

**TERMINAL OPERATOR AGREEMENT FOR THE DESIGN, DEVELOPMENT, FINANCE,
CONSTRUCTION, OPERATION, MAINTENANCE AND TRANSFER OF THE LIQUID
BULK AND/OR GREEN FUEL TERMINAL FOR A CONCESSION PERIOD OF TWENTY-
FIVE (25) YEARS IN THE SOUTH DUNES PRECINCT AT THE PORT OF RICHARDS
BAY.**

Between

**TRANSNET NATIONAL PORTS AUTHORITY, a division of TRANSNET SOC LTD
(registration number 1990/000900/30)**

and

[NAME OF TERMINAL OPERATOR TO BE INSERTED]
(registration number [•])

Note to Bidders:

1. Bidders attention is drawn to the provisions of the RFP and are reminded to submit "marked-up" versions of the negotiable clauses of this Terminal Operator Agreement.
2. As the Terminal Operator Agreement has been drafted in general terms, TNPA reserves the right to amend or vary any of the terms of this Terminal Operator Agreement to ensure alignment with the preferred Bidders Business Case and the commercial risk allocation between the TNPA and the Preferred Bidder.
3. Schedule 7 (Financiers Direct Agreement) will be negotiated and agreed between the TNPA, the Preferred Bidder and the Lenders of the Preferred Bidder should

third party finance be provided to undertake the project. This Financiers Direct Finance Agreement and the negotiable clauses of the Terminal Operator Agreement will be revised to ensure consistency between the Terminal Operator Agreement and the Financiers Direct Finance Agreement.

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PART I – GENERAL PROVISIONS

1. Definitions and Interpretation

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

- 1.1.1 **"Act"** - the National Ports Act, 12 of 2005;
- "Actual Operations Commencement Date"** - the date of Operation Commencement as stated in the Operations Certificate issued by the Independent Certifier in accordance with clause 29.3 (*approval to provide Services*);
- 1.1.2 **"Agent"** - the agent bank appointed by the Lenders as their agent;
- 1.1.3 **"this Agreement"** - this Terminal Operator Agreement and its schedules, as amended, extended, replaced and varied from time to time;
- 1.1.4 **"Associated Agreement"** - the Construction Agreement, the Operations Agreement, the Constitutional Documents and any other agreements entered into by the Terminal Operator in respect of the Project (other than the Financing Agreements) that the TNPA may designate as falling within this clause 1.1.4;
- 1.1.5 **"Base Case Equity IRR"** - the nominal post-tax internal rate of return on Equity over the full period up to the expiry of the Term as specified in the Financial Model at the Effective Date;

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- 1.1.6 **"B-BBEE"** - Broad-Based Black Economic Empowerment, a South African legal requirement that requires all entities operating in the South African economy to contribute to empowerment and transformation;
- 1.1.7 **"BEE Entities"** - ***[Note: to be inserted]***
- 1.1.8 **"Berth"** - means the existing berth 208 & 209 and the proposed new berth 210 to which the Terminal is connected via pipelines used for the conveyance of Cargo to and from the Terminal as reflected in Schedule 12A;
- 1.1.9 **"Bidder"** - means a Pre-qualified Bidder, who having received an RFP, responded thereto by submitting a Bid Response to undertake the Project;
- 1.1.10 **"Bid Response"** - the bid submitted by a Bidder in response to the RFP;
- 1.1.11 **"Business Day"** - means a day, other than a Saturday or a Sunday or an official public holiday in South Africa;
- 1.1.12 **"Cargo"** - ***[note: to be inserted]***;
- 1.1.13 **"Change in Control"** - any change whatsoever in Control whether effected directly or indirectly, excluding any change of Control in respect of a company listed on a stock exchange;
- 1.1.14 **"Change in Law"** - means:
- 1.1.14.1 any enactment, promulgation, execution, ratification or issue of any new Law or any change, amendment,

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alteration, modification, repeal or commencement of any existing Law, or any change in the interpretation or application of any Law, by a competent court, tribunal or legislature in South Africa, other than any Law which, at the Effective Date, has been published in a bill or draft statutory instrument and is available for public scrutiny, to the extent such Law is enacted in the form so published; or

1.1.14.2

any change in any requirement in relation to any Consent as a result of any administrative action which is contrary to the interpretation thereof which existed and was generally accepted at the Effective Date,

in each case coming into effect after the Effective Date;

- 1.1.15 **"Claims"** - means any and all suits, sanctions, legal proceedings, claims, assessments, judgments, damages, penalties, fines, liabilities, demands and or losses by, on behalf of or in favour of any third party;
- 1.1.16 **"Companies Act"** - the Companies Act, 71 of 2008 and where relevant, applicable provisions of the Companies Act No. 61 of 1973;
- 1.1.17 **"Company"** a company incorporated in the Republic of South Africa, in terms of the relevant Companies Act;
- 1.1.18 **"Compensation"**

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- Event"** - any breach by the TNPA of any of its obligations under this Agreement (save for any breach that constitutes the TNPA Default), and to the extent in each case that the breach is not caused or contributed to by the Terminal Operator or any of its Subcontractors, and any other event that is designated in this Agreement to be dealt with in accordance with clause 41 (*Consequences of a Compensation Event*);
- 1.1.19 **"Completion Certificate"** - the certificate to be issued by the Independent Certifier in terms of clause 28.4 (*completion of Construction Works*) upon the completion of the Construction Works;
- 1.1.20 **"Concession"** - the concession granted by TNPA to undertake the Project in terms of section 56 of the Act;
- 1.1.21 **"Concession Fee"** fees payable by the Terminal Operator to TNPA, in respect of the rights to undertake the Project as set out in Clause 15
- 1.1.22 **"Confidential Information"** - has the meaning given in clause 55;
- 1.1.23 **"Consents"** - all consents, permissions, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions, licences, required to be issued by or made with or from any Responsible Authority, which are required from time to time in respect of the Project or to be held by the Terminal Operator or which has any impact (whether direct or indirect) on the Project or the Terminal Operator;

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- 1.1.24 **"Constitution"** - the Constitution of the Republic of South Africa, 1996;
- 1.1.25 **"Constitutional Documents"** - the Terminal Operator's memorandum of incorporation and registration certificate, as well as the shareholders' agreement, equity subscription agreements and equity guarantees entered into and provided in respect of the Terminal Operator and any documents or agreements in respect of any debentures issued by the Terminal Operator, all of which are attached to this Agreement as Schedule 3 and the terms all of which are to be to the satisfaction of the TNPA;
- 1.1.26 **"Construction Agreement"** - each and every written agreement to be entered into between the Terminal Operator and the Construction Contractor in respect of any of the Construction Works, which agreement shall, in respect of the Construction Works, be in substantially the same form and content as the agreement attached hereto as Schedule 4;
- 1.1.27 **"Construction Completion"** - the execution of the Construction Works that are required for the use of the Terminal Facility and for the Services to be provided in safety;
- 1.1.28 **"Construction Contractor"** - the person who is appointed as the construction contractor by the Terminal Operator in the Construction Agreement in force at the relevant time and any replacement or successor-in-title of such person;

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- 1.1.29 **"Construction Documents"** - all documents, drawings, data, reports, specifications and other information (whether in printed form or in electronic form) produced in respect of the Construction Works;
- 1.1.30 **"Construction Period"** - the period commencing on the Effective Date and terminating on the issue of the Completion Certificate, and shall not be for a period longer than 18 to 24 months, *unless otherwise agreed*;
- 1.1.31 **"Construction Performance Guarantee"** - the performance guarantee to be issued by a financial institution, of whom the TNPA approves on behalf of the Construction Contractor in respect of the Construction Works in favour of the Terminal Operator, substantially in the form of the guarantee attached to this Agreement as Schedule 14 and which is to be on terms to the satisfaction of the TNPA;
- 1.1.32 **"Construction Works"** -the construction works and any other design, construction, equipping and commissioning of and in respect of the Terminal Facility pursuant to the Operating Rights but excluding the Operation and Maintenance;
- 1.1.33 **"Contract Year"** - means each twelve (12) Month period, commencing at 00:00 hours on 1 April and ending at 24:00 hours on 31 March of the following year, provided that:
- 1.1.33.1 the first Contract Year shall commence at 00:00 hours on the first day of the Operations

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Period, or otherwise at 00:00 hours on the Commercial Operation Date, and shall end at 24:00 hours on 31 March of the following year; and;

- 1.1.33.2 the final Contract Year shall end at 24:00 hours on the Termination Date;
- 1.1.34 **"Control"** - the power, directly or indirectly, to direct or cause the direction of the management and policies of a legal person, whether through the ownership of voting securities or any interest carrying voting rights, or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) or those of its directors (or equivalent officials) holding the majority of the voting rights on its board of directors (or equivalent body), whether by contract or otherwise, and "Controlled" shall be construed accordingly;
- 1.1.35 **"Corrupt Activities Act;"** - means any offence involving any act of corruption or corrupt activities contemplated in the Prevention and Combating of Corrupt Activities Act No. 12 of 2004;
- 1.1.36 **"CPI"** - means the consumer price inflation;
- 1.1.37 **"Day"** - any period of 24 (twenty four) hours that starts at 00h01 and ends at 24h00;
- 1.1.38 **"D&C Specifications"-** the design and construction specifications detailed in Schedule 1;
- 1.1.39 **"Debt"** - means, at any date, all amounts due and payable by the Seller that are outstanding under the Financing Agreements at that date,

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excluding Shareholder Loans or interest thereon and all default interest;

1.1.40

"Decommissioning Costs"

- has the meaning in the costs of decommissioning each of the Facilities upon the termination of the PPA, whether prematurely or due to the effluxion of time, which costs are detailed, in respect of each Contract Year, in the Financial Model, which costs must, at a minimum, include the costs of undertaking the following:

- (a) the rehabilitation of the adverse environmental impacts of the listed or specified activities detailed in the environmental consents;
- (b) engagement with all necessary stakeholders including but not limited to the National Energy Regulator of South Africa, Eskom, the Department of Environment Forestry and Fisheries, the local and or district municipality, the Department of Employment and Labour, South African National Roads Agency Limited and the site neighbours;
- (c) rehabilitation of the impacts of making the Facility available and the generation and dispatch of Energy Output, including:
 - (i) the pumping, treatment and storage of any waste material;
 - (ii) the handling and storage of fuel (if applicable);

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- (iii) the pumping, storage and containment of fuel oil;
- (iv) any other waste or hazardous material including asbestos, insulation, other oils, grease, industrial gases, PCBs, heavy metals and chemicals; and;
- (v) polluted or extraneous water;
- (d) removal and disposal of waste, including any waste associated with any battery or other storage technologies;
- (e) securing, making safe, decommissioning, isolation and closure of the Facility and supporting infrastructure;
- (f) remediation of latent or residual environmental impacts which are presently identifiable pursuant to the Consents;
- (g) demolition and removal of buildings, structures, plant, equipment and other objects including subsurface, foundations and services;
- (h) rehabilitation of the Project Site, in respect of each Facility comprising the Project, any or all of the Facility Site(s) making up the Project, including capping and covering if necessary and landscaping;
- (i) consideration and management of the heritage requirements of each Facility;

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- (j) compliance with all Laws applicable to the decommissioning, demolition or rehabilitation process;
- (k) monitoring of residual risks such as dam condition and leachate;
- (l) obtaining all necessary permits or approvals for decommissioning, demolition, remediation and rehabilitation; and;
- (m) remediation of any other negative environmental impacts.

- 1.1.41 **"Decommissioning Costs Bank Guarantee"** - means a bank guarantee issued by a financial institution that meets the TNPA's satisfaction, not to be unreasonably withheld, and substantially in the form of the bank guarantee attached hereto as Schedule 9 (*Form of Decommissioning Costs Bank Guarantee*);
- 1.1.42 **"Decommissioning Reserve"** - means one or a combination of a section 37A Trust and/or a Decommissioning Cost Bank Guarantee;
- 1.1.43 **"Detailed Design"** - the detailed design for the Construction Works, which is to be prepared by the Terminal Operator and reviewed and approved by the Independent Certifier, in terms of clause 28.1 (*performance of Preliminary Design and Detailed Design*) and the Detailed Design Procedure;
- 1.1.44 **"Detailed Design"**

- Procedure"** - the procedure in respect of the preparation and approval of the Detailed Design that is contained in the D&C Specifications;
- 1.1.45 **"Direct Agreement"** - the Direct Agreement to be entered into between the TNPA, the Terminal Operator and the Lenders, which shall be substantially in the form and substance of the agreement attached to this Agreement as Schedule 7;
- 1.1.46 **"Effective Date"** - the date on which this Agreement has been duly executed by each of the Parties;
- 1.1.47 **"Environment"** - the surroundings within which humans exist and that are made up of:
- 1.1.47.1 the land, water and atmosphere of the earth;
- 1.1.47.2 micro-organisms, plant and animal life;
- 1.1.47.3 any part or combination of 1.1.47.1 and 1.1.47.2 and the interrelationships among and between them; and
- 1.1.47.4 the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;
- 1.1.48 **"Environmental Authorisations" or "Environmental Consents"** - any authorisations or consents to be obtained from the Responsible Authority in compliance with the Environmental Laws in order to perform the Project Deliverables;

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- 1.1.49 **"Environmental Laws"** - means any Laws designed to:
- 1.1.49.1 protect ecosystems and dependant animal and plant species;
- 1.1.49.2 regulate the harm caused to the environment and or public health by pollution or degradation; or
- 1.1.49.3 regulate the generation, handling, storage, use, release, emission or spillage of any substance which, alone or in combination with any other, is capable of causing harm to the environment, including, without limitation, any waste;
- 1.1.50 **"Environmental Management Plan"** - the environmental management plan and system prepared in respect of the Project for the monitoring and management of environmental issues raised as a result of the Environmental Impact Assessment and based on the TNPA's environmental policy and any Environmental Consents issued in respect of the Project pursuant to the Environment and the Environmental Laws;
- 1.1.51 **"Equipment"** - the moveable assets in the Terminal, including Cargo handling equipment, the current composition of which is attached as Schedule 13;
- 1.1.52 **"Equity"** - the entire issued share capital of and Shareholder Loans to the Terminal Operator;
- 1.1.53 **"Equity Compensation"** - the amount that, when taken together with all amounts already paid by the Terminal Operator in respect of Equity up to the

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Termination Date (by way of dividends, other distributions, interest and principal) and taking into account the actual timing of all such payments plus the Equity, provides the Terminal Operator's shareholders with an internal rate of return equal to the Base Case Equity IRR over the period up to the Termination Date. Should the Equity Compensation amount be negative as at the Termination Date, in that such internal rate of return has already been achieved by the shareholders, the Equity Compensation amount will be zero (0);

- 1.1.54 **"Expiry Date"** - the expiry date of the Terminal Operator Agreement;
- 1.1.55 **"Final Maintenance Guarantee"** - the final maintenance guarantee to be issued by a financial institution (of whom the TNPA approves) on behalf of the Operator in favour of the Terminal Operator, substantially in the form of the guarantee attached to this Agreement as Schedule 16 and shall be on terms to the TNPA's satisfaction;
- 1.1.56 **"Finance Agreements"**- means:
- (a) the agreements relating to the Debt listed in Schedule 6 (*Project Documents*) in their form as at the Effective Date and excluding all amendments thereto not approved in advance by the Department; and
- (b) any master agreement, confirmation, schedule or other agreement entered into

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or to be entered into to comply with the provisions of the agreements referred to in (a) in relation to the hedging of exposure to interest rate changes and foreign currency exchange rate fluctuations only;

1.1.57 **"Financial Model"** - means the financial base case for the Project as reflected in the computer model to be attached to this Agreement on an electronic storage device that can be used to store data, as provided for in Schedule 5 (Financial Model), which model incorporates the forecast cash flow statements of the Seller including all expenditure, revenues, taxation and financing of the Construction, Operation and Maintenance of the Facility together with the income statements and balance sheets for the Seller over the Term, and details of all assumptions, calculations and methodology used in the compilation thereof;

1.1.58 **"Force Majeure"** - any act, event or circumstance or any combination of acts, events or circumstances which:

1.1.58.1 is beyond the reasonable control of the Affected Party;

1.1.58.2 is without fault or negligence on the part of the Affected Party and is not the direct or indirect result of a breach by the Affected Party of any of its obligations under any Project Documents;

- 1.1.58.3 could not have been (including by reasonable anticipation) avoided or overcome by the Affected Party, acting in accordance with the standards of a Reasonable and Prudent Operator; and
- 1.1.58.4 prevents, hinders or delays the Affected Party in its performance of all (or part) of its obligations under this Agreement.
- Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in subclauses 1.1.58.1 and 1.1.58.4 above:
- 1.1.58.5 any action or failure to act by a Responsible Authority, including without limitation, any Consent or Supplier Consent (a) ceasing to remain in full force and effect other than in accordance with the terms and conditions upon which it was issued or by reason of the failure of the holder thereof to comply with any of its terms or conditions or (b) not being issued or renewed upon application having been properly made;
- 1.1.58.6 lightning, fire, earthquake, tsunami, drought, unusual flood, storm, cyclone, typhoon, tornado or other natural calamity or act of God;
- 1.1.58.7 epidemic or plague;
- 1.1.58.8 strikes, lock-outs and other industrial action other than by employees of the Affected Party

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or of any Affiliate or of any contractor of the Affected Party or of any Affiliate;

- 1.1.58.9 accidents or explosions;
- 1.1.58.10 acts of war whether declared or not, invasion, armed conflict, act of foreign enemy or blockade in each case occurring within or involving the Republic of South Africa;
- 1.1.58.11 acts of rebellion, riot, civil commotion, act or campaign of terrorism, or sabotage of a political nature, in each case occurring within the Republic of South Africa;
- 1.1.58.12 boycott, sanction or embargo;
- 1.1.58.13 any natural event, disaster or Act of God, (which includes but is not limited to cyclone, drought, fire, lightning, earthquake, explosion, tsunami, tempest, unusual flood, violent storm, typhoon, tornado, ionising radiation, epidemic or plague); or
- each such act, event or circumstance or combination thereof being a Force Majeure Event, provided always that the following shall not constitute Force Majeure:
- 1.1.58.14 failure of either Party to make any payment of money in accordance with its obligations under this Agreement;
- 1.1.58.15 late delivery of fuel, equipment, machinery, plant, spare parts or materials caused by negligent conduct or wilful misconduct on the part of the

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- Affected Party or any of its Suppliers or contractors;
- 1.1.58.16 late performance by either Party, caused by such Party's or such Party's Subcontractor's failure to engage qualified Subcontractors and suppliers or to hire an adequate number of personnel or labour;
- 1.1.58.17 mechanical or electrical breakdown or failure of equipment, machinery or plant owned or operated by either Party due to the manner in which such equipment, machinery or plant has been operated or maintained;
- 1.1.58.18 delays resulting from reasonably foreseeable unfavourable weather or reasonably foreseeable unsuitable ground conditions or other similar reasonably foreseeable adverse conditions;
- 1.1.58.19 any failure by the Affected Party to obtain and/or maintain or cause to be obtained or and maintained any Consent;
- 1.1.58.20 strikes, lockouts and other industrial action by the employees of the Affected Party, any of its Affiliates or any contractor of the Affected Party or of any Affiliate, unless such action is part of any wider industrial action involving a significant section of the public sector,

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- the public administration, the construction industry or the electricity supply sector;
- 1.1.58.21 wear and tear or random flaws in materials and equipment or breakdown in or degradation of equipment or machinery of the Affected Party;
- 1.1.58.22 an event, circumstance or situation that arises as a direct or indirect result of any appeal or review being lodged against any amendment to any of the Consents issued in terms of any Environmental Laws;
- 1.1.58.23 an event, circumstance or situation that arises as a direct or indirect result of the Terminal Operator's failure to obtain the conversion of its provisional air emissions licence into a final air emissions licence, in terms of the Environmental Laws, due to its failure to comply with the terms and conditions of the provisional air emissions licence;
- 1.1.58.24 an event, circumstance or situation that arises as a direct or indirect result of any Responsible Authority imposing additional conditions on the Terminal Operator in terms of any Consents issued in terms of any Environmental Laws, pursuant to a review by the Responsible Authority of the Terminal Operator's provisional or final air emissions licence or waste management licence; or

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

1.1.59 **"Force Majeure Event"** - any event of Force Majeure as more fully described in 1.1.58 above

1.1.60 **"Green Fuels"** - any means any of the following types of green fuels:

Biofuels: derived from organic materials such as crops (corn, sugarcane), algae, or organic waste. Common biofuels include ethanol (made from corn or sugarcane) and biodiesel (made from vegetable oils or animal fats); or

Green Hydrogen: is produced from renewable energy sources such as wind, and solar through water electrolysis (additional information on Hydrogen is contained in Annexure or

Synthetic Fuels: produced through processes like Power-to-Gas (PtG) or Power-to-Liquid (PtL), where electricity is used to convert carbon dioxide (CO₂) and water into fuels like synthetic methane or synthetic gasoline; or

Biogas: produced from the anaerobic digestion of organic materials such as agricultural waste,

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sewage, and food scraps. It consists primarily of methane and carbon dioxide; or

Hydrogenated Vegetable Oil (HVO): a type of biodiesel made from hydrogenating vegetable oils or animal fats, resulting in a fuel with properties similar to diesel fuel; and

Ammonia: can be produced from renewable energy sources and used as a carbon-free fuel or as a carrier of hydrogen for various applications;

1.1.61 **"Hazardous Substances"**

- means:

1.1.61.1

any petroleum or petroleum products, radioactive materials, asbestos in any form, urea formaldehyde foam insulation, transformers or other equipment that contain dielectric fluid containing regulated levels of polychlorinated biphenyls (PCBs) and radon gas; and

1.1.61.2

any pollutants, contaminants, pesticides, chemicals, materials or other substances (including any special, dangerous or toxic wastes) defined as or included in the definition of "pollutant", "hazardous substances", "hazardous wastes", "hazardous materials", "extremely hazardous wastes", "restricted hazardous wastes", "toxic substances", "toxic pollutants", or other words of similar import, by any Responsible Authority.

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- 1.1.62 **"IFRS"** - means the International Financial Reporting Standards, a set of common accounting rules for gathering and presenting information in financial reports;
- 1.1.63 **"Independent Certifier"** - the person appointed by the Terminal Operator in respect of the Project, and whose duties are specified in this Agreement under clause 27 (*Independent Certifier*), the Construction Agreement, the Operations Agreement and the Independent Certifier Agreement;
- 1.1.64 **"Independent Certifier Agreement"** the agreement entitled the "Independent Certifier Agreement", entered into on or about the Effective Date, between the Terminal Operator and the Independent Certifier;
- 1.1.65 **"Independent Expert"** -shall mean:
- 1.1.65.1 an accountant of not less than 10 (ten) years professional experience or investment banker agreed to between the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants: Northern Region, if the matter relates primarily to a financial matter; or
- 1.1.65.2 a legal practitioner of not less than 10 (ten) years professional experience agreed to between the Parties, and failing agreement nominated (at the

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request of either Party) by the Chairman for the time being of the Legal Practice Council, if the matter relates primarily to a legal matter; or

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

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

1.1.66 **"Intellectual Property Rights"** -

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

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- above, whether arising or granted under the Laws or any other jurisdiction;
- 1.1.67 **"Insurance"** - the project insurance that the Terminal Operator is required to purchase and maintain in terms of clause 16 (*Project Insurance*);
- 1.1.68 **"International Best Practice"** - in relation to the design, construction, equipping and commissioning of the Terminal Facility, and in relation to the provision of the Operation and Maintenance and the Services, the exercise of that degree of skill, diligence, prudence, foresight and operating practice that would reasonably and ordinarily be expected from a skilled and experienced person engaged in providing a facility similar to the Terminal Facility or the same type of business as the Services (irrespective of whether or not that facility or that business is conducted by or on behalf of any organ of State), under the same or similar circumstances;
- 1.1.69 **"Laws"** - the Constitution, the common law, Legislation, and all judicial decisions and any notifications or other similar directives made pursuant thereto that have the force of law, issued by any executive, legislative, judicial or administrative entity in the Republic of South Africa or by the TNPA or the municipality in which the Port is located;
- 1.1.70 **"Legislation"** - all applicable statutes, statutory instruments, by-laws, regulations, orders, rules, executive orders and other secondary, provincial or local

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- legislation, treaties, directives and codes of practice having the force of law in South Africa;
- 1.1.71 **"Lenders"** - any funder, other than in its capacity as a Member or Shareholder;
- 1.1.72 **"Liquid Bulk Cargo"** - means liquid bulk commodities to be handled at the Terminal, which may include fuels such as petrol, diesel, jet fuel, marine fuel oils, heavy fuel oils and other liquid bulk products including any chemicals, waxes, etc and gases including liquified petroleum gas, Hydrogen and any other green fuels (green ammonia, green methanol, etc) but excluding liquefied natural gas;
- 1.1.73 **"Long Stop Date"** - the date which falls twenty four (24) months after the Scheduled Operations Commencement Date being the date by which the Services must have commenced failing which the TNPA shall be entitled to terminate this Agreement in accordance with the provisions in clause 45 (*Terminal Operator Default*);
- 1.1.74 **"Losses"** - losses, damages, liabilities, claims, actions, proceedings, demands, costs, charges or expenses of any nature in respect of the Project;
- 1.1.75 **"Member"** means any legal entity and or natural person which will become a Shareholder (either itself or through an intermediary entity) once the Project Company is incorporated to undertake the Project, and if the Project Company has

- already been incorporated, then any Shareholder;
- 1.1.76 **"NERSA"** - the National Energy Regulator of South Africa, established pursuant to Section 3 of the National Energy Regulator Act, 40 of 2004;
- 1.1.77 **"Operating Performance Guarantee"** - the performance guarantee to be issued by a financial institution (of whom the TNPA approves) on behalf of the Operator in favour of the Terminal Operator, substantially in the form of the guarantee attached to this Agreement as Schedule 15 and the terms of which are to be to the satisfaction of the TNPA;
- 1.1.78 **"Operating Rights"** - all the rights and obligations conferred and imposed on the Terminal Operator in terms of and pursuant to this Agreement in respect of and for the purposes of carrying out the Project;
- 1.1.79 **"Operating Specifications"** - the specifications and standards in accordance with which the Services are to be provided, the Operation and Maintenance conducted and the Terminal is to be maintained and upgraded, all of which are detailed in Schedule 2;
- 1.1.80 **"Operating Term"** - the period for which the Operating Rights are granted to the Terminal Operator, which period is as detailed in clause 4 (*Duration of this Agreement*);
- 1.1.81 **"Operation and Maintenance"** - all operation and maintenance activities in respect of the Project, that are requirements in

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order to provide the Services and for the operation and maintenance of the Terminal, in accordance with the requirements of Schedule 2 of this Agreement, the Operating Specifications and International Best Practice;

- 1.1.82 **"Operation Commencement"** - the commencement of the Services subsequent to the issue of the Operations Certificate in accordance with clause 29.3 (*approval to provide Services*);
- 1.1.83 **"Operations Agreement"** - the agreement to be entered into between the Terminal Operator and the Operator in respect of the Operation and Maintenance of the Terminal, which agreement shall be in substantially the same form and content as the agreement attached as Schedule 5;
- 1.1.84 **"Operations Certificate"** - the certificate to be issued by the Independent Certifier in terms of clause 29.2 (*inspection*) as the date on which the Operating Term may commence;
- 1.1.85 **"Operations Period"** - the period from the Actual Operations Commencement Date until the end of the Operating Term;
- 1.1.86 **"Operator"** - the person who is appointed as the Operation and Maintenance contractor by the Terminal Operator in the Operations Agreement, and any replacement or successor-in-title of such person;
- 1.1.87 **"Parties"** - the TNPA and the Terminal Operator;

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- 1.1.88 **"Payment Expert"** - a chartered accountant of not less than 10 (ten) years professional experience or investment banker as agreed to between the Parties, and failing agreement, nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants, if the matter relates primarily to a financial matter or financial management matter;
- 1.1.89 **"Performance Guarantees"** - the Construction Performance Guarantee, the Operating Performance Guarantee and the Final Maintenance Guarantee;
- 1.1.90 **"PFMA"** - the Public finance Management Act, 1 of 1999;
- 1.1.91 **"Pipeline "** means the transmission pipeline on which the Cargo may be transported from the Terminal to delivery point;
- 1.1.92 **"Port"** - the deep-water Port of Richards Bay, situated on the northern east coast of the Province of KwaZulu-Natal;
- 1.1.93 **"Port Infrastructure"** -the basic common use structures of the Port of Richards Bay, including the Berths, breakwaters, seawalls, channels, basins, quay walls, jetties, roads, railways and infrastructure used for the provision of water, lights, power, sewage and similar services, other than the Terminal Infrastructure;
- 1.1.94 **"Port Rules"** - any rules, by-laws, regulations and delegated legislation issued from time to time in respect of the operate of the Port specifically or ports in South Africa generally and or in respect of

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- the behaviour, conduct and manner of conducting business of users of the Port specifically or ports in South Africa generally;
- 1.1.95 **"Port Users"** - any person other than the Terminal Operator, organisation and or agency utilizing the facilities of the Port and or conducting business within the Port limits, including shipping lines, vessel agents, licenced operators, operators of other terminals within the Port and any Subcontractor and or any third parties authorised to conduct business on behalf of any Port User;
- 1.1.96 **"Preliminary Design"** - the preliminary design of the Terminal carried out prior to the Effective Date by the Terminal Operator in accordance with the Preliminary Design Procedure;
- 1.1.97 **"Preliminary Design Procedure"** - the procedure designated as such in the D&C Specifications;
- 1.1.98 **"Project"** the Design, Development, Financing, Construction, Operation and Maintenance of an Terminal at the Port to meet the Project Deliverables;
- 1.1.99 **"Project Site"** - the site on which the Project will be undertaken as demarcated on Schedule 12A (*Project Site*);
- 1.1.100 **"Project Company"** *[insert name of the project company];*
- 1.1.101 **"Project Deliverables"** -the deliverables in respect of the design, development and commissioning of the required Terminal Infrastructure to be

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undertaken by the Terminal Operator, as specified in Schedule 8 of this Agreement;

- 1.1.102 **"Project Documents"** -all drawings, data, books, reports, documents, software, source codes and manuals and other information, which the Terminal Operator, Construction Contractor and or Operator has or have been using and which are necessary for the Construction Works and or continuing Operation and Maintenance;

- 1.1.103 **"Provisional Operations Certificate"** - the certificate to be issued by the Independent Certifier prior to Construction Completion when, in the reasonable opinion of the Independent Certifier, Construction Completion is likely to be achieved by the Construction Contractor by the date specified in the certificate;

- 1.1.104 **"Rand" or "R"** - the lawful currency of South Africa;

- 1.1.105 **"Reasonable and Prudent Operator"** - a person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and appropriately experienced developer, contractor, owner or operator internationally, who is complying with all applicable Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions, and any

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references herein to the "standards of a Reasonable and Prudent Operator" shall be construed accordingly;

- 1.1.106 **"Refinancing"**¹ - at any time after the Signature Date:
 - 1.1.106.1 any material amendment, assignment, novation, replacement or supplementing of any of the Finance Agreements and or the Constitutional Documents, whether independently or in combination with any connected arrangements;
 - 1.1.106.2 the exercise of any right or grant of any waiver, indulgence or approval under any of the Finance Agreements (other than a Permitted Borrowing) and or the Constitutional Documents;
 - 1.1.106.3 the disposition or encumbering (by whatever means) of any rights under any of the Finance Agreements and or the Constitutional Documents or the creation or granting of any other benefit or interest in any of the Finance Agreements and or the Constitutional Documents or any of the Terminal Operator's

¹ To the extent that the Preferred Bidder funds its obligations using third-party loan financing, these provisions, and related clauses will be retained

other contracts, revenues or the Terminal;
and/or

1.1.106.4 any other arrangements having any of the effects in clauses 1.1.119.1.3 to 1.1.119.3;

1.1.107 **"Related Party"**

- a person who:

1.1.107.1 directly, or indirectly through one or more intermediaries, controls, or is controlled by, a person who holds, at least 5% Equity in the Terminal Operator;

1.1.107.2 is under common control with any person who holds at least 5% Equity in the Terminal Operator; or

1.1.107.3 any person who holds at least 5% Equity in the Terminal Operator,

where **"control"** in respect of any person means the power to direct the management and policies of such person, whether through the holding of voting rights or the ability to nominate and or appoint a majority of the directors or through any contractual arrangement (whether at Law or pursuant to a contractual arrangement) and the term "controlled" has a cognitive meaning;

1.1.108 **"Related Party Transaction"**

- any transaction relating in any way directly or indirectly to the Project in which the Terminal Operator or any Subcontractor of the Terminal Operator leases, transfers or otherwise disposes of any of its properties or assets to, or purchases any property or assets from, or

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enters into any contract, agreement, understanding, loan, advance or guarantee with, or for the benefit of, a Related Party (other than the Terminal Operator), but excluding the Financing Agreements;

- 1.1.109 **"Responsible Authority"** - any ministry or department, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, institution, entity, service utility, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question;
- 1.1.110 **"Schedules"** - the schedules to this Agreement, as amended, replaced and varied from time to time;
- 1.1.111 **"Scheduled Operations Commencement Date"** - *[insert date]*, the date stipulated in the Programme for Construction Works, set out in Schedule 22, as the day after the date on which the Operations Certificate is scheduled to be issued and the Services are due to commence;
- 1.1.112 **"Services"** - the provision of services at the Terminal in respect of the berthing of Cargo carriers at the designated Port locations, the unloading and receipt of Cargo from Cargo carriers at the Terminal receipt point, storage of Cargo, transportation of Cargo to the delivery point and other activities related to performance by the Terminal Operator of the foregoing,

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including the maintenance of the Terminal, which services are more fully described in and are to be provided in accordance with the specifications and standards detailed in Operating Specifications and Schedule 12B *(Description of the Services)*;

- 1.1.113 **"Shareholders"** - means the holders of the Equity, whether directly or indirectly;
- 1.1.114 **"Signature Date"** - the date on which this Agreement has been signed by both Parties and, if signed on different dates, the last of such dates;
- 1.1.115 **"South Africa"** - the Republic of South Africa;
- 1.1.116 **"Special Loss"** - means, in relation to either Party, any loss or damage suffered or incurred by it which does not constitute a Direct Loss, including indirect losses, consequential or special losses and wasted or increased overheads;
- 1.1.117 **"Subcontractors"** - any subcontractor of the Terminal Operator, who has contracted directly with the Terminal Operator in respect of the Project;
- 1.1.118 **"Substitute Entity"** - a person duly and properly appointed to be the new terminal operator in the place and stead of the Terminal Operator in terms of the Direct Agreement;
- 1.1.119 **"Supplier Development Plan"** - the Terminal Operator's Supplier Development Plan as set forth in Schedule 10B hereto;

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- 1.1.120 **"Target Completion Date"** - the date by which Construction Completion is, at the Signature Date, intended to occur, which date is specified in Schedule 22;
- 1.1.121 **"Tax"** - VAT, any tax, levy, impost, duty or other charge or withholding of a similar nature (including any related penalty or interest);
- 1.1.122 **"Terminal"** - means the landside liquid bulk storage, Pipeline and related Equipment and related Terminal Infrastructure located on the designated land space used for the Operation and Maintenance as depicted in Schedule 12
- 1.1.123 **"Terminal Infrastructure"** - the land-based structures including the storage facilities, terminal buildings, sheds, workshops, substations, surfacing and the internal network for the provision of water, lights, power, sewerage and similar services within the Terminal boundaries demarcated in Schedule 12A;
- 1.1.124 **"Terminal Operator"** - *[insert name, registration number and description of the Terminal Operator];*
- 1.1.125 **"Terminal Users"** - the users or customers of the Terminal;
- 1.1.126 **"Termination Amount"** - the amount payable on termination of this Agreement in terms of Part VII;
- 1.1.127 **"Termination Date"** - any date on which this Agreement is terminated in accordance with its terms, other than by way of effluxion of time;

- 1.1.128 **"Third Party Access"** the granting of access to the uncommitted capacity in the Terminal to parties other than the Project Company on a:
- 1.1.128.1 commercial basis; and
- 1.1.128.2 transparent, non-discriminatory and an arms-length basis in line with applicable law; and
- 1.1.148.3. in accordance with the provisions of the Petroleum Pipelines Act, any Directives and or Rules as may be issued by NERSA;
- 1.1.129 **"TNPA"** - the Transnet National Ports Authority of South Africa, an operating division of Transnet;
- 1.1.130 **"Transnet "** - Transnet SOC Ltd, registration number 1990/000900/30, as incorporated pursuant to the Legal Succession to the South African Transport Services Act, 9 of 1980;
- 1.1.131 **"Transfer Costs"** - all reasonable costs incurred by the Terminal Operator arising out of the transfer to the TNPA (or its nominee) of the right, title and interest of the Terminal Operator in and to the Terminal , the Approvals and the Project upon termination of this Agreement including VAT, but excluding (i) any costs incurred by the Terminal Operator pursuant to clause 49.2 (Independent Expert Calculations) or clause 53.5 (Fast-track Dispute Resolution) or clause 53 (Dispute Resolution) which are allocated by the Expert to the Terminal Operator, (ii) any costs in respect of legal or financial advisory services, and (iii) any tax on income, receipts, sales, transfer, property, capital gain, dividends or other similar taxes;

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- 1.1.132 **"Unforeseeable Conduct"** - such conduct shall occur if, after the Signature Date, the TNPA or any Responsible Authority takes any action (including the introduction, application, or change of any law, regulation, by-law or order having the force of law) or fails to carry out its obligations as prescribed by law:
- 1.1.132.1 the principal effect of which is directly borne by:
 - 1.1.132.1.1 the Project and not other similar transactions;
 - 1.1.132.1.2 the Terminal Operator and not other persons; or
 - 1.1.132.1.3 parties undertaking port terminal operations and not other persons;
 - 1.1.132.2 in respect of which the Terminal Operator is not entitled to any other relief pursuant to any other provisions of this Agreement;
 - 1.1.132.3 which was not foreseen by the Terminal Operator on or before the Signature Date; and
 - 1.1.132.4 which could not reasonably have been foreseen by any person in the position of the Terminal Operator on or before the Signature Date;
- provided that:

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- 1.1.132.5 Unforeseeable Conduct shall be deemed not to have occurred under circumstances where any action or omission of the TNPA or Responsible Authority is in direct response to any act or omission of the Terminal Operator which is illegal (other than an act or omission rendered illegal by virtue of such conduct of the TNPA or Responsible Authority) or in violation of agreements to which the Terminal Operator is a party;
- 1.1.132.6 an increase in taxes of general application which does not discriminate against the TNPA or against the TNPA and other parties undertaking similar transactions shall be deemed not to be Unforeseeable Conduct; and
- 1.1.132.7 Unforeseeable Conduct shall be deemed not to have occurred if such conduct by the TNPA or any Responsible Authority is required as a result of an event of Force Majeure and is reasonably proportionate thereto;
- 1.1.133 **"Utilities"** - all facilities serving the public and Port Users such as water, electricity, sewage, gas and telecommunications and where appropriate includes the relevant provider thereof.

1.2 Interpretation

- 1.2.1 In this Agreement, unless inconsistent with the context, words referring to:
- 1.2.1.1 one gender include a reference to the other genders;

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- 1.2.1.2 the singular includes the plural and vice versa;
- 1.2.1.3 natural persons include juristic persons and vice versa, and "**person**" includes a corporation, company, firm, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of any of the foregoing that is recognised by Law as the subject of rights and duties, and references to a "person" (or to a word incorporating a person) shall be construed so as to include that person's successors in title and assigns or transferees.
- 1.2.2 When a number of days is prescribed in this Agreement, such number shall be calculated including the first and excluding the last day, unless the last day falls on a day that is not a Business Day, in which case, the last day shall be the first succeeding day which is a Business Day. In computation of periods of time from a specified day to a later specified day, "**from**" means from and including and "**until**" or "**to**" means to and including. Unless otherwise specified, all references to any time shall be to the time of day in Johannesburg, South Africa.
- 1.2.3 The words "**include**", "**including**" and "**in particular**" shall not be construed as being by way of limitation, illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words. The words "**other**" and "**otherwise**" shall not be construed so as to be limited or defined by any preceding words, where a wider construction is reasonably possible.
- 1.2.4 The terms "**hereof**", "**herein**", "**hereunder**" and similar words refer to this entire Agreement and not to any particular clause, paragraph, Part, Schedule or any other subdivision of this Agreement.
- 1.2.5 References to any recital, clause, paragraph, Schedule or Annex are to those contained in this Agreement, and references to a part of a Schedule are to the part of the Schedule in which the reference is relevant, and all Schedules and Annexes to this Agreement are an integral part of this Agreement. If

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there is a conflict between the provisions of a Schedule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

- 1.2.6 Any reference to legislation, a statute, a statutory instrument, by-law, regulation, rule, subordinate legislation or delegated legislation or order or a standard in this Agreement shall be a reference to such legislation, statute, statutory instrument, by-law, regulation, rule, subordinate legislation or delegated legislation or order or standard as amended, replaced, consolidated, varied or re-enacted from time to time.
- 1.2.7 Words and expressions defined in any sub-clause shall, for the purpose of the clause of which that sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause.
- 1.2.8 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive clause in the body of the agreement, notwithstanding that such provision is contained in such clause.
- 1.2.9 Any reference in this Agreement to this "**Agreement**" or to another agreement shall be to this "**Agreement**" or such agreement as amended, supplemented, varied, novated or replaced from time to time in accordance with its terms and conditions provided that, in the case of any other document, such amendment, variation, novation, supplement or replacement has received the prior written approval of the TNPA.
- 1.2.10 The index and titles of clauses and schedules of and to this Agreement are inserted for the sake of convenience only and shall not be used in respect of or in any way affect the interpretation of any provision of this Agreement.
- 1.2.11 A reference in this agreement to any person shall be a reference to such person's permitted successor, transferee, cessionary and or delegatee.
- 1.2.12 Any reference in this Agreement to the Updated Financial Model shall, unless the context requires otherwise, be a reference to such document as most recently updated, amended or replaced and approved by the TNPA, in accordance with the terms of this Agreement.

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- 1.2.13 Where this Agreement requires that the waiver, consent, approval or permission of the TNPA is to be obtained:
- 1.2.13.1 such waiver, consent, approval or permission shall at all times be required to be obtained by the Terminal Operator prior to undertaking or failing to undertake the course of action to which such waiver, consent, approval or permission pertains; and
- 1.2.13.2 the granting or withholding of such waiver, consent, approval or permission shall not be valid unless it is issued in writing by the TNPA.
- 1.2.14 The terms "**holding company**" and "**subsidiary**" shall have the meanings ascribed to them in the Companies Act.
- 1.2.15 References in this Agreement to the TNPA, the Terminal Operator, the Independent Certifier, the Agent and the Lenders shall include their respective authorised agents and representatives and successors and permitted assignees.
- 1.2.16 Any provision of this Agreement that contemplates or provides for performance of an obligation or compliance with a provision of this Agreement subsequent to any termination or expiry of this Agreement shall survive and termination or expiry of this Agreement and shall continue in force and effect for the period contemplated in said provision, notwithstanding that these provisions do not expressly state this.
- 1.2.17 Termination or expiry of this Agreement shall not affect and shall be without prejudice to the accrued rights, obligations, claims, duties and liabilities of either Party which such accrued rights, obligations, claims, duties and liabilities arose prior to such termination or expiry. For the avoidance of doubt, such rights, claims and liabilities shall include any rights of a Party in respect of an antecedent breach or non-performance by either Party of any of the terms or conditions of this Agreement.
- 1.2.18 The *eiusdem generis* rule and the *contra proferentem* rule shall not be applicable to this Agreement.

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2. Introduction

- 2.1 In terms of the Act, the TNPA exercises authority, power, control and responsibility in respect of the commercial ports in South Africa, including the Port.
- 2.2 The Terminal Operator has been authorised to enter into this Agreement with the TNPA, for the Port, following the conclusion of an open, fair, transparent, and competitive bid process in accordance with the provisions of Section 56 of the Ports Act 12 of 2005;
- 2.3 In terms of this Agreement, the TNPA wishes to appoint a Terminal Operator who shall finance, design, construct, equip, Operate and Maintain, and transfer the Terminal to TNPA. TNPA requires the said Terminal to be designed, constructed and equipped and then operated and maintained, all in accordance with the standard of a Reasonable and Prudent Operator and International Best Practice.

3. Appointment of Terminal Operator and grant of rights

3.1 grant of rights

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

3.2 exclusivity of rights

- 3.2.1 Subject to the provisions of this Agreement, the Operating Rights are granted exclusively to the Terminal Operator from the Signature Date until the termination or expiry of this Agreement in accordance with its terms.
- 3.2.2 The Terminal Operator shall also be entitled to use the Port Infrastructure for the purposes of the Project in accordance with the Port Rules, subject to the use thereof by any other Port Users in accordance with the Port Rules.

3.3 Terminal Operator's obligations

- 3.3.1 The Terminal Operator shall undertake the Project at its own cost and risk in accordance with the terms of this Agreement. TNPA shall not provide any

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guarantee, subsidy, grant or any financial support of any nature to the Terminal Operator or in respect of the Project.

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

3.4 **subcontracting**

3.4.1 Regardless of the fact that this Agreement permits or requires the Terminal Operator to appoint third parties to perform part of the Project, such appointment shall not relieve or excuse the Terminal Operator of any duty, obligation, liability or responsibility under this Agreement and in respect of the Project.

3.4.2 The Terminal Operator shall be responsible for the management and supervision of any third party, agents or subcontractors appointed by it to perform any part of the Project.

3.4.3 The Terminal Operator shall be and shall remain, at all times, fully responsible and liable for the actions and omissions (whether negligent, wilful or intentional) of all such third parties, agents, representatives and employees of such third parties, whether such third parties are employed directly or indirectly by the Terminal Operator.

3.4.4 Nothing in this Agreement is intended to create or should be interpreted as creating any privity of contract between the TNPA and any third parties appointed by the Terminal Operator to perform any part of the Project. The Terminal Operator shall ensure that a provision to this effect is inserted into every contract entered into by it with such a third party.

3.5 **General Rights and Obligations of the Terminal Operator**

3.5.1 The Terminal shall be used solely for the Services and activities described in this Agreement, for purposes incidental to the provision of those Services and activities, and for the exercise of the rights and the fulfilment of the obligations set out in this Agreement, and for no other purpose whatsoever

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unless the prior written consent of the TNPA has been obtained, in terms of this clause 3.5, for such other purpose.

- 3.5.2 The Terminal shall be used, managed and operated on a common user access basis to all Port Users, meaning that the Terminal Operator shall provide reasonable equality of access to the Terminal to Cargo importers or shippers wishing to utilise the Services of the Terminal and shall not unreasonably discriminate, in its tariff structure or in its trading conditions between the services required for the Project and the users of the Terminal Operator's Services at the Terminal .
- 3.5.3 the Terminal Operator shall, acting as a Reasonable and Prudent Operator, make available the following services to the users (such available services being herein referred to as the "**Services**") in the manner set out in Schedule 12B (*Description of Services*):
- 3.5.3.1 the berthing of Cargo carriers at the Terminal at the designated Port locations;
- 3.5.3.2 the unloading and receipt of Cargo from Cargo carriers at the Terminal;
- 3.5.3.3 Storage of Cargo;
- 3.5.3.4 the transportation and delivery of the Cargo to the Terminal; and
- 3.5.3.5 other activities directly related to performance by the Terminal Operator of the foregoing.
- 3.5.4 Without limiting the other obligations of the Terminal Operator as specified in this Agreement or imposed by Law, the Terminal Operator shall be obliged to:
- 3.5.4.1 provide reliable, secure and efficient services and facilities to Port Users;
- 3.5.4.2 obtain, maintain and renew all documents, licensed, permits or other authorisations necessary to operate the Terminal and render the

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Services and perform the activities referred to in clauses 3.5.3 and 3.5.4;

- 3.5.4.3 ensure that if any Subcontractors, agents, third parties and service providers used by it require a licence in terms of the Act, such persons are duly licensed;
- 3.5.4.4 provide, maintain or replace, according to International Best Practice, all operating and other equipment necessary for the efficient operation of the Terminal ;
- 3.5.4.5 procure, install and operate communication, control and administrative systems necessary for the efficient operation of the Terminal;
- 3.5.4.6 promote customer relations and market the Terminal to potential customers;
- 3.5.4.7 to the extent that the relevant service at the Terminal is not provided by the TNPA, be responsible for the disposal of garbage and waste, including garbage and waste generated by Cargo carriers visiting the Terminal;
- 3.5.4.8 keep the Terminal in a clean, orderly and sanitary condition;
- 3.5.4.9 ensure that roadways within the Terminal are constructed and maintained at a standard complying with the permissible axle loads for the type and volume of traffic which will use the roads, and otherwise at such standard as is stipulated by TPNA and communicated to the Terminal Operator in writing;
- 3.5.4.10 ensure that all vehicles entering and exiting the Terminal are planned and organised to minimise traffic congestion, interference, the staging and /or queuing outside the Terminal by:
 - 3.5.4.10.1 providing to TNPA a traffic management plan within thirty (30) days of Operations Commencement Date, clearly indicating how

- trucks and general vehicle movement at the Terminal and the surrounding areas will be managed;
- 3.5.4.10.2 utilizing a truck booking system for all trucks calling to the Terminal during the Operations Period; and
- 3.5.4.10.3 providing to TNPA the confirmed number of truck bookings daily.
- 3.5.4.11 comply with all applicable provisions of the Act, the Port Rules, the Regulations and any directives issued in terms of the Act;
- 3.5.4.12 comply with the requirements of SAMSA, including any applicable legislation and codes relating to safe working practices;
- 3.5.4.13 ensure that the perimeter of the Terminal is fenced with security fencing of a standard reasonably acceptable to TNPA and which is in compliance with the ISPS Code, and maintain the fencing at that standard (and repaired as necessary) during the term of this Agreement;
- 3.5.4.14 comply with the ISPS Code and the IMDG Code in relation to security and dangerous goods, respectively; and
- 3.5.4.15 comply with all other applicable legislation and generally conduct its activities and operations in accordance with the Law and applicable precinct management rules, where applicable.
- 3.5.5 The Terminal Operator may not:
- 3.5.5.1 use the Terminal for residential purposes or as sleeping quarters, save that the TNPA may in writing authorise a portion of the Terminal to be used as sleeping quarters for operational or security purposes;
- 3.5.5.2 do or cause anything to be done that may cause a nuisance to the TNPA or to any other port service provider or the occupants of adjoining properties or the operators of nearby facilities;
- 3.5.5.3 do anything that materially detracts from the appearance of the Terminal; or

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3.5.5.4 undertake the Services in any area within the Port, other than in the Terminal, unless with the TNPA's prior written consent or with permission from another person legally in control of the area.

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

3.5.6.1 immediately notify the TNPA if any Cargo, equipment, objects and/or any other matter is spilled or dropped in the water as a result of its operation of the Terminal or the conduct of its employees, agents, service providers, Subcontractors or persons responsible for the carriers calling at the Terminal; and

3.5.6.2 immediately take steps to recover such Cargo, equipment, objects and/or any other matter.

3.5.7 If the Terminal Operator fails to recover any spilled or dropped Cargo, equipment, objects and/or any other matter as envisaged above, the TNPA may take whatever steps are necessary to recover the Cargo, equipment, objects and /or any other matter and to claim the full costs of taking such steps from the Terminal Operator.

3.6 **Terminal Operator's Replacement, Repair and Maintenance Obligations**

3.6.1 The Terminal Operator shall be responsible for maintaining the Terminal Infrastructure and Equipment and shall at its own cost undertake all maintenance and make all repairs, renewals and replacements necessary to maintain the Terminal and for the efficient operation of the Terminal , as follows:

3.6.1.1 The Terminal Infrastructure (including the surface of the quay, if applicable) shall be maintained and kept in good order and condition, in accordance with the standards of a Reasonable and Prudent Operator, International Best Practice and the international standards for a terminal comparable to the Terminal. The Terminal Operator shall

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be responsible for repairs, renewals and replacement of the Terminal Infrastructure necessary for the efficient operation of the Terminal in accordance with the standards of a Reasonable and Prudent Operator.

3.6.1.2 The Terminal Operator shall provide additional equipment or replace equipment in order to ensure the efficient operation of the Terminal in accordance with the standards of a Reasonable and Prudent Operator, International Best Practice and the international standards for a terminal comparable to the Terminal.

3.6.1.3 The Terminal Operator shall conduct annual inspections of the Terminal Infrastructure and Equipment and must prepare annual reports on those inspections, which reports must be submitted to the TNPA, at least 2 (two) Months prior to the start of each of the Terminal Operator’s Financial Years.

3.6.1.4 The Terminal Operator shall provide the TNPA with an annual maintenance programme for the Terminal Infrastructure and a replacement programme for the Equipment, at least 2 (two) Months prior to the start of each of the Terminal Operator’s Financial Years.

3.7 Surfaces and Access to the Terminal

3.7.1 The Terminal Operator shall, at its own cost, construct or maintain in good order and condition such surfaces as may be required within the Terminal for the provision of the Services and the performance of the activities contemplated in this Agreement.

3.7.2 The Terminal Operator shall ensure that all Cargo carriers mooring at the Terminal shall be scheduled by way of a Cargo carriers calling schedule so as to minimise congestion and any queuing of the Cargo carriers outside the Terminal.

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3.7.3 The TNPA's duly authorised agents, employees and contractors shall have the right of access to the Terminal for purposes of performing the TNPA's functions, provided that the TNPA ensures that its agents, employees and contractors comply with all reasonable safety and security stipulations, environmental and site rules of the Terminal Operator whilst in the Terminal.

4. Duration of this Agreement

4.1 This Agreement shall be effective from the Effective Date until the earlier of:

4.1.1 its termination in accordance with Part VII (*Termination*); or

4.1.2 the Expiry Date,

(such period being the "**Term**" of this Agreement).

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

4.3 The Operating Term shall commence on the Scheduled Operations Commencement Date and shall continue until the Expiry Date or earlier termination of the Agreement.

4.4 The TNPA shall within its sole discretion be entitled to extend the duration of this Agreement on such terms and conditions as it determines.

5. Concession Fee

5.1 The Terminal Operator shall pay to the TNPA, upon signature of this Agreement, an upfront Fee in the amount of **R [insert amount]** in respect of the granting to the Terminal Operator of the right to operate the Terminal for the Term of the Agreement.

5.2 The Terminal Operator shall further pay to the TNPA Rental in respect of the Site, in the amount of **[insert amount]**. This fee is payable irrespective of the performance and volume handled at the Terminal. All amounts payable by the Terminal Operator in terms of this clause 5.2, shall be paid monthly in advance, by no later than the 7th day of each month, commencing on the Effective Date.

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6. Ownership and return of the Project Site and the Terminal

- 6.1 The Terminal Operator agrees and acknowledges that the TNPA is and shall at all times be the owner of the Port Site.
- 6.2 Upon the termination for any reason or expiry of the Operating Rights and or this Agreement and where the TNPA has exercised its option to take transfer of the Terminal, the Terminal Operator shall deliver and give vacant possession of the Terminal, Project Site and any other relevant assets or facilities owned by or if not owned by, in the possession of, the Terminal Operator, free of charges, liens, claims or encumbrances of any nature whatsoever and free of any liabilities, and in accordance with the standards and requirements detailed in the D&C Specifications and the Operating Specifications, to the TNPA.

7. Indemnity

- 7.1 Subject to clauses 7.2 and 7.4, the Terminal Operator shall fully and effectively indemnify and hold the TNPA or any Port User harmless in respect of all Losses suffered or incurred by the TNPA, or any Port User which arise in connection with the breach of this Agreement or the Laws by the Terminal Operator, including, without limitation to the generality of the foregoing, any Losses which may be incurred or suffered by the TNPA, or any Port User, in respect of personal injury (including injury resulting in death).
- 7.2 Clause 7.1 shall not apply to:
- 7.2.1 any Losses to the extent that they arise directly from the wilful default of the TNPA or the relevant Port User;
- 7.2.2 Losses to the extent that the TNPA or the relevant Port User is reasonably able to mitigate such Losses.
- 7.3 If the Terminal Operator pays to the TNPA an amount in respect of Losses and the TNPA subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise howsoever) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Losses, the TNPA shall forthwith repay to the Terminal Operator:

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- 7.3.1 an amount equal to the sum recovered or the value of the savings or benefit obtained, less any reasonable costs and expenses incurred by the TNPA in recovering the same; or
- 7.3.2 if the figure resulting under clause 7.3.1 above is greater than the amount paid by the Terminal Operator to the TNPA in respect of the Losses, such lesser amount that has been paid by the Terminal Operator to the TNPA.
- 7.4 The Terminal Operator shall indemnify the TNPA in respect of all Losses relating to the use or infringement or alleged use or infringement by the Terminal Operator of Intellectual Property Rights.
- 7.5 Except as expressly provided in this Agreement, the Terminal Operator shall not make any claim against the TNPA or any Port User in respect of any Losses sustained by the Terminal Operator by reason of or arising out of or in any way connected with the performance of this Agreement.
- 7.6 For the avoidance of doubt, this clause 7 (*Indemnity*) shall take effect without prejudice to the Terminal Operator's obligations under the other provisions of this Agreement.
- 7.7 The TNPA agrees that it will forthwith notify the Terminal Operator of any claim or any matter or thing which comes to its attention and which may give rise to a claim by the TNPA against the Terminal Operator under this Agreement pursuant to this clause 7 (*Indemnity*), as follows:
- 7.7.1 The TNPA will at all times after such notification, disclose in writing to the Terminal Operator all information and documents relating to such claim and the matter giving rise thereto and will allow the Terminal Operator to see appropriate files and records relating to the same and take copies of all relevant documents.
- 7.7.2 The TNPA will take such action as the Terminal Operator may reasonably request at the Terminal Operator's expense to avoid disputes, settle, compromise, defend or appeal against such claim and the TNPA will take no steps to avoid disputes, settle, compromise, defend or appeal against such claim without the Terminal Operator's consent, which consent shall not be

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unreasonably withheld or delayed. The Terminal Operator shall procure that its Subcontractors shall provide identical undertakings to the TNPA.

8. **Related Party Transactions**

- 8.1 Unless otherwise agreed to by the TNPA and without prejudice to the provisions of clause 8.3, the Terminal Operator shall not enter into any Related Party Transactions which are no less favourable to the Terminal Operator than those that could have been obtained in a comparable arm's length transaction by the Terminal Operator with a person who is not a Related Party.
- 8.2 The TNPA shall have the right to review the basis for all costs charged, directly or indirectly, to the Terminal Operator under any Related Party Transaction. The Terminal Operator shall give prior notice to the TNPA of any Related Party Transaction, together with all relevant details relating thereto.
- 8.3 The TNPA acknowledges that the Construction Agreement and the Operations Agreement are regarded as Related Party Transactions which are no less favourable to the Terminal Operator than the ones that could have been obtained in comparable arm's length transactions by the Terminal Operator with persons which are not Related Parties, provided that, on the dates of signing of the Construction Agreement and the Operations Agreement, the contract price and the remuneration payable by or to the Terminal Operator, Construction Contractor and the Operator, respectively, do not exceed the relevant amount indicated in the Financial Model.

9. **Limitation on financial indebtedness**

- 9.1 The Terminal Operator shall not incur, assume or permit to exist any indebtedness including guarantees issued to third parties, the creation of charges, pledges or

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other encumbrances over its assets and or shares and, in general, any claims and rights otherwise than:

- 9.1.1 in accordance with the Associated Agreements or the Financing Agreements;
or
- 9.1.2 in the ordinary and normal course of business; or
- 9.1.3 with the prior consent of the TNPA.

10. Compliance with D&C Specifications and Operating Specifications

- 10.1 The Terminal Operator shall comply with, and shall ensure that its Subcontractors comply with the D&C Specifications in respect of the Construction Works and the Operating Specifications in respect of the Operation and Maintenance at all times.
- 10.2 The Terminal Operator warrants that the Project shall be carried out in conformity with the D&C Specification and the Operating Specifications using Equipment and materials, which are of suitable quality for the purposes and uses intended and are free of defects and deficiencies. All such work shall be completed and undertaken in accordance with the D&C Specifications and the Operating Specifications to the reasonable satisfaction of the Independent Certifier.
- 10.3 The Terminal Operator shall ensure that any decision, determination, instruction, inspection, examination, testing, consent, approval, expression of satisfaction, acceptance, agreement, exercise of discretion (whether sole or otherwise) or similar act by any Responsible Authority or the Independent Certifier in respect of this Agreement or the Associated Agreements shall be applied for or requested promptly by the Terminal Operator.

11. Contracts

- 11.1 The Terminal Operator shall enter into the Associated Agreements, the Financing Agreements and such other contracts as are necessary to ensure the timeous and proper completion and undertaking of the Project in accordance with the D&C Specifications and the Operating Specifications. The Terminal Operator shall satisfy itself that the terms of such agreements fully describe the rights,

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obligations, risk allocation and protection of the Terminal Operator’s rights. None of the TNPA, any other Responsible Authority or their respective officers, employees, agents and or representatives shall have any liability whatsoever to the Terminal Operator arising from the Associated Agreements and or the Financing Agreements except as provided in or arising from this Agreement.

11.2 The Terminal Operator shall not:

- 11.2.1 amend, replace or cancel any term of the Associated Agreements or the Financing Agreements;
- 11.2.2 terminate any of the Associated Agreements or the Financing Agreements;
- 11.2.3 replace the Construction Contractor or the Operator;
- 11.2.4 enter into a new Construction Agreement, Operations Agreement;
- 11.2.5 consent to the cession, delegation or novation of any Associated Agreement and or the Financing Agreements,

without the prior written consent of the TNPA.

12. Environmental Compliance

- 12.1 The TNPA shall procure that the Consents set out in table A of Schedule 9 in terms of Environmental Laws are transferred to the Terminal Operator on or before the Effective Date.
- 12.2 Notwithstanding the above, the Terminal Operator shall be responsible for obtaining all the Consents that are required in respect of the Project in terms of any Environmental Laws and shall comply with, maintain and implement such Consents in accordance with their respective terms within the period of their validity. The TNPA shall use its reasonable endeavours to assist the Terminal Operator to obtain such Environmental Consents, heritage Consents and other Consents as may be required to enable the Terminal Operator to execute the Project, provided that the TNPA shall bear no liability or responsibility for any failure of the Terminal Operator to obtain such Consents save as provided in this Agreement.

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- 12.3 The Terminal Operator shall take all necessary steps to ensure that appropriate pollution control and other environmental protection measures are taken in accordance with the Environmental Laws. The Terminal Operator shall comply with the Environmental Management Plan at all times.
- 12.4 Upon written request by the TNPA, the Terminal Operator shall conduct an environmental site assessment, at the Terminal Operator's expense and within the period specified by the TNPA, in respect of all the works conducted at the Port.
- 12.5 Such environmental site assessment shall:
- 12.5.1 include a systematic identification and evaluation of any potential impacts of any current or proposed work on the environment, this includes biophysical, biological, social, cultural, economic, aesthetic and technological aspects, to such an extent that those aspects are relevant to the works conducted at the Port;
- 12.5.2 be conducted by an independent environmental assessment practitioner;
- 12.5.3 form part of the Terminal Operator's Environmental Management Plan (the "**EMP**") and inform the Terminal Operator's Environmental Management System (the "**EMS**"); and
- 12.5.4 comply with any other reasonable requirements stipulated for such an assessment by the TNPA.
- 12.6 Within a period of 3 (three) months of the Actual Operations Commencement Date, the Terminal Operator shall submit, for the approval of the TNPA, the EMP which shall comply with National Environmental Management Act, 107 of 1998 ("**NEMA**") and the TNPA's written requirements (which requirements shall be provided to the Terminal Operator). The EMP and EMS shall be developed and implemented by the Terminal Operator for the duration of this Agreement. The EMP and EMS shall be binding upon the Terminal Operator.
- 12.7 The TNPA shall have the right at all times to conduct audits of the Terminal Operator's compliance with the EMP and the EMS. If, and where the TNPA is of reasonable belief that there is non-compliance, inefficiency or inadequacy, then the TNPA may require that the Terminal Operator rectify such non-compliance,

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inefficiency or inadequacy, without any delays, to the reasonable satisfaction of the TNPA.

- 12.8 The Terminal Operator, as required by law, shall comply with: ***[Note: this section will be updated to include all the Environmental laws with which the Terminal Operator is required to comply once this has been determined in respect of the Cargo to be handled.]***
- 12.8.1 all the requirements of the South African Maritime Safety Authority (the "SAMSA") in relation to the environment;
- 12.8.2 all the conditions laid down in respect of the Terminal, if the Terminal is declared as a protected natural environment or a special nature reserve;
- 12.8.3 the TNPA's requirements for the regular waste removal, including waste originating from cleaning or unloading of Cargo carriers;
- 12.8.4 all the conditions in environmental permits, consents, licences, certificates, authorisations, orders and exemptions from the Responsible Authority in respect of the Terminal ; and
- 12.8.5 all applicable statutory requirements related to the environment including NEMA, the National Water Act, 36 of 1998, the Air Quality Act, 39 of 2004 and the Biodiversity Act, 10 of 2004, and any other environmental legislation enacted or promulgated before or after the Effective Date.
- 12.9 The TNPA shall appoint, at the Terminal Operator's reasonable cost, and with the prior approval of the Terminal Operator, which shall not be unreasonably withheld, an independent environmental monitor who shall be responsible for:
- 12.9.1 ensuring that the Construction Works and Operation and Maintenance are performed in accordance with the D&C Specifications, the Operating Specifications and the Environmental Laws; and
- 12.9.2 monitoring and ensuring the implementation and effectiveness of mitigation measures and other requirements and targets set forth in the D&C Specifications, Operating Specifications and the Environmental Laws.

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- 12.10 During the construction, Operation and Maintenance of the Terminal, and in terms of the Operational Environmental Management Programme (the "**OEMP**"), there are conditional authorisations and or environmental requirements to be fulfilled by the Parties. Such authorisations are set out in Schedule 9 of this Agreement.
- 12.11 The Parties shall review the Environmental Management Plan at the start of each Contract Year in order to ascertain whether that EMP needs to be amended or replaced. If the Parties are unable to agree whether the EMP should be amended or replaced or on the contents of such amendment or replacement, then such dispute shall be referred to the monitor detailed in clause 12.9 for determination in terms of clause 53.5 (*fast-track dispute resolution*). The decision of such monitor shall, in the absence of manifest error or fraud, be final and binding on the Parties.
- 12.12 The Terminal Operator shall, upon the request of the TNPA and within a reasonable period of such request, provide the TNPA with certified copies of:
- 12.12.1 all environmental permissions obtained regarding the works and Services it provides at the Port, and, where the permissions are renewable, in each instance a certified copy of a new or updated permission; and
- 12.12.2 any measurements undertaken of emissions, effluent, storm water quality and material safety data sheet for hazardous substances, which it is, obliged to submit to a Responsible Authority.
- 12.13 The Terminal Operator may, as required by Law, not by any means cause significant pollution or degradation of the environment and shall:
- 12.13.1 provide the TNPA within a reasonable period with certified copies of any notices and directives issued by a Responsible Authority to the Terminal Operator to take steps to address pollution or negative impact on the environment;
- 12.13.2 provide the TNPA with certified copies of any report, including an emergency report, submitted by the Terminal Operator to a Responsible Authority regarding pollution or negative impacts on the environment;

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- 12.13.3 take all reasonable measures as envisaged by applicable Environmental Laws, including NEMA and the National Water Act, 36 of 1998, to investigate, assess and evaluate the impact of its activities on the environment of the Port and on the water resources on or below the Port;
- 12.13.4 if the Terminal Operator's works and Services directly or indirectly cause any significant pollution, environmental degradation or negative impact on the environment, which is not authorised by the TNPA or a Responsible Authority, the Terminal Operator shall, at its own costs, undertake efficient and effective means of combating, mitigating, cleaning, collecting and or disposing of all pollutants, or of otherwise addressing the environmental damages or other negative impact with the appropriate remedial and or rehabilitative measures, to the satisfaction of the TNPA and any Responsible Authority; and
- 12.13.5 take every reasonable precaution to prevent the spillage of Cargoes and/or other material (including fuel and waste) from Cargo carriers, vehicles, Cargo handling equipment and Terminal Infrastructure, and take immediate steps to mitigate and remedy any spillage to the satisfaction of SAMSA and the TNPA, at the Terminal Operator's expense.
- 12.14 If the Terminal Operator fails to comply promptly with any of the obligations imposed under this clause, the TNPA shall be entitled to immediately take whatever steps necessary to combat, mitigate and remedy any such pollution, environmental degradation or other impact on the environment, and to recover all costs incurred by the TNPA from the Terminal Operator.
- 12.15 Should the TNPA, in writing, determine that the Terminal shall be decommissioned upon cancellation or termination of this Agreement, the Terminal Operator shall develop and submit a Decommissioning-EMP to the TNPA and the Responsible Authority for implementation during the decommissioning phase in terms of the Decommissioning-EMP guidelines, which guidelines shall be provided to the Terminal Operator by the TNPA. The Decommissioning-EMP shall be required to be approved by the TNPA and all applicable Relevant Authorities in order for the duly approved Decommissioning-EMP to be submitted to the TNPA within a period of 6 (six) months after termination.

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13. Economic Development Obligations

[Note: the provisions of this clause will be informed by the Terminal Operator Agreement (TOA) negotiations Economic Development criteria and in respect of which elements of the Cargo value chain will be imposed and monitored. Transnet may require certain Economic Development obligations to be monitored under this agreement in accordance with its Supplier Development Policies and procurement guidelines in respect of section 56]

- 13.1 The Terminal Operator shall comply with the B-BBEE obligations specified in Schedule 10A and the Supplier Development Plan in Schedule 10B of this Agreement for the duration of this Agreement.
- 13.2 The Terminal Operator shall provide an annual report to the TNPA on the extent to which the Terminal Operator's undertakings contained in this clause 13 and Schedules 10A and 10B have been met, as well as documenting other achievements in promoting the empowerment of the BEE Entities.
- 13.3 The Terminal Operator shall, on an annual basis and by the date determined by the TNPA, provide the TNPA with a certificate of accreditation from an accredited verification agency verifying the Terminal Operator's B-BEEE status.
- 13.4 If the Terminal Operator fails to achieve the specific and quantifiable targets detailed in Schedule 10A and Schedule 10B within the relevant periods, the Terminal Operator shall pay the Penalties detailed in Schedule 11 in respect of the specific targets, to the TNPA in accordance with Schedule 11.

14. Access to documents, copyright and related matters

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

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- 14.2 The Terminal Operator shall use its best endeavours to procure that all software, source codes and manuals, programmes and documentation shall be provided to the Terminal Operator by the Operator upon termination of each Operating Contract and that the Terminal Operator shall be granted a perpetual non-exclusive, royalty-free licence to use the same for the continued Operation and Maintenance of the Terminal, which licence shall be transferred to a Substitute Entity or to a third party for continuing the Operation, Maintenance and or upgrade of the Terminal in accordance with the provisions of the Operations Agreement in force at that time.
- 14.3 Copyright owned by the Terminal Operator, Construction Contractor or any third party in all Project Documents shall be transferred free of any cost to the TNPA on termination of this Agreement or expiry of the Operating Term, whichever is the earlier.
- 14.4 Copyright in the D&C Specifications, the Operating Specifications and other documents issued by the TNPA or the Terminal Operator, to the extent that the Terminal Operator is the owner of the copyright in any such documents, shall be the property of the TNPA and, to the extent necessary, shall be ceded, assigned and made over to the TNPA.
- 14.5 The Terminal Operator may at its cost (and shall allow other parties to the Associated Agreements and the Lenders and prospective Lenders at their cost to), copy, use and communicate any such document for the purposes of the respective Associated Agreements and Financing Agreements. The Terminal Operator shall not (and shall ensure that other parties to the Associated Agreements, the Lenders and prospective Lenders shall not), without the TNPA's consent, use, copy or communicate to a third party such documents, except as strictly necessary for the purposes of the Associated Agreements and the Financing Agreements.
- 14.6 In addition to and without limiting the foregoing, the Terminal Operator shall deliver the Construction Documents and Operating Documents, and to the extent that the Terminal Operator is the owner of the copyright in any such documents or the Terminal Operator is otherwise lawfully able or entitled to do so, transfer the copyright in such documents to the TNPA on the earlier of:

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- 14.6.1 the termination of this Agreement; or
- 14.6.2 the termination of the Construction Contract; or
- 14.6.3 the termination of the Operations Agreement; or
- 14.6.4 if the appointment of a Substitute Entity and provided that such documents have or such copyright has not already been delivered or transferred to the TNPA, as the case may be, upon the appointment of such Substitute Entity.
- 14.7 Upon termination of this Agreement due to Terminal Operator Default, the Terminal Operator shall, upon request by the TNPA, provide copies of or access to the TNPA in respect of, or to any other Responsible Authority designated by the TNPA, the Project Documents, which access and copies shall be at no cost to the TNPA or such Responsible Authority, and shall be for their use in relation to the Construction Works and or Operation and Maintenance before the appointment of a Substitute Entity, if any.
- 14.8 The Terminal Operator further agrees, upon expiry of the Operating Term or termination of this Agreement for whatsoever cause, to ensure the transfer of ownership of the Project Document (to the extent owned by the Terminal Operator, Construction Contractor or Operator) to the TNPA. The Terminal Operator shall procure that the TNPA is legally entitled to use such Project Documentation and any other information which is not owned by the Terminal Operator, Construction Contractor or Operator and which is necessary for the Construction Works and or continued Operation and Maintenance.
- 14.9 Save in the course of the proper discharge of its duties hereunder, the Terminal Operator shall not, and shall ensure that other parties to the Associated Agreements and the Financing Agreements shall not, during the Construction Period and Operating Term or at any time thereafter, disclose to any person (other than to the Lenders or prospective Lenders) or otherwise make use of any information relating to the Project, the TNPA or the Terminal Operator (including, but without limitation, information relating to the Construction Works, Operation and Maintenance, the contents of any documents, including any legal agreements, prepared by or on behalf of the Terminal Operator or to which the Terminal Operator is a party), save for such information that is or comes into the public

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domain (other than through the default of the Terminal Operator or other parties to the Associated Agreements or the loan agreements), other than with the prior approval of the TNPA. Nothing contained in this clause shall preclude the Terminal Operator from using such information in enforcing its rights against the TNPA or any other person.

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

15. Performance Guarantees

15.1 Delivery of Performance Guarantees

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

15.2 Construction Performance Guarantee

- 15.2.1 The Terminal Operator shall obtain the Construction Performance Guarantee, which shall be an on demand guarantee in favour of the Terminal

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Operator, from the Construction Contractor as at the Effective Date in the amount of R[*insert amount in millions*], (which amount shall reduce to R[*insert amount in millions*] upon the issue of the Completion Certificate upon completion of the Construction Works as contemplated in clause 28.4 (*completion of Construction Works*)) to secure the performance by the Construction Contractor of its obligations in terms of the Construction Agreement, as at the Effective Date.

15.2.2 The Construction Performance Guarantee shall be substantially in the form of the guarantee attached to this Agreement as Schedule 14.

15.2.3 The Construction Performance Guarantee shall be valid from the Effective Date until the expiry of the Completion Defects Rectification Period (as this latter term is defined in the Construction Agreement) and shall be returned to the Terminal Operator within 14 (fourteen) days after the expiry of the Completion Defects Rectification Period.

15.3 **Operating Performance Guarantee**

15.3.1 The Terminal Operator shall obtain the Operating Performance Guarantee, which shall be an on demand guarantee in favour of the Terminal Operator, from the Operator in an initial amount of R[*insert amount in millions*] (in [*insert month and year*] prices) to secure the performance by each Operator of its obligations in terms of each Operating Contract.

15.3.2 Each Operating Performance Guarantee shall be substantially in the form of the guarantee attached to this Agreement as Schedule 15.

15.3.3 An Operating Performance Guarantee shall be provided by the Terminal Operator in respect of each Contract Year after the issue of the Completion Certificate so that the amount to be guaranteed by such Operation Performance Guarantee for each successive year of the Operating Term takes into account any fluctuations in CPI. The Operation Performance Guarantees for the second and successive Contract Years shall be provided not later than 14 (fourteen) days before the expiry of the Contract Year in respect of which such guarantee was provided.

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

15.4 Final Maintenance Guarantee

15.4.1 The Terminal Operator shall obtain a Final Maintenance Guarantee in favour of the Terminal Operator from the Operator in an amount equal to the aggregate amount expended by the Operator on Operation and Maintenance (as reported by the Terminal Operator to the TNPA in accordance with clause 32 (*Financial Accounts, Reports, inspection and reporting of changes*)) in the period of time from the commencement of Contract Year [●] of the Operating Term to the end of Contract Year [●] of the Operating Term, and in any event not less than [●] of the average annual gross revenues for Contract Years [[●], [●] and [●]] (all inclusive) of the Operating Term.

15.4.2 The Final Maintenance Guarantee shall be substantially in the form of the guarantee attached to this Agreement as Schedule 16.

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

15.5 Security in respect of Decommissioning of the Terminal

15.5.1 The Terminal Operator shall, in respect of the Decommissioning Costs, for the duration of the Operating Term and or for the entire life of the Project including the Terminal (whichever shall be the latest):

15.5.1.1 either establish a Section 37A Trust, of which the TNPA is the sole beneficiary, or provide a Decommissioning

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Costs Bank Guarantee, of which the TNPA is the sole beneficiary, or provide a combination of such trust and bank guarantee;

Commented [KB[ND1]: The Port Environment team to review this clause closely.

- 15.5.1.2 ensure that the Decommissioning Reserves, at all times from Scheduled Operations Commencement Date, contain and or provide sufficient funds to undertake the Decommissioning Costs in full, from time to time;
- 15.5.1.3 if the Terminal Operator issues a Decommissioning Cost Bank Guarantee in favour of the TNPA, which is withdrawn by the issuing financial institution in accordance with its terms, the Terminal Operator shall ensure that a replacement Decommissioning Cost Bank Guarantee is issued before the lapse of the withdrawn Decommissioning Cost Bank Guarantee; and
- 15.5.1.4 the Terminal Operator shall, on an annual basis (from the Operations Commencement Date) in respect of each Contract Year, ensure that the Decommissioning Reserves contain amounts equal to the Decommissioning Costs designated in the Terminal Operator's Financial Model as the Decommissioning Costs applicable for that Contract Year, by not later than the last day of the relevant Contract Year. The Terminal Operator shall provide confirmation from the Terminal Operator to the TNPA, on an annual basis, of the amount of the Decommissioning Costs that is provided by the Decommissioning Reserves, as well as a reconciliation statement of that amount against the amount of the Decommissioning Costs that is required, in accordance with the Financial Model, to be provided in respect of the relevant Contract Year. The Terminal

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Operator shall procure that the reconciliation shows that the amounts are the same.

15.6 Terminal Operator's obligations incorporated into Associated Agreements

15.6.1 The Terminal Operator shall ensure that the Construction Contractor and the Operator incur the same obligations to the Terminal Operator under each Construction Agreement and Operations Agreement, respectively, as the Terminal Operator has imposed upon it in terms of this Agreement in respect of the Construction Works and Operation and Maintenance.

15.6.2 The Performance Guarantees shall also secure the obligations of the Construction Contractor and the Operator under the Associated Agreements in favour of the Terminal Operator.

15.7 cession of Performance Guarantees

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

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

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to the TNPA) to and in favour of any Lender as security for the Terminal Operator's obligations to such Lender under the Financing Agreements.

15.8 **enforcement action**

15.8.1 Pursuant to the cession of the Terminal Operator's right, title and interest, or any reversionary interest, (as the case may be) in and to the Performance Guarantees as contemplated in clause 15.7 (*cession of Performance Guarantees*), such Performance Guarantees shall secure the Terminal Operator's performance of its obligations to the TNPA in respect of the Construction Works and Operation and Maintenance and may be called on by the TNPA to the extent of any losses, costs, damages or expenses suffered or incurred by the TNPA as a result of a breach by the Terminal Operator of the aforesaid obligations including, but not limited to, compensation to the TNPA for any actions taken by the TNPA as a result of such breach by the Terminal Operator of its obligations.

15.8.2 Prior to enforcing any such Performance Guarantee as aforesaid, the TNPA shall give notice to the Terminal Operator, informing the Terminal Operator of the breach giving rise to the right, on the part of the TNPA, to enforce the Performance Guarantee. If such breach is not remedied within the stipulated remedy period (as contemplated in clause 45.4 (*remedy provisions*)), and subject to the terms and conditions contained in the relevant or applicable Performance Guarantee, the TNPA may enforce the applicable Performance Guarantee for an amount equal to any cost, losses, damages or expenses incurred by the TNPA in respect of any such breach by the Terminal Operator.

16. **Project Insurance**

16.1 **Insurances and information**

16.1.1 The Terminal Operator shall, in accordance with this clause 16 (*Project Insurance*), obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by:

16.1.1.1 any Laws; and

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16.1.1.2 the standards of a Reasonable and Prudent Operator.

16.1.2 The Terminal Operator shall take reasonable steps to ensure that its Subcontractors obtain and maintain in effect at all times such insurance cover as is appropriate for a reasonable and prudent contractor.

16.2 **Application of insurance proceeds**

Unless the TNPA (acting reasonably) otherwise agrees in writing, the Terminal Operator shall apply all proceeds of any insurance claim made due to loss or damage to the Project or any part of the Terminal (other than claims under any loss of revenue policies) towards reinstatement, reconstruction, replacement, repair or renewal of such loss or damage in the first instance.

17. **Port Users and Port Rules**

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

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

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

18. **Shareholding in the Terminal Operator**

18.1 The Terminal Operator shall procure that there is no change in the equity of the Terminal Operator (or in any subsidiary or company of which the Terminal Operator is a subsidiary), unless such change in equity has been approved by the TNPA

19. **Assignment**

19.1 The Terminal Operator may not assign its rights and obligations under this Agreement to a third party without the written consent of the TNPA which consent shall not be unreasonably held.

- 19.2 The Terminal Operator may not Assign its rights under this Agreement for the purpose of providing security under the relevant Financing Agreements without the consent of the TNPA which consent shall not be unreasonably held.
- 19.3 The TNPA may not Assign all or any part of its rights and or obligations under this Agreement to a creditworthy third party, save with the prior written approval of the Terminal Operator (such approval not to be unreasonably withheld, conditioned or delayed) or to give effect to any mandatory requirement of any Law, and provided that all of the TNPA's rights and or obligations under the Direct Agreement are assigned together with this Agreement.

20. **The TNPA's Assistance and Rights and Limitations on Liability**

- 20.1 Except as otherwise provided in this Agreement, the TNPA shall;
- 20.1.1 apply its best endeavours, to assist the Terminal Operator in its dealings with any Responsible Authority in connection with implementing the Project in accordance with the terms and conditions set forth herein; and
- 20.1.2 apply its best endeavours to assist the Terminal Operator to obtain those consents necessary for the Construction Works and Operation and Maintenance or Services, provided that the TNPA shall not be liable or responsible for any failure of the Terminal Operator to obtain any such Consents. If the Terminal Operator fails to obtain any such Consents, the Terminal Operator shall discuss with the TNPA mutually acceptable solutions.
- 20.2 Nothing in this Agreement shall preclude or in any manner limit the rights of the TNPA or any other Responsible Authority from granting such further or other concessions as it in its sole discretion deems fit, nor shall the Terminal Operator have any claim against the TNPA or any other Responsible Authority arising from the grant of such further or other concessions, provided that the TNPA agrees and undertakes for the duration of the Operating Term, and the Construction Period that, subject to Part VI of this Agreement, it will not itself, nor will it grant a concession or similar right to any person to, operate a facility substantially similar to the Terminal at the Port.

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- 20.3 The TNPA shall not be liable to the Terminal Operator for the volume of demand for the Services.
- 20.4 No warranties, representations or undertakings are given as to the accuracy or completeness of any information provided by the TNPA and any other Responsible Authority and or its advisors. None of the TNPA nor its advisors shall be liable for any error, misrepresentation or omission in any such information.
- 20.5 Notwithstanding anything else contained in this Agreement, the Terminal Operator shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the TNPA or any other Responsible Authority and or their respective officers, employees, agents and or representatives on grounds that any information, whether obtained from or made available by the TNPA or any such other Responsible Authority and or their respective officers, employees, agents and or representatives or otherwise is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.
- 20.6 Where in this Agreement any power, duty, function or discretion is given or is to be carried out or exercised by the TNPA, such power, duty, function or discretion may be carried out or exercised by any person nominated by the TNPA.

21. The TNPA Step-in

- 21.1 In the event that a serious and urgent risk arises to the health or safety of persons, property, the environment and or to the national and public safety of persons and or to discharge a statutory duty, the TNPA may be authorised by the Minister of Public Enterprises, with the concurrence of the Minister of Transport, to take any action necessary in in respect of the Operation, Maintenance, Construction Works and or the Services of the Port to prevent or curtail the risk or to discharge the statutory duty. The TNPA shall be entitled to take action in accordance with the following provisions:
- 21.1.1 If pursuant to clause 21.1, the TNPA wishes to take action, it shall as soon as possible after reaching its determination to do so notify the Terminal Operator in writing of:

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- 21.1.1.1 the action it wishes to take;
 - 21.1.1.2 its reasons for taking such actions;
 - 21.1.1.3 the date when it wishes to commence such action;
 - 21.1.1.4 the time period (the "**Step-in Period**") which it reasonably believes will be necessary for such action and which must be a fixed period; and
 - 21.1.1.5 to the extent practicable, the effect of such action on the Terminal Operator on its obligations to perform the Operation and Maintenance and Construction Works, and or Services during Step-in Period.
- 21.1.2 Following the service of such notice, the TNPA shall take such action as notified under clause 21.1.1 and any ancillary action as it reasonably believes is necessary (the "**Required Action**") and the Terminal Operator shall give all reasonable assistance to the TNPA in the conduct of such Required Action.
- 21.1.3 If the Terminal Operator is not in breach of its obligations in terms of this Agreement in respect of which the Required Action is proposed to be taken, then for so long as and to the extent that the Required Action is taken, and this prevents the Terminal Operator from providing any part of the Project:
- 21.1.3.1 the Terminal Operator shall be relieved from such obligations; and
 - 21.1.3.2 in respect of the time period over which such Required Action is conducted and provided that the Terminal Operator provides the TNPA with such reasonable assistance as the TNPA may need in the conduct of such Required Action (such assistance, however, to be at the expense of the TNPA to the extent of any incremental costs), the TNPA shall pay to the Terminal Operator an amount of monies that is equal to the revenue that the Financial Model projects to have been earned by the Terminal Operator at the time of and

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

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

21.1.4.1 the Terminal Operator shall be relieved of its obligations in respect of such part; and

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

provided that, if by the expiry of the Step-in Period, the breach still subsists and if it constitutes a Terminal Operator Default, then the TNPA will be entitled to serve a notice in terms of clause 45.3 (*the TNPA's option*) requiring the Terminal Operator to remedy the Terminal Operator Default or to put forward a remedial programme.

PART II – PROVISION OF THE PROJECT SITE AND THE PORT

22. Provision of the Port

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

23. Port Site

23.1 The TNPA shall be the owner of the Project Site for the duration of this Agreement. The Terminal Operator acknowledges the ownership rights of the TNPA in respect of the Project Site on which the Port is constructed and shall not in any way

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challenge or procure that any person challenges or assists any other person to challenge, such ownership rights and title of the TNPA.

- 23.2 The Terminal Operator acknowledges that it does not have and shall not have any rights of title, ownership, lien, leasehold or any other rights in respect of the Port Site, other than the rights of occupation and use as detailed in this Agreement.
- 23.3 The Terminal Operator shall have the right to use and occupy the Port Site, commencing on the Effective Date.
- 23.4 The Terminal Operator shall, in respect of its rights of use of the Port Site, pay to the TNPA the amount of **[R insert the prevailing rate]** per square meter per month (excluding rates and taxes referred to in clause 23.6). All amounts payable by the Terminal Operator in terms of this clause 23.4, shall be paid monthly in advance, by no later than the 7th day of each month, commencing on the Effective Date.
- 23.5 The amount payable by the Terminal Operator in terms of clause 5.2 may be escalated in accordance with the following principles:
- 23.5.1 the Parties shall meet in order to agree on the escalation that shall apply in respect of the subsequent Contract Year taking into account the value of the land on which the Project Site is situated;
- 23.5.2 should the Parties fail to reach an agreement on any escalation referred to in clause 23.5.1, the matter shall be referred to an independent valuer registered with the South African Institute of Valuers who, in the absence of agreement between the Parties, shall be appointed by the President of the South African Institute of Valuers (or any successor entity), for determination in terms of clause 53.5 (*fast-track dispute resolution*). Any decision of the independent valuer shall, in the absence of manifest error or fraud, be final and binding on the Parties.
- 23.6 The Terminal Operator accepts responsibility for the payment of rates, taxes, charges, levies, assessments or any equivalent taxation which may at any time be levied by a Responsible Authority upon or in connection with the Project Site, in respect of the period covered by this Agreement, other than any taxes imposed in

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relation to the receipt by the TNPA of the payment detailed in clause 23.4 or in connection with its disposal of its interest in the Project Site used by the Terminal Operator or in relation to any other amounts received by or accrued to the TNPA as a result of or in connection with this Agreement or the Project Site used by the Terminal Operator.

- 23.7 If the TNPA is obliged by the Responsible Authority to make payments referred to in clause 23.6, as a result of which the TNPA makes such payments on behalf of the Terminal Operator, the TNPA shall notify the Terminal Operator in writing about such payments and following such notice the Terminal Operator shall, within 30 (thirty) days after being called upon to do so, refund to the TNPA such payments as the TNPA may have made in respect of the rates, taxes, charges, levies, assessments or equivalent taxes levied.
- 23.8 The TNPA shall use its reasonable endeavours to ensure that no other Port Users negatively affect the use by the Terminal Operator of the Port Site. The Terminal Operator shall not negatively affect the use of the Port by the TNPA and the other Port Users, other than the Project Site and then only to the extent detailed in this Agreement.
- 23.9 The TNPA shall have the right to enter into and inspect the Project Site and the Terminal at reasonable times and on reasonable notice so as to enable it to inspect the Project Site and the Terminal, to fulfil its obligations of maintenance in respect of the Port and to fulfil its obligations as the port authority of South Africa.
- 23.10 The Terminal Operator shall use the Project Site solely for the uses and purposes contemplated in this Agreement in respect of the Project.
- 23.11 The Terminal Operator shall be responsible for maintaining the Terminal in good condition, fair wear and tear excepted, at no cost to the TNPA or any other Port User. The TNPA shall maintain or shall use its reasonable endeavours to procure that other Port Users maintain the Port, other than the Terminal, in good condition, fair wear and tear excepted, at the cost of the TNPA or the relevant Port User. The Parties shall meet and discuss any intended maintenance or repair activities so as to ensure that such activities are conducted in a manner that minimises any interference with the operations of the other party.

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- 23.12 The Terminal Operator shall not be able to transfer any of its rights in respect of the Project Site or the use thereof to any other person without the prior written consent of the TNPA, save for any transfer to the Lenders, in accordance with clause 45.6 (*Lender's step-in*), which shall take place in accordance with the provisions of the Direct Agreement.
- 23.13 The Terminal Operator shall, subject to the TNPA's approval, provide for:
- 23.13.1 the clearance of the Port Site;
- 23.13.2 security of the Port Site;
- 23.13.3 the clearance, relocation and diversion of all Utilities on the Port Site, from the date the Project Site is delivered to the Terminal Operator and which are necessary for the execution of the Project.
- 23.14 The Terminal Operator shall, at its cost, apply for all Consents required for the clearance of the Port Site.
- 23.15 The Terminal Operator shall continue to be bound by and shall honour any existing agreements between the TNPA and any person, which grant access or way-leaves to the Port Site. The Terminal Operator may, however, apply to the TNPA for any necessary modifications or cancellations of such agreements, such application to be made timeously in order to avoid any delay or additional cost. To the extent that the TNPA has the right to modify or cancel such agreements, it shall comply timeously with the Terminal Operator's reasonable request to modify and or cancel any such agreements.
- 23.16 The TNPA warrants to the Terminal Operator that, to the best of its knowledge, all of agreements referred to in clause 23.15 are listed in Schedule 17 and that the TNPA has provided the Terminal Operator with true and complete copies of such agreements.

24. Key Personnel and Removal of Personnel

- 24.1 The Terminal Operator shall at all times ensure that it has sufficient suitable and appropriately qualified and experienced personnel to undertake the Project and

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that such personnel shall be located in South Africa. Without limiting the generality of the foregoing, the Terminal Operator shall ensure that the key personnel positions are always filled as soon as reasonably possible.

- 24.2 The Terminal Operator shall implement all measures as are required by Law and or as may be reasonably necessary to ensure the safety of its employees or Subcontractors and shall provide them or ensure that they are provided, free of charge, with any necessary personal protective clothing and equipment.
- 24.3 The Terminal Operator accepts full responsibility for the training of staff and shall ensure that all its employees and Subcontractors are properly trained for the work they are undertaking and are familiar with safety and security requirements that apply to the Terminal.
- 24.4 The TNPA may require the Terminal Operator to remove any employee or other personnel of the Terminal Operator or any Subcontractor from the Project Site and the Terminal Operator shall do so (subject to applicable law) if in the reasonable opinion of the TNPA such employee or personnel engages in any conduct which might reasonably result in a breach of any provision of this Agreement or threaten public health, safety or security, and the Terminal Operator shall immediately comply and replace such employee or personnel with suitable appropriately qualified and experienced replacements, subject to applicable law.

25. **Health and Safety**

- 25.1 Within 3 Months of the Actual Operations Commencement Date, the Terminal Operator shall, at its cost, complete a comprehensive risk assessment of its business, in respect of all areas of the Terminal, and the Services or processes it intends to undertake, in accordance with the requirements of the Occupational Health and Safety Act No 85 of 1993, and shall provide the TNPA with a full report on its risk assessment so undertaken within 1 (one) Month of completing the assessment.
- 25.2 The Terminal Operator shall be responsible for:
- 25.2.1 the implementation of and adherence to the IMDG Code and its regulations;

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- 25.2.2 compliance with the Occupational Health and Safety Act No 85 of 1993 and regulations promulgated in terms of that Act;
- 25.2.3 procuring and implementing systems and Services for the prevention, monitoring, detection and extinguishment of fires or explosions; and
- 25.2.4 maintaining a working environment which is safe and designed to minimise the risk of injury or illness to any person present on the Project Site and to minimise the risk of loss or damage to Cargoes, Cargo carriers or other moveable and immovable property in accordance with Law and the further written requirements of the TNPA.
- 25.3 Save for the storage of Cargo, the Terminal Operator may not keep or store in the Terminal any hazardous or flammable substances unless:
- 25.3.1 it reasonably requires such hazardous or flammable substances to be kept or stored to enable it to conduct its business on the Port Site;
- 25.3.2 it has obtained the prior written approval of the TNPA; and
- 25.3.3 it complies with the applicable Law in respect of hazardous substances in general and that specific hazardous substance in particular.
- 25.4 In addition to the general Port water network provided by the TNPA, the Terminal Operator shall provide, at its own cost, such fire water network, facilities or equipment, or other protective measures, that are, in the TNPA's reasonable opinion, necessary in order to provide effective fire protection installations and water supply to the Port Site.
- 25.5 The TNPA may, from time to time, require the Terminal Operator, by notice in writing, to provide and install, at the Terminal Operator's cost, such further devices, appliances and installations as the TNPA may reasonably consider necessary to minimise the risk of any fire occurring or to prevent the spread of any fire which may occur. The Terminal Operator shall, when so required, comply with the requirements set forth in such notice within the time period specified in the notice.

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26. Security

- 26.1 The Terminal Operator must ensure that the perimeter of the Terminal is fenced with security fencing of a standard reasonably acceptable to the TNPA and which is in compliance with the ISPS Code, and that such fencing is maintained at that standard (and repaired as necessary) during the term of this Agreement.
- 26.2 The Terminal Operator shall comply in all material respects with the provisions of the International Maritime Organisation Convention of Safety and Security at Sea, the ISPS Code, and the Terminal Operator shall be responsible for the security of the Terminal and for all persons and movables therein, including Cargo, and for the implementation of and adherence to the ISPS Code.
- 26.3 The Terminal Operator shall submit to the TNPA, within 1 (one) Month of the Actual Operations Commencement Date, a Terminal security assessment and develop a Terminal security plan for security levels 1, 2 and 3, corresponding with normal, medium and high threat situations. The plan shall indicate the operational and physical security measures the Terminal Operator will take to ensure that it normally operates at security level 1. The plan shall also indicate the additional, or intensified, security measures the Terminal Operator will take when instructed to do so by the TNPA, to move to and operate at security level 2, and to operate at security level 3. The Terminal Operator will nominate a Terminal security officer, organise regular security drills and at all times provide the necessary security equipment on the Terminal.
- 26.4 As part of the Terminal security plan, the Terminal Operator shall monitor and control all Cargo, vehicles and people entering and leaving the Terminal and ensure that security communications are always readily available.

PART III – DESIGN AND CONSTRUCTION, OPERATION AND MAINTENANCE

27. Independent Certifier

27.1 appointment of Independent Certifier

- 27.1.1 TNPA and the Terminal Operator, acting jointly, shall appoint the Independent Certifier for a period which shall include the Planning and

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Construction Period as may be agreed to between the Parties and notified to the Independent Certifier in terms of the Independent Certifier Agreement. In this regard, it is recorded that TNPA, the Terminal Operator and the Independent Certifier shall enter into the Independent Certifier Agreement as soon as reasonably practicable after the Signature Date, but not later than the Effective Date. The Independent Certifier Agreement shall be substantially in the form of the agreement attached to this Agreement as Schedule 23 (*Independent Certifier Agreement*).

- 27.1.2 TNPA shall propose a person for appointment as the Independent Certifier, for approval by the Terminal Operator.
- 27.1.3 If TNPA and the Terminal Operator are unable to agree on the person to be appointed as the Independent Certifier:
- 27.1.3.1 TNPA and the Terminal Operator shall each nominate 2 (two) persons ("Nominees") for the position of Independent Certifier;
 - 27.1.3.2 TNPA shall submit the names of the Nominees together with their resumes to the chairperson for the time being of the Consulting Engineers South Africa ("CESA") or its successors in title;
 - 27.1.3.3 the said chairperson of the CESA shall appoint the Independent Certifier from amongst the Nominees; and
 - 27.1.3.4 such decision of the chairperson of the CESA shall be final and binding on the Parties.
- 27.1.4 The Independent Certifier will report directly to TNPA and the Terminal Operator, and the fees and disbursements of the Independent Certifier incurred in connection with the Project shall be paid by TNPA and the Terminal Operator in equal proportions except as otherwise provided in the

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Independent Certifier Agreement or as otherwise agreed between TNPA and the Terminal Operator.

27.1.5 In appointing a person to act as the Independent Certifier in the future, the Parties shall comply with TNPA's B-BBEE Policy and requirements in respect hereof

27.2 **performance of duties of Independent Certifier**

27.2.1 The Terminal Operator shall provide the Independent Certifier with a copy of this Agreement and shall, to the extent available to the Terminal Operator, provide the Independent Certifier with the requisite information and documentation in order to enable the Independent Certifier to discharge its duties and or obligations. This information includes, but not limited to, the following:

- 27.2.1.1 copies of working drawings, Schedules and specifications prepared by the Terminal Operator and its Subcontractors sufficient to demonstrate compliance of the Terminal Operator and Subcontractor against the requirements of this Agreement;
- 27.2.1.2 copies of the Terminal Operator's correspondence relating to the Terminal or building control matters;
- 27.2.1.3 copies of the Terminal Operator's commissioning reports;
- 27.2.1.4 copies of the Terminal Operator's operating and maintenance manuals as well as the Operational Plan;
- 27.2.1.5 if applicable, copies of the Annual Reports submitted by the Terminal Operator in terms of this Agreement;
- 27.2.1.6 copies of the Construction Agreement, the Construction Works Programme, the draft Detailed Design and the D&C Specifications
- 27.2.1.7 a copy of the health and safety plan of the Terminal Operator; and
- 27.2.1.8 any other information that the Independent Certifier reasonably requires in order to fulfil its duties and responsibilities.

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- 27.2.2 The Independent Certifier shall be required to perform the duties set forth in this Agreement and in the Independent Certifier Agreement.
- 27.2.3 The TNPA and the Terminal Operator shall be entitled to consult with the Independent Certifier on any matter relating to the Project. The TNPA and or the Terminal Operator may request the Independent Certifier to deliver and issue an opinion, instruction, certificate or valuation, or other determination as applicable with respect to all technical matters relating to the Project, in accordance with the provisions of and as contemplated in this Agreement. The Parties agree to comply with such decisions of the Independent Certifier until and unless otherwise determined pursuant to clause 53 (*Dispute Resolution*).
- 27.2.4 The Independent Certifier's duties shall include, but shall not be limited to, the review, inspection, testing, approving and certification of the Construction Contractor's work to ensure proper performance and completion of the Construction Works in accordance with this Agreement, the Construction Agreement and the Independent Certifier Agreement. The Independent Certifier's duties may also include the review, analysis, audit, inspection and testing of the Operator's work to ensure proper Operation and Maintenance in accordance with the terms of this Agreement, the Operations Agreement and the Independent Certifier Agreement.
- 27.2.5 Nothing in this clause shall alter the rights and obligations of the Parties under this Agreement nor prevent the Parties from challenging any opinion, instruction, determination, certification or valuation of the Independent Certifier in accordance with clause 53 (*Dispute Resolution*), provided that the Parties shall comply with such decisions by the Independent Certifier until and unless otherwise determined pursuant to clause 53 (*Dispute Resolution*).
- 27.2.6 If any determination, which the Independent Certifier is required to make in terms of this Agreement or the Independent Certifier Agreement, involves an evaluation or assessment of any matter outside the Independent Certifier's field of expertise as Independent Certifier, the Independent

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Certifier shall rely on independent expert advice in making such evaluation or assessment.

28. Design and Construction

28.1 performance of Preliminary Design and Detailed Design

28.1.1 The Terminal Operator shall complete the preliminary design prior to the Effective Date, perform or procure the performance of the Preliminary Design.

28.1.2 The Terminal Operator shall perform or procure the performance of the Detailed Design in accordance with the Detailed Design Procedure and the D&C Specifications.

28.1.3 The Terminal shall be designed and constructed so as to fulfil the following requirements in Schedule *[insert]*:

28.2 execution of Construction Works

28.2.1 The Terminal Operator shall perform or procure the performance of the Construction Works in accordance with the provisions of this Agreement and the D&C Specifications provided by the bidder.

28.2.2 The Terminal Operator shall bear sole responsibility for the procurement of all construction materials, the adequacy of the design and compliance with the D&C Specifications provided by the bidder.

28.2.3 The Terminal Operator may submit to the Independent Certifier proposals for modifications by the Terminal Operator to the design, which, in the Terminal Operator's opinion, would improve the quality or safety of the Terminal .

28.2.4 The location, design and construction of any points of access to and or egress from the Project Site both during construction and afterwards shall be in accordance with the D&C Specifications or otherwise be subject to the prior consent of the TNPA and the Terminal Operator.

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28.3 commencement of Construction Works

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

28.4 completion of Construction Works

28.4.1 Completion of the Construction Works shall be effected not later than the Target Completion Date unless such date is extended in terms of this Agreement.

28.4.2 Upon the Construction Contractor giving notice to the Terminal Operator in terms of the relevant Construction Agreement of the anticipated date of completion of the Construction Works, the Terminal Operator shall promptly and, in any event within 7 (seven) days after receipt of such notice, notify the TNPA and the Independent Certifier of such anticipated date, provided that such notice shall be given not less than 28 (twenty-eight) days before such anticipated date.

28.4.3 The TNPA and the Independent Certifier shall inspect the Construction Works on such anticipated date of Construction Completion or as soon as reasonably practicable thereafter, but in any event within 7 (seven) days after such anticipated date.

28.4.4 If the Independent Certifier is reasonably of the opinion that completion of the Construction Works has taken place, the Independent Certifier shall forthwith issue the Completion Certificate.

28.4.5 If the Independent Certifier is not satisfied that completion as set out in clause 28.4.4 has occurred, the Independent Certifier shall notify the Terminal Operator and the TNPA of such failure to attain completion of the Construction Works within 5 (five) Business Days after the inspection referred to in clause 28.4.3 specifying those elements of the Terminal or other conditions that remain to be satisfied by the Terminal Operator.

28.4.6 The issuing of a Completion Certificate shall not be withheld or delayed notwithstanding that minor items have yet to be completed and or attended

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to and such outstanding items shall be reflected in a Snagging List (as defined in clause 28.4.8).

28.4.7 The Independent Certifier shall issue a Completion Certificate within 5 (five) Business Days after the completion, to the Independent Certifier's satisfaction, of the Construction Works specified in the notice contemplated in clause 28.4.5 and the satisfaction of any other conditions specified.

28.4.8 The Independent Certifier shall identify in a list ("**Snagging List**") appended to the Completion Certificate any unfulfilled obligations of the Terminal Operator ("**Unfulfilled Obligations**"), which the Terminal Operator has undertaken to complete in respect of the Construction Works and the time within such Unfulfilled Obligations are to be completed or certify that there are no Unfulfilled Obligations in respect of the Construction Works. The Terminal Operator shall attend to such Unfulfilled Obligations within the time specified in the Snagging List.

28.5 **archaeological matters**

28.5.1 All fossils, coins, articles of value or antiquity, structures and other remains or things of geological or archaeological interest or burial sites discovered on the Site ("**Archaeological Articles**") shall (as between the Parties) be the property of the TNPA. The Terminal Operator shall take all reasonable precautions to prevent its agents, representatives and employees, labour or other persons from removing or damaging any such Archaeological Articles. The Terminal Operator shall, immediately upon discovery of such Archaeological Articles, advise the TNPA and the Independent Certifier, who shall issue instructions for dealing with it, accordingly.

28.5.2 If the Terminal Operator has suffered delay in the execution of its rights or obligations in terms of this Agreement as a result of having followed the Independent Certifier's instructions as contemplated in clause 28.5.1 or any obtaining the Consents required in respect of such Archaeological Articles and their removal or preservation, the Terminal Operator shall be granted an extension to the Target Completion Date and or the Scheduled Operations Commencement Date, equivalent to the delay suffered in

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suspending the Construction Works complying with any instructions of the Independent Certifier and the Terminal Operator shall be entitled to compensation for any Losses caused as a result of the discovery of such Archaeological Articles.

28.6 **Utilities and Utility way-leaves**

28.6.1 The TNPA shall provide Utilities between the Port Boundary and the Terminal provided that, for the avoidance of doubt, the TNPA shall not be liable or responsible for any Utilities at the Terminal, including the removal and disposal of waste.

28.6.2 The TNPA shall have the right to approve the establishment on or over and or relocation from the Port Site, at the request of any public or private Utility, of Utility way-leaves including, but not limited to, power pylons or lines, water or gas pipes and telecommunication lines or pylons.

28.6.3 If such establishment and or relocation has delayed the Construction Works or the Scheduled Operations Commencement Date or adversely affected the normal course of Operation and Maintenance, the Terminal Operator shall be granted an extension to the Target Completion Date and or the Scheduled Operations Commencement Date, equivalent to the delay suffered in suspending the Construction Works and the Terminal Operator shall be entitled to compensation for any Losses caused as a result of the establishment and or relocation.

28.7 **information relating to the Project and the Construction Works**

28.7.1 The Terminal Operator shall furnish to the TNPA, or any of its duly authorised representatives, all such reports and other such information in relation to the Project and the Construction Works as the TNPA may reasonably request from time to time.

28.7.2 The Terminal Operator shall cause the Construction Contractor to provide directly to the TNPA copies of the reports of the Construction Contractor as set forth in this Agreement and the relevant Construction Agreement.

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28.7.3 Upon completion of any part of the Construction Works, the Terminal Operator shall supply the TNPA with the Construction Documents, copies of all "as-built" drawings and such other technical and design information and completion records relating to the finished Construction Works as the TNPA may reasonably request.

28.8 **disruption to Port and Port Users**

The Terminal Operator shall ensure that none of the Construction Works cause any disruption to existing Port Users nor to activities on adjoining land except to the extent that such disruption cannot reasonably be avoided as a result of any Construction Works being carried out. Where disruption cannot reasonably be avoided, the Terminal Operator shall ensure that appropriate traffic and other appropriate management measures are implemented to minimise the effect of any such disruption on Port Users.

29. **Commissioning**

29.1 **commencement of Operation and Maintenance**

The Terminal Operator shall perform or procure the performance of Operation and Maintenance in accordance with the D&C Specifications and the Operating Specifications.

29.2 **inspection**

29.2.1 Upon the Construction Contractor giving notice to the Terminal Operator in terms of the Construction Agreement of the anticipated date of Operation Commencement, the Terminal Operator shall promptly and, in any event within 7 (seven) days after receipt of such notice, notify the TNPA, and the Independent Certifier of such anticipated date, provided that such notice shall be given not less than 28 (twenty-eight) days before such anticipated date.

29.2.2 The TNPA, and the Independent Certifier shall, no later than 21 (twenty-one) days before such anticipated date of Operation Commencement, inspect the Construction Works in conjunction with the Terminal Operator to

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verify whether or not Operation Commencement will be achieved by the anticipated date.

- 29.2.3 If the Independent Certifier is reasonably of the opinion that Operation Commencement will be achieved by the anticipated date and that provision of the Services can commence from such anticipated date, the Independent Certifier shall within 5 (five) Business Days after such inspection issue the Provisional Operations Certificate to the Terminal Operator.
- 29.2.4 If any of the conditions set out in clause 29.2.3 have not been satisfied, the Independent Certifier shall, within 5 (five) days after the inspection referred to in clause 29.2.2, notify the Terminal Operator, and the TNPA of such failure to satisfy the conditions, and shall specify those elements of the Construction Works or other conditions that remain to be satisfied by the Terminal Operator and shall state the date on which the Independent Certifier reasonably estimates those elements or other conditions will be satisfied.
- 29.2.5 On the date referred to in clause 29.2.4, the Independent Certifier shall again inspect the Construction Works and, if the matters referred to in the notice have been satisfied, the Independent Certifier shall issue the Provisional Operations Certificate forthwith. If necessary, the procedure provided for in clause 29.2.4 shall be repeated until the Independent Certifier has issued the Provisional Operations Certificate. Nothing shall prevent the Independent Certifier from inspecting earlier than the date given by him if so requested by either the Terminal Operator or the TNPA.
- 29.2.6 On the anticipated date for Operation Commencement determined in terms of clause 29.2.3 or 29.2.5, the Independent Certifier shall inspect the Construction Works and, if he is satisfied that Operation Commencement will be achieved, shall forthwith and on the same day as the inspection issue to the Terminal Operator the Operations Certificate. If the Independent Certifier is not so satisfied, he shall notify the Terminal Operator of those items which require to be attended to in order to achieve Operation Commencement and, when such items have been attended to, the Independent Certifier shall forthwith and on the same day as the relevant

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items are finally attended to by the Terminal Operator, issue the Operations Certificate to the Terminal Operator.

29.3 **approval to provide Services**

29.3.1 The TNPA shall, subject to and in accordance with the provisions of the Act, grant approval to the Terminal Operator to provide the Services and shall at the same time announce the Terminal open and that the Terminal Operator is authorised to charge and collect fees in respect of the Services, with effect from the date that the Independent Certifier issues the Operations Certificate. The date specified by the TNPA in the relevant notice issued in respect of such approval, as the date upon which the aforesaid approval and authorisation comes into operation or takes effect, shall be the Actual Operations Commencement Date.

29.3.2 Notwithstanding but without prejudice to the provisions of clause 29.3.1, the Terminal Operator shall not operate the Terminal or charge or collect fees in respect of the Service until the Independent Certifier has issued the Operations Certificate in terms of clause 29.2.6.

30. **Operation and Maintenance**

30.1 **obligation to Operate and Maintain**

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

30.2 **standards of Operation and Maintenance**

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

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30.2.2 Prior to the Target Completion Date, the Terminal Operator shall prepare operation and maintenance manuals based on the Operating Specifications and shall submit such manuals to the TNPA for approval. Once the TNPA has approved such manuals, the manuals shall be the ("**Operation and Maintenance Manuals**").

30.2.3 Any changes to the Operation and Maintenance Manuals, after such manuals have been approved by the TNPA as contemplated in clause 30.2.2, shall require the prior approval of the TNPA.

30.3 **management**

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

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

30.3.3 The Terminal Operator shall otherwise manage the Terminal and all Cargo carriers using the Terminal in accordance with the Act, the Port Rules, the Operation and Maintenance Manuals and the Operating Specifications.

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

30.4 **marketing**

30.4.1 Upon the written request of the TNPA providing the Terminal Operator with no less than 6 months prior written notice, the Terminal Operator shall actively market the Terminal and the Services internationally. The Terminal Operator shall submit all information, materials, documents and any other data that it intends to use in respect of its marketing campaign in respect of the marketing of the Terminal and the Services to the TNPA for approval prior to its use thereof.

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30.4.2 Within 30 (thirty) days of the receipt by the TNPA of the information, materials, documents and other data detailed in clause 30.4.1, the TNPA shall either grant or withhold its consent in respect of the use thereof in the marketing of the Terminal and the Services. If the TNPA withholds its consent, it will provide its written reasons for such withholding at the time that it notifies the Terminal Operator that it is withholding its consent. If the TNPA has withheld its consent in respect of any such information, materials, documents or other data, the Terminal Operator shall not be entitled to use it in the marketing of the Terminal and the Services.

30.5 **Performance Measures**

30.5.1 Subject to clause 30.5.6, the Terminal Operator shall, from the first anniversary of the Actual Operation Commencement Date, meet the minimum performance standards to be determined by the TNPA, after consultation with the Terminal Operator, and notified to the Terminal Operator in writing at least 3 (three) Months prior to such anniversary.

30.5.2 The minimum performance standards determined in terms of clause 30.5.1 shall be reviewed by the TNPA on an annual basis after consultation with the Terminal Operator, and new minimum performance standards shall be determined by the TNPA and notified in writing to the Terminal Operator prior to expiry of the year in which such review is conducted.

30.5.3 The performance of the Terminal Operator will be reviewed quarterly by the TNPA.

30.5.4 In order to conduct the quarterly review, the Terminal Operator shall provide the TNPA, within 10 (ten) Business Days after the end of each Quarter, with all information that is, in the reasonable opinion of the TNPA, necessary to conduct the review.

30.5.5 The TNPA shall communicate its initial comments and any requests for additional information within 10 (ten) Business Days after information has been provided to the TNPA, by the Terminal Operator in respect of its performance against the agreed TOPS. The TNPA will take into consideration any response by the Terminal Operator to these initial comments and

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provided that this response is submitted within 10 (ten) Business Days of the initial comments. Where TNPA makes a negative finding regarding any aspect of the performance of the Terminal Operator, it shall give reasonable notice to that effect to the Terminal Operator and representatives of TNPA and the Terminal Operator shall meet to discuss and develop a performance improvement plan or a performance remediation strategy, in terms of which:

- 30.5.5.1 a plan of action with appropriate timelines shall be implemented by the Terminal Operator without delay, and
- 30.5.5.2 the results thereof be submitted within the set timelines to TNPA for review and final decision and/or outcome.

30.5.6 When, in the opinion of the Terminal Operator, circumstances occur which may impact negatively on its achievement of its performance targets, the Terminal Operator shall notify the TNPA in writing within 10 (ten) Business Days of the occurrence and both the Terminal Operator and the TNPA shall document the details of the occurrence. The performance standards may be relaxed should the Terminal Operator be prevented or delayed in performing its obligations by reason of a Force Majeure Event. The performance standards may be reviewed and amended, by agreement between the Parties, in the case of any other event or circumstance demonstrably beyond the control of the Terminal Operator, which had a material, negative impact on the achievement of the targets by the Terminal Operator.

30.5.7 Subject to the provisions of clause 42, if the Terminal Operator fails to achieve any of the minimum performance standards following receipt of the Annual Report, TNPA shall review compliance by the Terminal Operator with the performance standards annually in respect of the preceding Contract Year.

30.5.8 In this clause, "**Performance Penalties and Incentives**" shall mean penalties payable by the Terminal Operator to the TNPA for a failure to meet

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or comply with the minimum performance standards and incentives payable to the Terminal Operator by the TNPA where the minimum performance standards are achieved. The performance standards as set out in Schedule 25 shall continue to apply and remain binding on the parties.

- 30.5.9 If Terminal Operator achieves the minimum performance standards as agreed for the Assessment Period, TNPA will notify the Terminal Operator of their entitlement to an Incentive applicable to it as shall be determined in accordance with the cascade formula contained in Schedule 25A (*Penalty and Incentive Cascade Formula*).
- 30.5.10 Subject to the rights of TNPA to terminate this Agreement under clause 39 (Terminal Operator Default), if the Terminal Operator fails to achieve the terminal operator performance standards set out in Schedule 25 (*Performance Standards*) at the conclusion of the year under assessment (the "**Assessment Period**"), and such failure is not attributable to any action, inaction or breach by the TNPA of its obligations under this Agreement ("**Failure**"), the TNPA will notify the Terminal Operator of such Failure and the manner in which the Penalty, as determined in accordance with the cascade formula in Schedule 25A (*Penalty and Incentive Cascade Formula*), shall be imposed.
- 30.5.11 Any monies due to TNPA or due by TNPA pursuant to the provisions of this clause shall be payable over a period of 12 (twelve) months after TNPA has certified (as the case may be) that the Terminal Operator is liable or is entitled (as the case may be) to such payment.
- 30.5.12 The TNPA shall be entitled to set-off any amounts payable as aforesaid against any monies due or which may become due to the Terminal Operator under this Agreement or against any Performance Guarantee provided that, should the Terminal Operator notify TNPA with appropriate supporting information that the Terminal Operator has not committed the breach complained of and that no such right to set-off or deduct penalties has arisen.

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30.5.13 Any penalty amount payable in terms of this Agreement shall be due and payable within the period specified by the TNPA in writing.

30.5.14 In the instance that a dispute arises under this clause, either Party shall approach an **“Independent Expert”** (a person with appropriate expertise) to determine whether TNPA shall be entitled to the aforesaid penalties, the costs of whom shall be borne by the Party that refers the dispute and whose determination shall be final and binding. The payment or set-off of such penalties shall not relieve the Terminal Operator from any liability or any of its obligations under this Agreement.

31. Reporting Requirements

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

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

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

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

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

31.2 On an annual basis, the Terminal Operator shall submit to the TNPA:

31.2.1 such statistical information relating to its operations as may reasonably be required by the TNPA, including but not limited to statistics on the quantity and status of the Cargo handled at the Port Site; statistics on the number, type and size of Cargo carriers serviced at the Port Site; and statistics on the number of wagons and trucks handled at the Project Site interface with land transport and Cargo dwell time statistics; and

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- 31.2.2 its Cargo forecast for the remainder of the Operating Term, or such other shorter period as specified, in the form determined by the TNPA.
- 31.3 The Terminal Operator shall, if requested by the TNPA in writing, submit to the TNPA an information summary regarding the information in clauses 31.1 and 31.2, excluding any confidential information and or any information not required to be provided by the Terminal Operator, which summary may be disclosed to members of the public.
- 31.4 Outturn reports in respect of all Cargo unloaded, must be provided to the TNPA by the Terminal Operator on a per vessel basis, 72 (seventy-two) hours subsequent to the Cargo carriers having entered the Port.
- 31.5 The TNPA may require the Terminal Operator, at the Terminal Operator's cost, to submit such additional information as may be necessary to explain or amplify any report or information submitted by the Terminal Operator in terms of clauses 31.1 and 31.2 above.
- 31.6 Any information required by the TNPA must be lodged by the Terminal Operator within the period and in the manner determined by the TNPA.
- 31.7 The Terminal Operator must, within 24 (twenty-four) hours of its occurrence or discovery, inform the TNPA of:
- 31.7.1 any industrial dispute between the Terminal Operator and its employees;
 - 31.7.2 any industrial accident or disaster involving any employee or agent of the Terminal Operator or any injury on duty or fatality;
 - 31.7.3 any occurrence of fire within the Port Site;
 - 31.7.4 any theft or pilferage within the Project Site or any theft or pilferage involving any Cargo in the Terminal Operator's possession or control;
 - 31.7.5 any proceedings or claim instituted or made against the Terminal Operator which could materially affect its ability to perform any obligation or to comply with any term or condition of this Agreement; and

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

32. **Financial Accounts, Reports, inspection and reporting of changes**

32.1 **financial accounts and auditors**

32.1.1 The Terminal Operator shall arrange at its own expense and cost for an accounting and cost control system consistent with IFRS and for the appointment as auditors of a firm of independent accountants.

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

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

32.2 **right of inspection**

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

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32.3 **periodic reports**

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

32.3.1.1 3 (three) copies of the Terminal Operator's complete financial statements for such financial year (which are consistent with the books of accounts and prepared in accordance with IFRS), together with an audit report thereon, all in accordance with the requirements of the laws and regulations pertaining to accounting;

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

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

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

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

32.3.2.1 3 (three) copies of the Terminal Operator's complete financial statements for such quarterly period (which are consistent with its books of account and prepared in accordance with IFRS), including in each such report a balance sheet, a statement of income and a statement of cash flows as of the end of and for such period, and for

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

- 32.3.2.2 a report on any factors materially and adversely affecting or which might materially and adversely affect the Terminal Operator's business and operation or its financial condition;
- 32.3.2.3 a list of each of its lenders and creditors to which the Terminal Operator owes a sum in excess of R[*insert appropriate threshold*] (in [*month and year*] prices) including the amounts due to each of them;
- 32.3.2.4 a statement describing in detail any Related Party Transaction during the respective period;
- 32.3.2.5 a report on the implementation and progress of the Project, containing such information as the TNPA may reasonably require and disclosing any factors of which the Terminal Operator is aware materially and adversely affecting or which would be otherwise likely, materially and adversely to affect, the carrying out of the Project; and
- 32.3.2.6 a statement identifying separately the capital costs, construction costs and Operation and Maintenance costs, during the respective period, for the Terminal and the provision of the Services separately.
- 32.3.3 The Terminal Operator shall furnish to the TNPA as soon as practicable, but in any event no later than 35 (thirty-five) days prior to the end of each Contract Year, the projected profit and loss account and the budget for the following year, together with an analysis thereof.
- 32.3.4 The Terminal Operator shall furnish to the TNPA as soon as practicable, but in any event no later than the end of each quarterly period of each Contract Year, projected cash flow for the following quarterly period, together with an analysis thereof.

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- 32.3.5 The Terminal Operator shall immediately report to the TNPA, details of the following events:
- 32.3.5.1 any charge, lien or attachment imposed on any of the Terminal Operator's property and any seizure thereof which charge, lien, attachment or seizure will have a material adverse effect on the ability of the Terminal Operator to perform its obligations under this Agreement;
 - 32.3.5.2 any transaction in respect of the shares of the Terminal Operator of which the Terminal Operator is aware;
 - 32.3.5.3 any default under any Finance Agreement, the circumstances thereof and possible results as viewed by the Terminal Operator; and
 - 32.3.5.4 any matter the Terminal Operator is aware of, which might influence the validity of this Agreement or any matter that constitutes a material breach, including without limitation, any possible termination event, the circumstances thereof, and possible results as viewed by the Terminal Operator.
- 32.3.6 The Terminal Operator shall provide a monthly written report to the TNPA with respect to the matters specified in the D&C Specifications and Operating Specifications to be reported relating to provision of the Operation and Maintenance and or the Services.

32.4 **delivery of records**

For a period of not more than 4 (four) months following the termination of this Agreement for whatever reason, the Terminal Operator shall retain in safe custody and storage all such records as are referred to in clause 32.3 (*periodic reports*) which were in existence at the date of termination. Upon expiry of such period or such earlier date as may be agreed by the TNPA and the Terminal Operator, the Terminal Operator shall deliver all such records (or where such records are required by legislation to remain with the Terminal Operator or the Terminal Operator's shareholders, copies thereof) to the TNPA or to its duly authorised representative, in such manner and at such location as the TNPA shall determine.

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The TNPA shall make such records available for inspection by the Terminal Operator at any reasonable time. All costs of retaining such records in safe storage and delivering the same shall be borne by the Terminal Operator.

32.5 reporting of changes

32.5.1 The Terminal Operator shall not without the prior notification to TNPA:

32.5.1.1 make or allow any change in or to its corporate structure, the Terminal Operator Constitutional Documents or its financial year end;

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

32.5.1.3 save for the Financing Agreements and the Associated Agreements, enter into any agreement or series of agreements which contemplates or could involve one or more payments by or to the Terminal Operator in the aggregate in excess of the equivalent of R[insert appropriate threshold] (in **[month and year]** prices);

32.5.1.4 enter into any Related Party Transaction;

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

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

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

33. Rights of Access

33.1 Subject to the reasonable safety requirements of the Terminal Operator, the TNPA, the Lenders, the Independent Certifier and or their representatives may, at their

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own risk, enter upon the Terminal and the Project Site (or any other site or property used by the Terminal Operator for the purposes of the Project) to inspect the Construction Works, the Terminal and Operation and Maintenance, and to monitor compliance by the Terminal Operator with its obligations under this Agreement.

- 33.2 The TNPA, the Lenders, the Independent Certifier and or their representatives may at all times, but subject to the reasonable security and safety requirements of the Terminal Operator, enter upon any property used by the Terminal Operator as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.
- 33.3 The Terminal Operator shall procure that adequate facilities are made available to the TNPA, the Lenders, the Independent Certifier and or their representatives and that reasonable assistance is given for the purposes of clauses 33.1 and 33.2, subject to the Terminal Operator's construction or operational requirements not being adversely affected and to reimbursement of any reasonable costs or expenses of the Terminal Operator.

PART IV – FINANCIAL PROVISIONS

34. Fees in respect of Services

- 34.1 The Terminal Operator shall have the exclusive right and obligation for its benefit and risk to levy and collect tariffs in respect of the Services, with effect from the Operations Commencement Date.
- 34.2 TNPA shall not incur or assume any liability for or in connection with the tariffs charged in respect of the Services, any system used in respect of such fees or any defect or deficiency therein.
- 34.3 No later than 3 (three) months before the Scheduled Operations Commencement Date, the Terminal Operator shall submit to TNPA the initial tariff rates which it intends to charge in respect of the Services with effect from the Operations Commencement Date.

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- 34.4 The Terminal Operator must submit to TNPA annually from the Operations Commencement Date, any adjustments to tariff rates which the Terminal Operator intends on implementing and that are in accordance with any applicable statutes.
- 34.5 All costs and expenses related to and arising from the charging and collection of tariffs shall be borne by the Terminal Operator.
- 34.6 The Terminal Operator may from time to time request the TNPA, or alternatively, a customer of the Terminal Operator may request TNPA to determine revisions and/or increases to fees charged or tariff rates implemented by the Terminal Operator ("**Revision Request**") in accordance with section 58(2)(e) of the Act. ***[Note: This will be informed by whether or not the fee or tariff is prescribed or subject to a maximum cap pursuant to contractual terms with customers. NERSA's methodology also requires consideration in respect of increases.]***
- 34.7 Provided that the Terminal Operator has made the Revision Request at least 21 (twenty-one) days before the date the revision is required to take effect and the requested revisions and increases do not individually exceed CPI, the TNPA may, subject to section 58(2)(e) of the Act, receive representations from customers and/or solicit external expert advice, with the intention to make an informed decision.
- 34.8 Any revision or increase shall be effective only from the date fixed by the TNPA from time to time.
- 34.9 The TNPA shall not be obliged to approve any change, revision or increase if a Terminal Operator Default has occurred and is continuing. If the TNPA does not for any reason, not due or related to a Terminal Operator Default, prescribe any outcome pursuant to any Revision Request, such event shall constitute a Compensation Event and shall be dealt with in accordance with clause 41 (*Consequences of a Compensation Event*).
- 34.10 All costs and expenses related to and arising from the charging and collection of fees or tariff shall be borne by the Terminal Operator.

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35. **Marine services**

35.1 Marine services shall be provided by the TNPA in accordance with the agreed service between the Cargo carrier agent and the harbour master at the Port, and marine services charges will be payable by the Cargo carrier owners to the Cargo carrier agent to cover for pilotage, tugs or craft assistance, berthing services running of ships lines and Cargo carrier tracking systems. The details of the marine services tariffs as at the Signature Date are stipulated in the table in Schedule 20. The tariffs specified in Schedule 20 are in **/month and year/** prices.

35.2 The TNPA shall provide port and marine services to the Terminal Operator in accordance with the Port Facility and Operating Arrangements which is attached to this Agreement as Schedule 24.

36. **Port Dues**

Port dues shall be levied by the TNPA for its costs in providing Port protective works and dredging. The port dues will be payable by the Cargo carrier owner based on each Cargo carrier's technical characteristics. The port dues as at the Signature Date are specified in Schedule 21 and are in **/month and year/** prices.

37. **Refinancing**

37.1 The Terminal Operator agrees that it shall not be entitled to undertake any refinancing or re-arrangement of its Debt or Equity at any time during the Operating Term unless it has obtained the prior written approval of the TNPA, which consent shall not be unreasonably withheld. The Terminal Operator shall ensure that it obtains the prior written approval of the TNPA in respect of such refinancing or re-arrangement.

38. **Penalties**

38.1 Subject to the rights of the TNPA to terminate this Agreement and or claim damages or otherwise in respect of any Terminal Operator Default, but not in addition to or in lieu of penalties, if the Terminal Operator fails to perform any of its obligations under this Agreement (a "**Failure**"), the Independent Certifier shall notify the TNPA and the Terminal Operator of such Failure or if there is no Independent Certifier, the TNPA may notify the Terminal Operator of such Failure.

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If the Terminal Operator fails to rectify such Failure, within such reasonable period of time specified by the Independent Certifier or the TNPA (as the case may be) for such rectification, to the reasonable satisfaction of the Independent Certifier or the TNPA (as the case may be), the latter shall notify TNPA and the Terminal Operator of such Failure or the TNPA may notify the Terminal Operator of such Failure (if there is no Independent Certifier), and the Terminal Operator shall thereupon be liable to pay to the TNPA the penalties specified in relation to such Failure, as set forth in Schedule 11, commencing from the first day of such Failure.

38.2 Any monies due to the TNPA pursuant to clause 38.1 shall be payable by the Terminal Operator within 30 (thirty) days after certification by the Independent Certifier or the TNPA (as the case may be) that the Terminal Operator is liable for such payment to the TNPA and the TNPA shall be entitled to set-off any amounts payable as aforesaid against any monies due or which may become due to the Terminal Operator under this Agreement or against any Performance Guarantee provided that, should the Terminal Operator notify the Independent Certifier with appropriate supporting information that the Terminal Operator has not committed the breach complained of and that no such right to set-off or deduct penalties has arisen, the Independent Certifier shall determine whether the TNPA shall be entitled to the aforesaid penalties. The payment or set-off of such penalties shall not relieve the Terminal Operator from any liability or from any of its obligations under this Agreement.

39. **Foreign exchange risk**

To the extent that the Terminal Operator at any time enters into any agreement in any currency whereby the risk of currency fluctuations is hedged, the TNPA shall not in any circumstances be liable for such hedging arrangements and the Terminal Operator shall not enter into in any such arrangements whereby the TNPA is or may become so liable. The costs and losses arising out of such hedging arrangements shall not be included in or form part of the Termination Amount.

40. **Default Interest**

Interests shall accrue on all overdue amounts payable in terms of this Agreement at the Agreed Interest Rate) plus ~~2~~2% (two percent).

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PART V –COMPENSATION AND FORCE MAJEURE EVENTS, CHANGE OF LAW**41. Consequences of a Compensation Event**

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

41.1.1 the Terminal Operator is unable to complete the Construction Works before the Target Completion Date or to provide the Services on or before the Scheduled Operations Commencement Date;

41.1.2 the Terminal Operator is unable to comply with its obligations under this Agreement; and or

41.1.3 the Terminal Operator incurs costs or loses revenue,

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

41.2 In order for the Terminal Operator to obtain relief and or claims compensation, the Terminal Operator must:

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

41.2.2 within **[10 (ten)]** days of receipt by the TNPA of the notice referred to in clause 41.2.1, give full details of the Compensation Event and the extension of time and or any estimated change in project costs claimed; and

41.2.3 demonstrate to the reasonable satisfaction of the TNPA that:

41.2.3.1 the Compensation Event was the direct cause of the estimated change in project costs and or any delay in the achievement of the Target Completion Date and or the Scheduled Operations Commencement Date; and

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- 41.2.3.2 the estimated change in project costs, time lost, and or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Terminal Operator acting in accordance with International Best Practice.
- 41.2.4 If the Terminal Operator has complied with its obligations under clause 41.2 above, then the Target Completion Date and or the Scheduled Operations Commencement Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;
- 41.2.5 In the case of an additional cost being incurred by the Terminal Operator:
- 41.2.5.1 on or before the Scheduled Operations Commencement Date; or
- 41.2.5.2 as a result of capital expenditure being incurred by the Terminal Operator at any time,
- the TNPA shall compensate the Terminal Operator for the actual estimated change in project costs as adjusted to reflect the actual costs reasonably incurred within ~~60 (sixty)~~ days of its receipt of a written demand by the Terminal Operator supported by all relevant information;
- 41.2.5.3 in the case of a payment of compensation for the estimated change in the costs of the Project that does not result in capital expenditure being incurred by the Terminal Operator but which reflects a change in the costs being incurred by the Terminal Operator after the Actual Operations Commencement Date, the TNPA shall compensate the Terminal Operator; and or
- 41.2.5.4 the TNPA shall give the Terminal Operator such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event.
- 41.3 If the information is provided after the dates referred to in clause 41.2, then the Terminal Operator shall not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement in respect of the period for which the information is delayed.

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41.4 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Terminal Operator's obligations under this Agreement, or the TNPA disagrees that a Compensation Event has occurred (or as to its consequences), or that the Terminal Operator is entitled to any relief under this clause, the Parties shall resolve the matter in accordance with clause 53.5 (*fast-track dispute resolution*).

42. Force Majeure

42.1 If a Party (the "**Affected Party**") is unable to perform all or part of its obligations under this Agreement by reason of Force Majeure, the Affected Party shall, as soon as reasonably practicable, notify the other Party in writing (such notice being a "**Force Majeure Notice**") setting out:

42.1.1 full particulars of the Force Majeure Event;

42.1.2 the impact of the Force Majeure Event on the Affected Party's obligations under this Agreement;

42.1.3 the Affected Party's reasonable estimate of the length of time by which its performance has been and will be affected by such Force Majeure Event; and

42.1.4 the steps which it is taking or intends to take or will take to remove and mitigate the adverse consequences of the Force Majeure Event on its performance hereunder.

42.2 The Affected Party shall have the burden of proving both the existence of any Force Majeure Event and the effect (both as to nature and extent) which any such Force Majeure Event has on its performance.

42.3 If the Parties are, on the basis of the Force Majeure Notice and any supporting documentation, unable to agree as to the existence or as to the effect of a Force Majeure Event by the date falling sixty (60) Days after the receipt by the non-Affected Party of the Force Majeure Notice, either Party shall be entitled to refer the matter to dispute resolution in accordance with clause 53.5 (*Fast-Track Dispute Resolution*).

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- 42.4 If it is agreed or determined that a Force Majeure event has occurred, the Affected Party shall, provided that it has complied with the requirements of this clause 42, not be liable for any failure to perform an obligation under this Agreement as a consequence of such Force Majeure event to the extent only that:
- 42.4.1 such performance is prevented, hindered or delayed by Force Majeure; and
- 42.4.2 such failure could not have been mitigated by the Affected Party (acting as a Reasonable and Prudent Operator).
- 42.5 Provided that the Terminal Operator has complied with the requirements of this clause 42, if the Terminal Operator's performance of all (or part) of its obligations under this Agreement is prevented, hindered or delayed by a Force Majeure event:
- 42.5.1 occurring prior to Scheduled Operations Commencement Date, then Scheduled Operations Commencement Date shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed by the Force Majeure Event;
- 42.5.2 occurring after Scheduled Operations Commencement Date but prior to the Actual Operations Commencement Date, then Long Stop Date shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed by the Force Majeure event; and
- 42.5.3 during any twelve (12) month period commencing on 1 April, where the period by which the Terminal Operator's performance of all (or part) of its obligations under this Agreement has been prevented, hindered or delayed by one or more Force Majeure events (each of which events lasts twenty four (24) hours or longer) for a period in excess of thirty (30) days in such twelve (12) month period, the Expiry Date shall be extended to such date as shall place the Terminal Operator in the same overall economic position (after taking into account any other relief and compensation to which the Terminal Operator may be entitled pursuant to any other provisions of this Agreement for the acts, events or circumstances constituting Force Majeure) as the Terminal Operator would have been in but for the Force Majeure Events which have prevented, hindered or delayed the Terminal Operator's performance, provided further that the aggregate extensions to the Expiry

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Date under this clause 42.5.3 shall not result in the Expiry Date ~~falling more than forty (40) years after Scheduled Operations Commencement Date~~. The Terminal Operator shall not be entitled to enforce this clause 42.5.3 pursuant to any Force Majeure Event in respect of which it is entitled to bring a claim under any insurance policy or would have been so entitled had it been in compliance with clause 16.1 (*Project Insurance*).

42.6 The Affected Party shall use all reasonable efforts to mitigate, rectify and overcome the effects of such Force Majeure event and to minimise the effect on the Project and shall give the other Party:

42.6.1 regular reports on the progress of the mitigation measures; and

42.6.2 notice promptly on the cessation of the Force Majeure event.

43. Unforeseeable Conduct

43.1 Should any Unforeseeable Conduct occur which materially and adversely affects the general economic position of the Terminal Operator, the Terminal Operator shall be entitled to such compensation and or relief from the TNPA as shall place the Terminal Operator in the same overall economic position as the Terminal Operator would have been in but for such Unforeseeable Conduct.

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

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

43.4 The Receiving Party shall have 60 (sixty) days from the date of receipt of such notice to effect a remedy for the Unforeseeable Conduct which restores the general economic position of the Terminal Operator to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party

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does not effect such a remedy within such period, the Parties shall consult within 10 (ten) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. If a mutually satisfactory resolution has not been reached within such 10 (ten) Business Day consultation period, the matter shall be dealt with in accordance with clause 53 (*Dispute Resolution*).

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

43.6 If the Terminal Operator is the Claiming Party, and the remedy contemplated by the TNPA under clause 43.4 is monetary compensation, the TNPA shall have the option to compensate the Terminal Operator as a result of the Unforeseeable Conduct either:

43.6.1 in one lump-sum payment, payable within sixty (60) Business Days of its receipt of the notice contemplated in clause 43.4 from the Terminal Operator; or

43.6.2 in equal monthly installments for the remainder of the Operating Term, commencing within sixty (60) Business Days of its receipt of the notice contemplated in clause 43.4 from the Terminal Operator, provided that interest shall accrue on the full amount due and payable, at the Agreed Interest Rate, from the due date to, but excluding, the date of final payment.

44. Change in Law

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

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- 44.1.2 The provisions of this clause 44 shall not apply in respect of any Change in Law which:
- 44.1.2.1 was foreseen or could reasonably have been foreseen by the Terminal Operator on or before the Effective Date as being reasonably likely to occur and to impact the Project; and
 - 44.1.2.2 could reasonably have been foreseen by any person in the position of the Terminal Operator on or before the Effective Date as being reasonably likely to occur and to impact the Project; or
 - 44.1.2.3 relates to any changes in the rates, effect, application, implementation, enforcement or interpretation of any tax of any nature (including income, capital gains and value added taxes), custom duties, dues, levies, stamp duty, excise fees or charges; or
 - 44.1.2.4 arises as a direct or indirect result of any appeal or review being lodged against any amendment to any of the Consents issued in terms of any Environmental Laws; or
 - 44.1.2.5 arises as a direct or indirect result of the Terminal Operator's failure to obtain the conversion of its provisional air emissions licence into a final air emissions licence, in terms of the Environmental Laws, due to its failure to comply with the terms and conditions of the provisional air emissions licence; or
 - 44.1.2.6 arises as a direct or indirect result of any Responsible Authority imposing additional conditions on the Terminal Operator in terms of any Consents issued in terms of any Environmental Laws, pursuant to a review by the Responsible Authority of the Terminal Operator's provisional or final air emissions licence or waste management licence; or
 - 44.1.2.7 arises as a direct or indirect result of the Responsible Authority declaring the area in which the Project Site is situated as an air pollution priority area and imposing additional requirements on the

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Terminal Operator in terms of its fair emissions licence to align with the air quality management plan for that area.

- 44.1.3 The Terminal Operator shall use all reasonable endeavours to minimise and mitigate the effects of any Change in Law on the Terminal Operator.
- 44.2 The Terminal Operator shall not be entitled to claim both Unforeseeable Conduct and Change in Law or a combination of Unforeseeable Conduct and Change in Law in respect of the same event or circumstance or the same series of events or circumstances.
- 44.3 Any Change in Law which constitutes Unforeseeable Conduct shall be dealt with in terms of clause 43 (*Unforeseeable Conduct*).

PART VII – TERMINATION

45. Terminal Operator Default

45.1 definition

"Terminal Operator Default" means any of the following events or circumstances (in each case, other than where solely due to Force Majeure, a Compensation Event, TNPA Default, Change in Law or Unforeseeable Conduct):

- 45.1.1 a resolution being passed or an order being made for the administration or the commencement of business rescue proceedings, winding-up, liquidation or dissolution of the Terminal Operator (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- 45.1.2 the Terminal Operator fails to complete the Construction Works on or before the Target Completion Date;
- 45.1.3 the Terminal Operator fails to commence with providing the Services on or before the Long Stop Date;
- 45.1.4 the Terminal Operator commits a breach of any of its material obligations under this Agreement;

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- 45.1.5 the Terminal Operator abandons the Construction Works (other than as a consequence of a breach by the TNPA of its obligations under this Agreement);
- 45.1.6 the Terminal Operator ceases to provide all or a substantial part of the Services in accordance with this Agreement (other than as a consequence of a breach by the TNPA of its obligations under this Agreement);
- 45.1.7 the Terminal Operator failing to comply with any provision of clause 18;
- 45.1.8 the Terminal Operator fails to pay any sum or sums due to the TNPA under this Agreement (which sums are not bona fide in dispute) which, either singly or in aggregate, exceeds R[●] (in [month and year] prices) and such failure continues for [60 (twenty)] Business Days from receipt by the Terminal Operator of a notice of non -payment from the TNPA;
- 45.1.9 the Terminal Operator failing to maintain any required insurance in terms of clause 16 (*Project Insurance*);
- 45.1.10 an event of default under the Financing Agreements;
- 45.1.11 a Terminal Operator Default, as the term is defined under the PPA; and
- 45.1.12 any of the warranties in clause 51 (*Terminal Operator Warranties*) fails, at any time during the existence of this Agreement, to be true and correct in all material respects and the Terminal Operator fails to remedy, cure or correct that untruth and incorrectness within a period of one hundred and twenty (120) days of such warranty failing to be true and correct in all material respects;
- 45.1.13 any breach of any provision of this Agreement has occurred more than once and:
- 45.1.13.1 the TNPA has given an initial warning notice to the Terminal Operator describing that breach in reasonable detail and stating that if that breach persists or recurs then the TNPA may take further steps to terminate the Agreement; and

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45.1.13.2 the TNPA has issued a second and final warning notice following the persistence or recurrence of that breach in the period of **[45 (forty five)]** days after the initial warning notice, stating that if that breach persists or recurs within the period of **[45 (forty five)]** days after the final warning notice then the TNPA may terminate the Agreement on **[10 (ten)]** days' notice to the Terminal Operator.

45.2 **notification**

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

45.3 **the TNPA's options**

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

45.3.1.1 in the case of the Terminal Operator Default referred to in clauses 45.1.1, 45.1.2, 45.1.5, 45.1.6, 45.1.7, 45.1.8, 45.1.9 and 45.1.10 terminate this Agreement in its entirety by notice in writing having immediate effect;

45.3.1.2 and while the same is subsisting, in the case of any other Terminal Operator Default referred in clauses 45.1.3 and 45.1.12, serve notice of default on the Terminal Operator requiring the Terminal Operator at the Terminal Operator's option either:

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

45.3.1.2.2 to put forward within **[20 (twenty)]** Business Days of such notice of default a reasonable programme for remedying the Terminal Operator Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Terminal

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Operator Default is proposed to be remedied. The Terminal Operator shall only have the option of putting forward a programme in accordance with this clause if it first notifies the TNPA within ~~15 (fifteen)~~ Business Days of such notice of default that it proposes to do so.

45.4 **remedy provisions**

45.4.1 Where the Terminal Operator puts forward a programme in accordance with clause 45.3.1.2.2, the TNPA shall have ~~15 (fifteen)~~ Business Days from receipt of the same within which to notify the Terminal Operator that it does not accept the programme, failing which the TNPA shall be deemed to have accepted the programme. The TNPA shall act reasonably in rejecting the programme. Where the TNPA notifies the Terminal Operator that it does not accept the programme, the Parties shall endeavour within the following ~~10 (ten)~~ Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within ~~10 (ten)~~ Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Terminal Operator Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either Party for resolution in accordance with clause 53.5 (*fast-track dispute resolution*).

45.4.2 If:

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

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

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45.4.2.3 any programme put forward by the Terminal Operator is rejected by the TNPA as not being reasonable, and the dispute resolution procedure does not find against that rejection, then the TNPA may terminate this Agreement in its entirety by written notice to the Terminal Operator with immediate effect, provided that if the Terminal Operator's execution of the programme is adversely affected by the occurrence of a Force Majeure Event or a Relief Event

then, subject to the Terminal Operator complying with the mitigation and other requirements in this Agreement concerning Force Majeure Events or Compensation Events (as the case may be), the time for execution of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure Event or Compensation Event (as the case may be) which is agreed by the Parties or determined in accordance with clause 53.5.

45.5 **the TNPA's costs**

45.5.1 The Terminal Operator shall reimburse the TNPA with all costs incurred by the TNPA in exercising any of its rights in terms of this clause 0 (*Terminal Operator Default*) (including, without limitation, any relevant increased administrative expenses).

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

45.6 **Lenders' step-in**

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

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46. The TNPA Default

46.1 definition

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

- 46.1.1 an expropriation or requisition of a material part of the Terminal and or shares of the Terminal Operator by the TNPA or other Responsible Authority, or a material part of the Terminal being removed from the possession of the Terminal Operator by the TNPA or other Responsible Authority, other than in terms of this Agreement; and or
- 46.1.2 a failure by the TNPA to make payment of any amount or amounts that are due and payable by the TNPA under this Agreement (which amounts are not bona fide in dispute) which, either singly or in aggregate exceeds the sum of R[*insert threshold*] (in [month and year] prices) and such failure continues for [20 (twenty)] Business Days from receipt by the TNPA of a notice of non-payment from the Terminal Operator.

46.2 termination for the TNPA Default

- 46.2.1 On the occurrence of the TNPA Default, or within [90 (ninety)] days after the Terminal Operator becomes aware of same, the Terminal Operator may serve notice on the TNPA of the occurrence (and specifying details) of such the TNPA Default. If the relevant matter or circumstance has not been remedied or rectified within [30 (thirty)] Business Days of such notice, the Terminal Operator may enforce its rights to terminate this Agreement, on the basis of Government Default.
- 46.2.2 The Terminal Operator shall not exercise or purport to exercise any rights to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly provided for herein.

47. Invalidation in terms of Section 67 of the Act

If it is necessary to change the use to which the Project Site or Terminal is put in order to improve the safety, security, efficiency and effectiveness of the operations of the Port, and the new use is incompatible with this Agreement, the TNPA may issue a

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directive, subject to the provisions of section 67(2)(b) of the Act, stipulating that this Terminal Operator Agreement is invalid from the date stipulated in that directive.

48. **Effects of Termination**

48.1 **termination**

Notwithstanding any provision of this Agreement, on service of a notice of termination, this Agreement shall only terminate in accordance with the provisions of this clause 48 (*Effects of Termination*).

48.2 **continued effect - no waiver**

Notwithstanding any breach of this Agreement by either Party, and without prejudice to any other rights which the other Party may have in relation to it, the other Party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either Party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

48.3 **continued performance**

Subject to any exercise by the TNPA of its rights to perform, or to procure a third party to perform, the obligations of the Terminal Operator, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement becomes effective in accordance with the provisions of this clause 48 (*Effects of Termination*).

48.4 **transfer to the TNPA of the Terminal, Associated Agreements and other assets**

On the expiry or termination date of this Agreement or, where applicable, the service of a notice of termination in accordance with this Agreement for any reason, the TNPA shall have the option to take over the right, title and interest in and to the Terminal and the Approvals. The TNPA shall be required to notify the Terminal Operator in writing of whether it intends to exercise such option within

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a [120] Business Days of the notice terminating this Agreement. If the TNPA exercises its option:

- 48.4.1 if termination occurs prior to the Target Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the TNPA, the Terminal Operator shall transfer to, and there shall vest in, the TNPA such part of the Construction Works and or the Facilities as shall have been constructed and such items of the plant and equipment as shall have been procured by the Terminal Operator, and if the TNPA so elects:
- 48.4.1.1 all plant and all materials on or near to the Project Site shall remain available to the TNPA for the purposes of completing the Construction Works; and
- 48.4.1.2 the construction plant shall remain available to the TNPA for the purposes of completing the Construction Works, subject to payment of the Terminal Operator's reasonable costs;
- 48.4.1.3 if the TNPA so elects, the Terminal Operator shall procure that any of the Associated Agreements specified by the TNPA are assigned to the TNPA or any third party nominated by it; provided that where termination occurs under clause 46 (*The TNPA Default*), the consent of the relevant Subcontractors shall be required. Where the TNPA does not so elect, or any Subcontractor whose consent is required refuses that consent, the Terminal Operator shall procure that all relevant Associated Agreements automatically terminate when this Agreement terminates.
- 48.4.2 On service of a notice of termination in accordance with this Agreement for any reason or not less than **[10 (ten)]** days prior to the expiry date of this Agreement, the Terminal Operator shall:
- 48.4.2.1 hand over to, and there shall vest in, the TNPA, free from all encumbrances, the Terminal which shall be in the state required in accordance with the Operating Specifications; or

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- 48.4.2.2 shall procure that any Subcontractor shall (as the case may be), transfer to the TNPA, free from any security interest full and unencumbered title in and to all or any part of the Terminal required by the TNPA in connection with the Project and the Services;
- 48.4.2.3 shall procure that any Intellectual Property Rights shall be provided to the TNPA and the TNPA shall be granted a perpetual nonexclusive, royalty-free license to use such Intellectual Property Rights;
- 48.4.2.4 deliver to the TNPA (as far as not already delivered to the TNPA) one complete set of:
- 48.4.2.4.1 "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Terminal;
- 48.4.2.4.2 Maintenance, Operation and training manuals for the Terminal; and
- 48.4.2.4.3 the historical operating data and plans of the Terminal, its furniture, fittings and Equipment in a format acceptable to the TNPA;
- 48.4.2.4.4 use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Terminal Operator under this Agreement and included in the Terminal are assigned, or otherwise transferred, to the TNPA;
- 48.4.2.4.5 deliver to the TNPA the information referred to in the clause 32 (*Financial Accounts, Reports, inspection and reporting changes*), except where such documents are required by Law to be retained by the Terminal Operator or any Subcontractor concerned, in which case complete copies shall be delivered to the TNPA; and
- 48.4.2.4.6 ensure that provision is made in all contracts of any description whatsoever to ensure that the TNPA will be in a position to

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exercise its rights, and the Terminal Operator will be in a position to comply with its obligations, under this clause 48.4.2.

48.5 **termination**

On completion of the transfer required by clause 48.4 (*transfer to the TNPA of the Terminal, Associated Agreements and other assets*) (except in so far as any of the requirements of that clause may be waived by the TNPA), this Agreement shall terminate and, save as provided in clause 48.7 (*continuing obligations*), all rights and obligations of the TNPA and the Terminal Operator under this Agreement shall cease and be of no further force and effect.

48.6 **transitional arrangements**

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

- 48.6.1 the Terminal Operator shall co-operate fully with the TNPA and any person who is providing services in the nature of any of the Services or any part of the Services, in order to achieve a smooth transfer of the manner in which the TNPA obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the TNPA, the Port Users and members of the public;
- 48.6.2 the Terminal Operator shall as soon as practicable remove from the Project Site all property not required by the TNPA pursuant to clause 48.4 (*transfer to the TNPA of the Terminal, Associated Agreements and other assets*) and if it has not done so within **[20 (twenty)]** Business Days after any notice from the TNPA requiring it to do so, the TNPA may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred for the credit of the Terminal Operator;
- 48.6.3 the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations pursuant to any

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obligations or requirements to decommission the Terminal pursuant to and in accordance with the applicable Consents and Environmental Laws;

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

48.6.4.1 any remote access apparatus and computer access cards to the Terminal; and

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

48.6.4.3 the Terminal Operator shall as soon as practicable vacate the Project Site and (without prejudice to the rest of this clause 48 (*Effects of Termination*)) shall leave the Project Site and the Terminal in a safe, clean and orderly condition.

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

48.6.5.1 providing any information which the TNPA may reasonably require to conduct such tender excluding any information which is commercially sensitive to the Terminal Operator (and, for the purpose of this sub-

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clause, commercially sensitive shall mean information which would if disclosed to a competitor of the Terminal Operator give that competitor a competitive advantage over the Terminal Operator and thereby prejudice the business of the Terminal Operator but shall exclude any information dealing with employment matters); and

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

48.7 **continuing obligations**

Save as otherwise expressly provided in this Agreement:

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

48.7.2 termination of this Agreement shall not affect the continuing rights and obligations of the Terminal Operator and the TNPA under clauses 1 (*Definitions and Interpretation*), 7 (*Indemnity*), (*Terminal Operator's warranties and undertakings*), 12 (*Environmental Compliance*), 14 (*Access to documents, copyright and related matters*), 15.1 (*delivery of Performance Guarantees*), 19 (*The TNPA's Assistance and Rights and Limitations on Liability*), 48.6 (*transitional arrangements*), 48.7 (*continuing obligations*), 50 (*Corrupt gifts and fraud*), 53 (*Dispute Resolution*) and 56.15 (*Information and audit access*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

49. **Termination Amount for the TNPA Default**

49.1 On termination of this Agreement as a result of the TNPA Default, the TNPA shall pay the Terminal Operator an amount equal to the direct actual costs incurred or

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sustained by the Terminal Operator as a consequence of the termination of the Agreement. The direct actual costs will be limited to the following:

- 49.1.1.1 the Debt; and
- 49.1.1.2 the Equity Compensation;
- 49.1.1.3 the Subcontractors' and Suppliers' Costs;
- 49.1.1.4 an amount equal to the redundancy payments for employees of the Terminal Operator not transferring to the TNPA or its nominee that have been or will reasonably be incurred by the Terminal Operator as a direct result of the termination of this Agreement; and
- 49.1.1.5 the Transfer Costs (for the Terminal Operator to take over the Terminal, the Port Sites, the Approvals and the Project or to nominate a third party to do so),

provided that the Terminal Operator shall use reasonable endeavours to mitigate its liability in respect of all such amounts;

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

- 49.1.1.6 all credit balances on any bank accounts held by or on behalf of the Terminal Operator and or its Affiliates on the Termination Date and the value of any right of the Terminal Operator and or its Affiliates or the Lenders to receive any proceeds pursuant to letters of credit and bank guarantees and sums due and payable from the Subcontractors or the Suppliers (save to the extent that such sums are included in the calculation under clause 49.1.1.3) and any other third parties;
- 49.1.1.7 the fair market value of any other assets and rights of the Terminal Operator (other than those transferred or to be transferred to the TNPA or its nominee pursuant to this Agreement) less liabilities of the Terminal Operator properly incurred in connection with this Agreement, unless such liabilities fall within clauses 49.1.1.1 to 49.1.1.4 above, provided that no account shall be taken of any

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liabilities and obligations of the Terminal Operator arising out of agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in:

- 49.1.1.7.1 connection with the Terminal Operator’s obligations in relation to the Project; and
- 49.1.1.7.2 the ordinary course of business and on commercial arm’s length terms;
- 49.1.1.8 if termination of this Agreement occurs after the Actual Commercial Operations Date and if the Terminal is not found to be in the condition reasonably expected with due regard to the age and use of the Terminal and the performance expected of the Terminal in accordance with the terms of this Agreement, the amount determined by the Independent Expert as being required to bring the condition of the Terminal to the standard expected as at the Termination Date by a Reasonable and Prudent Operator,

provided that, if the aggregate of the amounts referred to in clauses 49.1.1.1 to 49.1.1.5 after the deductions made in clauses 49.1.1.6 to 49.1.1.8 above is less than zero (0) then, for the purposes of the calculation in this definition, the aggregate shall be deemed to be zero (0).

49.2 **Payment Expert Calculations**

- 49.2.1 If any calculation or valuation is required to be made for the purposes of determining an amount payable by the TNPA to the Terminal Operator pursuant to clause 49.1, the same shall be made by the Payment Expert appointed by the Parties and the Lenders or, in the absence of agreement within ~~/fifteen (15) /~~ Business Days, by the President of the South African Institute of Chartered Accountants.
- 49.2.2 The Terminal Operator and the TNPA shall ensure that the Payment Expert is appointed within ~~/fifteen (15) /~~ Business Days of delivery by the Terminal Operator of the second notice in terms of clause 46.2.1. The Payment Expert

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shall have ~~five~~ **fifteen (15)** Business Days to calculate the amount payable by the TNPA to the Terminal Operator pursuant to this clause 49 (*Compensation on Termination for TNPA Default*).

49.2.3 Upon determination of the amount payable by the TNPA to the Terminal Operator pursuant to this clause 49 (*Compensation on Termination for TNPA Default*), the Terminal Operator shall be entitled to issue a written demand to the TNPA for payment of such amount.

49.2.4 In making any determination pursuant to this clause 49.2 (*Payment Expert Calculations*), the Payment Expert shall act as an expert and not an arbitrator.

PART VIII – PROCEDURAL ISSUES

50. Corrupt gifts and fraud

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

50.2 If the Terminal Operator, any Shareholder, any Subcontractor or any Affiliate of any of them (or anyone employed by or acting on behalf of any of them) admits to or is convicted of having committed any Corrupt Act in relation to the Project or in respect of any of the Project Documents, then the TNPA shall be entitled to act in accordance with clauses 50.2.1 to 50.2.9 below:

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

50.2.2 if the Corrupt Act is committed by an employee of the Terminal Operator or of any Shareholder acting of his or her own accord, then in any such case, the TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within ~~thirty (30)~~ **thirty (30)** Business Days

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of the Terminal Operator's receipt of such notice that employee's involvement in the Project is terminated and (if necessary) the performance of any part of the Project Deliverables previously performed by him or her is performed by another person;

- 50.2.3 if the Corrupt Act is committed by a Subcontractor or supplier, director of a Subcontractor or supplier or an employee of a Subcontractor or supplier acting under the authority or with the knowledge of a director of that Subcontractor or supplier, then in any such case, the TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within ~~thirty (30)~~ **[sixty (60)]** Business Days of its receipt of such notice the Terminal Operator terminates the relevant Subcontract or supply contract and procures the performance of the relevant part of the Project Deliverables by another person, where relevant;
- 50.2.4 if the Corrupt Act is committed by an employee of a Subcontractor acting of his or her own accord, then the TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate, unless within ~~thirty (30)~~ **[thirty (30)]** Business Days of its receipt of such notice the Terminal Operator procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Project Deliverables previously performed by that employee to be performed by another person;
- 50.2.5 if the Corrupt Act is committed by a Lender, a director of a Lender or any employee of a Lender acting under the authority or with the knowledge of a director of that Lender, then in any such case the TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within ~~thirty (30)~~ **[eighty (80)]** Business Days of its receipt of such notice the Terminal Operator procures the termination of such Lender's involvement in the Project (in any capacity whatsoever including, without limitation, as Lender under the Financing Agreements) and provides the TNPA with satisfactory proof that such Lender's entire participations in the Debt and in any undrawn financial commitments under the Financing Agreements have been assumed by any other financial institution (including

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

50.2.6 if the Corrupt Act is committed by any employee of a Lender acting of his or her own accord, then the TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within ~~/thirty (30)/~~Business Days of the Terminal Operator's receipt of such notice, that employee's involvement in the Project is terminated;

50.2.7 if the Corrupt Act is committed by an Affiliate of any of the persons detailed in any of clauses 50.2.1 to 50.2.6, a director of such an Affiliate or an employee of such an Affiliate acting under the authority or with the knowledge of a director of that Affiliate, then the TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate, unless the Terminal Operator procures the termination of the involvement in the Project of the person detailed in any of clauses 50.2.1 to 50.2.6 who is affiliated to that Affiliate, within the time period specified in the clause amongst clauses 50.2.1 to 50.2.6 that is relevant in the circumstances;

50.2.8 if the Corrupt Act is committed by any other person not specified in clauses 50.2.1 to 50.2.6 above but involved in the Project as a Subcontractor or supplier to any Subcontractor or to the Terminal Operator, then the TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate unless within ~~/sixty (60)/~~ Business Days the Terminal Operator procures the termination of such person's involvement in the Project and (if necessary) procures the performance of the relevant part of the Project by another person; and

50.2.9 any notice of termination under this clause 50.2 shall specify:

50.2.9.1 the nature of the Corrupt Act;

50.2.9.2 the identity of the party or parties who has committed the Corrupt Act; and

50.2.9.3 the date on which this Agreement will terminate in accordance with the applicable provisions of this clause 50.2.

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- 50.3 Without prejudice to its other rights or remedies under this clause or any other Laws, the TNPA shall be entitled to recover from the Terminal Operator, the greater of:
- 50.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act; and
- 50.3.2 any direct losses sustained by the TNPA in consequence of any breach of this clause 50 by the Terminal Operator.
- 50.4 Nothing contained in this clause 50 shall prevent the Terminal Operator from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 50.5 The Terminal Operator shall notify the TNPA of the occurrence (and details) of any Corrupt Act promptly on the Terminal Operator becoming aware of its occurrence.

51. Terminal Operator's warranties and undertakings

51.1 Terminal Operator's general undertakings

- 51.1.1 As between the Parties and save as otherwise expressly provided for in this Agreement, at all times during the Operating Term, the Terminal Operator shall exercise its rights and perform all of its obligations as provided for in this Agreement, at its sole cost and risk and in compliance with the requirements of:
- 51.1.1.1 applicable Laws;
- 51.1.1.2 the Consents;
- 51.1.1.3 the terms and conditions of this Agreement;
- 51.1.1.4 the standards of a Reasonable and Prudent Operator; and
- 51.1.1.5 relevant manufacturers' guidelines and instructions.

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- 51.1.2 If there is a conflict between the documents listed in clause 51.1.1, the order of priority between the documents shall be the order of priority in which the sub clauses to clause 51.1.1 are listed.
- 51.1.3 The Terminal Operator agrees and undertakes that, as between the Terminal Operator and the TNPA:
- 51.1.3.1 the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge, all environmental and or health and safety obligations in relation to the Terminal Facilities and the Project Site pursuant to and in accordance with the applicable Consents and Environmental Laws; and
- 51.1.3.1.1 the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations in relation any contamination of the Port Sites pursuant to and in accordance with the applicable Consents and Laws, whether such contamination was existing at the time that the Terminal Operator obtained its rights in respect of the Project Site or arises during the term of this Agreement;
- 51.1.3.1.2 the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations pursuant to any remediation order issued by any Responsible Authority pursuant to and in accordance with the applicable Consents and Environmental Laws in respect of any contamination of the Port Site, whether such contamination was existing at the time that the Terminal Operator obtained its rights in respect of the Project Site or arises during the term of this Agreement;
- 51.1.3.1.3 the Terminal Operator shall be solely responsible for, shall bear full responsibility for, shall discharge all obligations and shall bear all consequences (including the possibility that any of the following could lead, directly or indirectly, to a Terminal Operator Default) that:

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- 51.1.3.1.3.1 arise as a direct or indirect result of any appeal or review being lodged against any amendment to any of the Consents issued in terms of any Environmental Laws; or
- 51.1.3.1.3.2 arise as a direct or indirect result of the Terminal Operator's failure to obtain the conversion of its provisional air emissions licence into a final air emissions licence, in terms of the Environmental Laws, due to its failure to comply with the terms and conditions of the provisional air emissions licence; or
- 51.1.3.1.3.3 arise as direct or indirect result of any Responsible Authority imposing additional conditions on the Terminal Operator in terms of any Consents issued in terms of any Environmental Laws, pursuant to a review by the Responsible Authority of the Terminal Operator's provisional or final air emissions licence or waste management licence; or
- 51.1.3.1.3.4 arise as a direct or indirect result of the Responsible Authority declaring the area in which the Project Site is situated as an air pollution priority area and imposing additional requirements on the Terminal Operator in terms of its air emissions licence to align with the air quality management plan for that area; and
- 51.1.3.2 the Terminal Operator shall be solely responsible for, shall bear full responsibility for and shall discharge all obligations pursuant to any obligations or requirements to decommission the Terminal at the end of its life, pursuant to and in accordance with the applicable Consents and Laws, in accordance with the provisions of clauses 12.15 and 15.5 and the provisions of any applicable Laws and or the terms and conditions of any Consents; and
- 51.1.3.3 if any consequence arises pursuant to any circumstance, event or situation detailed in clause 51.1.3, the Terminal Operator shall be

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liable for and bear the full responsibility of and consequences for such circumstance, event or situation, and the TNPA shall not bear any liability, responsibility or consequence for or of such circumstance, event or situation, including any consequential Terminal Operator Default; and

51.1.3.4 that the TNPA has no obligations of any nature to monitor compliance with or to enforce the terms and conditions of any of the Consents; and

51.1.3.5 that the TNPA has no obligations of any nature to monitor compliance with or to enforce the terms and conditions of any remediation order issued by any Responsible Authority in respect of any contamination of the Port Site; and

51.1.3.6 if the Terminal Operator fails to comply with any of its obligations under clause 51.1.3, it alone shall be liable for and bear the full responsibility of and consequences for such failure, and the TNPA shall not bear any liability, responsibility or consequence for or of such failure; and

51.1.3.7 the Terminal Operator indemnifies and shall hold harmless, upon demand, the TNPA against any claims, damages, losses, expenses and any other consequences of or arising out of the Terminal Operator's failure to comply with this clause 51.1.3; and

51.1.3.8 the Terminal Operator indemnifies and shall hold harmless, upon demand, the TNPA against any claims, damages, losses, expenses and any other consequences of or arising out of any consequence arises pursuant to any circumstance, event or situation detailed in clause 51.1.3.

51.1.4 The provisions of clause 51.1.3 shall remain in full force and effect after the Termination Date.

51.1.5 The Terminal Operator shall:

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- 51.1.5.1 provide the TNPA with copies of all of the Associated Agreements (that have been signed at Financial Close) and all of the Financing Agreements, at Financial Close;
- 51.1.5.2 provide to the TNPA copies of any changes to the Financing Agreements at any time after Financial Close, for the duration of the Operating Term;
- 51.1.5.3 obtain the TNPA's prior written consent for any changes to the Associated Agreements at any time after Financial Close, for the duration of the Operating Term; and
- 51.1.5.4 obtain the TNPA's prior written consent for any changes to any of the Financing Agreements.
- 51.1.6 In respect of those Associated Agreements that have not been signed by Financial Close, the Terminal Operator shall deliver a copy of each Associated Agreement to the TNPA within five (5) Business Days of the date of signature of that agreement by the last of the parties to it, to sign it.
- 51.1.7 If the Terminal Operator requires any change to the Associated Agreements as a result of any replacement of any Associated Agreements or a counterparty to any Associated Agreements, it shall, before effecting such replacement, promptly notify the TNPA of the need for the replacement. The prior written consent of the TNPA (acting reasonably) shall be required in respect of the replacement of any of the Lenders, Subcontractors or an equipment supplier, unless such replacement Lender, Subcontractor or equipment supplier was included, in that role, in the bid response that was submitted by the Terminal Operator or on behalf of the Terminal Operator and that was the basis on which the TNPA entered into this Agreement with the Terminal Operator.
- 51.1.8 The Terminal Operator shall ensure that the Independent Certifier shall, in the exercise of its duties for the duration of this Agreement, owe a duty of care to the TNPA and that the TNPA shall be entitled to receive copies of all notices, reports and any other documentation issued to the Terminal

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Operator by the Independent Certifier and or issued by the Terminal Operator to the Independent Certifier in terms of such agreement.

51.2 Terminal Operator's warranties

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

- 51.2.1 the Terminal Operator is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement, the Associated Agreements, the Financing Agreements and the Project Documents;
- 51.2.2 the Terminal Operator has the sole purpose, object and business of undertaking the Project and providing Services in terms of the Terminal Use Agreements;
- 51.2.3 its obligations under this Agreement are legal, valid and binding and enforceable against it, in accordance with the terms of this Agreement;
- 51.2.4 all the Financing Agreements have been duly executed on proper authority and are in full force and effect as at the Effective Date;
- 51.2.5 once the Associated Agreement has been executed, it has been duly executed on proper authority and is in full force and effect;
- 51.2.6 the execution and performance of any of the Associated Agreements, Project Documents or Financing Agreements do not and will not contravene any provision of the memorandum of incorporation of the Terminal Operator as at the Effective Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on the Terminal Operator;
- 51.2.7 all Consents (whether provisional or final) required by the Terminal Operator, its Subcontractors or suppliers for the conduct of the Project are in full force and effect as at the Effective Date, save for any Consents which

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are not required under the Laws to be obtained by the Effective Date, provided that:

- 51.2.7.1 the Terminal Operator warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent will not be granted on reasonable terms by the time the Terminal Operator, its Subcontractors or suppliers are required to obtain such Consent; and
- 51.2.7.2 the Terminal Operator knows of no reason why any provisional Consents issued to it in terms of the Environmental Laws will not be converted into final Consents in order for it to be permitted to commence the Project Deliverables;
- 51.2.8 subject to clause 51.2.7, the Terminal Operator, Subcontractors and or suppliers have, at all times during the Operating Term, all Consents required to enable them to fulfil their obligations in terms of this Agreement, the Associated Agreements and have complied in all material or relevant respects, with such Consents and the Laws applicable to the Terminal Operator, Contractors and or the Suppliers;
- 51.2.9 the Terminal Operator shall inform the TNPA of any cancellations, amendments, disputes, penalisations and or revocations in respect of any Consents within ~~three (3)~~ Business Days of becoming aware of such occurrence. If any such cancellation, amendment, dispute, penalisation and or revocation takes place, the Terminal Operator shall within ~~five (5)~~ Business Days of the receipt of the notification thereof by the TNPA, provide the TNPA with a detailed plan explaining how the Terminal Operator will deal with the issue so as to ensure that it does not cause any interruptions to the provision of the Services, and the TNPA shall, in its sole discretion, be entitled to decide whether or not to accept such plan;
- 51.2.10 no litigation, arbitration, investigation or administrative proceeding is in progress as at the Effective Date or, to the best of the knowledge of the Terminal Operator as at the Effective Date (having made all reasonable enquiries), threatened against it or any of the Subcontractors or suppliers,

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which is likely to have a material adverse effect on the ability of the Terminal Operator to conduct the Project;

- 51.2.11 the Terminal Operator is not subject to any obligation or non-compliance which is likely to have a material adverse effect on its ability to conduct the Project;
- 51.2.12 no proceedings or any other steps have been taken or, to the best of the knowledge of the Terminal Operator (having made all reasonable enquiries), are threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final), business rescue or deregistration of Terminal Operator or for the appointment of a liquidator, judicial manager business rescue practitioner or similar officer over it or over any of its assets;
- 51.2.13 the Terminal Operator has not carried out any trading or business activities since its incorporation or incurred any liabilities other than in connection with the operations of the Project (including the entry into of this Agreement, the Financing Agreements, the Associated Agreements and the other Project Documents);
- 51.2.14 all information disclosed by or on behalf of the Terminal Operator to the TNPA at any time up to the Effective Date and, in particular, during the bid process preceding the award of this Agreement to the Terminal Operator, is true, complete and accurate in all material respects and the Terminal Operator is not aware of any material facts or circumstances not disclosed to the TNPA and which would, if disclosed, be likely to have an adverse effect on the TNPA's decision (acting reasonably) to enter into this Agreement with the Terminal Operator;
- 51.2.15 the copies of the Financing Agreements have been delivered to the TNPA in accordance with the terms of this Agreement, and those copies are true and complete copies of such Financing Agreements and there are no other documents replacing or relating to any such Financing Agreements, which would materially affect the performance of these Financing Agreements;

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- 51.2.16 following the execution from time to time of Project Documents and the Associated Agreements, copies of the Project Documents and the Associated Agreements have been delivered to the TNPA and in accordance with the terms of this Agreement, and those copies are true and complete copies of such Project Documents and Associated Agreements, and the Terminal Operator has promptly delivered copies of any other documents replacing or relating to any such Project Documents and Associated Agreements, where such documents would materially affect the performance of these Project Documents, the Associated Agreements and or this Agreement, to the TNPA.
- 51.2.17 as at the Effective Date:
- 51.2.17.1 the Terminal Operator has an authorised share capital as set out in its memorandum of incorporation and issued share capital as set out its shareholders agreement (to the extent that there is such an agreement) and all shares in the issued share capital of the Terminal Operator are fully paid up;
- 51.2.17.2 all shares in the issued share capital of the Terminal Operator are legally and beneficially owned as represented in the Terminal Operator's memorandum of incorporation and shareholders agreement (to the extent that there is such an agreement);
- 51.2.17.3 save as provided in the Financing Agreements, the memorandum of incorporation or the Terminal Operator's shareholders agreement (to the extent that there is such an agreement), no person has the right (whether actual or contingent) to call for the issue of any share or loan capital in the members of the Terminal Operator whether pursuant to any option or otherwise including any realisation of security;
- 51.2.17.4 save as provided in the Financing Agreements (in respect of all of the security provided by the Terminal Operator to the Lenders or their nominee), the memorandum of incorporation or the Terminal Operator's shareholders agreement (to the extent that there is such an agreement), there are no Encumbrances over or affecting any of

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the Equity or the Shareholder Loans and there is no agreement or commitment to grant or create any such Encumbrance; and

51.2.18 no person (whether the Terminal Operator, a Shareholder, Subcontractor, supplier or any other third person) has agreed to pay or be paid any Success Payment in respect of, in connection with or pursuant to the Project, other than the Success Payments detailed in the Financial Model.

51.3 **Breach of Terminal Operator warranties**

If the Terminal Operator fails to comply with any of the warranties in terms of clause 51.2, then the Terminal Operator shall notify the TNPA of such non-compliance within ~~/5 (five)/~~Business Days of becoming aware thereof.

52. **TNPA Warranties**

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

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

52.2 the execution and performance of this Agreement by it has been duly authorised by all necessary action, and its obligations hereunder constitute valid, binding and enforceable obligations.

53. **Dispute Resolution**

53.1 **referable disputes**

The provisions of this clause 53 (*Dispute Resolution*) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this Agreement between the Parties.

53.2 **internal referrals**

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

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- 53.2.1.1 all disputes shall first be referred to a meeting of the liaison officers or other designated executives from each Party who are actively involved in the Project, and have sufficient authority to be able (if necessary with consultation back to their respective organisations) to resolve it; and
- 53.2.1.2 if the Parties have been unable to resolve the dispute within 15 (fifteen) days of referral to the persons specified in clause 53.2.1.1, either Party may refer the dispute for a decision by the chief executive officer of the TNPA and the chief executive officer or equivalent officer of the Terminal Operator.
- 53.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 53.2 (*internal referral*), the Parties shall (and shall procure that their employees and representatives shall) use reasonable endeavours to resolve such dispute without delay by negotiations or any other informal procedure which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the dispute without necessity for formal proceedings.
- 53.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 53.2.1 within 15 (fifteen) days of the dispute being referred to them (or any longer period agreed between the Parties) shall be treated as a dispute in respect of which informal resolution has failed.
- 53.3 **performance to continue**
- No reference of any dispute to any resolution process in terms of this clause 53 (*Dispute Resolution*) shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.
- 53.4 **litigation**
- 53.4.1 Save where any dispute has been expressly referred for determination in terms of clause 53.5 (*fast-track dispute resolution*), if informal resolution of any dispute has failed, then the dispute may be referred to litigation in the High Courts by either Party.

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

53.5 **fast-track dispute resolution**

53.5.1 Disputes expressly referred for determination pursuant to this clause 53.5 (*fast-track dispute resolution*) shall be determined by the Independent Expert.

53.5.2 Within 5 (five) Business Days after a dispute has been referred by either Party to the appropriate Independent Expert, the Independent Expert shall require the Parties to submit in writing their respective arguments. The Independent Expert shall, in his or her absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.

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

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

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

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- 53.5.6 The Independent Expert's costs of any referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 53.5.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the law.
- 53.5.8 Should the need arise for either Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were one heard by a Judge in the High Court of South Africa, save that if by law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.
- 53.5.9 The proceedings shall be confidential and all information, data or documentation disclosed or delivered by either Party to the Independent Expert in consequence of or in connection with his or her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by the confidentiality provisions of this Agreement contained in clause 55, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.
- 53.5.10 The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as Independent Expert unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.

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- 53.5.11 Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission prejudices the adjudication process, then the Independent Expert can either:
- 53.5.11.1 give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or
- 53.5.11.2 warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.
- 53.5.12 The Independent Expert shall be deemed not to be an arbitrator but shall render his or her decision as an expert and the provisions of the Arbitration Act No. 42 of 1965 and any other law relating to arbitration shall not apply to the Independent Expert or his or her determination or the procedure by which he or she reaches his or her determination. The Independent Expert's decision shall be final and binding on the Parties.

54. **Liability**

54.1 **Direct losses**

- 54.1.1 The Parties' liability to each other in respect of any claim that arises pursuant to this Agreement, whether under delict or contract, shall be as detailed in this Agreement, and no Party shall have any additional liability to the other Party in respect of such claim.
- 54.1.2 Notwithstanding anything contained to the contrary in this Agreement, neither Party shall be liable to the other Party for any Special Loss suffered by such other Party as a result of any act or omission by the first Party.
- 54.1.3 Save as expressly provided elsewhere in this Agreement, neither Party shall be liable to the other Party for any losses, liabilities, expenses, damages, costs and claims (including Claims) suffered or claimed which arise out of,

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under or in connection with any alleged breach of any statutory duty or delictual act or omission or otherwise.

54.2 **Mitigation**

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

55. **Confidentiality**

55.1 **Confidential Information**

Each Party shall treat any and all information and data disclosed to it by the other Party in connection with this Agreement in any form whatsoever, and this Agreement itself (the "**Confidential Information**") as confidential and proprietary, shall preserve the secrecy of the Confidential Information and shall not use the Confidential Information for any purpose other than solely in connection with the Project or, in respect of the TNPA, for the purposes of complying with any obligations imposed on it by any Laws, to report to Parliament, any committee of Parliament or any other part of Government.

55.2 **Exclusions to Confidential Information**

For the purposes of this clause 55, the term "**Confidential Information**" shall not include information which:

- 55.2.1 at the time of disclosure or at any time thereafter is in, or becomes part of, the public domain other than through a breach of this clause 55;
- 55.2.2 the Party receiving the information can prove was already known to it, or was independently acquired or developed by it without being in breach of its obligations under this clause 55;
- 55.2.3 became available to the Party receiving the information from another source in a non-confidential manner otherwise than in breach of an obligation of confidentiality; or

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55.2.4 is published by, or the publication of which is required by, a Responsible Authority or any court.

55.3 Permitted disclosure of Confidential Information

Notwithstanding the provisions of this clause 55, the Confidential Information may be disclosed:

55.3.1 by either Party to any Responsible Authority (where for the purposes of this clause 55.3 such definition shall be limited to South Africa) or to any of the shareholders (direct or indirect), agents, consultants, contractors, advisers, financiers, potential financiers, investors, potential purchasers of the interests of a shareholder (direct or indirect), insurers or lenders of such Party or its Affiliates, in any such case for the purpose of enabling the disclosing Party to comply with its obligations under this Agreement, provided that:

55.3.1.1 such Party notifies the recipient at or about the time of such disclosure that the information is confidential and should not be disclosed by the recipient to third parties; and

55.3.1.2 such Party shall be responsible for ensuring that the recipient keeps the Confidential Information confidential and shall accordingly be responsible for any failure of the recipient to do so;

55.3.2 by either Party as may be required by the regulations of any recognised securities exchange upon which the share capital of the Party (or any shareholder (direct or indirect) in the Party) is or is proposed to be from time to time listed or dealt in, and the Party making the disclosure shall, if reasonably practicable prior to making the disclosure, and in any event as soon as reasonably practicable thereafter, supply the other Party with a copy of such disclosure or statement and details of the persons to whom the Confidential Information is to be, or has been, disclosed;

55.3.3 by either Party as may be necessary to comply with any obligation under any applicable Law;

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55.3.4 by either Party if required by any court, any arbitrator or administrative tribunal or an expert in the course of proceedings before it to which the disclosing Party is a party; or

55.3.5 by either Party, if so agreed in writing by the Parties prior to the disclosure.

55.4 **Ownership and treatment**

55.4.1 Save for all Project Data, all information supplied by or on behalf of a Party shall remain the property of such Party, and this Agreement shall not operate to transfer ownership interest therein.

55.4.2 The Parties shall, in so far as is reasonably practicable, ensure that any copies of the Confidential Information, whether in hard copy or computerised form, shall clearly identify the Confidential Information as confidential.

56. **Miscellaneous matters**

56.1 **notices**

56.1.1 **methods of delivery**

Unless otherwise provided in this Agreement, all notices, requests, statements and other communications required or permitted between the Parties by this Agreement shall be in writing and either hand-delivered or sent by pre-paid registered post or facsimile to the address or number within South Africa of the Party concerned set out in clause 56.1.2.1 or such other address or number as contemplated in clause 56.1.2.1. No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

56.1.1.1 if delivered by hand during ordinary business hours, to its physical address in clause 56.1.2.1, when so delivered;

56.1.1.2 if delivered by pre-paid registered post, to its postal address in clause 56.1.2.1, ~~seven (7)~~ Business Days after posting, subject to proof of posting; and

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56.1.1.3 if delivered by facsimile, upon sending, subject to confirmation of uninterrupted transmission on a transmission report and provided that a hard copy is promptly dispatched to the recipient in the manner provided in clauses 56.1.1.1 or 56.1.1.2 above.

56.1.2 **addresses**

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

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

postal address: *[insert]*

physical address: *[insert]*

current fax no: *[insert]*

attention: *[insert]*

56.1.2.1.2 in the case of the Terminal Operator: *[insert]*

postal address: *[insert]*

physical address: *[insert]*

current fax no: *[insert]*

attention: *[insert]*

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

56.1.2.3 A Party may change that Party's physical or postal addresses for this purpose to another physical or postal address, as the case may be, in South Africa (and not in any other country) or its contact details, by

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giving at least fifteen (15) days' prior notice in writing to the other Party.

56.2 no partnership or agency

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

56.3 entire contract

56.3.1 This Agreement contains the whole agreement between the Parties with regard to the subject matter hereof and supersedes any prior written or oral agreement between them, and the Parties waive the right to rely on any alleged express provision not contained in this Agreement.

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

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

56.4 rights and remedies

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

56.5 further undertakings

The TNPA and the Terminal Operator shall perform, or procure the performance, of all further things, and execute and deliver (or procure the execution and delivery) of all further documents, as may be required by the Law or as may be desirable or necessary to implement or give effect to the Project, the purposes and intent of this Agreement and the transactions contemplated therein.

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56.6 no representations

Each Party acknowledges and agrees that it is not entering into this Agreement in reliance on and shall have no right of action against the other Party in respect of, any assurance, promise, undertaking, representation or warranty made by the other Party at any time prior to the Effective Date, unless the representation is recorded in this Agreement.

56.7 variation, cancellation and waiver

56.7.1 This Agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of each of the Parties to this Agreement.

56.7.2 The failure of any Party to exercise any contractual right or remedy shall not constitute a waiver thereof. No waiver shall be effective unless it is communicated in writing to the other Parties. No waiver of any right or remedy arising from a breach of contract shall constitute a waiver of any right or remedy arising from any other breach of this Agreement.

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

56.8 invalidity and severability

If any of the provisions of this Agreement becomes invalid, illegal or unenforceable for any reason, the validity, legality and enforceability of the remaining provisions of this Agreement shall not be impaired or affected in any way by such invalidity, illegality or unenforceability. In the event of any such deletion the Parties shall negotiate in good faith in order to agree the terms of a mutually acceptable and satisfactory alternative provision in place of the provision so deleted.

56.9 set-off

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

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56.10 costs

Each Party shall bear its own costs in relation to the negotiation and preparation of this Agreement and any amendments hereof.

56.11 applicable law

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

56.12 language

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

56.13 jurisdiction of South African courts

Subject to clause 53.5 (*fast-track dispute resolution*) and 53 (*Dispute Resolution*) generally, the Parties consent to the exclusive jurisdiction of the High Court of South Africa, Durban, for any proceedings arising out of or in connection with the Project and this Agreement.

56.14 public relations and publicity

56.14.1 The Terminal Operator acknowledges that certain information pertaining to the Project and the Project Data is required to be disclosed in accordance with the statutory reporting obligation of the TNPA to publish information about the performance of the Terminal Operator and or any other information as it may be required to publish from time to time in response to enquiries from:

56.14.1.1 Parliament and its members and officers;

56.14.1.2 the Auditor-General under the Public Audit Act No. 25 of 2004; and

56.14.1.3 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act No. 2 of 2000.

56.14.2 Subject to clause 56.14.3, neither Party shall communicate with representatives of the press, television, radio or other communications

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media on any matter concerning this Agreement without the prior approval of the other Party, such consent not to be unreasonably withheld.

56.14.3 To the extent that the TNPA is obliged to disclose or publish information pursuant to clause 56.14.1, it undertakes to the Terminal Operator, if time permits, to consult with the Terminal Operator prior to any communication contemplated by this clause 56.14.3, and if time does not so permit, such consultation shall be dispensed with by the Parties.

56.14.4 No facilities to photograph or film in or upon the Port Sites shall be given to or permitted by the Terminal Operator unless the TNPA has given prior written approval.

56.15 **information and audit access**

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

56.15.2 Without limiting the generality of the foregoing, the Terminal Operator shall:

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

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56.15.2.2 note and facilitate the TNPA’s compliance with the Promotion of Access to Information Act, 2000 if the TNPA is required to provide information to any person pursuant to that Act.

56.16 **counterparts**

This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original, and such counterparts or duplicates shall together constitute one and the same agreement.

56.17 **third parties**

The Parties intend that terms and conditions of this Agreement shall be solely for the benefit of the Parties and their respective successors and shall not confer any rights upon any third Parties.

56.18 **Lenders’ benefits**

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

Signed at on 2023

Witness for **Transnet National Port Authority**

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

2.

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Signed at _____ on _____ 2023

Witness for **[insert Terminal Operator]**

- 1.
.....
duly authorised and warranting such authority
- 2.

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Schedule 1

D&C Specifications

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

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Schedule 2

Operating Specifications

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

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Schedule 3

Constitutional Documents

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

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Schedule 4

Construction Agreement

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

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Schedule 5

Operations Agreement

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

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Schedule 6

Financial Model

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

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Schedule 7

Financiers Direct Agreement

[Note: to be provided in standard form with this Agreement]

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Schedule 8

Project Deliverables

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Schedule 9

OEMP Required Authorisations

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Schedule 10A

B-BBEE Requirements

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Schedule 10B

Terminal Operator's Supplier Development Plan

[Note: to be derived from the preferred bidder's tender submission]

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Schedule 11

Penalties

[Note: the penalties should be determined with reference to the financial and economic strength of the Project. The penalties applicable to each project are specifically devised for that project.]

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Schedule 12A

Port Site: Description of Services

[Description of Services at Port Site]

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Schedule 13

Equipment

[To be provided by the TNPA]

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Schedule 14

Construction Performance Guarantee

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Schedule 15

Operating Performance Guarantee

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Schedule 16

Final Maintenance Guarantee

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Schedule 17

Existing TNPA Agreements

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Schedule 18

Access and Way Leaves

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Schedule 19

Fees

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Schedule 20

Marine Service Charges

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Schedule 21

Port Dues

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Schedule 22

Programme for Construction Works

[Refer to Target Completion Date and Scheduled operations Commencement Date]

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Schedule 23

Details of Subcontractors' and Suppliers' Loss of Profits

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Schedule 24

Port Facility and Operating Arrangements

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