

No. 2/76/2012-Infra-Fin
Government of India
Ministry of Finance
Department of Economic Affairs

North Block, New Delhi
Dated 30th April, 2014

OFFICE MEMORANDUM

Subject: Model Tripartite Agreement (MTA) for Port Sector PPP Projects

The Empowered Inter-Ministerial Group (IMG) constituted by the Cabinet Committee on Infrastructure (CCI), has under the Chairmanship of Secretary, Economic Affairs, in its meeting held on 10.3.2014 approved the Model Tripartite Agreement (MTA), for take-out financing of PPP projects in Ports Sector. The said MTA is placed at **Annexure**, for information.

This issues with the approval of the Competent Authority



(Praveen Kumar)
Deputy Director (Infra-Finance)
Tel: 23095022

1. Secretary, Planning Commission
2. Secretary, Ministry of Shipping
3. Secretary, Department of Legal Affairs
4. Deputy Governor, RBI
5. Additional Secretary (Capital Market), DEA
6. NIC- for uploading on the Department's Website

Copy for information to:

1. Additional Secretary, Economic Affairs
2. Joint Secretary (Infrastructure), DEA

**MODEL TRIPARTITE AGREEMENT
(FOR PORTS PROJECTS)
BETWEEN PROJECT AUTHORITY, CONCESSIONAIRE AND
INFRASTRUCTURE DEBT FUND**

This Tripartite Agreement¹ is made at [New Delhi] on the *****² day of *****, 20** by and between

- (i) [**BOARD OF TRUSTEES for [*] PORT**³, a body corporate constituted under the provisions of the Major Port Trusts Act, 1963], and having its principal administrative office at [*] (hereinafter referred to as the “**Concessioneing Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);
- (ii) The [***** Infrastructure Debt Fund], a company registered under the Companies Act, 1956, acting through *****, and having its registered office at ***** (hereinafter referred to as the “**Debt Fund**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

And

- (iii) [***** Limited], a company registered under the Companies Act, 1956, acting through *****, duly authorised by the resolution

¹ This Tripartite Agreement is based on the Model Concession Agreements for PRIVATE SECTOR PROJECTS in MAJOR PORTS . Provisions referring to specific clauses of these MCAs may be suitably modified to reflect the provisions of the respective concession agreements, but without altering the allocation of risks.

² Words enclosed in square parenthesis and all asterisks may be substituted as per Project-specific requirements.

³ **For Ennore Port:** The Ennore Port Limited, a company registered under the Companies Act, 1956, acting through *****, and having its registered office at ***** (hereinafter referred to as **the “the Concessioneing Authority”** which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns);

passed at the meeting of its Board of Directors held on *****, and having its registered office at ***** (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns)

WHEREAS:

- (A) The Concessions Authority and the Concessionaire had entered into a Concession Agreement (as defined hereinafter), a true copy of which is annexed hereto and marked as Annex-I, for development of ***** (the “**Project**”);
- (B) The Project entered into commercial operation or any substitute thereof on ***** (the “**Date of Commercial Operation**”) in accordance with the provisions of the Concession Agreement;
- (C) Following the occurrence of the Date of Commercial Operation, the Concessionaire has been operating the Project in accordance with the terms and conditions of the Concession Agreement;
- (D) The Concessionaire had raised debt from the Lenders for financing the Project and had utilised the same for the purposes of the Project under the Concession Agreement;
- (E) The Concessionaire has been discharging its debt service obligations, including the repayment of principal and interest, in accordance with the provisions of the Financing Documents;

(F) The debt service obligations have not been rescheduled, waived or postponed in any manner during the past one year from the date hereof, and the Concessionaire is not in default of its debt service obligations under the Financing Documents; and

(G) The Concessionaire has decided to refinance all or part of its outstanding debt and has requested the Debt Fund to invest in its bonds, the proceeds of which shall be paid to the Lenders as specified in Schedule-I.

Now, therefore, the Parties hereby agree and this agreement witnessed - as follows:

1. DEFINITIONS AND INTERPRETATIONS

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

“**Actual Project Cost**” means an amount of Rupees ***** crore, as determined in accordance with the provisions of the Concession Agreement;

“**Agreement**” means this Tripartite Agreement, and amendments if any thereto;

“**Bonds**” means the securities issued by the Concessionaire in consideration of the amounts paid for the investment thereof;

“**Concession Agreement**” means the executed Concession Agreement dated [date on which the Concession Agreement has been signed] for the Project, entered into between the Concessions Authority and the Concessionaire,

and shall include all Schedules thereof and any amendments thereto made in accordance with the provisions contained in this behalf therein;

“Financing Documents” means financing documents under the Concession Agreement and documents executed on the date [...date of signing of the financing documents] for the Project and shall include all Schedules thereof and any amendments thereto made in accordance with the provisions contained in this behalf therein.

“Lenders” means any Persons based in India or abroad providing Financial Assistance under the Financing Documents and includes a trustee for the holders of debentures/ or other debt instruments issued by the Concessionaire to finance the Project.

“Lenders’ Representative” shall have the same meaning as ascribed to it in the Financing Document, provided that, this would include the Trustees for any bonds issued by the Concessionaire. In absence of one such person/ entity having the authority to sign, Lenders Representative shall mean all the Lenders, and/or the Trustees for any bonds issued by the Concessionaire.

“Major Ports” means a port notified by the Central Government in the Official Gazette or a port that is declared as a Major Port through the Major Ports Act, 1963⁴

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

⁴ All Major Ports except Ennore Port, are regulated by their respective Port Trusts. The major port trusts' are autonomous bodies managed by a board of trustees under the overall control of the Central Government through the Ministry of Shipping. All major ports are covered under the Major Port Trust Act (MPTA), 1963 except Ennore Port, which it is a limited company and registered under the Companies Act, 1956.

1.2 The words and expressions beginning with or in capital letters used in this Agreement and not defined herein but defined in the Concession Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Concession Agreement.

1.3 **Interpretation**

1.3.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof, or any rules, regulations, bylaws or notifications thereunder, shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;
- (c) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (d) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-

clause shall not operate so as to increase liabilities or obligations of the Debt Fund hereunder or pursuant hereto in any manner whatsoever;

- (e) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party in this behalf and not otherwise;
- (f) the Recitals and Annexes to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement; and
- (g) time shall be of the essence in the performance of the Parties' respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence.

1.3.2 Any word or expression used in this Agreement shall, be construed as per the definition given in the General Clauses Act, 1897 failing which it shall bear the ordinary English meaning.

2. ISSUE OF BONDS

2.1 The Parties agree that the Concessionaire may, in accordance with the provisions of this Agreement, issue Bonds for the amounts subscribed by the Debt Fund; provided that the total value of such Bonds shall not exceed 94% (ninety four percent) of compensation payment from the Concessioneering

Authority on day of signing this Tripartite Agreement **(as specified in Schedule II)**; [provided further that the Concessionaire may, with prior written approval of the Concessions Authority, which approval the Concessions Authority may in its sole discretion deny, issue additional Bonds for a total value not exceeding the balance of the said compensation payable]⁵.

2.2 Upon investment in Bonds pursuant to Paragraph 2.1, the Debt Fund shall be deemed to be a Lender and shall thereupon be entitled to all the rights and privileges of a Lender under the Concession Agreement.

2.3 The tenor of the Bonds, in accordance with the provisions of this Agreement shall be such that at least 50% (fifty per cent) and 75% (seventy five per cent) of the total nominal value thereof shall be fully redeemed by the Concessionaire no later than the expiry of 75% (seventy five per cent) and 85% (eighty five per cent) of the Concession Period respectively and the balance, if any, shall be redeemed no later than 2 (two) years prior to the expiry of the Concession Period.

2.4 Subject to the clause 2.3 of this Agreement, the tenure, rate of interest and other commercial terms of the Bonds shall be determined by mutual agreement between the Debt Fund and the Concessionaire.

2.5 The Bonds shall be in such denomination as the Debt Fund and the Concessionaire may determine, but not less than Rs [10,000 (Rupees ten thousand)] in any case.

⁵ All portions enclosed in square parenthesis in paragraph 2.1,3.5 and 4.1 of this Agreement may be omitted by the Concessions Authority if it does not wish to extend the cover hereunder beyond limits specified in line with the Model Concession Agreement for Ports Sector.

2.6 Subject to the provisions of Paragraph 4.1, the Debt Fund and the Concessionaire may, with prior written approval of the Concessioneing Authority, which approval the Concessioneing Authority may in its sole discretion deny, allocate and bear the foreign exchange risks for and in respect of any foreign-exchange denominated Bonds, in such manner as they may mutually agree.[For the avoidance of doubt, the Parties expressly agree that if the foreign exchange risk for any or all Bonds is borne by the Concessionaire, the compensation to be made by the Concessioneing Authority for and in respect of such Bonds shall be adjusted to cover the variation between the nominal value of Bonds and the actual amount payable to the Debt Fund, such that the liability of the Concessionaire for redemption of the Bonds hereunder is fully discharged by the Concessioneing Authority.]

2.7 The Parties expressly agree and confirm that repayment of the principal and interest in respect of the Bonds shall have a prior charge over the Lenders on appropriation of compensation under Article [9, 16 and 17] of the Concession Agreement, and only the balance remaining shall be paid to the other Lenders.

2.8 Any delay in the repayment of the principal or interest for and in respect of the Bonds shall attract interest at a rate of 3% (three per cent) above the rate of interest applicable for the Bonds.

2.9 The Parties agree and confirm that upon execution of this Agreement, the Debt Fund shall, acting through the Lenders' Representatives, be deemed to be a party to the Escrow Agreement and the Substitution Agreement for the Project, and all rights, privileges and obligations of the

Lenders shall also vest in the Debt Fund. The Parties further agree and confirm that the provisions of the Concession Agreement and all other agreements, including the Escrow Agreement, Substitution Agreement and Financing Documents, shall be read and construed so as to give effect to the provisions of this Agreement, but without increasing any financial obligations and/ or liabilities of the Concessioneing Authority under the Concession Agreement.

2.10 By counter-signing the Tripartite Agreement, the Lenders' Representative, acting on behalf of the Lenders agrees, confirms and undertakes that the *pari passu* rights, title or interest of the Lenders in compensation, to the extent such rights, title or interest are provided in the Concession Agreement, Substitution Agreement, Escrow Agreement, Financing Documents or any other agreement, shall be subordinate to the rights, title or interest created by the Bonds in favour of the Debt Fund, and accordingly, the compensation shall be applied first for the redemption of Bonds and only the balance remaining, if any, shall be paid into the Escrow Account for meeting other obligations⁶, including the balance Debt Due. For the avoidance of doubt, the Parties expressly agree that the Debt Fund may, in its discretion, exercise all the rights and privileges of the Lenders' Representative under the Concession Agreement, Substitution Agreement, Escrow Agreement and this Agreement. The Parties further agree that save and except the application of compensation for redemption of Bonds in pursuance of this Agreement and subject to the provisions of Paragraph 2.7, the Lenders shall have *pari passu* charge on the revenues of the

⁶ It is hereby clarified that statutory dues shall have priority over the rights of all lenders including the Debt Fund

Concessionaire in accordance with the provisions of the Concession Agreement.

2.11 The Debt Fund may, by notice to the Parties, transfer all or any Bonds to any other person, and upon such transfer, the rights and obligations of the Debt Fund shall vest in such person. Provided that no such notice shall be required for transfer of Bonds if they have been listed in any recognised Stock Exchange and such transfer is in accordance with the regulations of the Stock Exchange.

2.12 Notwithstanding anything to the contrary contained in this Agreement, the Debt Fund may have the option to extend a term loan to the Concessionaire for an amount not exceeding 50% (fifty per cent) of its total exposure to the Concessionaire and the provisions of this Agreement shall apply *mutatis mutandis* to such term loan as if it were a Bond.

3. REDEMPTION OF BONDS

3.1 The Concessionaire agrees and undertakes that upon completion of the tenor of the Bonds, it shall redeem the same by making full and complete payment of the outstanding principle and the interest thereon.

3.2 Notwithstanding anything to the contrary in this Agreement, the Debt Fund may by notice require the Concessionaire to redeem upto 10% (ten per cent) of the value of the Bonds in any financial year and upon notice in this behalf, the Concessionaire shall redeem such Bonds no later than 120 (one hundred and twenty) days from the date of receipt of such notice.

3.3 The Parties expressly agree that the Debt Fund and the Concessionaire may at any time by mutual agreement undertake early

redemption of the Bonds and upon full redemption thereof, this Agreement shall cease to be in force.

3.4 The Parties expressly agree and confirm that in terms of Article [15, 16 and 17] of the Concession Agreement, the Concessions Authority has covenanted that in the event of termination of the Concession Agreement, the Concessions Authority shall pay compensation in accordance with the provisions of the Concession Agreement, which shall be applied for redemption of the Bonds in accordance with the provisions of this Agreement. The Parties further agree and confirm that upon termination on account of a Concessionaire Event of Default or Concessions Authority Event of Default, the Concessions Authority shall pay compensation in accordance with the provisions of the Concession Agreement,

3.5 The Parties agree and confirm that in the event of default in Debt Service by the Concessionaire, the Lenders shall have the right to enforce termination of the Concession Agreement in terms of Clause [15.1(a)(xi)] and [17] of the Concession Agreement, which *inter alia* requires the Concessions Authority to pay compensation in accordance with the provisions of the Concession Agreement. [The Parties further agree that in the event the Concessions Authority approves the issuance of additional Bonds under the provisions of Paragraph 2.1 of this Agreement, the liability of the Concessions Authority shall, notwithstanding the provisions of the Concession Agreement, extend to an amount equal to 100% of the compensation in Concessionaire Event of Default.]

3.6 The Concessions Authority agrees and undertakes that upon receipt of a notice under and in accordance with the provisions of Clause [3.2] of

the Substitution Agreement, it shall, no later than 15 (fifteen) days from the date of receipt of such notice, issue a notice to the Concessionaire requiring it to cure the Financial Default and in the event the default is not cured before the expiry of the Remedial Period specified in Clause [15.4] of the Concession Agreement, a Concessionaire Default shall have occurred and the Concessions Authority shall issue the Termination Notice forthwith, but no later than 15 (fifteen) days from the date of occurrence of Concessionaire Default, and shall make compensation no later than 15 (fifteen) days from the date of Termination Notice. The Parties expressly agree that the timelines specified in the Paragraph 3.6 of this Agreement are not in modification of the Concession Agreement but only in elaboration thereof.

3.7 The Parties expressly agree and confirm that the rights of the Debt Fund and the Lenders' Representative to enforce termination of the Concession Agreement in accordance with Paragraph 3.6 may be exercised individually or jointly, as the case may be, by the Debt Fund and/or the Lenders' Representative.

3.8 The Parties expressly agree that the Concessions Authority shall, instead of depositing the compensation in the Escrow Account of the Project, redeem the Bonds by making payments due and payable to the Debt Fund, and the balance, if any, shall be paid into the Escrow Account. The Parties further agree that the provisions hereof shall in no way be construed to increase the financial liability of the Concessions Authority for and in respect of the compensation [save and except as provided in Paragraph 3.5 for and in respect of the additional bonds specified therein].

3.9 The Parties agree and confirm that the amounts, if any, paid by the Concessioneing Authority for redemption of Bonds and the balance compensation, if any, paid as per the Concession Agreement into the Escrow Account shall be deemed to be a valid discharge of its obligations to make compensation under and in accordance with the Concession Agreement.

4. FEES

4.1 The Debt Fund shall pay to the Concessioneing Authority, 0.05%⁷ (zero point zero five per cent) per annum of the outstanding debt financed by the IDF, by way of a guarantee fee in consideration of the obligations of the Concessioneing Authority hereunder; [provided that the guarantee fee shall be 1% (one per cent) in respect of Bonds for which the foreign exchange risk is to be borne by the Concessionaire] [provided further that the guarantee fee for and in respect of the additional Bonds specified in Paragraph 2.1 shall be 3% (three per cent) per annum of the nominal value thereof].

4.2 The guarantee fee specified in Paragraph 4.1 shall be due and payable annually before commencement of the financial year to which it relates. In the event of delay in payment of the guarantee fee, the Debt Fund shall pay interest at the rate of 14% (fourteen per cent) per annum, to be computed on a daily basis and compounded every month for the period of delay; provided, however, that if such delay exceeds the period of 180 (one hundred and eighty) days this Agreement shall cease to be in force, and upon termination of the Concession Agreement at any time thereafter, the Concessioneing Authority's obligation to pay the compensation to the Debt Fund shall be deemed to be reduced by 20% (twenty per cent) thereof.

⁷This fee percentage shall be reviewed after three years or earlier, if required, by the IMG under Secretary (EA) as approved by the Cabinet.

5. REPRESENTATIONS AND WARRANTIES

5.1 Each of the Parties represent, warrant and confirm the following:

- (a) This Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and obligations enforceable against it in accordance with its terms;
- (b) the execution, delivery and performance of this Agreement will not conflict with or result in a breach or constitute default under or accelerate performance required by any of the terms of Memorandum and Articles of Association of any Party or any applicable law or any covenant, contract, arrangement or understanding, or any decree or order of any court to which it is a party or by which it or any of its properties or assets is bound or affected;
- (c) all information provided by the Party is true and accurate in all material respect;
- (d) there are no actions, suits, proceedings or investigations pending or to its knowledge threatened against it at law or in equity before any court or any other judicial, quasi judicial or other authority or body, the outcome of which may result in a material breach of this Agreement;
- (e) the Party has complied with all Applicable Laws and Applicable Permits in all material respects;
- (f) the Concessionaire is not in a material breach of the Concession Agreement or of any Project Contracts or Financing Documents; and

(g) no representation or warranty contained herein or in the Concession Agreement or any other document furnished by the Party contains or will contain any untrue or misleading statement of material facts or omits or will omit to state a material fact necessary to make such representation or warranty not misleading.

5.2 In the event of any occurrence or circumstance coming to the knowledge of the Party making any representation hereunder which renders any of its aforesaid representations or warranties untrue or incorrect at any time during the subsistence of this Agreement, such Party shall immediately notify the other Parties hereto about the same. Such notification shall not have the effect of remedying any such representation or warranty that has been found to be incorrect or untrue.

6. ARBITRATION

6.1 Any Dispute which is not resolved amicably by conciliation shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Paragraph 6.2 of this Agreement. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

6.2 In the event of a dispute between two Parties, there shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the

event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules. In the event of a dispute involving all the Parties, a single arbitrator shall be appointed in accordance with the Rules.

6.3 The arbitrators shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Paragraph 6 shall be final and binding on the Parties as from the date it is made, and the Parties agree and undertake to carry out such Award without delay.

6.4 The Parties agree that an Award may be enforced against the Concessionaire, the Concessions Authority and/or the Debt Fund, as the case may be, and their respective assets wherever situated.

6.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

7. COMING INTO FORCE AND DURATION OF THE AGREEMENT

This Agreement shall come into force and effect on the date hereof and shall remain in force until the redemption of all Bonds.

IN WITNESS WHEREOF, this Agreement has been executed on the day and year first above written.

For and on behalf of the Concessions **Authority**

Signature :

Name :

Designation :

For and on behalf of the **Debt Fund**

Signature :

Name :

Designation :

For and on behalf of the **Concessionaire**

Signature :

Name :

Designation :

Agreed, Accepted, Countersigned and Witnessed by the Lenders'
Representatives for and on behalf of **Lenders** by

Signature :

Name :

Designation :

SCHEDULE-I

(Refer Recital G)

S.No.	Name of Lenders/Bond holders' Trustee with address	Amount to be refinanced IDF by way of Bonds/Loan (Rs. in crore)	Remarks, if any
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

SCHEDULE-II

(Quantum of compensation)

As per the definition in the Concession Agreement, the quantum of (i) Book Value, (ii) Debt Due and (iii) Actual Project Cost as on the date of execution of this Agreement, and at the end of each financial year until the end of the concession period is mentioned in the table below:

(Rs. in crore)

Date	Book value	Debt Due	Actual Project Cost	Amount of compensation⁸
1				
2				
3				
4				
5				
6				
7				
8				

⁸On Termination due to Concessionaire Event of Default after the Date of Commercial Operation, the compensation payable by the Concessioneing Authority (as per 17.1 (b) of the Model Concession Agreement for Private Sector Projects in Major Ports), shall be the lowest of (i) [Book Value (ii) 90% of Debt Due and (iii) the Actual Project Cost)

ANNEX-I

(Refer Recital A)

[Attach True Copy of the Concession Agreement]