

**TERMINAL OPERATOR AGREEMENT IN RESPECT OF THE LIQUID BULK TERMINALS  
FOR A 25 (TWENTY-FIVE) YEAR CONCESSION AT THE PORT OF CAPE TOWN**

**between**

**TRANSNET NATIONAL PORTS AUTHORITY, a division of TRANSNET SOC LTD  
(Registration Number: 1990/000900/30)**

**and**

**( TERMINAL OPERATOR )**

**(Registration Number:)**

**Note to Bidders:**

1. All Bidders are to note 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. The Financiers Direct Agreement will be negotiated and agreed between the TNPA, the Preferred Bidder and the Lenders of the Preferred Bidder should third party finance be provided to undertake the project. This Financiers Direct Finance Agreement and the negotiable clauses of the Terminal Operator Agreement will be revised to ensure consistency between Terminal Operator Agreement and the Financiers Direct Finance Agreement.

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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 within which they appear, have the following meanings and cognate expressions shall bear corresponding meanings:

- |          |  |   |   |
|----------|--|---|---|
| 1.1.1.   | <b>"the Act"</b>                                 | - | the National Ports Act, 12 of 2005;   |
| 1.1.2.   | <b>"Actual Operations Commencement Date"</b>     | - | the date of commencement of Operations as stated in the notice issued by TNPA in terms of clause 29.4 ( <i>Approval to Commence Operations</i> ); |
| 1.1.3.   | <b>"Adjusted Highest Compliant Tender Price"</b> | - | the Highest Compliant Tender Price less, to the extent it is a positive amount, the aggregate of:   |
| 1.1.3.1. |  |   | the tender costs; and   |
| 1.1.3.2. |  |   | amounts that TNPA is entitled to set off or deduct under clause 59.11 (set-off),<br><br>plus the aggregate of:                                    |
| 1.1.3.3. |  |   | all credit balance on any bank accounts held by or on behalf of the Terminal Operator on the date that the highest-priced Tender is received; and |
| 1.1.3.4. |  |   | any insurance proceeds and other amounts owing to the Terminal Operator (and which the Terminal Operator is entitled to retain).                  |

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to the extent that:

- 1.1.3.5. the amounts in clauses above have not been directly taken into account in the Adjusted Highest Compliant Tender Price; and
- 1.1.3.6. TNPA is entitled to such amounts in accordance with this Agreement;
- 1.1.4. **"the Agent"** - the agent bank appointed by the Lenders as their agent;
- 1.1.5. **"this Agreement"** - this terminal operator agreement and its schedules, as amended, extended, replaced and varied from time to time;
- 1.1.6. **"Amended B-BBEE Codes"** - the amended B-BBEE Codes of Good Practice, published under Government Gazette 42496, on 31 May 2019, in terms of section 9(1) of the B-BBEE Act;
- 1.1.7. **"Associated 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 Finance Agreements) that TNPA may designate as falling within this clause 1.1.7;
- 1.1.8. **"Authority Change"** - has the meaning ascribed to it in clause 34 (*Authority Changes*);
- 1.1.9. **"Base Case Financial Model"** - the base case financial model for the Project, which is attached to this Agreement as Schedule 6 and which has been agreed by TNPA, the Terminal Operator and the Lenders;

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- 1.1.10. **“B-BBEE”** - Broad-Based Black Economic Empowerment;
- 1.1.11. **“B-BBEE Act”** - Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended;
- 1.1.12. **“B-BBEE Commitment Schedule”** - the schedule setting out the Terminal Operator’s commitments on B-BBEE as set out in Schedule 10A;
- 1.1.13. **“B-BBEE Improvement Plan”** - a plan for the improvement of the Terminal Operator’s Contributor Status Level as set out in Schedule 10B;
- 1.1.14. **“Berths”** - the berth or berths to which the Terminal is connected via pipelines used for the conveyance of liquid bulk Cargoes to and from the Terminal as reflected in Schedule 1 (Project Site). Berths are common-user berths, open to use by other liquid bulk terminal operators and shipping lines calling at such other operators’ liquid bulk terminals;
- 1.1.15. **“Black Ownership”** - the effective ownership of shares by Black People, which shall be determined with reference to the Amended B-BBEE Codes and evidenced by way of a B-BBEE verification certificate or sworn affidavit;
- 1.1.16. **“Black Ownership Commitment Schedule”** - the schedule setting out the Terminal Operator’s commitments relating to Black Ownership of the Terminal Operator as set out in Schedule 10B;

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- 1.1.17. **“Black People” or “Blacks”** - is a generic term defined in the B-BBEE Act to mean natural persons who are Africans, Coloureds and Indians:
- 1.1.17.1. who are citizens of the Republic of South Africa by birth or decent; or
- 1.1.17.2. who became citizens of the Republic of South Africa by naturalisation –
- 1.1.17.1.1. before 27 April 1994; or
- 1.1.17.1.2. on or after and who would have been entitled to acquire citizenship by naturalisation prior to that date;
- 1.1.18. **“Business Day”** - any day that is not a Saturday, Sunday or official public holiday in South Africa;
- 1.1.19. **“Cargo”** - means for the purpose of this RFP all Liquid Petroleum and related products thereof, but excluding Liquefied Natural Gas (LNG), Any reference in this document to "cargo" or "cargoes" includes Liquid Bulk Cargoes;
- 1.1.20. **“Cargo Controlling Interest”** - the entitlement to vote more than 49% of the voting rights or have the ability to control the exercise of more than 49% of the voting rights associated with the shares, securities or similar interests of an entity that owns Cargo in whole, whether pursuant to a shareholders' agreement or otherwise, that is transported, handled

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and/or stored at any port facility at the Port of [...]; and/or

1.1.21.1.

the right to appoint or elect, or control the appointment or election of the board of directors or similar governance body of the entity that owns Cargo in whole, that is transported, handled and/or stored at any port facility at the Port of [...], that controls more than 49% of the votes at a meeting of the board of directors or similar governance body of such entity; and/or

1.1.21.2.

the ability to materially influence the policy of the entity that owns Cargo that is transported, handled and/or stored at any port facility at the Port of [...], in a manner comparable to a person or entity, that in the ordinary commercial practice, would be able to exercise an element of control referred to in the sub-paragraphs above.

1.1.21. **“Cargo Ownership Interest”**

means ownership of Cargo that is transported, handled and/or stored at any port facility at the Port of [...], in whole; or ownership of Cargo that is transported, handled and/or stored at any port facility at the Port of [...], in whole; or

the holding of shares or similar interests in an entity that owns Cargo, that is transported, handled and/or stored at any port facility at the Port of [...], in whole, exceeding 49% of the issued share capital or similar capital of such juristic person;

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- 1.1.22. **“Certifications”** - the following certifications or certifications that are equivalent to the certifications listed below:
- 1.1.23.1. ISO 14001;
- 1.1.23.2. BS OHSAS 18001;
- 1.1.23.3. ISO 9001; and
- 1.1.23.4. NOSA 1 – 2 Star or Equivalent;
- 1.1.23. **“Change in Control”** - any change whatsoever in Control whether effected directly or indirectly;
- 1.1.24. **“Change in Law”** - the coming into effect, after the Signature Date, of any Law, or any amendment or variation to any Law, other than any Law that on or before the Signature Date, has been published:
- 1.1.25.1. as an Act but has not been brought into effect;
- 1.1.25. **“Companies Act”** - the Companies Act, 71 of 2008;
- 1.1.26. **“Compensation Date”** - either:
- 1.1.27.1. clause 49.2 (*retendering procedure*) applies, the earlier of:
- 1.1.26.1.1. the date that the New Terminal Operator Agreement is entered into; and
- 1.1.26.1.2. the date on which TNPA pays the Adjusted Highest

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Compliant Tender Price to the Terminal Operator; or

1.1.26.1.3. if clause 49.3 (*no retendering procedure*) applies and TNPA exercises its option to purchase the Terminal Equipment as contemplated in clause 50.3.1 read with clause 7.2, the date on which TNPA pays the purchase price for the Terminal Equipment to the Terminal Operator;

1.1.26.1.4. if clause 50 (*Termination Amount for TNPA Default*) applies, the date on which TNPA pays to the Terminal Operator monies that are payable to the Terminal Operator for TNPA Default;

1.1.27. **"Compensation Event"**

- any breach by TNPA of any of its obligations under this Agreement (save for any breach that constitutes TNPA default), to the extent in each case that the breach is not caused or contributed to by the 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 40 (*Consequences of a Compensation Event*);

1.1.28. **"Completion Certificate"**

- the certificate to be issued by the Independent Certifier in terms of clause 28.8 (completion of the Works) upon the completion of the Works;

- 1.1.29. **"Concession Fees"** - the concession fees payable by the Terminal Operator to TNPA, in respect of the rights to undertake the Project as set out in clause 6, which fees consist of fixed concession fees and Variable Concession Fees;
- 1.1.30. **"Confidential Information"** - any and all:  
information relating to the design of the Facility or to any Intellectual Property Rights of the Terminal Operator;
- 1.1.31.1. information in respect of or relating to the Base Case Financial Model as well as such model and each Updated Financial Model; and
- 1.1.31.2. other information which relates to the undertaking or finances of any of the Parties and which is identified by the Party releasing such information as being confidential and the release of which is made in connection with this Agreement;
- 1.1.31. **"Consents"** - any consent, registration, filing, agreement, notarisation, certificate, licence, approval, permit, authority, or any exemption from the aforesaid, by, with or from any Relevant Authority, which is required from time to time in respect of the Project or to be held by the Terminal Operator or which has any impact (whether direct or indirect) on the Project or the Terminal Operator;

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- 1.1.32. **“Constitution”** - the Constitution of the Republic of South Africa Act, 108 of 1996;
- 1.1.33. **“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 TNPA;
- 1.1.34. **“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 Works, which agreement shall, in respect of the Works, be in substantially the same form and content as the agreement attached hereto as Schedule 4.
- 1.1.35. **“Construction Completion”** - the execution of the Works that are required for the use of the Terminal and for the services to be provided safely;
- 1.1.36. **“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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- 1.1.37. **“Construction Documents”** - all documents, drawings, data, reports, specifications and other information (whether in printed form or in electronic form) produced in respect of the Works;
- 1.1.38. **“Construction Performance Guarantee”** - the performance guarantee to be issued by a financial institution of whom TNPA approves on behalf of the Construction Contractor in respect of the 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 TNPA;
- 1.1.39. **“Contractors”** - any Subcontractor appointed by the Terminal Operator for the Project;
- 1.1.40. **“Contract Year”** - each period of 12 (twelve) consecutive calendar months, commencing on the Effective Date and thereafter commencing on the anniversary of the Effective Date;
- 1.1.41. **“Contributor Status Level”** - the B-BBEE contributor status level of the Bidder as determined by their compliance with the generic B-BBEE scorecard in terms of the Amended B-BBEE Codes;
- 1.1.42. **“Control”** - has the same meaning as defined in the Companies Act, and “Controlled shall have the same meaning”;
- 1.1.43. **“Corrupt Act”** - any conduct that constitutes an offence under the Prevention and Combatting of Corrupt Activities Act, 12 of 2004, including but not limited to:

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1.1.44.1.

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

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

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

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

1.1.44.2.

committing any offence in connection with this Agreement:

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- 1.1.44.3. under any law from time to time dealing with bribery, corruption or extortion;
- 1.1.44.4. under any law creating offences in respect of fraudulent acts; or
- 1.1.44.5. at common law, in respect of fraudulent acts in relation to this Agreement or any other contract with TNPA or any other public body; or
- 1.1.44.6. defrauding or attempting to defraud or defraud or conspiring to defraud TNPA or any other public body in relation to this Agreement;
- 1.1.44. **“CPI”** - the consumer price index excluding interest on mortgage bonds, for metropolitan and other urban areas (Base 2000=100) published from time to time by Statistics SA in Statistical Release P0141.1, provided that if, after the Signature Date:
- 1.1.45.1. such index ceases to be published; or
- 1.1.45.2. the Terminal Operator and TNPA agree or, failing agreement, if it is determined pursuant to clause 57.7 (fast-track dispute resolution) that, due to a change in circumstances, the index is no longer representative, then, from the date that the index was last published, the Parties shall use such other index as agreed between them or, failing agreement, as determined pursuant to clause 57.7 (fast-track dispute resolution) as being a fair and reasonable replacement index;

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- 1.1.45. **“Day”** - any period of 24 (twenty four) hours that starts at 00h01 and ends at 24h00;
- 1.1.46. **“D & C Specifications”** - The design and construction specifications detailed in Schedule 2;
- 1.1.47. **“Decommissioning-EMP”** - the environmental management plan to be developed by the Terminal Operator for the decommissioning of the Terminal as contemplated in clause 12.17;
- 1.1.48. **“Decommissioning Period”** - a maximum period of 6 (six) months commencing on the 1<sup>st</sup> (first) business day before the Expiry Date, provided that the TNPA has delivered the notice contemplated in clause 7.7, requiring the Terminal Operator to demolish and remove the Terminal Infrastructure;
- 1.1.49. **“Deemed New Terminal Operator Agreement”** - a contract on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:
- 1.1.50.1. if this Agreement is terminated prior to the Operations Date, then the Operations Commencement Date shall be extended by a period to allow a New Terminal Operator to achieve Service Commencement;
- 1.1.50.2. any penalties accrued in terms of Schedule 11 (*Penalties*) shall be cancelled; and
- 1.1.50.3. the term of such contract shall be for a period equal to the term from the Termination Date to the Expiry Date;

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- 1.1.50. **“Design and Construction Period”** - The date between the Effective Date and the Actual Operations Commencement Date;
- 1.1.51. **“Detailed Design”** - the detailed design for the Works set out in Schedule 2, which is to be prepared by the Terminal Operator after the Signature Date and approved by the Independent Certifier, in terms of clause 28.1 (performance of the Detailed Design);
- 1.1.52. **“Development Period”** - the period from the Effective Date to the day immediately preceding the Actual Operations Commencement Date;
- 1.1.53. **“Distributions”** - whether in cash or in kind, any:
- 1.1.54.1. dividend or other distribution of share capital;
- 1.1.54.2. reduction of share capital, stated capital, any capital redemption fund or any share premium account;
- 1.1.54.3. cancellation, conversion, redemption or repurchase of shares or any other variation whatsoever in share capital;
- 1.1.54.4. payment in respect of the shareholder loans (whether of principal, interest, breakage costs or otherwise);
- 1.1.54.5. payment, loan or other financial assistance, transfer of rights or other assets or receipt of any other benefit to the extent put in place after the Signature Date and not in the ordinary course of business, on an arm’s-length basis or otherwise on

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reasonable commercial terms to any shareholders of the Terminal Operator or their Related Parties in respect of the Project; or

1.1.54.6.

any release of any contingent liability of any of the Terminal Operator's shareholders or their Related Parties in respect of their financial obligations to the Terminal Operator and or the Lenders, including any security company or trust holding any security in respect of the Finance Agreements for the benefit of the Lenders;

1.1.54. **“Economic Development Plan”**

- the Terminal Operator's development plan, which includes economic development value summary during the Construction phase and economic development value summary during the operations phase as set forth in Schedule 10C hereto;

1.1.55. **“Effective Date”**

- the 1<sup>st</sup> (first) Business Day following the date on which the last of the Suspensive Conditions is fulfilled, or if capable of being waived, has been waived;

1.1.56. **“Encumbrance”**

- any encumbrance, lien, charge, hypothec, pledge, mortgage, title retention agreement, security interest of any nature, adverse claim, exception, reservation, easement, right of occupation, any matter capable of registration against title, option, right of pre-emption, right of first refusal, privilege or contract to create any of the foregoing; and variations of the word, including **“Encumber”** and

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**“Encumbered”**, shall have corresponding meanings;

- 1.1.57. **“Environment”** - the aggregate of surrounding objects, conditions and influences that influence the life and habitats of man or any other organism or collection of organisms, and including all or any of the following media: air (including the air within any building or the air within any other man-made or natural structure above or below ground), water (including inland waters, groundwater and water in drains and sewers) and the Project Site;
- 1.1.58. **“Environmental Authorisations”** or - any authorisations, permits, consents, licences, certificates, orders and exemptions to be obtained from the Relevant Authority in compliance with the Environmental Laws in order for the Terminal Operator to undertake the Project;
- 1.1.59. **“Environmental Laws”** - means all applicable laws (including general remedies and duties of care), statutes, regulations, statutory guidance notes and final and binding court and other tribunal decisions of any relevant jurisdiction in force and binding on the Terminal Operator at the date of this Agreement whose purpose is:
- 1.1.60.1. to protect, or prevent pollution of, or to remedy damage to the Environment;
- 1.1.60.2. to protect or prevent or compensate harm to human health and safety; or

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- 1.1.60.3. to regulate emissions, discharges, or releases of Hazardous Substances into the Environment, or to regulate the use, treatment, storage, burial, disposal, transport or handling of Hazardous Substances,
- and all by laws, codes, regulations, decrees or orders issued or promulgated or approved thereunder for such purposes to the extent that the same have force of law and are binding either or both of TNPA and the Terminal Operator at the date of this Agreement;
- 1.1.60. **“Environmental Management Plan”** - the environmental management plan and system prepared in respect of the Project for the monitoring and management of environmental issues raised as a result of the environmental impact assessment and based on TNPA’s environmental policy (which will be provided by TNPA to the Terminal Operator) and any Environmental Consents issued in respect of the Project pursuant to the Environment and the Environmental Laws;
- 1.1.61. **“Equity”** - any shares issued in the authorised share capital of the Terminal Operator, any share premium on such issued shares, any debentures issued by the Terminal Operator and any loans to the Terminal Operator by its shareholders or debenture-holders;
- 1.1.62. **“Equity IRR”** - the projected blended rate of return to the Terminal Operator’s shareholders and their Related Parties over the full Operations Period, having regard to

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- Distributions made and forecast to be made and as detailed in the Base Case Financial Model;
- 1.1.63. **“Exempt Refinancing”** - any refinancing:
- 1.1.64.1. that affects any sale or cession of the Equity or securitisation of the rights attaching to the Equity, provided that the exemption contemplated in clause 36 (*Refinancing*) in relation to any such transaction shall not limit the application of clause 18 (*Shareholding in the Terminal Operator*);
- 1.1.64.2. required to raise the nominal post tax Equity IRR calculated immediately prior to the Refinancing (having regard to the Updated Financial Model, as updated to that time) to the nominal post tax Equity IRR at the Signature Date (having regard to the Base Case Financial Model, being [●]%), except if such Refinancing may increase the amounts payable by TNPA on termination of the Agreement; or
- 1.1.64.3. that arises solely from a change in taxation or accounting treatment;
- 1.1.64.4. that comprises waivers, approvals and similar actions arising in the day-to-day administration of breaches of warranties or representations or other provisions or late or non-provision of required information under any of the Subcontracts;
- 1.1.64.5. that affects any syndication, sell-down, cession or grant of any rights of participation or security by any Lender (or

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any agent acting on its behalf, or any security company or trust holding any security in respect of the Senior Debt for the benefit of the Lenders) of or in relation to any of its rights under any of the Finance Agreements in favour of any Qualifying Financial Institution, which is not already connected in any way to the Project;

- 1.1.64. **“Existing Buildings”** - the existing buildings located within the Project Site and depicted in Schedule 1 (*Project Site and Existing Building*);
- 1.1.65. **“Expert”** - has the meaning ascribed to it in clause 56 (*Expert Determination*) of this Agreement;
- 1.1.66. **“Expiry Date”** - date on which this Agreement shall expire, being at the end of the Project Term;
- 1.1.67. **“FDA ”** - Financier Direct Agreement to be entered into between 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 8;
- 1.1.68. **“Final Maintenance Guarantee”** - the final maintenance guarantee to be issued by a financial institution (approved by TNPA) in favour of TNPA on behalf of the Terminal Operator, which shall be substantially in the form of the guarantee attached to this Agreement as Schedule 17 and shall be on terms to TNPA's satisfaction;
- 1.1.69. **“Finance Agreements”** - the agreements entered into by the Terminal Operator and the Lenders (amongst others) in respect of the provision of loan facilities, credit facilities, hedging arrangements and guarantee

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facilities provided to the Terminal Operator for the purpose of financing the Terminal Operator's obligations in respect of the Project and under this Agreement, and any security documents in relation to such financing, all of which shall be on terms and conditions to TNPA's satisfaction;

- 1.1.70. **"Force Majeure"** - has the meaning ascribed to it in clause 41 (*Force Majeure*);
- 1.1.71. **"Force Majeure Event"** - any event of Force Majeure;
- 1.1.72. **"Handover Equipment"** - Terminal Equipment that is to be handed over to the Terminal Operator by TNPA as at the Effective Date, as listed in Schedule 1A;
- 1.1.73. **"Hazardous Substances"** - means:
- 1.1.74.1. 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
- 1.1.74.2. 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

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- pollutants,” or other words of similar import, in terms of all applicable Legislation;
- 1.1.74. **“Highest Compliant Tender Price”** - the price offered by the Tenderer (if any) with the highest tender price and, if no Tenders are received, zero;
- 1.1.75. **“IMDG Code”** - the International Maritime Dangerous Goods Code, published by the International Maritime Organisation;
- 1.1.76. **“IAS 18”** - International Accounting Standard 18 (revenue), applicable as at the Signature Date;
- 1.1.77. **“Incumbent Terminal Operator”** - the entity that is currently undertaking Operations at the Terminal;
- 1.1.78. **“Independent Certifier”** - the person appointed from time to time jointly by TNPA and the Terminal Operator as the independent certifier in respect of the Project, and whose duties are specified in this Agreement under clause 27 (*Independent Certifier*), the Construction Agreement, the Operations Agreement and the Independent Certifier Agreement, the last of which agreements is attached to this Agreement as Schedule 13;
- 1.1.79. **“Independent Certifier Agreement”** - the agreement to be concluded between TNPA, the Terminal Operator and the Independent Certifier setting out, *inter alia*, the roles and functions of the Independent Certifier in relation to the Project which shall be substantially in the form of the agreement attached to this Agreement in Schedule 13;

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- 1.1.80. **“Independent Expert”** - shall mean:
- 1.1.81.1. 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
- 1.1.81.2. an attorney or advocate of not less than 10 (ten) years professional experience agreed to between the Parties, and failing agreement nominated (at the request of either Party) by the Chairman for the time being of the Legal Practice Council, if the matter relates primarily to a legal matter; or
- 1.1.81.3. 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;
- 1.1.81.4. a port facilities manager of not less than 10 (ten) years professional experience agreed to between the Parties and failing agreement nominated (at the request of any Party) by the President for the time being of South African Facilities Management Association, if the matter

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- relates primarily to a port facilities management matter;
- 1.1.81. **“Insurance”** - the project insurance that the Terminal Operator is required to purchase and maintain in terms of clause 16 (*Project Insurance*);
- 1.1.82. **“Intellectual Property Rights”** - all registered or unregistered trademarks, service marks, patents, design rights (whether the aforementioned rights are registered, unregistered or formed pending applications), utility models, applications for any of the foregoing, copyrights (including copyright in any software programmes, data and documents), database rights, the sui generis rights of extraction relating to databases and any similar or analogous rights to any of the above, whether arising or granted under the Laws or any other jurisdiction;
- 1.1.83. **“International Best Practice”** - in relation to the design, construction, equipping and commissioning of the Terminal, and in relation to the provision of the Operation and Maintenance, 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 or the same type of business or undertaking as the Operations (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;

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- 1.1.84. **“ISPS Code”** - the International Ship and Port Terminal Security Code, as referred to in the Merchant shipping (Maritime Security) Regulations, 2004, published under Government Notice R751 in Government Gazette 26488 of 21 June 2004;
- 1.1.85. **“Key Performance Areas”** - the key performance areas that the Terminal Operator shall be required to meet for the Operations Period, which have been agreed upon by TNPA and the Terminal Operator and are set out in clause 28 (*Design and Construction*), 30 (*Operation and Maintenance*) and Schedule 16C of this Agreement;
- 1.1.86. **“Laws”** - the Constitution, the common law, Legislation, and all judicial decisions and any notifications or other similar directives made pursuant thereto that have the force of law, issued by any executive, legislative, judicial or administrative entity in South Africa or by TNPA or the municipality in which the Port is located;
- 1.1.87. **“Legislation”** - all applicable statutes, statutory instruments, bye-laws, regulations, orders, rules, executive orders and other secondary, provincial or local legislation, treaties, directives and codes of practice having the force of law in South Africa;
- 1.1.88. **“Lenders”** - any or all of the persons (other than providers of Equity) who conclude Finance Agreements with the Terminal Operator in respect of the Project;
- 1.1.89. **“Long Stop Date”** - the last Business Day of the 6<sup>th</sup> (sixth) month after the Scheduled Operations

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Commencement Date (as that date may be extended by the parties in writing from time to time in terms of this Agreement) being the date by which Operations and Maintenance must have commenced failing which TNPA shall be entitled to terminate this Agreement in accordance with the provisions in clause 41 (*Terminal Operator Default*);

- 1.1.90. **“Losses”** - losses, damages, liabilities, claims, actions, proceedings, demands, costs, charges or expenses of any nature in respect of the Project;
- 1.1.91. **“NEMA”** - National Environmental Management Act, 107 of 1998;
- 1.1.92. **“NERSA”** - National Energy Regulator established in terms of National Energy Regulator Act, 40 of 2004;
- 1.1.93. **“NERSA Legislation”** - legislation including regulations administered by NERSA and that is applicable to the Project;
- 1.1.94. **“New Terminal Operator Agreement”** - a contract on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

1.1.95.1.

if this Agreement is terminated prior to the Operations Commencement Date, then the Scheduled Operations Commencement Date shall be extended by a period to allow the Successor Terminal Operator to achieve commencement of Operations on or before

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- the extended Scheduled Operations Commencement Date;
- 1.1.95.2. any penalties accrued in terms of Schedule 11 and/or warning notices shall be cancelled;
- 1.1.95.3. the term of such contract shall be a period equal to the period from the Termination Date until the Expiry Date; and
- 1.1.95.4. any other amendments, which do not adversely affect the Terminal Operator;
- 1.1.95. **“Operations”** - services provided at the Terminal, consisting of handling Cargo, storing Cargo, transshipment of Cargo and delivering Cargo to vessels and services related thereto;
- 1.1.96. **“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;
- 1.1.97. **“Operations Certificate”** - the certificate issued by the Independent Certifier for the commencement of the Operations, in terms of clause 29.2.6;
- 1.1.98. **“Operations Date”** - the date, following the issue of the relevant notice and licence by TNPA, on which the Terminal Operator shall be entitled to undertake the Operations;
- 1.1.99. **“Operations Period”** - the period from the Actual Operations Commencement Date until the expiry or Termination Date of this Agreement as the case may be;

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- 1.1.100. **“Operations and Maintenance”** - all operation and maintenance activities and obligations of the Terminal Operator in respect of the Project, which shall include the provision of services at the Terminal in respect of the loading and unloading of liquids from vessels berthed in the Port for that purpose and the storage of such liquids until removed from the Terminal, that are required in order to undertake the Project and for the operation and maintenance of the Terminal, in accordance with the requirements of Schedule 16A (*Operating Specifications*) of this Agreement and International Best Practice;
- 1.1.101. **“Operations and Maintenance Manual”** - manuals that the Terminal Operator shall utilise in conducting Operating and Maintenance as contemplated in clause 30.2 (*Standards of Operation and Maintenance*);
- 1.1.102. **“Operation Performance Guarantee”** - the performance guarantee to be issued by a Qualifying Financial Institution (that TNPA approves) on behalf of the Operator Contractor 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 TNPA;
- 1.1.103. **“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;

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- 1.1.104. **“Operating Specifications”** - the specifications and standards in accordance with which the Operation and Maintenance activities are to be conducted and the Terminal is to be maintained and upgraded, all of which are detailed in Schedule 16A;
- 1.1.105. **“Operator”** - the person who is appointed as the Operation and Maintenance subcontractor by the Terminal Operator in the Operations Agreement, and any replacement or successor-in-title of such person;
- 1.1.106. **“Parties”** - TNPA and the Terminal Operator;
- 1.1.107. **“PFMA”** - the Public Finance Management Act, 1 of 1999;
- 1.1.108. **“Performance Guarantees”** - the Operation Performance Guarantee, the Construction Performance Guarantee and the Final Maintenance Guarantee;
- 1.1.109. **“Performance Penalties”** - penalties payable by the Terminal Operator for failure to meet or comply with the minimum performance standards, Key Performance Areas and Operating Specifications as set out in Schedule 16A;
- 1.1.110. **“Permitted Borrowing”** - at any time after the Signature Date, any advance made to the Terminal Operator under the Finance Agreements for the purposes specified therein;
- 1.1.111. **“Petroleum Pipelines Act”** - Petroleum Pipelines Act 60 of 2003, as amended;
- 1.1.112. **“the Port”** - the Port of Cape Town which been established by and equipped in terms of the National Ports Act South Africa;

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- 1.1.113. **“Port Facility Security Officer”** - a security officer appointed by the Terminal Operator in accordance with the provisions of the ISPS Code and the certificate issued in terms of the ISPS Code in respect of the Terminal;
- 1.1.114. **“Port Infrastructure”** - the basic common use structures of the Port of Cape Town 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;
- 1.1.115. **“Port Regulator”** - established in terms of section 80(1) of the Act;
- 1.1.116. **“Port Rules”** - any rules, by-laws, regulations and delegated legislation issued from time to time in respect of the operation of the Port specifically or ports in South Africa generally and or in respect of the behaviour, conduct and manner of conducting business of users of the Port specifically or ports in South Africa generally;
- 1.1.117. **“Port Users”** - any other person, other than the Terminal Operator, organisation and/or agency utilizing the Terminal 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;

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- 1.1.118. **“Private Siding”** - a railway line in private use which is connected to TNPA's railway lines by means of an agreed turnout, as well as any associate shunting yard, marshalling yard, the siding and siding extension or any section of railway line which provides access between TNPA's railway lines and the Terminal, as described in Schedule 1 (Project Site);
- 1.1.119. **“Project”** - design, development, Terminal Equipment procurement, finance, Operation and Maintenance and the transfer of the liquid bulk Terminal for the handling of Cargo at the Port and Project Site for a period of 25 (twenty-five) years;
- 1.1.120. **“Project Deliverables”** - the principal rights and obligations of the Terminal Operator, as specified in Schedule 16B of this Agreement including those specified in clause 5.5 (*Terminal Operator's Obligations*) of this Agreement and the Key Performance Areas;
- 1.1.121. **“Project Documents”** - all drawings, data, books, reports, documents, software, source codes and manuals and other information, which the Terminal Operator, the Construction Contractor and/or Operator has or have been using and which are required for the Works and/or necessary for the continuing Operation and Maintenance;
- 1.1.122. **“Project Site”** - the site detailed in Schedule 1, which includes the Port Infrastructure, linked to or associated with the Terminal, provided by TNPA to the Terminal Operator for use in respect of the Project;

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- 1.1.123. **“Project Term”** - the period from the Effective Date to the end of the Operations Period or the Termination Date, as the case may be;
- 1.1.124. **“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;
- 1.1.125. **“Qualifying Financial Institution”** - a bank as defined in section 1 of the Banks Act, 1990, any pension fund or provident fund registered in terms of the Pension Funds Act, 1956, any unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981, any long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 or any short-term insurer being a person registered or deemed (in terms of the Short Term Insurance Act, 1998) to be registered as a short-term insurer in that statute, or any financial institution that is established outside of South Africa in accordance with legislation in the place of its establishment, which legislation is analogous with any of the aforementioned legislation;
- 1.1.126. **“Quarter” or “Quarterly”** - a 3 (three) month period commencing on 1 April annually and occurring every 3 (three) months thereafter;
- 1.1.127. **“Rand” or “R”** - the lawful currency of South Africa;

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- 1.1.128. **“Real Base Case Project IRR”** - the real pre-Tax Project internal rate of return as set out in the Financial Model;
- 1.1.129. **“Rectification Costs”** - for the purposes of any Termination Date that occurs during the Operations Period, an amount equal to the reasonable and proper costs incurred by TNPA in ensuring that Operations and Maintenance are available;
- 1.1.130. **“Refinancing”** - at any time after the Signature Date:
- 1.1.131.1. 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;
- 1.1.131.2. 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;
- 1.1.131.3. the disposition or encumbering (by whatever means) of any rights under any of the Finance Agreements and or the Constitutional Documents or the creation or granting of any other benefit or interest in any of the Finance Agreements and/or the Constitutional Documents or any of the Terminal Operator's other contracts, revenues or the Terminal; and/or
- 1.1.131.4. any other arrangements having any of the effects in clauses 36.1.1 to 36.1.4;

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- 1.1.131. **“Refinancing Gain”** - in relation to any Refinancing (other than an Exempt Refinancing), an amount equal to the greater of nil and  $(A - B) - C$ , where:
- 1.1.132.1. A = the net present value of the Distributions forecast immediately prior to such Refinancing (having regard to the Updated Financial Model, as updated to that time), taking into account the effect of the Refinancing, to be made over the remaining Operations Period;
- 1.1.132.2. B = the net present value of the Distributions forecast immediately prior to such Refinancing (having regard to the Updated Financial Model, as updated to that time), not taking into account the effect of the Refinancing, to be made over the remaining Operations Period; and
- 1.1.132.3. C = any adjustment required to raise the nominal post tax Equity IRR calculated immediately prior to such Refinancing (having regard to the Updated Financial Model, as updated to that time) to the nominal post tax Equity IRR as at the Signature Date (having regard to the Base Case Financial Model, such IRR being **[●]%**);
- 1.1.132. **“Reinstatement Works”** - has meaning as defined in clause 16.3.3.1;
- 1.1.133. **“Related Party”** - a person who:
- 1.1.134.1. 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; or

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- 1.1.134.2. any person who holds at least 5% Equity in the Terminal Operator;
- 1.1.134. **“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 enters into any contract, agreement, understanding, loan, advance or guarantee with, or for the benefit of, a Related Party (other than the Terminal Operator), but excluding the Finance Agreements;
- 1.1.135. **“Relevant Authority”** - National and or Provincial legislature, any agency, local authority, department, inspectorate, minister, ministry, official or public or statutory person (whether autonomous or not) having jurisdiction over any or all of the Parties or the subject matter of this Agreement. A Relevant Authority shall not include any Utility operator or provider;
- 1.1.136. **“Relief Event”** - any of the following:
- 1.1.137.1. fire, explosion, tempest, flood, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, drought, cyclone, riot and civil commotion (including protestor action), or act of sabotage, or pressure waves caused by devices travelling at supersonic speed;
- 1.1.137.2. (without limiting the obligations of the Terminal Operator regarding service level

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- specifications) failure by any Relevant Authority, Utility or other like body to carry out works or provide services;
- 1.1.137.3. accidental loss or damage to the Terminal;
- 1.1.137.4. off-site failure or shortage of power, fuel or transport;
- 1.1.137.5. blockade or embargo which does not constitute a Force Majeure Event;
- 1.1.137.6. the discovery of any heritage objects or resources or conditions on the Project Site that could not reasonably have been foreseen or discovered by proper due diligence, by the Terminal Operator;
- 1.1.137.7. any delay in obtaining any Consent, other than as a result of any act, omission or delay on the part of the Terminal Operator; or
- 1.1.137.8. any official or unofficial strike, lockout, go slow or other such labour disputes generally affecting the shipping or port industries or a significant sector of either of them, unless any of the events listed in clauses [...] to [...] inclusive arises (directly or indirectly) as a result of any negligence, willful act or default of the Terminal Operator or any Subcontractor;
- 1.1.137. **“SAMSA”** - South African Maritime Safety Authority;
- 1.1.138. **“Schedules”** - the schedules to this Agreement, as amended, replaced and varied from time to time;

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- 1.1.139. **“Scheduled Operations Commencement Date”** - 30 (thirty) Business Days following the date of the Signature Date, which is the date provision of which the Operations are required to have commenced;
- 1.1.140. **“Senior Debt”** - the amount owed to the Lenders and or the hedging counterparties (as the case may be), subject to clause 37 (*Foreign Exchange Risk*), and calculated at the relevant date by deducting from the aggregate of the items listed at clause 1.1.138.1. to 1.1.131.4 the amount described in clause [...], determined as set out below and (save in the case of manifest error) as certified to TNPA by the Agent:
- 1.1.141.1. the principal amounts owing by the Terminal Operator to the Lenders under the Finance Agreements;
- 1.1.141.2. amounts necessary to discharge the Terminal Operator's obligations under hedging agreements, subject to clause 37 (*Foreign Exchange Risk*);
- 1.1.141.3. interest, fees, commissions, liabilities, expenses and costs (including breakage costs) payable by the Terminal Operator to the Lenders under the Finance Agreements and under hedging agreements (excluding, for any Finance Agreement other than any hedging agreement, fees or other mandatory additional payments required to be paid exclusively in respect of the early repayment of the principal of any loan or guarantee or the early payment of Concession Fees under any lease before its normal maturity or compensation for the

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loss of future interest from the date of early repayment of the principal of any loan or guarantee or the early payment of Concession Fees under any lease before its normal maturity):

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

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

to the extent that they have not been applied towards reducing the amount in clause 1.1.140 above before the date of payment pursuant to clause 54 (*Payment of Termination Amount*), an amount equal to the aggregate of all credit balances on any bank accounts held by or on behalf of the Terminal Operator over which the Lenders (or the Agent) have enforced their security; but

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

- 1.1.141. **“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;
- 1.1.142. **“South Africa”** - the Republic of South Africa;

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- 1.1.143. **"Subcontract"** - The agreement concluded between the Terminal Operator and a Subcontractor;
- 1.1.144. **"Subcontractors"** - any subcontractor of the Terminal Operator, who has contracted directly with the Terminal Operator in respect of the Project;
- 1.1.145. **"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 FDA;
- 1.1.146. **"Successor Terminal Operator"** - any person who has been appointed in terms of Part VI to take over the Operation and Maintenance and undertake the Operations in the place of the Terminal Operator;
- 1.1.147. **"Suitable Substitute Terminal Operator"** - a person approved by TNPA as:
- 1.1.148.1. having the appropriate technical and financial ability to perform the rights and obligations of the Terminal Operator under this Agreement;
- 1.1.148.2. employing persons having the appropriate qualifications, experience and technical competence; and
- 1.1.148.3. having sufficient resources available to it (including financial resources and subcontracts) to perform the obligations of the Terminal Operator under this Agreement;
- 1.1.148. **"Supplier Development Plan"** - the Terminal Operator's supplier development plan which includes the supplier development value summary

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- worksheet as set forth in Schedule 10D hereto;
- 1.1.149. **“Tax”** - VAT, any tax, levy, impost, duty or other charge or withholding of a similar nature (including any related penalty or interest);
- 1.1.150. **“Tender”** - any tender submitted by a Tenderer that meets the qualification criteria notified under clause 49.2 (*retendering procedure*);
- 1.1.151. **“Tenderer”** - a tenderer who is a Suitable Substitute Terminal Operator having submitted a Tender that complies with the requirements of the Request for Proposal issued by TNPA in relation to the New Terminal Operator Agreement;
- 1.1.152. **“Tender Costs”** - the reasonable and proper costs of TNPA incurred in carrying out the Tender Process;
- 1.1.153. **“Tender Process”** - the process by which TNPA requests tenders from any parties interested in entering into a New Terminal Operator Agreement, evaluates the responses from those interested parties and negotiates the conclusion of a New Terminal Operator Agreement with a Successor Terminal Operator, in accordance with clause 49.2 (*retendering procedure*);
- 1.1.154. **“Tender Process Monitor”** - a third party appointed by the Terminal Operator under clause 49.2 (*retendering procedure*);
- 1.1.155. **“Terminal”** - means the site boundaries demarcated in Annexure B (Terminal Layout), specialising in liquid bulk cargoes to be

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- operated and/or redeveloped by the Terminal Operator, in accordance with the terms of this RFP and the terms of the Terminal Operator Agreement;
- 1.1.156. **“Terminal Equipment”** - the movable assets, including equipment and machinery (whether affixed to the Project Site or not) that are required for the Operation of the Terminal, including Cargo handling equipment ;
- 1.1.157. **“Terminal Infrastructure”** - the land-based structures, including the storage facilities, terminal buildings, sheds, workshops, substations, surfacing and the internal network for the provision of water, lights, power, sewerage and similar services within the Terminal boundaries demarcated in Schedule 1 (Project Site);
- 1.1.158. **“Terminal Operator”** - -the Preferred Bidder granted the right to conduct the Project in terms of the Terminal Operator Agreement concluded between the Terminal Operator and the TNPA, pursuant to being selected as the Preferred Bidder under this RFP;;
- 1.1.159. **“Termination Amount”** - the amount payable on termination of this Agreement in terms of Part VI;
- 1.1.160. **“Termination Date”** - the date on which this Agreement is terminated in accordance with its terms, other than by way of effluxion of time;
- 1.1.161. **“TNPA”** - Transnet National Ports Authority, an operational division of Transnet;
- 1.1.162. **“TNPA Financial Year”** - the financial year of TNPA, which runs from 1 April to 31 March annually;

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- 1.1.163. **“Transition Period”** - a period between the Signature Date and the Actual Operations Commencement Date, during which the Parties shall enter into arrangements relating to the processes for the handing over of the Terminal including the Terminal Infrastructure and the Handover Equipment;
- 1.1.164. **“Transition Schedule”** - a schedule to be developed by TNPA in consultation with the Terminal Operator and after consultation with the Incumbent Terminal Operator, in writing within [30] days of the Signature Date, setting out the processes for the handing over of the Terminal including the Terminal Infrastructure and any Handover Equipment;
- 1.1.165. **“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;
- 1.1.166. **“Turnover Commencement Date”** - the last day of the first 12 (twelve) month period of the Turnover Period;
- 1.1.167. **“Turnover Period”** - a 12 (twelve) month period, with the first such period commencing on the Effective Date and each subsequent turnover period commencing on the anniversary of the said 12 (twelve) month period each year, provided that the last turnover period shall end when this Agreement expires or is terminated, irrespective of the remaining duration of that turnover period;

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- 1.1.168. **“Uncommitted Capacity Reports”** - reports that the Terminal Operator is required to develop in relation to uncommitted storage capacity of the Terminal and submit to NERSA in terms of Regulation 3 of Regulations in terms of the Petroleum Pipelines Act published under Government Notice 342 of 4 April 2008 in Government Gazette No. 30905 2008;
- 1.1.169. **“Unforeseeable Conduct”** - such conduct shall occur if, after the Signature Date, TNPA or any Relevant Authority takes any action (including a Change in Law) or fails to carry out its obligations as prescribed by law:
- 1.1.170.1. the principal effect of which is directly borne by:
- 1.1.170.2. the Project and not other similar transactions;
- the Terminal Operator and not other persons;
- parties undertaking port terminal operations and not other persons;
- 1.1.170.3. in respect of which the Terminal Operator is not entitled to any other relief pursuant to any other provisions of this Agreement;
- 1.1.170.4. which was not foreseen by the Terminal Operator on or before the Signature Date; and
- 1.1.170.5. which could not reasonably have been foreseen by any person in the position of the Terminal Operator on or before the Signature Date;

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provided that:

1.1.170.6.

Unforeseeable Conduct shall be deemed not to have occurred under circumstances where any action or omission of TNPA or Relevant Authority is in direct response to any act or omission of the Terminal Operator which is illegal (other than an act or omission rendered illegal by virtue of such conduct of TNPA or Relevant Authority) or in violation of agreements to which the Terminal Operator is a party;

an increase in taxes of general application which does not discriminate against TNPA or against TNPA and other parties undertaking similar transactions shall be deemed not to be Unforeseeable Conduct; and

Unforeseeable Conduct shall be deemed not to have occurred if such conduct by TNPA or any Relevant Authority is required as a result of an event of Force Majeure and is reasonably proportionate thereto;

1.1.170. **“Updated Financial Model”**

- the Base Case Financial Model as amended and updated from time to time in terms of the FDA;

1.1.171. **“Uninsurable”**

- in relation to a risk, means either that:

1.1.172.1.

the required insurance is no longer available in the worldwide insurance market from reputable insurers; or

1.1.172.2.

if the required insurance is available, the insurance premium payable for insuring that risk has increased to such a level that

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the risk is not generally being insured against in the South African insurance market on commercially acceptable terms;

- 1.1.172. **“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;
- 1.1.173. **“Valuer”** - a Property Valuer registered with the South African Council for the Property Valuers;
- 1.1.174. **“Variable Concession Fees”** - an amount calculated by the following formula:
- Variable Concession Fees = A x B
- Where:
- A = the net turnover as defined in IAS 18; and
- B = the turnover percentage of 5% (five *per centum*);
- 1.1.175. **“VAT”** - the value-added tax levied in terms of the Value Added Tax Act No.89 of 1999;
- 1.1.176. **“Works”** - any design, construction, refurbishment, equipment procurement, installation and commissioning, renewal, reconstruction, repair or reinstatement work required in respect of the Terminal, Terminal Infrastructure and/or the Terminal Equipment as set out in the Works Programme;

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- 1.1.177. **“Works Programme”** - a programme for the undertaking of the Works by the Terminal Operator as set out in Schedule 12;
- 1.2 In this Agreement, unless inconsistent with the context, words referring to:
- 1.2.1 one gender include a reference to the other genders;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 natural persons include juristic persons and vice versa.
- 1.3 When a number of days as prescribed in this Agreement, such number shall be calculated including the first and excluding the last day, unless the last day falls on a day that is not a Business Day, in which case, the last day shall be the first succeeding day which is a Business Day.
- 1.4 Any Schedules to this Agreement shall be deemed to form part of this Agreement. If there is a conflict between the provisions of a Schedule and the provisions of this Agreement, the provisions of this Agreement shall prevail.
- 1.5 Any reference to legislation, a statute, a statutory instrument or a standard in this Agreement shall be a reference to such legislation, statute, statutory instrument or standard as amended, replaced, varied or re-enacted from time to time.
- 1.6 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.
- 1.7 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive clause in the body of the agreement, notwithstanding that it is only contained in the interpretation clause.
- 1.8 Any reference in this Agreement to another agreement shall be to such agreement as amended, supplemented, varied, novated or replaced from time to time in accordance with its terms and conditions.
- 1.9 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.

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- 1.10 A reference in this agreement to any person shall be a reference to such person's permitted successor, transferee, cessionary and or delegatee.
- 1.11 Any reference in this Agreement to the Updated Financial Model shall, unless the context requires otherwise, be a reference to such document as most recently updated, amended or replaced and approved by TNPA, in accordance with the terms of this Agreement.
- 1.12 Where this Agreement requires that the waiver, consent, approval or permission of TNPA is to be obtained:
- 1.12.1 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
- 1.12.2 the granting or withholding of such waiver, consent, approval or permission shall not be valid unless it is issued in writing by TNPA.
- 1.13 The terms "**holding company**" and "**subsidiary**" shall have the meanings ascribed to them in the Companies Act.
- 1.14 References in this Agreement to TNPA, the Terminal Operator, the Independent Certifier, the Agent and the Lenders shall include their respective authorised agents and representatives.
- 1.15 Any provision of this Agreement that contemplates or provides for performance of an obligation or compliance with a provision of this Agreement subsequent to any termination or expiry of this Agreement shall survive and termination or expiry of this Agreement and shall continue in force and effect for the period contemplated in said provision.
- 1.16 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.
- 1.17 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, TNPA exercises authority, power, control and responsibility in respect of commercial ports of South Africa, including the Port. In addition, certain powers, capacity and authority have been conferred on TNPA, as a division of Transnet, in respect of the Port by the Act.
- 2.2 During 2024 TNPA issued a Request for Proposals for the appointment of a person to undertake the Project in terms of section 56(5) of the Act (“**the RFP Process**”).
- 2.3 Upon completion of the RFP Process, TNPA selected the Terminal Operator as the Preferred Bidder to undertake the Project.
- 2.4 Accordingly, TNPA wishes to grant the Terminal Operator the concession rights to undertake the Project in terms of section 56 of the Act, and the Terminal Operator wishes to accept the granting of such concession rights to undertake the Project on the terms and conditions set out in this Agreement.
- 2.5 The Parties agree to enter into this terminal operator agreement on the terms and conditions detailed in this Agreement.

## 3. SUSPENSIVE CONDITIONS

- 3.1 Save for the provisions of this clause 3 and clauses 1, **Error! Reference source not found.**, 8, 9, 11, 12, 16, 18, 19, 22, 27.1.1, 55, 55, 56, 57, 58, 59, which shall come into effect immediately upon signing of this Agreement (“**Immediately Operative Provisions**”), this Agreement shall not come into force and effect until the suspensive conditions set out below are fulfilled or waived as the case may be, within a period of [ ] from the Signature Date or such later date as the Parties may agree to in writing prior to the expiry of the said period of [ ] (“**the Fulfilment Date**”):
- 3.1.1 the Terminal Operator obtains all necessary Consents for the Works and the Operations and Maintenance of the Terminal, including but not limited to Environmental Authorisations and consents required in terms of NERSA Legislation (other than a tariff determination by NERSA);
- 3.1.2 financial close in respect of the Finance Agreements has been achieved;

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- 3.1.3 the Terminal Operator has concluded the Construction Agreement, and such agreement has become unconditional in accordance with its terms except to the extent that any conditions contained therein relating to the effectiveness of this Agreement;
- 3.1.4 the Terminal Operator has concluded an agreement with the Incumbent Terminal Operator to purchase the Terminal Equipment required for the Operation of the Terminal and such agreement has become unconditional in accordance with its terms except to the extent that any conditions contained therein relate to the effectiveness of this Agreement;
- 3.1.5 the Construction Agreement, the Works Programme, the Detailed Design and D&C Specifications have been approved by the Independent Certifier in accordance with the provisions of clause 28.1 (*Performance of the Detailed Design*) where applicable;
- 3.1.6 the Terminal Operator has undertaken an insurance due diligence assessment and has obtained (i) an insurance report which confirms that the Project Insurance is appropriate for the Terminal as well as the obligations of the Terminal Operator and (ii) a letter of undertaking from an insurance broker confirming that the Project Insurances are available in the market and that the Terminal Operator qualifies for such Project Insurances;
- 3.1.7 the Parties have agreed to Schedule 6 (*Business Case Financial Model*), Schedule 16A (*Terminal Operator's Operating Specifications*), Schedule 2 (*D&C Specifications*) where applicable, Schedule 6 (*Base Case Financial Model*), Schedule 11 (*Penalties*), Schedule 18 (*Project Insurance*), Schedule 16D (*Terminal Operator Performance Standards*), and Schedule 21 (*Annual Reporting*).
- 3.1.8 TNPA obtaining all approvals and/or consents required to be in place in terms of the PFMA; and
- 3.1.9 resolutions of the respective board of directors of each of Transnet and the Terminal Operator authorising the conclusion of this Agreement;
- 3.2 The Parties shall co-operate and shall use all reasonable endeavours to procure the fulfilment of the suspensive conditions in this clause. Each Party shall promptly

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inform the other Party, in writing, when the suspensive conditions for which it is responsible have been satisfied.

3.3 Unless the suspensive conditions contained in this clause, are fulfilled or where applicable, waived, as the case may be, on or before the Fulfilment Date, the provisions of the Immediately Operative Provisions shall continue to be of full force and effect, but the remainder of this Agreement shall not become operative or effective and shall have no force or effect whatsoever.

3.4 No Party shall have any claim, unless explicitly set out in this Agreement, against any other Party pursuant to the non-fulfilment of the suspensive conditions in this clause, save where a Party (**the “Guilty Party”**) has breached the terms of this clause and/or has deliberately frustrated the fulfilment of such condition or intentionally caused that condition not to be fulfilled, in which event the Guilty Party shall be liable to the other Party for such damages as such other Party may have suffered thereby.

#### 4. **DURATION OF THIS AGREEMENT**

4.1 The Project Term shall be for an operational period of twenty- five (25) years reckoned from the Effective Date and shall expire on the Expiry Date, unless terminated earlier in terms of the provisions of this Agreement.

4.2 It is recorded that, upon expiry, this Agreement may be extended, in TNPA's sole and absolute discretion, and otherwise on the same terms and conditions, in order to facilitate the process of transition for the taking over of the Operations by a new terminal operator, including pursuant to the provisions of clause 48.

#### 5. **APPOINTMENT OF TERMINAL OPERATOR AND GRANT OF RIGHTS**

##### 5.1 **Grant of rights**

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.

##### 5.2 **Exclusivity of rights**

5.2.1 Subject to the provisions of this Agreement, the Terminal Operator shall be granted the exclusive concession to finance, design, construct, refurbish, equip, operate and maintain the Terminal. The Operating

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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.

5.2.2 The Terminal Operator shall be entitled to use the Port Infrastructure that is within the Terminal from the Signature Date until the termination or expiry of this Agreement in accordance with its terms.

5.2.3 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.

### 5.3 **Sub-contracting**

5.3.1 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.

5.3.2 The Terminal Operator shall be responsible for the management and supervision of any third parties appointed by it to perform any part of the Project. 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 and of the agents, representatives and employees of such third parties, whether such third parties are employed directly or indirectly by the Terminal Operator.

5.3.3 Nothing in this Agreement is intended to create or should be interpreted as creating any privity of contract between TNPA and any third parties appointed by the 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.

### 5.4 **Corporatisation of TNPA**

5.4.1 TNPA is currently an operational division of Transnet. It is envisaged that TNPA will be corporatised and become a separate legal entity in due course, in terms of section 3 of the Act and which entity will, in

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terms of the aforesaid statute, take cession, delegation and transfer of all of the rights, obligations, assets and liabilities that are, at the Signature Date, held by TNPA as a division of Transnet, including all agreements concluded by Transnet for TNPA division prior to the registration of the aforesaid entity. This Agreement shall be one of the agreements ceded, delegated and transferred to such entity. After such cession, delegation and transfer, the term "TNPA", wherever used in this Agreement, shall also refer to and include such entity.

5.4.2 The Terminal Operator acknowledges that it shall be required to and hereby (upon the happening of same) consent/s to such cessions, delegation and transfer.

## 5.5 **General Rights and Obligations of the Terminal Operator**

### 5.5.1 **Use of Terminal and Project Site, No Alienation or Encumbrance and Site Condition**

5.5.1.1 The Terminal shall be used solely for the purpose of undertaking the Operations and carrying out tasks and activities that are reasonably necessary for and incidental to the undertaking of those Operations, in accordance with this Agreement (including the terms, conditions, exclusions, limitations and restrictions contained in this Agreement), and for the exercise by the Terminal Operator of its rights and the fulfilment of its obligations under this Agreement, and for no other purpose whatsoever, unless the prior written consent of TNPA has been obtained, which consent may be withheld in TNPA's sole and absolute discretion.

5.5.1.2 The Terminal Operator shall not lease, sell, dispose of or otherwise alienate or encumber the whole or any portion of the Project Site or the Terminal in any manner whatsoever.

5.5.1.3 The Terminal Operator shall not use the Terminal for residential purposes or as sleeping quarters, except if TNPA authorises (in writing) the use of a portion of the

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Terminal as sleeping quarters for operational or security purposes.

5.5.1.4 The Terminal Operator shall not do or cause anything to be done that may cause a nuisance to TNPA or to any other Port User or the occupants of adjoining properties.

5.5.1.5 The Terminal Operator shall not do anything that materially detracts from the appearance or safe Operation and Maintenance of the Terminal, the Terminal Infrastructure or the Terminal Equipment.

5.5.1.6 The Terminal Operator acknowledges and agrees that the Terminal Operator has inspected the Project Site and has satisfied itself fully as to the location, condition, geotechnical characteristics and features, zoning, ownership, existing Encumbrances, nature and extent of the Project Site as well as any and all Consents already granted to or held by TNPA in respect of the Project Site and the Terminal Operator expressly records and agrees that TNPA does not warrant the suitability or otherwise of the Project Site for purposes undertaking the construction, Operation and/or Maintenance of the Terminal or for purposes of undertaking the Operations and that the Terminal Operator shall have no claims whatsoever against TNPA in respect of the location, condition, geotechnical characteristics and features, zoning, ownership, existing Encumbrances, nature and extent of the Project Site as well as any and all Consents already granted to or held by TNPA in respect of the Project Site.

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

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5.5.1.8 The Terminal Operator shall at its own cost, maintain the Certifications, if applicable, for the duration of the Project Term.

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

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

#### 5.5.2 **Construction of the Terminal**

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

5.5.2.1.1 the Construction and installation of all Terminal Infrastructure in accordance with the Detailed Design, the D&C Specifications, International Best Practice and the terms and conditions of this Agreement, including but not limited to:

5.5.2.1.5.1 all infrastructure required to undertake the Operations;

5.5.2.1.5.2 basic services infrastructure within the Project Site in respect of water, electricity, sewerage and storm water reticulation;

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- 5.5.2.1.5.3 hard surfacing;
- 5.5.2.1.5.4 restrooms;
- 5.5.2.1.5.5 roads and parking areas;
- 5.5.2.1.5.6 lighting (i.e. high mast) enabling 24/7 operations;
- 5.5.2.1.5.7 perimeter fencing and entrance gate/s;
- 5.5.2.1.5.8 security kiosk/s;
- 5.5.2.1.5.9 firefighting capability as required (based on the type and volume of Cargo handled at the Terminal);
- 5.5.2.1.5.10 electrical sub-station/s linked to maximum demand;
- 5.5.2.1.5.11 appropriate signage;
- 5.5.2.1.2 the procurement, installation, testing and commissioning of all Terminal Equipment in accordance with the Detailed Design, the D&C Specifications, International Best Practice and the terms and conditions of this Agreement;
- 5.5.2.1.3 subject to obtaining the prior written approval of TNPA, the construction and alterations to the quayside for the installation of the Terminal Infrastructure;
- 5.5.2.1.4 any other construction activities necessary in accordance with the Detailed Design and the D&C Specifications.
- 5.5.2.1.5 Without limiting the other obligations of the Terminal Operator in this Agreement or which are imposed on it by Law, the Terminal Operator shall:

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

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

### 5.5.3 **Terminal Operator's Obligations to Undertake the Operations**

5.5.3.1 The Terminal Operator shall undertake the Operations in accordance with the terms of this Agreement for the duration of the Operations Period.

5.5.3.2 The Terminal Operator shall in undertaking the Operations, comply at all times with, the Operations Specifications and the Terminal Operator Performance Standards and the provisions of this Agreement.

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- 5.5.3.3 The Terminal Operator shall undertake the Operations at the Terminal, 365 (three hundred and sixty five) days a year on a 24/7 twenty four hours a day for all seven days of the week) basis and for the duration of the Project Term.
- 5.5.3.4 The Terminal Operator shall undertake the Operations with effect from the Actual Operations Commencement Date.
- 5.5.3.5 The Terminal Operator shall undertake the Operations at any time during the Project Term.
- 5.5.3.6 The Terminal Operator shall only undertake the Operations to the extent that such Operations do not have a negative impact on the delivery of any of the existing activities at the Port.
- 5.5.3.7 Without limiting the other obligations of the Terminal Operator as specified in this Agreement or imposed by Law, the Terminal Operator shall:
- 5.5.3.7.1 provide reliable, secure and efficient services associated with the Operations to all Port Users wishing to use any or all of such services;
  - 5.5.3.7.2 ensure that the provision of any services as envisaged above, shall not hinder or otherwise interfere with any other activities undertaken or conducted at the Port by TNPA, any other Port User or any other person;
  - 5.5.3.7.3 obtain, maintain and renew all documents and all Consents necessary to Operate and Maintain the Terminal and to undertake the Operations and perform the activities and

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discharge the obligations contained in clause 5.5 (*General Rights and Obligations of the Terminal Operator*) and this clause 5.5.3 (*Terminal Operator's Obligation to Undertake Operations*) and in this Agreement;

5.5.3.7.4 provide, maintain or replace, according to International Best Practice, all Terminal Equipment and other equipment necessary for the efficient operation of the Terminal; and

5.5.3.7.5 promote and foster positive customer relations and actively market and promote the Terminal and the services associated with the Operations to potential customers and Port Users.

5.5.3.8 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 manage and operate the Terminal for the purpose of:

5.5.3.7.6 providing reliable, secure and efficient services and facilities to Port Users;

5.5.3.7.7 receiving Cargo at the Project Site via pipeline, tankers or rail;

5.5.3.7.8 loading of Cargo into vessels and off-loading of liquid bulk Cargo from vessels;

5.5.3.7.9 embarking upon temporary storage of Cargo in storage tanks;

5.5.3.7.10 transferring Cargo to, in and from the Terminal via pipeline, tankers or rail;

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- 5.5.3.7.11 transferring Cargo from the vessel into the storage tanks for distribution and/or vice versa;
- 5.5.3.7.12 distributing refined Cargo to inland customers through rail or road, or through the pipeline;
- 5.5.3.7.13 performing maintenance related activities that the Terminal Operator may deem necessary;
- 5.5.3.7.14 obtaining, maintaining and renewing all documents, permits or other authorisations necessary to operate the Terminal and render the services and perform the activities referred to in this clause 5.5.3.7;
- 5.5.3.7.15 procuring, installing and operating communication, control and administrative systems necessary for the efficient operation of the Terminal;
- 5.5.3.7.16 complying with all applicable provisions of the Act, the Port Rules, the Regulations and any directives issued in terms of the Act;
- 5.5.3.7.17 complying with the requirements of the SAMSA, including any applicable Legislation and codes relating to safe working practices;
- 5.5.3.7.18 complying with the ISPS Code and the IMDG Code in relation to security and dangerous goods, respectively; and
- 5.5.3.7.19 complying with all other applicable Legislation and generally conduct its activities and operations in accordance with the Law.

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5.5.3.7.20 For the avoidance of doubt, all the obligations of the Terminal Operator set out in this clause 5.5.3 and under this Agreement in its entirety, shall be in compliance with the applicable NERSA Legislation as the context requires. In the event that the Terminal Operator contravenes the applicable NERSA Legislation such contravention shall constitute a breach of this Agreement by the Terminal Operator. The Terminal Operator shall be fully conversant with the requirements of NERSA in respect of the handling of Cargo and should in particular take note of the tariff methodology applied by NERSA in regulating the prices of liquid bulk terminal operators. The Terminal Operator shall be required to obtain all the necessary Consents from NERSA prior to the Commencement of Operations and maintain same for the duration of this Agreement.

**5.5.4 The Terminal Operator may not:**

- 5.5.4.1 permit the growth upon the Terminal of noxious weeds;
- 5.5.4.2 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;
- 5.5.4.3 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 offshore facilities
- 5.5.4.4 do anything that materially detracts from the appearance of the Terminal;

5.5.4.5 load cargo on vehicles in any area within the Port, other than in the Terminal, unless with TNPA's prior written consent or with permission from another person legally in control of the area.

## 5.6 **Non-discrimination and Open Access**

5.6.1 the Terminal Operator shall have the exclusive right to operate the Terminal and shall provide reasonable equality of access to the Terminal and the loading facilities to Terminal Users and potential Terminal users wishing to utilise the services of the Terminal.

5.6.2 the Terminal Operator shall not unreasonably discriminate, in its tariff structure or in its trading conditions (including but not limited to all commercial terms and conditions) between various users or potential users of the Terminal and the loading facilities.

5.6.3 Terminal Users have on a first come, use it or lose it basis, open access to the Terminal and the loading facilities available and uncommitted.

5.6.4 As part of its reporting obligations under clause 31, the Terminal Operator shall provide to TNPA copies of all the Uncommitted Capacity Reports at the same time as it provides such Uncommitted Capacity Reports to NERSA.

5.6.5 The Terminal Operator acknowledges and agrees that failure to provide TNPA with the copies of the Uncommitted Capacity Reports shall constitute Terminal Operator Default for which TNPA shall be entitled to terminate this Agreement in terms of the termination provisions set out in this Agreement.

## 5.7 **Cargo Controlling Interest / Cargo Ownership Interest**

5.7.1 It is recorded that the Parties are entering into this Agreement on the basis of, *inter alia*, the representation that the Terminal Operator made to TNPA that it does not own Cargo nor does it hold a Cargo Controlling Interest and/or Cargo Ownership Interest as at the Signature Date.

5.7.2 The Terminal Operator hereby agrees that it shall not at any time during the Project Term directly or indirectly own Cargo nor hold a Cargo

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Controlling Interest and/or Cargo Ownership Interest (“**Cargo Ownership Undertaking**”).

5.7.3 The Terminal Operator acknowledges and agrees that a non-compliance with the Cargo Ownership Undertaking shall constitute Terminal Operator Default for which TNPA shall be entitled to terminate this Agreement in terms of the termination provisions set out in this Agreement.

#### 5.8 **Terminal Operator’s Replacement, Repair and Maintenance Obligations**

5.8.1 The Terminal Operator shall be responsible for maintaining the Terminal Infrastructure and Terminal 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 detailed in this clause 5.8.

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

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

5.8.4 The Terminal Operator shall conduct annual inspections of the Terminal Infrastructure and Terminal Equipment and must incorporate the outcome of such inspections in its the reports that the Terminal Operator has to , submit to TNPA in terms of clause 31.1.

5.8.5 The Terminal Operator shall provide 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.

5.8.6 The Terminal Operator shall to the extent that the relevant service at the Terminal is not provided by the relevant local authority in the ordinary course as envisaged in clause 28.10, the Terminal Operator

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shall be responsible, at its own cost, for the disposal of garbage and waste, including garbage and waste generated by vessels visiting the Terminal and by the Terminal itself.

5.8.7 The Terminal Operator shall keep the Terminal and the Project Site in a clean, orderly and sanitary condition.

5.8.8 The Terminal Operator shall attend to removal of intrusive vegetation including regular control and removal of grass, noxious and other weeds, and other plants and vegetation on the Project Site (save for any landscaped gardens which may be provided for in the Detailed Design).

5.8.9 The Terminal Operator shall, in the Operation and Maintenance of the Terminal, comply with all other applicable Laws (including all labour related Laws) the Port Rules, the Port Regulations, TNPA Policies, any directives issued in terms of the Act, and generally perform the Operations at the Terminal in accordance with all applicable Laws.

## 5.9 **Erection of Improvements and Extensions of Terminal Infrastructure**

5.9.1 The Terminal Operator shall be entitled to make, or cause to be made in the Terminal or in respect of the Terminal Infrastructure such improvements, alterations, additions and/or extensions as may be necessary or appropriate for the undertaking of the Operations and/or the Operation and Maintenance of the Terminal upon the Project Site; provided that any improvements, alterations, additions and/or extensions which are not envisaged or provided for in the Detailed Design and/or the Works Programme shall only be undertaken by or on behalf of the Terminal Operator after it has first submitted the plans, designs and specifications thereof to TNPA and has obtained the prior written approval of TNPA which approval may be withheld in TNPA's sole and absolute discretion.

5.9.2 Unless otherwise agreed in writing by the Parties or otherwise expressly provided for in this Agreement, all improvements, alterations, additions and/or extensions envisaged in clause 5.9.1 shall be undertaken by the Terminal Operator at its own cost and TNPA shall

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not be liable to compensate the Terminal Operator for improvements, alterations, additions and/or extensions which are effected to the Terminal (including the Terminal Infrastructure) whether or not such improvements, alterations, additions and/or extensions are effected pursuant to and with the prior approval of TNPA in terms of clause 5.9.1 and the value of such any and all such improvements, alterations, additions and/or extensions shall not be deducted from or set-off by the Terminal Operator against, or otherwise form the substance of counterclaim by the Terminal Operator or in other manner whatsoever affect or detract from any amounts which are or may become payable by the Terminal Operator to TNPA in terms of this Agreement

**5.10 Roadways, Surfaces and Access to the Terminal**

- 5.10.1 The Terminal Operator shall not load vehicles (including as a car or truck, or tracked or wheeled equipment) in any area within the Port, other than in the Terminal, except with TNPA's prior written consent or with written permission from another Person legally in control of the area.
- 5.10.2 The Terminal Operator shall, at its own cost, operate and maintain in good order and condition, all existing roads within the Terminal and shall construct, Operate and Maintain in good order and condition all roadways and surfaces as may be required within the Terminal for the provision of the Operations and the performance of the activities and obligations contemplated in this Agreement. Such roadways and surfaces shall be constructed, Operated and Maintained in accordance with all applicable Laws, the Detailed Design and the Operating Specifications and in accordance with a standard that complies with the permissible axle loads for the types and volumes of Cargo and traffic which will use the roads which is envisaged in the Business Plan, Operating Specifications and the Detailed Design, and otherwise at such standard as is stipulated by TNPA and communicated to the Terminal Operator in writing.
- 5.10.3 The Terminal Operator shall ensure that all vehicles entering and exiting the Terminal shall be organised to minimise traffic congestion, the parking of vehicles and any queuing outside the Project Site. To the extent that the weighing of vehicles entering and exiting the

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Terminal in order to load or unload cargo is required by any Law, the Terminal Operator must check the weight of vehicles entering and exiting the Terminal.

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

5.10.5 All other Persons, vehicles and equipment shall have access to the Terminal and may use the roadways and the surfaces in the Terminal in the manner reasonably determined by the Terminal Operator in order to conduct normal legal business related to the Operation of the Terminal, provided that in the use of such roadways such Persons, vehicles and equipment shall not unnecessarily interfere with or impede the activities of the Terminal Operator and shall comply with all the safety and security stipulations, environmental and Project Site rules of the Terminal Operator.

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

## 5.11 **Spillage**

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

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

5.11.1.2 immediately take steps to recover such Cargo or any other matter.

- 5.11.2 If the Terminal Operator fails to recover any spilled Cargo or any other matter as envisaged above, TNPA may take whatever steps are necessary to recover the Cargo or any other matter and to claim the reasonable costs of taking such steps from the Terminal Operator.

**5.12 General Safety and Security in the Terminal**

- 5.12.1 Without detracting from the provisions of 25 (*Health and Safety*) and 26 (*Security*), the Terminal Operator shall be responsible for the safety and security of the Terminal and for all persons and movables therein, including Cargoes, and for the implementation of and adherence to the ISPS Code, and accordingly the Terminal Operator shall:

5.12.1.1 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 that such fencing is maintained at that standard (and repaired as necessary) during the term of this Agreement;

5.12.1.2 as part of the security plan envisaged in clause 26 (*Security*), monitor and control all Cargo, vehicles and people entering and leaving the Terminal as part of the Terminal security plan, and ensure that security communications are always readily available;

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

5.12.1.4 comply with the requirements of the Port Regulator;

5.12.1.5 comply with the provisions and requirements of SAMSA, including any applicable legislation and codes relating to safe working practices;

5.12.1.6 comply in all material respects with the provisions of the International Maritime Organisation Convention of Safety and Security at Sea, the ISPS Code and the Maritime

Security Regulations 2004, adopted under the Merchant Shipping Act No 57 of 1951; and

5.12.1.7 comply with the IMDG Code in relation to security and dangerous goods.

### 5.13 **Personnel, Contractors and other Subcontractors - Generally**

5.13.1 The Terminal Operator as well as its Contractors and other Subcontractors shall comply with all relevant labour Laws.

5.13.2 The Terminal Operator as well as its Contractors and other Subcontractors shall at all times employ or engage sufficient and suitably qualified and competent personnel to enable it to efficiently undertake the Operations and Operate and Maintain the Terminal, all envisaged in the Terminal Operator Agreement.

5.13.3 The Terminal Operator shall implement all measures as are required by the relevant applicable Laws and/or as may be reasonably necessary to ensure the safety of its employees and that of its Contractors and other Subcontractors, and shall provide them or ensure they are provided, free of charge, with any necessary personal protective clothing and equipment and shall ensure that its Contractors and other Subcontractors do likewise.

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

5.13.5 TNPA may require the Terminal Operator to remove any employee or other personnel of the Terminal Operator or any Subcontractor from the Project Site and the Terminal Operator shall do so (subject to applicable law) if in the reasonable opinion of TNPA such employee or personnel engages in any conduct which might reasonably result in a breach of any provision of this Agreement or threatens public health,

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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.

## 6. CONCESSION FEES

### 6.1 Concession Fees

6.1.1 The Terminal Operator shall pay to TNPA, in consideration of the right to use the Project Site for the purpose set out in this Agreement, a fixed concession fee in the amount of:

6.1.1.1 R[insert] per month (excluding VAT) from the Effective Date to the day before the Actual Operations Commencement Date;

6.1.1.2 R[insert] per month (excluding VAT) from the Actual Commencement Date.

6.1.2 The concession fees referred to in clause 6.1.1 shall be paid quarterly in advance on or before the 1st day of each and every Quarter of a Contract Year of this Agreement and, in respect of the Concession Fees referred to in clause 6.1.1.1, the first Quarter shall be the quarter following the Effective Date ("**the Concession Fees Commencement Date**"), provided that where the Effective Date falls on a day after the first day of a month, Concession Fees payable in respect of that month shall be apportioned accordingly.

6.1.3 Thereafter the monthly Concession Fees payable by the Terminal Operator in terms of clause 6.1.1.2 shall be reviewed and/or escalated annually in accordance with the following principles:

6.1.3.1 for the period commencing [insert], the monthly Concession Fees amount shall be escalated by TNPA on each anniversary of such date by 9% (nine per centum)

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per annum, with the first such escalation being based on the amount that was payable in terms of clause 6.1.1.2 above;

6.1.3.2 for a 5 (five) year period commencing upon the expiry of the period referred to in 6.1.3.1 and for each subsequent period of 5 (five) years, the Concession Fees payable and escalations in respect thereof shall be market related amounts, determined in accordance with the remaining provisions of this clause;

6.1.3.3 no later than 6 (six) months prior to the expiry of the first 5 (five) Contract Year period referred to in clause 6.1.3.2 or the expiry of each subsequent discrete 5 (five) Contract Year period thereafter, the parties shall meet in order to endeavour to agree the Concession Fees and the annual escalation that shall apply in respect of the subsequent 5 (five) Contract Year period;

6.1.3.4 should the Parties not be able to agree upon the Concession Fees and escalation rate in terms of clause 6.1.3.3 above, the Concession Fees and escalation rate shall be determined by a registered Transnet approved Valuer (or such other Valuer as Transnet may appoint) and a Valuer that the Terminal Operator may appoint;

6.1.3.5 in the event that the two Valuers referred to in clause 6.1.3.4 fail to reach agreement, within a period of 14 (fourteen) days from the date of referral thereto, the Concession Fees and escalation rate shall be determined by an independent expert Valuer mutually agreed upon by the parties ("**External Valuer**");

6.1.3.6 in the event that parties fail to agree on an External Valuer within 10 (ten) days after the expiry of the said 14 (fourteen) day period, the dispute shall be referred to the Chairman of the South African Council for the Property Valuers who shall appoint a Valuer of at least 10 (ten)

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years standing for the purpose of determining the Concession Fees and escalation rate (“SAIV Valuer”);

6.1.3.7 forthwith following the appointment of the External Valuer, or the SAIV Valuer, as the case may be, each Party shall submit a written Concession Fees estimate to such Valuer, together with any information supporting such estimate;

6.1.3.8 the External Valuer or SAIV Valuer, as the case may be, will act as an expert (and not as an arbitrator) and, within 30 (thirty) days after being appointed, will determine the Concession Fees and the escalation rate for the Project Site for the relevant Concession Fees review period, which determination shall be reduced to writing; and

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

6.1.4 Notwithstanding anything to the contrary contained in this Agreement, pending the determination of the Concession Fees and the escalation rate applicable during any Concession Fees review period, the Terminal Operator shall continue to pay Concession Fees equal to the Concession Fees which prevailed in the month immediately prior to the dispute referred to under this Agreement until such determination is made. Thereafter, if applicable, the Terminal Operator shall on demand pay any additional amount it would have had to pay in respect of the period from the date of the dispute arising to the end of the month during which the determination is made.

6.1.5 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 Relevant Authority upon or in connection with the Project Site. Such acceptance shall endure for the period covered by this Agreement. Such acceptance does not, however, include any Taxes imposed in relation to the receipt by TNPA of the payment detailed in this clause 6.1 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 TNPA as a

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result of or in connection with this Agreement or the Project Site used by the Terminal Operator.

- 6.1.6 The Terminal Operator shall not be entitled to set-off against the bank guarantee referred to in clause 6.1.10 any amount owed to TNPA in terms of or arising out of this Agreement.
- 6.1.7 Except if TNPA otherwise agrees in writing, all payments shall be made in Rand.
- 6.1.8 All payments to be made in terms of this Agreement by the Terminal Operator to TNPA shall be made in full without set-off or counterclaim in immediately available funds, free of bank exchange or any other charges or deductions, electronically into the following bank account: **Transnet SOC LTD-Transnet National Port Authority -Cape Town, FNB Corporate Current Account-62875757919 branch code: 255005. Swift code: FIRZAJJ**
- 6.1.9 TNPA shall be entitled in its sole and absolute discretion to appropriate or re-appropriate any amounts received from the Terminal Operator towards the payment of any other amounts owing by the Terminal Operator to it.
- 6.1.10 The Terminal Operator shall, no later than the Effective Date, furnish to TNPA an unconditional bank guarantee in an amount equal to 3 (three) months fixed Concession Fees as payable during the First Contract Year, excluding VAT thereon (the "**Guarantee**") as security for the payment of any and all amounts payable by the Terminal Operator in terms of this Agreement. The Guarantee shall be in favour of TNPA and shall have a term no shorter than the full duration of this Agreement and any renewal or extension thereof. In addition, the Guarantee shall be the security for the payment of any and all amounts payable by the Terminal Operator in terms of this Agreement. The Terminal Operator shall be required, annually within 30 (thirty) days after expiry of each anniversary of the Concession Fees Commencement Date, to increase the amount of the Guarantee to such amount as is equal, at the relevant time, to an amount of 3 (three) months fixed Concession Fees, excluding VAT thereon.

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- 6.1.11 TNPA shall have the right to apply the whole or portion of the Guarantee towards the payment of any amounts owing by the Terminal Operator, when any such amount has not been paid within 15 (fifteen) Business Days of written notice requesting such payment that is due and payable. If any portion or the whole of the Guarantee is so applied, the Terminal Operator undertakes, within 30 (thirty) days of receipt of request from TNPA, to reinstate the amount of the Guarantee to the original amount.
- 6.1.12 The rights and claims to the Guarantee shall be retained by TNPA until the termination of this Agreement, the vacating of the Terminal by the Terminal Operator and the complete discharge by the Terminal Operator of all its payment obligations under this Agreement, whereafter the rights and claims to such amount (or the remaining balance thereof in the event that a portion thereof has been applied by TNPA in terms of clause 6.1.11) shall then be returned to the Terminal Operator.

## **7. OWNERSHIP AND EVENTUAL HANDOVER OF THE PROJECT SITE AND TERMINAL INFRASTRUCTURE**

- 7.1 The Terminal Operator agrees and acknowledges that TNPA is and shall at all times be the owner of the Port and the Project Site.
- 7.2 The Terminal Operator agrees and acknowledges that TNPA shall be the owner of the Terminal.
- 7.3 The Terminal Operator hereby grants to TNPA the right of first refusal to purchase the Terminal Equipment, upon the expiry or early termination of this Agreement, on the following terms and conditions:
- 7.3.1 the right shall be exercisable by written notice given by TNPA to the Terminal Operator at any time between the date on which notice of termination of this Agreement is given by either Party to the other in terms of this Agreement and the Termination Date and at least 3 (three) months prior to the Expiry Date; and
- 7.3.2 the purchase price for the Terminal Equipment shall be its fair value as agreed by the Terminal Operator and TNPA as at the Termination Date

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or the Expiry Date, as the case may be, or failing such agreement, as determined by an Independent Expert.

- 7.4 The Parties shall use their reasonable endeavours to agree the purchase price and complete the transfer of the Terminal Equipment to TNPA within [30] days prior to the Termination Date and/or Expiry Date, as the case may be.
- 7.5 It is recorded that TNPA shall be entitled to cede its right to purchase the Terminal Equipment to a third party that may undertake the Operations after the expiry or early termination of this Agreement without the consent of the Terminal Operator.
- 7.6 In the event of TNPA electing not to exercise its right to purchase the Terminal Equipment or of the Terminal Operator and the third party referred to in clause 7.5 not reaching an agreement on the purchase of the Terminal Equipment by such third party, the Terminal Operator shall be obliged to remove such Terminal Equipment from the Project Site within 90 days of TNPA notifying the Terminal Operator of its election not to purchase the Terminal Equipment or of such third party and the Terminal Operator failing to reach an agreement.
- 7.7 At least 2 (two) Contract Years prior to the expiry of the Operations Period, TNPA shall notify the Terminal Operator whether it is required to demolish and remove all or some of the Terminal Infrastructure. Should TNPA notify the Terminal Operator to demolish and remove all or some of the Terminal Infrastructure, the Terminal Operator shall decommission, demolish and remove all or the selected Terminal Infrastructure during the Decommissioning Period.
- 7.8 Upon the termination for any reason or expiry of this Agreement, but subject to the provisions of clause 22, the Terminal Operator shall deliver and give vacant possession of the Terminal and any other assets or facilities owned by or if not owned by, in the possession of, the Terminal Operator (to the extent that they are capable of being transferred), free of charges, liens, claims or encumbrances of any nature whatsoever and free of any liabilities, and in accordance with the standards and requirements detailed in the Operating Specifications, and in the D & C Specifications to TNPA. The Terminal Operator shall not be entitled to payment of any monies in connection with delivery.
- 7.9 Upon the termination for any reason or expiry of this Agreement and subject to clause 7.7 and without derogating from the generality of the provisions of clause 48 (*Effects of Termination*), and where TNPA has exercised its option to take transfer of the Terminal Equipment, the Terminal Operator will be required to:

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- 7.9.1 give free and vacant possession of the Terminal, the Project Site, the Terminal Infrastructure and subject to clause 7.3, the Terminal Equipment to TNPA;
  - 7.9.2 hand over all associated manuals, certificates and documents in respect of the Terminal Infrastructure and the Terminal Equipment, if applicable;
  - 7.9.3 leave the Project Site in a safe, clean and orderly condition in accordance with the terms and conditions contained in the Draft Terminal Operator Agreement.
- 7.10 Subject to clause 7.3, the Terminal Operator shall not be entitled to payment of any monies in connection with such delivery referred to in clause 7.9.

## 8. INDEMNITY

- 8.1 Subject to clauses 8.2 and 8.4, the Terminal Operator shall fully and effectively indemnify and hold TNPA or any Port User harmless in respect of all Losses suffered or incurred by TNPA, or any Port User which arise in connection with the breach of this Agreement or the Laws by the Terminal Operator, including, without limitation to the generality of the foregoing, any Losses which may be incurred or suffered by TNPA, or any Port User, in respect of personal injury (including injury resulting in death).
- 8.2 Clause 8.1 shall not apply to:
- 8.2.1 any Losses to the extent that they arise directly from the wilful default of TNPA or the relevant Port User;
  - 8.2.2 Losses to the extent that TNPA or the relevant Port User is reasonably able to mitigate such Losses.
- 8.3 If the Terminal Operator pays to TNPA an amount in respect of Losses and TNPA subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise howsoever) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Losses, TNPA shall forthwith repay to the Terminal Operator:

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- 8.3.1 an amount equal to the sum recovered or the value of the savings or benefit obtained, less any reasonable costs and expenses incurred by TNPA in recovering the same; or
- 8.3.2 if the figure resulting under clause 8.3.1 above is greater than the amount paid by the Terminal Operator to TNPA in respect of the Losses, such lesser amount that has been paid by the Terminal Operator to TNPA.
- 8.4 The Terminal Operator shall indemnify TNPA in respect of all losses relating to the use or infringement or alleged use or infringement by the Terminal Operator of Intellectual Property Rights.
- 8.5 Except as expressly provided in this Agreement, the Terminal Operator shall not make any claim against 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.
- 8.6 For the avoidance of doubt, this clause 8 (*Indemnity*) shall take effect without prejudice to the Terminal Operator's obligations under the other provisions of this Agreement.
- 8.7 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 TNPA against the Terminal Operator under this Agreement pursuant to this clause 8 (*Indemnity*), as follows:
- 8.7.1 TNPA will at all times after such notification, disclose in writing to the 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.
- 8.7.2 TNPA will take such action as the Terminal Operator may reasonably request at the Terminal Operator's expense to avoid disputes, settle, compromise, defend or appeal against such claim and TNPA will take no steps to avoid disputes, settle, compromise, defend or appeal against such claim without the Terminal Operator's written consent, which consent shall not be unreasonably withheld or delayed. The

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Terminal Operator shall procure that its Subcontractors shall provide identical undertakings to TNPA.

## 9. TERMINAL OPERATOR'S WARRANTIES AND UNDERTAKINGS

### 9.1 Registration

9.1.1 The Terminal Operator shall be incorporated in South Africa in accordance with the provisions of the Companies Act. The Terminal Operator shall remain validly incorporated and registered in accordance with the provisions of the Companies Act for the entire Operations Period.

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

### 9.2 Single Purpose Company with no Subsidiaries

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

9.2.2 The Terminal Operator shall not hold an ownership interest in other subsidiaries throughout the Project Term except with the prior express consent of TNPA.

### 9.3 Compliance with Laws

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

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

Terminal Operator to obtain such Consents save as provided in this Agreement.

#### 9.4 **Related Party Transactions**

9.4.1 Unless otherwise agreed to by TNPA and without prejudice to the provisions of clause 9.4.3, the Terminal Operator shall not enter into any Related Party Transactions, other than 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.

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

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

#### 9.5 **Limitation on Financial Indebtedness**

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

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

9.5.1.2 in the ordinary and normal course of business; or

9.5.1.3 with the prior written consent of TNPA.

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**10. COMPLIANCE WITH THE D & C SPECIFICATIONS AND OPERATING SPECIFICATIONS**

- 10.1 The Terminal Operator shall comply with and shall ensure that its Subcontractors comply with the Operating Specifications in respect of the Operation and Maintenance and D & C Specifications at all times.
- 10.2 The Terminal Operator warrants that the Project shall be carried out in conformity with the D & C Specifications and Operating Specifications using equipment and materials, which are of suitable quality for the purposes and uses intended and are free of defects and deficiencies. All such work shall be undertaken in accordance with the D & C Specifications and 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 Relevant 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 Finance Agreements and such other contracts as are necessary to ensure the timeous and proper undertaking of the Project in accordance with the D & C Specifications and Operating Specifications. The Terminal Operator shall satisfy itself that the terms of such agreements fully describe the rights, obligations, risk allocation and protection of the Terminal Operator's rights. None of TNPA, any other Relevant 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 Finance 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 Finance Agreements;
  - 11.2.2 terminate any of the Associated Agreements or the Finance Agreements;

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11.2.3 consent to the cession, delegation or novation of any Associated Agreement,

without the prior written consent of TNPA.

## 12. ENVIRONMENTAL COMPLIANCE AND OTHER CONSENTS

12.1 The Terminal Operator shall be responsible for all applicable Environmental Authorisations and permits at its cost.

12.2 The Terminal Operator shall comply with the Environmental Authorisations and/or permits for the Project Term, where applicable or required. The Terminal Operator undertakes to indemnify TNPA in respect of all losses for any failure to comply with the Environmental Authorisations during the Project Term.

12.3 TNPA shall use its reasonable endeavours within its powers to assist the Terminal Operator to obtain such Environmental Consents, Consents relating to heritage and other Consents as may be required to enable the Terminal Operator to execute the Project, provided that TNPA shall bear no liability or responsibility for any failure of the Terminal Operator to obtain such Consents save as provided in this Agreement.

12.4 The Terminal Operator shall exercise the duty of care at all times and take all necessary steps to ensure that appropriate pollution controls and other environmental protection measures are taken in accordance with the Environmental Laws as well as applicable international conventions. The Terminal Operator shall comply with the existing Environmental Management Plan at all times.

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

12.6 Such environmental site assessment shall:

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

12.6.2 be conducted by an independent environmental assessment practitioner;

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- 12.6.3 form part of the Terminal Operator's Environmental Management Plan (**the "EMP"**) and inform the Terminal Operator's Environmental Management System (**the "EMS"**); and
- 12.6.4 comply with any other reasonable requirements stipulated for such an assessment by TNPA.
- 12.7 Within a period of 3 (three) months of the Effective Date, the Terminal Operator shall submit the EMP to TNPA for its approval. The EMP shall comply with NEMA and TNPA's written requirements (which requirements shall be provided to the Terminal Operator). On or before the Actual Operations Commencement Date, the Terminal Operator must develop a further Operational Environmental Management Plan ("**OEMP**") that will be implemented during the Operations Period. The EMP, OEMP and EMS shall be binding upon the Terminal Operator.
- 12.8 TNPA shall have the right at all times to conduct audits of the Terminal Operator's compliance with the EMP or OEMP (as the case may be) and the EMS. If, and where TNPA is of reasonable belief that there is non-compliance, inefficiency or inadequacy in relation to such compliance, then TNPA may require that the Terminal Operator rectify such non-compliance, inefficiency or inadequacy, without any delays, to the reasonable satisfaction of TNPA.
- 12.9 The Terminal Operator, as required by Law, shall comply with:
- 12.10 all the requirements of SAMSA in relation to the Environment;
- 12.10.1 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;
- 12.10.2 TNPA's requirements for the regular waste removal;
- 12.10.3 all the conditions in environmental permits, consents, licences, certificates, authorisations, orders and exemptions from the Relevant Authority in respect of the Terminal; and
- 12.10.4 all applicable requirements of the Laws 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.

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- 12.11 TNPA shall appoint, at the Terminal Operator's reasonable cost, and with the prior approval of the Terminal Operator, which approval shall not be unreasonably withheld, an independent environmental monitor who shall be responsible for:
- 12.11.1 ensuring that the Operations and Maintenance are performed in accordance with the Operating Specifications and the Environmental Laws; and
  - 12.11.2 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.
- 12.12 The conditional authorisations and/or environmental requirements to be fulfilled by the Parties during the Operations Period in terms of the OEMP are set out in Schedule 9 of this Agreement.
- 12.13 The Parties shall review the EMP or OEMP (as the case may be) at the start of each Contract Year in order to ascertain whether that plan needs to be amended or replaced. If the Parties are unable to agree whether the EMP or EMS should be amended or replaced or on the contents of such amendment or replacement, then such dispute shall be referred to the independent environmental monitor detailed in clause 12.11 for determination in terms of clause 56 (*Expert Determination*). The decision of such monitor shall, in the absence of manifest error or fraud, be final and binding on the Parties.
- 12.14 The Terminal Operator shall, upon the written request of TNPA and within a reasonable period of such request, provide TNPA with certified copies of:
- 12.14.1 all Environmental Authorisations obtained regarding Operation and Maintenance at the Port and where such authorisations are renewable in each instance a certified copy of a new or updated permission; and
  - 12.14.2 any measurements undertaken of emissions, effluent, storm water quality and material safety data sheet for hazardous substances which it is obliged to submit to a Relevant Authority.
- 12.15 The Terminal Operator may, as required by Law, not by any means cause significant pollution or degradation of the Environment and shall:

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- 12.15.1 provide TNPA within a reasonable period with certified copies of any notices and directives issued by a Relevant Authority to the Terminal Operator to take steps to address pollution or negative impact on the Environment;
  - 12.15.2 provide TNPA with certified copies of any report, including an emergency report, submitted by the Terminal Operator to a Relevant Authority regarding pollution or negative impacts on the Environment;
  - 12.15.3 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;
  - 12.15.4 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 TNPA or a Relevant 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 otherwise addressing the environmental damages or other negative impact with the appropriate remedial and/or rehabilitative measures to the satisfaction of TNPA and any Relevant Authority;
  - 12.15.5 take every reasonable precaution to prevent the spillage of Cargo and/or other material (including fuel and waste) from vessels, vehicles and Terminal Infrastructure. The Terminal Operator shall take immediate steps to mitigate and remedy any spillage to the satisfaction of SAMSA and TNPA at its expense; and
  - 12.15.6 take all reasonable measures to utilise energy efficient solutions as well as any other sustainable means in order to reduce the carbon footprint of the Terminal and to promote environmental sustainability.
- 12.16 If the Terminal Operator fails to comply promptly with any of the obligations imposed under this clause, TNPA shall be entitled to immediately take whatever steps necessary to combat, mitigate and remedy any such pollution, environmental degradation or other impact on the Environment and to recover all reasonable costs incurred by TNPA from the Terminal Operator.

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- 12.17 Should TNPA, in writing, determine that the Terminal shall be decommissioned upon cancellation or termination of this Agreement, the Terminal Operator shall develop and submit a Decommissioning-EMP to TNPA and the Relevant Authority for implementation during the Decommissioning Period in terms of the Decommissioning-EMP guidelines. The Decommissioning-EMP guidelines shall be provided to the Terminal Operator by TNPA. The Decommissioning-EMP shall be required to be approved by TNPA and all applicable Relevant Authorities in order for the duly approved Decommissioning-EMP to be submitted to TNPA within a period of 6 (six) months after termination of this Agreement.
- 12.18 In terms of rehabilitation of the Project Site, the Terminal Operator shall comply with the provisions of 9 of the Regulations in Terms of The Petroleum Pipelines Act, 2003 (Act No.60 of 2003)] including in relation to providing financial security or making arrangements, as may be acceptable to the Relevant Authority, for the purposes of rehabilitating the Project Site.

### 13. **EMPOWERMENT OBLIGATIONS**

- 13.1 The Terminal Operator shall comply with its obligations and commitments, for the duration of this Agreement, as set out in:
- 13.1.1 the B-BBEE Commitment Schedule (Schedule 10A);
  - 13.1.2 the Black Ownership Commitments (Schedule 10B); and
  - 13.1.3 the Economic Development Plan (Schedule 10C), which consists of, *inter alia*, the following:
    - 13.1.3.1 development phase value summary sheet; and
    - 13.1.3.2 operational phase value summary sheet.
- 13.2 It is recorded that, as at the Signature Date, the Terminal Operator holds a Level 1 Contributor Status Level in terms of any prevailing sector code for the maritime transport and service sector published in terms of section 9 of the B-BBEE Act and shall further maintain such Contributor Status Level for the duration of the Operations Period.
- 13.3 The Terminal Operator shall within 30 (thirty) Days of the date of issue of its annual B-BBEE accreditation, provide TNPA with a certificate of accreditation from an

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accredited verification agency verifying the Terminal Operator's Contributor Status Level.

- 13.4 The Terminal Operator shall ensure that for the duration of the Contract Year and subsequent years thereafter, it holds a valid certificate of accreditation from an accredited verification agency verifying the Terminal Operator's Contributor Status Level.
- 13.5 The Terminal Operator, further undertakes to:
- 13.5.1 promote job creation, job retention, skills development and undertake such further supplier development initiatives as set out in its Supplier Development Plan, which is annexed hereto as Schedule 10D (*Supplier Development Plan*) of this Agreement;
  - 13.5.2 maintain its Contributor Status Level as set out in its B-BBEE Certificate; and
  - 13.5.3 improve its level of Black Ownership as set out in the Black Ownership Commitment Schedule, which is Schedule 10B (*Black Ownership Commitment Schedule*) of this Agreement.
- 13.6 The actual performance of the Terminal Operator against its targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE Improvement Plan and the Supplier Development Plan will be reviewed annually by TNPA, following the completion of each Contract Year. TNPA shall provide the Terminal Operator with a list of all the information which it reasonably requires the Terminal Operator to provide in respect of each Contract Year by no later than 40 (forty) Business Days before the end of each Contract Year.
- 13.7 Subject to the rights of TNPA to terminate this Agreement under clause 43 (*Terminal Operator Default*), following receipt of the annual report, TNPA shall review compliance by the Terminal Operator with the targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE Improvement Plan and the Supplier Development Plan in respect of the preceding Contract Year.
- 13.8 In order to conduct the annual review, the information requested by TNPA in terms of clause 13.6 shall be submitted by the Terminal Operator in writing in terms of clause 31.1.2 and shall form part of the annual report.

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- 13.9 TNPA shall communicate its initial comments and any requests for additional information within 15 (fifteen) Business Days after the information has been supplied by the Terminal Operator in terms of clause 13.7 read with clause 31.1.2, and will take into consideration any response by the Terminal Operator to these initial comments, provided that such response is submitted within 10 (ten) Business Days of the initial comments and/or requests envisaged above. If TNPA intends to make a negative finding regarding any aspect of the performance of the Terminal Operator, it shall give reasonable notice of its intention to do so to the Terminal Operator and representatives of TNPA and the Terminal Operator shall meet to discuss the proposed finding before a final decision is made.
- 13.10 When, in the opinion of the Terminal Operator, events or circumstances occur which may impact negatively on its achievement of its targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE Improvement Plan and/or the Supplier Development Plan, the Terminal Operator shall notify TNPA in writing within 10 (ten) Business Days of the occurrence and both the Terminal Operator and TNPA shall document the details of the occurrence of such events or circumstances. The targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE Improvement Plan and/or the Supplier Development Plan, as applicable, may be adjusted or reduced in accordance with such terms as the Parties may agree in writing, should the Terminal Operator be prevented or delayed in performing its obligations by reason of a Force Majeure event. Furthermore, the targets and commitments in the Black Ownership Commitment Schedule, the B-BBEE Improvement Plan and/or the Supplier Development Plan, as applicable may be reviewed and amended, by agreement between the Parties in writing, in the case of any other event or circumstance demonstrably beyond the reasonable control of the Terminal Operator, which had a material, negative impact on the achievement of the targets or commitments by the Terminal Operator.
- 13.11 If the Terminal Operator fails to achieve compliance with the targets and commitments in the Black Ownership Commitment Schedule, B-BBEE Improvement Plan and the Supplier Development Plan in respect of any Contract Year (**the "Penalty Period"**), as determined in accordance with Schedule 11 (*Penalties*) and such failure is not attributable to any action, inaction or breach by TNPA of its obligations under this Agreement or due to Force Majeure (a "Failure") TNPA shall be entitled to impose the penalties envisaged in Schedule 11 (*Penalties*) in respect of such Failure.

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- 13.12 Such penalties shall be calculated from the completion of the first Contract Year onwards but shall only be imposed on the Terminal Operator in respect of any Penalty Period, with effect from the completion of the 4th Contract Year onwards.
- 13.13 In relation to any Penalty Period in respect of which a Failure occurs the Terminal Operator shall as part of the annual report envisaged in clause 31 (*Reporting Requirements*), submit a written remedial plan to TNPA, which shall detail the remedial steps that the Terminal Operator will take during the Penalty Period immediately following the Penalty Period in respect of which such Failure arose, in order to remedy the Failure and to achieve compliance with the Black Ownership Commitment Schedule, B-BBEE Improvement Plan and the Supplier Development Plan referred to in Schedule 11 (*Penalties*).
- 13.14 If the Terminal Operator: (i) fails to comply with clause 13.2; and/or (ii) incurs a Failure and associated penalties in respect of any Penalty Period following completion of the 4th Contract Year; and/or (iii) fails to submit a remedial plan in terms of clause 13.13; and/or (iv) fails to comply with a remedial plan submitted in terms of clause 13.13 in respect of any Penalty Period following completion of the 4th Contract Year; (v) fails to comply with the targets in the Black Ownership Commitment Schedule, TNPA shall be entitled to exercise its rights in accordance with the provisions of clause 43 (*Terminal Operator Default*).
- 13.15 The provisions of clauses 30.8.9 and 30.8.10 shall apply equally to the imposition and recovery of penalties by TNPA in terms of this clause 13(*Empowerment Obligations*).
- 13.16 The Parties agree that in the event that any penalties incurred in terms of this clause 13 (*Empowerment Obligations*) are determined to be a penalty in terms of the Conventional Penalties Act, 1962, TNPA shall be entitled to claim liquidated damages from the Terminal Operator in lieu of the relevant penalty, in an amount equal to such penalty.
- 13.17 The Terminal Operator shall incorporate the "Increased Competitiveness, Capability and Capacity Supplier Development Classification Matrix in Schedule 10D (Economic Development Guideline Document) into its supply chain and procurement practices and shall at the request of TNPA submit such reports as may be requested and required in respect of the extent of the Terminal Operator's compliance thereto from time to time.

#### 14. ACCESS TO DOCUMENTS, COPYRIGHT AND RELATED MATTERS

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- 14.1 Subject to the provision of clause 14.6 the Terminal Operator shall, at no cost to TNPA or any other Relevant Authority, at any time make available to TNPA and/or such Relevant Authority, as the case may be, upon request by any of them, all documents which are or were acquired or brought into existence by the 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 Finance Agreements.
- 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 Operations Agreement 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, or Operator in all Project Documents shall be transferred free of any cost to TNPA on termination of this Agreement or expiry of the Operations Period, whichever is the earlier
- 14.4 To the extent that the Terminal Operator is the owner of the copyright in the Operating Specifications and other documents issued by TNPA or the Terminal Operator, such copyright shall be the property of TNPA. To the extent necessary, any copyright in terms thereof shall be ceded, assigned and made over to TNPA. The Terminal Operator may at its cost (and shall allow other parties to the Associated Agreements to) copy, use and communicate any such document for the purposes of the respective Associated Agreements. The Terminal Operator shall not (and shall ensure that other parties to the Associated Agreements shall not) without TNPA's written consent, use, copy or communicate to a third party such documents, except as strictly necessary for the purposes of the Associated Agreements. In addition to and without limiting the foregoing, the Terminal Operator shall deliver the Project 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 TNPA on the earliest of:
- 14.4.1 the termination of this Agreement; or

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- 14.4.2 the termination of the Operations Agreement; or
- 14.4.3 the appointment of a Substitute Entity/Successor Terminal Operator, and

provided that such documents have or such copyright has not already been delivered or transferred to TNPA, as the case may be, upon the appointment of such Substitute Entity/ Successor Terminal Operator.

- 14.5 Upon termination of this Agreement due to Terminal Operator Default, the Terminal Operator shall upon request by TNPA provide copies of or access to TNPA or to any other Relevant Authority designated by TNPA, in respect of the Project Documents, which access and copies shall be at no cost to TNPA or such Relevant Authority, and shall be for their use in relation to the Operation and Maintenance before the appointment of a Substitute Entity, if any. The Terminal Operator further agrees, upon expiry of the Project Term or termination of this Agreement for whatsoever cause, to ensure the transfer of ownership of the Project Documents (to the extent owned by the Terminal Operator, to TNPA. The Terminal Operator shall procure that TNPA is legally entitled to use such Project Documents and any other information which is not owned by the Terminal Operator and/or continued Operation and Maintenance.
- 14.6 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 Finance Agreements shall not, during Operations Period or at any time thereafter, disclose to any person (other than to the Lenders or prospective Lenders) or otherwise make use of any information relating to the Project, TNPA or the Terminal Operator (including, but without limitation, information relating to the Operations and Maintenance, the contents of any documents, including any legal agreements, prepared by or on behalf of the Terminal Operator or to which the Terminal Operator is a party), save for such information that is or comes into the public domain (other than through the default of the Terminal Operator or other parties to the Associated Agreements), other than with the prior written approval of TNPA. Nothing contained in this clause shall preclude the Terminal Operator from using such information in enforcing its rights against TNPA or any other person.
- 14.7 Unless otherwise agreed to by TNPA in writing, and except as provided for in this Agreement or the Associated Agreements, the Terminal Operator and other parties to the Associated Agreements shall have no other interest or benefit in or to receive any other remuneration in connection with the Project or any part thereof. The

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Terminal Operator shall not (and shall ensure that other parties, excluding the Lenders acting in their capacity as such, to the Associated Agreements shall not) be engaged in any activity which might conflict with the interests of TNPA under this Agreement or the Associated Agreements, unless such activity is carried out pursuant to the enforcement of its rights thereunder. Nothing in this clause shall prevent the Terminal Operator or the Lenders from enforcing their rights under this Agreement, the Associated Agreements.

## 15. PERFORMANCE GUARANTEES

### 15.1 Delivery of Performance Guarantees

15.1.1 The Terminal Operator shall obtain or cause to be obtained, at its own cost, from a bank or a financial institution approved by TNPA, the Performance Guarantees referred to below in this clause 15 (*Performance Guarantees*), in the form of an on demand guarantee in the format, amount and currencies specified below or in a form mutually agreed between TNPA and the 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 TNPA on or before the dates specified below.

15.1.2 The Terminal Operator shall ensure that the Performance Guarantees are capable of being ceded to TNPA or the Lenders, for the purposes of the cessions contemplated in clause 15.6.

### 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 Operator, from the Construction Contractor as at the Effective Date to the value of [●]% of the aggregate construction price, (which percentage shall reduce to [●] % upon the issue of the Completion Certificate upon completion of the Works as contemplated in clause 26.4 (completion of the Works). Such guarantees shall be required to secure the performance by the Construction Contractor of its obligations in terms of the Construction Agreement, as at the Effective Date.

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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 Operations Performance Guarantee

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

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

15.3.3 An Operations Performance Guarantee shall be provided by the Operator in respect of each Contract Year from the Actual Operations Commencement Date until the Termination Date. The amount to be guaranteed by such Operations Performance Guarantee for each successive year of the Operations Period shall take into account any fluctuations in CPI. The Operations 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.

15.3.4 Each Operations 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 Operator within 14 (fourteen) days after such later date.

### 15.4 Final Maintenance Guarantee

15.4.1 The Terminal Operator shall obtain from the Operator a Final Maintenance Guarantee in favour of the Terminal Operator in an amount equal to the aggregate amount expended by the Operator on

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Operation and Maintenance (as reported by the Terminal Operator to 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 [22 (twenty two)] of the Operations Period to the end of Contract Year [25 (twenty five)] of the Operations Period, and in any event not less than [15%] of the average annual gross revenues for Contract Years [22 (twenty two), 23 (twenty three) and 24 (twenty four)] (all inclusive) of the Operations Period.

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

15.4.3 The Final Maintenance Guarantee shall be valid from the commencement of Contract Year [22 (twenty two)] of the Operations Period 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 (following the cession contemplated in clause 15.7) upon the expiry of the said 90 (ninety) Business Days, subject to 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 TNPA's satisfaction.

#### 15.5 **Terminal Operator's Obligations Incorporated into Associated Agreements**

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

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

#### 15.6 **Cession of Performance Guarantees**

15.6.1 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

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of its obligations to the Lenders in respect of the Finance Agreements, all its right, title and interest in and to each Operations Performance Guarantee. The Terminal Operator hereby irrevocably cedes all reversionary interests in each Operations Performance Guarantee (which it may have after the aforesaid cession to the Lenders) to and in favour of TNPA, as security for the Terminal Operator's obligations to TNPA in terms of this Agreement.

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

## 15.7 Enforcement Action

15.7.1 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 15.6 (*Cession of Performance Guarantees*), such Performance Guarantees shall secure the Terminal Operator's performance of its obligations to TNPA in respect of the Operation and Maintenance and may be called on by TNPA to the extent of any losses, costs, damages or expenses suffered or incurred by TNPA as a result of a breach by the Terminal Operator of the aforesaid obligations including, but not limited to, compensation to TNPA for any actions taken by TNPA as a result of such breach by the Terminal Operator of its obligations.

15.7.2 Prior to enforcing any such Performance Guarantee as aforesaid, TNPA shall give notice to the Terminal Operator, informing the Terminal Operator of the breach giving rise to the right, on the part of TNPA, to enforce the Performance Guarantee. If such breach is not remedied within the stipulated remedy period (as contemplated in clause 43.4 (*Remedy Provisions*)), and subject to the terms and

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conditions contained in the relevant or applicable Performance Guarantee and to any rights of the Lenders in terms of their cession under clause 15.7.1, TNPA may enforce the applicable Performance Guarantee for an amount equal to any cost, losses, damages or expenses incurred by TNPA in respect of any such breach by the Terminal Operator.

## 16. PROJECT INSURANCE

### 16.1 General Obligations

16.1.1 As of the Effective Date and thereafter at all times throughout the Project Term, the Terminal Operator shall obtain and maintain, at its own expense, with a reputable insurance company, as determined by TNPA in its sole and absolute discretion, insurance cover against:

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

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

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

16.1.1.2 Environmental risks, including sudden and accidental environmental risks and, if so required by TNPA in writing, long-term gradual pollution risks to the extent that such risks are not uninsurable.

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- 16.1.2 The Terminal Operator shall with effect from the Operations Date (or earlier if the relevant risks commence before that date) take out and maintain or procure the maintenance of the insurances described in Part [x] of Schedule 18 and any other insurances as may be required by law. These insurances must be taken out and become fully effective in each case not later than the date on which the relevant risk commences.
- 16.1.3 No Party to this Agreement shall take any action or fail to take any action, or (in so far as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.
- 16.1.4 The insurances referred to in clauses 16.1.1 and 16.1.2 shall:
- 16.1.4.1 name TNPA as co-insured with any other party maintaining the insurance;
  - 16.1.4.2 provide for non-vitiation protection in respect of any claim made by TNPA as co-insured in respect of the insurances detailed in Part [y] of Schedule 18. If non-vitiation protection is unavailable when any such insurance policy is first placed, then the Terminal Operator shall use all reasonable diligence to investigate whether any non-vitiation protection subsequently becomes available prior to each renewal of the policy and provides written confirmation promptly upon the renewal thereof as to the unavailability thereof to TNPA. If any non-vitiation protection subsequently becomes available, then TNPA shall be entitled to require the Terminal Operator to procure such protection and the costs thereof shall be borne by the Terminal Operator;
  - 16.1.4.3 contain a clause waiving the insurers' subrogation rights against TNPA, its employees and agents;
  - 16.1.4.4 provide for [90 (ninety)] days prior written notice of their cancellation, non-renewal or amendment to be given to TNPA; and

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

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

- 16.1.10 If the Terminal Operator is in breach of clause 16.1.1 or 16.1.2 , TNPA may procure and maintain, at the sole cost and expense of the Terminal Operator, the insurances referred to in those provisions to the extent that TNPA deems it necessary. In this event, the Terminal Operator shall be obligated to reimburse TNPA with any or all of the insurance premiums disbursed by TNPA on behalf of the Terminal Operator within a period of 14 (fourteen) days of receiving a written notice from TNPA to do so.
- 16.1.11 The Terminal Operator shall give TNPA notification within [5 (five)] days after any claim in excess of R10 000 000.00 under any of the insurance policies referred to in this clause 16.1 (*General Obligations*).
- 16.1.12 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Terminal Operator of its liabilities and obligations under this Agreement.
- 16.1.13 The proceeds from the insurance cover referred to in clause 16.1.1 above shall be utilised towards the repairing and/or the re-construction of the Terminal, and the Terminal Equipment with the end view of having them restored to their condition immediately prior to the event which occasioned the loss or damages.

## 16.2 Uninsurable Risks

- 16.2.1 If a risk usually covered by the Project Insurances in Part Y of Schedule 18, becomes Uninsurable, then the Terminal Operator shall notify TNPA within [3 (three)] days of that risk becoming Uninsurable.
- 16.2.2 If both Parties agree, or it is determined in accordance with clause 57.7 (*fast-track dispute resolution*), that:
- 16.2.2.1 such risk is Uninsurable;
- 16.2.2.2 such risk being Uninsurable is not caused by the actions or omissions of the Terminal Operator or a Subcontractor; and

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16.2.2.3 other service providers carrying on businesses similar to the Project would cease to operate their business as a result of such Uninsurability, then the Parties shall meet to discuss the means by which such risk should be managed (including by way of self-insurance by either Party).

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

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

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

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

16.2.5.2 an amount equal to the amount set out in clause 51 (*Termination Amount for termination in terms of Section 67 of the Act*) less the proceeds in or that ought to be in the Premium Reserve Account, and this Agreement will terminate.

### 16.3 Reinstatement

16.3.1 Subject to clause 16.4(*Economic Test*), all insurance proceeds received under any policy referred to in Part X of Schedule 18 ("Material Damage Policies") shall be applied to repair, reinstate and

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replace each part or parts of the Terminal in respect of which the proceeds were received.

16.3.2 All insurance proceeds paid under any Material Damage Policy in respect of a single event (or a series of related events) in an amount in excess of R10 000 000.00 (in *[month and year]* prices) shall be paid into a bank account to be opened in the name of both Parties (the "**Joint Insurance Account**"). The Lenders shall not be entitled to take security over the Terminal Operator's rights in the Joint Insurance Account.

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

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

16.3.3.1.1 if the Terminal Operator is not going to undertake the Reinstatement Works,, the prior written agreement of TNPA shall be required in respect of the person to be appointed to undertake the Reinstatement Works; and

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

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provided that if the Parties fail to reach any such agreement, then the dispute shall be referred for resolution in accordance with clause 57.7 (*fast-track dispute resolution*).

16.3.4 If TNPA is satisfied that the Reinstatement Plan will enable the Terminal Operator to comply with clause 16.3.5 below within a reasonable time-scale:

16.3.4.1 the Reinstatement Plan will be adopted;

16.3.4.2 the Terminal Operator shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan agreed to by TNPA;

16.3.4.3 prior to the earlier to occur of the termination or the expiry of this Agreement, any amount standing to the credit of the Joint Insurance Account (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by the Terminal Operator to the extent required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in clause 16.3.3 above, and to meet any other reasonable costs and expenses incurred by the Terminal Operator for the sole purpose of undertaking the Reinstatement Works. Following the earlier to occur of the termination or the expiry of this Agreement, TNPA may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;

16.3.4.4 TNPA agrees and undertakes that, subject to compliance by the Terminal Operator with its obligations under this clause 16.3, and provided that the Terminal Operator procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in clause 16.3.3 above, it shall not exercise any right which it might otherwise have had to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds; and

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16.3.4.5 after the Reinstatement Plan has been implemented to the reasonable satisfaction of TNPA and in accordance with clause 16.3.5 below, TNPA shall permit withdrawal by the Terminal Operator of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under clause 16.3.3 above, in respect of the Relevant Incident, together with any interest accrued on the Relevant Proceeds.

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

#### 16.4 **Economic Test**

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

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

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

16.4.3.1 the insurance proceeds; and

16.4.3.2 the Senior Debt,

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16.4.4 shall be released from the Joint Insurance Account to the Terminal Operator and such release shall constitute a complete discharge of all and any liability on the part of TNPA in respect of the damage caused to the Terminal and the damaged Terminal, but shall not discharge the Terminal Operator from the Operation and Maintenance or from undertaking the Operations in accordance with this Agreement. For the avoidance of doubt, should this Agreement subsequently and as a result of the damage done to the Terminal, terminate for Terminal Operator Default, TNPA shall not have any additional liability in terms of clause 51 (*Termination Amount on Terminal Operator Default*).

## 17. **PORT RULES, OCCUPATIONAL HEALTH AND SAFETY, AND PROCESS SAFETY ENGINEERING**

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

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

17.1.2 in compliance at all times with the Act, Port Rules and the Liquid Bulk Terminals: Mandatory Requirements for Safety, Health, Environment, Process Safety, Civil, Structural, Mechanical and Electrical Engineering as set out in Schedule 19.

## 18. **SHAREHOLDING IN THE TERMINAL OPERATOR**

18.1 Subject to clause 18.2 below, the Terminal Operator shall notify TNPA forthwith on becoming aware of any change in the legal or beneficial ownership from time to time of the Terminal Operator, and shall provide TNPA with any information which TNPA may reasonably require (and which the Terminal Operator is reasonably able to provide) relating to any person, which from time to time has acquired, or which it is aware proposes to acquire, a legal or beneficial interest in the Terminal Operator.

18.2 The Terminal Operator shall obtain TNPA's written consent (which consent shall not be unreasonably withheld or delayed) prior to any material change (as defined below) in the ownership of the Terminal Operator (other than where the Lenders exercise their rights to take a transfer of the shares in the Terminal Operator, in terms the Finance Agreements conferring security over any of the shares of the

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Terminal Operator). TNPA shall notify the Terminal Operator whether it consents to the transfer of ownership within 20 (twenty) Business Days of receipt from the Terminal Operator of all information required by TNPA to make a decision on the said request for consent. In this clause "**material change of ownership**" shall mean:

- 18.2.1 any Change in Control directly or indirectly of the Terminal Operator (or any company of which the Terminal Operator is a subsidiary and which company has the sole business of holding Equity in the Terminal Operator), within [5 (five) years] from the date hereof, provided that, without limitation to the generality of TNPA's right to refuse consent, TNPA shall be entitled to withhold its consents if it considers, in its reasonable opinion, that the proposed change has or is reasonably likely to have a material adverse effect on the basis upon which the Terminal Operator was appointed to be the preferred party to equip, operate and maintain the Terminal or provide Operation and Maintenance;
- 18.2.2 any Change in ownership or Control directly or indirectly of the Terminal Operator (or any company of which the Terminal Operator is a subsidiary and which company has the sole business of holding Equity in the Terminal Operator) or any change in the way in which the Terminal Operator is managed which results in or is reasonably likely to result in non-compliance with Schedule 10A (B-BBEE Requirements) at any time prior to the expiry of the Operations Period, provided that TNPA's consent shall not be unreasonably withheld or delayed;
- 18.2.3 any change to the ownership of (including without limitation the right to exercise any rights in relation to) the shares of the Terminal Operator, with the direct or indirect result of a change of ownership of 50% or more of such shares in aggregate over any period of 24 (twenty-four) calendar months, provided that TNPA's consent shall not be unreasonably withheld or delayed; or
- 18.2.4 any change in the composition of the directors of the Terminal Operator or the voting rights of the directors of the Terminal Operator that results in a change to at least 50% (fifty percent) of the voting rights.

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18.3 TNPA shall not unreasonably refuse its consent to any change of ownership of the Terminal Operator which is intended to produce compliance with Schedule 10A. Any dispute as to whether TNPA is acting unreasonably in refusing its consent to such transfer shall be resolved in accordance with the dispute resolution procedure set out in clause 57.7 (*fast track dispute resolution*).

19. **TNPA ASSISTANCE AND RIGHTS AND LIMITATIONS ON LIABILITY**

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

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

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

19.2 Nothing in this Agreement shall preclude or in any manner limit the rights of TNPA or any other Relevant Authority from granting such further or other concessions as it in its sole discretion deems fit, nor shall the Terminal Operator have any claim against TNPA or any other Relevant Authority arising from the grant of such further or other concessions. as it in its sole discretion deems fit, nor shall the Terminal Operator have any claim against TNPA or any other Relevant Authority arising from the grant of such further or other concessions, in any other port in South Africa.

19.3 TNPA shall not be liable to the Terminal Operator for the volume of demand for the services rendered in respect of the Operations.

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

19.5 Notwithstanding anything else contained in this Agreement, the Terminal Operator shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against TNPA or any other Relevant Authority and or their respective officers, employees, agents and or representatives on grounds that any

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information, whether obtained from or made available by TNPA or any such other Relevant Authority and or their respective officers, employees, agents and or representatives or otherwise is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

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

## 20. TNPA STEP-IN

20.1 If TNPA reasonably believes that it needs to take any action in connection with the Operation and Maintenance of the Port Terminal because a serious and urgent risk arises to the health or safety of persons or property, or to the environment, or to national and public safety and or to discharge a statutory duty, then TNPA shall be entitled to take action in accordance with the provisions set out below.

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

20.2.1 the action it wishes to take;

20.2.2 its reasons for taking such actions;

20.2.3 the date when it wishes to commence such action;

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

20.2.5 to the extent practicable, the effect of such action on the Terminal Operator on its obligations to perform the Operation and Maintenance during Step-in period.

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

20.4 If the Terminal Operator is not in breach of its obligations in terms of this Agreement in respect of which the Required Action is proposed to be taken, then for so long as

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and to the extent that the Required Action is taken, and this prevents the Terminal Operator from providing any part of the Project:

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

20.4.2 in respect of the time period over which such Required Action is conducted and provided that the Terminal Operator provides TNPA with such reasonable assistance as TNPA may need in the conduct of such Required Action (such assistance, however, to be at the expense of TNPA to the extent of any incremental costs), TNPA shall pay to the Terminal Operator an amount of monies that is equal to the revenue that the Updated Financial Model projects to have been earned by the Terminal Operator at the time of and during the period of the Required Action if the Terminal Operator was fulfilling all its obligations in respect of the Project that are affected by the Required Action over such period, less any monies that would have been payable to TNPA in terms of this Agreement including Concession Fees.

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

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

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

provided that, if by the expiry of the Step-in Period, the breach still subsists and if it constitutes a Terminal Operator Default, then TNPA will be entitled to serve a notice in terms of clause 43.3 (*TNPA's Options*) 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**

### **21. PROVISION OF THE PORT**

In accordance with the Act and any other applicable Laws TNPA shall provide the Port and shall manage and maintain the Port.

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## 22. TRANSITION PLANNING

- 22.1 It is recorded that, in order to ensure that there is no interruption of Operations at the Terminal during the cessation of Operations by the Incumbent Terminal Operator and the taking over of such Operations by the Terminal Operator, TNPA shall within 30 days of the commencement of the Transition Period, develop the Transition Schedule setting out the processes for the handing over of the Terminal including the Terminal Infrastructure and, where applicable the Terminal Equipment.
- 22.2 TNPA shall develop the Transition Schedule in consultation with the Terminal Operator and the Incumbent Terminal Operator, and take, *inter alia*, the following factors into account:
- 22.2.1 the date on which the Incumbent Terminal Operator shall cease to undertake Operations at the Terminal;
  - 22.2.2 the provisions of the Works Programme;
  - 22.2.3 any reports prepared by the independent certifier or engineers appointed or employed by NERSA in relation to the Project Site;
  - 22.2.4 whether TNPA would exercise its right of first refusal to purchase the terminal equipment from the Incumbent Terminal Operator and thus whether there is any Handover Equipment or TNPA would cede its right to do so to the Terminal Operator, as contemplated in clauses 7.3 and 7.4;
  - 22.2.5 the anticipated Effective Date of this Agreement; and
  - 22.2.6 the anticipated Actual Operations Commencement Date.
- 22.3 Upon completion of all the processes and activities set out in the Transition Schedule that are necessary to ensure seamless transfer of the Terminal from the Incumbent Terminal Operator to the Terminal Operator in a manner that does not interrupt Operations at the Terminal and ensures security of supply, TNPA shall issue a notice to the Terminal Operator notifying it of the date on which the Terminal will be handed over to the Terminal Operator in accordance with the procedure set out in the Transition Schedule ("**Operations Commencement Notice**").

## 23. PROJECT SITE

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- 23.1 TNPA shall be the owner of the Port and the Project Site on which the Port (including without limitation the Project Site) is constructed for the duration of this Agreement. The Terminal Operator acknowledges the ownership rights of TNPA in respect of the Port, the Project Site on which the Port is constructed and shall not in any way challenge or procure that any person challenges or assist any other person to challenge, such ownership rights and title of 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 Project Site other than the rights of occupation and use as detailed in this Agreement. The Terminal Operator also acknowledges that the Lenders do not have and shall not have any rights of title, ownership, lien, leasehold or any other rights in respect of the Project Site by virtue of providing funding to the Terminal Operator in respect of the Project.
- 23.3 The Terminal Operator shall bear all risks and costs with regard to the physical conditions or obstructions on the Project Site (both above ground and subsurface and whether artificial or not) whether foreseen or unforeseen which are encountered during the Operations Period or otherwise. The Terminal Operator shall be deemed as at the date of this Agreement to have satisfied itself in all respects as to the properties, nature, condition and extent of the Project Site.
- 23.4 For the Project Term of this Agreement the Terminal Operator shall have the right to free and undisturbed use and occupation of the Project Site as from the Effective Date, subject to the terms of this Agreement.
- 23.5 The Terminal Operator may object to any rates valuation made by any Relevant Authority of the Project Site used by the Terminal Operator or the Project Site of which they form part. The Terminal Operator shall be liable for all costs in prosecuting any such objection and the Terminal Operator shall be entitled to any benefit accruing as a result of a successful objection.
- 23.6 If TNPA is obliged by the Relevant Authority to make payments referred to in clause 6.1.5 , as a result of which TNPA makes such payments on behalf of the Terminal Operator, TNPA shall notify the Terminal Operator in writing about such payments and following such notice the Terminal Operator shall, within 30 (thirty) Days after being called upon to do so, refund to TNPA such payments as TNPA may have made in respect of the rates, Taxes, charges, levies, assessments or equivalent Taxes levied.

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- 23.7 TNPA shall use its reasonable endeavours to ensure that no other Port Users negatively affect the use by the Terminal Operator of the Project Site. The Terminal Operator shall not negatively affect the use of the Port by TNPA and the other Port Users, other than the Project Site and then only to the extent detailed in this Agreement.
- 23.8 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 in order to fulfil its obligations of maintenance in respect of the Port and to fulfil its obligations as the port authority of South Africa.
- 23.9 The Terminal Operator shall use the Project Site solely for the uses and purposes contemplated in this Agreement in respect of the Project.
- 23.10 The Terminal Operator shall be responsible for maintaining the Project Site in good condition, fair wear and tear excepted, at no cost to TNPA or any other Port User. TNPA shall maintain or shall use its reasonable endeavours to procure that other Port Users maintain the Port, other than the Project Site, in good condition, fair wear and tear excepted, at the cost of TNPA or the relevant Port User. The Parties shall meet and discuss any intended maintenance or repair activities, taking into account the maintenance programme referred to in clause 5.8.5, so as to ensure that such activities are conducted in a manner that minimises any interference with the operations of the other Party.
- 23.11 The Terminal Operator shall not be able to transfer any of its rights in respect of the Project Site or the use thereof to any other person without the prior written consent of TNPA.
- 23.12 The Terminal Operator shall, subject to TNPA's written approval, provide for:
- 23.12.1 any diversions to and re-routing of roads not forming part of the Project Site; and
- 23.12.2 the clearance, relocation and diversion of all Utilities on the Project Site, from the date the Project Site is delivered to the Terminal Operator and which are necessary for the execution of the Project.
- 23.13 The Terminal Operator shall continue to be bound by and shall honour any existing agreements between TNPA and any person, which grant access or way-leaves to the Project Site. The Terminal Operator may, however, apply to TNPA for any necessary modifications or cancellations of such agreements, such application to

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be made timeously in order to avoid any delay or additional cost. To the extent that TNPA has the right to modify or cancel such agreements and agrees to such modifications or cancellations, it shall comply timeously with the Terminal Operator request to modify and/or cancel any such agreements.

23.14 TNPA warrants to the Terminal Operator that, to the best of its knowledge, all of agreements referred to in clause 23.13 are in the form of Schedule 18 and that 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 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. The Terminal Operator shall provide TNPA with a plan in respect of such training, in accordance with the requirements of TNPA.

#### 25. **HEALTH AND SAFETY**

25.1 In accordance with the requirements of the Occupational Health and Safety Act No 85 of 1993, within 3 (three) months of the Actual Operations Commencement Date the Terminal Operator shall at its cost complete a comprehensive risk assessment of its business in respect of all areas of the Project Site and the services or processes it intends to undertake. Furthermore, the Terminal Operator shall provide 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:

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- 25.2.1 the implementation of and adherence to the IMDG Code and its regulations;
  - 25.2.2 compliance with the Occupational Health and Safety Act No 85 of 1993 and regulations promulgated in terms of such 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, vessels or other movable and immovable property in accordance with the Laws and the further written requirements of TNPA.
- 25.3 The Terminal Operator may not keep or store on the Terminal any Hazardous Substances or flammable substances unless:
- 25.3.1 it reasonably requires such Hazardous Substances or flammable substances to be kept or stored to enable it to conduct its business on the Project Site;
  - 25.3.2 it has obtained the prior written approval of 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 TNPA, the Terminal Operator shall provide, at its own cost, such fire water network, facilities or equipment, or other protective measures that are, in TNPA's reasonable opinion necessary in order to provide effective fire protection installations and water supply to the Project Site.
- 25.5 TNPA may from time to time require the Terminal Operator by notice in writing to provide and install at the Terminal Operator's cost such further devices, appliances and installations as TNPA may reasonably consider necessary to minimise the risk of any fire occurring or to prevent the spread of any fire which may occur. The Terminal Operator shall, when so required, comply with the requirements set forth in such notice within the time period specified in the notice.

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## 26. SECURITY

- 26.1 The Terminal Operator must ensure that the perimeter of the Project Site is fenced with security fencing of a standard reasonably acceptable to TNPA and which is in compliance with the ISPS Code, and that such fencing is maintained at that standard (and repaired as necessary) for the duration of the Project Term.
- 26.2 The Terminal Operator shall comply in all material respects with the provisions of the International Maritime Organisation Convention on Safety and Security at Sea and the ISPS Code. The Terminal Operator shall be responsible for the security of the Project Site and for all persons and movables therein, including Cargoes, and for the implementation of and adherence to the ISPS Code. The Terminal Operator shall submit to TNPA, within 1 (one) month of the Actual Operations Commencement Date a Project Site security assessment and develop a Project Site security plan for security levels 1, 2 and 3, corresponding with normal, medium and high threat situations. The plan shall indicate the operational and physical security measures the 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 TNPA in order to move to and operate at security level 2 and level 3. The Terminal Operator will nominate a Port Facility Security Officer who shall organise regular security drills and at all times provide the necessary security equipment on the Project Site.
- 26.3 The Terminal Operator shall submit to TNPA, within 1 (one) month of the Actual Operations Commencement Date, a Project Site security assessment and develop a Project Site security plan for security levels 1, 2 and 3, corresponding with normal, medium and high threat situations. The plan shall indicate the operational and physical security measures the 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 TNPA, to move to and operate at security level 2 (two), and to operate at security level 3 (three). The Terminal Operator will nominate a Port Facility Security Officer, organise regular security drills and at all times provide the necessary security equipment on the Project Site
- 26.4 As part of the Project Site security plan the Terminal Operator shall monitor and control all Cargo, vehicles and people entering and exiting the Project Site. In addition the Terminal Operator shall ensure that security communications are always readily available.

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**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 the duration of the period during which design and Construction shall take place and for any other period during the Operations Period as may be agreed upon between them. In this regard, it is recorded that TNPA, the Terminal Operator and the Independent Certifier shall enter into the Independent Certifier Agreement as soon as reasonably practicable after the Signature Date, but not later than the Effective Date. The Independent Certifier Agreement shall be substantially in the form of the agreement attached to this Agreement as Schedule 13.

27.1.2 TNPA shall propose a person for appointment as the Independent Certifier for approval by the Terminal Operator and after the Effective Date, by the Lenders.

27.1.3 If TNPA, the Terminal Operator and the Lenders are unable to agree on the person to be appointed as the Independent Certifier:

27.1.3.1 TNPA, the Terminal Operator and the Lenders 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 resumés 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. The fees and disbursements of the Independent Certifier

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incurred in connection with the Project shall be paid by TNPA and the Terminal Operator in equal proportions or shall be paid solely by the Terminal Operator depending on the complexity of the Project except as otherwise provided in the Independent Certifier Agreement or as otherwise agreed between TNPA, the Terminal Operator and the Lenders.

27.1.5 If, at any time during the Operations Period, there is no person appointed as the Independent Certifier for any purposes set forth in this Agreement, TNPA and the Terminal Operator shall appoint such an Independent Certifier in accordance with the provisions of this clause 27 (*Independent Certifier*).

## 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 requisite information includes, but is 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 with 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 commission reports;

27.2.1.4 copies of the Operating and Maintenance Manual;

27.2.1.5 copy of the health and safety plan of the Terminal Operator; and

27.2.1.6 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 TNPA and the Terminal Operator shall be entitled to consult with the Independent Certifier on any technical matter relating to the Project. In accordance with the provisions of and as contemplated in this Agreement 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. The Parties agree to comply with such decisions of the Independent Certifier until and unless otherwise determined pursuant to clause 54 (*Dispute Resolution*).
- 27.2.4 The Independent Certifier's duties shall include, but not be limited to, the review, inspection, testing, accepting and certification of the Construction Contractor's work to ensure proper performance and completion of the Works in accordance with this Agreement, the Construction Agreement and/or 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 57 (*Dispute Resolution*), provided that the Parties shall comply with such decisions by the Independent Certifier until and unless otherwise determined pursuant to clause 57 (*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 an Independent Certifier, the Independent Certifier shall rely on independent expert advice in making such evaluation or assessment. The costs of such

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independent expert advice shall form part of the Independent Certifier's costs.

## 28. DESIGN AND CONSTRUCTION

### 28.1 Performance of the Detailed Design

28.1.1 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.

28.1.2 The Terminal Operator shall provide to the Independent Certifier and TNPA Detailed Design and D&C Specifications in respect of the Terminal within 5 (five) months of the Signature Date. The Detailed Design and D&C Specifications in respect of the Terminal must comprise the following:

28.1.2.1 evidence of compliance with the said Detailed Designs and D&C Specifications;

28.1.2.2 any access to existing pipelines and loading arms which will be determined in consultation with the existing terminal operator at the Project Site, in compliance with NERSA Legislation;

28.1.2.3 connectivity to existing pipelines for the conveyance of Cargo to and from the Terminal; and

28.1.2.4 access to the Project Site via rail and road.

28.1.3 The Detailed Design shall be reviewed, prior to Construction, by the Independent Certifier in accordance with the Rules of Conduct for Registered Persons: Engineering Profession Act, 2000 (Act No. 46 of 2000). If the Independent Certifier, acting reasonably, is of the opinion that the Detailed Designs comply with the requirements of this Agreement, the Independent Certifier Agreement, and industry norms and standards, the Independent Certifier shall accept the Detailed Designs in writing.

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- 28.2 If the Independent Certifier, acting reasonably, is not satisfied with the Detailed Designs, the Independent Certifier shall notify the Terminal Operator and TNPA of the reasons for its dissatisfaction within 5 (five) Business Days after the review referred to in 27.1.2 specifying those elements of the Detailed Designs with which the Independent Certifier, acting reasonably, is dissatisfied.
- 28.3 Within 5 (five) Business Days of the Independent Certifier having expressed dissatisfaction with the detailed designs, the Terminal Operator shall attend to such areas of concern raised by the Independent Certifier and re-submit the amended Detailed Designs for review by the Independent Certifier (the "**Second Review**").
- 28.4 If, after reviewing the Second Review, the Independent Certifier, acting reasonably, is still not satisfied with the Detailed Designs, the Independent Certifier shall notify the Terminal Operator and TNPA of the reasons for its dissatisfaction within 5 (five) Business Days after the Second Review, specifying those elements of the Detailed Designs with which the Independent Certifier, acting reasonably, is still dissatisfied with the Terminal Operator. The Independent Certifier and the Parties will arrange a meeting that includes the designer and endeavour to reach mutual agreement on the correction of the areas of concern raised by the Independent Certifier.
- 28.5 Once the Detailed Design has been accepted in writing by the Independent Certifier, it shall be deemed to have been approved by TNPA.
- 28.6 **Execution of the Works**
- 28.6.1 The Terminal Operator shall perform or procure the performance of the Works in accordance with the provisions of this Agreement, the Works Programme and the D&C Specifications with effect from the Effective Date.
- 28.6.2 The Terminal Operator shall bear sole responsibility for the procurement of all construction materials, in accordance with the approved Detailed Design and compliance with the D&C Specifications.
- 28.6.3 The Terminal Operator may submit to the Independent Certifier for review, acceptance and recording of 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.

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28.6.4 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 written consent of TNPA and the Terminal Operator.

#### 28.7 **Commencement of the Works**

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

#### 28.8 **Completion of the Works**

28.8.1 Completion of the Works shall be effected no later than the target date for the completion of the Works as set out in the Works Programme ( the “**Target Completion Date**”)

28.8.2 TNPA and the Independent Certifier shall inspect the 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.

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

28.8.4 If the Independent Certifier is not satisfied that completion of the Works has occurred, the Independent Certifier shall notify the Terminal Operator and TNPA of such failure to attain completion of the Works within 5 (five) Business Days after the inspection referred to in clause 28.8.2 specifying those elements of the Works or other conditions that remain to be satisfied by the Terminal Operator.

28.8.5 The issuing of a Completion Certificate shall not be withheld or delayed where there are minor items that were not completed and or attended to and such outstanding items shall be reflected in a Snagging List (as defined in clause 28.8.7).

28.8.6 The Independent Certifier shall issue to the Independent Certifier's satisfaction a Completion Certificate within 5 (five) Business Days after the completion of the Works, ensuring that all elements and conditions

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as specified in the notice contemplated in clause 28.8.4 and any other conditions specified are satisfied.

28.8.7 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 should still undertake to complete in respect of the Works and the time within which such Unfulfilled Obligations are to be completed or certify that there are no Unfulfilled Obligations in respect of the Works. The Terminal Operator shall attend to such Unfulfilled Obligations within the time specified in the Snagging List.

28.8.8 If the Terminal Operator has suffered delay in the execution of its rights or obligations in terms of this Agreement as a result of the Independent Certifier's failure to act in accordance with this clause 28.8 (*Completion of the Works*), such event shall constitute a Relief Event and shall be governed by the provisions of clause 39 (*Consequences of a Relief Event*).

## 28.9 **Archaeological matters**

28.9.1 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 TNPA. The Terminal Operator shall take all reasonable precautions to prevent its agents, representatives and employees, or other persons from removing or damaging any such Archaeological Articles. The Terminal Operator shall, immediately upon discovery of such Archaeological Articles, advise TNPA, who shall issue instructions for dealing with it, accordingly.

28.9.2 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 TNPA's instructions as contemplated in clause 28.9.1 or obtaining the Consents required in respect of such Archaeological Articles and their removal or preservation, such event shall constitute a Relief Event and shall be dealt with in accordance with clause 39 (*Consequences of a Relief Event*).

## 28.10 **Utilities and Utility Way-Leaves**

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- 28.10.1 TNPA shall provide Utilities between the Port boundary and the Terminal boundary provided that, for the avoidance of doubt, TNPA shall not be liable or responsible for any Utilities at the Terminal, including the removal and disposal of waste.
- 28.10.2 At the request of any public or private Utility TNPA may approve the establishment on or over and/or relocation from the Project Site, of Utility way-leaves including, but not limited to, power pylons or lines, water or gas pipes and telecommunication lines or pylons.
- 28.10.3 If such establishment and/or relocation has delayed the Works or the Scheduled Operations Commencement Date or adversely affected the normal course of Operation and Maintenance, such event shall constitute a Relief Event and shall be dealt with in accordance with clause 39 (*Consequences of a Relief Event*) ***[drafting note: delete "the Works" if there is no construction, refurbishment and/or equipment procurement.]***

#### 28.11 Information Relating to the Project and the Works

***[drafting note: delete "the Works" if there is no construction, refurbishment and/or equipment procurement.]***

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

#### 28.12 Disruption to Port and Port Users

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The Terminal Operator shall ensure that none of the 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 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

### 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 commencement of operations, the Terminal Operator shall promptly and, in any event within 7 (seven) Days after receipt of such notice, notify 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 TNPA and the Independent Certifier shall no later than 21 (twenty-one) Days before such anticipated date of commencement of Operations inspect the Works in conjunction with the Terminal Operator to verify whether or not commencement of Operations will be achieved by the anticipated date.

29.2.3 If the Independent Certifier is reasonably of the opinion that commencement of Operations will be achieved by the anticipated date and that Operations 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, taking into account the provisions of the Transition Schedule.

29.2.4 If the Independent Certifier is reasonably of the opinion that commencement of Operations will not be achieved by the anticipated date, the Independent Certifier shall, within 5 (five) Days after the inspection referred to in clause 29.2.2, notify the Terminal Operator and TNPA of such failure to satisfy the conditions and shall specify those elements of the Works or other conditions that remain to be

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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 Works and if the matters referred to in the notice have been satisfied the Independent Certifier shall issue the Provisional Operations Certificate forthwith, taking into account the provisions of the Transition Schedule. 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 TNPA.

29.2.6 On the anticipated date for commencement of Operations determined in terms of clause 29.2.3 or 29.2.5, the Independent Certifier shall inspect the Works and, if he is satisfied that commencement of Operations will be achieved, shall forthwith and on the same Day as the inspection issue to the Terminal Operator the Operations Certificate, taking into account the provisions of the Transition Schedule. 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 commencement of Operations and when such items have been attended to the Independent Certifier shall forthwith and on the same Day as the relevant items are finally attended to by the Terminal Operator, issue the Operations Certificate to the Terminal Operator, taking into account the provisions of the Transition Schedule.

29.2.7 If the Terminal Operator has suffered delay in the execution of its rights or obligations in terms of this Agreement as a result of the Independent Certifier's failure to act in accordance with the provisions of this clause 29.1(*Commencement of Operations and Maintenance*), such event shall constitute a Relief Event.

### 29.3 **Inventory**

29.3.1 Within 3 (three) months after the anticipated date of commencement of Operations, the Terminal Operator shall notify and request the Independent Certifier and the technical representatives of TNPA to

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attend an inspection of the Terminal Infrastructure, the details of which will be agreed between them and set out in the Transition Schedule.

29.3.2 The Terminal Operator, the representatives of TNPA and the Independent Certifier shall at such inspection agree on the inventory of and prepare a written statement covering the condition and value of such Terminal Infrastructure and shall take full colour photographs of all such Terminal Infrastructure.

29.3.3 The contents and the accuracy of the written statement shall be approved by the Independent Certifier.

#### 29.4 **Approval to Commence Operations**

29.4.1 The date specified by TNPA in the Operations Commencement Notice referred to in clause 22.3, as the date upon which the aforesaid Terminal will be handed over to the Terminal Operator, shall be the Actual Operations Commencement Date.

29.4.2 On the Actual Operations Commencement Date, TNPA shall, subject to and in accordance with the provisions of the Act, grant approval to the Terminal Operator for the commencement of Operations at the Terminal. The Terminal Operator shall be authorised to charge and collect fees in respect of the Operations, with effect from the Actual Operations Commencement Date.

29.4.3 Notwithstanding but without prejudice to the provisions of clause 29.4.1, the Terminal Operator shall not operate the Terminal or charge or collect fees in respect of the Operations until the Independent Certifier has issued the Operations Certificate

### 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 including the Operating Specifications.

#### 30.2 **Standards of Operation and Maintenance**

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- 30.2.1 Operation and Maintenance shall be carried out in accordance with the Law and in conformity with the standard of care and workmanship prescribed in the Operating Specification, using equipment and materials which are of suitable quality for the purposes and uses intended and free of defects and deficiencies, and in accordance with the Operating Specifications.
- 30.2.2 The Terminal Operator shall prepare Operations and Maintenance Manuals based on the Operating Specifications and shall submit to TNPA for approval. The Operations and Maintenance Manuals shall include:
- 30.2.2.1 formalised risk management processes in place which demonstrate how hazards are identified and quantified, and how the associated risk is managed;
  - 30.2.2.2 risk assessments for the proposed Operations and the manner in which the Terminal Operator will be structured in order to identify hazard events, assess the probability of occurrence and the determination of potential consequences of the event;
  - 30.2.2.3 the output of the risk assessment shall provide recommendations on prevention, mitigation and recovery; and
  - 30.2.2.4 written, comprehensive marine terminal operating manual specific for the proposed operations at the Project Site which shall comprise *inter alia* loading and discharge procedure, exposure to toxic vapours, cargo transfer equipment procedures, control and shutdown procedures, fire and emergency procedures, Terminal layout plan, drawings, static electricity precautions and plan of firefighting systems.
- 30.3 Any changes to the Operations and Maintenance Manuals, after such manuals have been approved by TNPA as contemplated in clause 30.2.2, shall require the prior written approval of TNPA.

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30.4 The Terminal Operator shall develop an active and comprehensive safety programme designed to deliver a high level of safety performance, designed to achieve the aims of TNPA's safety policy. The Terminal Operator must submit its health and safety policy document together with the elements covered in its safety program to TNPA for approval. The safety programme must comprise the following minimum requirements:

- 30.4.1 emergency management;
- 30.4.2 periodic fire and oil spill drills to address all aspects and locations of potential incidents including vessel at berth;
- 30.4.3 hazard identification and risk assessment;
- 30.4.4 permit to work system;
- 30.4.5 incident reporting;
- 30.4.6 site safety inspections;
- 30.4.7 site work practices of work and housekeeping;  
site work practices of work and housekeeping;
- 30.4.8 personal protective equipment;
- 30.4.9 safety management of visitors; and
- 30.4.10 on site training and management.

30.5 **Management**

- 30.5.1 The Terminal Operator shall ensure that, subject to the other provisions of this Agreement, the Terminal is open to undertake the Operations and that the use of the Terminal and undertaking of the Operations are convenient and safe at all times and (for the avoidance of doubt) 24 (twenty-four) hours of each Day.
- 30.5.2 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.

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

30.5.4 The Terminal Operator shall at all times exercise its concession rights strictly in compliance with the provisions of this Agreement and applicable Law.

### 30.6 **Marketing**

30.6.1 The Terminal Operator shall actively market the Terminal and the services internationally and locally. 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 TNPA for approval prior to its use thereof.

30.6.2 Within 30 (thirty) Days of the receipt by TNPA of the information, materials, documents and other data detailed in clause 30.6.1, TNPA shall either grant or withhold its consent in respect of the use thereof in the marketing of the Terminal. If 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 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.

### 30.7 **Volumes and Occupancy**

30.7.1 The Terminal Operator shall ensure that the volumes of the Cargo on the liquid bulk vessels are in accordance with the measures set out in Schedule 16C (Key Performance Areas).

30.7.2 For the avoidance of doubt, the Operations Performance Guarantee shall also be given in respect of and cover the Terminal Operator's obligations in terms of this clause 30.7 (*Volumes and Occupancy*) and Schedule 16C (Key Performance Areas).

### 30.8 **Performance Measures and Penalties**

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- 30.8.1 Without limiting the generality of this clause 30.8.1, but subject to clause 30.8.6, the Terminal Operator shall, from the first anniversary of the Actual Operations Commencement Date meet the minimum performance standards to be determined by TNPA. TNPA shall notify the Terminal Operator in writing at least 3 (three) months prior to such anniversary.
- 30.8.2 The minimum performance standards determined in terms of clause 30.8.1 shall be reviewed by TNPA on an annual basis in such a manner that the reviews are aligned with TNPA Financial Year, after consultation with the Terminal Operator. New minimum performance standards shall be determined by TNPA and notified in writing to the Terminal Operator at least 3 (three) months prior to the expiry of TNPA Financial Year in which such review is conducted.
- 30.8.3 The performance of the Terminal Operator will be reviewed quarterly by TNPA. TNPA will provide the Terminal Operator with a list of all the information which it reasonably requires the Terminal Operator to provide for each Quarter no later than 10 (ten) Business Days before the beginning of that Quarter.
- 30.8.4 In order to conduct the Quarterly review, the Terminal Operator shall provide TNPA, within 10 (ten) Business Days after the end of each Quarter, with all information that TNPA requires to assess the Terminal Operator's performance in that Quarter.
- 30.8.5 TNPA shall communicate its initial comments and any requests for additional information within 10 (ten) Business Days after the information has been supplied by the Terminal Operator in terms of clause 30.8.4, and will take into consideration any response by the Terminal Operator to these initial comments, provided that this response is submitted within 10 (ten) Business Days of the initial comments. If TNPA intends to make a negative finding regarding any aspect of the performance of the Terminal Operator, it shall give reasonable notice of its intention to do so to the Terminal Operator and representatives of TNPA and the Terminal Operator shall meet to discuss the proposed finding before a final decision is made.
- 30.8.6 When, in the opinion of the Terminal Operator, circumstances occur which may impact negatively on its achievement of its performance

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targets, the Terminal Operator shall notify TNPA in writing within 10 (ten) Business Days of the occurrence and both the Terminal Operator and TNPA shall document the details of the occurrence. Every performance standard shall be relaxed in accordance with such terms as the Parties may agree, should the Terminal Operator be prevented or delayed in performing its obligations by reason of a Force Majeure event. The performance targets 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.

- 30.8.7 Subject to the rights of TNPA to terminate this Agreement under clause 43 (*Terminal Operator Default*), if the Terminal Operator fails to achieve the minimum performance standards set out under this clause 30.8 and Schedule 16C (Key Performance Areas) for 3 (three) consecutive years (the "**Penalty Period**"), and such failure is not attributable to any action, inaction or breach by TNPA of its obligations under this Agreement ("**Failure**") the Independent Certifier shall notify TNPA and the Terminal Operator of such Failure. If there is no Independent Certifier TNPA will notify the Terminal Operator of such Failure.
- 30.8.8 The Terminal Operator shall be liable upon notice of the Failure to pay to TNPA the Performance Penalties specified in relation to such Failure, as set forth in Schedule 11 commencing from the first Day of such Failure.
- 30.8.9 The penalties payable in terms of this clause 30.8 shall be in addition to any other amounts payable in respect of the Penalty Period. TNPA shall not be entitled to seek damages for any failure of the Terminal Operator for which there is a specified penalty under this clause 30.8 or elsewhere in this Agreement. The provisions of this clause 30.8 are, however, without prejudice to TNPA's rights to claim damages for any other breach or default of this Agreement or to exercise any other rights available to it at Law or under this Agreement arising as a result of any failure of the Terminal Operator as referred to in this clause 30.8 or any other cause whatsoever.

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30.8.10 Any monies due to TNPA pursuant to clause 30.8.6 shall be payable by the Terminal Operator within 30 (thirty) Days after certification by the Independent Certifier or TNPA (as the case may be) that the Terminal Operator is liable for such payment to TNPA and TNPA shall be entitled to set-off any amounts payable as aforesaid against any monies due or which may become due to the 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 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.

## 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 TNPA a report on its Operations and Maintenance during that financial year. The format, nature and the scope of the reporting required by TNPA shall be provided to the Terminal Operator within a reasonable period of time before that report is required to be submitted by the Terminal Operator, but shall generally include detailed information in respect of the following:

- 31.1.1 the quality and level of service in the financial year under review;
  - 31.1.1.1 its compliance with the terms of this Agreement, the Act and the Regulations;
  - 31.1.1.2 steps taken to eliminate anti-competitive and discriminatory practices; and
  - 31.1.1.3 the quality and level of performance with regard to such environmental criteria and social responsibility requirements as may be set by TNPA or required by other national Legislation.

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

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- 31.1.2.1 such statistical information relating to its operations as may reasonably be required by TNPA, including but not limited to statistics on the number, type and size of vessels serviced at the Project Site;
  - 31.1.2.2 statistics on the number of wagons and trucks handled at the Project Site interface with land transport and Liquid Bulk Cargo dwell time statistics; and
  - 31.1.2.3 its cargo forecast for the remainder of the Project Term, or such other shorter period as specified, in the form determined by TNPA.
- 31.2 The Terminal Operator shall, if requested by TNPA in writing, submit to TNPA an information summary regarding the information in clauses 31.1 and 31.1.2 (excluding any Confidential Information and or any information not required to be provided by the Terminal Operator) and the Uncommitted Capacity Reports referred to in clause 5.6.4, which summary may be disclosed to members of the public.
- 31.3 Reports in respect of all Cargo exported, landed and shipped must be provided to TNPA by the Terminal Operator on a per vessel basis, 72 (seventy two) hours subsequent to the vessel having entered the Port.
  - 31.3.1 TNPA may require the Terminal Operator, at the Terminal Operator's cost, to submit such additional information as may be reasonably necessary to explain or amplify any report or information submitted by the Terminal Operator in terms of clauses 31.1 and 31.1.2 above.
  - 31.3.2 The Terminal Operator must, within 24 (twenty four) hours of its occurrence or discovery inform TNPA of:
    - 31.3.2.1 any industrial dispute between the Terminal Operator and its employees;
    - 31.3.2.2 any industrial accident or disaster involving any employee or agent of the Terminal Operator or any injury on duty or fatality;
    - 31.3.2.3 any occurrence of fire within the Project Site;

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- 31.3.2.4 any theft or pilferage within the Project Site or any theft or pilferage involving any Cargo in the Terminal Operator's possession or control;
- 31.3.2.5 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
- 31.3.2.6 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 Generally Accepted Accounting Principles 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 TNPA.
- 32.1.3 TNPA may meet with the Terminal Operator's auditors regarding the Terminal Operator's accounts and operations twice in a Contract Year. TNPA may also, at its own cost, require that officers of TNPA or a firm of independent accountants conduct additional audits of the Terminal Operator after 10 (ten) Days prior notice to the Terminal Operator.

### 32.2 **Right of Inspection**

The Terminal Operator shall furnish to TNPA any information that TNPA may reasonably request and shall permit representatives of TNPA to visit the Works, the Terminal and the Project Site, or any of the other offices where the business of the Terminal Operator is conducted. In addition the Terminal Operator shall provide TNPA with access to the Terminal Operator's books of accounts, 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. The

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Terminal Operator shall cause the Operator to make such information, books of accounts and records, drawings and other data relating to Operations and Maintenance, available to TNPA. The Terminal Operator shall provide TNPA with full read-only access to the Operator's computer for the review and monitoring of revenue collection at the Terminal.

### 32.3 Periodic Reports

32.3.1 The Terminal Operator shall furnish TNPA as soon as practicable but in any event not later than 6 (six) 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 Generally Accepted Accounting Principles), 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 Finance Agreements and as contemplated in the Updated Financial Model as at the end of the relevant financial year or detailing any non-compliance by the Terminal Operator therewith; and

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.

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- 32.3.2 The Terminal Operator shall furnish TNPA, as soon as practicable but in any event no later than 45 (forty-five) Days after the end of each Quarterly period of each Contract Year (except for the last Quarterly period of each financial year), with:
- 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 Generally Accepted Accounting Principles), including in each such report a balance sheet, a statement of income and a statement of cash flows as of the end of and for such period, and for the period from the beginning of such year to the close of such Quarterly period, certified by an officer of the 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 R1,000,000.00 (one million Rand) (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 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 Operations and Maintenance

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costs, during the respective period, for the Terminal and the undertaking of the Operations separately

- 32.3.3 The Terminal Operator shall furnish to TNPA as soon as practicable, but in any event no later than 35 (thirty-five) Days prior to the end of each Contract Year, the projected profit and loss account and the budget for the following Contract Year, together with an analysis thereof.
- 32.3.4 The Terminal Operator shall furnish to TNPA as soon as practicable, but in any event no later than the end of each Quarterly period of each Contract Year, projected cash flow for the following Quarterly period, together with an analysis thereof.
- 32.3.5 The Terminal Operator shall immediately report to 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 TNPA with respect to the matters specified in the Operating Specifications to be reported relating to provision of the Operations and Maintenance and or the Operations.

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#### 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 TNPA and the Terminal Operator, the Terminal Operator shall deliver all such records (or copies thereof where such records are required by Legislation to remain with the Terminal Operator or the Terminal Operator's shareholders) to TNPA or to its duly authorised representative, in such manner and at such location as TNPA shall determine. TNPA shall make such records available for inspection by the Terminal Operator at any reasonable time. All costs of retaining such records in safe storage and delivering the same shall be borne by the Terminal Operator.

#### 32.5 Reporting of Changes

32.5.1 The Terminal Operator shall not without the prior written consent of 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 Finance Agreements and the Associated Agreements, enter into any agreement or series of agreements which contemplate or could involve one or more payments by or to the Terminal Operator in the aggregate in excess of the equivalent of R50, 000, 000.00 (fifty million Rand) (in [month and year] prices);

32.5.1.4 enter into any Related Party Transaction;

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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 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, TNPA, the Lenders, the Independent Certifier and/or their representatives may, at their 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 Terminal and Operation and Maintenance and to monitor compliance by the Terminal Operator with its obligations under this Agreement.

33.2 TNPA, the Lenders, the Independent Certifier and or their representatives may at all times, but subject to the reasonable security and safety requirements of the 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 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 incurred by the Terminal Operator.

### 34. AUTHORITY CHANGES

34.1 TNPA shall have the right to require changes to be made to the Operating Specifications in accordance with this clause ("**Authority Change**"), in which event TNPA shall serve notice thereof ("**Authority Notice of Change**") on the Terminal Operator. Such Authority Changes shall always provide for any variation of the

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Terminal Operator's obligations under this Agreement and the Associated Agreements and be technically feasible.

34.2 The Authority Notice of Change shall:

34.2.1 set out the Authority Change required in sufficient detail to enable the Terminal Operator to calculate and provide the estimated revised costs of the Project in accordance with clause 34.3("Estimate"); and

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

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

34.3.1 any impact on the performance of the Terminal Operator's rights or obligations under this Agreement and any impact on the Terminal Operator's obligations to the Lenders;

34.3.2 any amendment required to this Agreement and or any Associated Agreement as a result of the Authority Change;

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

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

34.3.5 the proposed method of certification of any operational aspects of the Terminal Operator's obligations under this Agreement required by the Authority Change if not covered by the procedures set forth in the Operation and Maintenance.

34.4 As soon as practicable after TNPA receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. In such discussions TNPA may modify the Authority Notice of Change, in which case the Terminal Operator shall as soon as practicable and in any event within such period as determined by the Independent Certifier (which period shall not be less than 28 (twenty-eight) Days after receipt by

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the Terminal Operator of such modification), notify TNPA of any consequential changes to the Estimate.

- 34.5 As soon as practicable after the contents of the Estimate have been agreed, TNPA shall:
- 34.5.1 confirm the Estimate (as modified); or
  - 34.5.2 withdraw the Authority Notice of Change.
- 34.6 If TNPA does not confirm the Estimate (as modified) within 30 (thirty) Days after the contents of the Estimate having been notified to it in accordance with clause 34.3 or determined pursuant to clause 34.5, then the Authority Notice of Change shall be deemed to have been withdrawn.
- 34.7 If the Estimate (as modified) involves estimated capital expenditure, then the Terminal Operator shall use its reasonable endeavours to obtain funding for the whole of the estimated capital expenditure, on terms satisfactory to the Terminal Operator and the Lenders.
- 34.8 If the Terminal Operator has used its reasonable endeavours to obtain funding for the whole of the estimated capital expenditure, but has been unable to do so within 60 (sixty) Days after the date that TNPA confirmed the Estimate, then the Terminal Operator shall have no obligation to carry out the Authority Change, unless TNPA agrees to pay the cost involved.
- 34.9 TNPA may at any time following the date on which the Estimate is confirmed agree to meet all or to the extent the Terminal Operator has obtained funding for part of the capital expenditure the remaining part of the estimated capital expenditure.
- 34.10 If the Estimate has been confirmed by TNPA and TNPA has agreed to meet all or part of the capital expenditure pursuant to clause 34.9, then the Terminal Operator shall be entitled to compensation as set forth in clause 40 (*Consequences of a Compensation Event*).
- 34.11 If the Authority Notice of Change is deemed to be withdrawn in terms of clause 34.6 or if TNPA has confirmed the Estimate and has agreed to meet all or part of the capital expenditure as envisaged in clause 34.9, but TNPA thereafter withdraws the Authority Notice of Change, TNPA shall pay to the Terminal Operator the reasonable costs of providing the Estimate.

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## PART IV – FINANCIAL PROVISIONS

### 35. FEES IN RESPECT OF OPERATIONS

- 35.1 With effect from the Actual Operations Commencement Date, the Terminal Operator shall have the exclusive right and obligation for its benefit and risk to levy and collect tariffs in respect of the Operations.
- 35.2 None of TNPA or any other Relevant Authority shall incur or assume any liability for or in connection with the tariffs charged in respect of the Operations, any system used in respect of such tariffs or any defect or deficiency therein.
- 35.3 No later than 3 (three) months before the Scheduled Operations Commencement Date, the Terminal Operator shall submit to TNPA the initial tariff rates which it intends to charge in respect of the services with effect from the Actual Operations Commencement Date.
- 35.4 The Terminal Operator must submit to TNPA annually from the Actual Operations Commencement Date, any adjustments to tariff rates which the Terminal Operator intends on implementing and that are in accordance with the necessary statutory and regulatory approvals.
- 35.5 None of TNPA or any other Relevant Authority shall incur or assume any liability for or in connection with the fees charged in respect of the Operations, any system used in respect of such fees or any defect or deficiency therein.
- 35.6 With effect from the Actual Operations Commencement Date, the Terminal Operator shall apply the initial fee rates specified in Schedule 20 (Fees Schedule), until revision thereof in accordance with the provisions of clause 35.7.
- 35.7 The Terminal Operator may from time to time request TNPA to approve revisions and increases to fee rates, ("**Fee Revision Request**") in accordance with Schedule 20 (Fees Schedule).
- 35.8 Provided that the Terminal Operator has made the Fee Revision Request at least 21 (twenty one) days before the date the revision is required to take effect and the requested revisions and increases do not individually exceed CPI, TNPA may, subject to clause 35.10, approve such increase.
- 35.9 Any revision or increase in fee rates shall be effective only from the date approved by TNPA from time to time.

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- 35.10 TNPA shall not be obliged to approve such an increase if a Terminal Operator Default has occurred and is continuing.
- 35.11 All costs and expenses related to and arising from the charging and collection of tariffs shall be borne by the Terminal Operator.
- 35.12 Tariffs shall be charged and collected in Rand.

### 36. **REFINANCING**

- 36.1 The Terminal Operator shall promptly notify TNPA in writing prior to taking any steps to implement any proposed Refinancing (including any Exempt Refinancing). Such notice shall include:
- 36.1.1 full details of any proposed amendments to be made to or waivers granted under any of the Project Documents to give effect to such Refinancing;
  - 36.1.2 a copy of the proposed financial model relating to such Refinancing (if any) and the basis for the assumptions used in that financial model;
  - 36.1.3 the reasons for such Refinancing; and
  - 36.1.4 any other information that may be reasonably necessary to enable TNPA to assess such Refinancing having regard to the provisions of this clause 36 (*Refinancing*).
- 36.2 The Terminal Operator shall procure that no Refinancing (other than an Exempt Refinancing) is implemented without the prior written approval of TNPA.
- 36.3 Subject to clause 36.1, the Terminal Operator may implement any Exempt Refinancing without the prior approval of TNPA.
- 36.4 For the avoidance of any doubt, the notification and approval requirements set forth in this clause 36 (*Refinancing*) do not apply to any Permitted Borrowing.

### 37. **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, 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 TNPA is or may become so liable. The costs and losses arising

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out of such hedging arrangements shall not be included in or form part of the Termination Amount.

### 38. **DEFAULT INTEREST**

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

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

### 39. **CONSEQUENCES OF A RELIEF EVENT**

39.1 If and to the extent that a Relief Event:

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

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

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

39.2 To obtain relief, the Terminal Operator must:

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

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

39.2.3 demonstrate to the reasonable satisfaction of TNPA that:

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- 39.2.3.1 the Terminal Operator and its Subcontractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
  - 39.2.3.2 the Relief Event directly caused the delay to Actual Operations Commencement Date or the need for relief from other obligations under the Agreement;
  - 39.2.3.3 the time lost and/or relief from the obligations under the Agreement claimed could not reasonably be expected to be mitigated or recovered by the Terminal Operator acting in accordance with International Best Practice, without incurring material expenditure; and
  - 39.2.3.4 the Terminal Operator is using reasonable endeavours to perform its obligations under the Agreement.
- 39.3 If the Terminal Operator has complied with its obligations under clause 39.2.3 above, then:
- 39.3.1 the Actual Operations Commencement Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or
  - 39.3.2 TNPA shall not be entitled to exercise its rights to terminate this Agreement under clause 43 (*Terminal Operator Default*) and, subject to clause 39.4 below, shall give such other relief as has been requested by the Terminal Operator.
- 39.4 If the information required by clause 39.2 above is provided after the dates referred to in that clause, then the Terminal Operator shall not be entitled to any relief during the period for which the information is delayed.
- 39.5 The Terminal Operator shall notify TNPA if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

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- 39.6 If a Relief Event continues for a period in excess of 180 (one hundred and eighty) days, the Parties shall meet in order to find a mutually satisfactory solution for dealing with such prolonged Relief Event.
- 39.7 The Parties shall resolve the matter in accordance with clause 57.7 (*fast-track dispute resolution*) if:
- 39.7.1 the Parties cannot agree the extent of the relief required; or
  - 39.7.2 TNPA disagrees that a Relief Event has occurred; or
  - 39.7.3 the Terminal Operator is entitled to any extension of the Target Completion Date and/or the Scheduled Operations Commencement Date and/or relief from other obligations under this Agreement.

#### 40. CONSEQUENCES OF A COMPENSATION EVENT

- 40.1 If, as a direct result of the occurrence of a Compensation Event:
- 40.1.1 the Terminal Operator is unable to provide the Operations on or before the Scheduled Operations Commencement Date;
  - 40.1.2 the Terminal Operator is unable to comply with its obligations under this Agreement; and/or
  - 40.1.3 the Terminal Operator incurs costs or loses revenue,
- then the Terminal Operator is entitled to apply for relief from its obligations under this Agreement.
- 40.2 To obtain relief the Terminal Operator must:
- 40.2.1 as soon as practicable, and in any event within 14 (fourteen) days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Terminal Operator to incur costs or lose revenue, give to TNPA a notice of its claim for an extension of time of the Scheduled Operations Commencement Date and/or relief from its obligations under this Agreement;
  - 40.2.2 within 10 (ten) days of receipt by TNPA of the notice referred to in clause 40.2.2, give full details of the Compensation Event and the

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extension of time and or any estimated change in Project costs claimed; and

40.2.3 demonstrate to the reasonable satisfaction of TNPA that:

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

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

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

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

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

40.3.2.1 on or before the Scheduled Operations Commencement Date; or

40.3.2.2 as a result of capital expenditure being incurred by the Terminal Operator at any time, 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, less any Concession Fees that would have been payable by the Terminal Operator to TNPA during the period of the Compensation Event;

40.3.2.3 in the case of a payment of compensation for the estimated change in the costs of the Project that does not

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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 Scheduled Operations Commencement Date , TNPA shall compensate the Terminal Operator, less any Concession Fees that would have been payable by the Terminal Operator to TNPA during the period of the Compensation Event and or

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

40.4 If the information is provided after the dates referred to in clause 40.2, then the 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.

40.5 If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Terminal Operator's obligations under this Agreement, or 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 57.7 (*fast-track dispute resolution*).

#### 41. **FORCE MAJEURE**

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

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

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

41.1.3 chemical or biological contamination of the Terminal from any of the events referred to in clause 41.1.1 above,

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

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- 41.2 Subject to clause 41.3, the Party claiming relief shall be relieved from liability under this Agreement to the extent that, by reason of the Force Majeure Event, it is not able to perform all or a material part of its obligations under this Agreement.
- 41.3 Where a Party is (or claims to be) affected by a Force Majeure:
- 41.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Force Majeure Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 41.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure to comply with its obligations under clause 41.3.1.
- 41.4 The Party claiming relief shall serve written notice on the other Party within 5 (five) Business Days of it becoming aware of the relevant Force Majeure Event. Such initial notice shall give sufficient details to identify the particular Force Majeure Event.
- 41.5 A subsequent written notice shall be served by the Party claiming relief on the other Party within a further 10 (ten) Business Days, which notice shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Force Majeure Event on the ability of the Party to perform, the action being taken in accordance with clause 41.2, the date of the occurrence of the Force Majeure Event and an estimate of the period of time required to overcome it and or its effects.
- 41.6 The Party claiming relief shall notify the other as soon as the consequences of the Force Majeure Event have ceased and when performance of its affected obligations can be resumed.
- 41.7 If, following the issue of any notice referred to in clause 41.5, the Party claiming relief receives or becomes aware of any further information relating to the Force Majeure Event and/or any failure to perform, it shall submit such further information to the other Party as soon as reasonably possible.

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- 41.8 If a Force Majeure Event occurs before the Scheduled Operations Commencement Date, the Terminal Operator shall not be entitled to receive any payment in respect of the Force Majeure Event from TNPA.
- 41.9 Subject to clause 46(*Termination for Force Majeure*), the Terminal Operator's sole right to payment or otherwise in relation to the occurrence of a Force Majeure Event shall be as provided in this clause 41 (*Force Majeure*).
- 41.10 The Parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Clause 57 (*Dispute Resolution*) shall not apply to a failure of TNPA and the Terminal Operator to reach agreement pursuant to this clause 41.10, and this Agreement shall terminate in terms of clause 46(*Termination for Force Majeure*) if no such agreement is reached.

#### 42. UNFORESEEABLE CONDUCT

- 42.1 Should any Unforeseeable Conduct occur which materially and adversely affects the general economic position of the Terminal Operator, the Terminal Operator shall be entitled to such compensation and/or relief from 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.
- 42.2 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 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.
- 42.3 The Party claiming the occurrence of the Unforeseeable Conduct ("**Claiming Party**") shall give written notice to the other Party ("**Receiving Party**") containing reasonable particulars of such conduct and its likely economic consequences to the Terminal Operator.
- 42.4 The Receiving Party shall have 60 (sixty) days from the date of receipt of such notice to effect a change for the Unforeseeable Conduct which restores the general economic position of the Terminal Operator to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party does not effect such a change within such period, the Parties shall consult within 10 (ten) Business Days after the expiration of such period with a view to reaching a

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mutually satisfactory resolution of the situation. In the event that 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 57 (*Dispute Resolution*).

- 42.5 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.

## PART VI – TERMINATION

### 43. TERMINAL OPERATOR DEFAULT

#### 43.1 Definition

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

43.1.1.1 any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act) being entered into by or in relation to the Terminal Operator;

43.1.1.2 a liquidator, business rescue practitioner or the like taking possession of or being appointed, or any business rescue, winding-up, execution or other process being levied or enforced (and not being discharged within 20 (twenty) Business Days) upon the whole or any material part of the assets of the Terminal Operator (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);

43.1.1.3 the Terminal Operator ceasing to carry on business;

43.1.1.4 a resolution being passed or an order being made for the administration or the commencement of business rescue proceedings, winding-up, liquidation or dissolution of the Terminal Operator (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);

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- 43.1.1.5 the Terminal Operator fails to complete the Works and/or before the Target Completion Date;
- 43.1.1.6 the Terminal Operator fails to commence with the Operations on or before the Long Stop Date;
- 43.1.1.7 the Terminal Operator commits a breach of any of its material obligations under this Agreement;
- 43.1.1.8 the Terminal Operator abandons the Works (other than as a consequence of a breach by TNPA of its obligations under this Agreement);
- 43.1.1.9 the Terminal Operator ceases to undertake all or a substantial part of the Operations in accordance with this Agreement (other than as a consequence of a breach by TNPA of its obligations under this Agreement);
- 43.1.1.10 the Terminal Operator failing to achieve the specific and quantifiable targets detailed in Schedule 10A and Schedule 10A for 3 (three) consecutive years;
- 43.1.1.11 the Terminal Operator failing to comply with any provision of clause 18 (Shareholding in the Terminal Operator);
- 43.1.1.12 the Terminal Operator fails to pay any sum or sums due to TNPA under this Agreement (which sums are not *bona fide* in dispute) which, either singly or in aggregate, exceed R[●] (in [month and year] prices) and such failure continues for 20 (twenty) Business Days following receipt by the Terminal Operator of a notice of non-payment from TNPA;
- 43.1.1.13 the Terminal Operator failing to maintain any required insurance in terms of clause 16 (Project Insurance);
- 43.1.1.14 an event of default under the Finance Agreements; and
- 43.1.1.15 any breach of any provision of this Agreement has occurred more than once and:

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

43.1.1.15.2 TNPA has issued a second and final warning notice following the persistence or recurrence of that breach for a period of 90 (ninety) Days after the initial warning notice, stating that if that breach persists or recurs within the period of 90 (ninety) Days after the final warning notice then TNPA may terminate the Agreement on 30 (thirty) Days' notice to the Terminal Operator

43.1.1.16 the Terminal Operator fails to maintain any Performance Guarantee;

43.1.1.17 the Terminal Operator pledging or ceding the Terminal and/or the Terminal Equipment [and/or the Terminal Infrastructure] as security without TNPA's written approval;

43.1.1.18 the Terminal Operator failing to achieve the minimum performance requirements, Key Performance Areas and Operating Specifications for [•months/years];

43.1.1.19 the Terminal Operator failing to operate the Terminal on a common-user basis;

43.1.1.20 any warranty made by the Terminal Operator as set out in clause 8 proves to have been false or incorrect in any material aspect;

43.1.1.21 the employees, agents, sub-contractors or representatives engaging in any activity prohibited under this Agreement and/or by law or which constitutes a breach of this Agreement or breach of or an offence under

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any law, in the course of any activity undertaken pursuant to this Agreement;

43.1.1.22 The Terminal Operator breaches the Cargo Ownership Undertaking; and

43.1.1.23 the Terminal Operator fails to provide TNPA with the copies of the Uncommitted Capacity Reports.

#### 43.2 **Notification**

The Terminal Operator shall notify and provide details to TNPA of the occurrence 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. The Terminal Operator shall notify TNPA promptly upon the Terminal Operator becoming aware of occurrence of any of the above.

#### 43.3 **TNPA's Options**

43.3.1 On the occurrence of a Terminal Operator Default, or within a reasonable time after TNPA becomes aware of same, and subject to clause 43.6, (Lender's Step In Rights) and clause 43.1 (Effects of Termination) TNPA may,

43.3.2 in the case of the Terminal Operator Default referred to in clauses 43.1.1.1, 43.1.1.2, 43.1.1.3, 43.1.1.4, 43.1.1.5, 43.1.1.7, 43.1.1.8, 43.1.1.9, 43.1.1.10, 43.1.1.11, 43.1.1.12, 43.1.1.13 and 43.1.1.14, terminate this Agreement in its entirety by notice in writing having immediate effect, and in any event subject to clause 48.1; and

43.3.3 while the same is subsisting in the case of any other Terminal Operator Default referred to in clause 43.1, serve notice of default on the Terminal Operator requiring the Terminal Operator at the Terminal Operator's option either:

43.3.3.1 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

43.3.3.2 to put forward within 20 (twenty) Business Days of such notice of default a reasonable programme for remedying

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

#### 43.4 Remedy Provisions

43.4.1 Where the Terminal Operator puts forward a programme in accordance with clause 43.3.3.2, TNPA shall have 15 (fifteen) Business Days from receipt of the same within which to notify the Terminal Operator that it does not accept the programme, failing which TNPA shall be deemed to have accepted the programme. TNPA shall act reasonably in rejecting the programme. Where TNPA notifies the Terminal Operator that it does not accept the programme, the Parties shall endeavour within the following 10 (ten) Business Days to agree any necessary amendments to the programme being 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 57.7 (*fast-track dispute resolution*).

43.4.2 If:

43.4.2.1 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

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

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

TNPA may, subject to clauses 43.6 (*Lenders' Step-in*) and 48.1, terminate this Agreement in its entirety. TNPA shall do so 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, TNPA's right in this regard is subject to the Terminal Operator complying with the mitigation and other requirements in this Agreement concerning Force Majeure Events or Relief Events (as the case may be), and the time for execution of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure Event or Relief Event (as the case may be) which is agreed by the Parties in writing or determined in accordance with clause 57.7 (*fast-track dispute resolution*).

#### 43.5 **TNPA's Costs**

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

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

#### 43.6 **Lenders' Step-In**

Upon the occurrence of a Terminal Operator Default, as defined in clause 43 (*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 FDA.

### 44. **TNPA DEFAULT**

#### 44.1 **Definition**

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

44.1.1.1 an expropriation or requisition of a material part of the Terminal and/or shares of the Terminal Operator by TNPA or other Relevant Authority or a material part of the Terminal being removed from the possession of the Terminal Operator by TNPA or other Relevant Authority other than in terms of this Agreement;

44.1.1.2 a failure by TNPA to make payment of any amount or amounts that are due and payable by TNPA under this Agreement (which amounts are not bona fide in dispute) which, either singly or in aggregate exceed the sum of R10, 000, 000 (ten million Rand) (in [month and year] prices) and such failure continues for 20 (twenty) Business Days from receipt by TNPA of a notice of non-payment from the Terminal Operator; and

44.1.1.3 a breach by TNPA of its obligations under this Agreement which substantially frustrates or renders it impossible for the Terminal Operator to perform its obligations under this Agreement for a continuous period of 90 (ninety) Days.

#### 44.2 **Termination for TNPA Default**

44.2.1 On the occurrence of a TNPA Default, or within 60 (sixty) Days after the Terminal Operator becomes aware of same, the Terminal Operator may serve notice on TNPA of the occurrence (and specifying details) of such TNPA Default. If the relevant matter or circumstance has not been remedied or rectified within 30 (thirty) Business Days of such notice, the Terminal Operator may serve a further notice on TNPA terminating this Agreement with immediate effect, in any event subject to clause 48.1.

44.2.2 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.

### 45. **TERMINATION FOR CONVENIENCE**

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TNPA shall be entitled to terminate this Agreement at any time on 90 (ninety) Business Days written notice to the Terminal Operator. In the event of notice being given by TNPA in accordance with this clause, TNPA shall, at any time before the expiration of such notice, be entitled to direct the Terminal Operator, where the Works (or any part thereof) or the Operations and Maintenance and/or any Operations (or any elements thereof) have not been commenced, to refrain from commencing any such the Works, Operation or Maintenance or Operations (or to procure the same). Upon termination pursuant to this clause 45 (*Termination for Convenience*), TNPA shall pay the Terminal Operator a Termination Amount calculated in terms of clause 54 (*Payment of Termination Amount*).

46. **TERMINATION FOR FORCE MAJEURE**

If, in the circumstances referred to in clause 41 (*Force Majeure*), the Parties have failed to reach agreement on any modification to this Agreement pursuant to that clause within 180 (one hundred and eighty) Days of the date on which the affected Party serves notice on the other Party in accordance with clause 41 (*Force Majeure*), either Party may, subject to clause 48.1, at any time afterwards terminate this Agreement by written notice to the other Party having immediate effect. This right is subject always to the effects of the relevant events of Force Majeure continuing to prevent either Party from performing any material obligation under this Agreement.

47. **INVALIDATION IN TERMS OF SECTION 67 OF THE ACT**

If it is necessary to change the use of the Project Site or the Terminal in order to improve the safety, security, efficiency and effectiveness of the operations of the Port in accordance with section 67(1) of the Act and the new use is incompatible with this Agreement, TNPA may issue a directive, subject to the provisions of section 67(2)(b) of the Act. Such directive shall stipulate that this Terminal Operator Agreement is cancelled from the date stipulated therein and payment shall be due in terms of clause 51 (*Termination Amount for Invalidation in terms of Section 67 of the Act*).

48. **EFFECTS OF TERMINATION**

48.1 **Termination**

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

48.2 **Continued Effect - No Waiver**

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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 of full legal force and effect and to enforce its rights hereunder. Failure of either Party to exercise any right hereunder, including any right to terminate this Agreement and 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 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 TNPA of Terminal, Associated Agreements and Other Assets**

48.4.1 Where the termination date of this Agreement, or the service of a notice of termination in accordance with this Agreement for any reason occurs prior to the Target Completion Date, insofar as any transfer shall be necessary to fully and effectively transfer property to TNPA, but subject to clause 43.6 (*Lender's Step-In*) and clause 49.1 (*Retendering Election*), the Terminal Operator shall transfer to TNPA such part of the Works and/or the Terminal in order for all rights and titles therein to vest in TNPA. Such transfer shall include the Works and/or the Terminal as constructed and such items of the plant and Terminal Equipment as shall have been procured by the Terminal Operator. If TNPA so elects:

48.4.1.1 all plant and all materials on or near to the Project Site shall remain available to TNPA for the purposes of completing the Works; and

48.4.1.2 the construction plant shall remain available to TNPA for the purposes of completing the Works, subject to payment of the Terminal Operator's reasonable costs;

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48.4.1.3 if TNPA so elects, the Terminal Operator shall procure that any of the Associated Agreements specified by TNPA are assigned to TNPA or any third party nominated by it, provided that where termination occurs under clause 44 (*TNPA Default*), the consent of the relevant Subcontractors shall be required.

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, or on such other time as may be agreed upon between the Parties in writing, the Terminal Operator shall:

48.4.2.1 transfer all rights and title to the Terminal to TNPA, free from all encumbrances, the Terminal which shall be in the state required in accordance with the Operating Specifications; or

48.4.2.2 procure that any Subcontractor shall (as the case may be), transfer to TNPA, free from any security interest full and unencumbered title in and to all or any part of the Terminal required by TNPA in connection with the Project and the Operations;

48.4.2.3 procure that any Intellectual Property Rights associated with the Project shall be provided to TNPA and TNPA shall be granted a perpetual nonexclusive, royalty-free license to use such Intellectual Property Rights;

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

48.4.2.4.1 "as built drawings" showing all alterations made to the Terminal since the commencement of Operations at the Terminal;

48.4.2.4.2 Operations and Maintenance Manuals, training manuals for the Terminal;

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- 48.4.2.4.3 the historical operating data and plans of the Terminal, its furniture, fittings and Terminal Equipment in a format acceptable to 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 TNPA;
- 48.4.2.4.5 the information referred to in clause 32 (*Financial Accounts, Reports, Inspection and Reporting of Changes*), except where such documents are required by Law to be retained by the Terminal Operator or any Subcontractor concerned, in which case complete copies shall be delivered to TNPA; and
- 48.4.2.4.6 ensure that provision is made in all contracts of any description whatsoever to ensure that TNPA will be in a position to exercise its rights and the 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 TNPA of Terminal, Associated Agreements and other Assets*) (except insofar as any of the requirements of that clause may be waived by TNPA), this Agreement shall terminate and, save as provided in clause 48.7 (*Continuing Obligations*), all rights and obligations of TNPA and the Terminal Operator under this Agreement shall cease and be of no further force and effect.

#### 48.6 **Transitional Arrangements**

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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 earlier termination or such extended period as may be agreed upon by the Parties in writing, the Terminal Operator shall have the following duties:

- 48.6.1 co-operate fully with TNPA and any person who is providing services in the nature of the Operations or any part of the Operations, in order to achieve a smooth transfer of the manner in which TNPA obtains Operations and to avoid or mitigate insofar as reasonably practicable any inconvenience or any risk to the health and safety of the employees of TNPA, the Port Users and members of the public;
- 48.6.2 the Terminal Operator shall as soon as practicable remove from the Project Site all property not required by TNPA pursuant to clause 48.4 (*Transfer to TNPA of Terminal, Associated Agreements and other assets*) and if it has not done so within 20 (twenty) Business Days after any notice from TNPA requiring it to do so, TNPA may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred for the credit of the Terminal Operator;
- 48.6.3 the Terminal Operator shall by no later than the expiry or the date of any earlier termination of this Agreement becoming effective, or such other date as may be agreed upon between the Parties in writing, deliver to TNPA:
- 48.6.3.1 any keys, remote access apparatus and computer access cards to the Terminal;
- 48.6.3.2 without prejudice to clause 14 (*Access to documents, copyright and related matters*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the 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 providing any of the Services at the Terminal or the assignment or transfer of which is otherwise restricted); and

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48.6.3.3 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.

48.6.4 If TNPA wishes to conduct a tender process, other than as envisaged in clause 49.1 (*Retendering Election*), 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 Operations or any of them) following the expiry or earlier termination of this Agreement, the Terminal Operator shall co-operate with TNPA fully in such tender process including (without limitation) by:

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

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

## 48.7 **Continuing Obligations**

48.7.1 Save as otherwise expressly provided in this Agreement:

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

48.7.1.2 termination of this Agreement shall not affect the continuing rights and obligations of the Terminal Operator and TNPA under clauses 1 (*Definitions and Interpretation*),

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8 (*Indemnity*), 9 (*Terminal Operator's warranties and undertakings*), 12 (*Environmental Compliance*), 14 (*Access to documents, copyright and related matters*), 15.1 (*delivery of Performance Guarantees*), 19 (*TNPA's Assistance and Rights and Limitations on Liability*), 48.6 (*Transitional Arrangements*), 48.7 (*Continuing Obligations*), 55 (*Corrupt gifts and fraud*), 56 (*Expert Determination*), 57 (*Dispute Resolution*), and 58 (*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 ON TERMINAL OPERATOR DEFAULT

##### 49.1 Retendering Election

49.1.1 Upon the occurrence of a Terminal Operator Default and subject to clause 49.1.3, TNPA shall be entitled either to:

49.1.1.1 re-tender the provision of the Operations in accordance with clause 49.2 (*Retendering Procedure*) should TNPA, within its entire and sole discretion, deem it necessary to maintain the continuity of Operations; or

49.1.1.2 exercise its rights as provided for in clause 48.4 and 48.5 and request the Terminal Operator to vacate and hand back the Terminal and or exercise its option to purchase the Terminal Equipment from the Terminal Operator in accordance with clause 49.3 (*No Retendering Procedure*) hereof below.

49.1.2 Subject to clause 49.1.3, TNPA shall notify the Terminal Operator of its election on or before the date falling 60 (sixty) Days after delivery of the relevant the termination notice.

49.1.3 TNPA shall not be entitled to elect to retender the Operations for the remaining portion of the Project Term if the Lenders have stepped-in and the Agent has demonstrated to TNPA that there are less than 3 (three) parties (each meeting the criteria in the definition of "Substitute Entity" in the FDA) who have pre-qualified

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pursuant to a request for proposals issued by the Lenders for the undertaking of the Operations for the remaining portion of the Project Term.

## 49.2 Retendering Procedure

- 49.2.1 If TNPA elects to retender the provision of the Services under clause 49.1 (*Retendering Election*), the provisions set out below shall apply.
- 49.2.2 The Terminal Operator and or its members shall be, precluded from participating, whether directly or indirectly in any manner, whatsoever, in the retendering procedure.
- 49.2.3 Whilst not the primary objective, one of the outcomes of the retendering procedure, among others, shall be to establish and (subject to clause 49.2.12) pay to the Terminal Operator and or Lender, as the case may be, the Highest Compliant Tender Price less tendering costs and other amounts owed to TNPA.
- 49.2.4 TNPA shall, (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.
- 49.2.5 TNPA shall notify the Terminal Operator of the qualification criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.
- 49.2.6 The Terminal Operator authorises the release of any information that is reasonably required as part of the Tender Process by TNPA, which TNPA would otherwise be prevented from releasing under clause 14 (*Access to documents, copyright and related matters*).
- 49.2.7 The Terminal Operator may, at its own cost, appoint a Tender Process Monitor for the purposes of observing and reporting to the Terminal Operator and the Lenders on TNPA's compliance with the Tender Process and making representations to TNPA in respect thereof. The Tender Process Monitor will not disclose any Confidential Information to the Terminal Operator, the Lenders or any other person (and shall provide an undertaking to TNPA to such effect as a condition of its appointment) but shall be entitled to advise the Terminal Operator and

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or the Lenders as to whether it considers that TNPA has acted in accordance with the Tender Process.

49.2.8 The Tender Process Monitor shall be required to enter into a confidentiality agreement with TNPA in a form acceptable to TNPA and shall be entitled to attend all meetings relating to the Tender Process. In addition, the Tender Process Monitor shall be entitled to inspect copies of the tender documentation and bids and shall make written representations to TNPA regarding compliance with the Tender Process. The Tender Process Monitor shall be required to make all representations in a timely manner as the Tender Process proceeds. TNPA shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Terminal Operator in the event that the Terminal Operator refers a dispute relating to the Tender Process to dispute resolution in accordance with clause 57.7(*fast-track dispute resolution*).

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

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

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

in either event as set out in 49.2.9.1 and 49.2.9.2, on the basis that they will receive the benefit of any insurance proceeds or any outstanding claims under material damage insurance policies on the date that the New Terminal Operator Agreement is entered into, and in either event TNPA shall cede its right to purchase the Terminal Equipment under clause 7.5.

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

49.2.11 If the Terminal Operator refers a dispute relating to the Highest Compliant Tender Price to dispute resolution in accordance with clause

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57 (*Dispute Resolution*), TNPA shall nevertheless be entitled to enter into a New Terminal Operator Agreement.

- 49.2.12 Upon receipt of payment of the Highest Compliant Tender Price and within 180 (one hundred and eighty) Days after the Adjusted Highest Compliant Tender Price has been determined, TNPA shall pay to the Terminal Operator the Adjusted Highest Compliant Tender Price .
- 49.2.13 The discharge by TNPA of the payment in clause 49.2.12 above shall be in full and final settlement of any and all claims and rights of the Parties as against each other for breaches and or termination of this Agreement and the Project Documents whether under contract, delict or otherwise.
- 49.2.14 If the Adjusted Highest Compliant Tender Price is not accepted by the Terminal Operator, TNPA shall have no obligation to make any payment to the Terminal Operator, in which event the Terminal Operator shall remain obliged to comply with the provisions of clause 48.4 and 48.5 (*Termination*) above. In these circumstances TNPA shall be released from all liability to the Terminal Operator for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict or otherwise.
- 49.2.15 TNPA may elect at any time prior to the receipt of a Tender to follow the no retendering procedure under clause 49.3 (*No Retendering Procedure*) by notifying the Terminal Operator that this election has been made.
- 49.2.16 If TNPA receives a Tender but decides not to complete the Tender Process, it shall notify the Terminal Operator of this decision and exercise its rights as per the provisions of clause 48.4 and 48.5 (*Termination*) and or 49.3 (*No Retendering Procedure*).

### 49.3 **No Retendering Procedure**

- 49.3.1 If either TNPA is not entitled to or elects not to retender pursuant to clause 49.1 (*retendering election*), then the provisions of clause 7.3 shall apply mutatis mutandis.
- 49.3.2 Save for the payment to the Terminal Operator for the Terminal Equipment, TNPA shall have no obligation to make any payment to the

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

#### 50. TERMINATION AMOUNT FOR TNPA DEFAULT

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

- 50.1 an amount equal to the Senior Debt and all fees, costs, expenses, breakage costs and breakage premiums in connection with any Finance Agreement;
- 50.2 redundancy payments for employees of the Terminal Operator that have been or will be reasonably incurred by the Terminal Operator as a direct result of termination of this Agreement and amounts payable to the Construction Contractor and the Operator under each Construction Agreement and Operations Agreement, respectively, as a direct result of such termination including any redundancy payments to their employees; and
- 50.3 an amount ("**Reinstatement Amount**"), which when taken together with:
  - 50.3.1 dividends (or other distributions) paid by the Terminal Operator to its shareholders on its share capital on or before the termination date of this Agreement; and
  - 50.3.2 interest paid and principal repaid by the Terminal Operator to its shareholders on shareholder loans on or before such termination date; and
  - 50.3.3 taking account of the actual timing of all such payments,
- 50.4 gives a real internal rate of return ("**IRR**") on the Equity, at the lower of the Equity IRR and the forecast IRR for the entire Operations Period, as if termination of this Agreement had not occurred. Less, to the extent it is a positive amount, the aggregate, as at the Termination Date, of:
  - 50.4.1 all credit balances on any bank accounts, held by or on behalf of the Terminal Operator on the Termination Date;
  - 50.4.2 the value of any right of the Terminal Operator or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and

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

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

50.4.4 the market value of any other assets and rights of the Terminal Operator or the Lenders (other than those transferred to TNPA pursuant to this Agreement) less liabilities of the Terminal Operator or the Lenders properly incurred in connection with this Agreement, provided that no account shall be taken of any liabilities and obligations of the Terminal Operator arising out of agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in connection with the Terminal Operator's obligations in relation to the Project; and agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

50.4.5 amounts that TNPA is entitled to set off and deduct under clause 59.11 (*set-off*).

## 51. **TERMINATION AMOUNT FOR INVALIDATION IN TERMS OF SECTION 67 OF THE ACT**

51.1 On termination of this Agreement under clause 47 (*Invalidation in terms of Section 67 of the Act*), TNPA shall pay to the Terminal Operator, the aggregate of:

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

51.1.2 all breakage costs and premia payable by the Terminal Operator to the Lenders (or the counter-parties to the interest rate hedging arrangements provided for in the Finance Agreements) in connection

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with the early termination of such hedging arrangements as a result of the prepayment of amounts outstanding under the Finance Agreements, subject to the Terminal Operator and the Lenders taking all reasonable steps to mitigate such costs and premia;

51.1.3 redundancy payments for employees of the Terminal Operator not transferring to TNPA that have been or will be reasonably incurred by the Terminal Operator as a direct result of the termination of the Agreement;

51.2 less, to the extent it is a positive amount, the aggregate of:

51.2.1 all credit balances on any bank accounts held by or on behalf of the Terminal Operator on such termination date;

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

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

51.2.4 the market value of any other assets and rights of the Terminal Operator (other than those transferred to TNPA pursuant to this Agreement) less liabilities of the Terminal Operator properly incurred in carrying out its obligations under this Agreement as at the termination date or such later date as the assets can be realised provided that no account shall be taken of any liabilities and obligations of the Terminal Operator arising out of:

51.2.4.1 agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in

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connection with the Terminal Operator's obligations in relation to the Project; and

51.2.4.2

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

51.2.5 amounts which TNPA is entitled to set off in terms of clause 59.11 (*set-off*),

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

## 52. **NO TERMINATION AMOUNT FOR TERMINATION FOR FORCE MAJEURE**

On termination of this Agreement in accordance with the provisions of clause 46 (*Termination for Force Majeure*), no payments and or compensation will be payable by TNPA to the Terminal Operator and the Terminal Operator will have no claim against TNPA for any payments and or compensation upon such termination.

## 53. **TERMINATION AMOUNT FOR CORRUPT GIFTS AND FRAUD**

53.1 On termination of this Agreement in accordance with clause 55 (*Corrupt Gifts and Fraud*) TNPA shall, subject to clause 53.2, pay the Lenders, for and on behalf of, the Terminal Operator, an amount equal to:

53.1.1 the Senior Debt;

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

53.1.3 all credit balances on any bank accounts held by or on behalf of the Terminal Operator on the Termination Date;

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- 53.1.4 the value of any right of the Terminal Operator or its Lenders to receive insurance proceeds and of any such proceeds actually received by them (save where such credit balances or insurance proceeds are paid to TNPA and/or are to be applied in reinstatement) and sums due and payable from Subcontractors and any other third parties;
- 53.1.5 all amounts payable by the Lenders (or the counter-parties to the interest rate or exchange rate hedging arrangements provided for in the Finance Agreements) to the Terminal Operator in connection with the early termination of such hedging arrangements as a result of prepayment of amounts outstanding under the Finance Agreements;
- 53.1.6 the market value of any other assets and rights of the Terminal Operator or the Lenders (other than those transferred to TNPA pursuant to this Agreement) less the liabilities of the Terminal Operator or the Lenders properly incurred in connection with this Agreement, provided that no account shall be taken of any liabilities and obligations of the Terminal Operator arising out of:
- 53.1.6.1 agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in connection with the Terminal Operator's obligations in relation to the Project; and
- 53.1.6.2 agreements or arrangements entered into by the Terminal Operator to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and
- 53.1.7 amounts that TNPA is entitled to set off and deduct under clause 59.11 (*set-off*),

provided that if the aggregate of the amounts referred to above is less than zero, then, for the purposes of the calculation in this clause 53.1 the aggregate shall be deemed to be zero.

- 53.2 If the termination is as a result of a Corrupt Act on the part of any of the Lenders, TNPA shall make no payment at all to the Lenders or the Lenders concerned, as the case may be.

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#### 54. PAYMENT OF TERMINATION AMOUNT

54.1 In this clause 54 (*Payment of Termination Amount*):

54.1.1 "**Notice Date**" means the date when the Termination Amount has been determined in accordance with clause 51 (*Termination amount for invalidation in terms of Section 67 of the Act*) or 53 (*Termination Amount for corrupt gifts and fraud*);

54.1.2 "**Termination Amount**" means any compensation payable by TNPA to the Terminal Operator on early termination of the Agreement under clause 51 (*Termination amount for invalidation in terms of Section 67 of the Act*) and 53 (*Termination Amount for corrupt gifts and fraud*); and

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

54.2 "**Method of payment**":

54.2.1 TNPA shall pay to the Terminal Operator the Termination Amount no later than 60 (sixty) Days after the Notice Date unless it elects to pay in accordance with clause 54.2.2 below.

54.2.2 TNPA may elect to pay the Termination Amount:

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

54.2.2.2 as the Parties may otherwise agree in writing.

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

54.2.4 If TNPA has elected to pay in accordance with clause 54.2.2 above, it may (on 30 (thirty) Days prior written notice to the Terminal Operator)

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elect to pay any outstanding element of the Termination Amount in full on any Instalment Date.

54.2.5 If TNPA fails to make a payment to the Terminal Operator in accordance with clause 54.2.1 or 54.2.2.1 and 54.2.2.2 above, the Terminal Operator may issue a notice to TNPA declaring any unpaid and outstanding element of the Termination Amount to be immediately due and payable.

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

## **PART VII – PROCEDURAL ISSUES**

### **55. CORRUPT GIFTS AND FRAUD**

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

55.2 If the Terminal Operator, any Shareholder, any Subcontractor or any Affiliate of any of them (or anyone employed by or acting on behalf of any of them) commits or is reasonably suspected by TNPA of having committed any Corrupt Act, then TNPA shall be entitled to act in accordance with clauses 55.2.1 to 55.2.8 below:

55.2.1 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, TNPA may terminate this Agreement with immediate effect by giving written notice to the Terminal Operator;

55.2.2 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, TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within 10 (ten) Business Days of the Terminal Operator's receipt of such notice that employee's involvement in the Project is terminated and (if necessary) the performance of any part of the Project Deliverables previously performed by him or her is performed by another person;

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- 55.2.3 if the Corrupt Act is committed by a Subcontractor, director of a Subcontractor or an employee of a Subcontractor acting under the authority or with the knowledge of a director of that Subcontractor, then in any such case, TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within 60 (sixty) Business Days of its receipt of such notice the Terminal Operator terminates the relevant Subcontract and procures the performance of the relevant part of the Project Deliverables by another person, where relevant;
- 55.2.4 if the Corrupt Act is committed by an employee of a Subcontractor acting on his or her own accord, then TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate, unless within 10 (ten) Business Days of its receipt of such notice the Terminal Operator procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Project Deliverables previously performed by that employee to be performed by another person;
- 55.2.5 if the Corrupt Act is committed by a Lender, a director of a Lender or any employee of a Lender acting under the authority or with the knowledge of a director of that Lender, then in any such case TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within 80 (eighty) 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 Finance Agreements) and provides TNPA with satisfactory proof that such Lender's entire participations in the Senior Debt and in any undrawn financial commitments under the Finance Agreements have been assumed by any other Financial Institution that meets with TNPA's approval (including any one or more of the remaining Lenders);
- 55.2.6 if the Corrupt Act is committed by any employee of a Lender acting on his or her own accord, then TNPA may give written notice to the Terminal Operator of termination and this Agreement will terminate, unless within 10 (ten) Business Days of the Terminal Operator's receipt of such notice, that employee's involvement in the Project is terminated;

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- 55.2.7 if the Corrupt Act is committed by any other person not specified in clauses 55.2.1 to 55.2.6 above but involved in the Project as a Subcontractor or supplier to any Subcontractor or to the Terminal Operator, then TNPA may give notice to the Terminal Operator of termination and this Agreement will terminate unless within 40 (forty) Business Days the Terminal Operator procures the termination of such person's involvement in the Project and (if necessary) procures the performance of the relevant part of the Project by another person; and
- 55.2.8 any notice of termination under this clause 55.2 shall specify:
- 55.2.8.1 the nature of the Corrupt Act;
  - 55.2.8.2 the identity of the party or parties who TNPA believes has committed the Corrupt Act; and
  - 55.2.8.3 the date on which this Agreement will terminate in accordance with the applicable provisions of this clause.
- 55.3 Without prejudice to its other rights or remedies under this clause, TNPA shall be entitled to recover from the Terminal Operator, the greater of:
- 55.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act; and
  - 55.3.2 any direct losses sustained by TNPA in consequence of any breach of this clause by the Terminal Operator.
- 55.4 Nothing contained in this clause shall prevent the Terminal Operator from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 55.5 The Terminal Operator shall notify TNPA of the occurrence and provide details of any Corrupt Act promptly on the Terminal Operator becoming aware of its occurrence.

## 56. EXPERT DETERMINATION

- 56.1 Any dispute arising out of or in connection with this Agreement which is referred to resolution in terms of this clause 56 (*Expert Determination*) shall be determined in accordance with the provisions of this clause 56(*Expert Determination*). The dispute

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resolution provisions contained in this clause 56 (*Expert Determination*) shall only be used in respect of matters specifically referred to dispute resolution in terms of this clause 56 (*Expert Determination*) by this Agreement, and all other disputes arising out of or in connection with this Agreement, or the subject matter of this Agreement shall not be referred to resolution in terms of this clause 56 (*Expert Determination*) but shall be dealt with in accordance with the Law applicable to such disputes and may be the subject of dispute resolution in terms of clause 57 (*Dispute Resolution*).

56.2 The dispute resolution in terms of this clause 56 (*Expert Determination*) shall be held in Johannesburg and the Parties shall endeavour to ensure that it is completed within 90 (ninety) days after appointment of the person designated in the clause of this Agreement that refers the relevant matter to determination under this clause 56 (such person being the "Expert" in this clause 56 (*Expert Determination*)).

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

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

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

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

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

56.4.2 the Expert may have regard to his personal knowledge of the facts, and any expert knowledge he may have, relating to the issues in dispute, but is to afford the Parties an opportunity of challenging the knowledge which he claims to have;

56.4.3 the Expert may make such award, whether interim, provisional or final, as he considers appropriate, including without limitation *ex parte* awards, declaratory orders, interdicts and awards for specific

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performance, restitution, damages, penalties, security for costs or restitution;

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

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

56.5 The Parties shall use their best endeavours to procure that the Expert complies with the provisions of clause 56.3 and that the procedures detailed in clause 56.3 above are followed.

56.6 Nothing in this clause 56 (*Expert Determination*) shall prevent a Party from seeking relief, in respect of matters referred to dispute resolution in terms of clause 56 by any of this Agreement, on an urgent or interlocutory basis with a court of appropriate jurisdiction. Subject to the provisions of the clause of this Agreement that refers a dispute to determination in terms of this clause 56 (*Expert Determination*), if either Party is dissatisfied with or otherwise wishes to challenge the Expert's decision, recourse may be had to dispute resolution in terms of clause 57 (Dispute Resolution).

## 57. **DISPUTE RESOLUTION**

### 57.1 **Referable Disputes**

The provisions of this clause 57 (*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.

### 57.2 **Internal Referrals**

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57.2.1 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:

57.2.1.1 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

57.2.1.2 if the Parties have been unable to resolve the dispute within 15 (fifteen) days of referral to the persons specified in clause 57.2.1.1, either Party may refer the dispute for a decision by the accounting officer or accounting authority of TNPA and the chief executive officer or equivalent officer of the Terminal Operator.

57.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 57.2 (*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.

57.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 57.2.2 within 15 (fifteen) days of the dispute being referred to them (or any longer period agreed between the Parties) shall be treated as a dispute in respect of which informal resolution has failed.

### 57.3 **Performance to continue**

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

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**57.4 Litigation**

57.4.1 Save where any dispute has been expressly referred for determination in terms of clause 57.7 (fast-track dispute resolution), if informal resolution of any dispute has failed, then the dispute may be referred to litigation in the High Courts by either Party.

57.4.2 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.

**57.5 Interlocutory Proceedings**

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

**57.6 Suspension of Prescription**

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

**57.7 Fast-Track Dispute Resolution**

57.7.1 Disputes expressly referred for determination pursuant to this clause 57.7 (*Fast-track Dispute Resolution*) shall be determined by the relevant Independent Expert.

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

57.7.3 It shall be entirely within the power and competence of the Independent Expert to decide upon any matters related to the proper preparation of

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the dispute for hearing and in that regard the Independent Expert shall direct the Parties accordingly.

- 57.7.4 The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in South Africa) for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert can decide whether at the hearing the Parties are to give oral evidence or confine themselves to presenting their cases in writing or by some other appropriate procedure. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.
- 57.7.5 The Independent Expert shall provide both Parties with his or her written decision on the dispute, within 20 (twenty) Business Days of the referred (or such other period as the Parties may agree after the referral). The Independent Expert shall give his or her reasons for the award, if so requested by either Party.
- 57.7.6 The Independent Expert's costs of any referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 57.7.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the law. The Independent Expert need not strictly observe the principles of law and may decide the matter submitted to him or her in accordance with what he or she considers equitable in the circumstances.
- 57.7.8 Should the need arise for either Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were heard by a Judge in the High Court of South Africa, save that if by law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.

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- 57.7.9 The proceedings shall be confidential and all information, data or documentation disclosed or delivered by either Party to the Independent Expert in consequence of or in connection with his or her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by the confidentiality provisions of this Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.
- 57.7.10 The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.
- 57.7.11 Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission prejudices the adjudication process, then the Independent Expert can either:
- 57.7.11.1 give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or
  - 57.7.11.2 warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.
- 57.7.12 The Independent Expert shall be deemed not to be an arbitrator but shall render his or her decision as an expert and the provisions of the Arbitration Act, 1965 and any other law relating to arbitration shall not apply to the Independent Expert or his or her determination or the procedure by which he or she reaches his or her determination. The Independent Expert's decision shall be final and binding on the Parties.

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**57.8 Survival of Clause 57**

57.8.1 The provisions of this clause 57:

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

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

**58. INFORMATION AND AUDIT ACCESS**

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

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

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

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

**59. MISCELLANEOUS MATTERS**

59.1 Addresses

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

59.1.1.1 in the case of TNPA:

Postal address: [insert]

Physical address: [insert]

Current fax no: [insert]

Attention: [insert]

59.1.1.2 in the case of the Terminal Operator: [insert]

Postal address: [insert]

Physical address: [insert]

Current fax no: [insert]

Attention: [insert]

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

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

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

## 59.2 Certificate of Indebtedness

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

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

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

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

59.2.1.4 shall be *prima facie* proof thereof.

### 59.3 **Entire Contract**

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

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

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

### 59.4 **Rights and remedies**

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

### 59.5 **Further undertakings**

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, this Agreement and the transactions contemplated therein.

### 59.6 **No representations**

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

### 59.7 **Variation, cancellation and waiver**

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

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

## 59.8 Indulgences

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

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

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

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

## 59.9 Invalidity and severability

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

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**59.10 Cession**

The Terminal Operator shall not be entitled to cede, assign or transfer any rights and obligations it has under this Agreement to any other person, without the written consent of TNPA.

**59.11 Set-off**

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

**59.12 Applicable law**

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

**59.13 Language**

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

**59.14 Jurisdiction of South African courts**

Subject to clauses 56 (*Expert Determination*) and 57 (*Dispute Resolution*), the Parties consent to the exclusive jurisdiction of the Cape Town High Court of South Africa, for any proceedings arising out of or in connection with the Project and this Agreement.

**59.15 Lenders' benefits**

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

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Signed at on 2024

**Witness** for **Transnet National Ports Authority**

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

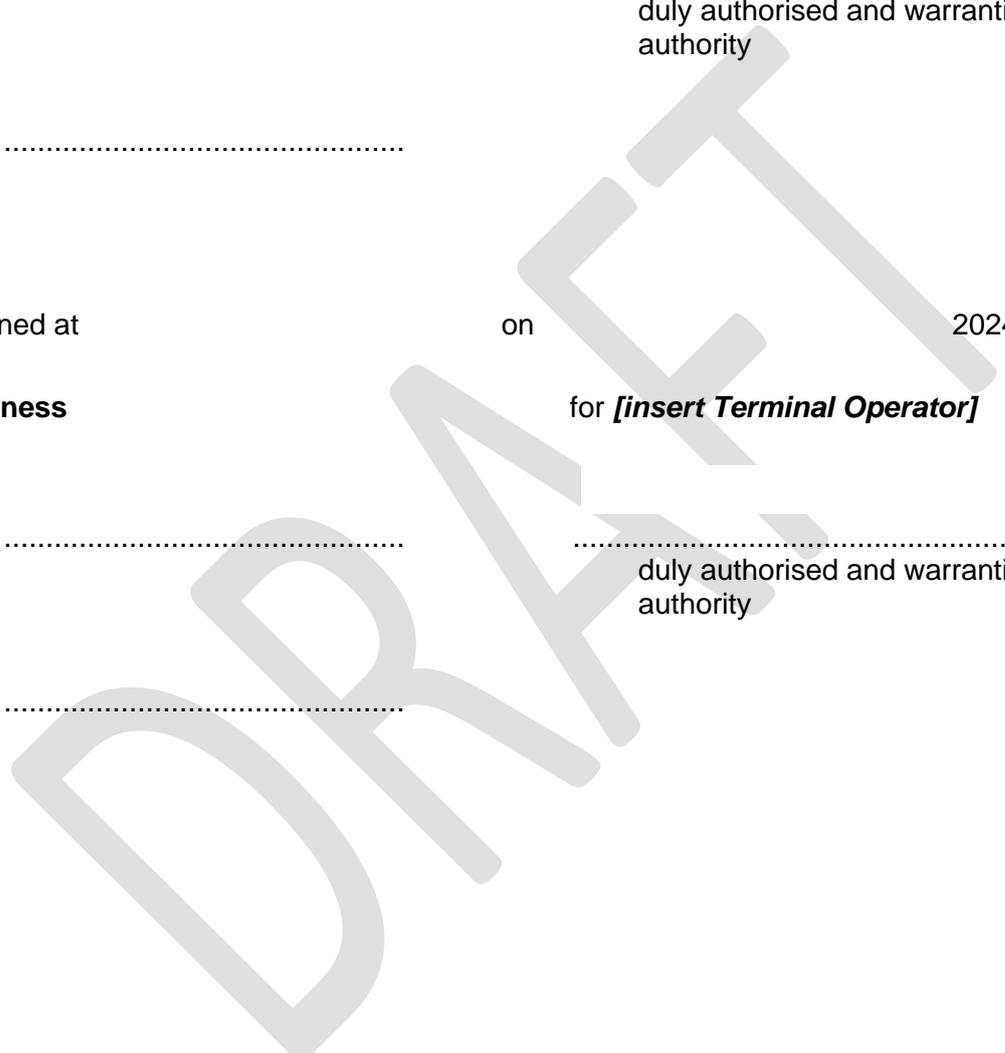
2. ....

Signed at on 2024

**Witness** for **[insert Terminal Operator]**

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

2. ....



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<b>SCHEDULES</b>	
SCHEDULE 1	Project Site and Existing Building
SCHEDULE 2	Detailed Designs and D&C Specifications
SCHEDULE 3	Constitutional Documents
SCHEDULE 4	Construction Agreement
SCHEDULE 5	Operations Agreement
SCHEDULE 6	Base Case Financial Model
SCHEDULE 7	Finance Agreements
SCHEDULE 8	Finance Direct Agreement
SCHEDULE 9	Environmental Management Plan
SCHEDULE 10	B-BBEE Improvement Plan
SCHEDULE 10A	Black Ownership Commitments
SCHEDULE 10B	Economic Development Plan
SCHEDULE 10C	Supplier Development Plan
SCHEDULE 10D	Economic Development Guidelines
SCHEDULE 11	Penalties
SCHEDULE 12	Works Programme
SCHEDULE 13	Independent Certifier
SCHEDULE 14	Construction Performance Guarantee
SCHEDULE 15	Operating Performance Guarantee
SCHEDULE 16	Terminal Operator Performance Standards
SCHEDULE 17	Final Maintenance Guarantee
SCHEDULE 18	Project Insurance
SCHEDULE 19	Safety Health Environment
SCHEDULE 20	Annual Reporting

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**SCHEDULE 1: Project Site and Existing Buildings**

DRAFT

**SCHEDULE 2: Detailed Designs and D&C Specifications**

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

DRAFT

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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]*

DRAFT

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**SCHEDULE 4: Construction Agreement**

**Construction Agreement [Delete if there is no Construction required]**

DRAFT

**SCHEDULE 5: Operations Agreement**

**Operations Agreement**

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

DRAFT

**SCHEDULE 6: Base Case Financial Model**

**Base Case Financial Model**

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

DRAFT

**SCHEDULE 7: Finance Agreements**

**Finance Agreements**

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

DRAFT

**SCHEDULE 8: Finance Direct Agreement**

**Finance Direct Agreement (FDA)**

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

DRAFT

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**SCHEDULE 9: Environmental Management Plan****Environmental Management Plan***[List of Conditional Environmental Requirements]***1. Interpretation and Definitions**

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

<b>"DEA"</b>	the National Department of Environmental Affairs;
<b>"DWA"</b>	the Department of Water Affairs;
<b>"ECA"</b>	the Environmental Conservation Act, 73 of 1989;
<b>"EMC"</b>	the Environmental Monitoring Committee;
<b>"Environment"</b>	shall have the same meaning as ascribed thereto in the Environmental Legislation;
<b>"Environmental Legislation"</b>	means all legislations relating to the Environment including, but not limited to, the National Environmental Management Act, 107 of 1998; the National Environmental Management Biodiversity Act, 10 of 2004; the National Environmental Water Act, 36 of 1998; the National Environmental Management Integrated Coastal Management Act, 24 of 2008; the National Environmental Management: Waste Act, 59 of 2008; the Marine Living Resources Act, 19 of 1998; the National Heritage Resources Act, 25 of 1999; the National Environmental Management Air Quality Act, 39 of 2004; and the Marine Pollution Act, 2 of 1986 (including international

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conventions such as the London Dumping Convention; and the MARPOL);

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

**"SWMP"** Storm Water Management Plan;

## 2. Introduction

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

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

## 3. Application and Scope of the EMP

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

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

## 4. General Obligations

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

4.2. The Port Users shall be responsible for ensuring that the operation works conducted in the Port, are compliant with the requirements contained in the OEMP, and any environmental obligations.

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- 4.3. The EMC may in consultation with TNPA be responsible for conducting periodic reviews on the site to ensure that TNPA is appropriately implementing the environmental requirements and specifications contained in the OEMP.
- 4.4. TNPA has developed an environmental induction and training programme that provides the environmental requirements of the Port which must be complied with. It is imperative for all Port Users to complete the induction and training programme prior entry to the Port. If the Port Users fail to complete such programme, Port access permit shall not be issued.
- 4.5. TNPA and all Port Users shall be responsible for reporting progress with regards to the implementation of the OEMP. The Parties shall report the results of the inspection; the monitoring and audits conducted within the Ports; environmental incidents or non-conformances; public complaints lodged; and the requirements for relevant permits or licenses.

## **ENVIRONMENTAL MANAGEMENT REQUIREMENTS**

### **5. Air Quality Management**

- 5.1. The sources of air pollution that is expected during the Port operation are dust, atmospheric and ship emissions from the port tenants and Port User's activities.
- 5.2. Ships shall be prohibited from producing smoke within the confines of the Port.
- 5.3. All power or electricity operated equipment used for activities within the Port limits that generate emissions shall be kept in good working condition or order. Regular inspections and emissions tests shall be undertaken.
- 5.4. The internal Port areas where dust is generated shall be stabilized using appropriate soil-binding agents (unless otherwise approved by TNPA's environmental department). All landscape areas shall be adequately maintained.
- 5.5. The material stores within the Port confines shall be fully enclosed unless otherwise authorised by TNPA. Appropriate dust mitigation measures shall be implemented for all dust generating works inside the Port.

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- 5.6. The air quality monitoring programme shall be initiated, if necessary. TNPA may require the Port Users to develop and implement air quality management plans depending on the nature of their works or activities.

## 6. **Solid and Liquid Waste Management**

- 6.1. TNPA and all Port Users are required to adhere to the waste management practices.
- 6.2. TNPA has developed and implemented a Solid and Waste Management Plan for the operation of the Port which shall comply with the requirements of TNPA Waste Management Strategy and any revisions thereof.
- 6.3. Port Users are required to comply with the Solid and Waste Management Plan.
- 6.4. The waste storage and the disposal storage facilities shall be cautiously positioned to reduce the visual impact and shall be placed in sheltered areas where the waste will not be subject to any disturbance such as wind.
- 6.5. The volumes of solid waste produced shall be monitored and thereafter recorded. The Terminal shall be monitored weekly for inappropriate waste disposal practices.
- 6.6. All waste produced shall be disposed of at licensed disposal sites. The waste storage liquid shall be equipped with lids or covers that are tip-proof, weatherproof and scavenger proof.
- 6.7. There shall be no burning within the confines of the Port, no on-site burials or dumping of waste.
- 6.8. TNPA shall ensure that the storm water and waste water discharged meet the required discharge quality standards and applicable requirements of this EMP.
- 6.9. Chemicals, potentially hazardous materials, oils, process effluent or wash water shall not be allowed to be discharged into storm water drainage systems.
- 6.10. A groundwater, surface water and near-shore seawater quality monitoring programmes have been implemented, these programmes shall be continual throughout the operational phase of the Port. The water quality report shall be submitted to the EMC.

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- 6.11. In the event of contamination and or unsatisfactory conditions, appropriate corrective and preventative measures shall be taken.
- 6.12. All Port Users shall be required to provide detailed information on their material inputs and outputs and the Port Users shall maintain an up to date waste register.
- 6.13. Waste that cannot be re-used or recycled shall be transported off-site for appropriate disposal or recycling. All operational areas shall be provided with an adequate number of waste bins and readily accessible liquids for the disposal of hazardous waste shall be provided.
- 6.14. All hazardous waste including oil and other chemicals (paints and solvents) shall be stored in enclosed areas and clearly marked. Such hazardous waste shall be disposed of at an approved hazardous landfill site and disposal manifests kept.
- 6.15. Oil and grease that is already used shall be removed from the site by an approved and authorised used oil recycling company.
- 6.16. Used oil, lubricants and cleaning materials or products, from the maintenance of the vehicles, machinery and equipment shall be collected in holding drums and removed from the site by a specialist oil recycling company for disposal at an approved and authorised hazardous waste site.
- 6.17. There shall be no spoiling of tar or bitumen products in any area inside the Port.

## 7. **operational noise management**

- 7.1. TNPA is required to ensure that all the operations meet the requirements of the relevant noise regulations and legislation.
- 7.2. As a number of operational activities or works will generate noise, it is required that a noise control measure be implemented, such as keeping the equipment in good working condition and regularly maintaining the machinery.
- 7.3. All excessive noise generating works shall be recorded in the register of noise generating equipment.

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- 7.4. Noise complaints reported shall be recorded.
- 7.5. Maintenance and service equipment shall be fitted with the required noise suppression equipment.

## 8. **Visual Impact Management**

- 8.1. Developments that take place inside the Port shall take the requirements of the Visual Guidelines for the Coega Industrial Development Zone into consideration. Such guideline shall be applicable to building design, colouring, signage, fencing walling and entrance gates, and lighting.
- 8.2. Landscaping and rehabilitation shall be done in accordance with the requirement outline in this EMP to allow adequate screening of the buildings, roads and parking areas.
- 8.3. Minimum lighting requirements for the Port include:
  - 8.3.1. external lights shall not be allowed to shine upwards;
  - 8.3.2. security and street lights shall be designed to ensure that light is directed downwards and that side spill is prevented; and
  - 8.3.3. lighting shall be designed to ensure that light spill beyond property boundaries are reduced.

## 9. **Emergency Preparedness and Response**

- 9.1. TNPA and all Port Users shall establish and implement emergency preparedness and response procedures as part of the operational environmental management system of the Port.
- 9.2. The Procedures shall clear define lines of authority during emergency situations and accidents, the type of response required and the communication lines to be followed.
- 9.3. These Procedures shall be exercised at least once a year and records shall be maintained of such drills. A register shall also be compiled and displayed in all operational areas.

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- 9.4. TNPA and the Port Users shall ensure compliance with the requirements of relevant legislation.
- 9.5. Fires and smoking shall not be permitted close to any potential source of combustion. Precautions shall be taken when working with spark generating equipment close to potential source of combustion.
- 9.6. Spillage of flammable substances shall be cleaned immediately.

#### 10. **protection of sites of Archaeological and Paleontological importance**

- 10.1. Should any archaeological or paleontological artefacts or remains be discovered during the operations, all work in the vicinity of the find shall be ceased immediately and the advice of the heritage specialist should be obtained.
- 10.2. TNPA shall be responsible for contacting the South African Heritage Resource Agency ("SAHRA") unless if the responsibility is delegated to the Port Users.
- 10.3. TNPA and all Port Users shall be required to adhere to the specifications set out by SAHRA or the heritage specialist appointed to investigate the finds.
- 10.4. The archaeological material shall not be destroyed, damaged, excavated, altered, defaced or otherwise disturbed without a permit issued by a Relevant Authority (relevant heritage resources authority).
- 10.5. Any finds or potential finds shall be reported immediately to TNPA's environmental management department.
- 10.6. During operation of the Port, disturbance of graves must be avoided. All grave sites shall be clearly demarcated and included in the Coega Open Space Management Plan.
- 10.7. Should the Port User find a grave within the Port boundaries, the Port User must immediately report the find to TNPA.

#### 11. **Storm Water Management**

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- 11.1. TNPA and the Port Users shall comply with the requirements set out in SWMP, which was developed and implemented by TNPA and which took into consideration the requirements and standards of the DWA.
- 11.2. All Port Users shall be responsible for the treatment and management of storm water generated on their sites and shall ensure that discharge complies with the DWA standards.
- 11.3. Regular maintenance of all storm water manholes, sumps and related structures shall be undertaken.
- 11.4. Specific cleaning and dewatering operations shall be undertaken prior to and immediately after rainfall events.
- 11.5. Disposal of dewatering water containing waste shall be done on the approval of TNPA's environmental management department and proof of disposal shall be kept for audit purposes.

## 12. **Prevention and Combating of Pollution**

- 12.1. TNPA and the Port Users shall establish emergency containment procedures which shall be implemented in the event of spillage.
- 12.2. A comprehensive oil Spill Contingency Plan shall be developed and implemented which shall address containment clean-up and shall adopt the best practice techniques.
- 12.3. Port Users may not by any means pollute or negatively impact the environment or the site and or areas in which they operate, or any property for that matter.
- 12.4. In the event that pollution arises or negative impact occurs, which is unauthorised by TNPA and or the Relevant Authority, the Port User shall, at its own expense, provide efficient means of combating, mitigating, cleaning, collecting and disposing of all pollutants, and required remediation and rehabilitation measures to the satisfaction of TNPA and or the Relevant Authority.

## 13. **Water Quality Monitoring**

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The Port tenants, terminal operators and all other Port Users may be required by TNPA to conduct site-specific or additional water (surface, fresh, storm and or ground) quality monitoring and biological monitoring where their works or activities and or operations pose a risk to the environment.

14. **marine biomonitoring**

- 14.1. TNPA implements a seawater quality, turbidity and biological monitoring programme to ensure that habitat quality is maintained and provide long term assessment of marine environmental health near the Port.
- 14.2. Water quality shall be monitored by the measuring of physical oceanography, several indicators of industrial pollution, and contamination by sewage.

15. **Invasive Alien Vegetation Management and Eradication**

- 15.1. The removal of alien plant and weed species shall be done in accordance with the requirements in the management plan.
- 15.2. The minimum strategy for alien vegetation control inside the Port includes the initial control (which is reduction of the existing populations), follow-up control (the control of seedling), and the maintenance control (the ongoing low level control of keeping alien plant numbers to a minimum level).

16. **Landscaping and Rehabilitation**

- 16.1. The vegetation rehabilitation plan shall be submitted to TNPA's environmental management department for approval. Such plan shall include:
  - 16.1.1. seed requirements;
  - 16.1.2. topsoil, mulch, fertiliser and soil stabiliser requirement and application;
  - 16.1.3. landscaping and vegetation methods for each area;
  - 16.1.4. list of indigenous plant species to be sourced;
  - 16.1.5. vegetation establishment and maintenance requirements including irrigation for all revegetated areas; and

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16.1.6. the use of herbicides or other substances for weed control during maintenance periods.

16.2. Maintenance of the rehabilitated areas shall remain the responsibility of the Port User concerned for the period of 12 months after acceptable cover has been established over all rehabilitated areas providing that acceptable cover is maintained throughout the 12 month period.

16.3. Control of spread of alien species, especially Acacia Cyclops shall be managed by regular monitoring of the area and removal of these seedlings.

16.4. The rehabilitation programme shall be flexible to allow modifications to the rehabilitation programmes such as the need to irrigate, sow more seed or fertilise.

#### 17. **Open Space Management**

17.1. The Open Space Management Plan, that TNPA has developed, provides specific guidelines for the management of open spaces which shall be implemented and complied with for the duration of the Port operations.

17.2. TNPA and all Port Users shall take cognisance of the plan and ensure compliance with its requirements.

#### 18. **Protection of Environmentally Sensitive Areas**

18.1. Certain areas within the confines of the Port have been identified as being Environmentally Sensitive Areas. These areas include the Dune vegetation, steep slopes which prone to erosion, the Coega River, the sites of archaeological and paleontological importance, and the Algoa Bay islands.

18.2. To minimise adverse impact to these areas during Port operations, the areas shall not be entered or used for any purposes unless written approval from TNPA's environmental management department has been obtained.

18.3. TNPA shall prevent any physical disturbance or pollution of these areas at all times.

18.4. These areas shall be fenced and remain fenced off for the duration of the Port operations.

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**19. Protection of Flora (plants) and Fauna (animals) Species of Special Concern**

- 19.1. Indigenous flora and all fauna within and around the Port shall be protected.
- 19.2. All indigenous flora (protected and unprotected) should not be removed without the written permission of the landowner being obtained, failure to obtain such consent will result in prosecution.
- 19.3. Alien fauna (animals that are not indigenous) shall not be allowed inside the Port. Should such faunas be identified within the Port, they should be reported to TNPA's environmental management department.
- 19.4. Measures should be implemented to prevent the disturbance of fauna species.

**20. Rodent Control and Monitoring**

- 20.1. The Port has been declared a poison-free zone and under no circumstances is poison allowed for any purpose inside the Port.
- 20.2. TNPA has developed a rodent control and monitoring plan that it and the Port Users shall comply with.
- 20.3. Only non-poisonous rodent bait shall be placed in the monitors to attract rodents. Live traps shall be set where rodent activity is detected and all exotic rodents trapped shall be removed off site.
- 20.4. A database shall be kept to record all species (indigenous and exotic) that are trapped, removed off-site and or released.

**21. Marine Mammal Management and Monitoring**

TNPA has developed and implemented a Marine Mammal Monitoring Plan which it and the Port Users shall comply with.

**22. Blasting Noise Management**

- 22.1. TNPA has developed and implemented a blasting noise management plan which it and the Port Users shall comply with.

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- 22.2. There shall be no underwater blasting allowed within the Port limits, without prior approval from the Relevant Authority.

23. **Control of Access to Islands**

- 23.1. Access to Algoa Bay islands is prohibited.
- 23.2. Shipping lanes shall be kept away from the islands and no unauthorised visits to the islands shall be allowed.
- 23.3. Should access to the island be required, for monitoring purposes, than the necessary authorisations shall be obtained from the South African National Parks and Port Control.
- 23.4. TNPA's environmental department shall verify all authorisations and requirements prior granting access.
- 23.5. The Port Control shall report any potentially illegal or unauthorised access to the South African National Parks, the Relevant Authority and TNPA's environmental management department.

24. **Ballast Water Management**

TNPA has developed and implemented a Ballast Water Management Plan for the duration of the Port operations in which it and the Port Users shall comply with.

25. **Cleaning of hulls and associated vessel structures**

Cleaning of hulls and associated marine vessel structures release marine organisms that may be harmful to the environment and also antifouling paints are identified as a pollution risk to the marine environment. These can only be applied with permission from TNPA's environmental management department.

26. **Management of Dredging activities**

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- 26.1. Appointed dredging contractors shall compile and submit a Dredge Material Management Procedure that must be submitted to TNPA's environmental management department for written approval.
  - 26.2. The two identified dredging which takes place within the Port boundaries are the capital dredging (necessary to create ports, harbours etc.) and maintenance dredging (aimed at sustaining sufficient water depths for safe navigation).
  - 26.3. Dredging and dredging material disposal inherently involves disturbance of existing substrates which may result in physical and ecological impacts on the environment. A specific EMP should be put in place to limit or minimise the potential environmental impacts associated with dredging.
  - 26.4. In the event that dredging takes place in areas where the sediments exceed the prohibition limits, an alternative disposal site or method should be identified.
  - 26.5. Disposal of material shall be carried out in such a way as to maximise the beneficial use whilst minimising the impact on the affected environment.
  - 26.6. Offshore disposal of dredge material shall be carried out under the conditions set out by the relevant legislation and best practices.
  - 26.7. TNPA shall obtain the required dredging permit from the necessary regulatory authority and contractors shall be required to comply with the terms and conditions of the dredging permit.
  - 26.8. A suspended solids standard has been developed for dredging contracts at the Port to ensure that the environmental impact of dredging is limited. It is the contract's responsibility to ensure that the suspended solids standard is complied with.
27. **Monitoring of Beaches**
- 27.1. TNPA implements a beach monitoring and profiling programme that extends from Sundays River to Swatkops River mouths.
  - 27.2. Surveying and monitoring of beach profiles at various sites along the coast in the vicinity of the Port shall be done through measurement of beach profiles at identified

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sites, grain size analysis of sand samples from the high, medium and low tide positions.

- 27.3. A detailed report with relevant graphs of findings shall be provided for each profiling and monitoring cycle.

## 28. **Management of Hazardous Substances**

- 28.1. TNPA and the Port Users shall develop and implement procedures for the handling, storage, use and disposal of fuels, hazardous and poisonous substances including hydrocarbon containing materials.
- 28.2. TNPA and the Port Users shall comply with the relevant national, regional and local legislation with regards to the transport, use and disposal of hazardous materials.
- 28.3. Information on all hazardous substances shall be made available to all personnel.
- 28.4. Personnel handling hazardous substances shall be adequately trained and educated on proper use, handling and disposal.
- 28.5. Petrochemical, oils and grease shall only be stored under controlled conditions and all hydrocarbon materials shall be stored in a secured, designated area that has restricted entry and all liquids shall be closed to prevent rainwater ingress.
- 28.6. Authorisations to store hazardous substances shall be obtained from the Relevant Authority.
- 28.7. Warning signs indicating the nature of the stored materials shall be clearly displayed on the storage facility or containment structure.
- 28.8. Bunded containment areas shall be provided for the storage of hazardous materials to prevent pollution of the surrounding environment by leaks or spillages.
- 28.9. Necessary precautions shall be taken to prevent fires or spills at the fuel stores. No smoking shall be allowed in the vicinity of the stores.
- 28.10. The Spill Contingency Plan to be developed by TNPA and the Port Users to prevent the pollution of the ground and or water resources by fuels and chemicals as a result of their activities.

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- 28.11. The necessary materials and equipment shall be kept on site to deal with spillages of any of the materials used or stored on site.
- 28.12. Pumps and other machinery requiring oil, diesel, or other that are to remain in one position for longer than two days shall be placed on drip trays, which shall be emptied regularly and the contaminated materials disposed of off-site at a facility capable of and authorised to handle such waste water.
- 28.13. The Port Users shall develop and implement a procedure for the activities, for the review and approval of TNPA's environmental management department.
- 28.14. Any person responsible for the distribution, sale, exportation or disposal of bunkers, or of any other related activity, shall be required to apply for a licence in terms of the Port Rules, regardless of whether such a person is responsible for physical transportation or conveying the bunkers to ships or not.

29. **Fire Control**

- 29.1. TNPA shall develop a Fire Contingency Plan for the duration of the Port operation.
- 29.2. All fire management plans shall take cognisance of biodiversity concerns and ensure compliance to the applicable legislative requirements (including the Veldt and Forest Fires Act).

30. **Resource Management**

- 30.1. TNPA and the Port Users shall incorporate resource efficient measures during Operation and Maintenance of the facilities.
- 30.2. TNPA and the Port Users are required to have programmes and procedures designed to manage aspects of resource conservation.

31. **Scientific Environmental Monitoring Programmes**

- 31.1. TNPA shall in terms of the requirements of the environmental authorisations implement various environmental monitoring programmes for the duration of the Port operations.

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- 31.2. Such monitoring programmes shall include marine Biomonitoring, rodent and plague monitoring, beach monitoring, marine mammal monitoring, and ground and surface water quality monitoring.

**32. Operation and Maintenance Environment Management Requirements**

- 32.1. All maintenance works or activities shall take cognisance of environmental and relevant legislation and should comply with the requirements of the OEMP.
- 32.2. Environmental procedures for individual works or activities shall be developed and written approval from TNPA's environmental management department shall be obtained prior to the commencement of the works.
- 32.3. Any activity requiring environmental authorisation must ensure that an environmental impact assessment and or applicable assessment is undertaken and a record of decision and or applicable authorisations have been obtained prior to any operations and or associated actions.
- 32.4. The Port Users shall supply TNPA with copies of all relevant authorisations, permits and or other applicable approvals.
- 32.5. All operations inside the Port boundaries shall be subject to the implementation of a Operations Environmental Programme which shall be reviewed and approved by TNPA's environmental management department.

**33. Port User Minimum Environmental Management Requirements**

- 33.1. TNPA shall make a copy of the OEMP available to all Port Users.
- 33.2. Such Port Users shall ensure that their activities comply with the requirements specified in the OEMP.

**34. Port Health Requirements**

TNPA and all Port Users shall comply with the applicable health and related requirements.

**EVALUATION AND COMPLIANCE**

**35. Compliance Monitoring and Inspections**

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- 35.1. The operational works shall be monitored and inspected in terms of the requirements of the OEMP and or this EMP.
- 35.2. TNPA shall inspect operational sites at least monthly, compile monthly written reports, maintain record of major incidents, conduct regular internal audits, and provide information as required during external audits which shall include the reports of internal audits conducted.

36. **Environmental Auditing**

- 36.1. Audits conducted shall determine compliance with the OEMP and the environmental authorisations, and the Port license requirements.
- 36.2. Findings of the audits and required changes and responses to the findings shall be discussed and the implementation thereof agreed upon at scheduled meetings.
- 36.3. All inspections and audit reports shall be documented and recorded.

37. **Recording Environmental Incidents**

TNPA shall develop and implement a procedure for recording and reporting environmental incidents which shall form part of the Operational Environmental Management System of the Port.

38. **environmental non-conformances**

- 38.1. TNPA can institute a non-conformance for any non-compliance with the environmental requirements.
- 38.2. The time period for mitigating a non-conformance shall be determined by the severity of the non-conformance.
- 38.3. All non-conformances shall be recorded in a register and made available for audit purposes.
- 38.4. TNPA shall be entitled to stop works or certain activities in the case of non-compliance or failure to implement corrective actions, and deal with any non-conformance in terms of the applicable mechanisms and legislation

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**39. OEMP Review**

- 39.1. The OEMP and supporting documents shall be reviewed and improved when required to ensure that it adequately addresses impacts associated with the operations of the Port.
- 39.2. The interval for review of the OEMP shall be determined by TNPA's environmental management department.

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**SCHEDULE 10A: B-BBEE Commitment Schedule and B-BBEE Improvement Plan**

**B-BBEE Commitment Schedule**

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## B-BBEE Improvement Plan

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**SCHEDULE 10B: Black Ownership Commitment**

**Black Ownership Commitment**

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**SCHEDULE 10C: Economic Development Plan**

**Economic Development Plan**

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**SCHEDULE 10D: Supplier's Development Plan**

**Supplier's Development Plan**

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

*[To include Supplier Development Value Summary]*

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**SCHEDULE 10E: Economic Development Guidelines**

**Economic Development Guidelines**

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**SCHEDULE 11: Penalties****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 12: Works Programme**

**Works Programme**

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**SCHEDULE 13: Independent Certifier Agreement**

**Independent Certifier Agreement**

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**SCHEDULE 14: Construction Performance Guarantee**

**Construction Performance Guarantee**

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**SCHEDULE 15: Operating Performance Guarantee**

**Operating Performance Guarantee**

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**SCHEDULE 16A: Terminal Operator's Operating Specifications**

**Terminal Operator's Operating Specifications**

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**SCHEDULE 16B: Principal Rights and Obligations of the Terminal Operator**

**Principal Rights and Obligations of the Terminal Operator**

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**SCHEDULE 16C: Key Performance Areas**

**Key Performance Areas**

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**SCHEDULE 16D: Terminal Operator's Performance Standards**

**Terminal Operator's Performance Standards**

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**SCHEDULE 17: Final Maintenance Guarantee**

**Final Maintenance Guarantee**

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**SCHEDULE 18A: Project Insurance****Project Insurance****General**

1. The Terminal Operator is required, in terms of clause 16 (*Project Insurance*) of this Agreement to arrange appropriate and adequate insurance policies for the Project. Without prejudice to the generality of that requirement, the Terminal Operator is required to arrange and maintain the Project Insurances listed in this Schedule 18 (*Project Insurance*) on the terms and with insurance companies acceptable to TNPA throughout the relevant period under this Agreement. Premiums per class of insurance must be identified.
2. The Terminal Operator shall punctually pay all premiums in respect of all insurance policies required to be effected in terms of this Agreement and shall promptly provide TNPA with copies of all payment receipts if so requested by TNPA.
3. The Terminal Operator shall be at liberty to combine any or all of the Project Insurances referred to in this Schedule 18 (*Project Insurance*) respectively into one policy document.

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**SCHEDULE 18B: Project Insurances -Part X****Project Insurances - Part X****List of insurances required during the Operation and Maintenance Period**

The Project Insurances in Part X of Schedule 18 shall be effective from Actual Operations Commencement Date (but only to the extent that such insurances have not been effected already during the Construction stage by the Terminal Operator) and maintained in force and renewed as required for the duration of the Operation and Maintenance Period:

**1. ASSETS ALL - RISK'S INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

**2. BUSINESS INTERRUPTION CONSEQUENTIAL INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]

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Exclusions:	[•]
Extensions:	[•]

### 3. **THIRD PARTY LIABILITY INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

### 4. **EMPLOYERS LIABILITY INSURANCE**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

### 5. **MOTOR VEHICLE THIRD PARTY LIABILITY INSURANCE**

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Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

6. **PROFESSIONAL INDEMNITY INSURANCE FOR WORKS**

Cover:	[•]
Insured Parties:	[•]
Sum insured:	[•]
Maximum Deductible:	[•]
Period:	[•]
Gross Premium:	[•]
Exclusions:	[•]
Extensions:	[•]

***[NOTE: the above to include details regarding the risks covered all material exclusions, any endorsements, amounts covered, deductibles and the earliest date on which the insurances are to become effective.]***

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**SCHEDULE 18C: Project Insurance- Part Y****Project Insurances - Part Y****List of insurances in respect of which non-vitiating cover is required**

The Project Insurances in Part Y of Schedule 18 shall include insurances in respect of which clause 16.2 (*Uninsurable risks*) regime is applicable and shall be effective from [•] Date and maintained in force and renewed as required for the duration of the Project:

[•]

[•]

[•]

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**SCHEDULE 19: Mandatory Requirements for Safety, Health, Environment and Engineering**

**Mandatory Requirements for Safety, Health, Environment, Process Safety, Civil,  
Structural, Mechanical and Electrical Engineering**

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**SCHEDULE 20: Fee Revision Request**

**Fee Revision Request**

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**SCHEDULE 21: Annual Reporting**

**Annual Reporting**

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