USER MANUAL— LEGAL AND INSTITUTIONAL ASPECTS OF PORT REGULATORY SYSTEMS

CAP-HAITIEN PORT REGULATORY STRENGTHENING PROJECT

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This document was produced for review by the United States Agency for International Development. It was prepared by Nathan Associates for the Cap Haitian Port (CHP) Regulatory Strengthening Project, contract number AID-521-C-16-00003.

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ACRONYMS

ANAREP	National Port Regulatory Authority
AOT	Temporary Occupation Authorization
APN	National Port Authority
BLT	Build-Lease-Transfer
BOO	Build-Own-Operate
BOT	Build-Operate-Transfer
CET	Terminal Operating Agreement (*convention d'exploitation de terminal*)
DBFO	Design-Build-Finance-Operate
DPP	Public Port Domain
DSP	Public Service Delegation
MEF	Ministry of Economy and Finance
MTPTC	Ministry of Public Works and Telecommunications
SME	Small and Medium-Sized Enterprises
PPP	Public-Private Partnership
PPPI	Institutional Public-Private Partnership
RLT	Rehabilitation-Lease-Transfer
ROT	Rehabilitation-Operate-Transfer
SEMANAH	Haitian Maritime and Navigation Service
SONAGEP	National Port Management and Operating Company

I. INTRODUCTION

1.1 PURPOSE OF THE MANUAL

APN has entered into a variety of contracts for the provision of port services, construction and operation of warehouses and merchandises handling facilities in Cap-Haitian, with different companies. However, the purpose and scope of the responsibilities and obligations of APN and the operators are described in a fragmented and imprecise manner. Furthermore, the technical specifications and performance levels of service providers are not expressly defined in these contracts. In addition, certain contractual conditions stipulated herein do not comply with the applicable laws and regulations in force in Haiti.

It is important that APN, as a contracting entity of these agreements concluded with corporations, has the capacity to define the precise terms and conditions under which the management and operation of the facilities and the provision of port services shall be carried out. APN must also be able to monitor and supervise the proper performance of the contracts concluded as well as to safeguard the Haitian people, the port users and the government interests d in managing the Haitian port domain .

Therefore, it is essential for APN to have the necessary resources and expertise in order to apprehend and comprehend the main aspects of port management and operation contracts and to master the stakes and implications of its responsibility as the regulator of the port sector.

The purpose of this Manual is to define the role and responsibilities of APN as the port regulatory authority in Haiti in the development and implementation of port infrastructure management and operation agreements.

This Manual also aims at providing contractual tools and defining the procedures for the fulfillment of APN's missions and functions, as defined in the Haitian legislation and regulations in force, and pursuant to international standards and best practices.

This Manual applies to all concession contracts and other agreements for the delegation of public port services to the private sector relating to the provision of services to ships or the transportation of goods, as well as to authorizations and licenses granted by the port authority to private operators.

1.2 WHO IS THIS MANUAL FOR?

This Manual is intended for APN's staff involved in the management of ports and port activities at operational, financial, accounting, legal and fiscal level This Manual is also relevant to APN's staff in charge of public safety, security, health and hygiene in the port domain.

In addition, this Manual is addressed to the APN line ministries (MTPTC, MEF), the Superior Court of Accounts and Administrative Litigation (CCCA) and all other public authorities involved in the management and operation of Haitian ports and in the supervision and regulation of port activities.

It is important to note that the provisions of the preliminary draft legislative and regulatory texts relating to port reform and the PPP legal framework, as well as the institutional and operational organization foreseen for PPP implementation, have been taken into account in the preparation of this Manual. Accordingly, it would be necessary to define the respective roles and responsibilities of ANAREP and SONAGEP within the scope of this reform.

This Manual will also take into account the project to delegate the operation and management of the Port of Cap Haitian container terminal to a private operator and will define the role and functions of the port authority in the management and supervision of this contract, object of this delegation.

1.3 STRUCTURE OF THE MANUAL

The Manual will first define the regulatory concept and its purpose, as well as the port regulator functions and scope of responsibility.

The present document will then describe:

- The main business models of port management and the port authority as well as the various economic actors' respective roles;
- The typology of port contracts and PPP contracts in the port sector, including their main characteristics highlighting the functions and responsibilities of the port authority in the development and supervision of these contracts;
- The legal and institutional framework governing port activities in Haiti that defines the missions and role of the port authority;
- The selection mechanism of private operators and related public procurement procedures;
- A list of standard clause comprising the main clauses and conditions to be included in the identified contracts, including their legal grounds and operational justification.

The annotated standard port concession agreements (Terminal Agreement, Tool Concession Agreement, and Authorization for temporary occupation of the port domain) will be addressed in a separate document.

This document *does not, however, exempt the relevant authorities from obtaining proper assistance in the legal, technical, financial, environmental, insurance aspects or other fields, in light of the specific characteristics of a given project.*

However, the Manual should help them to engage in a productive and informed dialogue with their advisors.

2. REGULATORY CONCEPT

In this context, it is important to define first and foremost the meaning of regulation, which is a complex concept, covering several aspects of the economic and social life of a country, and involving a broad range of economic and institutional actors categories of with diverse objectives.

This section will attempt to clarify the main characteristics of regulation as well as its purpose. Then, it will describe in the subsections below, its application to the port sector and the role and functions of its regulatory authority.

2.1 What is Regulation

Definition: Regulation may be defined as **« a set of mechanisms, rules, institutions, decisions, principles, which allow certain sectors to build and maintain balances that they would otherwise not be able to establish on their own economic capacity"».**[1]

Thus, the regulation of a given sector can be described as, various mechanisms, standards and procedures for direct and indirect oversight of certain aspects of an economic activity, as well as the decisions or actions taken by actors operating in that sector, as established by the public authorities.

Regulation can cover different aspects of business activities. In addition to economic regulation, the State and governmental institutions can establish and impose principles and rules relating to environmental, health and safety matters to economic actors. Public entities in charge of regulating the industrial, technological (e. g. telecommunications), commercial (e. g. banking) and commercial areas of activity are generally endowed with police forces and can apply sanctions in the case of violation.

2.2 Principles and scope of Port Regulation

It is important to define the scope of the regulator's overseeing economic activities in the port sector and to clarify its principles.

The scope and purpose of regulation is multi-faceted in order to ensure the following main tasks:

i. effective competition between the various economic players in the sector (exclusion of any monopoly or abuse of dominant positions) while complying with public service obligations and constraints (exclusivity and non-competition);
ii. the conditions for delegating the operation of public facilities and/or service provision;
iii. competitiveness of the sector;
iv. arbitration between the respective interests of operators, public management authorities/granting authorities and users;
v. determination of the tariffs applicable to port services and the mechanisms for reviewing and indexing them.

Under a concession system in which port activities are delegated to several private operators, regulation may be between ports, where different ports compete with each other or intra-port where several operators in the same port compete for the provision of the same services.

[1] Regulation "can also be a result of political will, which forsakes the system of public monopoles, willingly or by force in order to bring some balance in the workings of competitive markets and in public service objectives such as equal access to goods, like health and security» Anne-Marie Frison- Roche – *Regulatory Law Review – december 2009*

2.3 Functions of the Regulator

The regulatory operational aspects concern the following tasks:

(i) overseeing compliance with the commitments made by port operators;

(ii) monitoring the application of legislation and rules governing the port sector;

(iii) collecting, monitoring and exploiting information on the performance of different stakeholders.

The regulatory entity is **also entitled to impose sanctions in case of non-compliance with stakeholders' obligations**, including, in particular, the following:

- a warning notice , in case of non-compliance or errors and the determination and application of sanctions;
- **Received and processed complaints from users or third parties affected by** the rules contravention issued by the regulator.

The table below summarizes the main functions of the port regulator:

Table 1 Role of Port Authority

Role of the port authority regulator
Harbor Police
Regulation of Competition
Environmental, public health and public hygiene regulation and control
Construction and maintenance of port infrastructures (channels, dykes, locks, wharves, road and rail accesses….)
Management of development of the port domain and heritage preservation by elaborating appropriate strategies
General promotion of the port and development of the port services including its inland, rail and river access services.

2.3.1 Competition control

The prohibition of dominant position abuses , which hinders free competition between the various operators, tends to impose an obligation on the port authorities (owners or operator of an installation) to refrain from adopting abusive dominant positions measures by refusing, without objective reason, to allow third parties access to the installations.

To that must be added the principle of non-discrimination, imposed to the manager of the public domain. Restrictions on the right to occupy port public domain may also, depending on the circumstances, constitute an infringement of the freedom to provide services.

These principles are reflected in the draft ANAREP legislation, which state that practices aimed at **"preventing, restricting or distorting competition in the market, port and transport sector"** are prohibited. Thus concerted actions, agreements, express or tacit agreements, coalitions or cartels are prohibited if they result in anti-competitive practices.

The provisions of the draft ANAREP legislation also expressly prohibit any abuses of a dominant position that would consist of abusive operation by a company or group of companies: « *(i) a dominant* *position on the market in the port sector or maritime transport to or from Haiti, or in a substantial part of it: (ii) a state of economic dependency in which a customer or supplier does not have an equivalent alternative. »*

- **Exclusivity and anti-competition Notion**

  - Anti-competition measure to the benefit of the concessionaire: The concessionaire often request the inclusion in the contract of a clause guaranteeing that no concession of the same nature will be granted, either within the radius of a given distance from its own location or before a certain period of time. This is particularly the case of large investments over a long-term- payback period projects

  - Anti-competition to the benefit of the Contracting authority: The Contracting authority may requeste that the concessionaire refrain from taking part in any other concession that is likely to compete with the granted concession rights.

At times, it may be provided that should the contracting authority or the State for economic or social reasons impose preferential tariffs on the concessionaire for the benefit of certain users or a certain type of traffic, the concessionaire should be compensated on the basis of the tariffs normally applicable to such uses or traffic.

2.3.2 Police, Security and Safety Standards - Exclusive Jurisdiction of the State

The concession for operation of port public infrastructures and the provision of port public services does not grant the private operator any right to undertake responsibilities in the following areas:

- the placement of ships and boats at wharves equipped by him or in the movement of these ships and boats,
- the main roads, traffic and wharf use police.

2.3.3 Environmental, public health and hygiene norms and standards,

All public or private actors carrying out port activities are bound by environmental requirements aimed at protecting the public maritime domain and its surroundings. In this respect, the port authority must ensure compliance with environmental regulations, particularly when it comes to the transport of dangerous products and pollution control.[2]

2.3.4 Concept of public service

The definition of the concept of public service is crucial to impose or to lighten the public service mission obligations imposed on the port authority. Public service obligations and constraints are in fact lower when the activities authorized on the port public domain are of a purely commercial nature and do not involve users.

However, even if public sector intervention tends to decrease in the management and operation of the port area and related activities, its role is essential in the commercial management of the ports.

[2] International treaties, conventions and standards relating to matters of environmental protection, pollution and toxic waste management are listed in the manual on port operational regulation, which is part of the documents provided to the APN in the context of this Project.

Therefore, in all forms of delegation of port services to the private sector, **the public authority exercises and should always exercise its control power.**

2.3.4.1 Public service obligations

In general, the public service provider is compelled to do the following:

- **Continuity** of services is one of the fundamental principles of public service ;
- **The Quality and Adaptability** of the service to customer needs, both in quantity and in nature;
- **Transparency** is also an inherent principle of the public service that resides in:
  - the obligation to communicate administrative documents and the justification of administrative acts;
  - a transparent public tendering process for the implementation of public service delegation contracts, concessions and sub-contracts for the operation of public port equipment.
- **Neutrality** of the public sector: the port authority cannot use its public management authority to unduly favor an occupant of the public domain and competition must apply; and
- **Equal treatment of users**. all users meeting the same conditions must be treated in the same way. **Respect for equality between users** is a fundamental principle of public service (the port authority must not discriminate between users. In the absence of an overriding reason of general interest, the exclusive use of a wharf cannot be granted to a single ship owner). [3]

2.3.4.2 Legal status of port services and public service mission

All activities taking place in ports do not constitute a public service mission and are purely industrial or commercial. This is the case for the terminal convention where port merchandise handling carried out by private companies is not considered as a public service activity. The party to such convention freely organizes its commercial policy and is not subject to strict oversight by the port authority.

These activities are therefore not subject to the same constraints and obligations required for the provision of a public service as described in subsection 2.4.2.1 above.

2.4 DELIMITATION OF THE PORT PUBLIC DOMAIN

First and foremost, we must try to define the concept of port public domain. If there is no definition under current Haitian law, the ANAREP draft legislation provides that the port public domain for every Haitian port is defined by ministerial decree.

In general terms, it is all the **movable and immovable property belonging to the ports that serve the needs of public port operations.** There are therefore two cumulative conditions for a property to be considered a public property:

- public ownership; and
- the use of these assets for public service purposes

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More specifically, the port domain's assets are, among other things, the wharf, public wharehouses and developed land parcels where port companies are located. Hence we can consider that a large part of the port area is within the public domain.

2.4.1 Use of the public Domain

When it comes to the use of the public domain, it is important to remember that in order to carry out their activities port's companies must hold a permit allowing them to occupy the port public domain. This administrative authorization is mandatory and is issued by the port authority. According to the ANAREP draft legislation, this authorization is called "Authorization for the occupation of public domain". The form of this authorization is not clearly defined in the draft legislation. However, the conditions for carrying out the activities of the companies authorized by the port authority must be expressly set out in the contract between the latter and private actors.

2.5 ROLE OF APN AS THE REGULATORY AUTHORITY

APN, established by the **Presidential Decree of March 15, 1985** is a commercial entity with legal personality, administrative and financial autonomy operating under the authority of the Ministry of Economy and Finance.

APN's main mission is to control the management and operation of all ports in Haiti. It is responsible for the following:

- Oversight of all commercial port activities and all port facilities under its jurisdiction;
- Management, operation, maintenance and development of port facilities within its jurisdiction;
- Establishment of all necessary procedures to regulate the services required by vessels, cargoes, passengers and other users of the ports within its jurisdiction;
- Establishment, strengthening and revision, whenever necessary, of the modalities and procedures to ensure a certain level of economic profitability in all ports where investments have been made;
- Determination of the charges, fees, duties, rates, tariffs, rules and regulations for all ports within its jurisdiction, including private wharves and definition of the modalities for collecting said charges;
- Establishment of the terms and conditions for the lease or rental of land and property within the port areas within its jurisdiction;
- Organization of cabotage throughout the national territory.

APN's missions include economic, legal and financial regulation of all port activities in Haiti, including private wharves. APN has also the powers to impose sanctions in cases of non-compliance with the regulations governing the port sector and the standards established in the carrying out its mission.

The table below describes the different statutory schemes that can be adopted by the authorities in charge of port management around the world. It is noteworthy that in most cases the public sector, through the government or its territorial divisions, retains control of these port management entities.

Table 2 Status of port authorities (ESPO-Port Governance survey, 2010) [4]

Legal status of port authorities (PA)	Ensemble	Hanseatic*	Latin
The port authority (PA) is a department of a local authority (municipality or region)	13	18	8
The PA is a satellite entity of a local authority	40	27	60
The PA is a separate entity from the local government with shared capital held by the local government.	35	34	32
The PA is a private corporation	5	5	0
Other	7	16	0

*It is a geographical area in northern Europe (Germany, the Netherlands, Poland, Baltic States) where port activities were developed during the Middle Ages.

The following table shows the revenues of the port authorities classified by origin. It shows that the portion of public subsidies is decreasing and that the sources of revenue from land occupancy charges made available by the port authorities are the main driver of growth for the port's financial resources.[5]

Table 3 Financial Resources of Port Authorities

Financial resources of port authorities	Ensemble	Hanseatic	Latin
Port dues	49	46	41
Fees for occupancy of port domain	25	29	29
Sales of services	16	13	19
Public Subsidies	5	5	7
Other resources	5	7	4
Total	100	100	100

[4] "Two forms of statutes are dominant: (i) a legal entity separated from the local or national government but without shared capital (Latin model) or; (ii)a legal entity separated from the government but with a capital in which the government holds all or part of it. The "de-municipalization" of the ports, observed especially in Benelux, allowing the creation of companies whose capital is open to private investors, should not make us forget that the local authorities, sometimes along with the representatives of the State, control the supervisory boards. »The new role of port authorities for the adaptation of clusters to globalization challenges: Laurent Lévèque - Revue Espace Politique - No 16- 2012 -1

[5] Op cit no 6.

Op cit no 6. * Hanseatic ports: Ports of Northern Europe

3. PRIMARY PORT MANAGEMENT BUSINESS MODELS

3.1 TYPES OF PORT MANAGEMENT MODELS

In the handbook *Port Reform Toolkit,* the World Bank and the PPIAF (Public Private Infrastructure Advisory Facility) classify the possible port management business models according to whether the management of infrastructure, superstructures (equipment and coating of terminals), operations and other services are predominantly private or public. Accordingly, we can determine the following models:

- **The management concession model** (privatized port), in which the public sector entrusts the whole management of the port to the private sector.
- **The public service port model (Service Port)**, where the port authority is responsible for its own management, cargo handling and other front-line functions through a centralized administration. The private sector's involvement remains limited to secondary services.
- **The landlord port model (Landlord Port),** where the port authority transfers the ownership and operation of the superstructures to private operators, i. e. the equipment (cranes and gantry cranes), in order to focus its activities on the ownership and management of the port infrastructure (wharfs and berths) and its estate, that it puts at the private operators disposal, as well as the control of navigation and planning.
- **The intermediate model (Tool Port) -** quite common in French-speaking countries, the port authority leases equipment, warehouses and storage space to authorized private maintenance companies, who handle ship-owners by providing maintenance equipment, hiring daily laborers, and assisting ships during their port of call.

NB: However, it is important to note, that the concept of "concession" is sometimes used as a generic term which does not reflect the reality of the contractual relations between the public and the private partner. Indeed, authorizations to occupy a public domain are wrongly qualified as "concessions" such as the operation by a private operator of an industrial terminal, except where the agreement also confers the management of a public service.

3.2 MAIN CHARACTERISTICS

The purpose of this section is to describe the main characteristics of the different port management mechanisms, from which the nature of the specific contracts derives. However, the boundaries between the different business models are not airtight, certain elements that are specific to one management model may be found in a different management and operational mechanism. .

3.2.1 Dominant Management Model - Landlord Port

Since the 1980s the port sector has undergone profound changes in the management and operation of its activities. Commercial ports are evolving from the tool port model to the landlord port model. The "tool port" model is characterized by public authorities holding a majority stake, and the private sector activities generally remained limited to operational functions, particularly maintenance, but with equipment owned by the public authority. In the landlord port model, the public authority reduces its scope to the ownership of the infrastructure and land that are leased to private operators (concessions, terminal agreements).

The "Landlord Port" is emerging today as the major contractual model for a progressive disengagement of public authorities in port management. The deregulation of the maritime transport sector and activities has led to considerable growth in ports evolving from a business model of public management (ownership, management, operation) to a model in which the port authority is no longer the sole owner of the infrastructure and land that are leased to private operators, who in turn operate the terminals and finance their equipment.

Numerous ports, around the world, have indeed developed concession based models of technical, business and financial partnership that grant the construction of infrastructures as well as the management and operation of port terminals to private operators. This trend is particularly noticeable in container terminals financed and operated by major shipping groups. [6]

Main characteristics:

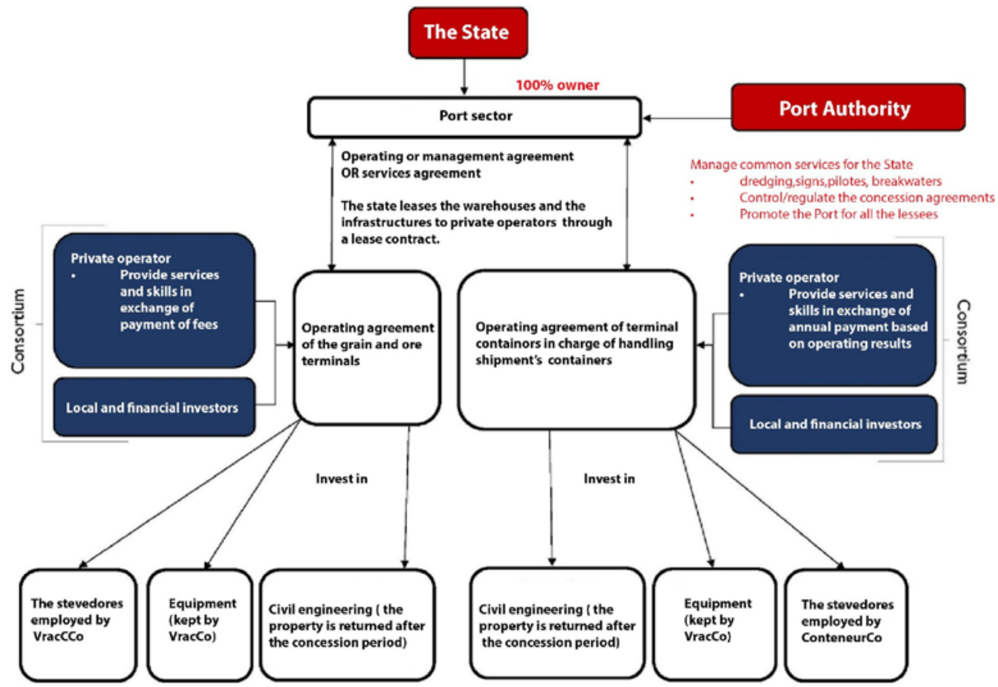
- In the « landlord » model:

- The public sector is responsible for planning and implementing the regulations. The State, through the port authority, retains ownership of land and certain basic infrastructure that are leased to private companies or industries such as refineries, terminals or chemical industries. These operators finance the superstructure.
- The private sector owns its own infrastructure and equipment in the field and is responsible for terminal operations. In this model, the contract should provide for a payment or remuneration mechanism for the investment in infrastructure. In such a case, the private operator's revenues must enable it to assume the current operations of a terminal and to finance its infrastructure investments, including their depreciation over several decades.

The table below illustrates the contractual arrangement and articulation between the different stakeholders in a proprietary port management system:

[6] The management and operation of containerized terminals around the world now follow a quasi universal Port-type model. In this model, the responsibility of the sovereign authority when it comes to operation disappears in favor of private interests in the framework of concession processes granted over long periods (from 20 to 35 years on average). Only 17.4% of container port terminals remained fully under public control in 2008 compared to more than 56% under the control of total terminal operators (Aldrick, 2009) (Alex-Grosdidier De Maton - March 2011).

Table 4 Contractual Arrangement in Port System



3.2.2 Management model – Privatized port

The port concession is a transport concession, covering infrastructures, works, superstructures, equipment and services.

3.2.2.1 Global port concessions – Main characteristics

Global port concessions cover the whole port, infrastructure, superstructures, equipment and services relating to the different types of traffic.

Unlike the proprietary landlord port management model, this concession model **is rarely used.**

Indeed, port concessions very seldom include infrastructure for the following reasons:

- **Lack of economy of scale** linked to the operation of infrastructures (protective works, access channels, wharf walls, etc.). Whether one or five hundred vessels with a large draught use a 16-metre dredged channel, the dredging cost will be the same;
- **The economic life and the length of their infrastructure depreciation exceed bank loans terms.**
- **Costly norms standardization process**
- **Low market value and inalienability** of these infrastructures, such as channels or protection works.

As a result, port private concessionaires rarely take part in these infrastructure projects.

Infrastructures concessions are generally limited to **quay walls, embankments, berths and dredging of basins.** Although major infrastructures are kept out of concession projects, the contracting authority/port authority may require the concessionaire to contribute financially to their maintenance and development.

However, in some parts of the world, terminal operators are sometimes willing to invest in infrastructure that is limited to operational infrastructure (dredging and quay).

3.2.2.2 Concession of a port domain area - port domain and land concession (Terminal Agreement & Public tool Agreement)

The port concession is an agreement, which aims to outsource the totality of a project involving the **occupancy and operation of an area within the port public domain (DPP).** This concession is granted to a private partner and often concerns the operation of a port terminal or port public equipment. The parties to an operating agreement for a port terminal (CET) often refer to a model agreement known as "Build, Operate, Transfer" (or BOT), which provides for the outsourcing of a whole port public service, from the design of a project to its operation, including its financing and construction.

The port domain concession consists of entrusting the private operator with **the maintenance and warehousing of general cargo**, and in particular of restructuring ship maintenance ("shore handling") and operations, in order to supervise and better control these activities and obtain gains in productivity.

3.2.2.3 Port Public Tool Concession

The purpose of the port public tool concession agreement is to delegate to a private partner the operation of warehouses, hydrocarbon storage facilities, berths, grain silos, etc., built and financed by the port authority. The private partner usually carries out works, even minor works, with result in privately occupying the DPP. This concession agreement is then qualified as a public service delegation combined with a domain concession.

3.2.3 The Intermediate Model (Tool Port)

The "tool port" model is characterized by public authorities holding a majority stake, while the private sector is generally limited to operational functions, particularly maintenance but with tools owned by the public authority.

4. TYPES OF CONTRACTUAL MODELS IN THE PORT SECTOR

The different port business management models, as classified by the World Bank in the aforementioned Section 2, takes into account a variety of contracts between the port authority and economic operators, which can be defined according to:

- **The purpose of the contract** and the nature of the services provided (public service or commercial activity to the benefit of the operator);
- The nature of the relevant **port domain** (public or private);
- The content and scope of the port authority and the private operator's respective obligations and responsibilities, as well as the related risks;
- Remuneration mechanisms of the private operator.

These different management models are not divisible and it is possible for the port authority to combine different management models in a single port, depending on the the authority's technical and financial resources and the market context.

This is the case of the port of Cap-Haitian, where the container terminal and the commercial terminal will follow the landlord model (with the terminal being built by the public sector and operated by the private sector) while the pilotage services will be provided by the APN, a public entity.

Nonetheless, clear distinction must be made between:

- The **Port business management models** (Landlord port /privatized port / intermediate port) which describe , the conditions according to which the technical, economic and financial conditional aspects of a given activity are performed;on one hand
- and on the other hand, the **contractual arrangements** (concession, leasing, lease, etc.) relating to those business management models, according to which the operators and the port authority agree to carry out the activity that has been entrusted to them.

It is therefore important to distinguish the different types of contract and to identify the role and responsibilities of the APN and the private co-contractor in accordance to the business management models described in the above sections.

The implications relating to the parties'respective obligations in these different agreement as well as their transposition in the contract will be subsequently described.

4.1 THE PPP AND DELEGATION OF A PUBLIC SERVICE CONCEPT - DEFINITION

4.1.1 What is a PPP?

Given the nature and scope of the regulatory authority's responsibility in the supervision of contracts concluded with private operators, it is important to define the concept of public-private partnership.

In fact, a PPP constitutes one of the public procurement contractual modes which differs from public procurement common law. PPP agreements are particularly complex and entail the involvement of multiple stakeholders, as well as the evaluation and understanding of technical, economic, financial, environmental, social and administrative parameters which require specialized skills in various different fields.

It is therefore necessary to describe beforehand, the constitutive elements and main characteristics of the different **contractual mechanisms involving the public and private sectors in the development, operation and management of port infrastructure and services** under the PPP mode.

The agreements between public authorities and private economic actors represent a broad variety of contractual mechanisms, as follows:

- the nature of the tasks and responsibilities entrusted by the public authority to the private sector;
- the method of remuneration of the private operator;
- the public procurement process ;
- the nature and extent of the risks incurred by the parties to the contract (demand risks, construction risks, currency risks, tax risks, etc.);
- the ownership of assets. (see Table 1)

However, the legal PPP definitions prevailing in many countries or those stemming from regional organizations and international donors, are not always clear and do not clearly establish the boundaries between the different types of public procurement contracts entrusted to the private sector.

In fact, there is no consensus on a precise definition of PPPs, among the various stakeholders involved in developing private sector participation. Therefore, for the purposes of this Manual, we will adopt a very broad definition of PPP formulated as follows ***"forms of cooperation between public authorities and the business community, with the purpose of financing, building , rehabilitating , managing or maintaining infrastructures or providing a service"***[7]. This definition has also been used by the Central Unit for PPP Management (UCG/PPP) at the MEF in Haiti.

[7] Green paper on public-private partnerships and community law 30/04/04

4.1.1.1 The main characteristics of PPPs are:

(i) The **length of the cooperation** (minimum of 5 years for a management contract, up to 30 years for a concession);
(ii) The existence of **private & public funds**
(iii) The **role of the private operator;** and
(iv) **The optimal allocation of risks** between the public and private partner (**a substantial part of the risks** shall be borne by the private entity);
(v) The purpose of the contract must relate, directly or indirectly, to the provision of a public service.

As such, if one of the criteria listed above is not part of the characteristics of the contract, this is not a PPP.

4.1.1.2 Public Service Delegation contract – a PPP variant

PSD agreements such as concessions or leases could be viewed as a **contractual variant of PPPs,** in which the collaboration between the public sector and private actors, the PPP comprising a much broader contractual scheme and including innovative financial and economic mechanisms. These principal characteristics are, in many aspects, similar to the public works or service concession described above. However, the operational risk is mitigated by the public authorities' participation in the form of subsidies, financial and industrial guarantees.

Definition of the PSD: the public service delegation contract can be defined as an agreement, according to which the State or its divisions (local authorities, public institutions) entrusts the construction or rehabilitation, operation and/or management of a public facility or the provision of a public service to a public or private delegate, and whose remuneration is substantially linked to the income generated by the provision of the service, including the contractual models as described below.

However, PPPs should be distinguished from public service delegation (PSD) as the former (i) does not substantially link the private partner's remuneration to the revenue generated by the provision of the service, but (ii) instead the payments to the private partner are dependent upon reaching performance objectives in relations to the quality of the public service provided - unlike the DSP contract, which does not in principle require the achievement of such performance objectives.

4.1.1.3 Conventional PPP contracts

Concession: the operation of a public service or of a general interest mission, by a public or private entity, for which the concessionaire's remuneration is based on the financial results of said operation. Therefore, in theory, it bears all the risks associated with the design, construction and operation of the structure and its main sub-categories:

- o BOT/ROT (Build-Operate-Transfer) / Rehabilitate Operate Transfer
- o DBFO (Design-Build-Finance-Operate)
- o BOO (Build-Own-Operate)

- This contractual model applied to port activities includes the following contracts:
- **The port concession** may cover the entire port (privatized port)
- **The concession of an area within the port domain:** Terminal agreement or public tool agreement.

Lease contract or BLT/RLT (Build-Lease-Transfer / Rehabilitate-Lease-Transfer): an agreement whereby the State is responsible for the management of the project (financing and building the assets) and retains ownership of the assets while the operator pays a state fee based on operation revenue.

- This contractual model applied to port activities includes the following types of contracts:
- **Contract for the management and operation** of a terminal by a private operator with or without investments limited to the renewal of assets whose operation have been delegated by the public sector (see description in section 4.2.1 below);
- **Contract for the management of public tools** provided by the port authority and leased to the private operator for their operation and the provision of related services;
- **Warehouse leasing agreement** owned by the port authority;
- **Public Service management**: the management of a public service by a private operator with variable remuneration based on the fulfillment of technical and commercial objectives.
    - This contractual model applied to port activities and includes the following types of contracts:
        - **The contract for the management of public tools ,** provided by the port authority and leasedto the private operator for their operation and the provision of services. The private operator's remuneration is based on a fixed fee and comprises a variable amount based on operation revenues;
        - Any contract relating to the provision of services to vessels and cargo ships that may be delegated to a private operator in accordance with applicable law.

4.1.1.4 Alternative PPP contractual models

It is important to include the definition of two other contractual arrangements between the public and private sectors, which may also be applicable to operating and managing port activities:

a) **Institutional Public-Private Partnership (PPPI):** The PPPI allows the public partner to maintain control, influence and expertise in the activities carried out in the partnership, through its shareholding and participation in the decision-making body of the joint venture . International lenders, such as the International Finance Corporation (IFC) or regional development banks, subscribe sometimes to the capital of these mixed entities in order to closely monitor the operations carried out by these companies and negotiate their withdrawal through a "put and call" agreement at a fixed or determinable price.

► This contractual model corresponds to the management and operation of port and service provision facilities by a mixte-public company whose share capital is held by private and public shareholders[8].

b) **The performance contract, or PFI (Project Finance Initiative):** a contract between the public authorities and the private sector for the design, financing, construction, operation and maintenance of infrastructure, public equipment over a long period of time, in exchange

[8] This model corresponds to the Haitian Telecommunications Company CONATEL, with 60% of its capital owned by a private partner and 40% owned by the Haitian State.

for a remuneration by the State based on the fulfillment of certain performance objectives as defined in the contract. This contractual framework is widely used in Great Britain for the construction of administrative buildings and the provision of public services.

The different contractual arrangements involving public authorities and the private sector for the development and operation of public infrastructures, public service provision or public service mission participation are described in the following table:

Table 5 Classification of PPP: The different types of partnership contracts between the public and private sectors

Type of PPP	Purpose	Operator compensation method	Project Manager	Availability/Performance risk	Operating risks / demand	Asset ownership
Total concession (DFBO, BOT/CET, BOO)	Financing, operation, management and maintenance of port infrastructure and superstructures, and service	The operator is remunerated by collecting user fees and pays a fee to the State.	Private operator	Private operator	Private operator / State	State and/ or private operator
Leasing	Operation, maintenance management of existing port infrastructure and service provision	The operator collects a percentage of operation revenue	State or port authority	Private operator	Private operator	State
Leasing with private investments	Operation, management and maintenance of equipment and public terminals, financing of new equipment by the private operator	The operator collects a percentage of operation revenue.	Port authority and private operator	Private operator	Port authority and private operator	State and Private operator
Management Contract	Infrastructure management and service delivery	The operator is remunerated by the public entity on the basis of revenues generated by the completion of objectives	State or public company	Private operator	State + Private operator	State or Public enterprise
"Lease – management contract with remuneration based partially on the	Infrastructure management and service delivery	Remuneration by the public entity + incentive payments, remuneration based on revenue	State or public company	State + private operator	State + private operator	State or private operator
PFI Contract based on Performance		The operator is remunerated based on its performance	Private operator	Private operator	Private operator / public partnership	Private operator

Authorization for temporary occupancy of port public domain (TPA)	Operation, management and maintenance of industrial or commercial terminals and all related services	The private operator is remunerated based on operation revenue ts and pays a fee to port authorities.	Private operator	Private operator	Private operator	Private operator
SEM (mixed companies/ PPPI	Creation of a JV/Project company with a capital contribution from the State	The SEM is remuneratedbased on operation revenues	SEM	SEM	SEM	SEM
purely private management contcats	Operation, management and maintenance of industrial terminals: Concession/Utilities	Private operator	Private operator	Private operator	Private operator	Private operator

4.2 MAIN CHARACTERISTICS OF PORT CONTRACTUAL AGREEMENTS

Contractual forms of private sector delegation most often cover:

- a terminal (container, commercial, industrial);
- a specific activity (warehousing);
- infrastructure and superstructure; or
- superstructures solely (equipment, information systems, office buildings, warehouses, logistics areas, etc.).

The purpose of this section is to describe the main characteristics of the different contractual arrangements used by public authorities to delegate the operation and management of port activities to the private sector in accordance with international best practices and to explore the implications for the contracting or leasing authority and the private operator.

4.2.1 Port Concession Agreement

The port reform project outlines a distinction between:

- **a concession for the exclusive use of the port public domain** ; and
- **a concession for the operation** of an area within a public domain (operating a terminal)

Conditions under which:

(i) The activities to be carried out in this area are explicitly provided for in the concession contract;

(ii) The concessionaire is required to invest in the physical infrastructure (quays, berths...) that has been entrusted to it which upon the expiration of the concession, will be transferred to the contracting authority;

(iii) The duration of the concession agreement is linked to the amortization of the investments made by the concessionaire;

(iv) The concessionaire is required to provide a compensation in return for the use of a part of the port domain (state fee).

(v)

Under a concession agreement for a terminal operation, the port authority enters into an agreement with a private operator for the construction of a terminal designed for a certain types of traffic, including berths, equipment and installations necessary for disembarkation, embarkation, handling and warehousing operations relating to the vessels .

4.2.2 Concession for the use of an area of the port public domain

4.2.2.2.1 Terminal Agreement (or Terminal Operation Agreement)

A terminal agreement concluded between the port authority and the operator provides for the operation of the terminal and possibly the construction of infrastructures, which often anticipates traffic development objectives. This contractual arrangement constitutes also **a public domain occupation authorization.**

The terminal agreement is a variant of state-owned concessions, where the private operator can:

- Operate a **purely industrial activity** (e. g. cargo handling) and therefore does not in theory **constitute a public service activity;**
- **Operate a public service** or be in charge of the development of public works.

4.2.2.2 Concessions involving the provision of a public service

Container Terminal concession

Shipowners' intention to operate terminals specifically dedicated to their containerized traffic has created a need to develop a new legal and financial framework for terminal operations. The idea was to simplify the relationship between users and managers of port facilities and to provide more flexibility to terminal operator activities.

Therefore, the port terminal operation convention (CET), arose from the need to create an instrument specifically dedicated to terminal operation and is a contract resulting from customary practices.

This agreement exclusively covers the management and, when appropriate, the construction of a a terminal specialized in certain types of traffic, comprised of berths, equipment and developments necessary for disembarkation, embarkation, handling and storage operations serving the ships. The use of this method of management, which may only involve an area of the port domain, must be compatible with the handling of a sufficient number of public or private equipment that is subject to public service obligations.

The purpose is to authorize the creation of private and autonomous container terminals and to grant to private sector the operation and management of said terminals in the form of an authorization for public domain occupation .[9]

Concessions of miscellaneous port services

All port services, other than those provided by governmental authorities (i. e. security, customs, immigration, public health) may be the object of concession contracts in order to reduce the burden of port public funding, but at the risk of creating income privileges. The most frequently granted concessions are:

- Towing,
- Silos,
- Refrigerated warehouses,
- Mooring and refueling,
- Pilotage services are generally operated within a statutory framework.

4.2.2.2.3 Concession of port domain excluding the provision of a public service

a) Contract for temporary occupation of the port public domain

These are authorizations granted to occupy public property granted to companies for the operation of their own installations, which may be made available to third parties under conditions approved by

[9] The grouping of shipowners and operators into specialized corporations or consortia with significant resources has encouraged the creation of this authorization. The development of these concessions, potentially subsidiaries of foreign ports, is a characteristic of globalization stemming from the increase in trade volume. As previously noted, it reduces the ability of port authorities to control their own traffic. Port authorities are only one factor, in a production cycle whose purpose is foreign to them, which is in fact consistent with their status and their for public service vocation. (See source)

the port authority. Public tools may be made available to the operator by the port authority in accordance with the financial conditions set out in the agreement.

This authorization constitutes an agreement between the port authority and the private operator, whereby the private operator is responsible for the terminal technical and commercial operation and benefits from a permanent priority for the use of the docks.

When the holder of the authorization operates its tools for its own needs, its activity shall not be controlled by the port authority, except for the purpose of ensuring compliance with conditions of occupation of the public domain.

This type of contract must be regarded as a purely commercial activity which does not constitute a public service delegation.

4.2.3 Domain Fee

Under a concession, the concessionaire's remuneration is based upon the amount of operation revenues where the concessionaire often collects directly service payments from the users. The concessionaire shall pay a fee to the licensing agency/port authority calculated on the basis of those results.

The concessionaire bears **the payment collection risk**

The fees paid by the concessionaire generally include:

- a rent or land fee;
- an entry or license fee;
- a fee based on traffic or operation financial results.

The concessionaire usually guarantees the payment of this fee with collaterals (e. g. guarantee or bank deposit, escrow account) set up by the concessionaire in favor of the licensing entity.

The concessionaire may in turn collect an occupancy charge from its subcontractors and the occupants of the leased property and collects user fees for the use of leased public tools .

4.2 LEASE AGREEMENT FOR PORT INFRASTRUCTURE MANAGEMENT

These contracts relate to the management of existing infrastructures that need to be rehabilitated, renewed or built, as the case maybe.

Contracts in line with the landlord port management type of contract are essentially lease agreements where the port authority entrusts the private sector with either: (i) an area of the port domain; or (ii) infrastructures or public tools.

4.3.1 Lease /Affermage Agreement - Definition and scope

4.3.1.1 Affermage

Affermage is the lease by a private operator (the lessee) **of works and maintenance equipment** (cranes and gantries) **belonging to the public port authority (the lessor).** It generally includes **the operation of existing infrastructures as well as their maintenance and upgrade, excluding their financing and construction,** supplemented, where appropriate, with equipment belonging to the operator. The private operator pays a fee to the port authority; this fee is based on the financial results or the volume of the delegated activities (e. g. traffic, availability) or the availability of the tools. Therefore there is no port infrastructure financed by the private partner. [10]

4.3.1.1.2 Affermage with limited private investment

Affermage contracts may, however, include concessionary elements, whereby the lessee invests in tools, machinery, warehouse construction or land development which ownership will be transferred to the port authority at the end of the contract. These contracts are often referred to as **"port concessions",** which made the clear distinction between these two types of contracts as well as the parties's respective responsibilities and obligations quite difficult .

For example, the lease agreement of the port of Dar es Salam in Tanzania, stipulates that the works are financed by the lessor , while the tools to be added to the existing ones, must be funded by the operator. Nevertheless, the lessor reserves the right to acquire these tools at the end of the agreement, which include, in particular , container lifting equipment. The lessor also hold a right of first refusal over other potential purchasers.

NB: In this regard, it is important to note that the purpose of the call for expression of interest, relating to the rehabilitation and development of the Port of Cap Haitian, is to select a private operator with the capacity to finance port tools and to manage, operate and maintain the container terminal under a lease agreement entitled "PPP leasing".

4.3.1.3 Public tools management contract for existing or future installations

This contract may be defined as a type of delegation, where the competent authority entrusts the management of existing or future public facilities and tools provided to port users to a private company. These tools can be operated, managed by the port authority, or leased or leased for a performance based fee, with future investment expenditures remaining the responsibility of said authority.

It is important to note that public tools includes works and equipment belonging to the port authority.

Definition of public equipment: In absence of a comprehensive list, this concept generally includes: cranes, horizontal unloading platforms, hangars, silos, handling accessories (fish unloading crates), runways, platforms as well as marinas.

Purpose: It is important to clearly specify the tools , installations and other machineries , comprising the activities which management has beeb delegated to a private operator. This may also include

[10] Components of the port reform. The transfer of these tools t was evaluated by an ad-hoc entity, the National Evaluation Commission, chaired by a magistrate of the Court of Auditors and composed of independent experts, in order to guarantee the transparency and sincerity of the public tools sales procedure to private companies.

investments in the construction and/or rehabilitation of such tools. "The purpose of this agreement is to establish and operate tools comprised of..."

Using this type of contract , which may only involve an area of the port domain, must be compatible with the maintenance of a sufficient number of public or private tools for the performance of public service obligations.

The granting of a public tool concession constitutes both a port domain occupancy authorization and a right to operate a public service.

4.3.2 Remuneration mechanisms

The calculation of the lessee's remuneration is based on financial operation revenues and in the light of performance objectives pursuant to the terms and conditions of the lease agreement. Lesse's remuneration conditions are, in theory, negotiated within the scope of the contract concluded between the parties and, take into account the particularities of the financial arrangements of the lease as well as other guarantees provided by the stakeholders.

4.4 RISK ALLOCATION BETWEEN THE PORT AUTHORITY AND THE PRIVATE OPERATOR

The private sector must bear **a substantial part of the risks** associated with the execution of a PPP contract. This is one of the main components of PPPs, as described in subsection 4.1.1.1.1 above.

4.4.1 Risk identification and assessment

The risks are allocated on the basis **of the technical, economic, financial and legal feasibility studies and the environmental and social impact assessments findings.** This feasibility study aims, among other things, to identify risks, assess the risks legal and financial implications and determine measures that may potentially reduce mitigate or cover those risks. Once this assessment has been carried out, the stakeholders allocate the risks among themselves, which will be specifically described in the partnership contract.

The risk assessments associated with a PPP project must take into account the following implications and challenges:

- economic impact on port development and activities;
- environmental and social impacts of the project;
- role of and scope of the services provided by SMEs as well as national and regional workforce to be employed for the project;
- inclusion of knowledge and technology transfers in the project;
- impact on the regional integration process.

Figure 1 Diagram of Risk Analysis and Management Procedure

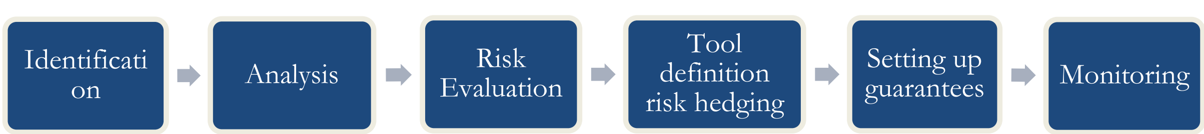


Table 6 PPP Project Risk Matrix

Nature of Risk								
Stakeholders	Policy	Additional Cost	E&S	Market	Construction	Operation	Performance	Achievement
Private Operator	X	X	X	X	X	X	X	X
Contracting authority	X		X		X			
Project Manager /EPC		X	X	X	X	X		X
Operator (O&M)		X	X	X	X	X	X	
Buyer / Users				X			X	X
Suppliers			X	X		X	X	X

4.4.2 Infrastructure Risks (design, construction, technical, performance)

The risks of the contracting authority may vary from one type of contract to another, but are almost always reflected into financial terms. They primarily depend on the level of investment made by the public sector.

4.4.2.1. Concession

Under a concession contract, the technical and financial risks to the ,Contracting authority are low, as the concessionaire is responsible for the financing and construction of the infrastructure with the transfer of the facility(ies) at the end of the contract.

However, the concession grantor may be at risk if it is the co-concessionaire within a mixed public special purpose company or if it invests directly to fund other works and tools. Therefore theserisks may be substantial .

4.4.2.2 Lease/affermage Agreement

The public authority is most often responsible for heavy and intermittent infrastructures (dredged channels, protective works, docks) while the concessionaire tends to limits its participation in superstructure development and operation.

These substructures must be completed in their permanent dimensions, as they cannot be easily adapted to traffic increases. The projected lifespan of these works is much higher than that of the loans that financial institutions are willing to grant. The risk must therefore be borne by the public sector which financial system is set over longer terms.

The following table summarizes the contractual agreements relating to the development and management of port activities.

Table 3 Development and management of port activities contractual agreements

Development and Management of Port Activities Contractual Agreements						
Global Management Concession (Privatized Port)						
Type of Contract	**Purpose**	**Operator remuneration mechanism**	**Project Manager**	**Availability/ Performance risk**	**Operating Risks/**	**Asset Ownership**
Total concession (DFBO, BOT/CET, BOO)	Financing, operation, management and maintenance of port infrastructures and superstructures and/or service provision.	The operator is remunerated by collecting user fees and pays a fee to the State.	Private Operator	Private Operator	Private Operator / State	State and/ or Private Operator
Purely private management	Operation, management and maintenance of industrial terminals: Concession/ public service	Private Operator	Private Operator	Private Operator	Private Operator	Private Operator
Landlord Port						
Type of Contract	**Purpose**	**Operator compensation method**	**Project Manager**	**Availability/Performance risk**	**Operating Risks/**	**Ownership of assets**
Authorization for temporary occupation of port public domain	Operation, management and maintenance of industrial or commercial terminals and all related services	The private operator is remunerated based on operation results and pays a fee to port authorities.	Private Operator	Private Operator	Private Operator	Private Operator
Lease/affermage with private investments	Operation, management and maintenance of tools and public terminals, financing of new tools by the private operator.	The operator collects a percentage of operation revenue.	Port authority and private operator	Private Operator	Port Authority Private Operator	State and Private Operator
Intermediary Model (Tool Port)						

Lease/affremage	Operation, management and maintenance of existing port infrastructures and service provision	The operator collects a percentage of operation revenue	State/ Port authority	Private Operator	Private Operator	State
Management contract	Infrastructures management and service provision	The operator is remunerated by the public entity on the basis of revenues generated by the completion of objectives	State/ Public Enterprise	Private Operator	State + Private Operator	State/ Public Enterprise
Lease – management contract with variable remuneration”	Infrastructures management and service provision	Remuneration by the public entity + incentive payments, remuneration based on results	State/ Public Enterprise	State + Private Operator	State + Private Operator	State/ Public Enterprise
Contract based on **PFI performance**	Infrastructures management and/or operation and service provision	The operator is remunerated based on its performance	Private Operator	Private Operator	Private Operator / Public Partnership	Private Operator
SEM (mixed public company/ PPPI		The SEM self remunerates based on operation revenues	SEM	SEM	SEM	SEM

4.5 TYPES OF CONTRACTS AUTHORIZED BY THE PORT REFORM

It is important to note that with regards to the port reform, section II of the draft legislation anticipates 3 types of port service delegation contracts involving the private sector. These contracts are:

1) The concession contract for the use/occupation of port public domain assest or for the provision of services.
2) The management contract for future (to be built) and existing installations
3) authorization given to a private operator for port services provision

Table 7 List of contracts authorized by the port reform:

Type of contract	Activities	Responsibility of private operator

concession for the operation of a public domain space	Management and investment in physical infrastructure (wharfs, lands)	Management and infrastructure operation risks throughout the duration of the contract with a transfer of infrastructures and assets at the end of the contract.
Authorization contract for the temporary occupation of port public domain	Private operator operates its own installations	Provision of services by the private operator in accordance with minimum quality conditions and maximum pricing applicable for the services.
Contract for public equipment management relating to existing installations	Operation, maintenance, management of existing port infrastructures and service provision	Management of existing installations and public tools made available to port users
Contract for public tools management relating to existing and future (to be built)installations	Operation, maintenance, management of tools and public terminals, financing of new tools by the private operator	Management of existing and future installations and public tools made available to port users.

4.6 TERMS AND CONDITIONS APPLICABLE TO ALL PPP/DSP CONTRACTS

4.6.1 Identity of contractual parties and the role of different government institutions

Under the draft port bill, ANAREP approves concessions, port public domain occupation authorizations and permits submitted by the General Director of SONAGEP.

It is important to note that under the draft ANAREP legislation, the Minister of Public Works, Transport and Communications (MTPTC) is the sole governmental authority entitled to to countersign concession agreements relating to the use of port public domain and contracts relating to the management of ports operated by the public sector. Consequently, in addition to the signature of SONAGEP as a contracting party to delegation agreements (concession, management contract or authorization), the MTPTC is also a signatory party

4.6.2 Operator's legal status

It is important to note that natural persons are not qualified to perform the aforementioned activities under applicable law.

Public or private legal persons governed are the sole entities authorized to enter into a management contract for the construction or management of a new or existing port infrastructures or to obtain an authorization for the operation and management of a wharf or a port terminal.

4.6.3 General terms and conditions applicable to all port contracts

There are general provisions included in management and operation contracts of port services and there are others that have specific contents relating to the characteristics of the aforementioned activities to be performed:

Table 8 General Contractual Clauses to all DSP Contracts

General contractual clauses to all DSP contracts

Conditions precedent and entry into force: conditions to be met for the performance of the contractual obligations of the parties and the start of contractual periods shall be specified. They must include approvals from the competent authorities, the various permits needed, licenses and authorizations, access to the site, the underwriting of the required insurance policies and, if necessary the establishment of the guarantees, financings and all other elements necessary to the start the contract.	Termination of the Contract - Requirement for continuous and quality public service: The consequences of a default, by the owner, of the delegation agreement, and the conditions under which the contracting authority may, unilaterally terminate the contract and assign it to a third party in order to ensure an uninterrupted and quality public service, should be provided for.
contract term: duration of the contract, conditions of contract extension and transfers, if any, including works, assets and tools from the private partner to the port authority shall be specifically detailed. These provisions are particularly needed for the transfers at the end of the contract, of works and tools whose design and/or construction and/or operation have been delegated.	Contract supervision procedure: The conditions that allow the public entity to carry out periodic audits relating to performance objectivesand the conditions under which the contract is performed and in more general terms, the control of all technical and accounting elements relating to the management of the delegated public service, will need to be specifically defined in the contract.
Purpose of the contract and the distribution of responsibilities between parties : The nature of the tasks assigned to each of the parties and the manner in which they are to be performed must also be specified in the contract. The conditions for the operation of the delegated service or the provision of authorized services (provider's responsibilities, terms of execution and service provision, type and nature of the provider's relationship with users) relating to service contracts including the management of the operation of the infrastructure, the maintenance and repai of tools and infrastructures (Total or partial lease agreement, Concession of works, BOT) should also be clearly defined.	The obligation of the private partner to comply with the laws relating to public safety and health, labor , environment, standards and technical norms in force in Haiti and/or industrial standards mentioned in the contract.
Private operator's payment terms and amount of the State Fee: all occupation or use of public domain is subject to the payment of a fee to the port authority. The contract should specify the conditions under which the fee must be paid by the private operator. When calculating the fee, benefits of any kind provided to the holder of the authorization, must be taken into account. The amount of the royalties may include a fixed portion corresponding to the annual rental value of the facilities, and a variable portion calculated on the basis of the after-tax net income generated from the use of the public domain property. The conditions for revising and adjusting the fee, calculation elements and indexation method should also be detailed in the contract.	Mechanisms for the settlement of disputes between the parties shall be described in the contract enabling disputes to be resolved amicably, and providing for the possibility of calling upon qualified conciliators or mediators to resolve technical, economic or financial problems. The procedure for the appointment of a joint expert to hear the dispute, the powers conferred ton the expert, and the enforceability of the decision, should also be clearly stipulated in the contract.

4.7 SPECIFIC CONDITIONS FOR EACH TYPE OF CONTRACT

4.7.1 Port Concession Contract

- **Purpose:** Concession of a right to operate port infrastructure works or services: (Ex: "This present concession is intended to create and operate a terminal (containers, grain carriers), a commercial dock, or a marina within the delimited area".)

  Under a public service port concession, the mission of public service requires that the concessionaire only perform activities related to those already granted and **compatible with the functions of the public domain.**

- **Conditions for entry into force :** In addition to obtaining all permits, licenses and approvals necessary for the entry into force of the contract, as required by Haitian law and as agreed to by the parties, the concession contracts also requires that the contract financing (bank loans, equity contributions and quasi-equity) be put in place.

  The conditions under which contract performance may start before the financing agreements are finalized or before the conditions for entry into force are met, should also be specified.

- **Duration:** Article 5.3 of the ANAREP draft legislation provides that the duration of a concession is linked to the amortization period of the investments made by the concessionaire. However, it cannot **exceed thirty (30) years** save an extension approved by the Government based on a proposal from the supervising Ministry duly justified.

- **Main Components :**

  - Legal regime applicable to the assest : works and tools used by the concessionaire are grouped into two categories: (i) *returned assets s*, which are those assets that have been identified as those to be transferred back to the contracting authority at the end of the concession, free of charge; (Case law considers these assets as forming part of the public domain as soon as they are carried out or assigned to public port services); (ii) *recovered goods*, which are those assigned to public port services by the concessionaire, but which may be purchases by the contracting authority at the end of the concession and the concessionaire cannot oppose it; ; (iii) *assets owned by the concessionaire*, the concessionaire has full ownership for the duration of the concession and beyond.

  - Risk transfer to the concessionaire: The concession is executed at the expense and risk of the concessionaire and implies "real exposure to the fluctuations of the market". Thus, the transfer to the concessionaire of an operational risk of a monetary nature includes the possibility that investments made and costs incurred when operating the works or services awarded under normal operating conditions, may not be amortized, even though some of the risk continues to be borne by the port authority.

  - Transfer of works to the port authority at the end of the terms of the concession:

  - Rendezvous/Renegotiation clause: The principles, governing the conditions of contract renegotiations based on the fixed deadlines, should be determined in detail, aiming to preserve the economic balance of the contract, without compromising the continuity and the quality of the public service provided.

  - Nature of securities and guaranties: The nature and conditions for the implementation of the securities and guarantees that may be required by financial backers, including private banks and insurers, must be clearly specified in the concession contrac, as they are crucial for the project financial viability of and the contract sustainability .

  - The nature of the guarantees that may be granted by the State or public entities authorized to enter into port concession agreements and the conditions for their issuance shall be clearly specified in the contract in accordance with the legislation in effect..

- Conditions of termination of the concession contract: Similarly, the calculation of indemnities and compensations due to each party in case of default and, particularly in relations to obligations vis-à-vis the lenders. In this regard, the conditions of subrogation of the rights of the private operator (step –in rights) shall be provided for. The terms and conditions of compensation in the absence of a party's default as well as the limitation and exclusion of liability must inevitably be stipulated in the contract.

4.7.2 Content of the concession agreement for port works and public services under the port reform

Content of the concession agreement for works and public port services under the port reform

The provisions of the draft ANAREP legislation (Art.37) set out the general conditions for the operation of the port, the dock or the terminal and the specific clauses that must appear in the concession contracts for the supply of works and port services delegated to the concessionaire. Those are described in the table below:

Table 9 Content of port works and public service concession contacts

General Conditions of Usage : - The purpose and nature of the concession; - the delimitation of the area it covers, as well as parcels of public port property necessary for the operation of the facilities, or port activities covered by the agreement; - the conditions and time limits for the completion of infrastructures, superstructures , tools and works in the case of an operation and a construction concession; - the standards and conditions for the management, operation and use of said infrastructures, superstructures, tools and works and the conditions and methods for their maintenance and adaptation; - the insurance policy or policies that the concessionaire must subscribe to cover its liability for damages caused to third parties; - the term of the concession; - the concession fees, how they are calculated and their terms of payment; - the specific tasks and obligations of the concessionaire; - respect for the principle of equal treatment of users; - the minimum professional and technical qualifications as well as the financial guarantees required from the concessionaire; - the concessionaire's obligations with regards to environmental and social impact studies as well as environment and Haitian cultural heritage the protection; - the terms of payment for the services provided by the concessionaire and the tariffs to be applied; - the method of calculating compensations to be paid to the concessionaire when the decision is made to terminate the concession agreement before its expiration date for reasons other than non-compliance with its terms and conditions
Other clauses to be included in the concession contracts:

- purpose of the concession;
- the legal status of the concessionaire;
- the assest put at the concessionnaire's disposal and the rules governing their returned and acquisition by the public sector;
- performance objectives in terms of cost reduction and port transit time;
- the term of the concession, which can not exceed thirty (30) years. An extension is possible only with the approval of the Government, granted based on a motivated proposal from the supervising Ministry;
- time limites and milestones for carrying out the work and for starting the activities;
- tasks and obligations relating to the construction, maintenance, adaptation of infrastructure, superstructures, structures and installations;
- conditions and procedures for exercising rights in rem over the concessioned asstes throughout its term;
- conditions of temporary occupation of the parcels of the port domain;
- obligation to comply with the legal directives required for reasons of public security, national defense and port security;
- conditions of renewal or extension; the terms of redemption, lapse and termination.

5. LEGAL AND INSTITUTIONAL FRAMEWORK APPLICABLE TO THE PORT SECTOR

The transfer of management and operation of terminal activities and, more broadly, of port infrastructures, requires a clear and coherent legal, institutional and regulatory framework in order to ensure transparency, competition between the various bidding operators as well as to control and sanction dominant position abuses in the port.

The legal framework for the management and operation of ports must also set out a clear definition of respective public authorities and private economic actors rights and obligations of with regards to:

- Provision of quality and continuous public service to users;
- Efficient use of port areas and competitive commercial and industrial maintenance, storage and warehousing activities;
- Compliance with environmental, public health, hygiene and public safety standards.

5.1 CURRENT LEGAL FRAMEWORK / CURRENT CONTEXT

The Decree of March 1985 establishes the APN as an autonomous administrative entity tasked with the functions listed in Section 1 above.

The APN, thus has two missions as a port operator in charge of the operation and development of the port sector, while also serving as a regulator of these activities. The combination of these two missions may cause some problems with regards to impartiality, transparency and the port authority's mission of public service. Indeed, assigning both the oversight and performance of contracts to a single entitydo not seem to be compatible .

5.2 PORT SECTOR REFORM –DEVELOPMENT OF THE PRIVATE SECTOR PARTICIPATION

In 2014, the Haitian Government launched a vast reform of the port sector, based on guiding principles elaborated by the APN and adopted by the Ministry of Economy and Finance (MEF).

The port reform[11] undertaken by the Haitian Government encourages the participation of the private sector with the intention of improving the quality and efficiency of port services.

The Preamble to the draft legislation on port reform and the creation of the port regulatory agency (ANAREP) along with the National Society for Ports Management and Operation (SONAGEP), underline the objectives of the reform and, in particular, the importance of:

"... taking all the necessary measures to encourage private investment in the physical and technological development of ports and in the provision of port services, by creating optimal conditions for private

[11] February 2017 version of the draft legislation relating to port reform relating to the port sector reform and the creation of the national agency charged with regulating of the port sector (ANAREP) along with the National Society for Ports Management and Operation (SONAGEP).

sector involvement, both in the construction of new ports, wharves and terminals, and in the operation of various activities in ports managed by the public sector "

5.2.1 Establishment of the SONAGEP – Role and missions

Under the terms of these draft legislations, the draft SONAGEP legislation describes the SONAGEP mission, which includes:

- Managing, operating and developing all ports and installations under its jurisdiction;
- Direct provision, or through private partners, of quality port services at a competitive price for users;
- Planning the development of these ports and marketing their services;
- Developing, building and maintaining public sector port infrastructure with public or private funds.

As discussed in section 2 above, the majority of reforms instituted throughout the world, have centered on the transition from a "Service Port" model (all public) or a "Tool Port" model (public infrastructures and superstructures with the possibility of private operation) to a "Landlord Port" model.

5.2.2. Establishment of the ANAREP – Role and missions

The draft legislation of June 2015, relating to the port sector reform and the creation of the national agency in charge of the regulation of the port sector (ANAREP): the provisions of this draft legislation provide that:

- Port public services and operation of infrastructures (dykes, breakwaters, jetties, berthing structures such as docks and wharves, ponds, berths) and port superstructures (all buildings, installations and arrangements for the reception of goods and passenger ships), may be the subject of different forms of delegation, such as concessions, lease - management contracts and operation authorizations.
- Economic activities in all or part of the ports, the commercial operation of port , and port services of all kinds, may be delegated to private operators.

The text also specifies that, although the public port domain may be the subject of a concession, a management contract or an authorizations for temporary occupation, the domain is inalienable, non-seizable and imprescriptible.

Thus, this draft legislation sets the conditions for collaboration between the State or the contracting entity and the private sector for the development and operation of infrastructure and port services in compliance with best international practices.

Nevertheless, as its title indicates, this text has not yet been promulgated, therefore this present study should not rely upon the new provisions of Haiti's port reform.

5.3 ESTABLISHMENT OF A PPP LEGAL AND REGULATORY FRAMEWORK

The Government of Haiti has also drafted a legislative and regulatory project governing public private partnership agreements between the public sector and the private sector, with the objective of promoting the participation of private economic actors in the development of industrial and social infrastructures.

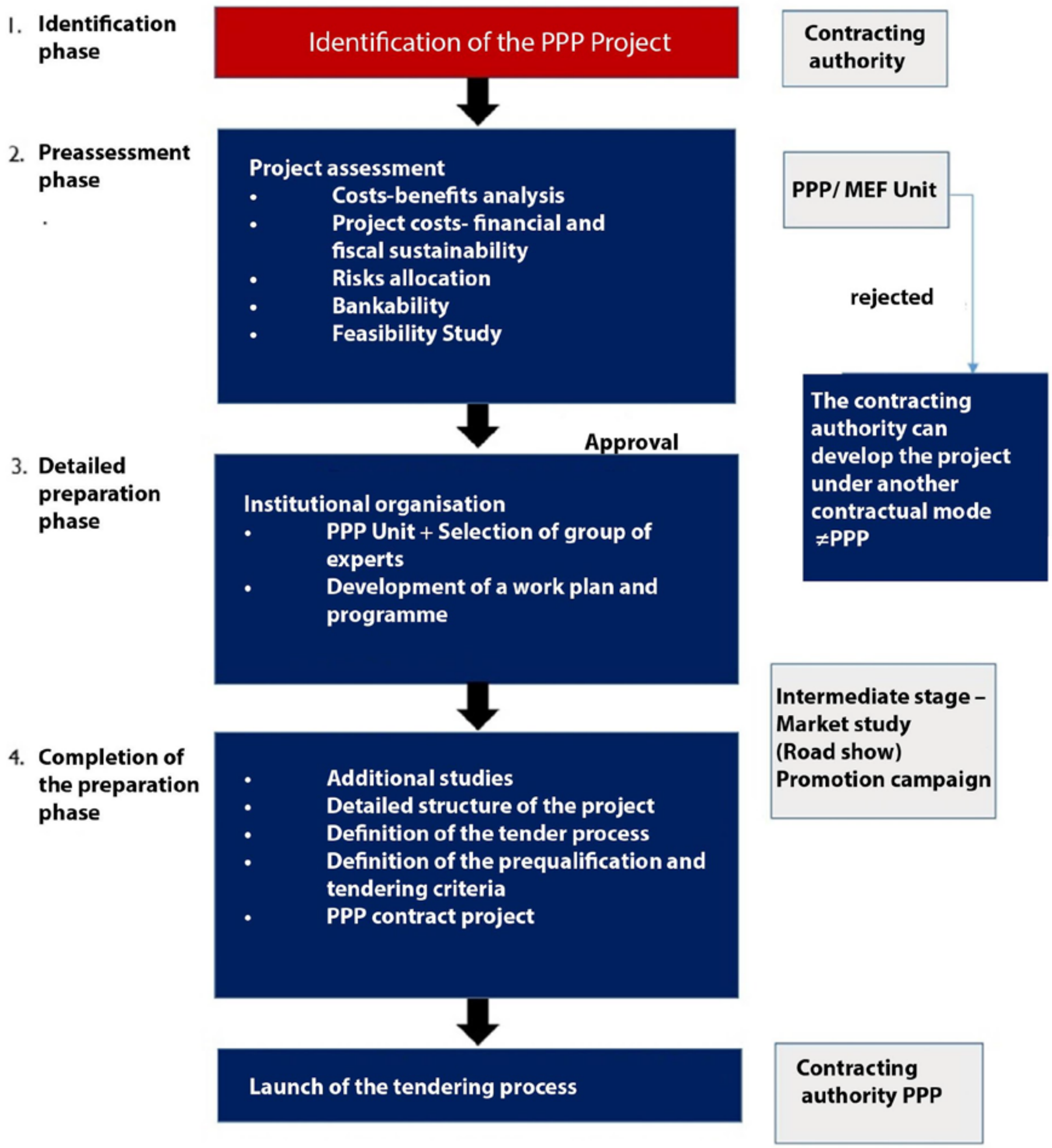
As such, the new PPP legal framework that is currently being evaluated, introduces new collaboration modalities, including in particular, a private sector remuneration method that is no longer exclusively linked to operational financial results and that can be subjected to fixed prices calculated and paid over the whole term of the contract, or dependent upon certain performance achievements, availability or capacity objectives.

It also provides for an evaluation procedure for PPP projects to be carried out by an institution specifically dedicated to this task, (PPP Unit) as well as rules for their implementation in the context of a new institutional framework.

Thus, the criteria for the use of the PPP contractual frame have been set to help public authorities evaluate the merits and rationale of their private sector delegation project as well as the inclusion of the specific clauses that must be included in the partnership contracts.

The charter below describes the process for evaluation and implementation of PPPs as recommended.

Table 10 Process for Evaluating PPPs



5.3.1 Existing PPP framework

The legislation and regulations currently governing PPPs in Haiti include the following texts:

5.3.1.1 Legislation governing the modernization of public enterprises, October 2 1996

This law authorizes the state to grant a right to operate and/or manage public enterprises, either under a concession or management agreement, to a private investor.

Furthermore, the law allows for the creation of a semi-public company (SEM), when the state has decided to modernize the company concerned, using capitalization to subscribe to the capital via patrimony/asset contributions of the public company (Art 11 of the law governing the modernization of public enterprises of September 26th, 1996). The private investor of the SEM contributes to the capital by making a cash contribution intended to finance the investments as required by the call to tender.

These SEMs are subject to the legislation in force relating to limited companies as defined by the provisions of the MEP Legislation (Article 19), and they may not engage in any other commercial activities other than those related to their original purpose as set out in their bylaws.

5.3.1.2 Legislation establishing the general rules for public procurement and public service concession agreements of 12 June 2009

This law provides the conditions under which the construction or the renovation and operation of a public service facility may be granted to a private sector by a public entity. Article 4 al.13 of the law, defines the concession as an administrative contract under which the construction, maintenance and operation are entrusted to a private concessionaire, who at the end of the contract, transfers all the assets previously granted to the contracting authority.

5.3.1.3 September 16, 1963 legislation governing semi-public/mixed public companies

The provisions of this law allow the Haitian Government or govermnemtal entities to own stock in semi-public companies, and therefore partner with private investors under a PPPI. Once The state has become a shareholder it will need to obtain a change in statutes in order to transform the public limited company into semi-public company. This transformation is necessary to allow for a State representative on the board of directors.

6. PUBLIC PROCUREMENT PROCEDURES

6.1 PUBLIC PROCUREMENT AND CALLS FOR TENDER

Concession contracts for works and port public services are, just like any other public service delegation agreement or public-private partnership (PPP) as defined in the draft PPP bill , subjected to competitive, non-discriminatory and transparent procurement procedures.

Thus, the preamble of the draft ANAREP / SOGAREP legislation emphasizes the importance of "*establishing and preserving fair and free competition for the supply of port services, without compromising the establishment of specialized units whose numbers may be subject to restrictions* »

Article 2 of the draft legislation establishes the existence of SONAGEP and also provides that port services, provided by private partners, should be of high quality and at a competitive tariff for users.

Article 19 of the same draft legislation provides that, in all cases, SONAGEP must use a competitive and transparent process when seeking to grant authorizations for the provision of services in its ports.

The General Director of SONAGEP is in charge of preparing the necessary documents for the initiation of calls for tender for the granting of concessions by ANAREP and all other forms of public service delegation within its jurisdiction.

6.2 PPP CONTRACT AWARD PROCEDURE

Under the PPP legislation, the private contractor is selected following a procedure guaranteeing transparency, free access to public procurement and equal treatment as follows:

- Advertising: All calls for tender and calls for expression of interest must be published in mass-circulation newspapers and in specialized press in the case of a restricted invitation to tender. If the call for tender is international, the advertisements should also be published in the foreign press.
- Equal treatment and national or regional candidates: The PPP regulation, as well as the legislation which sets the general rules on public procurement and concession agreements for public service works, provide that the public entity may grant a preference to small and medium-sized enterprises, as well national and regional SMEs in compliance with regional treaties ratified by the Haitian Government.

Partnership contracts may be awarded either in the context of:

- a restricted call for tender procedure addressed to the candidates selected by the contracting entity, or

- an open call for tender preceded by a pre-qualification phase,

- a competitive dialogue procedure.

The award of partnership contracts is governed by the public procurement statutory law in effect in Haiti[12], which sets the rules for open and restricted tenders.

[12] Legislation establishing the general rules for public procurement and public service concession agreements June 10th 2009.

It is therefore required that the agreements for delegation of port services and activities, including lease and occupation of public domain contracts, be subjected to public procurement rules as required by law.

7. CONTRACT SUPERVISION, AUDIT AND REGULATION

Contract supervision by a public authority, is one of the conditions characterizing the concession of public services. The oversight procedures may be defined by applicable laws and regulations, and in most cases, by the contract terms and conditions.

Under concession contracts for port public tools, the operator must provide an itemized report of all gross revenues generated from the operation of the concession as well as a report detailing costs of maintenance and operation of the works and facilities conceded, to the granting authority.

The operation of the works and tools is carried out under the aegis of the supervising authority. The latter may require administrative, technical and financial audits when it deems it necessary., It may require specifically periodic inspections of maintenance equipment and electrical installations by an approved body, at the concessionaire expense.

The draft legislation ANAREP provides that the General Director shall:

- carry out administrative, technical, financial and accounting audits, identify and summarize all dashboards, documents, reports that must be submitted by port operators and port public service delegates, to the National Authority for Ports Regulation;
- verify activities related to procedures, training and perform management audits.

Furthermore, according to the provisions of the port reform, port operators must keep detailed accounts in accordance with accounting plans in effect in Haiti or any other accounting plan prescribed by ANAREP. The draft legislation also sets the periodicity and provides that at the end of each fiscal year the concessionaires, the managers and the port operators must share their audited financial statements with port authorities, including all accounting elements that may be requested by the said authorities in the context of their mission of control. (Ref: Art 45 draft legislation ANAREP).

8. APPENDIX

Types Of Contracts For The Development And Management Port Activity Contracts

Types of PPP	Purpose	Operator compensation method	Project Manager	Availability/Performance risks	Operating risks/demand	Ownership of assets
Total Concession (DFBO, BOT/CET, BOO)	Financing, operation, management and maintenance of port infrastructures, superstructures and service delivery	The operator collect infrastructure user fees and pays a fee to the State.	Private Operator	Private Operator	Private Operator /State	Private Operator and/or State
Leasing	Operation, management and maintenance of existing port infrastructures and service delivery	The operator collects a percentage of operation revenues	State or Port Authority	Private Operator	Private Operator	Etat
Leasing with private investments	Operation, management and maintenance of equipment and public terminals as well as financing of new equipment by the private operator	The operator collects a percentage of operation revenues	Port Authority and Private Operator	Private Operator	Port authorities and private operator	Private Operator and State
Management Contract	Infrastructure management and service delivery	The operator is remunerated by the public entity on the basis of revenues generated by the completion of objectives	State or public enterprise	Private Operator	State + private operator	State or public enterprise
« Régie intéressée »	Infrastructure management and service delivery	Remuneration by the public entity + incentive payments, remuneration based on results	State or public enterprise	Private Operator / State	Private Operator / State	State or public enterprise

Contrat based on PFI performance		The operator is remunerated based on performance	Private Operator	Private Operator	Private Operator/ Public partner	Private Operator
Temporary occupancy authorization of public domain (AOT)	Operation, management and maintenance of industrial or commercial terminals and related services	The private operator is remunerated based on operation results and pays a fee to port authorities.	Private Operator	Private Operator	Private Operator	Private Operator
SEM/ PPPI	Creation of a JV/SP with a capital contribution from the state	The SEM self remunerates based on operation revenues	SEM	SEM	SEM	SEM
Private management methods	Operation, management and maintenance of industrial terminals : concession/public service	Private Operator	Private Operator	Private Operator	Private Operator	Private Operator