obligations of the Concessionaire for and in respect of Termination as set forth in Clause 39.1;

“**Document**” or “**Documentation**” means documentation in printed or written form, or in tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

“**Draught**” means the depth as maintained below Chart Datum;

“**Drawings**” means all of the drawings, calculations and documents pertaining to the Port as set forth in Schedule-H, and shall include ‘as built’ drawings of the Port;

“EPC Contract” means the engineering, procurement and construction contract or contracts entered into by the Concessionaire with one or more Contractors for, inter alia, engineering and construction of the Port in accordance with the provisions of this Agreement;

“EPC Contractor” means the person with whom the Concessionaire has entered into an EPC Contract;

“Emergency” means a condition or situation that is likely to endanger the security of the individuals on or about the Port, including Users thereof, or which poses an immediate threat of material damage to any of the Project Assets;

“Encumbrances” means, in relation to the Port and Port Estate Development, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Port, where applicable herein but excluding utilities referred to in Clause 11.1;

“Entrance Channel” means the harbour channel from breakwater mouth to the turning circle maintained to a Draught of 18.4 (eighteen point four) metres;

“Equity” means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and for the purposes of this Agreement shall include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Company, and any interest-free funds advanced by any shareholder of the Company for meeting such equity component, but does not include Equity Support;

“Equity Support” shall have the meaning as set forth in Clause 25.2.1;

“Escrow Account” means an Account which the Concessionaire shall open and maintain with a Bank in which all inflows and outflows of cash on account of capital and revenue receipts and expenditures shall be credited and debited, as the case may be, in accordance with the provisions of this Agreement, and includes the Sub-Accounts of such Escrow Account;

“Escrow Agreement” shall have the meaning as set forth in Clause 32.1.2;

“Escrow Bank” shall have the meaning as set forth in Clause 32.1.1;

“Escrow Default” shall have the meaning as set forth in Schedule-S;

“Exempted Vessel” means a vessel exempted from payment of Fee under and in accordance with the Fee Schedule;

“Fee” or **“User Fee”** means the tariff or charge levied on cargo and Containers, in accordance with the provisions of this Agreement;

“Fee Schedule” means the Schedule of Fees set forth in Schedule-Q for and in respect of the levy and collection of Fee during the Concession Period;

“**Financial Close**” means the fulfilment of all conditions precedent to the initial availability of funds under the Financing Agreements;

“**Financial Default**” shall have the meaning as set forth in Schedule-V;

“**Financial Model**” means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;

“**Financial Package**” means the financing package indicating the total capital cost of Project Completion and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any;

“**Financing Agreements**” means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.3;

“**Force Majeure**” or “**Force Majeure Event**” shall have the meaning ascribed to it in Clause 35.1;

“**Funded Works**” shall have the meaning as set forth in Clause 12.6.1;

“**GOI**” means the Government of India;

“**Good Industry Practice**” means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner;

“**Government**” means the Government of the State;

“**Government Instrumentality**” means any department, division or sub-division of the Government of India or the State Government and includes any commission, board, authority, agency or municipal and other local authority or statutory body, including Panchayat, under the control of the Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Port or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement;

“**Grant**” shall have the meaning as set forth in Clause 25.1.1;

“**IMDG Code**” means the International Maritime Dangerous Goods Code;

“**IMO**” means the International Maritime Organisation;

“**ISPS Code**” means the International Ship and Port Facility Security Code;

“**Indemnified Party**” means the Party entitled to the benefit of an indemnity pursuant to Article 43;

“**Indemnifying Party**” means the Party obligated to indemnify the other Party pursuant to Article 43;

“**Independent Engineer**” shall have the meaning as set forth in Clause 23.1;

“**Indirect Political Event**” shall have the meaning as set forth in Clause 35.3;

“**Insurance Cover**” means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to Article 33, and includes all insurances required to be taken out by the Concessionaire under Clause 33.2 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;

“**Intellectual Property**” means all patents, trade marks, service marks, logos, get-up, trade names, internet domain names, rights in designs, blue prints, programmes and manuals, drawings, copyright (including rights in computer software), database rights, semi-conductor, topography rights, utility models, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;

“**LOA**” or “**Letter of Award**” means the letter of award referred to in Recital (D);

“**Lead Member**” shall have the meaning as set forth in Recital (B);

“**Lenders’ Representative**” means the person duly authorised by the Senior Lenders to act for and on behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes its successors, assigns and substitutes;

“**Licensed Premises**” shall have the meaning as set forth in Clause 10.2.2;

“**MARPOL**” means the international conventions for prevention of pollution from ships;

“**Maintenance Manual**” shall have the meaning as set forth in Clause 17.3.1;

“**Maintenance Programme**” shall have the meaning as set forth in Clause 17.4.1;

“**Maintenance Requirements**” shall have the meaning as set forth in Clause 17.2;

“**Master Plan**” means the master plan set forth in Schedule-A for construction, development and operation of the Port in accordance with the provisions of this Agreement, and includes the vacant land earmarked for expansion of the Port;

“Material Adverse Effect” means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

“Nominated Company” means a company selected by the Lenders’ Representative and proposed to the Authority for substituting the Concessionaire in accordance with the provisions of the Substitution Agreement;

“Non-Political Event” shall have the meaning as set forth in Clause 35.2;

“O&M” means the operation and maintenance of the Port and includes all matters connected with or incidental to such operation and maintenance, provision of services and facilities, and collection of Fee in accordance with the provisions of this Agreement;

“O&M Contract” means the operation and maintenance contract that may be entered into between the Concessionaire and the O&M Contractor for performance of all or any of the O&M obligations;

“O&M Contractor” means the person, if any, with whom the Concessionaire has entered into an O&M Contract for discharging O&M obligations for and on behalf of the Concessionaire;

“O&M Expenses” means expenses incurred by or on behalf of the Concessionaire or by the Authority, as the case may be, for all O&M including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all taxes, duties, cess and fees due and payable for O&M, (e) all repair, replacement, reconstruction, reinstatement, improvement and maintenance costs, (f) payments required to be made under the O&M Contract, Tolling Contract or any other contract in connection with or incidental to O&M, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;

“O&M Inspection Report” shall have the meaning as set forth in Clause 19.2;

“O&M Support” shall have the meaning as set forth in Clause 25.3.1;

“Operation Period” means the period commencing from COD and ending on the Transfer Date;

“Other Business” shall have the meaning as set forth in Clause 31.9.1;

“Panel of Chartered Accountants” shall have the meaning as set forth in Clause 34.2.1;

“Parties” means the parties to this Agreement collectively and **“Party”** shall mean any of the parties to this Agreement individually;

“Performance Security” shall have the meaning as set forth in Clause 9.1.1;

“Political Event” shall have the meaning as set forth in Clause 35.4;

“Port” means the Site comprising all Project Assets, and its subsequent development and augmentation in accordance with this Agreement, and shall include Port Estate Development;

“Port Estate Development” shall have the meaning as set forth in Clause 3.1.3;

“Port Services” shall have the meaning as set forth in Clause 20.3.1;

“Premium” shall have the meaning as set forth in Clause 26.2.1;

“Price Index” shall comprise:

- (a) 70% (seventy per cent) of WPI; and
- (b) 30% (thirty per cent) of CPI (IW),

which constituents may be substituted by such alternative index or indices as the Parties may by mutual consent determine;

“Project” means the construction, operation and maintenance of the Port in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project;

“Project Agreements” means this Agreement, the Financing Agreements, EPC Contract, O&M Contract, all agreements relating to Port Estate Development and any other material agreements or contracts that may be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow Agreement, the Substitution Agreement, any commercial agreement with Users, or any agreement for procurement of goods and services involving a consideration of upto Rs. 25 crore (Rupees twenty five crore);

“Project Assets” means all physical and other assets relating to and forming part of the Site including (a) rights over the Site in the form of licence, Right of Way or otherwise; (b) tangible assets such as civil works and equipment including quay wall, Wharf, foundations, embankments, pavements, road surface, bridges, drainage works, sign boards, electrical systems, communication systems, and administrative offices; (c) Project Equipment situated on the Site; (d) buildings and immovable fixtures or structures forming part of the Port, including Port Estate Development; (e) all rights of the Concessionaire under the Project Agreements; (f) financial assets, such as receivables, security deposits etc.; (g) insurance proceeds; and (h) Applicable Permits and authorisations relating to or in respect of the Port, including Port Estate Development;

“Project Completion Schedule” means the progressive Project Milestones set forth in Schedule-G for completion of the Port on or before the Scheduled Completion Date;

“Project Equipment” means all the equipment situated on the Site, as described in Schedule-C;

“Project Milestones” mean the project milestones set forth in Schedule-G;

“Provisional Certificate” shall have the meaning as set forth in Clause 14.3;

“**Punch List**” shall have the meaning ascribed to it in Clause 14.3;

“**RBI**” means the Reserve Bank of India, as constituted and existing under the Reserve Bank of India Act, 1934, including any statutory modification or replacement thereof, and its successors;

“**Re.**”, “**Rs.**” or “**Rupees**” or “**Indian Rupees**” means the lawful currency of the Republic of India;

“**Realisable Fee**” means all the Fee due and realisable under this Agreement, with or without any discounts or reduction in Fee, but does not include fees that the Concessionaire has not been able to realise after due diligence and best efforts. For the avoidance of doubt, Realisable Fee shall, save as provided in Clause 26.3, be the amount so declared by the Concessionaire on the basis of its provisional accounts or the audited accounts, as the case may be, which shall truthfully reflect the actual collection of Fee, and in the event of a dispute thereto, the Dispute Resolution Procedure shall apply;

“**Reference Exchange Rate**” means, in respect of any one currency that is to be converted into another currency in accordance with the provisions of this Agreement, the exchange rate as of 12.00 (twelve) noon on the relevant date quoted in Delhi by the State Bank of India, and in the absence of such rate, the average of similar rates quoted in Delhi by the Bank of India and the Bank of Baroda;

“**Request for Proposals**” or “**RFP**” shall have the meaning as set forth in Recital (C);

“**Request for Qualification**” or “**RFQ**” shall have the meaning as set forth in Recital (B);

“**Revenue Share from Other Business**” shall have the meaning as set forth in Clause 31.9.2;

“**Revenue Shortfall Loan**” shall have the meaning as set forth in Clause 28.1.1;

“**Revenue Statement for Other Business**” shall have the meaning as set forth in Clause 31.10.1;

“**Right of Way**” means the constructive possession of the Site, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Port and Port Estate Development in accordance with this Agreement;

“**Safety Consultant**” shall have the meaning as set forth in Clause 18.1.2;

“**Safety Requirements**” shall have the meaning as set forth in Clause 18.1.1;

“**Scheduled Completion Date**” shall have the meaning as set forth in Clause 12.5.1;

“**Scheduled Capacity Augmentation Date**” shall have the meaning as set forth in Clause 12.8.1;

“**Scope of the Project**” shall have the meaning as set forth in Clause 2.1;

“Senior Lenders” means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold *pari passu* charge on the assets, rights, title and interests of the Concessionaire;

“Site” shall have the meaning as set forth in Clause 10.1;

“Specifications and Standards” means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Port, as set forth in Schedule-D, and any modifications thereof, or additions thereto, as included in the design and engineering for the Port submitted by the Concessionaire to, and expressly approved by, the Authority;

“Specified Assets” means and includes all or any of the Project Assets which form part of Capacity Augmentation, Port Estate Development, or are otherwise constructed, acquired or installed after the 3rd (third) anniversary of COD but no later than the 30th (thirtieth) anniversary of the Appointed Date, in accordance with the provisions of this Agreement, but shall in no case include any land;

“State” means the State in which the headquarters of the Authority are situate and **“State Government”** means the government of that State;

“Statutory Auditors” means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 1956, including any re-enactment or amendment thereof, for the time being in force, and appointed in accordance with Clause 34.2.1;

“Subordinated Debt” means the aggregate of the following sums expressed in Indian Rupees or in the currency of debt, as the case may be, outstanding as on the Transfer Date:

- (a) the principal amount of debt provided by lenders or the Concessionaire’s shareholders for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and
- (b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Indian Rupees and lesser of the actual interest rate and 6 (six) month LIBOR (London Inter Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due 1 (one) year prior to the Transfer Date;

provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire’s shareholders, it shall, for the purposes of this Agreement, be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

“Subsistence Revenue” means the total amount of Fee revenue that is required by the Concessionaire in an Accounting Year to meet the sum of (a) O&M Expenses, subject to an annual ceiling of 3% (three per cent) of the Total Project Cost, plus Grant, if any

during the first Accounting Year after COD, to be revised for each subsequent year to reflect the variations in Price Index occurring between COD and commencement of such Accounting Year, and (b) Debt Service in such Accounting Year, but excluding any interest paid by the Authority under clause 35.7.2 or 36.2;

“**Substitution Agreement**” shall have the meaning as set forth in Clause 41.3.1;

“**Suspension**” shall have the meaning as set forth in Clause 37.1;

“**TEU**” means the standard unit of a Container comprising a twenty-foot equivalent Container measuring 20x8x8.5 feet each;

“**Taxes**” means any Indian taxes including excise duties, customs duties, value added tax, sales tax, local taxes, cess and any impost or surcharge of like nature (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Port charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;

“**Termination**” means the expiry or termination of this Agreement and the Concession hereunder;

“**Termination Notice**” means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

“**Termination Payment**” means the amount payable by the Authority to the Concessionaire, under and in accordance with the provisions of this Agreement, upon Termination;

“**Tests**” means the tests set forth in Schedule-I to determine the Project Completion in accordance with the provisions of this Agreement and shall, *mutatis mutandis*, include similar Tests to determine completion of any additional capacity;

“**Total Project Cost**” means the capital cost incurred on construction and financing of the Project, excluding Port Estate Development, and shall be limited to the lowest of:

- (a) the capital cost of the Project, less Equity Support as set forth in the Financial Package; and
- (b) a sum of Rs. 4,089 crore (Rupees four thousand and eighty nine crore), less Equity Support;

provided that in the event Price Index increases, on an average, by more than 3% (three per cent) per annum for the period between the date hereof and COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in Price Index, in excess of such 3% (three per cent), is reflected in the Total Project Cost;

provided further that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in Price Index or Reference Exchange Rate

occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement;

provided also that the Total Project Cost shall not exceed the actual capital cost of the Project less Equity Support;

“**Transfer Date**” means the date on which this Agreement and the Concession hereunder expires pursuant to the provisions of this Agreement or is terminated by a Termination Notice;

“**User**” means a person who uses or intends to use the Port or any part thereof on payment of Fee or in accordance with the provisions of this Agreement and Applicable Laws; and includes vessels and vehicles using the Port;

“**Vesting Certificate**” shall have the meaning as set forth in Clause 39.4;

“**WPI**” means the Wholesale Price Index for all commodities as published by the Ministry of Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the latest monthly WPI published no later than 30 (thirty) days prior to the date of consideration hereunder; and

“**Wharf**” means the land abutting the water front and used for loading and unloading of ships.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND
DELIVERED

For and on behalf of
the AUTHORITY by:

THE COMMON SEAL OF
CONCESSIONAIRE has been affixed
pursuant to the resolution passed by the
Board of Directors of the Concessionaire at
its meeting held on the 27th day of July, 2015
hereunto affixed in the presence of Mr.
Santosh Kumar Mohapatra, Director, who
has signed these presents in token thereof:

(Signature)

Mr. James Varghese IAS,
Principal Secretary to Government
Department of Ports
Government of Kerala
Government Secretariat,
Thiruvananthapuram – 695001,
Kerala, India
Fax No. - +91-471-2320434
e-mail address- prlsecy@lsgd.kerala.gov.in

(Signature)

Mr. Santosh Kumar Mohapatra
Director
Adani Vizhinjam Port Private Limited,
Adani House, Near Mithakhali Six Roads,
Navrangpura,
Ahmedabad – 380 009,
Gujarat, India Fax No. - +91-79-25555024
(e-mail address -
Santosh.Mohapatra@adani.com)

In the presence of:

1. Mr. A S Suresh Babu
Managing Director & CEO
Vizhinjam International Seaport Ltd.
1st Floor, Vipanchika Tower
Thycaud P.O.
Thiruvananthapuram – 695014
Kerala, India

2. Mr. Sumeet Agrawal
Dy.GM – Business Development
Adani Ports and Special Economic Zone
Ltd., Adani House, Nr. Mithakali Circle
Navrangpura
Ahmedabad – 380009
Gujarat, India

Schedules

SCHEDULE – A
(See Clause 10.1)

SITE OF THE PROJECT

1. The Site

- 1.1 Site of the Port shall include the land, buildings, structures and road works as described in Annex-I of this Schedule-A.
- 1.2 An inventory of the Site including the land, buildings, structures, road works, cargo handling equipment, other equipment trees and any other immovable property on, or attached to, the Site shall be prepared jointly by the Authority Representative and the Concessionaire, and such inventory shall form part of the memorandum referred to in Clause 10.3.1 of the Agreement.
- 1.3 Additional land required for storage, transit or any other purpose shall be acquired by the Concessionaire in accordance with the extant rules and regulations of the Authority and shall form part of the Site and vest in the Authority if such land is situated within 5 (five) kilometres of the coast line or water front, as the case may be.
- 1.4 The water front area and water channels may be included in the Site as necessary.

2. Master Plan for the Site

- 2.1 The Master Plan for the Site is described in Annex-II of this Schedule-A.
- 2.2 The Master Plan includes all the land earmarked for the Port, and specifies the location and land use in respect of the Project Assets and Port Estate Development. The Master Plan also includes the additional land earmarked for the expansion that shall take place in accordance with the provisions of this Agreement.

3. Additional land for Capacity Augmentation

- 3.1 Additional land required for Capacity Augmentation has been described in Annex-III of this Schedule-A. Such land shall be acquired by the Authority, at its own cost, no later than 3 (three) years prior to the Scheduled Capacity Augmentation Date, and shall thereupon form part of the Site. Any delay in granting Right of Way in respect of the land included in Annex-III or part thereof shall entitle the Concessionaire to Damages in accordance with Clause 10.3.4.
- 3.2 If any land not forming part of this Schedule-A is required for construction of any structure forming part of Capacity Augmentation, the same shall be acquired by the Authority no later than 3 (three) years prior to the Scheduled Capacity Augmentation Date. The location and alignment of such land shall be determined by the Authority, in consultation with the Concessionaire, before proceedings for its acquisition are initiated. In the event of any delay in the acquisition of land hereunder, the Concessionaire shall be entitled to complete and commission the

Construction Works thereon within a period of 2 (two) years from the date of such acquisition.

4. Port Estate Development

The land earmarked for Port Estate Development has been described in Annex-IV of this Schedule-A, and such land shall form part of the Licensed Premises.

Annex - I
(Schedule-A)

Site for Port

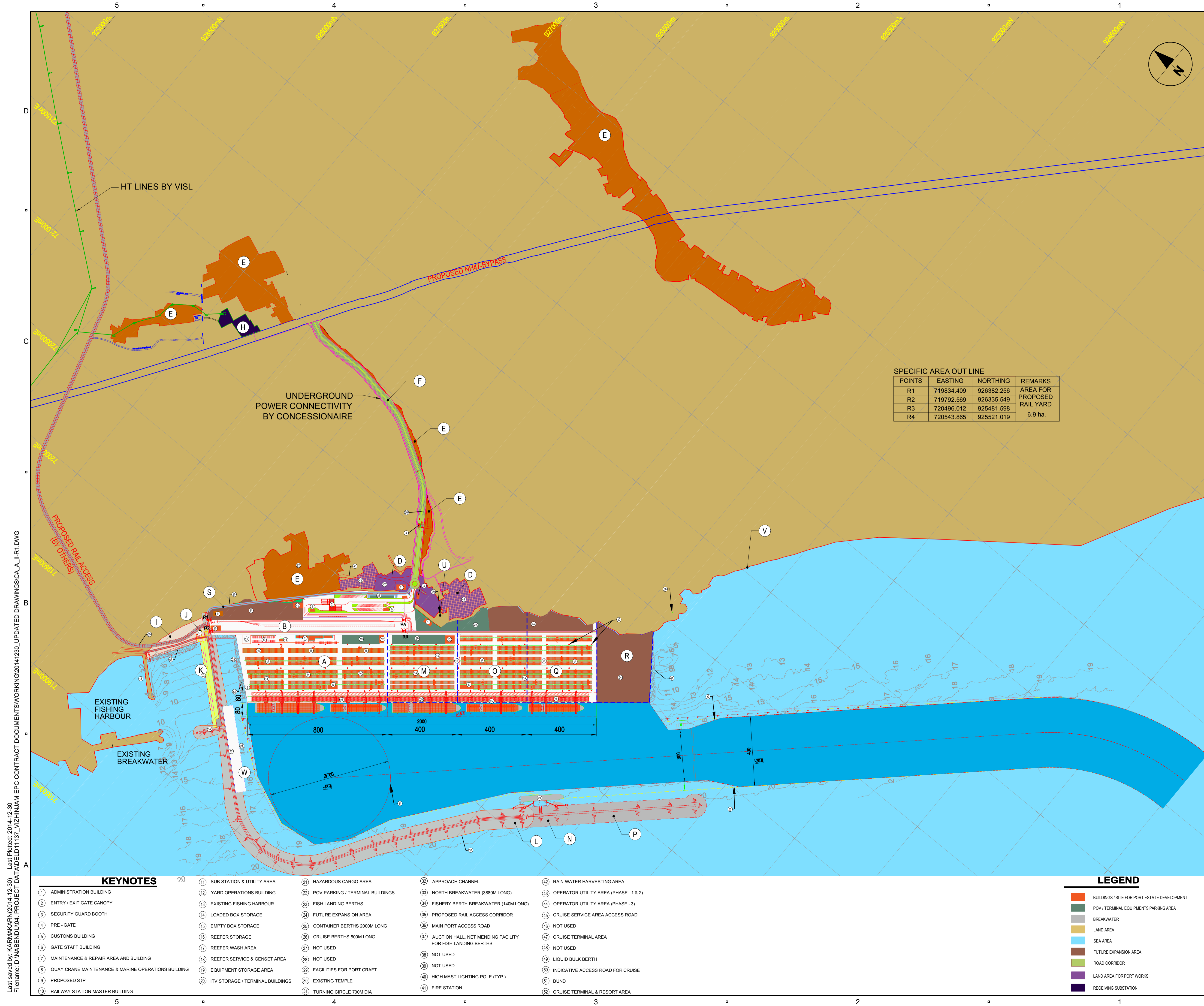
1. The Site for the Port is located at Vizhinjam which is 16 (sixteen) km south of Thiruvananthapuram, Kerala. The geographical coordinates of the Site are Latitude 8° 22' N and Longitude 76° 57' E. The Site for the Project has been marked in Drawing Number CA/A/V-R which is attached at Annex - V of this Schedule-A.
2. The land acquisition notifications for and in respect of the Site, save and except for parcels of land admeasuring approximately 5.0 (five) hectares, are:
 - (a) Notification No. LA 2-2/2010 dated March 12, 2010 issued by Special Tahsildar (L.A), Vizhinjam International Seaport, Thiruvananthapuram (notified in Kerala Gazette No.586 vol. LV dated March 12, 2010);
 - (b) Notification No. LRC (1) 37158/10 dated December 9, 2010 issued by Land Revenue Joint Commissioner, Thiruvananthapuram (notified in Kerala Gazette No.2897 vol. LV dated December 21, 2010);
 - (c) Notification No. LRC (1) 37159/10 dated December 9, 2010 issued by Land Revenue Joint Commissioner, Thiruvananthapuram (notified in Kerala Gazette No.2898 vol. LV dated December 21, 2010); and
 - (d) Notification No. LRC (1) 34336/2011 dated August 4, 2011 issued by Land Revenue Joint Commissioner, Thiruvananthapuram (notified in Kerala Gazette No.2898 vol. LVI dated August 4, 2011).

Notification No. LA 2-2/2010 dated March 12, 2010 also includes the land required for rehabilitation and resettlement activities as identified in the said notification, which does not form part of the Site.
3. A 2.5 (two point five) km long waterfront at Vizhinjam near Thiruvananthapuram has been earmarked as part of the Site for the development of the Port. The coastline is mainly oriented towards Northwest-Southeast direction (bearing of the shore line is about 155° - 304°N).
4. The location of the road connecting the Port with the NH47 by-pass is marked in Drawing Number CA/A/V-R which is attached at Annex - V of this Schedule-A.

Annex-II
(Schedule-A)
(See Clause 12.3)

Master Plan for the Site

The area earmarked for development of the Port, including Capacity Augmentation, location and land use in respect of the Project Assets and Port Estate Development are specified in the Master Plan (Drawing Number CA/A/II-R) attached herewith.



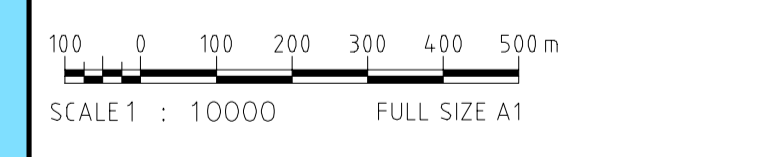
KEYNOTES

- PORT WORKS**
- RECLAMATION 53 ha
 - BERTH 800x60 m
- (A) RECLAIMED PORT OPERATIONAL AREA INCLUDING BERTH
 - (B) PROPOSED RAIL YARD
 - (C) NOT USED
 - (D) ON LAND SITE AREA TO BE USED FOR PORT OPERATION
 - (E) LAND AREA FOR PORT DEVELOPMENT AND PROJECT FACILITIES
 - (F) AREA FOR CONSTRUCTION OF EXTERNAL ROAD
 - (G) NOT USED
 - (H) MAIN RECEIVING SUBSTATION - 1 ha BY CONCESSIONAIRE
- FUNDED WORK**
- (I) RECLAIMED SEA BEACH AREA - 3.5 ha
 - (J) FISHING HARBOUR BUILDING AREA
 - (K) FISHING BERTHS & SERVICE AREA
 - (L) BREAK WATER PHASE-1 - 3100 m (MIN.)
- CAPACITY AUGMENTATION**
- (M) EXTENSION OF BERTH & YARD BEHIND IN PHASE-2
 - (N) EXTENSION OF BREAK WATER IN PHASE-2
 - (O) EXTENSION OF BERTH & YARD BEHIND IN PHASE-3
 - (P) EXTENSION OF BREAK WATER IN PHASE-3
 - (Q) EXTENSION OF BERTH & YARD BEHIND IN PHASE-4
 - (R) SPACE FOR ADDITIONAL PORT TERMINALS (OPTIONAL)
 - (S) INDICATIVE ACCESS ROAD FOR BREAK WATER AND CRUISE BERTH
 - (T) NOT USED
 - (U) EXISTING TEMPLE
 - (V) HIGH TIDE LINE
 - (W) CRUISE BERTHING AREA (500m)

SPECIFIC AREA OUT LINE

POINTS	EASTING	NORTHING	REMARKS
R1	719834.409	926382.256	AREA FOR PROPOSED RAIL YARD 6.9 ha.
R2	719792.569	926335.549	
R3	720496.012	925481.598	
R4	720543.865	925521.019	

- NOTE:**
- ALL LEVELS ARE IN METRES WITH RESPECT TO LOCAL CHART DATUM.
 - ALL DIMENSIONS ARE IN METERS UNLESS OTHERWISE MENTIONED.
 - ALL CO-ORDINATES ARE GIVEN IN METERS RELATING TO UTM PROJECTION, SPHEROID WGS 84.



REV.	DATE	DESCRIPTION
R	30-12-2014	GENERALLY REVISED

REVISION DETAILS

VIZHINJAM INTERNATIONAL DEEPWATER MULTIPURPOSE SEAPORT

PORT MASTER PLAN AND LAND USE PLAN

DRG. TITLE: **CA / A / II -R**

DRAWING NUMBER: **CA / A / II -R**

DIMENSIONS ARE IN: **METERS** DATE: 30-12-2014

Last saved by: KANAKAKAN(2014-12-30) Last Printed: 2014-12-30
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KEYNOTES

- | | | | | |
|---------------------------------------------------------|---------------------------------------|---------------------------------------|-----------------------------------------------------------------|--------------------------------------------|
| (1) ADMINISTRATION BUILDING | (11) SUB STATION & UTILITY AREA | (21) HAZARDOUS CARGO AREA | (31) APPROACH CHANNEL | (41) RAIN WATER HARVESTING AREA |
| (2) ENTRY / EXIT GATE CANOPY | (12) YARD OPERATIONS BUILDING | (22) POV PARKING / TERMINAL BUILDINGS | (32) NORTH BREAKWATER (3880M LONG) | (42) OPERATOR UTILITY AREA (PHASE - 1 & 2) |
| (3) SECURITY GUARD BOOTH | (13) EXISTING FISHING HARBOUR | (23) FISH LANDING BERTHS | (33) FISHERY BERTH BREAKWATER (140M LONG) | (43) OPERATOR UTILITY AREA (PHASE - 3) |
| (4) PRE - GATE | (14) LOADED BOX STORAGE | (24) FUTURE EXPANSION AREA | (34) PROPOSED RAIL ACCESS CORRIDOR | (44) CRUISE SERVICE AREA ACCESS ROAD |
| (5) CUSTOMS BUILDING | (15) EMPTY BOX STORAGE | (25) CONTAINER BERTHS 2000M LONG | (35) MAIN PORT ACCESS ROAD | (45) NOT USED |
| (6) GATE STAFF BUILDING | (16) REEFER STORAGE | (26) CRUISE BERTHS 500M LONG | (36) NOT USED | (46) NOT USED |
| (7) MAINTENANCE & REPAIR AREA AND BUILDING | (17) REEFER WASH AREA | (27) NOT USED | (37) AUCTION HALL, NET MENDING FACILITY FOR FISH LANDING BERTHS | (47) CRUISE TERMINAL AREA |
| (8) QUAY CRANE MAINTENANCE & MARINE OPERATIONS BUILDING | (18) REEFER SERVICE & GENSET AREA | (28) NOT USED | (38) NOT USED | (48) NOT USED |
| (9) PROPOSED STP | (19) EQUIPMENT STORAGE AREA | (29) FACILITIES FOR PORT CRAFT | (39) NOT USED | (49) LIQUID BULK BERTH |
| (10) RAILWAY STATION MASTER BUILDING | (20) ITV STORAGE / TERMINAL BUILDINGS | (30) EXISTING TEMPLE | (40) HIGH MAST LIGHTING POLE (TYP.) | (50) INDICATIVE ACCESS ROAD FOR CRUISE |
| | | (31) TURNING CIRCLE 700M DIA | (41) FIRE STATION | (51) BUND |
| | | | (42) CRUISE TERMINAL & RESORT AREA | (52) CRUISE TERMINAL & RESORT AREA |

LEGEND

- BUILDINGS / SITE FOR PORT ESTATE DEVELOPMENT
- POV / TERMINAL EQUIPMENTS PARKING AREA
- BREAKWATER
- LAND AREA
- SEA AREA
- FUTURE EXPANSION AREA
- ROAD CORRIDOR
- LAND AREA FOR PORT WORKS
- RECEIVING SUBSTATION

Annex - III
(Schedule-A)

Site for Capacity Augmentation

The Site of the Capacity Augmentation for the Project comprises the land shown in the Drawing Number CA/A/V-R which is attached at Annex - V of this Schedule-A.

For the avoidance of doubt, notwithstanding anything to the contrary contained in the Agreement, it is expressly agreed that no additional real estate is required to be acquired by the Authority for Capacity Augmentation. The Concessionaire shall undertake reclamation if any additional land is required.

Annex-IV
(Schedule A)

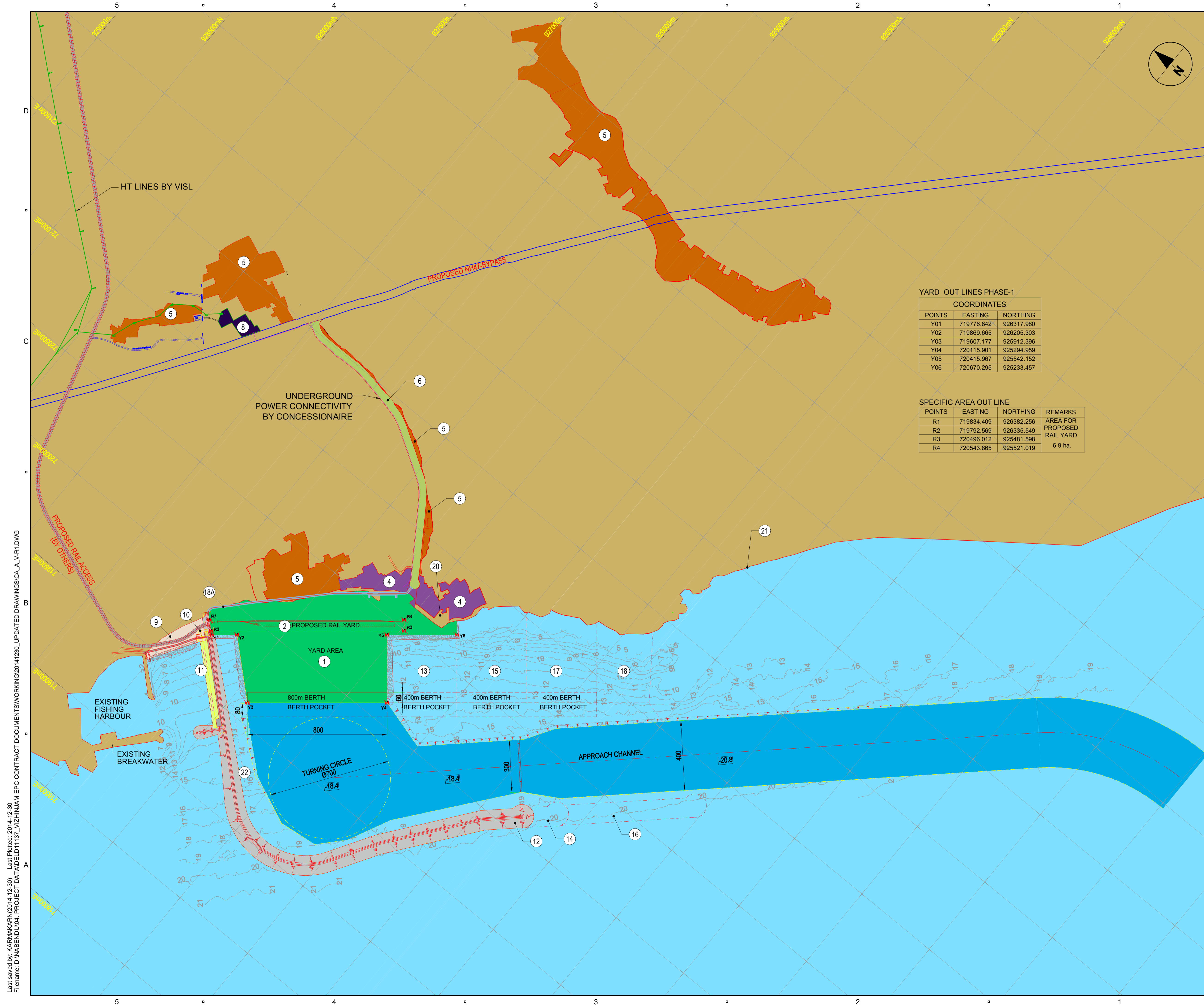
(See Clause 3.1.3)

Site for Port Estate Development

1. Description of the land parcels available for Port Estate Development, including commercial and residential development is as shown in Drawing Number CA/A/V-R which is attached at Annex - V of this Schedule-A.
2. The relevant land acquisition notifications for and in respect of the Site for Port Estate Development are set forth in Annex - I of this Schedule-A.
3. The Concessionaire may undertake Port Estate Development on the Site within the area earmarked hereinabove for commercial and residential use in a manner such that the Port operations are not obstructed. The Port Estate Development shall be undertaken in accordance with the description set forth in Annex - III of Schedule-B and Applicable Laws. The land used for Port Estate Development shall not exceed 30% (thirty per cent) of the total area of the Site and the maximum area used for residential purposes shall not exceed 1/3rd (one-third) thereof.

Annex-V
(Schedule A)

Drawing of the Site



KEYNOTES

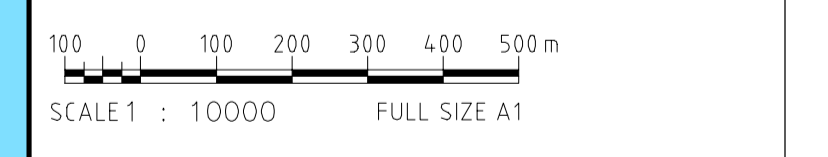
- PORT WORKS**
- RECLAMATION 53 ha
 - BERTH 800x60 m
- 1 RECLAIMED PORT OPERATIONAL AREA INCLUDING BERTH
 - 2 PROPOSED RAIL YARD
 - 3 NOT USED
 - 4 ON LAND SITE AREA TO BE USED FOR PORT OPERATION
 - 5 LAND AREA FOR PORT ESTATE DEVELOPMENT AND PROJECT FACILITIES
 - 6 AREA FOR CONSTRUCTION OF EXTERNAL ROAD
 - 7 NOT USED
 - 8 MAIN RECEIVING SUBSTATION - 1 ha BY CONCESSIONAIRE
- FUNDED WORK**
- 9 RECLAIMED SEA BEACH AREA - 3.5 ha
 - 10 FISHING HARBOUR BUILDING AREA
 - 11 FISHING BERTHS & SERVICE AREA
 - 12 BREAKWATER PHASE-1 - 3100 m (MIN.)

- CAPACITY AUGMENTATION**
- 13 EXTENSION OF BERTH & YARD BEHIND IN PHASE-2
 - 14 EXTENSION OF BREAKWATER IN PHASE-2
 - 15 EXTENSION OF BERTH & YARD BEHIND IN PHASE-3
 - 16 EXTENSION OF BREAKWATER IN PHASE-3
 - 17 EXTENSION OF BERTH & YARD BEHIND IN PHASE-4
 - 18 SPACE FOR ADDITIONAL PORT TERMINALS (OPTIONAL)
 - 18A INDICATIVE ACCESS ROAD FOR BREAKWATER AND CRUISE BERTH
 - 19 NOT USED
 - 20 EXISTING TEMPLE
 - 21 HIGH TIDE LINE
 - 22 CRUISE BERTHING AREA (500m)

LEGEND

- BREAKWATER
- RECLAIMED LAND
- LAND AREA
- ROAD CORRIDOR
- SEA AREA
- LAND AREA FOR PORT WORKS
- SITE FOR PORT ESTATE DEVELOPMENT
- RECEIVING SUBSTATION

- NOTE:**
1. ALL LEVELS ARE IN METRES WITH RESPECT TO LOCAL CHART DATUM.
 2. ALL DIMENSIONS ARE IN METERS UNLESS OTHERWISE MENTIONED.
 3. ALL CO-ORDINATES ARE GIVEN IN METERS RELATING TO UTM PROJECTION, SPHEROID WGS 84.



YARD OUT LINES PHASE-1

POINTS	EASTING	NORTHING
Y01	719776.842	926317.980
Y02	719869.665	926205.303
Y03	719607.177	925912.396
Y04	720115.901	925294.959
Y05	720415.967	925542.152
Y06	720670.295	925233.457

SPECIFIC AREA OUT LINE

POINTS	EASTING	NORTHING	REMARKS
R1	719834.409	926382.256	AREA FOR PROPOSED RAIL YARD 6.9 ha.
R2	719792.569	926335.549	
R3	720496.012	925481.598	
R4	720543.865	925251.019	

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R	30-12-2014	GENERALLY REVISED
REV.	DATE	DESCRIPTION
REVISION DETAILS		
VIZHINJAM INTERNATIONAL DEEPWATER MULTIPURPOSE SEAPORT GOVT. OF KERALA		
GENERAL LAYOUT AND LAND USE PLAN		
DRAWING NUMBER:	CA / A / V - R	
DIMENSIONS ARE IN:	METERS	DATE: 30-12-2014

SCHEDULE - B
(See Clause 2.1)

DEVELOPMENT OF THE PORT

1 Development of the Port

Development of the Port shall include construction of the Port as described in this Schedule-B and in Schedule-C.

2 Project Completion

2.1 Project Completion shall include the Port as described in Annex-I of this Schedule-B and Annex-I of Schedule-C.

2.2 The Project shall be completed by the Concessionaire in conformity with the Specifications and Standards set forth in Annex-I of Schedule-D.

3 Capacity Augmentation

3.1 Capacity Augmentation shall include the area and works as described in Annex-III of this Schedule-B and Project Equipment as described in Annex-II of Schedule-C.

3.2 Capacity Augmentation shall be completed by the Concessionaire in conformity with the Specifications and Standards set forth in Annex-II of Schedule-D.

4. Port Estate Development

4.1 Port Estate Development shall be undertaken in accordance with and subject to the terms and conditions specified in Annex-IV of this Schedule-B.

4.2 Port Estate Development shall be undertaken and completed by the Concessionaire in conformity with the Specifications and Standards set forth in Schedule-D.

Annex - I
(Schedule-B)

Description of Port

1 Rated Capacity

The rated annual capacity of the Port on COD shall be 6,00,000 (six lakh) TEUs, which shall be augmented to 10,00,000 (ten lakh) TEUs no later than the 10th (tenth) anniversary of COD.

2 Dimensions of the Wharf

2.1 The Wharf shall have a quay length of 800 (eight hundred) metres with the necessary width required to support Port operations in accordance with Good Industry Practice;

2.2 Except as otherwise provided in this Agreement, but subject to the provisions of paragraph 4 of this Annex-I, the quay length and width of the Wharf shall at all times conform to Clause 2.1 above.

2.3 Dredging

Dredging works are required to provide access for safe navigation, turning, loading and unloading of ships visiting the Port. The dredging works shall be undertaken in accordance with the parameters set forth below and at the area specified in Drawing Number CA/A/V-R which is attached at Annex - V of Schedule-A:

- (a) A berth pocket with a minimum level of 18.4 (eighteen point four) metres Chart Datum, extending 80 (eighty) metre seaward of the berthing line is required. These depths shall be the minimum level after the placing of any bed scour protection.
- (b) The turning circle of minimum diameter of 700 (seven hundred) metres, internal dredged basin and inner approach channel shall be dredged to a minimum level of 18.4 (eighteen point four) metres Chart Datum.
- (c) The Access Channel shall be dredged to a minimum level of 20.8 (twenty point eight) metres Chart Datum.

2.4 Reclamation

2.4.1 Reclamation works are required at the back side of the berth to create land for building Container storage yard and space for other utilities required for the Port.

2.4.2 The reclamation works include filling of suitable dredged material inside reclamation bund. The average finished reclamation level behind the berth shall be a minimum of +4.2 (positive four point two) metres Chart Datum, so as to match with the final berth level. The Concessionaire shall check that no part of the Port shall be submerged in water in extreme weather for a minimum return period of

100 (one hundred) years. If required, the formation level of the Container yard and berth shall be raised to comply with this requirement. The area of reclamation should be a minimum of 53 (fifty three) Ha. Out of this, a total area of 6.9 (six point nine) Ha and 5.3 (five point three) Ha are to be earmarked for rail yard and the Authority's future expansion respectively as marked in Drawing Number CA/A/V-R which is attached at Annex - V of Schedule-A.

2.5 Buildings

The Concessionaire shall build the infrastructure as set forth below in accordance with Good Industry Practice:

- (a) Port Users' Administrative Building
- (b) Port Marine Operations Building
- (c) Yard Operations Building
- (d) Crane Maintenance Building
- (e) Maintenance & Repair Building
- (f) Trouble Kiosk & Restrooms
- (g) Quay Workers Restrooms
- (h) Reefer Shop
- (i) Canteen
- (j) Security Booth - Entry and Exit Gate

2.6 Utilities

The Concessionaire shall develop and maintain all necessary utilities and services required for operations of the Port in accordance with Good Industry Practice. This will include power supply with adequate power back-up, internal roads, potable water, fire-fighting, lighting, Port navigation aids, heating ventilation air-conditioning in buildings and sewage/effluent collection treatment and disposal.

2.7 Roads

The Concessionaire shall construct the roads forming part of the Project in accordance with Good Industry Practice. For the avoidance of doubt, Good Industry Practice shall, for the purposes hereof, mean the standard and specifications specified for National Highway Projects undertaken through public private partnership.

2.7.1 External Road

The Concessionaire shall construct a 4 (four) lane divided road connecting the Port to NH-47 by-pass taking-off at/near chainage 26,540. The road shall be initially designed for a traffic volume of minimum 50 million standard axles with base and sub-base courses for full 150 (one hundred and fifty) million standard axles. The natural obstacles and intersections with other existing local roads shall be crossed-over by constructing suitable viaducts/cross drainage structures/road intersections in accordance with Good Industry Practice. At the Port's starting point a roundabout with inner radius of minimum 30 (thirty) metres will be built to provide traffic connectivity and easy maneuverability to multiple roads merging at this location.

2.7.2 Internal Road

Internal roads within the Port shall be constructed by the Concessionaire. The internal roads shall have two-way traffic, except the truck lanes under the RTGC as well as under the Wharf crane which will have one-way traffic.

2.7.3 Gate Complex

The Concessionaire shall build a gate complex at a suitable location with a minimum of 4 (four) lanes each for entry and exit for trucks. The Concessionaire may construct additional lanes for other vehicles.

3 Project Equipment

Project Equipment shall be constructed and/or installed in conformity with Annex-I of Schedule-C.

4 Specifications and Standards

The Port shall be constructed in conformity with the Specifications and Standards specified in Annex-I of Schedule-D.

Annex-II
(Schedule-B)
(Refer Clause 12.6)

Description of Funded Works

1 Funded Works

1.1 Breakwaters

1.1.1 The Concessionaire shall undertake the construction of the breakwaters as shown in Drawing Number CA/B/V which is attached as Annex-V of this Schedule-B and in accordance with the Specifications and Standards as set forth in Annex - I of Schedule - D. The Concessionaire shall maintain the alignment of the breakwater with reference to the below mentioned points:

Point	Easting (Meters)	Northing (Meters)	Remarks
Absolute points (Coordinates with respect to WGS 84 Spheroid)			
BR1	719862.367	926420.928	Points connected by straight line.
BR2	719411.171	925917.442	
BR3	719304.341	926013.177	
Relative points with respect to Berthing Line of Wharf (minimum offset required from berthing line to breakwater)			
BR4	-62.263	-583.524	Connected by straight line to BR02
BR5	463.798	-901.415	Connected by arc of 400m radius with its centre within harbour
BR6	747.650	-803.352	Points connected by straight line.
BR7	1345.870	-663.920	
BR8	1572.096	-650.141	

1.1.2 The breakwaters shall meet the following requirements and shall be designed and constructed in accordance with Good Industry Practice:

- (a) minimum length of 3,100 (three thousand one hundred) metres, including crown wall, to protect the harbour basin from waves and swells;
- (b) breakwater top road having a width of 10 (ten) m;
- (c) provide a safe mooring for ships and other vessels during ambient or non-cyclonic weather conditions;
- (d) facilitate safe navigation of vessels into and around the Port;
- (e) provide a safe haven for Port vessels during extreme ocean conditions;
- (f) provide an acceptable wave climate for operation of the Port infrastructure;

and

- (g) The breakwater shall be designed to withstand minimum significant wave of 4.7 (four point seven) metres high.

1.1.3 The Concessionaire shall, at its own cost, provide and maintain utilities and services on the breakwaters including electricity, water etc. as part of the Project. For the avoidance of doubt, the maintenance cost of the same is not included in the cost of Funded Works and shall be borne by the Concessionaire.

1.2. Fishing Harbour

1.2.1 The Concessionaire shall undertake the construction of a fishing harbour consisting of the buildings and facilities listed in the following table, in accordance with figure number CA/B/02 of this Schedule-B and Specifications and Standards as set forth in Annex - I of Schedule - D.

S. No.	Building/facilities	Dimensions/description	Additional requirements																																							
(i)	Fish landing berth on the south of straight line connecting points 719372.156mE, 925971.203mN and 719705.845mE, 926343.563mN	200 m × 8m at +1.70m Chart Datum 300m × 8m at +1.50m Chart Datum To be provided with suitable fenders, bollards, mooring rings, ladders and cope edge protection. Area behind the berth till the breakwater to be reclaimed till +1.70m level.	Minimum length of fishing boats to be used for design shall be 10 metres. Lighting at berth and area behind to be achieved by 3 nos. of high mast lights.																																							
(ii)	New sea beach area on the eastern side of line defined by: <table border="1" data-bbox="268 1464 730 1731"> <thead> <tr> <th>Point</th> <th>Easting (m)</th> <th>Northing (m)</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>719432.323</td> <td>926514.903</td> </tr> <tr> <td>2</td> <td>719692.098</td> <td>926355.882</td> </tr> <tr> <td>3</td> <td>719743.081</td> <td>926310.194</td> </tr> <tr> <td>4</td> <td>719785.780</td> <td>926357.841</td> </tr> <tr> <td>5</td> <td>719835.179</td> <td>926412.965</td> </tr> </tbody> </table>	Point	Easting (m)	Northing (m)	1	719432.323	926514.903	2	719692.098	926355.882	3	719743.081	926310.194	4	719785.780	926357.841	5	719835.179	926412.965	Reclamation of 3.5 Ha till a level of +1.5m Chart Datum after consolidation, except the area demarcated for fishing harbor building, which shall be reclaimed till +1.70m Chart Datum after consolidation. This area is demarcated by: <table border="1" data-bbox="762 1682 1225 1984"> <thead> <tr> <th>Point</th> <th>Easting (m)</th> <th>Northing (m)</th> </tr> </thead> <tbody> <tr> <td>2</td> <td>719692.098</td> <td>926355.882</td> </tr> <tr> <td>3</td> <td>719743.081</td> <td>926310.194</td> </tr> <tr> <td>4</td> <td>719785.780</td> <td>926357.841</td> </tr> <tr> <td>6</td> <td>719745.222</td> <td>926394.186</td> </tr> <tr> <td>7</td> <td>719732.160</td> <td>926379.613</td> </tr> <tr> <td>8</td> <td>719721.736</td> <td>926388.955</td> </tr> </tbody> </table>	Point	Easting (m)	Northing (m)	2	719692.098	926355.882	3	719743.081	926310.194	4	719785.780	926357.841	6	719745.222	926394.186	7	719732.160	926379.613	8	719721.736	926388.955	The sea front shall have gentle slope (maximum 5 horizontal to 1 vertical)
Point	Easting (m)	Northing (m)																																								
1	719432.323	926514.903																																								
2	719692.098	926355.882																																								
3	719743.081	926310.194																																								
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8	719721.736	926388.955																																								
(iii)	Auction halls	100m × 10m – 2 nos.	Concrete																																							

S. No.	Building/facilities	Dimensions/description	Additional requirements
		<p>Each fishing berths as mentioned in S.No. (i) above and separated by their formation levels, shall have one auction hall located immediately behind the berths and centrally along the length of the berth. Longer edge of auction hall shall be parallel to the berth. Floor level of the auction hall shall be at or above +1.70m Chart Datum.</p>	<p>floor with anti-skid granite flooring with open shed with powder coated aluminum sheeting or equivalent.</p>
(iv)	Loading area	<p>100m × 20m – 2 nos. Loading area shall be located immediately behind the auction halls with longer edge being parallel to the auction halls. Between the loading area and the auction halls, a drain of 1.0m x 1.0m (minimum clear inside dimensions) shall be provided to collect all the water from auction halls and loading areas. This drain shall be long enough to cover the entire berth length and shall be extended till the ground slot marked for ETP (ETP to be constructed by others). Area behind the berth which is not being developed either as auction halls, loading area or road, shall be paved with concrete heavy duty paving blocks and shall be capable of withstanding occasional truck parking.</p>	<p>At the back of the auction halls with concrete flooring.</p>
(v)	Net mending shed	25m × 15m – 1 no.	<p>Open shed with raised concrete floor.</p>
(vi)	Gear shed	20m × 8m – 1 no.	<p>Single storey building with separate small rooms of similar plan dimensions.</p>

S. No.	Building/facilities	Dimensions/description	Additional requirements
(vii)	Admin building	30m × 10m	Single storey building with toilets (2 men's + 2 women's) and steel furniture.
(viii)	Toilet Block		10 men's + 5 women's toilet
(ix)	Road	3 lane undivided road from breakwater to the fishing harbour entry gate; a divided road inside the fishing harbour area; and a 3 lane undivided road along the fish landing jetty with provision for turn-around at the western end.	Associated road furniture and lighting
(x)	Boundary wall	2 metres high wall with 4 rows of barbed wire of 1 metre height, with heavy duty gates at entry on road.	
(xi)	Gate and Security Room	2m × 5m	Single floor building
(xii)	Parking space	25m × 10m	With heavy duty concrete block paving
(xiii)	Canteen Facility	300 square metres (sq. m)	

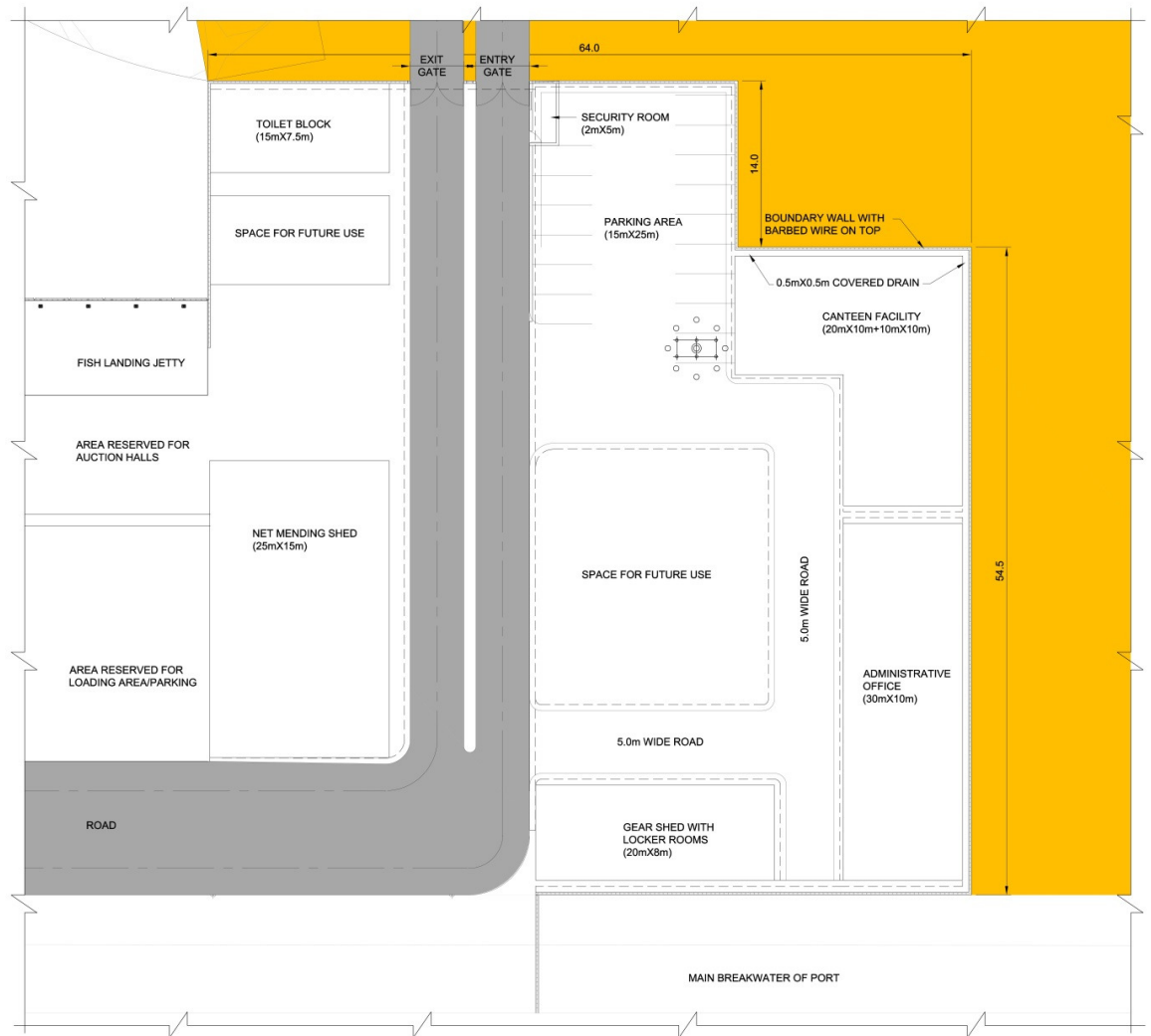


Figure CA/B/02: Arrangement of Fishing Harbour Administrative Area.

1.2.2 While the location, alignment and minimum dimensions are fixed, type of sub-structure, sections of the berthing structures and buildings shown in the drawings are indicative. The Concessionaire shall design the facilities in accordance with the Specifications and Standards.

1.2.3 The entire fishing harbour building area shall be at the same level as of the fish landing berth level. However, buildings shall be designed with floor levels in such a way that they are not inundated in extreme weather. For the difference of the floor level with the surrounding ground level, necessary ramp and/or stairs shall be provided by the Concessionaire.

The Concessionaire shall design the proposed fish landing berth to cater to the fishing vessels of country crafts fitted with outboard engines and small mechanized crafts. The structures shall have all the required accessories/ fixtures including the following:

- (a) Rubber fenders including all its ancillaries;
- (b) Kidney type bollards to facilitate mooring of vessels;
- (c) Mooring rings on berth face;
- (d) Safety ladders;

- (e) Stainless steel rubbing strip for the protection of edges of berths from rubbing of mooring ropes;
- (f) The proposed berths shall be provided with a slope towards seaside to drain off water.

2 Cost of Funded Works

S. No.	Items	Rupees in crore.*
1.	Breakwaters	1,387
2.	Fish Landing Berth and buildings in the fishing harbour	30
3.	Site Development, Reclamation etc.	46
	GRAND TOTAL	1,463

* Includes physical contingency of 20% and financing costs.

Annex - III
(Schedule-B)

Description of Capacity Augmentation

1 Area of Capacity Augmentation

The area of Capacity Augmentation is described below:

- 1.1 The Concessionaire shall undertake construction of Capacity Augmentation, so that the Project shall have Capacity Augmentation on or before the earlier of (a) the 30th (thirtieth) anniversary of the Appointed Date and (b) the 5th (fifth) anniversary of the close of the Accounting Year in which the throughput has, for a continuous period of 3 (three) Accounting Years, exceeded 75% (seventy five per cent) of the existing Capacity of the Port. The Concessionaire may implement the Capacity Augmentation in following phases:

Phase II:

Phase II shall be undertaken before the 5th (fifth) anniversary of the close of the Accounting Year in which the throughput has, for a continuous period of 3 (three) Accounting Years, exceeded 75% (seventy five per cent) of the Capacity of Phase I of the Port. Phase II shall include 1 (one) Container berth having a minimum of 400 (four hundred) metres berth length in continuation with the Phase I in south-east direction and the backup area behind the berth. The backup area for Container yard shall be reclaimed. The Concessionaire shall develop Container handling facility along with necessary equipment mentioned in Annex – II of Schedule – C. The minimum Capacity of the Port after construction of Phase II shall be 15,00,000 (fifteen lakh) TEUs.

Breakwater shall be extended by a minimum of 200 (two hundred) metres towards south-east from the end of the breakwater already constructed.

Phase III:

Phase III shall be undertaken before the 5th (fifth) anniversary of the close of the Accounting Year in which the throughput exceeds 90% (ninety per cent) of the existing Capacity of the Port, which shall include the enhanced capacity after Phase II augmentation. Phase III augmentation shall consist of 1 (one) Container berth having a minimum of 400 (four hundred) metres quay length in continuation with the Phase II in South-east direction and the backup area behind the berth. The backup area for Container yard shall be reclaimed. The minimum Capacity of the Port after construction of Phase III shall be 22,00,000 (twenty two lakh) TEUs.

Breakwater shall be extended by a minimum of 720 (seven hundred and twenty) metres towards south-east from the end of the breakwater already constructed.

Phase IV:

Phase IV shall be undertaken before the 5th (fifth) anniversary of the close of the Accounting Year in which the throughput exceeds 90% (ninety per cent) of the existing Capacity of the Port, which shall include the enhanced capacity after Phase II and Phase III augmentation. Phase IV shall include 1 (one) Container berth having a minimum of 400 (four hundred) metres quay length in continuation with the Phase III in south-east direction and the backup area behind the berth. The backup area for Container yard shall be reclaimed. The minimum Capacity of the Port after construction of Phase IV shall be 30,00,000 (thirty lakh) TEUs.

The Concessionaire shall demonstrate to the Independent Engineer by physical modeling that the different length of breakwater extensions being undertaken are sufficient to maintain the tranquility requirements at the harbor basin and berth pocket. Total length of breakwater after Capacity Augmentation shall be a minimum of 4,020 (four thousand and twenty) metres (including 3,100 (three thousand one hundred) metres covered in Funded Works).

In addition to the above, the Concessionaire shall carry out the associated dredging to create the necessary berth pocket and/or harbor basin for the purpose.

For the avoidance of doubt, the Parties agree that the Concessionaire may, in its discretion, undertake Capacity Augmentation in one or more phases as set forth hereinabove. However, the total berth length and total reclaimed area at the end of all phases must match the total berth length of minimum 2,000 (two thousand) metres and reclaimed area of 113 (one hundred and thirteen) Ha.

1.2 Cruise/Multipurpose Berth

The Concessionaire may undertake construction of the cruise/multipurpose berth of a minimum length of 300 (three hundred) metres and maximum length of 500 (five hundred) metres. The associated infrastructure for its operation shall be constructed in the area designated for it.

1.3 Additional Port Terminal

The Concessionaire may reclaim and use the additional area of 12.8 (twelve point Five) Ha which is available till the southern end of the Port for development of Additional Port Terminals.

2 Project Equipment

Project Equipment shall be installed in conformity with the Specifications and Standards specified in Annex-II of Schedule-C.

3 Specifications and Standards

The Project shall be constructed in conformity with the Specifications and Standards specified in Annex-II of Schedule-D.

Annex-IV
(Schedule B)
(See Clause 3.1.3)

Description of Port Estate Development

1. Port Estate Development

- 1.1 The Concessionaire may undertake Port Estate Development on the Site, but restricted to the area earmarked for this purpose in Annex-III of Schedule-A. The land may be used for commercial and residential purposes, in a manner such that the operations of the Project are not affected.
- 1.2 Port Estate Development to be undertaken by the Concessionaire shall be in conformity with Applicable Laws including the Kerala Panchayat Building Rules, 2011 and/or the Kerala Municipality Building Rules, 1999, as the case may be.
- 1.3 Port Estate Development shall be undertaken in conformity with the terms and conditions specified in Paragraph 2 below.

2. Terms and conditions of Port Estate Development

2.1 Permissible Percentage of Coverage and Floor Area Ratio (FAR)

- 2.1.1 For the land falling under the jurisdiction of Thiruvananthapuram Municipal Corporation, the following percentage of coverage and FAR shall apply.

Sl.No.	Building use / Occupancy*	Maximum Permissible Coverage (percentage of plot area)	Maximum permissible F.A.R without additional fee	Maximum permissible F.A.R with additional fee at the rate of Rs.3000 per Sq. Metres of Additional floor area
(1)	(2)	(3)	(4)	(5)
1	A1-Residential	65	3.00	4
2	A2-Special Residential	65	2.50	4
3	B-Educational	35	2.50	3
4	C-Medical/Hospital	40	2.00	3
5	D-Assembly	40	1.50	2.50
6	E-Office/Business	40	2.00	3
7	F-Mercantile /	65	2.50	4

	Commercial			
8	G1-Industrial	40	1.50	-
9	G2-Small Industrial	60	2.50	3
10	H-Storage	70	2.50	3
11	I1-Hazardous	30	1.00	-
12	I2-Hazardous	25	0.70	-

* *Classification is in accordance with Section 30 of the Kerala Municipality Building Rules, 1999*

2.1.2 For the land following under the jurisdiction of Kottukal Village Panchayat the following percentage of coverage and FAR shall apply.

Sl. No.	Building use / Occupancy**	Maximum Permissible Coverage (percentage of plot area)	Maximum permissible F.A.R without additional fee	Maximum permissible F.A.R with additional fee at the rate of Rs.3000 per Sq. Metres of Additional floor area
(1)	(2)	(3)	(4)	(6)
1	A1-Residential			
	Upto 300 Sq.Metres	65	3.00	4.00
	Above 300 Sq.Metres	65	3.00	4.00
2	A2- Lodge Housing	65	2.50	4.00
3	B-Educational	35	2.50	3.00
4	C-Medical/Hospital	40	2.00	3.00
5	D-Assembly	40	1.50	2.50
6	E-Office/Commercial	40	2.00	3.00
7	F-Mercantile / Commercial	65	2.50	4.00
8	G1-Low and Medium Hazard Industrial	60	2.50	3.00
9	G2-High Hazard Industrial	40	1.50	-
10	H-Storage	70	2.50	3.00
11	I-Hazardous	25	0.70	-

** *Classification is in accordance with Section 34 of the Kerala Panchayat Building Rules, 2011*

Explanation:

Percentage of coverage = (Maximum built up area at any floor/plot area) X 100;
and Floor Area Ratio (FAR) = total floor area on all floor/plot area.

2.2 Height Restrictions

2.2.1 The maximum height of any building or part thereof falling under the jurisdiction of Thiruvananthapuram Municipal Corporation shall be as follows:

- (a) the maximum height of the building or part thereof shall not exceed twice the width of the street abutting the plot plus twice the width of the yard from the building to the abutting street and this height may further be increased proportionately at the rate of 3 (three) metres for every 50 (fifty) cms. by which the building or the corresponding portion or floor of the building is set back from the building line; and
- (b) if a building plot abuts on two or more streets of different width, the building plot shall be deemed to abut the street that has the greater width for the purposes of this rule and the height of the building shall be regulated by the width of that street and shall be continued at this height along the narrower street:

Provided that the height restriction shall be compulsory only for buildings or part of building coming within 12 (twelve) metres of building line.

2.2.2 The maximum height of any building or part thereof falling under the jurisdiction of Kottukal Village Panchayat shall be as follows:

- (a) the maximum height of a building or part thereof shall not exceed 1.5 (one point five) times the width of the street abutting the plot plus 1.5 (one point five) times the width of the yard from the building to the abutting street and this height may be further increased at the rate of 3 (three) metres for every 0.50 (point five) metre or part thereof by which the building is set back from the building line; and
- (b) If a building plot abuts on two or more streets of different width, the building shall be deemed to abut the street that has the greater width and the height of the building shall be regulated by the width of that street and may be continued at this height along the narrower street.

Provided that the height restriction shall be compulsory only for buildings or part of building coming within 12 (twelve) metres of building line.

2.3 Open Spaces, green area, parking etc.

The Concessionaire shall, for and in respect of creating open space, green area, parks, parking etc., comply with the Applicable Laws including, the Kerala Panchayat Building Rules, 2011 and/or the Kerala Municipality Building Rules, 1999, as the case may be.

Annex-V
(Schedule B)

Drawing of Breakwater Layout

SCHEDULE – C
(See Clause 2.1)

PROJECT EQUIPMENT

1 Project Equipment

The Concessionaire shall construct and/or install the Project Equipment in accordance with the provisions of this Agreement. Such Project Equipment shall include:

- (a) Equipment having the rated capacity to handle Containers/ cargo equivalent to 110% (one hundred and ten per cent) of the Daily Capacity of the Port; and
- (b) All ancillary equipment or any facility and equipment incidental or necessary for operation of the Port.

2 Description of Project Equipment

Project Equipment forming part of the Port and to be installed on or before COD has been described in Annex-I of this Schedule-C.

3 Project Equipment for Capacity Augmentation

Project Equipment forming part of Capacity Augmentation and to be installed on or before the Scheduled Capacity Augmentation Date have been described in Annex-II of this Schedule-C.

Annex - I
(Schedule-C)

Project Equipment

1 Project Equipment

The Concessionaire shall construct and/or install the Project Equipment described in this Annex-I to form part of the Port. The Project Equipment shall include:

- (a) Rail Mounted Quay Crane (RMQC), Rail Mounted Gantry Crane (RMGC), Rubber Tyre Gantry Crane (RTGC) or any substitute or modification thereof having a cumulative rated capacity to handle Containers/ cargo equivalent to 110% (one hundred and ten per cent) of the Daily Capacity of the Port; and
- (b) All ancillary equipment or any facility and equipment incidental or necessary for operation of the Port.

2 Description of Project Equipment

Each of the Project Equipment is briefly described below:

(a) RMQCs:

These are rail mounted gantry cranes provided on the berth for ship-to-shore handling of the Containers. They shall have a front outreach of up to 65 (sixty five) metres for handling up to 18,000 (eighteen thousand) TEUs vessels. The cranes shall be provided with telescopic twin lift spreaders.

(b) Electrically Powered Container Lifting Equipment for Container Yard:

Rubber Tyred Gantry Cranes (RTGC) shall be operated on rubber tyres and may travel anywhere in the Container yard on reinforced concrete runways to minimize the rutting that can take place along their travel paths.

Rail Mounted Gantry Cranes shall be operated on a fixed rail track and shall be used with thicker / wider Container stacks.

(c) Port Crafts:

The minimum requirement of Port Crafts shall be as indicated below:

S. No.	Harbour Craft	No.
1.	Tugs	
	<ul style="list-style-type: none">• 70T bollard pull	3

	• 40T bollard pull	1
2.	Mooring Launch	2
3.	Pilot cum Survey Vessels	1

(d) Navigational Aids:

Navigation aids shall be installed on land and in water for guidance to all vessels for safe and regulated navigation in channels, basin, berths and docks. The navigation aids shall include:

- (i) Fairway buoys, port and starboard buoys;
- (ii) Leading / transit lights;
- (iii) Beacons; and
- (iv) Vessel Traffic Management Information System

(i) Fairway buoys (FB)

The Concessionaire shall install fairway buoys marking the entry to the Approach Channel. The Concessionaire shall follow IALA (International Association of Marine Aids to Navigation and Lighthouse Authorities) Guidelines for spacing of the paired buoys along the navigational channel. The lateral marks shall be in red and green colours to denote the Port and starboard sides of the channel. IALA maritime buoyage system for Region A, which is applicable to the Port, shall be followed.

The minimum Navigational Aids to be provided shall include a total of 14 (fourteen) buoys comprising of the following:

- (a) 11 (eleven) outer channel buoys i.e. one fairway buoy (3.5m dia.), 5 (five) port side buoys (3m dia.) and 5 (five) starboard buoys (3m dia.); and
- (b) 3 (three) buoys (2.5m dia.) in the inner channel and harbour basin marking the periphery of the harbour basin area.

(ii) Leading Lights

The centre line of the channel shall be marked with leading lights to ensure safe day and night navigation of vessels visiting the Port.

The leading lines shall meet the following criteria:

- Useful range: Navigation channel
- Visibility range: 20 nautical miles

The leading lines and leading lights shall be designed in accordance with IALA Guidelines.

(iii) Beacons/ Breakwater Lights

Roundhead of the breakwaters shall be provided with beacons. The breakwaters shall be provided with Radar Beacon. The structure shall consist of 200 (two hundred) mm circular hollow steel structure with an access ladder on mass concrete block foundation to reach light position.

(e) Road Furniture

All road furniture and markings as necessary shall be provided by the Concessionaire in accordance with Good industry Practice.

Annex - II
(Schedule-C)

Project Equipment for Capacity Augmentation

1 Project Equipment

The Concessionaire shall install the Project Equipment described in Annex-I of this Schedule to form part of the Capacity Augmentation.

2 Description of Project Equipment

The description of Project Equipment shall be the same as provided in Annex-I of this Schedule.

SCHEDULE - D
(See Clause 2.1)

SPECIFICATIONS AND STANDARDS

1 Construction of the Project

The Concessionaire shall comply with the Specifications and Standards set forth in Annex-I of this Schedule-D for construction of the Port.

2 Capacity Augmentation

The Concessionaire shall comply with the Specifications and Standards set forth in Annex-II of this Schedule-D for construction of Capacity Augmentation.

3 Port Estate Development

Port Estate Development shall be undertaken in accordance with Applicable Laws, Good Industry Practice and the provisions of building construction codes widely followed in India, UK or USA, as the case may be.

Annex - I
(Schedule-D)

Specifications and Standards

1 Manual of Specifications and Standards to apply

Construction of the Port shall conform to the Manual of Specifications and Standards for DBFOT Port Projects published by the Authority. (An authenticated copy of the Manual has been provided to the Concessionaire as part of the bid documents.)

Annex - II
(Schedule-D)

Specifications and Standards for Capacity Augmentation

1 Manual of Specifications and Standards to apply

Capacity Augmentation of the Project shall conform to the Manual of Specifications and Standards for Port Projects published by the Authority. (An authenticated copy of the Manual has been provided to the Concessionaire as part of the bid documents.)

SCHEDULE - E
(See Clause 4.1.3)

APPLICABLE PERMITS

1 Applicable Permits

1.1 The Concessionaire shall obtain, as required under Applicable Laws, the following Applicable Permits on or before the Appointed Date, save and except to the extent of a waiver granted by the Authority in accordance with Clause 4.1.3 of the Agreement:

Part-I

- (a) Permission of the State Government for extraction of boulders from quarry; and
- (b) Permission of the Pollution Control Board for installation of crushers.

Part-II

- (a) Permission of the State Government for cutting of trees;
 - (b) Notification in the Official Gazette appointing the Port as a customs port; and
 - (c) Any other permits or clearances required under Applicable Laws.
- 1.2 Unless otherwise specified in this Agreement, Applicable Permits, as required, relating to environmental protection and conservation of the Licensed Premises, excluding Port Estate Development, shall have been procured by the Authority as a Condition Precedent.

SCHEDULE – F
(See Clause 9.1)

PERFORMANCE SECURITY

The Principal Secretary,
.....
.....

WHEREAS:

- (A) (the “**Concessionaire**”) and the Governor of (the “**Authority**”) have entered into a Concession Agreement dated (the “**Agreement**”) whereby the Authority has agreed to the Concessionaire undertaking the development of Port on design, build, finance, operate and transfer (the “**DBFOT**”) basis, subject to and in accordance with the provisions of the Agreement.
- (B) The Agreement requires the Concessionaire to furnish a Performance Security to the Authority in a sum of Rs.....cr. (Rupees crore) (the “**Guarantee Amount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Construction Period (as defined in the Agreement).
- (C) We, through our Branch at (the “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

- 1. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to the Authority upon occurrence of any failure or default in due and faithful performance of all or any of the Concessionaire’s obligations, under and in accordance with the provisions of the Agreement, on its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
- 2. A letter from the Authority, under the hand of an Officer not below the rank of Deputy Secretary in the Authority, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Construction Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any dispute between them pending before any court, tribunal, arbitrators or any

other authority or body, or by the discharge of the Concessionaire for any reason whatsoever.

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force until the earlier of the 1st (first) anniversary of the Appointed Date or compliance of the conditions specified in paragraph 8 below and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee, not later than 6 (six) months from the date of expiry of this Guarantee, all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
8. The Performance Security shall cease to be in force and effect when the Concessionaire shall have expended on Project construction an aggregate sum not less than 20% (twenty per cent) of the Total Project Cost which is deemed to be Rs. cr. (Rupees crore) for the purposes of this Guarantee, and provided the Concessionaire is not in breach of this Agreement. Upon request made by the Concessionaire for release of the Performance Security alongwith the particulars required hereunder, duly certified by a statutory auditor

of the Concessionaire, the Authority shall release the Performance Security forthwith.

9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorised to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.
11. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of two years from the date hereof or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

Signed and sealed this day of, 20..... at

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

(Signature)
(Name)
(Designation)
(Code Number)
(Address)

NOTES:

- (i) The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.
- (ii) The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

SCHEDULE - G
(See Clause 12.1)

PROJECT COMPLETION SCHEDULE

1 Project Completion Schedule

During Construction Period, the Concessionaire shall comply with the requirements set forth in this Schedule-G for each of the Project Milestones and the Scheduled Completion Date (the “**Project Completion Schedule**”). Within 15 (fifteen) days of the date of each Project Milestone, the Concessionaire shall notify the Authority of such compliance alongwith necessary particulars thereof. For the avoidance of doubt, it is agreed that the provisions of this Schedule shall not apply to Port Estate Development.

2 Project Milestone-I

2.1 Project Milestone-I shall occur on the date falling on the 365th (three hundred and sixty fifth) day from the Appointed Date (the “**Project Milestone-I**”).

2.2 Prior to the occurrence of Project Milestone-I, the Concessionaire shall have commenced construction of the Port and expended not less than 10% (ten per cent) of the total capital cost set forth in the Financial Package.

3 Project Milestone-II

3.1 Project Milestone-II shall occur on the date falling on the 600th (six hundredth) day from the Appointed Date (the “**Project Milestone-II**”).

3.2 Prior to the occurrence of Project Milestone-II, the Concessionaire shall have expended not less than 25% (twenty five per cent) of the total capital cost set forth in the Financial Package and conveyed to the Independent Engineer, the nature and extent of physical progress comprising such expenditure so as to enable the Independent Engineer to determine that the physical progress is reasonably commensurate with the expenditure incurred. Provided, however, that at least one-half of the expenditure referred to hereinabove shall have been incurred on physical works which shall not include advances of any kind to any person or expenditure of any kind on plant and machinery.

4 Project Milestone-III

4.1 Project Milestone-III shall occur on the date falling on the 900th (nine hundredth) day from the Appointed Date (the “**Project Milestone-III**”).

4.2 Prior to the occurrence of Project Milestone-III, the Concessionaire shall have commenced construction of all Project Equipment and expended not less than 60% (sixty per cent) of the total capital cost set forth in the Financial Package.

5 Scheduled Completion Date

- 5.1 The Scheduled Completion Date shall be the 1,460th (one thousand four hundred and sixtieth) day from the Appointed Date.
- 5.2 On or before the Scheduled Completion Date, the Concessionaire shall have completed the Port in accordance with this Agreement.

6 Extension of period

Upon extension of any or all of the aforesaid Project Milestones or the Scheduled Completion Date, as the case may be, under and in accordance with the provisions of this Agreement, the Project Completion Schedule shall be deemed to have been amended accordingly.

SCHEDULE - H
(See Clause 12.4)

DRAWINGS

1 Drawings

In compliance of the obligations set forth in Clause 12.4 of this Agreement, the Concessionaire shall furnish to the Independent Engineer, free of cost, all Drawings listed in Annex-I of this Schedule-H.

2 Additional drawings

If the Independent Engineer determines that for discharging its duties and functions under this Agreement, it requires any drawings other than those listed in Annex-I, it may by notice require the Concessionaire to prepare and furnish such drawings forthwith. Upon receiving a requisition to this effect, the Concessionaire shall promptly prepare and furnish such drawings to the Independent Engineer, as if such drawings formed part of Annex-I of this Schedule-H.

Annex - I
(Schedule-H)

List of Drawings

A. Port

1. General Arrangement of the Port (Proposed Master Plan)
2. General Arrangement of Port development
3. Dredging layout
4. Reclamation layout
5. Ground improvement works
6. Container yard
7. Container terminal gate complex
8. Port operations/control building
9. Electrical substation(s)
10. Fire station
11. Electrical network
12. Fire fighting network
13. Potable water supply network
14. Storm water drainage
15. Sewage systems
16. Effluent collection, treatment & disposal system
17. Port connecting road (from NH47 bypass till the Port)
18. Internal road network & traffic circulation
19. Berth structure
20. Mooring layout
21. Shore protection works

B. Funded Works

1. Breakwater
2. Utilities and services on breakwater
3. Breakwater access road
4. Fish landing berth
5. Buildings for fishing harbour
6. Utilities for fishing harbour
7. Road network for fishing harbour
8. Reclamation, ground improvement & revetments for fishing harbour
9. Navigation Markers for fishing harbour

C. Capacity Augmentation

1. General Arrangement of proposed Capacity Augmentation
2. Breakwater expansion

3. Dredging layout
4. Reclamation layout
5. Ground improvement works
6. Container yard expansion
7. Electrical network expansion
8. Fire fighting network expansion
9. Potable water supply network expansion
10. Storm water drainage expansion
11. Sewer systems expansion
12. Effluent collection, treatment & disposal system expansion
13. External connectivity road from roundabout at the start of the Port till roundhead of breakwater
14. Internal road network & traffic circulation
15. Berth structure
16. Mooring layout
17. Shore protection works
18. Navigational markers

SCHEDULE - I
(See Clause 14.1.2)

TESTS

1 Schedule for Tests

- 1.1 The Concessionaire shall, not later than 30 (thirty) days prior to the likely completion of the Port, notify the Independent Engineer and the Authority of its intent to subject the Port to Tests, and not later than 7 (seven) days prior to the actual date of Tests, furnish to the Independent Engineer and the Authority detailed inventory and particulars of all works and equipment forming part of the Port.
- 1.2 The Concessionaire shall notify the Independent Engineer of its readiness to subject the Port to Tests at any time after 7 (seven) days from the date of such notice, and upon receipt of such notice, the Independent Engineer shall, in consultation with the Concessionaire, determine the date and time for each Test and notify the same to the Authority who may designate its representative to witness the Tests. The Independent Engineer shall thereupon conduct the Tests itself or cause any of the Tests to be conducted in accordance with Article 14 and this Schedule-I.

2 Tests

- 2.1 In pursuance of the provisions of Clause 14.1.2 of this Agreement, the Independent Engineer shall conduct, or cause to be conducted, the Tests specified in this Paragraph 2.
- 2.2 Visual and physical Test: The Independent Engineer shall conduct a visual and physical check of the Port to determine that all works and equipment forming part thereof conform to the provisions of this Agreement.
- 2.3 Draught Test: The Independent Engineer shall measure the Draught at the Port and verify its conformity with this Agreement.
- 2.4 Test drive: The Independent Engineer shall undertake a test drive of the Port by a Car and by a fully loaded Truck to determine that the quality of service conforms to the provisions of the Agreement.
- 2.5 Pavement Composition Test: The thickness and composition of the pavement structure shall be checked on a sample basis by digging pits to determine conformity of such pavement structure with Specifications and Standards. The sample shall consist of one pit to be chosen at random in each block of 2,500 (two thousand and five hundred) square metres of the Port. The first pit for the sample shall be selected by the Independent Engineer through an open draw of lots and every fiftieth metre from such first pit shall form part of the sample for this pavement quality Test.
- 2.6 Cross-section Test: The cross-sections of the Port shall be checked on a sample basis through physical measurement of their dimensions for determining the

conformity thereof with Specifications and Standards. For the Wharf portion, the sample shall consist of one spot to be selected at random in each block of 1,000 (one thousand) square metres of the Port. The first spot for the sample shall be selected by the Independent Engineer through an open draw of lots and the spots located at every thirtieth metre from such first spot shall form part of the sample.

- 2.7 Structural Test for Wharf structures and bridges: All Wharf structures and major and minor bridges constructed by the Concessionaire shall be subjected to the Rebound Hammer and Ultrasonic Pulse Velocity tests, to be conducted in accordance with the procedure described in Special Report No. 17: 1996 of the IRC Highway Research Board on Non-destructive Testing Techniques, at two spots in every span, to be chosen at random by the Independent Engineer. Bridges with a span of 15 (fifteen) metres or more and all Wharf structures shall also be subjected to load testing in accordance with Good Industry Practice.
- 2.8 Project Equipment Test: All Project Equipment shall be tested for its conformity with the capacity and availability requirements specified in this Agreement.
- 2.9 Other Tests: The Independent Engineer may require the Concessionaire to carry out or cause to be carried additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Port with Specifications and Standards.
- 2.10 Environmental audit: The Independent Engineer shall carry out a check to determine conformity of the Port with the environmental requirements set forth in Applicable Laws and Applicable Permits.
- 2.11 Safety review: Safety audit of the Port shall have been undertaken by the Safety Consultant as set forth in Schedule-L, and on the basis of such audit, the Independent Engineer shall determine conformity of the Port with the provisions of this Agreement.
- 2.12 Tests for roads: The Independent Engineer shall undertake Tests for roads forming part of the Project. Such Tests shall be determined in accordance with the Good Industry Practice which shall, for the purposes hereof, mean the tests specified for National Highway Projects built through public private partnership.

3 Agency for conducting Tests

All Tests set forth in this Schedule-I shall be conducted by the Independent Engineer or such other agency or person as it may specify in consultation with the Authority.

4 Completion/Provisional Certificate

Upon successful completion of Tests, the Independent Engineer shall issue the Completion Certificate or the Provisional Certificate, as the case may be, in accordance with the provisions of Article 14.

5 Tests during construction

Without prejudice to the provisions of this Schedule-I, tests during construction shall be conducted in accordance with the provisions of Clause 13.3.1.

SCHEDULE –J
(See Clause 14.2 & 14.3)

COMPLETION CERTIFICATE

- 1 I/We, (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated (the “**Agreement**”), for development and operation of the Port (the “**Port**”) on design, build, finance, operate and transfer (the “**DBFOT**”) basis, through (Name of Concessionaire), hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been successfully undertaken to determine compliance of the Port with the provisions of the Agreement, and I/We am/are satisfied that the Port can be safely and reliably placed in commercial service of the Users thereof.

- 2 It is certified that, in terms of the aforesaid Agreement, all works forming part of the Port have been completed, and the Port is hereby declared fit for entry into commercial operation on this the day of 20.....

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

(Signature)
(Name)
(Designation)
(Address)

PROVISIONAL CERTIFICATE

- 1 I/We, (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated (the “**Agreement**”), for development and operation of the Port (the “**Port**”) on design, build, finance, operate and transfer (the “**DBFOT**”) basis through (Name of Concessionaire), hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been undertaken for the Port to determine compliance thereof with the provisions of the Agreement.

- 2 Construction Works forming part of the Port that were found to be incomplete and/or deficient have been specified in the Punch List appended hereto, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. (Some of the incomplete works have been delayed as a result of reasons attributable to the Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire,)[§] I/We am/are satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Port, pending completion thereof.

- 3 In view of the foregoing, I/We am/are satisfied that the Port can be safely and reliably placed in commercial service of the Users thereof, and in terms of the Agreement, the Port is hereby provisionally declared fit for entry into commercial operation on this the day of 20.....

ACCEPTED, SIGNED, SEALED
AND DELIVERED
For and on behalf of
CONCESSIONAIRE by:

(Signature)
(Name and Designation)
(Address)

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

(Signature)
(Name and Designation)
(Address)

[§] May be struck out if not applicable. Also strike out other parts which are not applicable.

SCHEDULE –K
(See Clause 17.2)

MAINTENANCE REQUIREMENTS

1 Maintenance Requirements

- 1.1 The Concessionaire shall, at all times, operate and maintain the Port in accordance with the provisions of the Agreement, Applicable Laws and Applicable Permits. In particular, the Concessionaire shall, at all times during the Operation Period, conform to the maintenance requirements set forth in this Schedule-K (the “**Maintenance Requirements**”).
- 1.2 The Concessionaire shall repair or rectify any defect or deficiency set forth in Paragraph 2 of this Schedule-K within the time limit specified therein and any failure in this behalf shall constitute a breach of the Agreement. Upon occurrence of any breach hereunder, the Authority shall be entitled to recover Damages as set forth in Clause 17.8 of the Agreement, without prejudice to the rights of the Authority under the Agreement, including Termination thereof.
- 1.3 The Concessionaire shall operate and maintain the roads forming part of the Project in accordance with Good Industry Practice. For the avoidance of doubt, Good Industry Practice shall, for the purposes hereof, mean the maintenance requirements specified for National Highway projects undertaken through Public Private Partnership.

2 Repair/rectification of defects and deficiencies

- 2.1 The obligations of the Concessionaire in respect of Maintenance Requirements shall include repair and rectification of the defects and deficiencies specified in Annex-I of this Schedule-K within the time limit set forth therein.
- 2.2 The Concessionaire shall at all times maintain an adequate inventory of spares and consumables to meet the Maintenance Requirements.

3 Other defects and deficiencies

- 3.1 In respect of any defect or deficiency not specified in Annex-I of this Schedule-K, the Concessionaire shall undertake repair or rectification in accordance with Good Industry Practice and within the time limit specified by the Independent Engineer.
- 3.2 In respect of any defect or deficiency not specified in Annex-I of this Schedule-K, the Independent Engineer may, in conformity with Good Industry Practice, specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards, and any deviation or deterioration beyond the permissible limit shall be repaired or rectified by the Concessionaire in accordance with Good Industry Practice and within the time limit specified by the Independent Engineer.

4 Extension of time limit

Notwithstanding anything to the contrary specified in this Schedule-K, if the nature and extent of any defect or deficiency justifies more time for its repair or rectification than the time specified herein, the Concessionaire shall be entitled to additional time in conformity with Good Industry Practice. Such additional time shall be determined by the Independent Engineer and conveyed to the Concessionaire and the Authority with reasons thereof.

5 Emergency repairs/restoration

Notwithstanding anything to the contrary contained in this Schedule-K, if any defect, deficiency or deterioration in the Port poses a hazard to safety or risk of damage to property, the Concessionaire shall promptly take all reasonable measures for eliminating or minimizing such danger.

6 Daily Inspection by the Concessionaire

The Concessionaire shall, through its engineer, undertake a daily visual inspection of the Port and maintain a record thereof in a register to be kept in such form and manner as the Independent Engineer may specify. Such record shall be kept in safe custody of the Concessionaire and shall be open to inspection by the Authority and the Independent Engineer at any time during office hours.

7 Divestment Requirements

All defects and deficiencies specified in this Schedule-K shall be repaired and rectified by the Concessionaire so that the Port conforms to the Maintenance Requirements on the Transfer Date.

8 Display of Schedule-K

The Concessionaire shall display a copy of this Schedule-K at the Site and the Concessionaire's offices along with the Complaint Register stipulated in Article 47.

Annex - I
(Schedule-K)

Repair/Rectification of Defects and Deficiencies

The Concessionaire shall repair and rectify the defects and deficiencies specified in this Annex-I of Schedule-K within the time limit set forth herein

Nature of defect or deficiency	Time limit for repair/rectification or criteria laid down therein
I. INFRASTRUCTURE	
(A) Structure and pavement of Wharf, quay wall and roads	
(i) Roughness value of pavement exceeding 2,000 mm in a stretch of 100 metres (as measured by a standardized roughometer / bump integrator)	30 days
(ii) Pot Holes	48 hours
(iii) Cracking in more than 5% of surface in a stretch of 100 m	30 days
(iv) Rutting exceeding 10 mm in more than 2% of surface in a stretch of 100 m (measured with 3 m straight edge)	30 days
(v) Bleeding/Skidding	7 days
(vi) Ravelling/Stripping of concrete blocks over surface exceeding 10 sq. m	15 days
(vii) Damage to quay wall	7 days
(viii) Damage to pavement	7 days
(viii) Removal of Debris	6 hours
II. EQUIPMENT	
(A) Cranes	
(i) Reduction in availability below 90% of Capacity	15 days
(ii) Reduction in availability below 90% of Daily Capacity during period of availability	7 days
(B) Reach stackers, empty handlers, tractors and trailer units	
(i) Reduction in availability below 90% of Capacity	15 days

(ii)	Reduction in availability below 90% of Daily Capacity during period of availability	7 days
(C) Wharf lights / high mast lights and Telecom		
(i)	Any major failure of the system	24 hours
(ii)	Faults and minor failure	4 hours
(D) Fenders		
(i)	Replacement/repair of fender in case of damage due to accidental hits	2 days
(E) Navigational Aids		
(i)	Any major failure of individual systems	24 hours
(ii)	Faults and minor failure of individual systems	2 hours
(F) EDI and computer systems		
(i)	Any major failure of the system	24 hours
(ii)	Faults and minor failure	4 hours

SCHEDULE –L
(See Clause 18.1.1)

SAFETY REQUIREMENTS

1 Guiding principles

- 1.1 Safety Requirements aim at reduction in injuries, loss of life and damage to property resulting from accidents on or about the Port, irrespective of the person(s) at fault.
- 1.2 Users of the Port include motorised and non-motorised vessels and vehicles as well as pedestrians involved in, or associated with accidents.
- 1.3 Safety Requirements apply to all phases of construction, operation and maintenance with emphasis on identification of factors associated with accidents, consideration of the same, and implementation of appropriate remedial measures.
- 1.4 Safety Requirements include measures associated with traffic management and regulation such as signs, pavement marking, traffic control devices, Port furniture, design elements, enforcement and emergency response.
- 1.5 The Concessionaire shall, in accordance with Good Industry Practice, make adequate arrangements for safety during construction and operation of roads forming part of the Project. For the avoidance of doubt, Good Industry Practice shall, for the purposes hereof, mean the safety requirements applicable to National Highway projects undertaken through Public Private Partnership.

2 Obligations of the Concessionaire

The Concessionaire shall abide by the following insofar as they relate to safety of the Users:

- (a) Applicable Laws and Applicable Permits;
- (b) Manual for Safety in Port Design and Operation, issued by the Authority;
- (c) provisions of this Agreement; and
- (d) Good Industry Practice.

3 Appointment of Safety Consultant

For carrying out safety audit of the Port under and in accordance with this Schedule-L, the Authority shall appoint from time to time, one or more qualified firms or organisations as its consultants (the “**Safety Consultant**”). The Safety Consultant shall employ a team comprising, without limitation, one Port safety expert and one navigation expert to undertake safety audit of the Port.

4 Safety measures during Development Period

- 4.1 No later than 90 (ninety) days from the date of this Agreement, the Authority shall appoint a Safety Consultant for carrying out safety audit at the design stage of the Project. The Safety Consultant shall collect data on all accidents which occurred on the Authority premises in the preceding two years by obtaining copies of the relevant information from the Authority. The information shall be analysed for the type of victims killed or injured, impacting vessels or vehicles, location of accidents and other relevant factors.
- 4.2 The Concessionaire shall provide to the Safety Consultant, in four copies, the relevant drawings containing the design details that have a bearing on safety of Users (the “**Safety Drawings**”). Such design details shall include horizontal and vertical alignments; sightlines; Port cross-section; bridges; provision for parked vessels and vehicles, slow moving vehicles (tractors, carts) and pedestrians; and other incidental or consequential information. The Safety Consultant shall review the design details and forward 3 (three) copies of the Safety Drawings with its recommendations, if any, to the Independent Engineer who shall record its comments, if any, and forward one copy each to the Authority and the Concessionaire.
- 4.3 The accident data and the design details shall be compiled, analysed and used by the Safety Consultant for evolving a package of recommendations consisting of safety related measures for the Port. The safety audit shall be completed in a period of three months and a report thereof (the “**Safety Report**”) shall be submitted to the Authority, in 5 (five) copies. One copy each of the Safety Report shall be forwarded by the Authority to the Concessionaire and the Independent Engineer forthwith.
- 4.4 The Concessionaire shall endeavour to incorporate the recommendations of the Safety Report in the design of the Port, as may reasonably be required in accordance with Applicable Laws, Applicable Permits, Manuals and Guidelines of the Authority, Specifications and Standards, and Good Industry Practice. If the Concessionaire does not agree with any or all of such recommendations, it shall state the reasons thereof and convey them to the Authority forthwith. In the event that any or all of the works and services recommended in the Safety Report fall beyond the scope of Schedule-B, Schedule-C or Schedule-D, the Concessionaire shall make a report thereon and seek the instructions of the Authority for funding such works in accordance with the provisions of Article 18.
- 4.5 Without prejudice to the provisions of Paragraph 4.4, the Concessionaire and the Independent Engineer shall, within 15 (fifteen) days of receiving the Safety Report, send their respective comments thereon to the Authority, and no later than 15 (fifteen) days of receiving such comments, the Authority shall review the same alongwith the Safety Report and by notice direct the Concessionaire to carry out any or all of the recommendations contained therein with such modifications as the Authority may specify; provided that any works or services required to be undertaken hereunder shall be governed by the provisions of Article 18.

5 Safety measures during Construction Period

- 5.1 A Safety Consultant shall be appointed by the Authority, no later than 4 (four) months prior to the expected COD, for carrying out a safety audit of the completed Construction Works.
- 5.2 The Safety Consultant shall collect and analyse the accident data for the preceding two years in the manner specified in Paragraph 4.1 of this Schedule-L. It shall study the Safety Report for the Development Period and inspect the Port to assess the adequacy of safety measures. The Safety Consultant shall complete the safety audit within a period of 4 (four) months and submit a Safety Report recommending a package of additional safety measures, if any, that are considered essential for reducing accident hazards on the Port. Such recommendations shall be processed, *mutatis mutandis*, and acted upon in the manner set forth in Paragraphs 4.3, 4.4 and 4.5 of this Schedule-L.
- 5.3 The Concessionaire shall make adequate arrangements during the Construction Period for the safety of workers and Users in accordance with Good Industry Practice for safety in construction zones, and notify the Authority and the Independent Engineer about such arrangements.

6 Safety measures during Operation Period

- 6.1 The Concessionaire shall develop, implement and administer a surveillance and safety programme for Users and workers, including correction of safety violations and deficiencies and all other actions necessary to provide a safe environment in accordance with this Agreement.
- 6.2 The Concessionaire shall establish a Port Safety Management Unit (the “PSMU”) to be functional on and after COD, and designate one of its officers to be in-charge of the PSMU. Such officer shall have specialist knowledge and training in Port safety by having attended a course conducted by a reputed organisation on the subject.
- 6.3 The Concessionaire shall keep a copy of every FIR recorded by the Police with respect to any accident occurring on the Port. In addition, the Concessionaire shall also collect data for all cases of accidents not recorded by the Police but where a vessel or vehicle rolled over or had to be towed away. The Concessionaire shall also record the exact location of each accident on a map of the Port. The aforesaid data shall be submitted to the Authority at the conclusion of every quarter and to the Safety Consultant as and when appointed.
- 6.4 The Concessionaire shall submit to the Authority before the 31st (thirty first) May of each year, an annual report (in ten copies) containing, without limitation, a detailed listing and analysis of all accidents of the preceding Accounting Year and the measures taken by the Concessionaire pursuant to the provisions of Paragraph 6.1 of this Schedule-L for averting or minimising such accidents in future.
- 6.5 Once in every Accounting Year, a safety audit shall be carried out by the Safety

Consultant to be appointed by the Authority. It shall review and analyse the annual report and accident data of the preceding year, and undertake an inspection of the Port. The Safety Consultant shall complete the safety audit within a period of 1 (one) month and submit a Safety Report recommending specific improvements, if any, required to be made to the Port. Such recommendations shall be processed, *mutatis mutandis*, and acted upon in the manner set forth in Paragraphs 4.3, 4.4 and 4.5 of this Schedule-L.

7 Costs and expenses

Costs and expenses incurred in connection with the Safety Requirements set forth herein, including the provisions of Paragraph 2 of this Schedule-L, shall be met in accordance with Article 18, and in particular, the remuneration of the Safety Consultant, safety audit, and costs incidental thereto, shall be met by the Concessionaire.

SCHEDULE –M
(See Clause19.5)

MONTHLY FEE STATEMENT

Port:				Month:					
Type of Vessels	For corresponding month of previous year			For preceding month			For the month reported upon		
	No. of Vessels	No. of TEUs/ Cargo (in MT)	User Fee (In lakh Rs.)	No. of Vessels	No. of TEUs/ Cargo (in MT)	User Fee (In lakh Rs.)	No. of Vessels	No. of TEUs/ Cargo (in MT)	User Fee (In lakh Rs.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1.									
2.									
3.									
4.									
5.									

SCHEDULE –N
(See Clause 22.3.1)

TRAFFIC SAMPLING

1 Vessel and Cargo sampling

The Authority may, in its discretion and at its own cost, undertake traffic sampling, pursuant to Clause 22.3, in order to determine the actual vessel and cargo traffic on the Port and the User Fee and dwell time thereof. Such traffic sampling shall be undertaken through the Independent Engineer in the manner set forth below.

2 Vessel and Cargo count

The Independent Engineer shall employ the required number of enumerators who shall count, classify and record all the vessels, vehicles and cargo as they pass by, and divide the survey into fixed time periods. The survey shall be conducted continuously for a minimum of 15 (fifteen) days and maximum of 30 (thirty) days at a time. The results shall be summarised hourly. These results will be cross-checked with the data collected and analysed by the Concessionaire and the Authority. For the avoidance of doubt, it is expressly agreed that the Authority may, in consultation with the Concessionaire, adopt modified or alternative processes of traffic sampling for improving the reliability of such sampling.

SCHEDULE –O
(See Clause 23.1)

SELECTION OF INDEPENDENT ENGINEER

1 Selection of Independent Engineer

- 1.1 The provisions of the Model Request for Proposals for Selection of Technical Consultants, issued by the Ministry of Finance, GOI vide OM 24(23)/PF-II/2008 dated May 21, 2009, or any substitute thereof shall apply for selection of an experienced firm to discharge the functions and duties of an Independent Engineer. Provided, however, that no entity which is owned or controlled by the Authority shall be eligible for appointment as the Independent Engineer hereunder.1.2 In the event of termination of an Independent Engineer appointed in accordance with the provisions of Paragraph 1.1, the Authority shall appoint another firm of Technical Consultants forthwith or may engage a government-owned entity in accordance with the provisions of Paragraph 5 of this Schedule-O.
- 1.3 The Concessionaire may, in its discretion, nominate a representative to participate in the process of selection to be undertaken by the Authority under this Schedule-O.

2 Terms of Reference

The Terms of Reference for the Independent Engineer shall substantially conform with Schedule-P.

3 Fee and expenses

- 3.1 In determining the nature and quantum of duties and services to be performed by the Independent Engineer during the Development Period and Construction Period, the Authority shall endeavour that payments to the Independent Engineer on account of fee and expenses do not exceed 2% (two per cent) of the Total Project Cost, including Equity Support, if any. Payments not exceeding such 2% (two per cent) shall be borne equally by the Authority and the Concessionaire in accordance with the provisions of this Agreement and any payments in excess thereof shall be borne entirely by the Authority.
- 3.2 The nature and quantum of duties and services to be performed by the Independent Engineer during the Operation Period shall be determined by the Authority in conformity with the provisions of this Agreement and with due regard for economy in expenditure. All payments made to the Independent Engineer on account of fee and expenses during the Operation Period, shall be borne equally by the Authority and the Concessionaire.

4 Selection every three years

No later than 3 (three) years from the date of appointment of Independent Engineer pursuant to the provisions of Paragraph 1 of this Schedule-O, and every 3 (three)

years thereafter, the Authority shall engage another firm in accordance with the criteria set forth in this Schedule-O.

5 Appointment of government entity as Independent Engineer

Notwithstanding anything to the contrary contained in this Schedule, the Authority may in its discretion appoint a government-owned entity as the Independent Engineer; provided that such entity shall be a body corporate having as one of its primary function the provision of consulting, advisory and supervisory services for engineering projects; provided further that any entity which is owned or controlled by the Authority shall not be eligible for appointment as Independent Engineer.

SCHEDULE –P
(See Clause 23.2.1)

TERMS OF REFERENCE FOR INDEPENDENT ENGINEER

1 Scope

- 1.1 These Terms of Reference for the Independent Engineer (the “**TOR**”) are being specified pursuant to the Concession Agreement dated (the “**Agreement**”), which has been entered into between the Authority and (the “**Concessionaire**”) for undertaking the Port on design, build, finance, operate and transfer (the “**DBFOT**”) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.
- 1.2 This TOR shall apply to construction, operation and maintenance of the Port and shall apply, *mutatis mutandis*, to Capacity Augmentation thereof.

2 Definitions and interpretation

- 2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.
- 2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.
- 2.3 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Agreement shall apply, *mutatis mutandis*, to this TOR.

3 Role and functions of the Independent Engineer

- 3.1 The role and functions of the Independent Engineer shall include the following:
- (i) review of the Drawings and Documents as set forth in Paragraph 4;
 - (ii) review, inspection and monitoring of Construction Works as set forth in Paragraph 5;
 - (iii) conducting Tests on completion of construction and issuing Completion/ Provisional Certificate as set forth in Paragraph 5;
 - (iv) review, inspection and monitoring of O&M as set forth in Paragraph 6;
 - (v) review, inspection and monitoring of Divestment Requirements as set forth in Paragraph 7;
 - (vi) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
 - (vii) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;

- (viii) assisting the Parties in resolution of Disputes as set forth in Paragraph 9; and
- (ix) undertaking all other duties and functions in accordance with the Agreement.

3.2 The role and functions of the Independent Engineer shall not include construction works comprising Port Estate Development.

3.3 The Independent Engineer shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

4 Development Period

4.1 During the Development Period, the Independent Engineer shall undertake a detailed review of the Drawings to be furnished by the Concessionaire along with supporting data, including the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites, topographical surveys and traffic surveys. The Independent Engineer shall complete such review and send its comments/observations to the Authority and the Concessionaire within 15 (fifteen) days of receipt of such Drawings. In particular, such comments shall specify the conformity or otherwise of such Drawings with the Scope of the Project and Specifications and Standards.

4.2 The Independent Engineer shall review any modified Drawings or supporting Documents sent to it by the Concessionaire and furnish its comments within 7 (seven) days of receiving such Drawings or Documents.

4.3 The Independent Engineer shall review the Drawings sent to it by the Safety Consultant in accordance with Schedule-L and furnish its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receiving such Drawings. The Independent Engineer shall also review the Safety Report and furnish its comments thereon to the Authority within 15 (fifteen) days of receiving such report.

4.4 The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.

4.5 Upon reference by the Authority, the Independent Engineer shall review and comment on the EPC Contract or any other contract for construction, operation and maintenance of the Port, and furnish its comments within 7 (seven) days from receipt of such reference from the Authority.

5 Construction Period

5.1 In respect of the Drawings, Documents and Safety Report received by the Independent Engineer for its review and comments during the Construction Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.

- 5.2 The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.
- 5.3 The Independent Engineer shall inspect the Construction Works and the Port once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out a report of such inspection (the “**Inspection Report**”) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Scope of the Project and the Specifications and Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in the construction of the Port. The Inspection Report shall also contain a review of the maintenance of the existing water channels in conformity with the provisions of the Agreement. The Independent Engineer shall send a copy of its Inspection Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.
- 5.4 The Independent Engineer may inspect the Port more than once in a month if any lapses, defects or deficiencies require such inspections.
- 5.5 For determining that the Construction Works conform to Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. For purposes of this Paragraph 5.5, the tests specified in (the “**Quality Control Manual**”) or any modification/substitution thereof shall be deemed to be tests conforming to Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 5.6 The sample size of the tests, to be specified by the Independent Engineer under Paragraph 5.5, shall comprise 10% (ten per cent) of the quantity or number of tests prescribed for each category or type of tests in the Quality Control Manuals; provided that the Independent Engineer may, for reasons to be recorded in writing, increase the aforesaid sample size by up to 10% (ten per cent) for certain categories or types of tests.
- 5.7 The timing of tests referred to in Paragraph 5.5, and the criteria for acceptance/rejection of their results shall be determined by the Independent Engineer in accordance with the Quality Control Manuals. The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.
- 5.8 In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that

such remedial works have brought the Construction Works into conformity with the Specifications and Standards, and the provisions of this Paragraph 5 shall apply to such tests.

- 5.9 In the event that the Concessionaire fails to achieve any of the Project Milestones, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Port is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) days the steps proposed to be taken to expedite progress, and the period within which COD shall be achieved. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire forthwith.
- 5.10 If at any time during the Construction Period, the Independent Engineer determines that the Concessionaire has not made adequate arrangements for the safety of workers and Users in the zone of construction or that any work is being carried out in a manner that threatens the safety of the workers and the Users, it shall make a recommendation to the Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 5.11 In the event that the Concessionaire carries out any remedial measures to secure the safety of suspended works and Users, it may, by notice in writing, require the Independent Engineer to inspect such works, and within 3 (three) days of receiving such notice, the Independent Engineer shall inspect the suspended works and make a report to the Authority forthwith, recommending whether or not such suspension may be revoked by the Authority.
- 5.12 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of dates set forth in the Project Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the Authority and the Concessionaire of the same.
- 5.13 The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in Schedule-I and issue a Completion Certificate or Provisional Certificate, as the case may be. For carrying out its functions under this Paragraph 5.13 and all matters incidental thereto, the Independent Engineer shall act under and in accordance with the provisions of Article 14 and Schedule-I.
- 5.14 Upon reference from the Authority, the Independent Engineer shall make a fair and reasonable assessment of the costs of providing information, works and services as set forth in Article 16 and certify the reasonableness of such costs for payment by the Authority to the Concessionaire.
- 5.15 The Independent Engineer shall aid and advise the Concessionaire in preparing the Maintenance Manual.

6 Operation Period

- 6.1 In respect of the Drawings, Documents and Safety Report received by the Independent Engineer for its review and comments during the Operation Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.
- 6.2 The Independent Engineer shall review the annual Maintenance Programme furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 15 (fifteen) days of receipt of the Maintenance Programme.
- 6.3 The Independent Engineer shall review the monthly status report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.
- 6.4 The Independent Engineer shall inspect the Port once every month, preferably after receipt of the monthly status report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out an O&M Inspection Report setting forth an overview of the status, quality and safety of O&M including its conformity with the Maintenance Requirements and Safety Requirements. In a separate section of the O&M Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in O&M of the Port. The Independent Engineer shall send a copy of its O&M Inspection Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.
- 6.5 The Independent Engineer may inspect the Port more than once in a month, if any lapses, defects or deficiencies require such inspections.
- 6.6 The Independent Engineer shall in its O&M Inspection Report specify the tests, if any, that the Concessionaire shall carry out, or cause to be carried out, for the purpose of determining that the Port is in conformity with the Maintenance Requirements. It shall monitor and review the results of such tests and the remedial measures, if any, taken by the Concessionaire in this behalf.
- 6.7 In respect of any defect or deficiency referred to in Paragraph 3 of Schedule-K, the Independent Engineer shall, in conformity with Good Industry Practice, specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards and shall also specify the time limit for repair or rectification of any deviation or deterioration beyond the permissible limit.
- 6.8 The Independent Engineer shall determine if any delay has occurred in completion of repair or remedial works in accordance with the Agreement, and shall also determine the Damages, if any, payable by the Concessionaire to the Authority for such delay.
- 6.9 The Independent Engineer shall examine the request of the Concessionaire for closure of any part of the Port for undertaking maintenance/repair thereof, keeping in view the need to minimise disruption in traffic and the time required for

completing such maintenance/repair in accordance with Good Industry Practice. It shall grant permission with such modifications, as it may deem necessary, within 3 (three) days of receiving a request from the Concessionaire. Upon expiry of the permitted period of closure, the Independent Engineer shall monitor the re-opening of such part of the Port, and in case of delay, determine the Damages payable by the Concessionaire to the Authority under Clause 17.7.

- 6.10 The Independent Engineer shall monitor and review the curing of defects and deficiencies by the Concessionaire as set forth in Clause 19.4.
- 6.11 In the event that the Concessionaire notifies the Independent Engineer of any modifications that it proposes to make to the Port, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire within 15 (fifteen) days of receiving the proposal.
- 6.12 The Independent Engineer shall undertake traffic sampling, as and when required by the Authority, under and in accordance with Article 22 and Schedule-N.

7 Termination

- 7.1 At any time, not earlier than 90 (ninety) days prior to Termination but not later than 15 (fifteen) days prior to such Termination, the Independent Engineer shall, in the presence of a representative of the Concessionaire, inspect the Port for determining compliance by the Concessionaire with the Divestment Requirements set forth in Clause 39.1 and, if required, cause tests to be carried out at the Concessionaire's cost for determining such compliance. If the Independent Engineer determines that the status of the Port is such that its repair and rectification would require a larger amount than the sum set forth in Clause 40.2, it shall recommend retention of the required amount in the Escrow Account and the period of retention thereof.
- 7.2 The Independent Engineer shall inspect the Port once in every 15 (fifteen) days during a period of 90 (ninety) days after Termination for determining the liability of the Concessionaire under Article 40, in respect of the defects or deficiencies specified therein. If any such defect or deficiency is found by the Independent Engineer, it shall make a report in reasonable detail and send it forthwith to the Authority and the Concessionaire.

8 Determination of costs and time

- 8.1 The Independent Engineer shall determine the costs, and/or their reasonableness, that are required to be determined by it under the Agreement.
- 8.2 The Independent Engineer shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

9 Assistance in Dispute resolution

- 9.1 When called upon by either Party in the event of any Dispute, the Independent Engineer shall mediate and assist the Parties in arriving at an amicable settlement.

- 9.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of the Agreement, the Independent Engineer shall specify such meaning, scope and nature by issuing a reasoned written statement relying on Good Industry Practice and authentic literature.

10 Other duties and functions

The Independent Engineer shall perform all other duties and functions specified in the Agreement.

11 Miscellaneous

- 11.1 The Independent Engineer shall notify its programme of inspection to the Authority and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.
- 11.2 A copy of all communications, comments, instructions, Drawings or Documents sent by the Independent Engineer to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the Independent Engineer thereon shall be furnished by the Independent Engineer to the Authority forthwith.
- 11.3 The Independent Engineer shall obtain, and the Concessionaire shall furnish in 2 (two) copies thereof, all communications and reports required to be submitted, under this Agreement, by the Concessionaire to the Independent Engineer, whereupon the Independent Engineer shall send 1 (one) of the copies to the Authority along with its comments thereon.
- 11.4 The Independent Engineer shall retain at least one copy each of all Drawings and Documents received by it, including 'as-built' Drawings, and keep them in its safe custody.
- 11.5 Upon completion of its assignment hereunder, the Independent Engineer shall duly classify and list all Drawings, Documents, results of tests and other relevant records, and hand them over to the Authority or such other person as the Authority may specify, and obtain written receipt thereof. Two copies of the said documents shall also be furnished in their editable digital format or in such other medium or manner as may be acceptable to the Authority.
- 11.6 Wherever no period has been specified for delivery of services by the Independent Engineer, the Independent Engineer shall act with the efficiency and urgency necessary for discharging its functions in accordance with Good Industry Practice.

SCHEDULE -Q

(See Clause 27.1.1)

FEE SCHEDULE

1. DEFINITIONS & INTERPRETATION

1.1 Definitions

The words and expressions beginning with capital letters and defined in this Fee Schedule shall, unless the context otherwise requires, have the meaning ascribed thereto herein and the words and expressions used but not defined in this Fee Schedule shall have the meaning ascribed thereto in the Concession Agreement:

“**Hazardous Cargo**” means bulk cargo or a container containing hazardous goods as classified by IMO;

“**Major Port**” means a major port as defined in the Major Ports Trust Act, 1963;

“**Reefer Container**” means a refrigerated container with provision for receiving electrical supply for refrigeration;

“**Shut Out Cargo**” means bulk cargo or a container which enters into the Port as export intake for a particular vessel as indicated by the Vessel Identification Advice No. (VIAN) however, is eventually not shipped into that particular vessel for any reason whatsoever;

“**Transshipment Container**” means a Container that is discharged from one vessel at the Port and subsequently shipped through another vessel to other ports and which may be stored in the container yard in the interim; and

“**Wharfage**” means the basic dues recoverable on all bulk cargo landed, shipped or transhipped within the Port.

1.2 Rounding off of rates

For ease of payment and collection, the total amount of Fee to be paid by a User shall be rounded off to the nearest Rs. 10 (Rupees ten).

2. CONTAINER RELATED CHARGES

2.1 General terms & conditions

The Concessionaire may levy and recover the charges set out in this Paragraph 2 for and in respect of handling of Containers.

2.2 Charges for handling and movement of Containers

2.2.1 The Concessionaire may levy and recover the charges set out in this Paragraph 2.2 for services rendered in respect of Containers landed, shipped or transhipped within the Port.

2.2.2 The charges in respect of import and export (gateway) Containers may be levied and recovered as follows:

Sr. No.	Type of Containers	Rate per Container (In Rs.)	
		20 ft. Container	40 ft. Container
1.	From vessel to CY or vice versa- loaded Containers (import /export)	500	750
2.	From vessel to CY or vice versa – empty Containers (import /export)	440	670
3.	Wharfage charges - loaded Containers	1,110	1,660
4.	Wharfage charges – empty Containers	230	350
5.	Transport to rail flat from CY or vice versa - loaded Containers	500	750
6.	Transport to rail flat from CY or vice versa – empty Containers	440	670
7.	Transport to truck from CY or vice versa – empty Containers	330	500
8.	Transport to truck from CY or vice versa - loaded Containers	1,060	1,600
9.	Handling at CY for lift on / off while receiving from quay	1,060	1,600

*CY: Container Yard

2.2.3 The charges in respect of Transshipment Containers may be levied and recovered as follows:

Sr. No.	Type of Containers	Rate per Container (In Rs.)	
		20 ft. Container	40 ft. Container
1.	From vessel to CY or vice versa – loaded Containers	11,290	16,940
2.	From vessel to CY or vice versa - empty Containers	10,030	15,040

*CY: Container Yard

2.2.4 The charges for and in respect of Transshipment Containers shall be reckoned for discharging one Container from a vessel or for loading one container onto a vessel.

2.2.5 A Container declared as Transshipment Container, but subsequently moved by rail or road, will lose its identity as a Transshipment Container and shall be treated as a normal import (gateway) Container.

2.2.6 The Concessionaire may determine and recover charges for Shut Out Cargo.

2.2.7 Reefer Containers (Loaded or Empty) may be charged at the rates applicable to Standard Containers.

2.2.8 Containers carrying Hazardous Cargo shall be liable to pay an additional handling charge equivalent to 50% (fifty per cent) of the handling charge applicable to a Container.

2.3 Container Storage Charges

The Concessionaire may levy and recover the charges set out in this Paragraph 2.3 for and in respect of storage of Containers.

2.3.1 Unit rates for storage of import and export (gateway) loaded Containers are set out below:

Sr. No.	Period of occupation	Rate per Container (In INR)	
		20 ft. Container	40 ft. Container
1.	Upto 7 th day	0	0
2.	From 8 th to 15 th day	520	1,040
3.	From 16 th to 30 th day	1,040	2,080
4.	Beyond 30 th day	2,080	4,170

2.3.2 Unit rates for storage of import and export (gateway) empty Containers are set out below:

Sr. No.	Period of occupation	Rate per Container (In INR)	
		20 ft. Container	40 ft. Container
1.	Upto 3 rd day	0	0
2.	From 4 th to 10 th day	520	1,040
3.	From 11 th to 35 th day	1,040	2,080
4.	Beyond 35 th day	2,080	4,170

2.3.3 The rates set out below are applicable for Transhipment Containers – Loaded:

Sr. No.	Period of occupation	Rate per Container (In INR)
---------	----------------------	-----------------------------

		20 ft. Container	40 ft. Container
1.	Upto 15 th day	0	0
2.	16 th to 30 th Day	1,040	2,080
3.	Beyond 30 th day	1,560	3,130

2.3.4 The rates set out below are applicable for Transshipment Containers – Empty:

Sr. No.	Period of occupation	Rate per Container (In INR)	
		20 ft. Container	40 ft. Container
1.	Upto 15 th day	0	0
2.	16 th to 30 th Day	1,040	2,080
3.	Beyond 30 th day	1,560	3,130

2.3.5 Containers carrying Hazardous Cargo shall be liable to payment of an additional storage charge equivalent to 25% (twenty five per cent) of the storage charge applicable to a Container.

3. BULK CARGO RELATED CHARGES

3.1 General terms & conditions

The Concessionaire may levy and recover the charges set out in this Paragraph 3 for and in respect of the services rendered for handling bulk cargo.

3.2 Charges for Wharfage and handling of bulk cargo

3.2.1 The Concessionaire may levy recover the charges set out in this Paragraph 3.2 for and in respect of Wharfage and handling services rendered in respect of bulk cargo passing through the Port.

S.No.	Description of commodity	Unit	Coastal (In Rs.)	Foreign-going (In Rs.)
1.	Cashew nuts and fruits	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
2.	(a) Thermal coal	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port

	(b) Coal (other than thermal coal), coke, wood charcoal and firewood	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
3.	Coir, coir products, jute and jute products	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
4.	<u>Construction material:</u> (a) Sand, stones, granite and marble	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(b) Cement, clinker, clay and chalk	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
5.	Cotton, cotton waste, twist yarn, wool, clothes and cotton piece goods	CUM	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
6.	Defence goods	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
7.	Fertiliser (a) raw material & finished	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(b) Sulphur	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(c) Rock phosphate	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(d) Finished fertilisers	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
8.	Food grains, oilseeds, cereals, pulses and bran of all kinds	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port

9.	Fuel for ships' bunkers	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
10.	<u>Liquid cargo:</u> (a) Crude oil - at Port berth	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(b) Crude oil - SBM	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(c) POL products - at Port berth	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(d) POL products and other liquids - STS	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(e) Liquid ammonia	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(f) Phosphoric acid	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(g) Molasses, edible oils & other liquids	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
11.	Metals and metal products	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
12.	Metal scrap	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
13.	Minerals and ores	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
14.	Oil cakes and fodder	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port

15.	Paper, paper products and newsprint	CUM	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
16.	Salt	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
17.	Ship stores and provisions	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
18.	Soda ash	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
19.	Sugar and raw sugar	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
20.	Sludge and oily waste	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
21.	Unaccompanied personal baggage	CUM	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
22.	<u>Wood, timber and products:</u> (a) Timber logs	CUM	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(b) Wood, bamboo and wood products	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
	(c) Wood pulp	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port
23.	Any item other than those specified above	MT	Not exceeding the maximum rates levied at any Major Port	Not exceeding the maximum rates levied at any Major Port

3.2.2 For the purpose of calculating the charges hereunder, the unit by weight shall be 1 (one) tonne or 1,000 (one thousand) kilograms, the unit by volume measurement shall be 1 (one) cubic metre and the unit by capacity measurement for liquids in bulk shall be 1,000 (one thousand) litres.

- 3.2.3 In calculating the gross weight or measurement by volume or capacity of any individual item, fractions upto 0.5 (point five) shall be taken as 0.5 (point five) unit and fractions of 0.5 (point five) and above shall be treated as one unit.
- 3.2.4 Before classifying any cargo under the unspecified category, the relevant customs classification shall be referred to, for assessing whether the cargo can be classified under any of the specific categories mentioned in the customs classification.

3.3 Charges for dwell time (storage) of bulk cargo

- 3.3.1 The Concessionaire may levy and recover the charges set forth in this Paragraph 3.3 for and in respect of dwell time of bulk cargo.

S. No.	Description	Rate per Wharfage unit per day or part thereof (In Rs.)
1	Import cargo	Not exceeding the maximum rates levied at any Major Port
2	Export, Transhipment & Shut Out Cargo	Not exceeding the maximum rates levied at any Major Port

- 3.3.2 The charges payable under this Paragraph 3.3 shall be determined for the period of storage of the cargo and till the cargo is cleared from the storage yard.

4. MISCELLANEOUS CHARGES

- 4.1 For any goods or services not specified in the Fee Schedule, the Concessionaire shall specify the Fee not exceeding the rates prevalent from time to time in other similar ports in India, and in case of transhipment and passenger ships, rates prevailing in similar ports in India and Asia, and may in addition, recover additional charges for any delays, detention or cancellation at such rates as it may determine.
- 4.2 For the services performed at the request of and payable by the shipping lines / agents, the Concessionaire may levy reasonable charges in accordance with the prevailing market rates. The Concessionaire may, at its sole discretion, withdraw any charges or introduce charges for any additional services offered to Users at any time.
- 4.3 For non-standard Containers, the Concessionaire shall specify the Fee not exceeding the rates prevalent from time to time in other similar ports in India, and in case of transhipment, rates prevailing in similar ports in India and Asia.

5. ADDITIONAL FEE

Notwithstanding anything to the contrary contained in this Fee Schedule, the Concessionaire may, in its discretion, levy and collect Fee and charges which may exceed the rates specified herein by upto 15% (fifteen per cent) thereof to compensate for the additional cost incurred on this Port as compared to the costs incurred on the terminals at any Major Port.

6. REVISION OF FEE

The Concessionaire may, in its discretion, revise the Fee annually on April 1, to reflect the variation in Price Index or in accordance with the rates prevailing at other Major Ports, as the case may be.

7. VESSEL RELATED CHARGES

All charges levied on and payable to the Concessionaire for a vessel using the Access Channel, Entrance Channel and the harbour shall be determined by the Concessionaire from time to time in accordance with Applicable Laws.

8. EXEMPTED VESSELS

All vessels owned and/or operated by the Authority or by any agency engaged in the security of the Port or the maintenance thereof shall be exempted from payment of Fee.

9. CEILING ON RATES

Subject to the provisions of Paragraph 5 of this Fee Schedule, the rates specified in this Fee Schedule are the maximum rates that the Concessionaire may levy and recover. Provided, however, that the Concessionaire may, in its discretion, collect Fee at such lower rates as it may specify in respect of all or any category of the Users.

SCHEDULE –R
(See Clause 31.10.1)

REVENUE STATEMENT FOR OTHER BUSINESS

Port:

Month:

Date	For corresponding month of previous year		For preceding month		For the month reported upon		
	Item	Revenues (in '000 Rs.)	Item	Revenues (in '000 Rs)	Rate/ Unit Charge (in Rs)	Item	Revenues Due (in '000
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							
21							
22							
23							
24							
25							
26							
27							
28							
29							
30							
31							
Total							

Total Revenue Share:

Remarks, if any:

Note: For every source of revenue from which the monthly revenues exceed Rs. 10 lakh, a separate statement substantially in the above format shall be submitted. The residual sources shall be combined and submitted in a separate statement.

SCHEDULE –S
(See Clause 32.1.2)

ESCROW AGREEMENT

THIS ESCROW AGREEMENT is entered into on this the day of
20.....

AMONGST

- 1 **LIMITED**, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
- 2 (insert name and particulars of Lenders’ Representative) and having its registered office at acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
- 3 (insert name and particulars of the Escrow Bank) and having its registered office at (hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
- 4 The Governor of, represented by and having its principal offices at (hereinafter referred to as the “**Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

WHEREAS:

- (A) The Authority has entered into a Concession Agreement dated with the Concessionaire (the “**Concession Agreement**”) for undertaking the Port on design, build, finance, operate and transfer (the “**DBFOT**”) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (B) The Concession Agreement requires the Concessionaire to establish an Escrow Account, inter alia, on the terms and conditions stated therein.

NOW THEREFORE, in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the receipt and sufficiency 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, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“**Agreement**” means this Escrow Agreement and any amendment thereto made in accordance with the provisions contained herein;

“**Concession Agreement**” means the Concession Agreement referred to in Recital (A) above and annexed hereto as Annex-A, and shall include all of its Recitals and Schedules and any amendments made thereto in accordance with the provisions contained in this behalf therein;

“**Cure Period**” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Concessionaire, and shall commence from the date on which a notice is delivered by the Authority or the Lenders’ Representative, as the case may be, to the Concessionaire asking the latter to cure the breach or default specified in such notice;

“**Escrow Account**” means an escrow account established in terms of and under this Agreement, and shall include the Sub-Accounts;

“**Escrow Default**” shall have the meaning ascribed thereto in Clause 6.1;

“**Lenders’ Representative**” means the person referred to as the Lenders’ Representative in the foregoing Recitals;

“**Parties**” means the parties to this Agreement collectively and “**Party**” shall mean any of the Parties to this Agreement individually;

“**Payment Date**” means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment; and

“**Sub-Accounts**” means the respective sub-accounts of the Escrow Account, into which the monies specified in Clause 4.1 would be credited every month and paid out if due, and if not due in a month then appropriated proportionately in such month and retained in the respective sub-accounts and paid out therefrom on the Payment Date(s).

1.2 Interpretation

1.2.1 References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.

1.2.2 The words and expressions beginning with capital letters and defined in this

Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.

1.2.3 References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.

1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

2 ESCROW ACCOUNT

2.1 Escrow Bank to act as trustee

2.1.1 The Concessionaire hereby appoints the Escrow Bank to act as trustee for the Authority, the Lenders' Representative and the Concessionaire in connection herewith and authorises the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

2.1.2 The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Authority, the Lenders' Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Authority, the Lenders' Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as third party beneficiaries under this Agreement.

2.2 Acceptance of Escrow Bank

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Senior Lenders or the Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for the benefit of, and as agent for, the Authority, the Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

2.3 Establishment and operation of Escrow Account

2.3.1 Within 30 (thirty) days from the date of this Agreement, and in any case prior to the Appointed Date, the Concessionaire shall open and establish the Escrow Account with the (name of Branch) Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.

2.3.2 The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the

maximum rate of interest payable to similar customers on the balance in the said account from time to time.

- 2.3.3 The Escrow Bank and the Concessionaire shall, after consultation with the Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

2.4 Escrow Bank's fee

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the O&M Expenses and shall be appropriated from the Escrow Account in accordance with Clause 4.1.

2.5 Rights of the Parties

Save and except as otherwise provided in the Concession Agreement, the rights of the Authority, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Authority, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

2.6 Substitution of the Concessionaire

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Nominated Company, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Nominated Company is a Party hereto and the Nominated Company shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Nominated Company.

3 DEPOSITS INTO ESCROW ACCOUNT

3.1 Deposits by the Concessionaire

- 3.1.1 The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:
- (a) all monies received in relation to the Project from any source, including the Senior Lenders, lenders of Subordinated Debt and the Authority;
 - (b) all funds received by the Concessionaire from its share-holders, in any manner or form;
 - (c) all Fee levied and collected by the Concessionaire;
 - (d) any other revenues from or in respect of the Port, rentals, deposits or capital receipts, as the case may be; and

(e) all proceeds received pursuant to any insurance claims.

3.1.2 The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

- (a) Grant and any other monies disbursed by the Authority to the Concessionaire;
- (b) Revenue Shortfall Loan;
- (c) all Fee collected by the Authority in exercise of its rights under the Concession Agreement; and
- (d) Termination Payments:

Provided that, notwithstanding the provisions of Clause 4.1.1, the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account.

3.3 Deposits by Senior Lenders

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

3.4 Interest on deposits

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

4 WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals during Concession Period

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-

Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):

- (a) all taxes due and payable by the Concessionaire for and in respect of the Port, excluding Port Estate Development;
- (b) all payments relating to construction of the Port, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of the Concession Agreement, and certified by the Authority as due and payable to it;
- (e) Concession Fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) Premium due and payable to the Authority;
- (h) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including repayment of Revenue Shortfall Loan;
- (i) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- (j) any reserve requirements set forth in the Financing Agreements; and
- (k) balance, if any, in accordance with the instructions of the Concessionaire.

4.1.2 No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

4.2 Withdrawals upon Termination

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Port, excluding Port Estate Development;

- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding Concession Fee;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including Premium, repayment of Revenue Shortfall Loan and any claims in connection with or arising out of Termination;
- (e) retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 40 of the Concession Agreement;
- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under the Concession Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that the disbursements specified in Sub-clause (j) of this Clause 4.2 shall be undertaken only after the Vesting Certificate has been issued by the Authority.

4.3 Application of insufficient funds

Funds in the Escrow Account shall be applied in the serial order of priority set forth in Clauses 4.1 and 4.2, as the case may be. If the funds available are not sufficient to meet all the requirements, the Escrow Bank shall apply such funds in the serial order of priority until exhaustion thereof.

4.4 Application of insurance proceeds

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilised for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Port, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

4.5 Withdrawals during Suspension

Notwithstanding anything to the contrary contained in this Agreement, the Authority may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 37 of the Concession Agreement. Any instructions given by the Authority to the Escrow Bank during such period shall be complied with as if such instructions were given by the Concessionaire under this Agreement and all actions of the Authority hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

5 OBLIGATIONS OF THE ESCROW BANK

5.1 Segregation of funds

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds and property of the Escrow Bank.

5.2 Notification of balances

7 (seven) business days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account and Sub-Accounts as at the close of business on the immediately preceding business day.

5.3 Communications and notices

In discharge of its duties and obligations hereunder, the Escrow Bank:

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;
- (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
- (c) shall, within 5 (five) business days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- (d) shall, within 5 (five) business days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

5.4 No set off

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

5.5 Regulatory approvals

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

6 ESCROW DEFAULT

6.1 Escrow Default

6.1.1 Following events shall constitute an event of default by the Concessionaire (an “**Escrow Default**”) unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders’ Representative:

- (a) the Concessionaire commits breach of this Agreement by failing to deposit any receipts into the Escrow Account as provided herein and fails to cure such breach by depositing the same into the Escrow Account within a Cure Period of 5 (five) business days;
- (b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement and fails to cure such breach by depositing the relevant funds into the Escrow Account or any Sub-Account in which such transfer should have been made, within a Cure Period of 5 (five) business days; or
- (c) the Concessionaire commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) business days.

6.1.2 Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Concession Agreement.

7 TERMINATION OF ESCROW AGREEMENT

7.1 Duration of the Escrow Agreement

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or financial assistance received by it from the Senior Lenders, or any of its obligations to the Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

7.2 Substitution of Escrow Bank

The Concessionaire may, by not less than 45 (forty five) days prior notice to the Escrow Bank, the Authority and the Lenders’ Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders’ Representative and arrangements are made satisfactory to the Lenders’ Representative for transfer of amounts deposited in the Escrow

Account to a new Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

7.3 Closure of Escrow Account

The Escrow Bank shall, at the request of the Concessionaire and the Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Agreements including the payments specified in Clause 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and Sub-Accounts and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

8 SUPPLEMENTARY ESCROW AGREEMENT

8.1 Supplementary escrow agreement

The Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Sub-Accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Senior Lenders and lenders of Subordinated Debt, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of this Agreement or upon occurrence of an Escrow Default, procedures relating to operation of the Escrow Account and withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow agreement, the provisions of this Agreement shall prevail.

9 INDEMNITY

9.1 General indemnity

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

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

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

9.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 9.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

10 DISPUTE RESOLUTION

10.1 Dispute resolution

10.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be finally decided by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act.

10.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The place of arbitration shall be the capital of the State and the language of arbitration shall be English.

11 MISCELLANEOUS PROVISIONS

11.1 Governing law and jurisdiction

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

11.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

11.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

11.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

11.5 Waiver

11.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (b) shall not affect the validity or enforceability of this Agreement in any manner.

11.5.2 Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

11.6 No third party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity

shall have any rights hereunder.

11.7 Survival

11.7.1 Termination of this Agreement:

- (a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

11.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

11.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

11.9 Successors and assigns

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

11.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number or e-mail are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall

be effective when all the Parties have notice of it.

11.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

11.12 Authorised representatives

Each of the Parties shall, by notice in writing, designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

11.13 Original Document

This Agreement may be executed in four counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the day of 20..... hereunto affixed in the presence of, Director, who has signed these presents in token thereof and, Company Secretary / Authorised Officer who has countersigned the same in token thereof[£]:

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

SIGNED, SEALED AND DELIVERED
For and on behalf of
SENIOR LENDERS by the
Lenders' Representative:

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

[£] To be affixed in accordance with the articles of association of the Concessionaire and the resolution passed by its Board of Directors.

SIGNED, SEALED AND
DELIVERED

For and on behalf of
ESCROW BANK by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(e-mail address)

SIGNED, SEALED AND
DELIVERED

For and on behalf of
AUTHORITY by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(e-mail address)

In the presence of:

1.

2.

SCHEDULE –T
(See Clause 34.2.1)

PANEL OF CHARTERED ACCOUNTANTS

1 Panel of Chartered Accountants

Pursuant to the provisions of Clause 34.2.1 of the Agreement, the Authority and the Concessionaire shall prepare a mutually agreed panel of 5 (five) reputable firms of Chartered Accountants having their registered offices in India (the “**Panel of Chartered Accountants**”). The criteria for preparing such Panel and the procedure to be adopted in this behalf shall be as set forth in this Schedule-T.

2 Invitation for empanelment

2.1 The Authority shall invite offers from all reputed firms of Chartered Accountants who fulfil the following eligibility criteria, namely:

- (a) the firm should have conducted statutory audit of the annual accounts of at least one hundred companies registered under the Companies Act, 1956, including any re-enactment or amendment thereof, of which at least ten should have been public sector undertakings;
- (b) the firm should have at least 5 (five) practising Chartered Accountants on its rolls, each with a minimum experience of ten years in the profession;
- (c) the firm or any of its partners should not have been disqualified or black-listed by the Comptroller and Auditor General of India or the Authority; and
- (d) the firm should have an office in the State or in an adjacent State with at least 2 (two) practising Chartered Accountants on its rolls in such State.

2.2 Interested firms meeting the eligibility criteria shall be required to submit a statement of their capability including the bio-data of all the practising Chartered Accountants on its rolls. In particular, each firm shall be required to furnish year-wise information relating to the names of all the companies with an annual turnover exceeding Rs. 100,00,00,000 (Rupees one hundred crore) whose annual accounts were audited by such firm in any of the preceding 5 (five) Accounting Years.

3 Evaluation and selection

3.1 The information furnished by each firm shall be scrutinised and evaluated by the Authority and 1 (one) point shall be awarded for each annual audit of the companies specified in Paragraph 2.2 above. (For the avoidance of doubt and by way of illustration, a firm which has conducted audit of the annual accounts of any such company for 5 (five) years shall be awarded 5 (five) points).

3.2 The Authority shall prepare a list of all the eligible firms along with the points scored by each such firm and 5 (five) firms scoring the highest points shall be

identified and included in the draft Panel of Chartered Accountants.

4 Consultation with the Concessionaire

The Authority shall convey the aforesaid panel of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinise the relevant records of the Authority to ascertain whether the selection of firms has been undertaken in accordance with the prescribed procedure and it shall send its comments, if any, to the Authority within 15 (fifteen) days of receiving the aforesaid panel.

5 Mutually agreed panel

- 5.1 The Authority shall, after considering all relevant factors including the comments, if any, of the Concessionaire, finalise and constitute a panel of 5 (five) firms which shall be deemed to be the mutually agreed Panel of Chartered Accountants.
- 5.2 After completion of every 5 (five) years from the date of preparing the mutually agreed Panel of Chartered Accountants, or such earlier period as may be agreed between the Authority and the Concessionaire, a new panel shall be prepared in accordance with the provisions of this Schedule-T.

SCHEDULE –U
(See Clause 39.4)

VESTING CERTIFICATE

- 1 The Governor of acting through (the “**Authority**”) refers to the Concession Agreement dated (the “**Agreement**”) entered into between the Authority and (the “**Concessionaire**”) for undertaking the Port (the “**Port**”) on design, build, finance, operate and transfer (“**DBFOT**”) basis.
- 2 The Authority hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 39.1 of the Agreement on the basis that upon issue of this Vesting Certificate, the Authority shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the Port shall be deemed to have vested unto the Authority, free from any encumbrances, charges and liens whatsoever.
- 3 Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this day of, 20..... at

AGREED, ACCEPTED AND SIGNED

SIGNED, SEALED AND
DELIVERED

For and on behalf of
CONCESSIONAIRE by:

For and on behalf of
AUTHORITY by:

(Signature)
(Name)
(Designation)
(Address)

(Signature)
(Name)
(Designation)
(Address)

In the presence of:

1.

2.

SCHEDULE –V
(See Clause 41.3.1)

SUBSTITUTION AGREEMENT

THIS SUBSTITUTION AGREEMENT is entered into on this the day of
20.....

AMONGST

- 1 The Governor of, represented by and having its principal offices at (hereinafter referred to as the “**Authority**” which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns);

- 2 **LIMITED**, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at, (hereinafter referred to as the “**Concessionaire**” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);

- 3 (insert name and particulars of Lenders’ Representative) and having its registered office at, acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**”, which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

WHEREAS:

- (A) The Authority has entered into a Concession Agreement dated with the Concessionaire (the “**Concession Agreement**”) for undertaking the Port on design, build, finance, operate and transfer basis (the “**DBFOT**”), and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.

- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.

- (C) Senior Lenders have requested the Authority to enter into this Substitution Agreement for securing their interests through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.

- (D) In order to enable implementation of the Project including its financing, construction, operation and maintenance, the Authority has agreed and undertaken to transfer and assign the Concession to a Nominated Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

NOW THEREFORE, in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the receipt and sufficiency 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 Substitution Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“**Agreement**” means this Substitution Agreement and any amendment thereto made in accordance with the provisions contained in this Agreement;

“**Financial Default**” means occurrence of a material breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;

“**Lenders’ Representative**” means the person referred to as the Lenders’ Representative in the foregoing Recitals;

“**Nominated Company**” means a company, incorporated under the provisions of the Companies Act, 1956, including any re-enactment or amendment thereof, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the Authority for assignment/transfer of the Concession as provided in this Agreement;

“**Notice of Financial Default**” shall have the meaning ascribed thereto in Clause 3.2.1; and

“**Parties**” means the parties to this Agreement collectively and “**Party**” shall mean any of the Parties to this Agreement individually.

1.2 Interpretation

1.2.1 References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.

1.2.2 References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.

1.2.3 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.

1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

2 ASSIGNMENT

2.1 Assignment of rights and title

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

3 SUBSTITUTION OF THE CONCESSIONAIRE

3.1 Rights of substitution

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

3.1.2 The Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders' Representative in accordance with this Agreement. For the avoidance of doubt, the Senior Lenders or the Lenders' Representative shall not be entitled to operate and maintain the Port as Concessionaire either individually or collectively.

3.2 Substitution upon occurrence of Financial Default

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

3.2.2 Upon issue of a Notice of Financial Default hereunder, the Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement.

3.2.3 At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Port in accordance with the provisions of Article 37 of the Concession Agreement, and upon receipt of such notice, the Authority shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire,

the Authority may extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days. For the avoidance of doubt, the Authority expressly agrees and undertakes to terminate the Concession Agreement forthwith, upon receipt of a written request from the Lenders' Representative at any time after 240 (two hundred and forty) days from the date of Suspension hereunder.

3.3 Substitution upon occurrence of Concessionaire Default

3.3.1 Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.

3.3.2 In the event that the Lenders' Representative makes a representation to the Authority within the period of 15 (fifteen) days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days; provided further that the Lenders' Representative may at any time withdraw its representation hereunder and upon such withdrawal, the Authority may terminate this Agreement in accordance with the provisions hereof.

3.4 Procedure for substitution

3.4.1 The Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Authority under Clause 3.3.2, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and transfer of the Port including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire towards the Authority under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.

3.4.2 To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the Authority for shortlisting the bidders for award of the Concession; provided that the Lenders' Representative may represent to the Authority that all or any of such criteria may be waived in the interest of the Project, and if the Authority determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibility criteria.

- 3.4.3 Upon selection of a Nominated Company, the Lenders' Representative shall request the Authority to:
- (a) accede to transfer to the Nominated Company the right to construct, operate and maintain the Port in accordance with the provisions of the Concession Agreement;
 - (b) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and
 - (c) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same terms as are contained in this Agreement.
- 3.4.4 If the Authority has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 15 (fifteen) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the Authority, the Nominated Company shall be deemed to have been accepted. The Authority shall thereupon transfer and endorse the Concession within 15 (fifteen) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the Authority, the Lenders' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.
- 3.4.5 The transfer of Concession hereunder to a Nominated Company may, notwithstanding anything to the contrary in this Agreement and the Concession Agreement, be undertaken by transfer of no less than 75% (seventy five per cent) of the equity of the Concessionaire to the Nominated Company, and upon such transfer hereunder, the Concessionaire shall be deemed to be the Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

3.5 Selection to be binding

The decision of the Lenders' Representative and the Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Senior Lenders or the Authority taken pursuant to this Agreement including the transfer/assignment of the Concession in favour of the Nominated Company. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets of the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Authority and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Authority or the Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

4 PROJECT AGREEMENTS

4.1 Substitution of Nominated Company in Project Agreements

The Concessionaire shall ensure and procure that each Project Agreement contains provisions that entitle the Nominated Company to step into such Project Agreement, in its discretion, in place and substitution of the Concessionaire in the event of such Nominated Company's assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

5 TERMINATION OF CONCESSION AGREEMENT

5.1 Termination upon occurrence of Financial Default

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Authority shall undertake Termination under and in accordance with the provisions of Article 38 of the Concession Agreement.

5.2 Termination when no Nominated Company is selected

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

5.3 Realisation of Debt Due

The Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.

6 DURATION OF THE AGREEMENT

6.1 Duration of the Agreement

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

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

7 INDEMNITY

7.1 General indemnity

- 7.1.1 The Concessionaire will indemnify, defend and hold the Authority and the Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.
- 7.1.2 The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.
- 7.1.3 The Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders' Representative, its officers, servants and agents.

7.2 Notice and contest of claims

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

8 DISPUTE RESOLUTION

8.1 Dispute resolution

- 8.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably shall be finally decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the Authority, Concessionaire and the Lenders' Representative. Such arbitration shall be held in

accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act.

- 8.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The place of arbitration shall be the capital of the State and the language of arbitration shall be English.

9 MISCELLANEOUS PROVISIONS

9.1 Governing law and jurisdiction

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

9.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

9.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

9.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

9.5 Waiver

9.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

9.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

9.6 No third party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

9.7 Survival

9.7.1 Termination of this Agreement:

- (a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

9.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

9.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable

provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 8 of this Agreement or otherwise.

9.9 Successors and assigns

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

9.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail address are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

9.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

9.12 Authorised representatives

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

9.13 Original Document

This Agreement may be executed in three counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the day of 20..... hereunto affixed in the presence of, Director, who has signed these presents in token thereof and, Company Secretary / Authorised Officer who has countersigned the same in token thereof[£]:

SIGNED, SEALED AND DELIVERED For and on behalf of AUTHORITY by:

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

SIGNED, SEALED AND DELIVERED For and on behalf of

SENIOR LENDERS by the Lenders' Representative:

(Signature)
(Name)
(Designation)
(Address)
(Fax)
(e-mail address)

In the presence of:

1. _____
2. _____

[£] To be affixed in accordance with the articles of association of the Concessionaire and the resolution passed by its Board of Directors.