



Container Terminal Concession Guidelines

Marc H. Juhel

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Foreword

Modern and efficient seaports are ever more important for Africa to seize opportunities from international trade. Without frequent and reliable cost-effective shipping services, African exports will be less competitive and the continent less attractive for investors. As UNCTAD¹ data on transport costs and liner shipping connectivity show, Africa still pays more for the transport of its international trade, and most countries on the continent have relatively low levels of maritime transport connectivity.

But improvements are on the way. African countries are advancing with trade facilitation reforms as well as port reforms, and infrastructure investments in their seaports have caught up with other continents. Latin American and Asian countries had already in the 1990s and 2000s invested heavily in their seaports, initially with “brownfield” reforms in Latin America, and mostly new “greenfield” ports in Asia. As shown by the recent study of the World Bank *Container Terminals Concessions – Making the Most of Ports in West Africa* (World Bank Report ACS17308), important improvements have now also been achieved in Africa.

However, not all operational and cost improvements achieved in African ports have been passed on to the shipper in terms of lower prices or better services. It is for this reason that concessions need to be better planned and implemented. The present *Container Terminals Concession Guidelines* are a very timely and helpful contribution in this regard.

Most African ports largely serve their own national hinterland, with few clients in neighboring countries. Inter-port competition is limited due to low levels of trade and transit facilitation, obstacles at border crossings, and no common regional markets for trucking transport services. Many ports are thus de facto in a monopolistic position, with little alternative choices for importers and exporters. It is important for policy makers to carefully plan private sector participation in such

¹ United Nations Conference on Trade and Development

situations. This is especially the case in the current environment, where container ports are confronted with ever larger ships and changing alliances among carriers. The *Container Terminals Concession Guidelines* will help port authorities and ministries of transport and infrastructure to take decisions on alternative concession schemes, time frames, and the timely planning of extensions.

A handwritten signature in black ink, appearing to be 'JH', positioned above the name Jan Hoffmann.

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Division on Technology and Logistics, UNCTAD

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The *Container Terminal Concession Guidelines* was developed by SSATP. Marc Juhel, consultant and former Transport Practice Manager at the World Bank is the main author, with inputs from Yaya Yedan, SSATP Regional Integration pillar leader, Olivier Hartmann, Senior Trade Facilitation Specialist at the World Bank Group, under the guidance of Ibou Diouf, SSATP Program Manager.

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Acronyms and Abbreviations

BOOT	Build-Own-Operate-Transfer
BOT	Build-Operate-Transfer
DPR	Detailed project report
GDP	Gross domestic product
IFC	International Finance Corporation
JDA	Joint development agreement
LCT	Lomé Container Terminal
LOI	letter of intent
PCC	Port community council
PCS	Port community system
RFP	Request for proposal
SSATP	Africa Transport Policy Program
TEU	Twenty-Foot Equivalent Unit
TOC	Terminal operating company

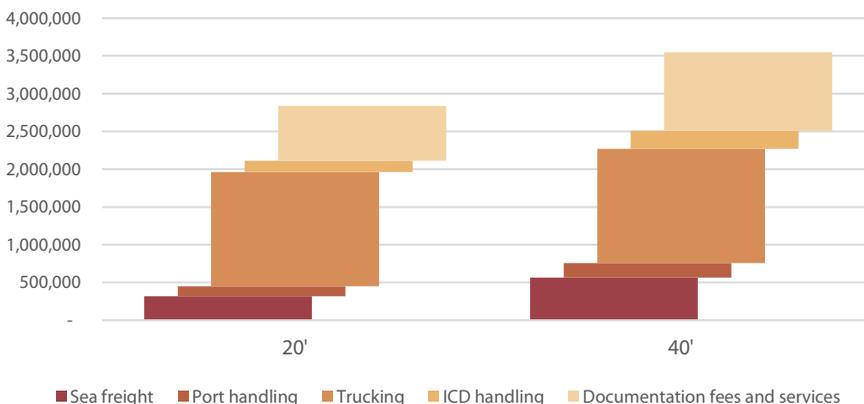
Preliminary Considerations

Port container terminals are important to efficiently accommodate external trade flows in many countries around the world, and are considered critical for African countries engaged in improving the overall competitiveness of their economies.

However, ports are just a node in the logistics chains linking the African continent to the world and if optimizing this node is important, it is far from being sufficient. Adequate attention also needs to be paid to the whole transport chain, in particular the inland logistics segment. This necessity becomes obvious when looking at the typical costs distribution for transporting a 20-foot or 40-foot container between Europe and a landlocked African country, which shows port handling amounting to less than 10% of the total costs in most cases (see example below). Even if this share may be slightly higher for a coastal country, it will remain noticeably less than the cost of both shipping and land transport. Coastal countries can indirectly impact sea freight tariffs by offering very cost-efficient calls to shipping lines. While this should be a key objective of any container terminal concession, governments have other means at their disposal to lower inland logistics costs. Improved road infrastructure, higher market contestability, as well as enhanced cross-border facilitation measures should be used as part of a broader strategy to increase competition between regional logistics chains, and consequently to exercise a downward pressure on inland transport costs.

The container terminal industry in Sub-Saharan Africa is facing a changing environment – much less predictability and greater uncertainties on expected volumes. The containerization of its trades was largely complete by the time the first wave of concession deals took place (concession of the container terminal in Dar es Salaam, management contract for the port of Djibouti, and concession of the port of Maputo, all in 2000). From 2000 to 2015, container traffic growth was supported by the strong economic growth in the continent at a time when the elasticity of trade to gross domestic product (GDP) was much greater than 1. Even the world crisis of 2008-2009 was just a temporary and short lived pause in what was largely perceived as an unending period of growth.

Total charges in FCFA paid for a container from Antwerp to Ouagadougou via Abidjan (by road)



In such a context, concessions for brownfield terminals were straightforward enough, as the base traffic at the time of the concession could only grow, allowing the incoming operator to modernize the equipment and the terminal with the cash generated by the revenue of the concession. The strong growth prospects also prompted further development of greenfield ports already in operation (Doraleh in Djibouti, starting operations in December 2008, Coega in South Africa, starting operations in October 2009), or still at blueprint stage (Lekki and Badagry in Lagos Nigeria, for instance).

GDP Sub-Saharan Africa IMF WEO April 2017 in US\$ billion



However, the commodity crisis hitting oil and mining products exporting countries from 2015 onwards on one hand, and the decoupling of trade growth from GDP growth which now sees trade growing slower than GDP on the other hand, combined with the relative scarcity of available seafront in existing container terminals are now conspiring together to make future port development both more expensive and far riskier.

The industry is also shifting from brownfield terminals to greenfield developments. Terminal operation concessionaire and port authorities have expanded the capacity of existing terminals by investing heavily into modern handling equipment, adding ship-to-shore (STC) gantry cranes, densifying the container yard through rubber-tired gantry (RTG) operation or expanding container yard space by converting adjacent breakbulk yards. However, there are limits to the number of cranes that can be added along the existing berths, and any significant capacity development in future will need to be on new berths within the existing port limits (TC2 in Abidjan, Berth 19 in Mombasa), or in completely new sites (Lekki and Badagry in Nigeria, Lamu in Kenya, or the dig-out extension of Durban).

As a result, the magnitude of investments is several orders higher than just in cranes, from a couple of hundred million dollars for new berths within a port to a couple of billion dollars if a new marine infrastructure needs to be created.

Furthermore, the investment amount is not the only added complexity in greenfield terminals, it is also the difference in the cash flow profile. In brownfield terminals, terminal operation concessionaires generally operate with a positive cash flow throughout the concession, financing the upgrades in the handling equipment from the revenue. In greenfield developments, the investment comes first, and it is only several years later that the terminal can finally enter into operation and start generating revenue to reimburse the invested capital expenditure.

This will often imply for concessionaires and port authorities the need to resort to debt financing at a time when lenders, increasingly concerned about the uncertainties on future levels of activity, will tend to require a higher percentage of equity financing to close the deal. It will also create substantial contingent public financial liabilities as governments will be exposed to the full costs and liabilities of certain force majeure events or early termination scenarios that neither private operators nor private lenders will accept to endorse.

Finally, governments need to do their homework and set realistic ambitions for the project like regional gateway versus hub versus local economy. Because past concessions largely managed to successfully transform dilapidated terminals into modern facilities while generating revenue for the port authorities and the governments, and in certain cases, increased transshipment activities, many ports now harbor ambitions to become regional hub, or become the sole gateway for their landlocked hinterland. The inherent optimism underpinning infrastructure investment plans is common in the transport sector, and by far not only for ports, but it remains nevertheless necessary for governments and port authorities to take fully into account the regional context in their traffic forecasts. In particular, it is advisable to keep in mind that developing a transshipment hub requires a minimum level of certainty about the commitment of a shipping line to channel a significant enough traffic through the terminal (refer for instance to the initial plans of MSC shipping company to use San Pedro as transshipment hub for West Africa, before switching to Lomé).

1. Background

Why are those Guidelines needed?

The decision, by a national government or a port authority, to contract out the development and operation of a container terminal facility to a qualified private operator sets in motion a process involving relationships with quite a different set of players compared to traditional port operations and management. It also most often requires a change in the function of the port authority, either from service provider to regulator, or from licensing authority to long-term contract manager, or a mix of both. Whatever the specific local conditions in play, this means a clear evolution in the respective roles of the public and private players having to work together to deliver the services expected by the clients of the port and the national economy at large.

Effectively dealing with experienced private container terminal operators requires public counterparts, port authorities and government administrations, to master the legal and institutional skills necessary to reach balanced and profitable arrangements for their countries. Even when the required legal framework has been thoroughly established, existing institutions may find it hard to adjust to dealing with partners whose short-term objectives may not at first sight coincide systematically with the long-term policy goals of public authorities. However, past and current experience does show that both can be preserved, provided both sides have the tools and skills needed to reach an effective contractual agreement. Not surprisingly, as this is the nature of the markets they have been operating in, private operators will bring to the negotiation table very strong legal competencies and experienced negotiating skills. Since these skills were not so much required to deliver their usual mandate so far, many port authorities may lack at the outset a comparable capacity. While on-the-job training will definitely be part of the learning process, specialized assistance by transaction management professionals is often warranted. The Guidelines will identify key areas that typically may need support to ensure a successful outcome.

These Guidelines do not intend to summarize or replace the various books and toolkits that exist and provide valuable insights and knowledge on the port concessioning process². Instead, they will refer to those sources for generic information on definitions and processes, and will focus primarily on highlighting critical steps, contract provisions, or contract management tools, which need particular attention throughout a concessioning journey. Whenever available, illustrative examples will be provided.

Definition and content of a port concession agreement

The World Bank Group defines a concession as “An arrangement whereby a private party (concessionaire) leases assets from an authorized public entity (grantor) for a defined period and has responsibility for financing specified new fixed investments during the period and for providing specified services associated with the assets; in return, the concessionaire receives specified revenues from the operation of the assets; the assets revert to the public sector at expiration of the contract” (World Bank Port Reform Toolkit).

Concession including new infrastructure construction (BOT and variants)

Terminal infrastructure financing and construction as part of a concession contract can come in a number of different contractual arrangements, Build-Operate-Transfer, Build-Own-Operate-Transfer, Build-Transfer-Operate, Design-Build-Finance-Operate, etc. These variants imply specific provisions in the tendering process as well as in the concession contract itself. The *World Bank Port Reform Toolkit* offers a list of detailed definitions of these arrangements. For container terminals, two variants in particular are often used:

BUILD-OPERATE-TRANSFER (BOT): Legal title to the newly constructed port infrastructure, and sometimes other assets, remains with the government or the 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.

² Two useful pieces of work are worth mentioning: (i) The World Bank Port Reform Toolkit Edition 2006, available on the eLibrary of the World Bank Group and (ii) *Les Concessions Portuaires* by Jean Grosdidier de Matons, Editions EMS, 2012, available on line at editions-ems.fr.

BUILD-OWN-OPERATE-TRANSFER (BOOT): It is also possible that a legal title for the land is acquired directly by the concessionaire. Under a BOOT model, the parties agree to have title over all assets that are passed to the government at the end of the concession.

Concession of operations (with or without equipment financing)

Operational concessions may take the characteristics of a leasehold on a defined port area, complemented with performance objectives to ensure optimal utilization of a scarce public resource. If the concession includes equipment financing, it must specify whether the equipment remains under the ownership of the operator at the end of the concession or if it is transferred to the port authority, and under which conditions.

Different scopes of a port concession

Concession of a specialized terminal

Most concession contracts involve a single specialized terminal facility. Container terminals, dry bulk and liquid bulk terminals make the greatest proportions of those contracts. However, bulk terminals are frequently concessioned and operated as part of broader vertically integrated industrial logistics chains, whereas container terminals are mostly stand-alone facilities. Corresponding concession contracts reflect this distinction accordingly, particularly in terms of performance criteria and monitoring arrangements.

Concession of a whole port (with delegation of public authority)

In this formula, two distinct agreements are packaged into one: (i) a commercial contract that basically includes the provisions of a traditional concession, and (ii) an administrative agreement that delegates specific public authority mandates to the operator. Control and monitoring of this kind of contract requires a double level of supervision on both the operational and regulatory sides. In particular, the recourse options against regulatory decisions by the concessionaire must be explicitly spelled out and the sector institutional framework adequately prepared to handle them.

These Guidelines focus on single container terminal concessions.

Objectives of a container terminal concessioning process

The decision to concession out a container terminal must be reached based on explicit objectives, which will guide a number of critical decisions in the process, like selection criteria, key performance indicators, monitoring tools and remedies.

Operational efficiency and innovation

Efficiency improvements and opening up to innovative practices should usually be at the core of a port concessioning process. Irrespective of other potential objectives, efficiency and innovations should always be explicitly pursued and contractual provisions should provide a clear incentive structure towards these goals. The main rationale for these lay in the need to optimize utilization of existing public assets and of any development that will ultimately revert to the port authority. This approach ensures the best cost-efficient use of public investments in the port and in collateral assets.

Port costs reduction

In parallel with efficiency improvements, bringing port costs down is the natural complement of operational rationalization. It comes back to the core mission of the port system, which is to serve the domestic economy by providing efficient sea/land transfer services at the least possible cost. While ports can and often offer a broader array of services, it must remain the first critical objective of any port, and a concession operation must help achieving it. Pursuing this objective implies having first a reliable assessment of actual port costs in the present situation, and a good understanding of the potential for costs reduction in the terminal operating structure. This potential will then have to be mobilized, both in the bidding/negotiation process itself, and in the monitoring of key performance indicators of the concession. This is also an area where users' feedback is of paramount importance, to avoid situations where costs get just transferred to other parts of the port system, with little meaningful impact in final analysis for port users.

Finance mobilization

Concessions are sometimes viewed by governments or public authorities as a means to access infrastructure financing options outside the fiscal constraints of national budgets. But private and commercial financing is practically always more costly than traditional public funding, and worthwhile only when it makes the attainment of the efficiency and port costs reduction objectives possible. Care

should also be taken to avoid subscribing to contingent liabilities over the concession period, which have the potential to significantly undermine the financial bottom line of the operation for public authorities. In any case, a concession should not be construed primarily as a source of alternative funding for long-term terminal infrastructure, at the expense of efficiency improvements and, in particular, of a sustainable reduction in costs for port users.

Revenues optimization

While it is legitimate for the concessioning authority to ensure full cost recovery of incurred expenses in building the assets to be concessioned or in preparing the area to be developed by the concessionaire, and to get a fair remuneration of its investments, care should be taken to avoid turning a port concession into a *cash cow* for public finances. This would come in all likelihood at the expense of the port costs reduction objective, and consequently result in an additional tax on the economy as a whole. However, if a port authority, because of special circumstances, still intends to select a concessionaire based on an income maximization criterion, it should do so while simultaneously focusing on two collateral aspects: (i) factoring in the expected operational improvements, assess the final costs to be borne by the terminal's users, and assess what these costs would be should the expected operational improvements fail to materialize; and (ii) develop an allocation plan for use of the additional resources generated by the concession (over and above the costs of concessioned assets referred to above), which should be primarily, if not exclusively, devoted to further modernize or extend port capacity in line with expected demand.

Facilitate port growth and development

This is a generic objective that must be construed as part of the optimization of the port sector contribution to the national economy. In this context, it may include valuing the additional networking opportunities the concessionaire may bring to the maritime connectivity of the country through its relationships with shipping lines and foreign terminals, or its capacity to contribute to the development of special economic zones and improve the domestic investment climate, therefore helping bringing more activities and employment around the port area. While this objective may be formally added to any of the previous ones, one should realize its translation into practical evaluation criteria is likely to remain subjective and prone to exaggeration, so it should probably be construed more as an overall background goal than as an objective assessment tool when it comes to assessing a possible deal.

2. The Concessioneing Process

Before embarking on a concessioneing process, care must be taken to clearly identify the many players, local and international, who may have a stake in the process. While some will naturally become involved as the operation progresses, the concessioneing authority may need to proactively reach out to others to ensure its strategy and intentions are well understood, and in doing so quell concerns that, if not addressed early in the process, may stall it at a later stage, if not derail it entirely. Once stakeholders are all accounted for, a decision will have to be reached as to which kind of process the concessioneing authority intends to follow to select a terminal operator. This decision will then trigger a series of steps ultimately leading, if successful, to the signature of a concession contract.

The players

Governments

Governments have the seminal role of establishing the legal and regulatory framework that will make the concessioneing process possible. Beyond that, it is generally not advisable that they directly enter into concessions agreements with private port operators, unless the local conditions make it the only practical option (in post-conflict situations for instance, when the domestic administration is not yet in a position to issue and manage contracts). There are several practical reasons for this. Firstly, a government, or a line ministry for that matter, is not the place to manage contracts on a daily basis, its role is to define strategy, not manage commercial operations. Secondly, by construction it lacks the responsiveness required to answer requests coming from a market operator, particularly when local authorities have vested interests in the matter (an example was the early container terminal concession in Buenos Aires, signed with the Ministry of Transport, where land use issues for further development involved the municipality and the port authority, leading to delayed decisions or stalled developments). Finally, it complicates conflict resolution, since any contractual disagreement has to be treated at the ministerial level instead of locally.

Port authorities

Local port authorities are usually the natural concessioning authorities for container terminals. They will conduct the concessioning process under the framework defined by the government, either in a port sector law or in a more generic piece of legislation specifying the procedure to be followed and the requirements to be met to maximize the benefits for the country. They will be the contractual counterpart of the private concessionaire and will manage all aspects of the contractual relationship – operational, commercial, and regulatory as needed. Most importantly, it is highly advisable that they refrain from requiring to be part of the shareholding structure of the concessionaire. The notion of the port authority being a shareholder in an operator, even in a minority position, contradicts the landlord port principle whereby the port authority should not be involved in commercial operations. Furthermore, not only does it create an obvious conflict of interest, but to maintain an appearance of level playing field the port authority should then be a shareholder at the same level in all future concessions in the area it manages, which quickly becomes impractical. The usual reason invoked has to do with control of the concessionaire, but the good answer to that is a good enforceable contract, competent monitoring of performance, and willingness to apply remedies when warranted.

Box 1: Risks for a port authority being a shareholder of its terminal operator

By becoming a shareholder, even on a minority basis, in the concessionaire operating its container terminal, a port authority puts itself in a situation of potential multiple conflicts of interest:

Strategic development: as traffic grows, the concessionaire's best interest would be to apply for the authorization to expand its facilities so that it remains in a monopoly situation within the port area, whereby the port authority's strategic interest would be to promote competition by bringing in another concessionaire when traffic levels make it possible.

Tariff policy: while the concessionaire's short term objective is to maximize profit for its shareholders, the port authority's paramount goal is to lower port costs for its clients.

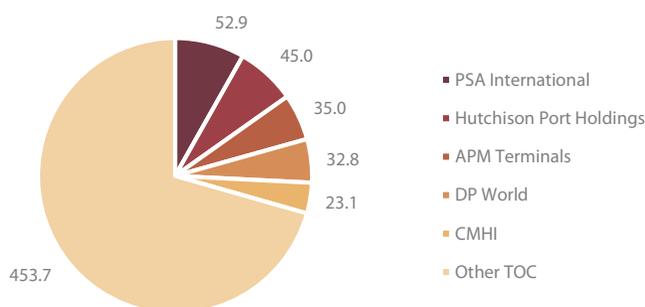
Customer claims: while the concessionaire's interest would be to settle a claim quickly and discreetly, the port authority's concern should be to hold the concessionaire accountable for any wrongdoing, in particular in case of potential discrimination between terminal customers.

Terminal operating companies

The terminal operating companies can be of three different kinds: (i) independent operators, with no corporate linkages with the shipping lines (Hutchison, ICTSI, SSA...), (ii) subsidiaries of major shipping lines (APMT, Cosco, TIL, Terminal

Link...), and (iii) operators linked to port authorities (PSA Corporation, DP World...). Today the top ten global terminal operators, which include the three kinds, handle about 37% of the world's container port throughput. Some shipping lines also operate their own terminals.

Figure 1: Equity TEU volumes of the main terminal operating companies



Source: Drewry Shipping, Top TOC 2014

Table 1: Terminal operating companies in sub-Saharan Africa

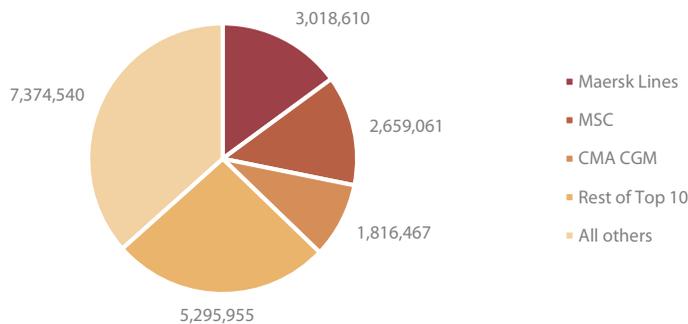
Terminal operators	
APM terminals	Luanda (Angola), Namibe (Angola), Douala (Cameroun), Pointe Noire (Congo), Abidjan (Côte d'Ivoire), Tema (Ghana), Monrovia (Liberia), Badagry (Nigeria), Lagos Apapa (Nigeria), Onne (Nigeria)
Bolloré Africa Logistics	Cotonou (Benin), Douala (Cameroun), Moroni (Comoros), Pointe Noire (Congo), Abidjan (Côte d'Ivoire), Libreville (Gabon), Tema (Ghana), Freetown (Sierra Leone), Conakry (Guinea), Lagos Tin Can Island (Nigeria), Lomé (Togo)
ICTSI	Matadi (DR Congo), Toamasina (Madagascar), Lekki (Nigeria)
DP World³	Maputo (Mozambique), Dakar (Senegal), Berbera (Somalia), Bossaso (Somalia)
Hutchison Ports	Dar es Salaam (Tanzania)
CMA-CGM	Tangier Med (Morocco), Lekki (Nigeria)
Portek	Libreville (Gabon), Port-Gentil (Gabon)
TIL / MSC	San Pedro (Cote d'Ivoire), Badagry (Nigeria), Lomé (Togo)
China Merchant Holding	Djibouti (Djibouti), Lagos Tin Can Island (Nigeria), Lomé (Togo)

³ DP World used to manage the port of Doraleh in Djibouti until the Government cancelled the concession in July 2014.

Shipping lines

The shipping lines are the direct customers of a terminal. They are mostly interested in the reliability and cost of calls for their ships. Schedule integrity being a paramount requirement of liner services, reliable and consistent container handling productivity, together with guaranteed timely access to terminals through berthing window schemes, will be of major concern for them and will guide their choices of ports of call, in particular for motherships.

Figure 2: Fleet operated in TEUs by the main shipping lines



Source: Alphaliner Top 100 2015

Shippers

The shippers are the ultimate consumers of port services, but they are typically not a party to their organization. Widening the range of shipping services available in any given port is in their interest, as it will normally increase the competitive pressure on freight rates and simultaneously expand the number of destinations economically reachable for products distribution or inputs sourcing. Furthermore, improving the cost efficiency and operational performance of a container terminal is clearly a strong argument to bring more shipping lines to call at the port. So shippers will have a vested interest in seeing the concessioning process yield positive results in terms of productivity increase and costs reduction. They may have a concern though, if the main or single container terminal of the country is to be concessioned to a specific shipping line, since fears of possible discrimination risk may deter other lines from calling at the port and rather serve it through cheaper feeder ships, hence reducing direct connectivity and making market access and sourcing more difficult.

Port labor

Port workers often entertain legitimate concerns about concessions to the extent that in many instances, ports have been used in the past by governments as convenient social shelters to provide employment to a number of unskilled or poorly skilled laborers. As a result, working practices have been slow to evolve, in particular when modernization of port operations leads to a reduction in operational jobs, which is typically the case with container handling. Port labor must therefore be closely associated by port management when initiating a terminal concessioning process, so that appropriate transition measures are defined and implemented ahead of concluding the deal itself. It is therefore recommended practice to associate port labor unions early on to the discussions on potential container terminal concessioning. When there are some reasons to anticipate significant change in manpower requirements following the concessioning, forming a special task force with unions' participation to plan ahead for the evolution of the working conditions and jobs on the terminal is advisable (see World Bank *Port Reform Toolkit Module #7*).

International competition versus direct contracting

When considering the option to concession out a container terminal, port authorities have basically two main options: (i) organize an international tendering process, or (ii) contract directly through negotiations with a known partner of the port or with an entity having submitted and unsolicited bid.

Benefits of international competition

The paramount concern of governments and public authorities when entering any kind of public-private partnership arrangement, like a container terminal concessioning process, is to ensure, and demonstrate to their constituents, that it will produce value for money, i.e. they will get more out of it compared to what they were getting with the traditional public operated system, and hopefully at a better price. To this end, they must convince all stakeholders that the commercial partner they will select is indeed the most capable of producing this outcome. A very effective way to go about this is to organize an open international competition. If properly managed, it will mechanically ensure the port is getting the best possible partner at this particular point in time. It will also avoid the suspicion that almost systematically comes in case of a direct negotiation with a single project sponsor. And as exposed before, a number of players are available today to compete for these concession contracts. So whenever possible, organizing an international ten-

dering process should be the preferred option to seek a professional operator for a container terminal.

Direct contracting

Apart from the usual misgivings about the optimization of contract conditions, direct contracting may also risk losing an opportunity for the port to avail itself of innovative solutions that may come up during an open consultation process. However, a sub-optimal agreement where a good deal of the financial benefits gets captured by the concessionaire at the expense of port users is by far the greatest risk. There are cases, however, where direct contracting may make sense, provided appropriate safeguards are implemented:

- *When an existing facility, so far operated under the “tool port” model with private stevedores, is turned into a full-fledged container terminal (see Box 2):* The incumbent operators may then form a consortium to negotiate with the port authority a concession contract replacing the typical operating license they were operating under. In such a case, the port authority should, in principle, be well equipped for this negotiation, since it will be expected to have a deep knowledge of the costs involved in the operations to date, as well of the costs involved in both transforming and operating the new facility. Simultaneously, the incumbent operators, because of their inherent detailed knowledge of the local conditions, may be expected to put forward a competitive proposal. In any case, a comprehensive understanding by the port authority of the costs of the new operation and of the appropriate productivity targets to be met by the concessionaire is a must for the direct negotiation of a concession contract to be successful for both parties.

Box 2: Nigeria direct contracting concessions

In 2004, the authorities established a new legal and regulatory framework that made it possible to convert the Nigeria Ports Authority into a true landlord port agency and set up the independent Regulatory Commission. Bid documents were issued in four rounds in 2004 and 2005, leading eventually to the award of twenty-five terminal concessions. While thirteen were concessioned through a competitive process, another twelve were so through direct negotiations.

These negotiations involved the local companies having been operating the terminals so far, with or without the participation of new international partners. Ultimately, two concessions were awarded to local groups, and the other ten went to consortia made of the original local operators joined by international companies.

- When a shipping line, or a consortium including a shipping line, comes forward with a proposal to build and operate a new greenfield container terminal, possibly aiming also at transshipment activities (see Box 3): Since the project is usually part of the line's commercial development strategy, it may not lend itself to optimization via an international competitive tendering process. However, the port authority must still consider how to optimize its outcome as far as the national economy is concerned. Two considerations are paramount here: (i) **assess the proposal against any alternative use that could have been considered for the project location** (coastal land is a scarce resource and must be carefully managed by national authorities), and (ii) **ensure the proposal will deliver the best possible results for the country, both financially** (return on concessioned assets, i.e. land), **and economically** (cost efficiency of services to port clients). An additional issue may come into play when the project intends to serve primarily, and sometimes exclusively, the shipping line that sponsors it. In such a case, and when a common user terminal already exists in the vicinity, the port authority's concern should be to assess whether the withdrawal of this shipping line from the existing terminal may make the present operation no longer viable. Maintaining a common user terminal available to all port clients is obviously a must (apart from situations where traffic is large enough for each shipping line to operate its own terminal, as on the US West Coast).

Box 3: Lomé Container Terminal in Togo

Further to an initial concession contract negotiated in 2001, Bolloré Africa Logistics (BAL) was awarded in 2010 a 35-year concession to operate the Container Togo Terminal. In March 2011, the extension work for Togo Terminal was launched, for an additional quay of 450 meters and 16 hectares of yard space, which became operational in October 2014.

However, a second concession was signed in December 2008 for the development of a new greenfield container terminal with Lomé Container Terminal (LCT). LCT is owned by Thesar Maritime Limited, a Cyprus subsidiary of Global Terminal Limited (GTL), a sister company of Terminal Investment Limited (TIL), the terminal operating arm of MSC. GTL was absorbed in 2012 by TIL, while China Merchant Holding International (CMHI) acquired a share of 50% in Thesar Maritime Limited (TML) in August 2012. The final shareholders of LCT are therefore now TIL/MS and CMHI, holding 50% each. The duration of the concession is 35 years, with an option for 10 more years. The terminal is a multi-user facility, not reserved for MSC, and mainly devoted to transshipment operations. The Terminal entered into service in October 2014. The second phase of the development of LCT will enable it to reach a capacity of 2 million TEUs, with a maximum vessel size of 14,000 TEUs. As of beginning of 2015, LCT operates with 12 STS (ship-to-shore crane). So far the activity is promising and transshipment is picking up.

Unsolicited proposals

As a rule, unsolicited proposals must be handled carefully to avoid any misinterpretation by other stakeholders, whatever the outcome of the proposal. Openness and transparency must be brought into the process despite the possible confidentiality requirements expressed by the sponsor. Should the government or port authority find the proposal may have merit, an advisable way to move the process forward would be to reinject a modicum of competition in it using a *Swiss Challenge* formula.

The Swiss Challenge is a procurement method whereby a public authority, having received an unsolicited bid and found some technical merit in it, publishes the technical component of the original bid and asks for counter financial proposals. Should a new bidder bid lower for the same technical content, the original bidder is given a chance to match this new bid, in which case he is awarded the contract, but if he declines, the contract goes to the new lowest bidder. This formula actually works as a market test to ascertain the cost/quality ratio of unsolicited proposals.

When a port authority contemplates the possibility of accepting an unsolicited bid, without putting it through a Swiss Challenge, it must go back to the two paramount considerations highlighted above (see paragraph on *Direct contracting*). It is critical, in particular, for the port authority to be able to assess the realism and reliability of the cost structure of the proposal, for both the construction and operation phases, and to determine the adequacy of the proposed performance objectives by comparison with the regional competitors, to ensure the resulting combination of tariff and productivity will be an attractive option for present and future line customers. Yardstick benchmarking is therefore imperative in such a situation to avoid settling for a sub-optimal outcome.

Organizing an international tendering process

Sequence and timeline

Establishing a comprehensive and realistic timeline at the outset of the process is important to identify all the tasks to be taken care of and get a good handle on the overall organization of the project. For both credibility and transparency, it is important not to underestimate the time required to effectively complete every step of the process. Over ambitious timelines will unavoidably backfire and lead to criticism of the implementing authority for supposed lack of efficiency, whereas it was

most likely just over-optimism. But the consequence will be just as harmful. So better assess as reasonably as possible the time needed at each step of the way, paying particular attention to the approval stages, where clearance to move forward will be expected from public authorities. To the extent possible, past records of government approval sequences should guide the elaboration of the overall project timeline. The concessioning authority will hardly be criticized for completing the process earlier than planned, but most surely if the reverse happens. Once a timeline has been determined, it should be made public so that all stakeholders and interested parties are aware of the project status and of its anticipated milestones.

Figure 3: Examples of concessioning timelines

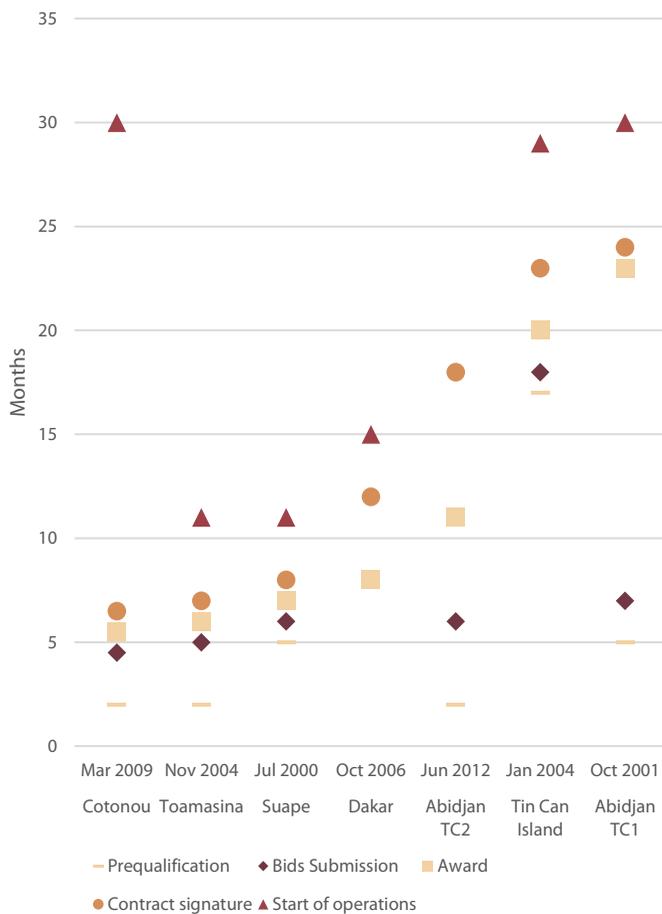


Figure 3 compares timelines for several concessions. The comparatively long time period to put in place the concession in Tin Can Island and the first Abidjan Terminal can be explained by the circumstances surrounding the concession: the process in Abidjan was interrupted by the civil unrest in 2002 and resumed on a negotiated basis, while in Lagos, Tin Can Island was part of a series of concessions that required additional time to assess. At the other end of the spectrum, Cotonou benefited from an extensive preparation phase, while the delayed entry into operation was linked to the construction work for the new terminal which was funded under the Millennium Challenge Account. Overall, depending on review and approval periods by public authorities, a total transaction period lasting between 12 and 18 months looks like a reasonable estimate.

As an initial guidance, it is reasonable to anticipate the following timeline when starting the process from scratch.

Table 2: Indicative timeline for concessioning process

Stage	Indicative duration
Legal due diligence and preparation of prequalification and draft bidding documentation	6 months
Prequalification phase	3 months
Tendering process	
Initial RFP, site visit, bidders conference, finalization of RFP documents	2 months
Final RFP	2 months
Bids evaluation and award	1 month
Contract signature	1 month
Total time	15 months

Term of the proposed concession contract

Determining the term of the proposed concession is a critical element, since it will decide the length of the contractual commitment between the authority and the operator. The first question could actually be whether it should be decided upfront by the concessioning authority, and therefore be an input into the tendering process, or should it be left for the bidders to propose, as a variable element to be assessed alongside the other evaluation criteria identified in the tender documents. At this point, it is worth bearing in mind:

FROM THE CONCESSIONING AUTHORITY'S STANDPOINT, the shorter the term is, the more often it will have the opportunity to re-open the competition for the market and consequently, to incentivize the incumbent to keep up its performance to justify getting a term extension.

FROM THE OPERATOR'S STANDPOINT, the longer the term is, the easier it is to plan for the development of the facility and the more comfortable it is to secure longer term financing backed by the expected revenues of the operations.

As a sensible rule, the term of the concession must match the depreciation period of the assets the concessionaire is required to invest in. It flows from this that the term could be rather short for a brownfield concession of a fully equipped terminal already in complete operational order, where the operator will just have to maintain the equipment and possibly invest in limited renewals, say between 5 to 10 years. Conversely, when the operator is asked to build and fully equip a greenfield facility, the size of the investment will lead to a longer contract, the experience suggests concession terms varying between 20 and 30 years.

So when it comes to choosing between the concession term being an input or a variable, the concessioning authority, based on its assessment of the investment costs involved and of the expected traffic to be handled at the terminal, may find it more practical to define the term for which it is seeking an operator. Otherwise, the risk exists that the bidders will be tempted to ask for longer terms than the above-mentioned rule would suggest, and even if the authority may specify it, it will give preference to shorter term submissions, factoring in this criterion in the bid evaluation methodology, alongside tariff, royalties, and income flows, which may prove challenging while simultaneously maintaining transparency and objectivity in the selection process.

Administration and management

A core team must be put in charge of the process under the direct supervision of the office of the general manager of the port authority. The team will allocate tasks, monitor progress, take action to resolve issues as they crop up, and keep the port management informed at all times about the progress of the operation. At the very outset of the project, a decision has also to be made as to whether it would be helpful to hire specialized advisers to help in organizing and conducting the concessioning process. One arm of the International Finance Corporation (IFC), part of the World Bank Group, is devoted to providing transaction advisory services of

this kind. If there is agreement that some professional advice is warranted, two options are basically available to the concessioning authority: (i) contract out the whole process, tendering, evaluation, award proposal, negotiations and closing, to a *transaction adviser* who will then work under the control of the authority, but be in charge of all the steps and sequencing actions required to move the process to its ultimate conclusion, or (ii) hire only the specific professional help required, like for instance a *legal adviser* experienced in preparing and negotiating concession contracts. It is worth bearing in mind that the potential bidders for a container terminal concession, be it independent terminal operators or shipping lines, will come to the negotiation table well equipped in legal capacity and negotiating experience, and it is of paramount importance that the concessioning authority be able to avail itself of an equivalent ability to improve the likelihood of reaching a balance agreement by the end of the process⁴. Finally, it is paramount to understand that following negotiations, if and when a concessionaire must seek out commercial debt, he may have to seek subsequently further modifications to the concession contract in order to meet commercial lenders' obligations. This process will invariably tax further the ability of the conceding authority to negotiate a concession contract, and it will often involve the negotiation of a direct agreement between lenders and the host government, as lenders will seek to ensure that local authorities cannot deny after the fact both their rights and obligations taken by public companies and/or regulatory authorities.

Procurement notice and advertisement

The first official communication of the port authority's intention to select a concessionaire for one of its terminals must be widely disseminated through both domestic media networks and international publications covering the port and shipping industries. The procurement notice must provide the initial provisional timetable for the operation, as well as the firm timeline expected for the request for prequalification, with information on how to collect prequalification documents and on the submission deadline.

⁴ A useful reference tool on the matter is the *Guide for Hiring and Managing Advisors for Private Participation in Infrastructure*, in particular Volume 3 on *How to Select and Manage PPI Advisors* (World Bank-PPIAF, 2001).

Rules of information disclosure

Throughout the process, a member of the core team will be designated to communicate with the media and to answer questions about the progress of the operation. Proactively, the port authority will release, preferably on its website, all information on the characteristics of the project and on the procurement process being followed. Regular updates on progress, in particular when pre-identified milestones are reached, will be published accordingly.

Prequalification criteria

Generally speaking, the prequalification criteria must be aligned with the scale of the project, so as to ensure the potential capacity of bidders to deliver the expected results, but without being overly demanding and so unreasonably restricting the range of potential competitors.

Professional experience

Professional references will document the capacity of the bidder to manage and operate facilities similar or slightly more important than the one object of the operation. They will provide information on investments, traffic, productivity and overall performance, supplemented as the case may be with certificates of appreciation from concessioneering authorities or customers.

Financial references

Financial references will support the ability of the bidder to undertake the expected investments, and will provide information on the overall financial health of the organization. They should also include information on ongoing contracts and operational portfolio, to make it possible to assess whether the new contract is compatible with the organization and the bidder's work plan, or if the bidder intends to expand its operational capacity to take on this assignment, how he plans to go about it.

Relationships with shipping lines

As most of the projects considered in these Guidelines are assumed to be common user facilities, the issue of shipping lines involvement with terminal operators must be given adequate attention. On the upside, one might think an operator affiliated with a line will be in a better position to secure the patronage of its

mother company, and possibly to grow its operations, for instance with transshipment activities. But on the downside, the risk of preferential treatment perception by other shipping lines calling at the port must be carefully managed (see section on *Clause on non-discrimination and common user principle*). The prequalification documents will have in particular to indicate whether a shipping line itself would be eligible to participate in the tender. As a general rule, if there is no other common user terminal in the port, it should probably be avoided.

However, it is definitely possible to have a common user terminal run by a professional operator having an arm-length relationship with a shipping line, provided the non-discriminatory provisions of the concession contract are compelling and rigorously backed-up by a robust user feedback mechanism including appropriate remedies as needed.

Data requirements and organization

Information disclosure

As a rule, information disclosure on all aspects of the operation should be as broad as possible. Technical information for bidders should preferably be made available on a dedicated webpage, where prequalified companies will have protected access and where they will be able to submit queries. Simultaneously, the port authority should set up and regularly update a dedicated webpage where all interested parties and the public at large could track the progress of the concessioning project.

Market studies

Before embarking on the concessioning operation, the port authority will have commissioned one or several market studies documenting the prospects of the facility over the concession period. These studies must be made available to the prequalified bidders, but specifying that they will remain responsible for their own market assessment of the project, without being able to hold the port authority liable for the commercial forecasts presented in its studies. If one of the selection criteria involves traffic projections, like the *total discounted revenue throughout the concession period*, then the traffic forecasts proposed by the port authority market studies will be used to assess this criterion for all submitted bids.

Data room

The port authority will set up a physical/virtual data room, accessible by all prequalified bidders, where all relevant information pertaining to the proposed concession will be presented. Additionally, a site visit will be organized to allow all prequalified bidders to get a full physical understanding of the conditions of the terminal to be concessioned (see section on *Bids preparation*).

Selection criteria

The selection criteria need to be consistent with the objectives of the concessioning process, as described earlier. Depending of the preferred objectives, the potential criteria below will be given differentiated importance and weight.

Business plan

The business plan must outline how the operator intends to meet the performance criteria requested in the contract (see section on *Performance parameters*). It will also describe the operator's strategy to grow the business of the facility and generally document his understanding of the role of the terminal, both within the port and more broadly within the country's national and regional logistics chain.

Typically, a business plan based on the traffic forecasts provided by the port authority will aim at achieving two main objectives:

- It will describe how the bidder intends to handle expected terminal throughput while meeting required performance targets, which is likely to include a depiction of its operational structure and the evolution of equipment throughout the concession period.
- It will offer a vision of its commercial approach with shipping lines in order to improve the development prospects of the facility, and of the relationships it proposes to build with other logistics players to strengthen and increase the role of the container platform nationally, and as the case may be, regionally.

While it is useful for the port authority to get a good overview of the approach of the bidder to the operational and commercial side of the business—meant to demonstrate the candidate's ability to tackle the specific challenges of the facility to be concessioned—it is advisable not to read too much into this kind of document, nor to give it too high a weight if it is part of the overall proposals scoring system.

The risk in doing otherwise would be to turn the competition into some kind of beauty contest where the presentation skills and other marketing gimmicks would take precedence over the substantive professional qualities of the bids.

Performance commitments

The bidders will have to commit to the minimum performance requirements spelled out in the draft concession contract, but the bidding documents may offer bonus evaluation points to the bidders who commit to higher performance levels, with the understanding that these higher performance commitments will replace the original ones in the final contract, and will therefore also become the new threshold triggering penalties in case of non-compliance.

Operational performance targets are advisable in all circumstances, with the following comments:

- What the port authority is mostly interested in are outcome-oriented indicators, irrespective of operational tools put to use. In other words, the key performance indicators must convey a level of commercial achievement, typically with the shipping lines that are the direct customers of the terminal and the shippers who bring in and pick up containers from the yard. Additional indicators, like individual equipment productivity ratios, are useful to assess the performance of the operator's assets and its overall organizational efficiency, but should not become the primary measures of his performance. Similarly, the port authority must be concerned first and foremost with the level of service delivered to the customers of the terminal, and not so much with the technical means implemented by the operator, provided the required level is met and all legal obligations fulfilled. In particular, the concessioning authority should refrain from prescribing the use of specific pieces of handling equipment, in capacity and number, as well as demanding a time-bound investment schedule committing the operator to replacement and additions of specific units.
- Investment requirements should to the largest possible extent be linked to capacity utilization and operational performance, only when there is an obvious need, reconstruction or hazard to operate, should they be time-bound. Demanding a concessionaire to sign off on a pre-determined, time-bound investment schedule in other circumstances carries at least three risks: (i) that investments are made too much ahead of time if demand does not follow forecasts, which carries a cost that one way or another will be charged back to

the port authority, (ii) that investments are made despite sub-optimal productivity of existing assets, which removes much incentive to maximize utilization of existing infrastructure, and (iii) that the concessionaire prefers to litigate rather than comply, arguing for instance that an unexpected economic depression made all forecasts irrelevant. The best formula is to include objective triggers in the concession contract, like reaching 80% of optimal capacity two years in a row, or reaching maximum average acceptable waiting times six months in a row (occupation ratios are not so much relevant anymore with window-berthing schemes), to launch investments operations.

- The competitive situation of the terminal will also have an impact on the relative importance of the performance parameters. If the terminal is faced with true competitors for most of its expected traffic, the incentive to perform naturally built-in by this situation makes it less important for the port authority to monitor the inner workings of the operator, who is already strongly incentivized to optimize its operations, whereas it is critical for the port authority to closely follow the performance level offered to customers compared with local or regional competitors. When the competition is weak or non-existent, which is the case for most container terminals in Sub-Saharan Africa for domestic traffic, owing largely to the lack of facilitation of cross-border transport across the continent, it becomes necessary for the port authority to ensure not only that its customers are well served (rationale for the outcome-oriented indicators) but also that the port assets under the concession are optimally used (rationale for individual equipment and asset productivity indicators).

Examples of various possible performance indicators are presented in section on *Performance parameters*.

Traffic commitments

Port authorities are often tempted to require commitments on the volume of traffic to go through the terminal, in particular when the concessioning project has among its objectives to develop transshipment and transit activities. Since domestic traffic is largely contingent on the overall national economic growth, which is obviously beyond the control of the terminal operator, one can see the apparent rationale for such a request when these kinds of additional traffic are anticipated. However, in most cases the requirement for a container volume commitment is counter-productive, if not just unreasonable.

Firstly, let's recognize the obvious that when it comes to independent terminal operators, they just have no control whatsoever on the cargo or on the shipping lines, so asking them to commit to a certain volume of traffic does not make sense. The best they can do, and actually have to do to grow their business, is to make their services as attractive as possible to the lines, on productivity and on price.

Secondly, when it comes to subsidiaries of shipping lines, but operating at arm's length from their mother company, and bidding to operate a common user terminal, requiring from them a volume guarantee because of this affiliation runs intuitively counter to the principle of non-discrimination to the extent it lets people believe the operator may be led to give priority to the ships of its related company to meet this commitment.

Thirdly, volume guarantees will make it harder and maybe costlier for private operators to raise debt from commercial banks as such commitments inflate the financial risks taken by the borrower (s).

Ultimately, there is only one case where the requirement for a traffic volume guarantee is not only advisable, but sometimes necessary, when a shipping line proposes to build and operate a container terminal exclusively for its own account. Since the proposed facility would still be developed on a piece of public land on the shoreline—always a scarce public resource—the concessioning authority has the responsibility to ensure it will generate enough activity, and create jobs accordingly, to justify alienating the public domain for the term of the concession.

In final analysis, not even the shipping line owns the traffic, and any kind of traffic guarantee just creates an additional risk element that the terminal operator will have to hedge against. And he will do so, in one way or another, by making the port authority, and eventually the terminal users, pay for the cost of this risk. The best way for the port authority to achieve its goals for a successful concession is not in imposing artificial constraints that unavoidably result in additional costs, but in creating the right incentives for the operator to deliver at its best. These incentives may include the initial level of investment in the facility, an astute profit-sharing mechanism (see the section on *Concession fee*), and an effective customer feedback loop (see section on *Customer feedback*).

Tariffs

If the main objective of the concession is to lower port costs, the main or even only selection criterion may be the lowest tariff charged to users. Depending on the structure of the traffic, this criterion may be presented differently (see Table 3):

- If the expected traffic is mostly domestic, the handling charge per TEU for any container going through the terminal is the logical criterium.
- If the expected traffic is split between domestic and transshipment flows, bearing in mind the main objective of lowering port costs for national economic actors, the handling charge per TEU for any domestic container going through the terminal is the logical criterion, the handling charge for transshipment containers can then be left for the operator to decide based on what the market can bear given the regional competition context for this traffic.
- If the expected traffic is mostly transshipment, or in cases where the port authority wants to proactively promote transshipment activities, the bidding documents can then unilaterally decide the level of the handling charge for domestic containers, and make the handling charge for transshipment containers the main selection criterion.

Table 3: Choice of tariff criteria

Traffic structure	Domestic containers	Transshipment containers
Mostly domestic	Handling charge per TEU on all traffic	Handling charge per TEU on all traffic
Split domestic / transshipment	Handling charge per TEU	Free for the operator to decide
Mostly transshipment	Decided by the port authority	Handling charge per TEU

Concession fee

The concession payments may be split between an upfront payment and a series of annual payments. If the annual concession payment is the selection criterion, typically the upfront payment will be unilaterally decided by the port authority and indicated in the bidding documents. If the latter is chosen as the selection criterion, the annual concession payment will be decided by the port authority. If both

are left to be proposed by the bidders, the selection criterion moves toward the total discounted revenue throughout the concession period.

As to the annual concession payment, there will typically be a floor level defined in the bidding documents, reflecting the lease value for an existing facility or the remuneration of the preparatory investments and the land value for a greenfield operation. Topping this floor level may be the selection criterion.

Royalty fee

The royalty fee is an amount per TEU handled which represents a profit sharing tool between the port authority and the operator. It can be left for the bidder to propose and become a selection criterion, or it can also be predefined in the bidding documents, in particular when it is designed as an incentive to grow the traffic of the facility, for instance using a decreasing scale as traffic grows (see section on *Royalty sliding scale*, page 37).

When the royalty fee is the main or the only selection criterion, all other concession payments, upfront payments and annual fees, are unilaterally defined by the port authority in the bidding documents. When the royalty fee is left for the bidder to propose alongside other payments, the selection criterion moves toward the total discounted revenue throughout the concession period (see below).

Total discounted revenue throughout the concession period

This is usually the preferred criterion when the main objective of the concession is the optimization of revenues for the port authority. In this case, most revenue items will be left for the bidders to propose, maybe apart from the floor lease payment. The port authority should however assess the consequences of any proposed revenue package on the cost for port users, and may decide on a maximum applicable tariff, in particular for domestic containers, when opting for this criterion.

Summary

For the sake of both transparency and objectivity in the selection process, it is highly advisable to focus on a limited number of criteria:

- Some qualitative ones used to validate the technical credibility of the proposal: (i) the business plan, which should be precise enough to assert the capacity of the bidder to deliver on his commitments, but not overly presumptuous, and (ii) the key minimum performance indicators, to which the bidder

must formally commit. If the bidding documents offer the option to propose higher performance targets, which would become contractual commitments, they must spell out how bonus evaluation points will be calculated and applied towards the final evaluation results.

- Some quantitative, and preferably one only, to make an objective selection easy and undisputable when disclosing the results of the bidding process to all stakeholders. The following table sums up the options available to the concessioning authority when choosing a single quantitative criterion to select the preferred bidder.

Table 4: Decision table for single quantitative criteria

		Who defines what?			
		Tariff	Upfront payment	Concession fee	Royalty fee
Single quantitative criteria	Tariff	TOC	PA	PA	PA
	Upfront payment	PA	TOC	PA	PA
	Concession fee	PA	PA	PA sets floor level TOC to propose	PA
	Royalty fee	PA	PA	PA	TOC
	Total revenue	PA sets max for domestic, TOC proposes for transshipment	TOC	PA sets floor level TOC to propose	TOC

TOC: Terminal operating company

PA: Port authority

Bids preparation

Site visit

The port authority will schedule a comprehensive site visit and questions/answers session with prequalified bidders. It must take place as early as possible following the prequalification results. Care must also be taken to leave enough time following the site visit for the prequalified bidders to prepare their proposals.

Interactions with prequalified bidders

As soon as the prequalified bidders are notified, all information exchanges between the port authority and the bidders must be conducted in an even fashion, ensuring a total symmetry of information among all bidders. A transparent way to manage this is to use a dedicated website to post all transaction relevant information, receive questions from the bidders, and post answers. An access protected protocol will enable bidders to safely visit the site, which will be designed in such a way that questions of the bidders and answers of the port authority will be viewable by all bidders simultaneously.

Bids opening

Public opening session

The bids opening session must be public, and all bidders will be invited to attend. The main elements of the bids in particular:

- the presence of all mandatory elements of the submission, including the bank's bond,
- any performance commitment exceeding the minimum requirements, and
- the quoted value for the selection criteria

will be read aloud and reported in the minutes of the bids opening session, which will then be posted on the public access section of the website of the port authority. The bids will then be given to the Bids Evaluation Committee.

Publication of results

The bids evaluation results will be announced publicly by the port authority and simultaneously posted on its website, together with the full Bids Evaluation Report showing the ranking of the bidders. The preferred bidder will be invited to negotiate the concession contract without delay.

Pre-concession documents

The typical pre-concession documents are described in detail in the World Bank *Port Reform Toolkit*, 2006 edition. They are just mentioned here for reference.

Letter of intent (LOI)

The LOI is a pre-concession agreement stating the intention of the concessionaire to design, construct, or renovate a new or existing port facility, and the willingness of the port authority to establish terms for a privately operated facility under a concession agreement and to cooperate with the concessionaire in compliance with certain local requirements (permits, registrations, and 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—for BOT and variants)

The DPR is a document submitted to the port authority as an outline of the functional design or general technical design and time schedules (milestones) for the various phases of the construction. Once approved by the port authority, the DPR would be incorporated in the concession agreement, at which point the milestones become binding.

Joint development agreement (JDA)

When the successful bidder is a consortium of several companies, the JDA is an agreement among members of the consortium that allocates project responsibilities (for example, shareholding, financing, construction, or tax advantages). This agreement might also include the port authority itself.

Contract negotiation and award*Negotiation team*

The negotiation team will usually be led by the general manager of the port authority, and include its legal counsel, the financial director, the operation director and the technical director. If an external transaction adviser has been retained by the authority (see section on *Organizing an international tendering process*), he/she will be part of the negotiation team as well.

Issues open to negotiations

The scope of the contract negotiations will have been circumscribed in the bidding documentation. In particular, it cannot include any element having led to the award, like financial commitments and performance criteria. It cannot result in any significant departure from the original conditions of the tendering process. It

will likely include issues like firming up the contract implementation timetable, fine-tuning the handover process in case of an existing facility, and confirming the effectiveness conditions of the final agreement.

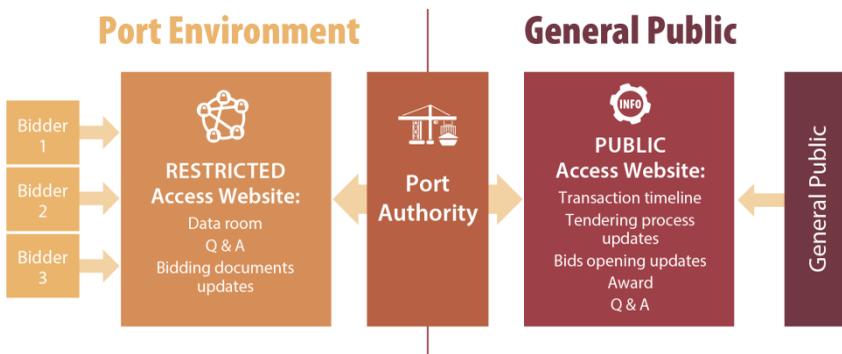
Negotiation period and conclusion

To avoid dragging along the process, the port authority will define a time window within which to conclude the negotiations with the preferred bidder. If for a reason the preferred bidder is not in a position to sign the final agreement by the end of the defined negotiation period, the port authority may then decide to end the negotiations and invite the second-ranked bidder to negotiate the contract.

Transparency principles throughout the concessioning process

From the initial announcement and publication of the procurement notice to the final award and signature of the contract, all steps achieved will be reported on the website of the port authority and regular publications to keep the general public informed on the progress of the operation. Key documents, including the bidding documentation, the prequalification report, the bids opening session minutes, the bids evaluation report, and the final contract award report, will be made available on the website of the port authority. To the extent it does not include proprietary information that could be detrimental for the bidder to share, the final concession contract should also be made public. (Example: TC2 in Abidjan, see Box 4).

Figure 4: Transaction Process



Box 4: Abidjan TC2 concession contract

The presidential decree N° 2014-22 dated January 22, 2014, approving the concession agreement for the construction and operation of the second container terminal in the port of Abidjan, known as TC2, was published in the Official Gazette of the Republic of Côte d'Ivoire together with the entire concession document with all its annexes.

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DECRET N° 2014-22 DU 22 JANVIER 2014 portant approbation de la Convention de concession pour la réalisation et l'exploitation de deuxième Terminal à conteneurs, dénommé TC2, du port d'Abidjan, de cahier de charges y relatif et de ses annexes. LE PRESIDENT DE LA REPUBLIQUE, Alassane OUATTARA.			

3. The Concession Contract

Extensive examples of contract provisions for port concessions are provided in the World Bank *Port Reform Toolkit, Module 4, Legal Tools for Port Reform*. This section will focus on providing examples of wording for critical provisions of any container terminal concession contract, which require particular attention to ensure a balanced and sustainable agreement can be reached.

Conditions precedent

Conditions to be met by the concessionaire to make the contract effective

Those conditions can be listed in two categories:

- Legal requirements documenting the capacity of the concessionaire to enter the contractual agreement: certificate of incorporation, resolution of the board of directors approving the contractual commitments made by the concessionaire in the project and pre-concession documents.
- Project specific requirements: execution and delivery of the project documents, receipt of applicable permits, evidence of required insurance policies, acceptance of transferred assets (as the case may be), recognition and formal acceptance of the conditions of the concession area (in terms of environmental status, climate, geology, hydrology, etc.).

Conditions to be met by the port authority to make the contract effective

Those conditions can be listed in two categories:

- Necessary conditions for the ability of the terminal to operate effectively: adequate protection and maritime access, including guaranteed draught and maintenance dredging schedule; adequate land access and links to land transport networks (road and/or rail and waterways).
- Conditions pertaining to the situation of the site as regards the environment legislation: the port authority must certify the environmental status of the concession site; this does not systematically mean it must be fully cleaned or devoid of any existing pollutant—often contaminated material is buried beneath container terminals because it is better than moving it. But the status

has to be acknowledged as compliant with existing regulations and therefore formally agreed as the reference starting point for the concessionaire.

Exclusivity

Situations where an exclusivity clause may be warranted

Although competition-restricting provisions are generally not advisable, there are situations where some kind of limited exclusivity may be considered:

- When existing container traffic at the time of concessioning is only marginally sufficient to make a balanced operation possible for a private operator. Typically, if fully privately financed, even a small scale terminal, two berths for instance, three/four gantry cranes and corresponding yard equipment, will need around 100,000 TEUs per year to break even under an average container handling tariff. As long as the traffic remains in this vicinity or slightly above, allowing for the possibility of a competitor, a shipping line for instance, to set up its own terminal to handle its own traffic could undermine practically overnight the financial sustainability of the concession.
- When the investment required from the concessionaire is well above what would be necessary to handle existing traffic under normal circumstances, which is the case for instance if the concessionaire has to invest in an infrastructure with a high threshold effect, like an island terminal that cannot easily be developed in stages. Clearly, in such a situation, the port authority could avoid the exclusivity issue if it could afford financing the share of the investment over and above the level necessary to cater to existing traffic.

Traffic-bound and time-bound exclusivity

In all cases, however, the exclusivity provision must not be open-ended. It must be either time-bound or traffic-bound, and can be expressed in a formula using the following wording: *no new port infrastructure for handling containers will be developed that competes with the terminal operated by the Concessionaire within xx km of the Port for x years or as long as the traffic does not reach xxx,000 TEUs per year, whichever comes first.* Five years will often be a reasonable period, and it provide the concessionaire with some incentive to keep improving the quality/cost ratio of its services to deter its customers from moving to a potential competitor in case the traffic level remains below the other exclusivity limit.

Performance parameters

Schedule of key performance indicators

Key performance indicators may include:

- SHIP PRODUCTIVITY: *number of container moves per ship hour at berth*. This is the best indicator of the terminal's commercial performance for shipping lines. A minimum benchmark for gearless full containerships today would be 60 moves per hour at berth. This objective will be adjusted downward for smaller size vessels, non-cellular vessels and feeder vessels, which cannot be worked on with several gantry cranes simultaneously.
- SHIP CALL PRODUCTIVITY: *number of container moves per ship hour in port*. This is the ultimate port performance indicator for the shipping lines, but obviously it includes aspects outside of the control of the terminal operator, like towage and vessel movements governed by the Harbor Master's Office. So it should not be part of the concession indicators, but the port authority should monitor it nonetheless, since any large disconnect between ship productivity and ship call productivity would be a clue that marine services are likely below standard, barring disrupting weather events.
- CRANE PRODUCTIVITY: *number of container moves per gross working hours (gross productivity) or per net working hours (net productivity, deducting all non-operational and idle time experienced by each crane)*. The difference between gross and net productivity can be an indication of a ship difficult to work (non-optimal bay plans, physical characteristics) or of operational inefficiencies on the terminal. Similarly, a high disconnect between gross crane productivity times the number of cranes working a ship, and ship productivity would likely be an indicator of sub-optimal call management by the terminal, or of unpredictable disrupting events (e.g. weather).
- QUAY PRODUCTIVITY: *number of container moves per meter of quay per year*. This is a utilization indicator the port authority must monitor to assess the capacity utilization of the sea side of the terminal.
- TERMINAL PRODUCTIVITY: *number of containers handled per hectare or square meter of container yard per year*. This is a utilization indicator the port authority must monitor to assess the capacity utilization of the land side of the terminal. It obviously varies with the type of operational equipment in use, as well as with the containers dwell time, over which the operator has little control.

- DWELL TIME: *It measures the period from the time a container is lifted off the ship to the time it departs the container yard for imports, and the reverse for exports.* It is a critical indicator of the efficient use of the terminal area, but it may depend on other actors than the terminal operator, notably customs, and sometimes importers' commercial practices. But it must be carefully monitored so that corrective measures or policy incentives can be deployed in case of excessive dwell time in the terminal area. Two days for exports and seven days for imports should be considered a maximum acceptable level in most cases.
- TRUCK TURNAROUND TIME: *It measures the time from entry to exit in the terminal area when delivering or picking up a box.* Twenty minutes is the common efficiency benchmark for efficient operations.

Remedies for insufficient performance

Performance must be assessed on a monthly basis, but bearing in mind possible variations between calls characteristics, contractual performance should be formally evaluated annually. If the annual average performance is below target, a financial penalty can be assessed.

To be both fair and effective in providing the right incentive, a penalty should only apply to an objective which is fully under the control of the operator and which best illustrates the overall operational performance of the terminal. Ship productivity meets those two criteria.

The penalty formula could then apply the missing percentage of the performance target to total traffic times the royalty fee. Example:

- Ship productivity contractual objective: 60 moves per ship hour at berth.
- Annual ship productivity achieved: 54 moves per ship hour at berth.
- Missing productivity percentage: 10%
- Total traffic handled at the terminal that year: 200,000 TEUs
- Royalty per TEU: US\$5
- Penalty: $0.10 \times 200,000 \times 5 = \text{US\$}100,000$

To account for the adjustment period when the concessionaire takes over the facility, no penalty shall be payable for not meeting the performance target in the first year of operation.

However, if the concessionaire comes short of the performance target by 20% or more for three consecutive years of operation or in any three years out of a consecutive five years of operation period, then the port authority may elect, in its sole discretion, to declare this a contractual event of default, and the corresponding provision must then be included in the concession contract.

Investments

Investments requirements should to the largest possible extent be linked to capacity utilization and operational performance—only when there is an obvious need, reconstruction or hazard to operate, should they be made contractual and time-bound, as also for safety and security purposes (lighting, fences, etc.). Under normal circumstances, making a pre-determined and time-bound investment schedule contractual carries at least three risks: (i) that investments are made too much ahead of time if demand does not follow forecasts, which carries a cost that will one way or another be charged back to the port authority, (ii) that investments are made despite sub-optimal productivity of existing assets, which removes much incentive to maximize utilization of existing infrastructure, and (iii) that the concessionaire prefers to litigate rather than comply, arguing for instance that an unexpected economic depression made all forecasts irrelevant. The best formula is to include objective triggers in the concession contract, like reaching 80% of optimal capacity two years in a row, or reaching maximum average acceptable waiting times six months in a row (occupation ratios are not so much relevant anymore with window-berthing schemes), to launch investments operations.

Concession fee

The concession fee may or may not include an initial down payment, followed by a series of annual payments typically representing both the cost of leasing the concession area and the fee for the right to operate the terminal.

Down payment

The down payment may be justified to cover the necessary adjustments costs the port authority may have to incur to make the concession possible, for instance (i) the social costs of right-sizing the workforce through early retirement, voluntary departures and retraining programs, or (ii) infrastructure investments required to improve accessibility, like dredging or dedicated land access routes. As discussed

earlier, it can either be determined by the port authority as an input into the bidding documents, or left for the bidder to propose as one of the selection criteria. Over time, down payments have become the norm, as illustrated in table 6 (Berbera is a specific case, due to the political and commercial risk, as the main potential is to attract Ethiopia transit once the connecting infrastructure is built).

Table 5: Examples of down-payment

Contract award	Terminals	Amount in US\$ million
2003	Abidjan TC1	No down payment
2004	Tema	5
2005	Tin Can Island (BAL)	3.5
2005	Toamasina	10
2009	Cotonou	25
2013	Abidjan TC2	120
2016	Berbera	10

Annual payments

The annual payments cover the price for leasing the concession area, which remains under the ownership of the port authority, as well as the fee for the right to operate the terminal. The lease value can be determined by the port authority either based on the land market for a greenfield project, or on the amount invested in the assets of the terminal when concessioning out an existing facility. If the port authority developed the facility with debt financing, the lease must at the minimum cover the cost of debt amortization payments. These bases for calculating the lease provide the ground for establishing a floor level for the annual concession payment, even when the total annual fee is left for the bidder to propose. The amount of the annual concession fee over and above the lease value reflects the price to be paid for the right to operate the terminal.

Escalation clause

The concession fee is usually expressed in dollar, euro, or other hard currency. Since the term of the concession might reach 25 or 30 years, costs inflation must clearly be considered. A contract should therefore include a specific clause on in-

dexation. An option would be to adjust the fee periodically on the basis of a basket of currencies, such as a combination of the U.S. dollar, the euro, and the currency in which the concession fee is expressed. The national Consumer Price Index can also be used as a reference to the extent the local economy is open enough so that the CPI reflects the variations in costs of both internal and external inputs.

It is advisable to adjust the concession fee at regular intervals, probably aligned with tariff adjustments, then avoiding leaving the commercial terms unchanged for too long a period, which may lead to financial distortions detrimental to the sound management of the concession. A three-year period looks like a reasonable maximum interval between revisions.

Royalty fee

Profit sharing principles

The royalty fee schedule is an opportunity to set up a mechanism whereby the financial benefits of the growth of traffic, achieved thanks in part to the performance of the operator but also to the management of the port authority, are shared between the partners to the concession contract. It illustrates one shared objective of both the port authority and the concessionaire, which is to grow the traffic, even if it may be for different ultimate goals, economic growth for the port, and financial return for the operator.

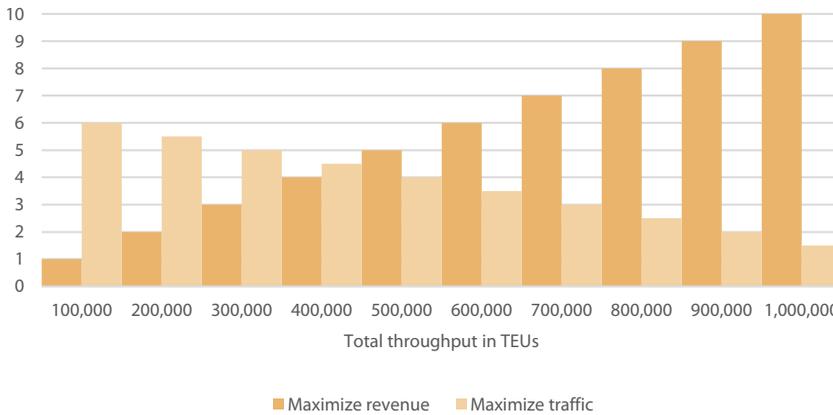
Royalty sliding scale

There are actually two ways to build this profit-sharing mechanism:

- If the main objective of the port authority in concessioning out the terminal is to **maximize revenues**, the royal fee schedule can be designed with an upward staggered structure, whereby the amount per TEU increases with traffic (Abidjan TC1 for instance).
- If the objective of the port authority is to **boost traffic**, as part of a policy to promote the port as a transshipment hub, the royalty fee schedule can be designed with a downward staggered structure, whereby the amount per TEU decreases as traffic grows. This provides an additional incentive to the operator to increase the traffic, as his profit per container will grow with the traffic.

In both cases, to avoid too brisk a change up or down in revenues of the port authority, it is advisable to apply the royalty schedule by tranches, and not to the total traffic as one threshold is reached.

Figure 5: Examples of royalty fee structure according to objective (in US\$ per TEU)



Moreover, the royalty fee may be defined at different levels for different traffic flows, domestic and transshipment for instance.

Tariff and regulation principles

These Guidelines consider how tariffs for commercial services charged by a concessionaire for handling containers going through the terminal it operates should be regulated. There are, however, other financial flows taking place between economic actors around a container terminal that cannot easily be apprehended, including charging arrangements between shipping lines, consignees, freight forwarders, which ultimately have a bearing on the total transit cost through the terminal, but do not typically fall under the purview of a public regulatory regime, unless particular circumstances apply. The structure of port costs is inherently complex, and port authorities should keep monitoring the total spectrum of charges being levied on the cargo as it moves through the port, so that they have an updated picture of the whole process at all times and can assess its competitiveness accordingly.

Keeping in mind that the economic regulation of tariffs is fundamentally a proxy for insufficient competition, tariff regulation may vary depending on the level of competition the operator faces for different categories of traffic⁵.

Captive traffic

In most cases in Sub-Saharan Africa, domestic traffic will be deemed captive for want of alternative ways to bring it in or out of the country. This is the consequence, on one hand, of the limited number of possible ports of entry in individual countries (sometimes only one), and on the other hand, of the lack of trade and transport facilitation across land borders with neighboring countries, which prevent the establishment of additional cross-regional supply chains. The terminal operator therefore enjoys a natural monopoly on captive traffic, which justifies economic regulation of its tariff by the port authority. This regulation is embedded in the concession contract, which stipulates the maximum tariff the operator is allowed to apply.

To ensure the financial integrity of the concession, this tariff cap should not be below the costs incurred by the operator in providing the service, plus a reasonable profit margin. The cap is meant to prevent him from overcharging by taking advantage of the lack of competition, not to deny him a fair profit. This is why the concession contract can sometimes also include a provision to monitor the financial rate of return allowed on the investments by the operator, and to provide for adjustments of the concession fee or of the tariff cap in case the financial balance of the concession is at risk of being undermined (as in Abidjan TC2 for instance).

Competitive traffic (including transshipment)

When there is natural competition, as in the case of transshipment traffic, there is no ground for economic regulation of tariff, and the operator should be free to set up his tariff schedule. This will be acted in the concession contract.

There could be instances where public authorities wish to impose tariff caps on some specific commodities, whether or not they are subject to competition for port services. This is typically the case for basic supplies or specific export cargoes (cotton in Dakar for instance), but these provisions are policy instruments that use

⁵ A comprehensive methodology for setting port tariffs is included in the website of the Port Regulator in South Africa www.portsregulator.org/economic/tariff-methodology.

port tariffs to further their goals, and should not be construed as economic regulation of port tariff. Should these imposed tariff caps be blatantly below the cost of providing the service, they could even justify compensation payments as consequence of public service obligations, as in other transport sectors (public transport for instance). However, an easier way to gauge their impact on the financial balance of the concession would be to monitor the rate of return on investments as discussed above, and adjust other financial terms of the contract accordingly.

Clause on non-discrimination and common user principle

Terminal operating companies

The concessionaire shall endeavor to serve all customers without preference or discrimination, be it on price or quality of service, irrespective of any link of any kind it may have, corporate or otherwise, with any particular customer. Discrimination complaints, if established, could lead to remedies that could, if repeated, result in the port authority rescinding the concession contract due to event of default by the concessionaire.

The formal customer feedback loop described below will be instrumental in documenting complaints.

Special case of the shipping lines

When a shipping line is awarded a concession to operate a container terminal, most often it is to exclusively handle its own traffic. However, when the terminal to be operated is a common user facility, special care must be exercised by the port authority to assuage concerns that all customers may not be treated equally. The non-discrimination clause mentioned above shall be strengthened to explicitly state that the operator's ships shall not benefit from any preferred operational treatment. Discrimination complaints will be handled as indicated above.

Information requirements

The purpose of the port authority in collecting this information is to ensure, in particular when it is dealing with a monopoly situation but the rationale stands in all cases, that the piece of waterfront concessioned to the private operator is exploited with optimal efficiency. As the ultimate owner of a scarce resource like

coastal land, and as trustee of the public interest, the port authority has a duty to monitor the use being made of this resource and be satisfied that it is optimally exploited for the good of the national economy.

Operational information

The concession contract must spell out the operational information the concessionaire is expected to provide the port authority with at regular intervals. Beyond the data necessary to assess the level of performance achieved as per the contractual objectives, a monthly operational report will be prepared by the concessionaire documenting the following:

- Monthly analysis of container throughput by shipping line
- Average ship productivity by shipping line
- Average crane gross and net productivity
- Average container dwell time import and export
- Average truck turnaround time
- Equipment availability rates
- Equipment utilization rates
- Information on industrial accidents, if any
- Information on industrial disputes, if any

Financial information

The concessionaire shall submit to the port authority, within six months after the end of each financial year, a report of its financial operations pertaining to the terminal, together with its audited accounts, including balance sheet, operating account, profit and losses account, cash flow, and any relevant notes and annexes, as well as the auditors' report.

Review clause

In some particular circumstances (e.g. volatile market demand, uncertain investment needs sharing with host government or port authority, currency devaluation) it might make sense to build within a concession contract a review clause that allows both public and private sector to discuss possible amendment to the concession framework either at fixed intervals (e.g. every five years) or whenever one or several economic condition changes already identified in the initial concession contract have occurred. This approach can assist in adjusting the concession

contract framework in a transparent and predictable manner. In frontier markets such as those of Sub-Saharan Africa, this approach, if sensibly designed and negotiated (i.e. it does not only provide upside to the public party), could actually result in lowering the risk perception of private investors and their commercial lenders.

Extension of the concession

A contractual option to extend the concession at the end of the initial concession period provides a natural incentive for the concessionaire to keep up his performance and maintenance efforts as the contract nears its term, but the conditions under which it can be requested by the operator and granted by the port authority must be explicitly spelled out in the initial concession contract to ensure a transparent negotiation. In particular, it must make clear that the ultimate decision whether or not to extend the concession remains fully with the port authority, without having to justify its decision in case of refusal.

In the case of long-term concessions (20 to 30 years), it is good practice to start the formal extension discussions two years before the end of the contract, and to reach a decision at least one year before the expiry of the initial concession.

Expiration of the concession

If the concession is not extended, the contract must define how the assets of the concession are to be transferred to the port authority, and in particular specify the compensation to be paid to the concessionaire for the assets not fully depreciated. A fair compensation mechanism is critical to protect against the potential temptation for the concessionaire to cut back on maintenance during the last two years of the contract.

For the assets that had been transferred to the concessionaire at the outset of the contract, and have to be returned to the port authority, like gantry cranes and heavy yard equipment, the contract must provide for a joint inspection procedure to determine whether the assets are in full working order at the time of transfer. Should any action be taken to restore the full capacity of any asset to be returned, it must be at the expense of the concessionaire.

Dispute resolution

Arbitration

If a conflict between the parties cannot be solved by amicable settlement, the concession contract may provide an arbitration procedure. A decision has to be made as to the Court of Arbitration. Typically, port authorities prefer a local court, often housed in the national Chamber of Commerce and Industry or equivalent institution, while international lenders, when they are involved in financing or supporting the concession agreement, may prefer an international court like the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA). It is worthwhile noting that the LCIA has set up local or affiliated branches in several countries, namely in the United Arab Emirates (DFIC-LCIA in Dubai), in Mauritius (LCIA-MIAC), in India and in Singapore. The International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank Group, may also provide a venue (as was the case after the cancellation of the concession for the Conakry Container Terminal in Guinea).

Court proceedings

In the case that one of the parties refuses the arbitration protocol, the ultimate venue to settle a contractual conflict will be the court of justice of the country hosting the concession.

Lenders' rights

When the concession project involves commercial lenders to finance planned capital expenditures, these lenders will always want to make sure that they have a series of rights to protect their interests. Among the most prominent is their right linked to an event of an early termination of the concession agreement. In this case most multilateral lenders such as Proparco (private arm of the French development agency, *Agence Française de Développement*), IFC (private arm of the World Bank Group), etc., because of their articles of incorporation that forbids them to lend to a public entity must require that the conceding authority liquidates any outstanding debt at the time of termination, including pays for any early debt liquidation penalties embedded in their commercial loans. Likewise, lenders will want to make sure that they have preemption rights to any liquidated damages and other payments made to the concessionaire by the conceding authority in similar case of early termination. Likewise, Lenders will usually ask the conceding authority to grant them up to a year to find and seek a replacement to the operator, or restruc-

ture of the shareholding of the operator, if the conceding authority decides to trigger a default clause against the operator that would lead to the early termination of the concession agreement for cause. Lastly, the lenders may require some oversight rights or approval rights regarding the tariff setting mechanisms (specifically when this leads to the lowering of maximum applicable tariffs or the re basing of tariffs in local currency using a decision making process that was not identified in the concession contract at the time of its signature) and/or level of indebtedness that the concession can accrue.

4. The Management and Control of the Concession

Access requirements of the port authority

On-site access

The port authority must have at all time full access to the terminal, without of course disrupting the operations. It will in particular carry out regular technical visits to control the maintenance activities on the terminal infrastructure, as defined in the concession agreement.

Access to information

The concession agreement will specify the information to be made available to the port authority on a regular fashion (see section on *Information requirements*). The monthly operational reports should be made available to the general public by being disclosed on the website of the port authority or the operator (Example: Meridian Port Services, the operator of the Tema container terminal, publishes on line detailed monthly operational reports⁶). The annual financial reports will be shared with the port community council when it exists.

Port community systems (PCS) also provide an opportunity to widely share operational information among all port and shipping stakeholders. As defined by the International Port Community Systems Association (IPCSA), “A PCS is a modular system with functionality designed to provide all the various sectors and players within a port community environment with tools specific to them, thus delivering a tightly integrated system. Developed for port users by port users, a PCS encompasses exports, imports, transshipments, consolidations, hazardous cargo and maritime statistics reporting”. Operational terminal statistics can therefore find their way on a PCS website. Similarly, single windows could also provide access to the same kind of operational information to their participants.

⁶ www.mps-gh.com/en/content/enewsletter.php

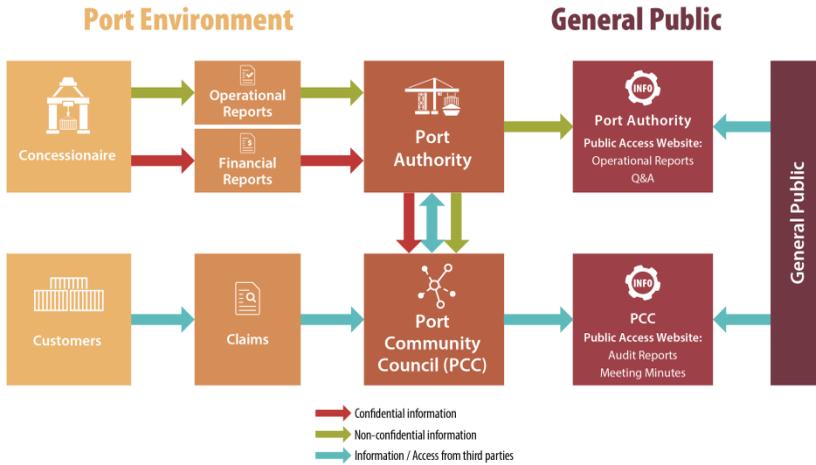
On particular occasions, the port authority may need access to additional operational and financial information and data, as when discussing with the concessionaire the opportunity to increase handling charges. This information must be made available with the caveat that it may not be disclosed to third parties as some of it may pertain to the proprietary arrangements of the operator.

As a rule, in monopoly or quasi-monopoly situations like the ones prevailing in many Sub-Saharan African countries for container terminals operations, as far as domestic traffic is concerned, the port authority must require full financial transparency from the terminal operating company, so that it can satisfy itself throughout the term of the concession that the legitimate profit margin of the concessionaire remain within reasonable bounds.

In particular, when applying to the port authority for an increase in the maximum handling charge allowed for domestic traffic, the concessionaire shall provide documented evidence of the raise of its own operating costs that justify the request on the basis of maintaining his profit margin at an acceptable level for both contractual partners. Available cost accounting results shall be made available to the port authority to support the operator's claims.

Beyond the monthly performance reports, a more comprehensive performance review will also be warranted when discussing tariff increases, so that the port authority can assess the overall degree of efficiency displayed by the concessionaire in exploiting all the assets at his disposal. Should potential improvement possibilities be identified during such a review, the port authority may then postpone its decision on increasing tariffs until the time when the identified improvements materialize. An updated cost accounting review will be carried out at this point to establish whether the request can actually be supported.

Figure 6: Management of the concession



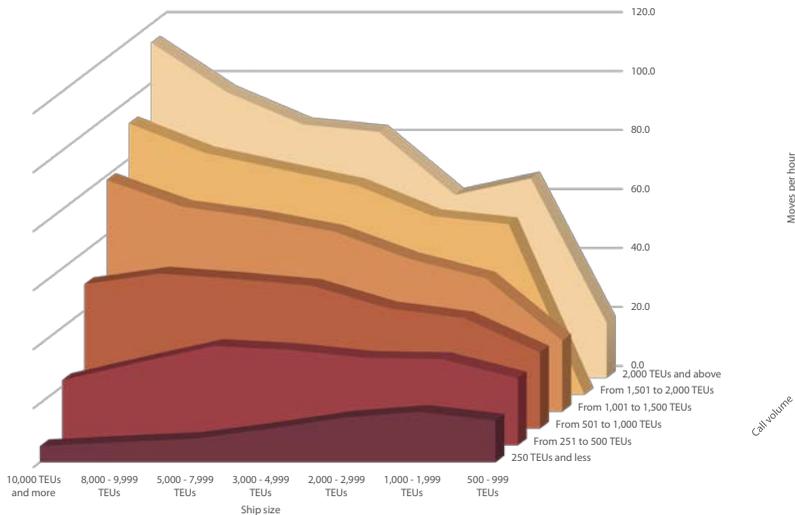
Performance monitoring

Ongoing assessment of key performance indicators

The operations directorate of the port authority will monitor the performance of the terminal on an ongoing basis by reviewing the monthly operational reports submitted by the operator. It will also confirm them with the shipping lines representatives, for instance during the regular meetings of the port community council or of any equivalent consultative body representing the port and the shipping professional community. Any contradictory information tabled during these consultations will then be submitted back to the operator for clarification or correction.

As reference information for evaluating the level of performance of the facility under review, Figure 7 presents the average berth productivity (number of move per hour while vessel is at berth) for container terminals in different regions of the world, as collected in 2015.

Figure 7: Berth productivity according to ship size and call volume



Source: IHS data (further information on the HIS Maritime & Trade website www.ihs.com/industry/maritime.html)

Periodicity and format of reviews

On top of the monthly reports required by the concession agreement, and upon which penalties may be assessed annually in case of insufficient performance (see section on *Performance parameters*), the port authority may want to carry out quarterly performance reviews to fully document the workings of the facility.

These quarterly reviews will focus on the overall operational organization of the terminal, including access protocols, security arrangements and ISPS (International Ship and Port Facility Security code) implementation, safety procedures, data management, customer service, dispute resolution, equipment and infrastructure maintenance, interface with customs and review of customers’ feedback.

Like the monthly operational reports, the quarterly reviews will be posted on the website of the port authority and made accessible by the general public.

Customer feedback

Formalization of a customer feedback loop

Mobilizing port customers is a very powerful way to both ascertain the true level of performance of the operator and keep him focused on delivering the best results. To this end, customer feedback must be formalized, since absent this provision, it remains difficult to act on it. A conduit to channel feedback could be the port community council if this kind of structure exists.

Establishing a port community council goes beyond the realm of these Guidelines, but it is worthwhile to stress the usefulness and importance of such a venue to discuss critical aspects of port management and performance and, above all, to set up and nurture a constructive relationship between the port authority and all its constituents (see section on *Role of the port community council*). As part of the preparatory steps towards a terminal concession project, setting up a port community council, if not yet in place, is another positive means to foster a spirit of transparency and shared purpose among the port community at large. Furthermore, when such councils do exist but with just an advisory function, it would be highly advisable to get them moved from a mere consultative role to the status of an official forum where issues raised should get answers within a definite period of time.

If a concession is awarded without an existing port community council, a formal customer feedback channel must be provided, on the port website for instance where professionals would have a specific access-protected protocol to submit their assessments. The concession agreement must also refer to this feedback and define how the port authority may use it. (Examples: The Mombasa Port Community together with the Northern Corridor Transport Observatory publishes a Performance Dashboard Report summing up productivity and efficiency results across the corridor, starting in the port of Mombasa <http://top.ttcanc.org/>).

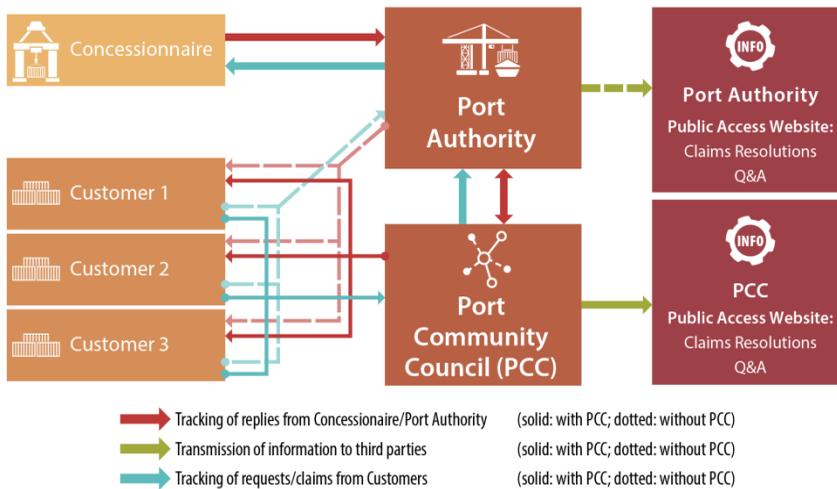
Process to handle customer feedback

Whether collected through the port community council or directly from port customers through the website of the port authority, the feedback must be processed, i.e. submitted for answer or comments to the relevant directorate of the port authority and/or to the concessionaire, and the answers sent to the customers using the same channel. To instill some discipline into the process, a maximum time window must be enforced for the answers to be provided, for instance two weeks for issues related to simple daily working practices, up to two months for issues

requiring a specific investigation. All questions and answers will be posted on the website of the port authority and made available to the general public.

For issues of particular sensitivity, like discrimination claims, a very thorough process is required. Practical monitoring of common user requirements can most effectively be done by setting up a formal feedback mechanism allowing users who believe they have been discriminated against to voice their claims. Those claims and the results of their review by the port authority should then be made public, for instance on its website. The concession contract will establish this formal mechanism, which must be made public if the contract itself is not, and will state that over a certain number of legitimate claims in a given year, three for instance, the concession could be terminated at the concessionaire’s fault. Simultaneously, to avoid abuse by the claimants, any claimant found to have brought forward two illegitimate claims would be subject to financial penalties by the port authority.

Figure 8: Customer Feedback Loop



Role of the port community council

The port community council has a critical role to play in improving the transparency of port operations, for the benefit of all users and final customers of port services, including shippers. It must be a formal instance, with an explicit mandate and working arrangements. It will hold regular meetings, typically on a monthly

basis, and barring any special circumstances, its deliberations will be made public (Example: Mauritius below).

Box 5: Mauritius Ports Authority (MPA) Port Users Council

The Port Users Council in collaboration with the MPA is:

- actively interacting with port users for efficient port operations;
- undertaking market studies to identify potential new port users and their requirements;
- promoting the facilities, services and future potential of Port Louis in close co-operation with the operators of port services and the Mauritius Freeport Authority; and
- responding positively to third parties expressing interest in the development of port or port-related activities.

The Council which has a consultative status deliberates extensively on important matters like port development projects, tariffs revision, changes in legislation and procedures, etc.

Terms of Reference

- to provide a regular medium of communication between port authorities and related agencies on the one hand, and all port users on the other;
 - to discuss matters affecting clients' interests in general, level and adequacy of port services and port performance;
 - to examine and discuss the port situation and port efficiency;
 - to advise on port regulations, procedures and practices, documentation systems and other related matters;
 - to discuss port development projects and advise on adequacy of port facilities;
 - to make suggestions on security, safety and environment projects likely to affect the efficiency of the port;
 - to assist the port in its marketing strategy and the enhancement of its image;
 - to suggest and propose improvements in areas of common interest to the port users; and to discuss any other related issues.
-

Most existing port community councils are consultative entities, which are obviously valuable as a conduit between port authorities and their professional environment, but this status could be enhanced by making them an official channel to table questions from port customers about, for instance, the implementation and supervision of a container terminal concession. To make it an effective process, this channel must be part of a customer feedback loop defined as such in the port institutional and contractual arrangements. The issues transmitted to the council would be formally submitted to the port authority, which will have, as suggested above, maximum periods of time to reply, depending on the complexity of the question. Importantly, both the questions and answers will be posted on the website of the port community council or on the one of the port authority, so that all port stakeholders will receive an even and complete information.

Annual operational reviews

During the final quarter of the fiscal year, the port authority will carry out an annual operational review of the concession that will be featured in the port authority's annual report. This review will build on the previous quarterly reviews and provide an overall assessment of the performance and service quality offered on the terminal throughout the year. If warranted, it will also suggest possible adjustments to improve overall performance and customers' relations.

Public information disclosure

As a rule, apart from situations where proprietary information belonging to the concessionaire must remain confidential, all monitoring reports on the performance of the concession should be made public and posted on the website of the port authority. Financial reports will be shared with the port community council when it exists, and the audited reports can also be made public.

Adaptation of contract provisions

During the life of a 25- or 30-year concession, circumstances may change in ways that could not be anticipated at the time when the original contract was negotiated. It is therefore possible that at some point in time some provisions of the contract may have to be adjusted. But while this is acceptable in principle, it must be very strictly circumscribed to situations which undeniably warrant reconsideration of previously agreed arrangements. It should not, in particular, occur within a short time frame following the signing of the original agreement, at the risk of undermining the validity and seriousness of the original bidding process. The concession agreement may actually specify a timeframe within which adjustment of any contract provision is prohibited, barring force majeure events.

Box 6: Dar Es Salaam concession adjustments

The container terminal in Dar Es Salaam port is concessioned. The original concessionaire was a consortium consisting of International Container Terminal Inc in the Philippines (ICTSI) with 70% of shares and Vertex Financial services of Tanzania with 30%. The consortium registered a local company Tanzania International Container Terminals Services Ltd (TICTS), which began operations in September 2000 with a ten-year contract. Subsequently, Hutchison Port Holdings (HPH) of Hong Kong purchased a proportion of worldwide interests of ICTSI, so that 70% of the shares in the concession are now held by HPH.

The initial concession was for 10 years, without the possibility of extension but with a review after 5 years in the event of greater-than-expected traffic volumes. The contract did not offer exclusivity to the concession for container handling.

The contract was renegotiated in the fifth year of the concession, in 2005, when traffic was increasing strongly and the terminal productivity was at its highest. An extended contract was signed for an additional 15 years, giving 25 years in total. The extended contract differed in concept from the original contract, which was envisaged as primarily an operating contract, with minimal investment obligations. The extended contract requires the concessionaire to make substantial investments. In addition it contains some important operating changes, with the provision of additional berth space and an extended back-up area. A clause was included giving exclusivity for the handling of container vessels to the concessionaire, to apply until a level of 650,000 TEUs had been reached.

Source: Review of Effectiveness of Port and Port Terminal Concessions, Southern Africa Global Competitiveness Hub, 2009.

Should the concessionaire believe a contract adjustment has become warranted owing to unforeseeable and significant change in the economic environment within which he has to operate, it falls on him to prepare a documented request for contract adjustment and submit it to the port authority. It must be stressed, however, that the port authority has all latitude on whether to consider the request or deny it, based on its own assessment of the local conditions (see Box 6 above).

5. Conclusion

The objective of the guidelines is to help public authorities steer their way as efficiently as possible towards successful negotiation and implementation of container terminal concessions. However, it will always be for them alone to do the heavy lifting that such an endeavor entails.

All said and done, it remains paramount for decision-making authorities, governments and port authorities, not to lose sight of the goals they set for themselves when embarking on the concessioning journey, for it remains often too easy to get diverted towards secondary short-term objectives. Let's keep in mind the kind of contractual relationship a concession agreement involves is far more complex than the regular owner/contractor relationship public authorities have been used to so far—and so more complex is the procurement and negotiation process as well.

Because of this complexity, and of the initial asymmetry of experience between the public concessioning authority and the private terminal operator, it is absolutely essential that public authorities be equipped with all required skills, legal in particular, to enable them to negotiate on a level playing field with their private counterparts. This is the reason why multilateral development banks usually stand ready to provide, or finance, technical assistance to concessioning authorities when they decide to launch a container terminal concession. As an example, the private sector arm of the World Bank Group, the International Finance Corporation, is offering transaction advisory and management services to client countries to help them cope effectively with these situations.

