



**WORLD BANK
PORT REFORM
TOOL KIT**

M O D U L E 4

**LEGAL TOOLS FOR
PORT REFORM**



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INTRODUCTION AND OVERVIEW

Transformation of port structures often requires new legislation. This Module identifies fundamental points to consider when developing such legislation, with examples from existing port reform regimes. The examples provided should be used for reference purposes only.

Because every country has a unique legal and institutional context, it is impossible in practice to present a model law that fits the wide variety of fundamentally different legal systems. With such a diversity of legal and policy regimes worldwide, the exact purpose of a port law may vary from country to country. Sometimes, an existing law is changed to accommodate new institutional structures, made necessary because of changed socio-economic

conditions. Other times, a law lays the groundwork for the public sector to participate in port development and infrastructure investments, or enables the private sector to carry out port activities that previously resided in a public sector monopoly. The reference provisions presented in this Module are not meant to cover completely each and every issue. They are meant to be used as tools for port reform, to shape the legal foundation for marketable and bankable regulatory and contractual arrangements.

The examples are derived from a variety of institutional structures covering not only tasks and responsibilities of Port Authorities, but also related institutes such a National Ports Council (or Commission), a Port Fund and others. In



the case of a Port Authority that is part of a municipality, no specific law is necessary because the legal basis of such authority is part of municipal legislation. However, the fundamental elements of this Module might still be considered in drafting such legislation.

It is often thought that the sole purpose of a Ports Law is to create an institutional framework to develop and manage seaports. It should, however, be emphasized that a Ports Law should also establish a flexible business framework that enables a Port Authority to compete successfully in national and international transport markets.

A Ports Law often creates one or more Port Authorities, as well as a host of other port-related bodies, such as a Ports Council/Commission or a similar advisory/regulatory body. It might also set operational conditions for private operators. Finally, such a law may regulate organizational and financial relations between public organs (such as the State, regional governments, and/or municipalities) and the maritime administration.

General Approach for Drafting a Ports Law

A Port Authority should be formally established by the Ports Law, either as a public or commercial (e.g., joint stock or limited liability company) entity. Two examples illustrate some key juridical attributes to be considered.

On this matter, the Ports Law in Singapore states:

There is hereby established a

body to be known as the Maritime and Port Authority of Singapore, which shall be a body corporate with perpetual concession and a common seal, by that name, be capable of:

- a) suing and being sued;
- b) acquiring, holding and developing or disposing of property, both movable and immovable; and
- c) doing and suffering such other acts or things as bodies corporate may lawfully do and suffer.


Some countries have opted for a corporatized Port Authority. Apropos of that, the Polish Ports Act states:

Joint Stock Companies, administering ports of fundamental importance to the national economy, are established under this Act and operate on the basis of the Commercial Code, unless otherwise provided for by this Act.

Companies mentioned in Paragraph 1 have a public service character.

A Ports Law may be very detailed or merely set forth basic principles of port management and operation. Regardless of the form adopted for the port's regime, to create a solid basis for clearly delineating port functions and responsibilities, a core set of provisions should be included. These provisions and their key features are described below.

Preface. A preface states the objective of the law and some general conditions. The approach adopted is a function of



the underlying legal system. For example, some countries use a combination of statute and implementing regulations; others pass a decree that applies a privatization or concession law to a port or ports. The objective might be to create new Port Authorities or to reform an existing Port Authority. Also, the preface should indicate whether transfer of rights to private parties (e.g., lease, concession, BOT) is permitted. It might be necessary in such instances to make corresponding changes in laws governing public property (e.g., in the case of the so-called "Maritime Domain"). Finally, the law should regulate the organizational, financial and fiscal relations between the related public organs (such as the national government, regional governments and municipalities) as well as with regulators such as the maritime administration, the fiscal authority and the competition commission.

Two approaches have been developed for drafting the first section of a typical port law:

- A preface stating only the objective of the law (See Box 1 and Box 2); or
- A preface of general conditions, elaborating the objective and a number of boundary conditions. In several cases the definitions used in the law are included in the first section.

In Asia and Africa, the institutional structures of many ports were often patterned after their European counterparts. The vast majority were public service ports responsible for all port services. Dockers were employed by the public Port Authority or Port Trust. In

Box 1

Eastern Europe: Decentralizing Port Management

In the past, Eastern European ports were managed mainly by centralized authorities. After the introduction of market reforms, it became necessary to decentralize port management and modernize former State-dominated structures. More independent port authorities were established, often with some form of State participation. The prefaces of the relevant laws reflect these changes. Examples are the Ports Laws of Poland (December 20, 1996) and of Latvia (June 22, 1994).

- *The Act regulates the principles for establishing governing bodies for ports and sea harbors, their organizational structure and their operation. The limits of port areas are stipulated in separate regulations. The Act is not applicable to naval ports.(Poland)*
- *This Act establishes principles of operation and management of ports and the safety of navigation within port areas (Latvia).*

Box 2

Latin America: Allowing Private Stevedoring Operations

Until the 1980s, Central and South American ports were usually part of the State and managed as public service ports. Recently, many countries in the region have changed port structures to allow private stevedoring operations. The "General Conditions" of the Mexican Ports Law (1993) describes the objectives of such a Law:

- *This Act has a public character and shall be observed in the entire territory of the State. The objective of the law is to regulate ports, terminals, marinas and port installations, their construction, use, acquisition, exploitation, operation and ways of administration, as well as the execution of port services.*

these countries, new Port Laws are aimed at converting Service Ports into Landlord Ports, requiring the separation

of public landlord responsibilities from cargo-handling activities. (See Box 3) New Port Laws regulating the tasks and

Box 3

Singapore: Transforming a Service Port into Landlord Port

A useful example of a change of structure of a Port Authority is represented by two laws enacted in the Republic of Singapore. Prior to the change, the port functioned as a public service port. As the Port Authority increasingly became engaged in terminal operations abroad and other commercial activities, public functions and commercial functions were separated. A new statutory board (Maritime and Port Authority of Singapore or MPA) was set up. The commercial and marine activities of the original Port of Singapore Authority were corporatized. Two Acts implemented the changes, one providing for the dissolution of the Port of Singapore Authority and the other establishing the MPA (Republic of Singapore, Acts No. 6 & 7, 1997). The prefaces of these Laws were, respectively:

- An Act to provide for the dissolution of the Port of Singapore Authority and for the transfer of its property, rights and liabilities to a successor company and others, to make financial arrangements for that company and for matters connected therewith, to repeal the Port of Singapore Act (Chapter 236 of the 1985 Revised Edition) and to make consequential amendments to other written laws.
- Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:.....
- An Act to establish and incorporate the Maritime and Port Authority of Singapore, to provide for its functions and powers, and for matters connected therewith; and to repeal the National Maritime Board Act (Chapter 198 of the 1985 Revised Edition) and to make consequential amendments to certain other Acts.
- Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:....

responsibilities of a (public) Landlord Port Authority have been combined recently with the establishment of private operating companies in accordance with the national Commercial Code.

Some situations require a law to specifically regulate the development and construction of a terminal by a private operator through authorizing the award of a Concession Contract. (See Box 4)

Box 4

Panama: Enabling Legislation for a Concession

In Panama a Concession Contract was concluded between the State and a private operator. The text of the contract was included in a specific law authorizing its conclusion. The opening text of the Law is:

- Law of 1995, whereby Development, Construction, Operation, Administration and Management Contract of a container Terminal in the North Coco Solo Area, Province of Colon, between the State and the Corporation Colon Container Terminal, S.A. is approved.

Definitions. The second element should comprise definitions of the main terms used in the law. The port business, especially as a specific mix of public and private interests and financiers, will require that the interplay of these interests be balanced and result in well circumscribed functions. The law should likewise define maritime and port infrastructure, identifying which are under the authority of the State and which are under the authority of a Port Authority. Sometimes it may be necessary to designate several types of ports such as "ports of national interest" and "ports of



regional interest," or as in the French Ports Law of 1965: "Ports Autonomes and Ports d'Intérêt National," with each exhibiting its own definition.

It is highly advisable to precisely define critical functions, features and port administration bodies. In the port field, investors and lenders will review definitions of a port law closely to determine if there are ambiguities that may affect security interests or lender rights. As there is no internationally accepted terminology the following list is only an illustrative compilation of the most often-used terms.

"Port Authority" means every port undertaking agency established under the subject law;

"Port (or Seaport)" means one or more port areas forming an autonomous functional and economic entity, of which the boundaries are established by authority of [relevant government body] and whose activities are governed in accordance with [national or other relevant] law;

"Port Infrastructure" means all infrastructure located within the Seaport or in the land and sea accesses containing Basic Infrastructure, Operational Infrastructure and Superstructure;

"Basic Infrastructure" means sea-locks, breakwaters, piers, sea walls and other protective works not directly involved in the transfer of goods, maritime accesses and canals, primary roads to and from the ports, and also railway tracks, pipelines and buffer-zones situated at the borders of the port;

"Operational Infrastructure" means port facilities and constructed works dedicated to commercial handling of sea-going and inland vessels such as quaywalls, piers, jetties, roll-on roll-off facilities, berthing aids and also secondary connecting roads within the port area, including all appurtenances and components thereof;

"Superstructure" means sheds, silos, warehouses and housed facilities of all kinds, and all infrastructure not identified under Basic and Operational Infrastructure;

"Maritime Access" means fairways, dredged channels and other waters providing access to Ports, equipped with Aids to Navigation for commercial sea-going and inland vessels;

"Aids to Navigation" means all floating, stationary and on-shore objects dedicated to assisting sea-going and inland vessels in the safe navigation at sea and in inland waters including buoys, beacons, lighthouses, vessel traffic systems, tidal measuring systems and fixed objects and markers;

"Harbor Master" means the Harbor master appointed under [section] of this Law and such Harbor Master's appointees, representatives, deputies or delegates appointed in accordance with such section;

"Port Services and Port Facilities" means port terminal services and facilities for handling, storage and transportation of goods on port land and for handling of passengers carried by vessels;

"Pilot" means any person not belonging



to a vessel who has the conduct thereof;

“Authorized Pilot” means a pilot employed or authorized by a competent Authority to pilot vessels;

“Dues” includes port dues, cargo-related dues and pilotage dues;

“Port Dues” means dues levied in respect of a vessel for entering, using, and leaving the port;

“Public License” means a license granted under the Act and for the purposes of this Act; a public licensee shall be construed as the recipient of a Public License and subject to its terms and conditions.

Objectives and Functions of a Port Authority. The third section should delineate the objectives and functions of a Port Authority.

Usually, a Port Authority exercises jurisdiction over a port territory, which should constitute an economic and functional unit. The establishment of a Port Authority as this legal entity is one of the major elements of a Ports Law. The law provides the legal status for the Port Authority, which might be a public entity or a corporate entity under the Commercial Code of the relevant country, such as a joint stock company. The law should also indicate which public entity has the right to establish a Port Authority in the event that the State is not doing so. This might be a region, province, city or a combination.

In the case of corporatized or privatized Port Authorities, linkages will be needed to the Mercantile, Corporate or

Commercial Code. Provisions should be included on shareholding, for example, or conforming changes made to commercial or corporate laws.

There is an important point affecting Port Authorities established as Joint Stock Companies. Generally, Port Authorities are responsible for operating the entire port. In the event of a Landlord Port situation, a corporatized or privatized Port Authority must ensure a level playing field among many terminal operators and other service providers. To avoid conflicts of interest, the law should explicitly regulate the powers and duties of the Port Authority vis-à-vis private operators with respect to investments and share participation.

Powers and duties of a Port Authority with respect to land management require specific attention in the law. A Landlord Port Authority is responsible for land management and overall port development. Special attention should be paid to the matter of regulating ownership and use of port land under the law. A Port Authority may own the land or have a perpetual or time-specific right to use the land. Powers to act as a landlord may need to be specifically elaborated, as well as the limitations of such powers, such as the interdiction of the sale of port land. While the Authority is engaged in, or provides for, construction of operational infrastructure, the maintenance of such infrastructure constitutes a duty for the Authority. The Ports Law should specify the exact responsibilities of the Port Authority and those of the State with respect to investments in basic and operational infrastructure, maritime accesses, port



access roads, rail and waterway infrastructure, as well as hinterland connections.

Generally, the objective of a Port Authority is to efficiently and economically manage the port. In a public Landlord Port its objectives should be aligned with the macro-economic goals of the State and the needs of the region (such as the creation of jobs, strengthening of the economic structure, etc.). (See Box 5)

Box 5

Caution: Single National Ports Authority Can Be Hazardous to Economic Health

Since ports generally compete among themselves both in the international and national transport markets, a National Ports Authority, comprising all ports of a country, is not a preferred option. Occasionally, a National Ports Authority is established on the grounds that there is only one major port in a country as well as a number of smaller ports with a regional function. However, even in such a case, a more effective system could consist of an autonomous Port Authority for the major port, and a Secondary Ports Directorate within the Ministry of Transport, which exercises the overall tutelage on the national port system.

Fundamental port functions should be considered in the law, such as:

- Administration, management and physical development of the port area;
- Maintenance, rehabilitation, renovation and construction of basic and operational infrastructure;
- Establishment of contractual (conces-

sion, lease) and other conditions (public license) for private operators to provide port services;

- Co-ordination of berthing and unberthing of vessels;
- Ensuring public order in the port area;
- Safeguarding the port environment; and
- Port marketing.

(See Box 6)

Box 6

Functions of Corporatized Port Authorities


The Polish Ports Law chooses a straightforward landlord model for its Corporatized Port Authorities. Their responsibilities are formulated as follows:

The functioning of the entities managing the ports comprises inter alia:

- Managing land and infrastructure;
- Forecasting, scheduling and planning port development;
- Construction, development, modernization and maintenance of port infrastructure; and
- Acquisition of new land for port use.

Corporatised Ports - Special Considerations

If a Port Authority is established as a joint stock company, matters of share issuance and capitalization arise. The



Ports Law should include clauses pertaining to the way this is effected, consistent with the provisions of relevant commercial, mercantile and securities laws.

One key consideration is whether a Government, be it national or local, intends to exercise direct influence in the Port Authority via its shareholder's rights (e.g., the nomination of the Chairman of the Board or the Port Director). In the event of a corporatized Authority, the Government or other public body usually owns 100% of the shares. In some countries the shares are divided between a national government, local government and other public or private shareholders in such a way that the involved public entities retain a majority voting position. In some corporatized situations voting shares can be allocated to private investors. Once private investors have a majority voting position, the Port Authority can be considered as being privatized. (See Box 7)

Capitalization can be effected through transfer by law of all relevant properties to the new Port Authority. These might include all operational infrastructure, related land and superstructure, including such assets as equipment and other rolling stock. When a Landlord Port is created, together with a new corporatized Port Authority, one or more separate operating companies with the legal structure of a limited liability company might be set up to take title to the superstructure and equipment. The value of the initial shares could be determined on the basis of their book or market value, whichever is less.

Box 7

Division of Shares in Corporatized Port Authority

One example of a Government seeking to be directly involved in port management is Poland. Under the new ports law, the Polish State retains 51% of the shares of its corporatized national ports, thus exercising control over the Board of Directors, and gives these shares preferential treatment in the event of liquidation of a port enterprise. The relevant clauses are as follows:

- *A joint stock company named 'Port Authority of Gdansk' S.A. shall be established by the State Treasury, which will retain at least 51% of the company's shares whilst the Municipality of Gdansk will hold at least 34% of the shares.*
- *A joint stock company named 'Port Authority of Gdynia' S.A. shall be established by the State Treasury, which will retain at least 51% of the company's shares whilst the Municipality of Gdynia will hold at least 40% of the shares.*
- *A joint stock company named 'Port Authority of Szczecin-Swinoujscie' S.A. shall be established by the State Treasury, which will retain at least 51% of the shares, whilst the Municipalities of Szczecin and Swinoujscie will each hold 24,5% of the shares.*
- *The shares owned by the State Treasury and the Municipalities are registered shares and have a preferential nature establishing priority rights to Port Authority assets in the event of liquidation.*

Depending on the port policy of the country concerned, limits can be imposed on the sale of shares. In many cases a Government may want to retain the right to determine port policy. This requires the possession of the majority of the voting shares or of a "golden shares." A clause in the law guaranteeing such majority position should then be considered.



PORT AUTHORITY AND TERMINAL OPERATIONS

One important issue to be treated in port laws is the relation between a Port Authority and port services providers, in particular the cargo-handling companies operating in the port's territory. Generally, it is undesirable for a public Port Authority to be directly involved in terminal operations. A port law may explicitly prohibit a Port Authority from providing cargo-handling services. A further step to avoid conflict of interest issues would be to prohibit a Port Authority from being a shareholder in a terminal operating company located in its port area. Notwithstanding potential conflicts of interest, a Port Authority with the overall responsibility to develop the port area may sometimes opt to make strategic investments to develop a sector of the port business. However, indirect involvement, even if it takes the form of becoming an equity shareholder of or lender to a private port operator, should be limited both in time and money. (See Box 8)

Licensing

A Port Authority might be authorized to exercise licensing and regulatory functions with respect to marine and port services and facilities. Regulation of marine activities is related to the Harbor Master's function, as well as to the transport of dangerous goods and protection of the environment (such as rules pertaining to discharge of ship wastes into port waters, tank cleaning and the use of port reception facilities). The licensing power of the Port Authority with respect to port services can be

Box 8

Violated Neutrality: A Port Director with Two Hats

In 1998 the shareholders of Rotterdam's largest container terminal, ECT (Europe Combined Terminals), decided to put the company up for sale. Agreement was reached with Hutchison Port Holdings from Hong Kong to buy the terminal. To protect Dutch interests the Municipal Port Authority, together with the Dutch ABN-AMRO Bank, retained the majority of the shares, although Hutchison gained operational control of the terminal. The Port Director of the Rotterdam Municipal Port Authority was nominated as a member of the Supervisory Board of ECT, apparently in a move to exercise as much local influence as possible. This, however, clearly violates the neutrality of the Port Authority since the Port Director:

- As a public servant has to represent the interests of the entire port;
- Must advise the Municipality on matters involving competing container terminals in the port;
- Has the legal task as a Board Member of ECT to represent and defend the interests of this company and its personnel; and
- Has to advise the Municipality about public investments, including those regarding the ECT terminal.

The combination of potential conflicting functions may result in loss of confidence by the local port community.

extensive, because it usually has the legal power to revoke licenses for violations without administrative appeal. The law may authorize the issuance of public licenses to operate terminals. Because public licenses require extensive oversight by the Port Authority and reporting by the licensee, their utility should be balanced against the bureaucratic burden for the Port Authority and the port licensees. The same goals may be better achieved through

Box 9

Maritime Domain: A Potential Impediment to Port Development

An European country enacted a Ports Law in 1996 that included port land and even inland terminals as the so-called "Maritime Domain." This concept developed among Mediterranean countries to protect local coastlines from undue commercial exploitation. However, the inclusion of ports has potentially far-reaching negative effects for the commercialization of port operations and may seriously impede the reconstruction of the national ports sector. Proposals are under consideration to put the port sector on a normal commercial footing, but the current law is still valid. The main issue to be resolved is the current law's provision that no private property is allowed in the Maritime Domain. Relevant articles are:

MARITIME DOMAIN BASIC PROVISIONS

Article 48

The Maritime Domain is the public estate of interest to the Republic of ..., is under its special protection, and shall be used and/or exploited under the conditions and in the manner prescribed by law.

Article 49

The Maritime Domain includes the internal waters and the territorial sea, its seabed and subsoil, as well as parts of the dry land that are by their nature intended for public maritime use or are declared as such.

In respect of Paragraph 1 of this Article the following shall be considered as the Maritime Domain: the seashore, ports and harbors, breakwaters, embankments, dams, sandbars, rocks, reefs, mouths of rivers flowing into the sea, sea canals, and live and inanimate natural resources (fishes, minerals, etc.) in the sea and in the marine subsoil. (cf.. Official Gazette of the Republic of ...)

Article 51

There is no property or other proprietary rights in the Maritime Domain on any basis.

Anyone is free to use and/or to be benefited by the Maritime Domain according to its nature and purpose in conformity with the provisions of this Law.

Special use and/or economic exploitation of a part of the maritime domain may be conceded to physical and legal persons (concession) provided that such use is not in contradiction with the interests of the Republic of
Special use of the Maritime Domain is any use that is not general use or economic exploitation of the marine domain .

concession/leasehold contracts, as these are more flexible for both parties.

However, in the event of inclusion of a public license authority in a Ports Law, rules should be set for transfer, renewal and cancellation of a license. Unlike for a concession or lease, where breaches are matters of contract and law, license breaches fall under administrative (or even criminal) processes for their resolution.

In this regard, the following reference

text may be used:

No person shall provide:

- (i) any marine service or facility; or
- (ii) any port service or facility,

unless he is authorized to do so by a public license granted by the Port Authority.

Every public license granted by the Authority shall be in such form and

for such period and may contain such conditions as the Authority may determine.

Usually, a corporatized Port Authority does not have the power to grant a public license. It can only set conditions for the provision of port services under commercial contracts (such as leases, rent contracts or concessions) with port service providers.

Marine Management

Marine management tasks form part of either a national maritime administration or of a public Port Authority. Marine management, which is essentially a public safety task, should be performed separately from a corporatized or privatized Port Authority to prevent a conflicting mix of commercial and safety objectives. A Ports Law should make that separation of objectives clear. Because of overriding safety concerns, which may run counter to the profit-making objectives inherent under this type of Port Authority, combining marine management tasks with managing a corporatized or privatized port may not be the best option for managing navigational port safety. (See Box 10)

The function and duties of a Port Authority with respect to marine safety and environmental protection can be described as follows:

- To regulate and control navigation within the limits of the port and the approaches to the port;
- To disseminate nautical and other relevant information to ships and all

Box 10

Marine Management Tasks: To Be Separated from Corporatized/Privatized Port Tasks

Key functions of marine management are:

- Control and co-ordination of vessel movements in the port and the port approaches;
- Monitoring of the pilot organization;
- Dissemination of nautical and operational information to all concerned parties;
- Provision of safe berthing practices;
- Control of handling and storage dangerous cargoes, control of safe loading and discharging practices;
- Keeping law and order (together with the regular police); and
- Combating marine accidents and co-ordination of search and rescue operations.

other involved parties;

- To control maritime transport, loading and discharging of dangerous goods;
- To exercise regulatory functions with respect to protection of the marine environment;
- To discharge or facilitate the discharge of international obligations of the Port Authority with respect to marine safety and protection of the environment;
- To promote measures for the safety



of persons who work at or visit the port;

- To combat or to provide for combating marine accidents in the port including fire fighting and ambulance services; and
- To secure public order in the port area and to exercise police functions in co-operation with the civilian police authority.

If the Harbor Master's function forms part of a national maritime administration, its powers and duties are usually regulated in a Maritime Code. Often, however, the Harbor Master (Port Master or Port Captain in some jurisdictions) is part of a Port Authority's organization. If so, the Ports Law should include a section dealing with the specific powers and duties of this function. Generally a Harbor Master may issue general and specific directions to shipping within the framework of his powers. He is usually the operational commander responsible for marine safety and for combating the effects of incidents involving ships and/or terminals. At the same time, he is involved in regulating traffic and acts as the main nautical adviser to the Port Authority's governing board. (See Box 11).

Regulation of Other Port Functions

A variety of other aspects may be regulated by a Port Authority under a Ports Law, such as:

- Inquiries with respect to any case where damage has been caused by or to a vessel in port;

- Keeping and placing buoys, beacons and other navigational aids as well as provision and maintenance of lighthouses;
- The landing of personnel belonging to an armed service;
- Cleaning of basins, works and premises;
- The use and manning of harbor craft (sometimes requires fire fighting capabilities);
- Provision and maintenance of pontoons;
- Manning and use of tugs and boats;
- Special police powers for patrol boat personnel (may also be included in the Harbor Master's function);
- Disaster control and emergency communication procedures; and
- Fire fighting procedures and operations.

Financial Issues

It is very important to regulate a Port Authority's financial powers and have them conform with applicable fiscal and public administration laws. A Port Authority, whether public or private, may do very well in attracting investment, especially from private sources, if it is managed like a commercial business. Many ports, however, are part of an overall State or municipal structure and subject to the same financial rules and regulations as other parts of the public administration. Especially in the



Box 11

Harbor Master's Powers and Functions

The statutory powers and duties of the Harbor Master are the focus of a Port Authority's safety function. They can be incorporated in a Ports Law or be included under a Maritime Code with a cross reference in the Ports Law to such provisions.

The Harbor Master may:

- ensure compliance with laws and regulations on nautical safety and international conventions aboard a vessel, including fishing vessels and other categories of vessels regardless of flag and affiliation;
- provide for verification of vessel documents and of necessary qualifications of the crew;
- regulate, restrict or prohibit the movements of vessels in the port and in the approaches to the port;
- register a vessel's arrival in and departure from the port;
- direct a pilot service and when necessary assign a pilot to a vessel in regions not requiring compulsory pilotage;
- (only when dealing with public quays) direct where any vessel may be berthed, moored or anchored and the method of anchoring;
- give directions to a vessel and/or a terminal to ensure safe transport, loading and discharging of dangerous goods in the port;
- inspect a vessel within the framework of port-state control;
- ensure the keeping of law and order in the port area;
- co-ordinate the combating of marine or other incidents;
- in the event of any risk for loss of human life to any person or damage to any property, direct the removal of any vessel from any place in the port area to any other place and the time within which such removal is to be effected;
- declare berths, locations, anchorages and fairways which may be used by vessels and the areas which are prohibited or restricted areas.

case of a Public Service Port Authority, the administrative costs of burdensome procurement procedures can be high, for example when a Cabinet of Ministers is the only body authorized to approve the purchase of quay cranes or other high-cost equipment.

Since a port is a functional and economic entity that often operates in a compet-

itive market, clear financial powers for port management should be included in a Ports Law. These include the power to:

- Levy charges, rates and fees;
- Make a reasonable profit;
- Take loans, issue bonds and securities;



- Establish its own procurement rules; and
- Keep financial records and to present annual audits conducted by independent accountancy firms.

Examples of legal language used to define certain aspects of financial authority include:

- Ship and port dues and charges and income from real estate, whatsoever their nature, arising in the Port domain, are earned and destined for the Port Authority, with exclusion of all other Authorities.
- The tariffs are determined by the Port Authority. The proceeds of the tariffs shall be sufficient to meet the financial needs of the port, including operational expenses, the maintenance of assets, the payment of interest, allocation for depreciation of assets and other standard commercial elements (including shareholders' dividends and a reasonable profit).
- The Port Authority can take loans, and issue bonds and securities.

National Ports Commission

Especially in countries where the port sector is still under development, the national government has an important role to play. This role may be expressed in a national ports policy formally authorized by the Parliament. The preparation and implementation of this policy usually is the responsibility of a Transport/Port Ministry.

Sometimes, in order to involve major sectors of the ports community in the development, a National Ports Commission (or Ports Council) is established by law. Generally, the Commission has an advisory role. The general objective of a National Ports Commission is to provide input to the development of a national ports policy. Generally, the Commission provides this advice to the Council of Ministers through the person of the Minister of Transport. Commissions may be asked to contribute to the development of the national ports policy by offering advice on:

- The prioritization of policies that will maximize private participation in the port sector;
- The preparation of a national ports (restructuring and investment) plan based on an objective methodology for the evaluation of project proposals received from the port authorities;
- The allocation of public sector funding for port development;
- The administration of an investment fund established specifically to finance port development;
- Measures to prevent monopolistic practices in the ports and to encourage competition; and
- The role of the maritime sector in the overall national transport strategy and national export policies.

The President and the members of the Commission should be appointed from



among persons with extensive experience in the management of ports, shipping, inland transport, commercial, financial or economic matters, applied science or the organization of workers, and who have extensive experience as persons engaged in port operations, or have demonstrated their ability in other fields of port-related operations (including in particular the fishing industry and the shipbuilding industry).

If a country decides to institute a Ports Commission, it should be empowered with the necessary tools to function effectively. Therefore, a Ports Commission should be assisted by an Executive Secretary and a small professional staff. Members of the staff should receive remuneration in accordance with applicable conditions for civil servants. Finally, the costs of the Commission should be borne by the State in order to ensure its independent status.

Liability

If a Port Authority carries out marine services such as pilotage, towage and other related activities (for example, Vessel Traffic (Radar) Services), liability for the effects of default, negligence or any other wrongful act should be limited as much as possible. Therefore, the law might contain a clause outlining such a limitation. Examples of such a clause are:

- Notwithstanding the grant of any public license, the Port Authority shall not be liable in any circumstances for any injury, loss, damage or cost sustained by any person as a result of any default or omission of

any public license or any agent or employee of the licensee.

- The Port Authority shall not, where, without its actual fault or privity, any loss or destruction is caused by any vessel or to any goods or other thing whatsoever on board a vessel, be liable for damages beyond an aggregate amount [currency of country] for each ton of the vessel's tonnage.

Inclusion of such provisions should be considered in light of the overall goals for port development. For example, limitations of liability may have a chilling effect on some investors, who would have to seek someone other than the Port Authority to assume liability risks that exceed the limit. Therefore, the Port Authority should be provided with the power to waive such liabilities or readjust the liability limit.

Offenses

A Ports Law may explicitly list a number of specific administrative, civil and criminal offenses and empower the Public Port Authority to assess fines for their violation, subject to administrative or judicial appeal. Such offenses may pertain to:

- damage to Port Authority property;
- unlawful operation of port services;
- evasion of dues;
- unsafe operation of vessels; and
- pollution of the marine environment.



Implementation Problems

Implementing a new Ports Law presents a wide variety of issues and often results in disagreements among the parties involved. The major issues encountered in implementing new Ports Laws are described below.

The effects of port reform on the existing work force. Port reform is often triggered by overstaffing at ports and restrictive labor practices. However, the objective of a new Ports Law is not labor reform, but port reform. Labor reform may be a by-product when a port must rationalize its workforce to improve efficiency and reduce costs. A Ports Law might set conditions for the transfer of personnel from the existing Port Authority to the new one.

Since port reform is often accompanied by a reduction of the size of the port's workforce, the Ports Law may establish and regulate a Port Workers Fund to soften the impact of labor force reductions. The Fund can be used for redundancy payments and/or retraining programs.

The valuation of assets and the capitalization of a new Port Authority. A valuation should be conservative. Often, ports in the process of reform have to dispose of a large variety of outmoded equipment and poorly maintained port infrastructure and buildings. This obsolescence and maintenance backlog must be fully taken into consideration when assessing the value of the port's assets. Otherwise, private sector bids in port privatization may reflect significant discounts as the bidders take into account

the need to pay for the substantial investments that will be required to modernize and upgrade the infrastructure.

The need to replace top management. Ports functioning within the framework of competitive markets require a different management ethic to lead the difficult reform process and steer the new Port Authority safely through the shoals of competition and other commercial activities.

Creation of a clear definition of the port area. This definition should be established at the outset of reform and not be postponed to a later date (e.g., until later Decree of a Council of Ministers). Significant differences of opinion often arise with port cities as to what areas are part of the port and what area are part of the city. If a Decree is required by the Ports Law, it should be enacted at the same time as the law itself.



FULL CONCESSION AGREEMENTS

Legal Nature

As more elaborately discussed in Module 3, concession agreements are a relatively new development in ports. Business opinions differ about the legal nature of a concession agreement – as well as its configuration. Some concession agreements have more in common with a privatization model, while others resemble a leasehold contract. Because comprehensive privatization constitutes an unrestricted and irrevocable transfer of port land from the public to the private sector, a concession agreement, with or without BOT types of arrangements, cannot be conceived as being comprehensive port privatization but only partial port privatization.

Concession agreements are a new (and in many cases very successful) development of the Public-Private Partnership model and are most successfully applied within a Landlord Port structure.

Concession agreements were originally developed for Service Ports. Landlord Ports usually did not need concession agreements, but used leasehold agreements instead. Both types of agreements have much in common and some authors consider a leasehold contract to be a variant of a concession. To avoid misunderstanding, the term "full concession agreement" will be used to describe a concession in its broadest form; i.e., a series of contracts that define the relationship between the Government and the private sector regarding the right to exploit port land and facilities as well as the obligation to construct port infrastructure and superstructure.

In some aspects, a leasehold might be considered a long term rent contract. But contrary to a rent contract, a leasehold conveys a possessory interest. Therefore, a leasehold can be transferred or sold to another private party under the conditions stipulated by the Port Authority. This is a very important feature for advancing the business plan of port investor operator.

Full Concession, Leasehold and Land Rent

What differentiates a concession agreement from a leasehold? When would one instrument be preferable over another? Box 12 summarizes the formal differences and similarities.

The main reason to apply a full concession contract is fiscal. In the 1980s many ports (especially Service Ports) were in dire financial straits: government-controlled, over-manned, badly maintained, without market orientation and often not able to provide even essential port services. This situation did not occur solely in developing countries, but also in many developed countries. In developing countries, however, the financial resources necessary to modernize port facilities and to provide for redundancy payments for excess personnel were usually lacking. Concession agreements provided a timely solution: private investors provided the money to modernize port facilities and often were willing to take over some port personnel liabilities. This freed up Government resources for use in other parts of the economy. For all their advantages, concession agreements do have a price, most particularly the surrender by the



Box 12

Full Concession, Lease and Rent Contracts – Landlord Port

Characteristics	Full Concession	Leasehold	Land Rent
Term	25-35 years	25-35 years	10 years
License	Maybe, depends on legislation	Maybe, depends on legislation	Maybe, depends on legislation.
Government guarantees (loan, taxes, exchange rate, competition conditions, etc)	Yes	No	No
Obligation to assume port personnel liability	Often, depends on local situation	No	No
Port assets may be pledged as security	Yes	Maybe, depends on legislation	No
Performance monitoring by Port Authority	Yes	Yes or no depending on the contract	No
Traffic guarantee by Concessionaire, Lessee or Renter	Yes, depends on contract	Usually not	No
Private investments in port infrastructure	Yes	No	No
Private investments in port superstructure & equipment	Yes	Yes	Yes
Tariff control by Government or Port Authority	Depends on situation	No	No
Terminal management	Concessionaire or his chosen operator	Lessee	Renter
Payments	Fixed and variable	Lump-sum, mini-max or shared revenue	Fixed
Legal character of private party	Joint Venture, often including shipping line	Mainly Limited Liability Company	Limited Liability Company
Responsibility for environmental conditions	Yes	Depends on legislation	Usually not
Business Plan required	Yes	Depends on contract conditions	No
Reversion of user rights after contract period	Yes	Yes	Yes
Compensation for newly built facilities	Depends on contract	To be transferred to new lessee or to be removed	Not applicable



Government of full and complete control over port development.

Full Concession and BOT Schemes

If the concessionaire obtains the right to construct significant parts of the operational facilities as well as the basic port infrastructure, a concession could be combined with a BOT arrangement. In the case of legislation designating part of the infrastructure to be of a public character, the concession may be considered a public license. However, the part of the concession constituting a public license is generally not negotiable. The Government authority granting the license usually reserves the right to unilaterally modify license conditions.

The most important BOT arrangements combine many variations of long-term leasing with pre-agreed investment commitments. In port reform, the most commonly used models are BOT, BOOT, BTO and WBOT.

BOT (Build, Operate, Transfer). Legal title to the newly constructed port infrastructure, and sometimes other assets, remains with the Government/Port Authority until the end of the concession period. The concessionaire concludes a long-term leasehold agreement, which conveys rights similar to holding title over the land. This agreement is usually attached as an annex to the concession.

BOOT (Built, Own, Operate Transfer). It is also possible that legal title in the land is acquired directly by the concessionaire. Under a BOOT model, the parties agree to have title over all assets

pass to the Government at the end of the concession. For many large terminal operators, the BOOT model is a preferred option.

BTO (Build, Transfer, Operate). To address instances in which legislation forbids ownership by private parties over what is considered public infrastructure or part of the maritime domain ownership may be directly transferred to the Government after construction (e.g., Costa Rica, Croatia). Generally, this form of public-private partnership is considered more complicated than the more common BOT scheme, especially with respect to liability and increased government involvement. Under the BTO model, "ownership" over port facilities becomes an issue for lenders and investors, especially when fixed assets are required as collateral for financing. In such cases, lenders may require some form of Government guarantee regarding adherence to the terms of the concession agreement.

WBOT (Wraparound BOT). Finally, the WBOT concept packages a BOT with a privatization of the public infrastructure. Under a WBOT structure, existing Government-owned port facilities are expanded by the private sector, which holds title only to the additional infrastructure. Under this model, a private operating company would then:

- Operate the entire port facility under a project development agreement (PDA);
- Manage the Government-owned port facility under a management contract;

- Expand the facility under a concession/BOT contract; and
- Have both the management contract and concession/BOT contract "wrap around" the PDA.

Full Concession Agreement Structure

While the principal framework for the relationship between the Port Authority and the concessionaire is specified in the main concession agreement, there are a number of other documents that form part of the concession. The concession agreement and related documents can be used in a number of circumstances including when:

- A private operator concludes a concession agreement for an existing public terminal;
- A private operator concludes a concession agreement with a BOT arrangement for an existing terminal that must undergo large-scale reconstruction and be thoroughly re-equipped; and
- A private operator constructs an entirely new terminal under a concession agreement with a BOT arrangement (greenfield project).

Box 13 lists the important topics usually treated in a concession agreement and related documents.

Pre-concession Documents

Often, either pursuant to the terms of an award or for purposes of securing financing commitments, the parties execute various pre-concession documents

Box 13

Contents of a Typical Concession Agreement

Definitions
 Appointment of the Operator
 Term of the Agreement
 General Rights and Obligations of the Operator
 General Rights and Obligations of the Port Authority
 Transfer of Rights, Obligations and Assets
 Performance Parameters
 (Transfer of) Employees
 Force Majeure
 Liability for Loss and Damage of Goods
 Lease of Facilities
 Activities Permitted by the Authority
 Liability for Damage
 Regulations by the Authority
 Access to the Site
 Miscellaneous Conditions
 Construction and maintenance
 BOT Arrangements
 Investments under a BOT Arrangement
 Functional and Technical Design
 Design and Construction Flaws
 Building Conditions
 Construction under a BOT Arrangement
 Zero Date
 Drop Dead Date
 Extension Events
 Completions Tests and Take-over
 Handback and Transfer of Facilities
 Lender's Security
 Change in Law
 Freedom to Set Tariffs
 Concession Fee
 Security and Safety
 Access
 Unclaimed Cargoes and Containers
 Taxes
 Information and Communication
 Insurance and Indemnity
 Termination and Prolongation
 Option to Continue
 Termination due to non-compliance
 Bankruptcy, etc.
 Expiry of Concession
 Arbitration
 Costs
 Governing Law



that either outline the fundamental terms of the concession or become incorporated into the concession itself.

Among these are:


- **Letter of Intent (LOI).** A pre-concession agreement stating the concessionaire/sponsor's intention to design, construct and build or renovate a new/existing port facility, and the Port Authority's willingness to establish terms for a privately operated facility under a concession agreement and to cooperate with the concessionaire/sponsor in complying with certain local requirements (e.g., permits, registrations, qualifications to do business). The LOI is prepared in accordance with draft functional specifications that were originally submitted as part of the bid documentation.
- **Detailed Project Report (DPR).** A document submitted to the Port Authority as an outline of the functional design/general technical design and time schedules (milestones) for the various phases of the construction. Once approved by the Authority, the DPR would be incorporated in the concession agreement, at which point the milestones become binding.
- **Joint Development Agreement (JDA).** An agreement among members of the sponsor group that allocates project responsibilities (e.g., shareholding, financing, construction, tax advantages). This agreement might include a Port Authority or even a Ministry.

- **Technical Operations Agreement.** An agreement that specifies joint use of, and responsibilities for, technical facilities, such as shore cranes or operational infrastructure.

Definitions

Every concession agreement includes a list of definitions to delineate precisely both the subject matter and the concepts used throughout the agreement. These definitions will vary from country to country and legal system to legal system. Examples of the most commonly used definitions include:

- **Approved Detailed Project Report/Approved (DPR).** The detailed project report approved by the Port Authority for the development of the various phases of the site, the approved form of which shall be signed for identification by the parties to this agreement and shall include any amendments to the DPR approved by the Port Authority in accordance with this Agreement;
- **Bank.** Every shore structure (excluding a quay wall), measured in each case from the crest line of the ground to the bed line, and including related artificial structures;
- **Basic Port Infrastructure.** Immovable assets destined for general use of the port area, such as:
 - maritime access channels;
 - port entrance;
 - protective works including breakwaters, shore protection;

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- 
- accesses to the port for inland transport (roads, tunnels, etc.); and
 - hinterland rail connection.
 - **Basic Structures.** All immovable property, with the exception of such property that is subject to the right to lease. Basic structures include all pieces of stone, foundation remains, poles, pipes, cables, scaffolding, pavements, demarcations and structures on or at the grounds, which were founded, placed or built by the Port Authority or by the former users before the commencement of the right of lease as part of a concession;
 - **Buildings.** Structures that were already present on or in the ground at the issue of the right of lease as part of a concession and to which this lease bears upon;
 - **Cargo Handling Services.** Cargo terminal management and operations including cargo handling services for stevedoring, landing, transporting, cargo consolidation and warehousing of general, liquid and/or bulk cargoes; and wharfage;
 - **Concession Area.** The port areas within the port of [name], known as [name], as more fully described and delineated in Annex [number] to this Agreement;
 - **Concession Fee.** The monthly price per meter for the use of leased property and, in addition to such amount, a Throughput Royalty to be paid in recognition of the Port Authority's ownership (user) rights as specified in Section [number];
 - **Container Services.** Container terminal management and operations including container handling services for stevedoring, landing, transporting and warehousing; stuffing and stripping and consolidation of containerized cargoes; and wharfage;
 - **Depreciated Replacement Value.** Shall have the meaning assigned to it in accordance with the [reference to appropriate document, accounting practice, method of depreciation, etc.];
 - **Financial Closing.** The fulfillment of all conditions precedent to the initial availability of funds under the Financing Documents and receipt of commitments for the equity required for (Phase 1 of) the project/immediate access to funds;
 - **Financing Documents.** All loan agreements, notes indentures, security agreements, letters of credit, share subscription agreements, subordinated debt agreements, and other documents relating to the financing of the Project as the same may be amended, supplemented or modified from time to time;
 - **Force Majeure.** An event or circumstance or a combination of events or circumstances beyond the reasonable control of either party, which materially and adversely affects the performance by that party of its obligations under this Agreement and that cannot reasonably be foreseen or pre-



vented (such as civil disturbance, armed conflict or act of foreign enemy, wars, blockades, insurrections, uprisings, sabotage, embargo, revolution, or riot, action or inaction of public officials, expropriation, nationalization or confiscation of facilities, earthquakes, mudslides, lightning, typhoon, fires, storms, floods, epidemics or plagues, acts of God and other natural disasters);

- **Good Industry Practice.** As applicable to the Operator, its contractors, sub-contractors, operators, sub-concessionaires, sub-lessees and all other third party agents of the Operator, practices, methods, techniques and standards, as changed from time to time, that are generally accepted for use in international port construction, development, management, operations and maintenance taking into account conditions in [country];
- **Grounds.** The grounds given out in lease to the Operator under this Agreement;
- **Joint Development Agreement.** The Agreement dated [date] between the Sponsors and, inter alia, allocating project responsibilities between the Sponsors as per Annex [number].
- **Lead Sponsor.** [Name] having a major Equity Share as per the Joint Development Agreement.
- **Lenders.** Local/Foreign finance institution(s), corporations, companies or banks providing secured and unsecured credit facilities to the Operator including lease and hire/purchase facilities to the Operator pursuant to the Financing Documents.
- **Operational Port Infrastructure.** Infrastructure essential to port operations, to include any or all of the following items:
 - inner port channels, turning and port basins;
 - revetments and slopes;
 - roads, tunnels, bridges, locks in the port area;
 - quaywalls, jetties and finger piers;
 - aids to navigation, buoys and beacons;
 - hydro/meteorological systems;
 - specific mooring buoys;
 - Vessel Traffic Management System (VTMS);
 - docks;
 - port land (excluding superstructure, terminal road system and paving);
 - access roads to general road infrastructure; and
 - rail connection to general rail infrastructure, marshalling yards.
- **Port Equipment.** Equipment (non-fixed assets) essential to the operation of the port, to include any or all of the following items:
 - tugs;



- line handling vessels;
 - specialized vessels for depth survey and fire fighting;
 - dredging vessels and equipment;
 - ship/shore handling equipment (top cranes, gantry cranes, grain elevators, etc.); and
 - cargo handling equipment (apron and terminal), such as transainers, top lifts, trailers, etc.
- **Project.** The development, financing, design, construction, operation and maintenance of the site in accordance to the provisions of services to the users;
 - **Regulatory Authority.** Any authority (referred to in Article [number]) constituted by law in [country],
 - **Site.** The wharves, buildings, and other infrastructure and superstructure leased/given in concession to the Operator under this Agreement;
 - **Sponsors.** The Consortium selected [through a process of competitive bidding in [month], [year]], led by the Lead Sponsor;
 - **Terminal.** The terminal facility proposed to be developed in accordance with the terms of this concession agreement by the Operator;
 - **Transport Infrastructure Linkages.** The road/rail/water infrastructure linkages agreed to in the Approved DPR, identified as material transport infrastructure required for the devel-

opment /operations of the [terminal, port];

- **Quay Wall.** A vertical or almost vertical shore structure, including related support structures.

This list may be augmented with other items or the definitions may be expanded, depending on the specific objectives of the concession and considerations of the national concession law.

The Operator

Parties under a full concession agreement usually consist of a Port Authority and a sole sponsor or a consortium of sponsors (often called a Special Vehicle Company or Special Purpose Company). The consortium may not necessarily be identical to the Operator but may include the operator as a consortium member.

The amount of share capital provided for a new venture provides one indication about the consortium's confidence about the port's prospects and future development. In developing countries, the International Finance Corporation may be a source of share capital for the venture. Whether the Port Authority itself may take shares is debatable, but the Port Authority preferably should not be a share holder in order not to compromise its position with respect to other port users, thereby creating conflicts of interest with its role as a landlord port manager and regulator. Based on the estimated income expected during the concession period and the infrastructure and superstructure to be constructed during the concession period,

the consortium should be expected to leverage its investment with borrowed money from various sources, usually from a syndicate of commercial banks or through the issuance of bonds or other capital markets instrument under an indenture.

Finally, the consortium may conclude a management contract with a professional operating company. Both the financing arrangements and the management contract form part of the concession documents. (See Box 14)

Box 14

Reference Clause on Nomination of Operator of a Container Terminal

This INDENTURE made and entered into at (place) this (number) day of (month) (year), by and between The Port Authority of [name] a body corporate (a public entity), incorporated under the (name) Act No [number] of [date] and having its Head Office at [name].street, [city], in [country], (hereinafter called and referred to as "The Authority," which term or expression where the context so requires or admits, mean and include the said Port Authority and its successors or assignees) on the one hand, and the (name) Container Terminal Ltd, duly incorporated in [country] under the Companies Act of [date] and having its registered office at [name] street, no.[number], [city] in [country] (hereinafter referred to as 'the Operator'), which term or expression shall where the context so requires or admits, mean and include the said Container Terminal Ltd. and its successors and assignees), on the other hand,

Article...

The Authority hereby appoints the Operator to provide cargo handling (or container) services at the port area(s) known as (name of area), under the terms and conditions specified in this Agreement.

Term of the Agreement

The term of the agreement is a strategic

issue. It mainly depends on the respective amounts of investment the Port Authority and the concessionaire have made or will make. In a Landlord Port, standard lease contracts are usually concluded for a period of 30 years, with options to renew. Investments of lessors in superstructure and equipment often exceed those of a Port Authority by a large margin; whether this is the case or not, both parties have an interest in a mutually beneficial long-term relationship. This is especially true when concluding a full concession agreement together with a BOT arrangement. Shorter term arrangements (10 years or less) are suitable for Tool Ports, but in general do not provide much security or stability for the Port Authority and offer no major incentives to the concessionaire to improve performance or to introduce innovative operations.

Concession documents must also indicate precisely when the concession period actually starts, which can be a complicated issue. Some of the provisions come into force on signature, such as warranties, confidentiality provisions and clauses relating to applicable law and dispute resolution. In the event of transfer of assets or construction of infrastructure under a BOT arrangement, relevant conditions come into force upon satisfaction of waiver of pre-existing conditions. Conditions precedent deal largely with delivery and proper execution of certain documents required to give effect to or support obligations under the concession agreement.

The effectiveness of a full concession agreement is conditioned upon the fulfillment of specified conditions prece-

dent and evidence that no circumstances exist that may result in the early termination of the agreed terms. (See Box 15)

Box 15

Reference Clause on Term of Concession

This Concession Agreement shall commence on the [day] of [month] of the year Two Thousand and [year] and shall end, in whole or in part, on [day] of [month] of the year Two Thousand and [year]. The Operator has the option to extend the duration of this Concession Agreement by a period of maximum [number] years, immediately following the present period, taking into consideration the provisions given in Article [number]. Upon pain of lapsing of this right the Operator shall notify the Authority in writing at least two years before the extension might commence, that he wishes to avail himself of his right.

General Rights and Obligations of the Operator

The Operator generally acquires leasehold rights and obligations when he assumes control of an existing facility under a concession agreement. The concession agreement generally limits use of the leased premises exclusively for port purposes and for handling certain cargoes. Within these limits an operator is free to develop the business. Detailed restrictions regarding cargoes being handled on the terminal should be avoided, with the exception of dangerous and polluting cargoes.

There are many other critical subjects to be included in a concession agreement. Two issues of main importance are:

- The right of the concessionaire to transfer the leasehold rights to a

third party including conditions under which such transfer can be effected (the right to transfer should be sufficiently flexible to encourage the financing of port improvements);

- The right to own all newly constructed buildings and superstructure improvements on the premises during the lease period, with compensation by the Port Authority (Lessor) after termination of the agreement, or, in the case of transfer to a third party, sale of such assets according to the terms of the finance agreements (in some jurisdictions it may be necessary to require such sales to comply with local procedures or applicable bulk transfer notice requirements).

Full concession agreements (including BOT arrangements) and lease agreements usually stipulate that the fixed assets revert to the Port Authority at the end of the lease. Transfer may be effected with or without compensation, depending mainly on the duration of the contract and the investment value of the fixed assets. It is not unusual for a Port Authority to pay the concessionaire or lessee the depreciated value of the assets at the end of the concession period.

Finally, a concession agreement may contain an exclusivity clause designed to prevent the concessionaire/operator, and any of their subsidiaries, from competing with other terminal operators in relation to the particular traffic for which the concession was granted within defined geographical areas and for stated time periods, as the market situa-



tion and the scope of the investments may reasonably require. In any case, this time period must remain short enough compared to the length of the concession agreement, and not exceed a few years.

Generally, port infrastructure constructed by a concessionaire through a BOT arrangement remains the property of the Port Authority. With respect to movable assets placed on the concession area by the concessionaire, ownership rights over these assets generally remain with the concessionaire (with the right to pledge these assets as collateral to financiers) throughout the concession period and may, depending on the concession agreement's terms, be transferred to the Port Authority when the concession terminates. Some legal systems allow a concessionaire/lessee to own buildings, installations and other immovable property located on Port Authority owned land (e.g., in The Netherlands). Therefore, operators may use these assets as collateral for bank or shareholder financing. In countries where the port area constitutes part of the Maritime Domain, private ownership of immovable property will be considered fixtures that cannot be owned independently from the Maritime Domain (e.g., in Croatia). In such cases, user rights (in some instances including the right to mortgage – but not own outright – the asset) may be allowed under the concession. Whichever is the case, the Port Authority should include in the concession detailed provisions pertaining to ownership or user rights over those assets that are erected by the concessionaire in the concession area. (See Box 16)

General Rights and Obligations of The Port Authority

During the concession period the Port Authority often assumes dual roles. On the one hand, the Port Authority serves the public interest as a regulator monitoring performance under the concession agreement. On the other hand, the Port Authority may possess a stake in the port enterprise as a participant in a public-private relationship with a private sector port user. There is an increasing trend for Port Authorities to become commercial actors, interacting with private terminal operators as economic partners, rather than acting as regulators. This trend is born of necessity – the Port Authorities and terminal operators need each other. Therefore, it is a major challenge to find the proper balance between the regulatory relationship and the commercial interests of both parties. In this context, rights and obligations of the Port Authority have been modeled within the framework of a Landlord Port model.

Investments and capacity calculations are primarily based on traffic and throughput forecasts. In the case of a BOT arrangement requiring significant outlays by a concessionaire, the Port Authority (or the national government) might obligate itself not to concession, promote or commence another competing terminal (or a terminal aggregating more than a certain capacity) in a nearby port area. If, unexpectedly, new capacity were to be created, the feasibility of a project might well be in jeopardy. There is often, especially in smaller ports, room only for one or two terminals handling a specific commodity. If the



Port Authority is too preoccupied with intra-port competition, terminal operators might end up in cut-throat competition, resulting in the bankruptcy of some of them at a time when the government's goal is to encourage sound private-sector participation in the port sector. (See Box 17)

Transfer of Rights, Obligations and Assets

When an operator acquires an existing (former public) port facility, rights and obligations of the public sector owner transfer, along with the use (but not ownership) of the assets, to the private

Box 16

Reference Clauses on General Rights and Obligations of the Operator

Subject to other provisions of this Agreement and its liability under any Law, and without in any way limiting its ability, the Operator hereby undertakes and binds itself to the following at the Concession Area:

- To provide, inter alia, effective and efficient container (cargo handling) services according to the performance parameters as described in Annex [number];
- To ensure that facilities leased by the Authority are operated with due care and skill and in accordance with the terms of this Agreement;
- To repair and make good to the satisfaction of the Authority all damages and breakages to infrastructure and superstructure made by the Operator or by third parties acting under the responsibility of the Operator, fair wear and tear excepted;
- To ensure that the sites are kept clean, and that the environment is fully protected;
- To draw up rules for safe systems of work and operational procedures to ensure health, safety and welfare of all workforce and terminal users in compliance with the applicable laws and regulations, international practices and the Authority's guidelines;
- To implement an effective safety and security system and to comply with the guidelines of all competent Authorities; and
- To ensure that any safety and security remedial action requested by any competent Authority is acted upon immediately.

The Operator shall apprise the Authority of the current work schedule, the previous day's vessel operations and the following day's vessel planning and work schedule.

Any damage to the site's environment shall be assessed and restoration costs billed to the Operator, who shall bear such costs.



Box 17

Reference Clauses on General Rights and Obligations of the Port Authority

Subject to other provisions in this Agreement, the Authority shall exercise regulatory functions in respect of the conduct of port operations as detailed in the following sub-sections:

- allocate berths at the request of the Operator, in accordance with established port policies, in order to satisfy the Operator's work program in the best overall interest;
- chair Port Operations Meetings with one or more representatives of the Operator and of other port users;
- set productivity targets and monitor the Operator's performance against set parameters (as per Annex [number]).

The Authority hereby undertakes and binds itself to:

- provide and maintain the necessary basic infrastructure such as maritime approaches, canals, turning circles, breakwaters, aids to navigation, access roads, etc.;
- provide marine services including vessel traffic management, pilotage, towage, berthing, unberthing and shifting of vessels;
- ensure safe, orderly and timely movement of vehicles and pedestrian traffic along the access roads;
- maintain the security of all land and sea entrances to the port area (those existing presently and in the future);
- provide and maintain all perimeter fencing around the port area;
- provide any services not listed herein and on which both parties will agree by this Agreement or by any other subsequent agreement.

When providing services listed above, the Authority, in line with the operational plans and work schedule of the Operator, will ensure that all such services are provided in a non-discriminatory way and in accordance with the Operator's needs to enable him to meet the performance targets and other objectives to be achieved.

sector operator. When a new facility is constructed under a BOT arrangement, the new operator commissions the facility after successful commissioning tests have been conducted by an independent expert (usually a test certifier, who issues a Commissioning Certificate). (See Box 18)

When taking over an existing facility, the following rights and obligations are usually included in the concession agreement:

Rights

- To succeed to and to carry on the business of the port facility and supporting services of the Port Authority, as established under the Port Law;
- To succeed to the ownership, rent or lease of certain properties, movable and immovable, located on the terminal in the port or used by the port facility and supporting services; and,
- To succeed to certain rights, powers,

Box 18

Reference Clauses on Newly Built Assets in the Concession Area (BOT arrangement)

- Operational infrastructure constructed by the Concessionaire/Operator in the Concession area, in furtherance of its business, shall be and shall remain the property of the Port Authority, without any claim for or reimbursement from the Port Authority/Lessor for the cost of value thereof.
- Port superstructure and movable assets constructed and/or installed by the Concessionaire/Operator, in furtherance of its business, shall remain owned by the Concessionaire/Operator. At the end of the Concession period the aforementioned assets shall either be transferred to the Port Authority after payment to the Concessionaire of the written down value of those assets, or be demolished or removed from the Concession Area.

privileges and interests of the Port Authority pertaining to cargo handling/container operations and supporting services on the terminal.

Obligations

- To succeed to certain liabilities of the Port Authority pertaining to cargo handling/container operations and supporting services, carried out at the terminal;
- To receive and maintain all books, accounts and documents relating or pertaining to the Terminal and supporting services;
- To offer employment to officers and employees of the Terminal and supporting services;
- To succeed to contracts and agreements entered into for the purposes of, and in relation to, the business of the terminal and supporting services; usually, these contracts are specified in a schedule annexed to the concession agreement; and
- To succeed to all actions and proceedings instituted by or against or in relation to the terminal (it is not uncommon for the operator and Port Authority to negotiate an indemnity for liability incurred as a result of certain proceedings).

The transfer of assets to the new operator under a concession agreement requires thorough inspection and to determine what repairs or backlog maintenance, if any, is expected to be carried out by the Port Authority prior to the transfer. Existing assets forming part of the operator's leasehold and their attendant condition and quality will be reflected in the concession fee. The highest concession fee (relative to value of assets transferred) is usually accorded in jurisdictions allowing for the ownership of superstructures to be transferred to the operator.

When building terminal facilities under a BOT arrangement, the operator has to design and construct the terminal including quay walls and other infrastructure works. The design has to be carried out in accordance with functional requirements and design solutions set out in the approved DPR (Detailed Project Report) as well as under the construction program included in the agree-

Box 19

The Buenos Aires Case

In 1993 bid documents were issued by the Argentine Government offering concessions for six terminals in Buenos Aires (Puerto Nuevo). The bid was for six conventional finger piers of which two piers (No. 1 and 2) could be bid as one. This resulted in five operating concessionaires of which one had to close down within 13 months after starting operations. From the remaining four operators, one specialized in general cargo and bulk, three in container handling. The story of Buenos Aires was told in September 1998 by Trevor H. Bryans of P&O Ports during a World Port Privatization Conference in London.

“Unbeknown to the Puerto Nuevo bidders at the time of submitting the bid, another concession was to be granted for container operations. A fourth container terminal, called Exolgán, was developed at Dock Sud, only 8 km from Puerto Nuevo. This area falls under the Buenos Aires State Province jurisdiction, and not under the Federal Government. The position then was that there were four container terminals in the Port of Buenos Aires, to handle 500.000 containers, further reducing the size of the cake, and casting considerable doubt on the achievability of the commitments made in winning the concessions.

The issue of competition, and how it is addressed in government policy, is an issue, which is fundamental to the success of privatization. Competition becomes an obsession with Port Authorities planning for privatization. Ports with insufficient volume to support one efficient operator, look to bid two or more concessions.

The Port of Buenos Aires is a perfect example of this obsession with competition, which has led to over-capitalization, five concessions have been let, and there is only sufficient volume for two, or at the most, three efficient container terminals. As mentioned previously, the operator who won the concession of terminal 6 has gone bankrupt, mainly as a consequence of lowering tariffs to sub-economic rates to retain business, and since the early part of '95 a savage price war developed, which has seen average-per-box revenues plummet from US\$ 400.- pre-privatization to less than US\$ 200.- today and they are still falling. The current rate-of-return to terminal operators in Buenos Aires is beneath average long-term cost of the provision of the services by segmenting the market into four operators. Each terminal incurs considerably higher costs than the combined average cost of one large operator. The clients have been denied access to services provided in the most effective manner possible.

Moreover, the three terminals operating in Puerto Nuevo suffer unfair competition by the operator Exolgán at Dock Sud, operating at the Provincial Administration. It is estimated that the commercial advantage to Exolgán is approximately US\$ 40.- per box.

The commercial advantage to Exolgán arises from the following

- The 'Tasas a la Carga', payable by importers/exporters to the terminal, which is then passed on to the Federal Government, does not apply at Exolgán. The 'Tasas a la Carga' is US\$ 3.- per ton on import cargo, and US\$ 1.- on export cargo. It is collected by Exolgán, but not passed onto the Province.
- Under the terms of the bid in Puerto Nuevo, the Concessionaires had to absorb a proportion of the waterfront and AGP labour. In the case of TRP, this amounted to almost 900 people, although the terminal only required 430. Reducing this labour to the required number cost in excess of US\$ 10M. Exolgán was not required to absorb any of the redundant or surplus labour, although that labour was originally employed at Dock Sud.
- Volume commitments were made by the Puerto Nuevo terminals as part of the bid. Shortfalls in these volume commitments must be paid for by the operators. No similar commitments were required from the operator at Exolgán.
- The rental fee payable to the Province by Exolgán is payable for the quay area only; the remainder of the land is freehold.
- Stringent performance guarantees and bonds had to be made by the operators in Puerto Nuevo, and stipulated insurance costs covered. This was not the case at Exolgán.”



ment. Major aspects of the construction process will have been identified for completion by stated times and, if these milestones are not met, the Port Authority usually has the right to assess penalties or terminate the concession. In practice, technical problems should be expected to arise. Although the operator may not alter the construction program without approval of the Authority, reasonable requests for changes to the program are usually approved. The Port Authority customarily reserves the right to appoint a construction observer, usually an engineer. Commission/transfer of the new assets is concluded on the basis of a commissioning certificate issued by an independent test certifier, according to the relevant provisions of the concession agreement. (See Box 20)

Performance Parameters

Concession agreements often include performance parameters to measure the success of the operator in managing the port or terminal. A Port Authority may want to highlight performance indicators and incorporate certain ones into the concession. These parameters can relate to:

- Realization of a agreed (minimum) number of ship calls;
- An agreed (minimum) quantity of cargo passing through the terminal;
- Efficient utilization of the terminal; and
- Service quality.

Generally, from the Port Authority perspective there may be a tendency to

over-regulate performance by imposing very detailed and strict parameters. This tendency appears to be more of a problem in the case of new terminals or terminals with a low level of current throughput. Detailed parameters require extensive control and limit an operator's flexibility. Also, the Port Authority must devote resources to their administration. Performance parameters that are most likely to succeed are those set at a level that a Port Authority believes will result in agreed concession fee being paid. When required levels are exceeded, a positive financial incentive should be given to the operator, because extra traffic and throughput results in extra revenue for the Port Authority. Performance parameters have produced the best results when they were established with the idea of not controlling the operator but creating a win-win situation for both parties.

There are no standard performance criteria for handling various commodities. Situations differ widely from country to country and from terminal to terminal. Much depends on labor conditions, the attitudes of labor unions, and factors such as size and age of vessels, consignment size and timely availability of information. Therefore, performance criteria ordinarily reflect local conditions and take into account the reality of all relevant local factors influencing a port.

A vast majority of concession agreements relate to container terminals. In this field many items are standardized, resulting in the development of internationally accepted, detailed performance criteria.



Box 20

Reference Clauses on Transfer of Assets

- The present Agreement relates to the [name] Terminal at [name] Port with associated buildings and stacking area, as more fully described in Annex [number] to this Agreement, which shall form an integral part of this Agreement, and which may be modified from time to time by mutual agreement between the Authority and the Operator.
- A list of facilities, buildings, equipment and others together with a detailed inventory of the contents thereof leased /transferred to the Operator is shown in Annex [number].
- A joint survey of the facilities, buildings, equipment and contents thereof shall be effected before the time of take over, with the objective that the site should be delivered to the Operator in good working condition.
- Before commissioning, the Operator may require major improvements and modifications to be effected on infrastructure, superstructure or facilities, concessioned/leased by the Authority to the Operator, which he deems to be in an insufficient technical condition. The Operator shall submit such requests to the Authority for consideration. The Authority is obliged either to carry out the requested improvements and modifications at its own cost or take the insufficient technical condition of infrastructure, superstructure or facilities into account when negotiating the Concession Fee.
- All major modifications and improvements, as above, to infrastructure and facilities concessioned/leased to the Operator under this Agreement, which the Operator deems to be necessary to improve its services shall be subject to written approval of the Authority and the costs thereof shall either be borne by the Operator or be reflected through a re-adjustment of the Concession Fee.
- In cases where repairs or other works may have to be performed by the Authority, prior to the start of operations, the Authority shall be responsible to meet the costs of repairs or other works, unless these are due to the negligence of the Operator.

The Design of Productivity Targets.

Productivity targets are usually designed in a phased manner, taking into consideration the emerging problems that a container terminal will face during the first years of its operation. For the purpose of the concession/lease agreement two phases are usually defined.

Phase 1 constitutes the start-up period, from the date operations commence to a later point one to two years later. During this time the new management and the

workforce have an opportunity to structure operations, develop commercial policies and engage in training various categories of personnel.

Phase 2 specifies the phase during which the terminal is expected to work at peak efficiency with professional management and a well-trained workforce in place.

The following types of productivity targets can be included in the concession agreement's performance provisions.



Crane Productivity. Crane productivity measures the number of equivalent container movements per crane working hour. It is calculated by dividing the number of equivalent container movements handled by a crane by the number of hours the crane operated. Crane productivity is usually expressed as:

- Equivalent container moves per gross crane working hour;
- Equivalent container moves per net crane working hour (deducting all non-operational and idle time experienced by each crane).

Equivalent container moves is the sum of the following:

- each container discharged;
- each container loaded;
- each container shifted to gain access to another container - counted as one move if the container is shifted within the vessel, but as two moves when it is shifted via the quay;
- each container moved to another position on the request of the ship operator (a restow) - counted as one move if it is restowed directly to another location in the vessel and as two moves when the restow involves discharging to the quay and later re-loading to a new position on board the vessel;
- each container lifted in error and returned to the ship - counted twice; and
- each hatch cover lifted to the quay

and replaced by the quayside gantry cranes (or ship mounted cranes) - two moves for every cover removed.

Ship Productivity. Ship productivity is the output achieved per ship working hour and is used to measure the efficiency of ship operations. It is the most important indicator to ship operators and a valuable means for measuring year-round terminal performance. It is recorded and expressed in four categories:

- Equivalent container moves per ship-hour in port (calculated by dividing the total equivalent container moves by the time spent in port, measured in hours);
- Equivalent container moves per ship hour at berth (calculated by dividing the total equivalent container moves by the time the vessel spent alongside the berth, measured in hours);
- Equivalent container moves per gross working hour (calculated by dividing the total equivalent container moves by the time the vessel is worked, measured from the start of the work to the termination of the work); and
- Equivalent container moves per net ship working hour (calculated by dividing the total equivalent container moves by the gross working time minus the non-operational time and the idle time).

Non-operational time is the period when the berth is not scheduled to be worked (e.g., meal breaks).



Idle time is the period when work has stopped for unexpected and unscheduled reasons, (e.g., equipment breakdown).

Quay Productivity. Quay productivity measures the throughput in equivalent container moves per unit of time per meter of quay length. This criterion is included to encourage the operator to successfully promote and market the terminal facilities and to increase traffic. The targets may be different for each applicable phase of the project.

Terminal Productivity. Terminal productivity expresses activity in terms of the number of containers handled per square meter of terminal area per time unit. It is calculated by dividing terminal traffic, measured in TEUs, by the total terminal area in square meters. The targets may be different for each applicable phase of a project.

Dwell Time. Dwell time is a measure of the time spent by containers in the terminal. It is a major indicator of the efficient use of the terminal area. It measures the period from the time a container is lifted off the ship to the time it departs the container yard. An appropriate indicator of quality of service is also the truck turnaround time from entry to exit in the terminal area when delivering or picking up a box, with 15-20 minutes being the common efficiency benchmark.

Labor Productivity. Labor productivity figures relate traffic and terminal throughput to the total number of people employed by the terminal. This indicator is included to enable the operator

and the Ports Authority to monitor labor productivity and, indirectly, terminal operating costs. Labor productivity indicators are based on the total number of hours worked by certain categories of employees in the terminal.

Utilization Measures. This category of indicators measures the intensity of the use of terminal resources by the operator. It includes two important indicators, the berth working index and the yard utilization index. The berth working index compares the total time vessels were worked at the quay with the total time that such vessels were berthed. The yard utilization index compares the number of storage slots occupied to the total number of available slots, and is typically calculated daily.

Performance parameters are best included in an annex to the concession agreement, with a section in the agreement referring to the detailed annex. (See Box 21)

Transfer of Employees

When concluding a concession agreement for an existing terminal, is it common practice to engage all or part of the employees already working in the terminal or to extend an offer to join the new venture. This area is highly sensitive and should be handled with great care even before the concession is awarded. Module 7 deals with labor issues in greater detail.

Often, as a result of years of neglect, unfavorable working conditions and outdated equipment, workers lack motivation to perform at an acceptable level.

Box 21

Reference Clause on Productivity Targets

The operator binds itself to:

- Use its best efforts to reach or exceed the minimum productivity targets specified in Annex [number], which is an integral part of this Agreement and which may be modified from time to time by agreement between the parties;
- Participate in a Monitoring Committee, to be jointly established by the Authority and the Operator;
- Provide the Authority with monthly reports on performance and productivity in a format to be agreed between the Authority and the Operator, and provide the Authority with any special report that, in exceptional circumstances, the Authority may reasonably request.

In the event that the Operator fails to meet the performance targets as set out in Annex [number] (one) year after commencement of operations, the Authority may levy a penalty on the Operator at a rate of US\$ [amount].

Often, they were members of unions that fought aggressively for the preservation of their jobs, sometimes resisting any change that they feared could have endangered the continued employment of the workforce. New operators taking over an existing terminal must therefore anticipate a start-up period for motivation of new workers as well as for re-training. Otherwise, they may face the inefficiencies of an underemployed workforce. The reference clauses should be considered only as an indication of how to approach the issue. Whether existing employees should transfer into a new operator's service on terms and conditions no less favorable than those enjoyed by them immediately prior to their transfer is a matter of negotiations

among labor, the new operator, and the Government. (See Box 22)

Box 22

Reference Clauses on Selection and Transfer of Personnel

- The operator shall engage professional management personnel (including top management) for the efficient and effective operation of the Terminal Area. The management personnel shall be selected from amongst persons presently in the service of [name of present terminal]. In the event that the operator is unable to select sufficient management personnel from amongst the [terminal's] staff, the operator is allowed to appoint suitable management personnel selected from outside the [terminal's] organization. When for certain functions no suitable candidates can be found in [the relevant country], the Authority will allow the operator to select expatriate personnel. (Sometimes the provision of expatriate staff is an obligation – this is particularly the case when a transfer of know-how is a major objective of the concession agreement).
- The Port Authority shall use all reasonable endeavors, upon request of the operator, to obtain work permits, long-term non-immigrant visas and tax clearance certificates for all expatriate personnel appointed by the operator.
- The operator shall select its labor force from amongst persons presently employed by the (terminal). These persons will be selected by the operator based on their skills and suitability in the discharge of their duties. Selected persons will have the option to enter into fixed service of the operator.
- Notwithstanding the foregoing provisions, in the event any person appointed from among the [terminal's] personnel are found to be incompetent, unsuitable or unfit in discharging their duties within a period of one year, the operator shall be entitled to terminate the services of that person, subject to the provisions of any employment contract.
- The terms and conditions to be drawn up by the operator shall take into account the salaries and terms and conditions of service, including any accrued rights to leave, enjoyed by the persons transferred to the service of the operator.

Force Majeure

An operator cannot be held responsible for fully achieving performance goals when unforeseen and uncontrollable events intervene (Force Majeure). However, such events should not automatically excuse the concessionaire from its financial obligations payable under a concession agreement. The operator should be encouraged to obtain insurance to cover the risks of such events as much as possible. (See Box 23)

Box 23

Reference Clauses on Force Majeure

- Upon the occurrence of a Force Majeure event, the party so affected is relieved of performance under this Agreement for the duration of the event. Notwithstanding this, the occurrence of a Force Majeure event shall not excuse the Operator from making payments due hereunder in a timely manner.
- Parties agree to use all reasonable endeavors to mitigate the effects of any Force Majeure event.

Liability for Loss and Damage of Goods

The concession or lease agreement should hold the operator liable for goods deposited in its custody during port operations. The operator should indemnify the Port Authority against liability for goods at the terminal. (See Box 24)

Lease of Facilities

At many ports (e.g., Antwerp, Rotterdam and Hamburg) the operator may be best able to perform under a straightforward lease contract. In a con-

Box 24

Reference Clauses on Liability

- The Operator shall be deemed to be in charge of goods deposited in its custody as from the time that:
 - it has taken the goods from the shipper or any person acting on his behalf up to the time the goods are shipped or otherwise disposed of;
 - the goods are discharged from ships up to the time of delivery to the consignee or any person acting on his behalf or until final disposal; and
 - transshipment containers/goods are received up to the time they are re-shipped.
- The Operator shall indemnify the Authority in respect to any liability the Authority may incur for loss and/or damage to goods in custody of the Operator.

cession, with or without a BOT arrangement, lease conditions form part of the overall concession. The reference clauses contained in Box 25 and Box 26 can therefore be used under both types of contracts.

The section on lease arrangements presents a number of strategic issues for consideration. The most important of which are:

Ownership of assets. Generally, a new operator will invest in superstructure and equipment. Under a BOT arrangement, operational infrastructure such as quay walls also forms part of the investment. If the relevant legal system allows private ownership of such assets – which is not always the case – their transferability becomes a critical issue. If private ownership is not allowed, an agreement should be reached on how to

Box 25

Reference Clauses on Lease of Facilities

- The lease refers to two allotments of land marked Lot [number] and Lot [number], demarcated in red and depicted in Plan No:[number], dated [date], made by the Chief Hydrographic Surveyor and belonging to the Authority, situated at [location] within the Municipal limits of [city name] and bounded on the North by [area], on the East by [area], on the South by [area] and on the West by [area], containing in extent [number] hectares, [number] acres.
- The quay walls and the banks below the ground level (yet not underground), as well as, in the case of the banks, the body of water above it, are not included in the right of lease but remain in the ownership of the Authority.
- The Operator is entitled to sub-let the buildings and the ground in whole or in part to a third party, or to give these in use in any other manner, only after having obtained prior conditional or unconditional permission from the Authority.

compensate, at the end of the period, the operator for investments made. If it is legally impossible to compensate the operator or to effect the transfer of assets to a third party, the duration of the agreement remains the only vehicle available for creating a bankable arrangement. Within the framework of a balanced public-private partnership, the Port Authority may allow the operator to own superstructure on the site as well as grant the right to transfer such assets to third parties under certain previously agreed conditions, regardless of the inalienability of other port property.

Maintenance. Concession terms applicable to maintenance of assets, especially infrastructure, is often considered very carefully by operators and their investors. If the assets revert to the Port Authority at the end of the lease period, maintenance standards should be set by the Port Authority to avoid deterioration during the final part of the period. Maintenance of operational infrastructure is usually the responsibility of the Port Authority. Such infrastructure is a strategic asset and should not be allowed to deteriorate. That risk exists, however, especially if an operator is in financial difficulty, since maintenance often becomes the first victim of an operator trying to cut costs.

Level of control by the Port Authority.

Even if legal title over assets remains with the Port Authority, full use and easy adaptability of the assets should be guaranteed. While the Port Authority should exercise some form of control, such control should be based on clear standards and be flexible and permit the operator to quickly respond to market requirements. Prompt modification and extension of the site and the superstructure may be possible based on a previously agreed procedures. Moreover, control standards could be uniform for the entire port area to create a level playing field for all port operators.

Sub-letting. To allow flexible port development, sub-letting of ground and assets should be allowed by the Port Authority under specified conditions.

The specific content of any lease is very dependent on the site conditions and local factors. The lease usually presents



Box 26

Reference Clauses on Site Conditions

The following conditions are applicable:

- The site is determined to be [number] square meters.
- The site is unencumbered by other limiting rights or claims, nor by other qualitative obligations and/or perpetual clauses other than those mentioned in this Agreement.
- The site is accepted by the Operator in the state in which it is found on the date the lease commences.
- Cables, pipes and pipe-lines of third parties, which are situated on the ground are not included in the lease.
- The Authority is not liable for damages as a result of defects in cables, pipes, pipe-lines, etc.
- The Operator is liable for damages, which have been caused to cables, pipes, pipe-lines, etc., as a result of any use of the ground.
- The Operator shall at all times allow access for the benefit of the owners to the cables, pipes, pipe-lines, etc. in the leased property for maintenance and repair work.
- The site includes quay walls and banks with foundations and piles, constructed by the Authority. The Authority is not liable for the present suitability of the quay wall construction.
- The Authority is not liable for damages of whatever nature, which might arise for the Operator from the condition of the leased property, especially not for damages caused by basic structures, pieces of stone, foundation remnants, poles, pipes, cables, anchors, sunken vessels or any object whatsoever, which may be present on or in the leased property or in the surrounding area, and/or works and/or materials or substances on or in the leased property or in the surrounding area.

The ground is leased with a bottom level alongside the quay wall being part of the main yard of [number] meters below [reference] level and alongside the quay wall of the North pier of [number] meters below [reference] level. The Authority will ensure that the water depth along the quay walls will remain at the agreed level. In the event that the water depth is less than the agreed depth, the Authority will not be liable for damages as a result of this situation. The Operator cannot invoke the right to re-dredging as long as the bottom has not risen to [number] below [reference] level at a certain location along quay wall(s). The Authority is obliged to carry out re-dredging within a reasonable period (but not longer than three weeks) after the Lessee has submitted a request to that purpose. If the Authority

in detail the responsibilities and liabilities allocated to each party. When an existing site is leased or concessioned, conditions should be enumerated clearly to give lenders certainty of outcomes under particular "what-if" scenarios.

Activities Permitted by the Port Authority

Many concession agreements contain a list of activities that are permitted to be performed at the site. These activities should be construed as broadly as possible so the operator has maximum flexibility to develop the business and generate revenue. (See Box 27)



Box 27

Reference Clauses on Permitted Activities

Without a written consent from the Authority, which refers to this provision, the site may only be used for/as:

- loading and discharging of (general cargo, bulk/liquid cargo, containers);
- transport and storing of (general cargo, bulk/liquid cargo, containers);
- handling of other cargoes, only if necessary and on a limited basis;
- stuffing and stripping;
- controlling and guarding of (general cargo, bulk/liquid cargo, containers);
- operating equipment necessary for the above;
- repair and maintenance of containers;
- repair and maintenance of equipment;
- repair and maintenance of buildings;
- providing accommodation for personnel and administration;
- providing services to vessels;
- providing services to customs and other government agencies;
- providing services and accommodation to ancillary services such as, pilots, agents, shippers, etc.; and/or
- all other activities necessary to conduct efficient cargo handling operations.

The Operator is obliged to continuously exploit the site during the duration of the Concession Agreement. A strip of one meter wide alongside the quay wall shall not be planted or built on, shall not contain roots or foundations and shall only contain cables, pipes, roads, rails.


The Authority may reduce the maximum permitted load(s) if, in its opinion, the condition of the quay wall provides a reason for doing so.

Permitted use shall also be taken to include the construction of the necessary buildings and/or installations for the benefit of the business of the Operator, with the exception of (service) home(s). The number, nature and location of these constructions and/or installations shall be subject to the approval of the Authority.

Liability for Damages

The respective liabilities associated with occupancy and use of the site must be clearly presented in leases and concessions. Generally, the operator pays for all damage caused to the site by moor-

ing or unmooring of vessels or during cargo handling operations. In a Landlord Port, the Port Authority is responsible for maintenance of the quay wall. The responsibility for damage is therefore limited for a mutually agreed period after a vessel arrives at the quay



wall (or pier). Damage to the Port Authority's property by a vessel can usually be recouped from a marine insurance company. The operator may be required to pay for damage even if acting pursuant to orders or instructions of officers (such as pilots) of the Port Authority. (See Box 28)

Box 28

Reference Clauses on Damages

- The operator shall be liable to pay for all damages that are detected in the properties of the Port Authority during the time that the berth is used by a vessel or during the three months thereafter. The operator shall only be released from that obligation if and to the extent that he proves that this damage can be contributed to a cause other than the one referred to.
- The operator shall also be liable to pay for all damages which are detected at a later stage, which may have been caused to any Port Authority property as a result of such use, without it being able to invoke that he did not act contrary to any order and/or instruction given by officers authorized by the Port Authority to do so.
- If, in the opinion of the Port Authority, as a result of any use of the site, including the quay wall, damage is caused to the site, the bank protection or port works and/or the sites, bank protections or port works in the vicinity of the leased property, the operator shall pay the repair costs of such damage.

Regulations by the Authority

In most ports, safety and security regulations are found in port by-laws.

Regulations in the by-laws have a public character and bind all operators in the port area. However, a Port Authority may decide to issue specific regulations in addition to those which can be found in the by-laws. In that case, the operator should have an opportunity to appeal the application of such regulations, especially if their applications will result in significant economic harm to the operator.

Provisions of the concession agreements may further provide the operator with the opportunity to request an expert opinion, binding both parties. Pending the decision of the experts, the contested regulation of the Port Authority would be suspended. The general rules for arbitration of disputes contained in the concession agreement may also apply to this section. (See Box 29 and Box 30)

Box 29

Reference Clauses on General Regulations of the Authority

When using the site the Operator shall observe all regulations given by the Authority and/or any other competent Government entity:

- For promoting safety in general;
- To avoid and combat fire in particular;
- To avoid danger, damages, injury or nuisance; and
- To avoid pollution of or damage to the environment and excess taxation of the soil.

Box 30

Reference Clauses on Specific Regulations of the Authority.

- Should the Operator object to the regulations given by the Authority in respect of the use of the concessioned/leased property as referred to in the previous paragraph, and which are not given by virtue of any power or obligation contained in a government regulation or port by-law, then the decision of three experts shall be binding in respect of the question whether, or to what extent, those regulations are necessary and reasonable. The provisions on Arbitration mentioned in the Section [number] are equally applicable.
- The Operator may invoke the decision by experts within six weeks after the day of dispatch of the letter with which the Authority notified the Operator of the regulations referred to above.
- Pending the decision of the experts, the implementation of the regulation given by the Authority in respect of the use of the concessioned/leased property shall be suspended without releasing the Operator from the financial or other consequences arising out of the non-compliance with the regulation.
- The costs of the aforesaid experts shall be for the account of the party who is held to be in the wrong, while, if the parties are both held to be in the wrong on one or more points, these costs shall be divided by the experts in a fair and reasonable manner.
- The experts shall be notified of the provisions of this agreement to the extent that having them is important for the conduct of their work. By accepting his appointment an expert subjects himself to the aforesaid conditions.

Access to the Site

Clauses should be included in the concession agreement to fence off the site, while still allowing sufficient, unimpeded access to the site to enable the Port Authority to perform inspections. (See Box 31)

Box 31

Reference Clauses on Access to the Site

- Free access to the site and the buildings on the site shall have to be granted at all times to the officers and employees of the Authority, including police officers, and/or other persons who are authorized by the Authority, who may have been or may be appointed for the supervision of the compliance with regulations and the lease conditions, or for carrying out repairs. The Authority's representatives shall have access to any of the facilities and premises to inspect and examine their condition, provided that, unless in cases of emergency or when circumstances so justify, the Operator will be informed of such inspection and that such inspection, whenever possible, shall not disturb the Operator's operations.
- Free mooring opportunity must be allowed along leased quays, berths and other mooring places for service and dredging vessels used by Port Authority employees or persons authorized by the Authority in the execution of their duties. Mooring of such vessels should not unduly disturb cargo operations.



Miscellaneous Conditions

The concession agreement may contain provisions to cover a number of miscellaneous conditions and activities in the port including environmental conditions, construction and maintenance of a fence around the site, advertisements, and dumping of liquids in port waters. (See Box 32)

Box 32

Clauses on Miscellaneous Conditions

- If, when carrying on businesses or when building, expanding or changing constructions and/or installations, an environmental license or another license is required, not only this (these) license(s), but also a separate permission from the Authority shall be required by virtue of this article.
- The Operator shall have to fence off the site to the satisfaction of the Authority and keep it fenced off from the public road and from the adjoining land at all times.
- The partitions, buildings, mooring sites and/or installations may only bear advertising, legends, announcements, signs and the like relating to the business of the Operator, and also those which are prescribed by or on behalf of the Government. All other advertising and the like, including that which is put up against the will of the Operator, shall be removed immediately by the Operator.
- With the exception of rainwater, dumping of solid substances and liquids into the port is not allowed unless the Authority has given permission in writing to do so. This permission may include conditions.

Construction and Maintenance Aspects

An operator managing a site under a concession or lease agreement usually

obtains the right to reconstruct the site, to erect buildings and introduce new equipment. When the site is constructed or re-constructed under a BOT arrangement, the operator also has the right to build new quay walls, to dredge channels and create new port land. In undertaking these activities, the operator assumes some duties previously undertaken by the Port Authority.

Every concession agreement contains lease conditions when ownership of the site formally remains with the Port Authority. When ownership is temporary or definitively transferred to the operator (under BOOT or BOO arrangements), the concession agreement may include a variety of clauses pertaining to the use of the site, although such clauses may solely be based on a public license, a port by-law or other enabling authority.

BOT arrangements in a concession agreement are spelled out in detailed provisions covering construction, quality control, time schedules, milestones and similar issues. One important provision deals with the granting of exclusivity rights, guaranteeing that the Port Authority does not promote or permit any other competing facility in the concessionaire's port area for a certain time period (sometimes incorporated into a sponsors direct agreement). This issue is dealt with in a separate section. (See Box 33)

BOT Arrangement

BOT (Built, Operate, Transfer) and the BTO (Built, Transfer, Operate) arrangements are frequently integral parts of



Box 33

Reference Clauses on Construction and Maintenance (Landlord Port Situation)

- The maintenance of the site at its present level shall be carried out by and for the account of the operator.
- The maintenance, the repair and the renovation of the foundations and piles of the quay wall, the electricity channel with brush contact groove and the connection pits for light, water and telephone supply and appurtenances thereto, and also of the visible concrete works of the quay wall, shall be carried out by and for the account of the Port Authority.
- The operator is obliged to maintain the buildings, installations, fences, roadways, mooring sites on the site in a proper manner and, if necessary, to renew them in due time. Buildings that are run-down and no longer used for business operations shall be demolished. All this shall be done to the satisfaction of the Port Authority.
- All costs for the construction and maintenance of roads, sewers, electricity lines, gas and water pipes and lighting on the site are for the account of the operator.
- If objects, liquids or materials are present in the water or in or on the bottom in the port in the vicinity of the site, which, in the opinion of the Authority, do not belong there and have originated from the site or from vessels moored alongside a quay wall owned by the operator, the operator shall pay the Port Authority the costs which arise from the removal thereof, unless the operator proves that the objects, liquids or materials originate from another source.
- The operator shall indemnify the Port Authority for all claims of third parties in respect of damages which arise from the presence of the said objects, liquids or materials, to the extent that they do not originate from a source other than is referred to above. This indemnification does not apply to objects, liquids or materials that originate from vessels moored alongside a quay wall owned by the operator, which are owned by, or carrying out services on behalf of, the Authority.
- The operator shall further be obliged to take such measures as shall be necessary in the opinion of the Port Authority to enable dredging and placing and removing any mooring posts and the like in the vicinity of the leased property, which entails, among other things, the fact that the operator shall allow means of anchoring, mooring and dredging vessels to be installed, used and maintained by or on behalf of the Port Authority in the shore strip of the site, this at places which shall be indicated by or on behalf of the Port Authority.
- For that purpose the operator shall, at his own expense, carry out such work to its fences, buildings, mooring sites, installations and the like as shall be deemed necessary in joint consultation with the Port Authority in order to avoid damages which could arise from the work or provisions which are to be carried out by or on behalf of the Port Authority. If, as a result of work or provisions carried out by the Port Authority, damage is inflicted to fences, buildings, mooring sites, installations and the like of the operator, such damage shall still be for the account of the operator, unless the Port Authority can be held responsible for gross fault or negligence.
- Without prejudice to other provisions in this agreement, the operator shall contribute to the costs, to be borne by the Port Authority, of cleaning the surface water in the harbors and above the sloping embankments in proportion to the area of the sites bordering the harbor, and the length of the waterfront.



concession agreements. The difference between these models is the time at which the operator transfers the newly constructed assets to the Port Authority. BTOs are employed when relevant legislation does not allow for the private ownership of port assets. Transfer is conducted immediately upon the completion of construction and the operator receives the equivalent of a management contract.

The distinguishing feature of the BOT arrangement is the legal form of user rights. The concession agreement always sets out clauses that clearly define such rights. The concession entitles the operator to a right to use and exploit port infrastructure and, in the case of an existing terminal, also to use the superstructure and available port equipment.

Most concessions have a term of 30 years or less. Extension of the concession can usually be re-negotiated at any time during its lifetime in case the operator plans a major investment in the port's infrastructure in return for an adjusted tariff rate reflecting changes that may have been introduced pursuant to the extension. In case no agreement for extension is reached by the end of the 30-year term, the concession ends and the right to use and exploit of the port's infrastructure and other assets reverts to the Port Authority (or another Government agency), preferably under a fixed price formula.

The scope of the concession agreement appears in its Preamble. The Preamble typically consists of three main elements:

- The right to construct new port infrastructure and superstructure;
- The right to use of the subject assets; and
- The right to exploit the site during the tenure of the concession. (See Box 34)

Investments Under a BOOT Scheme

Sometimes an operator is allowed to own the site on which improvements are to be constructed until the end of the concession period under a BOOT arrangement. Usually, the concession agreement specifies the value of the assets under a predefined formula (including an agreed depreciation table). At the time of transfer to the Port Authority at the end of the concession period, the Port Authority pays the operator in accordance with the residual value, calculated on the basis of the established formula.

Functional and Technical Design Under a BOT Arrangement

Generally, a Port Authority presents functional specifications for the facility to be constructed under a BOT arrangement. When the Authority specifies detailed construction works, it becomes vulnerable to delays, construction errors and, perhaps, the application of wrong technology or processes relative to expected port functions. Many ports simply lack the required expertise to prepare detailed technical specifications for modern port construction works.

Since new facilities are to be transferred to the Port Authority in due time, it is

Box 34

Reference Clauses on Scope of a Concession Agreement (including a BOT arrangement)

WHEREAS Art. [number] of the Ports Act of [date] gives the Port Authority of [name] the exclusive right to develop, construct and maintain basic and operational infrastructure in its port area;

WHEREAS it is the policy of the Government/Port Authority to have the new terminal be constructed and operated by a commercial operator (or: have the existing terminal known as [name] be re-constructed and operated by a commercial operator) under a [BOT, BOOT, BTO] arrangement;

WHEREAS the Authority has invited bids in [month], [year] for the Project, and through a process of competitive bidding selected in [month], [year] the Consortium of [name] as Sponsors, hereinafter referred to as the 'Operator', led by [name], a company whose registered office is at [location], (the 'Lead Sponsor'), as identified in the Joint Development Agreement for developing the terminal/port of [name];

WHEREAS, subject to the provisions of this Agreement, the Sponsors and its designated Operator shall have the right and the obligation to finance, design, construct, equip, test, commission, operate and maintain the terminal/port known as [name];

WHEREAS the Authority awarded a Letter of Intent ('LOI') dated [date], [year] to the Sponsors to finance, design, construct, equip, test, commission, operate and maintain the terminal/port [name] on [BOT, BOOT, BTO, etc] basis, (and has agreed to grant a license to the Sponsors under the [name] Act, No. [number], dated [date], for financing, designing, constructing, equipping, testing, commissioning, operating and maintaining the terminal/port [name]).

(optional) WHEREAS the Authority has been reimbursed by the Sponsors for the cost associated with site specific technical studies which were undertaken by the Authority [at the time of approval of the Detailed Project Report] [at the time of International Competitive Bidding].

WHEREAS the Sponsors have executed a Joint Development Agreement dated [date], [year] allocating project responsibilities among Sponsors, pursuant to which the Sponsors promoted the Operator to finance, design, construct, equip, test, commission, operate and maintain the terminal/port [name] on [BOT, BOOT, BTO, etc] basis and transfer the Site and the assets thereon to the Authority on termination of the Concession Agreement;

WHEREAS a Detailed Project Report ('DPR') has been prepared and submitted, by the Operator, in accordance with the terms of the LOI, to the Authority on [date], [year], and has been approved by the Authority. The DPR with such modifications shall be referred to as the Approved DPR (annexed hereto as Annex [number]), and shall be treated as a part of this Agreement;

WHEREAS the Concession Area required for the development of the terminal/port [name] and the minimum area of land required to be leased to the Operator for the commencement of the construction have been identified in the Approved DPR. The Operator has agreed to construct the Contracted Assets on the Site in accordance with Annex [number] of the approved DPR;

WHEREAS on the signing of the LOI, the Operator provided a Development Guarantee in favor of the Authority for US\$ [amount], which unless otherwise agreed, to shall remain in force and effect until the Zero Date;


WHEREAS at the signing of the LOI, the Sponsors provided a Development Guarantee in favor of the Authority for US\$ [amount], which unless otherwise agreed, to shall remain in force and effect until the Zero Date;

WHEREAS the parties hereto have agreed to render all necessary co-operation and assistance and take appropriate action for giving effect to the terms of this Concession Agreement;

WHEREAS the Operator, being duly licensed to operate in the port, has applied for appointment to start container/general cargo/bulk services at the above mentioned terminal on the Date of Commencement of Operations;

WHEREAS the Authority is satisfied that the Operator is qualified in this field;

WHEREAS the Authority grants the Operator the right of usufruct over operational infrastructure, superstructure and other assets by way of this Concession for the period of (30) years.



useful to engage a technical consultant who represents the Port Authority and reports on the progress of the work. The technical consultant can also observe the way in which the project is being constructed to meet the functional specifications and the requirement to use best practices for design, materials and workmanship. The consultant may also assist in evaluating alternative technical solutions and advise on the best technical and cost-effective solutions.

A crucial point in the design phase is obtaining agreement on a timetable for completion of the detailed technical design. The design should include an interface element to integrate the terminal into an existing port area. The interface element takes into consideration paving levels, drainage, fencing, design and routing of underground facilities, reconstruction of existing infrastructure within the concession area and access through neighboring port areas and terminals.

Finally, the operator is obliged to provide the Port Authority with sufficient detailed benchmark data to allow for evaluating and monitoring the development of the concession area as part of the approved Detailed Project Report. (See Box 35)

Design and Construction Flaws

During every major construction job, design and technical problems will inevitably occur. Some of these issues can be easily resolved, but others might influence the construction timetable or quality of the work. It is important that design and construction flaws be

Box 35

Reference Clauses on BOOT Scheme

- Any port infrastructure and superstructure constructed by the Operator within the Concession Area will be property of the Operator during the lifetime of the Concession. However, all related investments will become part of the assets to be returned to the Authority at the end of the Concession Period. At the time of transfer the Authority shall pay the Operator a remuneration according to a predefined formula (to be included in an Annex to the Agreement).
- The Operator shall be completely free in its investment decisions (but he will have to submit his plans and obtain all necessary authorizations).
- Investments in expansion of port infrastructure within the Concession Area during the lifetime of the Concession will allow a mutually agreed reduction from the Concession Fee to be paid to the Authority.

resolved in good faith consultation with the operator and its construction firm. The Port Authority should be ready to demonstrate flexibility without compromising the requirement that work be performed at a predetermined level of quality.

In some instances, part of the work may have to be redesigned. The effects on construction time and cost of any redesigned element(s) should be ascertained by the Port Authority, which should ensure that the overall functional specifications are adhered to. (See Box 36 and Box 37)



Box 36

Reference Clauses on Infrastructure Design

- The Operator shall design and construct the terminal/port facilities in accordance with the functional design set out in Annex [number] to this Agreement.
- Without affecting the obligations under the preceding provision, the Operator shall comply with the design and construction methods set out in Annex [number] to this Agreement
- The Operator represents, warrants and undertakes that:
 - the technical design solution satisfies the functional design; and
 - each item of the facilities (quay wall, terminal area, superstructure and other assets) will be fit for its respective purposes.
- The Operator shall complete the detailed technical design of the facilities so as to comply with the Construction Program as set out in the time table for design completion (Annex [number]).
- The Operator shall submit to the Authority all interface design data, including all calculations, designs, design information, specifications, plans, programs, computer software, drawings, graphs, sketches, models and samples.
- If in the opinion of the Authority any interface design data does not comply with the requirements of the Agreement, it shall be entitled to require the Operator to amend the relevant interface design data so as to comply with these requirements.
- The Authority shall be entitled to monitor the development and other aspects of the technical design and the Operator shall provide it with all relevant data promptly. The Operator shall not be obliged to adhere to possible comments of the Authority but shall give due consideration to such comments made by or on behalf of the Authority. Any comment or approval of the Authority shall not be construed as transfer of responsibility for compliance with the Functional Design from the Operator Company to the Authority.

Box 37

Reference Clauses on Technical Design and Construction Problems

- If the Operator and/or the construction firm responsible for carrying out the work become aware of any failure to comply with the Functional Design and/or other provisions concerning design and construction of the facilities, they shall:
 - immediately notify the Authority of the situation and provide details of the problem;
 - as soon as possible provide the Authority with a written statement giving a full statement for the reasons of the problem:
 - describing in full the measures taken or to be taken to cure the problem and/or to mitigate the consequences; and
 - assessing the effect(s) of the problem on the construction program.
- In case the Operator is not able to comply with the Functional Design and/or the provisions concerning the technical design and construction of the facilities, a full statement of the proposed changes including cost estimates and effects on the construction program shall be submitted to the Authority.

Building Conditions

The construction company carrying out the work on behalf of the operator should be required in most cases to inspect the building site and the adjacent water area thoroughly before starting construction. Any obstacles in the sub-soil affecting the construction should be reported and taken into consideration when executing the technical designs and for obtaining permits. It is customary for the Port Authority to agree to provide its co-operation in obtaining construction permits and obtaining approvals from governmental authorities, including environmental oversight authorities.

Construction

Construction is based on a construction program that outlines completion dates for the various construction phases (milestones) as part of the approved DPR. This DPR is almost always incorporated into the concession agreement. The Port Authority ordinarily requires that it be notified promptly of every delay that occurs at the construction site, as well as the resulting contingency plan devised to remedy the delay. (See Box 38 and 39)

Zero Date

The so-called Zero Date is an important event that marks the start of construction work. By this date all conditions precedent are fulfilled by both the Port Authority and the operator. Generally, the Port Authority fulfills all conditions necessary for the operator to commence work, while the operator concludes all

Box 38

Reference Clauses on Site Conditions

The Operator shall be deemed to have thoroughly inspected the Concession Area and its surroundings, and have satisfied itself as to:

- The nature and extent of the conditions of or affecting the Concession Area, including climatic, hydrological, ecological, environmental, geo-technical, seismic and archeological conditions;
- The adequacy of the rights of access and egress to and from the Concession Area;
- The possibility of interference by persons of any description whatsoever (other than the Authority) with access to or use of or rights concerning the Concession Area and its surroundings, including adjacent land owners; and
- The precautions, times and work methods necessary to prevent any nuisance or interference, whether public or private, being caused by persons whose interests may be affected by the performance of the Operator's/Vehicle Company's obligations under this Agreement.

Box 39

Reference Clauses on Construction

Throughout the period from the effective date of this Agreement until the actual commissioning date for the last of the planned facilities, the Operator shall keep the Authority fully informed about the progress of the works. In that regard, the operator shall:

- Provide the Authority with monthly progress reports, in such form and containing such information as the Authority may reasonably require from time to time;
- Hold regular progress meetings to review performance of the work and discuss any coordination issues; and
- Fully co-operate with the Authority's observer, who shall be entitled to be present at any time during the performance of the work and to have reasonable access to all parts of the concession area and to all records and materials of the Operator concerning the work including attendance at the progress meetings of the work. The observer shall be entitled to disclose all such information to the Authority and its advisers.

financial arrangements and engages a construction firm to begin construction. (See Box 40)

Box 40

Reference Clauses on Zero Date

- The Zero Date shall mean the date on which all the conditions precedent set out in Article [number] have been satisfied and the following conditions have been fulfilled:
 - The environmental permit of the Ministry of [name] has been received;
 - The following milestones necessary for the commencement of construction stated in the approved DPR are complete: [milestones to be identified]; and
 - Financial Closing has been achieved.
- The Zero Date shall be achieved within [number] months from the Effective Date (namely, signing of this Agreement).

Drop Dead Date

During the preparation phase, events may occur that result in delays or even cancellation of a project. The Port Authority as well as the operator may include provisions for termination of the concession agreement once it becomes clear that the project will fail. Therefore, a so-called Drop Dead Date is included in the agreement. In drafting such a clause, it is important to specify if any performance guarantees will be drawn or canceled as a result of the Drop Dead Date. (See Box 41)

Extension Events

In practice, construction of a major work rarely proceeds according to the original

Box 41

Reference Clauses on Drop Dead Date

- In the event Zero Date is not achieved within [number] months from the Effective Date, this Agreement shall stand terminated and the parties to the Agreement shall have no liability of any nature whatsoever, subject to clause (b) and (c) below.
- If Zero Date is not achieved on account of failure to achieve Financial Closing, the Development Guarantee may be invoked by the Authority;
- In the event the Authority has not fulfilled the covenant set forth in Article [number] within a period of (number) months after completion of inspection of facilities as per Article [number], the Operator shall be entitled to terminate this Agreement in accordance with Article [number] and the Development Guarantee shall stand discharged and shall be returned to the Operator.

plan. In case a delay is caused by action (or inaction) of the Authority itself, the operator is usually entitled to claim liquidated damages. There might also occur an event of Force Majeure, causing delays in the construction process. Such possibilities are acknowledged in the concession agreement and procedures included to change the milestone dates and compensation paid by the operator when an Extension Event occurs. (See Box 42)

Completion Tests and Take-Over

BOT schemes are mainly employed for the construction of new port infrastructure and superstructure. When newly built facilities are completed, completion tests are carried out and a takeover certificate issued by a competent expert or

Box 42

Reference Clauses on Extension Events

- In the event that the Operator fails to:
 - complete construction (or cause construction to be completed) within the scheduled construction period; or
 - achieve any intermediary milestones as may have been agreed to between the parties, subject in both cases to agreed extension.
- The Operator shall pay the Authority liquidated damages of US\$ [amount] for each day of delay up to a maximum period of six months. The amount of such liquidated damages will be linked to the Royalty Fee payable by the Operator to the Authority based on an annual cargo projection in the Approved DPR, and shall, if so required, be realized by invoking the Construction Guarantee.

authority on the Port Authority's behalf. While verification of the civil works is required throughout the production process, it will not be possible to verify solely at the conclusion whether all work was completed in a professional manner and proper materials were used during the process. The Port Authority should use its expert to inspect all work at completion and to prepare a punch-list of deficiencies. The construction company then has a certain period to rectify all deficiencies. The final take-over is based on a test certificate issued by the certifier. After this, there still is a defect liability period during which the operator has the obligation to repair all deficiencies.

Take-over of mechanical and electrical installations are more complicated and require a variety of tests including oper-

ational, safety, reliability, interoperability and endurance tests. (See Box 43)

Box 43

Reference Clause on Take-over Tests

An actual commissioning date shall occur when the 'Test Certifier' issues a certificate that completion tests for civil works and installations (if any) have been successfully carried out.

Hand-Back and Transfer of Facilities

Under a BOT arrangement, the facilities are transferred to the Port Authority at the end of the concession period, usually with (under a BOOT arrangement) or without (under a common BOT arrangement) compensation.

The hand-back is concluded after a joint inspection and assessment of any renovation works (if applicable). Hand-back requirements and procedures depend on local practices. The most sensitive issue is in the level of compensation to be paid by the Port Authority. (See Box 44)

Box 44

Reference Clauses on Hand-back of Facilities

- On the day the Concession Period expires the Authority and the Operator shall conduct a final joint inspection.
- Within 14 days after the completion of this inspection, the Authority shall either issue a Hand-back Certificate to the Operator or notify him of the decision not to issue one and state the reasons for this decision.



Lenders Security

The success of BOT arrangements is highly dependent on the ability of the operator to attract financing for the construction work. This issue is reviewed in greater detail under Module 3 and Module 5. In many cases lenders have recourse only to certain assets or income streams to secure repayment of their loans. Sometimes there are legal considerations that should be addressed, especially with respect to the creation and enforcement of security interests in the host country that limit or even prohibit the granting of a lien over port assets.

Such limitations present a significant stumbling block for attracting private capital to port development.

The restriction under the legislation presented in Box 45 may impede investors and lenders because of a lack of definition of property rights.

The situation on St. Maarten is very different from that noted in Box 46. Care has been taken to maximize the lender's security there.

In a concession contract with BOT arrangements it is generally necessary to establish explicitly the lender's rights

Box 45

A Case of Legal Limitations Adversely Affecting a Port Concession

The main elements of recent ports legislation in one European country include the following:

- Ports are part of the maritime domain as mentioned in art. 49 of the Maritime Code (MC) of the country. According to the same law a main characteristic of the maritime domain is that within this domain there are no property or proprietary rights whatsoever (art. 51 MC). In the Law the definition of a port is as follows (art. 5 MC):
 - A port is a water area and with water directly connected land area with built-up and non built-up wharf structures, breakwaters, equipment, installations and other facilities intended/ designed for berthing, mooring and sheltering seagoing ships, loading and discharge of materials, embarkation and disembarkation of materials and passengers, warehousing and other cargo handling operations, production, refinement and processing of goods, and other economic activities in connection therewith, concerning matters of business, traffic or technology.
- Since no property rights exist within the maritime domain and subsequently within the port areas, all economic exploitation has to be based on a system of concessions (art. 51 MC) granted to companies. The Maritime Code contains detailed rules with respect to such concessions (art. 59 - 72). It should be mentioned that this system is not only applicable to port operations such as stevedoring activities, but also to industrial activities in the port areas (refineries, chemical plants, etc.).
- The national Port Management System is fully enumerated in the Seaports Law, 1995 (SL). The law sets out further rules for issuing concessions. Concessions for a longer period shall be granted by the Cabinet of Ministers, while concessions for a period of longer than 33 years can be granted by the Parliament. Concessions with a duration of not longer than 10 years can be granted by a Port Authority. All concessions must be publicly tendered. The so-called former socially owned enterprises acting both as port authorities and port operators in the previous period, have the right to be issued a priority concession with a duration of 12 years (art. 63 SL). There is no freedom to set tariffs. Port construction is primarily a task of the Parliament. Moreover the law lays down a very detailed planning system

The above outlined port management system had a disastrous effect on the development of the country's ports. Main competence problems arose between the new Port Authorities and the former socially owned enterprises. Port through-put of the country's main port fell from some 7 million tons p/a to a mere 2 million tons. No major investors were willing to risk their money under the above institutional conditions. Presently, proposals are being developed to make the Seaports Law more market oriented in order to attract foreign investors.



Box 46

The Case of St. Maarten

The island's bay has sufficient depth to accommodate cruise ships, which visit the island in vast numbers. Tourism (and especially cruise tourism) constitutes a major source of income for the island. Economic benefits are estimated at US\$ 200 million per year. Some one million cruise tourists visit the island annually.

In September 1995 the island was hit by hurricanes that seriously damaged the port's facilities. This resulted in cruise ships having to anchor in the bay and transporting their passenger ashore with small tenders. This solution was only accepted by the Cruise Lines on a temporary basis. In 1997, the government concluded an agreement with the Lines charging US\$ 5 per passenger to (partially) finance a new Cruise Terminal. Plans were made to expand the Terminal and dredge the bay up to a depth of 10 meters.

Reconstruction of the Cruise Terminal became part of a corporatization scheme. A St. Maarten Cruise Terminal N.V. (joint stock company) was established as a subsidiary of the St. Maarten Holding Company N.V., jointly owned by the Government of St. Maarten and the Dutch Government via the Participation Company for the Netherlands Antilles NV. (NPMNA).

The main features of the Concession Agreement between the Island Government and the St. Maarten Cruise Terminal N.V. are:

- Limited Construction Risk. A turn-key contract has been concluded with an experienced construction firm (Ballast Nedam Caribbean NV). Its Dutch parent company (one of the largest of Holland) acted as main sponsor and provided a subordinated stand-by facility during the construction period. It also acted as a guarantor of the obligations of the construction firm under a fixed price construction contract.
- No political risk. Elimination of political risks was achieved through extended political risk cover of the Netherlands Credit Company (95%, covering inter alia breach of contract by the St. Maarten Government as well as Force Majeure events).
- No hurricane risk. This risk is covered under a commercial insurance policy of NCM.
- Proven cashflow. Financing is based upon an already existing cashflow and a no-growth scenario. After completion, the debt service reserve and the maintenance reserve accounts will be funded up front, guaranteed by the St. Maarten Government and covered by NCM. Direct payment from the Cruise Lines is effected through an offshore escrow account of the St. Maarten Cruise Terminal N.V. Payment is approved only by the agent bank pursuant to a cash-flow waterfall. There also is significant involvement by the Dutch Government, providing equity, a subordinated loan as well as appointing a board member.

The Concession Agreement has a Build, Own, Operate (BOO) character. Under the above conditions, a senior loan was arranged by Dutch ING Bank with participation of Commerzbank and Bayerische Landesbank.

with respect to the affected assets. While providing for this right entirely in the concession agreement is difficult because of the variety of financial structure options available to operators, a Port Authority could elect to enter into a "Lender's Direct Agreement" with the lenders to facilitate financing the BOT package. (See Box 47)

Change in Law

Operators under a BOT arrangement run a considerable risk of applicable leg-

Box 47

Reference Clause on Lender's Security Provisions

For the sole purpose of financing the implementation of the project and the fulfillment of his obligations under the Concession Agreement, the Operator may assign, by way of security, the benefit of, or his interest in, this Agreement, according to the requirements of any of the financing documents, and create other forms of security over any property or rights forming part of his interests in the project in favor of any lender, provided that the payment of rents and royalties to the Authority shall have priority over any such security and that before any such security takes effect, the holder of the security must have entered into a 'Lender's Direct Agreement' with the Authority.

isolation changing during the concession period. Such change may affect operating profits and alter or negate the original exploitation conditions. Therefore, it should be expected that detailed provisions in the concession agreement will be negotiated to minimize the effects of

Box 48


such changes. (See Box 48)

Freedom to Set Tariffs

To respond to market competition, the operator should have the freedom to set his own prices. The operator should be expected to negotiate periodically with

Reference Clauses on Law Changes

- Change in law shall mean the occurrence of any of the following events after the effective date of the agreement:
 - the enactment of any new applicable law;
 - the modification, repeal or re-enactment (other than re-enactment that merely consolidates or codifies existing applicable law) of any existing applicable law;
 - the commencement of any applicable law which had not at the Effective Date yet entered into effect, except to the extent such applicable law was enacted prior to the Effective Date with a commencement date after the Effective Date and such applicable law takes effect on that commencement date without material amendment;
 - a change in the interpretation or application of any applicable law by a judicial or other authority (including a court, tribunal or any other regulatory authority) having the authority to interpret or apply such applicable law or any interpretation of any applicable law by such authority which is contrary to the existing generally accepted interpretation thereof;
 - the revocation or cancellation (other than for cause) of any permit;
 - to the extent that such Change in Law has a material adverse effect on the rights and obligations of the Operator under this Agreement and that such event has not been caused due to fault of negligence of the Operator.
- Notwithstanding anything contained in the clause above, Change in Law shall not include any change in tax laws or change in a law of general applicability but which solely has an economic and financial impact on the Operator.
- The Operator shall, on the occurrence of a Change in Law, give notice of such change to the Authority in accordance with the provisions of this Article as soon as it may be reasonably practicable. The notice served pursuant to this clause shall provide, inter alia, precise details of the Change in Law and the effect thereof on the Operator.
- In the event that a Change in Law renders impossible the exercise by the Operator of any of its material rights or performance by the Operator of any of its material rights and obligations – unless such obligation is waived by a person having the power to do so under this Agreement, the Operator may serve a notice for termination of this Agreement (Termination Notice). Provided that, prior to service of the Termination Notice, the parties shall consult in good faith for a period of 180 days to mitigate the material adverse impact of the Change in Law. In the event that parties are unable to agree to changes in the Agreement to mitigate the impact of the Change in Law during the 180 day period, either party may refer the matter to dispute resolution, in such case the Termination Notice shall stand suspended until such matter has been resolved in accordance with Article [number].
- The parties hereby acknowledge and agree that the Operator shall be entitled to serve a Termination Notice on the Authority, provided that the Change in Law results in its physical and legal impossibility of performance of the Operator's obligations or exercise of its rights under this Agreement. The parties shall bear the respective impact of any economic consequences of the Change in Law.



its customers and may provide quantum rebates in return for increased throughput. Only in a situation when the operator is in a monopoly position might there be a reason for interference in tariff setting by the Government. To avoid conflicts of interest with the Port Authority, an independent Port Regulator usually is given authority to oversee tariff regulation (see Module 6 for a full discussion on economic regulation). The mere fact that competing ports in the country offer lower tariffs may not be a reason for regulation of tariffs. When it can be proven that competing ports offer lower prices as a result of distorting government subsidies, the competent authorities should take measures to eliminate such subsidies, such as through a complaint to a competition authority. Thus, regulation of prices should only be reverted to in case of abuse of a monopolistic position by an operator (as in predatory pricing). (See Box 49)

Concession Fee

There is no generally accepted standard for a concession fee. This fee usually is determined as the sum of (1) a fixed fee for the use of the areas under administration of the Authority, and (2) a variable fee in the form of a through-put royalty for the right to perform cargo handling services. The fee amount is a function of local circumstances. The fixed portion should represent the infrastructure costs (and superstructure costs, if applicable) of the terminal, including financing costs. The structure and level of the concession fee is a primary element for analysis by project lenders. The variable fee is a function of the market

Box 49

Reference Clause on Price Discrimination

- The operator agrees that the charges for his services rendered in connection with his operations on the concession premises shall be competitive within the port and with other competing ports having such facilities and services. The operator shall, however, at all times have the right to increase or decrease such charges and modify the relevant rules and regulations, in accordance with sound business practices.
- In the event the Port Authority (or Port Regulator, if applicable) receives a complaint or complaints of discrimination on the part of the operator of the concession premises and the Port Authority (Port Regulator) concludes after thorough investigation that there are reasonable grounds to believe that discrimination has been practiced by the operator, then the operator, upon written notice to him by the Port Authority (Port Regulator) shall cease and desist from such practices.

position of the port overall (i.e., what the market can bear) and other considerations such as the creation of a fund for excess port workers. (See Box 50)

Physical Security

A concession agreement usually contains clauses pertaining to security in the port area. Generally, these issues fall under a Port Authority's jurisdiction, although a terminal operator also bears part of the responsibility. (See Box 51)

Access

A Port Authority usually takes responsibility for all common areas, including road connections and pedestrian areas. An operator will seek to hold the Port



Box 50

Reference Clauses on Concession Fee

- The concession fee exists of two elements:
 - a Lease Rent, related to the amount of square meters of port area leased by the Operator; and
 - a Throughput Royalty, related to the amount of cargo/number of containers handled on the concession area by the operator.
- A fixed sum of US\$ [amount] per annum shall be paid by the operator as the lease rent. This rent shall be paid in advance in four equal installments on January 1, April 1, July 1, and October 1 into account number [number] with [name] Bank in [place] in the name of [name] Port Authority. If the period for which the right to lease is granted does not commence on one of these dates, then the Lease funds incurred over the period between the commencement and the beginning of the next quarter will be paid on the first upcoming date mentioned above.
- The amount owed to the Authority in accordance with the right to lease shall be paid in full and without any discount or debt compensation, regardless of nature.
- The Lease Rent shall be adjusted as from January 1 of the year Two Thousand and [year], and thereafter each time that a period of five years elapses.
- All adjustments shall be calculated by multiplying the rent sum, which applied most recently by a fraction of which:
 - the numerator is formed by the price index figure as given by [name of agency], which is published in the seventh calendar month preceding the time of adjustment; and
 - the denominator of which is formed by the same price index figure, which applied in the same month a year earlier.
- Should the details referred to in the previous paragraph cease to be available, then the Authority is entitled to calculate the Lease rent adjustment on the basis of any other similar index or methodology. This adjustment requires mutual agreement. If such agreement cannot be reached, then this shall be determined in the manner given in Section 26 on the basis of the advice of three experts.
- The operator will pay to the Port Authority an annual Throughput Royalty in the amount of US\$ [amount] per ton cargo throughput/Twenty Feet Equivalent Unit (TEU) container handled in the concession area, regardless the manner in which it is handled or which mode of transport is used, payable in two installments after every six months (within 30 days after the end of each period). The Throughput Royalty will increase every year in accordance with the price index figure given by [name of agency] (or any other mutually agreed index).

Authority liable for all undue delays in road traffic destined for the terminal.

Unclaimed Cargo and Carriers

Often, cargo at the port is not claimed by the rightful owners. In case of com-

plex customs legislation or port by-laws, warehouses filled with unclaimed cargoes may burden the operator's ability to operate the terminal and meet performance target. Therefore, the operator will expect to set clear rules with respect to such cargoes and who bears removal

Box 51

Reference Clause on Security and Safety

- The Port Authority shall be responsible for maintaining the security of all land and sea entrances to the Port of [name] and the maintenance of all perimeter fencing around the port area.
- Without limitation of the Port Authority's obligations under this agreement, the operator shall provide additional security within, and on the boundaries of the site, including the entrances to these areas from within.
- The operator shall be solely responsible for keeping, at all times, the concession area in good order and condition and also to ensure that the terminal environment is adequately protected.
- Traffic operations, vehicular traffic and all transport activities related to the concession area shall be conducted in accordance with existing laws and/or internal regulations.
- Parking restrictions, as indicated by notices or road markings, should be strictly observed and enforced by the operator. Vehicles shall be parked only in locations designated to that effect.
- Final check of cargo and/or containers at the gates shall be the responsibility of the operator.

responsibility and costs in conformity with custom's regulations. (See Box 52)

Taxes

National or local taxes with respect to the leased site(s) are usually paid by the operator. At times, to encourage port development certain promotional rates or tax holidays are extended to the operator during the initial phases of operation. Such incentives are a function of national fiscal policy. (See Box 53)

Box 52

Reference Clauses on Unclaimed Cargoes

- All containers, packages and cargo deposited in the terminal and not removed at the expiry of a period of (21) days or (42) days in case of transshipment containers, may be disposed of by public auction, in conformity with Section [number] of the [name] Act, No. [number] of [year].
- As regards unclaimed containers containing perishable or hazardous goods, the operator shall dispose of such goods according to the requirements set down by the relevant authorities and as per national regulations in force.

Box 53

Reference Clause on Taxes

The operator shall reimburse the Port Authority for all taxes, dues, concession fees and public levies, under whatever name, including the surcharges, which the Port Authority has to pay because of the leased property or the buildings thereon.

Information and Communication

It is essential that a Port Authority be able to gain access to recent, relevant and direct information on all aspects of port operations including marine operations cargo throughput. The Port Authority should be informed promptly about all incidents occurring in the port area so that it can undertake appropriate measures in response.

The agreement includes a requirement

for the operator to provide such information. (See Box 54)

Box 54

Reference Clauses on Information and Communication

- The Operator shall install and maintain an efficient information and communication system and shall provide on-line information to the Authority on all aspects of operations necessary for providing marine services and for monitoring.
- The Authority and the Operator will agree, in writing, on the type and flow of extra information, which may be communicated to the Authority on request.
- The Authority and the Operator shall immediately inform each other of any matter, which may affect the operational performance of the Operator under this Agreement including but not limited to:
 - fire within the terminal or within the Authority's area of responsibility;
 - damages/stoppages caused by severe weather conditions;
 - industrial disputes with risks of work stoppages;
 - major damage to facilities, premises and/or equipment and
 - pollution of the environment within the Authority's area of responsibility.

Insurance and Indemnity

Insurance for employees, equipment and vessels covering injury and damage within the concession area is typically specified in a concession agreement. Moreover, the operator is expected to

indemnify the Port Authority against a variety of incidents pertaining to port operations and other events. (See Box 55)

Box 55

Reference Clauses on Insurance and Indemnity

- The operator undertakes to provide the necessary and relevant insurance covers, in respect of its employees, equipment and vessels being serviced, for injury, damage to the terminal, vessels and/or cargo when they are, at all material times, considered to be under control of the operator.
- The operator hereby holds the Port Authority free and harmless from any and all liabilities and claims for damages and suits for or by reason of any death or injury to any person or damages to property of any kind, whether the person or property of the operator, its subcontractors, agents or employees, or third persons, arising out of negligent or intentional act or omission of the operator in connection with this agreement, and the operator shall indemnify, save, and hold harmless the Port Authority from all liabilities, charges, expenses (including reasonable attorneys' fees), and costs on account of claims, suits, losses arising therefrom.
- The Port Authority hereby holds the operator free and harmless from any and all liabilities and claims for damages and suits for or by reason of any death or injury to any person or damages to property of any kind, whether the person or property of the Port Authority, its subcontractors, agents or employees, or third persons, arising out of negligent or intentional act or omission of the Port Authority in connection with this Agreement, and the Authority shall indemnify, save, and hold harmless the operator from all liabilities, charges, expenses (including reasonable attorneys' fees), and costs on account of claims, suits, losses arising therefrom.
- The operator indemnifies the Port Authority against all claims due to non-compliance by the operator with the provisions relating to the site, which have been given by the competent public bodies.



Termination and Prolongation

Termination clauses of a concession agreement are of prime importance for the relation between the Port Authority and the operator, especially under a BOT arrangement. The concession agreement represents a negotiated balance between the interests of the Port Authority (an efficient and economic use of the port land) and the operator (provision of cargo-handling services on a profitable basis). Both parties are tied together in a long-term symbiotic relationship, where the fortunes of one directly bears upon the results obtained by the other. That contractual relation, therefore, should not be terminated without good cause.

The way termination clauses are conceived reflects the power balance between the two parties. An operator with alternative port locations available will not easily accept harsh termination clauses. On the other hand, a Port Authority should be aware that an operator might fail in the market, and valuable port land may lay unused for years if the right to terminate the concession is not clearly defined. Finally, lenders to the operator will be very careful in their analysis of these provisions to make certain their interests are protected. (See Box 56 and Box 57)

Option to Continue

Many concession agreements provide an option to extend the term of the concession. This feature becomes more important in concessions with shorter terms. One may expect that concession agreements with a duration of ten years or

Box 56

Reference Clause on Termination by the Port Authority

The following (unless as a result of a Force Majeure or change in law that results in consequences set out in Article [number] or a default of the Port Authority) shall constitute operator events of default:

- A material breach of a material provision of this agreement by the operator;
- Repudiation of this agreement by the operator or the evidencing of the intention by the operator not to be bound by the terms of this agreement;
- Appointment of a provisional liquidator providing for winding up of the operator, after notice to the Port Authority and due hearing, unless such appointment has been set aside within 45 days;
- The operator is ordered to be wound up by a court or files a petition for voluntary winding up except for the purpose of amalgamation or reconstruction provided that the property, assets and undertakings of the operator are transferred to its successor;
- The operator abandons the construction or operation of the terminal/port and the facilities for a continuous period of 45 days;
- Persistent failure on the part of the operator to operate and promote activities at the terminal/port and provide terminal users with services in accordance with good industry practice and in accordance with the provisions of this agreement
- Failure to pay the concession fee for a consecutive period of 6 months;
- Failure to comply with lawful directive given by a statutory authority connected with ports.

Box 57

Reference Clause on Termination by the Operator

The following (unless as a result of a Force Majeure or change in law that results in consequences set out in Article [number] or a Default of the Operator) shall constitute Authority Events of Default:

- Commission of a material breach of a material provision of this agreement by the Port Authority;
- Repudiation of this agreement by the Port Authority or the evidencing of the intention by the operator not to be bound by the terms of this Agreement; or
- Dissolution of the Port Authority and occurrence of any structural changes within the present constitution of the Authority which have a material adverse effect on the rights and obligations of the operator under this Agreement, or the transfer of the Port Authority's undertaking and statutory powers or any material part thereof, unless such dissolution or structural change or transfer is in connection with privatization or other restructuring of all or any substantial part of the Port Authority, and the Port Authority's successor is able to perform the Port Authority's obligations under this agreement.

shorter will generate significant investment. When there is an option to continue under balanced conditions, an operator might be tempted to take more investment risks. It is therefore in the interest of the Port Authority to include options to continue the agreement.

Generally, the Port Authority, when there is a mutually beneficial relationship between the parties, may favor

extending an agreement under new conditions. Significant time and expertise may be lost if a new operator has to be found and terminal operations have to be restarted under new management. Judgments about agreement extensions depend, among other things, on the position of the port in the overall market and the alternatives available to the operator. (See Box 58)

Box 58

Reference Clauses on Prolongation

- At least two years before the expiration of the concession, the operator may require the Port Authority to take a decision concerning the extension of the period for which the concession is granted, as well as concerning the concession fee and the provisions, which shall apply for the duration of its renewal or extension. The operator shall approach this in the manner stipulated in the following paragraphs.
- The operator shall send a written request to the Port Authority by registered mail. The request shall indicate the number of years for which the extension is requested, with a maximum period of ten years, and the proposed concession fee. The Port Authority will inform the operator in writing of its decision and the reasons thereof within six months after receiving the request.
- The request of the operator shall expire if he has not reached agreement with the Port Authority with regard to the extension, the amount of the concession fee and the provisions within three months after receiving a response mentioned in the previous subsection. In that case the operator has the option either to have the concession agreement expire or to revert to arbitration as mentioned in Section [number].
- (optional) In determining the Concession Fee for the duration of the extension, no consideration shall be given to the value of the buildings or structures in the Concession Area constructed by the operator.



Termination Due to Non-Compliance

In the event the operator fails to comply with its obligations, a Port Authority will ordinarily have the option to terminate the agreement. Termination for cause is very serious, especially for financing parties, and should be avoided as much as reasonably possible. The operator should be given a reasonable period to demonstrate compliance with the terms of the agreement and cure non-compliance events. However, an operator may be in financial distress, for example, and unable to pay the concession fee. In this case, the Port Authority may not directly terminate the agreement, but consider the seriousness and likely duration of the problem. If it is determined to be temporary, the Port Authority, perhaps in concert with the operator's lenders, may come to an understanding with the operator (e.g., a deferred payments scheme) that avoids termination of the agreement. (See Box 59)

Bankruptcy

The Port Authority will usually insist on the right to terminate the agreement in case of bankruptcy or insolvency of the operator. Sometimes, an operator will be provided an opportunity to cure such insolvency petitions within a limited period of time. (See Box 60)

Expiration of Concession

Upon expiration of the concession period, the facilities built on the site and any title that passed to the operator as part of a B(O)OT arrangement will be transferred back to the Port Authority. In

Box 59

Reference Classes on Termination Due to Non-Compliance

- Without prejudice to the conditions of Sub-Section [number], the concession agreement may be terminated by the Port Authority on the grounds of non-compliance by the operator with one or more obligations under this agreement. The Port Authority shall send a notice of termination to the operator by registered mail, indicating the date of termination and the reasons thereof. There must be at least [number] of months between the day of sending the letter and the termination date.
- If the operator complies with the terms of this agreement before the termination date, the decision of the Authority to terminate the Concession/lease shall become ineffective and shall be deemed not to have been taken.
- If the Concession is terminated on the grounds of the provisions given in this Article, the Operator shall, as a result of the mere fact of the termination, forfeit a fine amounting to [number] times the sum of the annual Concession Fee owed by virtue of the provisions of Section [number] which applied most recently and all rights of whatever nature to everything which is built on or placed in the site shall pass over to the Authority, without compensation for damages, and without prejudice to legal proceedings for compensation of damages.

Box 60

Reference Clauses on Bankruptcy

- If the operator is declared bankrupt, applies for a moratorium or loses his status as a legal entity during the concession period, the Port Authority may summarily terminate the concession agreement.
- In the event that more than one legal entity acts as operator, each of them shall be separately liable for fulfilling all obligations arising from this agreement.



some contracts, the site may have to be restored to its "original state," which could mean that the operator must demolish structures and installations that were built on the site during the concession period. Equipment would be transferred or retained as a matter of contractual obligations. It may be compensated at book or market value, or it might be removed from the site by the operator for sale or for use elsewhere. An obligatory free transfer of equipment to the Port Authority is not recommended as a preferred option in view of the maintenance requirements for such equipment. If an Operator knows that it may have to transfer equipment at the end of the concession period, the operator may cut back on maintenance as much as possible to save money toward the end of the period.

The concession agreement should specify the condition of the basic and operational infrastructure at the time of transfer. The Port Authority should monitor thoroughly the maintenance situation (life cycle maintenance, routine maintenance and reactive maintenance) of the infrastructure and, if applicable, the superstructure throughout the concession period. Any deficiencies found during the joint inspection prior to hand-back should be made good by the operator.

The Authority should expect to receive all construction documentation for installations, power and water lines, sewerage systems and any other systems that have been constructed underground at the site during the concession period. The operator should also remove all remnants of piles, foundations and

similar civil works before leaving the site. When the site is to be handed over in its "original condition," all later restoration costs should be borne by the operator. (See Box 61)

Arbitration

Many concession agreements include a provision for arbitration. Sometimes, reference is made to International Chamber of Commerce (ICC) arbitration (which is the preference of most lenders) or to a local arbitration institute. Oftentimes, a specific procedure is presented in the agreement. Arbitration is often a preferred option in case of a conflict between parties. The reference clauses in Box 62 are meant for deciding on increases of the concession fee, if parties cannot come to an agreement. This type of arbitration can also be applied to other conflicts that may arise during the concession period.

Costs

Costs pertaining to the use of the concessioned site are usually paid by the operator including the case in which the Port Authority holds legal title over the port land. (See Box 63)

Governing Law

Most often, the governing law of the concession agreement is the national law of the country where the terminal is located. Some foreign lenders, however, require that documentation be governed by English or New York law. Issues relating to governing law, submission to jurisdiction and dispute resolution should be addressed at an early stage of

Box 61

Reference Clauses on Expiration of Concession

- Not less than three months prior to the date of expiration of this agreement, the Port Authority and the operator shall conduct a joint inspection of the facilities. Such inspection shall be in accordance with the requirements of the hand-back scheme included in Annex [number].
- The operator shall ensure that on the date of expiration of the agreement each element of the facilities complies with the requirements of the hand-back scheme included in Annex [number].
- The operator shall at the expiration of the lease period peacefully and quietly leave, surrender and yield up the site to the Port Authority or to its agents without any claim for compensation in respect to any improvement effected by the operator on the site and shall before leaving, demolish, at the request of the Port Authority, some or all buildings constructed by the operator and remove any equipment, machinery or appliances installed therein, which otherwise will be vested in the Port Authority without compensation. Moreover, other items have to be removed such as stumps of piles, piles, foundations, materials, substances and the like.
- The scope of the hand-back of assets shall include all assets prevailing at the site as at the date of transfer, and shall, inter alia, include:
 - all land and buildings
 - plant and machinery
 - spare parts
 - such deeds and documents as may be necessary for effectively transferring rights, title and other interests under this agreement in favor of the Port Authority free of all encumbrances
 - the benefits of all rights and interest in all unexpired insurance, guarantees and contractor warranties, if so desired by the Port Authority
 - all documents, manuals, records, etc. as may be required for the efficient operation of the terminal/port.
- The hand-back (and compensation) shall relate only to tangible assets and such intangibles (such as capital dredging) identified for the purpose of the Article in the Approved DPR.
- If there are piles in the site which have been placed there by the operator and/or by other parties, the operator shall submit a full and clearly specified drawing thereof to the authority. The authority shall decide how these piles should be removed and to which depth. The operator shall strictly comply with the instructions, which are given by the Port Authority. The Port Authority is entitled thereby to prescribe that one or more piles are left behind in a good condition, without the operator being able to claim any form of compensation for the piles, which will be left behind.
- In the absence of clearance within three months after the end of the lease period the fences, buildings, mooring sites and installations, and in general everything which is still situated on or in the site, shall revert to the Authority.
- If the site is not handed over in its original condition, after removal of everything which has been built thereon, placed therein or brought thereto by the operator and/or his predecessor(s) and levelled at the proper height, all costs which the Authority will incur in order to restore the site to its original condition shall be refunded by the Operator.
- (optional) The Operator shall at the expiration of the lease period sell back to the Authority the existing quay walls and all other new mooring facilities constructed during the Concession Period. In the event that parties cannot agree on a price, the price will be determined by an Arbitration Commission appointed in the manner given in Section [number].

Box 62

Reference Clause on Arbitration

- In the event that the parties do not reach agreement on a new concession fee before the new period commences, the fee shall be determined by the parties in the manner given below on the basis of the advice of an Arbitration Commission consisting of three arbitrators.
- In that event, the Port Authority and the operator shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon application of a party, by the [name] Court. The arbitrators shall be notified of the provisions of this agreement, to the extent that these are important for them by the parties who appoint them. By accepting his appointment an expert subjects himself to the aforesaid condition.
- The third arbitrator will act as Chairman of the Arbitration Commission.
- The Arbitration Commission shall, together with a well motivated statement of their considerations and arguments, give its decision as to the extent to which the Concession Fee must be reviewed in relation to the Fee, which was charged during the last year of the concession period.
- In doing so the Commission shall compare:
 - the situation and the condition of the area with that of the other port areas, without taking into account the nature of the use or the fact that they are built on;
 - the conditions under which concession agreement(s) concluded with other parties in the port area;
 - special circumstances under which the concession agreement has been concluded with those of other parties in the port area;
 - in the event that within the last two years prior to the end of the concession period, no other sites have been issued in concession within the area of the Port Authority, the Commission shall decide on the adjustment of the concession fee under observance of:
 - the situation and the condition of the site;
 - the conditions under which the site was concessioned;
 - the special circumstances under which the site was concessioned;
 - the increase or decrease of the user value of the site concerned as a result of external circumstances; and,
 - the increase or decrease of the value of money.
- If all three experts, or two of them, agree on a new concession fee, the Commission shall inform parties in accordance therewith in writing. If all three differ in opinion then the new fee shall be established by the Commission at half of the total of the two estimates, which have the smallest difference between them. If the difference between the lowest and the middle estimate is the same as the difference between the middle and the highest estimate, then the fee shall established by the Commission in accordance with the middle estimate.
- A change in the fee by virtue of the provisions in this article shall, if one of the parties expresses the desire thereto, be laid down in a separate deed.



Box 63

Reference Clause on Costs

- Where this agreement determines that costs, damages, taxes and other levies by public bodies and the like are for the account of the operator, the latter shall pay the amount stated by or on behalf of the Port Authority and shall at the same time state the reason for the payment, immediately upon the first request, without awaiting notice in default or court intervention.
- All costs incurred for this agreement and supplementary agreements shall be for the account of the operator.

the negotiation between the Port Authority and the operator, particularly in the case of a concession involving a BOT agreement. (See Box 64)

Box 64

Reference Clause on Governing Law

The Agreement shall be construed and governed by the law of the Republic/Kingdom of [name].



PORT REGULATIONS

Port Operating Regulations

Port regulations (port by-laws) are usually issued by a Public Port Authority and have a legal basis either in a specific law such as a Maritime Code (e.g., as in Azerbaijan), a Port Law (e.g., as in Singapore) or a Municipal Law (e.g., as in Rotterdam). Port by-laws are generally well considered and provide very detailed regulations relating to the conduct of vessels, safety and order in the port area, the protection of the environment, the use of pilots, documentation of disembarking passengers, loading and discharging of goods and crisis management.

Because port regulations are dependent on specific local circumstances, development of generally applicable port regulations is not feasible. Therefore, in this section only a selection of the most important issues is discussed.

General Elements of Port Regulations

Port and traffic regulations should cover all principal aspects of operations as described below.

Vessel Traffic Management. Vessel traffic management focuses on the safe passage of vessels through the port area. Traffic density in a major port—especially in the case of sea-going and inland vessels using the same port waters—may require an elaborate system of traffic regulation and management. This system comprises four principal elements:

- The vessel with all its sophisticated

communication and positioning equipment such as satellite communication and anti-collision radars;

- The available port facilities such as vessel traffic systems and modern aids to navigation, often with advanced features such as centralized digital radar displays, collision prediction and CCTV as well as pilot boats, patrol boats for traffic control, tugs and mooring boats;
- Clear traffic regulations consistent with International Maritime Organisation (IMO) conventions (if applicable) as well as long-established communication procedures; and
- Well motivated and trained personnel such as pilots, traffic and radar operators, patrol boat crews, tug crews and other shore personnel.

Provisions regarding these issues are found not only in Port Regulations (port by-laws), but also in pilotage laws/regulations, vessel traffic regulations and IMO Conventions.

Pilotage. The sea/harbor pilot is the first representative of a port encountered when a seagoing vessel enters port waters. He acts as adviser to the Captain during the ship's transit. The efficiency of the pilot service is of major importance both for port safety and efficient traffic management.

Order and safety in the port. This part of the port regulations is related to a variety of subjects such as:

- Berthing requirements;



- Manning of a vessel when at berth;
- Shifting of ships;
- Use of anchors;
- Use of stern or side-thrusters when alongside;
- Air pollution from vessels;
- Substances in the water;
- Repairs alongside;
- Fumigation of ships; and
- Ships causing danger of hindrance (See Box 65)

Generally, the Harbor Master (or Port Captain) is responsible for maintaining good order in the port area, often in cooperation with specialized port police, and, in emergencies, with the regular police, fire brigade and ambulance services.

Reporting and communication. Part of reporting and communication with the Harbor Master (or Port Captain) is standard and does not need much explanation. Expected time of arrival (ETA) at the port is usually reported at least 24 hours prior to arrival and regularly updated. Departure of a ship from berth is usually reported to traffic control three hours before unmooring. There are special procedures for reporting dangerous or noxious substances carried by the ship. Border police and customs require a host of documents. In the event that a country is a member of the Port-State Control Agreement, the Port Authority controls ship documentation

in order to prevent sub-standard ships from using the port. Rules should be made by ports for Captains or Agents to inform the Harbor Master/Captain's Room in a timely manner about goods loaded or discharged at the terminals, especially with respect to dangerous and noxious cargoes. Data communication between ship and port and harbor authorities is increasingly done by electronic means via satellite communication devices (GPS, Internet). Modern ports increasingly accept only messages in digital format.

Transport and handling of dangerous cargoes. The entry and presence of dangerous, hazardous and harmful cargoes in port areas and their attendant handling should be fully controlled to ensure general safety. The passage of ships carrying dangerous cargoes is a critical responsibility of a VTS. Ships loading and/or discharging dangerous cargoes are usually regulated by an expert Dangerous Goods Department.

Over the last four decades, the International Maritime Organisation (IMO) has been recognized as the principal forum for all matters affecting the safety of shipping. The transport of dangerous cargoes has been one of IMO's main responsibilities since its founding in 1958. Its rules, requirements, regulations, standards, codes, guidelines and recommendations have been implemented by Port Administrations all over the world and are followed and observed by both Port Authorities and the ports industry. Port regulations should be consistent with with IMO rules as much as possible.



Box 65

Reference Clauses on Port Safety and Environmental Protection

Air Pollution

- It is prohibited to allow smoke, vapors, fumes, dust or steam to escape from a vessel, which cause or may cause danger, harm, hazard, damage or hindrance within or outside the port area.
- The Port Authority shall publish the names of substances, that may cause unacceptable stench or hindrance when being loaded into or discharged in bulk from a vessel. It is prohibited to load or discharge such substances unless the Port Authority has issued a license to do so.

Removing Objects and Substances from the Port Water

- When a person by fault or negligence introduces an object into port water, hereby causing danger, hazard, harm or hindrance within or outside the port area, he shall ensure:
 - that the Harbor Master is informed without delay;
 - that the object or substance is removed from the water immediately, unless this is not practically possible;
- The Port Authority may issue further detailed regulations in order to prevent pollution of port waters.

Execution of Repair Works On Board

- It is prohibited to execute or cause to execute works on board a vessel with respect to renovation, repair or maintenance in the following cases:
 - when a ship is berthed in a Petroleum Harbor and the works cause open fire and/or sparks;
 - when is ship is carrying dangerous goods or when it concerns a tanker for which no cleaning certificate has been issued;
 - if the works are impairing a vessel's readiness to maneuver;
 - it the works cause danger, damage or hindrance.
- The above shall not apply when a ship is berthed at a shipyard licensed to carry out such works.
- The injunction shall only be imposed when it has become apparent that conditions imposed by the Authority have not complied with or, in the opinion of the Authority, no effective measures can be taken to prevent or end the situation of danger, serious damage or serious hindrance to the port area and/or the nearby population.

Fumigation of Vessels

- It is prohibited to use or cause to be used gases on board a vessel for the purpose of disinfecting ship and cargo without a license issued by the Port Authority; and
- A vessel that used gases for disinfecting ship and cargo is prohibited to berth or be alongside a berth unless a declaration from a licensed expert has been issued stating that the vessel is gas-free.

Danger, Harm, Damage or Hindrance from Vessels

- The Port Authority may impose an injunction on the vessel to enter port, to berth or to remain alongside a berth if the vessel, in the opinion of the Authority, causes or may cause serious danger, harm, damage or hindrance to the port area an/or the nearby population.



It is estimated that more than 50% of packaged goods and bulk cargoes transported by sea can be classified as dangerous, hazardous and/or harmful. Some of the substances transported are dangerous or hazardous as a matter of safety and are also harmful to the marine environment; other cargoes are hazardous only when carried in bulk, and some may be considered harmful to the marine environment. Between 10% and 15% of the cargoes transported in packaged form, including freight containers, bulk packagings, portable tanks, tank containers, road tankers, trailers, unit loads, etc., fall under these categories.

Generally, port regulations may require a license for handling specific cargoes. The Port Authority may also prohibit loading, handling and discharging of dangerous cargoes in harbors where such activities would be especially dangerous to the public. Cleaning of ship holds still containing residues from dangerous cargoes may need to be separately regulated and controlled. Disposal of oil and chemical wastes should also be strictly controlled and carried out through Port Authority-owned or controlled installations, in line with the Marine Pollution Convention (MARPOL 73/78) on port reception facilities.

With respect to vessel management, the Port Authority may regulate the navigation and place of anchoring or mooring of vessels carrying dangerous goods. It also might regulate the mode of utilizing, stowing and keeping dangerous cargoes on board vessels and the conveyance within the port of any kind of dangerous cargoes with any other kind

of goods, articles or substances.

Finally, a Port Authority should have full information about type, amounts of dangerous goods in the port area and about locations where those goods are stored or handled. Detailed regulations should be issued by the Port Authority or the competent environmental agency with respect to location and segregation of dangerous cargoes on terminals or industrial sites. In the event of industrial/chemical sites located in the port area, the Port Authority should also be fully informed about possible dangers and risks with respect to explosions and damage to the environment.

Miscellaneous subjects. Port Regulations further comprise a number of miscellaneous subjects, such as:

- The conduct of inquiries into any case where damage has been caused to or by a vessel within the port limits or the approaches;
- Keeping the basins and premises of the port and the approaches clean and preventing oil, filth, rubbish and any other thing from being thrown into the port waters;
- The provision and maintenance of adequate pontoons for landing of persons, moorings buoys, gangways, landing stages, moorings and berthing facilities; and
- Prohibiting the embarkation and disembarkation of persons except at such places as may be authorized by the Port Authority.



Safety in the Port

Since it is not feasible to mention all port regulations on port safety, only those provisions that are of general application are listed here.

The main subjects are:

- Transport, handling and storage of dangerous, hazardous and/or harmful good;
- Air pollution;
- Reporting and removing substances and objects floating in port waters;
- Repairs aboard ships;
- Fumigation of ships; and
- Ships causing serious danger, damage or hindrance. (See Box 65)

Reporting

The obligation of the master of a vessel to report various events to the Port Authority or to the Harbor Master is an important part of port regulations. Main events include: reports on arrival and departure of a vessel, reports of dangerous goods on board a vessel and reports on accidents/incidents on board the vessel, when calling at the port or being alongside a berth.

Reports are usually made to the Captains Room of the Port or Marine Authority responsible for disseminating the relevant information to all parties concerned, such as the terminal of destination, the tug company, the boatmen, customs and immigration, shipchangers

and others. Information is often entered into a Port Community System serving the entire port community. (See Box 66)

Vessels Loading and Discharging Dangerous Cargoes

With respect to vessels loading and discharging dangerous cargoes, port regulations usually include detailed provisions. Often, handling liquid cargoes such as oil, oil products, gasoline, dangerous chemicals may only take place in designated harbor areas/zones that do not pose a threat to nearby population centers. (See Box 67)

Reception Facilities

The Marine Pollution Convention 1973/78 (MARPOL) aims to prevent pollution from ships. It has been widely adopted throughout the world. It obligates signatory states to ensure the provision of adequate port reception facilities for waste, which can be used without undue delay.

National legislation implementing the convention usually places responsibility for ensuring such provision on Port Authorities. Many ports meet the obligation by allowing suitable, qualified waste management contractors to offer services. In such cases the Authority is responsible for thorough quality control at the facility. Cleaning facilities for oil and oil wastes can often be economically exploited. However, cleaning facilities for chemical wastes generally do not offer by-products that can be extricated and marketed by a waste management contractor.



Box 66

Reference Clauses on Reporting

Arrival and Departure


- The Master of a vessel shall inform the Harbor Master of:
 - the ETA of the vessel at the port at least 24 hours before arrival;
 - the shifting of the vessel in port at least three hours prior to such event;
 - the vessel's departure from port at least three (two, one) hour before unmooring;
 - damage to the vessel, the equipment, machinery and other items which may impair maneuverability of the vessel and which may endanger the safety of the port area and/or the nearby population, directly upon occurrence of such incident;
 - other data required by the Harbor Master in connection with the vessel's presence in the port area.
- Notifications shall be made in digital form to the address determined by the Port Authority.

Dangerous Goods

- The Port Authority may require reporting data on dangerous cargoes loaded to or discharged from vessels in the port, or from vessel which have not been cleaned from such substances.
- The Port Authority may also require when and in what manner these data shall be provided to the Authority.

Reporting Data on Dangerous Goods

- The following data shall be provided by the Master of a vessel:
 - Name and call sign of the vessel and the IMO identification number, if applicable;
 - Nationality of the vessel;
 - Length, breadth and draught of the vessel;
 - Expected Time of Arrival (ETA) in port or at the pilot station, as required by the competent authority;
 - Expected Time of Departure (ETD);
 - Planned route;
 - The correct technical names of dangerous or polluting goods, the UN (United Nations) identification numbers, where applicable the IMO hazard class in accordance with IMDG, IBC and IGC Codes and the type of vessel as described in the INF Code, the quantities of the goods and their location on board. In the case such goods are transported in tank or cargo containers; their identification marks and signs;
 - Confirmation that a cargo list, manifest and suitable stowage plan is available on board which accurately lists the dangerous and polluting cargoes carried on board as well as their location;
 - The number of crew members on board.



An important issue to consider is whether the port will merely facilitate the provision of these services directly to ships through licensed, qualified contractors or provide the facilities itself (shore facilities and collection barges, if necessary). In the latter case, the port takes responsibility for the effective removal of waste materials. (See Box 68)

Box 67

Reference Clauses on Loading and Discharging Dangerous Cargoes

- The Authority shall make regulations for the transport, loading, handling or discharging of dangerous hazardous and/or harmful goods in the port and the approaches thereto. Such regulations may concern, inter alia:
 - Documents to be presented to the Harbor Master;
 - Berthing requirements including tug assistance;
 - Security and supervision;
 - Fire prevention and accident control;
 - Activities which may cause danger, hazard and/or hindrance;
 - Loading and discharging of cargoes; and
 - Incident reporting.
- The Authority may prohibit loading, handling or discharging of dangerous good at wharves or docks where such loading, handling and discharging appears especially dangerous to the public.



Box 68

Reference Clauses on Waste Management

- No person shall provide any waste handling facility cum collection service unless he is authorized to do so by a public license granted by the Port Authority (or Environmental Agency).
- Every public license granted under this section shall be in such form and for such period and may contain such conditions as the Authority may determine.
- A public license for the exploitation of a waste handling facility may include conditions requiring the public licensee:
 - to comply fully with the requirements of the Marine Pollution Convention 1973/78 on adequate port reception facilities, especially with regard to Annex I (Oil), Annex II (Noxious Liquids), Annex III (Packaging), Annex IV (Sewage) and Annex V (Garbage), if and when applicable;
 - to prepare itself to deal with any emergency threatening the health of the population and the pollution of the environment;
 - to comply with any rules, regulations, procedures and standards as specified in the license or which are given by a competent Authority;
 - allow control and inspection of facilities and administration by any competent Authority at all times;
- Subject to this Section, the Authority may modify the conditions of the public license granted.
- Any public licensee aggrieved by the modification of conditions by the Authority under this subsection may, within 30 days of the receipt of it, appeal to [Court], (ask for arbitration).
- The Authority may give directions for or with respect to standards of performance and procedures to be observed to ensure the reliability and the environmental friendliness of the facilities and the waste collection, as well as the prevention of undue delay to vessels.
- Any person who fails to comply with any direction given under this section shall be guilty of an offense.
- It shall be the duty of the public licensee to provide environmentally acceptable, reliable, efficient and economical services to the shipping community in accordance with the provisions of public license granted to it and the directions of the Authority.