



LEGISLATIONS ON PORT CONCESSIONS

Presentation to the

IV Hemispheric Seminar

on

Public Policies,
Legislation and
Regulation:

Integrated Legislation
for Port Modernization

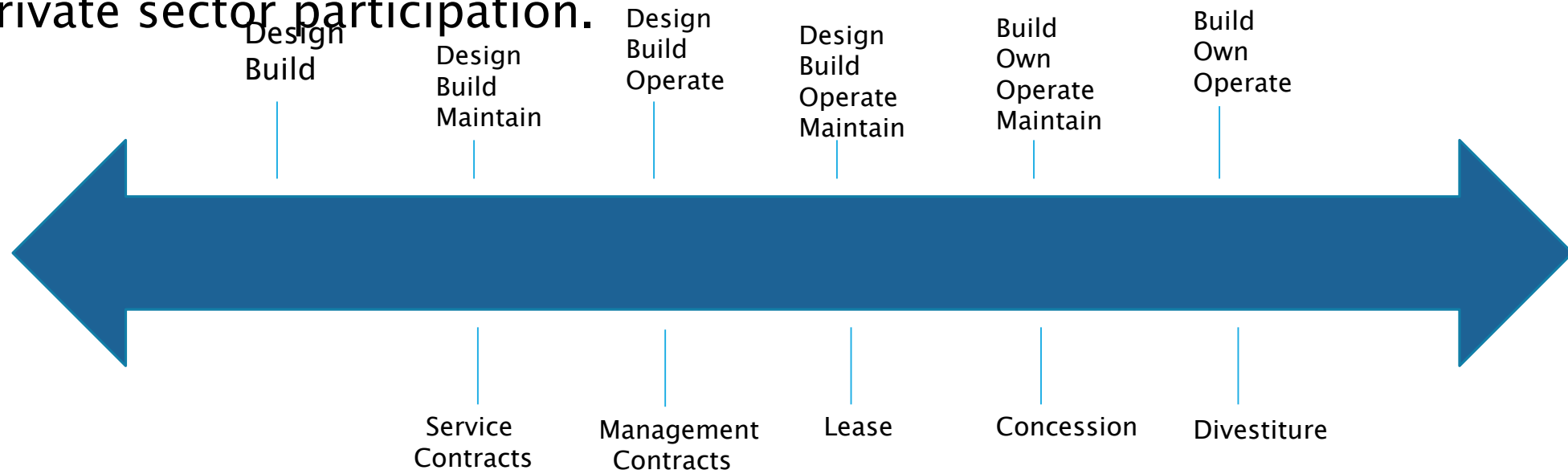
29 March 2023

Dr. Carrol Pickersgill

WHAT IS A CONCESSION?

Concession is a type of Public Private Partnership (PPP).

Forms of partnerships between **public** and **private** sectors depend on the political environment, the nature of the assets and the level of private sector participation.



FUNCTIONS OF CONCESSIONS

- To provide higher quality essential public services at a lower cost to Government
- Obtain new technologies from private sector
- Reduce need for government borrowings
- Use savings for sectors that the private sector will not invest in – e.g. SERVICES FOR THE POOR
- To save the public sector

CONCESSION USING PPP FRAMEWORK

- The PPP project is a public function = **A GOVERNANCE ISSUE**
- The PPP transaction structure is an agreement = **A CONTRACT**
- The PPP asset is a financial asset = **A FINANCIAL ISSUE**
- The PPP programme is a resource mobilization strategy = **A PUBLIC POLICY ISSUE**
- The private party identification process is a procurement issue = **LEGAL AND POLICY ISSUES**

LEGAL FRAMEWORK

- Legal framework can be achieved by general legislation, special legislation, or by contracts between the parties, in both civil and common law systems
- Many developing countries and countries in transition have adopted policies and enacted specific laws and regulations for clarification
- **Benefits of law:**
 - May reassure investors and stakeholders
 - Provide or clarify full legal authority of Government or governmental authority
 - Transparency
 - Establish or clarify institutional procedures within Government
 - May establish special procurement rules

KEY LEGAL ISSUES

- Change in law
- Force Majeure
 - Beyond reasonable control of host country or concessionaire
 - Could not reasonably be foreseen at outset of concession
 - Cause physical damage or delay completion or interrupt operation
 - Special case of strikes
- Hardship: Not events of force majeure
- Adverse governmental action
- Corruption in contract formation/administration

KEY LEGAL ISSUES

- Termination & Compensation

- What types of compensation are payable under what circumstances?

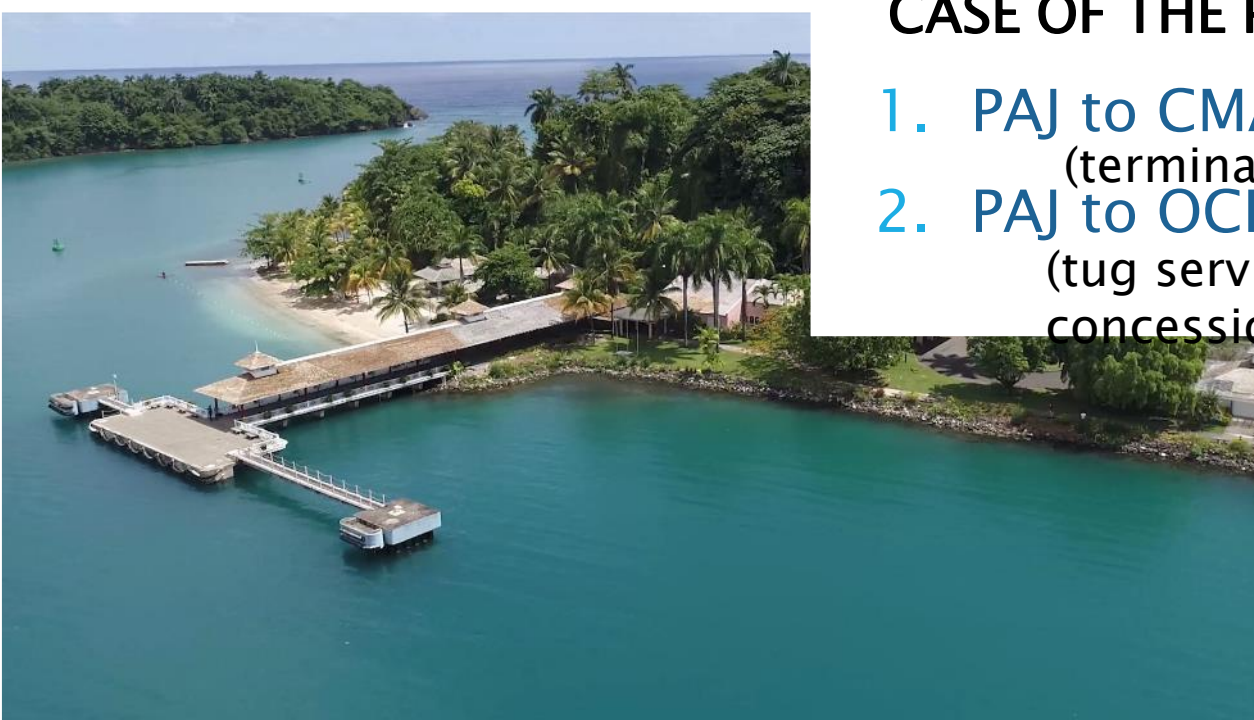
- In all cases, principal and interest on concessionaire debt (but after insurance, reserves, and security)
 - If terminated by concessionaire or host country (adverse arbitration only), equity of concessionaire (paid in capital)
 - If terminated by concessionaire, lost profits of concessionaire (as forecast by an independent expert over an agreed period)



CONCESSIONS IN THE JAMAICAN PORT INDUSTRY

CASE OF THE PORT AUTHORITY

1. PAJ to CMA CGM/KFTL
(terminal concession)
2. PAJ to OCEAN J TOWING
(tug service concession)



KINGSTON CONTAINER TERMINAL (2007)

KINGSTON CONTAINER TERMINAL PROJECT: PORT AUTHORITY & CMA CGM THROUGH KFTL



 **KINGSTON FREEPORT**
TERMINAL LTD

(Post 2016)

- Investment of over US\$300M (Dredging & rehabilitation activities); resilient infrastructure.
- Good working relationship with local environmental agency (NEPA).
- Mangrove replanting.
- Refuge Cay mangrove cleanup (Port Royal).
- ESG/Lenders
 - Collaboration with fisherfolk



KCT PROJECT

DESCRIPTION

The project consists of the operation and maintenance of the container facility, the deepening of the navigation channel to allow access by 14.2m draft vessels and the acquisition of new equipment and systems to increase port capacity to 3.6 Million TEUs per year within the first 6 years under the Concession.

Phase 1 – Dredging Quay works

Phase 2 – Yard and Equipment Concession Period: 30 years

Date of Concession Agreement: April 2015

Commencement Date of Concession: July 2016

The background of the slide is a blurred, close-up image of the Jamaican flag, showing the green, yellow, and black diagonal stripes. The text is centered and reads:

JAMAICA'S CONCESSION (PPP) LEGAL FRAMEWORK

Policy 2012

VIABLE

GUIDING PRINCIPLES

VIABLE

VALUE FOR MONEY

MARKETABILITY

FISCALLY RESPONSIBLE



POLICY CONT'D

- **Ministry of Finance & the Public Service** – Assessment of value for money and fiscal impact of projects

- **Development Bank of Jamaica (DBJ)** – Responsible for the development of the Business Case and the Transaction Phase of PPPs including:

- Provide advisory and administrative



LAW

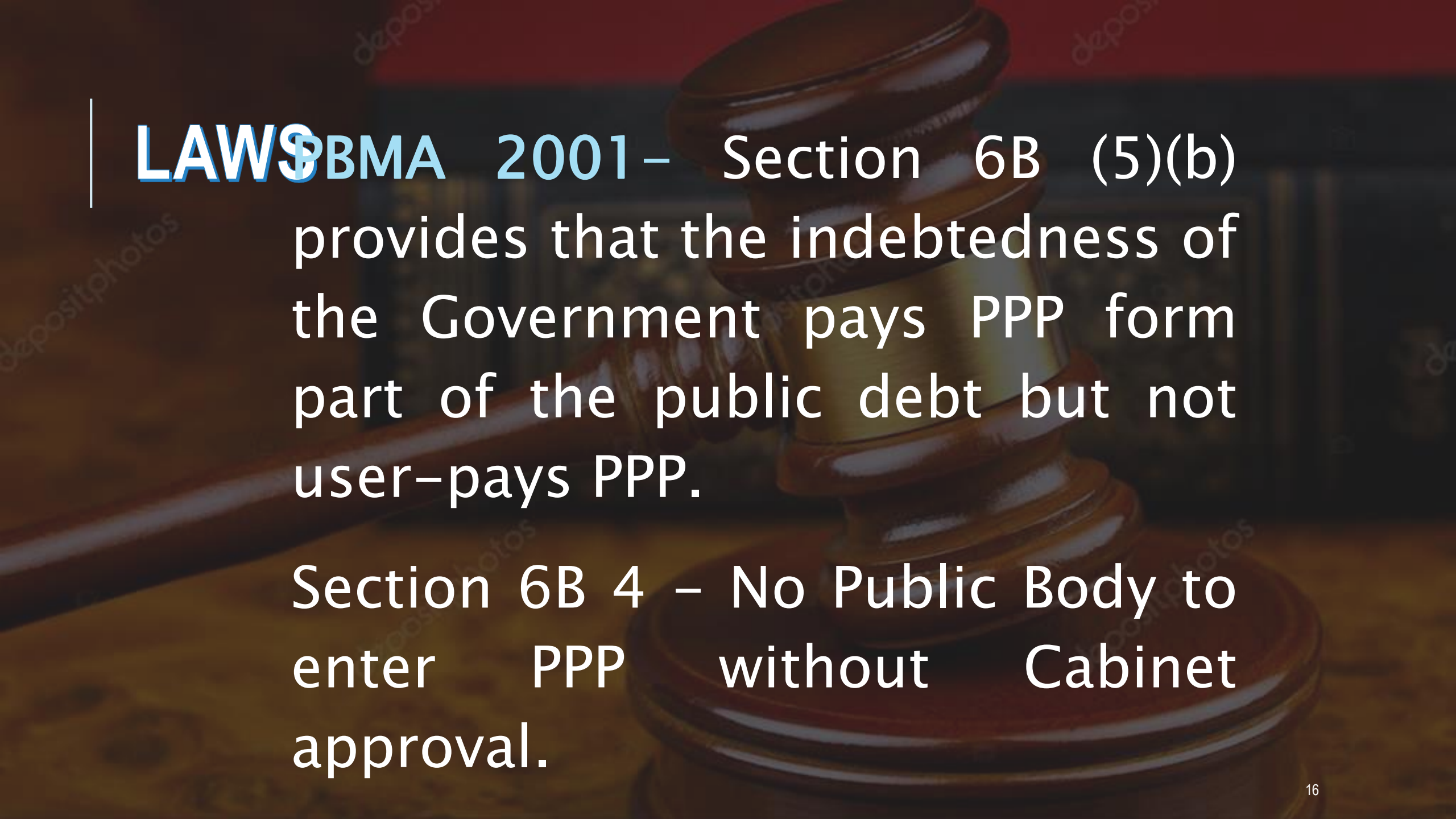
Financial Administration and Audit Act (FAA Act) of 1959 (amended in 2017) defines “public private partnership – an arrangement governed by a long-term procurement contract between one or more public entities and one or more non-public entities, involving the designing, financing, building and operating of an infrastructure project or the provision of a service, through the appropriate sharing of resources, risks and rewards.”

Section 48B 6(d) provides for contingent liabilities⁴



LAWS

Public Bodies Management and Accountability Act (PBMA) 2001 – Section 6B (1) provides for contingent liabilities to be continually assessed



LAW § PBMA 2001 – Section 6B (5)(b) provides that the indebtedness of the Government pays PPP form part of the public debt but not user–pays PPP.

Section 6B 4 – No Public Body to enter PPP without Cabinet approval.

LAWS

Public Procurement Act

2015 section 3(3)(a) – a

PPP approved by Cabinet

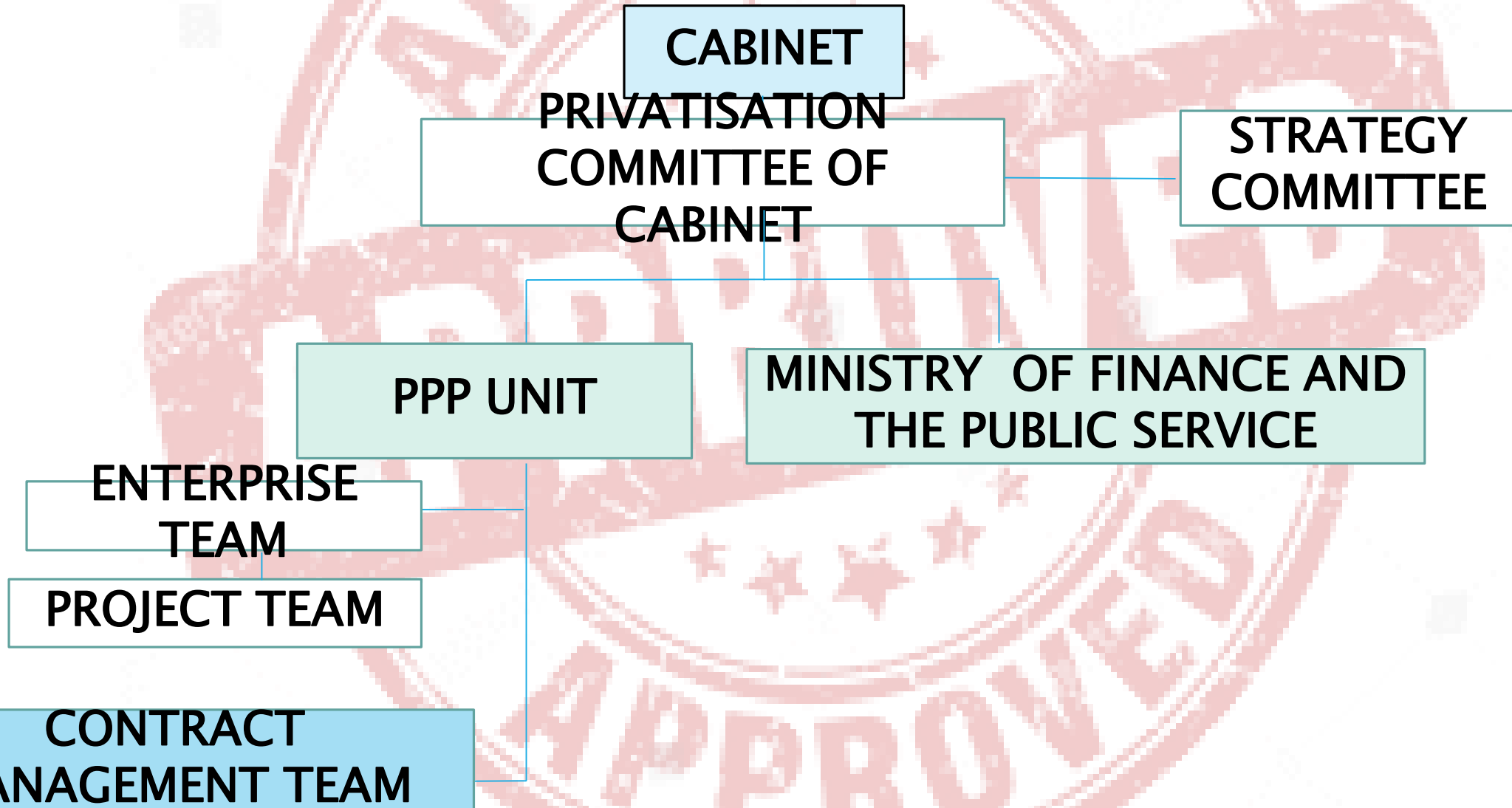
excluded from Public

Procurement legislative

subject to affirmative

resolution

APPROVAL PROCESS



TENDER & NEGOTIATION

- Establishment of an Enterprise Team authorized by Cabinet
- Expression of interest sent to top Global Terminal Operator (GTOs) and firms that had submitted interest in participating
- Prequalification and shortlist of possible bidders
- Submission of request for Proposal & Draft Concession Agreement to shortlisted firms
- Submission, revision and evaluation of tenders and Cabinet approval
- Declaration of Provisional Preferred Bidder
- Negotiations and signing of Concession Agreement and associated contracts

PARTIES

Grantor – The Port Authority of Jamaica



Concessionaire (SPV) – Kingston Freeport Terminal Limited



Sponsor – CMA CGM



Lenders – IDB and private banks



FINANCING

| PHASE | Investment US\$ |
|---------------------------|-----------------|
| PHASE 1 | 459M |
| Dredging & Infrastructure | 246M |
| New Equipment/Technology | 23M |
| Other | 190M |

| PROPOSED FINANCING: | US\$M | % |
|----------------------|-------|-----|
| Multilateral/Banks | 276 | 60 |
| Internally Generated | 102 | 22 |
| Equity | 81 | 18 |
| Total | 459 | 100 |

| PHASES | Investment (US\$M) |
|--------------------|--------------------|
| 2 | 259 |
| 3 OPTIONAL | 350 |
| | |
| Indicative Return: | |
| Project IRR | Approx. 15% |
| Shareholders ROE | Approx. 16% |

TRANSACTION DOCUMENTS

1. CONCESSION AGREEMENT

PAJ to be the Landlord – retain ownership of the lands and berth.

The Concession will be for 30 years and will be a Finance, Design, Build, Operate, Transfer arrangement with an option to renew for a further 30 years.

Existing equipment sold to the Concessionaire.

The Concessionaire will hand-back the Terminal to the PAJ/Government at the end of the period including assets purchased by the concessionaire.

TRANSACTION DOCUMENTS

1. CONCESSION AGREEMENT

Concessionaire payments:

- ❖ An upfront fee representing the market valuation of the physical assets to be transferred – US\$75Million (payable in tranches at financial close and the next six months).
- ❖ Annual fixed fee of US\$15 Million (payable quarterly in advance)
- ❖ Annual variable fee (equal to 8% of Gross Revenues)

TRANSACTION DOCUMENTS

2. DIRECT AGREEMENT

Appended to the CA and signed by PAJ and the Lenders. Sets out provisions regarding lender's security interest in the project and exercise of step on rights of lenders.

3. FINANCE AGREEMENTS

Some shared with Grantor while others were confidential. These were between the Sponsor and the Lenders. Sets out their rights and responsibilities in connection with the debt financing of the project.

TRANSACTION DOCUMENTS

4. SALES AND PURCHASE AGREEMENT

Between the Grantor and the Concessionaire for the sale of the existing Port equipment.

5. LEASE AGREEMENTS

Between the Grantor and the Concessionaire providing a 30 year lease of the port lands (registered and unregistered) and buildings with an option to renew for a further 30 years.

6. LETTER AGREEMENT

Between the Minister with responsibility for ports, the Grantor and Concessionaire confirming the Government's statutory obligation to support the PAJ.

KEY ISSUES



- **Authority to Grant Concession:** PAJ Act?
- **Dispute Resolution:** Agreed provision is that there would be escalation from negotiation, mediation and arbitration (UNCITRAL rules & seat of Mediation in Miami, USA)
- **Government Guarantee:** No guarantee allowed; Minister's letter.
- **Governing Law (Concession Agreement):** Jamaican law governs the Concession Agreement – both the Grantor and the SPV are Jamaican entities.
- **Termination/Hand-over**

POST IMPLEMENTATION DISPUTES

- a. Dredging – issue of the allocation costs between the Grantor (who is responsible for Maintenance dredging) and the Concessionaire (who is responsible for capital dredging).
- b. Security Fees under ISPS Code – Concessionaire obligation under the International Ship and Port Safety Code (ISPS Code) to provide PAJ with an assessment and security plan. PAJ charges fees for equipment pursuant to Ports Management and Security Regulations.
- c. Force Majeure

OCEAN J TUG PROJECT: PORT AUTHORITY & OCEAN TOWING



- Savings of over US\$60M and cost of tugs (Loan and Interest Payment)
- Savings on running costs e.g. Drydocking.

- Larger ships – satisfaction of obligation to shipping lines.
- Good working relationship with local agencies (JSEZA).



OCEAN J TUG

DESCRIPTION

The project consists of the provision of at least two(2) harbour tugs having a minimum capacity of 70 tonnes bollard pull for pulling/pushing vessels. The port requires at least three (3) tugs in total to ensure coverage for all vessels.

Transaction Process involved:

1. Request for Qualification
2. Request for Proposal/Bidding Stage

Date of Concession Agreement: 2 July 2018

Term of Concession: Five (5) years

A large container port at sunset. In the foreground, there are many stacks of shipping containers, mostly red with the ZIM logo, and some blue and yellow ones. In the background, there are several large gantry cranes and a body of water under a colorful sunset sky. The text "THANK YOU" is overlaid in a white box on the right side of the image.

THANK YOU