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THE LEGAL ASPECT RELATING TO THE OFFER OF PORT SERVICE BUSINESS BY STATE OWNED COMPANIES OUTSIDE THE TERRITORY INDONESIA

By

ADI NURCAHYA
INDONESIA

A Dissertation submitted to the World Maritime University in partial Fulfilment of the requirements for the Award of the Degree of

MASTER OF SCIENCE
In
MARITIME AFFAIRS
(MARITIME LAW AND POLICY)

2015

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DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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4. The Head of the Legal Bureau Pelabuhan Indonesia III (Persero) Limited Company that gave me absence permission to continue my further legal education and also to all the Legal Staff of the Pelabuhan Indonesia III (Persero) Limited Company;
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8. All persons that cannot be mentioned one by one for supporting my study in Sweden.

“THE MAIN BODY OF THE DISSERTATION SHOULD NOT EXCEED 20,000 WORDS OR ABOUT 70 PAGES”
ABSTRACT

Title of Dissertation: The Legal Aspect Relating to the Offer of Port Service Business by State Owned Companies outside the Territory Indonesia

Degree: MSc

This dissertation describes the legal aspect that may involve the strategic plan of a state-owned company that have a core business in port services in Indonesia to deliver port services outside the territory Indonesia. Furthermore, this dissertation have 3 (three) main concern, regarding: the legal aspects that considered by state-owned company; the mechanism of port business operated in the different jurisdictions of law; and the suitable schemes for state-owned company to expand port business overseas.

To response above concern, this dissertation used both normative and comparative method to examine the legal aspects of state-owned company in Indonesia to conduct port business overseas. In addition, list of important considerations was identified: the procedure of the bureaucracy within the state-owned company that shall be obey by the state-owned company; the compliance of the host State law and municipal law as well; the mechanism of procurement in Public Private Partnership (PPP) that shall be followed by state-owned company; and the legal entity of state-owned company itself that must be tenable after conduct port business overseas.

As a result, a state-owned company tends to deliver port business overseas with concession, cross-border cooperation and acquisition methods. In addition, each method has a different legal requirements and arrangements that creates distinguished features between one method and the other methods. On the other hand, there also exists similar legal requirements that are important to considered by a state-owned company to conduct port business overseas.

KEYWORDS: Acquisition, Concession, Cross-Border Cooperation, Public Private Partnership (PPP), State-Owned Company.
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LIST OF ABBREVIATIONS:

ADB       Asian Development Bank
B2B       Business to Business
BLO       Build Lease Operate
BOST      Build Operate Share Transfer
BOT       Build Operate Transfer
BROT      Build Rehabilitate Operate Transfer
BTO       Build Transfer Operate
CMP       Copenhagen Malmö Port
COSCO     China Ocean Shipping Company
CSR       Corporate Social Responsibility
DCMF      Design Construct Manage Finance
DPW       Dubai Port World
EBRD      European Bank for Reconstruction and Development
ECRP      European Commission Regional Policy
EIB       European Investment Bank
EPC       Engineering Procurement Construction
EPEC      European PPP Expertise Centre
EU        European Union
FCPA      Foreign Corrupt Practice Act
GPA       General Agreement on Government Procurement
IBRD      World Bank International for Reconstruction and Development
ICC       International Chamber of Commerce
IDA       International Development Association
ISPS      International Ship and Port Facility Security
MIGA      International Finance Corporation; Multilateral Investment Guarantee Agency
OECD      Organisation for Economic Co-operation and Development
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>PCT</td>
<td>Piraeus Container Terminal</td>
</tr>
<tr>
<td>Pelindo/Inaport</td>
<td>Pelabuhan Indonesia/Indonesia Port Corporation</td>
</tr>
<tr>
<td>PPA</td>
<td>Piraeus Port Authority</td>
</tr>
<tr>
<td>PPIAF</td>
<td>Public-Private Infrastructure Advisory Facility</td>
</tr>
<tr>
<td>PPP</td>
<td>Public Private Partnership</td>
</tr>
<tr>
<td>RFPs</td>
<td>Request for Proposals</td>
</tr>
<tr>
<td>SOLAS</td>
<td>The International Convention for the Safety of Life at Sea</td>
</tr>
<tr>
<td>TEU</td>
<td>Twenty Equivalent Units</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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CHAPTER I
INTRODUCTION

I.1 Background

The state-owned company based on Article 1 Law 19/2003 regarding State-owned company is a company in which majority of the shares are owned by the Indonesian Government. Furthermore, based on their nature to pursue a profit, every state-owned company in Indonesia has its own core business such as mining, oil and gas, financing institution, infrastructure and superstructure provider, agriculture and many more. In addition, one of the prospective core businesses that has been run by state owned companies in Indonesia is the port business, which can be divided further into port services and port supporting services (hereinafter called “port business”). Moreover, there are only 4 state owned companies that have been conducting port business in Indonesia, which are: Pelabuhan Indonesia I Limited Company (Pelindo I), Pelabuhan Indonesia II Limited Company (Pelindo II), Pelabuhan Indonesia III Limited Company (Pelindo III) and Pelabuhan Indonesia IV Limited Company (Pelindo IV)\(^1\). According to Ray (2008), these state owned companies have already been clustered by the Indonesian Government for their geographical service operations as listed below\(^2\):

\(^1\) There are also state owned companies that conduct business in port, but this dissertation only focuses on Pelindo I-IV
\(^2\) The Indonesian Government has clustered Pelindo I-IV in order to get the efficiency of the port’s operations from east to west of the Indonesian Territory
Table 1 Geographical Service Coverage of Pelindo I, II, III and IV (Ray, 2008)

<table>
<thead>
<tr>
<th>Name</th>
<th>Coverage (Province)</th>
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<tr>
<td>Pelindo I/PT Pelabuhan Indonesia I (Persero)</td>
<td>Aceh, North Sumatera, Riau</td>
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<tr>
<td>Pelindo II/PT Pelabuhan Indonesia II (Persero)</td>
<td>West Sumatra, Jambi, South Sumatra, Bengkulu, Lampung, Jakarta</td>
</tr>
<tr>
<td>Pelindo III/PT Pelabuhan Indonesia III (Persero)</td>
<td>Central Kalimantan, South Kalimantan, West Nusa Tenggara, East Nusa Tenggara</td>
</tr>
<tr>
<td>Pelindo IV/PT Pelabuhan Indonesia IV (Persero)</td>
<td>All Sulawesi, Maluku, Irian Jaya</td>
</tr>
</tbody>
</table>

Port business in Indonesia was supervised and regulated by the Ministry of Transportation as the representative of the government. As a consequence, the government has authorized to set up particular criteria for any legal entity to pursue a licence as a prerequisite to delivering port business in Indonesia. Moreover, the requirements for pursuing a licence above are complicated and it needs a huge capital to finance both the infrastructure and superstructure of a port. For this reason, the port service provider in Indonesia has been dominated by state owned companies as stated above, because they have an excellent financial capability and good network with the government. However, this practice changed in 2008, when the government decided to enhance the competitiveness of port services among state owned companies and private companies to increase the level of services in port. Furthermore, the Indonesian Government nowadays is given an equal opportunity to every company, including private companies to conduct port services and port supporting services, by virtue of Law 17/2008 regarding Shipping (hereinafter is called “Shipping Law”) which replaced Law 21/1992. The enactment of Law 17/2008 also gives affect in the event of tight competition between state owned companies that have core business in port services with other private companies to provide the same commodity of services within a port.
Furthermore, in order to face tight competition with private companies as above, the Board of Directors of state owned companies and the Minister of State-owned company as a representative of the shareholder, have proposed a concept of conduct the port business with the “out of the box” principle. This “out of the box” principle means that state owned companies as profit oriented companies must run their port business in a non-ordinary way to maximize profit. One of the implementations of the “out of the box” principle that can be realized by the state owned companies therefore is to expand their port business overseas.

In addition, with the port expansion plan as stated above, the mechanism that can be created by a state-owned company to conduct port business overseas is through a Public Private Partnership (PPP) that is recognized as a port governance model for introducing the private companies to finance, build, manage and operate public infrastructure and superstructure, especially ports in foreign States. Moreover, state owned companies will then be faced with many requirements including legal, commercial and also technical requirements that shall be obeyed by the government in the State where the cooperation of port business will be taken. Recalling the port as public infrastructure, the cooperation with the local port authority will also cover utilization schemes and the time period of the port operation, which means that the public body represented by the local port authority is entrusted to manage the public services to a third party or in other words, give a mandate to the state-owned company to operate and manage the port (Report of UNCTAD Secretariat, 1993).

Moreover, state owned companies need a precise benchmark for conducting port business overseas. In addition, Copenhagen Malmö Port (CMP) Company, COSCO Pacific and Dubai Port World (DPW) are probably suitable benchmarks for state owned companies, since they are also conducting port business outside of the law where they have registered their company. Subsequently, with the possibility to

3 The 100% of shares of Pelindo I-IV owned by the government
4 The CMP represent conducting port business in the different jurisdiction of law; COSCO Pacific reflect the successfully of foreign company to get the concession contract for port services in overseas and DPW World has proven their capability as a global terminal operator in their operations area at many States
conduct port business overseas, it would make state owned companies not only expand their business outside Indonesia to gain maximum profit, but also run the “out of the box” principle as mandated by the Board of Directors and the shareholders of the state owned companies.

I.2 Objectives

The objectives of this research are to:

a. Carry out the legal aspects of the state-owned company to conducting port business outside the territory Indonesia;

b. Compare all relevant methods to conduct port business in the different jurisdiction of law or operated by a company outside the jurisdiction of the State where the company was registered;

c. Determine the suitable schemes for the state-owned company to expand port business outside the territory Indonesia in a legal perspective.

I.3 Research Questions

The questions found within this research are:

a. What are the legal aspects that shall be considered by the state-owned company to conduct port business outside the territory Indonesia?

b. In the practical field, how is port business operated in the different jurisdictions of laws operated by a company outside the jurisdiction of the State where the company is registered?

c. What are the suitable schemes for the state-owned company to expand port business outside the territory of Indonesia from a legal perspective?
I.4 Methodology

The methodologies used to answer the research questions are:

a. The normative method to obtain all relevant information regarding the legal aspects to deliver port business outside the territory Indonesia;
b. The comparative method to examine the possibility of state owned companies to conduct port business outside the territory Indonesia based on practical field.

I.5 Structure of Dissertation

This dissertation is structured as follows:

a. Chapter II describes the legal regime of port business in Indonesia;
b. Chapter III comprises port business overseas that was granted by the government of the host State by the mechanism of concession;
c. Chapter IV examines the alternative ways to deliver port business overseas through cross-border cooperation and the acquisition method;
d. Chapter V details the aspect of conducting port business overseas by the tender/bid process mechanism;
e. Chapter VI concludes all the objectives that have been explained in Chapters II-VI of this dissertation.
CHAPTER II
THE LEGAL REGIME OF PORT BUSINESS IN INDONESIA

II.1 Port Business in Indonesia

The port by virtue of Article 1 point 16 of Shipping Law is defined as a place which consists of land and/or water with certain limits whereas a government activity and business activity took place. Moreover, this place is also used to dock ships, load and unload passengers and/or goods, in the form of terminals and berths, which are equipped with safety equipment and security facilities. As mentioned in the previous chapter, there are 4 state owned companies that have core business in port services and authorized by the government to manage and operate ports in Indonesia. Moreover, each company has the same role as a port operator in order to provide port services for customers and by virtue of Article 90 (3) Shipping Law those services are:

A. Port Services related to vessels, passengers and cargo services, which consists of:
   1) Berth services;
   2) Bunker and fresh water services;
   3) Passenger facilities service and vehicle services;
   4) The berth service for unloading/loading cargo and containers;
   5) Shed and storage services for cargo, unloading/loading and port equipment;
   6) Container, liquid bulk, dry bulk and Ro-Ro services;
   7) Unloading/loading services;
   8) Cargo distribution and cargo consolidation;

---

5 This services are the core business of Pelindo I-IV
9) Tug services.

B. Port Supporting Services, which by virtue of Article 90 (4) of Shipping Law are defined as any business which is related to the port services and can give added value to the port services. Moreover, the port supporting services consist of:

1) Offices;
2) Tourist facilities;
3) Hotels;
4) Fresh water installation;
5) Electrical and telecommunication services;
6) Waste water treatment service and sewage services;
7) Bunker services;
8) The locality for vehicle waiting spaces.

Actually, ports in Indonesia are already well operated by Pelindo I-IV, although the competitiveness level among other foreign ports is not enough to satisfy their customers. According to Geiger (2011) in Ariadno & Afriansyah & Dewi (2014), ports in Indonesia have a low competitiveness value which is measured by the Global Competitiveness Index 2011 issued by the World Economic Forum. This weakness has been caused by the low quality of “seaport and infrastructure” and “technological readiness” parameter in Indonesian ports. In addition, in the previous year for international shipping Indonesia’s rank also dramatically declined from 44 to 80 in 2010 which raised the commitment of the government to deal with the compliance of international standards, especially for international standards that apply to ports such as SOLAS and the ISPS Code.

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6 The concession that will be discussed does not relate to port supporting services, only to port service
7 Indonesia is one of the contracting governments that has ratified SOLAS 1974. In terms of the application of ISPS Code, Indonesia has enacted the Presidential Decree 65/1980 regarding SOLAS 1974 ratification and Ministry of Transportation Decree 33/2003 regarding the Amendment of SOLAS 1974 related to Ship Security and Port Facility in Indonesia Territory (ISPS Code)
There are many stakeholders involved inside the port. Furthermore, these stakeholders consist of the government institutions as well as private companies. The government institution has authority and plays as the regulator in port activities. Moreover, the example of this practice is reflected on the Port Authority that has the responsibility to govern all aspects related with port activities and state owned companies conducting port business under their supervision. In other examples, the Coast Guard is responsible for the safety and security of ships and the same responsibilities also for ports. Moreover, the Immigration will be responsible for any issues for the embarkation and disembarkation of passengers, while the Quarantine is responsible for any issues related to animals or agricultural products that have been handled by the port operators in their terminals. Other stakeholders from the government side, such as Customs are responsible for issues regarding tax for any cargo that has been unloaded/loaded within a port.

On the other side, there can also be found private companies that offer port services inside the port. These private companies consist of: freight forwarding companies; companies that offer services of unloading/loading cargo; and companies which provide labour supply for port operations. Subsequently, all stakeholders as mentioned above must have a synergy with the state-owned company in order to deliver excellent services to their customers.

II.2 The Legal Aspect of a State-owned company

There are different types of state owned companies in Indonesia based on the composition of their shareholders and based on their core business. First, based on the composition of the shareholders there is a state owned companies that all of the shares are solely owned by the government and on the other hand there are also state owned companies where the government holds the majority of shares and the rest of the shares are owned by the private entity or owned by the society. On the other hand, based on the type of core business that is being delivered, state owned companies in Indonesia have been subjected to be diversified regarding the business based on the
type of core business that they are committed to, namely: mining; oil and gas; financing and insurance; agricultural; Engineering Procurement Construction (EPC) companies; railways; aviation; and ports. In addition, the core business of a state owned companies is stipulated in their article of association and they cannot conduct other business which diverges from the type of core business in their article of association, except only for conducting business which supports their core business. Moreover, this dissertation will be focused only on the state owned companies that have a core business in port services.

Related to the plan to conduct of any strategic plan, the Board of Directors of the state owned companies shall notify the Board of Commissioners and pursue written approval from the government before they can take any further legal action. Indonesian law then recognizes this act as a subjective clause that must be obeyed to give those acts the full power of authorization. Contrast with this consideration, the act of the Board of Directors without prior notification and approval as mentioned above will only be categorized as a personal act and not bound as a corporate act that is binding for the state-owned company. This means, a state-owned company shall follow that procedure in order to get the approval of the initial process to execute any of their strategic plans.

**II.3 A Paradigm Shift Related with the Enactment of Shipping Law**

The Indonesian shipping law regime was amended in 2008, when the government enacted the Shipping Law. This Shipping Law has dramatically changed the role of state owned companies that have core business in port services. Before the enactment of the Shipping Law, the state owned companies had the power to manage ports with the delegation of power gained from the Ministry of Transportation. The port business was conducted by a landlord system which means all operations and the standardization of port services was decided solely by state owned companies through

---

8 The legal consequence is the contract can be made void by another party if the subjective clause is not being fulfilled
consultation with the Ministry of Transportation. Moreover, state owned companies can set up a standard of port productivity and they also enjoy the mechanism of monopoly, since they have the power to manage the port and hire the unloading/loading companies to perform unloading/loading activities in port with their own setting of productivity. In this case, however the state-owned company still has to provide an infrastructure and superstructure for the customer in order to deliver their port services.

Moreover, after the enactment of the Shipping Law, state owned companies were allowed by the government to act only as port operators with the concession in one or more than one terminal within the port. In addition, this affect to the state owned companies that they have obligations to improve the performance in their terminal. Furthermore, the productivity of the port will be decided by the Port Authority and the state-owned company shall pursue their productivity to meet the requirements that are given by the Port Authority.

II.4 Competition between States Owned Companies and Private Companies in Indonesia

The enactment of the Shipping Law created tight competition for providing port services between state owned companies and private companies. Moreover, this competition often occurs when they have the same interest in the same concession object that being is auctioned by the government. The government then would choose the best strategic partner which is suitable for their requirements. In addition, the competition to get the concession from the government, the competition for building the port infrastructure as well as the superstructure and the competition for providing port services are common competitions that happen between state owned companies and private companies. In more detail, based on the administrative arrangements, state owned companies will face difficulty relating to the fact that private companies will be

---

9 This issue was raised when the private companies consider that the privileges owned by a state-owned company no longer exist
more adaptive, because they have a simple bureaucracy of business approval rather than state owned companies which have a long bureaucracy, especially at the government level.

One of the advantages gained in the tight competition above is the improvement of port service quality to the customers. Another positive effect is the government will get cooperation with the best fitting strategic partner for maintaining and developing the port in order to drive the logistic supply for domestic and international demands through the trade that is derived from the carriage of goods by sea. The competition itself will also trigger both state owned companies and private companies to pull-out their maximum effort when they participate in developing commercial ports that are under regulated by the government.

II.5 Consideration for Conducting Port Business outside the Jurisdiction of Indonesia

There are many considerations before a state-owned company decides to execute their strategic plan to deliver port business outside Indonesia. Furthermore, the experience has shown that the port business in Indonesia has been regulated by the government and localized as per region. In addition, with the possibility of having a port business overseas it is a good way to expand the port service business and also gain more profitable business prospects for the future of a state-owned company.

Worldwide there are many companies that deliver port business outside their registered State jurisdiction. Moreover, state owned companies should learn about the successful Dubai Port World (DPW) while they extend the port services outside the United Arab Emirates jurisdiction. The information taken from Kane (2015) indicates that the income of DPW increased by 11.7 per cent in 2014 due to the container volumes increasing within their global ports. In other information, based on Turkey Seanews (2015) it was stated that COSCO Pacific had posted a 2.3 per cent year-on-
year net profit increase of US$292.75 million in 2014 related to their global port business operations at Piraeus-Greece, Guangzhou and Xiamen (China).

Another experience has shown when the company becomes a global port operator it can develop its business comparing if they only act as terminal operator in their registered State. Additionally, Notteboom and Rodrigue (2012) has described that global operators divided further into several categories: stevedore, financial holdings and maritime shipping companies. For instance, in the stevedore categories, global terminal operators can expand their business into the new markets to replicate their expertise and also to diversify their revenue. Moreover, in the financial holdings categories, global terminal operators can attract several financial interests ranging from investment in banks and retirement funds to sovereign wealth funds that have been attracted by the port terminal sector as an asset class with revenue generation potential. The global terminal operators which come from maritime shipping companies then also play a contribution role to support their core maritime shipping business that is manifested in the investment of the port terminal facilities being built.
CHAPTER III
PORT BUSINESS BY VIRTUE OF CONCESSION

III.1 The Legal Aspects of Port Privatization

A Port is a place where the public interest represented by the government, and the private interest represented by a private companies come together to provide port services for the customers. The nature of port business requiring a substantial investment, is a challenging issue for any government especially regarding on how to provide those funds, since in some developing States the port infrastructure and superstructure are not considered as a top priority in the national budgeting of the State.\(^\text{10}\) Furthermore, this obstacle has then been overcome by the government by privatization of the port, which means that the management of the port is handover to a private company. Cruz & Marques (2012) note that in the last 2 decades, the development of infrastructure has often been supported by public–private partnerships, particularly under concession arrangements. In addition, UNCTAD (2008) has given a clear definition of privatization as a transfer of ownership of assets from public to private sector or the application of private capital to fund investment especially in port facilities, equipment and systems which may:

a. Improve the management capability of port entities by increasing productivity;

b. Reduce the financial demands on the public sector by employing the private sector to generate revenue for both the government and private sector;

c. Enhance the service quality offered to the end user.

\(^{10}\) In developing States the top priorities are related to social needs, such as: health; education; and improvement of the quality of life
Furthermore, according to Tongzon & Heng (2005) port privatization, will improve port operational efficiency, increase port competitiveness and be more adaptable regarding the customers demands. Meanwhile, based on Vasigh & Howard (2012) ideas port privatization will be an effective mechanism in introducing corporatization into the port infrastructure the origin of which was characterized by poor competition and direct control by government. The development of ports with the PPP scheme will also contribute value to the economy when it maintains optimally in the investment, operational and risk among the parties (Siemonsma & Nus & Uyttendaele, 2012). Further, in order to have an overall picture regarding the different schemes in the PPP procurement this can be seen in Appendix A.

Monios & Bergqvist (2015) have given their opinion that the participation of the private sector in port development is an on-going process of governance reform which had the advantage to increase efficiency and reduce cost to the public sector. According to Estache & Gonzalez & Trujillo (2001) in Mexico the port services, such as towage and pilotage, is also to be delivered by private companies that have cooperated with the government in the form of license agreements, which means the government has given a business licence to those private companies to conduct business that origin recognized as the duties of the government to provided11.

One of the strategies to conduct privatization in the government perspective is through an administrative decision for granting a concession to the competent private company that can be registered in the State or it comes from outside the jurisdiction of the State. However, in much literature the meaning of concession is sometimes different to privatization. This concept was adopted by Guasch (2004) who mentions 3 aspects that distinguish concession from privatization. The first aspect is the concession does not involve a sale or transfer of the ownership of physical assets. Second the concession contracts are limited in duration and third the government as owner of the assets much closer involved in the concession. Moreover, this dissertation will not adopt this notion because of the objectives of privatization are

11 In Indonesia this service should be provided by the government, but in fact this service was conducted by a state-owned company because of technical and operational issues
quite similar with concession and the 3 aspects explained above can also be seen in privatization depending on the scheme that was adopted by the parties.

Moreover, the privatization of the port is related to the introduction of the concept of Public Private Partnership (PPP) recognized as a significant way to boost the development of the port in some countries. In more detail, there are many rules that govern the participation of the private sector to the infrastructure and superstructure development of particular States, as follows (Son, 2012):

b. World Trade Organization (WTO) on General Agreement on Government Procurement (GPA);
c. The Organisation for Economic Co-operation and Development (OECD) on Basic Elements of a Law on Concession Agreement;
d. The European PPP Expertise Centre (EPEC) Guide on Guidance;
e. EU Legislation regarding procurement as mentioned in Public Sector Directive (2004/18/EC) and Utilities Directive (2004/17/EC);
f. National Legislation which may be diverse in States that adopt the civil law system and the common law system. The civil law system is likely to be more prescriptive to regulate the PPP aspect in their national law rather than the common law system. The civil law system provides more standard clauses that cannot hindered by the parties. On the other hand, the common law system is more adaptive and negotiable since the system lies that the notion of PPP aspect will be decided by the parties rather than formulated on a standard clause.

The legal aspects of port privatization also cannot be separated with the port privatization principles as proposed by UNCTAD (1998). Subsequently, these principles that the stakeholders must pay attention to are:

12 More information regarding PPP is available on world bank website
13 Common law systems were adopted by the UK, USA. On the other hand civil law systems were adopted by most European Union countries except UK and Ireland
1. The privatization scheme will also open for the international bidder, who must be transparent, objective and non-discriminative for all candidates;

2. The privatization scheme shall have to conform with the governments policy. For instance it is in line with the master plan made by the government and it follows the provision of the bid/tender process;

3. The Port Authority will be an owner and manager of the landlord port, because they will no longer be involved in the actual operation of the port;

4. The concessionaires must have an award on the basis of their performance. This consideration also means that the bidder, who has an excellent financial capability and strong technical performance should be appreciated by the government during bid/tender process;

5. The privatization scheme can be executed as full privatization or partial privatization. In full privatization, the government gives all parts of the privatization object to be managed by the concessionaire. On the other hand, in partial privatization only some parts of the privatization object are handled over to the concessionaire and the government will take further cooperation with the concessionaire to provide the port services.

Moreover, the nature of a port as a public infrastructure is an important basis to understand how the PPP arrangement, like the concession plays a vital role in delivering port business overseas. Notteboom (2007) suggested that in the concession government it is believed that an enterprise based-port will be more flexible in terms of services and operations, more efficient in market competition, higher productivity and also has a better response to the customers’ satisfaction.

The term and conditions of the concession agreement, then shall comply with the host’s national law, since in the concession agreement legal considerations that are derived from national law. Further, Phillips (2009) adds information that in the concession there would be a delegation of power from the government to the private company to using, operating and developing parts of the state public domain of infrastructure and superstructure that is situated in the port for their advantage. The
national law, therefore can be extended into the application of all laws, decrees, rules, 
administrative circulars and other regulations that are applicable to the ports, including 
all provisions of any international treaty or convention to which the host State has 
become a party to.

III.2 Concession Agreement

III.2.a Definition of Concession

One of the strategies to perform port privatization is through a concession 
agreement between the government and concessionaire. In order to get more details 
about the concession, we should examine the definition of concession as follows:

Definition by Oxford Dictionaries (2015):

“The right to use land or other property for a specified purpose, granted by a 
government, company, or other controlling body”

Definition by Cambridge Dictionaries Online (2015):

“A special right to property or land”

Definition by Merriam Webster (2015):

“(1) A grant of land or property especially by a government in return for 
services or for a particular use (2): a right to undertake and profit by a specified 
activity (3): a lease of a portion of premises for a particular purpose; also: the 
portion leased or the activities carried on”

Based on the definitions stated above, the concession can be summarized as a 
grant by the government or other controlling body (in this case) to any legal entity for 
the utilization of land or other property for the purpose to undertake and generating 
profit. Moreover, in the port concession is usually granted by the port authority to a 
private operator for providing specific port services, such as terminal operations or 
nautical services (e.g. pilotage and towage) (Notteboom, 2007).
The concession in some legislation is also identical with the authorization from the government to a private entity. Furthermore, this authorization was adopted by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, in paragraph 14 which stated that:

“In addition, certain Member State acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally …….. concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable”.

III.2.b “Important Clauses” in Concession Agreement

The concession agreement between government and the concessionaire will consist of many clauses that join together to form a concession contract. The concession contract itself will follow the principle of freedom of contract as a basic principle recognized in the contract of law, but in practice the government has the privilege to offer their basic standard form to the nominated concessionaire and then the negotiation of contract will be conducted between them. Furthermore, this dissertation tries to extract the important clauses in concession agreement which are consists of:

1. Concession Period

The concession period is a timeline agreed by the government to the concessionaire relating to how long the concession will be given to the concessionaire. The port concession period usually depends on the investment provided by the concessionaire. Moreover, Indonesia Port Corporation III was giving 72 years of the concession by the Ministry of Transportation related to the building and development.

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14 This process can be through bid/tender process or direct proposal sent by the private company to the government
of the Multipurpose Terminal of Lamong Bay in Indonesia that cost a total of 500 million USD of company investments (Indonesia Infrastructure Initiatives, 2015). According to Djakarta Post (2014), Indonesia Port Corporation III also got their concession for 25 years related to the revitalization of Surabaya West Channel that connect Port of Tanjung Perak as the second biggest port in Indonesia with an outer part of shipping route which cost total investment of 73 million USD. This scheme is also followed by the Antwerp Port Authority that set the concession period to be determined by the investment of the concessionaire as mentioned in the table that follows (Port of Antwerp, 2011).

Table 2 Correlation between Investment Amount and the Duration of Concession in the Port of Antwerp (Port of Antwerp, 2011)\(^{15}\)

<table>
<thead>
<tr>
<th>Investment Amount</th>
<th>Year (extension)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment &gt;= 375 EUR/m(^2) of built-on area</td>
<td>40 years (5)</td>
</tr>
<tr>
<td>225 EUR &lt;= investment &lt; 375 EUR/m(^2) of built-on area</td>
<td>35 years (5)</td>
</tr>
<tr>
<td>175 EUR &lt;= investment &lt; 225 EUR/m(^2) of built-on area</td>
<td>30 years (5)</td>
</tr>
<tr>
<td>150 EUR &lt;= investment &lt; 175 EUR/m(^2) of built-on area</td>
<td>25 years (5)</td>
</tr>
<tr>
<td>125 EUR &lt;= investment &lt; 150 EUR/m(^2) of built-on area</td>
<td>20 years (5)</td>
</tr>
<tr>
<td>100 EUR &lt;= investment &lt; 125 EUR/m(^2) of built-on area</td>
<td>15 years (5)</td>
</tr>
<tr>
<td>25 EUR/m(^2) &lt;= investment &lt; 100 EUR/m(^2) of built-on area</td>
<td>10 years (3)</td>
</tr>
<tr>
<td>0 EUR/m(^2) &lt;= investment &lt; 25 EUR/m(^2) of built-on area</td>
<td>Quarterly (0)</td>
</tr>
</tbody>
</table>

Beside the determination of the concession period by the amount of the concessionaire’s investment, other criteria also have been influenced to determine the concession period. Moreover, the government sets other criteria depending on the kind of business that will be conducted by the concessionaire. In the Port of Antwerp, the Port Authority also set criteria for the port concession period, which is given to be 40 years for maritime activities and 30 years for the service activities (Antwerp Port

\(^{15}\) This method looks like it was the commonly used for determining the concession period
Authority, 2011). Apart from the Port of Antwerp, Mundhe (2008) suggests that the concession period should be determined from the years required for the concessionaire to recover their investment. Ye & Tiong (2003) also Hanaoka & Phalaphus (2012) hold the same perspective, from a different point of view which mentions that the concession period should be determined from the reasonable risk exposure calculation that may happen during the concession period which may be useful for the government and the private sector. Furthermore, another criterion to setting up the duration of the concession was suggested by the European Commission in Pallis & Notteboom & Langen (2008) which analyses that the maximum concession duration is 8 years when there are no investments made, 12 years in the case of significant investments in movable assets, and 30 years in the case of significant investments in immovable assets.

Regarding the further discussion to concession period, Theys & Notteboom (2010) described on how the investment, field actual condition and contractual condition were affected by the duration of concession as characterized by below parameters:

Table 3 Comparison between Longer and Shorter Duration of Concession Contract (Theys & Notteboom, 2010)

<table>
<thead>
<tr>
<th>Parameters</th>
<th>Longer Duration</th>
<th>Shorter Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment-specific conditions</td>
<td>a. High transaction specific investment by operator</td>
<td>a. High specific investments of landlord</td>
</tr>
<tr>
<td></td>
<td>b. Landlord wishes to provide incentives for investment effort in form of evaluation of value of assets invested by operator</td>
<td>b. Economic life of limited to contract duration</td>
</tr>
</tbody>
</table>
**Contractual conditions**

<table>
<thead>
<tr>
<th></th>
<th>a. High transactions/negotiation cost</th>
<th>b. Use properly designed contract</th>
<th>a. High probability of contract renegotiation</th>
<th>b. Parties require high flexibility</th>
<th>c. Landlord requires eviction threats</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contractual conditions</strong></td>
<td>a. High probability of free riding and hold-up problem</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2. **Concession Fee and the Others Financial Obligations of Concessionaire**

The concession fee is defined by Phillips (2009) as a fee to be paid by the concessionaire to the government through conceding authority during the concession period. The concession fee then will be separated into an entry fee as payment in front of the concession period and a performance fee that will be paid annually during the concession period; this performance fee is subject to be re-evaluated based on the rate of inflation.

Moreover, Brooks & Cullinane (2007) added more information regarding the concession fee that in some cases, the Port Authority will impose a fixed concession fee, but the concessionaire has the freedom to set its own charge to be negotiated with the Port Authority. In addition, the Port Authority also uses a method that was generated from the two-part system which consists of a fixed concession fee and a variable royalty fee based on the calculation per ton or per TEU of cargo that has been handled as the minimum throughput that must be reached by the port operator in a certain period.

According to Trujillo and Nombela (n.d) in European Ports, the revenue that is gathered from the ports tariff income is generally higher than the revenue from concession fees, the margin being around 37%\(^1\). The other rational business consideration beyond this margin is because the risks for conducting port business are

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\(^1\) This consideration also to keep the surplus of funds for financing the other project in port
already shifted to the concessionaire and the concessionaire then must provide the standard priced services to the customers in order to maintain their cash flow. However, in practice the Port Authority realized that the concession fee is not solely depending on the market situation which fluctuates depending on the seaborne trade volume. For this reason they proposed a new concept that the concession fee can be calculated by the price per square meters that was used, the subject to be revised periodically\(^{17}\). To gather more information about this topic, this dissertation tries to give an example of the concession fee for different ports based on price per square meters as follows:

Table 4 Concession Fee for Different Ports based on the Price per Square Meters in 1997 (Trujillo and Nombella, n.d)\(^ {18}\)

<table>
<thead>
<tr>
<th>Port</th>
<th>Annual Price per Meter Square (USD)</th>
<th>Revision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baltimore</td>
<td>6.5</td>
<td>Annual</td>
</tr>
<tr>
<td>Bremerhaven</td>
<td>2.3</td>
<td>5 years</td>
</tr>
<tr>
<td>Bordeaux</td>
<td>4.5</td>
<td>Annual</td>
</tr>
<tr>
<td>La Spezia</td>
<td>5.7</td>
<td>Variable</td>
</tr>
<tr>
<td>Le Havre</td>
<td>3.8</td>
<td>Annual</td>
</tr>
<tr>
<td>Lisbon</td>
<td>15.0</td>
<td>Annual</td>
</tr>
<tr>
<td>Oslo</td>
<td>61.5</td>
<td>Variable</td>
</tr>
<tr>
<td>Rotterdam</td>
<td>3.2</td>
<td>Variable</td>
</tr>
</tbody>
</table>

The other financial obligations of the concessionaire may vary from one concession contract to the other. These financial obligations will cover all expenses that not were covered by the entry fee and performance fee. In addition, other financial obligations can consist of the requirement to provide an insurance for the whole infrastructure and superstructure built at the concession area and it can also be stand for all the expenses related to the maintenance of the infrastructure and superstructure

\(^{17}\) The price per square meter seems not to be interfering with the market situation \\
\(^{18}\) In recent developments this configuration may have changed
that has been built. Moreover, Phillips (2009) gives a list that the other financial obligations also consist of:

a. A rehabilitation bond for a specific amount with a specific maturity date to guarantee the proper and timely performance of the rehabilitation work;

b. A maintenance and performance bond to ensure maintenance and performance targets meet with the government’s standard;

c. A hand back bond to guarantee the performance of the concessionaire related to the hand back obligations under the concession contract.

3. **Detail of the Asset Build by the Concessionaire**

The concession agreement usually contains a clause regarding the detailed aspect of the assets, including fixed assets and removable assets that shall be built by the concessionaire under the specific provision. This list of detailed assets is negotiated during the negotiation stage or it is already requested by the government under the procurement or bid/tender documents related to the asset utilization under concession. In addition, the list of the detailed assets is important to be considered by both parties, since at the end of the concession period some assets will shift to the government and some assets will remain in the possession of former concession holder that subject to be re-cooperation with the new concession holder or it subject to incorporate into the new concessionaire investment if the former concessionaire is appointed for the new concession period.

The concessionaire has obligations to build neither tangible nor intangible assets during the concession period. Furthermore, the tangible assets can consist of the number of berths that have been built, the shipping draft project, which includes the capital and maintenance dredging project, the build and developments of container yard, shed, procurements of unloading/loading equipment’s, buildings and area for cargo consolidation. On the other hand, intangible assets usually relate to the image of concessionaire as terminal operator that recognized by the domestic and international
market, the port’s productivity of unloading/loading and also it stands for the shorter dwelling time used to serve ships in port.

Assets built by the concessionaire are owned and managed depending on the contractual provisions as set out in the concession agreement. For instance, by following the Build Operate Transfer (BOT) scheme, the assets remain as the concessionaire’s possession, before at the end of the concession being transferred to the government with all the attributes linked with those assets.

III.2.c Rights and Obligations of the Parties under Concession

The concession agreement gives the different rights and obligations for the parties which will be formulated in the standard contract of concession. The rights and obligations of the government are more likely to be emphasized, since they have already delegated their authority to serve the public interest in the port business to be executed and managed by the concessionaire. Furthermore, in practice we acknowledge that the Business to Business (B2B) model puts equal treatment and equal position of the parties involved and therefore the interest of the concessionaire shall also put at the same level as well as the interest of the government. The stigma of landlord attributes owned by the government through the conceding authority has a strong effect to diminish the rights of the concessionaires. As a consequence, the concession contract seems to be non-negotiable between the concessionaire candidate and government\(^{19}\).

Based on PPP guidance that was provided by the World Bank (n.d), the rights and obligations of each concessionaire and government under a concession agreement can be summarized in Appendix B\(^{20}\).

\(^{19}\) Normally in the commercial agreement, each party is treated equally, but in concession agreement the government seems to have privileges rather than concessionaire

\(^{20}\) This rights and obligations was also added by author’s experience that involved drafting the concession contract
III.3 The Legal Status of Asset during Concession Period:

III.3.a Mechanism of Asset Financing

One of the most important aspects for the concessionaire after the concession agreement was signed is to think about the assets financing plan during the concession period. Since the concessionaire usually applies for financial arrangements to get a loan from third parties, such as the bank and other financial institutions, the concessionaire will have additional obligations to maintain their cash flow during the concession period in order to repay the loan from the creditor on the due date of the payment period. Furthermore, Delmon (2010) in Dewulf & Blanken & Bult-Spiering (2011) gives an alternative way in order to finance the infrastructure and superstructure in the different schemes as follows:

1. Equity contribution with use share capital and shareholders’ funds in order to finance the building of both infrastructures and superstructures\(^{21}\);
2. Debt contribution from the lenders that can be in the form of bank or financial institutions;
3. Mezzanine contribution, which is located between equity and debt. This contribution usually forms as a quasi-equity such as preference share with fixed annual dividend (Switala, n.d);
4. Project finance as the common financial arrangement for concession.

Another financing scheme was adopted by Pelindo III that issued a global bond in order to finance their project. According to Wee (2014) Pelindo III had got funds in the amount of USD 500 million with Australia New Zealand Bank (ANZ), Credit Suisse and Standard Chartered Bank acting as joint lead managers, while the Bank Negara Indonesia (BNI) Securities and Mitsubishi UFJ Financial Group were appointed as co-managers for executing the company’s strategic plan related with the financing of infrastructure and superstructure under the concession contract with the Indonesian Government in the Multipurpose Terminal Lamong Bay project for 75

\(^{21}\) It only can be conducted if the company has a strong financial capability to finance the project
years and Surabaya West Channel (Alur Pelayaran Barat Surabaya) project for 25 years\textsuperscript{22}.

In addition, UNCTAD (1993) listed that actually there are 3 main sources for the financing of port infrastructure and superstructure, which are:

1. Public financing, that uses funds from the government;
2. Private financing that uses funds generated from the PPP;
3. Mixed financing between public and private as a mix combination that uses part of the government funds and some part of the private funds.

In the other perspective, Hemming (2006) tried to divide the different schemes of assets financed by PPP with emphasizing on the modalities that can be an option for the government to financing the infrastructure and superstructure, as shown in the table 5 below:

Table 5 Different Schemes of Assets Financed with Different Sources of Modalities (Hemming, 2006)

<table>
<thead>
<tr>
<th>Scheme</th>
<th>Modalities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Build Own Operator (BOO)</td>
<td>Private sector builds and own the assets and manage it without any obligations to transfer to government</td>
</tr>
<tr>
<td>Build Develop Operate (BDO)</td>
<td></td>
</tr>
<tr>
<td>Design Construct Manage Finance</td>
<td></td>
</tr>
<tr>
<td>(DCMF)</td>
<td></td>
</tr>
<tr>
<td>Buy Build Operate (BBO)</td>
<td>Private sector buys or leases assets from government to modernize and operate the assets without obligations to transfer back to the government</td>
</tr>
<tr>
<td>Lease Develop Operate (LDO)</td>
<td></td>
</tr>
<tr>
<td>Wrap Around Addition (WAA)</td>
<td></td>
</tr>
<tr>
<td>Build Operate Transfer (BOT)</td>
<td>The private sector builds the assets and transfer back to government at the end of concession period or at specific time</td>
</tr>
<tr>
<td>Build Own Operate Transfer (BOOT)</td>
<td></td>
</tr>
<tr>
<td>Build Rent Own Transfer (BROT)</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{22} Pelindo III/Inaport III also had arrange other financial arrangement, in form of credit syndication of total amount USD 125 million in order to finance their other project.
Trujillo & Nombela (n.d) also described the different ways of financial schemes in different states related with the investment of port infrastructure and port superstructure. Moreover, the investment requires the participation of private companies to contribute funds to build the port infrastructures and superstructures. In addition, it was indicated that private companies actually can elaborate together with the local government or port authority to conduct port services with their investment. Subsequently, to have more understanding about cooperation among public and private bodies, we suggest table 6 below that shows a financing scheme in infrastructures and superstructures related to the port service in different states:

Table 6 Financing Schemes of Port Infrastructure and Superstructure in the Different States (Trujillo & Nombela, n.d)

<table>
<thead>
<tr>
<th>State</th>
<th>Maritime Access Infrastructure</th>
<th>Port Area Infrastructure</th>
<th>Port Area Superstructure</th>
<th>Land Access Infrastructure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>P.A/Private</td>
<td>P.A</td>
<td>Private</td>
<td>P.A provides this access within port areas and hinterland.</td>
</tr>
<tr>
<td>Belgium</td>
<td>State</td>
<td>Public</td>
<td>Private</td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>P.A</td>
<td>P.A</td>
<td>Concession</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>P.A</td>
<td>P.A</td>
<td>Private</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td>P.A</td>
<td>P.A</td>
<td>Private</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>State/P.A</td>
<td>Public/P.A</td>
<td>Concession</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>State</td>
<td>Public</td>
<td>Private</td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>State</td>
<td>Public/P.A</td>
<td>Concession</td>
<td></td>
</tr>
<tr>
<td>Hong Kong</td>
<td>P.A</td>
<td>Private</td>
<td>Private</td>
<td></td>
</tr>
<tr>
<td>Ireland</td>
<td>P.A</td>
<td>P.A</td>
<td>Concession</td>
<td></td>
</tr>
</tbody>
</table>

23 In the present time, this configuration is may change due to the rapid development in the scheme of Public Private Partnership (PPP) in every States
<table>
<thead>
<tr>
<th>Italy</th>
<th>State/A.P</th>
<th>Public/P.A</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malta</td>
<td>State</td>
<td>P.A</td>
<td>Concession</td>
</tr>
<tr>
<td>Mexico</td>
<td>P.A</td>
<td>P.A</td>
<td>Private</td>
</tr>
<tr>
<td>Netherlands</td>
<td>State</td>
<td>P.A</td>
<td>Private</td>
</tr>
<tr>
<td>Portugal</td>
<td>P.A</td>
<td>P.A</td>
<td>Concession</td>
</tr>
<tr>
<td>Spain</td>
<td>P.A</td>
<td>P.A</td>
<td>Concession</td>
</tr>
<tr>
<td>Sweden</td>
<td>P.A</td>
<td>P.A</td>
<td>Concession</td>
</tr>
<tr>
<td>UK</td>
<td>P.A</td>
<td>P.A</td>
<td>Concession</td>
</tr>
<tr>
<td>Venezuela</td>
<td>P.A</td>
<td>P.A</td>
<td>Private</td>
</tr>
</tbody>
</table>


Remark: (1) P.A= Port Authority, (2) P= Public/Financed by central, regional or municipal government (3) Concession= superstructures owned by public, but operated by private company

In order to add some information related to the port financing above, there also exists a different type of cooperation between the government and port operator. According to Murthy & Notteboom (2002) in Notteboom (2007) there are 4 (four) types of cooperation being adopted by the government to develop their port with the participation of a private company or state-owned company. This adoption relies on the type of scheme that was suggested by the government. Moreover, table 7 below shows the different responsibilities of government as well as private companies relating to construction, financing and the operations of terminals or port facilities.
Table 7 Responsibilities of Terminal Operator or Port Authority in accordance with Construction, Financing and Operations of the Terminal/Port Facility (Notteboom, 2007)\textsuperscript{24}

<table>
<thead>
<tr>
<th>Type</th>
<th>Definition</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Build Lease Operate (BLO)</td>
<td>Port Authority lease the construction and operation of their port</td>
<td>Fuzhou Qingzhou Container Terminal in Fuzhou Port that operated by PSA in 1998 for 20 years period</td>
</tr>
<tr>
<td>Build Operate Transfer (BOT)</td>
<td>Government gives concession to finance and build port facility and to operate. At the end, the object will be handed over to the government</td>
<td>Tanjung Pelapas Port (TPP) Malaysia.</td>
</tr>
<tr>
<td>Build Rehabilitate Operate Transfer (BROT)</td>
<td>Government gives concession to finance and rehabilitate or modernize the specific terminal or an entire port.</td>
<td>Port Klang in Malaysia which has a 21-year contract, an award was made in 1986 to a private operator, Port Klang Container Terminal to manage and develop container facilities at the port.</td>
</tr>
<tr>
<td>Build Operate Share Transfer (BOST)</td>
<td>Government give concession to finance and build or modernize specific port. The revenue also risk operational from the port operation is shared with public authority</td>
<td>BCC Shipping &amp; Shipbuilding Ltd and its UK Partner for developing Tadri Mini Seaport at Karnataka, India</td>
</tr>
</tbody>
</table>

\textsuperscript{24} This configuration also subject to change at the present time
Bichou (2009) has provided a more interesting analysis regarding the relationship between assets that are built by the concessionaire and the stratification of cost. The analysis referred to is provided in table 8 as follow:

Table 8 Disaggregation of Cost in Terminal Container Business relating to the Assets Provided by Concessionaire (Bichou, 2009)

<table>
<thead>
<tr>
<th>Cost elements</th>
<th>Capital Cost</th>
<th>Operation Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land and terminal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Design and mobilisation</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Dredging project</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Design and structure</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Container yard</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Sheds and buildings</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Reception facilities</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Civil works</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Lease</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Tax and professional fees</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Equipment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cranes</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Spreaders</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Rubber Tyred Gantry (RTG)</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Radio communications</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Work vehicles</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Engineering services</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Forklift</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Tractors/trailers</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Security</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>Fuel supply and utility services</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>--------</td>
<td>--------</td>
</tr>
<tr>
<td>Computation services</td>
<td>✓ (new)</td>
<td>✓ (old)</td>
</tr>
</tbody>
</table>

### III.3.b Asset Utilization during Concession Period

The concessionaire under a concession contract has the right to enjoy the utilization of the asset that has been built for providing the port service in order to gain revenue from the port service customers. Further the utilization of the assets are not limited for a supporting tool to provide port services, but also it can be subject to having mortgages for the creditor if the concessionaire needs more funds to be gained during a concession period\(^25\).

The infrastructure of the port consists of: access road that links the port and it is hinterland; the berthing point for the ships; the container yard for stacking containers and also a port superstructure that consists of: the equipment for unloading/loading activity, also all equipment for conducting the pilotage as well as towage service; and mooring buoy must be optimally utilized by the concessionaire due to the economic value of these assets will decrease by year to year which causes depreciation\(^26\). The concessionaire then shall assume that in the beginning of the concession, they must optimally use the assets because in this period the assets still have high economic value and therefore it can provide a high utilization of assets\(^27\). In addition, assets that have been built under the concession scheme with a long time period come through depreciation that may significantly decrease the value of the assets and as a consequence the value of the assets in the beginning operation period and the end of concession will have significantly different margin of value.

\(^{25}\) It can also be mortgage objects to raise more funds in the operation period, but if following the BOT scheme it means at the end of concession period the concessionaire must guarantee that the assets to be handled over to government were free from any mortgages and encumbrances

\(^{26}\) This problem mostly occurs in the calculation assets value from time to time

\(^{27}\) High utilization means that in early period the assets can optimally enhance the performance of the port operator, while in the next period the capacity is reduced and it needs more cost to maintain
Depreciation can be caused by inflation that happens in the State where the concession was taken and this obstacle cannot be hindered by the concessionaire. Moreover, depreciation will create terminology called salvage or residual value as estimated assets value in the end of its useful life (Burns, 2014). Further, Bichou (2009) explains that the asset depreciation is also recognized in tax law as a financial statement that creates costs or expenses that reflect the diminishing value of the physical assets. In order to calculate this depreciation, Bichou (2009) then suggests 5 (five) different methods, which are: straight line depreciation methods; declining balance depreciation; annuity; accelerated depreciation; and activity depreciation.

III.3.c Legal Status of Asset after Concession Period

The legal status of the asset after the concession period is depending on the type of cooperation that was used by the concessionaire and the government. This legal status of the assets is important to consider because it can answer which party the ownership right of the assets belongs and as the legal basis of asset registration as well. Further, the legal status of assets also explains which party will be liable for providing insurance during the concession period.

For instance, in the BOT Scheme, the asset still remains on the ownership of the concessionaire until the end period before the asset ownership is changed to the government by the mechanism of transfer. Moreover, Donaghue (2002) has shown that in the end period of cooperation, the mechanism of assets transfer can be free or it can be through the mechanism bought back by the government.

The opposite to the BOT scheme is the BTO Scheme where the asset ownership is transferred into government possession in the beginning of the concession. The concessionaire is using the assets for providing port services to the customers with the mechanism of cooperation that was set by the government. This mechanism of assets transfer to the government’s possession is also being calculated as the investment that

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28 Assets must be registered in the account of each party that indicates the ownership of the assets

29 The ownership will also determine which party is liable to risk exposure during the concession period
is being made by the concessionaire and government incorporate this calculation to determine the concession period that will apply to the concession contract. According to Sader (2000) the facility or assets in the BTO scheme is built on a turnkey basis with private capital and this private capital operates the facility for fixed term before the ownership title is transferred to the government.

III.4 Liability and Insurance of Asset during Concession Period

Besides the concessionaire’s obligation to build the infrastructure and superstructure, another obligation for the concessionaire is providing insurance to overcome any risks during the concession period or during when they begin the procurement/construction project\(^{30}\). The risks may come from everywhere, including damage cause by human act, such as the fault or the carelessness of construction design that may interrupt the port infrastructure and it can also be cause by technical acts that may occur in the form of technical failure of the system being developed to assist the port operation in port operating system that was being computerized. In addition, this risk also includes a risk related with the port operations such as the labour problem within the port that might affect port operation, the risk of any damage caused by third parties in relation with unloading/loading activities and many more. UNCTAD (1993) in their legal review of port management also mentions that each port has different types or risks. Moreover, the risks depend on the location of the port or the traffic of the volume of cargo that belongs to the port operation. Oil cargo in the multipurpose terminal, for instance, will potentially deliver more risk of fire explosion than other cargo such as dry bulk cargo or containers. In an extended explanation, the risk also includes risk where a port is located in the estuaries zone that probably is more exposed to nautical risk than a port located in the coastal zone.

The management of the port that was handled by the concessionaire is therefore liable for any unwanted condition in the port relating to the risk as described above. The concessionaire must realize that they must take appropriate measures to shift this liability for risk that may occur in their business operation to the third parties whose

\(^{30}\) May include the risk associated with the mobilisation of equipment
acts as an insurer with the contract of insurance. The contract of insurance then will be a legal basis for the concessionaire in order to get indemnity as stipulated in the contract for any risk that is classifies as a risk being covered based on insurance contract clauses.

WDenis (n.d) gives an explanation that the type of insurance within the port is various from one stakeholder to different stakeholder, due to the business that conduct by each stakeholder in port was different. This insurance then can be consisting of: cargo handling facility insurance for all equipment that uses to provide cargo handling service; and transport and logistics operator insurance that use for taking insurance in relation with carrier/freight in delivering goods by the sea context\textsuperscript{31}.

Another issue raised with the scope of the liability for insurance in the port is an issue which is correlated with the interpretation of the safe port as stated in the typical standard of charter party form. The port operator is liable to provide a safe port as well as a safe berth as the consequences of the application of doctrine mare liberum that is already interpreted by the ship-owner that they have a freedom to bring their ships across the sea to visit all ports in the worlds\textsuperscript{32}. This standpoint then is a precedent to put this responsibility in the concessionaire’s hand. According to Williamsen (2006) under English Law actually the charterer is liable to nominate a safe port during a charter party contract and in the practical field if the port is not safe for ships, the other problem will be raise up\textsuperscript{33}. This problem will relate with the subrogation of the charterer to the port operator if the ship suffers damage in the destination port against a claim adjusted by the ship owner. This dissertation realizes that the dispute settlement will depend on the specific circumstances and provisions in the contract.

\textsuperscript{31} Needs various type of insurance in port operations
\textsuperscript{32} Stands for the freedom of the sea as proposed by legal scholar Hugo Grotius. Nowadays, UNCLOS 1982 as an umbrella convention for the law of the sea recognizes this principle in Article 89 that means “Invalidity of claims of sovereignty over the high seas”
\textsuperscript{33} Both the NYPE and Baltimore Clause in charter party form gives the charterer the right to nominate a safe port and the ship-owner has the right to grant a decision whether they accept or refuse it
that are used as a legal basis or precedent before the Court/Arbitration Body gives a decision\textsuperscript{34}.

**III.5 Management of Risk during Concession Period**

Naturally risk during the concession period is actually born proportionally by the government as well as the concessionaire. The government is liable for providing the public infrastructure in the form of the port, which must be maintained by the government both in quality and productivity in order to guarantee the satisfaction of society or port customers in that aspect. Recalling also the philosophy of the port as a public infrastructure that in this context was already shifted the management of port from the government to the concessionaire, the risk for conducting port business is also shifted to the concessionaire. Another discussion was raised between the government and the concessionaire regarding when or what at that moment each party will be liable for any damages, loss or even for any lower productivity or the degradation of the quality of service served by the port service provider. In the basic understanding and in line with the notion from OECD (2008), the government actually bears all risks before the concession agreement and it will be shifted into the concessionaire’s hands regarding all risks related as described in the Figure 1 below:

![Figure 1 Spectrum of Combination of Public and Private Participation on Risk during Concession Period (OECD, 2008)](image)

\textsuperscript{34} Depend on the conditions in the port, do they implement ISPS Code or not if the port State is a contracting State to SOLAS 1974 as amended
The figure above indicates that the government passed the risk to the concessionaire when the concession agreement was taken. The risk that passed into the concessionaire’s hands includes but is not limited to financial risk, risk for any loss or damage of infrastructure and superstructure that been build and also revenue risk that concerned by concessionaire since they must generate profit to overshadow all cost and expenses to build the port’s infrastructure and superstructure. In the middle between the government and the private sector, there is the PPP that means the risk is shared between the government and private sector regarding all risks associated with all infrastructures and superstructures that are built depending on the type of PPP scheme that was adopted. Moreover, to justify the party that must be liable for the risk it also depends on the underlying clause in the concession agreement that governs that issue.

There is a management of risk that was proposed by Guasch & Aleman & Trujillo (2015) which mentions that the success of the private sector participation in public sector infrastructure and superstructure cooperation also depends on the ability of government to control public-private contractual relationships by ex-ante\textsuperscript{35} (by designing correct contracts; properly assigning risks; designing effective competitive tendering and robust and transparent award criteria, and implementing effective oversight and regulation) and also by ex-post\textsuperscript{36} (post contract award management and careful handling of renegotiation requests). Furthermore, Guasch & Aleman & Trujillo (2015) also give a details for the risk that may occur during the concession period, which are:

1. Technical risk, which covers all engineering works and project completion. This risk usually happens when there are delays that cause cost overrun and will cause overheat/unpredictable cost;
2. Revenue risk, which is related with the probability of changes in expected demand, due to overestimation or exogenous circumstances;

\textsuperscript{35} Based on forecast rather than actual result
\textsuperscript{36} Based on actual result rather than forecast
3. Operating risk related with the operation of the infrastructure and superstructure being built;

4. Financing risk. In addition, Zhang & Shen & Zhang & Zhang (2015) described this risk refers to the cash flow in case the management of the port cannot pay the debt and interest so that the creditors can force the project to be bankrupt by turning on the law resulting with a loss of revenue.

Moreover, Menheere & Pollalis (1996) then analysed that in the concession period, the risk is born by the concessionaire that will be transferred the government as a diminishing risk pattern as shown below:

![Diagram showing diminishing risk during concession period](image-url)

**Figure 2** Diminishing Risk during Concession Period (Menheere & Pollalis, 1996)
Matsukawa & Habeck (2007) then try to give a concept that the risk during the concession period actually can be transferred from the concessionaire as the project holder into creditworthy third parties. Moreover, to conduct this action, the concessionaire needs instruments called risk mitigation instruments as financial instruments that transfer certain defined risks. In addition, there are many financial risk mitigations providers for the multilateral project, for instance: World Bank International for Reconstruction and Development (IBRD); International Development Association (IDA); International Finance Corporation; Multilateral Investment Guarantee Agency (MIGA); Asian Development Bank (ADB); European Bank for Reconstruction and Development (EBRD); Inter-America Development Bank (IDB); and European Investment Bank (EIB).

Another issue that also should be considered by the concessionaire is the risk potentially arising from the concession. Moreover, Aronietis & Monteiro & Vanselislander & van de Voorde (2010) suggest that in this case there should be a risk allocation between the government and the concessionaire based on the best able of access by the party, ability to control, ability to manage by them or by the party with best access or lower cost the risk bearing. Machlin (n.d) divides a risk in port development into several risks that may be considered by the port operator. Furthermore, those risks are described below:

1. Legal/regulatory risk with the potential to change by the regulatory and jurisdictional role of transport ministries, maritime agencies, environmental authorities and naval and military authorities;
2. Construction/completion risk which can be formed as a risk that comes from civil engineering activities for construction many land based port facilities, such as: access road, terminal buildings and storage facilities by the act of the third parties. Regarding this issue based on Antwerp Port Authority (2011) the concessionaire is also liable for any damage or incident that is caused directly or indirectly as a

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37 There are many risks associated with the port concession, in this dissertation try to divide the risk based on the understanding gained from the references that were used
result from the constructions and its maintenance and also liable for any third parties liability that arising from the construction project;

3. Market risk that is related to the demand and supply side of the port services. Shipping traffic that can be changed to the alternative routes and alternative of port of destinations to take an advantage of better tariff, intermodal connections or synergic opportunities between one port operator and another port operator;

4. Labour risks which deals with the employment policies and procedures that apply in the host State, since in the maritime sector, the workers enjoy special protection supplied by the local government;

5. Concession risk related to the floated policy in the concession agreement regarding tariffs. Furthermore, this tariff is sometimes still re-negotiated because a subsequent government may view that the tariff is too generous or the owner underestimated the capital investment required to meet the service standard obligation.

III.6 Applicable Law and Dispute Resolution Matters

The concession agreement that will be delivered in a foreign jurisdiction beyond the law where the concessionaire was registered shall respect the national law of the host State whereas the port service will be delivering. The host State has its own national law that cannot be interfered by any mechanism or any commercial arrangements/contract that has been made even between the government itself and the concessionaire. This national law reflects the sovereignty of the host State and therefore the obligation of the concessionaire is to strictly follow it without any negotiation further related with that topic.  

Another perspective was shown by Recommendation 57 of PPP in the Infrastructure Resource Centre under the World Bank (n.d) that mentions:

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38 This consideration is un-doubtable, since all States have the sovereignty and jurisdiction to govern their domestic law
“The concessionaire and its lenders, insurers and other contracting partners should feel free to choose the applicable law to govern their contractual relations, except where such a choice would violate the host country’s public policy”

The recommendation above is aimed to accommodate the freedom of contract between the concessionaire and all relevant parties who have a contractual basis relating to the build, development of assets with the concessionaire. However, the application of freedom of contract cannot breach the applicability of the host State’s national law and the contract itself must give appreciate to any provision as set out in the host State legislation.

In the case of dispute resolution matters, the PPP in the Infrastructure Resource Centre under the World Bank suggested an arbitration clause under ICC jurisdiction that may be incorporated in the concession agreement with below wordings:

“In the event of a dispute between the Owner and the Operator (other than a matter to be resolved pursuant to Clause [   ]) concerning the interpretation of any provision of this agreement or the performance of any of the terms of this Agreement, such matter or matters in dispute shall be finally settled: -

a. under [the Rules of Conciliation and Arbitration of the International Chamber of Commerce];

b. by three arbitrators, one appointed by each Party, and the third, who shall be the chairman, selected by the two appointed arbitrators and failing agreement by the [Chairman of the International Chamber of Commerce];

c. the language of the arbitration shall be English; and

d. the place of the arbitration shall be [   ]”

Those wordings are optional to be applied in the concession contract and the parties will not be binding for the standard clause to govern their dispute resolution
unless it is already stated by the government\textsuperscript{39}. Furthermore, the dispute resolution with an arbitration clause offers different kinds of resolution compared to another type such as: court jurisdiction and through non-litigation methods such as negotiation and mediation. The choice to use arbitration over any dispute resolution methods that are available, give the parties the benefit to gain the certainty regarding their business because the arbitral award cannot be appealed by the other party so it will provide more efficiency for the continuity of the business. Arbitration also offers speedier resolutions, provide ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise also because of the finality of the arbitration award and that normally there is no right of appeal to the courts to change the award (Mazirow, 2008).

III.7 Compliance with the Host State Domestic Requirements:

III.7.a Corporate Social Responsibility (CSR)

The concessionaire besides complying with both national law and international standards that being adopted by the government also shall pay attention to the provisions of CSR that are regulated under national law. Since CSR are mandatory for any private company to benefit the surrounding society and environment, it also is a critical assessment by the government to continue or discontinue their cooperation with the private company in the end of the cooperation period. The issue of CSR is widely recognized in some EU countries as well as in the other regions of the world especially where the business has taken places in developing countries. Moreover, some governments have distinguished auditing schemes in order to justify whatever the company that operated in their jurisdiction had properly conducted the provisions of CSR as mandated by their national law or not. The concessionaire by this consequence shall follow the provision regarding CSR since the provision of CSR is usually mentioned at the concession agreement (Port Strategy, 2012).

\textsuperscript{39} In the every contract, it has stated on what way the dispute will be resolve
According to Crowter & Aras (2008) there are 3 basic principles that join together to comprise CSR activities as follows:
1. Sustainability;
2. Accountability;
3. Transparency.
All the above attributes shall be owned by the company in order to execute the CSR program effectively and they can have long lasting business in the place the business is conducted.

Different States have different kinds of CSR that shall be fulfilled by the private companies to show their effort to society. According to Souza (2010) in Khosrow-Pour (2014) show that in the Port of Rotterdam already attached concept of CSR is the key of the future of the port. The port that generates income shall tread a balanced development and therefore the management believes that CSR is a prerequisite to enhance the prosperity and harmony in the surrounding society.

The United Nations (2007) proposed that the concept of CSR is to examine the role of business in society and to maximise the positive societal outcomes of business activity. In relation with the compliance of CSR as mandated, the concessionaire also should consider with the protection of the environment by ensuring that they have all the appropriate measures to protect the environment around the object of the concession from pollution, noise and other results of its operations in accordance with any local and international applicable regulations (Phillips, 2009).

III.7.b Anti-Corruption Law

The port infrastructure and superstructure project probably are the most complex projects besides mining and oil and gas project. There are many stakeholders involved and the consequence is the likelihood of corruption act especially for the public officials who has direct or indirect contribute to the project as it is getting bigger. There also exists the likelihood of the bribery by the nominated concessionaire that
gives some amount of money to bribe the public official who has the authority to decide the administrative decision to grant the concession.

OECD with the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 is given a provision that requires each party (member States) to have a national law to prevent bribery that happens in international business transactions. Moreover, these provisions as set out in Article 4 also give privileges to the party to prosecute for any offences committed with that point. Following this concern, the scope of that convention is not only to cover the bribery act against public officials but also to cover the money laundering act that can be committed by the public officials without regard to place where the bribery act was taken.

Moran (2006) has pointed out an appalling statement which said that even OECD has the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which entered into force in 1997 and the U.S has already enacted the Foreign Corrupt Practice Act 1977 (FCPA), the number of bribes and corruptions remain high in some countries. Furthermore, the root cause was found and it has shown that between the OECD Convention and FCPA are create a gap or loopholes used by the multinational company to win the contracts and enjoy special advantages without fear of prosecution (Wells & Ahmed, 2007).

Recalling the potency of a corrupt act in particular States, there needs to be established adequate national laws that have full power and cannot be hindered by the parties. Similarly with the national law, the international community has also proposed a way to tackle the above problems by introducing the concept in the multi cooperation contract of arbitration under bilateral or regional cooperation to deter the corruption act without considering the amount of investment that has been made by the concessionaire. Further ICC (n.d) provided standard arbitration clauses, which can be used by the parties without modification or it can be modified as may be required by any applicable law according to the parties’ preferences. The arbitration clause as provided is:
“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

In addition, the choice of whatever use or may not use the ICC arbitration as the dispute resolution method should be incorporated under the concession agreement in order to avoid the corruption activity and to gain the certainty regarding the enforcement if there is any unlawful act during the implementation of contract.

III.8 Example of Port Concession: COSCO Pacific–Piraeus Container Terminal, Greece

One of best examples to describe the success of port concessions that are granted to a foreign company is the concession of Piraeus Terminal Container in Greece by COSCO Pacific China. Moreover, COSCO Pacific is identified as a fifth largest container terminal operator in the world with 9% of market share in container throughput. COSCO Pacific was owned by independent investors that have 57% shares and the rest of the shares are owned by China COSCO Holdings by 43% (COSCO Pacific Annual Report, 2012). Furthermore, this concession is grant by the Greece Government by mechanism of bid process and COSCO Pacific was announced as the winner of the bid for 35 years concession periods (Pagni, 2015). In addition, the company through a subsidiary company named Piraeus Container Terminal SA (PCT) signed the concession agreement on 25th November 2008 to develop and operate pier II and pier III at Port of Piraeus (COSCO Pacific Press Release, 2009). In order to get more detail about the concession area, Figure 3 below shows the picture of the concession area in the container terminal:
Furthermore, PCT had an obligation to increase the container’s throughput in pier II and complete the new section in pier III to be operating in the beginning of 2014 (van der Putten, 2014). This concession was tendered by Piraeus Port Authority (PPA) that gives PCT privileges to exploitation and gives exclusive use of the “New Container Terminal” in pier II and build pier III also covers the area adjacent thereto as well as use the adjacent berthing manoeuvre sea area, which allows the safe mooring and service of ships. Subsequently, PCT also was obligated to provide a whole range of port services related to the operation of the container terminal with their expenses (European Commission, 2015)\(^{40}\). The detail picture of pier II and pier III can be seen at Figure 4 below:

\(^{40}\) There is a case between the Federation of Greek Port Workers that claims alleged tax advantages given by Greece Government to PCT as reported to European Commission
Figure 4 The Photograph of Pier III (left-under construction) and Pier II (right-already operation) of Piraeus Container Terminal as Concession Areas (Source: pct.com on van der Putten, 2014)

In addition, COSCO has successfully increased the productivity in the area of concession which is indicated by data that provided by the company in their Monthly Throughput (2015), as indicated in Figure 5:

Figure 5 Comparisons between Monthly Throughput per July and Year to Year Throughput per July of Performance of COSCO Pacific in Piraeus Container Terminal, Greece (Source: COSCO Monthly Throughput, 2015)
The success of COSCO Pacific in increasing container throughput in Piraeus Container Terminal cannot be separated with their cooperation with a major company that plays as a distributor in Central, East, South-East Europe and the Black Sea Region, such as: Samsung; ZTE; Hewlett Packard and Huawei. This container terminal also acts as a hub for the transhipment in the Mediterranean and Europe though Greece (van der Putten, 2014). This example can be a benchmark to evaluate the success of the port’s concession in a particular State that was granted to foreign company due to UNCTAD on their review of maritime transport in 2014, COSCO Pacific strengthened their position in Global Container Operators as indicated in Figure 6 below:

![Figure 6: Ranks of Global Container Operators in 2014](source:
Drewry Maritime Research on UNCTAD, 2015)

The concession of Piraeus Container Terminal by COSCO Pacific is probably the suitable example of how the port operator that belongs to a foreign company conducts the port services in the foreign state must comply with the local laws and still be registered under their origin law. Furthermore, the concessions of OLP are also initiated to: limit the financial risk; pass the risk of the market to the concession holder and; a faster ways to gain investment (Psaraftis and Pallis, 2012).
III.9 Field Study: The Opportunity to Deliver Port Business by Virtue of Concession at Port of Antwerp, Belgium

The Port Authority of Antwerp has announced that they open a new investment by any legal entity or individual to develop, built or utilize infrastructure and superstructure within Port of Antwerp. Moreover, this information can be a good example for any company that have a core business in port service to get the concession contract at Port of Antwerp. This dissertation will discuss the issue regarding the possibility of conduct port business in Port of Antwerp separately in Appendix C.
CHAPTER IV
ALTERNATIVE WAYS TO DELIVER PORT BUSINESS OVERSEAS APART FROM CONCESSION

IV.1 Cross-Border Cooperation
IV.1.a Definition and Scope

The cross-border cooperation is the terminology that was used to describe the mechanism to conduct port services in different jurisdictions of law\textsuperscript{41}. This cooperation actually can be conducted by the Port Authority at the government level or it conducted by the private company at the private level. In the view of government level, there are many reasons of for the port authority to conduct or to join two ports in different jurisdiction. According to de Langen & Ducruet \& Nijdam (2009) based on their study on many annual reports gained from many Port Authorities, they summarized that there are 3 (three) main reasons behind the cooperation of ports in different jurisdictions, as follows:

a. The Port Authority has strategic cooperation with other Port Authorities;
b. The Port Authority has some form of cooperation, but not strategic level;
c. The Port Authority is registered as the same member of participation in the form of Ports Associations that might have the same concern to build up cooperation among their members.

Furthermore, The European Commission Regional Policy (ECRP) (2014) has pointed out that the cross-border cooperation among their member States not only useful to share knowledge by each State but also it create eagerness to learn on how to

\textsuperscript{41} This paper focuses on cross-border cooperation in the port service business, although there are many forms of cross-border cooperation in practice
maintain the management of a port, and it also can facilitate every member States to share their experience in a port operations\textsuperscript{42}. Furthermore, this notion is a booster to enhance cooperation between the Port Authority. Despite this, cross-border cooperation in this context emphasizes cross-border cooperation between private companies in the different jurisdictions\textsuperscript{43}.

This dissertation then focusses on the cross-border cooperation that is conducted by the company which is registered in other States that have a cooperation to conduct port services business with other companies that are registered in the different jurisdiction of law. Moreover, based on de Langen & Ducruet & Nijdam (2009) in the world there also exists many kind of cooperations as referred to in the different locations as seen in table 9 below:

Table 9 Port Business Cooperation between one Port and another Port (de Langen & Ducruet & Nijdam, 2009)

<table>
<thead>
<tr>
<th>Cooperation</th>
<th>Port 1</th>
<th>Port 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cross-border cooperation</td>
<td>Port of Copenhagen</td>
<td>Port of Malmö</td>
</tr>
<tr>
<td>Multimodal link cooperation</td>
<td>Port of New York</td>
<td>Port of New Jersey</td>
</tr>
<tr>
<td>Port development</td>
<td>Port of Amsterdam, Port of Zaandam, Port of Beverwijk en Ijmuiden</td>
<td></td>
</tr>
<tr>
<td>Joint strategy cooperation</td>
<td>Port of Stockholm, Sodertalje, Malarhamnar</td>
<td></td>
</tr>
<tr>
<td>Cooperation in Yangtze Delta</td>
<td>Port of Shanghai with other ports in Yangtze Delta</td>
<td></td>
</tr>
<tr>
<td>Marketing cooperation</td>
<td>Port of New Orleans with the others Lower Mississippi Ports</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{42} ECRP deal with the investment policy which supports job creation, competitiveness, economic growth, improved quality of life and sustainable development as manifested in the Europe 2020 strategy

\textsuperscript{43} ECRP also promotes cross-border cooperation among their member States in order to achieve the organization goal as stated above
Besides a cross border operation between private companies and other private companies, actually there is also mentioned private company which has cooperation with the ship-owner or port operator as well as Port Authorities to create a cross-border cooperation. Moreover, this notion was already examined by Haever et all (2001) in Meersman & Voorde (2008) to describe the coordination and the cooperation in the maritime sector between all stakeholders as mentioned above. In addition, they found several mechanisms as gives in table 10:

Table 10 Cooperation among Port Authority, Terminal Operators and Ship-Owner based Haever et all (2001) in Meersman & Voorde (2008) as modified

<table>
<thead>
<tr>
<th>The actors</th>
<th>Port Authorities</th>
<th>Terminal Operators</th>
<th>Ship-owners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Port Authorities</td>
<td>Alliance</td>
<td>Concession</td>
<td>Concession</td>
</tr>
<tr>
<td>Terminal Operators</td>
<td>Alliance</td>
<td>- Joint venture</td>
<td>- Joint venture</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Alliances</td>
<td>- Consortia</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Merger/acquisition</td>
<td>- Capital</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>participation</td>
</tr>
<tr>
<td>Ship-owners</td>
<td>Concession</td>
<td>- Joint venture</td>
<td>- Ships sharing</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Consortia</td>
<td>arrangement</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Capital</td>
<td>- Joint venture</td>
</tr>
<tr>
<td></td>
<td></td>
<td>participation</td>
<td>- Alliances</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Merger/acquisition</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Conference</td>
</tr>
</tbody>
</table>

Moreover, the development of the Port of Kaliningrad probably is the one good example to overview the success of the cross-border cooperation. Port of Kaliningrad is a port that was formed from the integration between Russia with EU, which served a shipping gateway from Russia to the EU or otherwise. The development of this port was aimed to stimulate seaborne trade via transit in this region to Russia or EU.

[44] Haever et all (2001) in Meersman & Voorde (2008) have mentioned the cooperation as above, but this dissertation add some information that is not so different from the original table.
Furthermore, the development of Port of Kaliningrad cost approximately EUR 1 million from the parties funding further can be good for facilitating trade and goods movement through an infrastructure development. This will reflect a real synergy between Russian as a State and EU as a States Organization in the form of the maritime sector cooperation (Hayoz & Jeisen & Meurs, 2005).

In addition, actually the cross-border cooperation among port operators is a reliable port business opportunity to be executed, because of each port operator is tend to have own comparative advantage compared to the other port operator and the maritime sector business has a high dependency between one port service providers to the other port service providers⁴⁵. In the more detail, the comparative advantage as mentioned can be observe in their market share and number of traffic of the ships that they served in their terminal as calculated per period. In further analysis, if the comparative advantage from each terminal operator is being merge with the other comparative advantage from other terminal operator, it will create an excellent operational of the port services that deliver by the terminal operator, which identified has a global market range, strong financial capability and good operational capability to provide high quality service for the customers.

IV.1.b Legal Requirements

The state-owned company that want to arrange cross-border cooperation with other company shall follow all procedure that necessary required by the government as a *conditio precedent* to open cross-border cooperation at the State where the port services will be offered⁴⁶. The procedures itself can be consisting of legal requirements as well as technical and operational requirements. Subsequently, the

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⁴⁵ Comparative advantage is an economical term used to describe that each company enjoys their ability to support the business operation, for instance: advance in technology; have abundant natural resources; or it stand for the financial capability to conduct port services that may not being owned by other companies

⁴⁶ *Conditio precedent* means that the requirement as referred is a most important clause that absolutely shall be conduct by the state-owned company in correlation with their strategy to conduct cross-border cooperation
legal obligation is a significant factor in order to guarantee these cooperation was delivered is in line with the national law of the host State and guarantee that there is no legal issue that in the future can disturb the cooperation. Furthermore, the legal requirements as indicated above will be emphasized on the compliance of the state-owned company itself to the whole legal systems that apply in the operational area in the State where they operated and it will also the ability for the state-owned company itself to adopt the law of a foreign State when they deliver the port business overseas.

Apart from the national law as stated above, the legal requirement for realizing cross-border cooperation also related with the compliance of local law as stipulated in the regional or municipal law that must be obey by state-owned company and their strategic partner. In the other hand, beside national law and local law another aspect that shall be considered by the state-owned company is about “new company” registration if the cooperation conducted through merger scheme\textsuperscript{47}. The company registration will play crucial role to determine on which law the cooperation will comply and it also has several legal effects that are driven from this concern. The legal effect as referred are: the operational aspect that is conducted in the cross border area; any issue regarding tax payments and calculations; and the mechanism of dispute resolution that all are derived from the jurisdiction of the host State.

**IV.1.c Example of Cross-Border Cooperation: Copenhagen Malmö Port (CMP), Denmark-Sweden**

The cross-border cooperation of Copenhagen Malmö Port (CMP) is a suitable example how the mechanism of port services can be conducted in the different jurisdictions of law, which are: Denmark and Sweden. In addition, CMP is a merged company between the Port of Copenhagen and Port of Malmö that registered based on Swedish Law and they act as a port operator in both Port of Copenhagen and Port of

\textsuperscript{47} Pelindo I-IV has difficulties from the legal aspect to have a merger with other port services provider company and they tend to form a subsidiary company as a “special purpose vehicles” to conduct cross-border cooperation, if the merger scheme is chosen
Malmö. The core business of CMP is to provide port services such as: passenger services, handling cargo of liquid bulk, dry bulk, the other cargo in the Northern Europe especially in the Baltic Sea Region or Oresund Region. The more details of the salient features of CMP business are mentioned in Appendix D.

Furthermore, the CMP shareholders reflect cooperation between the commercial side that represented by the person who comes from a business oriented interest and the government side that is represented by the Councils of Copenhagen and Malmö. This synergy in the near future will contribute a vital role in achieving a synergy of the commercial interests to earn maximum profit with the policy to provide the public infrastructure that is being represented by the government as policy maker. Moreover, compositions of shareholders in CMP port are: 50% owned by City & Port Development I/S, 27% owned by the City of Malmö and 23% owned by various private owners. The Board of CMP consists of 12 members, of which 8 shareholders elected members composed according to the number of shares. 4 employees’ representatives are elected, 2 from the Danish employees and 2 from the Swedish organizations (CMP Website, 2015).

According to de Langen & Nijdam (2008) some advantages was identified when CMP serve the port services in the Oresund Region. Moreover those advantages are:
1. CMP will have better resources utilization, since their resources as labour, land and capital in the 2 different locations are being merged into one calculation;
2. CMP still can provide the port infrastructure on the other side when the capacity on the one side is full;
3. CMP will enjoy cost savings on operational as well as administrative area;
4. CMP has 2 facilities that came from Port of Copenhagen and Port of Malmö that can be specialized based on the commodities;
5. CMP enjoy the financial resources of the revenue from both Port of Copenhagen and Port of Malmö that recognized has a large market share and international customers.
Furthermore, the cargo handling performance of CMP in 2010-2014 can be seen in Appendix E.

IV.1.d Possibility of Port of Tenau Kupang (Indonesia) to arrange the Cross-border cooperation with Port of Darwin (Australia)

The cross-border cooperation of CMP has given a stimulation that cross-border cooperation also can be made by a state-owned company in Indonesia. The state-owned company in Indonesia that has excellent financial and operational capabilities has a chance which should be used optimally to gain more profit. Furthermore, remembering the logistic traffic numbers in order to supply the exploration of Ichthys Gas Project by INPEX Corporation in the Australian EEZ, there is exist the cooperation between the construction’s contractor of the Ichthys Gas Project which is Saipem Corporation and Port of Tenau Kupang that managed by Pelindo III to provide a shore base facilities to support the logistic delivery. This dissertation will try to discover the possibility to conducting cross-border cooperation by Port of Tenau Kupang with Port of Darwin that managed by the Darwin Port Corporation, in order to supply the logistic for those project especially for long-term period as mentioned in Appendix F.

IV.2 Acquisition

IV.2.a Definition and Companies Practices

Another way to deliver port business overseas apart from concession and cross border operation is through acquisition\(^48\). Acquisition can be interpreted as a legal act or corporate action to take over the ownership and operation of the other company with the mechanism of shares purchasing. Acquisition based on Coyle (2000) also defined as legal action that occurs when a company acquires from another company

\(^{48}\) There are many scenarios to deliver port business overseas, but this paper only focus on concession, cross border operation and acquisition
either to controlling interest or business operations and its assets. In correlation with port business, the acquirer will get the possession of both infrastructure and superstructure which is registered as assets of the company that acquired by the acquirer. Furthermore, Coyle (2000) stated that acquisition can be divided into full and partial acquisition. In full acquisition, the acquirer buys all shares of the purchase company, while in partial acquisition not all shares are bought by the acquirer\textsuperscript{49}. In the maritime sector, there are many of examples on how one company that delivers port services business undertakes other companies that maybe act as their competitor in the port service business to strengthen their position as port service providers. This example will discuss further in this dissertation.

In practice merger would be similar to acquisition, although in the legal context this terminology is totally different\textsuperscript{50}. Merger is a corporate legal act which 2 or more companies are merged into a new legal entity (all previous legal entities will disappear by law), whereas acquisitions means that 1 company acquires another company’s shares, operation, business license and assets, while keeping the legal entity of the company that conducts those legal acts (Whitaker, 2012). In order to gain a more detailed picture regarding the main differences between a merger and acquisition, we can see this figure below:

<table>
<thead>
<tr>
<th>Merger</th>
<th>Acquisition</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image1" alt="Diagram of Merger" /></td>
<td><img src="image2" alt="Diagram of Acquisition" /></td>
</tr>
</tbody>
</table>

Figure 7 Main Differences between Merger and Acquisition\textsuperscript{51}

\textsuperscript{49} The position of acquirer will be dominant against other shareholders

\textsuperscript{50} This paper is focuses on acquisition rather than merger since for keep the legal entity of acquirer. The merger process will be dilute the legal entity of all company and yield 1 new legal entity

\textsuperscript{51} In merger scheme will result C as a new legal entity, while in acquisition A will keep their legal entity after acquire B
The acquisition schemes are offering many advantages in relation to the acquirer plan to execute the other company business plan rather than merger scheme. These advantages are: the acquirer did not need to pursue a new business licence in the purchased company area because the business licence is included on acquisition object. In merger scheme, the new legal entity still must pursue a new business license because the legal act of government that grants a business license is categorized as administrative act that rely to subjectivity of the license holder. The consequence is the new legal entities shall pursue the new business licence.

According to The Wall Street Journal (2014), a state-owned firm in China has spent their corporate expenditure in amount USD 3 billion to get a 49% stake in port operator Terminal Link SAS from French container-shipping company CMA CGM and 23.5% stake in the Port of Djibouti. Another example was conducted by Global Ports that has already completed their acquisition of 100% of the share capital of the NCC Group Limited as the second largest container terminals operator in Russia. Compare with domestic acquisition, Saadi (2014) mentioned that DP World as one of the terminal operators in Dubai also completed their acquisition of Jebel Ali Port and free zone, whereas Port Finance International (2015) stated that the UK port firm PD Ports has announced the completion of a takeover of terminal operator Groveport Logistics in order to strengthen their position to deliver port services on the East Coast of the UK.

IV.2.b Legal Issues and Basic Requirements

In order to conduct acquisition, the government in each State where the company was registered has different mechanisms to govern the legal act of a company that wants to take over other company within their jurisdiction. Moreover, this mechanism was aimed to avoid the monopoly practice by a particular company and also it stands for preventing an unfair business competition in their domestic practice. Each State has different mechanisms based on their sovereignty to regulate their own interests and
to protect themselves from the threat of that caused by a foreign company or company that is not registered in those State.

The paramount issue of the above consideration is regarding of the restriction of monopoly practice in particular jurisdiction of law. In some countries, monopoly practice is an illegal act that shall be avoided by the company when they provide their services to customers. The monopoly practice based on Stigler (2008) is defined as:

“Monopoly is an enterprise that is the only seller of a good or service. In the absence of government intervention, a monopoly is free to set any price it chooses and will usually set the price that yields the largest possible profit”

The definition above can also be extended by additional information that a monopoly can also be created by the legal system that allows one company to be dominant over another company to provide the same service. In the port business that requires a large amount of investment, there are lacks of company that have capability and therefore the other company that has the capability in terms of finance as well as funding will dominate over the others.

The acquisition process that will resulting a market possession that excess certain of the market possession that was set up by the government, in some jurisdiction also can be categorized as a monopoly which is prohibited by national law. The phrase of “certain per cent” then indicates that in one State if compared with another State, there are various percentages that are calculated. In Indonesia for instance, if one company has possession of more than 50% of the market possession without any legal reason, it can be categorized as a monopoly practice and the government will impose a fine on that act\footnote{Based Law 5/1999 regarding Restriction of Monopoly Practice and Unfair Business Competition}.

The next issue regarding the acquisition method conducted by a particular company is the issue related to unfair business competition. The unfair business
competition is a terminology that is usually linked to competition law. The unfair business is defined by WebFinance (2015) as:

“Unjust and often illegal attempt to gain unfair competitive advantage through false, fraudulent, or unethical commercial conduct. Examples include below-cost selling, counterfeiting or imitation, dumping, misleading advertising, rumor mongering, trademark or trade secret infringement”

The definition as stated above gives clarity on what is meant by unfair business, which is emphasized on the illegal attempt by the company to get an unfair advantage. Moreover recalling that the government has set standards for the percentage of the market possession to be categorized as monopoly practice, this definition “illegal attempt” is then correlated as a complementary means with a monopoly practice as an illegal act that can be conducted by a company if they have a certain per-cent of market possession that exceeded with the standard that was set up by the government.

The acquisition process needs a precise method to be executed because basically it will face a complexity from bureaucracy and it must also fulfil all the requirements related to the legal procedures. In practice, there are many mechanisms to conduct acquisition, but in this paper we only examine the basic procedure that shall be followed by the company in order to realize the acquisition plan. The company that wants to acquire another company must take due diligence about all aspects and therefore gain all information regarding the nomination company that will be undertaken. Furthermore, in due diligence that is conducted by competent institution the information can be vary, from the information regarding the financial condition as well as operational condition of the nomination company, the debt, the current assets that are owned by the nomination company and other benefits that may be got by the acquirer pursuant to their plan to conduct acquisition.
According to Weber & Tarba & Öberg (2014), there are 3 (three) stages that must be made by the acquirer to do acquisition against other company. Moreover, those stages are described further in Appendix G\textsuperscript{53}.

**IV.2.c Example of Port Acquisition: Dubai Port World (DPW) – Maher Fairview Container Terminal, Canada**

Dubai Port World (DPW) has a very broad scope of port business portfolio. The company that was registered in Dubai, United Arab Emirates had diversification business in port services. Moreover, one of the prospective strategic plans that executed the company is the acquisition of Maher Fairview Container Terminal in Canada from Deutsche Bank with a total transaction C$580 million (Dh1.69 billion) (Saadi, 2015). According to DP World Website (2015), the company has more than 65 marine terminals, including new developments that are still being constructed in India, Africa, Europe and the Middle East. The company has a strong interest in container handling as the company core business and experience had shown that in 2014 they handled approximately 60 million TEU of containers in their terminal spread worldwide and further they still had a plan to develop and expand their carrying capacity to exceed 100 million TEU by 2020.

The development of Maher Fairview Container Terminal by DP World also integrates with the expansion plan that proposed by Prince Rupert Port Authority as a regulatory body in the Port where the Maher Fairview Container Terminal is situated. The expansion plan named “Phase II” will dramatically increase the carrying capacity of the terminal. Phase I is a name or the call for the “old” terminal before the expansion of Phase II. Moreover, Phase I terminal area consists of 59 acres of container terminal that was dedicated to be a container terminal with the intermodal facility from ship to rail. This terminal was completed in September 2007 as the

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\textsuperscript{53} Based on Weber & Tarba & Öberg (2014) that has been modified in order to fit the focus of this dissertation
world’s largest independent multi-user container terminal operator. Moreover, Figure 8 gives an illustration of the view of this terminal with their performance for handling containers over the last 6 years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Volume (TEU)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>181,000</td>
</tr>
<tr>
<td>2009</td>
<td>263,000</td>
</tr>
<tr>
<td>2010</td>
<td>343,000</td>
</tr>
<tr>
<td>2011</td>
<td>410,000</td>
</tr>
<tr>
<td>2012</td>
<td>564,000</td>
</tr>
<tr>
<td>2013</td>
<td>536,000</td>
</tr>
</tbody>
</table>

Figure 8 (left) View of Maher Fairview Container Terminal and (right) Performance of Container Handling at 2008-2013 (Prince Rupert Port Authority, n.d)

The acquisition of Maher Fairview Container Terminal is the real implementation of how a company executes their strategic plan to expand the container handling carrying capacity. In accordance with the information generated from the DPW Website (2015b), the Maher Fairview Container Terminal that exists can handle 850,000 TEU and will expand with Phase II to an increased carrying capacity of up to 1.35 million TEU in Quarter 4 of 2017. In this acquisition process, the previous operator of Maher Fairview Container Terminal was granted a concession by the government and therefore the company will continue the concession period until 2034 with an option to extend until 2056 after the completion of the development of Phase II. Moreover, Figure 9 give clarity on the acquisition area as well as the project of Phase II as mentioned above:
IV.2.d The Possibility for State-owned company to Acquire other Company that have Core Business in Port Service at Overseas

The possibility of a state-owned company in Indonesia to conduct acquisition depends on their financial capability as well as their ability to manage many ports with different circumstances. The urgent to getting more market possession on the regional or international scale is also one of the contributing factor that trigger about the reason for particular company to acquire other company that may provide similar commodity to the global customers. The capability that owned by the state-owned company will determine their willingness to conduct acquisition of other company that has the core business in port service at overseas that it will discuss further in Appendix H.
CHAPTER V
LEGAL REQUIREMENTS FOR CONDUCTING PORT BUSINESS OVERSEAS THROUGH THE BID/TENDER PROCESS

V.1 Preparation of Bid/Tender Document by the State-Owned Company

The mechanism to announce the bid process as the methods for granting a concession or any PPP cooperation in many States is recognized as a common method that is being used by the government to filter potential bidders or concessionaire nominees with strong financial capacity and reputable experience in managing public infrastructures and superstructures for the long term contract. According to Klein (1998) the government tends to perform a bid process to encourage efficiency of the selection process and minimize further negotiations with the concessionaire after the concession contract was signed. All the documents that shall be prepared are depending on how the stages of the bid were conducted by the government and this dissertation already mentioned in Appendix I.

All tender documents as mentioned in Appendix I must be well prepared by the company, because the winner of the bid process usually is only distinguished by the detailed aspect on their bid documents. The content of the bid documents also determine the result of their bid. The bid documents that inserted by the relevant and adequate supporting documents will get a better mark from the government. One consideration that cannot be avoided is the ability of the state-owned company to

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54 With the bid process that include pre-qualification, it will filter more qualified bidders rather than direct appointment in some cases
55 The aim is to strictly apply the contract with no need for renegotiation if the contract was started for PPP with a concession scheme
provide all documents with an English translation, since the official language for many States is usually different. In addition, these translated documents must be translated by an official sworn translator and also be endorsed by the public notary to justify the originality between the genuine content with the translation content\textsuperscript{56}. Therefore, this stage is an important stage to be considered apart from the bid process itself.

Furthermore, based on Yun & Jun & Han & Park (2015), in the PPP projects the initiation for cooperation can come from the government itself (solicited) or from the investor (unsolicited), despite there being no significant differences on the PPP contract implementation. The initiatives that come from the government seem to need more attention by the state-owned company because maybe there will be more than one company that is interested in the PPP offer and the government puts a standard on any company that wants to join as a PPP strategic partner. On the other side, with the initiative that came from the state-owned company, it will be stressed on the initiator performance and track record to convince the government to elect them as a strategic partner on a long term contract.

V.2 Bid/Tender Process

In general there are many stages of the bid/tender process that must be followed by the bidder in order to win the bid and get the contract, which in this dissertation has already been mentioned in a previous explanation. The bidder must demonstrate their competency at each stage, because the bid/tender process often uses the elimination system at each stage in order to get the best fit strategic partner, especially for a long term contract such as concession or any forms of PPP schemes\textsuperscript{57}. Once the state-owned company is eliminated, their wish to get concessions or any PPP cooperation with the government will be over. The stages of bid/tender process are various and it will be determined by the government to decide which method that they want to use.

\textsuperscript{56} The genuine documents must be submitted with the translated documents to guarantee the substantial meaning not having been changed

\textsuperscript{57} The elimination system means there is no chance to re-bid or re-submit the application once the state-owned company cannot pass each stage of PPP procurement
The mechanism of bid/tender process for the infrastructure and superstructure concession or PPP contract with a private company shall adopt the open bid process due to the transparency and disclosure principle in every detail a process that cannot be hindered by the government\textsuperscript{58}.

Moreover, to get a more detailed aspect of PPP this dissertation summarize the types of PPP which are proposed by Marques on Public-Private Infrastructure Advisory Facility (PPIAF) (2010) that divides public procurement on PPP into several types as below:

1. Open procedure available for all bidders or all legal entities;
2. Selective or restrictive procedures which need a pre-qualification step, with the bids submitted afterwards;
3. Limited procedure where the government decides to invite particular bidders that are suitable with their requirements;
4. Negotiated procedure which allows the bidders to propose a different scheme which differs from the template from the government. This negotiation then happens among the bidders to seek the best and final offer proposal. The winner is selected from this result to step up to a further stage;
5. Competitive dialogue which give pre-qualified bidders to have a discussion with the government regarding the technical specifications issue and the operational.

The time for processing a bid/tender depends on how many stages the government will decide to apply. With more stages it means the timeline for bid/tender itself will be longer than the usual. Furthermore, the winner of the bid/tender process is often selected by the evaluation of technical bids as well as financial bids. The evaluations will be dictated based on the best offer and suitable technical and financial proposals and other considerations that might have a significant impact on the decision\textsuperscript{59}. This argument is also supported by the statement of Idornigie (2008) that states the

\textsuperscript{58} This also for applying the disclosure principle in the PPP procurement and to avoid misconduct for the personal interest of any members of the government’s committee during the bid/tender process

\textsuperscript{59} The most influence factors are technical and financial documents, but on the other hand the legal document is also important to be provide by the state-owned company
selection during bid/tender process will be choose a legal entity that that proposes a technical bid as stipulated in the Request for Proposals (RFPs) initiated by the government. Following this process, the legal entity will have the opportunity to be invited to submit a financial bid of the project at the next stage.

In order to review the assessment criteria for the bid process, this dissertation also give an example of how the bid/tender process assessment will be marked by the government based on the criteria as mentioned in Appendix J.

V.3 Negotiation and Legal Drafting between the Host Government and the State-Owned Company

This negotiation stage is not like the common negotiation of contract in the commercial area, but seems to be a one directed negotiation that is lead by the host government. The government tends to adjust its template of the contract to be discussed with the concessionaire or strategic partner nominee. This reason is deemed on the remark that government has its own jurisdiction that must be appreciated by the concessionaire nominee and the concessionaire nominee shall obey all the regulations that are involved in that concession provision.

Negotiation will focus on the negotiable aspect that may have a different interpretations between the government and the nominee. In addition, the detail aspects that may be negotiated during the negotiation for port concession purposes are mentioned in Appendix K.

Since the government has the privilege over the concessionaire to construct all provisions in the concession contract, the legal drafting of the concession contract be dominated by the government. Furthermore, the negotiation between the government and the concessionaire/partner nominee during the legal drafting process of the concession contract only limited to the aspect that labelled as negotiable clauses. Moreover, Trujillo and Nombela (n.d) suggest that the drafting of the contract as
referred should also cover all probabilities during the life of the contract, when some unpredicted circumstances may be affect the performance of both parties.

The application of the legal drafting technique in concession/PPP contracts cannot separated with the fulfillment of the rights of the other party and the compliance for conducting obligations from the other party. The balance for this implementation will create a non-dispute interpretation of the contract and therefore, it will enhance the sustainability of the contract.
CHAPTER VI

CONCLUSION

The state-owned company as mentioned in this dissertation can open a port business in the outside territory Indonesia by considering the legal aspects related to the strategic plan. Furthermore, the important legal aspect is the written approval from the Shareholder, which shall pursue through prior notification from the Board of Commissioners. Subsequently, another legal aspect that must be fulfilled is the compliance with the host State’s national law and the municipal law, where the state-owned company will deliver the port business. The compliance of both the national law and municipal law is cannot be hindered by the state-owned company, since in the concession agreement is usually cited, the national law of the host State and the municipal law as the jurisdictions of law that being apply in the contract.

Moreover, another legal aspect is related to the privatization of public infrastructure and superstructure in the form of Public Private Partnership (PPP) as port governance tools for the government to offer participation with the private company for managing and operating port as the public infrastructure and superstructure, especially for the long term. In addition, the legal aspect in PPP will cover all provisions regarding concession agreement, and this including concession period, concession fee, and the financial obligations of concessionaire, detail of asset that been build, right and obligations of both the government and concessionaire. The other provisions will govern about the mechanism of the asset financing scheme; the mechanism of the assets utilization; the legal status of the asset that has been build
after the cooperation is over; the liability aspect for insurance; management of risk during the cooperation period; the applicable law and dispute resolution matters; and the compliance with the host State domestic system in forms of Corporate Social Responsibility (CSR) and anti-corruption law as well.

In the practical field, there are many methods to conduct port business overseas. In the inside PPP method as proposed, there many schemes for executing port business overseas. However, each scheme having different arrangements and different legal consequences when it comes to being applied for the state-owned company. One of the common schemes in PPP is through concession agreement that signed between the government that represent by a conceding authority with the concessionaire. This dissertation selected concession as the scheme in that the state-owned company will be suited to if the state-owned companies were going to participate in the PPP cooperation with the government. Equally important, the PPP arrangements also conduct by the government by the mechanism of the bid/tender that shall be following by state-owned company to get the cooperation of the government. This process will need more attention from the state-owned company, due to government will decide it is strategic partner based on the capabilities of the financial and technical aspect of the state-owned company to be fit with the requirements that are already set by the government.

In further, according to the practical experience learned from the concession of Piraeus Container Terminal to COSCO Pacific; the cross-border cooperation of Copenhagen Malmö Port (CMP); and the acquisition of Maher Fairview Container Terminal Canada by Dubai Port World (DPW) from Deutsche Bank, had given the strong indications that those cooperation schemes as referred can expand the port business by the company, and thus it enhanced performance of the company in certain period operations. The company as indicated above also earn a significant profit when they are delivered port business overseas, beyond the jurisdiction where their company
was registered. The concession of Piraeus Container Terminal is granted by the Greek Government with the mechanism of tender, in the other hand the cross-border cooperation of CMP was formed from the merger process between Port of Copenhagen and Port of Malmo. Additionally, the acquisition of Maher Fairview Container Terminal is conduct by the mechanism of shares purchase to undertakes the port business from the former holder.

Furthermore, the suitable schemes for the state-owned company in Indonesia to conduct port business overseas are through either mechanism of concession, cross-border cooperation, and acquisition. The schemes as mentioned will not alter the legal entity of the state-owned company and through this schemes, the state-owned company has the legitimate legal basis to conduct its port business within the foreign jurisdiction. The mechanism of concession is offer a long period of utilization of the terminal or port that being granted by the government to the state-owned company for generate revenue, in the other hand the mechanism of cross-border cooperation will lead state-owned company to have cooperation with the other companies in the different jurisdiction of law and thus it can expand the market possession of their port business in international scale. Apart from concession and cross-border cooperation, the acquisition scheme will create a lawful and powerful of the domination of state-owned company to strengthen their position in the global port services provider by acquire the company that has a core business as port services provider.

The mechanisms as stated above are reliable to adopted by the state-owned company, due to the state-owned company has all attributes from the legal as well technical and financial capabilities that required to executing this strategic plan. By this concern, the possibility to have a concession in the Port of Antwerp-Belgium that have been announced by Antwerp Port Authority is a good example on the opportunity for state-owned companies or any legal entities to be deliver port services in overseas. In the other schemes, probably Port of Tenau Kupang (Indonesia) that being managed by Pelindo III to arrange the cross-border cooperation with Port of Darwin (Australia)
that managed by The Darwin Port Corporation can adopt the same scheme as the CMP’s cross-border cooperation. Subsequently, the acquisition that can conduct by the state-owned company will determine on the financial funds to take over the purchasing company and, therefore, to undertake all attributes that link with those purchase company.
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Maritime Transport Sector. (n.d.). Concession period for 30 years raised 20% every 5 years AICT contract approved to maintain 4 berths at Alexandria port. Retrieved August 6, 2015, from http://www.mts.gov.eg/content/6039-Concession-period-for-30years-raised-20%2525-every-5-years.


APPENDICES

Appendix A

The Project Procurements Options (Directorate General Regional Policy of European Commission, 2003):

Remark:

- The arrow indicates the degree of responsibility of public or private sector during the cooperation period;
- This figure represents the PPP scheme that was adopted in the EU.
Appendix B

The Rights and Obligations of the Parties under Concession Contract:

A. Rights of the Government:
1) Have jurisdiction to grant concession to concessionaire;
2) Receive the concession fee from the concessionaire;
3) Receive the handover of the ownership of the assets in the concession area based on the provisions in the concession contract;
4) Rights to monitor the productivity of the port and play their role as a supervisory body to ensure that the port management is well established and properly conducted by the concessionaire;
5) Rights to give an extension or not grant the extension of a concession at the end of the concession period based on the evaluation of the performance of the concessionaire.

B. Obligations of the Government:
1) Grant the concession after all requirements are fulfilled by the concessionaire;
2) Play their role as a regulatory body in the port operations;
3) The government shall set up their policy regarding port utilization without interrupting the right of the concessionaire;
4) The government will not terminate the concession contract unless there was negligence by the concessionaire that categorized can activate default clause in the concession contract;
5) Giving any of rewards for the performance of the concessionaire as stated in the concession contract.

C. Rights of the Concessionaire:
1) The concessionaire has the exclusive right to finance, manage operate and develop the assets and has the right to carry out any development work until the end of concession period;
2) The concessionaire has the right to generate income from the operation of the port and generate other commercial arrangements with the approval of the government;

3) Right to conduct cooperation with third parties in accordance to provide port services;

4) Freedom to choose their strategic partner to execute the plan based concession contract;

5) Right to get an explanation regarding the port policy issued by the government.

D. Obligations of the Concessionaire:

1) Pay concession fee to the government;

2) Negotiate with the government through the conceding authority, with regard to building and developing the infrastructure and superstructure in the area concession;

3) The concessionaire shall not subcontract their rights and obligations without written approval from the government;

4) The concessionaire has also the obligation to finance, manage, operate and develop the assets until the end of concession period;

5) Provide the port services under the concession contract;

6) Comply with all regulations including national regulations as well as international standards in port services;

7) Publish a reasonable port tariff or rates based on the calculation that is approved by the government;

8) Provide an insurance of the port infrastructure and superstructure during the concession period;

9) Undertake all works related with the building, development and rehabilitation work of the port infrastructure and superstructure;

10) Transfer the ownership of the assets that have been built to the government as stated on the concession contract.
Appendix C

Field Study: The Opportunity to Conducting Port Business by Virtue of Concession in Port of Antwerp (The Informations below taken from Port of Antwerp Website)

The Antwerp Port of Authority has announced the opportunity to conduct port business in their area through a concession scheme. The Port Authority wants to attract more investor to utilize the land and infrastructure to support the maritime activities in the Port of Antwerp and surrounding region such as: Port of Hamburg-Germany, Port of Rotterdam-Netherlands and Port of Le Havre-France. In addition, the Port Authority also set a several criteria for the port business that want to deliver at their area shall be matched with the strategic plan, that are it would give added value to the port and it is a environmental friendly with lowest emission.

There are many business opportunities that can gained from the cooperation with Antwerp Port Authority. The Port Authority then will be decided to grant the concession or not based on several factors as follow:

1. The financial situation of the company, which reflect on the capability of concessionaire to finance their project in the land of Port of Antwerp;
2. The amount that will invested, which also cover the financial implication of the investment;
3. The overall quality of the project;
4. The aim or the nature of the activities, that supposed to generate more traffic for the port as stipulated in the concession agreement;
5. Direct or indirect employment perspectives;
6. Optimum and efficient use of the available space;
7. Compliance with the strategy and vision of the concession policy, that means the utility of the business of the concession holder shall be fit the development plan of the Port of Antwerp that made by Port Authority.
Moreover, to facilitate this strategy, the Port Authority was proposed a standard of concession agreement that formed as a general terms and conditions for concessions in the Antwerp Port Area. This standard of concession agreement then will be precedent to be a legal basis to govern the rights and obligations of the parties apart from the rights and obligations as stipulated in the concession agreement that was determined by the special circumstances. This standard of concession agreement has been summarized to highlight the standard clause per standard clause as follow:

<table>
<thead>
<tr>
<th>No</th>
<th>Clause</th>
<th>Remark</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The compliance with the local law, including the law that established by the Port Authority</td>
<td>The Concessionaire shall comply with current and future legislation, decisions, decrees, rules and regulations, among other things, relating to the construction, erection, use and exploitation of grounds and structures, facilities and their appurtenances and equipment</td>
</tr>
<tr>
<td>2</td>
<td>Provisions regarding asset financing, utilization</td>
<td>The port appurtenance provided by the Port Authority that will be utilized by the concessionaire</td>
</tr>
<tr>
<td>3</td>
<td>Insurance</td>
<td>Concessionaire providing insurance for all facilities for the total value of risks caused by fire, lightning explosion, aircraft crashes and storm with the insurance company that was registered or represented in EU. Furthermore, the insurance must also contain a clause to waiving the rights of recourse of all lessees, sublessees or others users from the Port Authority</td>
</tr>
<tr>
<td>4</td>
<td>Fee</td>
<td>Basic fee determine on condition of the soil, location, and activities that performed on the site. The fee pays in advance for every quarter</td>
</tr>
<tr>
<td>5</td>
<td>Liability</td>
<td>The concessionaire liable for any damage as well as incident directly or indirectly in the concession area</td>
</tr>
<tr>
<td>6</td>
<td>Concession Period</td>
<td>Maximum 40 years for port activities and 30 years for service-providing activities. The concession period is given by the calculation of investment per m²</td>
</tr>
<tr>
<td>7</td>
<td>Additional terms and conditions</td>
<td></td>
</tr>
<tr>
<td></td>
<td>a. Change ownership</td>
<td>Shall be informed to Port Authority, the change of concessionaire’s shareholders that affect the business plan of the concessionaire</td>
</tr>
<tr>
<td></td>
<td>b. Environmental issue</td>
<td>The Port Authority has standard to give soil certificate that describe the “zero condition” of the environment in concession area that it will compare with the condition after concession period to determine the level of pollutants that produce by the concessionaire’s activity during concession period. Moreover, the concession agreement also gives an “exit clause” that depend on the circumstances that face by the parties to terminate the contract due to “high-risk land problem”</td>
</tr>
<tr>
<td></td>
<td>c. Safeguard for financial performance</td>
<td>Concessionaire must be providing a direct debit or bank guarantee that cover the concession fee for 2 quarters</td>
</tr>
<tr>
<td></td>
<td>d. Dispute</td>
<td>Using Belgian Law in Antwerp Courts</td>
</tr>
<tr>
<td></td>
<td>e. Third-party relations</td>
<td>The concessionaire only can transfer the concession and mortgages the concession object with the prior written permission</td>
</tr>
</tbody>
</table>
Appendix D

The Salient Features of CMP Business (Copenhagen Malmö Port, 2012):

1. Car

CMP provides a car handling service that is classified as the biggest car terminal in the Nordic Region. This advantage occur when there were car distributors or producers such as: Honda; Suzuki; Alfa Romeo; Peugeot; Citroen and many more that unload their cargo either at the Port of Copenhagen or Port of Malmö, in order to reach the Scandinavian Region without any transhipment;

2. Container

CMP operates the container terminal both in the Port of Copenhagen and Port of Malmö. The container traffic was derived from the intercontinental routes from the Ports of Hamburg, Rotterdam and Bremerhaven to the smaller feeder ships before sailing to CMP. Furthermore, both Copenhagen Container Terminal and Malmö Container Terminal have sufficient infrastructure and superstructure to serve the container handling demands in their market areas;

3. Cruise Ships

The City of Copenhagen is a famous destination and it acts as a hub for the cruise industry in the Scandinavian Region with approximately 45% of turnaround calls. CMP receives cruise ships in Copenhagen and Malmö and has a market position based on: the short distance to Copenhagen Airport; interesting sights and attractions; and Copenhagen and Malmö are well organized and safe cities;

4. Dry bulk

CMP has the largest dry bulk terminals in Western Sweden and Eastern Denmark, which serve both the import and export of dry bulk products as well as dry bulk for transhipment;

5. Liquid bulk

The CMP enjoys advantages since they have a high annual turnover of oil at CMP’s terminals in Copenhagen and Malmö, which is measured at 7,000,000
tons. Moreover, CMP also has excellent facilities for handling the large volumes of transit oil used tank capacity with 2 million m3 connected with the pipeline and the most modern and effective equipment;

6. Logistics

In the logistics segmentation, CMP operates different market segments. The logistics marked include Project Cargo, High and Heavy, RoRo, as well as lease of terminal area and lashing;

7. Passenger ships

CMP has stationed a passenger traffic provider terminal to Norway and Germany. The DFDS Company (one of the biggest Passenger ship companies) operates the route Copenhagen–Oslo as CMP’s largest passenger-shipping customer. In the other hand, a route Malmö-Travemünde also served by Nordö-Link as a carrier with “Finn Partner”, “Fintrader” and “Finneagle” for combined Ro-Ro and passenger ships;

8. Property

CMP rents out buildings and land adjacent to the ports and terminal buildings in both Copenhagen and Malmö. In Malmö CMP owns a commercial premise with a total floor area of 50,000 m² and 140,000 m² of land available to let. On the other side, at Prøvestenen in Copenhagen CMP has 30,000 m² that available for liquid bulk operations;

9. RoRo

CMP is a terminal for importing and exporting goods going from Denmark or Sweden to the other Continents, Russia and the Baltic States. Moreover the services for RoRo and RoPax are available for the routes: Malmö–Travemünde (Finnlines), Copenhagen–Oslo (DFDS), Copenhagen–Klaipeda (DFDS) and Malmö-Helsinki/St. Petersburg (Finnlines), which have a big percentage of the market share in Northern Europe.
Appendix E

Cargo Handling Performance of CMP in 2010-2014 (CMP Annual Report, 2014)
Appendix F

The Possibility of Port of Tenau Kupang (Indonesia) to Arrange Cross-Border Cooperation with Port of Darwin (Australia)

Port of Tenau Kupang is a Port that located in the province of East Nusa Tenggara, Indonesia. This port was managed and operated by the Pelindo III that provides cargo handling in various commodities from liquid bulk, dry bulk, container and general cargo. In end of 2013, Port of Tenau Kupang was signed an agreement with the SAIPEM Portugal Commercio Maritimo (hereinafter called by “Saipem”) to provide the logistic shore base to support the mobilization of equipment for Saipem’s project to build the offshore gas installation at Ichthys Project that owned by INPEX Corporation (this contract was finished in the mid of 2014). The project was recognized as a massive scale of gas exploration project that being analyzed has rich content of natural gas. The detail map of Ichthys Project that located within Australia’s Exclusive Economic Zone (EEZ) can be seen in below figure:

Map of Ichthys Gas Project that situated between Indonesia and Australia (Purtill, 2015)

Nowadays the project were in the development phase that conduct by the operator that hired by the owner. Further, the project will conduct exploration phase as stated in the concession contract that normally is last for the long period. Recalling this fact,
Port of Tenau Kupang and Port of Darwin as the closest ports to this project has an opportunity to conduct cross-border cooperation for providing shore base/port service or any logistic service related with this project. The location of Port of Tenau Kupang and Port of Darwin was separated about 521 nm based on the Ports.com (2015) calculation is a handicap for the realization, but the implementation in the future is still reliable to be realized based on the willingness of each the management of the port and considering also the economic benefit that may gather from this cross-border cooperation.

Location between Port of Tenau Kupang (B) and Port of Darwin (A) (Ports.com, 2015)

The possibility for Pelindo III and Darwin Port Corporation for conducting B2B cross-border cooperation to provide shore base service to Ichthys Project has a several advantages, which are:

1. Indonesia and Australia have bilateral cooperation between at the government level, which can influence the possibility to conduct this scenario

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60 Indonesia and Australia has signed a Bilateral Agreement No.19/1993 in Jakarta on 17th November 1992, which entry into force 29 July 1993 concerning the Promotion and Protection of Investments to govern the possibility of investment in either Indonesia or Australia that shall be facilitated by the host State. Indonesia-Australia also signed Comprehensive Economic Partnership Agreement (IA-CEPA) negotiations commenced in September 2012 that aimed to strengthen and expand the investment and economic cooperation relationship between Australia and Indonesia.
2. Both Port of Tenau Kupang and Port of Darwin has excellent service of cargo unloading and loading and adequate facilities to serve the logistic supply to the site for long-term contract;

3. The seaborne traffic volume of Indonesia and Australia was stable for recent years.

The possibility for realize this cross-border cooperation as mentioned above also will be face with the complex legal provisions that must be comply at each port, in order to provide the port service as well as for the establishment of the cross-border cooperation. Moreover, this dissertation also noticed that several provisions may influence the possibility of this scenario and those provisions is limited but not restricted to:

<table>
<thead>
<tr>
<th>Indonesian Law</th>
<th>Australian Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shipping Law</td>
<td>Northern Territory of Australia, as in force 9 June 2015 regarding Darwin Port Corporation Act</td>
</tr>
<tr>
<td>Law 19/2003 regarding State-owned company</td>
<td>Northern Territory of Australia, as in force 1 July 203 regarding Ports by Laws</td>
</tr>
<tr>
<td>Law 40/2007 regarding Limited Company</td>
<td>Darwin Port Corporation, as in force 4 July 2012 regarding Handling and Transport of Dangerous Cargoes by Laws</td>
</tr>
<tr>
<td>Government Decree 61/2009 regarding Port System</td>
<td>Anti-Discrimination Act</td>
</tr>
<tr>
<td>Ministry of Transportation Decree 53/2011 regarding Pilotage</td>
<td>Financial Management Act</td>
</tr>
<tr>
<td>Ministry of Transportation Decree 52/2011 regarding Dredging and Reclamation</td>
<td>Procurement Act</td>
</tr>
<tr>
<td></td>
<td>Marine Act</td>
</tr>
</tbody>
</table>

61 The regulations that may influence as a legal basis for the establishment or operational aspect for cross-border cooperation between Port of Tenau Kupang and Port of Darwin
Appendix G

The Stage to Conduct Acquisition based on Weber & Tarba & Öberg (2014):

A. **Stage I : Planning and Strategic Management**
   1. Strategic management goals that decide acquisition strategy;
   2. The searching, screening and selection process;
   3. Financial and strategic estimate, including synergy analysis and corporate culture differences;
   4. Integration planning.

At this stage, the state-owned company that wants to deliver port business should have a portfolio on what kind of business that they want to conduct. The possibility to have a port business overseas from the state-owned company side must also be contained in the strategic plan of a state-owned company. Written approval from the shareholder with prior notification from the Boards of Commissioners also must be fulfilled by the Board of Directors of the state-owned company. The acquisition strategy shall be backed up with the legal due diligence as well as technical and operational aspects to secure the acquisition process that wants to be taken. Following this step, the state-owned company should accomplish a searching, screening and selection process for any company that suits the criteria to acquire. Moreover, in order to screen many of the qualifying companies state-owned company can hire a consultant to conduct this work. Further, the financial and strategic estimate is the mechanism that the state-owned company must prepare a financing scheme and provide timeline on what period this process will be actualized. The last step in this stage will be the planning integration, which summarizes all the possibilities of planning that are proposed by the state-owned company.
B. Stage II: Negotiation, Due Diligence and Agreement

1. The negotiation process;
2. Assessment of due diligence.

This stage is important stage in the acquisition process. In this stage, the state-owned company will conduct negotiations with nominations of the purchase company. Each clause in the acquisition contract should be discussed to gain a clear understanding and same perspective of both parties. The later step in this stage is an assessment of due diligence that will determine the acquisition process will be done or it will not be based on due diligence already examined in the previous stage.

C. Stage III: Integrating the Organizations

1. Approach to integration, cultural differences and human capital integration;
2. Leadership and integration infrastructure;
3. Stress and tension;
4. Communication strategy;
5. Cultural assessment and cultural integration;
6. Integration approach;
7. Evaluation, control and feedback.

The last stage aim is to integrate the organization that focusses on the “new form” of the company after the acquisition was done. There is no new legal entity on this acquisition, but the operational, finance, human resources aspect from the purchased company must be integrated into the new system. In this dissertation, the aspect must be following up by the acquisition side and the purchase company side can more or less can also be summarized as follows as:

1. Any information that mentions the name of the company that will take over and the name of the company that will be taking over;
2. The specific purpose that explains the strategic plan reason to take over the other company;
3. The financial report that has already been audited by a competent public accountant from each company;
4. The legal requirements pursuant with the compliance of the law from each company if the acquisition process will be followed up;
5. The exact amount of shares that will be taken by the acquirer; it can be partial or it can be a total acquisition;
6. The financial arrangements that fund the acquisition process from the perspective of the acquirer;
7. The financial performance of both parties that have been merged after the acquisition process;
8. The way to resolve of any dispute arising from the acquisition that may come from the shareholders not agreeing with the acquisition (if the purchase company is an open listed public company);
9. The mechanism to undertake all obligations and rights of the purchase company in the acquisition that covers issues related to the financial covenant, debt, the assets, the obligation in wage and salary for the employees;
10. Consideration of the risk associated with this acquisition transaction.
Appendix H

The Possibility for State-owned Company to acquire other Company that have Core Business in Port Service

The mechanism to conduct acquisition in term of cross-border acquisition not different with the company domestic acquisition. The section of this dissertation will mention the highlight of the legal considerations that the state-owned company shall be aware regarding the applicability for conducting acquisition at overseas. The principles that may apply to this possibility are:

1. The state-owned company shall mention the strategic plan to acquisition of the company in their master plan of the state-owned company that made by the Ministry of State Owned Company to have legitimate basis;
2. The state-owned company must have a financial capability to buy the shares and ability to undertake all risks associated with the acquisition process;
3. There are 3 different jurisdictions of law that may involve during the acquisition process. The first law would be the law that govern the acquirer; the second is law that govern the purchased company and third is law apply at the location of port services being undertaken;
4. The state-owned company sometimes have a financial covenant with their creditors that they cannot conduct acquisition before getting written approval from the creditors. Failure to deal with this concern will lead a fine from the creditors to the state-owned company;
5. The purchased company has the owned employee that should be consider transferring the employment status from purchased company to the new legal entity. This process would be difficult since the regulations that deal with the labour and employment in some countries are different and complicated.
Appendix I

The typical forms of the bid process for concession based on Queiroz & Martinez (2013):

1. Advertising
At this stage, the state-owned company did not prepare any documents except they take a review of the advertisement that was published by the government in the international media or other recognized media for the PPP’s bid/tender process itself.

2. Investor feedback
The state-owned company gives feedback on their interest after conducting self-examination regarding their corporate approvals from shareholders and their capacity to follow the bid/tender. The documents that shall be prepared are the documents related to the feasibility study of the bid and the document that shows their previous performance in managing any of the PPP scheme.

3. Public information
Similarly with the advertising stage, the state-owned company does not prepare any documents at this stage. The government will get disclosure relevant information to the public in accordance with the PPP project that will be delivered by the winner of the bid process.

4. Pre-qualification of the concessionaire
The state-owned company must prove to the host State that they have the capability and resources to manage PPP in infrastructure and superstructure. Furthermore, the documents that shall be inserted to the government are all documents relating to the history tracking of the competency of the state-owned company, including: the latest article of association, the approval from the shareholders, the statement of the interest or proposal document, the guarantee bank for follow the qualification stage if the state-owned company qualifies for
the pre-qualification stage, the audited version of the financial report of the state-owned company, the performance of the company in the last 5-10 years.

5. Invited pre-qualified firm to submit a bid
The state-owned company that qualified for further process will get an invitation notifying to submit their bid. This process will be a step up for the state-owned company to further prepare their bid document that includes any relevant documents regarding their initiatives or their strategic plan for the PPP project that have been offered by the government.

6. Bidders review and comment
The concession or other PPP scheme standard agreement that is made by the government will be circulated for the bidders to get their review or comment. This stage was aimed to prevent any misinterpretation or miscommunication regarding the clauses in the contract. Furthermore, the state-owned company must be ready with their review on the substantial interpretation of the contract.

7. Competitive bidding process
The further process is the competitive bidding process that has the objective to organize the competitive bidding process. The state-owned company has to prepare the detailed documents in line with the government’s given standard clause. Moreover, these documents are all documents of their bid including the detailed technical aspect, financing scheme of the assets, the constructions of the project as well as the operational aspects of the object that covers the mechanism of assets management during the concession or cooperation period.

8. Bid evaluation
The bid evaluation will be conducted by the government in order to analyse all documents that have been submitted by the bidders in the previous stage. The evaluation will focus on the technical and capability aspect of the bidders.

9. Transaction closure
This stage will be a signature of the contract between the government and the winner of the bid process.
10. Public disclosure for concession agreement

The government will announce their cooperation with the strategic partner in front of the public to declare the bid process. This process is also useful for the state-owned company for providing an official press release to the society and their business stakeholders regarding the strategic plan that was executed.
Appendix J

The Examples of Bid/Tender Criteria from various States (Nigeria Infrastructure Concession Regulatory Commission, 2012)

<table>
<thead>
<tr>
<th>State</th>
<th>Provisions</th>
<th>Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>- Directive 2004/17/EC of The European Parliament;</td>
<td>Choice between:</td>
</tr>
<tr>
<td></td>
<td>- The Public Contracts Regulations 2006.</td>
<td>- Price only (lowest price to the public procurer);</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Price and economic benefits (value of features of the tender linked to</td>
</tr>
<tr>
<td></td>
<td></td>
<td>subject matter of the contract).</td>
</tr>
<tr>
<td>South Africa</td>
<td>- PPP Manual (published by PPP Unit of South Africa);</td>
<td>Weighted average of the following factors:</td>
</tr>
<tr>
<td></td>
<td>- Preferential Procurement Policy Framework Act 2000.</td>
<td>- Price (weight between 20% and 40%);</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Technical Evaluation Score (weight between 50% and 70%);</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Black Economic Empowerment Score (weight between 10% and 20%).</td>
</tr>
<tr>
<td>South Korea</td>
<td>Basic Plan for Private Participation in Infrastructure 2007</td>
<td>Weighted average of the following factors:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Engineering Factor-focusing on the content, plans and drawings (weight of 50%);</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Price Factor-Net Present Value of all payments to be made by the public entity (weight of 50%).</td>
</tr>
</tbody>
</table>
| Australia | Practitioners’ Guide- National PPP Guidelines | Combination of the following:  
| - Highest savings as compared to Public Sector Comparator (Bidder ranked accordingly);  
| - Qualitative assessment of individual bids. |
## Appendix K

**The Examples of Negotiable and Non Negotiable Aspects during Port Concession Negotiations**

<table>
<thead>
<tr>
<th>Aspect</th>
<th>Status</th>
<th>Remark</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial aspect, such as:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Concession fee</td>
<td>V</td>
<td>Government has right to grant concession based on their own calculation</td>
</tr>
<tr>
<td>2. Port’s Tariff calculation</td>
<td>V</td>
<td>This aspect can be negotiable, since concession gives privilege to private sector to generate profit from their investment made</td>
</tr>
<tr>
<td>3. Productivity standards</td>
<td>V</td>
<td>Recall the port as a public facility, the government will act as regulatory body for port operator to guarantee the logistic supply derived from port</td>
</tr>
<tr>
<td>4. Concession period</td>
<td>V</td>
<td>Same reason as concession fee</td>
</tr>
<tr>
<td>5. Cooperation with third parties</td>
<td>V</td>
<td>This is the concessionaire’s right to select their partner</td>
</tr>
<tr>
<td>Safety and navigation aspect, such as:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial and security aspect</td>
<td>V</td>
<td>The obligations of the concessionaire</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>---</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>1. Obligation to provide performance bonds</td>
<td>V</td>
<td>The obligations of the concessionaire</td>
</tr>
<tr>
<td>2. The insurance for port’s facilities</td>
<td>V</td>
<td>The obligations of the concessionaire</td>
</tr>
<tr>
<td>3. The risk allocation between the parties</td>
<td>V</td>
<td>Negotiable based on the assets ownership during the concession period</td>
</tr>
<tr>
<td>Asset’s utilization aspect</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Asset financing</td>
<td>V</td>
<td>This is the negotiable aspect which depends on the financing strategy of the concessionaire</td>
</tr>
<tr>
<td>2. Asset utilization-rehabilitation</td>
<td>V</td>
<td>This aspect is negotiable, since the government acts as a regulator in port operations</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>3. Asset status in the end of concession</td>
<td>V</td>
<td>The government can decide in the contract draft, which scheme that they will adopt</td>
</tr>
<tr>
<td>The applicable law</td>
<td>V</td>
<td>The jurisdiction of the government</td>
</tr>
<tr>
<td>The dispute settlement</td>
<td>V</td>
<td>The jurisdiction of the government</td>
</tr>
<tr>
<td>CSR clause</td>
<td>V</td>
<td>The government can set out a standard of CSR implementation by the company</td>
</tr>
<tr>
<td>Concession period extension</td>
<td>V</td>
<td>The sole right of the government</td>
</tr>
</tbody>
</table>